(2006) 02 AHC CK 0153

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No. 5085 (M.B.) of 2003

Swami Prasad Maurya		APPELLANT
	Vs	
Speaker, Legislative Assembly, Uttar Pradesh and others		RESPONDENT

Date of Decision: Feb. 17, 2006

Acts Referred:

- Uttar Pradesh Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1987 - Rule 7, 8

Hon'ble Judges: Ajoy Nath Ray, CJ; Jagdish Bhalla, J and Pradeep Kant, J

Final Decision: Disposed Of

Judgement

Ajoy Nath Ray, CJ.

1. This is a matter concerning the 10th Schedule of the Constitution, i.e. floor crossing. Sometime back, in this State of Uttar Pradesh, in the beginning of the month of September, 2003, some 40 members, who had been elected with party tickets of the Bahujan Samaj Party (BSP), according to their allegation, split from that party and formed a separate party called the ‘Loktantrik Bahujan Dal’. Closely following that decision, there was a further decision taken by them that they would merge as Loktantrik Bahujan Dal into the Samajwadi Party, headed at that time and also today in the Assembly by Sri Mulayam Singh Yadav. As a result of this floor crossing, a serious change in the Government took place. Km Mayawati, who was the Chief Ministor prior thereto, lost her position as such, and after this political change Sri Mulayam Singh Yadav came to assume the office of the Chief Minister, which he still holds. Before we give the short facts and a few important and relevant dates concerning the events, which took place in 2003 and thereafter in 2005, coincidentally again in the month of September, we should mention how this matter came to be heard by this Full Bench instead of the ordinary Division Bench consisting of two Hon''ble Judges, who would, in the usual course of litigation, be hearing it.

2. The petition of September, 2003 complaining against the floorcrossing was presented indeed before a Division Bench of two Hon''ble Judges by the BSP. It was heard from time to time and an amendment application was also made, seeking to challenge a certain order passed in September, 2005. In the month of November, 2005, the matters were being heard before one of us (Hon''ble Mr. Justice Jagdish Bhalla, Senior Judge, Lucknow Bench) and Hon''ble Mr. M.A. Khan, who was one of our sitting brothers then in November, 2005, but who has since retired.

3. It so happened that on the 22nd of November, 2005, after conclusion of some arguments on the amendment petition. Hon''ble M.A. Khan produced the judgment on the amendment application whereby his Lordship, apparently, had passed a final opinion on the application. Thereafter his Lordship produced another judgment on the substance of the writ petition and his Lordship''s opinion there also, apparently, was final. Brother Bhalla, J. was a little taken by surprise as there had been no prior discussion and as such was put in a position where his Lordship felt that the matter not being considered fully by him or jointly, any question of agreement with the two judgments or any of those did not arise on that day then and there.

4. The result simply was that there was no agreement in the Division Bench. Brother M.A. Khan was thereafter admitted into a Lucknow hospital for checkup.

5. There being no agreement in the Division Bench and one of the Hon''ble Judges retiring with the expiry of the month of November, 2005 itself, and the matter being placed before me, it was best thought to involve brother Bhalla, J., who had already heard a lot of the matter, and the new entrant being brother Pradeep Kant, J., who joined us as such, the result become a Full Bench.

6. Now we give the short list of events. On the 25th/26th of the August, 2003, Km Mayawati had resigned as Chief Minister and she with her cabinet had then decided to call for fresh elections midterm, when only about a year and a half of the elected term of the office of the MLA''s had run out; after the passage of five years, the next elections in the ordinary course would be due in February, 2007. On 26.8. itself; Sri M.S. Yadav as the Samajwadi leader requested the Governer, to be allowed to form Government. On 29.8., he was given time to demonstrate a majority.

7. All the MLAs faced the possible problem of reelections then. The Bahujan Dal had ruling powers only in coalition with the BJP, which is still a significant force in the U.P. Legislature Assembly, having still 82 elected members of their own sitting now. The Bahujan party, before floorcrossing, had strength of 109 the total number of the U.P. Legislative Assembly seats being 404. It is only after Bahujan lost 40 MLA''s and the Samajwadi party gained them, that they have a present majority, although not an absolute majority and a strength 194.

8. According to the respondents before us, on that fateful day, the 26th of August, 2003 itself, at a place called Darulshafa in the district of Lucknow, i.e. in the heart of the State and the State capital itself, a meeting took place involving 40 (or 43)

members of the then Bahujan Dal Party, who were also the sitting MLAs. It was not a meeting, as claimed by them, only of the MLAs, as other members, office bearers and Bahujan supporters also attended the meeting.

9. It is hotly disputed whether 40 or 43 members of the Legislative Assembly were present at Darulshafa on 26th of August, 2003 or whether even a meeting had taken place. The respondents'' claim before the Speaker in September, 2003, in the circumstances, which we shall mention hereinafter, was that 37 MLA members had attended the meeting and another six had also joined, raising the number ultimately to 43. In any event, on the 27th of August, 2003, only two small groups of 8+5 aggregating 13 MLAs went to his Excellency the Governor and requested the Governor to request Shri Mulayam Singh Yadav to test his strength, show the majority and perhaps form the Government. This would be a solid alternative to immediate reelections.

10. The respondents claimed that whether 13 went to the Governor or not, all 40 or 43 had met on the 26th August and the split of the total number of MLAs took place on the 26th August itself, and not at any later point of time.

11. The important date after the 27th of August, is the 4th of September, 2003. On that date, a petition was presented on behalf of the Bahujan Dal to the Speaker calling for a declaration of disqualification of the 13 Bahujan Dal MLAs, who had gone to the Governor and had thereby committed acts, which were inconsistent with their party loyalty and belonging, and these actions according to the Bahujan Dal were just the same as their giving up the Bahujan party voluntarily.

12. We shall mention the details hereafter, but roughly speaking Paragraph 3 of Schedule 10 states that if the split group is not less than one third number of MLAs of the party in question, then and in that event, such split will not cause the loss of office of the MLAs, who walk away from the party. On the other hand, if the number is less than this magic faction of one third, it becomes punishable floor crossing and the simple punishment is loss of the legislative office for the rest of the term.

13. On the 5th of September on behalf of the Bahujan Dal, a caveat was filed before the Speaker stating that the matter should not be heard in their absence, if the said 13 MLAs or some more apply for any recognition of any split before the Speaker.

14. On the 6th of September, 2003, such an application for recognition was indeed made.

15. The leader of this breakaway group was one Rajendra Singh Rana. A short petition dated 6.9.2003 was presented whereby it was mentioned that 37 MLAs who had signed that petition had broken away on 26.8.2003 and split from Bahujan Dal; they requested for recognition of their split. It was mentioned there that they had formed a Loktantrik Bahujan Dal, out of the said breakaway group as a new party. A second petition was also presented on the same day, i.e. 6.9.2003. It was there

mentioned to the effect that centpercent members of the Loktantrik Bahujan Dal had decided on the 6th of September, 2003 itself to merge lock, stock and barrel with the Samajwadi Party and recognition as well as merger was prayed for. That was the subject matter of this second petition of 6.9.2003. The 37 MLA''s included the original 13; 24 more had come forward openly to join them on 6.9., leaving aside the issue for the present, whether they were all along there behind the scene.

16. In regard to merger, the Paragraph in Schedule 10 is Paragraph 4. The details will be mentioned later. The substance of that paragraph is that a party can merge with another party and the merging members will not lose their MLA office during the rest of the term, if at least 2/3rd of the sitting MLAs of that party join in the merger.

17. Rajendra Singh Rana and others claimed that as they had split from Bahujan Dal and formed a new party, and since according to Para3 that new party from the time of the split became their original party for the purpose of Schedule 10 their merger with Samajwadi Party was wholly up to and even much more than the permissible faction mentioned in Para 4. Had they split by way of merger from the Bahujan Dal itself, then and in that event, they might not have been 2/3rd of the Bahujan Dal strength, but they had split and formed a new party before the merger, and thus the Bahujan Dal was not involved.

18. The strength of the MLA''s of the Bahujan Dal in the beginning of, say, August, 2003 was 109, 37 was, therefore the minimum number required for qualifying for a split within Para 3. With this splitting MLA strength of 37, the material issues would not alter, even if one original legislature party strength of the BSP were III, which it never was.

19. One of the main arguments of the petitioners was that 13 MLAs had split and walked away from the Bahujan Dal on 27.8.2003 and they had thus become disqualified then and there. The other 24 members, who signed along with these 13 members, were not there on 27.8.2003. They came later and surfaced for the first time, so to speak, on 6.9.2003. 24 is less than 37. 13 is even more so. Although no separate petition was made for the disqualification of these 24, ''yet they come under disqualification also, since the other 13 have already disqualified themselves. All 37 MLAs, according to the petitioners should be declared as having lost their seat as an MLA and the Speaker should have decided to that effect, which he unfortunately did not do.

20. On the 6th of September, 2003, Rana had presented yet another petition; this was with regard to six more Bahujan MLAs. It was claimed by them that these six were also in the group and they should have the same fate as the other 37.

21. On 6.9. the then Speaker Mr. Tripathi, who is still a sitting BJP MLA of the U.P. Assembly, but no longer the Speaker, decided that the 37 Bahujan Dal MLAs had correctly split with the appropriate number and they could not come under any

disqualification. No such decision was given with regard to the other six, who did not present themselves like the main 37 before the Speaker on 6.9.

22. On the 8th of September, 2003, three out of those six were present before the Speaker and an order was passed on the 8th of September, 2003 whereby these three were added to the group of 37 floor crossers and 40 came over from Bahujan Dal via Loktantrik Bahujan Dal to the Samajwadi Party.

23. The petitioners have said that the full group of 40 was not there in the beginning. If 40 were there, why should only 13 go to the Governor on 27.8.2003 and the others lie hidden? Further, at a condolence meeting in the Legislative Assembly on 1.9.2003, the balance 24 and certainly the other 6 were seen as sitting in the same portion of the Assembly House, as was occupied by the members of the Bahujan Dal. How could they have split and continued to sit with Bahujan Dal? Thirdly they have relied upon a letter allegedly signed by Mr. and Mrs. Nari, who were within the said group of 37, but who allegedly were threatened at gun point before that date to undertake the floor crossing. The respondents submit that it is a letter procured later, which has seen the light of the day only two years after September, 2003, and it cannot be looked into, because it is fabricated. The petitioners also rely on an affidavit of 3 of the said 6, who never joined ultimately, where it is stated that there was no meeting at Darulshafa as claimed or at all, and the whole story of Rana and others is false.

24. On the 6th of September, 2003, the Speaker stated that the petition of 4th September for disqualification was a quasi judicial matter and it would be decided by him later on. So the disqualification petition was kept pending although the nondisqualification petition by way of declaration of a permissible split made on 6.9.2003 was ordered upon, in a manner wholly favourable to the breakaway group. This is the main order of the Speaker, challenged before us.

25. The 4th September petition was disposed of by the Speaker as late as on the 7th September, 2005. It is not necessary to go into the details as to who, if any, were delaying the hearing of that petition, or who, if any, were suddenly in an unseemly hurry to have the petition disposed of. What is important for us to note is that an amendment application was made by the petitioners for the purpose, inter alia, of challenging the said order dated 7.9.2005 also. By that order, it was substantially ruled that the 6.9. split petition being allowed, there remained nothing more to be decided in regard to the disqualification petition of 4.9.2003.

26. On these facts, we now have to deal with the details of arguments and the cases cited and also give our decision on those.

27. The somewhat side issue of the amendment application can be disposed of easily here and now. We had all along assured Mr. Misra, who put forward the case on behalf of the writ petitioner that we would be allowing the amendment application in any event at the end, but that passing of a final order on the

amendment application midway during hearing was not advisable, as the other side was opposing it heavily. Such a final order at that stage would involve the court in an absolutely unnecessary exercise of practically a double hearing of the same matter. In a constitutional issue of this nature where the Legislators, the stability of the State politics and therefore the whole of the people of Uttar Pradesh are involved, it is not ordinarily possible to shut out any pleadings or materials on the ground of delay and delay alone. Moreover, the amendment application sought to raise in issue the validity of the Speaker''s Order dated 7.9.2005. It dealt with the disqualification petition of 4.9.2003. The order of 2005 is inextricably connected with the orders of 2003; it would be a travesty of justice not to take into consideration the arguments and materials with regard to the most current material order. As such, the amendment applications are to be taken as allowed by us in the sense that we permit the order dated 7.9.2005 to be brought under scrutiny and challenge and further that we do not shut out from our scrutiny any of the pleadings or materials, which the petitioners have requested the court to look into in the matter of disposal of their case before us.

28. The arguments of the respondents against the amendment petition are thus negatived, without in any manner affecting their rights and contentions on the substance of the issues raised, whether in the original petition or in the amendment petition.

29. On the main front, four main things (and about four comparatively minor points) fall to be decided by us. First, there is the question whether 13 MLAs leaving the party on 27.8.2003, and the other 24 MLAs joining them later on, say, sometime between 1.9.2003 and 6.9.2003, will have the effect of disqualifying both groups, which would not have been the case if all 37 defected at one and the same time.

30. The second important point is whether the split in the original Bahujan Dal, as opposed to the split only amongst the elected and sitting MLAs of the Bahujan Dal is a crucial and material factor; and if so whether any cogent materials the floor crossing MLAs have failed to bring forward to establish that such split in the original party itself had at all taken place; without the proof of which, whether the defecting MLAs alone have any right either to split from their original party, all by themselves, or join the opponent political party in the House.

31. The third main point is the point of natural justice. The argument was that everything was finished off by the Speaker on 6.9.2003 with unseemly hurry. No breathing time even was given to the Bahujan Dal or its spokesmen adequately to oppose the case of split recognition the floor crossers. There being a lack of fairness in the hearing, the decision of 6.9.2003 should be set aside. If that decision is set aside, all other decisions of 6.9.2003, 8.9.2003 and 7.9.2005 also fall to the ground.

32. The fourth main point is the point of merger. Is it the correct view to take that the 37 or 40 MLAs did not want to split at all, or form a separate group/ faction of

their own, but that their real objective was to cross over from Bahujan Dal to Samajwadi Party? If that be the real objective then, whether their attempted merger from the Bahujan Dal into the Samajwadi Party does not have the required fraction of two thirds, because they were only 40 in number and the strength of the Bahujan Dal party in the Legislative Assembly at the material time was 109. These four main topics are taken up one by one now.

33. To set the stage for arguing against the defection of the respondents in driblets, the purpose of introduction of Schedule 10 to the Constitution was emphasized by Mr. Misra. He said that it was inserted after nearly 20 years of debate and consideration to stop the recognized evil of floor crossing. The constitutionality of the insertion was upheld in the case of Kihoto, reported at 1992 (suppl.) 2 SCC 651.

34. The argument in that case ran that a restriction upon a citizen from joining any party as and when he pleased on the basis of the dictates of his own conscience was an unconstitutional restriction of his absolute political freedom. English sentiments were referred to in that regard. The great parliamentary Speaker Edmund Burke was quoted. The Supreme Court negatived these arguments and upheld the 10th Schedule.

35. It is true that in England, there is no provision similar to Schedule 10 from the time William the Conqueror set his foot upon the English soil in 1066 until now. Such a provision has never been attempted there. But India is not England. From 1066 upto 1649 when Charles the First was beheaded. Parliament sat but as called for by the Monarch. It could last for 13 days or 13 years; it could be a short Parliament or a long Parliament; it all depended on the King''s will and wish; it was only after a bloody civil war that Parliament began to wrest away from the King political and governmental power; it was earned by the people of England after generations of sacrifice and effort. Parliamentary democracy, as it is known in the World today, is a creation of the English Nation. It is made by them according to their own national feelings, sense of priority and their peculiar ethos. Along with the growth of English Parliamentary democracy, the party system has also grown. That is also their creation. There are but two parties in England, Labour and Conservative. The liberal party in just there for a little variation, it never forms the Government now; an Englishman cannot change his party and survive in politics; he belongs to a party for ever; floor crossing for an English politician is like crossing to his own political doom; no English Act of Parliament is necessary; the prohibition is in English blood.

36. We have had democracy served to us on a plate; it was inserted by way of words into our Constitution; there was no war; there was no shedding of blood, nothing at all. Freedom movement and the blood shedding by those who believed in compulsory use of violence against a violent enemy, was for freedom, not for democracy as such. Compared to the English history of politics, Indian history of polities is but at a baby stage; our political picture and experience at present is entirely different from the English experience. Parties are numerous. Local parties

often rule certain States although they hardly have any all India footing; they can hope to rule the State but never hope to rule the Country. Defections from parties and formation of new parties are every day events. Changing one''s party is not the end of political life in India. It might just be a glorious beginning. Many people have done it. CongressI itself was a breakaway party from CongressO. In any event the Schedule 10 penalty is a mild one. As can be easily seen from Articles 190 (3), 191 (1) and 191 (2), the MLA loses only his balance term at the worst; he can ask for a ticket from his new party in the next election. If elections are just round the corner, all the better.

37. In the Legislative Assembly of Uttar Pradesh today, there are 16 independent MLAs and members of at least 10 other political parties. In this situation, which is not odd or peculiar to U.P. but is practically the story in every State in India, floor crossing was quite rampant. It was to stop this common and undesirable occurrence that Schedule 10 was inserted. Mr. Misra argued that it is in the light of this history, and in the light of this objective of curbing the rampant evil, that we should determine the issue of members breaking away from a party, group by group. Such group by group breaking away was argued to be unprincipled and unsupportable. If there were one issue, the break would also be one. But if the issue is only one''s own political gain, then the break will come slowly, one by one.

38. In our opinion, this type of general argument is not of very great help to a Court of law; the objective of insertion of Schedule 10 must not be lost sight of, but the all important things are the actual words used. This is a Schedule inserted by Legislators for the Legislators. They have allowed freedoms and curbed freedoms; the Court has to interpret the words and the phrases and the objective is to be gathered also mainly from such interpretation and not from any general feeling that floor crossing is to be stopped wherever the court so can.

39. In the Speaker''s first order of 6.9.2003, he laid great emphasis on there being 37 breakaway MLAs before him on the day of the claim itself, i.e. 6.9.2003. The 37 breakaway MLAs were all personally present before him; their heads were counted, they were identified and so were their signatures. The Speaker''s order runs to this effect that there being 37 before him on the date of the claim of recognition of a split, it little mattered whether all 37 chose to break away together at the meeting held at Darulshafa, Lucknow on 26.8.2003 or whether only 13 of them broke away first and the other 24 joined them later. The events we have mentioned above, emphasized by the petitioners, like the 13 not mentioning the other 24 to the Governor on 27.8., or husband and wife Mr. and Mrs. Nari alleged if complaining about their being criminally threatened before they joined the breakaway group on 6.9.2003, or the 24 members being seen in the Assembly House sitting with the Bahujan Dal MLAs on 1.9.2003, or the affidavit of the 3 MLA''s denying any meeting at all being held at Darulshafa, all seek to establish the fact and the submission that the breaking away took place part by part and not at the same time. The Speaker

substantially says that this is not a material or relevant legal consideration. Did the Speaker seriously misdirect himself? An issue of law therefore arises. The decision on this issue is crucial to our case. We shall set out the provisions now to consider whether snowballing is permitted in the matter of splitting away from the original political party. Paragraph 3 of Schedule 10 of the Constitution reads as follows:

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

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

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

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

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

40. The first reason why I am of the opinion that party leavers can form their ultimate total group by slowly snowballing is that the words of Paragraph 3 Schedule 10 merely require that at the making of a claim, the total group must consist of not less than one third of the members of the concerned such legislature party.

41. In Paragraph 1 (b) of the 10th Schedule, legislature party means as follows:

"(b) ''legislature party'', in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or, as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions."

42. Paragraph 3 requires no particular way for formation of this ultimate group of one third. It can form on one day, it can form slowly over one week, perhaps it can form slowly over a much greater length of time, even one month, or two months. The necessary thing is that at the time of the claim and at the time of consideration of the claim by the Speaker, the group must be not less than one third.

43. The Speaker''s jurisdiction to decide on any question of disqualification is given by paragraph 6 of the 10th Schedule. The first subparagraph of that is important and it is set out below:

6. Decision on questions as to disqualification on ground of defection (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the speaker of such House and his decision shall be final.

44. The time limit or the time period during which a breakaway group has the opportunity to snowball or grow is, in practice, limited by the speaker''s consideration of the question of disqualification and when he takes up the issue.

45. The manner of disqualification, which we are concerned with, is the giving up of one''s own party voluntarily by a member. The 40 Bahujan Dal members walked out, out of their own will and volition. It was not a case of voting against the party whip; it was a case of really walking out. In this regard, paragraph 2(1)(a) is set out below:

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

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

46. As per the dicta in the case of Naik, reported at 1994 (Suppl.) 2 SCC 641, the going of the 13 MLAs to the Governor on 27.8.2003 is a conduct which leads to the inference that they had voluntarily given up their membership of the Bahujan Dal. They asked the Governor to call the leader of the main opposing party, to be requested to demonstrate his strength. In paragraph11 in Naik''s case, it is said that an inference can be drawn from the conduct of a member that he has voluntarily given up his membership. That inference has to be drawn in regard to the conduct of 27.8.2003 most certainly.

47. The point is that if the disqualification petition in regard to these 13 members had been made on the 28th of August instead of the 4th of September, and if the decision thereon had to be given by the Speaker on 28.8. itself, and upon notice being given to the Bahujan Dal, no others of that party joined the breakaway group of 13 to increase their strength, then the speaker would have no alternative to disqualifying them. The time gap between 27.8. and 4.9. or 6.9. was all important. That was the gap permitting the snowballing effect. The nonconsideration by the Speaker of any question of disqualification during this all important growing period sets the limitation as to how long a breakaway group has available to it for growing and for continuing to grow. Whatever growth they have in their mind or within their means and possibility, must be completed before the Speaker''s consideration of disqualification. When disqualification is considered, at that time the respondents

and the breakaway members have to demonstrate their strength. No more time will be available to them to grow, but until then, until the Speaker considers the matter, there is nothing in the Constitution, which prevents their further growth, what we have called the snowballing effect.

48. A question will be asked, is the Speaker free to delay the matter as much as he pleases and thereby, at least indirectly encourage the reduction of strength in a party? The question is academically material, but not really material in our case. The disqualification petition was made on 4.9., and the consideration came on 6.9. The time period is too short to allow anybody to argue that the Speaker acted on any extraneous consideration or kept the matter pending unduly long and thereby encouraged further dissent.

49. There is no material to suggest that even if notice had been issued on 4.9. by the Speaker and the petition of 4.9. heard out on that day itself or even on 5.9., the 13 would not have been supported by the other 24. The argument might have been available if the disqualification petition had been made on 27.8. or 28.8. and in spite of repeated requests for its disposal the Speaker went on waiting, and there were indications that he was waiting only to let the opposers of the Bahujan Dal grow in strength. Such factors are not available here. The question does not really fall for consideration by us.

50. We agree that if instead of on 6.9., the Speaker had decided the disqualification petition on 5.9.2003, his decision might, just might, have been different and he might have disqualified the 13 MLAs if they could not find their supporters on that day. The possibility is there. But that the petition of 4.9., if decided on 5.9., might have yielded a different result than was yielded by the consideration of the question of disqualification on 6.9., does not mean that the decision of 6.9. is automatically rendered bad. There is nothing to indicate that the question of disqualification is to be instantaneously considered by the Speaker.

51. The next argument against snowballing is that, whenever might the Speaker consider the question of disqualification, the effective date of such disqualification must be the date of the offending act, or the date of walking out voluntarily from the party. So here, even when deciding on 6.9., the Speaker should have treated the 13 to have already been disqualified on 27.8.

52. In the case of Dr. Maha Chandra Prasad Singh, reported at (2004) 8 SCC 747, it is stated as follows in paragraph 6: ��.on the plain language of paragraph 2, the disqualification comes into force or becomes effective on the happening of the event.�

53. Mr. Misra argued that whenever might the Speaker be considering the issue, he has to opine that on 27.8., the 13 MLAs had walked out and thus they had become disqualified on 27.8. itself. It little mattered whether they managed to get 24 more supporters by 6.9. when the decision was actually given. Since the disqualification

dates back to the date of the wrongful act, the Speaker must give his decision on that basis also. He cannot make his decision depend upon the time when he is giving the decision. It was therefore material for him to consider whether on 27.8. itself the 13 were on their own, or whether they had already been joined by the other 24. The Speaker thought that this was not a material consideration at all because all 37 were before him on 6.9. He seriously erred in law; his order is liable to be set aside on a judicial review. The following dicta from Kihoto were relied upon from paragraph 94 at page 705; ﬠIt is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the 10th Schedule is not a judicial power and is within the nonjusticiable legislative areaﬠ.

54. From paragraph 109 at page 710: ﬠﬠ..judicial reviewﬠofﬠ.an order passed by the SpeakerChairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, noncompliance with rules of natural justice and perversityﬠ.

55. It was argued that the Speaker having violated the constitutional mandate of treating a floor crossing MLA as disqualified from the very day he crosses the floor, he rendered his decision liable to be set aside.

56. If he were to give the dates the due importance which those dates deserved, he would come to quite a different conclusion; he would not treat the total group of 37 before him on 6.9. as one and indivisible, irrespective of the history of its growth. He would have to disqualify the 13 because there was no material to show in any convincing way that those 13 had been joined by the other 24 as early as on 27.8., i.e. on the very next day after Ms. Mayawati had resigned and called for a dissolution of the Assembly.

57. This argument is an important one. The argument calls for a reading of paragraphs 2 and 3 together. Is paragraph 2 to be considered by the Speaker individually in respect of every MLA before him on the date of the decision, as the first and the foremost step, or is he to consider the total breakaway group in its totality and count its strength and determine the fraction it bears to the total legislative party as the first and foremost step? Is he to consider paragraph 2 first or is he to consider paragraph 3 first? The order of consideration will yield diametrically opposite results. Even in this case, if he had considered paragraph 2 first, he might well have had to disqualify all 37, as they did not walk away at one and the same time. But because he considered paragraph 3 first, because he thought as a matter of law that the requirements of paragraph 3 being satisfied, it obviated the necessity of considering paragraph 2 separately for any part of the whole group, he gave a decision for the respondents. The importance of the issue is thus clear.

58. Mr. Dwivedi, although he never gave up on facts, argued that if there is a discernible, rational and reasonable continuity in the snowballing effect, if there is sufficient and reasonable proximity in time, then and in that event, the split has to

be treated as one split. Otherwise the splitting MLAs would be faced with an almost insuperable obstacle. How could 30 or 40 or 50 MLAs demonstrate in all the usual cases that they decided to walk away at exactly the same point of time or at the same meeting at the very same hour? In the practical world of polities, can there not be a dissident group on Monday and some others join them on Thursday or Friday? Would not the permission given by the Constitution to a group of one third to walk away with impunity be rendered practically unworkable if the proof of an instantaneous split involving of the dissident members were made an absolute legal necessity? Can they not show their conscionable dissidence openly as and when they feel the necessity? Must they keep themselves hidden, until 1/3rd is formed, so as only to deny the knowledge of real facts to be other side?

59. This issue of an instantaneous split arose in the case of Kihoto, see paragraph 124. The matter was left open to be decided in an appropriate case. Such case has now arisen.

60. I would unhesitatingly accept Mr. Dwivedi''s submission that the Constitution does not call for a denial of right of dissidence to onethird members of a legislative party provided such dissidence takes place within a reasonable length of time and as one understandably continuous process. The dissidence here was sparked off by Ms. Mayawati''s decision to have the Assembly dissolved. The dissident group collected in a continuous process within quite a short span of time, even if the facts from the side of the respondents are for the sake of argument discarded and the facts all assumed as suggested by the petitioners. Therefore the speaker was right in considering the group a whole first and he would be wrong to deny the protection of paragraph 3 to this group by disqualifying them individually considering the case of each at different previous periods or points of time.

61. In our opinion, an equally strong, perhaps an even stronger point in favour of the respondents would be that in considering paragraph 3, the Speaker has to focus his attention not on whether there has been really a single continuous split or not, but whether there is really one faction, which is the dissident faction. The emphasis is not on ''split'', or one split, but on ''faction'' and one faction.

62. In paragraph 3 there is a split, there is a faction and there is a group; the faction is of the political party, caused by the split; the group is of the walkaway MLAs, who represent this faction. This faction becomes the new original political party of the dissident group from the time of the split. The Speaker has to see whether there is one faction or not; he has to see whether this same single breakaway group is cohesive or not and whether this cohesive group has one third strength of the legislative party of the old original party. If he finds that the breakaway faction is one and not two, then he cannot and he should not turn this faction notionally into two factions and disqualify the whole group which is presenting itself to him as a single and a whole dissident group. If he has already disqualified some members, well and good, and one can only beat one''s chest; but if a decision on

disqualification has not already been given, the speaker must give paragraph 3 its due effect and treat one breakaway faction as one and one only, and not as two, merely because there has been some practical time gap or time period consumed in its formation, which will be there in some form or the other in practically every case. We, leave aside cases where the floor crossers cross over group by group, but secretly, the point would not arise there, because the other side would not know the facts.

63. These are two reasons why we are of the opinion that the first point of the petitioners fails and the speaker was right in not considering the history of the generation of the dissident faction, once he found the faction to be one and once he found the group representing the said faction to be satisfying, even more than satisfying, the minimum strength of one third of the legislative party''s strength of the members of the old party.

64. There are several other compelling reasons too. That the Speaker''s decision has the effect of disqualification of the MLA, if so ordered, from the date of the resignation or the offending act of the MLA, does not mean that the Speaker, even during the time he is in the process of making the decision and writing it, has to consider, think and give primary importance to the date of the MLA''s voluntary resignation from the party, in every context of his decision and for every purpose of it. In other words, the dating back of the decision occurs as a matter of law after the decision is given, but that effect should not unduly cloud the Speaker''s mind when he is engaged in the decision making process.

65. That an MLA could have been disqualified because of his voluntary resignation at some certain earlier point of time, is no reason why he cannot be counted in the group which constitutes one third or more of the old legislature party. Even if the whole group were to resign from their old party at the very same time and even at the striking of a particular hour of the clock, even so under paragraph 2 of the 10th Schedule each of them would be liable to be disqualified. Paragraph 2 would apply to them individually nonetheless. But they cannot be disqualified because their liability to be disqualified is removed by the formation of their larger group. That some MLA''s could have been disqualified one minute earlier or one day earlier or may be even one month earlier does not alter this sequence of looking at the paragraphs; the Speaker must look at paragraph 3 first and only thereafter at paragraph 2. Otherwise he would go wrong and would never be able to apply paragraph 3.

66. Short of actual disqualification being already ordered by the Speaker in respect of some MLAs, the group offering itself as a whole for consideration under paragraph 3 must be considered as a whole. The case of Naik is interestingly to the point here.

67. There, two members, Bandekar and Chopdekar had been disqualified by the Speaker on 13.12.1990. On the next day, i.e. 14.12.1990, the High Court, however, stayed the operation of the Speaker''s order. On 24.12.1990, Naik claimed a split which qualified, according to him under paragraph 3. Naik counted in Bandekar and Chepdekar; on 15.2.1991 the Speaker negatived the claim of Naik and disqualified him.

68. Ultimately Chopdekar and Bandekar lost their writs, their interim orders were vacated and the Supreme Court also refused to interfere in their case. But it said that the Speaker was not right in excluding B&C while considering Naik''s claim. Naik''s case is really two cases in one. Thus Naik won before the Supreme Court. Because of the High Court''s stay order, it was as if the Speaker had not passed the order of disqualification of B&C on 13.12.1990. If there had been no High Court stay, and if the Speaker had not already disqualified B&C, could the Speaker have discounted B&C from the total group claimed by Naik? Not to our mind. An order not passed until then by the Speaker at all, and an order stayed by the High Court are not materially different. It is true that in paragraph 44 in Naik''s judgment, the Court did not look at the matter or decide it in this way. It was more concerned with the Speaker not giving effect to the High Court''s stay order; perhaps from that point of view a stayed order of the Speaker, when the High Court had intervened, made the case a little stronger for counting in B&C during the period of operation of the stay than if no earlier order of disqualification of B&C had been passed by the Speaker at all. Still there is no contrary opinion of the Supreme Court entitling the Speaker to look at the disqualifying circumstances of B& C once again when they were sought to be counted again in the group of Naik.

69. One should bear in mind that if a paragraph 3 claim of split succeeds, the paragraph 2 claim for disqualification must fail in case of each of such successful MLAs. It is also true viceversa because the claim of split is as bad as walking out of a party and if the group is not big enough the MLA''s all forfeit their balance term.

70. Again, the disqualification of an MLA even on his voluntary resignation is not an automatic consequence. The gate keeper of the Legislative Assembly cannot stop the MLA, saying, Sir, you have resigned yesterday from Bahujan Dal and you cannot come in now. Hardly anybody in this regard is much better off than the gate keeper. Only the Speaker is different; he can decide on the disqualification, but until such decision is given, the MLA is an MLA for all purposes. One such purpose is counting him in the paragraph 3 group. When paragraph 3 is considered, the date of walking away of the MLA is not very material. What is material is the event of his walking away. For how many has that event occurred? That is the important question, not the list of dates of who walked away when.

71. This brings us to the second main point argued by the petitioners. On the wording of paragraph 3, it was argued, that a split in the original party must be proved. Original party is defined in paragraph 1(c) of the 10th Schedule and that is

as follows:

"1(c)."original political party", in relation to a member of a House, means the political party to which he belongs for the purposes of subparagraph (1) of paragraph 2."

Again in paragraph 2(1) in explanation (a), it is stated as follows:

"Explanation: For the purposes of this subparagraph:

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

72. Even if 37 out of 109 Bahujan MLAs have walked out, only the legislature party is split. This is defined in paragraph 1(b), which has been set out earlier, but in this case of ours, where is the proof before the Speaker of the split in the original party? Were any minutes tendered before the Speaker showing that so many lacs or millions of the original Bahujan Dal decided to split? A claim that on 26.8.2003, there were some party members along with the MLAs at the Darulshafa in Lucknow is not enough; it is too inadequate. The Bahujan Dal is too big; its party membership is too numerous for it to suffer a split in such a comparatively minor meeting, even if took place on 26.8.2003. There was no intimation that one group was going to split; even the name Loktantrik Bahujan Dal found its place for the first time on paper on 6.9.2003; there were no newspaper reports; there were no statements of dissatisfied party members, the core of the Bahujan Dal was not asked to ''rectify'' its behaviour, or else. The threat of a split was not ever made imminent; nothing like this happened; only one evening, it is claimed, the Bahujan Dal had split and a faction had arisen. This is so cursory as not to class as a split in the original party at all. Look at the split in CongressO, which resulted in CongressI coming into being. Look at the split in CongressI in West Bengal and the resulting Trinamul Congress coming into being; was there anything like that here? The answer is a big no.

73. Reliance is placed on the case of Mayawati v. Markandey, reported at (1998) 7 SCC 517. The report will show that there was no decision given, but the then Hon''ble Chief Justice had only opined that the matter be referred to the Constitution Bench for a decision. It is on record in Civil Appeal No.5057 of 1998, i.e. the same case, a five strong Bench of the Supreme Court headed by another Hon''ble Chief Justice of India ordered on 23.11.2004 that the appeal had become infructuous; as such the appeal was disposed of leaving all questions open.

74. In the report of the judgment, Srinivasan, J. said in paragraph 87 as follows: "It is not sufficient if more than one third members of a legislature party form a separate group and give to themselves a different name without there being a split in the original political party. Thus the factum of split in the original party and the number of members in the group exceeding one third of the members of the legislative party are conditions to be proved."

75. In Naik, in paragraph 38, it is said: "As to whether there was a split or not has to be determined by the speaker on the basis of the material placed before him." On the basis of these authorities, the petitioners argued that there was no material worth the name before the Speaker to prove any original split in the main Bahujan Dal political party itself. Thus the Speaker had no jurisdiction to recognize the split faction under paragraph 3.

76. For the respondents, the case of Naik itself was relied upon. They showed paragraph 36. There, with reference to paragraph 3, it was said as follows: "the burden, therefore, lay on Naik to prove that the alleged split satisfies the requirements of paragraph 3. The said requirements are: (i) the member of a House should make a claim that he and other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original party; and (ii) such group must consist of not less than one third of the members of such legislature party."

77. The requirement here is not proof of a split of the original political party, but only of a claim of such split. As opposed to this, the objective demonstration of the existence of the one third number is to be made in fact; it is not enough merely to claim that there are one third. Even in paragraph 38 of Naik, which was relied upon by the petitioners, all the proof that the Supreme Court felt satisfied with was a declaration dated 24.12.1990 whereby 8 out of 18 MLAs declared themselves as a split away group; there was really nothing more about the original political party; yet the Supreme Court felt satisfied. So what more proof is required for split of the original political party than a good number of their leaders, who are sitting MLAs, breaking away from that party finally and altogether? And what proof, the respondents asked themselves, was contemplated by Srinivasan, J.? The reader, Mr. Shanti Bhushan, (who appeared for three respondents) said, is only left guessing in this regard. With due respect, he is right.

78. In view of the authorities, we are compelled to look at the language of paragraph 3 very seriously ourselves and give such decision as we are capable of, thereon.

79. The language indeed tallies with the requirement mentioned in paragraph 36 of Naik; in fact that paragraph, in requirement (i), practically quotes the opening portion of paragraph 3.

80. Once a claim of split in the original party is made by more than one third members, it cannot but be held that there has necessarily been a split in the original political party also. The members of the legislature party are necessarily members each of the original political party. If they split, the original political party also splits. No magnitude of the split is mentioned in paragraph 3. What yardstick will the Speaker go by? How many outside members will he consider? Does he have to consider any outside member? The then Speaker, Mr. Tripathi said that the outside

members of the Bahujan Dal need not be examined en masse as that would be like opening up Bhanumati''s box.

81. We are of the opinion that he was right in law. The breakaway MLAs must clearly claim that they are walking away from their original party also; they cannot claim that they are only walking away for, say, one particular issue or one particular voting item for the purpose of avoiding the whip; they cannot split on an issue or an item and then go back to the party. This type of split the MLAs cannot put forward for saving their disqualification under paragraph 3. But if they split finally from the party even only and all by themselves without a single outside member of the original political party coming with them at that time, even then there is a split, of some size, of some tangible effect in the original political party which the Speaker cannot fail to recognize and which is quite sufficient, even by itself, for the Speaker to assure jurisdiction and to act upon. Of course one must bear in one''s mind the practical consideration that a politician, who is an MLA, is not, and is not even expected to be a loner like a Judge. He will have a following, almost as if of physical necessity; when he will walk away, his group, which will certainly be sizable for a sitting MLA, will walk away with him too, almost fully, perhaps, in most cases. The decision of an MLA is the decision of a significant part of the original political party also. This is sound, practical politics. This is why, under paragraph 4(2), two thirds MLA''s, by merging, can bring about a merger of their original political party itself, not merely, be it noted, their legislature party only.

82. It was argued in this context that if the above argument be right, then why did Parliament in the amendment of the Constitution simply not say in paragraph 3 that the faction might arise as a result of a split in the MLA''s legislature party itself? That would make the matter simple, the Speaker would only look at the breakaway MLAs; Parliament knew as well as we do that legislature party members are original party members also, if they thought that split in the legislature party was enough split in the original party by itself why did they not say so in paragraph 3? Why were the words not ���.a faction, which has arisen as a result of a split in his legislature party�? Why were the words ��..a faction which has arisen as a result of a split in his original political party�?

83. The answer to this question, though perhaps not obvious immediately, is really quite simple. There cannot be any split in the legislature party because the legislature party is no party. The legislature party is a mere definition; there cannot be a split in a definition; there can only be a split in a party; the only party in issue is the original political party of the MLA from which he wishes to cross over. Therefore, the words had to be ''the original political party'' and the words could not be ''legislature party''. Accordingly, it would be quite enough for the MLA''s alone to walk out although here, there is certainly a lot of claim about there being office bearers and other disgruntled members with the MLAs, who are not MLAs themselves, and who were present at Darulshafa on 26.8.2003.

84. Furthermore, the rational requirement for the claim of a big walk away group should properly and fairly be that their original political party has split; it sounds so theoretical and so redolent with horse trading when merely a claim is made that some MLAs have broken away all by themselves. Parliament could not insert in the Constitution the requirement of a claim, which is itself unnatural. The natural requirement has been inserted, if only for the purpose of making a specific claim to that effect. In these matters, concerning people in high office, even claims and surface behaviour should have respectability; this is necessary for running a State.

85. Related to this question of split in the original party was the question of the time from when an MLA changes his original political party and his original political party becomes the breakaway faction. According to the Paragraph 3(b), this occurs from the time of split. But the split might not be instantaneous. There might be several successive splits increasing the faction daybyday and weekbyweek. When will the MLAs belong to their new party? It is an ordinary question requiring an ordinary answer. The time of split mentioned in paragraph 3 does not and cannot refer for a whole faction, to an instant of time only; it must refer to a width; it must refer to a period of time; the split occurs during the entirety of that period. The faction grows during the entirety of that period. When a particular MLA splits into that faction, he becomes a member of that faction. His split from his original political party takes place at an instant that is his instant for change over of party; that instant is included in the width of time, in the total time period during which the split of the original political party has taken place. So for the whole faction, the time of split is a period of time, but for individual breakaway MLA''s the time of split is an instant, maybe different for different MLA''s, but all included in the fation''s total time period.

86. The third main argument related to the point of natural justice and fair hearing.

87. The petitioners absolutely denied being given a fair hearing, they said everything was over in a jiffy; everything was over between tea time and dinner time of 6.9.2003. This happened in spite of their caveat dated 5.9.2003, which showed how serious they were. Indeed the seriousness of the issue cannot be over emphasized. If the Speaker had not given a favourable decision, Shri Mulayam Singh Yadav would have been unable to demonstrate his strength, which he did just two days later, i.e. on 8.9.2003; he had been asked to demonstrate strength (within a fortnight if I remember correctly) by the Governor as early as on 29.8.2003. Everything was waiting for this decision of the Speaker, it totally altered the power balance. Just a notice was issued to the Bahujan Dal. As a result of that Mr Swami Prasad Maurya and Mr. Barkhu Ram Verma of Bahujan Dal came at the hearing; they were the legislature party leader and the State President of the Dals there is no proof that even the petition of recognition of split and the petition of recognition of merger were given to Mr. Maurya and Mr. Verma; documents were not examined; relevant documents are there, and these documents are not cursorily to be brushed aside.

Mr. and Mrs. Nari''s letter of being threatened to join Samajwadi Dal at gunpoint has been produced; even 3 out of the 43 MLAs claimed by Rana to have broken away, (and such claim was made on 6.9.2003 itself) even these 3 have denied that there was any meeting at Darulshafa as alleged or at all. The Speaker should have given a full hearing, if the matter could wait from 29.8.2003 to 6.9.2003, why could it not wait a few days more? Why could it not wait even overnight or one or two nights?

88. Under the U.P. Rules of 1987 framed under paragraph 8 of the 10th Schedule, a time of seven days is allowed under Rule 8(3) (b) in case of a disqualification petition. True it is that in Naik (See paragraph 18) the noncompliance of Rules framed under paragraph 8 is not by itself a ground of judicial review of the Speaker''s order, but is it not a factor for considering the denial of a fair hearing also? Can the Speaker issue notice only to save his own skin against an argument of breach of natural justice and as soon as somebody from other side arrives proceed like a jet plane to finish off the whole thing forever? Very great emphasis was laid on the briefest of time in which the Speaker gave his order on the petitions of 6.9.2003. Even the copy order was available to the Bahujan Dal, on 9.9.2003 after the Speaker returned from Delhi, the power had by that time gone over to the Samajwadi party. Everybody had to depend on the Speaker''s oral decision in the B.S.P. until 9.9.03.

89. For the respondents, the argument was that the matter was not disposed of exparte; an objection was raised and thereupon the genuineness of the breakaway group, their strength, their presence and their signatures were all verified. This was the most important part of the hearing; documents can do nothing. How and why the MLA''s broke away is not a material point of inquiry under paragraph 3, the history of formation of the one third group is largely; if not totally, immaterial. It is the strength of the group which is all important. This strength was verified to everybody''s satisfaction. There is no doubt raised about the number 37 even now; no such doubt was ever raised. In view of this, any protracted hearing, even the delay of one day was unnecessary and inexpedient. It was not, that only the strength of the Bahujan Dal was in issue; there was an issue of midterm election; the importance of party loyalty is there, but there is the importance of political stability and avoidance of quick midterm elections also; the interest of Bahujan Dal, Samajwadi Party and the entirety of Uttar Pradesh had to be looked after disinterestedly by the Speaker; after the formation of the qualifying breakaway faction any delay would be undesirable and could even have been dangerous, because winning back even one MLA would totally alter the situation. The importance of the decision of the Speaker was shown by immediate demonstration of strength of the Samajwadi''s on 8.9.2003 and has been further shown by the stability of the Government from then until now. The stability was there then and is the same now. The giving of a long hearing in these circumstances would not further the causes of justice and practical wisdom, but would go just in the other direction.

90. Mr. Dwivedi relied upon several cases to show that what type of hearing is adequate and fair in the circumstances of a case varies from case to case. One has to look at the person deciding the matter; the issue which is being decided; the parties involved about whom the decision is being given; the inquiry, which is necessary to be undertaken, and many other factors. As a matter of law, the above proposition is quite right. See the cases of State Bank of Patiala, reported at (1996) 3 SCC 364 and B. Karunakar, reported at (1993) 4 SCC 727. Professor Wade is quoted at paragraph 36 in Sohan Lal Gupta''s case, reported in (2003) 7 SCC 492 at page 508; ‘there must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice’.

91. In our opinion, the case of the respondents is correct and there was, in the circumstances of the case, no denial of the hearing, which was required to be given by the Speaker at the material time. Even today, nothing can be demonstrated, which, if the law which we are laying down here is right, could have persuaded the Speaker to hold differently (even less, certainly differently) on 6.9.2003. Without prejudice, without a real possibility of prejudice how can we set aside an order on the technical ground of natural justice and unstabilize an already stable Government? There is no such thing as natural justice in the air (just as, with due acknowledgement where acknowledgement is due, since I have forgotten the name of the case and the name of the Hon''ble English Judge, who said that there is no such thing as negligence in the air). What does it matter if the copy petition of 6.9. was not given, if seven days'' notice was not given, if two nights'' consideration were not made, if the exact events of 26.8.2003 and of later dates upto 6.9.2003 were not scrutinized? Would such consideration and such notice reduce the number from 37 to 36? No, not as a mere notice; but it could produce alteration, by prolonging the events. If as a notice, it cannot reduce that number, then what is the use of shedding tears over some abstract rule of natural justice being broken with regard to period of notice, consideration of documents examination of witnesses etc. etc.?

92. Related to the topics of hearing, procedure and the way the Speaker''s decisions are to be given, there are two comparatively small points, which we wish to dispose of here and now.

93. The first point, starts with the legal premiss that the Speaker''s decision on a disqualification petition is a quasijudicial decision and not merely an administrative one. In paragraph 94 of Kihoto, it has been laid down that it would be inappropriate to brand the jurisdiction of the Speaker or the Chairman in the 10th Schedule as not a judicial power.

94. The Speaker also says so in his decision of 6.9.2003. Naik lays down in paragraph 36 that where somebody claims a disqualification of an MLA under paragraph 2 of the 10th Schedule, the burden to prove the requirements of such disqualification is upon him. These are indeed trappings of a judicial decision. By the 10th Schedule decision of a Speaker, a right of a party is affected, directly and immediately as a

result of the decision. Some proof of ingredients are necessary, usually there will be at least two sides asking for two radically different decisions. The Speaker has to apply his mind to rules and practice and not merely to a policy question. These ingredients make the decision a quasijudicial one.

95. Although the speaker said in his order of 6.9. that the disqualification petition of 4.9. would require a judicial decision and therefore, he was shelving that petition for the time being, yet he went on straightaway to decide the recognition of split petition, which was tendered on 6.9.2003. The petitioners argued that if a disqualification petition requires a judicial decision, so does a recognition of split petition. The effects of both are the samea decision on disqualification. The Speaker at least impliedly thought that the recognition petition required at least not as judicial an exercise of his power as did the decision on the disqualification petition. The petitioners argued that the Speaker was wrong in law in implying this in his decision and he misdirected himself in law in proceeding on this basis.

96. The further argument was that on 7.9.2005 when the disqualification petition of 4.9.2003 was actually disposed of, the Speaker, (who by that time had changed and Mr. Tripathi had been replaced by Mr. Mata Prasad Pandey) said that the 4.9. petition required no further decision since the matter had been substantially disposed of on 6.9.2003 itself. The petitioners argued that they have suffered injustice and are victims of misdirection on law. The same petition is adjourned two years ago on the ground that it required detailed consideration; then the recognition petition is considered and decided upon within a matter of a few hours; and two years later it is said that whole thing is over and what had earlier been labelled as requiring a detailed consideration had, in fact, been considered and disposed of there and then, the disqualification petition of 4.9. was kept pending as a sort of mere eye wash.

97. There is great substance in this submission of the petitioners; they are right that the determination of the 6.9. petition implied a decision of the 4.9. petition also, they are right that the Speaker on 6.9.2003 wrongly thought that the 6.9. petition required any less quasi judicial treatment than the 4.9. petition. The petitioners are right, but their being right, does not necessarily give them any remedy or relief. The Speaker was in error in the above regard on 6.9.2003, but not every error is followed by a serious consequence, or even any consequence, in some cases. It is so in life and the world of the law but follows life.

98. If the Speaker thought he was disposing of only the 6.9. petition only and not touching the 4.9. petition, but his substantial decision touched upon and decided both, in effect, and if he decided in accordance with fair procedure and correct direction of himself in law, then the above error is not of any result producing or fruit bearing significance. We opine that the speaker''s substantial decision is not vitiated; we cannot opine that it is vitiated merely on this side issue, which has no real bearing on the main matter. The petitioners therefore win here, but get no

points.

99. The second related topic is the submission that the speaker merely counted members in disposing of the 6.9. petition and though the order is long, really did nothing else. A determination of the question on paragraph 3 cannot be as low an exercise as a mere head counting one. There was no consideration of any political morality, no consideration of any justification of a split of the original party, no thought was spared as to whether the MLAs were walking away only to serve their own ends by being a part of the party which is likely to come in power in future; the whole object of Schedule 10 as mentioned in Kihoto was impliedly thought to be irrelevant by the Speaker. He just counted the numbers, 1, 2, 3��.37 and he knocked down the ''action'' in favour of the respondents. This was going wholly against the sprit of the 10th Schedule and the 3rd paragraph. The Speaker''s decision is thus vitiated.

100. We are of the clear opinion that a mere head counting is not any lowly sort of exercise at all, the heads which are counted are not ordinary heads but those of sitting MLAs. They present themselves as the split away group after whatever consideration they think to have been necessary according to their own political wisdom. Democracy itself is a mere head counting game. How can the head counting under paragraph 3 then be branded as anything undemocratic or improper? The insertion of the 10th Schedule might have been made for certain exalted and lofty purposes but the working of the 10th Schedule has to be left to the practical judgment and decision of the elected MLAs. Democracy knows of no other way. The law does not permit crossexamination of MLAs on the way their hearts feel on any political decision or the course of their future political action. If they say that they are splitting and then joining with Samajwadi Party to prevent strangulation of democracy, then the speaker cannot but believe them; nothing else is possible to do under the circumstances. This comparatively minor point of the petitioners therefore fails.

101. The last major point of the petitioners is the one on merger. It was not pleaded in any very great detail in the petition, but only about two paragraphs mentioned the point and those two are after paragraph 30. The point is based upon paragraph 4 of the 10th Schedule and the said paragraph is set out below:

�4. Disqualification on ground of defection not to apply in case of merger (1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his original political party merges with another political party and he claim that he and any other members of his original political party

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

(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or

group, as the case may be, shall be deemed to be political party to which he belongs for the purposes of subparagraph (1) of paragraph 2 and to be his original political party for the purposes of this subparagraph.

(2) For the purposes of subparagraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if not less than twothirds of the members of the legislature party concerned have agreed to such merger.&#65533;

102. The respondents claimed that they had formed the Loktantrik Bahujan Dal out of the faction, which grew out of the split in the Bahujan Dal party on 26.8.2003.

103. They also claimed that the MLAs of the said Loktantrik Bahujan Dal unanimously decided in a meeting held on 6.9.2003 that they wanted to merge with the Samajwadi Party. This is the substance of the two petitions dated 6.9.2003, each of which is signed by 37 MLAs, one is the split petition under paragraph 3, another is the merger petition under paragraph 4. A yet separate petition was given by Rajendra Singh Rana on 6.9.2003, which was the subject of the six additional MLAs, who were claimed to have cast in their lot with the other 37.

104. On 6.9.2003, the Speaker granted both the recognition of the Loktantrik Bahujan Dal and by another order the merger of it into the Samajwadi Party. By an order of 8.9.2003, three MLAs out of the said six moved their own application before the Speaker and confirmed what had been said by Rana on 6.9.03; these three MLAs with their new petition and written confirmation were grouped by the Speaker with the other 37 in his order of 8.9.2003.

105. The balance three out of the six did not come on 8.9.2003 and they have even filed an affidavit denying the whole case of the respondents saying that there was no meeting at Darulshafa, Lucknow at all, and therefore, nor as alleged.

106. The respondents said that once the Loktantrik Bahujan Dal was recognized and once its &#65533;centpercent MLAs&#65533; decided to merge with the Samajwadi Party, the Speaker had no option but to grant the merger. Even if it is argued that only 40 members of the Loktantrik Bahujan Dal out of the 43 decided to merge with the Samajwadi Party, even then under subparagraph (2) of paragraph 4, the merger cannot be refused by the Speaker. In fact, in the merger petition, once the Loktantrik Bahujan Dal had separated from the Bahujan Dal, the members of the Bahujan Dal have no locus standi to participate; only the members of the Loktantrik Bahujan Dal are involved; the Bahujan Dal is not even entitled to any copy of the petition of the merger. The Bahujan Dal has no locus standi in the matter and cannot even raise any point about the merger in their writ petition.

107. The petitioners say otherwise; they say that in reality the merger of the 40 MLAs is not the merger of the Loktantrik Bahujan Dal party, but the merger of some MLAs of the Bahujan Dal itself. The petition for split and the petition for merger

were both dated and tendered on 6.9.2003. The time gap of formation of the Loktantrik Bahujan Dal (on 26.8.2003) and the decision to merger (on 6.9.2003) is a matter of clever pleading only, which wholly misses the substance of both the applications. The substance is that 37 or 40 MLAs of the Bahujan Dal wanted to avoid midterm elections and wanted to make personal gains and that is why they crossed the floor over to the Samajwadi Party, absolutely contrary to paragraph 4 of the 10th Schedule. The 40 MLAs are to be looked upon as merging from the Bahujan Dal itself. 40 is far less than twothirds of 109. Subparagraph (2) of paragraph 4 requires a merger of at least twothirds of the MLAs. This was not satisfied. Since the case was not a case of split in reality but a case of merger in reality, the fraction onethird is really immaterial; only the fraction twothirds of paragraph 4 is material. That fraction was not reached. An attempt at merging into another political party without reaching that fraction causes the MLAs to give up their original party membership voluntarily, without affording the protection of paragraph 4. This is what has happened to all the 40 MLAs; they should have been declared as disqualified under paragraph 2.

108. We agree that the argument certainly makes one think. By appropriately drafting two petitions, as in this case, where onethird members first claim a split and formation of a new party, and then claim a merger of the new party into another, in every case the requirement of the higher fraction of twothirds in paragraph 4 can be rendered unenforceable and useless. It is an argument, which is very strong; the strength of the argument is shown by the fact that paragraph 3 has been removed from the Constitution with effect from the month of January, 2004. One can no longer merge with onethird strength of MLAs by merely drafting a set of double petitions properly, claiming a split of onethird as a first step and a total merger of the new split away party as the second step of the process.

109. We ask ourselves this question that when this double petition occurred in September, 2003, what was the speaker to do? Paragraph 3 was there just like paragraph 4. A group was entitled to split on day one, and the same group was entitled to merge on day two, under paragraph 4. From the date of the split, according to paragraph 3, the split faction becomes the original political party of the split away group both for (i) paragraph 2(1) of the 10th Schedule, which means the whole of the 10th Schedule and, (ii) for paragraph 3 of the 10th Schedule (which insertion might or might not have been made ex abundante cautela; it is not necessary for us to decide this point).

110. If the spilt away faction becomes the new original political party as per the Constitutional definition in paragraph 3, then what can the Speaker do but allow its merger under paragraph 4 even if such merger is claimed one day later, or one minute later, or one second later than the completion of a split? The Speaker is helpless. Under paragraph (2) of paragraph 4, the necessary and sufficient condition for merger is not less than twothirds of the members of the original legislature

party to agree to such merger. After such agreement the merger cannot be further looked into by the Speaker; he has to accept it for the purpose avoiding disqualification. He did that here. We find no way of opining that the Speaker went wrong in law or that the Speaker should have adopted some other course of inquiry or reached some other decision thereby. The Speaker''s hands were tied. In paragraph 4(2), the twothirds MLAs alone can, by themselves merging cause a merger of the whole original party to happen. How important the MLAs are, and how, in reality, their decision is the same thing as the decision of a significant part of the whole of the original party, as quite emphatically shown by this.

111. We want to say one thing as a note of caution in regard to recognition of the original political party. The recognition given by the Speaker to the Loktantrik Bahujan Dal under paragraph 3 is a recognition given for the purposes of the 10th Schedule. It has relevance in regard to the further continuance of the MLAs as such until February, 2007 or so. Such recognition might be a material factor for the election Commission if the split faction maintains its identity without immediate merger into another party, but we are not concerned with the process of election here; the Election Commissioner is concerned with the preelection process. We are concerned with the legislative process upto the time of arrival of the next electing events.

112. The last point is also a comparatively minor one, but it should be touched before we leave this matter finally. The petitioners argued that a disqualification petition under paragraph 2 is envisaged by the 10th Schedule, but a mere declaratory petition under paragraph 3 or paragraph 4 is not envisaged. Somebody has to challenge the MLA''s right to continue as an MLA before the speaker can give a decision. The Speaker had a right to pronounce on the disqualification petition of 4.9.2003, but he had no jurisdiction to pronounce on the split recognition petition of 6.9. or the merger petition of 6.9.2003. If somebody claimed a disqualification of an MLA, who was amongst the break away group of 40, or if somebody claimed a disqualification of any of the 40 MLA''s because of their attempted merger interpreting it as happening directly from the Bahujan Dal, only then could the speaker consider these petitions. The 6.9. petitions are both not permissible; those are permissible only by way of defence; an MLA cannot walk away and all by himself say to the Speaker, please recognize my walking away. He remains at his own peril until somebody raises the question and he seeks to defend himself before the Speaker.

113. We are of the opinion that this argument is not well founded. Under paragraph 6, the Speaker can decide ���.if any question arises as to�..disqualification�. The 6th paragraph does not say that the question has to be raised by somebody other than the MLA who is under the possibility of disqualification himself. If any doubt about his disqualification has arisen, maybe in his own mind, or in his new group, the MLA can himself raise the question about his being disqualified (or his

being not disqualified, which is the same thing) and the Speaker would have to decide the matter by giving notice to the parties likely to be affected by his decision. Whether paragraph 3 is used as a shield or as a sword, depends on the facts and circumstances of the case; it is the same with paragraph 4; both the paragraphs are capable of use in both ways, i.e., both as defences to claims made and as petitions for obtaining a clearcut decision so that the rest of the period fo the Legislative Assembly might be continued by all persons concerned in a State of certainty. The obvious practical requirement also points in this direction.

114. Though the Rules framed under paragraph 8 of the 10th Schedule are not finally determinative, yet these Rules of U.P. also do not militate against the above view. A part of paragraph 8 of the 10th Schedule is quoted bellows:

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

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

115. In 1987, under the said paragraph the Speaker framed the Members of Uttar Pradesh Legislative Assembly (Disqualification on Grounds of defection) Rules, 1987.

116. Rule 6 thereof requires the Secretary of the House to maintain a register in Form IV of the said Rule, which requires the following 8 items to be entered:

(i) Name of member;

(ii) Father''s/Husbands name;

(iii) Permanent address;

(iv) Lucknow address;

(v) Date of election/nomination;

(vi) Name of political party to which he belongs;

(vii) Name of legislature party to which he belongs; and

(viii) General remarks.

117. Significantly, there is no rule which specifically asks the Secretary to make the correction in the register once the Speaker''s decision on a 10th Schedule matter is given; but this duty of the Secretary obviously has to be implied for furtherance of the purpose of Scheduled 10, and the U.P.Rules.

Rule 7 States as follows:

�7 (1). No reference of any question as to whether a member has become subject to disqualification under the 10th Schedule shall be made except by a petition in relation to such member�..�.

Then subrule (2) of Rule 7 provides as follows:

�7 (2). A petition referred to in subrule (1) may be made by any person in writing to the Secretary�.

Notably the rule does not exclude the member in question himself from making the petition; he is included in the expression "any person" occurring in Rule 7(2) and not excluded therefrom.

Under subrule (3) of Rule 8, the following provision is made:

"8(3).".the Speaker shall cause copies of the petition and of the annexures thereto to be forwarded:"(b) where such member belongs to any legislature party and such petition has not been made by the leader thereof,"to such leader".

118. Thus the Rule would require a member claiming a split or a merger to present his petition to the secretary and the Speaker would have to cause the copies of the petition to be given to the leader of the original party from which the member is splitting or seeking to come out for a merger. The notice provision also fits in with the possibility of declaratory petitions under paragraph 3 or paragraph 4.

119. Thus the petitions on behalf of the Bahujan Dal and by the Bahujan Party members all fail, and are dismissed and the Speaker''s decisions of September, 2003 and September, 2005 are all upheld, excepting that the amendment petitions of or on behalf of the Bahujan Dal are allowed for the purposes of looking at their comprehensive materials and prayers, if only for the purpose of dismissing their claims fully and comprehensively.

120. Thus, the petitions are dismissed. We have every sympathy with the Bahujan Dal, who lost power and 40 of their MLA members in September, 2003, those members walking out through the gateway of paragraph 3 of Schedule 10 of the Constitution, which gateway itself walked out of the Constitution just four months later in January, 2004. Such are the odd things that happen in life, law and politics.

121. No order as to costs.

(Petitions dismissed)

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Per Hon''ble Jagdish Bhalla, J.

I have minutely perused the well prepared and lucid judgment of Hon''ble the Chief Justice but with all regards, respect and all humility at my command, I find it difficult

to concur with the view expressed by His Lordship on the main issues involved in the case, which undoubtedly are of far reaching consequences on the future of Indian polity. It is because of this reason; I have to write a separate judgment.

2. This writ petition was filed before a Division Bench of this Court in September, 2003 initially impugning the orders dated 6.9.2003 and 8.9.2003 passed by the Speaker [opposite party no.1] contained in Annexure1 and 2 to the writ petition by the petitioner, who is a Member of Legislative Assembly and Leader of Bahujan Samaj Party Vidhan Mandal Dal, U.P. Hearing was concluded on 9th September, 2005 and the judgment was reserved by the Division Bench. In the meantime an application for further hearing was filed and during the hearing an application for amendment was made wherein the petitioner has chosen to challenge the order dated 7.9.2005 passed by the opposite party no.1 on the disqualification application dated 4.9.2003 filed under paragraph 2 read with paragraph 6 of the Tenth Schedule of the Constitution. Objections were filed to the said amendment application by the respondents saying that the application for amendment was made literally on the eve of the judgment and should be rejected on the basis of delay and laches. Prior to the decision on application for further hearing as well as on the amendment application, the matter was referred to this Full Bench by an order of Hon''ble the Chief Justice. The facts in detail have been explained by His Lordship in his judgment and thus the amendment application is also to be adjudicated by this Bench.

3. It has been prayed that a writ in the nature of Quowarranto be issued declaring the respondents no.2 to 41 to be disqualified under para 2(1)(a) of Tenth Schedule read with Article 191(2) of the Constitution of India and to declare that the seats occupied by the opposite parties no.2 to 41 have fallen vacant under the provisions of Article 191(2) of the Constitution of India w.e.f . 6.9.2003.

4. Before proceeding ahead, I would like to mention in brief the events, which has lead to the filing of this writ petition and the events which happened during the pendency of the writ petition. Elections to the U.P. Legislative Assembly were held in February 2002. The Assembly is composed of 404 members out of which 403 members are elected and the one is nominated. The 2002 Assembly elections did not give a clear mandate to any single political party. The Partywise position in 14th Legislative Assembly as on 2.9.2003 is as under:

Samajwadi Party 144

Bahujan Samaj Party 109

Bhartiya Janta Party 87

Indian National Congress 16

Rashtriya Lok Dal 14

Rashtriya Kranti Party 4

Bharatiya Communist Party 2

(Markswadi)

U.P. Lok Tantrik Congress 2

Apna Dal 1

Akhil Bhartiya Congress 1

Samajwadi Janta Party 1

(Rashtriya)

Janta Party 1

Samta Party 1

Akhil Bhartiya Hindu Mahasabha 1

National Lok Tantrik Party 1

Independent 16

Nominated 1

Vacant 2

5. On 25.8.2003, a decision was taken by the Cabinet headed by Miss. Mayawati [the then Chief Minister] to recommend to His Excellency, the Governor of Uttar Pradesh to dissolve the U.P. Legislative Assembly. The decision of the Cabinet regarding dissolution of Vidhan Sabha was made public by Miss. Mayawati in All India Party Worker Meeting of Bahujan Samaj Party held on 25.8.2003. At 10.45 AM on the following day i.e. on 26.8.2003, the leader of Samajwadi Party submitted his claim for forming a Government to the His Excellency the Governor of U.P. On 26.8.2003 itself at 1.00 PM Miss Mayawati submitted her resignation to the His Excellency the Governor. On the same day a meeting of 110 M.L.As of Bahujan Samaj Party (hereinafter referred to as ''BSP'') was convened at 5, Kalidas Marg, Lucknow at 7.00 P.M., where it was resolved that no member of Legislative Assembly of Bahujan Samaj Party will do anything which would be against the interest of the Party. On 27.8.2003, thirteen (8 + 5) M.L.As of Bahujan Samaj Party went to His Excellency, the Governor of Uttar Pradesh alongwith Shri Shivpal Singh Yadav, General Secretary of Samajwadi Party and submitted a letter to His Excellency to invite Shri Mulayam Singh Yadav to form the government. These letters have been annexed in the rejoinder affidavit filed by the petitioner and I would like to quote verbatim the said letters:

"HAM NICHE LIKHE VIDHAYAKGAN JINKE HASTAKSHAR NICHE ANKIT HAIN, AAPSE VINARM ANURODH KARTE HAIN KI SHRI MULAYAM SINGH YADAV JI KO SARKAR BANANE KE LIYE AMANTARIT KIYA JAI KYONKI UTTAR PRADESH KI JANTA NA TO

CHUNAV CHAAHATI HAI AUR NA HI RASHTRAPATI SHASHAN CHAAHATI HAI.[English Translation: we, the undersigned MLAs, do respectfully request you that Sri Mulayam Singh Yadav ji should be invited to form the government because public of Uttar Pradesh neither wants election nor wants President''s Rule.]

6. On 29.8.2003, Mulayam Singh Yadav was appointed as Chief Minister and the Governor fixed time till 8th September 2003 for proving majority by a motion of confidence on the floor of the House. On 30.8.2003, petitioner wrote a letter asking for copies of letters of support, if any, given by the thirteen MLAs to the Governor''s Secretariat. Similar letter was written by the petitioner on 3.9.2003. On 4.9.2003, the petitioner filed an application under paragraph 2(1)(a) of the Tenth Schedule of the Constitution of India for disqualification of the 13 MLAS for having voluntarily given up their Membership of Bahujan Samaj Party and acting against the interest of party.

7. On 5.9.2003, the petitioner filed a caveat petition before the Speaker as contained in Annexure3 to the writ petition interalia praying for opportunity to be given if 13 M.L.As or other members of the alleged faction files application under Paragraph 3 of the Tenth Schedule for recognition of split in the Legislature party On 6.9.2003, thirtyseven M.L.As i.e. 13+ 24 moved a joint application before the Hon''ble Speaker interalia informing that they have formed a new group under the leadership of Sri Rajendra Singh Rana, MLA in the name of Loktantrik Bahujan Dal and requested him to recognize the said Dal as an independent party in the Legislative Assembly and also requested for separate sitting arrangement in the Assembly(copy of application is annexed as Annexure4 to the writ petition). At a subsequent time, on the same day, these aforesaid M.L.As moved another application praying for merger of ''Loktantrik Bahujan Dal'' into ''Samajwadi Party''. Thus on 6.9.2003, three applications were moved, one for recognition of split, another was for recognition of merger of the split group and a third was for recognition of six more MLAs named therein as Members of the group represented by Rajendra Singh Rana. On 8.9.2003, the BSP submitted affidavits dated 7.9.2003 by three of the above noted six MLAs denying their signature on the application dated 6.9.2003.

8. The Speaker on the same evening i.e. on 6.9.2003 passed the order under the Tenth Schedule of the Constitution recognizing 37 Members of Legislative Assembly as Lok Tantrik Bahujan Dal in Assembly and by the same order the Speaker also accepted their merger in the Samajwadi Party. However, the Speaker reserved order on the third application on the ground that none of the above noted six MLAs were present in person before him and later on 8.9.2003 recognized three Members as Members of the defunct ''Lok Tantrik Bahujan Dal'' and also in the same breath recognized their merger with the Samajwadi Party.

9. Heard Sri S.C. Mishra, Senior Advocate appearing for the petitioner assisted by Sri P.N. Gupta and Sunil Chaudhary, Advocates and Sri Rakesh Dwivedi, Senior Advocate assisted by Gaurav Bhatia, Sri Anupam Mehrotra, Sri Ejaz Maqbool for the

respondents and Sri Virendra Bhatia, Senior Advocate appearing for the Speaker alongwith Sri S.A.H.Rizvi, Advocate. It may be mentioned that senior advocate Sri Shanti Bhushan also argued at some length on behalf of few of the respondents on a particular day but did not appear thereafter.

10. The material arguments advanced by the learned counsel appearing for the parties with regard to the merits of the case have been summed up in the latter part of the judgement.

11. Before considering the arguments advanced by learned Counsel for the parties, it would be proper to examine the legislative intent and provisions of the Tenth Schedule. The Tenth Schedule was inserted in the constitution by the 52nd Amendment Act, 1985. What impelled the Parliament to insert the Tenth Schedule can be seen from statement of objects and reasons appended to the bill which ultimately resulted in the Constitution 52nd Amendment Act:

�the evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles that sustain it. With this object, an assurance was given in the Address by the President to Parliament at the commencement of the first session after eighth general elections to Lok Sabha that the government intended to introduce in this session of Parliament an antidefection bill. This bill is meant for outlawing defection and fulfilling the above assurance.�

12. It would be also appropriate here to go into the history of the inclusion of the Tenth Schedule by the 52nd Amendment to the Constitution. On December 8, 1967 the Lok Sabha had passed an unanimous resolution in the following terms;

� A high level committee consisting of representatives of the political parties and constitutional experts be set up immediately by the Government to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floors in all its aspects and make recommendations in this regard.�

13. The said Committee, known as the �Committee on Defections�, in its report dated 7th January, 1969 observed;

�Following the fourth general elections, in the short period of March, 1967 and Feb. 1968, the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States compared to roughly 542 cases in the entire period between first and fourth general elections, at least 438 defections occurred in these 12 months alone. Among independents, 157 out of total of 376 elected, joined various parties in this period. That the lure of office played a dominant part in the decision of legislatures to defect was obvious from the fact that out of 210 defecting legislators of the State of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West Bengal, 116 were included in the Council

of Ministers which they helped into being by defections. The other disturbing feature of this phenomena, multiple acts of defections by the same person or set of persons ... few resignations of the Membership of the Legislature or explanations by the individual defectors, indifference on the part of the defectors to political proprieties, constituency preference or public opinion; and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections.

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

15. It is in this background that the Constitution (Thirtysecond Amendment) Bill, 1973 was introduced in the Lok Sabha on May 16, 1973. It provided for disqualifying a Member from continuing as a Member of either House of Parliament or the State Legislature on his voluntarily giving up his membership of the political party by which he was set up as a candidate at such election or of which he became a Member after such election, or on his abstaining from voting in such House contrary to any direction issued by such political party or by any person or authority authorized by it in this behalf without obtaining prior permission of such party, person or authority. The said Bill, however, lapsed on account of dissolution of the House. Thereafter, the Constitution (Fortyeighth Amendment) Bill, 1979 was introduced in the Lok Sabha which also contained similar provisions for disqualification on the ground of defection. This Bill also lapsed and it was followed by the Bill which was enacted into the Constitution (Fiftysecond Amendment) Act, 1985.

16. Before adverting to the controversy involved in the present writ petition, I also deem it proper to refer to the background and ''legislative intent'' for inserting Tenth Schedule in the Constitution and the reasons for prescribing the Speaker as appropriate Forum for deciding the vital question of disqualification.

17. The antidefection law in the form of Tenth Schedule of the Constitution of India was introduced in the Lok Sabha by way of Constitution [52nd Amendment Bill] in the year 1985. The basic feature of this bill, as stated by Mr Ashok Sen, the then Law Minister of India, while introducing it in the Lok Sabha, was that if any party puts up a candidate and that candidate gets elected on that party ticket, it will be impermissible for that person to resign from that party and join some other party, or disobey the mandate of the party, on the floor of the House. While parties were

mostly agreed on the need of such a legislation to check the evil of defection but apprehensions were there during the debate in the Parliament on the probability of misuse of powers given to the Speaker to decide the issue of disqualification of a Member of the House. As is evident from the Parliamentary debates on 52nd Amendment Bill, there has been demands from various members for appointing some other authority in place of the Speaker. Some members have put forward an amendment that instead of Speaker, some sort of the Committee of the House can be formed or a joint committee can be formed, which will go into the problem. The provision that if one third of the people wants to go away from the party in the name of a split, then they shall not be disqualified was also criticized during the debate. While defending the Speaker''s Authority to decide the issue of disqualification, the then Law Minister, Sri A.K.Sen has categorically stated in the Parliament that

"the other questions or about the Speaker''s authority, it was our clear intention from the very beginning that we are not going to allow this matter to be dillydallied and tossed about in the Courts of law or in the Election Commission''s Office. I had myself appeared in the Courts alongwith Late Kanhaiya Lal Mishra ji for winning our symbol. Babuji is there. He was the President of our party then. We used to go very regularly and Sri Siddharth Shankar Ray was assisting at that time. But the time we won back our symbol, it become worthless, because we had already won the elections not on a pair of bullocks but on a cow and calf. Therefore, that type of delay [in the law courts or in the Election Commission] should not be tolerated any more, we want a quick decision. If this Bill is to be effective, and if the defection is to be outlawed effectively, then we must choose a Forum which will decide the matter fearlessly and expeditiously. This is the only forum that is possible. With these words, I commend the motion for consideration."

18. Thus, the legislative intent of giving the power to decide the issue of disqualification of members in case of defection to the Speaker of the House was to decide the matter of disqualification fearlessly and expeditiously.

19. Senior Parliamentarians like Sri Jaipal Reddy, Sri Unni Krishnan expressed their considered view that august office of the Speaker should be kept above the din of dispute for disqualification of Members and suggested that the Committee on disqualification should be entrusted with the authority in this regard.

20. Ever since induction of the Tenth Schedule in the Constitution of India, the demands have been made for strengthening and amending this antidefection law as some of the provisions have not been able to achieve the desired goal of checking defection. The Tenth Schedule has mainly been criticized on the ground that it allows bulk defection as is witnessed in the case in hand. The provision for exemption from disqualification in case of splits as provided in paragraph (3) of the Tenth Schedule to the Constitution of India was criticized severely on account of its destablising effect on the Government.

21. Various Committees and Commissions were appointed to find out the shortcomings in the antidefection laws and to suggest ways and means for rectifying the same. The Committee on Electoral Reforms [Dinesh Goswami Committee] in Chapter X of its report of May, 1990 has given the recommendations relating to improvements in antidefection law. ''Goswami Committee'' appointed to suggest Electoral Reforms has recommended that the power of deciding the legal issues of disqualification should not be left to the Speaker or the Chairman of the House but to the President or the Governor, as the case may be, who shall act on the advice of the Election Commission, to whom the question should be referred for determination as in the case of any other postelection disqualification of any Member.

22. The Law Commission of India in its 170th report has suggested the deletion of paragraph 3 and 4 which deals with ''disqualification on the ground of defection not to apply in case of split'' and ''disqualification on ground of defection not to apply in case of merger'' respectively as it facilitates bulk defection. Paragraphs 6, 7 and 8 of the Tenth Schedule were also recommended to be deleted. While recommending the deletion of para 3, the Law Commission has emphasized that freedom of speech is undoubtedly precious but when a person becomes a member of a political party, accepts its ticket, fights and succeeds on that ticket, he renders himself subject to the discipline and control of the party. While recommending the deletion of paragraph 4, the Law Commission has stressed that this paragraph should go in the interest of maintenance of proper political standards in the Houses and also to minimize the complications arising on that account. Law Commission has also proposed a Constitution Amendment Bill for carrying out their recommendations relating to Tenth Schedule. Concern shown by the National Commission to review the working of the Constitution on the working of the then existing antidefection law is very significant and shocking. It would be relevant and useful to quote the observations:

�The question of defection has now haunted the Indian polity for over three decades. This was sought to be eliminated by the Tenth Schedule but all that has happened is that while individual defections have become rare, enblock defections are permitted, promoted and amply rewarded. Despite the Tenth Schedule, or because of it, countless defections have taken place without incurring any disqualification. In fact, on an average more defections per year took place after antidefection law as laid down in the Tenth Schedule came into force than ever earlier. What has been even more disconcerting is that some of the Speakers have tended to act in a partisan manner and without appreciation ofdeliberate or otherwise of the provisions of the Tenth Schedule.�

23. While making recommendations for the amendment of the Tenth Schedule, the Commission has stressed that Tenth Schedule should be amended specifically to provide that all personswhether individually or in groups from the party or alliance

of the party, on whose ticket they have been elected, must resign from their parliamentary seat and must contest fresh elections. The Commission, while expressing its apprehension about the misuse of the power by the Speaker''s on disqualification of members, has also recommended that the power to decide on questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or the Speaker of the House concern.

24. At this juncture, it would be apt to also refer the relevant provisions of Tenth Schedule:

1. Interpretation: In this Schedule, unless the context otherwise requires

(a) ''House'' means either House of Parliament or the Legislative Assembly or, as the case may, either House of the Legislature of a State:

(b) ''Legislature party'' in relation to a member of a House belonging to any political party in accordance with the provisions of paragraph 2 or paragraph 3 or, as the case may be, paragraph 4, means the group consisting of all the members of that House for the time being belonging to that political party in accordance with the said provisions;

(c) ''Original political party'', in relation to a member of a House, means the political party to which he belongs for the purposes of subparagraph (1) of Paragraph 2;

(d) ''paragraph'' means a paragraph of this Schedule.

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

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

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

Explanation: For the purposes of this subparagraph

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

(b) a nominated member of a House shall

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

(ii) in any other case, be deemed to belong to the political party of which he becomes, or, as the case may be, first becomes a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188.

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

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

(4) Notwithstanding anything contained in the foregoing provision of this paragraphs, a person who, on the commencement of the Constitution [Fiftysecond Amendment] Act, 1985, is a member of a house [whether elected or nominated as such] shall,

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

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

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

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

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

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

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

4. Disqualification on ground of defection not to apply in case of merger (1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party

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

(b) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of subparagraph (1) of paragraph 2 and to be his original political party for the purposes of this subparagraph.

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

5. Exemption: Notwithstanding anything contained in this Schedule, a person who has been elected to the office of the Speaker or the Deputy Speaker of the House of the People or the Deputy Chairman of the Council of States or the Chairman or the Deputy Chairman of the Legislative Council of a State or the Speaker or the Deputy Speaker of the Legislative Assembly of a State, shall not be disqualified under this Schedule

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

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

6. Decision on questions as to disqualification on ground of defection: (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final:

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question

shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under subparagraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.

25. This material arguments advanced by the Counsel for the petitioner in the present writ petition can be summed up as follows:

(a) Without deciding the question of disqualification, the Speaker should not have allowed the members to participate in the voting during the motion of confidence.

(b) The disqualification application was filed on 4.9. 2003 and in its contents clearly stated that 13 MLAs had acted against the party interest and an inference can be drawn from their conduct that they had voluntarily left the party a question was raised under paragraph 2 and the Speaker was duty bound under paragraph 6 to decide it first;

(c) The disqualification application under paragraph 2 (1)(a) of the Tenth Schedule was pending against 13 MLAs out of 37 constituting the new Loktantrik Bahujan Dal and hence the Speaker could only consider 24 MLAs as constituting the group representing the faction, which is less than one third of the number of members of the legislature party of BSP;

(d) The question whether there was a split or not has to be determined by the Speaker on the basis of material placed before him and the burden lies upon those who claim that there was split in the original political party. Infact the question has neither been decided by the Hon''ble Speaker in the order dated 6.9.2003 nor in the order dated 7.9.2005 and the benefit of paragraph 3 has been given to the respondents illegally and against the provisions of the Tenth Schedule;

(e) That in deciding the question of split and allowing the application under a paragraph 3 of the Tenth Schedule the Speaker had also decided the question of disqualification which he could not have done without considering the application under paragraph2; The disqualification application and the affidavits filed later on during the hearing of the application under paragraph3 of the Tenth schedule, clearly stated that there was no split in the party, and hence split in the legislature party could not be considered;

(f) Without deciding the question of disqualification, the Speaker should not have permitted 13 MLAs to vote on 8th of September at 2003 on the motion of confidence;

(g) The protection under paragraph 4 of the Tenth Schedule has been given to the respondents no. 2 to 41 on the ground of merger of political party by the Speaker without deciding the question whether it is a case of merger of a political party in another political party which infact was the constitutional mandate

(h) The merger application was not in the prescribed format and no notices were issued, even otherwise the order on the merger application was wholly perverse as far as respondents Nos. 39, 40 and 41 were concerned as the Loktantrik Bahujan Dal had been formed on 6th September 2003 and merged with the Samajwadi Party on the same day and, therefore, the 3 MLAs who had filed affidavits later on could not be considered to have joined Loktantrik Bahujan Dal on the 8th September 2003 when it was no longer in existence;

(i) The order dated 7.9.2005 has been passed without rendering any finding on the points in controversy because after filing the written statement and the provisional rejoinder statement to the application under paragraph 2 filed by the petitioner, the petitioner requested the Speaker to frame the issues as per Rule 7 of the Disqualification Rules of 1987 but the Hon''ble Speaker without framing the issue and without taking the evidence decided the petition dated 4.9.2003 summarily.

The material arguments advanced by the learned counsel for the respondents can be summarised as follows:

A. The Tenth schedule was part of the Constitution and, therefore, should be interpreted in the context of other provisions of the Constitution. The basic feature of the Constitution was parliamentary democracy and this envisages individual representation of constituencies. The Tenth Schedule for the first time gave recognition to the role of political parties in the Constitutional document, but maintaining the integrity of political party in the interest of political stability should not lead to party autocracy and deny that legislators the right to honor the commitment to their constituencies.

B. On the question of judicial review of the decision of the Speaker under paragraph 3 and paragraph 4 and whether the paragraph 2 is subject to para 3 and 4, arguments advanced by the advocates who appeared for the respondents are: (1) the decision of the Speaker is that of a High constitutional authority and is akin to the decision of the President for imposition of emergency under Article 356 hence only "lesser scrutiny" of the same is possible, that is, The "Relevancy Test" (2)) the order passed under paragraph 3 and 4 are only administrative in nature and they do not decide any lis (3) the Court should not go beyond Wednesbury principles, that is, illegality, procedural impropriety, and irrationality (4) the concepts of Split and Merger are political concepts and the Courts cannot reasonably devise any judicially manageable standards to test them , in other words, the Court should not enter into the "political thicket".

C. ''Split'' and ''disqualification'' under the Tenth schedule are mutually separate and distinct proceedings. Paragraph 2 of the Tenth schedule provides for disqualification from being a member of the house in two situations; if he has voluntarily given up his membership of such political party, or if he votes or abstains from voting in such house contrary to any direction issued by the political party to which it belongs without obtaining prior permission, and the same is not condoned by the political Party within 15 days. On the other hand paragraph 3 envisages a situation of split. It provides that if one third of the members of a legislature party form a separate faction as a result of split in the legislature Party then that becomes a case of split and in such a situation the member shall not be disqualified under paragraph 2 (1) as such the Speaker did not do any thing wrong in deciding the application under paragraph 3 first and independently of application under paragraph 2.

D. Even if split and disqualification are considered to be integrated, the impugned order of the Speaker would still be valid. Importantly, paragraph 2 begins with the phrase "subject to the provisions of para 3, 4 and 5" hence the provisions of paragraph 3 would override the provisions of paragraph 2. Even paragraph 3 expressly provide that where the split group consists of not less than one third of the members of the legislature party, the members "shall not be disqualified under subparagraph (1) of paragraph 2" and from the time of such split the faction/group shall be deemed to be the political party for the purposes of paragraph 2 (1) and to be his original political party for the purposes of paragraph 3 and hence the delayed decision on the application filed under paragraph 2 is of no consequence. The Speaker by passing the impugned order dated 6.9.2003 gave recognition to split could have made a brief observation a one line order saying that in view of his order regarding split under paragraph 3. The application regarding disqualification under paragraph 2 stands dismissed and the dismissal is consequential an automatic. Infact the impugned order dated 7.9.23005 is a realization by the Speaker, although belated, that the disqualification had become infructuous. The failure of the Speaker to reject such application under paragraph2 would best be a technical error or a mere error and the writ of certiorari would not issued for correcting an error or technical error, which have no bearing on the substance of the matter.

E. Alternatively, the nonpassing of the order on application under paragraph2 along with the order on paragraph 3 is a mere irregularity of procedure and if the final result of passing orders on both the applications is same, no illegality could be said to have been committed by not passing order on application under paragraph2.

F. The process of split does not require any definite number of members out side the house. Even two members can decide to split the party. However, for getting recognition of the split within the house this faction should be represented by a group consisting of not less than onethird the members of the legislature party. Also, the process of splitting up is continuous and snowballing is permissible, therefore, some can even join later.

G. The speaker''s role is not analogous to that of the Election Commission and the Speaker need not decide on the issue of split and the creation of splinter groups out side the house. He has only to see whether a claim has been made by one third of the legislators that they represent a faction, which has decided to split away from the party.

H. There has been no denial of procedural fairness i.e. neither violation of the principles of natural justice nor malafide on the part of the Speaker.

I. There is no ground for merger to be challenged even if allowed to be challenged, ought to be disallowed at the threshold as the Samajwadi Party which is necessarily going to be affected by any order passed on merger has not been impleaded. The BSP has no locus standi as the merger is between Loktantrik Bahujan Dal and Samajwadi Party.

J. Even if the orders dated 6th September 2003 and 8th September 2003 and 7.9.2005 are set aside, the second relief prayed for in the prayer clause cannot be granted under article to 226/227 of the Constitution as till date, no disqualification application has been filed against the 27 MLAs and the Speaker has been vested with the power under the 10th Schedule of the Constitution to decide the issue of disqualification of 13 MLAs.

26. We will now proceed to deal with each of the contentions separately in detail as argued by the learned senior advocates for the petitioner and for the respondents:

RE CONTENTION A :

27. Senior Counsel for the respondents has argued that the antidefection provisions of the Constitution are not to be read in isolation but in the context of the democratic process which the Constitution as a whole seeks to establish as a basic feature i.e., parliamentary democracy. Relying upon Kihoto Hollohon it was argued that in paragraph 2529 it has been held that Tenth Schedule is part of the Constitution and attracts the same cannons of construction as applicable to the expounding of the fundamental law. One Constitutional power is necessarily conditioned by the others as the Constitution is one coherent document. In expounding the processes of the fundamental law, the Constitution must be treated as a logical whole.

�The Constitution is a logical whole, each provision of which is an integral part thereof, and it is therefore, logically proper, and in deed the imperative, to construe one part in the light of the provisions of the other parts.�

�Upon the adoption of an amendment to the Constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the Constitution; and it is to be construed accordingly� it has been argued that since the 10th Schedule was brought in to the Constitution to strengthen parliamentary democracy, it cannot now be interpreted to stifle all individual expression of

conscience. Parliamentary democracy is a basic feature of the Constitution and it envisages individual representation of constituencies. The Tenth Schedule for the first time recognized the role of political parties in parliamentary democracy. However, a correct balance has to be struck between party autocracy to further political stability, and individual legislators commitment to honour the wishes of his constituency. The 10th Schedule cannot therefore be interpreted to gag all individual dissent.�

28. Sri Rakesh Dwivedi, learned Counsel for most of the respondents had placed Reliance upon the Statement of Objects and Reasons to The Constitution (52nd Amendment) Act 1985. To emphasize that the 52nd Amendment sought to draw a balance between injuncting licentious individual defecting conduct, and permitting a collective expression of dissent within a party by specifically stating �the bill also makes suitable provisions with respect to splits in, and mergers of political parties�

29. In recognizing splits some collective leverage is preserved to challenge party autocracy and canvass differences of opinion and thus preserve the democratic process.

30. Counsel for the respondents tried to impress upon the Court the fact that the decision of Ms. Mayawati to dissolve the Assembly on 25th of August 2003 was in fact her personal decision. This action, sought to cut short the normal life of the assembly, three and a half years before its time. Such an action was arbitrary and high handed as she simultaneously sought to dissolve the BSP legislature party itself. Any protest by BSP legislators was constitutionally permissible and proper. On 26th September 2003, 40 MLAs along with other members of the party met and decided to split from the party. Out of this group of 40 MLAs, 13 MLAs met the Governor to make a plea not to dissolve the House. Their stand can at best be seen as a note of dissent or even dissidence but does not manifest defection within the 10th Schedule. Such conduct may indicate only a willingness to sit in opposition. No exception can be taken to the behaviour of those BSP MLAs who met the Governor as Ms. Mayawati sought to cut short the life for the Assembly after 15 months and attempted to reduce the five years term by 75 percent and took arbitrary steps without due consultation. It was understandable that MLAs both of her party and others were alarmed and concerned and resorted to expressions of dissent, dissidence and further actions permissible by and under the Constitution. Normally, a legislature is expected to run its full course of five years. If this constitutional expectation is sought to be belied by a Chief Minister or a Prime Minister, who proposes the dissolution to cut short the parliamentary term, every effort should be made by the Governor or President and other constitutional functionaries (including legislators) to ensure that people are not denied a full assembly or parliamentary term.

31. To sum up, learned Counsel for the respondents argued that the respondents were well within their rights to approach the Governor as an expression of dissent

to the arbitrary decision of Ms. Mayawati to dissolve the House and could not thus be charged with ‘having voluntarily left the party’.

32. Sri S.C. Mishra in response to the arguments advanced by the counsel for the respondents has relied upon the observations made by their lordships in ‘Kihoto Hollohon (supra); Ravi S Naik (1994) Supplement 2 SCC 641 and G. Viswanathan v. The Honourable Speaker T. N Legislative Assembly (1996) 2 SCC 353; and Dr. Mahachandra Prasad Singh v. Chairman Bihar Legislative Council and others 2004 (8) SCC 747 to show that clearly it was not the intent of the Parliament in enacting the antidefection law (52nd Amendment) in the 10th Schedule to allow unprincipled floor crossing by members elected on party ticket.

33. I have gone through the case law relied upon by the learned counsel for the petitioner as well as the respondents and I would like to observe that in Kihoto Hollohon (supra) similar arguments as have been raised by the respondents counsel were raised by Shri Ram Jethmalani and Sri Sharma to the effect that parliamentary democracy did not envisage individual legislators commitment to their individual constituencies. It was argued by Shri Jethmalani that 10th Schedule sought to violate the fundamental principles of parliamentary democracy that is, of freedom of speech, of the right to dissent and of the freedom of conscience. It would be relevant to mention here the observations made by the Law Commission in its 170th report that ‘freedom of speech is undoubtedly precious but when a person becomes a member of a political party, accepts its ticket, fights and succeeds on that ticket, he renders himself subject to the discipline and control of the party.’ The Hon''ble Supreme Court negatived the contention of Shri Jethmalani and held that this was a situation when the Court had to strike a balance

‘ one hand there is the real and imminent threat to the very fabric of Indian democracy posed by certain levels of political behaviour conspicuous by their utter and total disregard of well recognized political proprieties and morality. These trends tend to be degrade the tone of political life and, in their wider propensities are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil.’

‘on the other hand, there are , as in all political and economic experimentation certain side effects and fallout which might affect and hurt even honest the dissenters and conscientious objectors. These are the usual plus and minus of all areas of experimentally legislation. ’

34. Holding that the Tenth Schedule was devised as a constitutional remedy against the immorality and unprincipled chameleon like changes of political hues in pursuit of power and pelf ‘ their Lordships went on to observe that although the argument of Shri Jethmalani appears to some extent valid, it cannot be accepted and held that :

� the Constitution is a living entity and provides for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The onslaughts on their sensibilities by the incessant and unethical political defections did not dull their current perception of this phenomenon as a canker eating into the vitals of those values that make democracy a living and worthwhile faith. This is preminently an area where judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defection to protect the community. �

35. The Apex Court examined the role of political parties in parliamentary democracy and the importance of debate, discussion and persuasion by elected representatives of the people. The debate and expression of different points of view do serve an essential and healthy purpose in the functioning of parliamentary democracy. However the importance of preserving the purity of electoral process cannot be disregarded. The role of political parties thus cannot be ignored:

� but a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its members in furtherance of those commonly held ideals and, freedom of its members to vote as they please independently of political party''s declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance nay indeed, its very survival. Intraparty debates are of course a different thing. But a public image of disparate stands by the members of the same political party is not looked upon in political tradition, as a desirable state of things �

36. Clause (b) of subparagraph 1 of Paragraph 2 of the Tenth Schedule gives effect to the balance struck by the legislators between party autocracy and individual expression of conscience. The provision recognizes two exceptions: one, when the member obtains from the political party prior permission to vote or abstain from voting and the other, when the member has voted without obtaining such permissions but his action has been condoned by the political party. ⁄This provision itself accommodates the possibility that there may be occasions when a member may vote or abstain from voting contrary to the direction of the party to which he belongs. ⁄

37. The Hon''ble Supreme Court also took note that freedom of conscience was sufficiently provided for by means of paragraph 3. In case of a valid split disqualification may not be the inevitable result:

⁄ the underlying premise in declaring an individual act of defection as forbidden is that the power of pelf or money would be presumed to have prevailed. Legislature has made this presumption on its own perception and assessment of extant

standards of political proprieties and morality. At the same time legislature envisages the need to provide for such "floor crossing" on the basis of honest dissent That a particular course of conduct commends itself to a number of elected representatives might, in itself, lend credence and reassurance to a presumption of bonafides. The presumptive impropriety of motives progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between "defection and "split".

38. The Apex Court reiterated the object sought to be achieved by introducing the Tenth Schedule in the Constitution in Ravi Naik''s case where the question as to when a member of house belonging to a political party can be said to have given up his membership of such political party was considered. In Ravi Naik''s case two MLAs, Bandekar and Chopdekar, had been elected on the ticket of MGP party, but they accompanied the leader of Congress (I) legislative party when he met the Governor to show that he had the support of 20 MLAs. On this conduct alone the Speaker held that they had given up the membership of MGP party and disqualified them for being a member of the house. The decision of the Speaker by which he held that the two MLAs shall be disqualified for being a member of the house under paragraph to (1) (it) of the schedule was upheld by the Hon''ble Supreme Court. The scope and amplitude of paragraph 2 (1) (a) was explained as under in paragraph 11 of the report:

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

39. In G Vishwanathan v. Honourable Speaker [supra] the appellants had been elected as members of the legislative Assembly in 1991 as candidates of the AIADMK party but they were expelled from the said Party on 8th of January, 1994. The Speaker declared them as unattached members of the Assembly on 16th March 1994. Sometime thereafter, an MLA informed the Speaker that the appellants had joined MDMK party and, therefore, they should be disqualified from membership of the Assembly. After calling for an Explanation the Speaker held that they had incurred the disqualification under paragraph 2 (1) (a) of the Tenth Schedule and had seized to be members of the Assembly. The main contention raised on behalf of the respondents was that paragraph 2(1)(a) of the Tenth Schedule comes into play only to disqualify a member who voluntarily gives up his membership of that

political party that had set him up as a candidate, and not when he is expelled from the party and declared ‘ unattached’ that is, not belonging to any political party. It was further contended that paragraph 2(1)(a) will apply only when a member himself of his own volition, gives up his membership of the party. Any member thrown out will seize to be a member of the party that had set him up as a candidate and if he joins another party thereafter, it will not be a case of ‘voluntarily giving up his membership of the political party’ that had set him up as a candidate for the election. It was held that if the contention urged on behalf of the appellant is accepted, it will defeat the very purpose for which the Tenth Schedule came to be introduced and would fail to suppress the mischief, and would be in the breach of faith of the electorate. The principle on which such a view was taken was dealt in paragraph 11 of the report:

‘ it appears that since Explanation to paragraph 2 (1) of the TENTH Schedule provides that an elected member of a house shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member, such person so set up as a candidate and elected as a member, shall continue to belong to that party. Even if such a member is thrown out or expelled from the party, for the purposes of the TENTH Schedule, he will not cease to be a member of the political party that had set him up as a candidate for the election. He will continue to belong to that political party even if he is treated as ‘unattached’. The further question is, then when does a person be said to have ‘voluntarily given up’ his membership of such political party, as provided in paragraph 2(1) (a). The act of voluntarily giving up the membership of the political party may be either express or implied when a person who has been thrown out or expelled from the party which set him up as a candidate and got elected, joins another (new) party, it would certainly amount to his voluntarily giving up the membership of the political party which had set him up as a candidate for election as such member.’

40. In the case of Dr. Mahachandra Prasad Singh [supra] the petitioner was elected as a member of the Bihar Legislative Council from Tirhut Graduate Constituency as a candidate of Indian National Congress. The notification for holding elections to the 14th Lok Sabha was issued in 2nd March 2004. The petitioner contested the said elections from Mahrajganj parliamentary constituency as an independent candidate. One member of the Bihar Legislative Council, sent a petition to the Chairman of the Legislative Council on 10th June 2004 stating, inter alia, that the petitioner, who was a member of Congress party, had contested the parliamentary election from Maharajganj Constituency as an independent candidate and consequently in view of the provisions of the Tenth Schedule to the Constitution he had become disqualified for being a member of the House. The petitioner was asked to submit his explanation vide letter dated 12thJune 2004 by the Secretary of the Council. After considering the explanation offered by the petitioner, the Chairman of the Legislative Council passed the impugned order dated 26th June 2004 holding that the petitioner had contested the election for the Bihar Legislative Council in the

1998 as a candidate of the Congress party and was a Member of the said political party and that he had contested the Lok Sabha elections 2004, as an independent candidate, and as such he had voluntarily given up his membership of the Congress party and therefore, he was disqualified for being a member of the house in view of paragraph 2 (1) (a) of the TENTH Schedule read very Article 191 (2) is of the Constitution and the seat held by him in the house had become vacant. The Hon''ble Supreme Court held as under:

"in the present case, the Chairman of the Legislative Council has held that the petitioner had been elected to the legislative council on the ticket of Indian National Congress but he contested the parliamentary election as an independent candidate. On these facts a conclusion has been drawn that he has given up his membership of the Indian National Congress. This being a matter of record, the petitioner could not possibly dispute them, and that is why he has admitted these facts in the writ petition as well. In such a situation there can be no escape from the conclusion that the petitioner has incurred the disqualification under paragraph 2(1)(a) of the Tenth Schedule and the decision of the Chairman is perfectly correct."

It was also observed:

" by contesting the parliamentary election as an independent candidate, he voluntarily gave up the membership of the Congress party. In G.Vishwanathan v. the Honourable Speaker, the Bench quoted with approval the observations made in Ravi S. Naik v. Union of India in paragraph 11 of the report that even in the absence of a formal resignation from membership, an inference can be drawn from the conduct of a member that he has voluntarily given up membership of the political party to which he belongs. On the facts of the present case, it cannot be said that the finding arrived at by the Chairman of the Legislative Council that the petitioner gave up the membership of Indian National Congress party to which he belonged, is one which could not reasonably and possibly have been arrived at."

41. I am of the considered opinion that as is evident from the case law cited above, the Hon''ble Supreme Court has given strict interpretation to the Tenth Schedule keeping in mind the objects sought to be achieved by the said legislation. Their Lordships have not permitted even the labelling of member as "unattached". I may quote from the case of G.Vishwanathan v. the Hon''ble Speaker, Tamilnadu Legislative Assembly [supra] where para 12 of the report reads as follows:

"We are of the view that labelling of a member as ''unattached'' finds no place nor has any recognition in the Tenth Schedule. It appears to us that the Classification of the members in the Tenth Schedule proceedings only on the manner of their entry into the house [1] one who has been elected on his being set up by a political party as a candidate for election as such member; [2] one who has been elected as a member otherwise than as a candidate set up by any political partyusually referred to as an ''independent'' candidate in an election; and (3) one who has been

nominated. The categories mentioned are exhaustive. In our view, it is impermissible to invent a new category or clause other than the one envisaged or provided in the Tenth Schedule of the Constitution. If a person belonging to a political party that had set him as a candidate, gets elected to the House and thereafter joins another political party for whatever reasons, either because of his expulsion from the party or otherwise, he voluntarily gives up his membership of the political party and incurs disqualification. Being treated as ''unattached'' is a matter of mere convenience outside the Tenth Schedule and does not alter the fact to be assumed under the explanation to paragraph 2(1)(a). Such an arrangement and labelling has no legal bearing so far as the Tenth Schedule is concerned. If the contention urged on behalf of the appellant is accepted it will defeat the very purpose for which the Tenth Schedule came to be introduced and would fail to suppress the mischief, namely, breach of faith of the electorate. We are, therefore, of the opinion that the deeming fiction must be given full effect for otherwise the expelled member would escape the rigour of the law which was intended to curb the evil of defections which had polluted our democratic polity.�

42. I cannot, therefore, accede to the submissions made by the learned Counsel for the respondents.

RE CONTENTION B:

43. On the question of admissibility of judicial review of the decision of the Speaker, the view of the Hon''ble Supreme Court as expressed in the Constitution Bench decision of Kihoto Hollohan [supra] should be taken into consideration. The Counsel for the various parties in that decision has advanced arguments similar to that of learned counsel for the respondents in this case. The question in this case was whether a dispute of the kind envisaged by paragraph 6 of the Tenth Schedule is a non justiciable and that in all events, the fiction in paragraph 6 (2) that all proceedings under paragraph 6 (1) of the Tenth Schedule be deemed to be proceeding of parliament or � proceedings in the legislature of a State�, attracts immunity from the scrutiny by the Court as under Article 122 or 212, as the case may be.

44. Their Lordships in the Supreme Court considered each of the arguments advanced by the Counsel in favour of lesser scrutiny of the decision of the Speaker and rejected the same because implicit in these postulates was the premise that questions of disqualifications of the members of the House are essentially matters pertaining to the House, and, therefore, the legislature is entitled to exert its exclusive power to the exclusion of the judicial power. Counsels in Kihoto Hollohon case had argued that dispute relating to disqualification from the membership of the house was essentially a matter of PRIVILEGES OF THE HOUSE and, therefore, non justiciable and hence not amenable to judicial review.

45. The Hon''ble Supreme Court rejected these arguments and held that the privileges claimed by the Indian Parliament were not the same as those that were claimed and admissible to the Parliament in England. I quote "Indeed, in dealing with the disqualifications and the resolution of disputes relating to them under Article 191 and 192 or Article 102 and 103, as the case maybe, the Constitution has evinced a clear intention to resolve electoraldisputes by resort to the judicial power of the State. It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the nonjusticiable legislative area. The classic exposition of Justice Issacs J. in Austrain Booth Trade Employees Federation v. Whybrow & Co. [1910] 10 CLR 226 at Page 317, as to what distinguishes a judicial power from a legislative power was referred to with the approval of this Court in Express Newspaper Ltd. v. Union of India, AIR 1958 SC 578 at 611. Isscas J. stated:

"If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgement, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute, the dispute is as to what shall in the future be the mutual rights and responsibilities of the partiesin other words, if no present rights are asserted or denied, but a future rule to conduct is to be prescribed, thus creating new rights and obligations, with sanctions for nonconformity then the determination that so prescribed, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorizes it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisement or ministerial act."

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

That apart, even after 1985 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Article 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, infact, not before the House; but only before the Speaker as a specially designated authority. The decision under paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, no immunity under Article 122 and 212 from

judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule.

46. The Hon''ble Supreme Court further went on to hold held that the Speaker or the Chairman acting under paragraph 6(1) is a Tribunal. We quote "where there is a lis and affirmation by one party and denial by another and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court.

47. I am bound by the views expressed by the Constitution Bench in Kihoto Hollohan''s case where their lordships have defined the scope of judicial review of the decision of the Speaker in paragraph 41 as under:

"...The finality clause in paragraph 6 does not completely exclude the jurisdiction of the Courts under Articles 136,226 and 227 of the Constitution. But it does have the effect of limiting the scope of the jurisdiction. The principle that it is applied by the Courts is that in spite of a finality clause it is open to the Court to examine whether the action of the authority under challenge is ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by malafides or is colourable exercise of power based on extraneous and irrelevant consideration. While exercising their certiorari jurisdiction, the Courts have applied the test whether the impugned action falls outside such jurisdiction. An ouster clause confines judicial review in respect of action falling outside the jurisdiction of the authority taking such action but precludes challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction. An ouster clause attaching finality to a determination, therefore, does oust certiorari to some extent and it will be effective in ousting the power of the Court to review the decision of an inferior tribunal by certiorari if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affects its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice."

48. It is also pertinent to note here that the arguments advanced with regard to the admissibility of the ''relevancy test'' and the ''inadmissibility of the proportionality test'' were also dealt with by the Hon''ble Supreme Court in the aforesaid case although the language used by the Counsel advocating the limited scrutiny of the decision of the speaker was somewhat different. Their Lordships referred with respect to the seven Judges Bench in State of Rajasthan v. Union of India [1978 (1) SCR 1] where the Court was considering the validity of a proclamation issued by the President of India under Article 356 of the Constitution. At the relevant time under Clause (5) of Article 356 the satisfaction of the President mentioned in Clause 1 was final and conclusive and it could not be questioned in any Court on any ground. The

learned Judges expressed the view that the proclamation could be open to challenge if it is vitiated by malafides. While taking this view, some of the Hon''ble Judges made express reference to the provisions of clause (5) and in this context, I quote Justice Bhagwati, C.J. [as His Lordship then was]:

"Of Course by reason of Clause (5) of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself..that it is absurd or perverse or malafide or based on wholly extraneous and irrelevant ground., and is, therefore, no satisfaction at all."

Justice Untwalia, J. has held as follows:

"... if, without entering into prohibited area, remaining on the fence, almost on the face of impugned order, or threatened action of the President, it is reasonably possible to say that in the eye of law, it is no order or action as it is in flagrant violation of the very words of particular Article justifying the conclusion that the order is ultra vires, wholly illegal or passed malafide, in such a situation it will be tantamount in law to be no order at all. Then this Court is not powerless to interfere with such any order, may, rather, must strike it down."

Similarly, Justice Fazal Ali, J has held:

"Even if an issue is not justiciable, if the circumstances relied upon by the Executive authority are absolutely extraneous and irrelevant, the Courts have undoubted power to scrutinize such an exercise of the Executive power. Such judicial scrutiny is one which comes into operation when the exercise of the executive power is colourable or malafide and based on extraneous or irrelevant considerations."

49. Now, I would also like to deal separately with the argument of Sri Rakesh Dwivedi, who submitted that the decision of the Speaker under para 3 and 4 is essentially a political decision and hence it is difficult to devise ''judicially manageable standards'' for judicial review. It was, therefore, urged that the Court should keep out of "political thicket". In this context, I would like to cite with respect the Hon''ble Supreme Court''s constitution Bench decision in R.C.Poudyal and another v. Union of India and others, reported in 1993(1) SCR at page 891. In the said case the question of accession of the State of Sikkim into Union of India and the consequent 35th Amendment Act, 1974 inserting Article 2(a) which made Sikkim'' associate State" with the Union of India and the resultant special provisions that were added into the Representation of Peoples Act, 1950 and Election Laws [Extension to Sikkim] Act, 1976 were challenged. The BhutiaLepchas were declared as Schedule Tribe in relation to the State of Sikkim by a Presidential order under Article 342 of the Constitution of India and thus they became entitled to the benefit of reservation in the State Legislature in accordance with Article 332.

Also, 12 seats out of 32 seats in Sikkim Assembly were reserved for Sikkimese of BhutiaLepcha origin; and one seat was reserved for ''Sanghas'', elections to which were required to be conducted on the basis of separate electoral roll in which Sanghas belonging to monasteries recognized for the purpose of election held in Sikkim in April 1974 were entitled to be registered. The petitioners, Sikkimese of Nepali Origin, filed petitions challenging the reservation of 12 seats for Sikkimese of BhutiaLepcha and one seat for ﷺ. The learned Attorney General of India and Sri Parasaran sought to contend that the terms and conditions of admission of new territory into Union of India are eminently political question which the Court should decline to decide as these questions lack adjudicative disposition. This political thicket doctrine as restraint on judicial power has been the subject of forensic debate, and has evoked the considerable judicial responses. I quote from R.C.Poudyal [supra]:

ﷺ16. In ﷺThe Constitution of the United States of Americaﷺ [Analysis and Interpretation; Congressional Research Service: Library of Congress 1982 Edn. At p. 703) the following statement of the law on the subject occurs:

ﷺIt may be that there will be a case assuredly within the Court''s jurisdiction presented by the parties with standing in which adverseness and ripeness will exist, a case in other words presenting all the qualifications we have considered making it a justiciable controversy, which the Court will nonetheless refuse to adjudicate. The ﷺlabelﷺ for such a case is that it presents aﷺ political question.

Tracing the origins and development of this doctrine, the authors refer to the following observations of Chief Justice Marshall in Marbury v. Madison 1 Cr. 5 US 137, 170 (1803):

ﷺThe province of the court is solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature, political, or which are, by the constitution and laws, submitted to the executive can never be made in this Court.ﷺ

17. Prior to the decision of the Supreme Court of the United States in Baker v. Carr, 3690 US 186 the cases challenging the distribution of political power through apportionment and districting, weighedvoting, and restrictions on political action were held to present nonjusticiable political questions. The basis of this doctrine was the ﷺseeming conviction of the courts that the issues raised were well beyond the judicial responsibility.ﷺ In Baker v. Carr, the Court undertook a major rationalization and formulation of the ''political question doctrine'' which led to considerable narrowing of its application. The effect of Baker v. Carr, and the later decision in Poweel v. McCormack, 395 US 486 is that in the United States of America certain controversies previously immune from adjudication were held justiciable and decided on the merits. The rejection of the political thickets arguments in these cases marks a narrowing of the operation of the doctrine in other areas as well.

In Japan Whalin Ass''n v. Americal Cetacean Society, 478 [1996] US 221 the American Supreme Court said:

��..Baker carefully pointed out that not every matter touching on politics is a political question,�The political question doctrine excludes from judicial reviews those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly illsuited to make such decisions, as� courts are fundamentally under quipped to formulate national policies or develop standards for matters not legal in nature.�

Our Court has received and viewed this doctrine with a cautious observation. In A.K.Roy v. Union of India [1982]2 SCR 272 at 2967, Chief Justice Chandrachud recognized that the doctrine, which was essentially a function of the separation of powers in America, was to be adopted cautiously and said:

�It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the courts must adopt a '' prudential'' attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of courts are in sharp conflict. The result, more or less, is that in America the phrase � political question'' has become a'' a little more than a play of words.�

There is further recognition of the limitation of this doctrine in the pronouncement of this Court in Madhav Rao v. Union of India, [1971]3 SCR and State of Rajasthan v. Union of India, [1978]1 SCR 1.

50. The Hon''ble Supreme Court negatived the contention of the learned Counsel in R.C.Poudyal''s case [supra] that since the Article 2 of the Constitution empowers the Parliament, by law to admit a new State into the Union on such terms and conditions as it thinks fit� and that these considerations involved complex question of political policy and expedience; of international relations; of security and defence of the realm etc which do not process judicially manageable standards and, therefore, the judicial response to these questions should be judicial restraint. Their Lordships held that the power to admit new State into the Union under Article 2 is, no doubt, in the very nature of the power, very wide and its exercise necessarily guided by the political issues of considerable complexity many of which may not be judicially manageable but for that reason it cannot be predicated that Article 2 confers upon the Parliament as unreviewable and unfettered power immune from judicial scrutiny. It cannot be said that the issues raised are nonjusticiable.

51. It is also relevant to note that the proceedings under Tenth Schedule are the proceedings before a Judicial Tribunal and the scope of judicial review of the orders

passed by the Speaker under paragraph2 or paragraph3 or paragraph4, is that which is admissible to judicial orders. It is pertinent to note here that [both the cases of Associated Provincial Picture Houses v. Wednesbury Corporation (1948) 1KB 223 and that of Council of Civil Service Union v. Minister for Civil Service, 1984 (3) ALLE.R. 935] were in the knowledge of the Hon''ble Supreme Court but it chose not to rely upon them for setting out the parameters of judicial review of the Speaker''s decision under the Tenth Schedule. Rather, it devised its own fourheads under which such an order could be challenged, namely, violation of constitutional mandate, violation of principles of natural justice, mala fides and perversity.

RE CONTENTIONC:

52. Shri Rakesh Dwivedi argued with regard to paragraph2 read with paragraph6 that it comes into operation only '' if any question arises'' i.e. someone concerned has to raise a question regarding disqualification under paragraph2 of the Tenth Schedule and the same is to be referred and decided in accordance with pragraph6. The expression ''if any question arises'' was emphasized with great vehemence by Shri Rakesh Dwivedi and according to him it indicated a lis and for fortifying his arguments, he relied upon Commissioner of Income Tax v. S.S .Navigation Private Ltd; AIR 1961 SC 1633 and C.I.T. v. Anusuya Devi; AIR 1968 SC 769. I have gone through both these cases and feel that they are inapplicable to the present controversy. In both of the above said cases, the issue before the Hon''ble Supreme Court was the decision of the Income Tax Tribunal and whether the High Court in a Reference could look beyond the grounds raised in the appeal before the Tribunal. In this context the Supreme Court defined and explained the phrase "any question of law arising out of such order", and held as under:

"(1) when a question is raised before the Appellate Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunals fails to deal with it, it must be deemed to have been dealt with by it and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with that will also be a question arising of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the finding given by it, stating the position compendiously, it is only a question that has been raised before or decided that has been raised before or decided by the Tribunal that could be held to arise out of its order."

53. Sri Rakesh Dwivedi also argued that the nature and procedure of the enquiry expected to be followed under paragraph3 is different from that of which is expected to be followed under paragraph2. In the case of disqualification an

allegation or charge of disqualification is levelled against a member of House, but in case of split a Member of the House makes a claim of split, in terms of paragraph3 as would be clear from the initial phrase "where a Member of House makes a claim". The proceedings are thus distinct as they begin in a different manner. The nature and character of the inquiry in the case of split under paragraph3 of the Tenth Schedule is more mathematical. It has to be seen that whether the splitting group has more than one third Members of the Legislature Party. This involves counting. It may be based either on affidavits or headcount. Even for split in the original political party, it is simply question of separation of some members, and infact the Constitution does not prescribe a minimum number. Also the issue of split is basically between members staking such a claim and the Speaker. The Original Party may be allowed to intervene, if it so desires but that is neither a legal desideratum nor a Constitutional imperative hence the enquiry is administrative in nature and based on objective numerical count. Sri Rakesh Dwivedi has relied AIR 1987 P& H; Prakash Singh Badal v. Union of India and 2004(8) SCC 747 Dr Mahachandra P.Singh v. Chairman, Bihar Legislative Council and others.

54. In the case of Prakash Singh Badal [supra] the petitioners averred that in the wake of Armed Police attack on the Holy Shrine of Shri Harmandir Saheb [Golden Temple, Amritsar] which was widely resented in the rank and file of Shiromani Akali Dal. A majority of its functionaries and its office bearers and District Jathedars resigned from their post. There occurred a split in Shiromani Akali Dal, and a separate political party also known as Shriromani Akali Dal [Badal] consisting of those members who had resigned from their post was formed under the leadership of Prakash Singh Badal. As a result thereof 27 MLAs, including 25 petitioners sent a letter on 7th May, 1986 to the then Speaker informing him that they had decided to form a separate legislative group and they be recognized as such and allotted separate seats in the Punjab Legislative Assembly. The Speaker after getting declaration from each of the signatories and having been satisfied of the claim made in the said letter, recognized them as a Member of separate political party and ordered for allotment of separate seats to them on 8th of May, 1986 which order was annexed as Annexure P3 to the writ petition. After sometime, the Speaker resigned and elections for the post of the Speaker was held in the Assembly in which although the candidate set up by Shiromani Akali Dal headed by Shri Surjit Singh Barnala was elected as Speaker, the votes of the break away group were polled in favour of some other candidate. Shri Surjit Singh Barnala filed a petition under Article 191(2) read with paragraph 2 and 6 of the Tenth Schedule for declaring Shri Prakash Singh Badal and 22 other members, who had violated the whip issued by him, has disqualified from being Members of the Punjab Legislative Assembly. The Speaker issued notices to the petitioners. The petitioners approached the High Court against these notices and order of the Speaker dated 4th July, 1986 rejecting the application of Captain Amrinder Singh wherein he claimed to be recognized as leader of Vidhan Mandal Dal of Shriromani Akali Dal [Badal]. The Full Bench of

Punjab High Court held that the order passed by the Speaker under paragraph3 of the Tenth Schedule was not an order passed under paragraph6 at the time when application under paragraph3 was made being an administrative order, and before a question or a dispute was raised as to the disqualification under paragraph2(1). It, therefore, held the issuance of notices to the petitioner as valid. This case is of no relevance to the facts of the case in hand (and hence paragraph 34 and 35 on which reliance has been placed by Sri Dwivedi cannot be read out of context.)

55. In Dr. Mahachandra P.Singh [supra], similarly, the Supreme Court''s observation in paragraph 15 [relied upon by Sri Dwivedi] will have to be seen in the context of what has been stated earlier in paragraph 7. I quote the relevant extract which reads as under:

��..On the plain language of Paragraph 2, the disqualification comes into force or becomes effective on the happening of the event...It is to be noted that the Tenth Schedule does not confer any discretion on the Chairman or Speaker of the House. Their role is only in the domain of ascertaining the relevant facts. Once the facts gathered or placed show that a member of the House has done any such act which comes within the purview of subparagraph (1), (2) or (3) of Paragraph 2 of the Tenth Schedule, the disqualification will apply and the Chairman or the speaker of the House will have to make a decision to that effect.�

56. If we now see paragraph 15 of the report, it does not in any way help advance the arguments of the respondents. I now quote paragraph 15:

�15. It may be noticed that the nature and degree of inquiry required to be conducted for various contingencies contemplated by Paragraph 2 of the Tenth Schedule may be different. So far as clause (a) of Paragraph 2(1) is concerned, the inquiry would be a limited one, namely, as to whether a member of the House belonging to any political party has voluntarily given up his membership of such political party.�

57. Sri Rakesh Dwivedi, Senior Advocate appearing for most of the respondents also argued that para 3 of the 10th Schedule deals with ''split'' and it is self contained code, which is separate and distinct from the issue of ''disqualifications'' and whenever any question arises with regard to ''split'' it is to be decided only with reference to para 3 as in Kihoto Hollohan case [supra], the Hon''ble Supreme Court has clearly observed that Para 3 and 4 of the 10th Schedule excludes the applicability of para 2. Thus while deciding the matter of split under para 3, the Speaker is not under an obligation to consider the question of disqualification. Placing reliance on the words said by Justice K.T.Thomas in Mayawati''s case, he further submitted that para 3 operates independently. However, according to him, paragraph 2 is subject to paragraph 4 and 5. Giving reference to the events which took place, learned Counsel stated that the application of respondentMLAs with respect to split and recognition of their party was moved on 6.9.2003 whereas the

application for disqualification was moved earlier by the petitioner, i.e. 4.9.2003. The respondent MLAs have claimed that the split had taken place on 26.8.2003 at Darul Shafa, Lucknow while learned Counsel for the petitioner has contended that 13 MLA''s had become disqualified on account of their act of meeting the Governor on 27.8.2003 and extending support to Samajwadi Party, which was against the interest of the Party on whose ticket they were elected. The position which emerges from these events is that the split had taken place on 26.8.2003 whereas, according to petitioner the disqualification is on account of act done on 27.8.2003, which is subsequent to split. As the split has taken place earlier, the Speaker committed no error in deciding first whether the split had occurred in terms of para 3 of 10th Schedule of Constitution.

58. Adverting to paragraph 9 of the writ petition, learned Counsel for the respondents, Sri Rakesh Dwivedi submitted that on 26.8.2003 all 110 MLAs participated in the workers meeting of BSP where Miss Mayawati instructed the party MLAs not to do anything against the party interest. The fact that they met on 26.8.2003 at Darul Shafa has also not been disputed as in the caveat petition dated 5.9.2003 filed by the petitioner before the Speaker it is stated that 13 or some other MLAs may be filing a claim petition under paragraph 3.

59. Shri Mishra on the other hand submitted that paragraph3 and 4 cannot have independent bearing and effect in the absence of proceedings under paragraph2. According to him the entire Tenth Schedule has been framed for dealing the menace of defection and only to deal with the question of disqualification on the ground of defection and nothing else, which is clear from Article 191(2) of the Constitution of India. Para 3 and Para 4 are not attracted in a mere case of arrangement of sitting of MLAs within the House, for which purpose Rules of Business, namely, ﷽Uttar Pradesh Vidhan Sabha Ki Prakriya Tatha Karya Sanchalan Niyamawali 1958﷽ already exist. Para 3 & 4 of the Tenth Schedule come into play only in the case of a lis arising between the party and the Members alleged to have formed a faction and then a separate group. If the role of the Speaker under the Tenth Schedule is administrative in nature then such an interpretation will be preposterous and would amount to nullifying the Tenth Schedule itself as deletion of paragraph 2 would result in rendering the paragraph 3 and 4 to the Schedule as redundant but deletion of paragraph 3 and 4 would not affect the existence of paragraph 2 of the Tenth Schedule. Sri Mishra further pointed out that paragraph 3 of the Schedule has already been deleted on 1.1.2004 vide Constitution [Ninety first Amendment] Act 2003. Therefore, paragraph 3 and 4 of the Schedule can only be treated as dependent and available only as a defence to the disqualification proceedings under paragraph 2 of the Schedule.

60. Reverting to the facts of the case, the learned Counsel for the petitioner argued that disqualification of a member under para 2(1)(a) of the Constitution is a matter of fact and would operate inherently from the exact time and date when such

members performed action to attract the disqualification. Further in the light of arguments of the learned Counsel for the petitioner that para 3 and 4 are defence to para 2, the Speaker was duty bound to decide the complaint dated 4.9.2003 of the petitioner under para 2 and defence under para 3 and 4 together. The Speaker in his impugned order dated 6.9.2003 has relied upon the decision of the Hon''ble Supreme Court in the case of Ravi S. Nayak v. Union of India 1994 Supp. (2) SCC 641 to hold that 37 MLAs had correctly claimed that they belong to one faction which had arisen due to a split in their original political party.

61. Inviting our attention to Ravi Nayak''s case [supra], Sri Mishra submitted that the decision in the said case was not a decision on a claim of a split under paragraph 3 of the Tenth Schedule of the Constitution without first taking a decision upon the disqualification of members within the said claimant group who had earned disqualification under paragraph 2(1)(a) of the Tenth Schedule of the Constitution. In paragraph 38 of the report, the Court held that the Speaker has to decide on the basis of material before him as to whether there was a split or not. Sri Mishra strongly contended that the above case supports the case of the petitioner as it is the duty of the Speaker to look at all the materials and all the applications before him in order of precedence i.e. first decide the disqualification issue of members on the basis of their activities and actions. Once the issue of disqualification of members is decided, then only there can be a proper determination as to whether there has been valid split or whether the defecting group deserves to be disqualified under para 2(1)(a) of the Tenth Schedule of the Constitution. Placing reliance on M. Prasad Singh v. Chairman, Bihar Legislature Council, (2004) 9 Scale 81, Sri Mishra stated that in paragraph 7 the Hon''ble Supreme Court has held that under para 2 of the Tenth Schedule, whether and when a member of the House has become subject to disqualification, is a question of fact. The Tenth Schedule does not confer any discretion upon the Speaker in this regard. Once the facts gathered or placed, show that a member has incurred disqualification under the Tenth Schedule, then the Speaker will have to make a decision to that effect.

62. Elaborating further, learned Counsel for the petitioner submitted that para 2 (1) (a) of the 10th Schedule of the Constitution of India comes into play only to disqualify a member who voluntary gives up his membership of the political party that had set him up as a candidate and this act of voluntarily giving up the membership of a political party may be either expressed or implied, as has been held by the Apex Court in Dr. Mahachand Prasad Singh Case (Supra). The act of 13 MLA''s of Bahujan Samaj Party to approach the His Excellency, the Governor of Uttar Pradesh and submitting a letter for inviting Sh. Mulayam Singh Yadav to form the Government amounts to voluntarily giving up the membership of the Bahujan Samaj party, which had set them as candidates in the election.

63. The fact that separate sitting arrangements was made in the house on 2/9/2003 also reflects that all these 13 MLA''s, who approached the His Excellency Governor

on 27.8.2003 for inviting Mulayam Singh Yadav to form the Government, had been recognized as a separate group by the speaker prior to 2.9.03 and this Act of speaker prior to by making separate sitting arrangement clearly signifies that this group of 13 MLA''s was a separate group other than that of BSP MLAs. As number of this group was less than onethird of the total strength of BSP MLA''s on that date; Para 2 (1) (a) of the Tenth Schedule came into play to disqualify them as member of the assembly and hence they ceased to be member of the Assembly on 27/8/2003 itself, when by their act of meeting the Governor and submitting a letter for inviting Shri Mulayam Singh Yadav to form the government, they have impliedly given up membership of the BSP voluntarily.

64. According to Counsel for the petitioner, the combined reading of all the aforesaid decision, referred to above, clearly established that the impugned order of the Speaker is perverse and not legally tenable. The Speaker should not have ignored or left undecided the complaint dated 4.9.2003 against defection and consequential disqualification, of the 13 Members on 27.8.2003.

65. In the case of Mayawati v. Markandey Chand; 1998 (7) SCC 517 Justice K.T.Thomas strongly deprecated the action of the Speaker in allowing the 12 defecting members to register votes in a composite poll by holding that this could not have been done as first the complaint seeking disqualification from membership of the House must be decided. It would be apt to quote the relevant paragraph: (and thereafter, the decision regarding the split must ken.)

Para 48 reads as under:

 I may point out, in this context, that the action of the Speaker, in allowing the 12 respondents to register their votes in a ''composite poll'' held by the Speaker on 26.2.1998 [as between Sri Kalyan Singh and Sri Jagdambika Pal a rival claimant to the post of Chief Ministership] without deciding the complaint made by the appellant seeking their disqualification from the Membership of the House, was criticized before this Court in Special Leave Petition (Civil) No. 4495 of 1998. This Court then noted in the order dated 27.2.1998 that out of 225 MLAs who voted in favour of Sri Kalyan Singh as against 196 MLAs [who supported Sri Jagdambika Pal] the votes of 12 respondents were also counted. However, the Court did not in that case pursue the said criticism made against the Speaker mainly for the following reasoning:

Even when those 12 members are taken to have voted in favour of Sri Kalyan Singh, their votes when subtracted from those polled still leaves him to be the one having majority in the House. Correspondingly, those 12 votes do not go to Sri Jagdambika Pal who would still be in minority. The conclusion, therefore, is that the decision of the Speaker in allowing a composite head counter, including the defecting members, in the present case and then hold that a split within the ambit of para 3 of the Tenth Schedule had been demonstrated, is with respect, an erroneous decision

contrary to the decision of this Hon''ble Court in the above cited case.

REGARDING CONTENTIONC:

66. I find force in the arguments of Sri S.C.Mishra. Paragraph2 of Tenth Schedule is the main provision, which deals with disqualification, and it enumerates two contingencies when the event of disqualification would occur. (1) When a Member voluntarily gives up the Membership of his party and (2) when he votes or abstains from voting against the direction issued by the Party without prior permission or later condonation. The only exception when such behaviour can be condoned is given in Paragraph3, Paragraph4 and Paragraph5. These paragraphs can be seen in defence alone and do not have independent existence of their own. Realising that the defence under Paragraph3 is being misused Legislature has deleted the para 3. By the Constitution [Ninety first Amendment] Act, 2003, the Parliament amended the Tenth Schedule and para 3 relating to disqualification on ground of defection not to apply in case of split was deleted. This amendment was made effective from 1.1.2004. Had the alleged split in this case would have occurred after this date, the legal position would have been the different? But the facts in the case in hand, shows that the apprehensions raised at the time of introduction of the Tenth Schedule regarding misuse of power by the Speaker and suggestions made by the Expert Bodies such as ''Goswami Committee'' and ''National Commission To Review Working of the Constitution'' for giving power to decide disqualification of members to some authority other than the Speaker were not without basis and in the instant case the Speaker by recognizing the split and merger simultaneously on one hand and postponing decision on issue of disqualification on other hand has defeated the very purpose for which this piece of legislation was enacted i.e. to decide the matter of disqualification expeditiously and for which the power has been given to the Speaker of the House instead of other Forums. Thus there could be no doubt that the act of Speaker in delaying the decision on disqualification of Members is against the legislative intent of the Tenth Schedule.

RE CONTENTION D:

67. Sri Rakesh Dwivedi submitted that even if the proceedings of split under paragraph3 and the proceeding of disqualification under paragraph2 are considered to be integrated, the impugned order dated 6th September, 2003 would still be valid. Sri Rakesh Dwivedi next contended that even assuming though not conceding that the proceedings of split under para 3 and the proceedings of disqualification under para 2 are integrated, in that occasion too the opening sentence of para 2 with the phrase subject to the provisions of para 3, 4 and 5 gives para 3 overriding effect over the provisions of para 2. Sri Rakesh Dwivedi, Counsel for the respondents laid great emphasis on the phrase subject to to impress upon the Court that the provisions of Para 3 and 4 would override the provisions of Para 2. To give strength to this contention, he has relied upon State of Bihar v. Sir Kameshwar Singh; AIR 1952 SC 252, The Gujarat University and another

v. Krishna Rangnath Mudholkar and others; AIR 1963 SC 703, South India Corporation (P) Ltd. v. Secretary, Board of Revenue; AIR 1964 SC 207, Ashok Leyland v. State of Tamil Nadu; 2004(3) SCC 1, Printers (Mysore) Ltd. v. M.A. Rasheed; 2004 (4) SCC 460 and P.S. Sathappan v. Andhra Bank Ltd. and another; 2004(11) SCC 672.

68. Sri Rakesh Dwivedi also stated that Para 3 expressly lays down that where there is split involving a group consisting of not less than 1/3 rd of the members of Legislature Party, the members shall not be disqualified under sub para (1) of para 2, and from the said date of split, the faction/group shall be deemed to be the political party for the purposes of para 2(1) (a) and to be his original political party for the purposes of para 3. In view of this legal position, no question arises for disqualification under para 2(1).

69. I shall now consider the case law relied upon by the learned Counsel for the respondent. Placing reliance on State of Bihar v. Sri Kameshwari Singh, it has been argued that the words "subject to the provisions of entry 42 of List III" must be taken to mean that the law making powers under Entry 36 of List II relating to acquisition/ requisition of land could only be exercised subject to conditions as to public purpose and payment of compensation, both of which are referred to in Entry 42 However, the Supreme Court held that "Those words mean no more than" that any law made under Entry 36 by a State Legislature can be displaced or overridden by the Union Legislature making a law under Entry 42 of List III.

70. In Ahmedabad v. Krishna Rangnath [supra} the dispute raised again was the power of the State Legislature to legislate in List II being subject to the powers of the Center to legislate under List I and List III. Relying upon Hingir Rampur Coal Company v. State of Orissa (1961)2 SCR 537 it was argued that because of the expression "subject to" in the relevant Entry in List II, the power is taken away from the State Legislature. Power of the State to Legislate in respect of education including Universities must only be to the extent to which it is entrusted to by the Union Parliament, hence whether such power is to be exercised or not is to be deemed to be restricted. The Hon''ble Supreme Court held that both the entries should be interpreted in harmony with each other. In South India case {supra} the Hon''ble Supreme Court was dealing with the scope of Article 277,278 and 372 of the Constitution and held that where the expression "subject to" is used it conveys the idea of a provision yielding place to another provisions or other provisions to which it is made subject. However, the object of Article 372 is to maintain conformity of pre existing laws with the Constitution after the Constitution came into force, till they were repealed, altered or amended by a competent authority. The words ''subject to other provisions of the Constitution'' should be given a reasonable interpretation; an interpretation which would carry out the intention of the makers of the Constitution.

71. Hon''ble Apex Court in Printers (Mysore) Ltd. [supra] held that where a statute confers powers on an authority to do certain acts or exercise power in respect of

certain matters, subject to rules, the exercise of power conferred by the Statute does not depend upon the existence of Rules. ‘Subject to Rules’ only mean in accordance with the rules, if any.

72. Moreover, in view of para 3(b) which provides a fiction of deemed recognition of political party from the time of such split. The recognition of political party relates back to the time of such split and not from the time of order of the Speaker. According to Sri Dwivedi, the matter of split is to be decided first under para 3 of the 10th Schedule of the Constitution and the split is separate and distinct from disqualification. In the present case the Speaker has recognized the split and the subsequent merger, therefore the applicability of para 2, as contended by the petitioner, stands excluded and there can be no disqualification if 13 out of 40 MLAs met the Governor on 27.8.2003. The failure of the Speaker in not rejecting the application of the petitioner while passing the order dated 6.9.2003, at best, can be said to be a technical error, for which no remedy lies under Article 226 of the Constitution.

73. Replying to the query made by the Court as to when an error can be said to be a ''technical error'', Sri Dwivedi relying upon Nagendra Nath Bora v. Commissioner of Hills Division; AIR 1958 SC 398 and Surya Dev v. Ram Chandra Rai; 2003(6) 675, said that the formal or the technical error is one which does not affect the substance of the matter of matter and causes no legal injury, whereas if it causes legal injury and irreparable loss it would a substantial error. Whereas Sri Mishra, learned Counsel for the petitioner, argued that the nondecision on the application under paragraph2, which was already pending before the Speaker, prior to filing of application under paragraph3, was gross and substantial error leading to grave political and legal consequences such as violation of natural justice, malice in law and perversity.

74. Advancing his arguments further, it has been submitted by Sri S.C.Mishra that the Speaker deliberately and intentionally did not give any decision on the disqualification application dated 4th September 2003 against the 13 MLAs and in the meantime proceeded hurriedly to decide the application dated 6th September 2003, thereby giving benefit the paragraph3 and paragraph4 to them with the oblique motive of rendering the main petition dated 4th September 2003 for disqualification infructuous so that the same may be dismissed without trial. According to the petitioner, in the present case, this is what has exactly happened. While erstwhile Speaker vide his order dated 14.11.2003 directed that the petitions on disqualification of 13 members will be decided only after disposal of the writ petition, the present Speaker dismissed the same on 7.9.2005 on the ground that in view of the decision on recognition of split and merger by his predecessor under para 3 and 4, there is now no justification for hearing under para 2 of the Tenth Schedule with respect to disqualification of these 13 MLAs.

75. It has been submitted by Shri Mishra that by order dated 7th September 2003 the Speaker has not decided the 13 applications filed under paragraph2 read with

paragraph6 on merits in spite of the fact that the written statement had already been filed by all the 13 MLAs to which a provisional rejoinder affidavit was also filed on 30th August, 2005, after which the petitioner had moved an application for proceeding in accordance with the 1987 Rules framed under paragraph8 of the Tenth Schedule. In the provisional rejoinder statement as well as in the applications filed on 2nd September, 2005 and 5th September, 2005 before the Speaker, it had clearly been stated that no split had taken place on 26th of August 2003 nor any group or new political party consisting of more than 1/3 MLAs was formed on the said date. In support of his contention the petitioner has placed reliance on several evidences including the two letters submitted by the 13 MLAs on 27th August 2003 before the Governor, as well as the two letters dated 2nd September, 2003 by the two MLAs, namely, respondents No. 27 and 28 in their own handwriting to the Governor, stating that they were BSP MLAs and they were being threatened for joining hands with the Samajwadi Party and, therefore need protection, which letters were personally handed over along with a copy of the letter of the petitioner to the Governor. The petitioner also placed reliance on the proceedings of 2nd September 2003 held in the Assembly which show that only 13 MLAs had actually sat with Sri Mulayam Singh Yadav of Samajwadi Party on the seats allotted to them, while all the other 27 MLAs sat with the petitioner in the seats and places allotted for BSP MLAs. On the strength of this, it was claimed before the Speaker that these evidences and also other evidences would sufficiently prove and establish that it was impossible to accept the assertion of the respondents that all the 40 MLAs had met on 26th of August, 2003 and formed a new group as a result of split in the party.

76. On the strength of the above, it was prayed before the Speaker to frame issues and permit the petitioners to lead evidences and also ask the respondents to lead the evidences to prove that the split had taken place, as the burden of proof was on them in view of the law down by the Hon''ble Supreme Court in Ravi S. Naik''s case [supra].

77. On the other hand, the Counsel for the 13 MLAs moved an application before the Speaker on 26th August, 2005, requesting to decide and dismiss all the 13 applications without going in for trial as it was not necessary in view of the order dated 6th September, 2003 wherein benefit of paragraph 3 and paragraph 4 had already been given to the 13 MLAs. It was submitted that inspite of the opposition of the petitioner the Speaker proceeded to dismiss all the 13 applications under paragraph2 read with paragraph6 even though, arguments in the writ petition were at the last stage and these orders dated 6.9.2003 and 8.9.2003 have been impugned in the writ petition. By upholding and allowing the preliminary objection of the 13 MLAs, Shri Mishra emphatically submitted, that the Speaker had not given any opportunity to the petitioner at any point of time to lead evidence even in support of his application dated 4th September, 2003 on the pretext of split having been recognized by the order dated 6th September 2003. The rejection and dismissal of the disqualification applications under paragraph 2 by the Speaker vide order dated

7.9.2005 confirms the submission of the learned Counsel for the petitioner that order dated 6.9.2003 should not have been passed without decision on the disqualification application under paragraph 2. The Hon''ble Speaker has dismissed all the 13 petitions on the ground that since the benefit of paragraph3 has already been granted to the 13 MLAs along with 27 others, under the ''constitutional fiction'' created by paragraph3(b) of the Tenth Schedule, the split group becomes the ''original political party'' within the meaning of the explanation to paragraph2 of the Tenth Schedule and hence no question of disqualification arises.

78. Having carefully examined the case law cited by Sri Dwivedi, I find that in Nagendra Nath Bora''s case, several civil appeals were clubbed together by the Hon''ble Supreme Court and heard on the common question of law that where administrative discretion is exercised in grant of liquor licences and statutory remedy of appeal and revision are provided to successively higher authorities under the Act, each authority being required to pass speaking orders; and the authorities being also expected to decide judicially; observing principles of natural justice. Can the High Court in exercise of its jurisdiction under Article 226 and supervisory jurisdiction under Article 227 exercise powers akin to that of an Appellate or Revisional Court and review findings of fact reached by the inferior Tribunal even if they be erroneous? It was held that a writ of certiorari can be issued only to correct an error which is apparent on the face of record. This error should not, however be, an error in respect of finding of fact. It must be an error of law manifest on the face of record. The question raised was whether an error of fact can be invoked in aid of power of High Court to quash an order of subordinate court or tribunal. The Supreme Court answered in the negative. It held that an error apparent on the face of record cannot be equated with an error of law manifest on the face of record and it is only in the latter case the High Court can interfere. In other words, it should not only be an error of law, it is essential that it must be one, which is manifest on the face of record. I deem it proper to reproduce here the relevant extract of the above said case:

It is also clear, on an examination of all the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the Common Law writ, now called an order of Certiorari, which was also adopted by our Constitution, is not meant to take the place of an Appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior Tribunal has exceeded its jurisdiction or has not proceeded in accordance with essential requirement of the law it was meant to administer. Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction.

79. In the case of Surya Dev Rai v. Ramchandra Rai; 2003 (6) SCC 675, the Court was considering the power of judicial review as had been curtailed by the amendment to Section 115 of the Code of Civil Procedure. It held that although the power of

Revision was circumscribed by the said amendment, the power under Article 226 and 227 of the Constitution could still be exercised against interlocutory orders of the Lower Court. In this case the Hon''ble Supreme Court also considered the difference between the exercise of jurisdiction under Article 226 and 227. It also dealt with situations where a writ of certiorari under Article 226 or an Order of supervisory nature under Article 227 could be issued. It held, Certiorari under Article 226 of the Constitution is issued in correcting gross errors of jurisdiction i.e. when the subordinate court is found to have acted (i) without jurisdiction by assuming jurisdiction where there exists none, or (ii) in excess of jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or rules of procedure or acting in violation of the principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. On the other hand, supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. It is in this context the High Court''s power under Article 226 and 227 of the Constitution in matters relating to the Code of Civil Procedure were described as not to be available to correct mere errors of fact or of law unless the following requirements are satisfied; (i) the error is manifest and apparent on the face of proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law and (ii) a grave injustice or gross failure of justice has occasioned thereby.

80. Regarding the present controversy, I am of the opinion, that the basic spirit of the Tenth Schedule is embodied in para 2 dealing with disqualification of members and the entire Tenth Schedule revolves around ways and means to check the defection i.e disqualification of members. It was a substantial error leading to gross failure of justice, not to decide the application under paragraph2 when it was filed on 4.9.2003 and when the fact of seating arrangement at the time of the opening of the Session of the Assembly on 2.9.2003 was brought to the notice of the Speaker. The Speaker should not have ignored it as has been held by the Hon''ble Supreme Court in the case of Mahachandra Prasad Singh [supra]. Even in the case of R.S.Naik, the very act of going to the Governor in support of the Congress leadership was held by the Supreme Court to have disqualified the two MLAs, namely, Bandekar and Chopdekar.

81. It is also relevant to note here that when the scope of judicial review has been specifically provided in the Constitution Bench of Kihoto Hollohan dealing with Anti Defection Law itself, there is no need for this Court to look beyond it. The Hon''ble Supreme Court has held in Kihoto Hollohan that writ of certiorari would certainly issue under Article 226 when (a) violation of constitutional mandates (b) violation of principles of natural justice (c) mala fide and (d) perversity has been established. Thus the submissions made by Sri Dwivedi have no force.

RE CONTENTION E:

82. The arguments advanced by the Counsel for the respondents that even if the application under paragraph2 was not decided alongwith application under paragraph3, it would only be a mere irregularity of procedure and would be protected under Article 212(1) of the Constitution; deserves to be rejected outright. In this context it would be relevant to refer the decision of the Hon''ble Supreme Court in the case of Kihoto Hollohan [supra] and I quote with great respect the paragraph 96 and extract of paragraph 111 of the report, which read as under:

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

Para 111:That the deeming provision in Paragraph 6(2) of the Tenth Schedule attracts an immunity analogous to that in Articles 122(1) and 212(1) of the Constitution as understood an explained in Keshav Singh''s Case Spl. Ref. No. 1, [1965] 1SCR 413, to protect the validity of proceedings from mere irregularities of procedure. The deeming provision, having regard to the words� be deemed to be proceedings in Parliament� or �Proceedings in the Legislature of a State� confirms the scope of the fiction accordingly�.

RE CONTENTION F & G:

83. Learned Counsel for the respondents relied upon various dictionaries of English language to submit ''split'' means (i) ''breakup'' with special reference to party or sect it meant a rupture, division or dissension [Shorter Oxford English Dictionary IIIrd Edn.]; or (ii) to divide into groups or factions, to disrupt as a political party [Webster''s'' Comprehensive Dictionary, Encyclopedic Edn.]; or (iii) To separate or be separated into faction usually through discord and the act of process of splitting meant breach or schism in a group or faction resulting from such a breach [Collins'' Concise Dictionary]. It has been argued that the word ''split'' is not a term of art and simply means alienation, severance or separation or disassociation or dissension or disconnection. It was argued that there is no particular form, manner, ceremony for a split in a political party and it can be inferred from the circumstances.

84. It was also argued by the learned Counsel for the respondents that the Speaker has only to see whether a claim has been made by a group of one third of the Members of legislature party that they represent a faction that has arisen as a result of split in the original political party and count numbers alone without going into a roving enquiry analogous to that which the Election Commissioner undertakes for recognition of splinter group, allotment of symbols to new political party as a result of splits and merger.

85. In response to the arguments advanced by the learned Counsel for the respondents, Sri Mishra, Senior Advocate appearing for the petitioner argued that in

proceedings under paragraph2 and paragraph3 proof plays a vital role. While the burden to prove the requirement of para 2 is on the person who claims that the member has incurred disqualifications and the burden to prove the requirement of para 3 is on the member who claims that there has been split in his original political party and by virtue of the said split disqualification under para 2 is not attracted. It becomes obligatory on the member of the House who makes a claim to establish that he and other members of the Legislature Party constitutes a group representing a faction which has arisen as a result of split in the original political party and such group consists of not less than one third of the members of such Legislature party. In this regard reliance has been placed on Mayawati v. Markandeya Chand and other; 1998 (7) SCC 517 and Narsingrao Gurunath Patil v. Shri Arun Gujarathi, Speaker and others; 2003 vol. 105(3) Bom L.R. 354. Relying upon Narsingh Rao Patil''s case, Sri S.C.Mishra quoted paragraph 55 and 57. The said paragraphs read as under:

�55. In his deposition the petitioner had stated that a meeting was held in the office of Janata Dal (S) at Nariman Point around 20th or 22nd May, 2002, where there was a split in the party. However, he was unable to furnish any proof regarding; (a) calling of the meeting; (b) agenda o the meeting; (c) proceedings of the meeting; (d) resolution for split; and (e) any report of the split in Janata Dal (S) in print media or on TV channels. The Counsel for the petitioner, however, argued before the Speaker that there is no need to have split in the original political party and there can be split in the Legislature party without it. The Speaker rejected this submission and held thus:

�Paragraph 3 of the 10th Schedule deals with the split in the original political party of the Members, which is a condition precedent for the Speaker to recognize a split in the Legislative party. The Speaker has to satisfy himself that a split in the original political party of the member has actually taken place before recognizing the split in the Legislature party. This is a condition precedent for recognizing the split in the Legislature Party. The High Court of Bombay in Wilfred A. Desouza v. Sri T. Cardozo. Hon. Speaker, Goa Legislative Assembly, has held that mere bare claim would not be sufficient to prima facie prove split resulting in faction/group and that such group consists of not less than 1/3rd members of the Legislative Party. Prima facie proof in support of claim shall have to be adduced before the Speaker. The Speaker has to prima facie satisfy himself that faction/group has arisen as a result of split. So, the question before me is to decide whether there has been a split in the Original Political party and whether Respondent has given sufficient proof to prove that a split has actually occurred in the original political party. But no evidence was produced to prove any split in the Original Political Party as contemplated in para 3 of the Tenth Schedule to the Constitution. So, Mr Gangaram Thakkarwad cannot claim the benefit of the para 3 of the Tenth Schedule to the Constitution.

Now, the question arose on the basis of the petition, and the arguments made by the petitioner that the Respondent has voluntarily given up the membership of his political party and as such he attracts the provisions of para 2(1)(a) of tenth Schedule, and incurred disqualification under this Paragraph. The respondent has written a letter on 4.6.2002, to me claiming a split in his political party and also he has written a letter to H.E. the Governor of Maharashtra that he is withdrawing the support to the Government led by Shri Vilasrao Deshmukh, Chief Minister and is supporting Shri Narayan Rane, Leader of Opposition in the Maharashtra Legislative Assembly. This very fact is sufficient proof for the respondent to attract the provisions of para 2 (1) (a) of the Tenth Schedule.�

�57. We are unable to accept the submission of Mr. Jahagirdar. In Ravi Naik''s case, the Supreme Court has pointed out that burden to prove the requirement of para 2 is on the person who claims that the member has incurred disqualification and burden to prove the requirement of para 3 is on the member who claims that there has been split in his original political party and by virtue of the said split disqualification under para 2 is not attracted. The requirement of para 3 is that member of the House who makes a claim must establish that he and other members of the Legislature party constitutes a group representing a faction which has arisen as a result of split in the original political party and such group consists of not less than onethird of the members of such Legislature party. In Dr. Wilfred A. De Souza and others v. Shri Tomazinho Cardozo Hon''ble Speaker of the Legislative Assembly and others, it was argued before the Division Bench that mere claim that there was a split in the original political party is sufficient compliance with para 3 of the Tenth Schedule. This submission was expressly rejected by the Division Bench. The Bench observed: [at page 220]

�Applying the principles of statutory construction, in our view, mere bare claim would not be sufficient, to primafacie prove split resulting in faction/group and that such group consists of not less than one third members of the Legislature Party. Prima facie proof in support of claim shall have to be adduced before the Speaker. The Speaker has to prima facie satisfy himself that faction/group has arisen as a result of split. It is not at all necessary that it should be to find out the extent or percentage of the split in the political party. However, when it comes to Legislature Party, the group claim representing the faction has to be not less than one third of the members of the Legislature party.�

86. Then Sri Mishra read Paragraph 58 of Mayawati v. Markandey Chand which reads as under:

58. Before referring to Ravi S.Naik (1994 AIR S.C.W. 1214) I would consider the question on first principles. Para 3 of the Tenth Schedule excludes the operation of para 2(1)(a) and (b) where a member of a House makes a claim that he and any other member of his legislative party constitute the group representing a faction which has arisen as a result of split in his original political party and such group

consists of not less than one third of the members of such Legislature Party. The following are the conditions for satisfying the requirement of the para.

(i) A split in the original political party.

(ii) The faction is represented by a group of M.L.As in the House.

Such group consists not less than one third of the members of Legislature party to which they belong. For the purpose of that para all the three conditions must be fulfilled. It is not sufficient if more than 1/3rd members of a legislative party form a separate group and give to itself a different name without there being a split in the original political party. Thus, the factum of split in the original party and the number of members in the group exceeding 1/3rd of the members of the Legislative party are the conditions to be proved.

87. He further submitted that although Justice Thomas differed on certain other aspects, His Lordship agreed with the above reasoning which is clear from the following observations made in para 68: [at page 3354]

"The argument of the appellant is that the expression ''political party'' in sub para (b) means "political party in the House", in other words, the Legislature Party". This argument runs counter to the definition contained in para 1(C). According to that definition, "original political party" in relation to a member of a House, means the Political Party to which he belongs for the purpose of subparagraph (1) of paragraph 2."

88. Learned Counsel for the respondents also referred to the Commentary on AntiDefection Law and Parliamentary Privileges by Sri Subhash C. Kashyap. According to Sri Subhash C. Kashyap, the term "split" has no where been defined in the Tenth Schedule and several decisions given by various Courts in petition arising under the AntiDefection law have mainly proposed two interpretation; one interpretation has been that once such a claim is made, the only concern of the Speaker is to see whether the group consists of not less than onethird of the legislature party members and if that condition is satisfied no member belonging to that group will be subject to disqualification. Under this interpretation, it is argued that since the word used is only ''claims'' and the Speaker is concerned only with the House and the legislature parties, it is not his function to enquire into the happenings in the political party outside. It is not for him to pronounce upon whether or not there has been a valid split in the party outside.

89. The other possible interpretation that has been put forward is that in order to provide a defecting member the protection of para 3, Speaker will also have to determine whether there has been a split in the political party outside and whether the member belongs to the group, which represents the faction arising as a result of the split. In case this interpretation is accepted, the most crucial words are ''arisen as a result of''. It was argued that these words make it crystal clear that the rising of

a group in the legislature party as a result of the split in the original political party outside is a process and cannot be a sudden eventtaking place at a particular or precise point of time. ''Arise'' necessarily involves the concept of growing, of ascending gradually.

90. Split in a national party itself cannot be in the nature of a guillotine that abruptly falls and in a moment divides the party members all over the country into two. Members are thinking human beings who need some time to decide which way to go. There is no mention in para 3 of duration within which a faction must arise from the split or when the members representing the faction must make a claim that they constitute a group.

REGARDING CONTENTION F & G:

91. I am of the opinion that Sri Subash C. Kashyap''s own view regarding split have been expressed in his book. "There is no concept in para 3 or elsewhere in the Tenth Schedule of a split in the legislature party as such. ""'Split'' in para 3 refers to a split in the original political party only. What happens in the legislature party is only the rise of groups representing the factions resulting from the split outside. Also, for the split in the original political party, there is no requirement of numbersonethird or the like breaking away or splitting the party.

92. The most significant words used in para 3 may be analyzed as follows:

(i) ''where a member makes a claim''

(ii) ''the group representing a faction''

(iii) ''which has arisen

(iv) as a result of a split.

(v) ''In his original political party and

(vi) Such group consists of not less than onethird members of the party

(vii) He shall not be disqualified.

"In any case that comes up before the Speaker/Chairman seeking nondisqualification under the protection of para 3, therefore, the factors that have to be considered are as follows:

(a) whether such a claim has been made,

(b) whether there is such a group,

(c) whether the group represents a faction of the original political party,

(d) whether the faction has ''arisen'' as a result of a split.

(e) Whether it is not less than onethird of the legislature party members."

93. I am inclined to accept the view advanced by the eminent author, who is also a known constitutional expert in the country, because it conforms to the settled principle of statutory interpretation wherein various Courts have held that the words of a statute must be given their plain meaning and no word or phrase can be interpreted as otiose or redundant. There is a presumption against redundancy and the legislature is deemed not to waste its words or to say anything in vain. The Courts always presume that the legislature inserted every part of the statute for a purpose and the legislated intention is that every part of the Statute should have effect. [See: J.K. Cotton Spinning and Weaving Mills Company Ltd. v. State of U.P.; AIR 1961 SC 1170, Mohd. Ali Khan v. C.W.T., AIR 1997 SC 1165 and CIT v. Kanpur Coal Syndicate, AIR 1965 SC 325]. Also where the plain meaning is in doubt they are to be interpreted or understood in the sense in which they best harmonized with the subject of enactment and with the object of the legislature has in view. Their meaning is found not so much in strict grammatical or etymological propriety of language, or even in its popular use, as in the subject or in the occasion when they are used and the object to be attained. [Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate, AIR 1958 SC 353]

94. In the words of Justice Shah, J. "it is a recognized rule of interpretation of statute that the expressions used therein should ordinary be understood in a sense in which they best harmonized with the object of the statute and which effectuate the object of the legislature". [New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar; AIR 1963 SC 1207]. Therefore, when two interpretations are feasible the Court will prefer that which advances the remedy and suppresses mischief as the legislature envisioned. This is commonly known as ''Heydon''s Rule''.

95. Learned Counsel for the respondents read out paragraph 124 of Kihotto Hollohan''s case to emphasize that since even the Constitution Bench of the Supreme Court had left it open for the Courts to decide the meaning to be given to ''split'' in a case in which such question arises in the context of particular facts, this Hon''ble Court should take into account that there was valid expression of dissent to the autocratic ways of Miss Mayawati in advising dissolution of assembly and thus attempting to subvert its designated term and the democratic norms, by the members of party who formed the separate group and expressed their concern by taking collective actions and in such a case even if only 13 MLAs went to the His Excellency the Governor to express their support to Mulayam Singh Yadav in forming an alternative Government, they could not be said to have incurred disqualification. Since the process of split does not require any definite number of member outside the House. It was only for the purpose of getting recognition of split within the House this faction should be represented by a group consisting of not less than 1/3 of the Members of the Legislature Party. This process of split is a continuous process and first eight, then five [thirteen] then twenty four and then three joined later on and made the application under paragraph3 to the Speaker. Learned Counsel for the respondents also submitted that the exact timing of split or

process of split was referred to the Constitution Bench in the case of Mayawati v. Markandey Chand; 1998 (7) SCC 517 by Chief Justice Punnchi [as his Lordship then was] which appeal was later dismissed as having become infructous on 23.11.2004 leaving the question of law open and exhorted us to give our opinion in favour of the respondents in this case where 13 MLAs, who broke away first and then 24 followed later on and 3 joined even later.

96. Paragraph 124 of Kihotto Hollohan reads as under:

"There are some submissions as to the exact import of a "split" whether it is to be understood as an instantaneous, one time event or whether a "split" can be said to occur over a period of time. The hypothetical poser was that if onethird of the members of a political party in the legislature broke away from it on a particularly day and a few more members joined the splinter group a couple of days later, would the latter also be a part of the ''split'' group. This question of construction cannot be in vacuum. In the present cases, we have dealt principally with constitutional issues. The meaning to be given to "split" must necessarily be examined in a case in which the question arises in the context of its particular facts. No hypothetical predications can or need be made. We, accordingly, leave this question open to be decided in an appropriate case.[emphasis supplied]"

97. On the bare reading of the above, It is evident that the phrase used was '' if one third members of a political party in the Legislature'' broke away in the first instance and then a few joined later on. This situation or possibility was not contemplated by the Supreme Court at all that only 13 [8+5] out of 109 and not the one third could break away first and then the conjure up the minimum one third required for a valid split. It is relevant to point out here that although two divergent views were expressed by Justice K.T.Thomas and Justice Srinivasan in Mayawati v. Markandey Chandra [supra] former allowing the appeal and the latter dismissing it; in both the judgments i.e. paragraph 25 of Justice Thomas'' judgment and para 87 of Justice Srinivasan''s judgment it has been held that the factum of split in the original party must first be established. The relevant extract of para 25 is as follows:

"Para 25: Before a claim is made by a member of House under paragraph3 of the Tenth Schedule, a split in the political party should have arisen. Such a split must have caused its reaction in the Legislature Party also by formation of a group consisting of not less than one third of that legislature party." [Emphasis supplied]

98. I am, therefore, of the view that submissions made by the respondents'' Counsel cannot be accepted as it will defeat the very object of paragraph 2 which embodies the basic spirit of Tenth Schedule of the Constitution. Moreover, split in the original political party is a condition precedent prior to any claim made by a member of the House for claiming the benefit of para 3 of the Tenth Schedule.

RE CONTENTIONH

99. It has been argued by the learned Counsel for the respondents that there has been no denial of procedural fairness, which means neither principles of natural justice have been violated nor there has been any malafide on the part the Speaker. The petitioner and the State President of BSP Sri Barkhu Ram Verma were present alongwith their Counsel and they were heard by the Speaker. None of them sought permission to crossexamine 37 MLAs present on their request nor sought any permission for filing any further pleading or evidence on any issue. There was no breach of natural justice and hence no grievance to the same effect was raised in the writ petition. Moreover, the question of fresh hearing on 8th September, 2003 in respect of 3 MLAs, who could not appear before the Speaker on 6th September, 2003 does not arise, as the contentions had been heard and it was only the question of identification and appearance in person in support of the affidavits filed earlier.

100. Sri Mishra on the other hand strenuously argued that the application under paragraph 3 was filed in the evening and taken up the same evening and orders were passed in the night. He brought certain facts on record. On 5th September, 2003 petitioner filed a caveat application stating clearly that there had been no split in original political party but still on filing application of 6th September, 2003 filed by the respondents stating that the split had taken place, no opportunity to file written statement was given to the petitioner. Learned Counsel for the petitioner read out the caveat application alongwith disqualification application dated 4th Sep. 2003, and also paragraphs 3, 27 and 30 of the writ petition wherein it was clearly stated that no split has taken place. It was submitted that ignoring all the above things and without taking note of oral objections of the petitioner, the Speaker not only entertained application dated 6.9.2003 in the evening itself but also called the petitioner and held that since "a claim" had been made, there was no legal necessity of requiring the respondents to prove the split outside the House in the original political party. Even the defectors were not called to prove the split by leading a primafacie evidence to prove that the split had infact taken place. The entire proceedings were completed in about two hours. The procedure to be followed under the Rules of 1987 made in furtherance of paragraph 8 of the Tenth Schedule were not adhered to.

101. It was also pointed out by Sri Mishra that the Speaker delivered the operative portion of the judgment on 6th September, 2003 itself at around 9.30 PM without giving a copy thereof. Copy was given only on 9th September, 2003 when the 40 MLAs on the strength of the operative portion of the order dated 6th Sep. 2003 exercised their votes on 8.9.2003 in the House, in favour of Sri Mulayam Singh Yadav when the motion for confidence was moved. Sri Mishra, stressed the fact that the unholy haste in which the whole proceedings were conducted smacks of mala fide and denial of procedural fairness.

102. Sri Mishra then proceeded to point out that not only the rules of natural justice were violated and there was mala fide on the part of the Speaker, the actions of the

Speaker was against the constitutional mandates and vitiated by the perversity as well.

103. According to the counsel for the petitioner, it was mandatory upon the Speaker to first consider the disqualification application under paragraph2 which was filed on 4th September, 2003 as the Tenth Schedule has been framed only for the purpose of curbing the tendency of unprincipled floor crossing. Even when the application under paragraph 3 was filed it was expected of the Speaker to club both the petitions together and hear them simultaneously because paragraph 3 is merely a defence to paragraph 2. He further argued that had these petitions been taken together the following procedure would have been required to be followed:

(a) to call the respondents to file written statement to the disqualification application as per Rule 8 of the Disqualification Rules, 1987 (b) opportunity to the petitioner to file rejoinder statement (c) frame issues. In their written statement the respondents would have raised the defence of paragraph 3 and consideration of their application dated 6.9.2003. The next course would have been to give opportunity to the respondents to prove that there was a split in their party resulting in a faction being represented by onethird members of the legislature party. Since the petitioner had already in the Caveat Application dated 6.9.2003 clearly stated that there was no split in the party, the claim of the respondents would have been disputed by the petitioner through oral and documentary evidence. By not following the procedure, the application dated 4.9.2003 was rendered infructuous without there being any trial on merit.

104. In an attempt to prove that the impugned order also suffers from perversity, Sri Mishra argued that on 26th August, 2003 all the 40 MLAs [respondents] were present alongwith the remaining MLAs in the meeting held at the Chief Minister''s residence at 5, Kalidas Marg, Lucknow and remained there till late in the night. All of them had expressed their full support to Ms. Mayawati. However, before the Speaker on 6th September, 2003 an application was moved by the respondents through Sri Rajendra Singh Rana that in the alleged meeting at Darul Shafa held on 26.8.2003 in the evening, 37+6= 43 MLAs had taken part and all of them were party to the split, and they were still together and had formed a new party called Loktantrik Bahujan Dal on account of above split. However, out of these 37+6= 43 MLAs, 3 filed their affidavits on 8.9.2003 before the Speaker disputing any such meeting held on 26.8.2003 at Darul Shafa.

105. Since in the applications under paragraph3 dated 6.9.2003, Sri Rajendra Singh Rana had claimed that 43 MLAs were present at Darul Shafa, his subsequent contention in the counter affidavit filed to the writ petition that there were only 40 MLAs present at the time of meeting at Darul Shafa, does create a doubt as to how many MLAs were actually present at the alleged meeting, if any held, at Darul Shafa. Infact, the whole story is concocted and an afterthought to escape from incurring disqualification under paragraph 2 (1)(a). It was also pointed out that the

respondents have for this reason not been able to indicate even the bare minimum proof required to show that any such meeting was ever held, namely, the agenda of such meeting, the minutes of such meeting, the resolution passed in such a meeting, the information to the press and other media, information to the Speaker or even to Election Commission asking for a recognition as a separate political party. Sri Mishra also pointed out that if a new political party or group was formed on 26.8.2003, the 13 MLAs while meeting His Excellency the Governor on 27.8.2003 extending their support to Sri Mulayam Singh Yadav would have been disclosed that they belong to a new political party called as ''Lok Tantrik Bahujan Dal'' and had come to support him in that capacity. However, in the two letters given by them to the His Excellency, no where it has been mentioned that they were supporting Sri Mulayam Singh Yadav as Members of new political party. It was also stated, as averred above, that on 2.9.2003 in the opening session of the Assembly only 13 respondents against whom disqualification application has been filed, were sitting alongwith Members of Samajwadi Party in the seats allotted to it. Rest of the 27 MLAs sat alongwith the Members of the BSP to the left of the Speaker. On 2.9.2003 itself an objection was raised by the Deputy Leader of BSP, Sri Jagdish Rai that these thirteen MLAs were sitting wrongly alongwith the SATTA PAKSH and it was matter of breach of privilege. Sri Mishra read out paragraph 25 of the Disqualification Application filed as CA1. When such an objection was raised none of 13 MLAs got up to say that they were Members of separate political party/group constituted as a result of split in the BSP on 26.8.2003. Despite such facts being brought to the notice of the Speaker through disqualification application dated 4.9.2003, the Speaker kept the matter pending and passed an order on 6.9.2003 absolutely against the facts on record and hence his order dated 6.9.2003 is vitiated by perversity.

106. Regarding this submission of Mr Mishra, I am of the opinion that the Hon''ble Apex Court, as averred above, has laid down the grounds on which the Courts can show interference in the order of the Speaker under the Tenth Schedule. These are; (a) violation of constitutional mandates (b) violation of principles of natural justice (c) malafide and (d) perversity.

107. The word ''perversity'' has not been defined in Kihoto Hollohan. However, the settled rule that has been followed is that an order is vitiated by perversity, if it is not only against the weight of evidence but is altogether against the evidence itself. It is an order made in conscious violation of pleading and law.

108. On examining the present case in the light of the facts before us I have come to the conclusion that the application dated 6.9.2003 could have been deferred or clubbed with the application dated 4.9.2003 as they related to the same issue regarding whether any split had or had not taken place in the BSP. And if no such split had taken place, 13 MLAs, who went alongwith Sri Shiv Pal Singh Yadav to His Excellency the Governor on 27.8.2003 to express their support to Sri Mulayam Singh

Yadav in forming the Government had incurred disqualification under paragraph 2(1)(a). The fact that the application dated 4.9.2003 was kept in the cold storage and the application dated 6.9.2003 was filed, heard and disposed of on the same day, rather, late in the evening, does raise a doubt as to what was the urgency to act with such undue haste. The fact that the split was disputed by the petitioner and the contention of the State President of BSP at the time of hearing of application under paragraph 3 that 13 MLAs against whom disqualification application is pending could not be counted within the split group only 24 MLAs could be said to be constituting the group as a result of split, was brushed aside by the Speaker by relying upon a wrong interpretation of Ravi S. Naik''s case. The Speaker''s decision that mere filing of claim was enough and no further proof was required; does make me wonder particularly when an application under para 2 for disqualification of 13 MLAs was already pending disposal before the learned Speaker.

109. Had the split not been disputed then there was no need to ask the respondents to prove the factum of split. Since a dispute had been raised as to the veracity of the claim, it was incumbent upon the Speaker to follow the Disqualification Rules of 1987 and ask the petitioner to file a written statement to the application under paragraph3 and the respondents/applicants to prove their claim by evidence documentary or otherwise. Rule 7 says that no reference of any question as to whether a member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such member made in accordance with the provisions of this rule.

110. It would be appropriate to reproduce Rules 7 and 8 of the Uttar Pradesh Legislative Assembly (Disqualification on grounds of Defection) Rules, 1987:

Rule 7: (1) No reference of any question as to whether a member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such member made in accordance with the provisions of this rule.

(2) A petition referred to in subrule (1) may be made by any person in writing to the Secretary.

The Secretary shall,

(b) as soon as may be after the receipt of a petition made under subrule (2) publish the information in respect thereof in the ''Bulletin'', and

(c) as soon as may be after the House has elected a member in pursuance of the proviso to subparagraph (1) of paragraph 6 of the Tenth Schedule place the petition before such member.

(2) Every petition.

4. shall contain a concise statement of the material facts on which the petition is based, and

(b) shall be accompanied by copies of the documentary evidence, if any on which the petitioner relies and where the petitioner relies on any information furnished to him by any person a statement containing the names and addresses of such person and the gist of such information as furnished by each such person.

(3) Every petition shall be signed by the petitioner and verified in the manner laiddown in the Code of Civil Procedure, 1908 for the verification of pleading.

(4) Every annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

Rule 8 8 (1) On receipt of a petition under rule 7, the Speaker shall consider whether the petition complies with the requirements of that rule.

(2) If the petition does not comply with the requirements of rule 7, the Speaker shall dismiss the petition and intimate the petitioner accordingly.

(3) If the petition complies with the requirements of rule 7, the Speaker shall cause copies of the petition and of the annexure thereto be forwarded:

(a) to the member in relation to whom the petition has been made; and

(b) where such member belongs to any legislature party and such petition has not been made by the leader thereof, also to such leader, and such member or leader shall, within seven days of the receipt of such copies or within such further period as the Speaker may for sufficient cause allow, forward his comments in writing thereon to the Speaker.

(4) After considering the comments if any, in relation to the petition, received under subrule (3) within the period allowed, the Speaker may either proceed to determine the question or, if he is satisfied having regard to the nature and circumstances of the case that it is necessary or expedient so to do, refer the petition to the committee for submitting a preliminary inquiry report in respect thereof.

(5) The Speaker shall, as soon as may be, after referring a petition to the Committee under subrule (4) intimate the petitioner accordingly and make an announcement with respect to such reference in the House, or if the House is not then in session, cause the information as to the reference to be published in the Bulletin.

(6) Where the Speaker makes a reference under subrule (4) to the committee, he shall proceed to determine the question as soon as may be after receipt of the report from the Committee.

(7) The procedure which shall be followed by the Speaker for determining any question and the procedure which shall be followed by the Committee for the purposes of making a preliminary inquiry under subrule (4) shall be, so far as may

be, the same as the procedure for inquiry and determination by the Committee of any question as to breach of privilege of the House by a member, and the Speaker or the Committee shall before recording a finding that the member has become subject to disqualification under the Tenth Schedule afford a reasonable opportunity to such member to represent his case and to be heard in person and, if he so desires, through his counsel.

(8) The provisions of subrules (1) to (7) shall apply with respect to a petition in relation to any other member and for this purpose, reference to the Speaker in these subrules shall be construed as including references to the member elected by the House under the proviso to subparagraph (1) of paragraph 6 of the Tenth Schedule.

(9) (1) At the conclusion of the consideration of the petition, the Speaker, or as the case may be; the member elected under the proviso to subparagraph (1) of paragraph 6 of the Tenth Schedule shall by order in writing:

(a) Dismiss the petition, or

(b) declare that the member in relation to whom the petition has been made has become subject to disqualification under the Tenth Schedule, and cause copies of the order to be delivered or forwarded to the petitioner the member in relation to whom the petition has been made and to the leader of the legislature party, if any, concerned.

(2) Every decision declaring a member to have become subject to disqualification under the Tenth Schedule shall be reported to the House forthwith if the House is in session, and if the House is not in session, immediately after the house re assembles.

(3) Every decision referred to in subrule (1) shall be published in the Bulletin and notified in the Official Gazette and copies of such decision shall be forwarded by the Secretary to the Election Commission of India and the State Government.

111. It is to be noted that the Chairman/Speaker of the House is empowered to make Rules for giving effect to the Tenth Schedule. The Rules being delegated legislation are subject to certain fundamental factors. Underlying the Concept of delegated legislation is the basic principle that the legislature delegates because it cannot exert its will in every detail. All that can be done in practice to do is to lay down the outline, that is, the intention of the legislature. This intention must be the prime object sought to be achieved. Delegate''s function is to serve and promote that object while at all times remain true to it. Rules of Procedure are ancillary and will authorize subsidiary means of carrying into effect what is enacted in the Statute itself. They cover what is incidental to the execution of its specific provisions. Rules framed in exercise of power conferred by the Constitutional provision like the Tenth Schedule must be interpreted and followed consistent to the objects sought to be

achieved by such constitutional provision. Rules framed under paragraph8 of the Tenth Schedule facilitate the job of the Chairman in discharging his duties. They are intended to help him to carry out a fair enquiry. It is relevant to note that Rule laid down in Taylor v. Taylor [1876]1 Ch. 426 that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the Judicial Committee of the Privy Council in Nazir Ahmad v. King Emperor; AIR 1936 PC 253 [2]. The said proposition of law was followed in State of U.P. v. Singhara Singh; AIR 1964 SC 358 and recently by the Constitution Bench in CIT v. Anjum M.H. Ghaswala; 2002(1) SCC 633. Underlying idea behind the Rules of procedure is to eliminate the possibility of arbitrariness and compliance thereof is necessary in the name of fair play as has been held in Viterally v. Seatton, 3 Law Fd. Second Series 1012, A.S. Ahluwalia v State of Punjab; [1975] 3 SCR 82; Sukhdev v. Bhagatram AIR 1975 SC 1331, Ramana Dayaram Shetty v. International Airport Authority of India; AIR 1979 SC 1628 and B.S.Minhas v. Indian Statistical Institute and others; AIR 1984 SC 362.

REGARDING CONTENTION I:

112. Learned Counsel for the respondents have argued that no ground has been taken in the writ petition challenging the merger order dated 6.9.2003 and 8.9.2003. Infact groundJ in the writ petition only says that the Speaker had not decided whether it is a case of merger of two political parties. In paragraph32, 33, 34 and 38 of the writ petition the case advanced by the petitioner is that the merger letter was moved on the very same day on which the split application was moved and allowed and that the letter dated 6.9.2003 shows that it is not issued by the officebearers of ''Lok Tantrik Bahujan Dal'' but was signed by 27 MLAs set up by the BSP. It was argued that the issue of merger is entirely between ''Lok Tantrik Bahujan Dal'' and ''Samajwadi Party'' and has no bearing to the BSP and the petitioner has thus no locus standi to object the merger between the said parties. Also, paragraph4 of the Tenth Schedule does not fix a time gap for merger after recognition under Paragraph 3. However, assuming though not conceding that such time gap was necessary, it is pointed out that the split took place on 26.8.2003 and the merger took place on 6.9.2003 i.e. after ten days. It was strenuously argued that the petitioner is questioning merger without impleading Samajwadi Party of Sri Mulayam Singh Yadav, who agreed to merger as its National president. They are necessary parties to the writ petition as any adverse order would directly impact the Samajwadi Party and may be its Government. The underlying principle of Order 1 Rule 10 of the Code of Civil Procedure and principles of natural justice both dictate that the Samajwadi party and Sri Mulayam Singh Yadav be made parties to the petition. It was submitted that nonimpleadment of necessary parties is fatal and the writ petition should be dismissed on this ground alone.

113. As regard to the contention of the respondents that the Samajwadi Party is a necessary party as any order would have direct impact on it, Sri Mishra stated that the provisions of Tenth Schedule deals with disqualification of Members, which is the subject matter involved in the present writ petition and all the persons, who would be affected by the order of this Court, have been arrayed as the respondents. On the strength of Rule 7 of the Members of U.P. Legislative Assembly [Disqualification on Grounds of Defection] Rules, 1987 any person can approach the Speaker. Learned Counsel for the petitioner placed certain facts before us. On 6.9.2003 while allowing application under paragraph3 of the Tenth Schedule, the Speaker also considered an application of the same date moved by Sri Rajendra Singh Rana to the effect that the newly formed Lok Tantrik Bahujan Dal had decided to merge with the Samajwadi Party. Sri Rajendra Singh Rana also moved another application on behalf of 6 MLAs, who he said, wanted to join Lok Tantrik Bahujan Dal and then merged with Samajwadi Party. The Speaker also considered this application on the same day. On merger application of Lok Tantrik Bahujan Dal, the Speaker noted that since all the 37 MLAs had signed the same and consent has been given by the National president of Samajwadi Party, Sri Mulayam Singh Yadav, the same deserved to be allowed. On the other application of the same date moved ;on behalf of 6 MLAs by Sri Rajendra Singh Rana, the Speaker observed that since these 6 MLAs were not present in person to support their affidavits, the decision on such application shall remain deferred. On 8.9.2003, the BSP moved application supported by affidavits of 3 out of these 6 MLAs, namely, Sri Dhoo Ram, Sri Anil Kumar Maurya and Sri Ramesh Chandra Bind stating clearly that no split as alleged had taken place on 26.8.2003 and the affidavits submitted alongwith the application made by Sri Rajendra Singh Rana on 6.9.2003 to the effect that they wanted to join ''Loktantrik Bahujan Dal'' and thereafter the Samajwadi Party were forged and concocted. The Speaker on 8.9.2003 allowed the merger of only 3 out of these 6 MLAs, namely, respondent No.39, 40 and 41 holding them to be the Members of LBD and thus entitle to merger with Samajwadi party alongwith 37 MLAs, who had already been allowed by the order dated 6.9.2003 to merge with the Samajwadi Party. It was submitted by Sri S.C.Mishra that all existing Members/MLAs of the splinter group had claim for merger on 6.9.2003 and were thereafter also merged with the Samajwadi Party on 6.9.2003. According to him, after the said date i.e. 6.9.2003, the said splinter group ceased to exist and therefore, no further MLA could be treated to be recognized on 8.9.2003 as Member of the above said new group and thereafter merged with Samajwadi Party. A group or political party which ceased to exist after 6.9.2003 could not be again revived or recognized for the purpose of giving split and merger to the 3 MLAs i.e respondent No. 39, 40 and 41, who under no circumstances, otherwise, could be said to be 1/3rd of the original political party. Since they were less than 1/3rd of the original political party, they will stand automatically disqualified under paragraph 2(1)(a) of the Tenth Schedule. Interestingly, this position has been admitted by all the respondents including the three MLAs that after the merger on 6.9.2003, the said political party i.e. LBD ceased

to exist.

114. I have carefully gone through the text of paragraph4 of the Tenth Schedule, reproduced herein above. However, for convenience the paragraph 4 of the Tenth Schedule is once again quoted below:

4. Disqualification on ground of defection not to apply in case of merger. (1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party

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

(e) have not accepted the merger and opted to function as a separate group, and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purposes of subparagraph (1) of paragraph 2 and to be his original political party for the purposes of this subparagraph.

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

115. In Paragraph4, referred to above, the prerequisite condition is the merger of ''original political party'' with another political party. Original political party has been defined in Interpretation Clause thus:

''original political party'', in relation to a member of a House, means the political party to which he belongs for the purposes of subparagraph (1) of paragraph 2;

In explanation to subparagraph 1 of paragraph 2 it has been provided thus:

Explanation For the purposes of this subparagraph,

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

A combined reading of Interpretation clause, explanation to subparagraph 1 of paragraph 2 and paragraph 4 would point to the inevitable conclusion that the merger can only be considered where the ''original political party'' decides to merge with another political party.

116. Regarding the maintainability of the writ petition in absence of nonjoinder of necessary parties, it is to be noted that the main order under challenge is the order of Speaker allowing the application of the respondent under Para 3. If this order is setaside, the only parties to be affected would be the Respondents 238 and for them the argument of Split would be setaside, and they would be liable to incur

disqualification under para 2(1)(a). The order on the merger application was only on adjunct to the main order dated 6.9.2003 recognizing split. If split is setaside the consequential order on merger also goes. At this juncture, I must note the principles set out in G.M.South Central Railways v. A.V.R.Sidaharth (1974) 3 SCR 20 relied upon in V.P. Srivastava v. State of M.P.; 1996(7) SCC 759. These are when the main policy decision on the basis of which the authorities are acting is under challenge and if that principles is setaside, other parties would be affected, then it is not necessary to implead the affected parties. In such proceedings the necessary parties to be impleaded are those against whom relief is sought, and in whose absence, no effective decision can be rendered by the Court. Here the Speaker''s decision is under challenge and he has been impleaded as respondent No.1. The other affected parties, if the Speaker''s decision recognizing split is setaside would be the respondent no. 241, the parties who are likely to be affected in case the consequential order is also set aside by the domino effect, would at best be proper parties and not necessary parties and their nonjoinder would not be fatal to the writ petition.

RE CONTENTION J:

117. It has been argued by the learned Counsel for the respondents the even if the Speaker''s order dated 6.9.2003 recognizing the split and merger is setaside, the second relief in the prayer clause cannot be granted for despite a lapse of more than two years since the split, no one has moved any petition under paragraph 2 read with paragraph 6 for disqualification against the 27 MLAs Hence the order qua then cannot be setaside nor their disqualification can be ruled by the Court as the Speaker alone is vested with the power to adjudicate the question of disqualification in paragraph 6.

118. Sri Mishra, appearing for the petitioner, in contrast, argued that the petitioner has prayed for a writ of quowarranto from the Court alongwith a writ of certiorari for quashing the order dated 6.9.2003 and 8.9.2003. If the order dated 6.9.2003 recognizing respondents No.238 s Members of new group '' Loktantrik Bahujan Dal'' formed as a result of split in BSP is setaside, then the defence claimed by them under para 3 would not be available to them and out of these 37 MLAs, 13 MLAs would automatically be deemed to have incurred disqualification as alleged in application dated 4.9.2003. If these 13 MLAs are disqualified, the remaining 24 MLAs would also stand disqualified as they would not constitute 1/3rd of the Member of BSP Legislature Party. The relief of disqualifying the 24 MLAs would then be consequential as their merger under paragraph 4 would also be nonest in the eyes of law. As regards respondents No.39, 40 and 4, learned counsel suggested, that they would not be allowed to be recognized as member of nonexistent ''Lok Tantrik Bahujan Dal'' and would consequentially also stand disqualified if the order dated 8.9.2003 is quashed by this Hon''ble Court.

REGARDING CONTENTION J:

119. I am of the considered opinion that although the second relief in prayer clause cannot be granted by this Court, but the Court cannot certainly close its eyes to the fact that had the application for disqualification dated 4.9.2003 been treated with the same promptitude and constitutionally required urgency, the 13 MLAs whose Membership in question was hanging in the balance could not have been counted alongwith the 24 others, who joined hands to conjure up the minimum required number. Regarding the relief that can be granted by this Court to the petitioner, I am of the opinion that the petitioner has been able to make out a case for interference in the impugned orders dated 6.9.2003, 8.9.2003 and 7.9.2005 on the grounds envisaged in the constitution Bench decision of Kihoto Hollohan [supra] and there has indeed been a violation of the constitutional mandate the way the key issue of disqualification under para 2 has been decided. It was improper on the part of the Hon''ble Speaker to have sidetracked the main issue of deciding the question of disqualification expeditiously for which the 52nd Amendment Act has been brought out. Had the Hon''ble Speaker decided the disqualification application simultaneously, if not earlier, with the application for recognition of split and merger, no one would have raised eyebrow at the conduct of high office of the Speaker.

120. Sri Virendra Bhatia, Senior Advocate appearing for the Speaker while defending the orders passed by the Speaker, stated that the orders have been passed by the Speaker are perfectly legal and justified and does not suffer from any infirmities as alleged by the petitioner. He also replied certain queries on the basis of record.

121. As far as denial of procedural fairness in terms of violation of principles of natural justice and malafide is concerned, the order dated 6.9.2003 could not certainly be said to have been passed by giving adequate opportunity to the petitioner. While the application under paragraph 2 dated 4.9.2003 was kept pending, the Speaker not only entertained applications under paragraphs 3 and 4 dated 6.9.2003 on the same evening as they were filed but also called the petitioner in the evening and after hearing, he pronounced the operative portion of the impugned order on the same night holding that since a claim had been made which he deemed sufficient, there was no legal necessity to give opportunity to the petitioner to lead evidence against the alleged split. Even the respondents were not called upon to prove the split. That the Speaker also delivered the operative part of the order without giving copy thereof. Copy was only given on 9.9.2003, when the respondents on the strength of the operative order dated 6.9.2003 had already exercised their votes on 8.9.2003 in the House in favour of Sri Mulayam Singh Yadav in the motion of confidence. All this reflects the questionable intent of the Speaker. From the consideration of the facts and circumstances mentioned in the foregoing paragraphs, as regard the order dated 8.9.2003, it is evident that weight of evidence and stream of law was in favour of the petitioner. Thus the impugned order dated 8.9.2003 was passed in conscious violation of facts and law.

122. Now, I will consider other reliefs claimed by the petitioner. It has been argued that if the impugned orders are quashed, then there is no need of remanding the matter to the Hon''ble Speaker as it would not serve any additional purpose because there is nothing further which is to be decided as respondents having given up their membership from the political party voluntarily, seeking to insulate such severance with the cover provided under paragraph 3 of the Tenth Schedule, only issue to be decided is whether the respondents are entitled to such protection.

123. According to the petitioner, if this court comes to the conclusion that 13 respondents would stand excluded from the group of 37 from the date of moving of application in paragraph 2 read with paragraph 6 i.e. from 4.9.2003 itself, they cannot be counted alongwith 24 others to reach the magic number of 37 required for a valid split in a legislature party of 109. Then the application under paragraph 3 and 4 of the Tenth Schedule would also stand rejected and in consequence respondents [group of 37] would also stand disqualified under paragraph 2(1)(a) of the Tenth Schedule. It is trite to say that it is not the function of the courts of law to substitute their wisdom of decision from that of the authority on whose judgment the matter in question has been entrusted by law. In V.C.Utkal University v. S.K.Ghosh; AIR 1954 SC 217, the Constitution Bench of the Supreme Court held that it is not the function of the Court of law to substitute their wisdom and discretion than that of a person on whose judgment the matter in question is entrusted by law. When the Tenth Schedule has expressly constituted the Speaker or the Chairman, as the case may be, to decide the question of disqualification and attach finality thereto, it is not for this Court to consider the facts and decide the said question by substituting itself in the place of Speaker. More or less the same view has been expressed by the Hon''ble Supreme Court in Manuskh Lal Vitthal Das Chauhan v. State of Gujrat, reported in 1987 (7) SCC 622 and in Tata Cellular v. Union of India, 1994(6) SCC 651, where the three Judges Bench of the Hon''ble Supreme Court concluded with approval the following passage of Lord Fraser''s Speech in Amin Re: 1983(2) All E.R. 864:
"Judicial review is entirely different from an ordinary appeal. It is made effective by the court''s quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal, where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

124. So far as the impugned order dated 7.9.2005 is concerned, it is wholly misconceived. When the law prescribes method to do certain thing in certain manner, it must be done in the same manner else not at all. When the application dated 4.9.2003 under paragraph 2 read with paragraph 6 was filed raising question of disqualification, which should have been treated with the same promptitude as expected by the Parliament. Notices, which would have been issued on the same day, were issued later on when the Members, whose membership was questioned, were allowed to vote in the motion of confidence on 8.9.2003. Then again on

14.11.2003, the hearing on the said application was deferred on the ground of pendency of the writ petition. After two years when the arguments in this petition had virtually concluded before the Division Bench, before whom the matter was subjudice, the order dated 7.9.2005 was passed. Hon''ble the Speaker had both the written statements and rejoinder statement alongwith notices with him, he could have considered the matter on merits and exercised the discretion expected of a Judicial Tribunal but he refused to exercise the same and passed the impugned order merely on the ground that the application under paragraphs 3 and paragraph 4 already stood allowed and hence nothing further needs to be decided.

125. Last but not the least, I would like to mention that Parliamentary democracy is a part of the basic structure of the Constitution. The electorates never want that their legislators after getting their mandate would become the object of corrupt means. When the sole object is to grab power at any cost even by apparent unfair and tainted means such as defection, the Speaker should not facilitate such a Government to be installed. By doing so, the Speaker would be acting contrary to the every essence of the democracy. The purity of electorate process would get polluted by such acts. The framers of the Constitution never intended that democracy or governance would be manipulated. Defections strike at the root of the representative Government and hence are unconstitutional, unethical and improper. The 10th Schedule in its existing form cannot take care of all situations of defections but the high office of the Speaker to whom the power to check the defections and take decisions on the issue of disqualification of defected members have been given by the law are expected to act impartially, expeditiously and in accordance with law.

126. In view of the above legal proposition and the discussions made hereinabove, the writ petition is allowed in part and the orders dated 6.9.2003, 8.9.2003 and 7.9.2005 passed by the learned Speaker are hereby quashed and the matter is remitted back to the learned Speaker to take a fresh decision on all the applications i.e. applications under paragraph 2, 3 and 4 of the Tenth Schedule treating the orders passed earlier i.e. the impugned orders dated 6.9.2003, 8.9.2003 and 7.9.2005 as nonest in the eyes of law. Learned Speaker shall decide the applications, in light of the observations made above, expeditiously.

127. Parties shall bear their own costs.

(Petition allowed in part)

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Per Hon''ble Pradeep Kant, J.

I have had the privilege of going through the judgement of Hon''ble the Chief Justice expressing his views elaborately and illustratively on the issues involved but find myself unable with great respect, to subscribe with the analysis done and findings

arrived at and consequently with the outcome of the judgement.

2. I have also gone through the judgement prepared by Hon''ble Jagdish Bhalla, J and I find myself in agreement with the reasoning given by him and the conclusions arrived at and while supporting his view, I pronounce on the issues involved and the controversy raised, as under:

3. Unfret and unmoved by the electorate''s concern and the people''s cry that the member that they elect should adhere to the policies and programmes as propagated through their party''s manifesto during elections and that they voted for a party in whose political, economic and social philosophy they have faith, the elected Members change their allegiance and loyalty very often, and they go in the camp of a rival political party completely ignoring the wish of their own constituency members. May be at times there is honest and ideological dissension leading to defection in a large scale and at times it may only be lure of office or money or other consideration which would prompt the elected member to part ways with his original political party from which he was elected and to support the other party. Voluntarily leaving the original political party from which the member has been elected to any House of Parliament or Assembly is known as floor crossing i.e. defection. If an elected member crosses floor with less than 1/3rd members of his legislature party in the House, he or all such members would incur disqualification and would stand disqualified from being the members of the Legislative Assembly for the remaining term of the House and can only come back on a fresh vote but in case a member crosses the floor with at least 1/3rd members of his legislature party or more by following the prescription given in Para 3 of the Tenth Schedule, the disqualification of defection would not stick to him.

4. In the case of Kihoto Hollohan v. Zachillhu and others,1992 Supp(2) SCC 651, while deciding the constitutional validity of the Tenth Schedule introduced by the Constitution (Fifty Second Amendment) Act, 1985, the Supreme Court took note of certain extracts of the report of the Committee known as ﷺCommittee on Defectionsﷺ. In its report dated January 7, 1969, after giving the figures of defections in the recent past, the Committee observed ﷺThe other disturbing features of this phenomenon were: multiple acts of defections by the same person or set of persons (Haryana affording a conspicuous example); few resignations of the membership of the legislature or explanations by the individual defectors, indifference on the part of the defectors to political proprieties, constituency preference or public opinion and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections.ﷺ The Supreme Court also took note of the Statement of Objects and Reasons appended to the Bill which was adopted as the Constitution (Fiftysecond Amendment) Act, 1985, which said ﷺThe evil of the political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles, which sustain it. With this object, an assurance was

given in the Address by the President to Parliament that the Government intended to introduce in the current session of Parliament an antidefection Bill. This Bill is meant for outlawing defection and fulfilling the above assurance.&#65533;

The Supreme Court observed:

&#65533;On the one hand there is the real and imminent threat to the very fabric of the Indian democracy posed by certain levels of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tends to degrade the tone of political life and, and in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There ixperimental legislation. In these areas the distinction between what is constitutionally permissible and what is outside it is marked by a `hazy gray line'' and it is the Court''s duty to identify, &#65533;darken and deepen&#65533; the demarcating line of constitutionality a task in which some element of Judge''s own perceptions of the constitutional ideals inevitably participate. There is no single litmus test of constitutionality. Any suggested sure decisive test, might after all furnish a &#65533;transitory delusion of certitude&#65533; where the &#65533;complexities of the strands in the web of constitutionality which the Judge must alone disentangle&#65533; do not lend themselves to easy and sure formulations one way or the other. It is here that it becomes difficult to refute the inevitable legislative element in all constitutional adjudications&#65533;

5. It was found that the Paragraph 2 of the Tenth Schedule to the Constitution is valid. Its provisions do not suffer from the vice of subverting the democratic rights of the elected Members of Parliament and the Legislatures of the States. It was also found that the provisions are salutary and are intended to strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections. The antidefection law seeks to recognise the practical need to place the proprieties of political and personal conduct above certain theoretical assumptions, which in reality have fallen into a morass of political and personal degradation. Court should defer to this legislative wisdom and perception. The choices in constitutional adjudications quite clearly indicate the need for such deference.

6. The case in hand, once again cast a duty upon the court to judicially scrutinise about the events which would be more fully described hereinafter so as to pronounce as to whether the floor crossing by 40 (37+3) members belonging to the Bahujan Samaj Party (BSP) made them disqualified for being the members of the Legislative Assembly or that it was an honest dissension and the disqualification would not attach to them in view of their claim of the provisions of Paragraph 3 and 4 of the Tenth Schedule.

7. Before proceeding with the merits of the case, it would be appropriate to put straightaway on record that an application for amendment of the writ petition was pending undisposed when the matter came before this Full Bench. The amended

writ petition, counter affidavit to the writ petition, as amended, as well as rejoinder affidavit have already been taken on record under the oral orders of the Court that the amendment would stand allowed. The parties were given to understand that the hearing may not be stopped and they may argue taking that amendment stands allowed. The amendment in fact incorporates subsequent events which had taken place after filing of the writ petition and also subsequent orders passed by the Speaker, who has dismissed the disqualification petitions as having become infructuous, by all means. Learned counsel for the respondents Sri Shanti Bhushan and Sri Rakesh Dwivedi though initially stated that they seriously oppose the amendment but in fact did not raise any such objection during the course of arguments and as a matter of fact, all the parties have proceeded with their case on the amended writ petition. The parties thus have proceeded to argue the matter taking the amendment having been allowed. Accordingly the formal orders on amendment application are hereby passed. The amendment is and stands allowed.

8. The short relevant synopsis of the facts is that after the elections of the U.P. Legislative Assembly held sometimes in the year 2002, Sushri Mayawati, leader of Bahujan Samaj Party (BSP), was sworn in as Chief Minister of the State but within a span of only approximately 15 months of her tenure as Chief Minister, a decision was taken in the Cabinet headed by her to make recommendation to the Governor to dissolve the U.P. Legislative Assembly, which decision was announced by the then Chief Minister and the leader of the BSP.

9. As per pleadings of the petitioner, on 25.8.03 the Cabinet led by Sushri Mayawati decided to recommend to the Governor for the dissolution of the House. This decision was made public by her in All India Party Workers'' Meeting of the BSP on 25.8.03 itself. The very next day at 10:45 a.m. Sri Mulayam Singh Yadav, leader of the Samajwadi Party, laid his claim before the Governor for forming a Government. Sushri Mayawati submitted her resignation at 1:00 p.m. on 26.8.03. A meeting on 26.8.2003 of 110 Members of Legislative Assembly of BSP was held at 5, Kalidas Marg, Lucknow at 7.00 p.m. and the members of the BSP were directed not to do anything which is against the party interest. It may be brought on record that there were in all 109 members belonging to the said party in the House. According to the petitioners, all 109 MLAs attended the said meeting and there was no dissension. On 27.8.03, 13 MLAs of the BSP in two separate groups, namely, (8+5) met the Governor of the State alongwith Sri Shiv Pal Singh Yadav, General Secretary of the Samajwadi Party (SP) and submitted a letter to the Governor to invite Sri Mulayam Singh Yadav to form the Government. The letter said that the MLAs who have signed the letter, request the Governor for inviting Sri Mulayam Singh Yadav to form the Government as the public of Uttar Pradesh does not wish to have the elections nor the President rule.

10. The petitioners treating it to be a case of leaving the original political party voluntarily by these 13 MLAs moved petitions of disqualification under Paragraph

2(1) (a) of the Tenth Schedule on 4.9.03 before the Speaker. On 5.9.03 they filed a caveat before the Speaker saying that if the aforesaid 13 MLAs or any other MLA comes for recognition of their group, the Speaker may proceed only after giving hearing to the petitioners as no ''split'' has taken place in the original political party i.e. BSP.

11. On 6.9.03 at 5.45 p.m. 37 MLAs, namely, 13 aforesaid MLAs plus 24 other MLAs moved an application jointly saying that a meeting on 26.8.03 of the members, office bearers and MLAs of the BSP was held, wherein all persons present unanimously decided that the BSP be divided, namely, a split be caused and a new faction under the leadership of Rajendra Singh Rana, MLA be formed, which be named as Loktantrik Bahujan Dal (LBD). The letter further stated that the said 37 MLAs have formed a group which represents the aforesaid faction and since the strength of the group is more than 1/3rd of the total members of the legislature party, the Loktantrik Bahujan Dal be recognised as a separate group and provision for its sitting in the House be made. Another application was also moved on the same date by the aforesaid 37 MLAs saying that Loktantrik Bahujan Dal has taken a decision to merge in Samajwadi Party, and the said merger be recognised.

12. The petitioner was though given an oral hearing but was not afforded any opportunity to file a reply or to adduce evidence to show that no split has taken place in the original political party nor a group of required strength was formed on 26.8.03 and that in the absence of any proof being brought by the 37 MLAs, a split in the original political party cannot be presumed. It appears to have been orally argued before the Speaker on behalf of the petitioner that the disqualification application having already been moved against 13 MLAs, who have already incurred disqualification, as their conduct of approaching the Governor and making the request for inviting Sri Mulayam Singh Yadav to form the Government amounts to an act of leaving the original political party voluntarily and, therefore, they cannot be treated to be included in the group of 37 nor such a group would be a valid formation of a group. It was also urged that the disqualification petitions be decided first.

13. The Speaker on that very date within a span of three hours or so, passed the order on the application moved by 37 MLAs giving them benefit of Para 3 of the Tenth Schedule holding that since these MLAs have made a claim that there has been split in the original political party and that they are in the required strength of not less than 1/3rd members of the Legislature Party, therefore, in accordance with the pronouncement made by the Apex Court in the case of Ravi S. Naik, (1994 Supp (2) SCC 641), gave recognition to the group, Loktantrik Bahujan Dal in the House and arrangement for their seating be made.

14. On the other application moved by these MLAs of the same date the Speaker also recognised the merger of the Loktantrik Bahujan Dal into Samajwadi Party. However, the claim of the 37 MLAs that there were six more MLAs asking for merger

was not accepted, as they were not present but later on an application was moved again on 8.9.03 by six aforesaid MLAs for treating them as member of the Samajwadi Party but this time also since only 3 MLAs were present in person therefore, the Speaker accepted the request of only 3 MLAs and not of those, who were not present and thus the Speaker allowed the merger of 40 MLAs into the Samajwadi Party.

15. It is also the admitted case of the parties, that on 6.9.03, only operative portion of the orders was pronounced, but full order was made available only on 9.9.03, i.e. after the motion of confidence in favour of Sri Mulayam Singh Yadav was successfully carried through on 8.9.03.

16. On the aforesaid orders being passed by the Speaker, the petitioner preferred the present writ petition challenging the said orders on various grounds including the action of the Speaker of not dealing with the petitions of disqualification moved by the petitioner and the manner in which the private respondents'' applications were allowed apart from the legal challenge on the applicability and scope of the various provisions of the Tenth Schedule and the factual aspects as brought forward by the parties.

17. It appears that the Speaker had issued notices on the disqualification petitions moved by the petitioner against 13 MLAs as late as on 18.9.03 and on 14.1103 on the request of the 13 MLAs the hearing on those disqualification petitions was deferred till the disposal of the present writ petition. The two MLAs, namely, Rajendra Singh Rana and Virendra Singh Bundela on 15th January,05 moved two separate petitions before the Speaker for expediting the hearing on the disqualification petitions. The petitioner appears to have approached the Supreme Court also by filing a Special Leave Petition against the hearing of the petitions as the matter was pending before this Court, but the Supreme Court refused to interfere saying that the matter is being looked into by the High Court.

18. A written statement was filed by 13 MLAs on 26th August, 05 and a rejoinder was filed by the petitioners but in the meantime an application was moved by the 13 MLAs for dismissal of the disqualification petitions dated 4.9.03 saying that in view of the declaration already given recognising the group of Loktantrik Bahujan Dal under Paragraph 3 and its merger under Paragraph 4 of the Tenth Schedule, the aforesaid disqualification petitions need not be considered on merits. The petitioner, however, opposed the said prayer for deciding the preliminary objection by moving an application on 2.9.05 under Rule 8(4) of The Members of Uttar Pradesh Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1987 (hereinafter referred to as 1987 Rules) with a prayer to determine the question involved in the petitions after permitting the petitioner to lead evidence. The petitioner again reiterated his stand by moving an application on 5.9.05 and requested for permission to lead the evidence. The said plea of the respondents was thus resisted by the petitioners but the Speaker dismissed those petitions of

disqualification. The Speaker upheld the preliminary objection raised by the 13 MLAs and dismissed all 13 disqualification petitions by a common order saying that since the split has been recognized under Paragraph 3 and merger has also been recognised under Paragraph 4, therefore, there is no necessity to decide the petitions on merits after taking the evidence.

19. However, again without giving any opportunity of giving evidence or arguing on disqualification petitions, the Speaker recorded a finding that in view of the recognition of the group being given by the Speaker on 6.9.03, those 13 MLAs cannot be held to be disqualified, because they met the Governor on 27.8.03 as the split has been recognised with effect from 26.8.03.

20. Elaborate arguments have been made by Sri S.C.Misra, Senior Advocate on behalf of the petitioners, and Sri Shanti Bhushan and Sri Rakesh Dwivedi, Senior Advocates on behalf of the private respondents.

21. Sri Shanti Bhushan took a plea and argued that even if it is taken as correct that 13 MLAs who met the Governor on 27th August, 2003, met as BSP MLAs, this act of theirs would not render them disqualified under paragraph 2 (1)(a). Elaborating the aforesaid argument, he submitted that paragraph 2 (1)(a) only speaks of two situations which would disqualify an MLA from being the member of the House, namely, if he voluntarily leaves the original political party, and secondly, if the member had cast vote against the mandate of the original political party or abstained from voting,. Further he argued that a Member in the House has got full liberty to express his views and even to call upon the Governor for the change of the Government and in doing so, he would not incur any disqualification, unless he does either of the acts as given in paragraph 2 (1)(a) and (b). According to him, if without leaving the original political party, the member meets the Governor, for inviting the leader of another political party to form the Government, his conduct would neither fall under paragraph 2 (1)(a) nor (b). The argument, if taken on its face value, would mean that unless the Member resigns or leaves the party by his conduct, he is free to act according to his conscience in the House. For leaving the original political party, it is not necessary that a Member should formally resign or accept or join any other political party. His conduct of meeting the Governor, requesting him to invite the leader of another political party to form the Government, in itself, would fall within the mischief of paragraph 2(1)(a).

22. Sri Shanti Bhushan also argued that since ''split'' has not been defined in the Tenth Schedule, therefore, no specific procedure is required to be followed for causing ''split'' in the original political party, which may be caused even by one member.

These questions shall be dealt with in detail at a later stage by me.

The points which have been raised by the counsel for the respondents mainly are the following:

(i) ''Bare claim'' of split made by a Member of the Legislative Assembly is sufficient to accept the split for which no evidence is required to be tendered nor such a split is required to be proved and consequently, the Speaker would not have any jurisdiction or authority to look into the factum of split, which is an event, which takes place outside the House; (ii) On claim of such split being made, if a group of onethird or more MLAs, presents themselves before the Speaker, the Speaker would only have to count the heads and if he finds that they form the group of requisite strength, no further enquiry is at all needed for giving benefit of paragraph 3; (iii) Even if a split in the original political party is required to be proved, the very fact that the Members of the legislature party who are more than onethird of their strength and who naturally belong to the original political party, from which they have splitted out and formed the group, would itself establish all the three ingredients of paragraph 3, namely, split in the original political party, faction arising out as a result of such split and group of onethird or more MLAs representing such faction in the House, and thus would not call for any further enquiry by the Speaker and there was no need to decide the disqualification petitions, as the MLAs were protected by the provisions of paragraph 3 and 4 and their group having been recognised by the Speaker, neither any prejudice could be said to have been caused to be petitioner, who in fact, represents the original political party nor the proceedings before the Speaker or the orders passed thereon could be said to be vitiated on this ground.

23. The points urged by the respondents broadly raise the following questions for consideration:

(1) Whether the orders passed by the Speaker on 6.9.03 and 8.9.03 are inherently bad in law having been passed in violation of the principles of natural justice and also because of the procedural irregularity in proceeding with the applications said to have been moved under Paragraph 3 and 4 of the Tenth Schedule without even issuing notice on the disqualification petitions, though moved prior in time and thereafter deferring the hearing of the said petitions; and whether the manner in which the Speaker proceeded is in consonance with the substance and procedure as given in the Tenth Schedule or was violative of the constitutional mandate?

(2) Whether Paragraphs 3 and 4 of the Tenth Schedule could only be a defence in a matter wherein a plea of disqualification of an MLA is either taken or arises in view of the provisions of Paragraph 2(1)(a) or an MLA which may include any number of MLAs can straightaway move a petition under Paragraph 3 or 4 or both, as the case may be, for seeking a declaration that they have not incurred any disqualification under paragraph 2(1), {in this case Paragraph 2(1)(a)} or they could claim recognition of their splinter group or the merger of their political party even under paragraph 3 or 4 though no question of their disqualification on their aforesaid act of forming a splinter group or merger of their political party is raised or arises?

(3) Whether the lodging of bare claim of split in the original political party with no proof at all would be sufficient compliance of Paragraph 3 of the Tenth Schedule?

(4) Whether the ''split'' in the original political party is a must and has to be proved when a member or any number of members of the House, seek to avoid disqualification and a finding on such ''split'' is necessary to be given by the Speaker?

(5) Whether in the absence of their recognition, as aforesaid, by the Speaker, the splinter group which has been constituted as a result of split in the original political party giving rise to a faction and representing the said faction in the Legislature Party would make the status of these MLAs ''fluid'' and their participation in the House proceedings would in anyway be restricted or adversely affected?

(6) Whether the Speaker can take cognizance of any application/request made either under Paragraph 3 or 4 of the Tenth Schedule under any other provision of the Schedule except Paragraph 6(1).

(7) Whether the date of disqualification under Paragraph 2(1)(a) would be the date of event or happening or it would come into effect from the date of declaration as given by the Speaker under paragraph 6(1); the effect of the date of disqualification coming into effect in a case where the benefit of Paragraphs 3 or 4 or both is being claimed is also a question to be considered and its effect in the present proceedings undertaken by the Speaker?

(8) Whether the disqualification petitions, could have been dismissed, on hearing of the preliminary objection, by holding that in view of the recognition given on 6.9.03 to the splinter group, there was no justification or occasion to hear those petitions on leading evidence; and whether at the same time the Speaker could have recorded a finding that these 13 MLAs were not disqualified again without affording any opportunity to the petitioner to put his case on the disqualification petitions?

24. The provisions of the Tenth Schedule have to be interpreted keeping in mind the avowed object and the purpose for which it has been enacted, namely, to curb the practice of dishonest dissensions and defections and to keep a check upon the MLAs to go against the wishes of their original political party either by leaving the party voluntarily or by disobeying the whip issued by the party, as the case may be. The provisions also cast an obligatory duty upon the Court to see that the MLAs who have left their original political party voluntarily are protected or, in other words, saved from being disqualified in terms of the provisions of Paragraphs 3 and 4 of the Tenth Schedule. In making such an enquiry, the Court would be guided by the well known principles of judicial review in respect of the order passed by the Speaker, as held in the case of Kihoto Hollohan, defining the scope of judicial review under Article 226 of the Constitution in respect of an order passed by the Speaker under Paragraph 6 confining it to the questions of jurisdictional errors only viz. infirmities based on violation of constitutional mandate, malafides and non compliance with rules of natural justice and perversity.

25. A look at the Tenth Schedule would reveal that it has the heading ‘Provisions as to disqualification on ground of defection.’ Paragraph 1 defines `legislature party'' in subclause (b) and the `original political party'' in subclause(c). Paragraph 2 is the `disqualification on ground of defection'' which says that subject to the provisions of paragraphs 3,4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House if he has voluntarily given up his membership of such political party. There is no dispute that BSP was the original political party of 37 MLAs and they had been elected as member of the House having been set up as candidate for the election and, therefore, in view of the Explanation (a) attached to the aforesaid provision, they will be deemed to belong to political party aforesaid. Since there is no case of applicability of the provisions of Paragraph 2(1)(b), therefore, the same is not being referred to.

26. Paragraph 3 has the subheading ''Disqualification on ground of defection not to apply in case of split'' and reads as under:

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

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

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

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

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

27. Likewise Paragraph 4 says that disqualification on ground of defection not to apply in case of merger and reads as under:

‘Disqualification on ground of defection not to apply in case of merger (1) A member of a House shall not be disqualified under subparagraph (1) of paragraph 2 where his original political party merges with another political party and he claims that he and any other members of his original political party

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

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

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

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

28. Paragraph 6 confers power upon the Speaker to decide the question of disqualification, as given in paragraph 6(1). Paragraph 8 prescribes the power to make rules by the Speaker for giving effect to the provisions of this Schedule under which the Rules known as The Members of Uttar Pradesh Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1987 have been framed.

29. The rules of natural justice cannot be put in a straitjacket formula nor they can be universally applied in all cases and in all situations but their applicability and the extent would depend upon the facts and circumstances of each individual case and also keeping in mind the nature of proceedings and the source from which they arise. The Supreme Court in the case of Brundaban Nayak v. Election Commission of India and others, AIR 1965 SC 1892 observed that it is of utmost importance that the complaints under Article 192(1) must be disposed of as expeditiously as possible. A catena of decisions have been cited to reinforce the aforesaid principle, which stands established beyond doubt and, therefore, there is no need to refer to such cases. However, reference can be made to the case of Kihoto Hollohan (supra) wherein the Supreme Court held that inspite of the finality attached, such decision is subject to the judicial review on the ground of non compliance of principles of natural justice but while applying the principles of natural justice, these principles cannot be put in straitjacket.

30. The Speaker''s order dated 6.9.03 as well as 8.9.03 is being challenged on the plea of violation of principles of natural justice, besides being malafide and violative of constitutional mandate. The order for being vitiated for violation of principles of natural justice would require that there has been such violation at some stage of proceedings which has caused some prejudice or possible prejudice, which, if afforded an opportunity might have or would have changed the fate of the order, unless it is a case of affording no opportunity at all, before passing the order. The theory, of the orders being held to be bad by mere show of violation of principles of natural justice in the proceedings cannot be said to be any more surviving in view of the decision rendered in the case of Managing Director, ECIL, Hyderabad and others v. B. Karunakar and others (1993) 4 SCC 727 and State Bank of Patiala and others v. S. K. Sharma, (1996) 3 SCC 364 wherein the Supreme Court held that the approach

and test adopted in B. Karunakar case should govern all cases where the complaint is not that there was no hearing, no notice, no opportunity and no hearing, but one of not affording a proper hearing (i.e. adequate or a full hearing) or violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice.

The Court further observed:

"The principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between" no notice4/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin). It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression (Calvin v. Carr). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer''s report (Managing Director, ECIL v. B. Karunakar) or without affording him a due opportunity of crossexamining a witness (K.L. Tripathi) it would be a case falling in the latter category violation of a facet of the said rule of natural justice in which case, the validity of the order has to be tested on the touchstone of prejudice."

31. In the case of Ganesh Santa Ram Sirur v. State Bank of India and another, (2005) 1 SCC 13, the same view has been reaffirmed, with the observation that what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before the court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

32. In the case of A.K.Kraipak and others v. Union of India and others, (1969) 2 SCC 262 the Supreme Court laid down that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it.

33. In M.C.Mehta v.Union of India, (1999) 6 SCC 237 the Supreme Court observed that there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example, where no prejudice is caused to the person concerned, interference under Article 226 is not necessary.

34. In the case of Aligarh Muslim University v. Mansoor Ali Khan, (2000) 7 SCC 529, the Supreme Court after referring to the earlier decisions in K.L.Tripathi v. State Bank of India, AIR 1984 SC 273 and M.C.Mehta v.Union of India (supra) observed:

"Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala and others v. S. K. Sharma (supra). In that case the principle of `prejudice'' has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P. (1996) 5 SCC 460".

35. The test, therefore, would be that whether the violation to observe the principle of natural justice is a violation of not following any provision of the rule or the enactment or in the absence of any such provision being provided under the rules, namely, Tenth Schedule itself, any such prejudice had occasioned, it would vitiate the order merely on the said breach of natural justice or it would command the petitioner to establish atleast an element of prejudice caused to him.

36. It is the admitted case of both the parties that the disqualification petitions with respect to 13 MLAs including Rajendra Singh Rana, who is said to be the leader of the group were filed on 4.9.03. The Speaker did not issue any notice on those petitions and felt satisfied by keeping those applications with him. The notices on these disqualification petition, for the first time were issued on 18.9.03 i.e. much after the Speaker had not only entertained but decided the applications of the 37 MLAs, who claimed the protection of Paragraphs 3 and 4 of the Tenth Schedule for avoiding disqualification under Paragraph 2(1)(a) on 6.9.03 and to be more explicit when the motion of confidence got through in favour of Sri Mulayam Singh Yadav on 8.9.03.

37. It was argued during the course of hearing that the petitioner was not even supplied a copy of the two applications dated 6.9.03 and that without affording any opportunity of filing a reply or leading evidence, he was merely afforded opportunity of oral hearing, on the spot, in an unholy haste, as the application itself was moved at 5.45 p.m. and the matter was finally decided by 8''O Clock or so in the night. The submission, therefore, is that the Speaker not only acted in uncalled for haste with a view to give advantage in the shape of immediate protection to the 37 defaulting MLAs from being subjected to disqualification which is established by the fact, that all 40 MLAs (37+3) were soon thereafter bestowed the office of Minister, and in a zeal to do so, he not only denied opportunity to file reply and lead evidence to rebut the claim of the respondents but also committed judicial irregularity to the grossest extent when he proceeded to hear the applications under Paragraph 3 and 4 and did not issue even notice upon the pending disqualification petitions, though moved earlier in point of time, what to say of deciding them. The aforesaid order of the Speaker was completely in derogation to the provisions of Tenth Schedule, which violated the constitutional mandate, prescribed therein.

38. Learned Advocate General, Sri Virendra Bhatia, though he did not argue on merits of the orders of the Speaker but was of great assistance in giving information from the records. On the basis of the record, he very fairly stated that the record does not show that copies of the applications dated 6.9.03, namely, one moved claiming benefit of Paragraph 3 of the Tenth Schedule and the other claiming benefit of Paragraph 4 were given to the petitioner. He also informed the Court that the copies of the application moved on 8.9.03 were also not given to the petitioner by means of which 3 more MLAs belonging to Loktantrik Bahujan Dal were allowed to join the Samajwadi Party.

39. Sri Rakesh Dwivedi being conscious of the aforesaid factual position regarding the non supply of the copies of the application moved by the 37 MLA''s to the Speaker, submitted that even assuming that the copy of the applications aforesaid were not given to the petitioner, it would not be a case of total denial of opportunity of hearing and at best it can be a case of insufficient or inadequate hearing said to have been afforded and since no prejudice has caused to the petitioner, it hardly matters, whether the copies of the applications were given or not.

40. The submission proceeds on the assumption that since the petitioner participated in the proceedings and made his defence, which was available to him and which he thought fit, which could have only been done when he had known the contents of the application and, therefore, it cannot be said that the petitioner was not aware about the contents of the applications and, therefore, could not raise a valid defence. The plea of the petitioner that it was not a valid split, as there were only 13 MLAs at the time of split was duly considered by the Speaker and that a group of 37 MLAs was duly identified in front of the petitioner on his own request and, therefore, nothing beyond could have been said by the petitioner even if any further opportunity had been given to him, either with the supply of the copies or for furnishing evidence and since there may not have been any other conclusion in the aforesaid circumstances to which the Speaker could have arrived, it is a case where no prejudice could be shown by the petitioners and, therefore, the order would not stand vitiated on that count.

41. The original political party, sets up a candidate for election and if such a member after being elected to the House, may be individual and may be in accordance with the terms of Paragraph 3 or 4 leave their original political party, it would certainly cause its public image tarnished and such party would be seen with suspicious eye, may be giving an impression that since a large number of MLAs have quit the party, therefore, the party was not true to the policies pronounced by the party or that it was not acting in a bonafide manner for the welfare of the people or in the interest of the State. If such an image of the party is reflected or comes to be reflected by the action of a group of MLAs in the legislature party, the original political party has every right to be heard and afforded reasonable opportunity before the Speaker decides that such a group has not become subject to any disqualification as given

under Paragraph 2(1)(a). Same would be the case when the merger takes place in accordance with Paragraph 4 of the Schedule.

42. The entire Tenth Schedule and the scheme therein, has been framed also with a view to safeguard the interest and image of the original political party, who sends the public representatives on its ticket. Any defection by its members not only causes damage to its reputation in public, which adversely may affect chances of its return in next election, but also makes the authenticity of its policy inside the House, gullible and questionable. Functioning of the House, so far the formation of Government is concerned, may not be disrupted by bulk defections, but the creditworthiness of the original political party both inside and outside the House, would necessarily be doubted. Therefore, while interpreting the provisions of the Schedule, the aforesaid underlined principles cannot be given a gobye.

43. Nonsupply of the copy of the applications on which the entire order has been based was a serious flaw violating the principle of natural justice though it has been pleaded by the Respondents that since this plea has not been raised in the writ petition specifically and it was only during the course of arguments that the plea has been raised and the petitioners having been afforded opportunity of hearing, may be of lesser degree, in which the petitioner did participate without raising any grievance for the non supply of copy therefore, the plea has to be decided on the principle of prejudice being caused to the petitioner.

44. Even assuming that non supply of the copies of the applications are not in itself sufficient in view of the fact that no such grievance was raised by the petitioner to nullify the order on the ground of violation of principle of natural justice, the question still remains as to why the Speaker proceeded with the hearing of these applications without supplying a copy of those applications, particularly, when the petitioner had already entered into caveat and also to test the logic of not issuing notice on disqualification petitions on 4.9.03 itself and entertaining the applications moved by the dissenting MLAs on 6.9.03 and deciding them on that very date without giving even breathing time to the petitioners to submit their reply or to adduce such evidence which they wanted to place in support of their claim that in fact there was no split in the original political party and no meeting was held on 26.8.03 or that on that date only 13 members splitted out and a group of 1/3rd was not formed at all and on such split of 13 MLAs, they approached the Governor also on 27.8.03 requesting the Governor to invite the leader of an opposition party to form the Government which amounts to an overt act of leaving their original political party voluntarily making themselves subject to disqualification under Paragraph 2(1)(a). Also the plea that in view of the disqualification of these 13 MLAs, subsequent addition of the 24 MLAs in the group would not save either of them from the mischief of para 2(1)(a). There is also no explanation on record as to why the notices were issued on disqualification petitions as late as on 18.9.03 and that too after recognising the group of the private respondents and after recognising

their merger with the Samajwadi Party, and why no effort was made by the Speaker, for deciding the petitions for disqualification moved by the 37 MLAs.

45. The Speaker also sidelined the fact that on 2.9.03, the opening day of the session, or even before the group of 37 (13+24) was recognised by the Speaker on 6.9.03, these 13 MLAs were provided seats with the party in power, though rest 24 MLAs sat with the BSP MLAs, which was a strong circumstance, as urged by the petitioner, in support of the plea that on 26.8.03, the group of onethird members was not constituted and even before the said group could be formed, 13 MLAs splitted out, and thus rendered themselves to the disqualification under paragraph 2(1)(a).

46. The applications for disqualification are to be decided expeditiously and without any unreasonable delay, has been repeatedly stated by the courts and, therefore, when the disqualification petitions had reached the Speaker on 4.9.03, there appears to be no justification, at least no such justification has been brought to the fore, for not issuing the notices immediately and keeping the matter pending without taking cognizance thereof.

47. The action of the Speaker postponing the issuance of notice, on the disqualification petitions, after receiving them cannot be supported by any Rules of procedure may be 1987 Rules or otherwise nor under the provisions of the Tenth Schedule. The procedure adopted by the Speaker cannot be said to be in accordance with the spirit of the Constitutional provisions of Tenth Schedule, and appears only to be a pretext for postponing their hearing and adjudication.

48. The Speaker, who was having the responsibility of seeing that the Government functions properly and is not destabilised and who was having full control of the House, ought to have immediately issued notice on the disqualification petitions, and should have proceeded to decide the said petitions, when all the parties were present before him and, particularly when there was also an allegation that not only these 13 MLAs had met the Governor on 27.8.03 but on 2.9.03 they sat with the ruling party (Samajwadi Party) whereas 24 other MLAs of the alleged group of 37 did sit with their original political party, namely, BSP, which showed a circumstance that atleast till 2.9.03 the group was not formed consisting of 1/3rd members of the legislature party and,therefore, those 13 members had incurred disqualification on 27th August, 03 itself, and could not have been added in later splinter group.

49. An argument has been raised by the respondents that assuming that the 13 members had soon after the split in the BSP on 26th August, 03 met the Governor on 27th August, 03 for inviting the leader of the Samajwadi Party to be the Chief Minister, it would not be a case of disqualification at all under Paragraph 2(1)(a) , as there being split in the original political party and 1/3rd members of the legislature party having formed the group, representing the faction arising out of the split, may be at a later point of time than the split within a short span of 8/9 days, therefore,

no defence was available to the petitioner and there being no bar under Para 3 of the Schedule to form such group within a reasonable period of time, looking to the continuity of the process and the reason for split, the action of the Speaker can be adjudged neither as violative of the principle of natural justice nor violative of any constitutional provisions, which has caused any prejudice to the petitioners. It has further been submitted that no malafides can be attributed to the Speaker for adopting the procedure, which he followed.

50. The aforesaid argument raises multiple questions to be determined i.e. whether there was any split in the original political party, though the role of the Speaker in this regard is limited, as he cannot go into the validity of the proceedings of the split and it is sufficient if split is said to have taken place in the original political party but this alone would not be an answer to the argument raised by the petitioner that the split in the original political party is a ''must'' and has to be proved by bringing some material on record and that when a claim of split in the original political party is made by the Members of the Legislative Assembly, the Speaker is under obligation to test the said ''claim''.

51. The plea also raises an issue for determination that whether the spilt in the original political party, formation of the faction arising as a result of such split and constitution of the group in the legislature party representing such a faction are the happenings which have to take place simultaneously or within a course of time, which though not defined, may be taken to be a reasonable time. It also involves a question as to what would be the date of disqualification of the member, if he has incurred the disqualification.

52. Before proceeding to consider the aforesaid pleas, for the limited purpose of making a review of the procedural irregularity which is being tested on the principle of natural justice and violation of the constitutional provisions, it would be apposite to keep hold of the fact that these questions were and are otherwise to be decided by the Speaker, in case the plea of the petitioners succeeds, as this Court would not be substituting its own decision on the facts and happenings in the case but would only confine itself in clarifying the legal position, as it stands under the Tenth Schedule.

53. The plea that a ''claim'' of split having taken place in the original political party is all that is required to be stated by the MLAs who have left the party is being made in the light of the observations made by the Supreme Court in the case of Ravi S. Naik (supra) and in particular placing reliance upon paras 36 and 37, which read as under:

36. As noticed earlier paragraph 2 of the Tenth Schedule provides for disqualification on the ground of defection if the conditions laid down therein are fulfilled and paragraph 3 of the said schedule avoids such disqualification in case of split. Paragraph 3 proceeds on the assumption that but for the applicability of the

said provision the disqualification under paragraph 2 would be attracted. The burden to prove the requirement of paragraph 2 is on the person who claims that a member has incurred the disqualification and the burden to prove the requirements of paragraph 3 is on the member who claims that there has been a split in his original political party and by virtue of said split the disqualification under paragraph 2 is not attracted. In the present case Naik has not disputed that he has given up his membership of his original political party but he has claimed that there has been a split in the said party. The burden, therefore, lay on Naik to prove that the alleged split satisfies the requirements of paragraph 3. The said requirements are:

(i) The member of a House should make a claim that he and other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original party; and

(ii) Such group must consist of not less than onethird of the members of such legislature party.

37. In the present case the first requirement was satisfied because Naik has made such a claim. The only question is whether the second requirement was fulfilled. The total number of members in the legislature party of the MGP (the original political party) was eighteen. In order to fulfil the requirements of paragraph 3 Naik''s group should consist of not less than 6 members of the legislature party of the MGP. Naik has claimed that at the time of split on December 24, 1990 his group consisted of eight members whose signatures are contained in the declaration, a copy of which was filed with the reply dated February 13, 1991.

54. In Ravi Naik''s case on whom the burden lies to prove the ingredients of para 2 and para 3 has been clearly spelt out wherein it has been propounded that the burden to prove the requirement of paragraph 2, namely, for holding a member disqualified lies upon the person who claims that the member has incurred disqualification whereas for avoiding disqualification burden to prove the requirement of paragraph 3 is on the member who claims that there has been a split in the original political party and by virtue of the said split, the disqualification under Paragraph 2 stands avoided. The burden, therefore, was found to be on Naik in the aforesaid case to prove that the alleged split satisfied the requirement of Paragraph 3 and the two requirements have been quoted above.

55. Having said so, in para 38 of the report the Supreme Court did not close the issue of proving the split in the original political party on merely raising a claim, as stated aforesaid, and, therefore, went into the causes which made the Speaker to hold that there was no split. The Speaker had held in that case that the split had not been proved because no intimation of the split had been given to him in accordance with Rules 3 and 4 of the Disqualification Rules. This reason was not found to be sufficient, as their Lordships observed that Rule 3 also comes into play after the split

and the failure on the part of the leader of the group that has been constituted as a result of the split does not mean that there has been no split. The Court, therefore, further held "As to whether there was a split or not has to be determined by the Speaker on the basis of the material placed before him". (Emphasis supplied) In the given facts of the case, the Court found that the question which required consideration was whether as a result of the said group being constituted there was a split in the MGP as contemplated by Paragraph 3 of the Tenth Schedule and since the Speaker had refused to count two MLAs, who were earlier disqualified by him, though their order of disqualification was stayed by the High Court in the writ petition filed by the aforesaid MLAs, they were not counted towards the group so as to make 1/3rd members of the legislature party, was found to be an erroneous decision, as in the presence of the stay order against the disqualification order passed by the Speaker, the Speaker could not have excluded them from being included in the said group, as due reverence should have been shown to the orders passed by the court.

56. When burden lies upon the members, who claim protection of Paragraph 3 to prove the split in the original political party, constitution of the group representing a faction arising out of a split, it becomes necessary that all the three conditions are brought to the notice of the Speaker with relevant facts and the Speaker is bound to record a finding on ''split'' in the original political party.

57. The aforesaid question also came up for consideration before the Bombay High Court in the case of Dr.Wilfred A. De Souza and others v. Shri Tomazinho Cardozo Hon''ble Speaker of the Legislative Assembly and others, (1998) Vol. 100(3) Bom. L.R. 194 and in the case of Ram Bilas Sharma v. The Speaker, Haryana Vidhan Sabha(FB), 195098 SC & F.B.Election cases 46 and also in the case of Mayawati v. Markandeya Chand and others, AIR 1998 SC 3340 and all these cases were considered by the Bombay High Court in Narsingrao Gurunath Patil v.Shri Arun Gurarathi,Speaker and others, 2003 Vol.105(3) Bom.L.R.354 fully keeping in mind the dictum made by the Apex Court, in Ravi Naik''s case. The Bombay High Court adopted the reasoning given by the Division Bench in the case of Dr. Wilfred A. De Souza (supra), wherein the Division Bench had made the following observations:

"Applying the principles of statutory construction, in our view, mere bare claim would not be sufficient, to prima facie prove split resulting in faction/group and that such group consists of not less than one third members of the legislature party. Prima facie proof in support of claim shall have to be adduced before the Speaker. The Speaker has to prima facie satisfy himself that faction/group has arisen as a result of split. It is not at all necessary that it should be a vertical split at all levels or rungs of the political party. It is not for the Speaker to find out the extent or the percentage of the split in the political party. However, when it comes to legislature party, the group claiming representing the faction has to be not less than one third of the members of the legislature party."

58. The same view was taken in the case of Ram Bilas (FB) and the Punjab & Haryana High Court held that a member claiming benefit of Paragraph 3 has to prove prima facie that there has been a split in the original political party and the plea that such proof is not necessary was rejected. On facts, the Bombay High Court found that the split was not proved.

59. In the case of Mayawati v. Markandeya Chand (supra), while making reference to the Constitution Bench, the Chief Justice found that the question regarding the nature and extent of power under Paragraph 3 of the Tenth Schedule have not been answered in Kihoto Hollohan''s case and, therefore, required consideration by the Constitution Bench. However, the two Hon''ble Judges, namely, Justice Thomas and Justice Srinivasan gave conflicting judgment.

60. We are informed that the reference could not be answered on merits, as the petition was dismissed as having become infructuous.

61. The Bombay High Court in the case of Narsingrao Gurunath Patil (supra) considered the judgment of the two Hon''ble Judges, namely, Justice Thomas and Justice Srinivasan and found that although Justice Thomas differed on certain other issues, agreed with the reasoning given by Justice Srinivasan in respect of the requirement of Paragraph 3, namely, "The following are the conditions for satisfying the requirements of the para.

(i) A split in the original political party; (ii) The faction is represented by a group of M.L.As in the House; and (iii) Such group consists not less than onethird of the members of the Legislature party to which they belong. For the purpose of that para all the three conditions must be fulfilled. It is not sufficient if more than 1/3rd members of a legislature party form a separate group and give to itself a different name without there being a split in the original political party. Thus the faction of split in the original political party and the number of members in the ''group'' exceeding 1/3rd of the members of legislature party are the conditions to be proved."

62. In Gurunath''s case, there were two members in Janta Dal(S) Party of which one wrote a letter to the Governor withdrawing the support from the Government and claimed that he has formed a separate group in the Legislative Assembly by leaving the membership of the original political party [Janta Dal (S)] and that he was the only member in the new legislature party. A plea was taken by one of the MLAs of the original political party that there has been no split in the original political party and a disqualification petition was also moved. Initially there was no claim by defecting member of any split having taken place in the original political party but later on in reply to the disqualification petition, such a plea was raised. The Bombay High Court despite the fact that out of the two members, one member of the legislature party had splitted out which certainly was more than 1/3rd strength of the legislature party, refused to hold that the member was not disqualified under the terms of

paragraph 3 after holding that no proof was furnished by the member, namely, Gangadhar Thakkarwad showing the split in the original political party, namely, calling of the meeting, agenda of the meeting, proceedings of the meeting, resolution of the split and any report of the split in Janta Dal(S) in print media and T.V. Channels. The plea that there was no need to have a split in the original political party and there could be ''split'' in the legislature party without it, was also not accepted.

63. In defence, it is being argued that the Speaker was not to go beyond the dictum of the apex court in the Ravi Naik''s case in regard to the proof which is required for taking shelter under Paragraph 3 and that the judgments of the High Courts of Punjab & Haryana and Bombay High Court were of no assistance, who have evolved a vague theory of ''prima facie proof'' which phrase does not find place nor flows from the provision of the Para itself. The submission was to the extent that in case the split in the original political party was to be proved by giving some evidence, then it was to be simply proved and there was no occasion for the courts to dilute it by saying ''prima facie proof''. Also it was urged that the opinion expressed by the two Judges of the Supreme Court in the case of Mayawati v. Markandeya Chand are obviously not binding, as they have not culminated into judgment or final order of the Apex Court and at the same time they are also not persuasive nor can be of any guidance in deciding the issue.

64. Bombay High Court and the Punjab & Haryana High Court in the above referred cases taking note of the provision of Para 3, and after taking into account the dictum of the Apex Court in the Ravi Naik''s case and also the unconflicting views expressed by Justice Thomas and Justice Srinivasan in Mayawati''s case have reached the conclusion that ''bare lodging of claim'' by a member would not be sufficient to hold the ''split'' in original political party, and he has to prima facie prove the split in the original political party. The reason for saying that there should be prima facie proof in support of the claim does not stand excluded even in Ravi Naik''s case where the Supreme Court after laying down the requirements of Para 3, proceeded to hold that whether there was a split or not was to be determined by the Speaker on the basis of the material placed before him. In case their Lordships were of the view that on lodging the claim it was not required at all to place any material in support of the split in the original political party, probably the aforesaid subsequent observation would not have come.

65. The view expressed in Mayawati''s case may not be a binding precedent but the dismissal of the petition as having become infructuous is only an indication of the fact that at the given point of time no relief could have been granted to the parties. The view, therefore, expressed in the aforesaid order can be of valuable assistance for interpreting the meaning, scope and import of paragraph 3 on first principles.

66. The Apex Court in the case of Ravi Naik has categorically held that the burden to prove that the member, who has left the original political party voluntarily, cannot

be subjected to disqualification or would successfully avoid disqualification lies upon the member who claims the benefit of paragraph 3. After pronouncing the said theory of burden of proof upon the respective persons who either allege disqualification of a particular member or members or who intend to avoid disqualification under paragraph 3, the Apex Court apparently not only laid down the requirement but also placed the burden of such a proof on the person who claims its benefit, and at the same time also observed that whether there was split or not was to be determined by the Speaker on the basis of the material placed before him.

67. A conjoint reading of the principles laid down by the Apex Court establishes beyond doubt that the Speaker has to determine the question of split in the original political party and for that matter the material which is brought on record has to be seen. Bare putting a claim does not in its absoluteness absolve the obligation of the Speaker to enter into the question of split. It having been said that the burden of proof lies upon a person who claims the benefit of paragraph 3, it can well be derived that proof is required to be given by such member, which would discharge his burden to prove the split in the original political party, which, of course, cannot be said to be proved by merely lodging a claim. When the Supreme Court says that the burden lies upon the member to prove the requirement of paragraph 3 it inherently takes into consideration all three steps specifically incorporated therein, which are necessary for avoiding disqualification. It would be a matter of facts in each case as to what would be the nature or degree of proof which would be sufficient for the Speaker to uphold the claim of split.

68. Paragraph 3 which is more in the nature of defence to a petition for disqualification or to an action which otherwise disqualifies the member, has been cautiously and specifically worded. When a statute and in particular where a Constitutional provision is to be interpreted, each and every word used or which finds place in the enactment has to be given its meaning for which the Parliament has used it and it cannot be made redundant nor it can be ignored. If the words are clear, the plain and simple meaning which are attributed to such words and phraseology used have to be attributed but if there is any ambiguity and if it can be cleared by making harmonious construction or interpretation, the same would be done. Every effort has to be made that no words are left without meaning and there does not arise any conflict so as to negate the meaning of one or the other word(s) unless the words used or the language implied are in direct conflict which cannot be reconciled or the interpretation given to one or the other word would lead to absurdity, the Courts would have little jurisdiction to give a different meaning to the enactment or to the Constitutional provisions. If the intention of the Parliament is sound and clear, the meaning that further the scope and is helpful in achieving the purpose and object of the Act has to be assigned.

69. For finding out the real intention, meaning and purpose of a provision, the intention of the legislature is very significant.

70. In the case of State of Himachal Pradesh and another v. Kailash Chandra Mahajan and others, AIR 1992 SC 1277, the Apex Court observed that the purpose or object of an enactment relates to the mischief to which the enactment is directed and its remedy, legislative intention relates to the legal meaning of the enactment.

71. The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of ''meaning'', i.e. what the words mean and in another aspect it conveys the concept of ''purpose and object or the ''reason of spirit'' pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.(G.P. Singh, Principles of Statutory Interpretation, Sixth Edn. 1996).

72. In the Constitution Bench judgement of the Supreme Court in the case of R.M.D.Chamarbaugwalla and another v. Union of India and another, AIR 1957 SC 628, the Supreme Court, laying down the principle of interpretation observed as under:

"Now, when a question arises as to the interpretation to be put on an enactment, what the Court has to do is to ascertain "the intent of them that make it", and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in this regard of all other materials. "The literal construction then", says Maxwell on Interpretation of Statutes, 10th Edn. p. 19, "has, in general, but prima facie preference. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider, according to Lord Coke: (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy."

73. These principles are well settled and have been applied by the Courts interpreting a statutory or a Constitutional provision.

74. Care has also to be taken while interpreting a provision that if the meaning and intention of the Parliament is clear and unambiguous, due effect should be given to the enactment without making an attempt to fill in the lacuna even if the Court in its own wisdom finds that the constitutional provisions, otherwise could have been more effective and reasonable and not being guided by the hardship, it may create, keeping in mind the well known principles of interpretation, as regards statutes and particularly the constitutional provisions. Without burdening the judgement with any further case law, the action of the Speaker in conducting the proceeding under

Tenth Schedule and the order passed by him has to be judicially scrutinised.

75. Since the term ''split'' has not been defined in the Tenth Schedule nor elsewhere in the Constitution, learned counsel for the respondents raised an argument that looking to the various meanings attributed to the word in the dictionary, it would be reasonable to conclude that there is no particular form, manner or procedure which should be adopted for causing split. He brought into service the meaning of the word ''split'' as given in various dictionaries, namely, to separate or separated into faction (Collins Concise Dictionary). Submission, therefore, is that in the absence of any specific and particular format or ritual to be followed, the split can be inferred by conduct or otherwise irrespective of the fact, whether an agenda has been issued, or a meeting has been called etc., as observed in the case of Gurunath Patil.

76. True, the nature and extent of proof which is required to prove split in the original political party may differ in a given case but there has to be a proof either by documentary evidence or by the conduct, may be in the reports of the newspaper, electronic media or in the like manner. The word ''split'' cannot have a different meaning as against its ordinary meaning which means ''breaking away'' and, therefore, a break up in the original political party is not only a must but has also to be proved by bringing necessary material on the basis of which split is being said to have caused, before the Speaker and moreso, when the original political party specifically refutes and repudiates the factum of split taking place in the original political party, it necessarily requires such a proof, e.g. in this case, ''split'' is said to have been caused in a meeting of the party in which office bearers of the party also participated.

77. Immediately the question arises that if a group of 1/3rd or more members of the legislature party forms a group and leave their original political party, nothing more is required to be proved for laying a claim under paragraph 3 and in such an event the split in the original political party would automatically stand proved, as the members of the legislature party who en bloc leave the original political party would establish, namely, the split in the original political party and a faction which has arisen as a result of the aforesaid split and also the group in the legislature party representing that faction and, therefore, the necessity to prove the split in the original political party by giving any evidence even of prima facie character would not be necessary. The aforesaid facts thus themselves satisfy all the three ingredients. The aforesaid plea has to be tested in the light of the conditions given in paragraph 3 of the Tenth Schedule.

78. Had it been the intention of the aforesaid provision that whenever a group of 1/3rd or more members of the legislature party is formed and they amongst themselves decide to leave their original political party or support some rival party or separate their place of sitting in the House, would be full compliance or in any case, sufficient requirement of paragraph 3, there was no necessity to put in paragraph 3(1), the words ''split in the original political party''. The Parliament being

conscious that 1/3rd members of the legislature party or more combined together if leave their original political party, that would save them from disqualification under paragraph 2(1)(a), the provisions would have been framed in a manner which do not require the necessity of having split in the original political party, if the MLAs are onethird or more of their total strength. For example, it would have been stated that in case 1/3rd or more members of the legislature party form a group by leaving their original political party or if they leave the original political party, then such a defection or floor crossing would save them from disqualification under paragraph 2. Split in the original political party would not have been required to be established or shown if by mere consented decision/action of group of members of the legislature party, may be 1/3rd or more, they acquire a right to choose their own forum or their stand, namely, their ideology, ignoring the wishes and the mandate of their original political party. The members who are elected on a ticket of original political party are supposed to abide by the principles and policies, which their original political party professes and propagates. After being elected as a member of the legislature party, they do not stand cut off from their original political party nor they get any right either to flout or to ignore the manifesto and the programmes and policy decisions or the decisions of the original political party in policy matters concerning the State or the nation of their own free will. So long they remain in the original political party, they are bound to follow its mandate.

79. It is in this light, one has to test the requirement of paragraph 3 wherein the formation of group or constitution of the group of 1/3rd or more members of the legislature party as the group which represents a faction which has arisen out of split in their original political party, means that unless a split in the original political party takes place, the members of the legislative assembly irrespective of their numbers are not free to change their loyalty and to cross the floor. The elected Members (MLAs) have to push forward the ideology and the stand of their original political party, both inside and outside the House. A Member of legislative assembly is not supposed to take a conflicting or different stand in mattes which come for consideration in the House, either in derogation or in contrast to the stand of his original political party.

80. In fact the choice of candidate by the political party, is indicated by the ticket given for contesting the election for sending such public representative, who not only believes in its political philosophy, but shall also plead and pursue the same in the House. This is also in consonance with the principle of public morality in politics for the protection of which the Tenth Schedule has been enacted. The concomitant of the requirement of having a split in the original political party for avoiding disqualification is that unless a split is there, the members elected on the ticket of the said original political party are bound by the wishes of their original political party and the original political party in turn has a right to instruct and guide them in the manner in which they have to be inside the House. Any deviation from such command would make them incur disqualification. Thus the numerical count or the

number of members of the legislature party, who unite together to leave the party and intend to cross the floor would incur disqualification unless and until they prove/show that this group formation has been done on split being taken place in the original political party in which a faction has come into being and they are representing that faction in the group of not less than 1/3rd MLAs.

81. The original political party is also supposed to know the activities of their members in the legislature party and they are not supposed to be taken by surprise that on one fine morning without any intention being disclosed and without there being slightest whisper, they will be losing a group of their MLAs because of an intrigue, which would undoubtedly cause turbulence in their political circles and would lower down the image of their original political party, or may be a cause for the fall of their Government if they are in power. It is for this reason that when there is dissension, a split has to take place in the original political party so that the group so formed may seek protection under paragraph 3. The original political party cannot be kept totally aloof from the activities of its members of the legislature party and their actions and activities inside the House. This is in fact for putting a curb upon the elected members from being swayed by different allurement or may be fear or greed, for joining the other party or for crossing the floor by making a group, which is totally in line with the object and purpose of the Tenth Schedule.

82. This is also evident by the meaning and intention enshrined in paragraph 3 of the Schedule. Split in the original political party is the first and foremost condition for saving the group of onethird members of the legislature party while representing a faction which has arisen as a result of such split. This can be explained in other words by looking to the provisions with another angle. The provision safeguards and avoids disqualification only if there is a group of onethird MLAs representing the faction arising out of the split. In case a split in the original political party takes place and as a result of which a faction arises, but the group of MLAs are less than the required strength of onethird, they would not be saved nor the provision makes any provision for their defence. It is only when the number reaches onethird that such a group stands protected. This means that if there was no rationale or corelation with requirement of split in the original political party with the group of onethird MLAs or more, then the condition of split in the party would have been excluded from being applicable to such a group. But the provision says otherwise. This reassures the view that there has to be split in the original political party for avoiding disqualification under paragraph 3 even by a group of onethird MLAs or more.

83. Paragraph 3 of the Tenth Schedule, which is a Constitutional provision, has to be read in a manner which gives full meaning and effect to the language used, to achieve the purpose for which it has been enacted. The language used and the words put are plain and simple, which have to be given their normal meaning and cannot be given any restrictive or extended interpretation. Mere crossing of floor by

any number of MLAs, may be 1/3rd or more, would not save them from disqualification under paragraph 2 unless all ingredients of paragraph 3 viz. split in the original political party, resulting into the rise of a ''faction'' and constitution of a ''group'' of not less than 1/3rd MLAs, in the legislative party, representing that faction, are established or shown to have happened.

84. The question that whether paragraph 3 and paragraph 4 of the Tenth Schedule are the provisions which only relate to a defence which can be taken by the members, who are charged of disqualification or they themselves are the provisions sufficient to claim a declaration/order from the Speaker by the defecting MLAs by making request that their group be recognised or in other words they do not stand disqualified, is another very important facet, in debate.

85. Lots of argument and circumstances have been placed from both the sides in support of their pleas in this regard. The petitioner''s claim is that paragraph 3 as well as paragraph 4 are only ''defence'' available to a member, who has incurred disqualification under paragraph 2 (1)(a) or (1)(b), whereas the respondents strenuously urged that whether there is a disqualification petition or not or a challenge is made raising a question of disqualification of such member(s) or not, he or such other members have got unquestionable right of approaching the Speaker for having a declaration that they do not stand disqualified by their action and that their group be recognised in the House.

86. It has also been argued by the respondents that paragraphs 3 and 4 are independent provisions, which would come into play the moment events mentioned therein take place whereas paragraph 2 which deals with the disqualification of members is '' subject to the provisions of paragraphs 3,4 and 5 of the Tenth Schedule''. It is, therefore, being pressed that paragraph 2 which relates to disqualification of members is subservient to the provisions of paragraphs 3 and 4 which are of dominant nature and, therefore, if the provision of dominant nature, which is independent in its character, stands fulfilled, the question of subservient provision being looked into or enquired into would be of no consequence and of no avail, once the ingredients of paragraph 3 or 4, as the case may be stand satisfied.

87. For emphasising that paragraph 2 is subservient to paragraphs 3 and 4 as the former is subject to the provisions of latter, reliance has been placed on the case of Printers (Mysore) Ltd. v. M. A. Rasheed and others, (2004) 4 SCC 460.

88. In the case of Printers (Mysore) Ltd. (supra), the question was raised regarding the interpretation of section 38 wherein the expression ''subject to the rules'' was considered and it was held to mean ''according to the rules'', if any. The following cases, which were noticed in the said judgment, have also been placed before us. Reliance has been placed upon paras 19, 20 and 21 wherein the case of Ashoka Leyland v. State of Tamil Nadu, (2004) 3 SCC 1 has been noticed. The case of P.S. Santhappan (Dead) by Lrs. v. Andhra Bank Ltd. and others, 2004 (11) SCC 672, was

also relied for the aforesaid proposition of law.

89. There cannot be any other way of defining the meaning and import of the phrase ''subject to the provisions'' as propounded by the Apex Court that in which circumstance and for what purpose the phrase has been used in a particular enactment, may have a bearing on its construction. It would be a complete misreading of the provisions of paras 2, 3, and 4 if it is interpreted, that if a petition is filed under para 3 or 4, the provisions of para 2 altogether stand excluded from consideration, they being subservient to the dominant provisions of paras 3 and 4. Such an interpretation would militate against the scheme of the Tenth Schedule and would in its entirety negate the role and effect of paragraph 2 (disqualification provision) by making it redundant and of no use, which would bring the two provisions viz. of paragraph 2 on one side and paragraphs 3 and 4 on the other side in direct conflict making the either provision otiose and unreasonable.

90. The plain and simple meaning which stands attributed to the aforesaid provision is that paras 3 and 4, would do away the disqualification or in other words, they will avoid the disqualification, which otherwise the member would incur under paragraph 2. It requires no argument that either it is a matter of disqualification petition moved by any person before the Speaker in which a defence of paragraph 3 or 4 can be taken or even assuming that in the absence of any disqualification petition, the break away group itself moves a petition claiming protection of paragraph 3 or 4 or in third contingency, which may arise because of the conduct of the group of MLAs inside the House which may subject them to disqualification, the Speaker of his own i.e. suo motu can take cognizance of such an event and proceed to decide as to whether such group would stand disqualified in view of paragraph 2 or it stands protected because of the provisions of paragraphs 3 or 4, as the case may be. The Speaker also on information being received under Rule 3 of the 1987 Rules about the formation of a new legislature party (group) can himself require the group or its leader to show and establish that they are not disqualified under paragraph 2, for which also ingredients of paragraph 3 had to be proved. In either of the aforesaid contingencies or events, it is inherent that the Speaker while considering the safeguards under paragraph 3 or 4, which would save the member from being disqualified would require a finding necessarily on the issue of disqualification. What the Speaker in substance would hold is that these members or such members do not stand disqualified because of paragraph 3 or 4.

91. ''Subject to the provisions of paragraphs 3, 4 and 5'' a phrase used in paragraph 2(1) would mean that had the members not being entitled or not being successful in establishing their right of formation of a group or merger in the manner prescribed under the aforesaid provisions themselves, they would have stood disqualified.

92. In this scheme of the aforesaid paragraphs, the question of disqualification of a member and his defence that disqualification would not apply for the reason given above would go side by side and it is a different matter that if the Speaker comes to

the conclusion that the conditions having been fulfilled, as given in paragraphs 3 or 4, he may pronounce that the disqualification does not attach to them, and dismiss the disqualification petitions.

93. It further flows from the scheme of the Tenth Schedule that the Speaker exercises power only under paragraph 6(1) or so to say, can exercise his powers under the aforesaid paragraph. Paragraph 6(1) postulates of only one situation that if any question arises as to whether a member of the House is subject to disqualification, the question shall be referred for the decision of the Chairman, or, as the case may, the Speaker of the House and his decision would be final. The occasion to decide the aforesaid question may arise in any one or the other way, in the circumstances narrated in the foregoing paras.

94. It, therefore, can be interpreted that the question before the Speaker can arise for determination as to whether a member of the House has become subject to disqualification under the Tenth Schedule. While dealing with this question, the Speaker shall see that but for the provisions of paragraphs 3 and 4, a member would have to be declared disqualified but if he is entitled to the protection of the aforesaid paragraphs, he be not treated disqualified. If no disqualification can be attached to a member otherwise, he would not stand disqualified under paragraph 2(1)(a) whether such a member moves any petition under paragraph 3 or 4 or gets a declaration to that effect by the Speaker, or not, as in the absence of any disqualification being incurred under paragraph 2, the question of consideration of disqualification or its avoidance under the Tenth Schedule would never arise. In fact, as per the provisions aforesaid, the legal position would be that while determining the disqualification or a defence under paragraphs 3 and 4, as the case may be, both the provisions have to be kept in mind and enquired into by the Speaker. Of course, since the provisions of paragraph 2 are subject to the provisions of paragraphs 3 and 4, in case of establishing the conditions of paragraphs 3 and 4, the fact of disqualification if otherwise it was a disqualification under paragraph 2 would have no place to stand and it would be ousted from being attached to such a member.

95. In support of the aforesaid argument, it has been vehemently urged that as soon as atleast 1/3rd members of the legislature party leave their original political party as a result of split and represent the faction which has arisen out of that split, their position becomes fluid in the House and unless their group is recognised by the Speaker, they would not be in a position to participate in the House proceedings and they would also not be in a position to intimate the Speaker as to who would be their leader in the House and all consequential actions which otherwise are to be taken by the leader. It is for the smooth functioning of the House in which the newly formed group may have its own seating arrangement and its own leader, the necessity of recognition being granted to such group is inherent in the House proceedings for which the Speaker is the only competent authority and, therefore,

paragraphs 3 and 4 do bestow power upon the Speaker to recognise the splinter group even without considering the plea of their disqualification, either raised or not.

96. It has further been urged that while dealing with the petition under paragraphs 3 and 4 of the Tenth Schedule, the Speaker is not exercising its powers under paragraph 6(1) but by virtue of his authority to recognise such a group, he has power to proceed under these two provisions independently of any other provision under the Tenth Schedule. Recourse was also taken to the 1987 Rules in this regard, which would be dealt with after a short while.

97. It is no gainsaying that the Speaker has the responsibility of smooth functioning of the House and consequently he has full powers to do under the legal framework whatever is desired for such running of the House. This also casts responsibility upon the Speaker to see that the government is not destabilised and defections are not protected in case the defectors have incurred any disqualification and also whether such disqualification stands avoided.

98. These are the broad features of the Speaker''s functioning, relevant for the purposes of the case and, therefore, the Court cannot be oblivious of the aforesaid requirement. In regard to the power of the Speaker to act, proceed and take a decision under any of the provisions of the Tenth Schedule or for the purpose of Tenth Schedule, paragraph 6(1) is the only provision which confers power upon the Speaker, to act under Tenth Schedule.

99. Sri Rakesh Dwivedi, learned counsel for the respondents, has not been able to indicate any other provision except paragraph 6 (1) under the Tenth Schedule under which the Speaker can either take cognizance of any complaint of disqualification or of a claim made under paragraph 3 or 4. It would be too speculative and beyond the legislative intent of the Tenth Schedule to accept the plea that paragraph 3 and 4 both inherently and of their own give independent powers to the Speaker to make a declaration in favour of the MLAs, who have left their original political party voluntarily recognising their group or merger, apart from the power conferred under paragraph 6(1).

100. Paragraphs 3 and 4, both are the provisions, which say that disqualification on ground of defection not to apply in the cases of split and merger respectively. What the Speaker can do under the aforesaid provisions is that he can hold that MLAs do not stand disqualified. The aforesaid two clauses, nowhere either speak of the recognition being granted to the group or to the merger by the Speaker by giving declaration to that effect nor it has been stated that an application under paragraph 3 or 4 would be moved before the Speaker, nor such a provision exists even under 1987 Rules.

101. The Rules of 1987 may be directory in nature and may not give cause of judicial intervention in an order passed by the Speaker in breach of the said Rules, not being

Constitutional enactment or mandate but for the limited purpose to find out the real scope of the powers of the Speaker under paragraphs 2, 3 and 4 of the Tenth Schedule, reference can also be made to the provisions of Rule 9 of the 1987 Rules, which lays down as to what orders can be passed by the Speaker on considering the applications for disqualification.

Rule 9 lays down as under:

"9. (1) At the conclusion of the consideration of the petition, the Speaker, or, as the case may be; the member elected under the proviso to subparagraph (1) of paragraph 6 of the Tenth Schedule shall by order in writing:

(a) dismiss the petition, or

(b) declare that the member in relation to whom the petition has been made has become subject to disqualification under the Tenth Schedule, and cause copies of the order to be delivered or forwarded to the petitioner the member in relation to whom the petition has been made and to the leader of the legislative party, if any, concerned.

(2) Every decision declaring a member to have become subject to disqualification under the Tenth Schedule shall be reported to the House forthwith if the House is in session and if the House is not in session, immediately after the House reassembles.

(3) Every decision referred to in subrule (1) shall be published in the Bulletin and notified in the Official Gazette and copies of such decision shall be forwarded by the Secretary to the Election Commission of India and the State Government."

102. This is in consonance with the provisions of the Tenth Schedule, which are provisions as to disqualification on grounds of defection. In essence what is to be seen in the Tenth Schedule is as to whether a member has incurred any disqualification on grounds mentioned under paragraph 2 and if the act of a member makes him subject to disqualification, he can still avoid disqualification by taking recourse to the provisions of paragraph 3 or 4 or both of them, as the case may be. The scheme of Tenth Schedule does not in specific terms or even impliedly envisage for seeking any declaration by those who have crossed the floor but, of course, in a petition for disqualification moved by any person a plea can be raised by them, taking recourse to the aforesaid provisions. In case such a plea is taken, it presupposes that but for the said plea(s), the member stands disqualified under either of the provisions of paragraph 2. Paragraph 2, namely, disqualification of a member and paragraphs 3 and 4 cannot be wholly separated from each other as unless there is disqualification, there cannot be any question of avoiding the disqualification. The disqualification would not come in the way of the member, if he establishes his claim either under paragraph 3 or paragraph 4. The Rules do not provide any mechanism or procedure for moving a declaratory petition, seeking recognition of the group under either paragraph 3 or paragraph 4.

103. Tenth Schedule basically is a Constitutional provision laying down the disqualification which an MLA would incur either by leaving his original political party voluntarily or by going against the whip by casting the vote or by abstaining from casting the vote. The purpose of the provision is to create a deterrent for the MLAs from being disloyal to their party for some instant or ulterior gains and not to pollute the democratic polity. While providing for disqualification, it also gives defence or protective umbrella to a group of MLAs if they can avoid their disqualification by following the conditions enumerated in paragraphs 3 or 4 of the Schedule. The object and purpose of the Tenth Schedule is to curb the menace of defection and put a check upon unprincipled and unhealthy alliances, which has nothing much to do with the constitutional philosophy of formation of the Government except that in a case of honest dissension which is reflected by the number of MLAs, who defect, the role of such MLAs in the formation of the Government may be of relevance but if they incur disqualification, they cannot stand protected because they bonafide intended to protect or form the Government by giving their assistance in formation so as to avoid midterm poll or imposition of the President rule.

104. The theory of ''fluid state'' of the splinter group in the House unless recognised by the Speaker does not appear to be in conformity with the practice and procedure in the House with respect to the seating arrangement being made by the Speaker in respect of a political party, namely, the new group or in the matter of choosing their leader in the House, as defined in Rule 2 sub clause (f).

105. The plea has to be considered keeping in mind the two aspects, namely, whether the claim of forming a group because of the split in the original political party is being disputed by any person including the original political party and if not, their status in the House. In a case where a group is said to have been formed because of the split in the original political party representing the faction arising out of such split and no person takes exception to this claim, mere intimation of the said fact and the name of the leader of the group to the Speaker under Rule 3 may be sufficient compliance and requirement for the purpose, even though the Speaker for satisfying himself may require the group or its leader to establish the split and the necessary requirement for the formation of the group and thereby to show cause against their disqualification arising under paragraph 2.

106. However, in case, the split in the original political party, the formation of the faction and constitution of the group, particularly of the required strength, are disputed by any person including the original political party or a disqualification petition is moved against the members of such group, the Speaker would have to determine the aforesaid question in accordance with the Scheme of the Tenth Schedule.

107. But mere participation in the proceedings of the House by forming a group on the ground of alleged split and choosing their leader would not in any way protect

such member(s), if they have incurred any disqualification under paragraph 2(1)(a) or (1)(b).

108. Rule 3 of the 1987 Rules has been pressed into service to buttress the aforesaid submission that the leader of the each legislature party has to submit within 30 days from the date of first meeting of the House certain particulars to the Speaker, as given in subclauses (a)(b)(c) and (d), wherein subclause (d) provides for furnishing of a copy of the constitution and the rules (by whatever name called) of such legislature party and of the political party to which to which its members are affiliated. This period of thirty days starts in case where the legislature party is formed after the first meeting of the House from the date of its formation, which period can be extended by the Speaker on sufficient cause, and in the absence of such recognition, this requirement of Rules would not be fulfilled.

109. Rules of 1987 are not the Constitutional mandate nor they can be raised to the pedestal of Constitutional provisions, as declared by the Apex Court, when they are breached in the matter of consideration of disqualification or its defence, which questions are to be considered in the light of the Constitutional provisions, namely, the Tenth Schedule. It has been found in Ravi Naik''s case that the breach of the Rules or not following the Rules of 1987, namely, intimating the split to the Speaker within a given time or like matters would not be conclusive to hold that either the split has not taken place or the same would be bad for want of information being given to the Speaker within a given time. Thus for all proceedings and purpose, in the House a newly formed legislature party, which has been formed after the date of first sitting of the House, has a right to choose its own leader of the party and to inform the said fact to the Speaker who would discharge functions of the leader of the party in the House. Under these Rules, there is no provision so as to require the Speaker to give any recognition to such newly formed legislature party but such legislature party, from the date it comes into existence, has an independent identity against its original political party and all other parties unless it merges with any other political party.

110. Therefore, so far as the status of the newly formed legislature party is concerned, in regard to the choosing of the leader and its participation in the House, there cannot be any doubt about its existence but it would not mean that if they have incurred disqualification under paragraph 2, that would stand wiped out. If an MLA shows extraordinary courage and takes risk of incurring disqualification, he cannot be stopped from doing so but he cannot save himself from the consequences of such utterly unwise bravery. An MLA honestly feeling suffocated in his original political party, may resign without any expectation of getting any office by joining any other party but those who leave the party voluntarily under the pretence of strengthening the Government to be formed by a rival party but are desirous of enjoying the privileges and honour of the Ministerial berths and other high offices have to wait and see that they proceed with their goal in a calculated

manner as per scheme of the Tenth Schedule so as to avoid disqualification.

111. The provisions of the Tenth Schedule or the Rules of 1987 nor any other provision of the Constitution has been read before us to reinforce the submission that unless the recognition is given to the splinter group, their position would be fluid and would not be allowed to participate in the proceedings of the House. It is a different issue that unless such a group assures the political party to which it intends to lend support that they would not be declared disqualified, the party in whose favour they leave their original party, may not reward them by giving prestigious offices or posts and for that matter an immediate declaration to that effect be needed. But this eagerness to show that disqualification stands wiped of in terms of paragraph 3 or 4, as the case may be, has to be taken as a propelling force for getting the disqualification petitions decided, if moved, instead of seeking a ''recognition'' of their group under the provisions of Tenth Schedule. However, in the absence of any such recognition being given by the Speaker to the newly formed group, its members would not be divested of their right to choose their leader.

112. The incurring of disqualification under any of the provisions of paragraph 2 and avoiding the said disqualification by taking recourse to paragraph 3 or 4, as the case may be, are such issues which would not stand diluted or wiped of, by the subsequent action of the members of the group, but their fate would depend upon the decision of the disqualification petitions.

113. In the case of Rameshwar Prasad and others v. Union of India and another, (2006) 2 SCC 1, the plea that there was a possibility of incurring disqualification under the Tenth Schedule if the MLAs belonging to LJP Party had supported the claim of Nitish Kumar to form the Government was not accepted by the Apex Court saying that it was wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belonged. The intricate question as to whether the case would fall within the permissible category of merger or not, could not be taken into consideration. Assuming that it did not fall in the permissible area of merger and the MLAs would run the risk of disqualification, it is for the MLAs or the appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent the staking of the claim by recommending dissolution.

114. The disqualification petition thus would decide the fate of the MLAs.

115. Further an MLA incurs disqualification if he votes against the mandate of original political party or abstains from voting, but if a member intends to do so, he has every right to do so. The Speaker cannot stop him to cast his vote nor his vote would be invalid, but the effect of such disobedience would be disqualification of the member subject to the same being condoned by his political party.

116. It is therefore, obvious that a member may incur disqualification under paragraph 2(1) (a) or (b) by his conduct or action but his action cannot be stopped. It is a different matter that he would stand disqualified from the date when he committed any one of the acts otherwise prohibited under the Tenth Schedule.

117. The orders passed by the Speaker impugned in the writ petition and the manner in which the Speaker proceeded in passing the aforesaid orders and the procedure adopted are thus liable to be decided on the aforesaid principle emanating from the Tenth Schedule itself.

118. The next question which has been argued with full zeal from both the sides is that whether disqualification as given paragraph 2(1)(a) is self inflicting or, in other words, automatic on the date of the event itself or on the date of happening of the event or unless the matter is decided and the Speaker declares him disqualified, he would not be treated as disqualified nor the disqualification would be deemed to have occurred nor he will become subject to disqualification.

119. The Apex Court in the case of Mahachand Prasad Singh (Dr) v. Chairman, Bihar Legislative Council and others, (2004) 8 SCC 747 had an occasion to consider that the petitioner, who was elected as a member of the Bihar Legislative Council (MLC) from Tirhut Graduate Constituency as a candidate of Indian National Congress, when contested the election of 14th Lok Sabha in March, 04 from Maharajganj constituency as independent candidate has incurred disqualification under paragraph 2(1)(a) of the Schedule, on a petition being moved by a member of the Bihar Legislative Council to the Chairman attributing the said disqualification to the said member. The Supreme Court after looking to the historical background in which Tenth Schedule was added to the Constitution including the dictum of the Kihoto Hollohan''s case considered the relevant provisions of the Tenth Schedule of the Constitution including paragraphs 1, 2 and 6.

120. The Supreme Court observed that paragraph 2 of the Tenth Schedule lays down the contingencies under which a member of the House belonging to any political party shall be disqualified for being a member of the House and they are enumerated in subparas (1)(2) and (3). Subpara (2) deals with a situation where a member of the House elected as an independent candidate joins any political party after such election and subpara (3) deals with a situation where a nominated member of the House joins any political party after the expiry of six months from the date on which he takes a seat. Subpara (1) deals with a situation where a member of the House belonging to any political party voluntarily gives up his membership of such political party. It also deals with a with a situation where he votes or abstains from voting in the House, contrary to any direction issued by the political party to which he belongs, without obtaining prior permission of such political party and such voting or abstention has not been condoned by such political party within fifteen days from the said voting or abstention.

121. The Apex Court further held as under:

"The scrutiny of the provisions of subpara (2) would show that a member of a House belonging to any political party becomes disqualified for being a member of the House if he does some positive act which may be either voluntarily giving up his membership of the political party to which he belongs or voting or abstention from voting contrary to any direction issued by the political party to which he belongs and in the case of an independent or nominated member, on his joining a political party."

122. The Court further observed that on a plain language of Paragraph 2, the disqualification comes into force or becomes effective on the happening of the event. Paragraph 4 is in the nature of an exception to Paragraph 2 and provides for certain contingencies when the rule of disqualification will not apply in the case of merger of political parties.

The Supreme Court also observed as under:

"Paragraph 6 says that where any question arises as to whether a member of the House has become subject to disqualification under the Schedule, the same shall be referred for the decision of the Chairman or, as the case may be, the Speaker of the House and his decision shall be final. Therefore, the final authority to take a decision on the question of disqualification of a member of the House vests with the Chairman or the Speaker of the House. It is to be noted that the Tenth Schedule does not confer any discretion on the Chairman or Speaker of the House. Their role is only in the domain of ascertaining the relevant facts. Once the facts gathered or placed show that a member of the House has done any such act which comes within the purview of subparagraph (1), (2) or (3) of Paragraph 2 of the Tenth Schedule, the disqualification will apply and the Chairman or the Speaker of the House will have to make a decision to that effect''.

123. The point of time from which the disqualification would be effective or would come into play is the date on which the event takes place. This means that if a member of the legislature party leaves his original political party voluntarily on a particular date then he would incur disqualification from that very date and if such a question is referred to the Speaker for determination, he would have no discretion but to ascertain the relevant facts and pronounce that the member had become disqualified. However, in case the Speaker finds that the member is entitled for protection of paragraphs 3 or 4, he would pronounce as such.

124. Sri Rakesh Dwivedi has made an attempt to distinguish the aforesaid case on the ground that firstly it was not a case under paragraph 3 of the Tenth Schedule and was a case under paragraph 4 in which, nature and degree of enquiry to be made by the Speaker differs. Further since the date from which a member becomes disqualified was not directly in issue, therefore, observations made by the Apex Court are neither determination of an issue arising between the parties nor even an

obiter, as no reasons have been given for such an observation.

125. The Supreme Court was considering the question of disqualification in paragraph 2 of the Tenth Schedule and, of course, a case under paragraph 4 of the Schedule also. The date of incurring disqualification or member becoming subject to disqualification cannot be said to be not in issue at all and in particular when the Court was examining the Scheme of Tenth Schedule including paragraph 2. The scope and the nature of enquiry in a case where ingredients of para 3 are put into service as against the case where ingredients of paragraph 4 are placed, may require different degrees of enquiry but the nature of enquiry would not at all be relevant for the purpose of determining the date of disqualification of a member. The disqualification in either case where paragraph 3 or 4, are sought to be attracted still has to be judged under the provisions of paragraph 2, which is the only provision for disqualification. In case his defence falls, it would be the date of happening of the event and not any subsequent date and the phrase used in para 2(1)(a) that the member''shall be disqualified'' is only an answer to the question which is raised before the Speaker under paragraph 6(1) in which he exercises his jurisdiction as a Tribunal but he would not be having any discretion to change the date of disqualification to any other date than the date of the happening of the event nor one can say that it is the date on which the Speaker passes the order of disqualification to be the date of incurring disqualification. In essence the order passed by the Speaker is no more than a formal order of the disqualification of the member of the House to which he had become subject to on the date he left his original political party voluntarily. This will also be a appropriate harmonious construction of the ambit of paragraph 2 and paragraph 6(1). Any other meaning would negate the plain and clear language and intention of paragraph 2.

126. The alternative plea of the respondents is that Ravi Naik''s case dealt with a situation where not only the disqualification orders passed in respect of the two MLAs were stayed in the writ petition filed by them but also the fact that when their petitions stood dismissed finally by the High Court, the Supreme Court while upholding their disqualification in the appeal of Ravi Naik did not record a finding that because of the dismissal of the writ petitions, the disqualification, attached to the aforesaid two MLAs would date back to the happening of the event and,therefore, they could not have been counted for the purpose of knowing the strength of the group.

127. The argument is based on mere assumption, as a reading of the judgment in Ravi Naik''s case, it makes abundantly clear that the question as to from what date the disqualification would become operative was neither an issue nor was at all considered by the Court.

128. Drawing inference from the facts of a case on a point in which no finding has been recorded nor even any observation has been made may not be a safe methodology, while interpreting the statutory enactments and more so, the

Constitutional provisions. Ravi Naik was a case where on the date of the passing of the order by the Speaker, the disqualification order of the two MLAs was in abeyance by virtue of the interim order of stay passed in the writ petition filed by them and, therefore, while judging the validity of the aforesaid order, the Supreme Court unequivocally observed that the interim order passed by the High Court ought to have been given due respect. A judgment of the apex court would be a binding precedent in respect of the findings recorded, decision given and the observation made, even if they are obiter but if neither there is any obiter nor there is any observation nor the issue was considered and decided, if a question arises which did not fall within the consideration of the Apex Court, it has to be considered in the light of the statute or the constitutional provisions under which the matter is to be considered.

129. ‘Nevertheless it is a real distinction which will best be appreciated by remembering that, when interpreting a statute, the sole function of the Court is to apply to the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not covered by the previous decisions, the Courts must be governed by the statute and not by the words of the judges. Each case must be brought back to the test of the statutory words.If a point should be reached where the words of the judges lead to a different result from the words of the statute, then the statute must prevail: because the judges have no right to supplant the words of the statute and would not wish to do so.’ (See Paisner and others v. Goodrich, 1955(2) All England Reports 330)

130. The point of time from which the disqualification would incur under the conditions enumerated in paragraph 2(1)(a) has been specifically considered and decided for the first time in the case of Mahachand Prasad Singh (supra). In the absence any such question having arisen in Ravi Naik''s case nor having been decided, it cannot be presumed that it is intrinsically ingrained in the said judgment, since the apex court considered the appeal of Ravi Naik at a time when the writ petition filed by the two MLAs stood dismissed.

131. In the light of the aforesaid factual and legal position, the plea of the petitioner that mere counting of heads on 6th September, 03 of the group in question was neither legal nor justified nor was backed by any provision of law nor was the only constitutional requirement to be looked into. This will also require the consideration of the two alternative pleas raised by Sri Rakesh Dwivedi regarding the time of split in the original political party and the formation of the group of the members of legislature party representing the faction arising out of such ''split''.

132. Sri Dwivedi has taken a stand that a split in the original political party took place on 26th August, 03 and that on that very date the group was formed consisting of 37 MLAs and even if it is found that the group of requisite strength could not be

formed on one single day i.e. 26th August, 03 but the same was formed within a reasonable time, namely, 8 or 9 days but before the claim was made before the Speaker, the approach of 13 MLAs to the Governor requesting for inviting the leader of another political party in opposition, Sri Mulayam Singh Yadav, to form the Government would not be a case of disqualification.

133. There is a specific case of the petitioner that on 26th August, 03, no meeting was held of the original political party wherein any split had taken place. For this, apart from the averments made in disqualification petitions filed on 4.9.03, reliance has also been placed upon the averments made in the caveat petition filed on 5.9.03 and also on the rejoinder filed against the written statement filed by the respondents to the disqualification petition coupled with the plea that on the aforesaid date only 13 MLAs can be said to have splitted out to form a group, who by virtue of their conduct incurred disqualification and as such they could not have been included in the alleged other splinter group of 24 MLAs, constituted later in point of time. It has also been urged by the petitioner that in the application dated 6.9.03, a copy of which is reproduced in the order of the Speaker dated 6.9.03 it was nowhere said that the group of 37 MLAs have been formed on 26th August, 03 but as a matter of fact it says that let there be a split and faction be formed.

134. The submission, therefore, is that from the own applications of the respondents it was sufficiently clear that in fact no split in the original political party had taken place on 26th August, 03 and at best it can be taken to be a decision for ''split'' at some later point of time, and even if it is taken as correct that the split had taken place on that date, then only 13 MLAs parted ways, who immediately on the next day went to the Governor. That being so, the disqualification petitions ought to have been decided at the earliest and in any case alongwith the petitions moved by the private respondents. By not doing so, the Speaker committed not only the gross procedural irregularity but he acted absolutely in violation of the principle of natural justice and against the scheme of the Tenth Schedule resulting into irreparable prejudice to the cause of the petitioner, who was representing the original political party.

135. The admitted fact of 13 MLAs sitting with ruling party on 2.9.03, while rest 24 of the alleged same group sat with the BSP MLAs and on objection being raised by the Deputy Leader Sri Jagdish Rai, no indication being given by the group including Rajendra Singh Rana, their leader, about the split in the original political party or the formation of the group of onethird members till then, thus, according to the petitioner, establishes that the entire story set up by the 37 MLAs was a total farce, and concocted, with no basis, for which even no prima facie proof was furnished before the Speaker, nor could be placed before this Court, despite specific pleas being taken throughout by the petitioner, which establishes beyond doubt that the Speaker wilfully shut his eyes while testing the claim of split and formation of group, which vitiates the orders.

136. Having regard to the case of either side and keeping in mind the provisions of Tenth Schedule and having found that paragraphs 3 and 4 of the Tenth Schedule cannot be taken to be separate and independent to paragraph 2 and the power of the Speaker to decide such a question arises only out of the provisions of paragraph 6(1) and that in case a member of the legislature party, namely, MLA becomes subject to disqualification that disqualification would date back to the date of event, the manner in which the Speaker had proceeded with and the entire decision making process adopted would be a fully relevant consideration for deciding the controversy involved.

137. The Speaker has not given any finding in regard to the ''split'' in the original political party and contented himself merely by saying that a split is a matter which takes place outside the House and it is not necessary for him to record a finding to that effect. While doing so, relying upon the case of Ravi Naik, he has stated that since a claim has been made regarding split in the original political party and there are 37 MLAs present in person duly identified, therefore, no finding is required to be recorded regarding split.

138. This finding is sought to be supported by Sri Rakesh Dwivedi by urging that the group of 37 MLAs which reflected 1/3rd members or more of the legislature party and they being the members of the original political party also was sufficient to infer split in the original political party.

139. The distinction between the original political party and the legislature party and their relevance in the matter of ''split'' has already been discussed separately in the earlier part and, therefore, this plea cannot be accepted. Even otherwise, the Speaker has not recorded any such finding which is being pressed by Sri Dwivedi and only it is an inference which is being sought to be drawn on facts. The Court is not supposed to substitute its own finding or to defend an order by taking into account the probable finding which though not recorded but could have been recorded. The orders are to be scrutinised in the light of the reasoning given therein and cannot be made valid by improving them either by filing affidavits or otherwise. (See Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16 and Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 627).

140. In regard to the factual aspect whether the group of requisite number was formed on 26th itself or it was formed in passage of time, as argued by Sri Dwivedi, the date of disqualification, which a member may incur is of relative significance. The plea of the petitioner is that the requisite group of 37 MLAs was not formed on 26th August, 03 and that there was only a small splinter group of 13 MLAs, who had met the Governor on 27th August, 03 requesting him for inviting the leader of an opposition party for being sworn in as Chief Minister. Whether such a conduct of 13 MLAs make them disqualified was to be considered and decided by the Speaker. The plea of the petitioner which he has specifically raised in his disqualification petitions as well as in the caveat petition and also at the time of hearing, howsoever

inadequate the hearing was, could not have been ignored by the Speaker simply on the head count of the MLAs on the date they moved application under paragraph 3 and 4. In case the aforesaid plea raised in the disqualification petitions had been considered and if the Speaker had come to the conclusion that these members had incurred disqualification or have become subject to disqualification, the said disqualification would have related back to the date of event i.e. 27th August, 03 and thereafter they could not have been included in the group of 24 MLAs, who subsequently formed a group to make them 37, and these 24 MLAs also would have stood disqualified, from the date they left the party.

141. It is no more res integra that for leaving the original political party voluntarily, a member of the legislative party has not to formally resign from the party but his voluntary renunciation of the party can be inferred by any overt act including meeting with the Governor for requesting him to invite the leader of opposition to form the Government and to make him the Chief Minister (See Ravi Naik, Narsinghrao Gurunath Patil and Mahachandra Prasad Singh)

142. In the case of Mahachandra Prasad Singh (supra), the Court noticed the observations made in paragraph 11 of the Ravi Naik''s case, wherein the scope and amplitude of paragraph 2(1)(a) was explained as under:

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

143. The Bench quoted paragraph 11 of the Report in which it was observed that even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs.

144. In G. Vishwanathan v. Hon''ble Speaker T.N. Legislative Assembly, (1996) 2 SCC 353, the Apex Court was considering the disqualification of leaving the original political party voluntarily of a member who is given the label of �unattached member�. The Court found that the label of �unattached member� does not save the member from disqualification under Tenth Schedule and in arriving to such conclusion it found that the deeming fiction must be given full effect which was intended to curb the evil of defection.

145. The 13 MLAs in this case, in which Sri Rajendra Singh Rana himself was present, had met the Governor on 27th August, 03 and though it has been argued by the learned counsel for the respondents that after split in the original political party and

forming of the faction and constitution of the group, if only 13 out of 37 MLAs had gone to meet the Governor wherein they did not disclose about any such happening having taken place on 26th August, 03 and in particular formation of the group of 37 MLAs, it would not in itself be conclusive to hold that the entire group was not formed on one and the same day simply because there was no whisper about these facts in the letter to the Governor, as it was not the function of the Governor to see as to whether the MLAs who have come forward have formed any group of 37 MLAs or not for which reliance has also been placed upon the case of Bihar Assembly Dissolution case in re: Rameshwar Prasad (supra).

146. The question as to whether by forming a group by leaving their original political party, the MLAs would incur disqualification would be a separate issue which would not come in the way of the MLAs if they proposed to do so. In case by doing so i.e. by forming a ''group'' they incur disqualification under paragraph 2 they would run the risk of being disqualified from the date they leave their original political party voluntarily.

147. Here it may be worthwhile to mention the role of Speaker when a disqualification petition comes before him and in a race against urgency and importance because of the fact that splinter group has been formed to extend its support to the leader of another political party other than their original political party from which they had contested the election, the matter has to be decided expeditiously and promptly and without any delay and if possible before the leader so appointed as Chief Minister is required to show his strength on the floor of the House. This expediency would give discretion to the Speaker and play in the joints, in following the Rules of Procedure which provide certain period of time for filing objection and proceeding in the matter and thus to decide the question of disqualification at the earliest but not without affording opportunity to the parties concerned, and also not without considering the case of both the parties nor by totally ignoring the claim of one of the parties, as in the instant case, where the constant cry of the original political party, which was represented by Sri Swami Prasad Maurya, could not move the Speaker for hearing the disqualification petitions.

148. The proceedings before the Speaker, are not proceedings like the law courts, and, therefore, should be concluded expeditiously, by following the principles of natural justice.

149. In response, it has also been submitted by the learned counsel for the petitioner that the MLAs were fully aware about the provisions of the Tenth Schedule and in case factually and actually any meeting had taken place in which the office bearers, the members and the MLAs participated and resolved for a split in the original political party and formed a faction and constituted the group, the said fact could not have been missed from being mentioned in the letter to the Governor as every person of ordinary prudence would have brought them to the fore, to avoid

even any futile attempt of holding them disqualified. The question as to whether any such meeting was held on 26th August, 03 and whether a group of only 13 MLAs splitted out on that date and the reason for not disclosing this fact to the Governor are all such questions, which ought to have been considered by the Speaker. In the absence of any decision being given by the Speaker, it is not for the Court to record any finding on such issues. It is, however, aptly clear that in case the plea of the petitioner was accepted by the Speaker after consideration, the fate of other 24 MLAs would have been otherwise.

150. The argument of the respondents that assuming that the entire group was not formed on 26th August, 03 but it was formed slowly and gradually within a space of time which was neither unreasonably long nor was there any break in continuity of the events, the formation of such group by snowballing would not attract disqualification, as given in Tenth Schedule, ignores the factual and legal position that Tenth Schedule itself has come into existence for prohibiting and putting an end to the piecemeal defections. In Kihoto Hollohan while considering the validity of the Tenth Schedule, the apex court rejected the argument that if floorcrossing by one Member is an evil, then a collective perpetration of it by onethird of the elected Members of a party is no better and should be regarded as an aggravated evil both logically and from the part of its aggravated consequences. The Court considered the aforesaid argument and observed as under:

"The underlying premise in declaring an individual act of defection as forbidden is that lure of office or money could be presumed to have prevailed. Legislature has made this presumption on its own perception and assessment of the extant standards of political proprieties and morality. At the same time legislature envisaged the need to provide for such "floorcrossing" on the basis of honest dissent. That a particular course of conduct commended itself to a number of elected representatives might, in itself, lend credence and reassurance to a presumption of bona fides. The presumptive impropriety of motives progressively weakens according as the numbers sharing the action and there is nothing capricious and arbitrary in this legislative perception of the distinction between `defection'' and `split''."

151. The plea that whether the split has to be instantaneous, one time event or within a pace of time was left open from being decided in Kihoto''s case with the observation that the meaning to be given to ''split'' must necessarily be examined in a case in which the question arises and in the context of its particular terms.

152. There can be split and a faction may arise out of that split at a given point of time but the group representing the aforesaid faction in the legislature party may arise instantaneously as one time event or in a reasonable interval or within a pace of time. If the group is formed instantaneously of the requisite strength of the MLAs, that would obviously stand protected under paragraph 3 of the Schedule and would avoid disqualification under paragraph 2; In a case where the aforesaid group is

formed within a period of time at some intervals, but does not open itself as a group during formation of the group or constitution of the group, and no member of the legislature party (MLA) thus leaves the original political party by any overt act either expressly or otherwise, till the formation of group of requisite number, such members would not incur disqualification, but in case any member does so, he would incur disqualification. It is a different matter that after the faction is formed on the split of the original political party, the members of the Legislative Assembly, give a thought to it and take some time in reaching to a decision that they should now represent a faction arising out of the split instead of the original political party and for that matter if they reach the requisite number gradually and they leave the original political party only when they reach the required number; in such a situation apparently there would be no attachment of disqualification to the members of such group but in a case where on split being alleged in the original political party and faction having been formed, a group of MLAs (legislature party) who are less than the requisite strength of 1/3rd by their conduct, act or otherwise leave the original political party voluntarily, they would become subject to disqualification under paragraph 2 and would no more be available for completing the group of requisite number of MLAs, subsequently at a later point of time.

153. Since the disqualification will date back to the happening, it was very crucial in the instant case, to find out as to whether 13 MLAs incurred disqualification on 27th August, 2003 and, therefore, they were no more available for the rest of the group of 24 MLAs in their own group.

154. In case any other interpretation is given to paragraph 3 of the Tenth Schedule and snowballing and piecemeal defection is allowed or is taken to be protected under paragraph 3, it would lead to the situation which was prevailing in the pre Tenth Schedule era. Applying the ''mischief rule'', the causes of the addition of Tenth Schedule to the Constitution, the mischief which it intended to undo and the remedy provided has to be considered. It cannot be lost sight of, that this individual or defection in small groups was the main cause of anxiety for a healthy democratic system where there were multiple political parties. Interpreting a provision of the Constitution, which may defeat its very purpose, would not be in consonance to the principle of interpretation. Accordingly, it was incumbent upon the Speaker to record findings on the aforesaid issues either way after giving reasonable opportunity to the parties and not to postpone the hearing of the disqualification petitions and to decide the applications allegedly moved under paragraph 3 and 4 of the Schedule independent of the petitions of the disqualification.

155. The plea of the petitioner that the group was not formed on 26th August, 03 apart from 13 MLAs, who met the Governor also is being sought to be supported by the circumstances that on 2.9.03 these 13 MLAs sat on the opposition benches whereas rest 24 who are said to be part of the same group sat on the treasury benches. It is being argued that the seating arrangement in the House is done by

the Speaker for the political parties and may be any reason which may be given by the respondents, it is difficult to accept that the members of the opposition would sit on the Treasury Benches. The submission of the petitioner is that in case on 26th August, 03, a group of 37 had been formed then these 24 MLAs would have also sat with the ruling party and that the explanation given by the respondents that since it was a day of condolence, therefore, this seating arrangement was made would not be of any assistance in the controversy involved, is an argument which would have been considered by the Speaker. The Speaker is an expert of the House procedure and, therefore, could have shown under any Rule or otherwise in practice, that on the day of condolence, such a change in seating arrangement can happen, and the members of Treasury Benches would invite and reconcile with the opposition members, at least for the purposes of sitting in the House.

156. The affidavits filed by the three MLAs, namely, Sri Ram Maurya, Sri Dhoo Ram and Sri Ramesh Chand Bind, who were said to be the persons present in the meeting of 26th August, 03 wherein the split has taken place and faction is formed refuting the said happening and the letters of the two MLAs Mr. & Mrs.Lari, given to the Governor, namely, husband and wife saying that they were kept under threat and coercion, were the issues which would have been subjected to scrutiny by the Speaker in case the petitioner was afforded an opportunity and the disqualification petitions were considered or the question of disqualification was decided.

157. The plea that all such evidence has been brought on record after two years of the passing of the order by the Speaker and, therefore, they are not credit worthy is being answered by the petitioner by saying that there arose no occasion for the petitioner to take all the specific pleas, as on day one when the respondents moved their application for recognition of the group and their merger, the same were decided within a short span of three hours without there being any opportunity to the petitioner to bring all these facts on record or to file the evidence.

158. The proceedings do indicate that the petitioners were not afforded any opportunity to take any such plea or any plea or to adduce evidence, as on 6th September, 03 when two applications moved by the respondents were decided, the disqualification petitions were lying unnoticed by the Speaker, though moved earlier on 4.9.03 on which even notices were not issued and the hearing of these petitions were deferred. The notices were, however, issued on 18.9.03 but again on 14.11.03, the hearing was postponed because of the pendency of the present writ petition. It was only after a span of about two years when the respondents themselves moved an application for expediting the hearing of the disqualification petitions pending before the Speaker and they filed written statement, only then the opportunity occurred to the petitioner to file rejoinder and take all such pleas. Thereafter again on preliminary objection being raised, the petitions for disqualification were dismissed after observing that in view of the recognition given to the group, it was necessary to decide the disqualification petitions, after taking evidence, though at

the same time the Speaker held that the respondents have not incurred any disqualification. This order was passed on 7.9.05, which is also the subject matter of challenge in the present writ petition.

159. The sequence of events aforesaid do establish beyond doubt that the petitioners were not having any opportunity to plead the facts, as have come on record of this petition as well as in the disqualification petition and the rejoinder to the written statement and at the first opportunity such pleas were taken. It is not the concern at the moment, as to under what circumstances and for what reason the hearing of the disqualification petitions were delayed even after the notices were issued on 18.9.03 but this delay in no case can be treated as an obstacle for the petitioners to raise the pleas, which they intend to raise and were otherwise available to them.

160. The Speaker on receiving the disqualification petition is not expected to keep that petition pending, that too without passing any orders or without issuing any notice and wait for the defaulting members, who have incurred disqualification to manoeuvre support of other members for defeating the petition of disqualification. As observed earlier, it would be entirely a different case where no disqualification petition has been moved or the members of the legislature party till then though constituted a group but of the lesser number of persons within the required group but none of them leave the party by their conduct or otherwise, and all leave the original political party only when the requisite group is formed but where before constitution of such group stray members or members less than 1/3rd leave their original political party by their conduct or action, the question that they had incurred any disqualification or not cannot be left without being considered, as they cannot be subsequently added in the other splinter group, so as to make the entire group of onethird strength. The Speaker could not have proceeded with the applications said to have been filed under paragraph 3 and 4, that too without giving any copies to the petitioners, though they were present and vigilant and that too without affording opportunity and more so without considering their petitions for disqualification and without requiring the respondents to submit their reply and put forward their claim against the disqualification petitions, though the two applications might have been decided together.

161. Snowballing or piecemeal defection within a given pace of time with the continuity of process and the need of the hour at the discretion of the Speaker in the matter of formation of group of 1/3rd members of the legislature party if introduced in the provision of Tenth Schedule, particularly in paragraph 3, it would make the action of the Speaker more subjective not depending upon the objective test laid down in the Schedule, as it would be his own discretion or wisdom to analyse the continuity of process, reasonable time which may be allowed to be lapsed in formation of group of requisite strength irrespective of the disqualification petition being filed by the aggrieved person(s) and thus giving every opportunity and

occasion to the defecting members to procure more members for brushing aside the disqualification arising under paragraph 2. This is neither the legislative intent nor the scheme of the Tenth Schedule.

162. The decision making process which was adopted by the Speaker makes the decision bad. It is yet undisclosed as to what prompted the Speaker for not issuing notice on disqualification petitions on 4.9.03, and deciding the applications said to have been moved under paragraphs 3 and 4 independent of the disqualification petitions by absolutely ignoring the same, within a span of three hours in the evening without affording reasonable opportunity to the petitioner even to contest the said applications and then issuing notice on disqualification petitions on 18.9.03. The orders say that the Speaker was of the view that the proceedings on disqualification petitions are quasi judicial proceedings, which would take time and, therefore, hearing was deferred whereas proceedings under paragraphs 3 and 4 are not of the same nature.

163. Even assuming that the Speaker took the proceedings of recognition under paragraphs 3 and 4 as purely administrative, the argument of Sri Dwivedi that nothing beyond than a claim of split and requisite number of heads were to be counted for giving recognition under paragraph 3, does not get support, even if it is taken to be the proceedings of administrative nature.

164. In the case of Tata Cellular v Union of India (1994) 6 SCC 651, the Apex Court, dealing with the scope of judicial review in administrative matters, observed as under:

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

and further that:

"Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decisionmaking process itself".

165. A relook on the entire happenings from the day one as they took place before the Speaker right form 4th September, 2003 upto 8th September, 2003, it stands proved beyond doubt that the Speaker adopted the process of taking a decision which was unknown in the scheme of the Tenth Schedule or the Rules framed for the purpose. This argument has been considered only with a view to examine the correctness or the perversity of the orders impugned, which has filtered into them, because of such a process being adopted by the Speaker, which can be termed as not bonafide. The nature of proceedings under paragraph 6 (1) of the Tenth

Schedule have already been found to be quasijudicial and the Speaker acts as Tribunal and, therefore, where the proceedings are said to be taken under paragraphs 2, paragraph 3 or paragraph 4, they are nonetheless proceedings under the Tenth Schedule and decide a lis between the parties, who put forward their own claim with the responsibility of proving the same. In a case where there a lis between the parties, and the burden of proof also lies on one or the other, looking to their claim, which has to be decided by a Tribunal after affording opportunity of hearing including opportunity of leading evidence, such a proceeding cannot be taken into the realm of purely administrative proceedings. Proceedings may be under paragraphs 2, 3 or 4, all have to be decided by the Speaker, only under his jurisdiction and power of paragraph 6 (1).

166. In their defence to the snowballing or trickling down of the MLAs one by one or in small groups for constituting the requisite group, it has been greatly stressed that it is the ''time'' when the defecting MLAs put their claim before the Speaker, they have to show the requisite number of MLAs in the group and not at any point of time before the claim is laid. The argument proceeds on the assumption that the language used in paragraph 3, which says ''where a member of the House makes a claim'' defines the period or point of time by which the group should be available, as required. Reference has also been made to para 36 of the Ravi Naik''s case.

167. Paragraph 3 does not say anywhere nor provides time for constitution of the group of the members of the legislature party nor it says that any such group should have been formed at a particular instance or in a given period of time nor it says that the group should be finally constituted on the date when a member puts forward his claim. Ravi Naik''s case is also silent on the issue and does not lay down any such time period nor does it specify any time for constitution of the group.

168. Paragraph 3 only says that ''where a member of a House makes a claim that he and any other members of his legislature party constitute the group'', as prescribed therein, which would only mean that such a member does not stand disqualified because of the formation of the group but it cannot be inferred from the phraseology used in the said paragraph that it is the time of making the claim before the Speaker, which is determinative of the point of time by which the group of 1/3rd MLAs should have been formed. It is not that group can be formed till the claim is made by the member before the Speaker, but formation of group of requisite number would depend upon their conduct of not leaving their original political party voluntarily before the constitution of such group despite a faction having arisen as a result of the split in their original political party. This point has been dealt with in detail in the foregoing paragraphs also.

169. Paragraph 3 does not lay down the period or point of time during which the group should have been constituted or has to be constituted. As already discussed, formation of the group is an independent action, which has to be considered in the light of the facts of each case keeping in mind the broad propositions laid down

hereinabove.

170. As it has already been observed that the Speaker assumes power only under paragraph 6 of the Tenth Schedule, in all proceedings under the Tenth Schedule including the proceedings of disqualification of a member which are so interwoven with the provisions of paragraph 3 and 4 that, the Speaker could not have postponed the hearing of the disqualification petitions even in the presence of the applications allegedly moved under paragraph 3 and 4.

171. It has been vehemently urged that since the public was not willing for a midterm poll at such a short interval after the general elections nor they were willing for the President rule and since the Governor invited Sri Mulayam Singh Yadav to form the Government and sworn him as Chief Minister on 30.8.03 giving him 14 days time to show his majority in the House, therefore, it was necessary in the circumstances and in the interest of the State to recognise the breakaway group immediately so that they could have voted in the motion of confidence is as much a superficial argument as it could be.

172. The plea that motion of confidence was to be placed before the House on 8th September, 03, therefore, there was urgency for deciding the application under paragraph 3 and 4 on 6th September, 03 in fact was an urgency for deciding the disqualification petition, so that any disqualified member should not have been allowed to vote on the day of motion. The parties could have either been given 24 hours time, as nothing was to happen on 7th September, 03 in regard to the motion of confidence, and the disqualification petitions, could have been decided the next day, but in any case the hearing on disqualification petitions, could not have been postponed, only for having a smooth sailing of the motion of confidence rather if there was time, the date for showing the strength could have been postponed within the time granted by the Governor, if necessary.

173. It is the responsibility of the Speaker to see that any disqualified member is not allowed to remain in the House, so as to spoil and pollute its atmosphere.

174. Sri Rakesh Dwivedi himself argued and admitted that there are innumerable instances where the splinter group have been formed in various States including Uttar Pradesh but such splinter groups have never intended to merge or merged with any other political party. The aforesaid plea based on the experience cannot be faulted with and it supports the view regarding the participation of the breakaway group in the House proceedings. The only thing which is required to be done is that such breakaway group is to elect its own leader of the party and intimate the name of the leader to the Speaker, who would provide space in the House to sit in the House, subject to his own satisfaction, if no challenge to the formation of group is made.

175. In the Bihar Assembly Dissolution Case {Rameshwar Prasad and others v. Union of India and others (supra)}, the Supreme Court has clarified that the members

incurring disqualification can form the Government even at the risk of being disqualified and the Governor cannot refuse the formation of such Government merely because according to his own wisdom that would mean disqualification under the Tenth Schedule. The Tenth Schedule would have its own effect and consequences despite the members unite with each other or participate in the House proceedings and take part in the formation of the Government.

176. The disqualification petitions thus would decide the fate of these members as to whether they had incurred any disqualification and if so, the same would date back to the date of happening, which would as a necessary corollary shall decide the fate of remaining 24 MLAs.

177. It would also be significant to scrutinise the contents of the two applications filed by 37 MLAs, which has been treated to be an application under paragraph 3 and 4 respectively whereas in the first application they have only prayed that their group be recognised and they be given place for sitting in the House. There is no prayer for not treating them disqualified nor any such negative prayer could have been made.

178. In regard to the order passed by the Speaker on 6.9.03 and 8.9.03 recognising the merger of Loktantrik Bahujan Dal into the Samajwadi Party, though it is sufficient to record that once the split having not been found to be proved and the order passed in the petitions under paragraph 3 of the Tenth Schedule having been found not to be sustainable, it is no more necessary to delve upon the intricacies of the order dated 6.9.03 as the same would also go for the reason that unless the group establishes that its members are not disqualified under paragraph 2(1)(a) and have successfully avoided the disqualification in terms of paragraph 3, there would be no political party duly formed which can merge with any other political party. To explain, in case the group in question who was representing Loktantrik Bahujan Dal has not been found to be protected, under paragraph 3, there is no question of the aforesaid political party coming into existence nor this can be treated as the original political party of this group under paragraph 3 subclause (b) and consequently it cannot be merged also in terms of paragraph 4. The position emerges out of the case of the respondents, that on the recognition of their group by the Speaker, they moved the application for recognising merger.

179. One more significant aspect of the matter is that the respondents claim that there were 43 MLAs in all who had formed the group, but on 4th September, 2003, they could produce only 37 and on that very date after the orders were passed recognising their group, Loktantrik Bahujan Dal, merged in the Samajwadi Party. This means that Loktantrik Bahujan Dal who was being represented by the group of 37 MLAs lost its independent identity on that very date when it merged with the Samajwadi Party. Three more MLAs, who appeared on 8.9.03, could not have been protected by merging in Samajwadi Party, treating them the members of Loktantrik Bahujan Dal, as on that date, such Dal was not in existence. Therefore, the merger

of these 3 MLAs could not have been done. Rest three MLAs did not appear which also created a doubt, as per the argument of the counsel for the petitioner about the meeting when the group was formed.

180. In view of the aforesaid conspectus of the factual and legal position, as emerged from the pleadings and circumstances of the case, read with the scheme of Tenth Schedule, it is manifestly clear that the Speaker while considering the applications of the respondents not only violated the principles of natural justice, but also acted against the Constitutional mandate and committed manifest irregularity and procedural illegality causing miscarriage of justice. The two orders dated 6.9.03 and one order passed on 8.9.03, all suffer from vice of perversity, they having been passed totally ignoring the provisions and the scheme of the Tenth Schedule and that too in violation of principles of natural justice, without affording any ''opportunity'' are liable to be quashed, and are hereby quashed. The nonconsideration of the disqualification petitions despite repeated requests by the petitioner, makes only a case of flagrant violation of the constitutional provisions and is utterly unconscionable.

181. The orders passed by the Speaker on 7.9.05 rejecting the disqualification petitions, after holding that there was no such necessity to hear them on merits, in view of the recognition of the group being given on 6.9.03, and its merger with the Samajwadi Party and then proceeding to record a finding that they were not disqualified again without affording any opportunity to the petitioner, while considering the preliminary objection makes the said order absolutely bad in law. Besides that the Speaker could not have on the one hand, refused to consider the petitions of disqualification on merit and on the other hand could have recorded findings of avoidance of disqualification in the said order, the disqualification petitions could not have been said to have become infructuous or meaning less in view of the legal position that disqualification petitions, if decided, and the claim of disqualification is upheld, the same would relate back to the date when these members left their original political party either by their express conduct or otherwise and such decision would certainly be conclusive to find as to whether the rest 24 MLAs of the group also stood disqualified or not. Thus, in any case, the disqualification petition could not have been rendered infructuous without recording a finding and without giving decision on merits. Consequently, the order dated 7.9.05 also deserves to be quashed, and is hereby quashed.

182. The matter regarding the consideration of these petitions, namely, 13 disqualification petitions moved by the petitioner and application moved by the respondents are thus required to be reconsidered by the Speaker in accordance with law keeping in mind the legal position explained above, as this Court would not substitute its own findings nor would be in a position to do the same and for that reason, I do agree with the directive that Brother Bhalla, J. has issued after quashing the orders impugned.

(Matter required to be reconsidered by the Speaker)