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(2002) 10 SC CK 0108

Supreme Court of India

Case No: (Under Article 143(1) of the Constitution of India)

In The Matter Of Special Reference No.1 Of 2002

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 28, 2002

Acts Referred:

Constitution (First Amendment) Act, 1951 - Section 8

- Constitution of India, 1950 Section 8, Article 14, 69,69(2), 79, 85, 85(2), 99, 100, 101, 102, 103, 104, 107(5), 109, 110, 111, 123, 143, 143(1), 145, 153, 159, 163, 164, 168, 172, 169, 170, 171, 174(1), 174(2),178, 179,180, 181, 182, 183, 184, 185, 188, 191, 193, 196(5),197, 198, 213, 289, 290, 324, 324(1), 327, 328, 355, 356(1), 368
- Representation of he People Act, 1951 Section 14, 15, 15(2), 21(3)
- Government of India Act 1919 Section 8, 8(1), 21(1), 204(1), 213
- Government of IndiaAct 1915 Section 19(1), 63, 63D, 63D(1), 63D(1)(c), 72B, 72B(1)
- Government of IndiaAct 1915 Section 19(1)Government of IndiaAct 1935 Section 18, 19, 19(1), 60, 61(3), 62, 62(1), 62(3)
- Government of Union Territories Act, 1963 Section 5

Citation: AIR 2003 SC 87 : (2002) 8 SCC 237

Hon'ble Judges: B. N. Kirpal, C.J; V. N. Khare, J; K. G. Balakrishnan, J; Ashok Bhan, J; Arijit Pasayat, J

Bench: Full Bench

Advocate: Harish N Salve, Solicitor General, Kirit N. Raval, Aditional Solicitor General, K.K. Venugopal, Arun Jaitley, Rajeev Dhavan, Jitendra Sharma, Kapil Sibal, A. Sharan, Milon K. Banerjee, M.C. Bhandare, D.N. Dwivedi, Gopal Subramanium, P.P. Rao, A.M. Singhvi, Ashwani Kumar, K. Parasaran, Kailash Vasdev, Vijay Gahaguna, Yetin Oza, O.P. Sharma, Ram Jethmalani and T.M. Mohammed Yousef, Preetesh Kapur, Meenakshi Sakhardanad, Siddhartha Chowdhury, Aparajita Singh, Gayatri Goswami, P. Parmeswaran, R.N. Poddar, S. Muralidhar, S. K. Mendiratta, Shreyas Jayasimha, Bina Gupta, Vanita Bhargava, Rakhi Ray, Divya Roy Jha, H.K. Puri, S.K. Puri, Ujjwal Banerjee, Anindita Gupta, B.K. Pal, P.N. Jha, Er. Anil Mittal, Dayan Krishnan, Ranji Thomas, Arun Baradwaj, Gautam Narayan, Pranab Kumar Mullick, Shail Kumar Dwivedi, Madhu Sharan, Amit Kumar, Amit Anand Tiwari,

Samir Ali Khan, Ashish Tiwari, Irshad Ahmad, Krishna Sarma, Asha G. Nair, Anil Shrivastav, Jyoti Dutt, G. Prabhakar, Kamini Jaiswal, Saket Singh, Kumar Rajesh Singh, B.B. Singh, Prakash Shrivastava, I.C. Pandey, R.M. Sharma and A. Subhashini, Kamal Trivedi, A.A.G. for Gujarat, Hemantika Wahi, J.P. Dhanda, Raj Rani Dhanda, Sunder Khatri, Naresh K. Sharma, Ashok Mathur, Rajesh Pathak, Anis Suhrawardy, Raj Shekhar Rao, K.R. Sasiprabhu, John Mathew, Sanjay R. Hegde, Satya Mita, Ashok Kumar Pandey, G. Balaji, Dhirendra Pandey, R.K. Mehta, M. Sarada, Suman Kukreti, R.S. Jena, R.S. Suri, Jagjit Singh Chhabra, K.N. Madhusoodhanan, Sunita Hazarika, Joy Basu, Prashant Chandra Sen, S.S. Shinde, V.N. Raghupathy, Kartik Singh, Ranjan Mukherjee, K.H. Nobin Singh, Satish K. Agnihotri, K.C. Kaushik, Rohit K. Singh, W.A. Nomani, Suren Uppal, Vikram Mehta, Pradip Tiwari, Anil K. Pandey, Sanjay K. Shandilya, V.D. Khanna and V.G. Pragasam, S.M. Mehta, Dv. Genl. for Rajasthan, Bharat Upadhyaya, Sushil Tekriwal, Javed M. Rao, A. Mariarputham, Gopal Singh, Rahul Singh, Rajiv Mahapatra, P.N. Ramalingam, V. Balaji, R.C. Verma, Mukesh Verma, Vivek Vishnoi, Rachana Srivastava, Kamlendra Mishra, Sanjay Visen, Tara Chandra Sharma, Rajeev Sharma, Neelam Sharma, Ajay Sharma, Rupesh Kumar, Kirti Singh, D.S. Mahra, S. Wasim A. Quadri, Jana Kalyan Das, Bina Mahavan, S. Udaya Kumar Sagar, Prashanth P. and Meena C.R, for the Appellant;

Judgement

V.N. Khare, J.

The dissolved Legislative Assembly of the State of Gujarat was constituted in March 1998 and its five-year term was to expire on 18.3.2003. On 19.7.2002on the advice of the Chief Minister, the Governor of Gujarat dissolved theLegislative Assembly. The last sitting of the dissolved Legislative Assembly washeld on 3rd April 2002. Immediately after dissolution of the Assembly, the Election Commission of India took steps for holding fresh elections forconstituting the new Legislative Assembly. However, the Election Commission byits order dated 16thAugust, 2002 while acknowledging that Article 174(1) ismandatory and applicable to an Assembly which is dissolved and further that theelections for constituting new Legislative Assembly must be held within sixmonths of the last session of the dissolved Assembly, was of the view that it wasnot in a position to a conduct elections before 3rd of October, 2002 which was the last date of expiry of six months from last sitting of the dissolved LegislativeAssembly. It is in this context the President of India in exercise of powersconferred upon him by virtue of Clause (1) of Article 143 of the Constitution ofIndia referred three questions for the opinion of the Supreme Court by this orderdated 19thAugust, 2002 which run as under:

"WHEREAS the Legislative Assembly of the State of Gujaratwas dissolved on July 19, 2002 before the expiration of its normalduration on March 18, 2003;

AND WHEREAS Article 174(1) of the Constitution provides that six months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for itsfirst sitting in the next Session;

AND WHEREAS the Election Commission has also noted thatthe mandate of Article 174 would require that the Assembly shouldmeet every six months even after the dissolution of the House, andthat the Election Commission has all along been consistent thatnormally a Legislative Assembly should meet at least every sixmonths as contemplated by Article 174, even where it has been dissolved;

AND WHEREAS u/s 15 of the Representation of thePeople Act, 1951, for the purpose of holding general elections on theexpiry of the duration of the Legislative Assembly or its dissolution, the Governor shall, by notification, call upon all AssemblyConstituencies in the State to elect members on such date or date asmay be recommended by the Election Commission of India;

AND WHEREAS the last sitting of the Legislative Assembly of the State of Gujarat was held on 3rd April, 2002, and as such the newlyconstituted Legislative Assembly sit on or before 3rd October, 2002;

AND WHEREAS the Election Commission of India by itsorder No. 464/GJ-LA/2002 dated August 16, 2002 has notrecommended any date for holding general election for constituting anew Legislative Assembly for the State of Gujarat and observed thatthe Commission will consider framing a suitable schedule for thegeneral election to the State Assembly in November-December 2002.Copy of the said order is annexed hereto;

AND WHEREAS owing to the aforesaid decision of the Election Commission of India, a new Legislative Assembly cannotcome into existence so as to meet within the stipulated period of sixmonths as provided under Article 174(1) of the Constitution of India;

AND WHEREAS THE Election Commission has held that thenon-observance of the provisions of Article 174(1) in the presentsituation would mean that the Government of the State cannot becarried in accordance with the provisions of the Constitution withinthe meaning of Article 356(1) of the Constitution and the Presidentwould then step in;

AND WHEREAS doubts have arisen with regard to the Constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in anon-compliance with the mandatory requirement under Article 174(1) of the Constitution under which not more than sixmonths shall intervene between two sittings of the State Legislature;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out havearisen which are of a such nature and of such public importance that itis expedient to obtain the opinion of the Supreme Court of India;

NOW, THEREFORE, in exercise of the powers conferred uponme under Clause (1) of Article 143 of the Constitution, I.A.P.(SIC) AbdulKalam, President of India, hereby

refer the following questions to the Supreme Court of India for consideration and report thereon, namely:-

- (i) Is Article 174 subject to the decision of the ElectionCommission of India under Article 324 as to the scheduleof elections of the Assembly?
- (ii) Can the Election Commission of India frame a schedulefor the elections to an Assembly on the premise that anyinfraction of the mandate of Article 174 would beremedied by a resort to Article 356 by the President?
- (iii) Is the Election Commission of India under a duty to carryout the mandate of Article 174 of the Constitution, bydrawing upon all the requisite resources of the Union and the State to ensure free and fair elections?"

Much before the matter was taken up for hearing it was made clear by the Benchhearing the reference that it would neither answer the reference in the context of the election in Gujarat nor look into the question of facts arising out of the order of the Election Commission and shall confine its opinion only on questions of lawreferred to it.

- 2. When this reference was taken up objections were taken by learnedcounsel appearing for the Election Commission, several national political parties and counsel for various States that this reference need not be answered and itrequires to be returned unanswered, inter alia, on the grounds:
- (a) that, the reference raises issues already decided or determined by earlier Supreme Court judgments regarding the plenary and all encompassing powers of the Election Commission to dealwith all aspects of an election under Articles 324 329;
- (b) that, if the Supreme Court considers the said question again, itwould convert advisory Article 143 jurisdiction into anappellate jurisdiction, which is impermissible;
- (c) that, if Article 174 were override Article 324, question No. 3 is unnecessary. Also, if question No. 1 is answered in theaffirmative, question No. 3 is automatically answered. In anyevent, the last part of question No. 3 raises a question to theeffect as to whether the Election Commission is obliged toensure free and fair elections, the answer to which is axiomatic, obvious and completely unnecessary to be answered in aPresidential Reference;
- (d) that, since question No. 2 cannot stand in the abstract, it also ught not to be gone into and deserves to be sent backunanswered;
- (e) that, no undertaking has been furnished by the Union of Indiathat they would be bound by the advice of this Court and, therefore, the reference need not be answered;

- (f) that, the reference proceeds on the flawed legal premise thatArticle 174 applies to the holding of periodic elections and mandatesthe Election Commission to hold elections within the six-month period from the last session of dissolved Legislative Assembly and, therefore, this Court should return the reference unanswered; and
- (g) that, the reference is a disguised challenge to the order of the Election Commission dated 16th August, 2002 which isinappropriate in a reference under Article 143.
- 3. In support of the aforesaid propositions learned counsel relied upon thefollowing decisions: (1) In re: Cauvery Water Disputes Tribunal (1993)Suppl. SCC 96; (2) In re: Keshav Singh, Special Reference No. 1 of 1964 (1965) 1 SCR 413; (3) In re: The Special Courts Bill, 1978, Spl Ref. No. 1 of 1978; (4) In re: Appointment of Judges Case, Special Reference No. 1 of 1998 (1998) 7 SCC 739; (5) The Ahmedabad St. Xavier"s College Society and Anr. v. State of Gujarat and Ors. (1974) 1 SCC 714; (6) In re: Presidential Poll, Special Reference No. 1 of 1974; (7) Inre: The Kerala Education Bill, 1957 (1959) SCR 995; and (8) Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors

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- 4. In re: The Kerala Education Bill, 1957 (supra), it was urged that since the Bill introduced in the Legislative Assembly has been referred to under Article 143 and the same having not received legislative sanction the reference need not beanswered. Dealing with the said argument this Court held that under Article 143, the Supreme Court is required to advise the President not only as to any question which has arisen but also as to a question which is likely to arise in future.
- 5. In re: Special Court Bill, 1978 (supra), it was held that it was not necessarythat the question on which the opinion of the Supreme Court is sought must havearisen actually. It is competent for the President to make a reference at an anteriorstage, namely, at the stage when the President is satisfied that the question is likelyto arise Chandrachud, CJ at pg. 400, para 20 held that:
- "20. Article 143(1) is couched in broad terms whichprovide that any question of law or fact may be referredby the President for the consideration of the SupremeCourt if it appears to him that such a question has arisenor is likely to arise and if the question is of such a natureand of such public importance that it is expedient toobtain the opinion of the Court upon it. Thoughquestions of fact have not been referred to this Court inany of the six references made under Article 143(1), thatArticle empowers the President to make a reference evenon questions of fact provided the other conditions of theArticle are satisfied. It is not necessary that the questionon which the opinion of the Supreme Court is soughtmust have arisen actually. It is competent to thePresident to make a reference under Article 143(1) at ananterior stage, namely, at the stage when the President issatisfied that the question is likely to arise. Thesatisfaction whether the question has arisen or is likely

toarise and whether it is of such a nature and of such publicimportance that it is expedient to obtain the opinion of the Supreme Court upon it, is a matter essentially for the President to decide. The plain duty and function of the Supreme Court under Article 143(1) of the Constitutionis to consider the question on which the President hasmade the reference and report to the President itsopinion, provided of course the question is capable ofbeing pronounced upon and falls within the power of the court to decide. If, by reason of the manner in which the guestion is framed or for any other appropriate reason the court considers it not proper or possible to answer theguestion it would be entitled to return the reference bypointing out the impediments in answering it. The rightof this Court to decline to answer a reference does notflow merely out of the different phraseology used inClauses (1) and (2) of Article 143, in the sense that Clause (1) provides that the Court "may" report to the President its opinion on the question referred to it, while Clause (2) provides that the Court "shall" report to the President its opinion on the question. Even in mattersarising under Clause (2), though that question does notarise in this reference, the Court may be justified inreturning the reference unanswered if it finds for a validreason that the question is incapable of being answered. With these preliminary observations we will consider the contentions set forth above."

- 6. In re: Keshav Singh, Special Reference No. 1 of 1964 (supra) 413, Gajendragadkar, CJ speaking for the Court stated that the words of Article 143(1) are wide enough to empower the President to forward to this Court for its advisoryopinion any question of law or fact which has arisen or is likely to arise, providedit appears to the President that such a question is of such a nature of such publicimportance that it is expedient to obtain the opinion of the Court upon it.
- 7. In re: Allocation of Lands and Buildings, 1943 FCR 20, Gwyer, CJ stated"we felt some doubt whether any useful purpose would be served by giving of anopinion u/s 213 of the Government of India Act. The terms of thatsection do not impose an obligation on the Court, though we should always beunwilling to decline to accept a reference except for good reason; and twodifficulties presented themselves. First, it seemed that questions of title mightsooner or later be involved, if the Government whose contentions found favourwith the Court desired to dispose of some of the lands in question to private individuals and plainly no advisory opinion would furnish a good root of title suchas might spring from a declaration of this Court in proceedings taken under Section204(1) of the Act by one government against the other".
- 8. In re: Levy of Estate Duty, 1944 FCR 317, it was held that Section 213 of the Government of India Act empowers the Government General to make a referencewhen question of law are "likely to arise".
- 9. From the aforesaid decisions it is clear that this Court is well within its jurisdiction to answer/advise the President in a reference made under Article 143(1) of the Constitution of India if the questions referred are likely to arise infuture or such

questions are of public importance or there is no decision of thisCourt which has already decided the question referred.

10. In the present case what we find is that one of the questions is as to whetherArticle 174(1) prescribes any period of limitation for holding fresh election forconstituting Legislative Assembly in the event of the premature dissolution of The contained earlierLegislative Assembly. recitals in the Presidential referencemanifestly demonstrate that the reference arises out of the order of the ElectionCommission dated 16thAugust, 2002. In the said order the Election Commissionhas admitted that under Article 174(1) six months should not intervene betweenone Assembly and the other even though there is dissolution of the Assembly. Thereference proceeds upon the premise that as per order of the Election Commission, a new Legislative Assembly cannot come into existence within the stipulated period of six months as provided under Article 174(1) of the Constitution on theassessment of conditions prevailing in the State. Further, a doubt has arisen withregard to the application of Article 356 in the order of the Election Commission. In view of the decision in Re: Presidential Poll holding that in the domain of advisory jurisdiction under Article 143(1) this Court go into the disputed question of facts, we have already declined to go into the facts arisingout of the order of the Election Commission. But the legal premise on which orderwas passed raises questions of public importance and these questions are likely toarise in future. The questions whether Article 174(1) is mandatory and wouldapply to a dissolved Assembly, that, whether in extraordinary circumstancesArticle 174(1) must yield to Article 324, and, that, the non-observance of Article 174 would mean that the government of a State cannot be carried on in accordance with the provisions of the Constitution and in that event Article 356 would step in, are notonly likely to arise in future but are of public importance. It is not disputed thatthere is no decision of this Court directly on the questions referred and further, a(SIC) has arisen in the mind of the President of India as regards the interpretation of Article 174(1) of the Constitution. Under such circumstances, it is imperative thatthis reference must be answered. We, therefore, overrule the objections raised andproceed to answer the Reference. Question No. 1

11. Is Article 174 subject to decision of the Election Commission of Indiaunder Article 324 as to the schedule of election of the Assembly?

In an effort that aforesaid question be answered in the negative it was interalia, urged on behalf of the Union of India, one of the national political parties andone of the States:

a) that, the provision in Article 174(1) of the Constitution that six monthsshall not intervene between the last sitting of one session and the dateappointed for its first meeting of the next session is mandatory in natureand it applies when the Governor

either prorogues either of the Housesor dissolves the Legislative Assembly;

- b) that, Article 174(2) empowers the Governor to prorogue or dissolve the Legislative Assembly and Article 174(1) does not make any exception in respect of the interregnum irrespective of whether the Governor has prorogued the House or dissolved the Legislative Assembly under Article 174(2);
- c) that, on the correct interpretation of Article 174, the mandate of Article 174(1) is applicable to the dissolved Assembly also. Such aninterpretation would be in the defence of a democracy and, therefore, as and when an Assembly is prematurely dissolved, the ElectionCommission has to fix its calendar for holding fresh election within the mandated under Article 174(1);
- d) that, alternatively, it was argued that in a situation where mandate underArticle 174(1) cannot be complied with, it does not mean that themandate is directory in nature; and
- e) that, the holding of election immediately after dissolution of the Assembly is also necessary in view of the sanction which is required to be taken with regard to Money Bills by the Legislative Assembly.
- 12. The contentions advanced on behalf of the other national political parties, political parties as well as other States is that Article 174(1) is neither applicableto the dissolved Assembly nor does it provide any period of limitation of sixmonths for holding fresh election in the event of a premature dissolution of the Legislative Assembly. According to learned counsel appearing for these parties, there is no provision either in the Constitution or in the Representation of the People Act which provides an outer limit for holding election for constituting thenew Legislative Assembly or the new House of the People, as the case may be, in the event of their premature dissolution.
- 13. On the argument of learned counsel for the parties, the first question that arises for consideration is whether Article 174(1) is applicable to a dissolved Assembly?
- 14. A plain reading of Article 174 shows that it stipulates that six months shallnot intervene between the last sitting in one session and the date appointed for itsfirst sitting in the next session. It does not provide for any period of limitation forholding fresh election in the event a Legislative Assembly is prematurely dissolved. It is true that after commencement of the Constitution, the practice hasbeen that whenever either Parliament or Legislative Assembly were prematurely dissolved, the election for constituting fresh Assembly or Parliament, as the casemay be, were held within six months from the date of the last sitting of the dissolved Parliament or Assembly. It appears that the Election Commission 'sinterpretation of Article 174 that fresh elections for constituting Assembly are required to be held within six months from the date of the last sitting of the lastsession was very much influenced by the prevailing practice followed by the Election Commission since enforcement of the

Constitution. At no point of timeany doubt had arisen as to whether the interval of six months between the lastsitting of one session and the first sitting of the next session of the Assembly underArticle 174(1) provides a period of limitation for holding fresh election toconstitute new Assembly by the Election Commission in the event of a prematuredissolution of Assembly. Since the question has arisen in this Reference and alsoin view of the fact that Article 174 on its plain reading does not show that itprovides a period of limitation for holding fresh election after the prematuredissolution of the Assembly, it is necessary to interpret the said provision byapplying accepted rules of interpretations.

- 15. One of the known methods to discern the intention behind enacting approvision of the Constitution and also to interpret the same is to look into the Historical Legislative Development, Constituent Assembly Debates or anydocument preceding the enactment of the Constitutional provision.
- 16. In <u>His Holiness Kesavananda Bharati Sripadagalvaru etc. v. State of Kerala and Anr. etc</u>, it was held that Constituent Assemblydebates although not conclusive, yet show the intention of the framers of theConstitution in enacting provisions of the Constitution and the ConstituentAssembly Debates can throw light in ascertaining the intention behind suchprovisions.
- 17. In <u>R.S. Nayak v. A.R. Antulay</u>, it was held thatreports of the Commission which preceded the enactment of a legislation, reportsof Joint Parliament Commission, report of a Commission set up for collectinginformation leading to the enactment are permissible external aid to construction ofthe provisions of the Constitution. If the basic purpose underlying construction oflegislation is to ascertain the real intention of the Parliament, why should the aidswhich Parliament availed of such as report of a Special Commission preceding theenactment, existing state of Law, the environment necessitating enactment oflegislation, and the object sought to be achieved, be denied to the Court whosefunction is primarily to give effect to the real intention of the Parliament inenacting the legislation. Such denial would deprive the Court of a substantial andilluminating aid to construction of the provisions of the Constitution. The modernapproach has to a considerable extent eroded the exclusionary rule in England.
- 18. Since it is permissible to look into the pre-existing law. HistoricalLegislative Developments, and Constituent Assembly Debates, we will look into them for interpreting the provisions of the Constitution.

Historical Legislative Developments Government of India Act, 1915 & Government of India Act, 1919

19. Part VI of Government of India Act 1915 dealt with the Indian Legislaturescontaining provisions dealing with Indian and governor"s provinces legislatures. Section 63D dealt with Indian Legislature while Section 72B dealt with thelegislature of Governor"s provinces. Sections 63D(1) and Section 72B(1) run

asunder:

- "Section 63D(1): Every Council of State shall continue for fiveyears and every Legislative Assembly for three years fromits first meeting: Provided that:
- a) either Chamber of the Legislature may be sooner dissolvedby the Governor general; and
- b) any such period may be extended by the governor General, if in special circumstances he so think fit; and
- c) after the dissolution of either Chamber the GovernorGeneral shall appoint a date not more than six months or, with the sanction of the Secretary of the State, not morethan nine months from the date of dissolution for the nextsession of that Chamber"

Section 72B(1): Every Governor''s legislative counsel shallcontinue for three years from its first meeting: Providedthat:

- a) the Council may be sooner dissolved by the Governor; and
- b) the said period may be extended by the Governor fora period not exceeding one year, by notification in the official gazette of the province, if in special circumstances (to be specified in the notification) he so think fit; and
- c) after the dissolution of the council the Governorshall appoint a date not more than six months or, withthe sanction of the Secretary of the State, not morethan nine months from the date of dissolution for thenext session of the council.
- 20. After repeal of Government of India Act 1915, Government of India act1919 came into force. Section 8 of the Government of India Act 1919 provided forsitting of Legislative Council in provinces. Section 8 read as follows:
- "Section 8(1): Every Governor"s legislative council shallcontinue for three years from its first meeting: Providedthat:
- a) the Council may be sooner dissolved by the Governor, and
- b) the said period may be extended by the Governor for a period notexceeding one year, by notification in the official gazette of theprovince, if in special circumstances (to be specified in thenotification) he so think fit; and
- c) after the dissolution of the council the Governor shall appoint adate not more than six months or, with the sanction of theSecretary of the State, not more than nine months from the dateof dissolution for the next session of the council"
- 21. Similarly, Section 21 provided for the sittings of the Indian legislature. Section 21 runs as under:

- "Section 21(1): Every Council of State shall continue for fiveyears and every Legislative Assembly for three years fromits first meeting: Provided that:
- a) either Chamber of the Legislature may be sooner dissolved by the Governor General; and
- b) any such period may be extended by the Governor General, if inspecial circumstances he so think fit; and
- c) after the dissolution of either Chamber the Governor Generalshall appoint a date not more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of that Chamber.
- 22. A combined reading of Sections 63D(1) & 72B(1) of Government of IndiaAct 1915 and Section 8(1) and 21(1) of Government of India Act 1919 showsthat the Governor General could also either dissolve the Council of State or theLegislative Assembly sooner than its stipulated period or extend the period of theirfunctioning. Further, it was mandated that after the dissolution of either Chamber, the Governor General shall appoint a date not more than six months or with thesanction of the Secretary of the State, not more than nine months from the date of dissolution, for the next session of that Chamber. Similarly, the Governor of the province could also either dissolve the Legislative Council sooner than itsstipulated period or extend the period of its functioning. Further, the Governor wasduly bound after the dissolution of the legislative council to appoint a date notmore than six months, or with the sanction of the Secretary of the State, not morethan nine months from the date of dissolution for the next session of legislative council.
- 23. It is noteworthy that these powers of the Governor General and the Governor for the province were similar to the powers exercised by the British monarchhistorically under British conventions. The mandate to the Governor General and the Governor to fix the date for the next session of the new chamber or the legislative council respectively was based on the British conventions whereunder the monarch fixes a date for next session of the House of Commons after its dissolution. Further the power of Governor General to extend the period of Legislative Council or to prematurely dissolve it was also based on British conventions.

Government of India Act 1935

24. The Government of India Act, 1919 was repealed by the Government ofIndia Act, 1935, Section 19(1) provided for the sittings of the Federal Legislature. Section 19(1) runs as under:

Section 19(1): The Chambers of the Federal Legislature shallbe summoned to meet once at least in every year, and twelvemonths shall not intervene between their last sitting in onesession and the date appointed for their first sitting in thenext session."

25. Similarly, Section 62(1) of the Act provided for sittings of ProvincialLegislature. Section 62(1) runs thus:

"62(1): The Chamber or Chambers of each Provincial Legislatureshall be summoned to meet once at least in every year and twelvemonths shall not intervene between their last sitting in one session andthe date appointed for their first sitting in the next session"

26. We find that under the Government of India Act, 1935, there was a completedeparture from the provisions contained in the Government of India Act, 1915 and Government of India Act, 1919 as regards the powers and responsibilities of the Governor General and the Governors of the Provinces to extend the period of thechambers or fix a date for the next session of the new chamber. By the aforesaidprovisions, not only were the powers to extend the life of the chambers of theFederal Legislature and the Provincial Legislatures done away with, but the BritishConvention to fix a date for the next session of the new chamber was also givenup. These were the departures from the previous Acts. It may also be noted thatunder the Government of India Act, 1935, statutory provisions were made inrespect of the conduct of elections. Under Schedule V Para 20 of the Government of India Act, 1935, the Governor General was empowered to make rules forcarrying out the provisions of the Vth and VIthSchedule. Para 20 as a wholerelated to matters concerning elections, and Clause (iii) particularly pertained toconduct of elections. Similarly, Schedule VI of the Government of India Act, 1935contained provisions with respect to electoral rolls and franchise. Such provisions are not found in either the Government of India Act, 1915 or the Government ofIndia Act, 1919. Thus, we see that statutory provisions have come in for the firsttime and conduct of elections has been entrusted in the hands of the executive. Since the power to fix the calendar for holding elections was given in the hand ofexecutive, therefore, the provisions for fixing a date of next session of newlegislature in The Government of India Act of 1915 and 1919 was given up in the 1935 Act. This shows that elections in India were no longer based on the Britishconventions.

27. Under the Constitution of India, 1950, even these provisions have beendeparted from. While under the Government of India Act, 1935, the conduct ofelections was vested in an executive authority, under the Constitution of India, aConstitutional authority was created under Article 324 for the superintendence, direction and conduct of elections. This body, called the Election Commission, istotally independent and impartial, and is free from any interference of the executive. This is a very noticeable difference between the Constitution of India and the Government of India Act, 1935 in respect of matters concerning elections for constituting the House of the People or the Legislative Assembly. It may benoted that Articles 85(1) and 174(1) which were physically borrowed from Govt. of India Act, 1935 were only for the purposes of providing the frequencies of sessions of existing Houses of Parliament and State Legislature and they do not relate to dissolved Houses.

Constituent Assembly Debates with regard to Articles 85 & 174 of the Constitution.

- 28. Draft Articles 69 and 153 correspond to Article 85 and Article 174 of the Constitution respectively. Article 69 dealt with the Parliament and Article 153 dealt with State Legislature Assembly. When the aforesaid two draft Articles were placed before the Constituent Assembly for discussion, there was not much debateon Draft Article 153. But there was a lot of discussion when Draft Article 69 was placed before the Constituent Assembly. Draft Articles 69 and 153 run as under:
- "69(1): The Houses of Parliament, shall be summoned tomeet twice at least in every year, and six months shall notintervene between their last sitting in one session and the dateappointed for their first shifting in the next session
- (2) Subject to the provisions of this Article, the Presidentmay from time to time-
- (a) summon the Houses or either House of Parliament tomeet at such time and place as he thinks fit;
- (b) prorogue the Houses;
- (c) dissolve the House of the People.
- 153(1): The House or Houses of the Legislature of the Stateshall be summoned to meet twice at least in every year, and sixmonths shall not intervene between their last sitting in onesession and the date appointed for their first sitting in the nextsession.
- (2) Subject to the provisions of this Article, the Governor mayfrom time to time-
- (a) summon the Houses or either House to meet atsuch time and place as he thinks fit;
- (b) prorogue the House or Houses;
- (c) dissolve the Legislature Assembly.
- (3) The functions of the Governor under Sub-clauses (a) and(c) of Clause (2) of this Article shall be exercised by him in hisdiscretion".
- 29. On 18.5.1949, when Draft Article 69 came up for discussion, there was aproposal to change the intervening period between the two sessions of the Housesof Parliament from six months to three months so as to ensure that the Parliamenthas more time to look into the problems faced by the people of the country. Prof.K.T. Shah one of the members of the Constituent Assembly, while moving anamendment to the Draft Article 69, as it then stood, said that the Draft Article wasbased on other considerations prevailing during the British times, when thelegislative work was not much and the House used to be summoned only forobtaining financial sanction. Shri H.V. Kamath while intervening in the debateemphasized on the need to have frequent sessions of the Houses of Parliament. Hesuggested that the Houses should

meet at least thrice in each year. he pointed outthat in the United States of America and the United Kingdom, the Legislatures satfor eight to nine months in a year as a result of which they were able to effectively discharged their parliamentary duties and responsibilities. He also emphasized that the period of business of transactions provided in the Federal or State Legislatures under the Government of India Act, 1935 were very short as there was not much business to be transacted then by those Legislature. He also reiterated that the Houses of Parliament should sit more frequently so that the interests of the countryare thoroughly debated upon and business is not rushed through. Prof. K.T. Shahwas very much concerned about the regular sitting of the Parliament and, thereforehe moved an amendment 1478 which read as follows:

"at the end of Article 69(2)(c), the following proviso is to beadded:

Provided that if any time the President does not summonas provided for in this Constitution for more than three monthsthe House of the People of either House of Parliament at anytime after the dissolution of the House of the People, or duringthe currency of the lifetime of the House of the People for aperiod of more than 90 days the Speaker of the House of thePeople or the Chairman of the Council of States may summoneach his respective House which shall then be deemed to havebeen validly summoned and entitled to deal with any businessplaced or coming before it".

- 30. Further, Prof KT Shah also moved amendment No. 1483, which provided for insertion of Clause (3) after Article 69(2), and a proviso thereto, which is very relevant. Clause (3) runs as under:
- "(3): If any time the President is unable or unwilling tosummon Parliament for more than three months after theprorogation or dissolution of the House of the People and thereis in the opinion of the Prime Minister a National Emergency heshall request the Speaker and the Chairman of the Council ofStates to summon both Houses of Parliament, and place beforeit such business as may be necessary to cope with the NationalEmergency. Any business done in either House of Parliamentthus called together shall be deemed to have been validlytransacted, and shall be valid and binding as any Act.Resolution or Order of Parliament passed in the normal course.

Provided further that if at any time the President isunable or unwilling to summon Parliament for a period of morethan three months or 90 days after prorogation or dissolution of the House of the People, and the Prime Minister is also unableor unwilling to make the request aforesaid, the Chairman of either Houses of Parliament thus called together shall be deemed to be validly convened and entitled to deal with anybusiness places before it".

31. Shri B.R. Ambedkar, while replying to the aforesaid proposed amendment, highlighted that after the Constitution comes into force, no executive could afford to show a callous attitude towards the legislature, which was not the

situationbefore as the legislature was summoned only to pass revenue demands. Since therewas no possibility of the executive showing a callous attitude towards thelegislature, this would like care of the fear voiced by some members that no effortsto go beyond the minimum mandatory sittings of the Houses of Parliament wouldbe made. He further dwelled on the fact that the clause provided for minimummandatory sitting in a year so that if the need arose, the Parliament could sit moreoften and if more frequent sessions were made mandatory, the sessions could be sofrequent and lengthy that members would grow tired.

- 32. From the aforesaid debates, it is very much manifest that Articles 85 andArticle 174 were enacted on the pattern of Sections 19(1) and 62(1) of theGovernment of India Act, 1935 respectively which dealt with the frequency ofsessions of the existing Legislative Assembly and were not intended to provide any period of limitation for holding elections for constituting new House of thePeople or Legislative Assembly in the event of their premature dissolution. Further, the suggestions to reduce the intervening period between the two sessions to three months from six months so that Parliament could sit for longer duration totransact the business shows that it was intended for existing House of Parliamentand not dissolved ones, as a dissolved House cannot sit and transact legislative business at all.
- 33. It is interesting to note that during the debate Prof. K.T. Shah suggestedamendment Nos. 1478 and 1483 quoted above, which specifically contemplatedthe possibility of a dissolved House of the People and convening of the Council ofStates in an emergency session by the President or the Speaker if the circumstancesso necessitated. Even these amendments were not accepted. This shows that DraftArticle 69 was visualized in the context of a scenario applicable only to a livingand functional House and that the stipulation of six months intervening periodbetween the two sessions is inapplicable to a dissolved House.
- 34. Moreover, it may be noticed that if the suggestion put forth during thecourse of the debate that the House of Parliament should sit for eight to ninemonths in a year was accepted, it would not have given sufficient time for holdingfresh elections in the event of premature dissolution of either Parliament orLegislative Assembly and it would also have led to a breach of Constitutionalprovisions. This also shows that what is contained in Article 174(1) is meant onlyfor an existing and functional House. In a further scenario, if the suggestions duringthe debate for reducing the intervening period from six months to three monthswere accepted, it would mean that after premature dissolution of the Houses ofPeople or the Legislative Assembly, fresh elections have to be held so that Houseof People or Legislative Assembly could hold their first sitting within three monthsfrom the date of last sitting of the dissolved Parliament or Legislative Assembly asthe case may be. This would also have not allowed sufficient time for holdingelection for constituting either House of People or a Legislative Assembly. T hisshows that the intention of the framers of the Constitution was that the provisionscontained in Article 174 were meant for a living

and existing Legislative Assemblyand not to a dissolved Legislative Assembly.

Debates during the Constitution First Amendment Bill regarding amendment of Article 85 and Article 174.

35. The original Articles 85 and 174 as they stood prior to first ConstitutionAmendment and after the Amendment read as follows:

| Article Original As Articles amended |
|---|
| in the by Constitution Constitution (Amendment) Act, 1951 |

Article (1) The (1) The President 85 Houses Sessions of shall of Parliament from Parliament shall be time to Prorogation time summoned & summon to Dissolution. each meet twice at House of least in every Parliament year, to and six meet at months such shall time and not place intervene as he between thinks their last fit, but sitting six in one months session shall and the not date intervene appointed between for its last their sitting first in one sitting session in the and the next date session. appointed for its first sitting

in the

session.

next

(2) Subject to the provisions ofcl. (1), the President may from time to time -(a) Summon the Houses or either House to meet at such time & Place as he thinks fit; (b) Prorogue the Houses; (c) Dissolve the House of the

People

President may from time to-(a) Prorogue the Houses of either House (b) Dissolve the House of the People

(2) The

Article (1) The (1) The 174 House Governor Sessions or shall of the from Houses time to State of the Legislature State summon Prorogation shall be the & summoned House Dissolution to or each meet House twice at to the least in Legislature of the every year, State to and six meet at months such shall time not and intervene place between as he their thinks last fit, but six sitting in one months Session shall and the not date intervene appointed between for its last their sitting first in one session sitting in the and the date next session. appointed for its first sitting in the

next

session.

| (2) | (2) the |
|------------|-------------|
| Subject | Governor |
| to the | may |
| provisions | from |
| of cl. | time to |
| (1), the | time- |
| Governor | |
| may | |
| from | |
| time to | |
| time- | |
| (a) | (a) |
| Summon | prorogue |
| the | the |
| House | House |
| or | or |
| either | either |
| House | House; |
| to | |
| meet at | |
| such | |
| time | |
| and | |
| place | |
| as he | |
| thinks | |
| fit; | |
| (b) | (b) |
| prorogue | dissolve |
| the | Legislative |
| House | Assembly |
| or | |
| Houses | |

36. The aforesaid original Articles show that what was mandated was that theHouse of Parliament and State Legislature were required to meet at least twice ina year and six months shall not intervene between the last sitting in one session andthe date appointed for their first sitting in the next session. This resulted inabsurdity. If it was found that the session then had been going on continuously for12 months, technically it could have been contended that the Parliament had notmet twice in that year at all as there must be prorogation in order that there may benew session

and therefore, the original Article 174(1) resulted in contradictions. In order to remove the said absurdity, the First Amendment Bill for amendment of Articles 85 and 174 was moved. While introducing the First Amendment Bill, Pt. Jawahar Lal Nehru stated thus:

"....one of the Articles mentions that the House shall meetat least twice every year and the President shall address it. Now a possible interpretation of that is that this House hasnot met at all this year. It is an extraordinary position considering that this time this House has laboured morethan probably at any time in the previous history of this orthe preceding Parliament in this country. We have been practically sitting with an internal round and X mas sinceNovember and we are likely to carry on and yet it may beheld by some acute interpreters that we have not met at allthis year strictly in terms of the Constitution because westarted meeting November and we have not met again -- ithas not been prorogued -- the President has not addressedthe Parliament this year. Put in the extreme way, supposethis House met for the full year without break except shortbreaks, it worked for 12 months then it may be said underthe strict letter of the law that it has not met all this year.Of course that Article was meant not to come in the wayof our work but to come in the way of our leisure. It wasindeed meant and it must meet at least twice a year andthere should not be more than six months interval betweenthe meetings. It did not want any government of the dayto simply sit tight without the House meeting.". (emphasis mine)

While intervening in the debate, Dr. B.R. Ambedkar stated thus:

".....due to the word summon, the result is that althoughParliament may sit for the whose year adjoining from time to time, it is still capable of being said that Parliament has been summoned only once and not twice. There must be prorogation order that there may be a new session. It is felt that this difficulty should be removed and consequently the first part of it has been deleted. The provision that whenever there is approrogation of Parliament, the new session shall be called within six months is retained."

(emphasis mine)

37. Even other members of the Parliament who participated int eh debate withregard to the proposed amendment of Article 85 and Article 174 were concernedonly with the current session and working of the existing House of the People. Theproceedings of the debate further show that the entire debate revolved aroundprorogation and summoning. There was no discussion as regards dissolution or Constitution of the House at all and the amendment was sought to remove the absurdity which has crept into the original Articles 85 and 174. For these reasonswe are of the view that Article 174(1) is inapplicable to a dissolved Assembly.

Textually

- 38. The question at hand may be examined from another angle. As noticedearlier, the language employed in Article 85 and Article 174 is plan and simpleand it does not contemplate an interval of six months between the last sitting in onesession and the date appointed for its first sitting in the next session of the newAssembly after premature dissolution of Assembly. Yet we will examine Article174 textually also.
- 39. Article 174 shows that the expression "date appointed for its first sitting inthe next session in Article 174(1) cannot possibly refer to either an event after the dissolution of the House or an event of a new Legislative Assembly meeting forthe first time after getting freshly elected. When there is a session of the newLegislative Assembly after elections, the new Assembly will sit in its "firstsession" and not in the "next session". The expression after each general electionhas been employed in other parts of the Constitution and one such provision isArticle 176. The absence of such phraseology "after each general election" inArticle 174 is a clear indication that the said Article does not apply to a dissolvedAssembly or to a freshly elected Assembly. Further, Article 174(1) usesexpressions i.e. "its last sitting in one session". "first sitting in the next session". None of these expressions suggest that the sitting and the session would include analtogether different Assembly i.e. a previous Assembly which has been dissolvedand its successor Assembly that has come into being after elections. Again, Article174 also employs the word "summon" and not "constitute". Article 174 empowersthe Governor to summon an Assembly which can only be an existing Assembly. The Constitution of an Assembly can only be u/s 73 of the Representation of the people Act, 1951 and the requirement of Article 188 of the Constitutionsuggests that the Assembly comes into existence even before its first sittingcommences.
- 40. Again, Article 174 contemplates a session, i.e. sitting of an existingAssembly and not a new Assembly after dissolution and this can be appreciatedfrom the expression "its last sitting in one session and its first sitting in the nextsession". Further, the marginal note "sessions" occurring in Article 85 and 174 isan unambiguous term and refers to an existing Assembly which a Governor cansummon. When the term "session or sessions" is used, it is employed in the contextof a particular Assembly or a particular House of the People and not the legislativebody whose life is terminated after dissolution. Dissolution end the life oflegislature and brings an end to all business. The entire chain of sittings andsessions gets broken and there is not next session or the first sitting of the nextsession after the House itself has ceased to exist. Dissolution of LegislativeAssembly ends the representative capacity of legislators and terminates theresponsibility of the Cabinet to the members of the Lok Sabha or the LegislativeAssembly, as the case may be.
- 41. The act of summoning, sitting, adjourning, proroguing or dissolving of theLegislature is necessarily referable to an Assembly in praesenti i.e. an

existing, functional legislature and has nothing to do with the Legislative Assembly which isnot in existence. It is well understood that a dissolved House is incapable of beingsummoned or prorogued and in this view of the matter also Article 174(1) has noapplication to a dissolved Legislative Assembly, as nothing survives afterdissolution.

Conceptually

- 42. Yet, Article 174 may be examined conceptually. Conceptually, Article 174deals with a live legislature. The purpose and object of the said provision is toensure that an existing legislature meets at least every six months, as it is only anexisting legislature that can be prorogued or dissolved. Thus Article 174 which is a complete code in itself deals only with a live legislature.
- 43. Article 174(1) shows that it does not provide that its stipulation is applicableto a dissolved legislature as well. Further, Article 174 does not specify thatinterregnum of six months period stipulated between the two sessions would alsoapply to a new legislature vis-a-vis an outgoing legislature. If such be the case, then there was no need to insert the proviso to Article 172(1) and insertion of thesaid proviso is rendered meaningless and superfluous.
- 44. Further, if Article 174 is held to be applicable to a dissolved House as wellit would mean that Article 174(2) is controlled by Article 174(1) inasmuch as the power has to be exercised under Article 174(2) in conformity with Article 174(1). Moreover, if the House is dissolved in 5thmonth of the last session, the election will have to be held within one month so as to comply with the requirement of Article 174(1) which would not have been the intention of the framers of the Constitution.
- 45. Yet, there is another aspect which shows that Article 174(1) is inapplicableto a dissolved Legislative Assembly. It cannot be disputed that each LegislativeAssembly after Constitution is unique and distinct from the previous one and nopart of the dissolved House is carried forward to a new Legislative Assembly. Therefore, Article 174(1) does not link the last session of the dissolved House withthe newly formed one.

The distinction between frequency of sessions and periodicity of the elections

- 46. A perusal of Articles 172 and 174 would show that there is a distinction between the frequency of meetings of an existing Assembly and periodicity of elections in respect of a dissolved Assembly which are governed by the aforesaid provisions.
- 47. As far as frequency of meetings of Assembly is concerned, the six monthsrule is mandatory, while as far as periodicity of election is concerned, there is nosix months rule either expressly or impliedly in Article 174. Therefore, it cannot beheld that Article 174 is applicable to dissolved House and also provides for periodof limitation within which the Election Commission is required to hold freshelection for constituting the new Legislative Assembly.

Whether, under the British Parliamentary practice a proclamation which onthe one hand dissolves an existing Parliament and on the other fixes a date of of new Parliament is embodied in Article 174 of the Constitution.

48. It was also urged on behalf of the Union of India that Indian Constitution is enacted on paten of Westminster system of parliamentary democracy and,therefore, election has to be held within the stipulated time following the Britishconventions as reflected in Article 174(1) of the Constitution. It was urged that since the Parliament was a single entity with the responsibility to debate mattersaffecting public interest on a continuous basis, it was most appropriate that longgaps were not there between its sessions.

49. Learned counsel relied upon certain passages from several books in supportof his contention which run as under:

Erskine May"s Treatise on the Law, Privileges, Proceedings and Usage of Parliament 21st Edn.: "AParliament" in the sense of a Parliamentary period, is aperiod not exceeding five years which may be regardedas a cycle beginning and ending with a proclamation. Such a proclamation on the one hand dissolves anexisting Parliament, and on the other, orders the issue ofwrits for the election of a new Parliament and appoints the day and place for its meeting. This period, of course, contains an interregnum between the dissolution of aParliament and the meeting of its successor during which there is no Parliament in existence; but the principle of unbroken continuity of Parliament is for all practical purposes secured by the fact that the same proclamation which dissolves a Parliament provides for the election and meeting of a new Parliament. A session is the period of time between the meeting of a Parliament, whetherafter a prorogation or a dissolution, and its prorogation."

JAG Griffith and Michael Ryle, Parliament:Functions, Practice and Procedures, 1989: "AParliament is summoned by the Sovereign to meet aftereach general election and the duration of a Parliament isfrom that first meeting until Parliament is dissolved bythe Sovereign, prior to the next general election.

The continuity of Parliament is today secured byincluding in the same proclamation the dissolution of oneParliament, the order for the issuing of writs for the election of a new Parliament and the summoning of thatParliament on a specified date at Westminster. UnderSection 21(3) of the Representation of People Act, 1918, theinterval between the date of the proclamation and themeeting of Parliament must be not less than 20 days,although this period can be further extended byproclamation. During this interval the general, election isheld."

50. Passages relied upon by the learned counsel are extremely inappropriate in the Indian context for holding elections for constituting either House of the Peopleor the Legislative Assembly. As is clear from the passages themselves, under British Parliamentary system, it is the exclusive right of the Monarch to dissolve the

Parliament and the Monarch by the same proclamation also provides for theelection and meeting of its successor, which is not the case under the IndianConstitution. Under the Indian Constitution, the power has been entrusted to the Election Commission under Article 324 to conduct, supervise, control and direction and, therefore, the British convention cannot be pressed into service. Inour democratic system, the Election Commission is the only authority to conductand fix dates for fresh elections for constituting new House of People orLegislative Assembly, as the case may be. However, it is true that in the year2000, Electoral Commission has been constituted in England by the PoliticalParties, Elections and Referendums Act, 2000, but the conventions sought to berelied upon are prior to the year 2000 and the Election Commission also does nothave the power to fix dates for holding elections for constituting the House of Commons. Therefore, the British conventions cannot be said to be reflected inArticle 174. Yet another reason why the British convention for fixing a date fornewly constituted Parliament cannot be applied in India is that under BritishParliamentary system, there is a continuity of Parliament, whereas in India oncethe Parliament gets dissolved, all the business which is to be transacted comes to an end and the House of People cannot be revived.

Is there any difference between the British Parliamentary practice and Parliamentary practice under the Indian Constitution as regards Prorogation, Adjournment and Dissolution?

51. In this context, learned counsel appearing for Union of India also relied uponthe following passages -- from (SIC) May, Parliamentary Practice, 20thEdn. as regards Prorogation, Adjournment and Dissolution under British conventionsand argued that the session is the period of time between the meeting of aParliament whether after prorogation or dissolution. According to learned counselthere is continuity in the Parliament and it forms an unbroken chain. In substancethe argument is that consequences of prorogation or dissolution of a House is thesame and therefore, Article 174(1) is applicable to new Legislative Assembly afterdissolution.

Prorogation

The effect of a prorogation is once to terminate all the currentbusiness of Parliament. Not only are the sitting of the Parliament at an end.but all proceedings pending at the time are quashed except impeachments by the Commons, and appeals before the House of Lords. Every bill must therefore be renewed after a prorogation, as if it had never been introduced.

Adjournment

Adjournment is solely in the power of each House respectivelythough the pleasure of the Crown has occasionally been signified in person, by message, commission or proclamation, that both Houses should adjourn; and in some case such adjournments have scarcely differed fromprorogations. But although no instance has occurred where the House has refused to adjourn the communication may be

disregarded.

Dissolution

The Queen may also close the existence of Parliament by adissolution, but is not entirely free to define the duration of the Parliament.Parliament is usually dissolved by a proclamation under great seal, afterhaving been prorogued to a certain day, but such a proclamation has beenissued at a time when both House stood adjourned. This proclamationsissued by the Queen, with the advice of her Privy Council and announcesthat the Queen has given orders to the Lord Chancellor of Great Britain andthe Secretary of State for Northern Ireland to issue out writs in due form, andaccording to law, for calling a new Parliament; and the writs are to bereturnable in due course of law.

52. The aforesaid passages relied upon by learned counsel are whollyinapplicable in the context of Indian Constitution. Under Article 85(2) when the President on the advice of the Prime Minister prorogues the House, there istermination of a session of the House and this is called prorogation. When the House is prorogued all the pending proceedings of the House are not quashed andpending Bills do not lapse. The prorogation of the House may take place at anytime either after the adjournment of the House or even while the House is sitting. An adjournment of the House contemplates postponement of the sitting orproceedings of either House to reassemble on another specified date. Duringcurrency of a session the House may be adjourned for a day or more than a day. Adjournment of the House is also sine die. When a house's adjourned, pendingproceedings, or Bills do not lapse. So far as. the dissolution of either House of thePeople or State Legislative Assembly is concerned, the same takes place onexpiration of the period of five years from the date appointed for its first meetingor under Article 85(2) or Article 174(2). It is only an existing or functional Lok Sabha or Legislative Assembly which is capable of being dissolved. A dissolution brings anend to the life of the House of the People or State Legislative Assembly and thesame cannot be revived by the President. When dissolution of House of the Peopleor State Legislative Assembly takes places all pending proceedings stand terminated and pending Bill lapses and such proceedings and Bills are not carried over to thenew House of the people or State Legislative Assembly when they are constituted after fresh elections.

53. From the afore-mentioned passages relied upon it is apparent that there is adifference in the British parliamentary practice and the Indian practice under heIndian Constitution as regards dissolution and prorogation. Under IndianConstitution dissolution brings a legislative body to an end and terminates its life.Prorogation, on the other hand, only terminates a session and does not precludeanother session, unless it is coincident with the end of a legislative term. In otherwords prorogation, unlike dissolution, does not affect the life of the legislativebody which may continue from the last session until brought to an end bydissolution. This is the difference in the meaning of prorogation and dissolution.

In so far as the effects following from prorogation and dissolution on pendinglegislative business are concerned in England, prorogation puts an end to allpending business in the Parliament, whereas in India, this is not the case. UnderArticles 107 and 196 there is a specific provision that mere prorogation will notlead to lapsing of Bills pending at that point of time. It is only on dissolution thatthe pending Bills lapse under Articles 107(5) and 196(5) of the Constitution. Thuswe see that there is practically no difference in the effects following prorogationand dissolution in England, which difference is specifically contemplated under theIndia Constitution. In England, dissolution does not bring with it any special oradditional consequences apart from those that attend upon prorogation. Therefore, the British convention with respect to summoning proroguing and dissolution of the House of Commons is also of not much relevance in the Indian context.

54. From the above, the irresistible conclusion is that Article 174(1) is neitherapplicable to a dissolved House nor does it provide for any period for holdingelection for constituting fresh Legislative Assembly.

Whether the expression "the House" is a permanent body and is different than the House of People or the Legislative Assembly under Article 85 and 174 of the Constitution.

- 55. It was then urged on behalf of the Union that under Article 174 what is dissolved is an Assembly while what is prorogued is a House. Even when an Assembly is dissolved, the House continues to be in existence. The Speaker continues under Article 94 in the case of the House of the People or under Article 179 in the case of the State Legislative Assembly till the new House of the People or the Assembly is constituted. On that premise, it was further urged that the freshelections for constituting new Legislative Assembly has to be held within six months from the last session of the dissolved Assembly.
- 56. At first glance, the argument appeared to be very attractive, but after goingdeeper into the matter we do not find any substance for the reasons statedhereinafter.
- 57. Drafting the text of a Statute or a Constitution is not just an art but is a skill.It is not disputed that a good legislation is that the text of which is plain, simpleunambiguous precise and there is no repetition of words or usage of superfluouslanguage. The skill of a draftsman in the context of drafting a Statute or theConstitution lies in brevity and employment of appropriate phraseology whereinsuperfluous word"s r repetitive words as avoided. It appears that the aforesaidprinciple was kept in mind while drafting the Government of India Act 1935, theGovernment of India Act, 1919, and the Government of India Act 1935. Thedraftsman of the Constitution of India has taken care to maintain brevity and thephraseology used is such that there is no ambiguity while making provisions

forthe Constitutional institutions in the provisions of the Constitution.

58. In this background, wherever the Constitution makers wanted to conferpower, duties or functions or wanted to make similar provisions both for Councilof States as well as House of the People or to the State, Legislative Council and theLegislative Assembly, they have referred both the institutions under Part VChapter II and Part VI Chapter III of the Constitution as "two Houses", "eachHouse", "either House & "both Houses". On the other hand the Constitutionmakers, when they wanted to confer powers, functions and duties or to makeprovisions exclusively either for House of the People or Council of States, theyhave referred the said institutions either as Council of States or House of thePeople. Similarly, in States when the Constitution makers wanted to confer power, functions duties or wanted to make similar provisions both for the Legislativecouncil and the Legislative Assembly, they referred both the institutions as"Houses", "either Houses", both Houses", "each House" and where there was noLegislative Council, and power was to give exclusively to Legislative Assembly, itis referred as Legislative Assembly. The aforesaid pattern of drafting has beenborrowed from Government of India Acts. 1915, 1919 and 1935 which we shallnotice hereinafter.

59. Section 63 of the Government of India Act, 1915 provided that IndianLegislature shall consist of the Governor General and two Chambers viz., Councilof State and Legislative Assembly Section 63D(1)(a) provided that eitherChamber of the Legislature may be summoned/dissolved by the Governor General. The expression " Chamber" here is analogous to the expression "House". UnderSection 63D(1)(c) of the Act, after the dissolution of either Chamber, the Governor General was required to appoint a date not more than six months or with thesanction of the Secretary of the State not more than nine months after the date of dissolution for the next session of the Chamber. Since both the "Chambers" were subject to dissolution, therefore, u/s 63D(i)(c) both the Council ofStates and Legislative Assembly have been referred as "either Chamber", and notas "Council of States or Legislative Assembly". This show that the expressions "either Chamber" are referable to Council of States as well as LegislativeAssembly, Under Government of India Act, 1919 again, the Indian Legislatureconsisted of the Governor General and two Chambers viz., Council of States andthe Legislative Assembly. u/s 21(1)(a) of the Act, "either Chamber" of the Legislature could be dissolved by the Governor General and u/s 21(1)(c) it was provided that after dissolution of either Chamber, the Governor General shallappoint a date not more than six months or with the sanction of the Secretaryof the State not more than nine months after the date of dissolution, the nextsession. This provision is in pari materia with Section 63D of Government ofIndia Act, 1915. In this case also, we find that since both the Chambers viz., Council of State and Legislative Assembly were subjected to dissolution, therefore, in Section 21(1)(c) the Council of State or Legislative Assembly both werereferred to as "either Chamber" and not as Council of State or LegislativeAssembly.

60. Section 18 of Government of India Act, 1935 provided that the FederalLegislature was to consist of His Majesty represented by Governor General andtwo Chambers to be known respectively as "Council of State" and FederalAssembly. Under Sub-section (4) of Section 18 of the 1935 Act, the Council of State was made a permanent body not subject to dissolution, but as many as 1/3rdmembers thereof shall retire in every third year, in accordance with the provisions that behalf contained in the First Schedule. Sub-section (2) of Section 19 of theGovernment of India Act, 1935 which is similar to Article 85 of the Constitution ofIndia, provided that the Governor General may in his discretion summon theChambers or either Chamber to meet at such time as he deems fit, prorogue theChamber and dissolve the Federal Assembly. In this case, the dissolution is not ofChambers, but of the Federal Assembly for the simple reason that Council of Statewas made a permanent body not subject to dissolution and, therefore, the FederalAssembly which was subjected to dissolution has been specifically referred in theSection.

61. In Government of India Act, 1935, there was a provincial legislature andunder Section 60 of the Act, it was provided that there shall provincial legislaturewhich shall consist of His Majesty represented by the Governor and in theprovinces of Madras, Bombay and Bengal and United Provinces Bihar and Assamthere shall be two Chambers and in other provinces one Chamber. In Sub-section(2) thereof, it was further provided that where there are two Chambers of the Provincial Legislature, they shall be known as Legislative Council and Legislative Assembly and where there is one Chamber the same will be known as LegislativeAssembly. Sub-section (3) of Section 61 provided that every Legislative Councilshall be a permanent body not subject to dissolution. Sub-section (2) of Section 62of the Act provided that Governor may in his discretion from time to time summonthe Chambers or either Chamber, prorogue the Chamber or Chambers and dissolvethe Legislative Assembly. This provision is pari materia with Article 174 of the Constitution of India. In this case also, it is very much clear that since LegislativeCouncil has been made a permanent body and the Legislative Assembly wassubjected to dissolution, therefore, the expression "Chamber" has not been employed for theLegislative Assembly, but expressly Legislative Assembly has been mentioned.

62. Coming to the Constitution of India, Article 85 is in pari materia withSection 19 of the Government of India Act, 1935. Similarly Article 174 is in parimateria with Section 62 of Government of India Act, 1935. Article 79 ofConstitution of India provides that thee shall be a Parliament for the Union whichshall consist of President and two Houses respectively to be known as Council ofStates and House of People. Article 83 provides that the Council of States shallnot be subject to dissolution. Article 85 provides that the President may, from timeto time, prorogue the Houses or either House and dissolve the House of People. Here again, since Council of States is a permanent body and not liable todissolution, therefore, instead of using the expression "either House", the expression "House of People" has been employed, the same being liable todissolution. The same thing holds for

the State Legislature under Article 168, Article 172 and Article 174 of the Constitution.

- 63. From the aforesaid provisions, it is clear that the expressions "Houses","both Houses" and "either House" and "the House" are used synonymously withthe institutions known as Council of States and House of the People and areinterchangeable expressions.
- 64. The matter may also be examined from another angle. Under Article 86, the President is empowered to specially address either House of Parliament or bothHouses assembled together. Similarly, under Article 87, the President isempowered to address both Houses of Parliament assembled together. UnderArticle 88, every Minister and Attorney General has a right to speak or take part in he proceedings of either House. Article 98 provides that each House ofParliament shall have a Secretariat Staff and under Clause (2) thereof, the Parliament is empowered to make law for regulating the appointment and conditions of services of persons appointed to the Secretariat staff of either Houseof Parliament. Article 99 provides that every member of either House ofParliament shall, before taking his sent, make and subscribe before the President, or some person appointed in that behalf by him an oath or affirmation according to the form set out for the purpose in the Third Schedule. Article 100 provides that allquestions at any sitting of either House or joint sitting of the Houses shall be determined by a majority of votes of the members present and voting, other thanthe Speaker or person acting as Chairman or Speaker. Article 101 provides that noperson shall be a member of both Houses of Parliament. Similarly, Article 102uses the expression "either House of Parliament". Article 103 again uses the expression " either House of Parliament". Article 104, 106 and 107 also use theexpression "either House of Parliament". This shows that the Constitution framers, wherever they wanted to make similar provisions for both Council of States and House of the People, have used the expressions "House", "either House", "bothHouses", "Houses" only for the purpose of maintaining brevity and to avoid using Council of States and House of the People again and again.
- 65. Analogous provisions are found in the provisions dealing with the StateLegislature under Part VI Chapter III of the Constitution. Article 168 provides thatfor every State, there shall be a Legislature which shall consist of the Governor andin the States of Bihar, Maharashtra, Karnataka and Uttar Pradesh two Houses andin other States one House. Sub-clause (2) thereof further provides that where there are two Houses, one shall be known as the Legislative Council and the other as theLegislative Assembly, and where there is only one House it shall be known asLegislative Assembly. Sub-clause (2) of Article 172 provides that the LegislativeCouncil of a State is permanent body which is not subject to dissolution. UnderArticle 174(1), the Governor is empowered to summon the House or each House ofLegislature of the State to meet at such time and place as the deems fit, but

sixmonths shall not intervene between its last sitting in one session and the dateappointed for its first sitting in the next session. Under Clause (2) of Article 174the Governor has power to pirogue the House or either House and dissolve the Legislative Assembly. Here again, we find that since Legislative Council is apermanent body, it cannot be dissolved and therefore, the expression "House" doesnot find place in Clause (2)(b) of Article 174.

- 66. Similarly, in the case of State Legislature, there are provisions where the Constitution makers have used the expression "either House" "both Houses" and "House of Legislature" wherever they intended to apply similar provisions to both the Legislative Council as well as Legislative Assembly.
- 67. Article 175 empowers the Governor to address "both the Houses assembledtogether" and his power to send messages to "Houses of Legislature" of the State.Article 176 provides for a special address by the Governor to both the "House"assembled together. Article 177 speaks of the rights of ministers and AdvocateGeneral to speak in the take part in the proceedings of "both Houses". Article 187dealing with Secretariat of the State Legislature uses the expressions, "the House", "each House, "common to both Houses" and "Houses". The head note of Article189 reads: "voting in House, power of Houses". Article 190 also refers to "bothHouses". "Article 196, uses the expressions "either House", "both Houses", and "Houses" while referring to both the Legislature Assembly and Legislative Council.Similarly, Article 197(2) also provides for passage of a Bill by the "Houses of theLegislature" of the State. Article 202 and Article 209 also use the expressionHouses" while referring to both the Legislative Assembly and Legislative Council.
- 68. These provisions may be contrasted while Articles 169, 170, 171, 178, 179,180, 181, 182, 183, 184, 185 and Article 186 which deal exclusively either with theLegislative Council or the Legislative Assembly, Similarly, Articles 197 and 198also mention Legislative Assembly and Legislative Council separately. Thus, theConstitution makers have specifically referred to Legislative Assembly and theLegislative Council wherever there was a need to do so. Moreover, Articles 188,191 and 193 while dealing with the respective matters specified therein mentionboth Legislative Assembly or Legislative council separately. Since theConstitution was being drafted for the entire country and not for a particular State,the Constitution framers thought it fit to specify the Legislative Assembly orLegislative Council separately to avoid confusion in States having just theLegislative Assembly and not the Legislative Council.
- 69. It may be noted here that there is a difference is phraseology used in Articles99 and 188, which deal with oath or affirmation of members, Articles 103 and 191, which deal with disqualification of members and Articles 104 and 193 which deal withpenalty for sitting and voting before making oath or affirmation or when not qualified or disqualified. Articles 99, 103 and 104 employ the expression

"eitherHouse" while Articles 188, 191 and 193 mention "Legislative Assembly or LegislativeCouncil". This difference in phraseology can be explained on the basis of the factthat there are many states where there is no Legislative Council, and therefore, inthis context, use of the expression "either House" in Articles 188, 191 and 193 couldhave been misleading.

- 70. From the aforesaid provisions, it is manifest that there is no distinctionbetween the "House" and "Legislative Assembly". Wherever the Constitutionmakers wanted to make similar provisions for Legislative Council as well asLegislative Assembly, both together have been referred to as Houses and whereverthe Constitution makers wanted to make a provisions exclusively for theLegislative Assembly, it has been referred to as Legislative Assembly. For theaforesaid reasons out conclusion is that the expressions "The House" or "eitherHouse" in Clause (2) of Article 174 of the Constitution and Legislative Assembly aresynonymous and are interchangeable expressions. The use of expression "theHouse" denotes the skill of Draftsman using appropriate phraseology in the text ofthe Constitution of India. Further the employment of expressions "the House or"either House" do not refer to different bodies other than the Legislative Assemblyor the legislative Council, as the case may be, and have no further significance.
- 2.(a) Is there any period of limitation provided under the Constitution of India or Representation of the People Act for holding fresh election forconstituting new Legislative Assembly in the event of premature dissolution of a Legislative Assembly?
- 71. In the context, we have looked into the provisions of the Constitution ofIndia, but we do not find any provision expressly providing for any period oflimitation for constituting a fresh Legislative Assembly on the prematuredissolution of the previous Legislative Assembly. On our interpretation of Article 174(1), we have already held that it does not provide for any period of limitation for holding elections within six months from the date of last sitting of the session of the dissolved Assembly. Section 15 of the Representation of the People Act,1951 provides that general election is required to be held for the purpose ofconstituting a new Legislative Assembly on the expiration of duration of theexisting Assembly or on its dissolution. Sub-section (2) thereof provides that forconstituting new Legislative Assembly, the Governor shall by notification, on suchdate or dates, as may be recommended by the Election Commission, call upon allAssembly constituencies in the State to elect members in accordance with theprovisions of the Act, rules and orders made thereunder. The proviso to Sub-section (2)of Section 15 of the Act provides that where an election is heldotherwise than on the dissolution of the existing Legislative Assembly, no suchnotification shall be issued at any time earlier than six months prior to the dates onwhich the duration of that Assembly would expire under the provision of Clause(1) of Article 172.
- 72. The aforesaid provisions also do not provide for any period of limitation forholding elections for constituting new Legislative Assembly in the event

ofpremature dissolution of an existing Legislative Assembly, excepting that electionprocess can be set in motion by issuing a notification six months prior to the dateon which the normal duration of the Assembly expires. Thus, the question arisesas to whether the Constitution framers have omitted by oversight to provide anysuch period for holding election for constituting new Assembly in an event ofpremature dissolution or it was purposely not provided for in the Constitution. Forthat purpose, we must look into the legislative developments and the Constitutionaldebates preceding the enactment of Constitution of India.

73. As earlier noticed, Sections 63D and 72B(1) of the Government of IndiaAct, 1915 and Sections 8(1) and 21(1) of the Government of India Act, 1919empowered the Governor General in case of Indian Legislature and the Governorin case of Provincial Legislature to dissolve either chambers sooner than theirstipulated period and appoint a date, nor more than six months or, with the sanction of the Secretary of the State, not more than nine months from the date of dissolution for the next session of that Chamber. Thus the statutes themselves provided a period of limitation within which elections were to be held for constituting the new Chamber. The power of the Governor General to fix a date for the next chamber was similar to the powers exercised by the British Monarchhistorically under the British conventions.

74. However, in Government of India Act, 1935, the period of limitation fixedfor holding election for constituting Legislative Council and Legislative Assemblywere dispensed with the under Schedule V Para 20 to the Government of IndiaAct, 1935, the Governor General was empowered to make rules for carrying outthe provisions of the Vth and VIthSchedule. Para 20 thereof as a whole, related to matters consisting of elections and Clause (3) particularly pertains to conduct of elections. Similarly, Schedule VI of Government of India Act, 1935 contained provisions with respect to electoral roll and franchise. Thus, the conduct of election was entrusted to the Executive and the Executive was empowered to fixthe date or dates for holding elections for constituting Federal Legislature as wellas Provincial Legislature.

75. When the question, who would conduct the elections under IndianConstitution was debated upon before the Constituent Assembly, concerns were expressed by the members of the Constituent Assembly in entrusting the same in the hands of the Executive and, in fact, there was unanimity among the members that an independent Constitutional Authority be set up for superintendence, direction, control and the conduct of elections to Parliament and Legislature of every State. In this connection, Dr. B.R. Ambedkar stated before the Constituent Assembly thus:

"But the House affirmed without any kind of dissent that in theinterest of purity and freedom of elections to the legislative bodies, itwas of the utmost importance that they should be freed from any kindof interference from the executive of the day. In pursuance of thedecision of the House, the Drafting Committee removed this questionfrom the category of Fundamental Rights and put it in a separate

partcontaining "Articles 289, 290 and so on. Therefore, so far as thefundamental question is concerned that the election machinery shouldbe outside the control of the executive Government, there has been nodispute. What Article 289 does is to carry out that part of the decision of the Constituent Assembly. It transfers the superintendence, direction and control of the preparation of the electoral rolls and of allelections to Parliament and the Legislatures of States to a bodyoutside the executive to be called the Election Commission."

76. It is in light of the aforesaid discussion, Article 324 was enacted and the superintendence, direction, control and conduct of election was no more left in thehands of the Executive but was entrusted to Constitutional Authority i.e. the Election Commission. It appears that since the entire matterrelating to the elections was entrusted to the Election Commission, it was found tobe a matter of no consequence to provide any period of limitation for holding freshelection for constituting new Legislative Assembly in the event of prematuredissolution. This was deliberate and conscious decision. However, care was takennot to leave the entire matter in the hands of the Election Commission and,therefore, under Article 327 read with Entry 72 of List I of VIIth Schedule of theConstitution, Parliament was given power subject to the provisions of theConstitution to make provisions with respect to matters relating to or in connectionwith the election of either House of Parliament or State Legislature, as the casemay be, including preparation of electoral roll. For the States also, under Article328 read with Entry 37 of List II, the Legislature was empowered to makeprovisions subject to the provisions of the Constitution with respect to mattersrelating to or in connection with election of either House of Parliament or StateLegislature, including preparation of electoral roll. Thus, the Parliament wasempowered to make law as regards matters relating to conduct of election of eitherParliament or State Legislature, without affecting the plenary powers of the Election Commission. In this view of the matter, the general power ofsuperintendence, direction, control and conduct of election although vested in the Election Commission under Article 324(1), yet it is subject to any law either madeby the Parliament or State Legislature, as the case may be which is also subject tothe provisions of the Constitution. The word "election" has been interpreted toinclude all the steps necessary for holding election. In M.S. Gill v. Chief ElectionCommissioner (suprs), A.C. Jose v. Sivan Pillai and Ors and Kanhiya Lal Omar v. R.K. Trivedi and Ors, it hasbeen consistently held that Article 324 operates in the area left unoccupied bylegislation and the words "superintendence, "controi" "direction" as well as "conduct of all elections" are the broadest of the terms. Therefore, it is no more indoubt that the power of superintendence, direction and control are subject to lawmade by either Parliament or by the State Legislature, as the case may provided the same does not encroach upon the plenary powers of the Election Commissionunder Article 324.

77. We find that the Representation of the People Act, 1951 also has notprovided any period of limitation for holding election for constituting freshAssembly election in the event of premature dissolution of former Assembly. Inthis context, concerns were expressed by learned counsel for one of the national political parties and one of the States that in the absence of any period provided either in the Constitution or in the Representation of the People Act, the ElectionCommission may not hold election at all and in that event it would be the end of democracy. It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical, free and fair election is substratum of democracy. If there is no free and fair periodic election, it is end of democracy and the same was recognized in M.S. Gill v. Chief Election Commissioner - (1978) 1 SCC 464thus:

"A free and fair election based on universal adult franchise is the basic, the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifies. The super authority is the Election Commission, the Kingpin is the returning of ficer, the minions are the presiding of ficers in the polling stations and the electoral engineering in conformity with the elaborate legislative provision."

78. Similar concern was raised in the case of <u>A.C. Jose v. Sivan Pillai and Ors</u>. In that case, it was argued that if the Commission isarmed with unlimited arbitrary powers and if it happens that the persons manningthe Commission shares or is wedded to a particular ideology, he could be givingodd directions cause a political havoc or bring about a Constitutional crisis, settingat naught the integrity and independence of the electoral process, so important andindispensable to the democratic system. Similar apprehension was also voiced in M.S. Gill v. Chief Election Commissioner (supra). The aforesaid concern wasmet by this Court by observing that in case such a situation ever arises, the Judiciary which is a watchdog to see that Constitutional provisions are upheldwould step in and that is enough safeguard for preserving democracy in the country.

79. However, we are of the view that the employment of words "on anexpiration" occurring in Sections 14 and 15 of the Representation of the PeopleAct, 1951 respectively show that Election Commission is required to take steps forholding election immediately on expiration of the term of the Assembly or its dissolution, although no period has been provided for. Yet, there is another indication in Sections 14 and 15 of the Representation of the People Act that the election process can be set in motion by issuing of notification prior to the expiryof six months of the normal term of the House of People of Legislative Assembly. Clause (1) of Article 172 provides that while promulgation of emergency is inoperation, the Parliament by law can extend the duration of the Legislative Assembly not exceeding one year at a time and this period shall not, in any case, extend beyond a period of six months after promulgation has ceased to operate. Further, under Articles 123 and 213, the

life of an ordinance promulgated either bythe President or by the Governor, as the case may be, is six months and repeatedpromulgation of ordinance after six months has not been welcomed by this Court.Again, under Articles 109, 110, and 111 and analogous Articles for StateAssembly, Money Bill has to be passed by the House of People or by theLegislative Assembly. The aforesaid provisions to indicate that on the prematuredissolution of Legislative Assembly the Election Commission is required toinitiate immediate steps for holding election for constituting Legislative Assemblyon the first occasion and in any case within six months from the date of prematuredissolution of the Legislative Assembly.

- 2(b) Is there any limitation on the powers of the Election Commission toframe schedule for the purpose of holding election for constituting LegislativeAssembly?
- 80. So far as the framing of the schedule or calendar for election of theLegislative Assembly is concerned, the same is in the exclusive domain of theElection Commission, which is not subject to any law framed by the Parliament. The Parliament is empowered to frame law as regards conduct of elections butconducting elections is the sole responsibility of the Election Commission. As amatter of law, the plenary powers of the Election Commission can not be takenaway by law framed by Parliament. If Parliament makes any such law, it would repugnant to Article 324. Holding periodic, free and fair elections by the Election Commission are part of the basic structure and the same was reiterated in Indira Nehru Gandhi v. Raj Narajn which run as under:

"198. This Court in the case of Kesavananda Bharati (supra) held bymajority that the power of amendment of the Constitution contained inArticle 368 does not permit altering the basic structure of theConstitution. All the seven Judges who constituted the majority were also agreed that democratic set-up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect old representatives or, if they so choose, to change therepresentatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of defence to mass opinion....."

81. The same is also evident from Sections 14 and 15 of the Representation of People Act, 1951 which provide that the President or the Governor shall fix thedate or dates for holding elections on the recommendation of the Election Commission. It is, therefore, manifest that fixing schedule for elections either for the House of People or Legislative Assembly is in the exclusive domain of the Election Commission.

82. It appears that the interpretation of Article 174(1) of the Constitution by the Election Commission in its order was mainly influenced by the past practiceadopted by the Election Commission holding elections for constituting freshLegislative Assembly within six months of the last sitting of the dissolved House.It also appears that the gratuitous advice of application of Article 356 by the ElectionCommission in its order was in all its sincerity, although now on our interpretation of Article 174(1), we find that it was misplaced. However, the ElectionCommission in its written submission has stated thus:

"The decision, contained in the Election Commission"sorder dated 16.8.2002, was taken without reference to Article 356. However, it was merely pointed out that there need be no apprehension that there would be aconstitutional impasse as Article 356 could provide asolution in such a situation".

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In that view of the matter and the view we have taken in regard to the interpretation of Article 174(1), there is no need to go further into the question of application of Article 356 in the context of the order of the Election Commission outof which the Reference arises.

- 83. As a result of the aforesaid discussion, our conclusions are as follows:
- a) The Reference made by the President of India under Article143(1) arises out of the order of the Election Commission dated19.8.2002 and the questions raised therein are of publicimportance and are likely to arise in future. Further, there beingno decision by this Court on the questions raised and a doubthaving arisen in the mind of the President in regard to theinterpretation of Article 174(1) of the Constitution, theReference is required to be answered.
- b) Article 174(1) of the Constitution relates to an existing, live and functional Legislative Assembly and not to a dissolved Assembly.
- c) The provision in Article 174(1) that six months shall notintervene between its last sitting in one session and the dateappointed for its sitting in the next session is mandatory andrelates to the frequencies of the sessions of a live and existingLegislative Assembly and does not provide for any period oflimitation for holding fresh elections for constitutingLegislative Assembly on premature dissolution of theAssembly.
- d) The expressions "the House", "either House" is synonymouswith Legislative Assembly or Legislative Council and they do not refer to different bodies other than the Legislative Assemblyor the Legislative Council, as the case may be.
- e) Neither under the Constitution nor under the Representation ofthe People Act, any period of limitation has been prescribed forholding election for constituting Legislative Assembly afterpremature dissolution of the existing one. However, in

view of the scheme of the Constitution and the Representation of the People Act, the elections should be held within six months for constituting Legislative Assembly from the date of dissolution of the Legislative Assembly.

- f) Under the Constitution the power to frame the calender orschedule for elections for constituting Legislative Assembly is within the exclusive domain of the Election Commission and such a power is not subject to any law either made by Parliament or State Legislature.
- g) In view of the affidavit filed by the Election Commissionduring hearing of the Reference, the question regarding theapplication of Article 356 is not required to be gone into.
- 84. In accordance with the foregoing opinion, we report on the questionsreferred as follows:

Question No. (i):

85. This question proceeds on the assumption that Article 174(1) is alsoapplicable to a dissolved Legislative Assembly. We have found that theprovision of Article 174(1) of the Constitution which stipulates that sixmonths shall not intervene between the last sitting in one session and thedate appointed for is first sitting in the next session is mandatory in natureand relates to an existing and functional Legislative Assembly and not to adissolved Assembly whose life has come to an end and ceased to exist. Further, Article 174(1) neither relates to elections nor does it provide anyouter limit for holding elections for constituting Legislative Assembly. The superintendence, direction and control of the preparation of electoral roll and conduct of holding elections for constituting Legislative Assembly is in the exclusive domain of the Election Commission under Article 324 of the Constitution. In that view of the matter, Article 174(1) and Article 324 operate on different fields and neither Article 174(1) is subject to Article 324nor Article 324 is subject to Article 174(1) of the Constitution.

Question No. (ii):

86. This question also proceeds on the assumption that Article 174(1) isalso applicable to a dissolved House. On our interpretation of Article 174(1), we have earlier reported that the said Article is inapplicable to adissolved Legislative Assembly. Consequently, there is no infraction of themandate of Article 174(1) in preparing a schedule for elections to an Assembly by the Election Commission. The Election Commission in its written submissions stated thus:

"The decision, contained in the Election Commission"sorder dated 16.8.2002, was taken without reference to Article 356. However, it was merely pointed out that there need be no apprehension that there would be aconstitutional impasse as Article 356 could provide asolution in such a situation".

In that view of the matter, the question of applicability of Article 356 on theinfraction of the provisions of Article 174 loses much of its substance and, therefore, application of Article 356 is not required to be gone into.

Question No. (iii):

87. Again, this question proceeds on the assumption that the provision of Article 174(1) also apply to a dissolved Assembly. In view of our answer toquestion No. (i), we have already reported that Article 174(1) neither applies a prematurely dissolved Legislative Assembly nor does it deal withelections and, therefore, the question that the Election Commission is required to carry out the mandate of Article 174(1) of the Constitution does not arise. Under Article 324, it is the duty and responsibility of the election Commission to hold free and fair elections at the earliest. No efforts should be spared by the Election Commission to hold timely elections. Ordinarily, law and order or public disorder should not be occasion for postponing the elections and it would be the duty and responsibility of all concern to renderall assistance, cooperation and aid to the Election Commission for holding free and fair elections.

88. The Reference is answered accordingly.

Balakishnan, J.

89. I had the advantage of reading the Opinion in draft of my learned brothers V.N. Khare and Arijit Pasayat, JJ. and I fully concur with the opinion expressed by them regarding interpretation of Article 174 and the consequential answers to the reference made by the President of India, and I would like to add the following.

90. The Legislative Assembly of Gujarat was dissolved by the Governor of Gujarat on 19th July, 2002 in exercise of the powers conferred on him under Article 174(2)(b) of the Constitution. The full term of the Legislative Assemblywould be expiring on 18th March, 2003. After the dissolution of the Assembly, the ruling party in the State of Gujarat requested the Election Commission for conducting fresh General Election urgently so that the new Legislative Assemblywould be able to have its first session before 6th October, 2002. The ruling party of the State of Gujarat made this demand on the basis of the premise that under Article 174(1) of the Constitution, there shall not be more than six monthsperiod in between the last session of the dissolved assembly and the first meeting of the next session of the Assembly to be newly constituted. Certainother political parties, public-spirited citizens and organisations urged the Election Commission not to hold the general election to the Gujarat State Legislative Assembly but to wait for some more time until the people who were affected by the communal riots and violence returned to their houses from the various relief camps where they were staying.

91. In the last week of February, 2002 an unfortunate incident took place atthe railway station in Godhara in Gujarat in which a railway compartment was seton fire

and several people who were occupants of that compartment died ofburning. After this incident a spate of communal violence erupted in variousparts of Gujarat and curfew was clamped in many cities of the State of Gujarat. Many people who had been the victims of such riots were put in the relief camps. Election Commission, which was requested to conduct the election, visited Gujarat and in the Order passed by the Election Commission on 16th August, 2002, the following observations were made:

- (1) The Commission was of the opinion that Article 174(1) of theConstitution was applicable even in respect of dissolvedAssemblies and in the Order it is stated that the Commissionhas, in the past, been taking the view that the six monthsmentioned in Article 174(1) of the Constitution applies notonly to a Legislative Assembly in existence but also todissolved assembly and elections to constitute a newLegislative Assembly have always been held within suchtime so as to enable the new Assembly to meet within theperiod of six months from the last sitting of the last session of the dissolved Assembly;
- (2) Commission was of the opinion that any other view on theinterpretation of Article 174(1) of the Constitution may lead toextensive gaps between two Houses of a LegislativeAssembly and the abuse of democracy, there being noprovision in the Constitution or in any law in force prescribinga period during which an election to be held to constitute anew Legislative Assembly on the dissolution of the previoushouse;
- (3) The Commission further observed that Article 174(1) of theConstitution cannot be read in isolation and it has to be readalong with other relevant provisions of the Constitution, particularly Article 324 of the Constitution and this Articlebeing not subject to the provisions of any other Article of theConstitution including Article 174(1), vests thesuperintendence, direction and control, inter alia, of thepreparation of electoral rolls for, and conduct of, elections toParliament and State Legislature in the ElectionCommission. The Commission further observed that freeand fair election based on universal adult franchise being thebasic feature of the Constitution the same cannot be held inview of the prevailing situation in Gujarat. The Commissionwas of the view that there was large scale movement andmigration of electors due to communal riots and violence andthey had not returned to their homes and they would not beable to go to the polling station to cast their votes and theelectoral rolls had to be revised.
- 92. Therefore, the Election Commission came to the conclusion that it was notin a position to conduct free and fair election immediately after the dissolution of the Assembly and after the electoral roll is revised, the Commission would be ina position to conduct election to the General Assembly in the month of November/December, 2002.

- 93. The Commission was also of the view that Legislative Assembly shouldmeet at least every six months as contemplated by Article 174(1) of theConstitution even when it has been dissolved and in case it was not feasible, that would mean that the Government of the State cannot be carried on inaccordance with the provisions of the Constitution within the meaning of Article356(1) of the Constitution and the President would step in and declare a state of emergency.
- 94. After the receipt of the report of the Election Commission, the PresidentialReference was made under Article 143(1) of the Constitution of India and theOrder of Reference proceeded on the assumption that the mandate of theConstitution under Article 174(1) is that six months shall not intervene betweenthe last sitting of the previous session and the date appointed for the first sittingin the next session and the Election Commission has all along been consistentthat normally, a Legislative Assembly should meet at least every six months ascontemplated by Article 174(1) of the Constitution, even where it has beendissolved, and the Order of the Election Commission of India dated August 16,2002 had not recommended any date for holding general election for constitutinga new Legislative Assembly for the State of Gujarat. The new LegislativeAssembly cannot come into existence so as to meet within the stipulated periodof six months as provided under Article 174(1) of the Constitution of India. Thefollowing observation of the Election Commission was also noted in theReference:

"AND WHEREAS the Election Commission has held that the non-observation of the provisions of Article 174(1) in the presentsituation would mean that the Government of the State cannot becarried in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in;

AND WHEREAS doubts have arisen with regard to the constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in a non-compliance with the mandatory requirement envisaged under Article 174(1) of the Constitution under which not more than six months shall intervene between two sittings of the State Legislature;

AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen which are of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India."

- 95. The following three questions were referred to the Supreme Court of India for consideration:
- (i) Is Article 174 subject to the decision of the Election Commission of India under Article 324 as to the schedule of elections of the Assembly?

- (ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premise that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?
- (iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all requisite resources of the Union and the State to ensure free and fair elections?
- 96. After the receipt of the reference, notices were issued to all the States and all the recognised national political parties. On behalf of the Union of India, Solicitor General Shri Harish N. Salve appeared and raised the following contentions. It was contended on behalf of the Union of India that Article 174 isapplicable even to dissolved assemblies and since there is no time limit at all forconducting fresh election, it would hypothetically lead to a situation of Council of Ministers continuing perennially after the dissolution of Assembly, which, in turn, would lead to a breakdown of the constitutional democracy. It was argued thatthere is no question of Article 174, or Article 85, or Article 85 or Article 164coming in conflict with Article 324 and these provisions operate in different fieldsand the power of superintendence, direction and control of elections vested withthe Election Commission should be exercised in the manner which would beconsistent with the constitutional scheme of representative government. It issubmitted that the Election Commission must use all the requisite resources of Union and the State to ensure free and fair election. It was further argued thatthe power under Article 356 is utterly irrelevant for ascertaining the constitutionalmandate for holding elections and this power is highly discretionary and is to be exercised where there is a breakdown of the constitutional machinery. The executive government has no legal authority to compel the holding of elections -not even Parliament can, by resolution, legally compel the Election Commissionto fix a particular schedule for the elections. By the same token, the ElectionCommission cannot recommend - or even proceed upon the premise of --imposition of President''s Rule, which would require executive action ratified by Parliament.
- 97. Shri Arun Jaitley, Sr. Advocate, appearing on behalf of the BharatiyaJanata Party contended that the view of the Election Commission that Article 174is subject to Article 324 of the Constitution is wholly erroneous and contrary to the constitutional mandate. It was further submitted that Article 324 does notenable Election Commission to exercise untrammeled powers and the Commission must exercise power either of the Constitution or the law under Article 327 and 328. It was also argued that even when the Assembly is dissolved, the House continue to exist and, therefore, Article 174 is applicable even to dissolved assemblies. A reference was made to the Parliamentary practice in various other countries including Britain.
- 98. Shri Kapil Sibal, Sr. Advocate appearing on behalf of the Indian NationalCongress contended that Article 174 has no application to dissolved Assembly. However, he submitted that on dissolution of an Assembly, it is the duty of the Election

Commission is conduct the election immediately and every step shall betaken to see that the new Legislative Assembly met for its first session at theearliest. However, it was submitted that the Election Commission is the supremeauthority, which should take a decision as to when a free and fair election can beheld. Article 324 of the Constitution gives vast power to the Election Commissionto decide the question as to when the election shall be held and if the ElectionCommission fails to carry out the constitutional mandate for any other extraneousreason, such decision can be challenged under judicial review. According to thecounsel, any other interpretation of these constitutional provisions would lead to a situation where the Election Commission would be forced to conduct electionwhen it is not possible to conduct a free and fair election and that would beagainst the constitutional spirit of a democratic government. It was submittedthat as the Reference was based on the wrong assumption of the constitutional provisions, it need not be answered by this Court.

99. Shri Ram Jethmalani, Sr. Advocate appearing on behalf of the State ofBihar submitted that Article 174 applies to an Assembly whosepersonality/identity is not interrupted or altered by premature dissolution orexpiry of its period of duration. Free and fair elections being a basic feature of democratic and Republican Constitution, Article 174 will have to yield to Article324. It was further submitted that Article 356 does not include the power tosuspend the operation of Article 174. It was also submitted that Article 174imposes a mandate only on the Governor of the State and is not concerned withthe Election Commission.

100. Shri Rajeev Dhavan, Sr. Advocate appearing on behalf of the CommunistParty of India (Marxist) also supported the contention raised by the counsel whoappeared for Indian National Congress and contended that Article 174 is notapplicable to dissolved Assembly. Similar contentions were raised by counsel forother political parties and counsel who appeared for various States.

K.K. Venugopal, Sr. Advocate appearing behalf of the on submitted that Article 174 ElectionCommission has no application dissolvedAssemblies. It was submitted that free and fair election is the basic feature of the Constitution and the power of superintendence, direction and control of electionvests with the Election Commission. It was further submitted that as theReference has been made on the wrong premise, this Court need not answer thesame. it was also submitted that the Election Commission has been trying itsbest to conduct election at the earliest even under very adverse circumstances and for the past 50 years Election Commission earned a good reputation as afree and independent body, which has conducted elections to various StateLegislatures and the House of the People.

102. We are greatly beholden to other Senior Lawyers, M/s. K. Parasaran, P.P.Rao, Milon Banerjee, M.C. Bhandare, Ashwani Kumar, P.N. Puri, A. Sharan, Devendra N. Dwivedi, A.M. Singhvi, Gopal Subramaniam, and Vijay Bahuguna, who had made very

enlightening arguments on various vexed legal questions involved in this case.

103. The first and foremost question that arises for consideration is whetherArticle 174 is applicable in respect of a dissolved Assembly. The next questionthat arises for consideration is the interplay of Article 147 and Article 324 of theConstitution. Incidently, a question also may arise whether the ElectionCommission can postpone the election indefinitely on one pretext or the otherand create a situation where there is a breakdown of democratic form of Government. Article 174 of the Constitution reads thus:

"174. Sessions of the State Legislature, prorogation and dissolution - (1) The Governor shall from time to time summonthe House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall notintervene between its last sitting in one session and the dateappointed for its first sitting in the next session.

- (2) The Governor may from time to time-
- (a) prorogue the House or either House;
- (b) dissolve the Legislative Assembly".

Article 324 of the Constitution reads as under:

324. Superintendence, direction and control of elections tobe vested in an Election Commission-

(1) The superintendence, direction and control of thepreparation of the electoral rolls for, and the conduct of, allelections of Parliament and to the Legislature of every Stateand of elections to the offices of President and Vice-Presidentheld under this Constitution shall be vested in aCommission (referred to in this Constitution as the ElectionCommission).



(4)

(5)

(6)".

104. Section 8 of the Constitution (First Amendment) Act, 1951 amendedArticle 174 of the Constitution. The amended Article requires the Governor tosummon the House or each house of the Legislature to the State and this Articlemandates that six months shall not intervene between the last sitting of onesession and the date appointed for the first sitting of the next session. The sole object of Article 174(1) is to ensure accountability of executive to the peoplethrough their elected representatives. Article 164(2) states that the Council of Ministers shall be collectively

responsible to the Legislative Assembly of the State. In a democratic form of Government the responsibility of the Government is to the people of the country and the Members of the Legislative Assemblyrepresent the people of the State and the Council of Ministers shall becollectively responsible to the Legislative Assembly. Therefore, frequency of themeeting of the Legislative Assembly is necessary, otherwise, there will not beany check and balance to the actions of the executive government. The SolicitorGeneral contended that Article 174 would apply even to a dissolved assemblybecause the House as such is not dissolved and it was pointed out that when the British Parliament is dissolved, notice to summon the next session of the Parliament is simultaneously issued. On that basis, it was contended that Article174 is even applicable to a dissolved Assembly. We do not find much force inthis contention. The plain meaning of the words used in Article 174 itself wouldshow that Article 174 has no application to a dissolved Assembly. The words "sixmonths shall not intervene between its last sitting in one session and the dateappointed for its first sitting in the next session" occurring in Article 174 clearlyindicate that the interregnum between the two sessions shall not be six monthsand that is applicable only in respect of a live Assembly. Once the Assembly isdissolved, Article 174 has no application.

105. Of course, in the Report of the Election Commission it is stated that thatCommission has all along been taking the view that once the Assembly isdissolved it would take all possible steps to see that the first sitting of the nextAssembly would be made possible within a period of six months of the last sitting of the dissolved Assembly. This is a very healthy convention which is beingfollowed since the adoption of our Constitution and we must appreciate theaction of the Election Commission in scheduling the election in such a way thatthe first session of the next Assembly meets within the period of six months ofthe last sitting of the dissolved Assembly. But that by itself is no reason tointerpret that Article 174 would apply to a dissolved Assembly. Frequency ofmeeting as provided under Article 174 would apply to an Assembly which is inesse at that time.

106. Therefore, a question may arise that if Article 174 is not applicable to adissolved Assembly, can the Election Commission postpone election forindefinite period so as to defeat the democratic form of Government? Is thereany mandate in the Constitution or in the Representative of People Act, 1951prescribing time to conduct the election? Obviously, neither the Constitution northe Representation of People Act, 1951 prescribes any time limit for the conductof election after the term of the Assembly is over either by premature dissolutionor otherwise. Proviso to Section 15(2) of the Representation of People Act, 1951states that where a general election is held otherwise than on dissolution of theexisting House of the People, no notification for election shall be issued at anytime earlier than six months prior to the date on which the duration of that Housewould expire under the provisions of Clause (2) of Article 83. Once there is dissolution of the Assembly, the Election Commission shall take immediate stepsto conduct the election an see that the new

Assembly is formed at the earliestpoint of time. A democratic form of Government would survive only if there are elected representatives to rule the country. Any delay on the part of the ElectionCommission is very crucial and it is the Constitutional duty of the ElectionCommission to take steps immediately on dissolution of the Assembly. Article324 of the Constitution gives vast powers to the Election Commission and timeand again this Court has pointed out the extent of powers and duty vested withthe Election Commission. It was argued by various counsel appearing on behalfof the various political parties as to what would be the position if the ElectionCommission would indefinitely postpone the election under some pretext or theother. So, the question posed was: "Quis custodiet apses custodes" - who will guard the guards themselves?

107. The Election Commission is vested with the power to decide the electionschedule. It can act only in accordance with the Constitutional provisions. Theelection process for electing the new Legislative Assembly should startimmediately on the dissolution of the Assembly. There may be cases where theelectoral roll may not be up-to-date and in such case the Election Commission iswell within its power to update the electoral roll and the time taken for suchupdating of the electoral roll shall be reasonable time. Ordinarily, the ElectionCommission would also require time for notification, calling of nomination and such other procedure that are required for the proper conduct of election. Theremay be situation where the Election Commission may not be in a position toconduct free and fair election because of certain natural calamities. Even undersuch situation the Election Commission shall endeavour to conduct election atthe earliest making use of all the resources within its command. Ample powersare given to the Election Commission to coordinate all actions with the help ofvarious departments of the Government including military and para-military forces. When an Assembly is dissolved by the Governor on the advice of the Chief Minister, naturally, the Chief Minister or his political party seeks freshmandate from the electorate. The duty of the Election Commission is to conductfresh election and see that a democratically elected Government is installed at the earliest and any decision by the Election Commission, which is intended to defeat this very avowed object of forming an elected Government can certainlybe challenged before the Court if the decision taken by the Election Commissionis perverse, unreasonable or for extraneous reasons and if the decision of the Election Commission is vitiated by any of these grounds the Court can giveappropriate direction for the conduct of the election. 108. The next point that arises for consideration to form opinion regarding the questions referred to this Curt is as to the application of Article 355 of theConstitution. Reference to Article 356 was incidentally made by the ElectionCommission to point out that if Article 174 cannot be complied with, the possiblealternative is to invoke Article 356 and declare a state of emergency. I do notthink that the solution suggested by the Election Commission is appropriate orjustified. Article 356 has no application under any of these situations. It is

anindependent power to be exercised very rarely and this power is hedged by everso many Constitutional limitations. In view of the above discussion, the threequestions made in the Reference can be answered in the following manner.

- (I) Is Article 174 subject to the decision of the Election Commission of Indiaunder Article 324 as to the schedule of elections of the Assembly?
- 109. Article 174 and Article 324 operate in different fields. Article 174 does notapply to dissolved Assemblies. The schedule of the election of the Assembly isto be fixed having regard to the urgency of the situation that a democratically elected Government be installed at the earliest and the process of election shall start immediately on the dissolution of the Assembly. Though the ultimate authority to decide as to when a free and fair election can be conducted is Election Commission, such decisions shall be just and reasonable and arrived athaving regard to all relevant circumstances. Any decision to postpone election onunreasonable grounds is anathema to democratic form of government and it is subject to judicial review on traditionally accepted grounds.
- (ii) Can the Election Commission of India frame a schedule for the elections to an Assembly on the premises that any infraction of the mandate of Article 174 would be remedied by a resort to Article 356 by the President?
- 110. The framing of schedule for election for the new Legislative Assemblyshall start immediately on dissolution of the Assembly and the ElectionCommission shall endeavour to see that the New Legislative Assembly meets atleast within a period of six months of the dissolution. Article 356 regardingdeclaration of state of emergency in the State has no relevance to the fixation of the election schedule.
- (iii) Is the Election Commission of India under a duty to carry out the mandateof Article 174 of the Constitution, by drawing upon all the requisiteresources of the Union and the State to ensure free and fair elections?
- 111. The Election Commission is under a constitutional duty to conduct theelection at the earliest on completion of the term of the Legislative Assembly ondissolution or otherwise. If there is any impediment in conducting free and fairelection as per the schedule envisaged by the Election Commission, it can drawupon all the requisite resources of Union of State within its command to ensurefree and fair election, though Article 174 has no application in the discharge of such constitutional obligation by the Election Commission. It is the duty of the Election Commission to see that the election is done in a free and fair manner tokeep the democratic form of Government vibrant and active.

Arijit Pasayat, J.

112. Free, far and periodic elections are the part of the basicstructure of the Constitution of India, 1950 (in short the Constitution). In a democracy the little man - voter - hasoverwhelming importance and cannot be hijacked from the course

offree and fair elections.

113. "Democracy" and "free and fair election" are inseparable twins. There is almost an insuperable umbilical cord joining them. The littleman"s ballot and not the bullet of those who want to capture power (starting with booth capturing) is the heartbeat of democracy. Path of the little man to the polling booth should be free and unhindered, and his freedom--to-elect a candidate of his choice is the foundation of afree and fair election.

114. The message relates to the pervasive philosophy of democraticelections which Sir Winston Churchill vivified in matchless words:

"At the bottom of all tributes paid to democracy is the littleman, walking into a little booth, with a little pencil, making a littlecross on a little bit of paper-no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

115. If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtleperversion of discretion by men" dressed in little, brief authority". For be you ever so high, the law is above you".

116. The moral may be stated with telling terseness in the words of William Pitt: "Where laws end, tyranny begins". Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of Power best expressed by Benjamin Disraeli:

"I repeat that all power is trust - that we are accountable forits exercise-that, from the people and for the people, all springs, and all must exist."

117. At the threshold: why the Reference was made, and in whatbackground.

118. The Gujarat Legislative Assembly met on 3rd April, 2002 andthereafter was dissolved on 19thJuly, 2002. Election Commissionpassed an order on 16thAugust, 2002 holding that free and fairelections was not possible in Gujarat, even though Article 174 of theConstitution mandatorily provides that the time gap between twosittings of the House should not exceed six months. In that context, theElection Commission held that Article 324 postulates "free and fairelection" and when it is not possible to hold it, the provisionscontained in Article 174 have to yield. That gave rise to doubts andthe President of India has made reference to this Court under Article143(1) of the Constitution, basically on that core issue and threequestions have been referred. First question specifically refers toArticle 174 and Article 324. The Election Commission observed thateven if the period prescribed under Article 174 cannot be adhered to the situation can be met by imposition of President"s Rule by Article356 of the Constitution. The Reference (including the preambles) andrelevant portion of Election Commission"s order so far as relevant for the Reference read as follows:

President Address:

- 119. WHEREAS the Legislative Assembly of the State of Gujaratwas dissolved on July 19, 2002 before the expiration of this normalduration on March 18, 2003;
- 120. AND WHEREAS Article 174(1) of the Constitution provides that six months shall not intervene between the last sitting of the Legislative Assembly in one session and the date appointed for its first sitting in the next Session;
- 121. AND WHEREAS the Election Commission has also noted that the mandate of Article 174 would require that the Assembly shouldmeet every six months even after the dissolution of the House, andthat the Election Commission has all along been consistent that normally a Legislative Assembly should meet at least every six months as contemplated by Article 174, even where it has been dissolved;
- 122. AND WHEREAS u/s 15 of the Representation of thePeople Act, 1951, for the purpose of holding general elections on theexpiry of the duration of the Legislative Assembly or its dissolutionthe Governor shall, by notification, call upon all AssemblyConstituencies in the State to elect members on such date or dates asmay be recommended by the Election Commission of India;
- 123. AND WHEREAS the last sitting of the Legislative Assembly of the State of Gujarat was held on 3rd April, 2002, and as such the newlyconstituted Legislative Assembly should sit on or before 3rd October, 2002;
- 124. AND WHEREAS the Election Commission of India by itsorder No. 464/GJ-LA/2002 dated August 16, 2002 has notrecommended any date for holding general election for constituting anew Legislative Assembly for the State of Gujarat ad observed thatthe Commission will consider framing a suitable schedule for thegeneral election to the State Assembly in November, December 2002.Copy of the said order is annexed hereto;
- 125. AND WHEREAS owing to the aforesaid decision of the Election Commission of India, a new Legislative Assembly cannotcome into existence so as to meet within the stipulated period of sixmonths as provided under Article 174(1) of the Constitution of India;
- 126. AND WHEREAS the Election Commission has held that thenon-observance of the provisions of Article 174(1) in the presentsituation would mean that the Government of the State cannot becarried in accordance with the provisions of the Constitution withinthe meaning of Article 356(1) of the Constitution and the Presidentwould then step in;
- 127. AND WHEREAS doubts have arisen with regard to the constitutional validity of the said order of the Election Commission of India as the order of the Election Commission which would result in anon-compliance with the mandatory requirement envisaged under Article 174(1) of the Constitution under which not

more than sixmonths shall intervene between two sittings of the State Legislature;

- 128. AND WHEREAS in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out havearisen which are of such a nature and of such public importance that itis expedient to obtain the opinion of the Supreme Court of India;
- 129. NOW, THEREFORE, in exercise of the powers conferred uponme under Clause (1) of Article 143 of the Constitution. I, A.P.J. AbdulKalam, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:-
- (i) Is Article 174 subject to the decision of the ElectionCommission of India under Article 324 as to the schedule of electionsof the Assembly?
- (ii) Can the Election Commission of India frame a schedulefor the elections to an Assembly on the premise that anyinfraction of the mandate of Article 174 would beremedied by a resort to Article 356 by the President?
- (iii) Is the Election Commission of India under a duty to carryout the mandate of Article 174 of the Constitution, bydrawing upon all the requisite resources of the Union and the State to ensure free and fair elections?

Order of the Election Commission (Relevant portions)

- 1. The term of the Legislative Assembly of the State of Gujaratwas normally due to expire, in terms of Article 172(1) of theConstitution, on the 18thMarch, 2003. Keeping that in view, theCommission had been planning to hold the next general election in theState for constituting a new Legislative Assembly in the early part ofthe year 2003, along with the general elections to the LegislativeAssemblies of Himachal Pradesh, Meghalaya, Nagaland and Tripurawhose terms are also normally due to expire in the month of March,2003.
- 2. The Legislative Assembly of the State of Gujarat was, however, dissolved prematurely by the Governor of Gujarat on the 19thJuly,2002 in exercise of his powers under Article 174(2)(b) of theConstitution. On such premature dissolution of the State LegislativeAssembly, a demand is being made, particularly by the Bhartiya JantaParty and a few other smaller parties and NGOs, that the generalelection to constitute the new Legislative Assembly be urgently heldby the Commission so as to enable the new Legislative Assembly soconstituted to meet for its first session before 6thOctober, 2002. Insupport of such demand, they are citing Article 174(1) of theConstitution which provides that the "the Governor shall, from time totime, summon the House or each House of the Legislature of the Stateto meet at such time and place as he thinks fit, but six months shall notintervene between its last sitting in one session and the date appointedfor this first sitting in the next session". The last session of thedissolved Legislative Assembly of Gujarat was prorogued on 6thApril,2002 and it is contended that the first session of the new

LegislativeAssembly should be held before 6thOctober, 2002 and, therefore, it ismandatory for the Commission to hold the election well before 6thOctober, 2002. They also claim that the situation in the State ofGujarat is quite normal and conductive to the holding of free and fairelections, as is evident from the facts that the panchayat elections inlarge areas were successfully conducted in April 2002, that HSC, SSCexamination were held peacefully and that various religious festivalslike the Rath Yatra had passed off without any untoward incident.

x x x x x x

- 4. The Commission has carefully examined the provisions of Article 174(1) of the Constitution. It has also considered otherrelevant provisions in the Constitution having a bearing onfunctioning of the Legislative Assemblies and the conduct of electionsto constitute them. The Commission has, in the past, been taking theview that the six months in Article 174(1) of the Constitution applies not only to a Legislative Assembly in existence but also to elections toconstitute the new Assembly on the dissolution of the previous Assembly and in all past cases, like the recent dissolution of the GoaLegislative Assembly on 27th February, 2002, wherever been dissolved prematurely by the Governor under any Assemblyhas Article174(2)(b) of the Constitution (and where the President has not takenover the administration of the State under Article 356 of the Constitution on the dissolution of the Assembly), elections toconstitute a new Legislative Assembly have always been held in suchtime as have enabled the new Assembly to meet within the period ofsix months from the last date of the last session of the dissolvedAssembly. Similar action has been taken by the Commission whereverthe House of the People has been prematurely dissolved by the President under Article 85(2)(b) of the Constitution-for example the dissolution of the House of the People in 1999, 1998 and earlier in 1991, 1979 and 1971 - so that the new House of the People could meet within the period of six months from the last sitting of the dissolved House.
- 5. Thus, the Commission has all along been consistent that,normally, a Legislative Assembly should met at least every sixmonths as contemplated by Article 174(1) of the Constitution, evenwhen it has been dissolved (except where President''s Rule has beenimposed in the State under Article 356 of the Constitution). TheCommission sees no convincing/justifiable reason to take a differentview in the present case. In fact, any other view on the interpretation of Article 174(1) of the Constitution might lead to extensive gapsbetween two Houses of a Legislative Assembly and the abuse ofdemocracy, there being no provision in the Constitution or in any lawin force prescribing a period during which an election is to be held toconstitute a new Legislative Assembly on the dissolution of the previous House. This will be contrary to the basic scheme of theConstitution which prescribes that there shall be a State LegislativeAssembly (Article 168) and the Council of Ministers shall becollectively responsible to that Assembly [Article 164(2)] and that if aminister is not a member of the Assembly for a consecutive sixmonths period, he shall cease to be a minister

[Article 164(4)]. Amore alarming situation may arise with Parliament where Article85(1) of the Constitution makes identical provisions relating to theholding of sessions of the House of the People. Any view that theHouse of the People need not meet every six months and the electionsbe indefinitely postponed after one House has been dissolved wouldnot only be destructive of the whole Parliamentary system soassiduously built in our Constitution but also be abhorrent to everysection of the Indian polity and citizenry.

6. The Commission is also fortified in its above interpretation bythe view taken by the President and Parliament on the provisions of Article 174(1) whenever there was an imposition of President"s Rulein a State under Article 356 of the Constitution. Whenever the Legislative Assembly of any State has been dissolved in the past bythe President under Article 356 of the Constitution, the provisions of Article 174(1) have invariably been expressly suspended in the Proclamation issued by the President under that Article and approvedby Parliament during the operation of that Proclamation (See forexample, the latest Proclamation dated 10thFebruary, 1999 issued bythe President dissolving the Goa Legislative Assembly imposingPresident"s Rule in that State). If Article 174(1) has no applicationafter an Assembly has been dissolved, as is being contended by oneset of representations, there is no question of the suspension of that provision after the dissolution of the Assembly by the saidProclamation.

x x x x x x

- 8. There is, to the Commission's knowledge, no authoritative pronouncement of the Supreme Court or of any High Court on this aspect of the issue. But the most plausible view that appears to the Commission in that Article 174(1) of the Constitution envisages that normally, the Legislative Assembly of a State should meet every sixmonths even after the dissolution of one House.
- 9. The next question for consideration of the Commission iswhether the Commission is obliged whatever may be thecircumstances to hold the general election within the period remainingout of six months from the date of the last sitting of the dissolvedAssembly. The Commission does not accept this view. Article 174(1) of the Constitution cannot be read in isolation and it has to be readalong with other relevant provisions of the Constitution, particularlyArticle 324 of the Constitution. Article 324, which is not subject to the provisions of any other Article of the Constitution includingArticle 174(1), vests the superintendence, direction and control, interalia, of the preparation of electoral rolls for, and conduct of, electionsto Parliament and State Legislature in the Election Commission. Elections, in the context of democratic institutions, mean free andfaire elections and not merely a ritual to be gone through periodically. In the words of the Constitution Bench of the Supreme Court in T.N.Seshan v. Union of India and Ors. (1995) 4 SCC 61:

"Democracy being the basic feature of ourconstitutional set up, there can be no two opinions thatfree and fair elections to our Legislative bodies alonewould guarantee the growth of a healthy democracy inthe country. In order to ensure the purity of the electionprocess, it was thought by our Constitution-makers thatthe responsibility to hold free and fair election in the country should be entrusted to an independent bodywhich would be insulated from political and/or executive interference."

Again the Constitution Bench of the Supreme Court observed in thefamous Keshavanand Bharati v. State of Kerala that "Free, fair fearless and impartial elections are the guarantee of ademocratic polity." Likewise, the Supreme Court repeatedlyunderscored the importance of free and faire elections in the case of Mohinder Singh Gill v. Chief Election Commissioner and Ors.; Kanhiya Lal Omar v. R.K. Trivedi and a catena of other decisions. In the case of Mohinder SinghGill (supra), the Supreme Court observed:

"The free and fair election based on universal adultfranchise is the basic....it needs little argument to holdthat the heart of the Parliamentary system is free and fairelection periodically held, based on adult franchise andthat social and economic democracy may demand muchmore."

Similar sentiments of the Supreme Court laying stress on free and fairelections to the legislative bodies have found echo in every otherdecision of the Supreme Court on elections

 $x \times x \times x \times x$

11. Thus, the Constitutional mandate given to the Election Commission under Article 324 of the Constitution is to hold free and fair elections to the legislative bodies. And, in the Commissioner"s considered view, if a free and fair election cannot be held to a legislative body at a given point of time because of the extraordinary circumstances then prevailing, Article 174 of the Constitution must yield to Article 324 in the interest of genuine democracy and purity of elections. Further, in the Commission"s considered view, such interpretation of the provisions of Articles 174(1) and 324 would not create a situation which is not contemplated or envisaged under the Constitution and which cannot be met thereunder. The non-observance of the provisions of Article 174(1) in the aforesaid eventuality would mean that the Government of the State cannot be carried on in accordance with the provisions of the Constitution within the meaning of Article 356(1) of the Constitution and the President would then step in.

x x x x x x

61. After completion of this exercise to correct the electoral rollsand bringing them as up-to-date as possible and creation of conditions conducive for free and fair

elections in the State, the Commission willconsider framing a suitable schedule for the general election to the State Assembly in November-December 2002.

- 130. It may be noted here that the Election Commission in thewritten submissions filed and the submissions made before us has stated that the observations regarding imposition of Presidents rulewere not made in the context of Article 356 of the Constitution, whichwe shall deal in detail infra. The third question relates to the exercise of power in the context of Article 174.
- 131. When the Reference was taken up for hearing we made it clearto the parties that the correctness of factual conclusions arrived at byElection Commission in its order shall not be considered by us. Onlylegal issues and the foundations therefore i.e. as recorded in the orderwere to be analysed. We also pointed out to learned counsel for theparties that while considering a Reference there is no adversarial lisinvolved. We record our appreciation that learned counsel appearingfor the parties have placed their submissions as amicus curiae, thoughthere was divergence in approach.
- 132. It was argued by some of the learned counsel that the Referenceneed not be answered because the questions do not arise of theorder of the Election Commission though the Preamble is based on thesame. It is not imperative for the Court to answer the Reference andeven if any doubt is entertained, that cannot be on hypothetical premises and answers which are self-evident and/or issues settled bythis Court by its decisions need not be answered. It was submitted that the questions which are inherently incapable of being answered should not be answered. The Reference was as described by some of the learned counsel to be inappropriate and defective. It wassubmitted that the Reference is potentially political and seeking judicial review though disguised as a Reference. Per contra, submissions were made by some of the learned counsel who have submitted that the questions are of great national interest, and there is no political overtone and in order to avoid controversies in future and to have the law settled, the Reference has been made.
- 133. The questions referred are intrinsically linked with theconclusions of the Election Commissioner and are clearly relatable toit. The scope and ambit of reference under Article 143(1) has been examined by this Court in several cases. In some cases, this Court haddeclined to answer References on the ground that political issues are involved or that the Court does not act in exercise of appellate jurisdiction while dealing with a Reference. It will be proper to takenote of few decisions on this aspect where References were notanswered on the ground that they are potentially political or that the Advisory Jurisdiction is not appellate in character [See <u>Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors.</u> and in the matter of Cauvery Water Disputes Tribunal (1993) Supp 1 SCC 96 (II).

134. The Federal Court in Re The Allocation of Lands and Buildings in a Chief Commissioner's Province (AIR 1943 FC 13) a Reference under Section 213(1) of the Government of India Act which is similarto Article 143 said that though the terms of the at section do not impose obligation on the Court, the Court should be unwilling to accept aReference except for good reasons. This Court accepted the Referencefor reasons which appeared to be constitutional importance as wellas in public interest.

135. In Re Kerala Education Bill AIR 1958 SC 956 Das, C.J. referred to the Reference in Re The Allocation ofLands and Buildings (supra) and the Reference InRe Levy of Estate Duty (AIR 1944 FC 73)> and the observations in both the cases that theReference should not be declined excepting for good reasons. ThisCourt accepted the Reference on the questions of law arising or likelyto arise. Das, C.J. in Re Kerala Education Bill (supra) said that it is forthe President to determine what questions should be referred and if hedoes not have any serious "doubt" on the provisions, it is not for anyparty to say that doubts arise out of them. In short, parties appearing inthe Reference cannot go behind the order of the Reference and presentnew questions by raising doubts. (See In Re: Presidential Poll).

136. This Court is bound by the recitals in the order of Reference. Under Article 145(1) we accept the statements of fact set out intheReference. The truth or otherwise of the facts cannot be enquired organe into nor can Court go into the question of bona fides orotherwise of the authority making the Reference. This Court cannot go behind the recital. This Court cannot got into disputed questions offact in its advisory jurisdiction under Article 143(1).

137. The correct approach according to us has been laid down by a 7Judge Bench in Special Reference No. 1 of 1964 [commonly knownas Keshav Singh Contempt Case] (1965) 1 SCR 413. After culling outthe core issues (as seen at page 439) from the questions set out atpages 429, 430 at page 440 it was observed as follows:

"Though the ultimate solution of the problemposed by the questions before us would thus lie within avery narrow compass, it is necessary to deal with somewider aspects of problem which incidentally ariseand the decision of which will assist us in rendering ouranswers to the questions framed in the presentReference".

(Underlined for emphasis)

138. It would be appropriate to take note of certain pivotalprovisions in the Constitution; Representation of Peoples" Act, 1951(in short "R.P. Act, 1951) and the Government of India Act, 1935 (inshort "Government Act").

Article 172: Duration of State Legislature-(1) Every LegislativeAssembly of every State, unless sooner dissolved, shall continue forfive years from the date appointed for its first meeting and no longerand the expiration of the said period of five years shall operate as adissolution of the Assembly:

- 139. Provided that the said period may, while a Proclamation of Emergency is in operation, be extended by Parliament by law for aperiod not exceeding one year at a time and not extending in any casebeyond a period of six months after the Proclamation has ceased tooperate.
- (2) The Legislative Council of a State shall not be subject todissolution, but a nearly as possible one-third of the members thereofshall retire as soon as may be on the expiration of every second year inaccordance with the provisions made in that behalf by Parliament bylaw.

Article 174: Sessions of the State Legislature, prorogation and dissolution-(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet as suchtime and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

- (2) The Governor may from time to time-
- (a) prorogue the House or either House;
- (b) dissolve the Legislative Assembly

Article 324: Superintendence, direction and control of elections to bevested in an Election Commission - (1) The superintendence, direction and control of the preparation of the electoral rolls, for andthe conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-Presidentheld under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

- (2) The Election Commission shall consist of the Chief ElectionCommissioner and such number of other Election Commissioners, ifany, as the President may from time to time fix and the appointment of the Chief Election Commissioner and the other ElectionCommissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.
- (3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.
- (4) Before each general election to the House of the People and tothe Legislative Assembly of each State, and before the first generalelection and thereafter before each biennial election to the LegislativeCouncil of each State having such Council, the President may alsoappoint after consultation with the Election Commission suchRegional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by Clause (1).
- (5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the ElectionCommissioners and the Regional Commissioners

shall be such as the President may be rule determine:

- 140. Provided that the Chief Election Commissioner shall not beremoved from his office except in like manner and on the like groundsas a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantageafter his appointment:
- 141. Provided further that any other Election Commissioner or aRegional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.
- (6) The President, or the Governor of a State, shall, when sorequested by the Election Commission, make available to the ElectionCommission or to a Regional Commissioner such staff as may benecessary for the discharge of the functions conferred on the ElectionCommission by Clause (1).

Article 327: Power of Parliament to make provision with respect toelections to Legislatures. - Subject to the provisions of thisConstitution, Parliament may from time to time by law makeprovision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or eitherHouse of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other mattersnecessary for securing the due constitution of such House or Houses.

Article 356: Provisions in case of failure of constitutional machineryin States - (1) If the President, on receipt of report from the Governorof a State or otherwise, is satisfied that a situation has arisen in whichthe government of the State cannot be carried on in accordance withthe provisions of this Constitution, the President may be Proclamation-

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powersvested in or exercisable by the Governor or any body orauthority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the Stateshall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions asappear to the President to be necessary or desirable forgiving effect to the objects of the Proclamation, including provisions for suspending in whole or in part theoperation of any provisions of this Constitution relating to any body or authority in the State:
- 142. Provided that nothing in this clause shall authorize the Presidentto assume to himself any of the powers vested in or exercisable by aHigh Court, or to suspend in whole or in part the operation of anyprovision of this Constitution relating to High Courts.
- (2) Any such Proclamation may be revoked or varied by asubsequent Proclamation.

- (c) Every Proclamation under this Article shall be laid before eachHouse of Parliament and shall, except where it is a Proclamationrevoking a previous Proclamation, cease to operate at the expiration oftwo months unless before the expiration of that period it has beenapproved by resolutions of both Houses of Parliament.
- 143. Provided that if any such Proclamation (not being aProclamation revoking a previous Proclamation) is issued at a timewhen the House of the People is dissolved or the dissolution of theHouse of the People takes place during the period of two monthsreferred to in this clause, and if a resolution approving theProclamation has been passed by the Council of States, but noresolution with respect to such Proclamation has been passed by theHouse of the People before the expiration of that period, theProclamation shall cease to operate at the expiration of thirty daysfrom the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirtydays a resolution approving the Proclamation has been also passed by the House of the People.
- (4) A Proclamation so approved shall, unless revoked, cease tooperate on the expiration of a period of six months from the date of six unless revoked, cease tooperate on the
- 144. Provided that if and so often as a resolution approving thecontinuance in force of such a Proclamation is passed by both Housesof Parliament, the Proclamation shall, unless revoked, continue inforce for a further period of six months from the date on which underthis clause it would otherwise have ceased to operate, but no suchProclamation shall in any case remain in force for more than threeyears;
- 145. Provided further that if the dissolution of the House of thePeople takes place during any such period of six months and are solution approving the continuance in force of such Proclamationhas been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.
- 146. Provided also that in the case of the Proclamation issued underClause (1) on the 11thday of May, 1987 with respect to the State ofPunjab, the reference in the first proviso to this clause to "three years" shall be construed as a reference to five years.
- (5) Notwithstanding anything contained in Clause (4), a resolution with respect to the continuance in force of a Proclamation approvedunder Clause (3) for any period beyond the expiration of one year from the date of issue of such proclamation shall not be passed by either House of Parliament unless-

- (a) a Proclamation of Emergency is in operation, in thewhole of India or, as the case may be, in the whole or anypart of the State, at the time of the passing of suchresolution, and
- (b) the Election Commission certifies that the continuance inforce of the Proclamation approved under Clause (3)during the period specified in such resolution is necessaryon account of difficulties in holding general elections to the Legislative Assembly of the State concerned:
- 147. Provided that nothing in this clause shall apply to the Proclamation issued under Clause (J) on the 11thday of May, 1987with respect to the State of Punjab.

Representation of People Act, 1951

Section 14: Notification for general election to the House of the People - (1) A general election shall be held for the purpose of constituting a new House of the People on the expiration of theduration of the existing House or on its dissolution.

(2) For the said purpose the President shall, by one or morenotifications published in the Gazette of India on such date or dates asmay be recommended by the Election Commission, call upon allparliamentary constituencies to elect members in accordance with theprovisions of this Act and of the rules and orders made thereunder:

148. Provided that where a general election is held otherwise than onthe dissolution of the existing House of the People, no suchnotification shall be issued at any time earlier than six months prior to date on which the duration of that House would expire under the provisions of Clause (2) of Article 83.

Section 15: Notification for general election to a State LegislativeAssembly - (1) a general election shall be held for the purpose of constituting a new Legislative Assembly on the expiration of theduration of the existing Assembly or on its dissolution.

- (2) For the said purpose the Governor or the Administrator as thecase may be shall, by one or more notifications published in theOfficial Gazette of the State on such date or dates as may be recommended by the Election Commission, call upon all Assemblyconstituencies in the State to elect members in accordance with the provisions of this Act and of the rules and orders made the reunder:
- 149. Provided that where a general election is held otherwise that onthe dissolution of existing Legislative Assembly on such notificationshall be issued at any time earlier than six months prior to the date onwhich the duration of that Assembly would expire under the provisions of Clause (1) of Article 172 or under the provisions of Section 5 of the Government of Union Territories Act, 1963, as thecase may be.

Section 30: Appointment of dates for nomination etc. - As soon as the notification calling upon a constituency to elect a member ormembers is issued, the Election

Commission shall, by notification in the Official Gazette, appoint-

- (a) the date of publication of the first mentioned notificationor, if that day is a public holiday the last date for makingnominations, which shall be the seventh day afterholiday, the next succeeding day which is not a publicholiday.
- (b) The date for the scrutiny of nomination, which shall be,the day immediately following the last day for makingnominations or, if that day is a public holiday, the nextsucceeding day which is not a public holiday,
- (c) The last date for the withdrawal of candidature, whichshall be the second day after the date for the scrutiny of nominations or, if that day is a public holiday, the nextsucceeding day which is not a public holiday.
- (d) The date or dates on which a poll shall, if necessary, betaken which or the first of which shall be a date notearlier than the fourteenth day after the last date for thewithdrawal of candidature; and
- (e) the date before which the election shall be completed.

Section 73: Publication of results of general elections to the House ofthe People and the State Legislative Assemblies and of names ofpersons nominated thereto - Where a general election is held for thepurpose of constituting a new House of the People or a new StateLegislative Assembly, there shall be notified by the ElectionCommission in the Official Gazette, as soon as may be, after theresults of the elections in all the constituencies other than those inwhich the poll could not be taken for any reason on the date originallyfixed under Clause (d) of Section 30 or for which the time forcompletion of the election has been extended under the provisions of Section 153 have been declared by the returning officer under theprovisions of Section 53 or, as the case may be, Section 66, the namesof the members elected for those constituencies and upon the issue of such notification that House or Assembly shall be deemed to be dulyconstituted:

150. Provided that the issue of such notification shall not be deemed-

- (a) to preclude-
- (i) the taking of the poll and the completion of theelection in any Parliamentary or Assemblyconstituency or constituencies in which the pollcould not be taken for any reason on the dateoriginally fixed under Clause (d) of Section 30; or
- (ii) the completion of the election in any Parliamentaryor Assembly constituency or constituencies forwhich time has been extended under the provisions of Section 153; or
- (b) to affect the duration of the House of the People or the State Legislative Assembly if any functioning immediately before the issue of the said notification.

Government of India Act, 1935:

- 18. Constitutional of the Federal Legislative (1) There shall be aFederal Legislature which shall consist of His Majesty, represented by the Governor General, and two Chambers, to be known respectively as the Council of State and the House of Assembly (in this Act referred to as "the Federal Assembly").
- (2) The Council of State shall consist of one hundred and fifty-sixrepresentatives of British India and not more than one hundred and four representatives of the Indian States, and the Federal Assemblyshall consist of two hundred and fifty representatives of British India not more than one hundred and twenty-five representatives of the Indian States.
- (3) The said representatives shall be chosen in accordance with the provisions in that behalf contained in the First Schedule to this Act.
- (4) The Council of State shall be a permanent body not subject todissolution, but as near as may be one-third of the members thereofshall retire in every third year in accordance with the provisions in thatbehalf contained in the said First Schedule.
- (5) Every Federal Assembly, unless sooner dissolved, shallcontinue for five years from the date appointed for their first meetingand no longer, and the expiration of the said period of five years shalloperate as a dissolution of the Assembly.
- 19. Session of the Legislature, prorogation and dissolution (1)The Chambers of the Federal Legislature shall be summoned to meetonce at least in every year, and twelve months shall not intervenebetween their last sitting in one session and the date appointed fortheir first sitting in the next session.
- (2) Subject to the provisions of this section, the Governor-Generalmay in his discretion from time to time-
- (a) summon the Chambers or either Chamber to meet at suchtime and place as he thinks fit;
- (b) prorogue the Chambers;
- (c) dissolve the Federal Assembly.
- (3) The Chambers shall be summoned to meet for their first session a day not later than such day as may be specified in that behalf in the Majesty's Proclamation establishing the Federation.
- 151. In the aforesaid background it would be expedient to renderanswers to the questions framed in the Reference.
- 152. The judicial aspect of these triple questions alone can attractjudicial jurisdiction. However, even if we confine ourselves to legalproblematic, eschewing the political overtones, the words of JusticeHolmes will haunt the Court: "We are quite here, but it is the quite ofa storm center". The judicature must, however, be illumined in itsapproach by a legal sociological guideline and a principled-pragmatic insight in

resolving with jural tools and techniques, thevarious crises of human affairs" as they reach the forensic stage and seek dispute-resolution in terms of the rule of law. Justice Cardozofelicitously set the perspective:

The great generalities of the Constitution have acontent and significance that vary from age to age.

Chief Justice Hidayatullah perceptively articulated the insight:

One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age.

153. The old Articles of the supreme lex meet new challenges of life,the old legal pillars suffer new stresses. So we have to adopt the lawand develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, not literal nor lexical but liberal and visional is our interpretation of the Articles of the Constitution and the provisions of the Act. Lord Denning's words are instructive:

"Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to servethe needs of the time. He must not be a meremechanic a mere working mason, laying brick onbrick, without thought to the overall design. Hemust be an architect - thinking of the structure as a whole building for society a system of lawwhich is strong, durable and just. It is on his workthat civilized society itself depends.

The constitutional scheme with regard to the holding of the electionsto parliament and the State Legislatures is quite clear. First, the Constitution has provided for the establishment of a high power bodyto be in charge of the elections to Parliament and the StateLegislature and of elections to the offices of President and Vice-President. That body is the Commission. Article 324 of the Constitution contains detailed provision regarding the constitution of the Commission and its general power. The superintendence, directionand control of the conduct of elections referred to in Article 324(1) of the Constitution are entrusted to the Commission. The words"superintendence", "direction" and "control" are wide enough toinclude all powers necessary for the smooth conduct of elections. It is, however, seen that Parliament has been vested with the power to makelaw under Article 327 of the Constitution read with Entry 72 of List Iof the Seventh Schedule to the Constitution with respect to all matters relating to the elections to either House of Parliament or to the Houseor either House of the Legislature of a State subject to the provisionsof the Constitution. Subject to the provisions of the Constitution and any law made in that behalf by Parliament, the Legislature of a Statemay under Article 328 read with Entry 37 of List II of the SeventhSchedule to the Constitution make law relating to the elections to theHouse or Houses of Legislature of that State. The general powers of superintendence, direction and control of the elections vested in theCommission under Article 342(1) naturally are subject to any lawmade either under Article 327 or under Article 328 of theConstitution. The word "election" in Article 324 is used in a widesense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may havean important bearing on the result of the process. Article 324 of theConstitution operates in areas left unoccupied by legislation and thewords "superintendence", "direction" and "control" and well as "conductof all elections" are the broadest terms which would include the power to make all such provisions. [See Mohinder Singh Gill v. Chief Election Commissioner, New Delhi, A.C. Jose v. Sivan Pillai and Kanhiya Lal Omar v. R.K. Trivedi and Ors.].

154. Before the scheme of the Constitution is examined in somedetail it is necessary to give the pattern which was followed in framingit. The constituent Assembly was unfettered by any previous commitment in evolving a constitutional pattern "suitable to thegenius and requirements of the Indian people as a whole". The Assembly had before it the experience of the working of the Government Act several features of which would be accepted for thenew Constitution. Our Constitution borrowed a great deal from theConstitutions of other countries, e.g. United Kingdom, Canada, Australia, Ireland, United States of America and TheConstitution being supreme all the organs and bodies owe their existence to it. Neon can claim superiority over the other and each ofthem has to function within the four-corners of the constitutional provisions. The preamble embodies the great purposes, objectives andthe policy underlying its provisions apart from the basic character of the State which was to come into existence, i.e. a Sovereign Democratic Republic. It is the executive that has the mainresponsibility for formulating the government policy by"transmitting it into law" whenever necessary. "The executivefunction comprises both the determination of the policy as well ascarrying it into execution. This evidently includes the initiation oflegislation, the maintenance of order, the promotion of social andeconomic welfare, the direction of foreign policy, in fact the carryingon or supervision of the general administration of the State". Withregard to the civil services and the position of the judiciary the Britishmodel has been adopted inasmuch as the appointment of Judges bothof the Supreme Court of India and the High Courts of the States iskept free from political controversies. Their independence has beenassured. But the doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution. The entire scheme of the Constitution is such that itensures the sovereignty and integrity of the country as a Republic andthe democratic way of life by parliamentary institutions based on freeand fair elections. These aspects have been highlighted inKesavananda Bharati"s case (supra).

155. Democracy is a basic features of the Constitution. Whether anyparticular brand or system of government by itself, has this attribute of a basic feature, as long as the

essential characteristics that entitle asystem of government to be called democratic are otherwise satisfied is not necessary to be gone into. Election conducted at regular, prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process. That may take within it the quality, efficacy and adequacy of the machinery for resolution of electoral disputes.

156. The first question essentially relates to the interplay betweentwo Articles i.e. Article 174 and Article 324 of the Constitution. Abare reading of the aforesaid two Articles makes it clear that theyoperate in different fields. Article 14 appears in Chapter III of PartVI of the Constitution relating to State Legislature. The parallelprovision, so far as the Union is concerned, is contained in Article 85in Chapter II of Part V of the Constitution. Chapter III of Part VI withwhich we are presently concerned deals with State Legislature. Article 168 provides that for every State there shall be Legislaturewhich shall consist of the Governor and in for States with twoHouses and in other States one House of the State. Where there aretwo Houses of the Legislature of a State, one is known as aLegislative Council and other is Legislative Assembly and when thereis only one House, it is known as the Legislative Assembly. Article172 provides for the duration of State Legislatures. Article 174 dealswith sessions of the State Legislatures, prorogation and dissolution. Under Clause (1), the Governor is required to summon the House oreach House of the Legislature of the State from time to time to meet atsuch time and place as he thinks fit. It further provides that six monthsshall not intervene between its last sitting of one session of the Houseand the date appointed for its first sitting in the next session of theHouse. The requirement relating to the meeting within the prescribedtime period is the crucial issue in the reference. Clause (2) deals withpower of the Governor to (a) prorogue the House or either House or(b) dissolve the Legislative Assembly. Almost in similar language arecouched Articles 83 and 85. As has been rightly contended by some ofthe learned counsel, Article 174 does not deal with elections. ON thecontrary, the occasion for holding of elections to the conducted by the Election Commission arise only after dissolution of the House. It isthe stand of the Union of India, the Election Commission and some ofthe parties that the Election Commission is duty bound to ensuremeeting of the House within the time indicated in Article 174(1). According to them, the urgency and desirability involved in callingthe meeting of the House cannot be frustrated by postponing elections. Thus, according to them, the Election Commission has to ensure that the elections are held in time, so that the State Legislature can meetwithin the prescribed time period. On the other hand, learned counselfor some of the other parties have submitted that the period of sixmonths does not operate in respect of the dissolved Assemblies. Election Commissioner under the Constitution is required to hold"free and fair election" and election which is not free and fair is, shamor manipulated, and no election at all. Article 174 according to themrelates to the live assembly and not assembly which on dissolution hassuffered civil death. It has been

pointed out by them that no timeperiod is prescribed for holding the elections after dissolution either inthe Constitution or Representation of People" Act, 1950 (in short R.P.Act 1950) and R.P. Act 1951". The stand of the Union of India, the Election Commission and some of the parties is that in the scheme of the Constitution and the laws framed under Article 327, it isimpossible to conceive that elections can be deferred indefinitely. According to them, the fact that elections constitute basic structure of the Constitution, the care taker Ministry is not the answer and noteven imposition of President"s Rule. According to them, PresidentRule can be imposed only if the enumerated circumstances exist andnot otherwise. Imposition of President's Rule has to be ratified byboth the Houses of Parliament. It is further submitted that ElectionCommissioner has to ensure holding of elections and not holding upthe elections, and effort should be to take necessary assistance from the Center and the States, if necessary, to hold the elections and that iswhy the third question has been referred. With reference to thelanguage used in Article 174 that is "between its last sitting in onesession and the date appointed for its first sitting in the next session", it is pointed out that the House does not get dissolved, it is only theLegislative Assembly which gets dissolved. Therefore, the ElectionCommissioner is duty bound to see that Article 324 is exercised insuch a manner that prescription under Article 174 is not diluted orrendered ineffective.

157. So far as Chapter III of Part VI is concerned, like Chapter III of Part V. difference is made between the Legislature, the LegislativeAssembly and the House of the People, as the case may be, Article 79says that there shall be a Parliament for the Union which shall consistof the President and the two Houses to be known respectively as the Council of States and the House of the People. As indicated above, inalmost identical language is couched Article 168, Clause (1) ofwhich provides that for every State there shall be a Legislature whichshall consist of the Governor etc. It was submitted by some of thelearned counsel that the House is known as Legislative Assembly sofar as the States are concerned and so far as the Parliament isconcerned, two Houses are known as Legislative Council and theLegislative Assembly. According to them, it is only the nomenclatureand that on the dissolution of the Legislative Assembly or the Houseof the People, as the case may be, there is no House in existence. Thisplea though attractive is not tenable. The question of holdingelections by the Election Commissioner to meet the dead line fixedunder Article 174, some times becomes impossible of beingperformed. In a hypothetical case if the House of People or theLegislative Assembly is dissolved a month before the expiry of the sixmonths period, it becomes a practical impossibility to hold theelection to meet the dead line. There may be several cases where actsof God intervene, rendering holding of election impossible eventhough a time schedule has been fixed. In such cases, even if theelections are held after six months period they do not become invalid. The Election Commission in such cases cannot be asked to performthe impossible. There lies the answer to the question whether Article174 has mandatory attributes.

158. The House of the people or the Legislature is a permanentbody. On dissolution of the House of the People or the LegislativeAssembly, the House does not cease to be in existence. Dissolution inits broadest sense means decomposition, disintegration, undoing abond. In a broad sense - the Constitutional - it implies the dismissal ofan Assembly or the House of the People. Dissolution is an act of theExecutive which dismisses the legislative body and starts the processthrough exercise of franchise by the little men who are the supremearbitrators of the State to put the new legislative body in place. Thenatural dissolution is on expiry of period fixed under the Constitution,and other mode of dissolution is by an act of the Executive. It is thelawful act of the Executive that prematurely dissolution ends the lifeof the Legislature. We are not concerned whether such an act of theExecutive can be subject to judicial review which is another matter.

159. The exercise of the right of the Executive to dissolve the Houseof the People or the Legislative Assembly pre-supposes certainconditions i.e. (i) the existence of a representative body which is the object of dissolution and (ii) the act of the Executive which implies as eparate and distinct state organ vested with the power to dissolve (iii) the consequential summoning of a new House of People or Legislative Assembly after the election is held by the Election Commission and the result notified after its conclusion.

160. The State organ vested with the right to dissolve Parliamentmust express its will to do so in a manner which accords with theConstitution, and the relevant laws. The primary consequence of dissolution is that House of People or the Legislative Assembly, as thecase may be, legally ceases to exist and cannot perform its legislative functions. Such pre-mature interruption of the life of the House of thePeople or the Legislative Assembly as the case may be, amongstothers factors affects it as a body as well as its individual memberslikewise its work is also abruptly ended, subject to prescribed exclusions, if any. Any further meeting of the ex-members has to beconsidered an ordinary meeting of citizens, and not an official session of the Legislative Assembly or House of People in the legislative capacity.

161. When the House meets after the results of election are notified and notification has been issued under the relevant law, it becomes alive body after it is duly constituted. The constituents of the body may been changed but the constitutional body which is permanent one becomes alive again. Therefore, the submission that under Article 174(1) time period fixed does not apply to dissolved Legislative Assembly has substance.

162. Dissolution brings a legislative body to an end. It essentiallyterminates the life of such body and is followed by a constitution of new body (a Legislative Assembly or a House of People, as the casemay be). Prorogation on the other hand relates to termination of assession and thus preclude another session, unless it coincides with endof the legislative term. The basic difference is that prorogation unlikedissolution does not affect a legislative body's life which maycontinue from session to session,

until brought to an end of dissolution. Dissolution draws the final curtain upon the House.Once the House is dissolved it becomes irrevocable. There is no ower to recall the order of dissolution and or revive the previousHouse. Consequently effect of dissolution is absolute and irrevocable. It has been described by some learned authors that dissolution "passesa sponge ever the parliamentary slate". The effect of dissolution is inessence termination of current business of the legislative body, itssittings and sessions. There is a cessation of chain of sessions, sittingsand for a dissolved legislative body and there cannot be any nextsession or its first sitting. With the election of legislative body a newChapter comes into operation. Till that is done, the sine qua non ofresponsible government i.e. accountability is non-existent.Consequentially, the time stipulation is non-existent. otherinterpretation would render use of the word "its" in relation to "lastsitting in one session" and "first sitting in the next session" without significance.

163. In providing key to the meaning of any word or expression the context in which it is said has significance. Colour and contentemanating from context may permit sense being preferred to meremeaning depending on what is sought to be achieved and what issought to be prevented by the legislative scheme surrounding the expression. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour and content are derived from their context and, therefore, every word in astatute must be examined in its context by the word "context". itmeans in its widest sense as including not only other enactingprovisions of the same statute but its preamble, the existing state ofthe law, other statutes in pari materia and the mischief which thestatute intended to remedy. While making such interpretation the rootsof the past the foliage of the Present and the seeds of the future cannotbe lost sight of Judicial interpretation should not be imprisoned inverbalism and words lose their thrust when read in vacuo. Contextwould quite often provide the key to the meaning of the word and thesense it should carry. Its setting would give colour to it and provide acue to the intention of the Legislature in using it. A word is not acrystal, transparent and unchanged; it is the skin of living thought andmay vary greatly in colour and content according to the circumstances and the time in which the same is used as was observed by Homes, J.in Towne v. Eisner (1917) 245 US 418

164. The following passage from Statutory Interpretation by JusticeG.P. Singh (Eighth Edition, 2001 at pp. 81-82) is an appropriate guideto the case at hand:

"No word", says Professor H.A. Smith "has anabsolute meaning, for no words can be defined invacuo, or without reference to some context". According to Sutherland there is a "basic fallacy"in saying "that words have meaning in and ofthemselves", and "reference to the abstractmeaning of words", states Craies, "if there be anysuch thing, is of little value in interpreting statutes"in determining the meaning of anyword or phrase in a statute the first question to beasked is---"what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only

when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some other possiblemeaning of the word or phrase. The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari material the general scope of the statute and the mischief that was intended to remedy.

165. The judicial function of the Court in interpreting theConstitution thus becomes anti nomi. It calls for a plea upon acontinuity of members found in the instrument and for meeting thedomain needs and aspirations of the present. A constitutional courtlike this Court is a nice balance of jurisdiction and it declares the lawas contained in the Constitution but in doing so it rightly reflects thatthe Constitution is a living and organic thing which of all instrumentshas the greatest claim to be construed broadly and liberally. [See Goodyear India Ltd. v. State of Haryana and Anr. and Synthetics and Chemicals Ltd. v. State of U.P. and Ors.].

166. In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than wordsthemselves. The significance of the change of the concepts themselves is vital and constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance of the line of theirgrowth. It is aptly said that the intention of the Constitution is rather to outline principles than to engrave details. (See <u>R.C. Poudval v. Union of India and Ors.)</u>.

167. In <u>Purushothaman Nambudiri v. The State of Kerala</u>, a Constitution Bench of this Court observed asfollows:

"Dissolution of Parliament is sometimesdescribed as "a civil death of Parliament". Ilbert,in his work on "Parliament", has observed that "prorogation means the end of a session (not of a Parliament)";"

"in any case, there is no continuity in thepersonality of the Assembly where the life of oneAssembly comes to an end another Assemblyis in due course elected."

168. It will be also clear from the Constituent Assembly Debates(vis-a-vis Article 153 - presently Article 174) that the stress was onfrequent meetings of long durations of live Legislative Assembly.

169. In May"s Parliamentary Practice, the following paragraphreinforces the view:

"A session is the period of time between themeeting of a Parliament, whether after theprorogation or dissolution, and itsprorogation...During the course of a sessioneither House may adjourn itself of its own motionto such as ti pleases. The period between theprorogation of Parliament and its reassembly in anew session is termed as "recess"; while theperiod between the adjournment of either Houseand the resumption of its sitting is generallycalled an "adjournment".

A prorogation terminates a session; anadjournment is an interruption in the course ofone an the same session."

170. There is a direct decision of the Kerala High Court in <u>K.K. Aboo v. Union of India</u> on the point. It wasinter alia observed as follows:

"A Legislature can be summoned to meetonly if it is in esse at the time. A dissolvedLegislature is incapable of being summoned tomeet under Article 174 of the Constitution. Thequestion therefore is not whether the Legislatureshould or could have been summoned to meet, butwhether its dissolution ordered by the President, isconstitutionally valid."

The view is well founded.

- 171. The position gets further clear that one looks at the original Article 174 which was amended in 1951. The un-amended Article 174 reads as follows:
- "174(1) The House or Houses of theLegislature of the State shall be summoned tomeet twice at lest in every year, and six monthsshall not intervene between their last sitting in onesession and the date appointed for their firstsitting in the next session.
- (2) Subject to the provisions of Clause (1), the Governor may from time to time--
- (a) summon the House or eitherHouse to meet at such time and placeas he thinks fit;
- (b) prorogue the House or Houses."
- 172. Having reached the conclusion that Article 174 in terms doesnot apply to dissolved Assembly (similar in the case of Article 85 incase of House of People), the other question that survivesconsideration is that can there be a time limit fixed for holding theelections in such cases? It has been emphatically submitted by someof the learned counsel that the Constitution does not provide for anytime of limitation, nor does not R.P. Act.
- 173. Can it be said that the framers of the Constitution intended thatin case of life of the elected body comes to an end on expiry of thefixed duration, a time limit for holding elections is imperative, whilein the case of a pre-mature dissolution it does not so?
- 174. Sections 14 and 15 of the R.P. Act, 1951 deal with notification of general election to the House of the People and the StateLegislative Assemblies respectively. It is clearly stipulated that notification for holding the election cannot be issued at any timeearlier than 6 months prior to the date on which the duration of the House will expire under provisions of Clause (2) of Article 83 or under Clause (1) of Article 172 respectively. The obvious purpose is that the President or the Governor, as the case may be, to call upon the electorate to elect members in accordance with the

provisions of theRules, Act and the orders made thereunder on such dates as may berecommended by the Election Commission. The dates are to be sofixed that they are not much prior to the expiry of the duration. Herealso, the underlying object is that the elected members are to continue for the full term. It has been fairly accepted by learned counsel for theparties who submitted that there is no time limit thereshould а responsible always be Government. Constitutionestablishes a democratic republic as is indicated in the Preamble to theConstitution itself and Cabinet system of Government is generallyknown as the responsible government. We may notice here that in ademocracy the sovereign powers vest collectively to the three limbsi.e. the executive, legislature and the judiciary. Section 14 of the R.P.Act, 1951 mandates that general elections shall be held for the purposeof constituting the new House of People on the expiry of the duration of the existing House or on its dissolution. Similar is in the case ofLegislative Assembly in the background of Section 15. When theelection is to be held on the expiry of the fixed term, the ElectionCommissioner knows the date in advance and can accordingly fix upschedule of the election. The problem arises when there is a pre-mature dissolution. In that case, the Election Commissioner becomesaware only after the dissolution takes place. He cannot, therefore, fixup any schedule in advance in such a case. The consequential fall outof not holding election for a long time is the functioning of a care-takergovernment which is contrary to the principles of responsibleGovernment. The caretaker government is not the solution to deferringelections for unduly long periods.

175. As noted above, due to unforeseen contingencies it may become impossible to constitute new House of People or the LegislativeAssembly. Deferring an election is an exception to the requirementthat elections should be held as early as practicable. The requirementof summoning the House has inbuilt in it; the existence of a Housecapable of being summoned. Therefore even in the case pre-maturedissolution, effort of the Election Commission should be to holdelections in time so that a responsible government is in office. At thecost of repetition it may be indicated that where free and fair electionis not possible to be held, there may be inevitable delay. But reasonsfor deferring elections should be relatable to acts of God and normally not acts of man. Myriad reasons may be there for notholding elections.

176. In determining the question whether a provision is mandatory ordirectory, the subject matter, the importance of the provision, therelation to the provision to the general object intended to be securedby the Act will decide whether the provision is directory ormandatory. It is the duty of the courts to get the real intention of thelegislature by carefully attending the whole scope of the provision tobe construed. The key to the opening of every law is the reason and spirit of the law, it is the animus impotentia, the intention of the lawmaker expressed in the law itself, taken as a whole". (See Bratt v.Bratt (1826) 3 Add 210.

177. The necessity for completing the election expeditiously isenjoined by the Constitution in public and State interest to see that thegovernance of the country is not paralysed.

178. The impossibility of holding the election is not a factor against the Election Commission. The maxim of law impotentia exist legemis intimately connected with another maxim of law lex non cogit adimpossibilia. Impotentia excusat legem is that when there is anecessary or invincible disability to perform the mandatory part of thelaw that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty orcharge, and the party is disabled to perform it, without any default inhim, and has no remedy over it, there the law will in general excusehim." Therefore, when it appears that the performance of theformalities prescribed by a statute has been rendered impossible bycircumstances over which the persons interested had no control, likethe act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of astatute, the statutory provision is not denuded of its mandatorycharacter because of supervening impossibility caused by the act ofGod. (See Broom''s Legal Maxims 10th Edition at pp. 1962-63 andCraies on Statute Law ^{6th} Ed. P. 268). These aspects were highlightedby this Court in in Special Reference 1 of 1974 (1975 (1) SCR 504) .Situations may be created by interested persons to see that electionsdo not take place and the caretaker government continue in office. This certainly would be against the scheme of the Constitution and thebasic structure to that extent shall be corroded.

179. A responsible Government provides for a healthy functioning. The democracy has to be contrasted with a caretaker governmentwhich is ad hoc in all its context and which is not required to take anypolicy decision. A piquant situation may arise when a Cabinet of Ministers being sure that it will loose the vote of confidence, calls fora dissolution a few days before the expiry of the six months" period interms of Article 174 knowing fully well that the elections cannot beheld immediately continues as the care taker government. Let us takeanother hypothetical case, where free and fair elections are notpossible and caretaker government continues in office because of manmade situations. Here the Election Commissioner has a duty to lift theveil, see the design and make all possible efforts to hold the electionsso that a responsible government takes place in office. Question thenarises as to how a impasse can be avoided when an Assembly or the House of People is dissolved and election can be held immediately sothat six month"s period is not given a go by, between the last sitting of the dissolved one and the first sitting of the duly constitutedsubsequent one. One of the solutions can be that an emergentsession which is usually described as "lame duck" session can beconvened, and immediately thereafter the dissolution can be notified.In such a situation, the Election Commissioner gets sufficient time tohold the election subject of course to the paramount consideration thatit is free and fair one; thereby enabling functioning of the next session of the duly constituted elected body to meet within six months

from the date of dissolution. For practical purposes the six months" period then would begin from the date of dissolution.

180. Free and fair election is the sine gua non of democracy. Thescheme of the Constitution makes it clear that two distinctConstitutional authorities deal with election and calling of session. Ithas been pointed out to us that as a matter of practice the elections are completed within a period of six months from the date of dissolution, on completing the prescribed tenure or on pre-mature dissolution except when for inevitable reasons there is a delay. The ElectionCommissioner is a high constitutional authority charged with the dutyof ensuring free and fair elections and the purity of electoral process. To effectuate the constitutional objective and purpose it is to drawupon all incidental and ancillary powers. Six months" periodapplicable to elections held on expiry of the prescribed term would beimperatively applicable to elections held after pre-mature dissolution. This of course would be subject to such rare exceptional casesoccasioned on account of facts situation (like acts of God) whichmake holding of elections impossible. But man made situationintended to defer holding of elections should be sternly dealt with and should not normally be a ground for deferring elections beyond sixmonths period, starting point of which would be the date of dissolution. As was observed in Digvijay Mote v. Union of India and Ors., , timely election which is not free and fairsubverts democracy and frustrates the ultimate responsibility to assessobjectively whether free and fair election is possible. Any man madeattempt to obstruct free and fair election is antithesis to democraticnorms and should be overcome by garnering resources from theintended sources and by holding the elections within the six months"period."

181. Reference was made to Article 164(4) of the Constitution tocontend that six months" period for holding election is in built inArticle 174. It has to be noted that as observed by this Court in S.R.Chaudhuri v. State of Punjab and Ors. theprovisions is not really concerned with holding of elections and primarily relates to a requirement to get elected within the timeprescribed. The said provision contemplates a situation where a Minister in a Legislature in existence has to be elected, it does not dealwith a non-existing House and in the background, there is nothing todo with Article 174.

- 182. The second question has really lost its sting because of thesubmissions made before this Court on behalf of the ElectionCommission.
- 183. So far as applicability of Article 356 is concerned, though in theorder the Election Commission has specifically dealt with thepossibility of applying that situation, in the written submissions and the arguments made before this Court the view was given a go by; and our view rightly. Mere non-compliance of Article 174 so far as the time period is concerned, does not automatically bring in Article 356. It is made clear that the order of the Election Commissioner is the foundation and not what is stated subsequently by way of an affidavitor submissions to clarify. But in

view of the concession, whichaccording to us is well founded, we need not go into the question indetail. It was submitted by some of the learned counsel that the Election Commission''s order otherwise makes out a case for applying Article 356. We are not concerned with those as the Reference only related to application of Article 356 when the requirement of Article 174 is not met. In K.N. Rajgopal v. Thiru M. Karunanidhi, , a Constitution Bench of this Court inter alia, observed as follows:

".....Article 356 of the Constitution makesprovisions in case of failure of constitutionalmachinery in the State. But when an Assembly is dissolved there is no failure of constitutionalmachinery within Article 356."

184. A similar observation was made by one of us (Hon"ble V.N.Khare, J. as His Lordship was then) in <u>Arun Kumar Rai Chaudhary v. Union of India</u>. His Lordship succinctlystated the position as follows:

"This question came up for considerationbefore Supreme Court in the case of <u>U.N.R. Rao v. Indira Gandhi</u> and <u>Thiru K.N. Rai Gopal v. M. Karuna Nidhi</u>. The Supreme Court while interpreting Articles 74 and 75 as well as Articles 163 and 164 of the Constitutionheld that even if the House is dissolved, the Council of Ministers continues. These decisions squarely cover the case before us. Following these decisions we hold that after the Governor of the State of U.. dissolved the Legislative Assembly and directions were issued for holding fresh pollfor constituting the Legislative Assembly, the Council of Ministers continues. Further there being no failure of constitutional machinery within the meaning of Article 356 of the Constitution, the contention that the President of India ought to have promulgated President Rule in the State for carrying on the function of the Government must be rejected."

185. Situations when Article 356 can be resorted to have beenilluminatingly highlighted in <u>S.R. Bommai v. Union of India</u>, . The following observations very aptly summarized the position:

".....Article 356 is an emergencyprovision though, it is true, it is qualitatively different from the emergency contemplated by Article 352, or for that matter, from the financial emergency contemplated by Article 360. Undoubtedly, breakdown of the constitutional machinery in a State does give rise to a situation of emergency. Emergency means a situation which is not normal, a situation which calls for urgentremedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution, consistent with his oath. He is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen."

It has been further observed:

".....He has to exercise his powers withthe aid and advice of the Council of Ministers withthe Chief Minister at its head (Article 163). Hetakes the oath prescribed by Article 159, topreserve, protect and defend the Constitution and the laws to the best of his ability. It is thisobligation which requires him to report to the President the commissions and omissions of theGovernment of his State which according to himare creating or have created a situation where the Government of the State cannot be carried on inaccordance with the provisions of the Constitution. In fact, it would be a case of his reporting againsthis own Government but this may be a case of hiswearing two hats, one as the head of the StateGovernment and the other as the holder of anindependent constitutional office whose duty it isto preserve, protect and defend the Constitution(See Shamsher Singh v. State of Punjab). Since he cannot himself takeany action of the nature contemplated by Article356(1), he reports the matter to the President and itis for the President to be satisfied whether on thebasis of the said report or on the basis of any otherinformation which he may receive otherwise - that situation of the nature contemplated by Article356(1) has arisen...."

186. The third question is to be considered in the background ofwhat has been observed supra about scope and ambit of Article 174. Itdoes not relate to holding of elections. Therefore, he question ofseeking control or State assistance does not arise. However, the Election Commission and the Governments (Central and or State)have well-defined roles to play to ensure free and fair election. The parameters have been laid down by this Court in several cases e.g. Election Commission of India v. State of Haryana, (1984 (3) SCR 554). Election Commission of India v. Union of India and Ors. (1995) Supp (3) SCC 643); Election Commission of India v. State of T.N. and Ors. (1995 Supp (3) SCC 379). Some of the relevantobservations need to be noticed.

187. In Tamil Nadu"s case (supra) it was observed:

"The Election Commission of India is a highconstitutional authority charged with the functionand the duty of ensuring free and fair elections and of the purity of the electoral process. It has all theincidental and ancillary powers to effectuate theconstitutional objective and purpose. The plenitude of the Commission"s powers corresponds to thehigh constitutional functions it has to discharge. Inan exercise of the magnitude involved in ensuring free and fair elections in the vastness of our country, there are bound to be differences of perception as to the law and order situation in any particular constituency at any given time and as to the remedial requirements. Then again, there may be intrinsic limitations on the resources of the Central government to meet in full the demands of the Election Commission. There may again behonest differences of opinion in the assessment of the magnitude of the security machinery. Theremust, in the very nature of the complexities and imponderables inherent in such situations, be a harmonious functioning of the Election Commission and the Governments, both State

andCentral. If there are mutually irreconcilableviewpoints, there must be a mechanism to resolvethem. The assessment of the Election Commissionas to the State of law and order and the nature andadequacy of the machinery to deal with situationsso as to ensure free and fair elections must, primafacie, prevail. But, there may be limitations of resources. Situation of this kind should be resolved by mutual discussion and should not be blown upinto public confrontations. This is not good for ahealthy democracy. The Election Commission of India and the Union Government should find amutually acceptable coordinating machinery for resolution of these differences."

188. To sum up, answers to the questions set out in the Reference areas follows:

- 1. The provisions of Article 174 are mandatory in character so faras the time period between two sessions is concerned in respect of liveAssemblies and not dissolved Assemblies. Article 174 and Article 324operate in different fields. Article 174 does not deal with electionswhich is the primary function of the Election Commission underArticle 324. Therefore, the question of one yielding to the other doesnot arise. There is scope of harmonizing both in a manner indicated supra.
- 2. Article 174 is not relatable to a dissolved Assembly. Similar is the position under Article 85 vis-a-vis House of People. Merelybecause the time schedule fixed under Article 174 cannot be adhered to, that per se cannot be the ground for bringing into operation Article 356.
- 3. As Article 174 does not deal with election, the question of Election Commissioner taking the aid, assistance or co-operation of the Center or the State Governments or to draw upon their resources to hold the election does not arise. On the contrary for effective operation of Article 324 the Election Commission can do so to ensure holding of free and fair election. The question whether free and fair election is possible to be held or not has to be objectively assessed by the Election Commission by taking into consideration all relevant aspects. Efforts should be to hold the election and not to defer holding of election.