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**(2021) 08 BOM CK 0019**

**In the Bombay High Court**

**Case No :** Public Interest Litigation (L) No. 10300 Of 2021

Ratan Soli Luth

APPELLANT

Vs

State Of Maharashtra & Anr.

RESPONDENT

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**Date of Decision :** 13-08-2021

**Acts Referred:**

Constitution Of India, 1950 — Article 14, 32, 74(1), 141, 143, 150, 153, 154, 159, 163, 163(1), 163(2), 166, 166(1), 166(2), 166(3), 168, 171, 171(1), 171(2), 171(3), 171(3)(a), 171(3)(b), 171(3)(c), 171(3)(d), 171(3)(e), 171(5), 173, 174(1), 175(2), 191, 208, 226, 239(2), 333, 356, 356(1), 361, 361(1)  
Maharashtra Government Rules Of Business, 1975 — Rule 9, 10, 12, 15, 15(2)(vi)  
Representation Of The People Act, 1950 — Section 10, 10(2)(c)  
Code Of Criminal Procedure, 1973 — Section 197

**Citation :** (2021) 08 BOM CK 0019

**Hon'ble Judges :** Dipankar Datta, CJ;G. S. Kulkarni, J

**Bench :** Division Bench

**Advocate :** Aspi Chinoy, Gaurav Srivastava, Mukul Taly, Aziz Mohammed, Vithoba Masurkar, Rafique Dada, Geeta Shastri, Akshay Shinde, Anil C. Singh, Aditya Thakkar, D.P. Singh

**Final Decision :** Disposed Of

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**Judgement**

Dipankar Datta, CJ

**INTRODUCTION**

1. This Public Interest Litigation raises an interesting question in regard to the powers and role of the Governor to make nomination on the Legislative Council as conferred by clauses (3)(e) and (5) of Article 171 of the Constitution read with section 10 of the Representation of People Act, 1950 (hereafter "the 1950 Act") and the Third Schedule thereto.

2. Maharashtra is one of the few Indian States the Legislature whereof has two houses, i.e., the Legislative Assembly and the Legislative Council. The Legislative Assembly is comprised of 288 members, who are chosen by direct election from

territorial constituencies in the State. Article 171(1) of the Constitution ordains that the total number of members in the Legislative Council shall not exceed one-third of the total number of members in the Legislative Assembly of that State whereas, the proviso thereto, ordains that the number of members in any case shall not be less than forty.

3. Clause (2) of Article 171 of the Constitution ordains that until Parliament by law otherwise provides, the composition of the Legislative Council of a State shall be as provided in clause (3). For facility of reference, such provision together with clause (5) of Article 171, which has to be read together, are reproduced hereunder:

"Article 171. Composition of the Legislative Councils

(1) \*\*\*

(2) \*\*\*

(3) Of the total number of members of the Legislative Council of a State—

(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5).

(4) \*\*\*

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

Literature, science, art, co-operative movement and social service."

4. Section 10 of the 1950 Act read with the Third Schedule thereof is the law

enacted by the Parliament, which now provides for the allocation of seats in the Legislative Councils.

In terms of such provision, the number of members of the Legislative Council of Maharashtra shall be 78, of whom 22, 7, 7 and 30 members shall be elected in terms of sub-clauses (a), (b), (c) and (d) of clause (3) of Article 171, respectively, totaling 66. The remainder, i.e., 12 members are to be nominated by the Governor in accordance with clause (5) of Article 171 of the Constitution.

5. The term of all the 12 members nominated earlier ended by efflux of time. By June 16, 2020 all the seats were vacant. Resultantly, the Council of Ministers met on October 29, 2021 and unanimously resolved to render appropriate aid and advice to the Governor. In such meeting, the Council of Ministers decided to recommend names of 12 individuals, who did not incur disqualification under Article 191 of the Constitution, to the Governor for nomination in terms of clause (5) of Article 171 thereof. The Chief Minister of Maharashtra followed up this decision by forwarding, on November 6, 2021, the names of the said 12 individuals to the Governor of Maharashtra for such nomination. Despite receipt of the names recommended by the Council of Ministers, which is in the nature of advice, and several months having passed since then, it is claimed that the Governor has not acted on such advice with the result that nomination of 12 members for composition of the Legislative Council in terms of the aforesaid provisions could not be completed.

#### THE CONCERN AND THE PRAYERS

6. In this Public Interest Litigation, the petitioner has expressed concern that the Governor of Maharashtra has failed to discharge a Constitutional obligation and, therefore, relief ought to be granted in terms of prayers (a), (b) and (c) of the writ petition, set out hereinbelow:

#### “PRAYERS:

(A) This Hon’ble Court be pleased to issue a writ of Certiorari or any other appropriate writ order or direction under Article 226 of the Constitution of India calling for the record and papers pertaining to the Hon’ble Governor’s failure to make nominations under Article 171(5) of the Constitution of India pursuant to the advice and decision of the Respondent’s Council of Ministers in November, 2020 and after considering the legality and propriety thereof be pleased to quash and set aside the same;

(B) This Hon’ble Court be pleased to declare under Article 226 of the Constitution of India that the Hon’ble Governor acted in breach of Article 163(1) read with Article 171(5) of the Constitution of India in failing to make nominations under Article 171(5) of the Constitution of India pursuant to the advice/decision of the Respondent’s Council of Ministers submitted to him in November, 2020;

(C) That this Hon’ble Court be pleased to declare under Article 226 of the Constitution of India that the Hon’ble Governor is constitutionally bound to act on

and in accordance the advice / decision of the Respondent's Council of Ministers in November, 2020 and is constitutionally required to make nominations under Article 171(5) of the Constitution of India to the Legislative Council in accordance therewith."

#### PETITIONER'S CONTENTIONS

7. Appearing in support of the writ petition, Mr. Aspi Chinoy, learned senior advocate, gave a brief overview of the procedure for functioning of the executive Government. He contended that though the Governor is the formal executive head of the Government, the Constitutional scheme requires the Governor of a State to act on the aid and advice of the Council of Ministers unless, of course, any particular provision confers on the Governor the power to act in his discretion. However, insofar as nomination of members of the Legislative Council under section 10 and the Third Schedule of the 1950 Act read with clause (5) of Article 171 is concerned, the Governor has no such discretion to act against or contrary to the advice of the Council of Ministers and, therefore, there is no reason for the Governor to nominate the recommended individuals by acting on the advice received from the Council of Ministers. According to him, the inaction of the Governor to nominate members as per the advice of the Council of Ministers and failure of the Governor to act on the names forwarded by the Chief Minister are ultra vires.

8. The Constitution Bench decision in *Rameshwar Prasad & ors. (VI) vs. Union of India & anr.*, reported in (2006) 2 SCC 1, was first cited by Mr. Chinoy. Paragraph 19 of the decision was adverted to where the Court indicated brief reasons, to be followed by detailed reasons later, on the question whether the Governor could be impleaded in his capacity as the Governor and whether a notice could be issued to him. The submission of the learned Attorney General and the Additional Solicitor General that in view of Article 361(1) the Court may not issue notice to the Governor, was accepted; at the same time, it was noted that the immunity granted to the Governor does not affect the power of the Court to judicially scrutinize the attack made to the proclamation issued under Article 356(1) of the Constitution on the ground of mala fides or it being ultra vires. Our attention was then invited to paragraph 141 to highlight that even when an action under Article 356 of the Constitution of India is taken by the President of India on the report of a Governor, the drastic and extreme action cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor, and that the Supreme Court cannot remain a silent spectator watching the subversion of the Constitution. Paragraph 170 was next placed to show that even though Article 361 of the Constitution of India grants immunity to the Governor from being answerable to Court in exercise and performance of the powers and duties of his office, a mala fide act is wholly outside the scope of the power, and immunity thus granted would not mean that in the absence of the Governor, the grounds of mala fide or being ultra vires would not be examined by the Court. The statement of law in paragraph 173 of the decision was then placed for the proposition that personal

immunity from answerability, provided in Article 361 of the Constitution, does not bar a challenge that could be laid to the actions of high authorities mentioned therein, and under law, such actions including those actions, where the challenge may be based on the allegations of mala fides, are required to be defended by the Union of India or the State, as the case may be.

9. Mr. Chinoy further placed heavy reliance on paragraphs 140 to 148, 150 to 155 and 214 of the Constitution Bench decision of the Supreme Court in *Nabam Rebia and Bamang Felix vs. Deputy Speaker, Arunachal Pradesh Legislative Assembly & ors.*, reported in (2016) 8 SCC 1, to which this Court proposes to advert a little later. The decisions of the Calcutta High Court in *Biman Chandra Bose vs. Dr. H.C. Mookerjee & ors.*, reported in AIR 1952 Calcutta 799, and the decision of the Andhra Pradesh High Court in *V. Venkateswar Rao (V.V. Rao) vs. The Government of Andhra Pradesh & ors.*, reported in 2012 SCC OnLine AP 286, were also cited to drive home the point that nomination of members of the Legislative Council by the Governor would not be justifiable.

10. Mr. Chinoy also placed before us a portion of the report of the Sarkaria Commission on Centre-State relations and relied on paragraph 4.11.31 thereof reading as follows:

“Nomination to Legislative Council/Assembly

4.11.31 A question has been raised whether the Governor has discretion in making nominations to the Legislative Council under Arts. 171(3)(e) and (5) and to the Legislative Assembly vide Art. 333. Art. 171 does not provide for the exercise of discretion by the Governor. Similarly, no discretion is available to the Governor to make a nomination to the Legislative Assembly under Art. 333. The Governor should await the formation of a Ministry, if at the time of making a nomination, a Ministry has not been formed or has resigned or lost majority in the Assembly.”

11. To summarize Mr. Chinoy’s submission, the Governor has no choice in the matter of nomination of members to the Legislative Council under the Constitution but to accept the advice of the Council of Ministers and to act on it and, the Governor in the present case, has maintained complete silence which is not in consonance with the obligation imposed on him by the Constitution and the laws.

12. In course of hearing, Mr. Chinoy submitted that the petitioner would not press for relief in terms of prayer (a) but based on the aforesaid submissions, the Court may consider granting prayers (b) and (c).

#### CONTENTIONS OF THE FIRST RESPONDENT/STATE

13. Mr. Rafique Dada, learned senior advocate appeared on behalf of the first respondent/State and extended due assistance by his fair arguments. He invited our attention to the reply affidavit of Mr. S.B. Waghole, the Secretary (in-charge), Parliamentary Affairs Department, Mantralaya, Mumbai, and placed its

contents. According to Mr. Dada, it is the Constitutional mandate that the nominated members [as per clauses (3) and (5) of Article 171] form part of the Legislative Council and the Governor is bound to accept the advice of the Council of Ministers received in that behalf. As a consequence of the Governor not nominating the said 12 individuals as members, Mr. Dada contended that the Legislature and the citizens of Maharashtra are being deprived of the special knowledge and expertise of the individuals who have been so recommended by the Council of Ministers.

14. Next, Mr. Dada invited the attention of this Court to clause (3) of Article 166 of the Constitution as well as to the Maharashtra Government Rules of Business, 1975 (hereafter "the RoB", for short) framed thereunder by the Governor himself. Referring to several provisions of the RoB [rules 9, 10, 15 and the Second Schedule] as well as the instructions forming part of the same, viz. Instructions 15(1)(x) and 15(2)(vi), Mr. Dada urged that the Governor cannot deviate therefrom and decline acceptance of the advice of the Council of Ministers to nominate the recommended individuals as members of the Legislative Council, and, by not respecting the advice, the fine balance in the interplay of powers between the Government and the Governor has been put at stake.

15. The decision in *Nabam Rebia* (supra) was also referred to by Mr. Dada. Since Mr. Chinoy had extensively referred to the leading judgment authored by Hon'ble J.S. Khehar, J. (as the former Chief Justice of India then was), Mr. Dada refrained from referring to the same. However, pointed attention of this Court was drawn by Mr. Dada to the concurring opinion of Hon'ble Madan B. Lokur, J. (as His Lordship then was) in paragraphs 257 and 258 thereof. Placing reliance thereon, Mr. Dada submitted that the Governor has neither been conferred discretion 'by the Constitution' nor 'under the Constitution' to not accept the advice of the Council of Ministers; also, in nominating members of the Legislative Council, the Governor is not empowered to act in his own judgment.

#### PROCEEDINGS BEFORE THIS COURT

16. It is placed on record that at the inception of the hearing on July 16, 2021, Mr. Anil C. Singh, learned Additional Solicitor General had intervened and prayed that the Union of India (UoI) may be impleaded as a respondent and heard. It was observed by this Court that an appropriate order on such prayer would be passed after hearing the parties on record.

17. Mr. Chinoy and Mr. Dada having completed their submissions on July 16, 2021, this Court considered it fit and proper to hear the Central Government upon it being brought on record as an additional respondent. Directions for impleading the Union of India as the second respondent, amendment of the cause title of the petition and service of amended copy thereof on Mr. D.P. Singh, learned advocate on record for the UoI were made.

18. The UoI was impleaded as the second respondent in compliance with the aforesaid order. This Court had the benefit of hearing Mr. Singh for the UoI on

July 19, 2021.

19. It is also placed on record that initially, this Public Interest Litigation tagged with two other writ petitions were placed on board. In those petitions, the recommendations made by the Council of Ministers by way of advice to the Governor have been challenged. Since such writ petitions were being opposed by Mr. Kumbhakoni, learned Advocate General for the State of Maharashtra, he had made available a compilation of judgments, which was taken on record.

#### CONTENTIONS OF THE SECOND RESPONDENT/UNION

20. Mr. Singh, at the outset, objected to the maintainability of the writ petition in the 'Public Interest Litigation' jurisdiction of this Court on three-fold grounds.

First, Mr. Singh referred to W.P. (C) No. 176 of 2021 [Dr. Jagannath Shamrao Patil vs. Union of India & anr.], being a writ petition under Article 32 of the Constitution instituted before the Supreme Court in its 'Public Interest Litigation' jurisdiction. The petitioner therein had claimed the following relief:

"a. Issue writ of mandamus / directions to the Respondents to act in consonance with the mandatory provision of the Art. 171(5) of the Constitution of India for the purpose of the nominations of 12 persons as members of the Maharashtra Legislative Council and frame the norms and / or the specific criteria for the purpose of such nomination.

b. Issue writ of mandamus / directions to the Respondents to defer the nominations till the specific norms or the criteria as prayed above is framed and approved by the office of the Hon'ble Governor or in the alternative it be directed to make such nominations under its sole discretion without any influence of the recommendation of the minister of councils of the Respondent no.2.

c. During the pendency and final hearing of this writ petition the respondent no.2 may kindly be directed to not to intervene in the process of nomination so as to avoid the practice of nomination under political considerations.

d. grant any other appropriate relief which this Hon'ble Court may deem fit in the facts and circumstances of the case."

By an order dated July 2, 2021 of the Bench presided over by the Hon'ble the Chief Justice of India, W.P. (C) No. 176 of 2021 was summarily rejected on the ground that the Court was not inclined to entertain the same. According to Mr. Singh, in view of rejection of the said writ petition which involved the same issue as raised in this Public Interest Litigation, the same is not maintainable. Secondly, according to Mr. Singh, a Public Interest Litigation would lie if members of the public, who are deprived of their rights for varying reasons, are unable to approach the Court for enforcement of such rights. He contended that not only is there any averment in the petition that the affected people are unable to approach the Court, no foundation has been laid in the petition as to why the Public Interest Litigation should be entertained. If at all, he further contended

that it is either the State Government or the recommendees who could lay a challenge to the Governor's action or inaction, but the petitioner has no locus standi to so challenge. While persuading this Court to decline interference, Mr. Singh relied on the decision of the Supreme Court in *Jaipur Shahar Hindu Vikas Samiti vs. State of Rajasthan and others*, reported in (2014) 5 SCC 530, and a decision of the coordinate bench of this Court in *Mrinali Shashi Shekhar Chakravorty vs. Election Commission of India, New Delhi and another*, reported in 2020 (4) Mh.L.J. 402.

Thirdly, Mr. Singh contended that the petitioner merely seeks a declaration of law and nothing else and any decision in relation thereto would be purely academic; and while submitting that the Court should be reluctant to decide Constitutional points which are of academic importance, reliance was placed on the decisions in *State of Bihar vs. Rai Bahadur Hurdut Roy Moti Lal Jute Mills & anr.*, reported in AIR 1960 SC 378, *Vidyasagar Singh vs. Krishna Ballabha Sahay & ors.*, reported in AIR 1965 Pat 321, *In re: ICICI Bank Ltd. & ors.*, reported in AIR 2006 All 239, and *K.B. Nagur, M.D. (Ayurvedic) vs. Union of India*, reported in (2012) 4 SCC 483.

21. Moving on further, Mr. Singh contended that the petitioner's contention of the Governor being bound by the advice of the Council of Ministers, meaning thereby that the Governor would have absolutely no discretion in the matter of nomination and that the State would control the nomination of members under clause (5) of Article 171, is clearly contrary to the intent of the Constitution. According to Mr. Singh, clause (5) of Article 171 of the Constitution empowers the Governor to nominate members, and in the process, the Governor has a discretionary power to nominate as well as a right to reject any particular name and to send it for reconsideration. He further argued that while the Governor exercises no control over influx of elected members, the decision on the question as to who would be nominated as a member to the Legislative Council is solely within the Governor's discretion. This is because, the power to nominate is not an executive function of the State Government and, therefore, the Council of Ministers has no control over the same.

22. To buttress his contention that in the matter of nomination under clauses (3) (e) and (5) of Article 171 of the Constitution, the Governor is not bound by the advice of the Council of Ministers and that he is to act in his own discretion, Mr. Singh placed reliance on a decision of the Division Bench of the Allahabad High Court in *Ranjana Agnihotri and others vs. State of Uttar Pradesh Chief Secretary Government and others*, reported in 2015 Indlaw ALL 404. Mr. Singh also fairly placed before this Court another Division Bench decision of the same High Court in *K.K. Tripathi vs. State of U.P.*, reported in 2010 SCC OnLine All 573, wherein it has been held as under:

"We, therefore, do not intend to enter into this debate about the nature of discretion, which is exercised by the Governor in the matter of nomination of members to Legislative Council, in the given facts and circumstances of the

present case, but do observe that if the Governor is to exercise his personal discretion in nominating the members, he can do so on his own satisfaction, but assuming that such a discretion by the Governor has to be exercised, on the aid and advice of the Council of Ministers, he can still send back the proposal for reconsideration of all or some of the names to the Council of Ministers, with his own suggestions, and even in case, the names are suggested individually by the Chief Minister, the Governor will have his authority to send the matter for consideration by the Council of Ministers.”

23. Arguing in support of the proposition that the Governor, even in the absence of express provision in the Constitution conferring discretion in his favour, has the discretion to go against the advice of the Council of Ministers or to even act contrary to it, Mr. Singh relied on the Constitution Bench decisions in *B.R. Kapur vs. State of T.N.* and another, reported in (2001) 7 SCC 231, and *M.P. Special Police Establishment vs. State of M.P. and others*, reported in (2004) 8 SCC 788. Incidentally, heavy reliance was placed by Mr. Singh on *M.P. Special Police Establishment (supra)* to contend that the Governor is not, in all cases bound to accept the advice of the Council of Ministers and may even proceed to act in a manner effectively rendering the advice as irrelevant and not binding.

24. Referring to paragraph 155 of the decision in *Nabam Rebia (supra)*, Mr. Singh also contended that the Governor may, in exceptional circumstances, on the ground of propriety refuse to be bound by the advice of the Council of Ministers.

25. The decision in *State of Gujarat & anr. vs. Justice R.A. Mehta (Retired) & ors.*, reported in (2013) 3 SCC 1, was relied on for the proposition that in terms of clause (2) of Article 163 of the Constitution, the Governor himself is the final authority to decide upon the issue as to whether he is required by or under the Constitution to act in his discretion and the Council of Ministers, therefore, would be rendered incompetent in the event of there being a difference of opinion with respect to such a question; and a decision taken in this regard by the Governor would not be open to challenge in any Court.

26. This Court has also heard Mr. Singh submit, in regard to the petitioner’s allegation of the Governor having acted *ultra vires* by not accepting the advice of the Council of Ministers, that the petitioner has not identified any provision requiring the Governor to act within a specified time period. In continuation of such contention, Mr. Singh argued that neither the State Government nor the petitioner has specified from when the Governor could be alleged to have been in default. A bald assertion that the Governor has failed to act without lawful cause, according to Mr. Singh, thus cannot form the basis to avoid the Constitutional bar under Article 361 of the Constitution without any further factual foundation having been laid.

27. Based on the aforesaid submissions, Mr. Singh submitted that the Public Interest Litigation lacked merit and deserves to be dismissed.

## ARGUMENTS IN REJOINDER

28. Replying to the submissions of Mr. Singh, Mr. Chinoy contended that the objection to the maintainability of this petition is without substance. Attention of the Court was drawn to the proviso to clause (1) of Article 74 of the Constitution for the proposition that while the President has been expressly conferred the power to require the Council of Ministers to reconsider an advice, no such similar power having been conferred by the Constitution on the Governor, he has no other option but to accept the advice. According to Mr. Chinoy, the RoB cannot also be read as conferring power on the Governor to return the advice that was tendered back to the Council of Ministers for reconsideration. Reiterating that the Governor had failed in his Constitutional obligation, he concluded by submitting that this Court may declare the action of the Governor as ultra vires the Constitution.

### THE QUESTIONS

29. The parties have been heard, with their consent, at the stage of admission of the writ petition.

30. This Court shall first proceed to consider the question whether the writ petition is maintainable. An affirmative answer to such question would necessarily propel the Court forward to find answers to the following two questions:

1. Whether, in terms of Section 10 of the 1950 Act and the Third Schedule read with clauses (3)(e) and (5) of Article 171 of the Constitution, or the RoB framed under clause (3) of Article 166 of the Constitution, any discretion is available to the Governor not to nominate members of the Maharashtra Legislative Council upon receipt of the advice of the Council of Ministers? If so, whether the Governor is required to take any further action?

2. In the event the answer to the above question is in the affirmative, does the Governor not have a 'duty to speak'?

### DECISION WITH REASONS

31. The first requirement for the maintainability of a public interest litigation is the uberrima fides of the petitioner. Mr. Singh has not contended that the writ petition does not satisfy the test of utmost good faith which is imperative to maintain a litigation in public interest. His objections, noted above, are different and this Court is unhesitatingly of the opinion that such objections are not well-founded for the reasons proposed to be assigned while dealing with each and every point of objection.

32. Dismissal of W.P. (C) No. 176 of 2021 by the order dated July 2, 2021 of the Supreme Court does not, in the considered view of this Court, pose any difficulty for the petitioner to maintain this writ petition. A bare reading of the said writ petition would reveal that the same was primarily instituted by the petitioner to urge the Supreme Court to frame norms and/or to specify criteria for the purpose of nomination of members to the Maharashtra Legislative Council under

clause (3) read with clause (5) of Article 171 of the Constitution. Paragraph 1 of the writ petition may be referred to where it was averred that due "to lack of specific norms or criteria ... several eligible and deserving Personalities are deprived from consideration of names for the purpose of their nominations ... and thus fundamental right contemplated under Article 14 is being violated". The thrust of the petitioner in W.P. (C) No. 176 of 2021 was framing of norms/criteria by or at the persuasion of the Supreme Court. Although incidentally the petitioner had prayed for a direction on the Governor to make such nominations under its sole discretion and without being influenced by the recommendation of the Council of Ministers, such prayers were clearly not maintainable and hence did not deserve consideration. The subject matter of this petition being entirely different, there is no bar to entertain it.

33. The next objection basically is that, it is either the State Government or the nominees who ought to have approached the Court and not the petitioner. In the further considered view of this Court, this contention too lacks merit.

34. The Governor in India, similar to the British Crown, is an integral part of the State Legislature. Whenever there is a bi-cameral legislature, it consists of the Governor, the Legislative Assembly and the Legislative Council (see: Article 168). Neither can the executive Government nor the Governor act contrary to the provisions of the Constitution or any law. However, should there be a challenge to any action/decision of a Governor in Court even on the ground of mala fide, the immunity provided by Article 361 of the Constitution, which is complete, would spring into action and bar the Court to either issue notice to the Governor or to demand an answer. In such an eventuality, it would be left to the executive Government to defend the Governor as held in *Rameshwar Prasad* (supra). All executive actions taken by the Government of a State, in exercise of its executive power and which are expressed in the name of the Governor and duly authenticated in terms of clauses (1) and (2) of Article 166 of the Constitution, would not make the Governor answerable to Court. Such being the Constitutional scheme and the ethos of the Parliamentary/Cabinet system of Government, it would be absolutely undesirable as well as inadvisable if a State Government, which is to defend the Governor, moves Court aggrieved by any decision or action of the formal or Constitutional head of the Government of that State. It is, therefore, not in the interest of the State that the Governor's action is made liable to a challenge by the same Government of which he is the formal or Constitutional head.

35. The other connected contention of Mr. Singh that it is for the recommendees to move the Court against the alleged inaction of the Governor, is urged to be rejected. The persons who have been recommended for membership of the Legislative Council are neither officially supposed to know of such recommendation, till such time the Governor nominates them as such members based on the advice of the Council of Ministers, nor do they acquire any right to enforce a recommendation in their favour made by such council. Without the

requisite knowledge as well as the right to enforce the recommendations, they would lack the locus standi to approach a Court seeking enforcement of such recommendations. Even otherwise, qua the recommendees, enforcement of recommendations of the present nature cannot be asked for by praying for a mandamus to the Governor. This Court is, thus, of the view that there is no substance in the contention advanced by Mr. Singh for consideration.

36. The final contention on maintainability is that none from the weak, needy and marginalized segment of the society has approached the Court and Constitutional points which are of academic importance ought not to be decided by it.

37. This Public Interest Litigation involves interpretation of Constitutional provisions and the questions arising for decision are of public importance having far-reaching effect. It has never been the law in this country that a Public Interest Litigation can only be maintained if it is intended to protect the interest of the weak, needy or marginalized people who, by reason of their social and economic status, are unable to access justice, with the result that the doors of justice are practically not open for them. Indubitably, for those class of people who 'struggle for justice' despite being legally wronged, the writ courts exercising public interest litigation jurisdiction are the last bastion and no number of technical objections to thwart justice should stand as obstacles in its path.

38. However, one of the purposes for which a Public Interest Litigation not involving the weak, needy or marginalized people could be maintained is to give proper direction to public power or to correct the exercise of such power, when it appears to the Court that there is an error in exercise thereof which is affecting public interest. It is settled law that if by the act in question, a specific legal injury to an individual or to a specific class or group of individuals is caused, in such cases, a member of the public having sufficient interest can certainly maintain an action. The "sufficient interest" that would give standing to a member of the public to maintain a litigation in public interest has, of course, to be determined by the Court having regard to the peculiar facts of each individual case and no hard and fast rule in this behalf can be laid down. While exercising the power of judicial review in a Public Interest Litigation, the Courts have to be cautious not to overstep their own limits of judicial functions and to trespass into the areas which are reserved to the Executive and the Legislature by the Constitution. The Courts, in course of hearing a public interest litigation, ought to remind itself that it is the 'sentinel on the qui vive', since it the Court's obligation to act as the custodian of Constitutional morals and ethics.

39. The decision in S.P. Gupta vs. Union of India, reported in 1981 Supp SCC 87, apart from being a landmark decision outlining the contours of a Public Interest Litigation, is regarded as the parent decision on such subject. It is evident from the leading judgment delivered by Hon'ble P.N. Bhagwati, J. (as the former Chief Justice of India then was) that the first out of several writ petitions, which were under consideration, was filed before this Court by a group of practicing

advocates who challenged circular letter dated March 18, 1991 addressed by the Law Minister of the Government of India to the Governor of Punjab and the Chief Ministers of the other States. The advocates of this Court viewed the circular letter of the Law Minister as a direct attack on the independence of the judiciary, which is regarded as a basic feature of the Constitution, and condemned the circular letter as subservient of judicial independence leading to a request to the Government of India to withdraw the circular letter. Since the circular letter was not withdrawn, Constitutional validity thereof was challenged seeking a declaration that if consent(s) for transfer, in furtherance of the circular letter had been given by any Judge/Judges, the same should be declared null and void.

40. Advocates from across the country had instituted the other writ petitions before the other High Courts. On transfer, all the petitions/proceedings were clubbed. The primary objective of all such writ petitions was to uphold the independence of the judiciary. It is not that the Judges of the High Courts, who would stand to be affected if such decision of the Government of India were implemented, could not have approached the Court seeking an order for quashing thereof individually. The Judges certainly did not belong to the weak, needy or marginalized section. On the other hand, the writ petitions were instituted to protect the independence of the judiciary, being a basic feature of the Constitution. This Court is of the view that the contention as raised by Mr. Singh does not deserve any further consideration in view of the law settled by the Supreme Court during the last four decades on the scope and contours of a Public Interest Litigation.

41. Insofar as the contention of Mr. Singh that this Court ought not to decide any academic issue is concerned, this Court finds no reason to accept the same too. An issue becomes academic, ordinarily, when by reason of events subsequent to institution of proceedings, it does not survive for being decided by the Court. Had this Court been seized of information that the Governor has conveyed his decision on the question of nomination to the Chief Minister, the issue raised herein could have petered out to be of academic interest. However, no such information has been laid before this Court. The affidavit of the State says that no response from the office of the Governor has been received. In view thereof, and particularly when the issue arising out of interpretation of Article 171 read with the provisions of the 1950 Act is one of substantial importance, and a live issue intrinsically connected with the relief claimed in this petition, the contention raised is unacceptable. A public law declaration can indeed be made at the instance of a public-spirited person, who approaches the Court as a petitioner with a genuine public cause. Since the petitioner seeks relief to ensure that the vacant seats of members in the Legislative Council are filled up without delay, the exercise to pronounce on the merits of such issue by interpreting the Constitution and the statutory provisions, instead of being futile, is one which this Court is bound to determine or else it would fail in its duty of rendering justice in the cause.

42. This Court may also profitably refer to those line of decisions laying down the law that if a suitor or a litigant who initiates an action in public interest is to be turned away at the threshold merely on the ground that the Governmental action in question does not affect his interest personally or the interest of any member of the public, it would leave room for the Governmental agency to violate the law; and what more can be prejudicial to the public interest if violation of law by a Governmental agency is not to be placed under the judicial scanner only on the ground that the suitor/litigant is not having sufficient interest. The law is well settled that if no one can have standing to maintain an action for judicial redress in respect of a public wrong or a public injury, not only the cause of legality would suffer but the people not having any judicial remedy to redress such public injury may turn to the street and in that process, the rule of law will be seriously impaired; also that, a breach of public duty, if allowed to go unredressed, because no one has suffered a specific legal injury, would promote disrespect for the rule of law. These are the reasons for which this Court would feel inclined to entertain the petitioner's concern and determine the questions on interpretation of the Constitution formulated above.

43. The decision in *Rai Bahadur Hurdut Roy Moti Lal Jute Mills* (supra) relied on by Mr. Singh is clearly distinguishable on facts since, as noted earlier, there is no material on record to suggest that the Governor has responded to the letter of the Chief Minister dated November 6, 2020. In any event, the objection that the writ petition raises an academic issue and ought not to be decided has been dealt with in the preceding paragraphs and, therefore, it is held that the cited authority has no application here.

44. It would be convenient at this juncture to also consider the other decisions referred to by Mr. Singh in support of his contentions on maintainability of this Public Interest Litigation.

45. In *Jaipur Shahar Hindu Vikas Samiti* (supra), the Supreme Court held that when the interest of the parties can be protected and the controversy or the dispute adjudicated by a mechanism created under a particular statute, they should be relegated to the appropriate forum instead of entertaining the writ petition filed as a Public Interest Litigation. There is no mechanism or forum available to the petitioner for redress and apart from the Supreme Court, this Court is the only other forum which could be approached. This decision, thus, is of no assistance for Mr. Singh. *Mrinali Shashi Shekhar Chakravorty* (supra) was a decision rendered on a challenge to the Constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968. The prayers were to freeze the reserved symbols for twenty years and to stay the effect, operation and execution of the Order. The Court declined relief since the petitioner was silent about any nexus with the cause, which was self-shouldered, and it was held that there is nothing to suggest that none of the affected persons can take up the cause and approach the Court of law. The discussion made while negating the contention of Mr. Singh that either the State Government or the recommendees

ought to approach the Court is sufficient to distinguish the decision under discussion. The decision in *Vidyasagar Singh* (supra) was referred to for showing that the Court had expressed disinclination to embark on an academic discussion on the question as to whether the Governor acts, in his discretion, under Article 171(3)(e) of the Constitution, without reference to the Council of Ministers, or whether he acts under such provision with the aid and advice of the Council of Ministers, so as to be constitutionally bound to accept their advice. It has been pointed out to this Court by the learned Advocate General that in the said decision, the argument of the Attorney General [who appeared for the Chief Minister] has been recorded that nomination under Article 171(3)(e) of the Constitution is not made by the Governor in his discretion, but is made by the Governor in exercise of the executive power of the State vested in him on the aid and advice of the Council of Ministers. The submission of the Attorney General notwithstanding, the subject case did not require the Bench of the Patna High Court to decide the question. However, that would not bar a decision by this Court on the facts of the present case. *ICICI Bank Ltd.* (supra), a Full Bench judgment of the Allahabad High Court, held that the Courts have jurisdiction to decide on points of law only when those arise in relation to or are incidental to questions raised by the parties affecting their own rights, liabilities and interest, but it is a paradox that the Court has no jurisdiction to decide a question of law, and a question of law only, like a Professor answering questions of a persistent law student. What this Court proposes here is to decide a point of law that has arisen in relation to or is incidental to the concern expressed by the petitioner affecting the rights of the public in general in not having the benefit of the Governor's nominees to the Legislative Council. This decision does not, therefore, help Mr. Singh.

46. The preliminary objections thus stand overruled and the petition is held to be maintainable.

47. While this Court would now tread the path to answer the questions involved, as formulated in paragraph 30 supra, it would record its satisfaction upon conducting some research that the questions of law presently under consideration have not been dealt with by the Supreme Court in any earlier decision, although two decisions of the Allahabad High Court, cited by Mr. Singh, have considered Article 171 and the Patna High Court in *Vidyasagar Singh* (supra) chose not to answer the question. However, the RoB is what makes this case different and the questions of law are, thus, *res integra*. Significantly, notwithstanding the guidance in fair measure available from such authorities of the Supreme Court relied on by the parties, none of them dealt with a situation where the Governor was alleged to have not exercised a power or performed a duty, as per the Constitutional mandate. This is the distinctive feature of this Public Interest Litigation.

48. Before the legal issues are discussed and the questions answered, this Court may note the relevant provisions of the Constitution. Part VI of the Constitution

deals with "The States". Article 153 provides that there shall be a Governor for each State. Article 154 ordains that the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 159 prescribes for the 'oath or affirmation by the Governor'. The oath of office mandates the Governor to the best of his ability, to preserve, protect and defend the Constitution and the law and to devote himself to the service and well-being of the people of the State. Article 163, which provides for Council of Ministers to aid and advise Governor, falls under the heading "Council of Ministers". In the context of the controversy in the present proceedings, Article 163 has been a subject matter of considerable discussion. It would, thus, be appropriate to extract the same hereinbelow. It reads thus:-

"Article 163: Council of Ministers to aid and advise Governor. -

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

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

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

49. The next relevant article is Article 166 falling under the heading "Conduct of Business of the Government of a State". It would be necessary to extract Article 166 as "rules of business" framed by the Governor has some bearing on the issue raised, and was also a subject matter of debate. Article 166 reads thus:-

Article 166 Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

50. This Court next comes to Chapter III in Part VI providing for "The State Legislature". Article 168 ordains constitution of Legislatures in States. Clause (1) thereunder provides that for every State there shall be a Legislature which shall consist of a Governor (emphasis added), and sub-clause (a) provides that for the States as notified therein, there shall be 'two houses'.

Included in the said sub-clause is the State of Maharashtra, As per clause (2), one of the houses shall be known as "Legislative Council" and the other shall be known as "Legislative Assembly". Thereafter comes Article 171, which is the heart of the present proceedings. It provides for 'Composition of the Legislative Councils'.

51. The Governor of Maharashtra, in exercise of the powers conferred by clause (3) of Article 166 of the Constitution, has framed the RoB, which was brought into force from July 1, 1975. Rules 9, 12 and 15 are required to be noted. They read thus:

"Rule 9

All cases referred to in the Second Schedule shall be brought before the Council-

(i) by the direction of the Governor under clause (c) of Article 167;

(ii) by the direction of -

(a) the Chief Minister ; or

(b) the Minister-in-charge of the case with the consent of the Chief Minister:

Provided that, no case in regard to which the Finance Department is required to be consulted under rule 11 shall, save in exceptional circumstances under the directions of the Chief Minister, be discussed by the Council unless the Finance Minister has had opportunity for its consideration.

Rule 12

All orders or instruments made or executed by or on behalf of the Government of the State shall be expressed to be made by or by order of or executed in the name of the Governor.

Rule 15

These Rules may to such extent as necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister."

52. The Second Schedule to the RoB contains "Instructions regarding the Business of the Government issued under Rule 15 of the RoB". Paragraph 15 provides for the classes of cases which "shall" be submitted to the Chief Minister before the issuance of order, under which clause (x) provides for proposals to nominate members of the Legislative Council under Article 171(3)(e). 15(2) provides for cases which shall be submitted by the Chief Minister to the Governor

before issuance of orders. Instruction-15(1)(x) and 15(2)(vi) read thus:

15 (1) (x)

Proposal to nominate members of the Legislative Council under Article 171(3)(e);

Rule 15 (2) (vi)

Cases relating to the nomination of members to either House of the State Legislature;

53. Instruction-16 of the said "Instructions" is also relevant. It is proposed to be considered at a later part of this judgment.

54. Having noted the relevant Articles of the Constitution and the RoB, this Court may observe that what falls for interpretation is a fine interplay between what Article 163 ordains in its applicability to the powers of the Governor conferred under clauses (3)(e) and (5) of Article 171 read with section 10 of the 1950 Act and the Third Schedule to nominate members to the Legislative Council and the provisions of the RoB insofar as they touch the applicability, effect and operation of such articles of the Constitution. On this backdrop, sub-clause (e), which is the subject matter of debate, would be required to be seen. Sub-clause (e) provides that the remainder, i.e., the percentage of the members which would remain after sub-clauses (a) to (d) of clause 3 are utilized, "shall" be nominated by the Governor in accordance with the provisions of clause (5). The word "shall" indicates that it is a mandate and a Constitutional duty is cast upon the Governor to nominate such remaining members which again shall be in accordance with clause (5) of Article 171. The wording of clause (5) also is a mandate to the Governor to nominate members to the Legislative Council, as it uses the words "shall consist of" so as to appoint persons having special knowledge or practical experience in respect of such matters as specified, namely, literature, science, art, co-operative movement and social service. A cumulative reading of clauses (3)(e) and (5) of Article 171 and section 10 of the 1950 Act brings about a consequence that such members to be nominated by the Governor shall be persons of the nature as contained in clause (5) of such article. Once clause (5) read with section 10 of the 1950 Act confers a power on the Governor, certainly such exercise of power would be coupled with a duty to adhere to the mandate as prescribed by clause (5), namely, that such persons, who would be nominated by the Governor, do not fall outside the stipulations as contained in clause (5).

55. The question, therefore, is as to in what manner the Governor would exercise such powers under clause (5) of Article 171 read with section 10 of the 1950 Act. For such exercise, in this Court's opinion, undoubtedly the provisions of Article 163 would come into play, which provides that the Council of Ministers would aid and advice the Governor with the Chief Minister at its head. However, there is an exception provided by clause (1) of Article 163, namely, that such aid and advice by the Council of Ministers would be excepting such issues where the Governor would exercise his functions in his discretion. Thus, the corollary would be as to

whether the powers under clauses (3)(e) and (5) of Article 171 read with section 10 of the 1950 Act would be a power to be recognized, being exercised by the Governor in his discretion. It appears to be quite settled that wherever the Constitution intended the Governor to exercise his powers/functions in his discretion, the Constitution has specifically so provided; also, discretion has been read into certain other articles by judicial pronouncements.

56. Having noted the relevant provisions of law, it would now be profitable to discuss the facts in *Nabam Rebia* (supra) and *M.P. Special Police Establishment* (supra) in some detail since much has been argued by either side based on such authorities.

57. The civil appeals decided by the 5-Judge Constitution Bench by its decision in *Nabam Rebia* (supra) arose out of a common order dated January 13, 2016 of the Gauhati High Court. The bare facts sufficient for understanding the conclusions recorded by the Court are these. The 5th Session of the Arunachal Pradesh Legislative Assembly concluded on October 21, 2015. On November 3, 2015, the Governor of Arunachal Pradesh issued an order summoning the 6th Session of the Assembly to meet on January 14, 2016. Such order was passed by the Governor, on the aid and advice of the Chief Minister, and in consultation with the Speaker of the House. The 6th Session of the House was, however, preponed by the Governor by an order dated December 12, 2015 from January 14, 2016 to December 16, 2015, indicating, inter alia, the manner in which the proceedings of the House should be conducted. In support thereof, the Governor issued a message on December 9, 2015. According to the appellants, these actions of the Governor demonstrated an extraneous and inappropriate exercise of constitutional authority. The above order and message of the Governor, without the aid and advice of the Council of Ministers and the Chief Minister, thus, constituted the foundation of the challenge raised by the appellants.

57.1. The order dated December 12, 2015 was prompted by a notice of resolution for the removal of the Speaker, *Nabam Rebia*, coupled with the assumption that a constitutional obligation was cast on the Governor to ensure that the said resolution was expeditiously taken up for consideration, because any delay in taking up the same on the scheduled date of summoning of the 6th Session of the House (January 14, 2016) would "... cause damage to the goals and ideals of the provisions of the Constitution, besides the Conduct of Business Rules ..."; and that, the Governor was not obliged, in the peculiar background to seek the advice of the Chief Minister and his Council of Ministers. Admittedly, the Governor had issued the above order at his own, without any aid and advice.

57.2. From the opinion rendered by Hon'ble Madan B. Lokur, J., this Court finds the questions that, in the opinion of His Lordship, emerged for the decision of the Court, viz.

"244.1. Whether, after having notified the dates of sitting of the Legislative Assembly in consultation with the Chief Minister and the Speaker of the House,

the Governor of Arunachal Pradesh could cancel those dates in the exercise of 'power' under Article 174(1) of the Constitution and in the exercise of discretion under Article 163 of the Constitution?

244.2. Whether, after having notified the dates of sitting of the Legislative Assembly in consultation with the Chief Minister and the Speaker of the House, the Governor of Arunachal Pradesh could unilaterally alter and reschedule those notified dates in the exercise of 'power' under Article 174(1) of the Constitution read with Article 163 of the Constitution by issuing a fresh notification?

244.3. Whether generally, in the exercise of discretion under Article 163(1) of the Constitution read with Article 174(1) of the Constitution and notwithstanding the relevant rules framed by the Legislative Assembly under Article 208 of the Constitution, the Governor of Arunachal Pradesh could summon the Legislative Assembly without consulting the Chief Minister and the Speaker of the House?

244.4. Whether the message sent by the Governor of Arunachal Pradesh on 9-12-2015 under Article 175(2) of the Constitution was a constitutionally valid message that ought to have been (and was) acted upon by the Legislative Assembly?"

57.3. It is, therefore, clear from the above questions that they are distinct and different from the questions that this Court is tasked to decide. However, the discussions provide able guidance to us and hence shall be noted in some detail.

57.4. The facts and circumstances preceding issuance of the order dated December 12, 2015 by the Governor find detailed narration in the judgment, reiteration whereof is not considered necessary for a decision by us. Suffice it to record, the Supreme Court came down heavily against the impugned orders of the incumbent Governor of Arunachal Pradesh because the same were not in accord with accepted Constitutional norms and principles in regard to powers and functions of the Governor of a State. In fact, findings were returned that the impugned orders were violative of Article 163 read with Article 174 of the Constitution. Not only that, provisions of Article 163 of the Constitution were read and interpreted to limit clause (2) as not being all-pervasive.

57.5. The argument advanced by the respondents before the Supreme Court based on clause (2) of Article 163 was repelled in the lead judgment in the following words:

"148. The above position leaves no room for any doubt that the Governor cannot be seen to have such powers and functions, as would assign to him a dominating position, over the State Executive and the State Legislature. The interpretation placed on Article 163(2), on behalf of the respondents, has just that effect, because of the following contentions advanced on behalf of the respondents. Firstly, whenever a question arises, whether in discharging a particular function, the Governor can or cannot act in his own discretion. According to the respondents, the discretion of the Governor, on the above question, is final.

Secondly, since the provision itself postulates, that ‘... the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion ...’, according to the respondents, makes the Governor’s orders based on his own discretion, immune from judicial review. Accepting the above position, will convert the Governor into an all-pervading super-constitutional authority. This position is not acceptable because an examination of the executive and legislative functions of the Governor, from the surrounding provisions of the Constitution clearly brings out that the Governor has not been assigned any significant role either in the executive or the legislative functioning of the State. The position adopted on behalf of the appellants, on the other hand, augurs well in an overall harmonious construction of the provisions of the Constitution. Even on a cursory examination of the relevant provisions of the Constitution, we are inclined to accept the contention advanced on behalf of the appellants.”

57.6. The aforesaid paragraph was immediately followed by reference to the Constituent Assembly Debates on draft Article 143, which subsequently appeared in the Constitution as Article 163. Next, reference to the Justice Sarkaria Commission Report on “Centre-State Relations” and the Justice M.M. Punchhi Commission Report on “Constitutional Governance and the Management of Centre-State Relations” were made. The Court endorsed and adopted para 4.5 of the latter report as a correct expression of the Constitutional interpretation, with reference to the issue under consideration.

57.7. After referring to the 7-Judge Constitution Bench decision in *Samsher Singh vs. State of Punjab*, reported in (1974) 2 SCC 831, the conclusions were recorded as under:

“155. We may, therefore, summarise our conclusions as under:

155.1. Firstly, the measure of discretionary power of the Governor, is limited to the scope postulated therefor, under Article 163(1).

155.2. Secondly, under Article 163(1) the discretionary power of the Governor extends to situations, wherein a constitutional provision expressly requires the Governor to act in his own discretion.

155.3. Thirdly, the Governor can additionally discharge functions in his own discretion, where such intent emerges from a legitimate interpretation of the provision concerned, and the same cannot be construed otherwise.

155.4. Fourthly, in situations where this Court has declared that the Governor should exercise the particular function at his own and without any aid or advice because of the impermissibility of the other alternative, by reason of conflict of interest.

155.5. Fifthly, the submission advanced on behalf of the respondents, that the exercise of discretion under Article 163(2) is final and beyond the scope of

judicial review cannot be accepted. Firstly, because we have rejected the submission advanced by the respondents, that the scope and extent of discretion vested with the Governor has to be ascertained from Article 163(2), on the basis whereof the submission was canvassed. And secondly, any discretion exercised beyond the Governor's jurisdictional authority, would certainly be subject to judicial review.

155.6. Sixthly, in view of the conclusion drawn at fifthly above [para 155.5], the judgments rendered in Mahabir Prasad Sharma case (72 CWN 328), and Pratapsingh Raojirao Rane case (AIR 1999 Bom 53), by the High Courts of Calcutta and Bombay, respectively, do not lay down the correct legal position. The constitutional position declared therein, with reference to Article 163(2), is accordingly hereby set aside."

57.8. Mr. Dada referred to paragraphs 257 and 258 of the concurring opinion rendered by Hon'ble Madan B. Lokur, J. This Court deems it appropriate to reproduce the same hereinbelow:

"Conclusions on Article 163 of the Constitution

257. The sum and substance of the historical background leading to Article 163 of the Constitution, as enacted, is this: (i) The Council of Ministers will aid and advise the Governor in the exercise of his functions. This is the first part of Article 163(1) of the Constitution. The Governor then has two options — (a) To reject the aid and advice of the Council of Ministers and act in 'his individual judgment'. This is an illusory and non-existent option since the Constitution does not permit it. (b) To act on the aid and advice of the Council of Ministers. By default this is the only real option available to him. (ii) If the exercise of function is beyond the purview of the aid and advice of the Council of Ministers but is by or under the Constitution, the Governor can act 'in his discretion'. Article 163(2) of the Constitution will have reference only to the last part of Article 163(1) of the Constitution and is not all-pervasive.

258. If there is a breakdown in communications between the Council of Ministers and the Governor (as imagined by Mr Churchill), then the Governor will not have the benefit of the aid and advice of the Council of Ministers. In that event, the Governor may 'take the matter into his own hands and act freely'. The breakdown of communications was a possibility under the Government of India Act, 1935 since it was 'in the main undemocratic' and there could be a breakdown of communications between the representative of His Majesty and the Council of Ministers. However, if such a situation were to arise today in Independent India, namely, a breakdown of communications between the Governor of a State and the Council of Ministers, it would be most unfortunate and detrimental to our democracy. In the unlikely event of a complete breakdown of communications, the President can and must intervene to bring in constitutional order."

57.9 Hon'ble Madan B. Lokur, J., in concluding the opinion, ruled that:

"361. Under Article 163(1) of the Constitution, the Governor is bound by the advice of his Council of Ministers. There are only three exceptions ["except insofar as"] to this:

(i) The Governor may, in the exercise of his functions, act in his discretion as conferred by the Constitution;

(ii) The Governor may, in the exercise of his functions, act in his discretion as conferred under the Constitution; and

(iii) The Governor may, in the exercise of his functions, act in his individual judgment in instances specified by the Constitution."

(italics in original)

58. All the observations and statements of law made by the Court in *Nabam Rebia* (supra) have to be read in the context of the issue directly under consideration, i.e., summoning of the Legislative Assembly by the Governor in his own discretion and its legality and validity on the touchstone of the powers conferred on the Governor by the Constitution. Although this Court is not seized of an issue remotely connected with summoning of the Legislative Assembly, the discussions in the decision, insofar as they outline the situations/circumstances where the Governor under the Constitutional scheme could act "in his discretion" or "in his judgment", would be of immense utility.

59. It would be pertinent at this juncture to observe that interpretation of Article 163 by the bench of two learned Judges in the decision in *Justice R.A. Mehta* (supra) was considered in *Nabam Rebia* (supra) but the interpretation of the Constitution Bench on such article in the latter decision does not seem to favour the interpretation in the former.

60. In *M.P. Special Police Establishment* (supra), the question for consideration was whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or under the Indian Penal Code.

60.1. The facts reveal that sanction to prosecute two ministers (the respective fourth respondents in the appeals) had been sought. The relevant Council of Ministers had refused sanction for prosecution of such ministers on the ground that there was not an iota of material available against both of them from which it could be inferred that they had entered into a criminal conspiracy with anyone and also that no prima facie case had been made out against them. The Governor then considered grant of sanction keeping in view the decision of the Council of Ministers. The Governor opined that the available documents and the evidence were enough to show that a prima facie case for prosecution had been made out. The Governor, accordingly, granted sanction for prosecution under Section 197 of the Criminal Procedure Code. The ministers then instituted separate writ proceedings before the Madhya Pradesh High Court assailing the

order of the Governor, which succeeded. A Single Judge of the High Court held that granting sanction for prosecuting the ministers was not a function which could be exercised by the Governor "in his discretion" within the meaning of these words as used in Article 163 of the Constitution. It was held that the Governor could not act contrary to the "aid and advice" of the Council of Ministers. It was further held that the doctrine of bias could not be applied against the entire Council of Ministers and that the doctrine of necessity could not be invoked on the facts of the case to enable the Governor to act "in his discretion". The two letters patent appeals carried from the orders of the writ court were dismissed by the judgment under challenge before the Supreme Court. The Division Bench upheld the reasoning and judgment of the writ court.

60.2. Having regard to the importance of the question involved, the civil appeals were directed to be placed before a Bench of five Judges. The Constitution Bench, speaking through Hon'ble S.N. Variava, J. (as His Lordship then was) noticed the decision of the Constitution Bench comprising seven Judges in *Samsher Singh* (supra), where exceptional situations when the Governor could act in his discretion were delineated. The statement of law in paragraph 154 of the decision in *Samsher Singh* (supra) was quoted, which reads:

"154. We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. \*\*\*"

This was followed by the statement of law, reading as under:

"Thus, as rightly pointed out by Mr Sorabjee, a seven-Judge Bench of this Court has already held that the normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out hereinabove. It is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is also recognised that the concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. It is recognised that there

may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice. Such a situation may be where bias is inherent and/or manifest in the advice of the Council of Ministers.”

60.3. The Court then proceeded to reiterate that undoubtedly, in the matter of grant of sanction to prosecute, the Governor is normally required to act on the aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety, the Governor may have to act in his own discretion. Similar would be the situation if the Council of Ministers disables itself or disentitles itself.

60.4. Ultimately, upon hearing the parties and on the basis of materials before it, the Supreme Court felt no hesitation to hold that the decision of the Council of Ministers was ex facie irrational whereas the decision of the Governor was not. While setting aside the judgments of the high court and, in effect, dismissing the writ petitions, the following observations were made:

“33. \*\*\* We also presume that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. However, on those rare occasions where on facts the bias becomes apparent and/or the decision of the Council of Ministers is shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction.”

61. Let it now be ascertained what was said of M.P. Special Police Establishment (supra) by the Bench in Nabam Rebia (supra).

62. Hon’ble J.S. Khehar, J. noticed the decision in M.P. Special Police Establishment (supra) in paragraphs 116, 118, and 128 of His Lordship’s judgment. This Court has not been able to find any statement of law in such judgment which dilutes the ratio of the decision in M.P. Special Police Establishment (supra).

63. Hon’ble Madan B. Lokur, J. noticed M.P. Special Police Establishment (supra) in paragraphs 314, 315, 326, and 362. The relevant observations read as follows:

“314. Adding to the exceptions already noted by this Court where the Governor could act despite the advice of the Council of Ministers, yet another exclusionary situation was carved out by the Constitution Bench— in this case, on the ground of propriety. It was held in M.P. Special Police Establishment case: (SCC p. 802, para 19)

‘19. ... Undoubtedly, in a matter of grant of sanction to prosecute, the Governor is normally required to act on aid and advice of the Council of Ministers and not in his discretion. However, an exception may arise whilst considering grant of sanction to prosecute a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion.”

315. It was observed that in such a case, if the Governor cannot act in his discretion then there could be a complete breakdown of the rule of law. It was observed (with respect, in an exaggerated manner) that democracy itself would be at stake. It was said in M.P. Special Police Establishment case: (SCC pp. 805-06, para 32)

'32. If, on these facts and circumstances, the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law inasmuch as it would then be open for Governments to refuse sanction in spite of overwhelming material showing that a prima facie case is made out. If, in cases where a prima facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld, democracy itself will be at stake. It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted'."

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"326. \*\*\* To the above example may be added the view of this Court expressed in M.P. Special Police Establishment."

"362. The development of constitutional law in India and some rather peculiar and extraordinary situations have led to the evolution of a distinct category of functions, in addition to those postulated or imagined by the Constitution and identified above. These are functions in which the Governor acts by the Constitution and of constitutional necessity in view of the peculiar and extraordinary situation such as that which arose in M.P. Special Police Establishment and as arise in situations relating to Article 356 of the Constitution or in choosing a person to be the leader of the Legislative Assembly and the Chief Minister of the State by proving his majority in the Legislative Assembly."

64. A bare reading of the aforesaid discussion would reveal a study in contrast insofar as the two Constitution Bench decisions are concerned. While in M.P. Special Police Establishment (supra) the Governor's refusal to accept the advice of the Council of Ministers not to grant sanction for prosecution of two ministers on the ground of propriety was held to be within the Governor's discretion by the Constitution Bench, summoning of the Legislative Assembly by the Governor in Nabam Rebia (supra) was held to be beyond the discretionary powers conferred by the Constitution on such Governor. The facts in Nabam Rebia (supra) showed disquieting signs of a growing interference by the Governor beyond Constitutional limits, which was interdicted, whereas M.P. Special Police Establishment (supra) was a decision affirming the position in law that in the matter of non-grant of sanction for prosecution of ministers, vices in the decision-making process such as bias, irrationality and non-consideration of relevant factors, would empower the Governor to act in his own discretion.

65. True, it has been held in Nabam Rebia (supra) that accepting the primacy of clause (2) of Article 163 would convert the Governor to an all pervading super-constitutional authority, which is not envisaged under the Constitution, and that

the principle of cabinet responsibility firmly entrenched in our Constitution does not accept any parallel administration by the Governor. Since *Nabam Rebia* (supra) is the last decision of the Supreme Court considering almost all previous decisions including *M.P. Special Police Establishment* (supra), the same is binding on all Courts under Article 141 of the Constitution. It is an authority for the propositions to be found in paragraph 155 of the leading judgment of Hon'ble J.S. Khehar. Inter alia, the authoritative statements of law are that the Governor could additionally discharge functions in his own discretion, where (i) such intent emerges from a legitimate interpretation of the provision concerned, and the same cannot be construed otherwise; and (ii) in situations where this Court has declared that the Governor should exercise the particular function at his own and without any aid or advice because of the impermissibility of the other alternative, by reason of conflict of interest.

66. However, as noted above, the factual matrix and the legal position this Court is seized of seems to be singularly singular in the sense that there is no reported decision of the Supreme Court interpreting Article 171 of the Constitution read with Section 10 of the 1950 Act, or such provisions read with the RoB and the Instructions forming part of it, and laying down the law that the Governor, while nominating members of the Legislative Council, has or lacks the discretion to take a view different from the one taken by the Council of Ministers. It is in such scenario that this Court proceeds to decide the second question.

67. The first and foremost point to be borne in mind is that the judgments of Courts are not to be read as statutes. Also, it is settled law that a decision is an authority for what it actually decides and not what can logically be deduced therefrom. Of course, the decisions of Constitution Benches while answering different but related questions would obviously be of persuasive value.

68. In our Constitutional scheme, apart from the Supreme Court, the High Courts are Constitutional courts too and declaration of law on interpretation of the provisions of the Constitution by the High Courts is an integral process of the justice delivery system. Paragraph 155.4 of the decision in *Nabam Rebia* (supra) cannot be read and understood as foreclosing the authority of any of the High Courts to say, in a given case that arises before it for consideration, that the Governor should or should not exercise the particular function on his own. The judgment, and in particular the conclusion under consideration, does not lay down the law that only in cases where the Supreme Court by its judicial interpretation of the Constitution has held that the Governor can act on his own or in his discretion, he may but not otherwise. If a particular article on powers exercisable by the Governor has not been interpreted by the Supreme Court and such article requires interpretation, as in the present case, it ought to be the duty of this Court to make a pronouncement upon just and proper interpretation of such an article. Significantly, that Article 171 was not even remotely under consideration in *Nabam Rebia* (supra) would be evident on reading of the leading judgment of Hon'ble J.S. Khehar, J., and particularly the discussion in paragraph

307 authored by Hon'ble Madan B. Lokur, J. There, an observation from the concurring view of Hon'ble P.N. Bhagwati and Hon'ble V.R. Krishna Iyer, JJ., in *Samsher Singh (supra)*, that if the Governor were held entitled to exercise his powers personally, then that interpretation would extend to several articles of the Constitution, was noted. An additional reference by the learned Judge was made to Article 239(2). Clause (3) read with clause (5) of Article 171 could have been a further addition to the list of articles, which perhaps was overlooked. Be that as it may.

69. To take shape, a Parliamentary form of Government has election as its plinth. Article 171 read with Section 10 of the 1950 Act provides not only election of members to the Legislative Council but also inclusion by way of nomination. Similarly, Article 333 permits nomination, in certain situations, of a member of the Anglo-Indian community to the Legislative Assembly. That is exactly the reason why the RoB in Instruction-15(2)(vi) includes nomination to both houses of the Legislative Assembly as a case which is to be placed before the Governor by the Chief Minister. The provision for nomination, which is an inroad into the principle of election, thus has to be given its due weight. There can be no dispute that proper care and caution should be exercised to ensure that the power of nomination is not misused or abused to achieve narrow political gains.

70. This would necessitate the Court to ascertain the reason for inclusion of members in the Legislative Council, who would thereby be part of the State Legislature, and participate in legislative functions. A peep into the Constituent Assembly debates would reveal that what is Article 171 now, was draft Article 150. Series of debates and deliberations were conducted by the members upon looking into the draft prepared by the Drafting Committee as to whether composition of the Upper Chamber/House ought to be left for the Parliament to decide or whether such composition should be decided upon by the Constituent Assembly itself. The members had serious differences of opinion. What this Court ultimately finds is that harmony was struck and, Article 171 was introduced with incorporation of clauses (2) and (3). It further appears on reading the debates that provisions for an Upper Chamber/House in some of the Legislative Assemblies was conceived with the idea that such Upper Chamber/House, to comprise of the intelligentsia, would be the revising body of legislations enacted by the Lower Chamber/House. Also, one of the members [Prof. K.T. Shah] expressed that the Governor will act presumably on the advice of the party in power. However, what intrigues this Court is whether it could be the intention that nomination was to provide a route for defeated candidates in an election to gain entry in the Legislature? Or, could it be intended to facilitate increase of numerical strength in the Legislature of the party/coalition parties in power? Or, was it intended in larger public interest to have the wisdom of those members for enacting laws who, despite having special knowledge or practical experience in the identified spheres, were not willing to contest elections and, thus, become members of the Legislative Assembly? The answers to the first two questions must be an emphatic "NO", whereas answering the third in the affirmative would

be in conformity with what the Constituent Assembly felt appropriate for the country's future qua enactment of laws. If indeed that is the approach to be adopted, it is imperative that decisions are taken keeping public interest in mind above self-interest or interest of any political party.

71. In the humble opinion of this Court, the offices of the Governor and the Chief Minister of a State, or for that matter the Council of Ministers, are entitled to respect from each other as well as other Constitutional functionaries in fair measure, the ever-expanding uncertainties of political unrest notwithstanding. For the Government to function smoothly and in an orderly manner, as ordained by the Constitution, abidance to Constitutional norms and ethos is non-negotiable and there is absolutely no place for decisions based on personal whims or caprices of what, in the perception of the Council of Ministers, is good for the State. Any possible abuse of power by any Constitutional authority, as the recent history would bear testimony, has to be eschewed.

72. Reverting to present times, it has to be presumed that names of those who have been recommended by the Council of Ministers and forwarded to the Governor of Maharashtra are based on valid considerations of what would serve the State's interest, a fortiori, the public's interest best. However, any inadvertent error or an approach which may not strictly be as per the Constitutional ethos cannot simply be wished away. Indeed, the high office of a Governor cannot be undermined to such an extent that it would be a mere post-office through which all acts of the Council of Ministers, ~ good, bad or indifferent ~ could be routed for validation as an act of the Government having Constitutional sanctity, denuding the Governor of any say in the matter. Having regard to the terms of clauses (1) and (2) of Article 166 of the Constitution as well as taking the entire Constitutional scheme in perspective in regard to exercise of the executive power of the State, this Court is of the opinion that it is neither imperative nor possible for the Governor personally to either approve or concur, as the case may be, with all executive actions that the Government of a State proposes to take. There could be umpteen number of cases which are not required to be placed before the Governor, yet, upon the approval of the Minister-in-Charge of the concerned department, orders could be issued expressed in the name of the Governor. The only requirement is that such orders must be duly authenticated. It is only in respect of those cases included in Instruction-15(2) appended to the RoB which have, as of necessity, to be submitted by the Chief Minister to the Governor before the issue of orders and the Governor has to consider and approve/concur such cases only; therefore, if a particular case is not included in Instruction-15(2), the Government, in accordance with the other provisions of the RoB, may proceed to take executive action and any such action expressed to be taken in the name of the Governor in an order or instrument, which is duly authenticated, also in terms of the RoB, is not liable to be questioned on the ground that it is not an order or instrument made or executed by the Governor. Take for instance, appointment of judicial officers in the district judiciary. The recommendations of the High Court that a certain number of

selected candidates should be appointed as judicial officers not being included in Instruction-15(2), it is not required to be placed before the Governor by the Chief Minister before the issue of orders, whereas cases pertaining to appointment of High Court Judges, being included in Instruction-15(2)(xvii), the Chief Minister is bound to place such case before the Governor for his approval/concurrence, as the case may be. A distinction, therefore, has to be drawn between cases where executive action is expressed in the name of the Governor and are duly authenticated, without execution of the order or instrument by the Governor, and orders or instruments which are issued after prior approval/concurrence of the Governor.

73. The Constitution is obviously supreme and be you (any Constitutional authority/functionary) ever so high, the Constitution is above you applies with equal force to a Governor as it does to a Chief Minister. The same principle is equally true of the Council of Ministers too and it has to be remembered that such Council, though being the real head controlling both legislative and executive functions, is also not envisaged under the Constitution to be a super-constitutional authority. A high authority like the Council of Ministers, it is presumed, will normally act bona fide, fairly, honestly and in accordance with law since such Council is expected to comprise of humans of goodwill and generosity who can unite regardless of party or politics in times of crises. However, this Court at this stage is reminded of the famous saying of the German philosopher Friedrich Nietzsche, that "(A) politician divides mankind into two classes: tools and enemies". Experience has shown the extent of corruption in all activities of public functioning including the corridors of politics, eradication whereof should be the prime object of all well-intentioned people of the country. Securing the purity and probity in public life and preventing criminalization of politics are what the society should aim for. The pernicious effect of not reading a limited 'discretion' preserved for the Governor 'by the Constitution' in Article 171 and/or 'under the Constitution' in the RoB cannot be kept out of consideration in present day realities of life when judicial authorities are in abundance striking down acts of the executive Government acting through the Council of Ministers, or even Governors, as ultra vires the Constitution.

74. Sustenance for the point under consideration can be drawn from the instances referred to hereafter. The fields from which the members to be nominated to the Legislative Council are enumerated in clause (5) of Article 171 as "(L)iterature, science, art, co-operative movement and social service". The following questions come to mind. Should the name of one or few, recommended by the Council of Ministers, be not referable to any of the aforesaid fields, even remotely, is the Governor under any compulsion to blindly nominate such ineligible recommendee(s) as member(s) of the Legislative Council? Or, take a case where a recommendation is made in favour of an individual overlooking Article 191 of the Constitution, which lays down factors for disqualification to be a member of the Legislative Council? Or, take the case of a dreaded criminal who is facing grave charges in multiple cases in courts of law but is fortuitously out on

bail? If the Governor does not wish to have such alleged law-breaker as a law-maker, is he not, in the least, seized of the power to request the Council to have a re-look at such name to avoid embarrassment of the Government of which he is the formal or Constitutional head? In the considered view of this Court, these particular instances could come under the category of choices made by the Council of Ministers without consideration of all materials or under the category of irrational choices and this Court is inclined to the view that in all such cases, or in other cases (for which an exhaustive list cannot be prepared), it would be open to the Governor not to act as a rubber-stamp authority on grounds of propriety. This Court, thus, holds that it is not impermissible to read an implied authorization, in the provisions of section 10 of the 1950 Act and the Third Schedule read with clauses (3)(e) and (5) of Article 171 of the Constitution, for the Governor to examine whether the recommendees ought to be nominated.

75. Responding to a query of the Court as to whether the Governor despite finding some material against some of the recommendees is of the view that on grounds of propriety or otherwise but on valid reasons, such recommendees should not be nominated and the course of action that would be open to the Governor in such a case, Mr. Chinoy fairly conceded that in such an exceptional case, the Governor can send back such name(s).

76. This Court, however, does not propose to proceed on any concession that might have been made in course of hearing. Arguendo, even if the Governor is not empowered 'by the Constitution', it is observed that the Governor is, entitled 'under the Constitution', to withhold nomination of any particular name for valid reason(s) and to send back such name(s) for further action by the Council of Ministers upon consideration of all relevant materials. Although referred to earlier, it is considered necessary to have a relook at the provisions of the RoB. Rule 9 of the RoB lays down that all cases referred to in the Second Schedule shall be brought before the Council, inter alia, by the direction of the Chief Minister or Minister-in-charge of the case with the consent of the Chief Minister. Rule 15 of the RoB authorizes the Rules to be supplemented by instructions, to such extent, to be issued by the Governor on the advice of the Chief Minister. Instructions, issued under Rule 15 of the RoB, have been issued to supplement the RoB. Such instructions are in six parts, with Part-I providing definitions of various terms used in the Instructions. Instruction-4 provides that, except as otherwise provided in the Instructions, cases shall ordinarily be disposed of by, or under the authority, of the Minister-in-charge, in the manner specified therein. Instruction-15 under Part-II lists classes of cases that shall be submitted to the Chief Minister before the issue of orders. Clause (x) of Instruction-15(1) includes proposals to nominate members of the Legislative Council under Article 171(3) (e) as a class of case which is required to be submitted to the Chief Minister. Clause (vi) of Instruction- 15(2) provides that the cases relating to the nomination of members to either House of the State Legislature shall be submitted by the Chief Minister to the Governor before the issue of orders. Instruction-16 is relevant for the purpose of a decision in the present case and is,

therefore, quoted below:

"16. Where in any case the Governor considers that any further action should be taken or that action should be taken otherwise than in accordance with the orders passed by the Minister-in-charge, the Governor may require the case to be laid before the Council of Ministers for consideration whereupon the case shall be so laid:

Provided that the notes, minutes or comments of the Governor in any such case shall not be brought on the Secretariat record unless the Governor so directs".

77. Reading Instruction-16, as it is, this Court finds that the Governor's power to require any case to be laid before the Council of Ministers for consideration could arise in twin situations, such as (i) where in any case, the Governor considers that any further action (emphasis supplied) should be taken; or (ii) where action should be taken otherwise than in accordance with the orders passed by the Minister-in-charge.

78. Having regard to such provision in the Instructions, which are part of the RoB, there could be and there is no hesitation for this Court to hold that the Governor does have a power, while a case is under his consideration, to require that such case be laid before the Council of Ministers for consideration for further action, whereupon the case shall be so laid. It can never be and hence was not urged that while considering names recommended by the Council of Ministers for nomination to the Legislative Assembly, such as the one under consideration, no application of mind by the Governor, to ascertain whether the recommendations are within the bounds of the Constitution, is required. Should upon such application of mind the Governor considers it proper to accept the advice of such Council, he may proceed to make the nomination. If not, the Governor may in his discretion return the recommendations for further action by the Council of Ministers in terms of whatever observation is made by the Governor or otherwise.

79. The above view taken by this Court is in accord with the Bench decision of the Allahabad High Court in K.K. Tripathi (supra), which must have been arrived at considering the Rules of Business of the Uttar Pradesh Government. However, this Court is in respectful disagreement with the Bench decision of the same High Court in Ranjana Agnihotri (supra) which did not notice its earlier decision in K.K. Tripathi (supra) and travelled beyond to hold that it is entirely within the discretion of the Governor to nominate members to the Legislative Council.

80. Reliance placed by Mr. Chinoy on Biman Chandra Bose (supra) is not quite relevant having regard to the nature of challenge there, although this Court records that the decision is apt for the questions it answered. V. Venkateswar Rao (supra) involved a similar challenge in Biman Chandra Bose (supra) and the Division Bench in reaching its conclusions followed the law laid down by the Calcutta High Court. Also, this Court does not consider reference made by Mr. Chinoy in his rejoinder to the proviso to clause (1) of Article 74, for persuading this Court to take the view that the Governor has no such similar power as

conferred on the President, to be well conceived. Such a power to request for consideration for further action by the Council of Ministers flows from Instruction-16.

81. The decision in B.R. Kapur (supra) arose out of a completely different fact situation. The Constitution Bench of the Supreme Court held that when a non-legislator is appointed as a Chief Minister, he must possess the requisite qualifications under Article 173 and must not suffer any of the disqualifications under Article 191; and if a request is made for such a person, who is not qualified, to be appointed as the Chief Minister, the Governor would be within his authority to refuse such request. This decision, therefore, is not material on facts and in the circumstances.

82. Having answered the question under consideration, what this Court is left to adjudicate is whether, the advice given by the Council of Ministers is in exercise of executive power and also whether, in the absence of any time limit indicated in any Constitutional provision [as contended by Mr. Singh], the Governor can maintain silence despite the fact that more than eight months have passed since receipt of the letter of the Chief Minister dated November 6, 2021.

83. The contention of Mr. Singh that forwarding of recommendations by the Council of Ministers to the Governor by way of advice is not within the executive functions, has failed to impress. In *Ram Jawaya Kapur vs. State of Punjab*, reported in AIR 1955 SC 549, Hon'ble B.K. Mukherjea, CJ. (as His Lordship then was) speaking for the Constitution Bench ruled that it may not be possible to frame an exhaustive definition of what executive function means and implies, but ordinarily the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away. In view of such authoritative pronouncement, this Court is left to wonder on what basis could advice tendered by the Council of Ministers in recommending names for nomination to the Legislative Council, which is neither a legislative nor a judicial function, would not be one made in exercise of executive power.

84. The other contention of Mr. Singh now falls for consideration. Does absence of a time limit within which a Constitutional authority/functionary is required to discharge its obligation or perform its duty, clothe such authority/functionary to maintain silence for months together attracting a charge of abdication? The answer cannot but be in the negative. One finds no time limit in the Constitution for high authorities/functionaries to act, or consequences in default thereof being provided, obviously because at or about the time the Constitution was framed and enforced, it might have been unimaginable for its founding fathers that an action/decision, which in terms of the Constitutional scheme has to be taken promptly or at least within a reasonable time, would be withheld, and thereby an important issue left to pend for months together. Although the founding fathers were gentlemen of character and vision and had dreamt of development, progress and upliftment of society based on the high and lofty ideals engrafted in the Constitution, the radical change that human mindset would undergo of

leaving aside the core human values and giving precedence to narrow materialistic self-interest over concerns for public good and interest of the public, in the immediate future, may not have been visualized or thought of. It is rather painful for this Court to fathom a contention of the nature that has been raised, based on absence of a time limit. No wonder, Nabam Rebia (supra) reinforces the position in law that no one can act as a super-constitutional authority. It would not behove the dignity, prestige and majesty of the office of a Constitutional authority/functionary to take shelter of absence of a time limit to act in terms of a provision of the Constitution, so as to defend an inaction when it is challenged in a Constitutional court. All such Constitutional authorities/functionaries, whichever office they are adorning, ought to stand tall and, while rising above all differences of opinion, arrive at a workable solution as quickly as possible. It is with the prompt and effective resolution of differences of opinion to take the nation forward that the respective incumbents would glorify the offices they hold, and not otherwise.

85. The recommendations made by the Council of Ministers have become eight months old by the time this Court commenced hearing of this petition. If the saying that everything happens for a reason is to be believed, this Court ought to assume that there was/were genuine reason(s) for the Governor not to convey his decision earlier, whatever be the nature thereof. However, it is time that the impasse is resolved. It is mature, sensible and responsible governance, both at the Centre as well as in the States, that the people look up to. Should there be any misunderstanding or miscommunication between two Constitutional authorities/functionaries, right steps in the correct direction ought to follow to obviate the same. If there be minor differences of opinion, the same ought to be resolved in such manner as deemed fit and appropriate including, inter alia, a discussion between the Governor and the Chief Minister in the guiding spirit of the Constitution. Indeed, if there are major differences, the same have to be made known for ironing out such differences. Given the stand of the State Government in the present case that a response from the Governor is awaited, conveying the desire of the Governor that further action ought to be taken, as envisaged in Instruction-16 of the RoB, could be one of the available options since the RoB binds both the Governor and the Government. Doubtless, the seats of the members in the Legislative Council who are required to be nominated by the Governor cannot be kept vacant indefinitely without there being a justifiable cause and much to the detriment of legislative functions. It is in such circumstances that this Court is of the clear view that the duty of the Governor to speak and to let the Chief Minister know his (the Governor's) reservations about the recommendees, if at all, within a reasonable time has to be read in section 10(2)(c) of the 1950 Act read with clauses (3)(e) and (5) of Article 171 of the Constitution, or else the legislative intent would stand defeated. What would be a 'reasonable time', however, must depend on the facts of each case. This is the law laid down in K.B. Nagur (supra). In such an important matter as this, where the nomination is pending for eight months, which is a sufficiently long period, it

seems to be beyond 'reasonable time' but this Court would infer that the Governor must have taken such time to complete necessary enquiries about the recommendees and has reached a conclusion one way or the other.

#### CONCLUSION:

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

87. Of course, the Governor is not answerable to the Court in view of Article 361 of the Constitution and no direction can issue to the Governor; hence, the petitioner has not joined the Secretary of the Governor as a party despite liberty granted by an earlier order of this Court. Before parting, this Court expresses hope and trust that things will be set right at an early date. If indeed, during the pendency of this writ petition, the Governor has acted on the advice of the Council of Ministers, in whatever way it was thought appropriate by him, that would take care of the petitioner's concern completely.

88. The Public Interest Litigation is, accordingly, disposed of with no orders as to costs.