

(2008) 03 GAU CK 0047
In the Gauhati High Court

Yitachu

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-03-2008

Acts Referred:

Constitution of India, 1950 — Article 105, 143, 164, 168, 173
Representation of the People Act, 1951 — Section 2, 29A

Citation : AIR 2008 Guw 103 : (2008) 2 GLT 284

Hon'ble Judges : Jasti Chelameswar, C.J;Ranjan Gogoi, J;I.A. Ansari, J;B.P. Katakey, J;Amitava Roy, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Jasti Chelameswar, C.J.—The Presidential proclamation dated 03.01.2008 under Article 356(1) of the Constitution of India imposing President's Rule and keeping the Assembly under suspension in the State of Nagaland has been put to challenge in the present writ petition. Intricate questions in un-chartered fields, notwithstanding the pronouncement of the Apex Court in Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, and S.R. Bommai and others Vs. Union of India and others etc. etc., , have arisen for our consideration in the present case. Before we proceed to make the required determination the relevant facts and circumstances giving rise to the Presidential notification will be required to be noticed by us.

2. On 26.2.2003 elections were held to the 60-member Nagaland Legislative Assembly. On 6.3.2003 the Democratic Alliance of Nagaland (DAN) formed a coalition government with Sri Neiphiu Rio as the Chief Minister. The alliance had the support of 43 members - 32 from the Nagaland Peoples Front (NPF), 5 from the Bharatia Janata Party (BJP), 2 from Janata Dal (United) [JD (U)] and 4 independents. The remaining 17 seats in the Assembly were filled up by members of the Congress Party.

3. On 21.7.2003 the Nagaland Assembly (Disqualification on Ground of

Defection) Rules, 2003 were framed by the Speaker in exercise of powers under paragraph 8 of the Tenth Schedule. The Rules, as framed, were laid before the House and took effect from 18.3.2006. In exercise of the power under Rule 19 of the aforesaid Rules a direction was issued by the Speaker on 21.8.2006, details of which will be noticed later on.

4. In the month of May 2007, 22 MLAs belonging to the alliance informed the Governor that they have withdrawn their support to the Government and staked a claim to form an alternative government under the leadership of one Sri Z. Obed. However, on the very next day 10 MLAs out of the group of 22 re-affirmed their support to the Government under the leadership of Sri Neiphiu Rio. What has happened thereafter would not be of any consequence to us save and except that the Government continued to remain in power with the support of 43 members of the House in which the opposition consisted of the remaining 17 members.

5. Thereafter on 18.9.2007, 4 MLAs belonging to the NPF resigned from the Assembly. One independent MLA withdrew his support to the Government. In the aforesaid changed situation the strength of the House stood reduced to 56 out of which 38 members supported the Government whereas 18 members (17 belonging to Congress party and the independent MLA who earlier withdrew support to the Government) constituted the opposition).

On 6.10.2007 one JD(U) member withdrew his support to the alliance. On 24.10.2007 another JD (U) member similarly withdrew his support to the Government. On 27.10.2007 the Governor of the State summoned the Assembly to meet on 13.12.2007. Thereafter, on 29.10.2007 one Tia Meren, a BJP member resigned from the Assembly. The strength of the House thus stood reduced to 55 and that of the Government to 35.

6. On 27.11.2007 two other independent members withdrew their support to the Government thereby depleting the strength of the DAN alliance to 33. In view of the impending session of the House scheduled on 13.12.2007 the NPF party issued a whip to its members on 6.12.2007. Thereafter on 11.12.2007, 17 Congress MLAs, 2 MLAs belonging to the JD (U) and 3 independents signed a no-confidence motion and tabled the same before the Speaker. On 12.12.2007 the Speaker by another publication issued reiterated the directions dated 21.8.2006 issued under Rule 19 of the Disqualification Rules. On the said day i.e. 12.12.2007 one Dr. Shurhoz Elie, a NPF MLA filed a petition for disqualification of the three independent MLAs who had earlier withdrawn support to the DAN alliance Government. On the said petition the Secretary of the Assembly issued notice to the three independent MLAs to file their interim replies by 9.00 A.M. of the next day i.e. 13.12.2007 which direction was complied with by the three MLAs in question. However, on the previous day i.e. 12.12.2007, 6 MLAs belonging to the NPF tendered their resignations, which was followed by another resignation by one more NPF MLA on 13.12.2007.

7. On receipt of the replies of the three independent MLAs in the morning of 13.12.2007, the Speaker passed interim orders restraining the three independent MLAs from voting on the no-confidence motion. On 13.12.2007 voting on the no-confidence motion took place. The 7 NPF MLAs who had resigned from the Assembly on 12.12.2007 and 13.12.2007, respectively, voted on the no-confidence motion and contrary to the party whip. Two other NPF MLAs voted in a similar manner. The three independent MLAs covered by the interim order of the Speaker also took part in the voice vote on the no-confidence motion. Thereafter, the Speaker by excluding the votes of the 9 NPF MLAs who had voted contrary to the party whip and the three independent MLAs who were debarred from voting by the Speaker's announced that the motion was defeated by 23 as against 19 votes.

Immediately after the decision of the Speaker 31 legislators comprising of 17 Congress MLAs, 2 from the JD(U), 3 independents and 9 belonging to the NPF came to the Raj Bhawan and met the Governor to claim that they have formed the Nagaland Progressive Alliance which was in a position to form the Government.

8. On the same day i.e. 13.12.2007 at about 9.45 P.M. the Governor sent the following report to the Union Home Minister.

Report on Political Developments in Nagaland on 12th and 13th December 2007.

Nagaland is due to go for polls in February 2008. As on 12th December 2007 the Assembly had 55 members with 5 vacant seats. 33 MLAs out of the 55 were supporting the ruling DAN Alliance led by Shri Niephiu Rio which includes 28 members of NPF, 4 of BJP and 1 independent. In opposition there were 22 members which include 17 of Congress, 2 of JD (U) and 3 Independents. 5 vacant seats were earlier occupied by 4 dissidents of NPF and 1 of BJP, who have resigned.

On 12th December 2007, 6 MLAs belonging to NPF met Governor Nagaland and informed that they are resigning from their seats. They gave their resignation letters to Speaker Nagaland also. However, the Speaker apparently did not take a decision on their resignation letters on 12th December 2007.

One day Winter Session of Nagaland Legislative Assembly was scheduled on 13th December. In the Assembly, today, Leader of Opposition moved a Motion expressing No Confidence in the ruling DAN Government. After several adjournments, the Speaker called the motion to Vote. At this point, along with the Opposition members, comprising of 17 of Congress, 2 of JD (U), and 3 Independents, 6 legislators who had resigned on 12th December also stood up saying Ayes to the Motion of No Confidence. However, the Speaker said that these 6 members do not have a right to Vote. Further 3 Independents who were earlier supporting the Government and had since 28th November, withdrew their support to the Government were also not allowed to Vote by the Speaker on the grounds that they have been issued notice under Anti Defection Act. On this

ruling of the Speaker, there was pandemonium in the House and the Opposition walked out. Thereafter, Vote of No Confidence was taken up and in the absence of the Opposition was defeated.

Thereafter, 31 legislators comprising of 17 of Congress, 2 of JD (U), 3 Independents and 9 of NPF (including 6 who had resigned on 12th Dec 2007 and 3 others) came to Raj Bhavan and met Governor and claimed that these 31 members have voted out the Government and claimed that they have formed Nagaland Progressive Alliance and requested the Governor to invite them to form the Government as they have 31 members compared to 23 of DAN Alliance led by Chief Minister Shri Neiphiu Rio.

AS per the proceedings of the Assembly released by Assembly Secretariat, the Motion of No Confidence was defeated by 23 votes to 19. In these proceedings, 3 Independent members have been shown as being barred from Voting as per the Interim Order of Speaker under the Tenth Schedule of the Constitution. As per the proceedings of the Assembly, 7 members whose resignation letters are pending consideration of the Speaker participated in the voting against Party Direction and thus their votes were not counted as per Speaker's direction dated 21st August 2006. Further votes of 2 more members who voted against the Party direction were not counted by the Speaker for the same reason. The legality of the decision of Speaker in not counting the votes of these 9 legislators is being examined with help of Constitutional Experts. A detailed report follows.

Sd/- K. Sankaranarayanan, Governor, Nagaland.

9. In the evening of 13.12.2007 the Speaker accepted the resignations of the seven MLAs belonging to the NPF who had tendered their resignations on 12th of December 2007. The strength of the House, therefore, stood further reduced to 48. On 14th of December 2007 the Governor sent the following report to the President of India:

Report on Political Developments in Nagaland.

In continuation of report sent earlier on 13th December 2007 (copy enclosed), I am to bring the following points to light.

1. After the Assembly Session on 13th December 2007, the Speaker of Nagaland Legislative Assembly has accepted the resignations of 7 MLAs who had resigned on 12th December 2007.
2. Chief Minister Nagaland and his Cabinet Ministers met me on 14th December at 8 A.M. and gave a note (copy enclosed) explaining the actions taken by Speaker on 13th December 2007 and requested Governor to allow DAN Government to continue since they had won the trust vote in Assembly.
3. I have examined the action taken by Speaker and Prima Facie, there seems to be some aberration in the proceedings in Legislative Assembly with regard to the denial of Voting Rights to 3 Independent Members and to 9 Legislators of NPF.

4. 3 Independent members were not given Voting Rights on account of Interim order issued by the Speaker in connection with the proceedings under Tenth Schedule of the Constitution.

5. 9 Legislators of NPF were allowed to Vote but their Vote was not counted on account of a direction issued by Speaker on 21st August 2006 whereby votes of any member who votes in violation of the Party Whip are not to be counted. This direction is subject to judicial review, however, the decision in this regard lies with the Courts.

6. The prime role of the Governor in such a situation is to assess if the Chief Minister enjoys the support of the majority of the members in the Legislative Assembly. In this case the Speaker has apparently erred on the following 3 counts:

- a. In not accepting the resignations in time.
- b. In not allowing Independent members to Vote.
- c. In not counting Votes of 9 Members who voted in violation of the whip.

7. Speaker's role has been to bail out the Government during the No Confidence motion, which he is not expected to do. However since he has absolute authority in conducting the proceedings of the House, there will be a case for interference from Raj Bhavan if his actions amount to propping a Government that does not command majority on the floor of the House.

8. In the instance case, 9 NPF legislators have joined hands with the Opposition when they came to meet me on 13th December claiming formation of Government by the Nagaland Progressive Alliance (copy of their letter enclosed). However, these 9 legislators of NPF can not join another political group as per the provisions of Anti Defection Act. Thus the effective strength of the Opposition remains 22. Subsequently resignations of 7 of the 9 NPF legislators have been accepted by the Speaker. Remaining 2 NPF legislators cannot join the Opposition Group led by Congress.

9. As per the proceedings of the Assembly, the DAN Government has won the Trust Vote by 23 votes to 19. After the acceptance of the resignations of the 7 members and the act of 2 NPF members in joining with the Opposition Group, the ruling DAN alliance has 24 members (including the Speaker) comprising of 19 of NPF, 4 of BJP and 1 independent.

10. Thus at the moment the effective strength of the Assembly is 48 with 24 members supporting the ruling DAN alliance and 22 members in the Opposition and 2 NPF legislators who have apparently defected to Congress.

Close watch is being kept on the situation and further reports will follow.

Sd/- K. Sankaranarayanan.

10. On 16th and 17th of December the Governor of the State sent two further

reports, the first to the President of India and the second to the Union Home Minister which reports are extracted herein below:

Raj Bhavan Kohima:: Nagaland

No. G-03/1-02/9/PD/07 Dated 16th Dec 2007 Respected President,

In continuation of my reports sent earlier on Nagaland Political Situation, I would like to inform that I have examined the political situation in Nagaland and have come to the conclusion that the ruling Democratic Alliance of Nagaland Government headed by Chief Minister Shri Neiphiu Rio has been plagued by instability and there has been a spate of resignations, defections and reports of horse trading of MLAs. The proceedings of the Legislative Assembly on 13th December 2007 when the No Confidence Vote was taken has not been over board and there has been a clear instance of the Speaker acting in an unconstitutional and partisan manner. The term of the Tenth Nagaland Legislative Assembly is scheduled to end on 13th March 2008. The State is scheduled to have Assembly elections in February-March 2008 and in the present circumstances the State Administration cannot be run as per the provisions of the Constitution. In view of this and reasons mentioned below, it is recommended that the Article 356 of the Constitution of India be imposed and the State brought under President's rule with immediate effect.

1. On the date of Vote of No Confidence, Nagaland Legislative Assembly had 55 members who attended the House. When the vote was taken up, 31 members Voted for the motion of No Confidence and 23 members voted against the motion.

2. However, the Speaker gave a ruling that the Motion of No Confidence was defeated by 23 Votes to 19. As per Assembly Bulletin Part I (Enclosed as Annexure A) for the 16th Session of the 10th Assembly dated 13th December 2007, this was done on the basis of the Speaker not counting 12 Votes for the Motion of No Confidence for the following reasons:

i. 3 Independent members namely Shri P. Chuba, Jortgshilemba and Kutoyi were barred from voting on the No Confidence motion as per the Interim Order No. PFD/1 of 2007/1 dated 13th December 2007 (Enclosed as Annexure B) of the Speaker with regard to Petition filed by Dr Shurzohelie, MLA under the Tenth Schedule of the Constitution of India and the rules made there under.

ii. Seven members namely Shri Hukavi, Nkhao Lotha, Kipili Sangtam, Hewoto, Tarie, Kihoto Hollohon and Mr Kheto, whose resignation letters were pending with the Speaker for consideration were allowed to Vote but their votes were not counted as per Speakers direction dated 21st August 2006 (enclosed as Annexure C) for voting for the Motion of No Confidence in violation of die whip issued by the NPF.

iii. Votes of Two members namely Shri Tokeho and Shri T Tali who voted for the Motion of No Confidence in violation of the whip issued by the NPF were not counted as per Speakers direction dated 21st August 2006.

3. The above decision of the Speaker was examined by me. The Interim Order of the Speaker with regard to the petition filed under the Tenth Schedule of the Constitution against the 3 Independent members, whereby he did not allow them to Vote on the Motion of No Confidence is unconstitutional and issued with an objective to help the ruling DAN Alliance win the Vote of No Confidence. As per the provisions of Anti Defection Act, Independent members come under the purview of the Act if they join a political party. In the present instance, there is no evidence of the 3 members joining a political party. In fact, the 3 members have withdrawn support to the ruling DAN Alliance on 18th September 2007 (Mr Kutovi) and on 27th November 2007 (Mr P Chuba and Jongshilemba). However the petition against them has been filed only on 12th December 2007 and they were given 20 days to file their replies. Further the notice issued to them on 12th December 2007 directed them to file interim replies till 9 AM on 13th December 2007. The 3 Independent members filed their replies stating very clearly that they have not joined any Political Party. However, the Speaker issued an Interim Order on 13th December 2007 barring them from voting either for or against a Motion of No Confidence. In the Interim Order (Annexure B) the Speaker mentions that the 3 Independent members were in the past voting in favour of ruling NPF party and even attending Legislature Party meetings of NPF. He continues that their act of signing a No Confidence Motion dated 11th December 2007 (Annexure D) with members of Congress Party implies that these 3 members are indulging in Party Politics. Thus the Speaker had no objection as long as these 3 members were supporting the ruling DAN alliance and the Interim Order has been issued only on account of these members supporting the No Confidence Motion against the ruling DAN alliance. This approach of Speaker clearly reflects a partisan attitude as Independent members are free to support the ruling party or the Opposition as long as they don't join a Political Party.

4. Further the Petition against the 3 Independents and the Interim Order issued thereon has been done with the objective of favouring the ruling DAN Alliance. It is clear that but for this unconstitutional Act of the Speaker in not allowing Independent members to exercise their Constitutional Right of Voting in the Assembly would have increased the Votes for the Motion by 3 Votes. Thus the Speaker has acted in a biased, mala fide and partisan manner to prevent 3 Independent members from Voting on the Motion of No Confidence.

5. With regard to the 7 members belonging to NPF, who had resigned from their Assembly seats, it is pertinent to note that 6 members had resigned on the morning of 12th December 2007 and one member on the morning of 13th December 2007. However, the Speaker did not decide on the resignation letters of the 7 members in spite of the fact that 6 resignation letters were received personally by the Speaker at 850 AM on 12th December 2007. Thereafter he allowed them to take part in the proceedings of the Assembly and even to Vote on the Motion of No Confidence. When these members voted for the Motion of No confidence in violation of Party whip, the Speaker declared that their votes will not be counted as per his direction dated 21st August 2006. It clearly shows

that some horse trading was going on with these 7 MLAs and the ruling alliance in collusion with the Speaker were expecting that these 7 members will vote against the Motion of No Confidence. As per the provisions of the Tenth Schedule and the Anti Defection Act, if a member belonging to a political party votes against the direction issued by the party whip, he will attract the disqualification proceedings against him unless the Political Party concerned condones the act of the member in voting against the Party whip within 15 days. This provision of the Anti Defection clearly specifies that Such Votes which are cast at the peril of attracting disqualification proceedings under the Anti Defection Act have to be counted. Thus the Speaker has erred in not counting the Votes of these 7 members. This has been done with an objective of favouring the ruling DAN alliance. It has been legally established that it is not the job of the Speaker to instill discipline in Political Parties. His role is limited to conducting the proceedings of the House in accordance with the Constitutional Provisions. This act of the Speaker in first not accepting the resignation letters in time and thereafter resorting to such extra constitutional means of not counting the Votes reflects as truly biased and partisan role. But for this, the number of Votes for the Motion of No Confidence would have gone up by 7 Votes.

6. The above attitude of the Speaker is further proved by the fact that on the night of 13th December, after the Vote of No Confidence was over, the Speaker has accepted the resignation letters of all these 7 MLAs.

7. The votes of 2 other MLAs belonging to NPF, who had not resigned but voted for the Motion of No Confidence in violation of the party whip, have also not been counted for the same reasons as for the 7 MLAs. This is also against the provisions of the Tenth Schedule and Anti Defection Act as legally and constitutionally these 2 Votes should have been counted for the Motion of No Confidence and thereafter proceedings under the Anti Defection Act could have been initiated. This just and legal action would have further increased the number of votes for the Motion of No Confidence by 2 Votes.

8. Thus if the Speaker would have rightfully counted the Votes on the Motion of No Confidence the Motion should have been carried over by 31 votes to 23. Of course thereafter the 9 MLAs who had voted in violation of Party Whip would have attracted disqualification proceedings as per the provisions of the Tenth Schedule of Constitution. Even though, the Speaker has supreme authority in conducting the proceedings of the House, yet his Acts cannot and should not result in creating a mockery of the Constitution. This situation has led to uncertainty in the State Administration with speculations of Horse Trading and claims and counter claims by opposition (Annexure E) for forming the Government. In any case the strength of ruling DAN alliance has been reduced to 23 in a 60-member house out of which NPF has only 19.

9. The above situation has been preceded by a series of events pointing to the instability of the Government. On 27th November, one Minister, Mr. Tokeho resigned from the Cabinet and immediately on 28th November 2007, Mr. Kaito

was sworn in his place. Thereafter, Forest Minister Mr. Kheto resigned on 1st December 2007 and in his place Mr. Doshehe was sworn-in on 3rd December 2007. Similarly Mr. K. Hollohon, Parliamentary Secretary resigned on 1st December and in his place Mr. Hukavi was sworn-in as Parliamentary Secretary. It is pertinent to note that Mr. Tokeho, Mr. Kheto, Mr. K. Hollohon and Mr. Hukavi have all voted against the Government in the No Confidence Motion. Prior to this also, 4 MLAs belonging to NPF and 1 member belonging to BJP had resigned in September 2007. This reflects in stability in the Government and it would not be possible to run the State Administration as per the Constitutional provisions, specially in light of the conduct of State Assembly Elections due in Feb-March, 2008.

10. After the trust Vote on 13th December 2007, when the Speaker refused to record the Votes of 12 MLAs, there was pandemonium in the House (Newspaper Reports Annexure F) and the Opposition members walked out of the Assembly and rushed to the Raj Bhavan. At around 3:30 PM on 13th December 2007, 31 members comprising of 17 of Congress, 2 of JD (U), 3 Independents and 9 NPF dissidents met me with a letter informing of the outcome of the Assembly proceedings and formation of Nagaland Progressive Alliance (NPA) by these 31 members and claimed to form the Government. This further points to the ensuing instability and confusion amongst the legislators. Such a scenario when Assembly Elections are just round the corner reflects a chaotic situation.

11. Over and above this, I have inputs that there are more Ministers and (sic) which will further paralyse the State....(sic). There has been an increase in killings and abductions as also the recent ambush on the convoy of Governor of Goa, Shri S.C. Jamir on 24th November 2007. This clearly points to the inability of the present State Machinery, plagued by instability and defections, in being able to smoothly conduct the State Elections.

12. It is also important to note that when 6 NPF legislators resigned on the 12th of December 2007, the Chief Minister made a statement (Press Clipping - Annexure G) that these MLAs have been put under duress by armed elements to defect, points to a situation which reflects helplessness of the State Government led by Chief Minister in controlling anti social and armed elements in harassing even legislators. Such a scenario and the history of involvement of underground elements in elections of Nagaland points to a situation where the present dispensation will not be able to conduct free and fair polls as per the (sic).

13. In the ensuing confusion, the Chief Minister with his Cabinet Colleagues met me on the morning of 14th December 2007 and gave their version (Annexure H) of the events in the Assembly on 13th December 2007. Leader of Opposition with Opposition MLAs again met me on 14th December 2007 and gave another representation requesting dismissal of the ruling DAN Government in view of unconstitutional means adopted in the Assembly on 13th December 2007. Both the groups are claiming their own right. However, in view of the resignations, defections and reports of Horse Trading, the situation is very fluid and no political

group is capable of forming a Stable Government. At the same time State Administration cannot remain in vacuum and Governance has to be carried out as per the Constitutional provisions.

14. I have explored the possibility if a viable Government can be formed in the present Legislative Assembly. After the acceptance of the resignations of 7 members by the Speaker on 13th December 2007, the effective strength of the Assembly is only 48. Out of this 21 members belong to the NPF, 17 to Congress, 4 to BJP, 2 to JD (U), and 4 are independents. Out of 21 NPF members, 2 members of NPF have come under the purview of Anti Defection Act and till final decision is taken on their membership, their status is unclear. In the floor test conducted on 13th December 2007, 23 members have voted for ruling DAN Alliance whereas 24 members have voted against the Government. The party wise break up for the two groups is as below:

In support of Government -----										SI No.	Party
Number	1	NPF	18	2	BJP	4	4	Independent	1		
-----										Total	23
-----										Opposition	SI No. Party Number
Congress	17	2	JD(U)	2	3	Independents	3	4	NPF	Rebels	1
-----										Total	24
----- In the floor test on 13th December 2007,											
the Speaker has not cast his Vote.											

15. Thus the DAN Government does not have majority in the House. However, the 2 NPF dissidents can not join the Congress led Nagaland Progressive Alliance also has the support of a maximum of only 22 members (Congress 17, JD(U) 2, and Independent 3) and 23 members of the DAN Alliance are against it. In these circumstances, it is not possible for a stable Government to be formed. Further since fresh elections are just 2-3 months away, until and unless Legislative Assembly is suspended and Article 356 imposed, there are strong chances of horse trading. Even the National Commission to Review the Working of the Constitution in its Consultation Paper on Article 356 of the Constitution have advised that resort to Article 356 should be taken when all possibilities of forming an alternative Government has been exhausted.

16. On the basis of the facts stated in the preceding paragraphs it is very clear that no stable Ministry can be formed from the present Assembly which has as many as 12 vacant seats and has seen a series of defections and resignations. Moreover the Assembly has just about 3 more months of life left. Any Government if formed from the present Legislature will only result in unprincipled defections with lure of office and is not likely to continue. This would be a very dangerous situation in any State, more so in Nagaland which has special security needs and is due for elections in just about 2-3 months. Fresh Elections, due early next year, will lead to a stable legislature and a stable Ministry. In view of this it will be better to suspend the present Assembly and impose provisions of Article 356, in order to be fair to both the parties and give a chance to the people

5. On 3rd June 2007, Shri Z Obed, MLA accused the ruling DAN Alliance of forcing withdrawal of signatures of 10 MLAs under duress.

6. The above political developments were reported by the Governor in his report dated 4th June 2007 (copy enclosed).

7. On 19th September 2007, 4 NPF MLAs namely Shri Z Obed, Shri K Therie, Shri Yeangphong and Shri Vatsu Meru resigned from the Assembly. On the same day, Independent MLA, Shri Kutovi, withdrew support from the DAN Government. Further, Shri Tiameraen, MLA of BJP also resigned in October 2007.

8. On 5th October 2007, Shri Huska Sumi, MLA of JD (U) withdrew support to the DAN Government. Again, Shri Deo Nukhu, MLA of JD (U) also withdrew support to the DAN Government on 24th of October 2007.

9. On 27th November 2007, Works and Housing Minister, Shri Tokeho, resigned from the Cabinet. On the same day, 2 Independent MLAs, namely Shri P. Chuba and Shri Jongshilemba withdrew support to the ruling DAN Alliance.

10. On 28th November, Shri Kaito, MLA was sworn in as Minister, Works and Housing in place of Shri Tokeho. Interestingly, Shri Kaito was one of the 16 signatories who had signed the petition against the Government on 30th May 2007 and later claimed that he had not signed.

11. On 1st December, Shri Kheto, Forest Minister resigned from the Cabinet. In his place, Shri Doshehe Y Sema, was sworn in on 3rd December. On 1st December only, Shri K Hollohon, resigned as Parliamentary Secretary and in his place Shri Hukavi was sworn in.

12. On 12th December 2007, 6 NPF MLAs namely Shri Hukavi, Nkhao Lotha, Kipili Sangtam, Hewoto, Tarie and Kihoto Hollohon submitted their resignations from the Assembly. Out of these 6 MLAs, 4 were signatories of the petition dated 30th May 2007 and subsequently denied having signed.

13. On 13th December 2007, Shri Kheto, MLA submitted his resignation from the Assembly.

14. On 13th December only, One Day Assembly Session was scheduled and Opposition moved a No Confidence Motion. Interestingly, till the session, Speaker had not decided on the resignation letters of the 7 MLAs who had resigned on 12th and 13th December 2007. The Assembly, with only 55 members had the following composition on this day:

Dan Alliance	-----	SI	No.	Party	Number	1	NPF				
28	2	BJP	4	4	Independent	1	-----	Total	33		
-----								Opposition			
-----				SI	No.	Party	Number				
-----				1	Congress	17	2	JD(U)	2	3	Independents
3				-----				Total			22

15. On 12th DECEMBER, Dr. Shurhoolie, MLA filed a petition before the Speaker under the Tenth Schedule of Constitution seeking disqualification of 3 Independent MLAs namely Shri P. Chuba, Shri Jongshilemba and Shri Kutovi for having signed on the No Confidence Motion along with the Congress and JD (U) MLAs.

16. On this petition Speaker ruled that these 3 MLAs can participate in the proceedings of the House but not Vote on the Motion of No Confidence.

17. When the Vote on Motion of No Confidence was taken up, along with the 17 Congress and 2 JD (U) MLAs, the 3 Independents and 9 NPF MLAs (including 7 who had resigned earlier) stood up and said Ayes to the Motion. 23 MLAs (comprising of 18 NPF, 2 BJP and 1 Independent) voted against the Motion. However, the Speaker did not count the Votes of 3 Independent MLAs and 9 NPF MLAs and ruled that Motion of No Confidence was defeated by 23 Votes to 19.

18. After that 31 MLAs (comprising of 17 Congress, 2 JD (U), 3 Independents and 9 NPF rebels) walked out and came to Raj Bhavan claiming that the Government has been defeated by 31 Votes to 23 and further claimed to form an alternative Government.

19. Though the Speaker ruled that Motion of No Confidence was defeated by 23 Votes to 19, the Government was reduced to a strength of 23 MLAs in a house of effective strength of 55 with 31 members not supporting the Government.

20. On the night of 13th December 2007, the Speaker accepted the resignations of 7 NPF MLAs, thereby reducing the effective strength of the assembly to 48. Even as of now, the ruling DAN Alliance has a support of only 23 MLAs out of 48 and 24 are against them, apart from the Speaker. The break up of MLAs is as below:

Dan Alliance -----										SI	No.	Party	Number	1	NPF
18	2	BJP	4	4	Independent	1	-----	Total	23						
-----										Opposition	SI	No.	Party	Number	1
Congress	17	2	JD(U)	2	3	Independents	3	4	NPF	Rebels	2				
-----										Total					24

21. Thus the ruling DAN Alliance is reduced to a minority of 23 members in a house of 48 members as on date.

22. An early decision in this regard will be appreciated.

With regards,

Yours faithfully, Sd/- K. Sankaranarayanan.

Copy to:

1. Dr. Manmohan Singh, Prime Minister of India, New Delhi.

2. Shri Shivraj Patil, Home Minister of India, New Delhi.

11. Thereafter, the matter was considered by the Union Cabinet on 24.12.2007. The Cabinet on such consideration deferred the matter for a fuller consideration. The matter was again considered on 01.01.2008 on which date the Cabinet agreed that President's Rule be imposed in the State and the Assembly be kept under suspension. Following the aforesaid decision of the Cabinet the proclamation under Article 356(1) of the Constitution of India was issued on 3.1.2008.

12. The facts relevant having been noticed, before proceeding further the provisions of the 10th Schedule may briefly be recapitulated.

Dealing with the Constitutional validity of the 52nd amendment of the Constitution by which the Tenth Schedule of the Constitution was inserted in the Constitution, speaking for the majority of the Court, Justice Venkatachaliah, J, held that the object is "to curb the evil or mischief of political defection motivated by the lure of office or other similar considerations" which endangered the foundation of the democracy.

13. Paragraph 2 of the Tenth Schedule prescribes that a member of a house "belonging to a political party" shall be disqualified for being a member of the house in two contingencies - (1) when such a member voluntarily gives up his membership of such political party, (2) votes or abstains from voting in the house contrary to any direction/whip issued by the political party to which he belongs. While in the case of voluntarily giving up the membership of the political party, the disqualification is inevitable, in the latter case, the disqualification does not visit the member if the act contrary to the direction of the political party is either with the prior permission of such political party or such an act is condoned by the political party.

14. Paragraph 6 of the Tenth Schedule stipulates that if any question arises as to the disqualification of a member of a house, the same is required to be decided by the Chairman or the Speaker of the house, as the case maybe.

Paragraph 8 of the Tenth Schedule authorizes the Speaker or the Chairman, as the case may be, of the house to make Rules for giving effect to the provision of the Schedule. Sub-para (2) mandates that such Rules shall be laid before the house for a total period of 30 days and on the expiry of the said period, the Rules shall take effect with modification, if any, unless the house totally disapproved the Rules.

15. In exercise of the power under paragraph 8, the Speaker of the Tenth Nagaland Legislative Assembly framed Rules calling "Nagaland Legislative Assembly (Disqualification on Ground of Defection) Rules, 2003", which came into force with effect from 18.3.2006. It may not be necessary to examine the entire body of the Rules except the Rules relevant for the present purpose.

16. Rule 5(1) stipulates that the question whether any member has become

disqualified under paragraph 2(i)(a) or 2(2) of the Tenth Schedule "shall only be raised by any other member through a Petition for Disqualification made in Form P-1".

Rule 19 stipulates, "the Speaker may from time to time issue such orders as considered necessary within the framework of these Rules for removal of any doubt in regard to implementation of these Rules."

17. On the 21.8.2006, the Speaker issued a direction purporting to be in exercise of the power under Rule 19 referred to above, which reads as follows:

I, Mr Kiyanilie Peseyie, the Speaker of the Tenth Nagaland Legislative Assembly, in exercise of my powers under Rule 19 of the Members of the Nagaland Legislative Assembly (Disqualification on Ground of Defection) Rules, 2003, hereby give the following Direction:

Without prejudice to the rights and liberties of members of the Tenth Nagaland Legislative Assembly belonging to political parties to claim protection under paragraph 4 of the Tenth Schedule to the Constitution of India or their rights and liberties to seek prior permission to vote contrary to, or seek condonation of violation of, any direction issued to them under paragraph 2(1)(b) of the Tenth Schedule to the Constitution of India, all Members of the Tenth Nagaland Legislative Assembly belonging to political parties shall vote in accordance with the directions issued by the respective political parties or persons or authorities authorized by them in this behalf, and any vote recorded contrary to the direction, subject to their entitlement to the said rights and liberties under paragraph 4 read with paragraph 2(1)(b) of the Tenth Schedule to the Constitution of India, shall not be counted in the result of the voting on any question decided by the House.

2. The above Direction shall be valid for the entire tenure of the Tenth Nagaland Legislative Assembly.

18. Voting on No Confidence Motion against the Government run by Democratic Alliance of Nagaland (DAN) of which the Nagaland Peoples' Front (NPF) was the major constituent party took place on 13th of December, 2007. Admittedly, there was a whip issued by the NPF to all its members to vote against the No Confidence Motion. Notwithstanding the whip, 9(nine) members belonging to NPF voted in favour of the No Confidence Motion. The Speaker did not take into account those 9(nine) votes for the purpose of deciding the fate of the No Confidence Motion. Apart from that, the Speaker also prohibited 3 (three) independent members of the Legislative Assembly (who had till then supported the DAN) to participate in the voting process. Consequently, the Speaker declared the No Confidence Motion to have been defeated and held that 23 members voted against the Motion and 19 members voted in favour of the Motion.

The question is whether the decision of the Speaker to eliminate the votes of the

abovementioned 12 members of the Legislative Assembly for the purpose of ascertaining the fate of the No Confidence Motion is legal and valid. For the purpose of deciding the said question, the cases of the 9 members of the NPF and the 3 independent MLAs are to be dealt with separately as the considerations relevant for such a decision with reference to each of the two groups are different.

19. Mr G. Subramaniam, learned Addl. Solicitor General, appearing for the Union of India, argued that insofar as the 9 members of the NPF are concerned, the decision of the Speaker not to count their votes is obviously in purported compliance of the direction, dated 21.8.2006, but such a direction, according to Mr Subramaniam, is beyond the authorization of the Rules of 2003 referred to earlier and also beyond the authority of the Rule making power conferred on the Speaker under paragraph 8 of the Tenth Schedule.

20. He further submitted that the direction, dated 21.8.2006, would be inconsistent with the scheme of the Tenth Schedule and also what he described as the "democratic pedigree" of a legislative body consisting of elected representatives of the people functioning under the Constitution. Mr Subramaniam argued that a member of Legislative Assembly has a right to participate in every voting process within the Assembly so long as his membership is not terminated by some process recognized either by the Constitution or any other appropriate statutory law. According to him, not taking into account the vote of a member, even before his membership is legally terminated, would be inconsistent with the constitutional rights, which are inextricably intertwined with the membership of the legislature.

21. Mr. L. Nageswara Rao, learned Senior Counsel, appearing for the petitioner, on the other hand, argued that the direction of the Speaker, dated 21.8.2006, is well within the authority of the Speaker under Rule 19 referred to earlier and also consistent with the spirit of the Tenth Schedule. In this context, he placed great emphasis on the judgment of the Supreme Court in *Sri Rajendra Singh Rana and Others Vs. Swami Prasad Maurya and Others*,

22. Before we examine the rival contention, it would be profitable to examine the relevant provisions of the Constitution dealing with the membership of legislative Assembly.

23. Article 173 deals with the qualification for membership of the State Legislature:

173. Qualification for membership of the State Legislature.- A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he-

(a) Is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission on oath or affirmation according to the form set out for the purpose in the Third Schedule;

(b) Is, in the case of a seat in the Legislative Assembly, not less than twenty-five

years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) Possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

24. Article 191 deals with the disqualification of the membership:

191. Disqualifications for membership.- (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State-

(a) If he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) If he is of unsound mind and stands so declared by a competent court;

(c) If he is an undischarged insolvent;

(d) If he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) If he is so disqualified by or under any law made by Parliament.

Explanation-- For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

25. While Article 173 mandates that a person shall be disqualified for being chosen to fill a seat in the Legislature of a State unless such a person satisfies the conditions laid down therein, Article 190(1) prescribes various disqualifications both for being chosen if it is a disqualification existing on the date of the election and also for continuing to be a member of the Legislature, if such disqualification is incurred subsequent to the election. The distinction between the preexisting disqualification and the subsequent disqualification is well recognized in Election Commission, India Vs. Saka Venkata Subba Rao and,

26. Apart from the abovementioned two Articles, Article 190 mandates that no person shall be a member of both houses of Legislatures of a State and also be a member of Legislature of two or more States. Such a person is given an option to choose the membership of any one of such plural houses, which he wishes to retain, and if such a choice is not made in the prescribed manner within the stipulated time, Article 190(2) declares that such person shall cease to be the member of all such houses.

27. The question whether a person suffers from a disqualification contemplated under Article 173 even as on the date of his election to the house is required to be decided exclusively by judiciary, whereas in the case of a supervening disqualification contemplated under Article 191, the question whether such a person has incurred disqualification is required to be, primarily, decided by the Governor in Consultation with the Election Commission.

28. In either case, such a decision making process consumes some time. Recognizing the possibility of a member, who is disqualified to be a member from participating in the legislative process before the decision as to his disqualification is rendered by the appropriate authority, the Constitution makers provided under Article 189(2) that such a participation shall not effect the legality of any proceeding of the legislature merely because of such participation of a person, who is not entitled to participate. The only consequence of such participation is (provided under Article 193) that such a member is liable in respect of each day on which he participates in the Legislative process for a fine of Rs. 500/- per day and that too, if such participation is with the knowledge (of the member) of the fact that he is not entitled to participate.

29. Article 194 declares that there "shall be freedom of speech" in the legislature of every State. This freedom of speech is, however, made "subject to the provisions of the Constitution and Rules and the Standing Orders regulating the procedure of the legislature

30. Article 208 authorizes the legislature of a State to make Rules for regulating the procedure and conduct of the business of the legislature subject, of course, to the provisions of the Constitutions.

31. The Governor is apart of the Legislature by virtue of Article 168; but the Constitution only speaks of the Governor's right to address and send the messages to the Legislature under Article 175 and 176. It does not recognize the right to vote in favour of the Governor. Similarly, Article 177 recognizes the rights of Minister and the Advocate General of the State to take part in the proceedings of the Legislature irrespective of the fact whether the Minister is a member of the Legislature or not. It may not be out of place to mention that Article 164 recognizes the possibility of a person becoming a Minister without being a member of the Legislature for a maximum period of six months. Therefore, Article 177 authorizes the Minister to participate in the Legislative process except voting. Similarly, the Advocate General is also given the right to speak or otherwise take part in the proceedings of the Legislature without the entitlement, however, to vote.

32. Article 189 stipulates that all questions of any sitting of a house of Legislature of a State shall be determined by a majority of votes of the members present on voting. Sub-Article (2) thereof specifically excludes the Speaker or the Chairman, as the case may be, of the house from participating in the voting on any question except in the case of equality of votes on any question.

33. Mr. Gopal Subramonium submitted that whenever the Constitution desired a person, who is a member of the Legislature or who has a right to address or otherwise take part in the proceeding of the Legislature shall not be entitled to vote, the Constitution expressly declared so. Neither the Tenth Schedule nor any other provisions of the Constitution specifically declares or authorizes the elimination of the vote of a member of the Legislature so long as the membership subsists. According to Mr. Subramaniam, such a right to vote is the essence of the membership of Legislature in a representative democracy and curtailment of such a right by any process, other than the ones expressly recognized by the Constitution, would strike at the very root of the democratic pedigree of the Legislator.

34. Before we examine the above submission of Sri Subramaniam, it would be appropriate to examine the legal concept of voting. Supreme Court in Lily Thomas (Ms), Advocate Vs. Speaker, Lok Sabha and Others, held as follows:

Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question. In Black's Law Dictionary it is explained as, "the expression of one's will, preference, or choice, formally manifested by a member of a legislative or deliberative body, or of a constituency or a body of qualified electors, in regard to the decision to be made by the body as a whole upon any proposed measure or proceeding or in passing laws, rules or regulations, or the selection of an officer or representative". Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well.

35. In other words, voting in the Legislature is a formal way of expressing the opinion of the member of the legislature. Therefore, in our view, the voting is an aspect of the freedom of speech conferred by Article 194 and such a freedom is made expressly subject to the provisions of the Constitution and also Rules and Standing Orders regulating the procedure of the legislature.

36. The amplitude of the right of the freedom of speech in the legislature conferred by Article 194 and the limitations thereon fell for the consideration of the Supreme Court in In the matter of: Under Article 143 of the Constitution of India, (In re, Under Article 143, Constitution of India). Speaking for the Court, Justice Gajendragadkar, CJ, held as follows:

It will be noticed that the first three material clauses of Article 194 deal with three different topics. Clause (1) makes it clear that the freedom of speech in the Legislature of every State which it prescribes, is subject to the provisions of the Constitution, and to the rules and standing orders, regulating the procedure of the Legislature. While interpreting this clause, it is necessary to emphasize that the provisions of the Constitution subject to which freedom of speech has been conferred on the legislators, are not the general provisions of the Constitution but only such of them as relate to the regulation of the procedure of the Legislature. The rules and standing orders may regulate the procedure of the

Legislature and some of the provisions of the Constitution may also purport to regulate it; these are, for instance. Articles 208 and 211. The adjectival clause "regulating the procedure of the Legislature" governs both the preceding clauses relating to "the provisions of the Constitution" and "the rules and standing orders". Therefore, Clause (1) confers on the legislators specifically the right of freedom of speech subject to the limitation prescribed

37. Therefore, it follows that the right of a member of a Legislature to participate in the voting process in the Legislature is nothing, but an aspect of the freedom of speech of each of the legislator recognized under Article 194 and, therefore, is subject to regulation, which, in our view, includes the curtailment also. One definite provision of the Constitution curtailing such freedom of speech/right to vote is under Article 211, which expressly prohibits any discussion, in the Legislature, in respect to the conduct of any Judge of the Supreme Court or High Courts in the discharge of his duties. The Supreme Court also recognized in In the matter of: Under Article 143 of the Constitution of India, (In re, Under Article 143, Constitution of India), referred to earlier, that Article 208 authorizes the freedom of speech, recognized under Article 194, to be regulated by the house of the Legislature of a State.

38. There is yet another way of testing the soundness of the submission made by the learned Addl. Solicitor General. If the right to vote in the proceedings of the Legislature by a member of the Legislature is not amenable to any abridgment, but an absolute right so long as the Legislator continues to be a member of the Legislature, suspension of a member from the house on the grounds of undignified conduct would be inconsistent with such an absolute right as claimed. During the period of suspension, a member of the Legislature is disabled from participating in the proceedings including the voting, if any, that takes place during such period.

39. Such curtailment of the right was recognized by the House of Commons and also the Indian Legislatures, Similar is the case of termination of the membership of a legislator on the grounds of conduct, which is perceived to be inconsistent with the dignity of the house and its membership. Undoubtedly, such power is available to the Legislature as held by the Supreme Court in Raja Ram Pal Vs. The Hon"ble Speaker, Lok Sabha and Others, Normally, the tenure of a legislator is co-terminus with the tenure of the Legislature. The authority of the Legislature to terminate the membership of a member, whenever it is exercised, necessarily results in the deprivation of freedom of speech under Article 194/vot-ing rights. Such power is held to be inherent in the Legislature by the Supreme Court in Raja Ram Pal's case, wherein the Supreme Court, in this context, held, at paragraph 162, as follows:

While it is true that the right to vote and be represented is integral to our democratic process, it must be remembered that it is not an absolute right. There are certain limitations to the right to vote and be represented. For example, a citizen cannot claim the right to vote and be represented by a person

who is disqualified by law or the right to be represented by a candidate he votes for, even if he fails to win the election. Similarly expulsion is another such provision. Expulsion is related to the conduct of the Member that lowers the dignity of the House, which may not have been necessarily known at the time of election. It is not a capricious exercise of the House, but an action to protect its dignity before the people of the country. This is also an integral aspect of our democratic set-up. In our view, the power of expulsion is not contrary to a democratic process. It is rather part of the guarantee of a democratic process. Further, expulsion is not a decision by a single person.

40. From the above discussions, we are of the opinion that there is nothing like an unfettered right to participate in the Legislative process even by a member otherwise validly elected to the Legislature. Such a right is subject to the regulations made under Article 208 or the Tenth Schedule by the Legislature, as a collective body, though such regulatory authority is subject to the provisions of the Constitution. If the Legislature as a collective body of the representatives of the people of the State or the Country, as the case may be, can terminate the membership of one of its member, we do not see logically any objection for the Legislature to stipulate that the freedom of speech/right to vote of a member should be kept in abeyance in a particular situation without terminating the membership of such a member.

41. The question, now, is whether the Speaker took the decision not to take into account the votes of 9 members of NPF and 3 votes of independent in pursuance of any such regulation made by the Legislature or the Assembly. Admittedly, the Speaker acted in furtherance of the direction, dated 21.8.2006 referred to earlier. It was a direction purportedly issued in exercise of the authority conferred on the Speaker by Rule 19 of the Nagaland Legislative Assembly (Disqualification on Ground of Defection) Rules, 2003. The said Rules, which were approved by the house in the manner prescribed under paragraph 8 of the Tenth Schedule, by themselves, do not contemplate the regulations of the freedom of speech/right to vote in the manner indicated by the order of the Speaker dated 21.8.06.

42. The Tenth Schedule itself does not prohibit any member of a Legislature from violating the direction/whip issued by a political party to legislators belonging to that political party. All that paragraph 2(1)(b) of the Tenth Schedule prescribes is that when such a direction/whip issued by the political party is violated by a legislator without either the prior permission of the political party or such violation is not condoned subsequently by the political party, the legislator incurs disqualification, for continuing as a member of the house.

43. Undoubtedly, the object, sought to be achieved by the Tenth Schedule, is to ensure loyalty of the legislators to a political party, which sponsored the candidature of such a legislator at the election. It was a remedy, which the Parliament sitting as Constituent Assembly, though fit to provide in order to curb the evil of widespread practice of unprincipled floor crossing motivated by the concerns of personal benefit. The Parliament could as well have declared that

such an act of voting (which attracts the consequence of termination of the membership of such a member) should also be ignored for the purpose of deciding the issue on which the voting took place. But it did not. Though, it would be difficult to speculate the reasons for such omission, we hazard a guess that it is in recognition of the possibility of an honest dissent. It is, thus, a balancing act between the party discipline and the convictions of individual members.

44. However, the fact that the Constitution does not contemplate such a step of ignoring the vote given in violation of the whip does not necessarily mean that Legislature, either in exercise of the Rule-making power under paragraph 8 of the Tenth Schedule, or in exercise of the authority under Article 208, is debarred from making such a provision in the absence of any Constitutional prohibition, in view of the conclusion reached by us that the right of freedom of speech/voting is subject to the regulations under Article 208, etc.

45. But the question, in the instant case, is whether the Nagaland State Legislature made such a provision? Neither in the Rules of 2003 nor any other Rule, which prescribes such a result, is brought to our notice. The direction of the Speaker, dated 21.8.2006, is not referable to any Rule, which authorizes the Speaker to give such a direction. Rule 19 of the 2003 Rules, which is quoted as a source of power by the Speaker for issuing the direction, is, in our view, only of limited amplitude. The language of the Rule authorizes the Speaker to give such directions, which are clarificatory in nature. However, by the direction, dated 21.8.2006, the Speaker sought to abridge the substantive rights of the legislators conferred by Article 194 of the Constitution without any authority of law.

46. The case of the three "independents" stands on a totally different footing. Irrespective of the legality of the direction, dated 21 -8-06, there cannot be any occasion for invoking the said direction against an "independent member" of the Legislature. The expression "independent MLA" does not occur either in the Constitution or under the Representation of the People Act, 1951. That expression is in vogue with reference to those Members of the Legislature, who get elected without being sponsored by any political party. In the context of the Tenth Schedule, such members are described, under Sub-paragraph (2) of Paragraph 2, as "an elected member of a House, who has been elected as such otherwise than as a candidate set up by any political party.

47. The disqualification, on the ground of the Violation of any direction/whip issued by the political party, can obviously arise only in the case of a member of the Legislature belonging to a political party. In the case of the member, who does not belong to any political party, the question of his violating any direction/whip issued by any political party does not and cannot arise. In fact, the scheme of paragraph 2 is clear in this regard. Paragraph 2(1) deals with the contingencies, which result in disqualification of the members of Legislature belonging to any political party. Such members are of two categories. The first

category is of those members, who have been set up as candidates for an election for the membership of such a House.

48. The second category of members is nominated to the Legislature (which process is recognized under the Constitution). Such nominated members are deemed to belong to a political party in the event of the happening of certain contingencies specified in paragraph 2, Explanation Clause-(b)

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

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

Paragraph 2(2) of the Tenth Schedule deals with the disqualification of "independents" and Paragraph 2(3) deals with the disqualification of the nominated members. The only contingency in which an "independent" member incurs the disqualification is that such an "independent" member joins some political party after being elected to the House. Though the expression "political party" is not defined in the Constitution, the said expression is defined, under Sub-section (f) of Section 2 of the Representation of the People Act, 1951, as follows:

2(f) "political party" means an association or a body of individual citizens of India registered with the Election Commission as a political party u/s 29A.

49. It appears from the reports of the Governor that these three independent members were earlier supporting the DAN and by the date of the proceedings of the No Confidence Motion, they decided not to support the DAN. The fact that they were no more supporting the government by the DAN is obvious from the fact that these three independents were also signatories to the motion of no confidence, dated 11.12.07. On 12.12.07, one of the members of the NPF filed a petition for disqualification of the above-mentioned three independents. The pleadings of the petitioner, in this regard, are to be found at paragraphs 13,14 and 15 as follows:

13. That on 12th December, 2007, a Minister and a member of the Tenth Legislative Assembly, namely Dr. Shurhozelie, filed a Petition for Disqualification in relation to the 3 Independent MLAs, namely, Mr. P. Chuba, Mr. Jongshilemba and Mr. Khutovi on the ground that they have first joined the NPF and later the Congress and sought from the Speaker an interim order restraining all the 3 independent MLAs from participating and voting in all proceedings of the House.

14. That on 12th December, 2007, immediately after receipt of the Petition for Disqualification, with the approval of the Speaker of the Nagaland Legislative Assembly, the Secretary of the Legislative Assembly forwarded a copy of the

Petition to all the 3 respondents to reply within 20 days and for interim reply by 9.00 AM on the 13th December, 2007 since a prayer for interim order was made by the Petitioner.

15. That out of the 3 respondents, only Mr. Khutovi gave an interim reply and other respondents did not choose to reply. The Speaker thereafter passed an interim order on the 13th December 2007, restraining the 3 Independent MLAs from voting only on Confidence and No-confidence Motions. The Interim Order was read out to the House by the Speaker on the 13 December, 2007.

50. Even if the application for disqualifying the three independents containing an allegation that these three independent MLAs "first joined NPF and later the Congress" is to be taken to be an accurate description of the contents of the application filed by the minister (as a copy of the application is not placed before this Court), the three independent MLAs would incur disqualification the day they joined the NPF in view of the declaration under sub-paragraph (2) of paragraph 2 of the Tenth Schedule as explained by the Supreme Court in *Sri Rajendra Singh Rana and Others Vs. Swami Prasad Maurya and Others*, . It is a different matter that any member of the Legislature never sought such adjudication earlier and for the first time, such a claim was made on the 12.12.07. The claim may be true or not, it depends on examination of evidence in that regard. Without deciding the issue whether such independent members really incurred the disqualification and prohibiting them from participating in the No Confidence Motion by an interim order of the Speaker, would, in our view, be highly detrimental to the working of the democratic process and the rights of such independent members, under Article 194, to participate in the legislative process. The larger question whether the Speaker has the power to pass such an interim order pending adjudication on the application seeking disqualification of any member was neither in issue in the present writ petition nor argued.

51. Therefore, we desist from expressing any opinion on that issue. Even if, for the sake of argument, it is presumed that the Speaker has such authority to pass interim orders pending adjudication on the application for disqualification, such an interim order must be passed, at least, after being *prima facie* satisfied on the basis of some evidence on record that a member, whose disqualification is sought, did, in fact, resort to some activity, which, if, eventually, proved, would render him subject to a disqualification. A mere allegation, in the application, is not evidence nor the fact that the three independents, in the instant case, had earlier supported the government is in itself evidence of the fact that they had joined the NPF. An independent is not debarred by the Constitution from voting on any issue in the Legislative Assembly, according to the dictates of his conscience, including the issue of confidence in the government run by a political party. The fact that an independent reposed his confidence in a government run by any political party at a given point of time need not necessarily mean that the independent member had joined such a political party.

52. Nothing is placed on record, not even some *prima facie* materials, to

establish that the three independents had indulged in such activity, which could, eventually, disqualify them. In the absence of any such material, the only conclusion we can reach is that the interim order of the Speaker, dated 13.12.07, restraining the three independents from participating in the No Confidence Motion is plainly illegal.

53. At this juncture, we must examine the submission made by the learned Counsel for the petitioner that in view of the decision of the Supreme Court in *Sri Rajendra Singh Rana and Others Vs. Swami Prasad Maurya and Others*, the decision of the Speaker not to take into account the votes of 9 MLAs on the ground that they had violated the direction/whip issued by the party is legal, valid and in tune with the object sought to be achieved by the Tenth Schedule. According to the learned Counsel, the disqualification incurred by the member dates back to the event, which rendered the member disqualified but not from the date of the decision of the Speaker holding that such a member did, in fact, incur the disqualification and consequently, the vote of such a member cannot be taken into account.

54. Before we examine the submission, we think it appropriate to examine the ratio decidendi of the above-mentioned case. It was a case where the question of disqualification of the 13 members of U.P. Legislative Assembly was at issue on the ground of defection. The case of the 13 MLAs was that there was, on 26.8.03, a split in the party to which they belonged (BSP). According to them, 37 of the total 119 members of the BSP had decided to form a separate group and as a consequence, there was a split within the meaning of Paragraph 3 (since deleted) of the Tenth Schedule and, therefore, they had not incurred disqualification under the provisions of the 10th Schedule.

55. The claim of a split by the 37 members including the above mentioned 13 members was actually received by the Speaker on 6.9.03; whereas the application seeking the disqualification of the 13 members was filed before the Speaker on 4-9-03. The Supreme Court found that there was no material to establish that there was a split on 26.8.03, in the political party that the 13 members had defected, on 27.8.03, to Samajwadi Party and the remaining members had decided to defect to the Samajwadi Party on 6.9.03. It is in the above-mentioned background that the Supreme Court held in paragraph 34, as follows:

34. As we see it, the act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defiance of the whip issued to him. Therefore, the act that constitutes disqualification in terms of para 2 of the Tenth Schedule is the act of giving up or defiance of the whip. The fact that a decision in that regard may be taken in the case of voluntary giving up, by the Speaker at a subsequent point of time cannot and does not postpone the incurring of disqualification by the act of the legislator. Similarly, the fact that the party could condone the defiance of a whip within 15 days or that the Speaker takes the decision only thereafter in those cases, cannot also pitch the time of

disqualification as anything other than the point at which the whip is defied. Therefore in the background of the object sought to be achieved by the Fifty-second Amendment of the Constitution and on a true understanding of para 2 of the Tenth Schedule, with reference to the other paragraphs of the Tenth Schedule, the position that emerges is that the Speaker has to decide the question of disqualification with reference to the date on which the member voluntarily gives up his membership or defies the whip. It is really a decision ex post facto. The fact that in terms of para 6 a decision on the question has to be taken by the Speaker or the Chairman, cannot lead to a conclusion that the question has to be determined only with reference to the date of the decision of the Speaker. An interpretation of that nature would leave the disqualification to an indeterminate point of time and to the whims of the decision-making authority. The same would defeat the very object of enacting the law. Such an interpretation should be avoided to the extent possible. We are, therefore, of the view that the contention that only on a decision of the Speaker that the disqualification is incurred, cannot be accepted.

56. These observations are made in the context of the fact that the Speaker of the UP Assembly had kept the application, dated 4.9.03, of the BSP seeking disqualification of 13 members pending even after receiving the request, on 6.9.03, of 37 MLAs, including the above mentioned 13, to recognize the split in terms of paragraph 3 of the Tenth Schedule. In substance, the Supreme Court held that there was no material on record to establish that all the 37 members had decided to give up their membership of the BSP at the same time, but decided so on two different dates.

57. If all of them had decided to leave the political party at the same time, (their being number 37) they would have constituted 1/3rd of the total membership of the BSP Legislature Party and there would have been a split within the meaning of Paragraph 3 of the Tenth Schedule. However, since they had decided to leave in two instalments, neither of the original 13 nor of the subsequent 24 by itself constituted 1/3rd of the BSP Legislature Party. Therefore, both the groups incur the disqualification under paragraph 2 of the Tenth Schedule and are not entitled for the protection of paragraph 3.

58. Mr Nageswar Rao, learned Senior Counsel, sought to rely upon the above decision in order to justify the decision of the Speaker not to take into account the votes of 9 NPF MLAs on the ground that if the disqualification dates back to the event, the Speaker was justified in not taking the votes, which had rendered the 9 MLAs subject to disqualification. According to Mr Rao, the decision of the Speaker is not only legal, but also would be consistent with the objectives underlying the Tenth Schedule.

59. The submission is, no doubt, attractive; but in our view, not sound. Undoubtedly, the disqualification dates back to the event, which renders the member subject to disqualification. In our view, such a dating back is relevant for the purpose of deciding the legal rights and obligations of such disqualified

persons subsequent to the date, for example, the privileges and immunities of such members during the interregnum between the date on which the disqualification had occurred and the date on which the Speaker actually declared the disqualification. But the dating back of the disqualification does not obliterate the vote given by such a member, which, ultimately, forms the basis of disqualification. We have already indicated our conclusion earlier that there is nothing in the Constitution, which expressly prohibits the Legislature to make an appropriate law either, in the form of an enactment, or, for that matter, in the form of even a Rule, under Article 208, not to take into account a vote given in violation of the whip.

60. The Tenth Schedule does not provide for such a result. If in the ultimate analysis, outside a statute, there is no right to be elected and no right to dispute an election, a statutory creation they are, and, therefore, subject to statutory limitations. (See *Jyoti Basu and Others Vs. Debi Ghosal and Others*, Logically it follows, in our view, that the rights/liabilities attached to the membership of the legislature are also to be found strictly with the four corners of the letter of the law. Therefore, the submission of Mr Rao, the learned Counsel cannot but be rejected.

61. Construing in the scope of para 2(1)(b) of the Sixth Schedule in the case of *Shri Kihota Hollohon Vs. Mr. Zachilhu and others*, , Venkatachaliah, J (as his Lordship then was), speaking for the majority of the Court, held as follows:

While construing paragraph 2(1)(b) it cannot be ignored that under the Constitution members of Parliament as well of the State Legislature enjoy freedom of speech in the House though this freedom is subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of the House [Article 105(1) and Article 194(1)]. The disqualification imposed by paragraph 2(1)(b) must be so construed as not to unduly impinge on the said freedom of speech of a member. This would be possible if paragraph 2(1)(b) is confined in its scope by keeping in view the object underlying the amendments contained in the Tenth Schedule, namely, to curb the evil of mischief of political defection motivated by the lure of office or other similar considerations. The said object would be achieved if the disqualification incurred on the ground of voting or abstaining from voting by a member is confined to cases where a change of Government is likely to be brought about or is prevented, as the case may be. as a result of such voting or abstinence or when such voting or abstinence is on a matter which was a major policy and programmed on which the political party to which the member belongs went to the polls. For this purpose the direction given by the political party to a member belonging to it, the violation of which may entail disqualification under paragraph 2(1)(b), would have to be limited to a vote on motion of confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programmed of the political party on the basis of which it approached the electorate. The voting or abstinence from voting by a member against the direction by the

political party on such a motion would amount to disapproval of the programme on the basis of which he went before the electorate and got himself elected and such voting or abstinence would amount to a breach of the trust reposed in him by the electorate.

62. Thus, the Supreme Court recognized, in *Kihoto Hollohon v. Zachilhu and Ors.* (Supra), the need to balance the freedom of speech/voting of legislator and also the need to curtail such speech/right to vote. If the consequence of disqualification for indulging in any prohibited conduct falling within the sweep of paragraph 2(1)(b) of Tenth Schedule is to be confined only to two limited categories of cases explained by the Supreme Court in the above extracted passage, obviously the Supreme Court recognized the importance of the freedom of speech of the legislator, in the context of a democracy. A consequence which is not expressly contemplated by the Constitution i.e. elimination of a vote given in contravention of whip, in our view, cannot be brought about by implication.

63. We are, therefore, of the opinion that the Speaker is legally wrong in not taking into account the 9 votes in dispute of the MLAs of NPF and prohibiting 3 independent MLAs from participating in the No Confidence Motion.

64. The next question would be whether the President or Advisors are justified in invoking Article 356 of the Constitution. In the background of the undisputed facts and legal position discussed earlier, what becomes clear is that, the 9 votes of NPF MLAs, who had, in fact, voted in favour of the No Confidence Motion, are, eventually, taken into account, the No Confidence Motion should have been declared as having been duly passed. By illegally eliminating these 9 votes, the Speaker came to the conclusion that the No Confidence Motion was defeated. That apart, the three independent MLAs were, as we notice, illegally prevented from participating in the No Confidence Motion proceedings.

65. As the learned Counsel for the parties have in essence concurred on the scope and ambit of judicial review vis-a-vis a challenge to the Presidential proclamation under Article 356 of the Constitution of India, an elaborate dilation on the authorities cited in relation thereto is considered inessential. In *S.R. Bommai and others Vs. Union of India and others etc. etc.*, His Lordship B.P. Jeevan Reddy speaking for himself and on behalf of S.C. Agarwal J, succinctly outlined the parameters therefore observing that if a proclamation is found to be malafide or based wholly on extraneous and/or irrelevant grounds, it would be liable to be struck down as indicated in *State of Rajasthan and Others Vs. Union of India and Others*,

66. It was enunciated therein that not only the Court would not substitute its opinion for that of the President or question the truth or correctness of the materials forming the foundation thereof or scrutinize the adequacy of such materials, it would not interfere even if some of the materials on which the action is taken is found to be irrelevant so long as there is some relevant material to sustain the decision. Their Lordships held the view that having regard

to the high constitutional power exercised by the highest constitutional functionaries of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities.

This view in substance found reiteration in *Rameshwar Prasad and Others Vs. Union of India (UOI) and Another*,

67. Ultimately, under the constitutional system, a Government must enjoy the confidence of the Legislature. No doubt, whether the Government enjoys the confidence of the Legislature or not is a matter to be decided on the floor of the house. If the proceedings of the house, where the Government is required to establish the fact that it enjoys the confidence of the Legislature, are conducted in utter disregard of the Constitution, as is established in this case and the result of the violation of the Constitution is that the Government, which lost the confidence of the house, is declared to be enjoying the confidence of the house, it cannot be said that the presidential satisfaction that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is un-constitutional.

68. Though on a volumetric measure, the contextual facts attendant on the issue of no confidence motion in the instant case are not as profuse, eventful and overbearing as for instance in *S.R. Bommai, supra*, and *Rameshwar Prasad (VI), supra*, the unconstitutionality of the Speaker's actions has not only rendered the proceedings thereof a nullity but also sustained a Government which in law and on facts had lost the confidence of the House. On a qualitative analysis, the assailed decisions of the Speaker are clearly antithetical to the constitutional scheme of legislative functioning and mutilative of the essence of democratic governance. The satisfaction of the President envisaged under Article 356 of the Constitution of India in the emerging exceptional fact situation could thus neither be dismissed as implausible nor construed to be founded on wholly irrelevant or extraneous considerations. Noticeably no allegation of malafide has been made in the case in hand. Judged on the touchstone of the propounded norms of judicial review as alluded hereinabove, the challenge to the Presidential proclamation cannot be upheld.

69. An incidental submission of the petitioner requires examination. It is submitted by the learned Counsel for the petitioner that the legality of the direction given by the Speaker, on 21.08.2006, was not one of the factors assigned by the Governor, while sending the report recommending invocation of Article 356, nor was such consideration weighed with the President or the Advisors of the President. It is only an *ex post facto* justification aided by the legal advice. The learned Counsel, therefore, argued that the same is irrelevant for the purpose of deciding the legality of the decision of the President.

70. In the Communication of the Governor, dated 6.6.2007, which is already extracted earlier, the Governor clearly opined, at paragraph 4 of the communication, that the act of the Speaker in not permitting the three

independent MLAs to participate, in the No Confidence Motion, is unconstitutional. Similarly, at paragraph 5, the Governor, with the decision of the Speaker, observed that the Speaker's decision not to take into account the votes of the 7 members of the NPF is also unconstitutional. Therefore, the constitutionality of the direction of the Speaker, dated 21.8.2006, and the consequential decision of the Speaker not to take into account the abovementioned votes for the purpose of deciding the fate of the no confidence motion was certainly one of the factors, which was before the President. Therefore, the submission of the learned Counsel for the petitioner must fail.

71. For the foregoing determination, no interference with the impugned Presidential proclamation is warranted. The petition, therefore, lacks in merit and is accordingly dismissed. In the facts and circumstances of the case, we make no order as to costs.