IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2018

DELIVERED ON : 27.04.2018

CORAM:

The HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
AND
The HON'BLE MR.JUSTICE ABDUL QUDDHOSE

W.P.Nos.26017, 27853 to 27856 of 2017

W.P.No.26017 of 2017

R.Sakkrapani
Whip, Dravida Munnetra Kazhagam,
Tamil Nadu Legislative Assembly,
Fort St.George,
Chennai-600 009. .. Petitioner

vs.

1 The Secretary
Tamil Nadu Legislative Assembly
Fort St. George,
Chennai 600 009.

2 Mr.P.Dhanapal
Sepeaker,
Tamil Nadu Legislative Assembly,
Fort St. George,
Chennai 600 009.

3 Thiru.O.Panneerselvam
Member, Tamil Nadu Legislative Assembly,
No.70/145 South Agragaram,
Thenkarai, Periyakulam, Theni 625 601.

4 Thiru.Aarukutty
Member, Tamil Nadu Legislative Assembly,
No.119/23 Lenin Street, Vilankurichi Post,
Coimbatore-64.

5 Thiru.Shanmuganathan,
Member, Tamil Nadu Legislative Assembly,
No.49 A Main Road,
Perunkulam, Pandarvilai Post,
Srivaikundam Tk, Thoothukudi 628 751.

6 Thiru.Manickam,
Member, Tamil Nadu Legislative Assembly,
No.3/274 Surveyar Colony, 1st Cross Street,
K Pudur Madurai North Post,
Madurai-7.

7 Thiru.Manoharan
Member, Tamil Nadu Legislative Assembly,
No.3/63 Ambedkar North St.,
Vishwanathpperi Post,
Sivagiri Circle 627 757.

8 Smt. Manoranjitham
Member, Tamil Nadu Legislative Assembly,
No.151 Boganapalli Village, Krishnagiri,
Krishnagiri 635 001.

9 Thiru.K.Pandiarajan
Member, Tamil Nadu Legislative Assembly,
61, Tas Enclave, Flat No. C3, 3rd Floor,
Golden Kings Court, 10th Main Road,
Anna Nagar,
Chennai 600 040.

10 Thiru.Saravanan
Member, Tamil Nadu Legislative Assembly,
D.No. 24, NewNo.93 Kaainpalayam 3rd Street,
Madurai 9.

11 Thiru.Semmalai
Member, Tamil Nadu Legislative Assembly,
No.311/197, Alagu Vinayagar Street,
Alagapuram, Salem.

12 Thiru.Chinnaraj
Member, Tamil Nadu Legislative Assembly,
No.1/139, Osur Tholampalayam Post,
Seeliyoor (via),
Mettupalayam, Coimbatore 641 113.

13 Thiru.R.Natraj
Member, Tamil Nadu Legislative Assembly,
New No. H-12/1 O.No. H-9/1 Kambar Street,
Kalashethra Colony,
Besant Nagar, Chennai – 90. .. Respondents

W.P.No.27853 of 2017

P.Vettrivel .. Petitioner

vs.

1.Mr.P.Dhanabal,
The Speaker,
Tamil Nadu Legislative Assembly,
Fort St. George,
Secretariat, Chennai – 600 009.

2.Thiru.S.Semmalai,
MLA, Mettur Constituency,
No.311/197, Alagu Vinayaka Street,
Alagapuram,
Salem District.

3.Thiru.O.K.Chinnaraj,
MLA, Metupalayam Constituency,
No.1/139, Hosur Pothanpadugai,
Tholampalayam,
Seeliyur Via,
Mettupalayam,
Coimbatore District. .. Respondents

W.P.No.27854 of 2017

Thanga Tamizh Selvan .. Petitioner

vs.

1.Mr.P.Dhanabal,
The Hon'ble Speaker,
Tamil Nadu Legislative Assembly,
Fort St. George,
Secretariat, Chennai – 600 009.

2.Thiru.O.Panneerselvam,
MLA, Bodinayakanur Constituency,
No.70/145, South Agragaram,
Thenkarai, Periyakulam,
Theni District. .. Respondents

W.P.No.27855 of 2017

N.G.Parthiban .. Petitioner

vs.

1.Mr.P.Dhanabal,
The Speaker,
Tamil Nadu Legislative Assembly,
Fort St. George,
Secretariat, Chennai – 600 009.

2.Thiru.K.Pandiarajan,
MLA, Avadi Constituency,
No.C3, Golden Kings Court,
AK61, Shanthi Colony,
Anna Nagar,
Chennai – 600 040.

3.Thiru.R.Natraj,
MLA, Mylapore Constituency,
Old No.H-9/1, New No.12/1,
Kambar Street,
Kalakshetra Colony, Besant Nagar,
Chennai – 600 009. .. Respondents

W.P.No.27856 of 2017

M.Rengasamy .. Petitioner

vs.

1.Mr.P.Dhanabal,
The Speaker,
Tamil Nadu Legislative Assembly,
Fort St. George,
Secretariat, Chennai – 600 009.

2.Thiru.A.Manokaran,
MLA, Vasudevanallur Constituency,
No.8/63, Dr.Ambedkar North Street,
Viswanathaperi,
Thirunelveli District – 627 757.

3.Ms.N.Manoranjitham,
MLA, Uthankarai Constituency,
No.5/10, Kamaraj Nagar,
Uthankarai Post,
Krishnagiri District – 635 207. .. Respondents

PRAYER : W.P.No.26017 of 2017 filed under Article 226 of the Constitution of India for issuance of a writ of mandamus directing the respondent No.2 to forthwith begin disqualification proceedings against 3rd to 13th respondent who had voted contrary to the directed issued by the Chief Government Whip on 18.02.2017 under the Tamil Nadu Legislative (Disqualification on Ground of Defection) Rules, 1986.

PRAYER : W.P.Nos.27853, 27855 and 27856 of 2017 filed under Article 226 of the Constitution of India for issuance of a writ of mandamus directing the 1st respondent to consider and pass orders forthwith on the petition dated 20.03.2017 filed by the petitioner seeking for disqualifying respondent nos.2 and 3 under Paragraph2(1)(b) of the X Schedule of the Constitution of India read with rule 6 of the Members of the Tamil Nadu Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986.

PRAYER : W.P.No.27854 of 2017 filed under Article 226 of the Constitution of India for issuance of a writ of mandamus directing the 1st respondent to consider and pass orders forthwith on the petition dated 20.03.2017 filed by the petitioner seeking for disqualifying respondent no.2 under Paragraph2(1)(b) of the X Schedule of the Constitution of India read with rule 6 of the Members of the Tamil Nadu Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986.

For Petitioner in W.P.No.26017 of 2017	:	Mr.Kapil Sibal Senior Counsel Mr.Amarendra Sharan Senior Counsel Mr.R.Shanmugasundaram Senior Counsel Mr.N.R.Elango Senior Counsel for M/s.R.Girirajan, R.Neelakandan & S.Manuraj
For Petitioners in W.P.Nos.27853 to 27856 of 2017	:	Mr.P.S.Raman Senior Counsel for Mr.N.Raja Senthur Pandian
For Respondents	:	Mr.R.Vijay Narayan Advocate General assisted by Mr.T.N.Rajagopalan Government Pleader for respondent No.1 in W.P.No.26017 of 2017 Mr.C.S.Vaidhyanathan Senior Counsel assisted by

M/s.Harish V.Shankar
K.Gowtham Kumar
C.Kasirajan
G.Prakash Kumar
R.M.Babu Murugavel
for respondent Nos.3 to 12
in W.P.No.26017 of 2017
and respondent Nos.2 & 3
in W.P.Nos.27853 &
27855 of 2017
and respondent No.2 in
W.P.Nos.27854 &
27856 of 2017

Mr.Vaibhav
for respondent No.13
in W.P.No.26017 of 2017

COMMON ORDER

Ms.INDIRA BANERJEE, CHIEF JUSTICE

The writ petition being W.P.No.26017 of 2017 has been filed seeking disqualification of 11 MLAs, being respondent Nos.3 to 13, of the All India Anna Dravida Munnetra Kazhagam Party under Paragraph2(1)(b) of the Tenth Schedule of the Constitution of India read with Tamil Nadu Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986, for voting contrary to the direction issued by the Chief Government Whip on 18.02.2017.

2. In W.P.Nos.27853, 27855 and 27856 of 2017, the petitioners sought issuance of writ of mandamus directing the first respondent to consider and pass orders forthwith on the petition dated 20.03.2017 filed by the petitioners herein seeking to disqualify respondent Nos.2 and 3 in each of these petitions, under Paragraph 2(1)(b) of the Tenth Schedule of the Constitution of India read with Rule 6 of the Members of the Tamil Nadu Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986, hereinafter referred to as "*the Disqualification Rules*".

3. In the writ petition, being W.P.No.27854 of 2017, the petitioner prayed for issuance of a writ of mandamus directing the first respondent to consider and pass orders forthwith on the petition dated 20.03.2017 filed by him seeking disqualification of respondent No.2 in this petition under Paragraph 2(1)(b) of the Tenth Schedule of the Constitution of India read with Rule 6 of the Disqualification Rules.

4. On 05.12.2016, the former Chief Minister of Tamil Nadu, Ms.J.Jayalalithaa died, after which, Mr.O.Panneerselvam of All India Anna Dravida Munnetra Kazhagam (AIADMK) was elected as Chief Minister of Tamil Nadu. On 05.02.2017, Mr.Panneerselvam resigned from the post of Chief Minister. Thereafter on 16.2.2017, Mr.Edappadi

K.Palaniswami was sworn in as Chief Minister. On the same day, i.e., 16.2.2017, the then Governor of Tamil Nadu directed Mr.Palaniswami to prove majority support in his favour by way of floor test.

5. According to the petitioner, a whip was issued under the AIADMK party's seal directing the MLAs of AIADMK party to vote in favour of Mr.Palaniswami. On 18.2.2017, the Tamil Nadu Legislative Assembly was convened for the purpose of floor test. Mr.Palaniswami, the Chief Minister and the Leader of the Legislative Party, moved the motion *"that this house expresses its confidence on the Cabinet headed by the Chief Minister Mr.Palaniswami"*. The motion was put to vote and carried by 122 MLAs of the AIADMK who voted in favour of the motion.

6. It is a matter of record that 11 MLAs, namely (i) Mr.O.Paneerselvam; (ii) Mr.A.Arukutty; (iii) Mr.Shanmuganathan; (iv) Mr.Manickam; (v) Mr.Manoharan; (vi) Mr.K.Pandiarajan; (vii) Mr.Manoranjitham; (viii) Mr.Saravanan; (ix) Mr.Semmalai; (x) Mr.Chinnaraj; and (xi) Mr.R.Nataraj, belonging to AIADMK party, hereinafter referred to as "the respondent MLAs", voted against the motion. This is also not disputed.

7. On 20.3.2017, some MLAs of AIADMK presented petitions to the Speaker under the Members of the Tamil Nadu Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986 seeking disqualification of the respondent MLAs for voting against the confidence motion, contrary to the direction issued by the AIADMK Whip.

8. In the meanwhile, on 14.3.2017, three members of the AIADMK filed a petition, being Dispute No.2 of 2017, before the Election Commission of India under Paragraph15 of the Elections Symbols (Reservation and Allotment) Order, 1968, hereinafter referred to as "*the Symbols Order*".

9. It is the case of the petitioner that no action has, till date, been taken by the Speaker on the said petitions for disqualification of the respondent MLAs. No notice has even been issued.

10. On 25.9.2017, the writ petition, being W.P.No.26017 of 2017., was filed seeking a writ of mandamus directing the second respondent, being the Speaker of the Tamil Nadu Legislative Assembly, to disqualify the respondent MLAs, who had voted contrary to the direction issued by the Chief Government Whip on 18.02.2017. Other

connected writ petitions, being W.P.Nos.27853 to 27856 of 2017, were also filed.

11. It appears that some time after the writ petitions were filed, a Transfer Petition, being Transfer Petition (Civil) No.2063 of 20017, was filed in the Supreme Court under Article 139A(1) of the Constitution of India, for transfer of the writ petitions to the Supreme Court.

12. On 01.12.2017, when the Transfer Petition was called on, Mr.Mukul Rohatgi appearing for the applicants for transfer, submitted that a similar controversy as to whether the Court could direct the Speaker to disqualify MLAs was in issue in S.L.P. (C) No.33677 of 2015, which had been referred to a Larger Bench. Counsel appearing for the concerned writ petitioners submitted that they would not press the prayer for a writ of mandamus on the Speaker to take a decision in this Court.

13. By an order dated 01.12.2017, the Supreme Court, disposed of the Transfer Petition with a direction on the High Court not to take up the prayer with regard to issue of a mandamus to the Speaker to take appropriate action under the Tenth Schedule of the Constitution

of India.

14. The Supreme Court, in effect, granted leave to the concerned writ petitioners to file applications in this Court for amendment of their writ petitions, *inter alia*, observing that any application for amendment pending or filed would be allowed by this Court to the extent permissible in law. Applications for amendment of the prayers in these writ petitions filed in this Court were, however, not proceeded with.

15. In the course of hearing, Mr.Kapil Sibal appearing for the writ petitioner in W.P.No.26017 of 2017 submitted that the prayer in the original writ petition for "*such other orders as this Court might deem fit in the facts and circumstances of the case*" enabled this Court to declare the 11 respondent MLAs as disqualified under Paragraph2(1)(b) of the Tenth Schedule.

16. Arguments on behalf of the writ petitioners were advanced by Mr.Kapil Sibal, Mr.Amarendra Sharan, Mr.P.S.Raman, Mr.R.Shanmugasundaram, and Mr.N.R.Elango, Senior Advocates. There being some overlapping of arguments, this Court has summarized the arguments advanced by all of them hereinafter.

17. Mr.Sibal submitted that the questions which arise for consideration of this Court are:

(i) Whether the eleven respondent MLAs have voted against the confidence motion moved by the AIADMK Leader of the Legislative Party, Mr.Palaniswami, and are accordingly, liable to be disqualified under Paragraph 2(1)(b) of the Tenth Schedule?

(ii) Whether this Court, in exercise of its power under Article 226/227 of the Constitution of India, can declare the 11 respondent MLAs to be disqualified since the Speaker was acting with bias and had abdicated his jurisdiction?

18. Counsel for the writ petitioners argued that to establish disqualification under Paragraph2(1)(b) of the Tenth Schedule, it needs to be demonstrated that a member of the legislature voted or abstained from voting contrary to any direction issued by the political party to which such member belonged.

19. Mr.Sibal referred to Paragraph2(1)(b) of the Tenth Schedule

quoted herein below for convenience:

> *"2.Disqualification on ground of defection. - (1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House-*
> *(a) ....*
> *(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."*

20. Counsel argued that the fact that the concerned respondents voted against the trust vote is undisputed and in any case, a matter of record. The next fact which needed to be established was, whether a direction had been issued to the concerned respondents to vote in favour of the confidence motion.

21. Counsel submitted that although the respondents have taken a contrary stand in these proceedings, they had earlier admitted issuance of such direction.

22. Mr.Sibal argued that in the petition under the Symbols Order, two of the respondent MLAs, Mr.S.Semmalai and Mr.O.Panneerselvam, had filed affidavits which read as under:

> *" ..... a whip was issued under the AIADMK Party's seal. As per the whip issued, the MLAs of the party were directed to vote in favour of appointment of Mr.Palaniswamy as Chief Minister of Tamil Nadu."*

However, in the counter-affidavit to the writ petition, being W.P.No.26017 of 2017, Mr.S.Semmalai, has sworn an affidavit stating *"it is submitted in the first place there has never been a direction issued to the respondents for them to follow and therefore, there could be no question of action against the respondents under the Tenth Schedule".*

23. Mr.Sibal argued that apart from Mr.S.Semmalai, no other respondent MLA had filed any counter-affidavit to the writ petitions. The counter-affidavit sworn by Mr.S.Semmalai is on his own behalf as well as on behalf of the other respondent MLAs.

24. Mr.Sibal argued that there was nothing on record to show that Mr.S.Semmalai had been authorised to swear an affidavit on

behalf of all other respondent MLAs. In so far as the other respondent MLAs were concerned, the averments in the writ petition should be deemed to have been admitted.

25. Mr.Sibal emphasized that the statement in the counter-affidavit of Mr.S.Semmalai is contrary to his own sworn affidavit before the Election Commission of India. Mr.S.Semmalai has thus committed perjury in these proceedings.

26. Mr.Sibal referred to the counter-affidavit of Mr.S.Semmalai filed in W.P.No.27853 of 2017 viz., *P.Vetrivel v. P.Dhanapal and others*, wherein it is stated:

> *"7.It is submitted that upon the sudden demise of Dr. J.Jayalalithaa, the Chief Minister of the State on 05.12.2016, a Ministry under the head of Mr.O.Panneerselvam was sworn in on 06.12.2016. Thereafter due to various circumstances which are in relation to persons who are not party before this Hon'ble Court, Mr.O.Panneerselvam was forced to resign as the Chief Minister on 05.02.2017. Thereafter, there were attempts made to make Mrs.V.K.Sasikala as the Chief Minister of the State and the said attempts had not fructified. Thereupon Mr.Edappadi K.Palaniswami was elected as the leader of AIADMK Legislative Party at a meeting held on*

14.02.2017 at a Resort at Koovathur. The Respondents herein were not present in the said meeting and were not even issued notice for the said meeting. Admittedly the 11 persons mentioned in Paragraph 6 of the petition had not supported the resolution to appoint Mr.Edappadi K.Palaniswami as the Leader of the Legislative Party. Thereupon Mr.Edappadi K.Palaniswami sought to form the government with the support of 122 MLAs only. In fact the Respondents herein had claimed that they were the original AIADMK party in fact even while a whip was allegedly issued to each MLA independently, there was no direction or whip that was received by the Respondent herein from Mr.S.Rajendiran. The 122 MLA's who had supported Mr.Edappadi K.Palaniswami as the leader of the legislative party were bound by the direction whereas the respondents who had not signed the said memorandum or received any direction cannot be claimed to be under a direction from the party."

27. Mr.Sibal argued that the third version was filed only on the second day of arguments i.e., on 14.2.2018, after the affidavit filed before the Election Commission was brought to the notice of this Court in the course of hearing on 13.2.2018.

28. Mr.Sibal submitted that there was a shift of stand that a whip was issued, but not to the 11 MLAs. This is an afterthought and an

attempt to reconcile the obviously inconsistent stands taken by the concerned respondents in different proceedings.

29. Mr.Sibal argued that the contention of the concerned respondents does not inspire confidence, as it is preposterous that when the trust vote is moved by a party, it would have issued a whip to all MLAs of the party, except for the 11 respondent MLAs.

30. Mr.Sibal argued that the affidavit before the Election Commission of India sworn on 14.3.2017 i.e., before the petitions for disqualification were submitted to the Speaker on 20.3.2017 was the most contemporaneous and natural version. Having admitted to the issuance as well as defiance in the said petition, it was clear that the MLAs concerned were adopting an entirely inconsistent stand in the present proceedings only to prevent a decision on disqualification. Further, the fact that two different stands were taken in the two writ petitions only renders the version of the events sought to be presented by the respondents in these writ petitions liable to be disregarded.

31. Mr.Sibal argued that the admission before the Election Commission should be treated as being conclusive. In any case, when the vote of confidence was sought by the ruling party, the motion itself

constitutes a direction to the members of the legislature belonging to the party to vote in favour of such motion.

32. Mr.Sibal and other learned counsel appearing on behalf of the writ petitioners submitted that the effect of voting against a motion seeking confidence was noted by the Supreme Court in *Kihoto Hollohan v. Zachillhu, reported in 1992 Suppl (2) SCC 651*, where the Supreme Court held:

> *"122. ..... 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 or mischief of political defections' 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 programme 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 or no confidence in the Government or where the motion under consideration relates to a matter which was an integral policy and programme 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."

33. Counsel argued that the conditions for disqualification under Paragraph2(1)(b) of the Tenth Schedule arose when the respondent MLAs voted contrary to the direction and against the trust vote. The 11 respondent MLAs are, therefore, disqualified to be Members of the Legislative Assembly since 18.02.2017.

34. Counsel further argued that Paragraph 6 of the Tenth Schedule mandates that any question as to whether a member of a House has become subject to disqualification shall be referred for the decision of the Chairman or Speaker of the House. Paragraph 8 provides for making rules for giving effect to the provisions of the Tenth Schedule under which the Disqualification Rules have been framed.

35. Counsel argued that the procedure for dealing with and disposing of a petition for disqualification of an MLA is elaborated in the Disqualification Rules. In terms of Rule 7 of the Disqualification Rules, upon receipt of a petition seeking disqualification, the Speaker was required to:

> *(i) consider whether it complies with the requirements under Rule 6 [sub-rule (i)];*
>
> *(ii) dismiss the petition, if it did not comply with such requirements [sub-rule (ii)]; and*
>
> *(iii) if the petition complies with the requirements under Rule 6, then cause copies of the petition to be forwarded inter alia to the member in relation to whom the petition has been made [sub-rule 3].*

36. Counsel argued that the Speaker had violated the mandate under the Constitution and the Disqualification Rules, inasmuch as the Speaker has neither dismissed the petition, nor issued notice on the same. Such inaction in itself constitutes a constitutional illegality.

37. Mr.Sibal referred to the decision of the Supreme Court in

Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council, reported in (2004) 8 SCC 747, where Paragraph 2(1)(b) of the Tenth Schedule was attracted. The Supreme Court held that when Paragraph 2(1)(b) is attracted, an inquiry into the following aspects may be necessary:

> *"15. .... For attracting clause (b) it is necessary that the member of the House (i) either votes or abstains from voting; (ii) contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf; (iii) without obtaining the prior permission of such political party, person or authority; and (iv) such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention. Therefore, for the purpose of clause (b), inquiry into several factual aspects has to be conducted. ....."*

38. Mr.Sibal submitted that this is a classic case where the principle of *res ipsa loquitur* is applicable, that is, where there is no scope to dispute the facts that constitute the elements necessary to be established under Paragraph 2(1)(b) of the Tenth Schedule. Mr.Sibal argued that four elements identified in Mahachandra Prasad case, supra, stood established by facts that were expressly admitted. Mr.Sibal submitted (i) voting by the 11 respondent MLAs against the

motion of confidence was apparent from records and admitted; (ii) direction to vote in favour of the motion of confidence was admitted; and (iii) it was nobody's case that the acts were condoned.

39. Mr.Sibal submitted that this case is, therefore, one which requires no further factual enquiry and the Speaker ought to have immediately proceeded to disqualify the 11 respondent MLAs.

40. Mr.Sibal referred to Para (7) of the decision in *Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council*, supra, set out herein below:

> *"It is to be noted that the Tenth Schedule does not confer any discretion on the Chairman or Speaker of the House. Their role is only in the domain of ascertaining the relevant facts. Once the facts gathered or placed show that a member of the House has done any such act which comes within the purview of sub-paragraph (1), (2) or (3) of Paragraph 2 of the Tenth Schedule, the disqualification will apply and the Chairman or the Speaker of the House will have to make a decision to that effect."*

41. Mr.Sibal submitted that in *Rajendra Singh Rana v. Swami Prasad Maurya, reported in (2007) 4 SCC 270*, the Supreme Court held

that where MLAs were found to be disqualified their continuance in the Assembly even for a day would be illegal and unconstitutional and their holding office as ministers would also be illegal at least after the expiry of six months from the date of their taking charge of the offices of Ministers.

42. Mr.Sibal and other counsel appearing for the writ petitioners all emphatically argued that the Supreme Court had held in the case of *Mahachandra Prasad Singh*, supra, that disqualification under Paragraph 2 of the Tenth Schedule "*comes into force or becomes effective on the happening of the event*".

43. Mr.Sibal argued that mala fides in the action of the Speaker were writ large from the fact that no action was taken on the petition filed by the petitioners for disqualification of the respondent MLAs on 20.3.2017, for voting against the motion of the Chief Minister seeking vote of confidence on 18.2.2017. However, two factions lead by the Chief Minister, Mr.Palaniswami and Mr.O.Pannerselvam merged on 21.8.2017, after which 18 MLAs went to the Governor withdrawing support to the government headed by the Chief Minister, Mr.Palaniswami. The Chief Government Whip presented a petition for disqualification on 24.8.2017. On the same day, the Speaker issued

notice to the 18 MLAs.

44. Mr.Sibal argued that bias and mala fides of the Speaker is apparent from the fact the Privileges Committee issued show cause notices to M.K.Stalin and 20 other MLAs of the DMK in respect of an incident relating to 19.7.2017 on 28.8.2018, within two days after 26.8.2017, when M.K.Stalin wrote to the Governor seeking direction on the Chief Minister to prove his majority on the floor of the House.

45. Mr.Sibal argued that since no trust vote had been directed in a case where the Government had been in minority for more than three weeks, the DMK moved this Court seeking a direction for a trust vote. The Speaker, thereafter, expedited the proceedings for disqualification of the 18 MLAs. After this Court directed that no floor test be held till 20.9.2017, 18 MLAs were disqualified by a decision of the Speaker. Mr.Sibal argued that the 18 MLAs were disqualified on the apprehension of their voting against the government, whereas in this case despite 11 MLAs having voted against the trust vote, no action has been initiated by the Speaker. The selective approach of the Speaker, contrary to the constitutional norms, smacks of mala fides. Learned counsel appearing for the other writ petitioners also elaborated on the selective approach of the Speaker.

46. Counsel submitted in one voice that mala fides on the part of the Speaker was further apparent from the fact that while disqualification proceedings were initiated against 19 MLAs, no action was taken against the 19th MLA, Shri S.T.K.Jakkaiyan. Mr.Sibal argued that the Speaker acted in a manner that would ensure artificial majority of the illegal government constituted of the faction of the AIADMK Party, to which he belonged.

47. Counsel submitted that the Speaker had acted and omitted to act selectively with a view to favour the interests of the faction to which the Speaker belonged. This was malafide, as held by the Supreme Court in *V.M.Tarkunde v. Union of India, reported in (1983) 1 SCC 428*:

> *"5. It is well settled that exercise as well as non-exercise of a constitutional power for extraneous or non-germane considerations is mala fide and unconstitutional and this principle will apply to power contained in Article 224(1) of the Constitution."*

48. Relying on the judgments of the Supreme Court in *State of Bihar v. P.P.Sharma, reported in 1992 Supp (1) SCC 222; Tandon Bros. v. State of West Bengal, reported in (2001) 5 SCC 664 and State*

of Assam v. Banshidhar Shewbhagavan & Co., reported in (1981) 3 SCC 283, Mr.Sibal argued that it was well settled that action or inaction, if tainted with mala fides was unconstitutional and vitiated.

49. Mr.Sibal argued that the Speaker was a quasi-judicial authority for the purpose of adjudication under the Tenth Schedule. The Speaker was bound by principles of natural justice, including the rule of bias. In the context of his arguments, Mr.Sibal cited the decision in *P.D.Dinakaran (1) v. Judge Inquiry Committee, (2011) 8 SCC 380,* where the Supreme held:

> *"41. In this case, we are concerned with the application of first of the two principles of natural justice recognized by the traditional English Law, i.e., Nemo debet esse judex in propria causa. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a*

position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making. The object is not merely that the scales be held even; it is also that they may not appear to be inclined. If the Judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

71. ..... A person having interest in the subject matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias.

In cases of non-pecuniary bias, the 'real likelihood' test has been preferred over the 'reasonable suspicion' test and the Courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries."

50. Mr.Sibal argued that in this case bias was manifest and it was not a question of mere likelihood of bias. This was, thus, a fit case for this Court to exercise its powers of judicial review and declare that the respondent MLAs stand disqualified in terms of Paragraph 2(1)(b) of the Tenth Schedule.

51. Referring to the decision in *Kihoto Hollohan*, supra, Mr.Sibal submitted that the scope of judicial review in respect of matters under the Tenth Schedule had to be confined to (i) infirmities based on violation of constitutional mandate; (ii) mala fides; (iii) non-compliance with rules of natural justice, and (iv) perversity. Mr.Sibal submitted that each of the aforesaid grounds were made out in this case.

52. Counsel appearing for the writ petitioners emphatically reiterated that where the Speaker had abstained from deciding a petition for disqualification, there was clear violation of the constitutional mandate under Paragraph (6) of the Tenth Schedule read with Paragraph (8) of the Tenth Schedule and the Disqualification Rules, which enjoin the Speaker to decide such petition.

53. Counsel submitted that the Speaker's complete failure to take action was perverse, as the Speaker sought to keep the disqualification proceedings pending so as to prevent any intervention by this Court. The Speaker also violated the principles of natural justice by evincing bias.

54. Mr.Amarendra Sharan cited *Mayawati v. Markandeya Chand and others, reported in (1998) 7 SCC 517*. In the said decision, the Supreme Court followed *Kihoto Hollohan*, supra, and held that Paragraph (6) of the Tenth Schedule does not completely exclude the jurisdiction of the Court under Article 226 of the Constitution of India. However, the scope of judicial scrutiny is limited to ascertaining whether the decision of the Speaker is vitiated by jurisdictional errors. The Supreme Court further held that the test of perversity was whether the decision of the Speaker was so unreasonable or

unconscionable that no Tribunal should have arrived at it on the given materials.

55. Mr.P.S.Raman, learned Senior Counsel appearing on behalf of the petitioners in W.P.Nos.27853 to 27856 of 2017 also took us through the facts, which are not reiterated to avoid prolixity, as the same have already been set out herein before.

56. Mr.Raman also argued that (i) the inaction of the Speaker in not taking up the disqualification petitions amounted to abdication of his constitutional duty; and (ii) the present case did not involve disputed questions of fact.

57. He submitted that in *Rajendra Singh Rana and others v. Swami Prasad Maurya, reported in (2007) 4 SCC 270*, the Supreme Court had directly gone into the facts of the case and declared certain MLAs as disqualified without referring the dispute back to the Speaker. The law laid down by the Constitution Bench in *Rajendra Singh Rana*, supra, rules the field. In view of the inaction of the Speaker, the only remedy left to an aggrieved person was to move this Court under Article 226 of the Constitution of India.

58. Mr.Raman argued that the right of every person, including the petitioners, to initiate proceedings under the Tenth Schedule had been recognized by the Supreme Court in the case of *the Speaker, Orissa Legislative Assembly v. Utkal Keshari Parida, reported in (2013) 11 SCC 794*.

59. Mr.Raman argued that a constitutional right mandatorily requires a constitutional remedy following the Roman maxim "*ubi jus ibi remedium*". In other words, wherever there is a right, a citizen cannot be denied a legal remedy.

60. Mr.Raman cited *Sardar Amarjit Singh Kalra v. Promod Gupta and others, reported in (2003) 3 SCC 272*, where the principle of *ubi jus ibi remedium* has been recognized as a basic principle of jurisprudence. The Supreme Court held that "*as far as possible, Courts must always aim to preserve and protect the rights of parties and extend help to enforce them rather than deny relief and thereby render the rights themselves otiose*".

61. Mr.Raman elaborated the argument of Mr.Sibal that the inaction of the Speaker in deciding the disqualification petition tantamounted to refusal to exercise jurisdiction, for which there was

no plausible explanation. He submitted that the pending dispute before the Election Commission was no reason. The Speaker had himself disqualified 18 MLAs by an order dated 18.9.2017, notwithstanding the freeze order passed by the Election Commission on 22.3.2017.

62. Mr.Raman also argued that the prevaricating stands taken by the contesting respondents needed to be deprecated with regard to issuance of whip and their voting against the whip.

63. The learned Advocate General appearing on behalf of the first respondent submitted that the original prayer in the writ petition was for a writ of mandamus directing the Speaker to forthwith initiate disqualification proceedings against the respondents 3 to 13, based on the allegation that the Speaker had abandoned his jurisdiction and acted in a malafide manner, had given up since similar question was pending before the Supreme Court.

64. The learned Advocate General submitted that while recording the submission of the concerned writ petitioners, in its order dated 01.12.2017, the Supreme Court had directed this Court not to consider the prayer for mandamus against the Speaker and to allow

the amendment sought by the concerned writ petitioners to the extent permissible in law. The amendment applications not having been decided, there was no other relief sought against the respondent No.1 or 2 that was pending decision in this matter.

65. Mr.C.S.Vaidyanathan, appearing on behalf of the respondents 3 to 12 submitted that the writ petitions were not maintainable, as the Speaker had not decided the disqualification application filed by the petitioners. In support of his submission, Mr.Vaidyanathan cited *G.S.Iqbal v. K.M.Khader and others, reported in (2009) 11 SCC 398,* where the Supreme Court held:

> *"28. The Speaker of the House, is accordingly, a competent authority to decide the question as to whether the member of a House has become subject to disqualification under the Tenth Schedule. The question relating to disqualification under the Tenth Schedule has to be decided by the Speaker and none else. The decision of the Speaker in this regard is final, however, subject to judicial review on the permissible grounds. ....."*

66. Mr.Vaidyanathan argued that the extent of judicial review that is permissible under the Tenth Schedule has been discussed by the Supreme Court in *Kihoto Hollohan v. Zchillhu and others,* supra,

where the Supreme Court held:

> *"110. In view of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings. Exception will, however, have to be made in respect of cases where disqualification or suspension is imposed during the pendency of the proceedings and such disqualification or suspension is likely to have grave, immediate and irreversible repercussions and consequence."*

67. Distinguishing the judgment of the Supreme Court in *Rajendra Singh Rana v. Swami Prasad Maurya, reported in (2007) 4 SCC 270,* on which the case of the petitioners is based, Mr.Vaidyanathan argued that the Speaker had in *Rajendra Singh Rana*, supra, taken a decision. Moreover, *Rajendra Singh Rana,* supra, was under Paragraph2(1)(a) of the Tenth Schedule, where a member elected under BSP had crossed over to SP and the tenure of the Assembly was also almost over.

68. Dealing with the allegation of the petitioners that the Speaker had abandoned his jurisdiction and had acted with malafides, Mr.Vaidyanathan submitted that both the allegations were unsubstantiated and baseless.

69. Mr.Vaidyanathan cited Speaker, *Haryana Vidhan Sabha v. Kuldeep Bishonoi and others, reported in (2015) 12 SCC 381,* where the Supreme Court set aside the directions of the High Court given while disqualification petition was pending before the Speaker.

70. Mr.Vaidyanathan also cited the judgment of a Division Bench of the Bombay High Court in *The Indian National Congress and others v. The State of Goa and others, reported in 2017 SCC Online (Bom) 8817,* where the Bombay High Court held that *"Courts cannot interfere in a proceeding under Tenth Schedule before the Speaker gives a decision."*

71. Mr.Vaidyanathan argued that the submission that the Speaker has to issue notice under the Assembly Defection Rules whenever a disqualification petition is filed before the Speaker is also misconceived. It is for the Speaker to decide whether notice can be

issued or not.

72. Mr.Vaidyanathan argued that merely because the Speaker had not issued notices on the disqualification application filed by the petitioners, but had decided the case of disqualification of 18 MLAs that was filed on 24.08.2016 by 18.09.2017, cannot lead to inference of malafides.

73. Mr.Vaidyanathan next submitted that there is no time limit prescribed in the Constitution for deciding a disqualification application. The issue of whether the Speaker is bound by a time limit is pending adjudication by a Constitution Bench of the Supreme Court.

74. Mr.Vaidyanathan argued that the case of disqualification of 18 MLAs stood on a totally different footing. The 18 MLAs had acted in a manner which was clearly calculated to put the Government in trouble and even the opposition party was involved. However, in this case, the petitioners have not been able to establish that a whip had been issued to the respondent MLAs.

75. In answer to the argument that this Court should invoke the principle *Ubi jus ibi remedium* i.e., whenever there is a wrong, there is

a remedy and disqualify the respondent MLAs since the Speaker had abdicated his powers and not acted, Mr.Vaidyanathan submitted that the petitioners have remedy before the Supreme Court, as the question of whether a mandamus might be issued to the Speaker is pending adjudication in the Supreme Court.

76. Both the learned Advocate General and Mr.Vaidyanathan challenged the locus standi of the petitioner in W.P.No.26017 of 2017 to file the writ petition on the ground that he had not filed any petition for disqualification of the concerned respondents, nor made any representation to the Speaker in this regard. Mr.Vaidyanathan argued that the writ petition is liable to be dismissed on this ground alone.

77. Mr.Vaidyanathan also argued that W.P.No.26017 of 2017 making sweeping allegations of malafides against the Speaker was only moved on 04.10.2017 after the decision of the Speaker in the case of 18 MLAs. This in itself evinces collusion between the writ petitioners, the 18 MLAs who were disqualified and the main opposition party.

78. Mr.Vaidyanathan submitted that the issues raised in these

writ petitions involve determination of hotly disputed questions of fact. The respondent MLAs have categorically denied the receipt of any whip or direction regarding voting on 18.02.2017. None of these respondents had signed the Memorandum supporting the Chief Minister, which was submitted to the Governor and were also not present at the meeting that elected the Chief Minister. Even in the writ petitions, the petitioners have not filed any whip or direction issued to them by the party in power.

79. In answer to the contention of the petitioners that the direction or whip need not be a formal order as held by the Supreme Court in *Kihoto Hollohan v. Zchillhu and others,* supra, Mr.Vaidyanathan submitted that it was the case of the petitioners before the Speaker that directions were issued in the form of a letter. The petitioners changed their stand only when it was pointed out that the letter had not been issued to the respondent MLAs.

80. Mr.Vaidyanathan emphatically argued that whether there was a whip issued to every party MLA; whether any whip was issued to the respondent MLAs; whether there were other issues involved were all questions of fact, which this Court cannot determine in exercise of jurisdiction under Article 226 of the Constitution of India.

81. Mr.Vaibhav, learned counsel appearing on behalf of one of the eleven respondent MLAs, Dr.R.Nataraj, argued that the original prayer in the writ petitions seeking a mandamus on the Speaker to disqualify the respondent MLAs had been referred to a Constitution Bench and was pending consideration before the Supreme Court. The prayer of the writ petitioners for amendment of the writ petition by incorporation of prayer seeking orders of this Court disqualifying the respondent MLAs in view of the judgment of the Supreme Court in *Rajendra Singh Rana,* supra, was misconceived.

82. Mr.Vaibhav submitted that there was no specific allegation against his client, Dr.R.Nataraj, in this writ petition or in the petition filed before the Speaker. He argued that Defection Laws are serious in nature and the Tenth Schedule provides for a detailed trial based enquiry with evidence and cross-examination, and empty general averments which are not specific cannot be the basis on which disqualification can be sought in writ proceedings.

83. Mr.Vaibhav argued that his client was democratically elected as an AIADMK MLA from the Mylapore Legislative Assembly Constituency in the 2016 election. He represents one of th emost

educated, vigilant and vibrant constituencies in the State, which has a great history and heritage.

84. Mr.Vaibhav submitted that since the people reposed their faith in him by giving him an opportunity to represent them, he has been working assiduously towards making Mylapore a model constituency.

85. Mr.Vaibhav further submitted that with a team of youngsters from his constituency, his client has ensured that representative democracy is given its true meaning. He has utilized his expertise in law and order, criminal investigating and police administration to suggest legislative changes in the field of criminal law and service law, including conducting constructive debates in the assembly on various matters.

86. Mr.Vaibhav argued that many independent news channels and other independent organizations have rated his client as a role model for effective, efficient and constructive electoral politics. His office addresses citizens' grievances, coordinates with other departments or agencies to sort out public issues and effectively represents the causes of the people to ensure that their voices,

including voices of dissent are heard in the assembly and raised as questions.

87. Mr.Vaibhav argued that AIADMK party was itself borne of constructive dissent and internal institutional democracy. Values such as internal democracy, constructive freedom of thought and lack of family rule are the most admirable traits of the AIADMK party.

88. Mr.Vaibhav submitted that his client, a retired Indian Police Service Officer from the 1975 batch, having served nearly four decades in Tamil Nadu as well as the Union of India, took a plunge into politics with a view to serve the public.

89. Referring to the doctrine of separation of powers propounded by Montesquieu, which has found place in the Indian Constitution, Mr.Vaibhav argued that the amended writ petition would tantamount to asking this Court to perform the role of the Speaker as opposed to exercise of its power of judicial review.

90. Emphasizing on mutual regard and respect for the discretionary powers of democratic institutions as the foundation of separation of powers, Mr.Vaibhav argued that taking over of functions

of the Speaker under the Tenth Schedule would open a pandora's box and the Courts would be flooded with litigation on the misplaced notion that the judiciary might perform functions of the Legislature and the Executive.

91. Mr.Vaibhav also argued that passing of orders as now prayed for by the petitioners would take away the right of his client to fair trial and an elaborate inquisitorial hearing before the Speaker, to which every MLA is entitled.

92. Mr.Vaibhav argued that the petitioners are abusing the process of this Court and trying to deprive his client of his right to equal treatment under the Tenth Schedule of a full-fledged free and fair trial and enquiry, including the right to adduce documentary evidence and to lead oral evidence and also conduct cross-examination.

93. Mr.Vaibhav finally argued that direction from AIADMK on his client, Dr.Nataraj, has neither been specifically averred, nor proved. The fact that there was no specific pleading as regards when, where, what time and from whom the so-called whip was issued to R.Nataraj leads to obvious conclusion that there was no direction on him. In any

case, these are disputed questions of fact.

94. In our view, the primary issue in this writ petition is whether this Court, restrained by the Supreme Court from taking up the prayer with regard to the issue of a mandamus to the Speaker to take appropriate action under the Tenth Schedule of the Constitution of India, can itself declare the 11 respondent MLAs as disqualified under Paragraph2(1)(b) of the Tenth Schedule and thereby do indirectly that which cannot be done directly. The answer to the aforesaid question has to be in the negative.

95. As recorded above, the Hon'ble Supreme Court has by its order dated 1.12.2017 restrained this Court from considering the prayer for issuance of a writ of mandamus to the Speaker to take action under the Tenth Schedule read with the Disqualification Rules.

96. Before the Supreme Court, the counsel appearing for the concerned writ petitioners gave an undertaking not to press the prayer for mandamus before this Court, but to amend prayers. The Supreme Court directed this Court to consider amendment of the prayer only to the extent as permissible in law.

97. First of all, for granting the relief now sought by the writ petitioners, of orders of this Court disqualifying the respondent MLAs, this Court would have to decide:

(i) if the respondent MLAs have voted or abstained from voting in the house;

(ii) whether they voted in favour or against the motion proposed by the Chief Minister;

(iii) whether there was any direction issued by the political party to the respondent MLAs to vote in any particular manner and if so, whether they voted contrary to such direction; and

(iv) whether the respondent MLAs voted without obtaining prior permission of the political party; and

(v) whether voting or abstention from voting had been condoned by the political party or not.

98. It is a matter of record that the respondent MLAs voted on 18.2.2017 against the motion proposed by the Chief Minister. The first two questions are established. However, the remaining questions, i.e., the question of whether there was any direction from the party on the respondent MLAs; whether the respondent MLAs voted without prior permission of the political party, and whether such voting had been condoned by the political party or not, are hotly disputed questions of

fact, which are not ordinarily decided on affidavits by the High Court exercising its extraordinary powers conferred under Article 226 of the Constitution of India.

99. Even assuming that there were contradictions in pleadings and/or affidavits filed in different proceedings, this Court would still be required to determine the factual questions in order to grant the relief now sought by the writ petitioners. Such determination might even require oral evidence which this Court does not take in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

100. An incorrect assertion in an affidavit may attract perjury punishable under Section 340 of the Code of Criminal Procedure. However, perjury cannot, in itself, be a ground for disqualification of the respondent MLAs, for which the conditions precedent as stipulated in Paragraph 2(1)(b) of the Tenth Schedule would have to exist.

101. As rightly argued by Mr.Vaidyanathan, disqualification of the respondent MLAs was sought on the ground that the respondents had defied the directions contained in a letter issued by the Chief Party Whip to all the MLAs. Whether such a letter was issued to all the MLAs and if so, whether the letter was at all received by the respondent

MLAs are disputed factual issues, which cannot be determined in these proceedings. This Court is unable to agree with Mr.Sibal's submission that this case requires no further factual enquiry.

102. To determine whether the respondent MLAs have rendered themselves liable to disqualification, the Court would also be required to decide whether there was any prior permission, express or implied, though it may reasonably be assumed that there was no prior permission as such, for it is obvious that no political party would give prior permission for casting a vote against the motion proposed by the Chief Minister elected by the political party.

103. Moreover, it would be necessary for this Court to decide whether the time stipulation of 15 days for condonation of voting contrary to any direction was mandatory or directory and whether voting contrary to a direction of the party was condonable after expiry of 15 days. On this aspect, no arguments have been advanced. If the time stipulation for condonation is only directory and not mandatory, the Court would have to consider whether there has been any condonation either express or implied.

104. In a writ petition filed under Article 226 of the Constitution

of India, the onus lies on the writ petitioner to substantiate his claim to the reliefs sought. The weakness of the defence cannot, in itself, be a ground for granting the reliefs claimed in a writ petition. It is only in exceptional cases where the attention of this Court is drawn to injustice and/or breach of rights of a large section of the people, that the Court embarks upon an inquisitorial process invoking the principle of *ubi jus ibi remedium,* i.e., wherever there is a wrong, there is a remedy.

105. There can be no dispute with the proposition of law laid down by the Supreme Court in *Kihoto Hollohan,* supra. The existence of the conditions stipulated in Paragraph 2(1)(b) of the Tenth Schedule attract disqualification. However, as held in *Kihoto Hollohan,* supra, itself that question has to be decided by the Speaker of the House in view of Paragraph (6) of the Tenth Schedule.

106. As held by the Supreme Court in *G.S.Iqbal v. K.M.Khader and others,* supra, cited by Mr.Vaidyanathan, it is the Speaker who is the competent party to decide the question of whether the Member of a House has become subject to disqualification under the Tenth Schedule.

107. Moreover, as held in *Kihoto Hollohan,* supra, *"having regard to the constitutional intendment and the status of the repository of the adjudicatory power i.e. Speaker/Chairman, judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a quia timet action would not be permissible. Nor would interference be permissible at an interlocutory stage of the proceedings."*

108. It is true, as argued by Mr.Vaidyanathan, that the Speaker is the authority under the Tenth Schedule read with the Disqualification Rules with discretion to decide on whether notice should be issued on an application for disqualification. However, it is well settled that an authority exercising discretionary powers cannot do so arbitrarily. If the facts and circumstances of a case warrant exercise of discretion in a particular manner, the discretion should be exercised in that manner. This proposition finds support from the judgment of the Supreme Court in *Sanchit Basal and another v. Joint Admission Board and others, reported in (2012) 1 SCC 157,* where the Supreme Court held:

> *"28. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the*

action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide."

109. It is now well settled that the finality of the decision of the Speaker is not immune from the scope of judicial review and the bar on jurisdiction of Courts imposed by Paragraph (7) of the Tenth Schedule does not apply to the jurisdiction of constitutional Courts of judicial review. The proposition finds support from the judgments of the Supreme Court referred to herein above and in particular, the judgments of the Supreme Court in *Kihoto Hollohan v. Zachillhu,* supra, and *Mahachandra Prasad Singh*, supra.

110. In this case, the Speaker has apparently not taken any decision on the disqualification petition. Assuming, as argued by the counsel appearing on behalf of the writ petitioners, that in not taking a decision the Speaker had abdicated his duties and functions under the Constitution of India read with the Disqualification Rules, the remedy

would lie by way of a writ of mandamus directing the Speaker to take a decision, which this Court cannot do by reason of the order passed by the Supreme Court on 1.12.2017 on the basis of the undertaking given by the concerned writ petitioners.

111. In any case, the fact that the Speaker acted in haste in disqualifying 18 MLAs, but did not even issue notice in respect of the respondent MLAs cannot in itself lead to the conclusion that the Speaker has acted mala fide and/or in a discriminatory manner. Whether the Speaker, in fact, acted mala fide and/or in a discriminatory manner would also depend on facts which are hotly disputed.

112. Even though it is nobody's case that the applicants who sought disqualification of the respondent MLAs did not have locus standi, it has to be remembered that there is one notable difference between the application for disqualification of the respondent MLAs and the 18 MLAs who have been disqualified, in that the application for disqualification of the 18 MLAs was filed by the Chief Party Whip and supported by the Chief Minister elected by the AIADMK party. The application for disqualification of the respondent MLAs has been filed by a few individual MLAs and is not supported either by the Party Whip

or the majority of the members of the AIADMK party in the Legislative Assembly. The involvement of the Party Whip or the Chief Minister elected by the party would be an important factor for determining whether the impugned action of an MLA has the approval or disapproval of the party.

113. This Court exercising jurisdiction under Article 226 of the Constitution of India does not exercise appellate powers. This Court would not interfere with any action or inaction, unless the reasons put forward were so unreasonable and arbitrary that no person properly instructed in law and acting fairly and judiciously could possibly have acted or not acted on the basis of such reasons.

114. Moreover, even though the power of a constitutional court exercising its extraordinary jurisdiction under Article 226 of the Constitution of judicial review of executive or legislative actions is wide, its powers are not unlimited. The Court cannot take over the functions of the Speaker of deciding a disqualification application by giving full opportunity of hearing to the MLAs sought to be disqualified. The judgment in *Rajendra Singh Rana*, supra, was rendered by the Supreme Court in the special facts and circumstances of the aforesaid case, as an exception to the general rule and in any case, there was

apparently a decision not to initiate disqualification proceedings. The judgment has no application in the facts and circumstances of this case.

115. This Court is also of the view that it might be inappropriate to decide questions, including the question of mala fides and/or bias, on the part of the Speaker, which would be issues in the proceedings pending before the Supreme Court on the question of whether mandamus to the Speaker should be issued.

116. On behalf of the Speaker, one of the reasons advanced for not taking action on the disqualification application against the respondent MLAs was the dispute with regard to symbol. This Court cannot exercise appellate powers to adjudicate the correctness of the decision.

117. We agree with Mr.Vaibhav's argument that separation of powers being an important feature of our Constitution, it would not be appropriate for this Court to take over the function of the Speaker.

118. In this case, there is no decision. May be, there is inaction. None of the authorities cited on behalf of the petitioners propound the

proposition that the High Court can in exercise of power under Article 226 of the Constitution of India to take over the duty of the Speaker and disqualify MLAs without a hearing as envisaged under the Tenth Schedule of the Constitution.

119. We are constrained to hold that even assuming that this Court might embark upon the exercise of taking over the functions of the Speaker in exceptional circumstances and even assuming that those circumstances exist, by seeking the relief of an order of this Court disqualifying the respondent MLAs, the petitioners are inviting this Court to do indirectly what it has been restrained by the Supreme Court from doing directly.

120. In view of the fact that the question of issuance of mandamus on the Speaker is pending consideration of the Supreme Court, it is difficult to conceive how this Court can disqualify the concerned MLAs and render the proceedings in the Supreme Court infructuous. Passing of such orders would only not amount to judicial overreach, it would also amount to gross breach of judicial discipline, if not contempt.

These writ petitions are, therefore, dismissed. No costs. Consequently, W.M.P.Nos.30494, 36857 to 36860 of 2017 are closed.

(I.B., CJ.) (A.Q., J.)

Index : Yes
Internet : Yes

Note to Registry:
Issue order copy today (27.4.2018)

bbr/sasi

To:

1 The Secretary
Tamil Nadu Legislative Assembly
Fort St. George,
Chennai 600 009.

THE HON'BLE CHIEF JUSTICE
AND
ABDUL QUDDHOSE.J

sasi

W.P.Nos.26017, 27853 to 27856 of 2017

27.04.2018

W.P.Nos.26017, 27853 to 27856
of 2017

Dated: 27th April, 2018

THE HON'BLE CHIEF JUSTICE
AND
ABDUL QUDDHOSE,J.

Mr.Shanmugasundaram, learned Senior Counsel seeks leave of this Court to appeal to the Supreme Court.

Considering the importance of the issues involved in the writ petitions, which need to be settled by the Hon'ble Supreme Court, such leave is granted.

(I.B., CJ.) (A.Q., J.)

sasi