

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. 1259-60 OF 2016

IN THE MATTER OF :

Shri Nabam Rabia & Anr. Etc. Etc.

.....Petitioners

Versus

The Deputy Speaker & Ors.

....Respondents

**BRIEF RESPONSE BY T.R. ANDHYARUJINA, SENIOR
ADVOCATE FOR THE GOVERNOR TO THE REJOINER
BY THE PETITIONER IN SLP (C) NO. 1259-60 OF 2016**

**I. THE DELIBERATE INSERTION OF UNDEFINED
GOVERNOR'S DISCRETION UNDER THE
CONSTITUTION**

Draft Article 143 corresponding to Article 163 of the Constitution, was the subject matter of debate in the Constituent Assembly. Various amendments were suggested to delete the items for exercising the discretion of the Governor in draft Article 143 but ultimately on 01.06.1949 these amendments were rejected and draft Article 143 with the words "*except insofar as he is by or under the Constitution required to exercise his functions or any of*

them in his discretion” were retained at the instance of Dr. Ambedkar. (See constituent Assembly Vol. VIII revised Edition @ p.502).

This has been noted in Framing India’s Constitution by B. Shivarao @ p.400-401. The Constituent Assembly deliberately avoided enumerating the situations in which the Governor could exercise his discretion when enacting draft Article 143 corresponding to Article 163. This has been noted also by CJ Sabharwal in the case of *Rameshwar Prasad vs. Union of India* 2006 (2) SCC 1 @ p.82.

Hence, it is clear that the Constitution purposely left the situations in which the Governor could exercise his discretion undefined. Starting with *Samsher Singh’s* case 1974(2) SCC 831 @ p.885 this Court has stated, without being exhaustive some situations in which the Governor can exercise his discretion. In subsequent decisions, this Court has stated that there may be situations whereby reasons of threat to democracy or democratic principles a discretionary action may be compelled by the Governor which from its nature is not amenable to ministerial advice. Such a situation may be whereby there is bias inherent or manifest in the advice of the Council of Ministers (See *MP Special Police Establishment vs. Madhya Pradesh* (2004) 8 SCC 788 @ p.798. In the *State of Punjab vs. Satya Pal Dang* (1969) 1 SCR 478 @ p.489 in para 12 his Court has stated that the function of

proroguing and summoning the Assembly by the Governor under Article 174 of the Constitution does not indicate any restrictions on this power and the power is untrammelled by the Constitution.

NB The proroguing summoning by the Governor was not on the aid and advice of the Chief Minister and the Government.

Hence the discretion of the Governor under Article 174(1) in this case to prepone the Legislative Assembly in the Special circumstances of this case cannot be considered unconstitutional. It is not the requirement of the exercise of discretion by the Governor under Article 363 or any other Article that the Governor must first ask the advice of the Chief Minister and then exercise his discretion. However, it is manifest from the protests by the Cabinet to the preponement in writing on 14.12.2015 as well as physically assaulting the Governor on 15.12.2015 by the Cabinet Minister that the Governor would never have been given on the aid and advice of the Chief Minister and therefore the Governor had to exercise his own discretion under Article 174 to prepone the Legislative Assembly.

II. THE CIRCUMSTANCES UNDER WHICH THE GOVERNOR EXERCISED HIS DISCRETION IN THIS CASE.

The discretion exercised by the Governor in preponing the Legislative Assembly from 14.01.2016 to 16.12.2015 was because

of the unique circumstances of the case. As stated in the Governor compilation, there were letters address on 11.10.2015 by 2 MLAs of the Congress party to the Governor and letter addressed on 10.11.2015 by 22 MLAs of the Congress party in which the complicity between the Chief Minister and the Speaker was clearly stated. The BJP by its letter of 10.10.2015 to the Governor also stated that the Speaker would be complying with the Chief Minister's directions to accept resignations and unseating the Members. When the notice was given for moving a resolution to remove the Speaker on 19.11.2015 by 13 MLAs the Governor felt obliged to prepone the Legislative Assembly from 14.01.2016 to 16.12.2015 as during this period of 42 days from the maturity of the notice the Speaker with his complicity with the Chief Minister would exercise his powers under Schedule X to disqualify the rebel Congress MLAs. He, therefore, directed the preponement of the Legislative Assembly to consider the resolution for the removal of the Speaker as 1st item by his order or 09.12.2015.

The Governor's apprehension that the Speaker would utilize his powers under Schedule X was justified as the Speaker by an exparte order on 15.12.2015 disqualified at one shot 14 MLAs of the Congress party who were dissenting MLAs thereby securing for the Congress Legislative party a majority in the same time ensuring that the resolution against him would not be passed by a majority. It is in these unique circumstances that the Governor exercised his discretion to prepone the Legislative Assembly.

III. RULES FOR LEGISLATIVE ASSEMBLY CANNOT FETTER THE CONSTITUTIONAL DISCRETION OF THE GOVERNOR.

It has been alleged that Assembly Rules made under Article 166(3) of the Constitution and Article 208 of the Constitution do not give the discretion to the Governor to summon Legislative Assembly. Reference is made to Rule 33 (p) made under Article 166(3) which states that the summoning, prorogation and the desolution of the State Assembly shall be submitted by the Secretary of the Department concerned with the approval of his Minister and the Chief Minister to the Governor before issue of the orders. It has to be noted that under Article 166(3) of the Constitution the rules made by the Governor for the convenient of the transaction of business of the Government etc. are “only so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion”. Hence no rule made under Article 166 (3) can fetter the discretion of the Governor to act by or under the Constitution.

Rule 3 made under Article 208 of the Constitution states that Chief Minister shall in consultation with the Speaker's advice the Governor for summoning the Assembly under Article 174 of the Constitution. Under Article 208 of the Constitution under which these rules are made a House of Legislature may make rules for regulations subject to the provisions of the Constitution, its

procedure and conduct of business. Hence no rule made Article 208 can fetter the discretion conferred on the Governor by and under the Constitution.

IV. MESSAGE SENT BY THE GOVERNOR

As regards the message sent by Governor on 09.12.2015 under Article 175(2) of the Constitution it is contended that the Governor could not send the message. It is submitted that it is totally incorrect that the Governor has no power to send a message under Article 175 (2). Article 175(2) states that the Governor can send a message with respect to a Bill when pending in the legislature. As regards the message for a Bill pending in the legislature the proviso to Article 200 makes it clear that message in respect of a pending bill in Article 175(2) is not contemplated as proviso under Article 200 refers to the message which the Governor sends to the Legislative Assembly only after the Bill has been passed and has been sent to his assent. Hence, there is a general provision for the Governor having a right to send the message in respect of Bill which is pending in the legislature.

Apart from message in respect of pending Bill the Governor even has the power to send a message “otherwise”. Hence the Governor has discretion to send a message to the Legislative Assembly if he deems fit. As a matter of fact, the Governor by his message in the present case has stated only the requirement of an

urgent consideration of the resolution for the removal of the Speaker. He has added that until the session was prorogued there should be no change in the composition of the House which was necessary to ensure that the Speaker did not disqualify MLAs and thereby ensure majority to the Government and also a majority in his own favour in the resolution to remove him. The Governor's power to send a message under Article 175(2) was noted in *State of Punjab vs. Satya Pal Dang* reported in 1969 (1) SCC 478 para 4.

V. BAR TO CONSIDER THE VALIDITY OF THE GOVERNOR'S DISCRETION OF ARTICLE 163(2).

There is no answer to the bar imposed by Article 163 (2) to considering his validity of the discretion exercised by the Governor on 09.12.2015 in summoning his Legislative Assembly under Article 174.

The bar can only be ignored if the discretion exercised by the Governor is patently unrelated to any function by or under the Constitution.

The cases applying the bar have been cited viz. AIR 1999 Bom. 53 paras 43 to 46, 1968 72 CW 328 at 346 para 44 and Constitutional Law of India by H.M. Seervai 4 Ad. P. 2070 para 1878.

Note on appointment of Shri Kalikho Pul as Chief Minister

The Governor has appointed Shri Kalikho Pul as the Chief Minister on 19.02.2016 after the Proclamation was revoked on 19.02.2016. The Governor exercised his discretion to appoint Shri Kalikho Pul as the Chief Minister as the previous Chief Minister Shri Nabam Tuki had lost the confidence by the Composite Floor Test motion moved by Shri Tamiyo Taga, Leader of Opposition on 17.12.2015 and a further resolution was passed by which Shri Kalikho Pul, MLA was chosen as the new Leader of the House (See the additional compilation given by the Governor @ p.43).

The total number of votes in the Composite Floor Test motion against the Council of Ministers headed by Shri Nabam Tuki was as many as 33 out of the total strength of 60 MLAs.

Hence the Governor's discretion was rightly exercised under Article 164 of the Constitution to appoint Shri Kalikho Pul as Chief Minister. There was no scope for appointing Shri Nabam Tuki as the Chief Minister.

There was no presence of the Chief Minister and his MLAs at the Legislative Assembly on 16.12.2015. In fact the Chief Minister and his MLAs had locked up the Legislative Assembly premises and had declared on 14.12.2015 that the Governor could not have preponed the Legislative Assembly. (See Chief Minister's

message on 14.12.2015). Hence there was, in any case, no strength of the Chief Minister and his MLAs whatsoever in the Legislative Assembly meeting on 16.12.2015.

The disqualification Order of 14 MLAs by the Speaker Shri Nabam Rebia on 15.12.2015 was quashed by the Deputy Speaker Shri T.N. Tongdok by his order on 15.12.2015. (See SLP No. 779 of 2016 @ p.56). The disqualification was also set aside by the Legislative Assembly on 16.12.2016.

In any event, the Gauhati High Court held by its orders of 5th and 7th January, 2016 stayed the operation of the Speaker's orders of disqualification of 15.12.2016. Hence the presence of the 14 MLAs who were purported to be disqualified in the Legislative Assembly on 16.12.2015 was not wrong.

In these circumstances, the basic question is whether the Governor's discretion to prepone the Legislative Assembly from 14.01.2016 to 16.12.2015 to consider the removal of the Speaker was correct. If it was correct then the proceedings of the Legislative Assembly of 16th and 17th December, 2015 were valid.

It is to be noted that immediately after the vote of no confidence on the 17.12.2015 the Single Judge passed an order on 17.12.2015 by the Gauhati High Court which was vacated on the 13.01.2016. Hence between 17.12.2015 and 13.01.2016 the

Governor could take no further steps. However, he did report to the President of the developments by his special report on 17.12.2015 and stated that it was immediately necessary to take special procedures including Article 356 of the Constitution. (See p.198 of Reply and Writ Petition No. 53 of 2016).

On 15.01.2016, the Governor made a report on the failure on Constitutional machinery to the President and called for the imposition of the President's Rule on account of the law and order situation. (See p. 311 of the above reply). On 26.01.2016, the President issued a proclamation on failure of Constitutional machinery.

Hence, the basic question is whether the Governor was justified in preponing the Legislative Assembly on 16.12.2015 at which resolutions have passed of want of confidence in the Chief Minister Shri Nabam Tuki.

The Governor's Discretion under the Constitution

Brief Submissions by Mr. T.R. Andhyarujina, Sr. Counsel for the Governor, Arunachal Pradesh (Respondent No. 16)

The Governor of Arunachal Pradesh by his Order of 09.12.2015 exercised his discretion under Article 174 to summon the Legislative Assembly of Arunachal Pradesh on 16.12.2015 instead of 14.01.2016 to consider urgently a resolution moved by 13 MLAs dated 19.12.2015 for the removal of the Speaker Shri Nabam Rabia from his office under Article 179(c).

In his Order of 09.12.2015 preponing the Legislative Assembly the Governor stated that if the Assembly had to wait for 42 days for reconvening it would be unduly long and unreasonable. (See I.A. 30 of 2016 – Annexure IX). Simultaneously, the Governor sent a message under Article 175(2) stating that the resolution for the removal of the Speaker shall be the first item on the Agenda of the House at the first seating of the next session and in view of the Article 181(1) of the Constitution, he stated that the Deputy Speaker would preside. He further stated that “Until the session is prorogued Presiding Officer shall not alter the party composition of the House”.

The Governor exercised his discretion to prepone the Legislative Assembly and to direct that the removal of the Speaker should be first item of business at the first seating and sent a message not to alter the party composition of the House because he was apprised of the fact that in the acrimonious turmoil caused by the dissention of 21 MLAs of the Congress party the Speaker had acted in a partisan war to favour the Congress Legislative party to prevent it from becoming a minority.

The Governor had received letters from two out of 17 MLAs of the Congress party on 11.10.2015 whose resignations had been accepted by the Speaker. The Speaker had discarding all propriety, participated in a dinner held by the Chief Minister on 16.09.2015 at which 17 resignations of the dissenting Congress MLAs had been collected by the Chief Minister and given to the Speaker. (Compilation of the Governor, pages 14 to 21). The two MLAs in their letter to the Governor of 11.10.2015 specifically alleged complicity by the Speaker with the Chief Minister stating that “these disgracing undemocratic and unethical actions has brought disgrace to the benign office of the Chief Minister and the Speaker as their conduct are completely unbecoming of the office of the Chief Minister and the Speaker”. The two MLAs further stated that the Governor should look into the issue seriously to unearth the unholy nexus between the Chief Minister and the Speaker.

The 22 dissenting MLAs of the Congress party also wrote a letter on 11.10.2015 complaining of the complicity of the Chief Minister and the Speaker. They stated that the Speaker was “playing hand-in-glove with the Chief Minister” and partnering in the conspiracy to accept the resignations of the dissenting MLAs (Annexure A-2 of the Compilation given by Governor at pages 22 to 29).

Further the Leader of Opposition also wrote a letter on 10.10.2015 to the Governor in which he stated that the Speaker was a party to accept the resignations of the dissenting Congress MLAs at once and notifications would be issued unseating the Members and requested the Governor to make an inquiry. (Additional Compilation of the Governor, p.102)

There was, therefore, sufficient material for the Governor to believe that the Speaker would act to favour the Congress Legislative party so that it would not lose its majority in the Assembly. It was a legitimate apprehension of the Governor that the Speaker who was facing a resolution for his removal could exercise his powers under Schedule X to disqualify the dissenting Congress MLAs and thereby create a situation whereby a majority would be created against the resolution for his removal and at the same time create a majority for the Congress legislative party which it had lost by the dissention of 22 MLAs. It was for this

reason that he stated in his message under Article 175 (2) of the Constitution that the Presiding Officer shall not alter the party composition in the House.

The apprehension of the Governor that the Speaker would act in this way to favour the Congress party which was in a minority turned out to be justified as on 15.12.2015 a day preceding the sessions of the Legislative Assembly on 16.12.2015, the Speaker acting under Schedule X disqualified 14 MLAs of the dissenting Congress party thereby reducing the strength of the Legislative Assembly from 60 to 46 and securing a majority for the Congress Legislative party. (See Compilation of Respondent No. 16 the Governor, p. 30-42).

The Governor therefore had good grounds to exercise his discretion in this manner in view of the facts and circumstances of the case in which the complicity of the Speaker with the Chief Minister and the Congress party was evident.

Under the Constitution the Governor has an undefined discretion to act without the aid and advice of the Government. This is well-settled law as stated in *Samsher Singh's case* 1974(2) SCC 831 at p. 885, *MP Special Police Establishment vs. Madhya Pradesh* (2004) 8 SCC 788 @ p. 798, *State of Gujarat vs. R.A. Mehta* (2013) 3 SCC 1 @ p. 30-31 and *State of Maharashtra vs. Ramdas Nayak* 1982 (2) SCC 463, para 10.

Specifically in the *State of Punjab vs. Satya Pal Dang* (1969) 1 SCR 478 @ p.489 in para 12 this Court has stated that the Governor's power to prorogue the Assembly under Article 174 (2) of the Constitution does not have any restrictions and is untrammelled. (A note on the Governor's discretion under the Constitution has been given separately. See Compilation on behalf of the Governor @ p.8).

Bar against the validity of Governor's discretion

As there were sufficient grounds for exercising the discretion of the Governor preponing the Assembly and considering the removal of the Speaker as the first item on 16.12.2015 the validity of the exercise of the discretion cannot be challenged in view of the bar of Article 163(2) of the Constitution which forbids the questioning of the validity of anything done by the Governor in exercise of his discretion. It is submitted that as there was a good ground for the Governor to exercise his discretion to prepone the Legislative Assembly to consider the removal of the Speaker, Article 163(2) would operate and the Governor's discretion cannot be called in question.

The Governor was not exercising any judicial or quasi-judicial function in preponing the Legislative Assembly. He was exercising his discretion which is a pure administrative action and

hence there is no scope for alleging that Governor acted in any arbitrary manner in exercise of any judicial or quasi-judicial function which would justify a judicial intervention.

The relevant case law relating to the Governor's exercise of discretion is given in the notes given in the Compilation of the Governor.

**The background for the Governor's Order of 09.12.2015
for preponing the Legislative Assembly
from 14.01.2016 to 16.12.2015**

When the Legislative Assembly was assembled in 2014, the composition of the Members of Legislative Assembly was as follows : -

Total MLAs	=	60
Congress MLAs	=	47
BJP MLAs	=	11
Independent MLAs	=	02
Total	=	60

The last session of the Legislative Assembly was on 21.07.2015. By an order of 03.11.2015 the Assembly was to convene on 14.01.2016.

There was political turmoil in Arunachal Pradesh since March-April, 2015 and became worse in about September, 2015 when a group of 21 MLAs belonging to the Indian National Congress party clamoured for change of guard and the removal of the Chief Minister Mr. Nabam Tuki. The 21 MLAs had camped in Delhi for the last three months to press for their demands. They refused to attend three meetings of the Congress Legislative party of Arunachal Pradesh.

On 14.09.2015, 17 dissenting Congress MLAs were invited to attend informal dinner hosted by the Chief Minister at his official bungalow. The Chief Minister obtained the resignation letter signed by 17 Congress MLAs in stereotype and identical copies. At the said meeting the Speaker was also present.

The Speaker accepted the resignations of 2 dissenting Congress MLAs Mr. Gabriel Denwang and Mr. Wanglam Sawin and issued a notification dated 01.10.2015 accepting the resignation. As a result these 2 seats became vacant under Article 190 of the Constitution.

On 11.10.2015, the said 2 MLAs whose resignations were purported to be accepted addressed a letter to the Governor complaining of the illegal acceptance of the resignation letters by the Speaker. A copy of this letter dated 11.10.2015 is annexed in the compilation.

The said 2 MLAs moved the High Court in a writ petition against the said resignation. The High Court issued an order for stay on the resignations on 07.10.2015. The writ petition was, however, dismissed on 12.01.2016. Against the said dismissal the 2 MLAs have filed SLP in this Court which is pending.

On 11.10.2015, 21 dissident MLAs of Congress party wrote to the Governor that the CM Nabam Tuki had lost confidence of

the legislature because of his autocratic conduct and that the CM was running a minority government and had lost confidence and goodwill of majority of his legislators. (See Compilation). With the dissent of 21 MLAs the Congress legislative party would be reduced to a minority of 26 MLAs.

On 19.11.2015, 11 BJP MLAs and 2 Independent MLAs gave a notice for the removal of the Speaker Mr. Nabam Rebia under Article 179 of the Constitution. The 14 days notice required under Article 179 expired on 04.12.2015 (I.A. 30 of 2015 at p.112).

The 13 MLAs also addressed another letter on 19.11.2015 to the Governor praying to rescind the summons issued for the House on 03.11.2015 to meet on 14.01.2016 and to reissue a summon for the House to meet at an emergent date so that the resolution for removal of the Speaker may be considered the earliest (I.A. 30 of 2015 at p.28).

On 07.12.2015 the Chief Whip of the Congress Legislative party petitioned the Speaker under Article 191 (2) and the X Schedule of the Constitution to disqualify 14 MLAs of the Congress Legislative party for having given up their membership of the Congress Legislative party in terms of the X Schedule and were subject to disqualification and to declare their seats vacant (I.A. 30 of 2015 at p.117).

On 09.12.2015, the Governor exercising his discretion under Article 174 of the Constitution preponed the Arunachal Pradesh Legislative Assembly from 14.01.2016 to 16.12.2015 to enable the Assembly to consider the notice for the removal of the Speaker.

The Governor by his order of 09.12.2015 considered it a Constitutional obligation on his part to ensure that the resolution for the removal of the Speaker of 19.11.2015 should be expeditiously placed before the Legislative Assembly to urgently consider the removal of the Speaker as the time gap for the hearing of convening of the Legislative Assembly would be as much as 42 days. This was too long and unreasonable and would cause damage to the Constitution. Hence in exercise of his discretion Governor directed that the Arunachal Pradesh Legislative Assembly should meet on 16.12.2015 instead of 42 days later on 14.01.2016 (I.A. 30 of 2015 at p.39).

Simultaneously, on 09.12.2015 the Governor sent a message under Article 175(2) of the Constitution that the removal of the Speaker would be the first item on the Agenda of the House on 16.12.2015 and as there was a resolution for the removal of the Speaker, the Deputy Speaker would preside over the House. He further stated until the session was prorogued no presiding officer shall alter the party composition in the House (I.A. 30 of 2015 at p.42).

It was evident from these facts and circumstances of the case that an order for preponing the Legislative Assembly to remove the Speaker would not have been approved by the Government. This was very clear by the Cabinet decision on 14.12.2015 which disapproved the preponing of the Assembly and requested Governor to recall his Order of 09.12.2015 (I.A. 30 of 2015 at p.42). On 15.12.2015 at a meeting at the Governor's House the Chief Minister and his Cabinet colleagues protested to the Governor against the preponing. Two Ministers started abusing the Governor. There was even an attempt to assault the Governor to withdraw the order of the 09.12.2015.

On 16.12.2015 access to the Legislative Assembly building was prevented and the Assembly premises were locked.

Despite the objection of the Government to the preponing of the Assembly to the 16.12.2015 by the Governor's order of 09.12.2015 no action was taken in a court of law against the action of the Governor for issuing the order of 09.12.2015 which the Cabinet declared was illegal until 17.12.2015 when the Speaker filed the writ petition in the High Court.

From the aforesaid facts, the Governor felt that it was necessary to take action in his discretion to prepone the hearing of the Legislative Assembly from 14.01.2016 to 16.12.2015 as in the 42 days between 04.01.2016 to 14.01.2016 the Speaker would have been utilized to disqualify the dissenting Congress MLAs

under the X Schedule of the Constitution when there was in fact a motion for his removal.

In fact the Speaker by an ex parte order of 15.12.2015 disqualified 14 Congress MLAs (annexed SLP 779 of 2016 at p.43). With the disqualification of 14 MLAs the strength of the House would be reduced to 46 from 60 and the Congress party would have a majority of 33 MLAs.

In this background the Governor rightly exercised his discretion under Article 174 of the Constitution to order the preponement of the Legislative Assembly to avoid any attempt with the help of the Speaker to disqualify the dissenting Congress MLAs.

Discretion of the Governor

The Constitution recognizes that the Governor can act in his discretion by or under the Constitution. In such situations the Governor does not act on the aid and advice of the Council of Ministers.

Certain Articles clearly indicate the exercise of the discretion by the Governor i.e. Article 200 that the Governor exercises his discretion in reserving the Bill passed by the Legislative Assembly for consideration by the President; Article 356 of the Constitution which authorizes the Governor to report to the President on the failure of the Constitutional machinery in the State.

There are other powers which the Governor can exercise independent of the Council of Minister, namely, powers of the Governor under para 9 of the 6th Schedule; functions of the Governor appointed to be an administrator of the Union Territory under Article 239(2); functions under Article 371(2), 371A(1)(b); 371C(1), 371F (g).

There are other situations in which Governor's discretion is evident, namely, selection of the Chief Minister after election (Article 164); order to obtain Vote on Confidence where it is apparent that the Government has lost its majority. In *Samsher Singh's case* 1974(2) SCC 831 at p. 885 para 154, the Court

referred to obvious situations for the Governor's discretion, the choice of the Chief Minister and the dismissal of a government which has lost its majority for the House and the dissolution of the House where an appeal to the country is necessary. In *MP Special Police Establishment vs. Madhya Pradesh* (2004) 8 SCC 788 @ p. 798 the Court has held that the mere stating of certain articles where Governor would act in his discretion is not exhaustive of the Governor's power to act on his discretion. This Court held that : -

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

Likewise in *State of Gujarat vs. R.A. Mehta* (2013) 3 SCC 1 @ p. 30-31, the Supreme Court has stated that:-

"Article 163(2) of the Constitution provides that it would be permissible for the governor to act without ministerial advice in certain other situations, depending upon the circumstances therein, even though they may not specifically be mentioned in the Constitution as discretionary functions e.g. the exercise of power under Article 356(1), as no such advice will be available from the Council of Ministers, who are responsible for the breakdown of constitutional machinery, or where on Ministry has resigned, and the other alternative Ministry cannot be formed. Moreover, clause (2) of Article 163 provides that the Governor himself is the final authority to decide upon the issue of whether he is required by or under the Constitution, to act in his discretion. The Council of Ministers, therefore, would be rendered incompetent in the event of there being a difference of opinion with respect to such a question, and such a decision taken by the Governor would not be justiciable in any court. There may also be circumstances where there are matters

with respect to which the Constitution does not specifically require the Governor to act in his discretion but the Governor, despite this, may be fully justified to act so e.g. the Council of Ministers may advise the Governor to dissolve a House, which may be detrimental to the interests of the nation. In such circumstances, the Governor would be justified in refusing to accept the advice rendered to him and act in his discretion. There may even be circumstances where ministerial advice is not available at all i.e. the decision regarding the choice of Chief Minister under Article 164(1) which involves choosing a Chief Minister after a fresh election, or in the event of the death or resignation of the Chief Minister, or dismissal of the Chief Minister who loses majority in the House and yet refuses to resign or agree to dissolution”.

Article 174 of the Constitution itself indicates that the Governor can summon the House at such time and place as he thinks fit. Sub-Article 2 of the Article 174 gives the power to Governor to prorogue the House and to dissolve the Legislative Assembly.

In *State of Punjab vs. Satya Pal Dang* (1969) 1 SCR 478 @ p.488, this Court stated that the power to prorogue the Assembly by the Governor under Article 174(2) of the Constitution does not indicate any restrictions on this power and held that the power is untrammelled by the Constitution.

Hence, the power under Article 174(1) of the Constitution conferred on the Governor to summon the Legislative Assembly is also a matter within his discretion in a certain circumstances and he is not bound to act on the aid and advice of the Council of

Ministers in exercising his discretion in certain circumstances under Article 174.

Summoning the Legislative Assembly is part of the discretion referred to in Article 163(1) of the Constitution where the Governor can act without the aid and advice of the Council of Ministers and under Article 163(2), the Governor's decision is final and cannot be questioned.

Hence the Governor acted within the discretion conferred on him by the Constitution in preponing the Legislative Assembly from 14.01.2016 to 16.12.2015.

Can the exercise of discretion by the Governor be challenged

Article 163(2) gives finality to the decision of the Governor exercised in his discretion. It further states that the validity of anything done by the Governor in his discretion shall not be called in question on the ground that he ought not to have acted in his discretion.

Such a wide exclusion of any challenge to a decision by an authority is unique in the Constitution. It was retained by the Constitution makers from the Section 50(3) of the Government India Act, 1935 after debate over its retention in the Constitution Assembly.

Judicial review is a part of the basic structure of the Constitution as held in *Kesavanand Bharati vs. State of Kerala* (1973) 4 SCC 225 which cannot be amended by Parliament under Article 368. But Article 163(2) is part of the original Constitution itself and there is therefore no question of it being destructive of the judicial review under the Constitution.

The applicability of Section 163(2) to the discretion of the Governor has been considered to preclude any judicial review of the discretion of the Governor. (*AIR 1999 Bombay 53 paras 42A to 46, Mahabir Prasad Sharma vs. Prafulla Chandra Ghose & Ors.*

(1968) 72 CWN 328 at 346 para 44, *Constitutional Law of India* by H.M. Seervai 4th Edn. P.2070, para 1878).

It is, therefore, submitted that even if the exercise of the discretion by the Governor to prepone the Assembly is considered to be wrong and called in question for any reason it is final and it is not permissible to declare that the Governor should not have acted in his discretion.

The alleged suppression of the notice for the removal of the Deputy Speaker : -

1. In the writ petition no. 7445 of 2015 and in the writ petition no. 7998 of 2015 (p.89), the Petitioners only mentioned that a notice for the resolution for the withdrawal of the Deputy Speaker was made without mentioning any date and without annexing the said notice of resolution (p.8, Vol. 11). The High Court in its initial judgement of Justice Roy (p.142 at para 21) considered this and held it against the Governor. In response to this ex parte judgement, the Governor by I.A. 30 of 2016 specifically stated that the notice for the removal for the Deputy Speaker that there was a rumour for the removal of the Deputy Speaker [p.12(f)]. But he referred to all the documents which his office has sent to the Assembly Secretary asking for the information regarding resolution for the removal of the Deputy Speaker. No such information was given (see Annexure 5 p. 135 and Annexure 8 p. 38, I.A. 30 of 2016).

2. Thereupon the Governor filed an I.A. No. 30 of 2016 in which he stated that there was only a rumour for the resolution against the Deputy Speaker and he annexed letters from his Secretary to the Legislative Assembly asking for the copy of the notice for removal of the Deputy Speaker. This was not granted (see Annexure 8 p. 38).

3. There was no rejoinder by the Petitioners to the I.A. No. 30 of 2016 of the Governor.

4. There was I.A. by the Congress legislatures MLAs who are respondent no. 1,2,3, 6 to 15 in which they reiterated what the Governor stated.

5. In response to the I.A. of the Congress MLAs the Petitioners filed a rejoinder in which they annexed Annexure RA-1 alleged to be notice of the resolution for the removal of the Deputy Speaker dated 16.12.2015 (Vol. 11, RA-1, p.8) annexing the copy of the notice for the removal of the Deputy Speaker on two grounds by several MLAs. They also annexed a letter from the Legislative Assembly Secretary to the Governor stating the date of receipt of the notice against the Deputy Speaker (RA-2, p. 16). Significantly no copy of the resolution was sent to the Governor Secretariat. This letter of 08.12.2015 would be a rejoinder had different stamp from the letter now shown in the file in Court.

The judgement of Justice Sharma has not referred to these annexures in the rejoinder obviously because they are unreliable. In the result it is submitted that on disputed question of fact in a writ petition the court cannot go into evidence to establish alleged allegation.

The Governor exercise his discretion to prepone the Legislative Assembly to the 16.12.2015 with the first item for the removal of the Speaker as per the notice issued by 13 MLAs on 19.11.2015 because he apprehended that the Speaker could have been use of to disqualify some of the 21 MLAs of the dissenting faction of the Congress party and thereby enable Speaker to obtain a majority. The Governor had a legitimate apprehension about the Speaker being partisan as the dissenting MLAs had stated in their letter of 11.10.2015 that the Speaker was playing hand-in-glove with the Chief Minister andin the conspiracy (p.25). Two MLAs whose resignations was accepted out of the 17 resignations by the Speaker also stated that the Chief Minister and the Speaker were in conspiracy (see 2 MLAs letter of 11.10.2015 @ p. 16). In addition to this of the 10.10.2015, the BJP Leaders of Opposition had written to the Governor also complaining of the conspiracy between the Chief Minister and the Speaker to accept the resignations of those MLAs who have been called to the dinner party on 16.09.2015. He requested the Governor to hold an inquiry into this event. In this background the Governor had a legitimate apprehension that the Speaker would utilize his office under X Schedule to disqualify the rebel members of the Congress party and therefore it was most essential that the resolution removing him urgently passed otherwise until the 14.01.2016 there would be no action against the Speaker.