

**CHIEF JUSTICE'S COURT**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MR. JUSTICE SURYA KANT**  
**HON'BLE MR. JUSTICE VIKRAM NATH**  
**HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA**  
**HON'BLE MR. JUSTICE ATUL S. CHANDURKAR**

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

**SPL.REF. No. 1/2025 XVII-A**

**IN RE: ASSENT, WITHHOLDING OR RESERVATION OF BILLS BY THE**  
**GOVERNOR AND THE PRESIDENT OF INDIA**

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TRANSCRIPT OF HEARING

20-August-2025  
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**Document Control**

|                                 |   |
|---------------------------------|---|
| <b>Document Name &amp; Date</b> | Transcript of Court No.1 Hearing dated 20.08.2025 |
| <b>Status</b>                   | Released  |
| <b>Version</b>                  | 1.0   |
| <b>Last Update</b>              | 20.08.2025  |
| <b>Nature of Update</b>         | Original version                                  |
| <b>Release Date</b>             | 20.08.2025  |
| <b>Document Owner</b>           | Supreme Court of India                            |

**10:30 AM IST**

**TUSHAR MEHTA:** My Lords, one copy of the written submissions I'm told could not come here, My Lords. That doesn't matter My Lord, it is getting printed. I would be able to place it for Your Lordships' perusal, in 15 minutes, My Lord. We just came to know 5 minutes back, otherwise I would have kept My Lord. In the meanwhile, we have the digital copies, My Lord.

**JUSTICE SURYA KANT:** You can continue, and we will note down the points.

**TUSHAR MEHTA:** Kindly, My Lord, give me only 15 minutes.

**CHIEF JUSTICE B. R. GAVAI:** Justice Narasimha and Justice Vikram Nath, they don't require physical copies.

**JUSTICE VIKRAM NATH:** Article 111 now?

**TUSHAR MEHTA:** 155.

**JUSTICE VIKRAM NATH:** 155?

**TUSHAR MEHTA:** I have completed 111. I have completed 74. My Lords would find it at page 128. My Lord, this is appointment of the Governor and this would... I am sorry, but this would have tremendous bearing for Your Lordship's consideration because My Lord the concept which is going on... What is the significance and sanctity attached to the office of the Governor? My Lord that we come to know from the Constituent Assembly debates. It's not an asylum for retired politicians as My Lord as we understand. It has its own sanctity and My Lord the Framers of the Constitution have debated on it, that why we need Governor? Why we need Governors with the powers which we are going to confer upon it, and in the federalism which we have adopted, as against My Lord absolute federalism in United States, where each state or province has its own Constitution has its own Supreme Court, has its own way of governance. We have not adopted that.

**CHIEF JUSTICE B. R. GAVAI:** Dual citizenship.

**TUSHAR MEHTA:** The dual citizenship. They have examined that centre will have to play a role in the governance of the provinces, which is now States, and that is how the position of Governor is conceived. My Lord, please have a look at page 128. My Lord Section 46 is the *pari materia* provision, or My Lord, if I may say, the precursor to the present 155, where the Governors were appointed. My Lord page 120 at bottom, Government of Bengal, Madras and

Bombay. "The presidencies of Fort William in Bengal, Fort St. George in Bombay are subject to the provisions of this Act, governed by the Governors in Council of those presidencies respectively, and the two former presidencies are in this Act referred to as the Presidencies of Bengal and Madras."

Then My Lord comes 35 Act. Initially, the idea was that the Governor should also be an elected person, so that he also wields the same democratic sanctity and which is rejected by the Framers of the Constitution. I'll show that, My Lord, Section 48. My Lord 1935 Act, again My Lord the Colonial Era Act. "The Governor of a province is appointed by his Majesty by a commission under the royal sign manual. The provisions of the third schedule..." not relevant. Now Draft Constitution My Lord, which was prepared by Mr. Rau, "The Governor of a province, shall be elected by direct vote of all persons who have the right to vote at a general election for the Legislative Assembly of the province." My Lord, Dr. Rau introduced the concept of Governor being an elected person. Then the Drafting Committee chaired by Dr. Ambedkarji made this again My Lord provided for election. "The Governor of a state shall be elected by direct vote of all persons who have the right to vote at a general election for the Legislative Assembly in the State." So his election would be confined to that particular state.

Then My Lord the Drafting Committee gives a second option for consideration as alternative is given. That is, My Lord, this: "The Governor of the State shall be appointed by the President by warrant, under his hand and seal from a panel of four candidates to be elected by the members of Legislative Assembly of the State, or where there is a Legislative Council in the State by all the members of Legislative Assembly and of the Legislative Council of the State assembled at a joint meeting in accordance with the system of proportionate representation by means of single transferable vote and the voting at such election shall be by secret ballot."

So they were visionaries. They gave two options, appointment or election. Appointment again by indirect way of election only. Now My Lord, please see the debate. At page 130 it starts. The Honourable President says, "As regards these Honourable members will see that there are two alternatives suggested by the Drafting Committee. The amendments are referring to either the one or the other alternative. So I think the best way is to take an amendment in favour of one of the alternatives, and if then is accepted, then all other amendments relating to the alternative drop automatically. We take 2006 and if this is carried, then we go to the second". 2006 is the number of that amendment.

**CHIEF JUSTICE B. R. GAVAI:** Number of amendment.

**TUSHAR MEHTA:** Yes. Then My Lord Ghanshyam Singh Gupta. "Sir, I suggest this, the amendments of course may be taken but first we might, we might form our opinion as to whether we want the first or second alternative, so that if we want the first alternative, then the amendment... It would come My Lord in... kindly bear with us. Then My Lord, Shri Brajeshwar Prasad, My Lord this is important. He suggests that "For Article 131 the following be substituted. Governor of a State shall be appointed by the President by warrant under his hand and seal." He said, no election whether as per alternative one or alternative two. And the reason or the justification he places before the assembly, "The great merit of this amendment which stands in the name of the five or six member members of this House is that it lays down a simpler procedure than the prescribed, either in the Article or in the alternative suggested by the Drafting Committee. I feel sir, that in the interest of all-India unity and with a view to encouraging centripetal tendencies"...that is tendency to...unification...cohesion My Lord if I have to use... "policies, tendencies, it is necessary that the authority of the Government of India should be maintained intact over the provinces. To say that the President may nominate from a panel of names really means restricting the choice of President. It gives power into the hands of the Legislature. It is necessary sir, that the President should be free from the influence of the Legislature. I feel that the Governor may be one from the province or from another province. Personally, I feel that the man from a province should not be appointed in the same province because it gives encouragement for fissiparous tendencies." So that tendencies, internal fix etc., etc. "So I say that choice of the President should be unrestricted and unfettered. Sir I have nothing more to add. This is a simple proposition and I commend it for acceptance of the House."

Then Alladi Krishnaswami Iyer. "Sir, in view of the decision that was reached some two years ago and in view of the fact that I feel convinced that only right course taking all the circumstances into consideration, is to accept the amendment of Mr. Brajeshwar Prasad. I should like to say a few words in support of the amendment. In the consideration of this question, the main points to be remembered are that this Assembly has accepted the introduction of responsible government in different states that the Governor is merely a Constitutional Head of the Province and the real executive power had been vested in Ministry responsible to the Lower House in the different states." No dispute or difficulty. The real power vested in the elected people who are elected by the Legislators, by the people of that State as Legislators. "The question for consideration before this House is whether under these circumstances, there is any point in going through an expensive and elaborate machinery of election based upon universal suffrage? After giving my best consideration to the various proposals put forward:

1) "Of choice of Governor on the basis of universal suffrage".

Transcribed by TERES

2) "Of election of the Governor by a majority of Lower House or of both Houses, whether on the principle of proportionate representation or otherwise.

3) "Of a selection of a panel by the Lower House in the state from which the choice." Lower House is Lok Sabha not Legislative Council but Legislative Assembly, wherever there is any. "Choice is to be made by the President of the Union or,

4) If appointment by the President in consultation with the Cabinet, I feel that the wisest course to adopt is the last one. If the Governor is properly functioning as the Constitutional Head, the expenses involved in going through the process of election is out of all proportion to the powers vested in the Governor under the Constitution. There is also the danger of Governor, who has been elected by the people at large, getting into a clash with the Premier", that is the Chief Minister of the State.

**CHIEF JUSTICE B. R. GAVAI:** Two power centres?

**TUSHAR MEHTA:** Yes, two power centres, "and the Cabinet responsible to the Legislature, which itself has been elected on the basis of Universal Suffrage. Again, the election itself under modern conditions, will have to be fought out on a party ticket. The fact is that even at or during the elections, the party will have to rally round a leader who will, presumably be the future Premier, the Chief Minister of the province, is the rallying to be round the Governor's name or Premier's name. In the normal working of the government also, there is a danger of a clash between Minister and the Governor, whereas the whole basis of the Constitutional structure we are erecting depends upon the harmony between the Legislature and the Executive and between the Executive and the formal head of the Government. There is no correspondence between the Governor of a state in United States of America and Governor under our Constitution. In the case of a Governor of a State under United States, the real and substantial executive power is vested in the Governor. There is a distinct separation between the executive and the Legislature in the United States. A proper analogy has to be sought for the Constitution of Canada, where a responsible Governor obtains. In Canada, the Lieutenant Governor of each Province is appointed by the Governor General, that is, by the Governor General, on the advice of the Cabinet." Similar like India, My Lords.

"There are many features of resemblance and similarity between the Canadian Constitution and our Constitution, which by some critics has been considered to be *quasi* federal. The system in the main, we have accepted is the principle of responsible Government obtaining in the dominions or in different parts of the Commonwealth. Nowhere does the system of election of Governor exist where the institution of responsible Governor, Government is the main

1 feature of the Constitution. In the normal working of the Constitution, I have no doubt that  
 2 convention will grow up of the Government of India, consulting the Provincial Cabinet in the  
 3 election of the Governor. If the choice is left to the President and his Cabinet, the President  
 4 may in conceivable circumstances with due regard to the conditions of the province, choose a  
 5 person of undoubted ability and position in public life who, at the same time, has not been  
 6 mixed up in the Provincial party struggle or factions". He is not a part of the local State politics.  
 7 Today, it appears to be very obvious to us but kindly visualize the vision of the framers of the  
 8 Constitution.

9 **CHIEF JUSTICE B. R. GAVAI:** Have we lived up to the vision?

10 **TUSHAR MEHTA:** Yes, My Lord.

11 **CHIEF JUSTICE B. R. GAVAI:** In the first paragraph.

12 **TUSHAR MEHTA:** Yes, My Lord.

13 **CHIEF JUSTICE B. R. GAVAI:** They said that there would be harmony between the  
 14 Governor...

15 **TUSHAR MEHTA:** Yes. I'm slightly on a different...

16 **CHIEF JUSTICE B. R. GAVAI:** ...and the Ministry.

17 **TUSHAR MEHTA:** Yes, My Lord.

18 **CHIEF JUSTICE B. R. GAVAI:** And the second part is, in the normal working of the  
 19 Constitution, a convention would be developed that the Provincial Government would be  
 20 consulted while appointing the Governor.

21 **TUSHAR MEHTA:** I have a different point. Deviations or My Lord, some exceptional  
 22 situations may not guide Your Lordships in interpreting the Constitution.

23 **CHIEF JUSTICE B. R. GAVAI:** You are relying on this.

24 **TUSHAR MEHTA:** The limited point.... There is something further. There is something...

25 **CHIEF JUSTICE B. R. GAVAI:** It is better to rely on the debates in the Constitution  
 26 Assembly, no doubt. But then whether the expectations that were...

27 **TUSHAR MEHTA:** Kindly, I stopped at a wrong stage, maybe, but the point I was...

1 **CHIEF JUSTICE B. R. GAVAI:** You didn't stop. Rather we stopped you at the wrong...

2 **TUSHAR MEHTA:** The real point, I was trying to make is, *dehors* the facts that look at the  
3 vision of those who were discussing this in 1947, and they could visualize these are the  
4 problems which will arise if a person is to be elected.

5 **CHIEF JUSTICE B. R. GAVAI:** There would be two power centres.

6 **TUSHAR MEHTA:** Two power centres.

7 **CHIEF JUSTICE B. R. GAVAI:** One, the Chief Minister elected by the majority of the  
8 Legislators and the Governor who is directly elected.

9 **TUSHAR MEHTA:** Directly elected.

10 **CHIEF JUSTICE B. R. GAVAI:** And then the system that we have accepted, is the  
11 Government responsible to the Legislature?

12 **TUSHAR MEHTA:** Correct. The Cabinet is answerable and responsible to the Cabinet

13 **CHIEF JUSTICE B. R. GAVAI:** No. The Cabinet is answerable to the Legislature.

14 **TUSHAR MEHTA:** To the Legislature. Cabinet is answerable and accountable to the  
15 Legislature. Thereafter, the bold part, "The central fact to be remembered is that the Governor  
16 is to be Constitutional Head, a sagacious Counsellor, an advisor to the Ministry. The Governor  
17 chosen by the Government of India, presumably with the consent of the provincial  
18 government, is likely to discharge his functions better than one who is elected on a political  
19 party ticket by province as a whole based on universal suffrage."

20 Now, My Lord, Pandit Jawaharlal Nehru says this: "Sir, this debate has already elicited so  
21 many speeches that probably every conceivable argument for and against this proposal has  
22 been placed before this Court. I do not know what I can add to it." My Lord, kindly come to  
23 My Lord, the bold part. "There was the Union Powers Committee headed by Nehruji. There  
24 was the Provincial Model Constitution Committee headed by Sardar Patel, of which my  
25 colleague, the deputy Prime Minister was the Chairman. After all these considerations and  
26 discussions, those Committees felt that a certain change was desirable. Thus, even those like  
27 Sardar Patel, who themselves put this forward in this House, the other view feel that the  
28 change would be desirable." This was the flexibility of Sardar Patel, My Lord. He chaired the  
29 Provincial Committee, took a particular view and thereafter takes the holistic view and says  
30 that some change is desirable.

1 "Now, the reasons for this have been stated before the House and I need not go into them,  
 2 except to say that I myself, originally was not very definite. If I may say so, in my mind as to  
 3 which would be the preferable course. I preferred something but not to the extent of  
 4 considering it as absolutely necessary, but the more I thought about it, the more I conferred  
 5 with others and discussed with them, the more I felt that from almost every point of view, this  
 6 proposal that is moved of a nominal Governor in the present context of the Constitution was  
 7 not only desirable from practical point of view, but from democratic point of view too, it was  
 8 desirable and worthwhile."

9 My Lord, now I can skip that, and kindly come to the bold part. My Lord, this is the way, I  
 10 generally make it bold so that the relevant part is before Your Lordships but we don't consume  
 11 Your Lordships time in reading them. And I must tell Your Lordships, I have selected passages  
 12 from the Constituent Assembly debates which are relevant, according to me, for deciding this  
 13 issue by Your Lordships. There are other debates also on these subjects. Entire debate is placed  
 14 in Volume 4. If Your Lordships would like... 4.2 My Lord, if Your Lordships would like to go  
 15 through it, but these are the relevant debates My Lord from the standpoint of the issues which  
 16 Your Lordships are advising us.

17 "But on the whole, it probably would be desirable to have people from outside eminent people.  
 18 Sometimes people who have not taken too great a part in politics. Politicians would probably  
 19 like a more active domain for their activities, but there may be an eminent educationist or  
 20 persons eminent in other walks of life who would naturally, while cooperating fully with the  
 21 government and carrying out the policy of the government at any rate, helping in every way,  
 22 so that the policy might be carried out. He would themselves represent before the public,  
 23 someone slightly above the party and thereby, in fact, help that government more than if he  
 24 was considered as a part of the party machine. I do submit that there is really a more  
 25 democratic procedure than the other procedure in the sense that the latter would not make  
 26 the democratic machine work smoothly."

27 Then Dr. Ambedkar My Lords. The first part of the Dr. Ambedkarji is only My Lord, the  
 28 description or a paraphrasing of what has happened, the second part would be relevant My  
 29 Lord. Well, that power, Your Lordship gets My Lord? "Well, that power, that power, an elected  
 30 or a nominated Governor will have, if he happens to call the wrong person to form a ministry,  
 31 he will soon find to his cost that he has made a wrong choice. That is not a thing that could be  
 32 avoided by having an elected Governor. Such a Governor may have a friend of his choice whom  
 33 he can call in to form the Ministry, and that issue can be settled by the House itself by a motion  
 34 of no confidence or confidence. But that is not the aspect of the question, which is material.



1 The aspect of the question which is material is, 'Is the Governor going to have any power of  
 2 interference in the working of a Ministry which is composed of a majority in local Legislature?'  
 3 If that Governor has no power of interference in the internal administration of a Ministry  
 4 which has a majority, then it seems to me that the question whether he is nominated or elected  
 5 is only immaterial. That is the way I look at it. And I want to tell the House that in coming to  
 6 their decision, they should not bother them more or less academic question, whether Governor  
 7 has to be nominated or to be elected. They should bear in mind this question, 'What are the  
 8 powers which the Governor is going to be endowed?' That matter, I submit, is not before us  
 9 today. We shall take it up at a later stage when we come to question of Article 175 and 188."  
 10 Please note there My Lord, in Your Lordship's note, 175 is the draft article which is Article 200  
 11 today. And 188 is emergency Powers, My Lord which are not.... which we are not..

12 **CHIEF JUSTICE B. R. GAVAI:** Not proper at this stage.

13 **TUSHAR MEHTA:** No, not concerned. "And probably by amendment or the addition of  
 14 some other clauses which would give him powers. The House should be careful and watchful  
 15 of these new sections that will be placed before them at a later stage. But today it seems to me,  
 16 if the Constitution remains in principle the same as we intend that it should be, the Governor  
 17 should be a purely Constitutional Governor with not power of interference in the  
 18 administration of the Province, then it seems to me quite immaterial whether he is nominated  
 19 or elected."

20 Now My Lord, what is accepted is 131 draft article. "The Governor of the state shall be  
 21 appointed by the President by warrant under his hand and seal." My Lord, both the  
 22 alternatives were given up and Brajeshwar Prasad's amendment that he should be appointed  
 23 by the President, nothing more, nothing less should be there. So far as his powers are  
 24 concerned, we will consider when we consider article... present Article 200, and I'll be able to  
 25 show that this wish, desire and My Lord what was in mind of the Constitutional framers did  
 26 reflect in Article 200, that he would have only those powers which are conferred and nothing  
 27 more, maintaining supremacy of the elected wing. I'll come to that My Lord.

28 Now, My Lord come to next page, Article 163. Page 134, Article 163. My Lord it is in pink  
 29 colour. My Lord this green colour final draft of the Constitution is same which I have read My  
 30 Lord, therefore I'm not reading it. The colour is, there is some legend. Green is the final thing,  
 31 etc. At my age My Lord, I can be colourful only on paper.

32 **CHIEF JUSTICE B. R. GAVAI:** We agree to disagree.

33 **KAPIL SIBAL:** He's not telling you the entire truth.

1 **CHIEF JUSTICE B. R. GAVAI:** No, but that's what I said. We agree to disagree.

2 **TUSHAR MEHTA:** My Lord 163. My Lord what was 1919 Act. Lord I have quoted, but what  
 3 is bold is relevant for the present purpose. For completeness, I have quoted this whole. (3) In  
 4 relation to transferred subjects. My Lord, when the Assembly talks about transferred subjects,  
 5 it means subjects allotted to State. List 2. Seventh Schedule, List 2. Present... "The entries may  
 6 have changed, but transferred subject would mean the State List where Legislature has the  
 7 power or competence to legislate. In relation to transferred subjects, The Governor shall be  
 8 guided by the advice of his ministers unless he sees sufficient cause to dissent from their  
 9 opinion. In which case he may require action to be taken otherwise, then in accordance with  
 10 that advice. Provided that rules may be made under the Principal Act or the temporary  
 11 administration of a transferred subject where, in case of emergency, owing to a vacancy. There  
 12 is no minister in charge of the subject by such authority, in such manner as may be prescribed  
 13 by the rules."

14 Then kindly come to My Lord, what was suggested. What was in 1935. My Lord something  
 15 similar but please see 50, subsection (2). I'll read My Lord (1) also, because here the Governor's  
 16 discretion comes. But your Lordships have seen yesterday, the President is not left with any  
 17 discretion after 1919 Act till Article 111 as it stands today. I'm sorry, 75, which it, stands today.  
 18 111 is a power of assent, but appointment, is solely guided by the aid and advice of the Council  
 19 of Ministers. In case of Governor the situation was different. The discretion continued  
 20 throughout, but the discretion came to be circumscribed by use of words which were very  
 21 consciously used. My Lord, please see Council of Ministers in 1935. "There shall be a Council  
 22 of Ministers to aid and advice the Governor in the exercise of his functions, Ministers, except  
 23 insofar as he is, by or under this Act, required to exercise his functions or any of them in his  
 24 discretion, provided that nothing in this subsection shall be construed as preventing the  
 25 Governor from exercising his individual judgment in any case whether, whereby or under this  
 26 Act is required to do so. The Governor in his discretion.." Please see My Lord, "...may preside  
 27 at the meeting of Council of Ministers if any question arises whether any matter is or is not a  
 28 matter as respects which the Governor is by or under this act, required to act in his discretion  
 29 or to exercise his individual judgment, the decision of the Governor in his discretion shall be  
 30 final and the validity of anything done by the Governor shall not be called in question on the  
 31 ground that he ought or ought not to have acted in his discretion or ought or ought not to have  
 32 exercised his individual judgment." Kindly note here and park that contention My Lord for a  
 33 subsequent thing. Two things. 'If he grants assent, can it be subject to the challenge?' 'If he  
 34 refuses to grant assent, both were immune from the judicial review.'

1 Now Draft Constitution prepared by the Constitutional Advisor, Mr. Rau. "There shall be a  
 2 Council of Ministers with the Prime Minister at the head to aid and advice...". Even the  
 3 Provinces had Prime Minister. When we use Prime Minister, it was present day Chief Minister.  
 4 "There shall be Council of Ministers with the Prime Minister at the head to aid and advice the  
 5 Governor in exercise of his functions, except insofar as he is by or under this Constitution  
 6 required to exercise his functions, or any of them in his discretion. If any question arises  
 7 whether any matter is or so-and-so..." the same, that should not be called in question. Now the  
 8 draft prepared by the Drafting Committee. "There shall be a Council of Ministers with the Chief  
 9 Minister." Now Prime Minister becomes the Chief Minister. Only nomenclature changes,  
 10 because there was no Prime Minister in 1935. The Governor General was the whole and sole  
 11 answerable to the Crown. "Chief Minister at the head or head, to aid and advice the Governor  
 12 in exercise of his functions, except insofar as he is by or under the Constitution, required to  
 13 exercise his functions or any of them in his discretion. If any question arises whether any  
 14 matter is or is not a matter as respect..." My Lord same, whether he exercises his discretion  
 15 rightly, wrongly, cannot be gone into.

16 That is My Lord... Now I come to the Constituent Assembly debate on this and thereafter, My  
 17 Lord the last debate, I will read would be Article 200 and 201. Thereafter the submissions  
 18 start. But Your Lordships must have the background in which these provisions were drafted.  
 19 And formulated the manner in which they were formulated, what was conceived. My Lord, H.  
 20 V. Kamath. "Mr. President, Sir, I move that in Clause 1 of Article 143, the words 'except insofar  
 21 as he is, by or under this Constitution, required to exercise his function', or any of them, in his  
 22 discretion be deleted." Mr. H.V. Kamath has always supported the provincial supremacy over  
 23 central supremacy. My Lord he was a proponent of that, he may have some personal equations  
 24 also and he always used to object, but this was his idea of the Constitution. "If this amendment  
 25 was accepted...

26 **CHIEF JUSTICE B. R. GAVAI:** It could be influenced by the American system.

27 **TUSHAR MEHTA:** Highly influenced, by the Americans. Because some of that tendency and  
 28 trait continues, even till date, we still believe in the American Constitution and apply it in the  
 29 context of Indian Constitution also, and that My Lord sometimes results into laying down the  
 30 law, which creates more complications than solving them.

31 "Sir, it appears from the reading of this clause that the Government of India Act 1935 has been  
 32 copied more or less blindly without mature consideration." This is kind of a personal affront  
 33 to Dr. Ambedkar that you have copied something without applying your mind. "There is no  
 34 strong or valid reason for giving the Governor more authority, either in his discretion or

1 otherwise *vis-a-vis* his ministers than has been given to the President in relation to his  
 2 Ministers". If we turn to Article 61(1), we find it reads as follows, "There shall be a Council of  
 3 Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of  
 4 his function. When you, sir, raised a very important issue the other day, Dr. Ambedkar clarified  
 5 that his clause by saying that the President is bound to accept the advice of his ministers in the  
 6 exercise of all his functions. But here, Article 143 vests certain discretionary powers in the  
 7 Governor. And to me it seems that even as it was, it was bad enough. But now, after having  
 8 amended Article 131 regarding election of the Governor and accepted nominated Governors,  
 9 it would be wrong in principle and contrary to the tenets and Principles of Constitutional  
 10 Government which you are going to build in this country. It would be wrong I say to vest  
 11 Governor with these additional powers, namely discretionary powers. I feel that no departure  
 12 from the Principle of Constitutional Government should be favoured except for the reason of  
 13 emergency and this discretionary powers must be done away with. I hope this amendment of  
 14 mine will commend itself to the House. I move, sir."

15 Then My Lord, Mr. Krishnamachari My Lord who generally echoes the views of Dr. Ambedkar.  
 16 The Ambedkar...

17 **CHIEF JUSTICE B. R. GAVAI:** Both of them were... Mr. Krishnamachari was also...

18 **TUSHAR MEHTA:** Members of the Drafting Committee, and it was

19 **CHIEF JUSTICE B. R. GAVAI:** Most of the replies to the amendments are either replied  
 20 by Dr. Ambedkar or by...

21 **TUSHAR MEHTA:** Or by T.T. Krishnamachari My Lord. Your Lordships are right. I'm  
 22 grateful. "Mr. President, I'm afraid I'll have to oppose the amendment moved by my  
 23 honourable friend Mr. Kamath only for the reason that he has not understood the scope of the  
 24 article clearly and his amendment arises out of misapprehension." He again gives it back My  
 25 Lord, in a polite language. "Sir, it is no doubt true, that certain words from this article may be  
 26 removed namely, those which refer to the exercise by the Governor of his functions where he  
 27 has to use his discretion irrespective of the advice tendered by his ministers. Actually I think  
 28 this is more by way of a safeguard because there are specific provisions in this Draft  
 29 Constitution which occur subsequently where the Governor is empowered to act in his  
 30 discretion irrespective of the advice tendered by his Council of Ministers.

31 There are two ways of formulating the idea underlying it. One is to make a mention of this  
 32 exception in this Article 143 and enumerating the specific power of the Governor where he can  
 33 exercise his discretion in the articles that occur subsequently, or to leave out any mention of

1 this power here and only stated in the appropriate article. The former method has been  
 2 followed. Here the general proposition is stated that the Governor has normally to act on the  
 3 advice of the ministers except in so far as the exercise of his discretion covered by those articles  
 4 in the Constitution in which he is specifically empowered to act in his discretion.

5 So long as there are articles occurring subsequently in the Constitution where he is asked to  
 6 act in his discretion, which completely covers all cases of departure from the normal practice  
 7 to which I see my honourable friend Mr. Kamath has no objection. I may refer to Article 188.  
 8 I see no harm in the provision in this article being as it is. If it happens that this House decides  
 9 that in all subsequent articles the discretionary power should not be there as it may  
 10 conceivably do, this particular provision will be of no use and will fall into desuetude. The  
 11 point that my honourable friend is trying to make while he concedes that the discretionary  
 12 power of the Governor can be given under Article 188, that is 200." I'm sorry 356. My  
 13 apologies.

14 **CHIEF JUSTICE B. R. GAVAI:** That Emergency.

15 **TUSHAR MEHTA:** Emergency. One interesting thing My Lord. An unfortunate thing. When  
 16 356 was being drafted by the Constituent Assembly, Mr. Kamath again My Lord objected to  
 17 that. That Central Government cannot be conferred power.

18 **CHIEF JUSTICE B. R. GAVAI:** Mr. Kamath was not in drafting...

19 **TUSHAR MEHTA:** No, no, in the Constitution...

20 **CHIEF JUSTICE B. R. GAVAI:** When it was debated in the Constitution.

21 **TUSHAR MEHTA:** When it was debated in the Constitution. He objected that Central  
 22 Government should not have the power to impose President's Rule and therefore Article 356  
 23 should not be there. To salvage the situation, My Lord it seems, Dr. Ambedkarji says very  
 24 wisely that 'I hope and trust that this article would remain a dead letter in the Constitution.'

25 **CHIEF JUSTICE B. R. GAVAI:** Yes, that's in speech of 3 November, 1949.

26 **TUSHAR MEHTA:** Your Lordships are right. Your Lordships remember the dates also My  
 27 Lord correctly. I'm grateful.

28 **CHIEF JUSTICE B. R. GAVAI:** Student of law.

1 **TUSHAR MEHTA:** We are all students of law. Unfortunately, in the first Government, which  
 2 was formed after the first election under Pandit Nehruji, My Lord the first 356 use came in  
 3 Kerala state. Namboodiripad was the popular leader, and he was unseated under Article 356.  
 4 I'm not going into the politics of it. But that debate was going on My Lord in the Parliament  
 5 and debate was whether it should be exercised or not. And Mr. Kamath made a very... made  
 6 one comment which he should have avoided. He said that when the Constitution was being  
 7 debated in the constituent assembly Dr. Ambedkar said, that this article would remain a dead  
 8 letter word in the Constitution. Today, Dr. Ambedkar is dead, but the constitutional provision  
 9 remains and it is being operated. So possibly he had some personal equations. But be that as  
 10 it may, we are not concerned.

11 **CHIEF JUSTICE B. R. GAVAI:** One is entitled to have his own view.

12 **TUSHAR MEHTA:** View My Lord. Certainly.

13 **CHIEF JUSTICE B. R. GAVAI:** He might be having a view that why should a elected  
 14 government in the Province, have control of the Central Government through the Governors.

15 **TUSHAR MEHTA:** No, no he always... he was an absolute provincialist that it should be  
 16 completed immune from any central interference. All his objections are leading to that, that  
 17 provinces should be completed independent like American model. He was genuinely, maybe  
 18 as theory.

19 **CHIEF JUSTICE B. R. GAVAI:** Everybody was... we have the Constituent Assembly  
 20 consisting of so many people having so many idea.

21 **TUSHAR MEHTA:** Ideas My Lord, and Mr. Kamath was a former ICS Officer, resigned and  
 22 started participating in freedom struggle and he had contributed a lot, and he on his own right  
 23 elected to Lok Sabha. So, he was not just a troublemaker. He had a very strong view maybe  
 24 some, we all have likes and dislikes. I see no harm in the provincial...

25 **CHIEF JUSTICE B. R. GAVAI:** On Mondays and Friday, we have 17 Supreme Courts so.

26 **TUSHAR MEHTA:** My Lord, if I may say on the lighter side, My Lord, 32. On the lighter  
 27 side. "I see no harm in the provisions in this article being as it is. If it happens, that this House  
 28 decides that all in the subsequent articles the discretionary power should not be there as it  
 29 may conceivably do, this particular provision will be of no use and will fall into desuetude."  
 30 The point that my Honourable friends is trying to... I mean he ultimately says that, let us wait  
 31 till the actual conferment of powers in the respective spheres comes.

1 "Therefore the serious objection of Mr. Kamath finds for mentioning of this exception is  
 2 pointless. I therefore think that the article had better be passed without any amendment if it  
 3 is necessary for the House either to limit the discretionary power of the Governor or  
 4 completely to do away with it. It could be done in the article that occurs subsequently, where  
 5 specific mention is made, without which this power that is mentioned here cannot at all be  
 6 exercised. That is the point I would like to draw the attention of the House to and I think the  
 7 article can better be passed as it is."

8 Then Dr. P. S. Deshmukh: "Mr. President, Mr. Krishnamachari has clarified the position with  
 9 regard to this exception which has been added to clause one of Article 143. If the Governor is  
 10 in fact going to have a discretionary power, then it is necessary that this clause which Mr.  
 11 Kamath seeks to omit must remain." So, first you decide whether he should have discretion or  
 12 not. What discretion, we will define when we deal with other articles. "Sir, besides this, I do  
 13 not know if the Drafting Committee has deliberately omitted or they are going to provide it at  
 14 a later stage, and I would like to ask Dr. Ambedkar whether it is not necessary to provide for  
 15 the Governor to preside at the meeting..." My Lord, that may not be relevant. Kindly turn the  
 16 page over.

17 Sri Alladi Krishnaswami Iyer, "sir, there is really no difference between those who oppose and  
 18 those who approve the amendment. In the first place, the general principle is laid down in  
 19 Article 143, namely the principle of ministerial responsibility that the Governor in various  
 20 fears of executive activity, should act on the advice of his ministers." Then the article goes on  
 21 to provide, except insofar as he is, by or under this Constitution, required to exercise his  
 22 functions, or any of them in his discretion. So long as there are articles in the Constitution  
 23 which enable the Governor to act in his discretion, and in certain circumstances, it may be to  
 24 override the Cabinet or to refer to the President, this article as it is framed is perfectly in order.  
 25 If later on the House comes to the conclusion that those articles which enable the Governor to  
 26 act in his discretion in specific cases should be deleted, it would be open to revise this article.  
 27 But so long as there are later articles which permit the Governor to act in his discretion and  
 28 not on ministerial responsibility, the article is as drafted, is perfectly in order. The only other  
 29 question is whether first to make a provision..." Your Lordships can skip.

30 Now, please come to the bottom. Dr. Ambedkar replies "Mr. President, sir, I did not think that  
 31 it would have been necessary for me to speak and take part in this debate after what my friend,  
 32 Mr. T. T. Krishnamachari had said on this amendment of Mr. Kamath. But as my friend Pandit  
 33 Kunzru, pointedly asked me the question and demanded a reply, I thought that out of courtesy  
 34 I should say a few words. Sir, the main and the crucial question is, should the Governor have  
 35 discretionary powers? It is that question which is the main and the principal question. After

1 we come to some decision on this question the other question, whether the words used in the  
 2 last part of Clause 1, of Article 143," that is present 163 "should be retained in that article or  
 3 should be transferred somewhere else could be usefully considered. The first thing, therefore,  
 4 that I propose to do is to devote myself to this question, which, as I said, is the crucial question.  
 5 It has been said in the course of the debate that the retention of discretionary power in the  
 6 Governor is contrary to responsible Government in the Provinces. It has also been said that  
 7 retention of discretionary power in the Governor smells of the Government of India Act 1935,  
 8 which is the main was undemocratic. Now, speaking for myself, I have no doubt in my mind  
 9 that retention in, on the vesting of Governor with certain discretionary power is in no sense  
 10 contrary to, or in no sense a negation of responsible Government. I do not wish to rake up the  
 11 point, because on this point, I can very well satisfy the House by reference to provisions in the  
 12 Constitution of Canada and Constitution of Australia. I do not think anybody in this House  
 13 would dispute that the Canadian system of Government is not fully responsible system of  
 14 Government, nor will anybody in this House challenge that Australian Government is not a  
 15 responsible form of Government."

16 Having said that, I would like to read Section 55 of the Canadian Constitution. Article 55 -  
 17 "Where a Bill passed by the House of Parliament is presented to the Governor General for the  
 18 Queen's assent he shall declare, according to his discretion and subject to provisions of this  
 19 Act, either assent thereto in the Queen's name or withhold the Queen's assent, or reserve the  
 20 Bill for signification of the Queen's pleasure." Three options, Pandit Hriday Nath Kunzru:  
 21 "May I ask, Dr. Ambedkar, when the British North America Act was passed? Dr. B.R..." This  
 22 was kindly My Lord a sarcastic question, it seems. The Honourable Dr. Ambedkar, "That does  
 23 not matter at all, the date of the Act, does not matter. Nearly a century ago, My Lord Dr... Mr.  
 24 Kamath says that "you are referring to."

25 **CHIEF JUSTICE B. R. GAVAI:** Because I think Canadian Constitution must have been  
 26 successor of the British North America Act?

27 **TUSHAR MEHTA:** Yes, yes. Which is 100 years ago. Therefore, he says that you are relying  
 28 upon something which is 100 years.

29 **CHIEF JUSTICE B. R. GAVAI:** We are relying upon a provision, which is a century old?

30 **TUSHAR MEHTA:** Century old. But without, while forgetting. Nothing turns on that, that a  
 31 provision which has withstood the test of time for 100 years, would not become invalid or not  
 32 acceptable, merely because of the vintage.

33 **CHIEF JUSTICE B. R. GAVAI:** That's what Dr. Ambedkar deals with in the next paragraph.



1 **TUSHAR MEHTA:** Dr. Ambedkar says this. "This is my reply. The Canadians and  
 2 Australians have not found it necessary to delete this provision. Even at this day, they are quite  
 3 satisfied that the retention of this provision in Section 55 of the Canadian Act is fully  
 4 compatible with responsible Government. If they had felt that this provision was not  
 5 compatible with responsible Government, they have even today, as dominions, the fullest right  
 6 to abrogate this provision." Dominions means dominions of the Commonwealth My Lord  
 7 under the Sovereign. "Dominions, the fullest right to abrogate this provision. They have not  
 8 done so. Therefore, in my reply to Pandit Kunzru, I can very well say that the Canadians and  
 9 Australians do not think that such a provision is an infringement on the responsible  
 10 Government."

11 Then Lokanath Misra. "On a point of order, Sir, are we going to have the status of Canada or  
 12 Australia or are we going to have a Federal Republican Constitution." Then Dr. Ambedkar, "I  
 13 could not follow what he said. If, as I hope the House is satisfied that the existence of a  
 14 provision, vesting a certain amount of discretion in the Governor is not incompatible or  
 15 inconsistent with responsible Government, there can be no dispute that the retention of this  
 16 Clause is desirable and, in my judgement, necessary. The only question that arises is", Pandit  
 17 Kunzru, "Well, Dr. Ambedkar has missed the point of the criticism altogether. The criticism is  
 18 not that in Article 175, some powers might not be given to the Governor. The criticism is  
 19 against vesting the Governor with certain discretionary powers of a great nature in the Article  
 20 under consideration." Dr. Ambedkar. "I think he has misread the Article. I'm sorry. I do not  
 21 have the Draft Constitution with me, "except insofar" as he is by or under this Constitution.  
 22 Those are the words. If the words were. Except whenever he thinks that he should exercise this  
 23 power of discretion against the wishes...

24 **CHIEF JUSTICE B. R. GAVAI:** He's replied that wherever the subsequent article provides  
 25 for a discretion, that power will be restricted only to the.....

26 **TUSHAR MEHTA:** Does not leave it to the Governor's sole discretion to decide where I will  
 27 be exercising my discretion. That's My Lord, what Dr. Ambedkar..

28 **CHIEF JUSTICE B. R. GAVAI:** Not an unruly horse.

29 **TUSHAR MEHTA:** Yes My Lord. Your Lordships are right.

30 **CHIEF JUSTICE B. R. GAVAI:** Only whenever there are subsequent articles, discretion is  
 31 provided.

32 **TUSHAR MEHTA:** Yes sir.

1 **CHIEF JUSTICE B. R. GAVAI:** In those articles, in the discharge of those functions, only  
2 he can exercise his discretion and not otherwise.

3 **TUSHAR MEHTA:** Otherwise My Lord, by aid and advice.

4 **JUSTICE SURYA KANT:** Verified. When you say, therefore Article 143 will have to be read  
5 in conjunction with some other articles which specifically reserves the power to the Governor.

6 **TUSHAR MEHTA:** Yes.

7 **JUSTICE SURYA KANT:** It is not a general clause giving the power to Governor to  
8 disregard the advice of ministers in any matter in which he find he ought to disregard.

9 **TUSHAR MEHTA:** Disregard. Correct My Lords.

10 **JUSTICE SURYA KANT:** There I think lie the fallacy of the argument of my learned friend.

11 **TUSHAR MEHTA:** Fallacy of the argument...

12 TT Krishnamachari also...

13 **JUSTICE SURYA KANT:** ...qualified that how this power is regulated within the framework  
14 of the constituency.

15 **TUSHAR MEHTA:** Will come further.

16 **CHIEF JUSTICE B. R. GAVAI:** That is what Mr. T.T. Krishnamachari also said that even  
17 subsequent, when we come to discussion with the subsequent articles, and we find that the  
18 vesting of the discretion with the Governor is not necessary, then we can have a relook at this  
19 article.

20 **TUSHAR MEHTA:** That's what My Lord it means. My Lords are right. Now, next page.  
21 "Therefore, as I said having stated that there is nothing incompatible with the retention of the  
22 discretionary power in the Governor in specified cases with the system of responsible  
23 government, the only question that arises is how should we provide for the mention of this  
24 discretionary power. It seems to me that there are three ways by which this could be done. One  
25 way is to omit the words from Article 143. That is 163 today. As my honourable friend Pandit  
26 Kunzru and other desire and to add to such Articles as 175 or 188, that is, 200 and the  
27 emergency powers. Or such other provisions with the House may hereafter introduce. Vesting  
28 the Governor with discretionary power saying, notwithstanding Article 143, the Governor shall

1 have this or that power. The other way would be to say in Article 143 that except as provided  
 2 in articles, so and so specifically mentioned Article 175 or whatever they are. But the point I'm  
 3 trying to submit to the House is that the House cannot escape from mentioning in some  
 4 manner that the Governor shall have discretion. Whether you put it under 163 or 200 later,  
 5 that's not relevant. The principal question as a principle to be decided is, whether Governor  
 6 should be given some discretion or not. And thereafter 163 retains the discretion.

7 Then, now the matter which seems to find some kind of favour with my honourable friend  
 8 Pandit Kunzru and those who have spoken in the same way is that the word should be omitted  
 9 from here and should be transferred somewhere, somewhere else, or that the specific article  
 10 should be mentioned in Article 143. It seems to me that this is a mere method of drafting.  
 11 There is no question of substance and no question of principle. I personally myself would be  
 12 quite willing to amend the last portion of Clause 1 of Article 143, if I knew at this stage, what  
 13 are the provisions that this Constituent Assembly proposes to make with regard to vesting of  
 14 the Governor with discretionary power. My difficulty is that we have not yet come either to  
 15 Article 175 or 188 nor have we exhausted all possibilities of other provisions being made  
 16 vesting the Governor with discretionary power. If I knew that, I would very readily agree to  
 17 amend Article 143, and to mention the specific article, but that cannot be done now. Therefore,  
 18 my submission is that no wrong could be done if the words as they stand under Article 143  
 19 remains as they are. They are certainly not inconsistent. Conferment of discretion..."

20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Is there a revisitation of this debate  
 21 after the debate of 175 and 188?

22 **TUSHAR MEHTA:** Yes.

23 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** There is. At that time, we didn't have  
 24 anything like fact assessment of a statute. As of now, if you see the amount of litigation it has  
 25 thrown by having provisions of this nature. Perhaps that could tell us whether the vision was  
 26 right or not right. Because the validity or correctness of a thought would come by its  
 27 performance...

28 **TUSHAR MEHTA:** How it operates. How it has...

29 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** ...the amount of opposition it would  
 30 have borne, which could perhaps be avoided with dignity and clarity.

1 **TUSHAR MEHTA:** I may make one thing clear. While reading this debate My Lord, it is not  
 2 my intention to argue and ultimately My Lord raise a contention that Governor has absolute  
 3 discretion. That's not the purpose of reading this. The purpose of...

4 **CHIEF JUSTICE B. R. GAVAI:** Your argument is that under this Article 163, the power of  
 5 the Governor to exercise his discretion wherever the subsequent article reserves the discretion  
 6 in him, the Governor would be entitled to exercise his discretion, and Article 200 is one of  
 7 such articles where a discretion is provided to the Governor.

8 **TUSHAR MEHTA:** My Lord, by very nature of the article, it is so provided and I'll My Lord  
 9 come to that. And when I read My Lord Article 200 debates, that comes out. Because, as My  
 10 Lord said, My Lord, Justice Narasimha rightly says, we understand the constituent  
 11 constitutional principles based upon how it has operated, how it has worked. My Lord, there  
 12 are some conventions which are also developed. For example, My Lord, 163 says that the  
 13 Governor will act on the aid and advise of the Council of Ministers. Now My Lord, when the  
 14 first person is to be called to form the government there is no Council of Ministers. So, the  
 15 Governor by very nature of the act, will have to act on his discretion. My Lord when there is a  
 16 dispute, which leader has the majority in the House.

17 **CHIEF JUSTICE B. R. GAVAI:** We have some experience as to what matters some of the  
 18 honourable Governors have exercised their decisions leading to so many litigations...

19 **TUSHAR MEHTA:** My Lord, I must, My Lord tell Your Lordships, and put a little word of  
 20 caution for myself also. My Lord if we go by some example...

21 **CHIEF JUSTICE B. R. GAVAI:** We are not going by that.

22 **TUSHAR MEHTA:** I understand, I'm saying something else. My Lord Indian Democracy is  
 23 a mature democracy. There may be aberrations, My Lord on individual cases, but by and large,  
 24 the democracy under this very Constitution has worked very effectively. And that My Lord I  
 25 have personally witnessed during COVID period. During COVID period the Indian democracy,  
 26 and how the centre province federal balance is envisaged what was at display. My Lord  
 27 irrespective of the party in power in the centre, which was, NDA, BJP, etc. All state  
 28 governments, ruled by Congress, ruled by Communist, everyone they were on the same page  
 29 with the Honourable Prime Minister. There was no dispute, difference. And they used to call  
 30 each other. That's the way democracy works, that you have debate, you have deliberation, you  
 31 have consultation, you give suggestions, you take suggestions and everyone was on the same  
 32 page.

1 My Lord since I was appearing, I know it for sure that Chief Ministers of those states whose  
 2 Chief Ministers were very critical, and it was their right to be critical of the centre, My Lord,  
 3 they used to call the Prime Minister at 02:00 that this is what we are needing and there would  
 4 be a serious problem, and the thing would reach. And My Lord, the counter thing also the  
 5 government also responded in a matured way, except for one or two exceptional states, but  
 6 everyone My Lord. Because all these people, My Lord irrespective of the political lineage, they  
 7 have My Lord, political experience of 30, 40, 50 years. They have that political maturity My  
 8 Lord to decide. So, My Lord it would be really hazardous My Lord to even examine  
 9 constitutional interpretation based on certain aberrations. There are ambitions, there are  
 10 pitfalls, but that is to be taken care of on a case to case basis. One cannot interpret the  
 11 Constitution based on the worst example because hard cases always results into laying down  
 12 of bad laws. That's My Lord... that's a settled principle throughout all jurisdictions.

13 **JUSTICE VIKRAM NATH:** Otherwise hard cases make good law.

14 **TUSHAR MEHTA:** My Lord, I would not respond. Then Dr. Ambedkar "Of course there is,  
 15 because we do not want to vest the President with any discretionary power because the  
 16 provincial governments are required to work in subordination to the Central Government, and  
 17 therefore, in order to see that they do act in subordination to the Central Government, the  
 18 Governor will reserve certain things in order to give the President the opportunity to see that  
 19 the rules under which the provincial governments are supposed to act according to the  
 20 Constitution or in subordinate to the Central Government, are observed." Please mark this My  
 21 Lord. This is My Lord the fundamental foundation of My Lord, the Constituent Assembly. And  
 22 this is what was the thought, the principle of constitutionalism in the mind of Dr. Ambedkar,  
 23 that they must be free to take decision, but there must be some level of deference to the Central  
 24 Government because we have a *quasi* Federal Constitution.

25 Then H.V. Kamath, "Will it not be better to specify certain articles in the Constitution?" With  
 26 My Lord, he continues My Lord, with his objection My Lord. I may skip that. Now My Lord  
 27 kindly come to present. Green is Article 163, which is at present that normally, I'm  
 28 paraphrasing. "The Governor will act in accordance with the aid and advice of the Council of  
 29 Ministers and Governor must do it." We are not arguing A versus B. I'm assisting the Court  
 30 because we are seeking Your Lordships' opinions, so I'm just giving what is my reading of the  
 31 Constitution. Governor will have to act on the aid and advise, except where he is having  
 32 discretion, either conferred by the constitutional provisions or by the very nature of the power  
 33 which he is exercising.

1 Then My Lord, 200 and 201. This is the last provision which I will bother Your Lordships with  
 2 the Constituent Assembly debates My Lord and then I'll come to other submissions My Lord.  
 3 Please see Government of India Act 1990. This is very relevant because this is directly in  
 4 question. This is precursor to Article 200. What are the options available for the Governor  
 5 when a Bill is presented to him. Is he supposed to sign it? As an automated person, as My Lord,  
 6 one word. Which is a....

7 **CHIEF JUSTICE B. R. GAVAI:** Postman.

8 **TUSHAR MEHTA:** He's not a postman. That's what, My Lord, my effort would be, and that  
 9 comes out from the constituent debate. The very nature, in the very manner in which Article  
 10 200 is couched, the language which is used, it gives him options. And when I am given three  
 11 options, means, I have been given discretion to choose one of them. The word discretion being  
 12 used or not used, will make no consequence, if I am given three options or four options. I'll  
 13 show that My Lord. Please come to Section 12, of Government of India Act 1919, and this would  
 14 be relevant, directly relevant for the present purpose. "Where a Bill has been passed by a local  
 15 Legislative Council, the Governor, Lieutenant Governor or Chief Commissioner may, instead  
 16 of declaring that he assents to"... or first option is granting assent, "assents to or withholds his  
 17 assent from the bill." Second option, "Return the Bill to the Council for reconsideration." Third  
 18 option, "either in whole or in part, together with any amendments which he may recommend,  
 19 or in cases prescribed by Rules under the Principal Act, may, and if the rules so require, shall  
 20 reserve the Bill for consideration of the Governor General", that is President. So, four options.  
 21 Assent, withhold, return to the House, or refer it to the Governor General, which is the present  
 22 day President, for his assent.

23 "Where a Bill is reserved for the consideration of the Governor General, the following  
 24 provisions shall apply", when it goes to the President, in the present terminology. "The  
 25 Governor, Lieutenant Governor or Chief Commissioner may, at any time within six months  
 26 from the date of reservation of the bill, with the consent of the Governor General, return the  
 27 Bill for further consideration by the Council, with a recommendation that the Council shall  
 28 consider amendments thereto, " The President can refer it back, instead of the Governor  
 29 choosing, Governor may choose, that I will send it to Governor General then, namely, the  
 30 President. He can say that, no, I send it back.

31 (b). "After any Bill so returned, has been further considered by the Council, together with any  
 32 recommendations made by the Governor, Lieutenant Governor or Chief Commissioner  
 33 relating thereto, the bill, if reaffirmed with or without amendment, may be again presented to  
 34 the Governor, Lieutenant Governor or Chief Commissioner. Any Bill reserved for the

1 consideration of the Governor General shall if assented to, by the Governor General within a  
 2 period of six months." Time limit was prescribed by the act itself for the President equivalent,  
 3 namely the Governor General, to act. And I'll come to that "as soon as possible" part, that is  
 4 also taken care of.

5 "From the date of such reservation become law, on due publication of such assent, in the same  
 6 way as a Bill assented to by the Governor, Lieutenant Governor, or the Chief Commissioner,  
 7 but if not assented to by the Governor General within such period of six months, shall lapse."  
 8 Consequence also provided time limit, stipulated and consequence provided, meaning  
 9 thereby, the time limit is mandatory, not discretionary and be of no effect, unless before  
 10 expiration of that period either, one, The Bill has been returned by the Governor, lieutenant  
 11 Governor or Chief Commissioner for further consideration by the Council, or in the case of the  
 12 Council not being in session, a notification has been published of an intention so to return the  
 13 Bill at the commencement of the session. The Governor General may, except where the Bill  
 14 has been reserved for its consideration, instead of assenting to or withholding his assent from  
 15 any act passed by local Legislature, declare, that he reserves the act for the signification of His  
 16 Majesty's pleasure."

17 This was a standalone provision because, there was someone above the Governor General, the  
 18 present day President. Here the President is...

19 **CHIEF JUSTICE B. R. GAVAI:** There is no one above this.

20 **TUSHAR MEHTA:** No one above. Assenting to... therefore, and I would come to that. My  
 21 interpretation of the term "withhold" is that, it is not given effect to. It falls through. That's  
 22 how the Supreme Court has read. Falls through. And please read these provisions in this  
 23 context.

24 Now 13, "Provision for case of failure to pass legislation in Governor's Legislative Council,  
 25 where a Governor's Legislative Council has refused leave to introduce or has failed to pass in  
 26 a form recommended by the Governor, any Bill relating to a reserved subject...", that is My  
 27 Lord, state list, "The Governor may certify that the passage of the Bill is essential for the  
 28 discharge of his responsibility for the subject, and thereupon, the Bill shall, notwithstanding  
 29 that the Council have not considered thereto be deemed to have passed." There is a deeming  
 30 provision made by way of a statute. "Deeming provision of a Bill having been passed can be  
 31 made either by a statute or by amendment of the Constitution." I'll come to that little later, My  
 32 Lord, whether that can be done by a judicial verdict, that's a separate argument. "And shall on  
 33 signature by the Governor become an act of the local Legislature in the form of the Bill as

1 originally introduced or proposed to be introduced in the Council, etc." My Lord, rest of them  
2 may not assist Your Lordships.

3 Please come to My Lord, para 72, is the draft Bill of the Constitutional Advisor. And My Lord,  
4 kindly come to My Lord, first 70 My Lord. This is again 1935 Act. What I read was 1919 Act.  
5 Now 1935 Act. "A Bill which has been passed by the Provincial Legislative Assembly... " That  
6 is My Lord, present day State Assembly... " Or in case of a province having a Legislative  
7 Council, has been passed by both chambers of the provincial Legislature shall be presented to  
8 the Governor, and the Governor in his discretion..." My Lord, the other side would harp upon  
9 this that there was a discretion which now no longer exists in Article 200. Therefore, I am  
10 highlighting, My Lord. In his discretion shall declare either that one he assents in his Majesty's  
11 name to the bill. Second, or that he withholds assent therefrom, third or that he reserves the  
12 Bill for consideration of the Governor General, that is President, provided that the Governor  
13 may in his discretion return the bill..." This is the fourth option. "Return the Bill together with  
14 a message requesting that the Chamber or Chambers will reconsider the Bill or any specified  
15 provisions thereof, and in particular, will consider the desirability of introducing any such  
16 amendment as he may recommend in his message. And when a Bill is so returned, the  
17 Chamber of Chambers shall consider it accordingly." It stopped here.

18 So three options, he can straightaway say I withhold it... I grant assent. He can say I withhold  
19 the assent, meaning thereby I will show the Bill falls through. Third, he may say that "no, there  
20 is some repugnancy, some violation of fundamental rights. I refer it to the President." And  
21 fourth option in his discretion. He can say that, no, it is curable defect in the bill, and therefore  
22 I return it with my message that this particular provision is repugnant. There is already a  
23 central law occupying the field, and therefore you please reconsider, or even desirably, that  
24 instead of 19 years of age, you consider 21 or any such thing, My Lord, I'm just not giving  
25 hypothetical examples. But four options were available to the Governor.

26 Then, now My Lord, Draft Constitution, Para 72, when Mr. B. N. Rau, Dr. B. N. Rau prepared  
27 the draft Constitution. "A Bill which has been passed by the provincial Legislative Assembly  
28 or in case of a province having the Legislative Council has been passed by both Houses of the  
29 Provincial Legislature shall be presented to the Governor, and the Governor shall declare  
30 either that he assents to the bill." One...

31 Yes, I was reading 147 as suggested by the Constitutional Advisor, "A Bill which has been  
32 passed by the Provincial Legislative Assembly or in case of a Province having Legislative  
33 Council has been passed by both Houses of Provincial Legislature shall be presented to the  
34 Governor, and the Governor shall declare either," first option, "he assents to the Bill", or



1 second option that he withholds, assent there from. Third option, that he reserves the Bill for  
 2 consideration of the President, provided that where there is only one House of Legislature of  
 3 a Province and the Bill has been passed by both the Houses of the Governor... Houses, the  
 4 Governor may in his discretion, it was initially there, in his discretion, return the Bill together  
 5 with a message requesting that the House will consider the desirability of introducing..." I'm  
 6 not reading it, it's the same.

7 **CHIEF JUSTICE B. R. GAVAI:** Almost the same.

8 **TUSHAR MEHTA:** Except there is no consequence provided if the House returns it back.  
 9 Now, it says Governor shall not withhold. It comes out subsequently. Now, My Lord, the  
 10 Committee, the Drafting Committee.

11 **CHIEF JUSTICE B. R. GAVAI:** In effect, upon the second occasion, the Legislature again  
 12 reiterates, then the Governor will not have any option but to give it that.

13 **TUSHAR MEHTA:** Not at this stage. I'm sorry, I'm sorry. It was there. The Governor shall  
 14 not withhold assent therefrom. He has no option.

15 **CHIEF JUSTICE B. R. GAVAI:** It is in the negative. Yes, it gives a mandate that if it is  
 16 passed.

17 **TUSHAR MEHTA:** You have to grant assent.

18 **CHIEF JUSTICE B. R. GAVAI:** A centre like the collegium.

19 **TUSHAR MEHTA:** That could have been used. That's a separate argument.

20 **CHIEF JUSTICE B. R. GAVAI:** Like the collegium. Fortunately, we are on not on that issue  
 21 now.

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Speaking the same language.

23 **TUSHAR MEHTA:** I cannot say anything.

24 **CHIEF JUSTICE B. R. GAVAI:** No, we are not on that issue. Let us stick to the case before  
 25 us.

26 **TUSHAR MEHTA:** Now My Lord, please come to now, draft prepared by the Drafting  
 27 Committee at page 145. No real change, Your Lordships can take it from me, but the Drafting

1 Committee also goes this way. Then in the Draft Constitution prepared by the Drafting  
2 Committee, now 201. Your Lordships have

3 **CHIEF JUSTICE B. R. GAVAI:** 175 and 176.

4 **TUSHAR MEHTA:** 200 and 201. Present. That is the subject matter of the reference and  
5 Your Lordships' advice. 201 was drafted by Drafting Committee like this. When a Bill is  
6 reserved by a Governor...

7 **CHIEF JUSTICE B. R. GAVAI:** There was only one section. Now, it is bifurcated into two  
8 sections.

9 **TUSHAR MEHTA:** Into two sections My Lord, because now we have a President and  
10 President has, a different regime where he is bound by the aid and advice. He does not have  
11 My Lord, the choice, etc. I'll come to that. Please have a look, "When a Bill is reserved by a  
12 Governor for consideration of the President, the President shall declare either that he assents  
13 to the Bill or that he withholds assent therefrom" - Two options. Third option, " Provided, that  
14 where the Bill is not a money bill, the President may direct the Governor to return the Bill to  
15 the House, or, as the case may be, the Houses of the Legislature of the state together with such  
16 a message as is mentioned in the *proviso* to the last preceding Article, and when a Bill is so  
17 returned, the house or houses shall reconsider it accordingly." Please mark this, "Within a  
18 period of six months". This continues. Whenever Constitution intended to provide for a  
19 timeline, the Constitution has provided for. This continues, even in the present Article 201.  
20 And therefore, it is not permissible, to lay down any timeline in other articles. I'll come to that.  
21 That's a separate point. Now, the debate. This debate, My Lord, both of us would be relying  
22 upon the other side would also... In fact, there cannot be any other side when it is a Presidential  
23 reference, but the other side point of view. They would also...

24 **CHIEF JUSTICE B. R. GAVAI:** Other point of view.

25 **TUSHAR MEHTA:** Other point of view, they would also rely upon to say, that the discretion  
26 was taken away. Apropos, My Lord Justice Narasimha's question, "Whether subsequent  
27 debates throw any light on that discretion or not?" Because Dr. Ambedkar says that  
28 whenever...

29 **CHIEF JUSTICE B. R. GAVAI:** No, that was not... What my learned friend just pointed it  
30 out, after the subsequent articles were discussed, like 200 and 201, wherein discretion was  
31 provided, was there a relook on the earlier article, which provided for discretion?

- 1 **TUSHAR MEHTA:** No. There was none. But it comes in 200, because while providing...
- 2 **CHIEF JUSTICE B. R. GAVAI:** Because when T.T. Krishnamachari and both Dr.  
3 Ambedkar, they said that, "if in subsequent articles, if they do not provide for discretion, then,  
4 we may have a relook at this article."
- 5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We will see, because the wording  
6 says, "My difficulty is that" I'm quoting from his statement...
- 7 **TUSHAR MEHTA:** I do not know what...
- 8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** "My difficulty is that, we have not yet,  
9 not as yet, come either to Article 175 or 188 more, nor have we exhausted all the possibilities  
10 of other provisions being made, vesting the Governor with the discretionary powers." We see  
11 at 200.
- 12 **TUSHAR MEHTA:** Your Lordships are right. That one Article 175 debate...
- 13 **CHIEF JUSTICE B. R. GAVAI:** It was not necessary because, in the subsequent article,  
14 they provided for discretion. So, there was no question of again having a relook at...
- 15 **TUSHAR MEHTA:** But, this is the debate. Page 146 is that debate which My Lords were  
16 referring to. But, please bear in mind, that in 163, the discretion remained, that aid and advice,  
17 except subject to, under, by or under the Constitution. And I may tell Your Lordships,  
18 subsequently, there are no articles which specifically uses the word 'discretion'. Subsequent to  
19 Article 163, there are no articles which confers discretion. But after reading this debate, my  
20 submission for Your Lordship's consideration is going to be, that if the article itself gives him  
21 options to choose from, use or not use of the word 'discretion' does not matter, because, you  
22 choose from either of these four.
- 23 **CHIEF JUSTICE B. R. GAVAI:** Then, the discretion has to be exercised among the options  
24 given in that article.
- 25 **TUSHAR MEHTA:** I'll come to that. I'll come to that.
- 26 **CHIEF JUSTICE B. R. GAVAI:** If the article provides you four options...
- 27 **TUSHAR MEHTA:** Yes.

1 **CHIEF JUSTICE B. R. GAVAI:** Then, the discretion would be restricted to only one of those  
2 four options.

3 **TUSHAR MEHTA:** Correct. Correct. I bow down. It cannot be beyond that. Governor is  
4 bound by one of those four options. Governor is bound by one of those four options. But which  
5 option to choose from?

6 **CHIEF JUSTICE B. R. GAVAI:** It is his discretion.

7 **TUSHAR MEHTA:** It is his discretion. For example, for the purpose of granting assent, the  
8 Council of Ministers would always say that grant assent, it is our bill. So, there is no question  
9 of his using discretion.

10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That will be relatable only to that part  
11 of the question, where it is sent back to the Assembly for reconsideration, and it is coming back  
12 to him, at that second stage will he have the discretion to send it back to the President for his  
13 approval.

14 **TUSHAR MEHTA:** There, he would have the discretion. He would have the discretion. He  
15 cannot withhold it.

16 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's your argument.

17 **TUSHAR MEHTA:** Yes, that's my argument. But, the problem has arisen because of State of  
18 Punjab judgment, not the State, State of Punjab judgement, I'll come to that.

19 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Issue relating to timelines is not  
20 relatable to the options.

21 **TUSHAR MEHTA:** No, no, no, that's a separate point. That's a separate. Your Lordships are  
22 right. A timeline has nothing to do with the option, or discretion, etc. Since I was there, since  
23 I was showing the provision where the Constitution itself prescribed time limit, since I was  
24 reading the provision, which itself provided for time limit, I just as a reference said, that  
25 whenever the makers wanted, they have provided for the time limit, and if it is required, it can  
26 be done by a constitutional...

27 **JUSTICE SURYA KANT:** The timeline which you are referring to is for reconsideration by  
28 the legislative. That is not a time given for the Governor.

- 1 **TUSHAR MEHTA:** That's my case. That's my case that now you are reading something  
2 which the Constitution has provided, not provided.
- 3 **JUSTICE SURYA KANT:** Ultimately, tell me Mr. Solicitor, possibly there can't be any  
4 serious dispute with regard to the three or four expressions used in 200. Assent, shall declare...  
5 Shall declare assent or withhold or send to the President for advice. And third is that return  
6 may return. But third in his discretion has been omitted on this lesson of Dr. Ambedkar.  
7 Earlier the draft was bound by his discretion.
- 8 **TUSHAR MEHTA:** Your Lordships, absolutely.
- 9 **JUSTICE SURYA KANT:** Dr. Ambedkar advised, no, we should believe these words towards  
10 the dignity.
- 11 **TUSHAR MEHTA:** Yes.
- 12 **JUSTICE SURYA KANT:** So these are the options available. Probably the central point of  
13 debate will be, what do we mean by withhold?
- 14 **TUSHAR MEHTA:** I'm grateful.
- 15 **JUSTICE SURYA KANT:** That will be the central point. And withhold means that after  
16 withholding, it means that you are not assenting and you are not... you are for the timing  
17 withholding yourself. Withholding for what? Either to return to the Assembly or  
18 reconsideration with your message or advice...
- 19 **TUSHAR MEHTA:** Punjab judgment says...
- 20 **JUSTICE SURYA KANT:** Or you said, for example, there may be a draft Bill touching upon  
21 or encroaching upon the power of the Parliament under list 1. One is well within his right to  
22 say. State assembly can't pass it. So therefore you can either advise them that look here, you  
23 need to look into it. You can't encroach for List 1. This is not within your domain or he will  
24 send to the President of media saying the state has attempted, the State Legislature as  
25 attempted like this. In my considered opinion this, such a Bill will fall under entry number so  
26 and so for which State Legislation is incompetent . And Honourable President will take the  
27 final call on that. Only issue will be this one...
- 28 **TUSHAR MEHT:** Yes, only issue will be, and I'll come to that after reading this.

1 **JUSTICE SURYA KANT:** How much time now this entire process should be undertaken.  
2 That is probably central point.

3 **TUSHAR MEHTA:** The time for completing the... I'll come to that. But that's a separate My  
4 Lord argument. Please allow me. But since Your Lordships have given a very right in apt  
5 example. The withhold. My Lord whether withhold is a temporary act of withholding or as the  
6 Supreme Court through Five Judge and Seven Judge Benches have said that withhold means  
7 the Bill falls through. Because there are circumstances where, suppose normally the  
8 Legislature is not expected or is not supposed to pass egregious something a very  
9 extraordinary bills which are beyond their competence. But suppose, how we read the Article  
10 200. My Lord, suppose a border state passes a Legislature... legislation which deals with our  
11 external affairs that we will permit a particular country's people to enter or not to enter. Give  
12 me a minute...

13 **JUSTICE SURYA KANT:** As for the way you want, you are only pointing out that rest of this  
14 discussion ultimately leads to the final Bill at page 150. And probably thereafter this issue  
15 arises.

16 **TUSHAR MEHTA:** Your Lordships are right. My Lord, then he cannot assent. He cannot  
17 refer it to the President because it's not a repugnancy issue. He cannot return it to the House  
18 because once he returns it to the House and House repasses it, then he is bound. He cannot  
19 withhold it, then he will have to withhold, My Lord, and I have given the examples, it is to be  
20 used rarely sparingly. But that's the way the situation is.

21 **CHIEF JUSTICE B. R. GAVAI:** Sorry, sorry, what is your submission?

22 **TUSHAR MEHTA:** My Lord, there can be instances...

23 **CHIEF JUSTICE B. R. GAVAI:** There are four instances. Four options. Either he assents  
24 to the bill, or withhold assents therefrom. And that he reserves the Bill for the consideration  
25 of President. So according to you, the withholding of the assent, the second option can be  
26 unlimited.

27 **TUSHAR MEHTA:** It's not My Lord temporary withholding. My Lord, can I go a little in the  
28 chronology so that I can make that point good. Yes, My Lord. My answer is yes. That withhold  
29 means the Bill falls through. That's how My Lord Five Judge Benches and Seven Judge  
30 Benches have understood My Lord Article 200. And I have given examples.

31 **CHIEF JUSTICE B. R. GAVAI:** But then if he doesn't...if he...if he...

1 **JUSTICE VIKRAM NATH:** It is difficult to understand

2 **CHIEF JUSTICE B. R. GAVAI:** But, if he doesn't, option. Doesn't exercise the option of  
3 resending the Bill for reconsideration to the Governor. Still, he can withhold it for a time,  
4 immortal.

5 **TUSHAR MEHTA:** It dies. It dies. It is to be used rarely, but the power is conferred. Rather  
6 than entering into this debate right now. Can I just give the background?

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Like for example, in the Kerala, in the  
8 Tamil Nadu case, ten out of twelve Bills after the first consultation, he said, "I am withholding  
9 these ten." But you are not talking about a situation where he would communicate saying that  
10 I have been [NO AUDIO].

11 **TUSHAR MEHTA:** It's a declaration. My Lords, before I start the arguments on this point,  
12 I'm skipping that debate, but debate takes...

13 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That, you will deal with those aspects  
14 independently, is what you're saying. The aspects on timeline?

15 **TUSHAR MEHTA:** Yes. That's a separate issue.

16 **CHIEF JUSTICE B. R. GAVAI:** He just wants to explain as the history as to how these  
17 provisions came into effect, and submissions later on.

18 **TUSHAR MEHTA:** Yes. Now, I am on interpretation of Article 200 and 201. Please come to  
19 page 150. Let me read it, the way we believe it requires to be read. 200, Assent of the Bills,  
20 "When a Bill has been passed by the Legislative Assembly of a State, or in case of a State having  
21 Legislative Council, has been passed by both houses of Legislative Assembly, it shall be  
22 presented to the Governor." This is the first condition. "And the Governor shall declare" this  
23 is his obligation, Constitutional obligation. He has to make a declaration. What? Four options.  
24 Either, that he assents to the bill. Or second option, he withholds assent therefrom. Third  
25 option, or that he reserves the Bill for consideration of the President. I'll come to Article 254,  
26 which says, that this reference would be necessary only if the Bill is repugnant to some central  
27 law, not otherwise. He cannot refer it for any other reason. That...

28 **CHIEF JUSTICE B. R. GAVAI:** Referring to the President?

29 **TUSHAR MEHTA:** Yeah, then he can refer. He has to refer. That's the mandate. If there is a  
30 repugnancy with the central law, we will have to refer it. Now, the fourth option, "provided

1 that the Governor may," it doesn't say 'shall'. "Governor may" and something would turn, when  
2 I point out...

3 **JUSTICE VIKRAM NATH:** Solicitor, one minute. Let's read it again, the first part.

4 **TUSHAR MEHTA:** I'll read. "When a Bill has been passed by the Legislative Assembly of a  
5 State, or in case of a State having Legislative Council, have been passed by both houses of  
6 Legislature of the State, it shall be presented to the Governor."

7 **JUSTICE VIKRAM NATH:** Right...

8 **TUSHAR MEHTA:** "And the Governor shall declare, either"

9 **JUSTICE VIKRAM NATH:** Yes, but the provision has to be invoked in this, whether he  
10 assents or he withholds?

11 **TUSHAR MEHTA:** Yes, yes, all four cases, all three cases...

12 **JUSTICE VIKRAM NATH:** That declaration has to be there.

13 **TUSHAR MEHTA:** 100%.

14 **JUSTICE VIKRAM NATH:** It is not that he will not make a declaration and withhold it.

15 **TUSHAR MEHTA:** Yes. He will have to declare, that I have withheld it.

16 **JUSTICE VIKRAM NATH:** Correct.

17 **TUSHAR MEHTA:** That is the only way it can be read. Yes, he has to declare one of the three.  
18 He will declare either first option, where he assents to the bill, then, no dispute will remain.

19 **CHIEF JUSTICE B. R. GAVAI:** So, according to you, if he declares that it is withheld, Bill  
20 is yet to be [UNCLEAR].

21 **TUSHAR MEHTA:** Yes, it falls through. Supreme Court says, the five judge and seven...

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** In other words, what you are saying  
23 is, when it is communicated to the Assembly that it is withheld, it cannot be placed back before  
24 the Assembly for reconsideration, is that what are you saying?

25 **TUSHAR MEHTA:** Yes.



- 1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Wording, the meaning of the word...
- 2 **JUSTICE SURYA KANT:** A declaration in public domains, assigning the reasons that, these  
3 are the reasons I am withholding...
- 4 **TUSHAR MEHTA:** Reasons, that is a separate issue. Declaration that I withhold because  
5 sometimes My Lord reasons can be in national security.
- 6 **CHIEF JUSTICE B. R. GAVAI:** But then could we not be giving total powers to the  
7 Governor to sit in an appeal over the...
- 8 **TUSHAR MEHTA:** For My Lord with profound respect, the powers are given by the  
9 Constitution.
- 10 **CHIEF JUSTICE B. R. GAVAI:** Otherwise the Government elected with the majority will  
11 be at the whims and fancies of the Governor. He will say that...
- 12 **TUSHAR MEHTA:** Before I answer that, My Lord first of all, all of us derive our powers from  
13 the Constitution.
- 14 **CHIEF JUSTICE B. R. GAVAI:** Yes, yes. Of course.
- 15 **TUSHAR MEHTA:** We neither give nor take away. Nobody can. My Lord, there are three  
16 organs. But it's not My Lord... Let me My Lord complete, then I will be able to answer Your  
17 Lordships' questions more effectively. Right now, Your Lordships' first blush reaction is that  
18 if withhold is held to be...
- 19 **CHIEF JUSTICE B. R. GAVAI:** A power to reject the bill.
- 20 **TUSHAR MEHTA:** Power to reject a bill. It is there. That's my case. I'll have to make it good.  
21 Provided that the Governor may, My Lord the fourth option.
- 22 **CHIEF JUSTICE B. R. GAVAI:** Yes.
- 23 **TUSHAR MEHTA:** Kindly park that question. I will answer that question. And...
- 24 **CHIEF JUSTICE B. R. GAVAI:** According to you, even if the Governor feels that the Bill is  
25 not correct or lacking something, it is not necessary for him to exercise the powers under the  
26 proviso. He may bypass the proviso and still hold that.

1 **TUSHAR MEHTA:** My Lord therefore I am requesting Your Lordships to park that question  
 2 right now. That's not my case. That's not my case. That's the extreme case visualised in Tamil  
 3 Nadu and My Lord whether will like it or not My Lord we are burdened with the Tamil Nadu  
 4 facts. I am arguing *dehors* Tamil Nadu facts. Correct, My Lords? So, he has three options. He  
 5 will have to make a declaration that I assent, I withhold, which according to me, Bill falls  
 6 through. I am My Lord accepting that. I am taking that argument head on, yes.

7 Third, if it is repugnant, because of Article 254 with some Central Act, it has to refer. But there  
 8 can be an act, or rather bill, which is of such a nature that it may have some provisions which  
 9 are repugnant. It may have some provisions which may violate somebody's fundamental  
 10 rights, or it may have some provisions which, according to Governor, is not desirable.  
 11 Desirable. Then My Lord kindly My Lord have...

12 **CHIEF JUSTICE B. R. GAVAI:** We are not responding. We didn't say anything.

13 **TUSHAR MEHTA:** Your Lordship's smile is a good reason, is a way...

14 **CHIEF JUSTICE B. R. GAVAI:** I am always smiling throughout the day.

15 **TUSHAR MEHTA:** My Lord please bear with me.

16 **CHIEF JUSTICE B. R. GAVAI:** I can't help you if the God has given me a smiling face.

17 **TUSHAR MEHTA:** It's a good thing. It's a good thing. My Lord. A smiling judge is always  
 18 pleasing to argue before My Lord. And all Your Lordships are always smiling.

19 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Consider, just bear in your mind that  
 20 there are two places in which the expression withhold comes in the Constitution in Article 200.  
 21 If your argument withhold enables... leads to a Bill falling flat once the Governor says that I  
 22 am withholding, then you will have to give it the same meaning in the first proviso last words  
 23 because it again says when it is represented to the Governor for assent, the Governor shall not  
 24 withhold assent. So therefore, you are saying if once it is fallen, then where is the question of  
 25 a second occasion Constitution is saying at this stage you shall not. Keep in mind and answer  
 26 that.

27 **TUSHAR MEHTA:** My Lord, can I request for a five minutes comfort break? Can I go and  
 28 come back or...?

29 **CHIEF JUSTICE B. R. GAVAI:** Yes. So in the meantime you want us to... We'll come back.

- 1 **TUSHAR MEHTA:** Five minutes.
- 2 **CHIEF JUSTICE B. R. GAVAI:** We'll come back at 12:30. 12:22 now.
- 3 **TUSHAR MEHTA:** I am grateful to Your Lordships for the...
- 4 **CHIEF JUSTICE B. R. GAVAI:** We hope you are comfortable now.
- 5 **TUSHAR MEHTA:** Yes, yes. My Lord, may I request Your Lordships. I have understood, My  
6 Lord.
- 7 **CHIEF JUSTICE B. R. GAVAI:** Now we will not interrupt your case.
- 8 **TUSHAR MEHTA:** No, I'm not saying. It's not an interruption, My Lord. Your Lordships,  
9 that dialogue My Lord only permits us...
- 10 **CHIEF JUSTICE B. R. GAVAI:** Speak whatever you want to and then you can develop your  
11 summary.
- 12 **TUSHAR MEHTA:** My Lord, let me not say that the question of withhold whether it is  
13 permanent or a temporary till he returns is the question. I will show Your Lordships some  
14 examples...
- 15 **CHIEF JUSTICE B. R. GAVAI:** You have said that it is already covered by Punjab  
16 judgment.
- 17 **TUSHAR MEHTA:** No, Punjab judgment without noting Five Judge and Seven Judge  
18 judgments. It's a Three Judge judgment. My Lord, Justice, Chief Justice Chandrachud, Justice  
19 Pardiwala and Justice Manoj Misra without referring to any of the binding Five Judge or Seven  
20 Judge judgments have recorded the findings that withhold means you have to read it with the  
21 proviso, which I will show and demonstrate, at least attempt to demonstrate that...
- 22 **CHIEF JUSTICE B. R. GAVAI:** Ignorance of the earlier Five Judges and Seven Judges...
- 23 **TUSHAR MEHTA:** Yes, and I want to show that and what earlier judgments have said on  
24 the question of withhold. Thereafter My Lord....
- 25 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** He has read it, took the meaning from  
26 the proviso to give him to read the withhold...

1 **TUSHAR MEHTA:** The last part, we tell immediately answering if the way in which My Lord  
 2 the *Punjab* judgement understood article, the last part would have been, "he shall grant his  
 3 assent, he shall not withhold." My Lord the power to refer still remains. But that's not right  
 4 the question. I have read My Lord Article 200. Now Article 201. What happens, My Lord, when  
 5 Bill is referred by the Governor to the President of India, that is 201. "When a Bill is reserved  
 6 by the Governor for consideration of the President, the President shall declare either that he  
 7 assents to the Bill or that he withholds assent therefrom." Withhold means Bill falls through.  
 8 I'll show from the judgment "...provided that where the Bill is not a Money Bill, the President  
 9 may direct the Governor to return the Bill to the House, or as the case may be, the Houses of  
 10 Legislature of the State together with such a message as in mentioned in the first proviso to  
 11 Article 200, and when a Bill is so returned, the House or Houses shall reconsider it accordingly  
 12 within a period of six months." Please mark My Lord as a separate point, Constitution provides  
 13 for a time limit, "...the date of receipt of such message and if it is again passed by the House or  
 14 the Houses, with or without amendment, it shall be presented again to the President for  
 15 consideration." It does not say here that thereafter, President shall not withhold it, meaning  
 16 thereby the ultimate power of the President to withhold, withhold means...

17 **JUSTICE VIKRAM NATH:** So this exercise of returning can continue as many number of  
 18 times as the President desires?

19 **TUSHAR MEHTA:** Desires.

20 **JUSTICE VIKRAM NATH:** Correct.

21 **TUSHAR MEHTA:** And he is thereafter not under an obligation not to withhold, as My  
 22 Lord...

23 **JUSTICE VIKRAM NATH:** As in 200.

24 **TUSHAR MEHTA:** 200 My Lord proviso. Now please see, what is My Lord, how I beg to  
 25 interpret this My Lord. At page 152. I have given what I'm not reading, several provisions  
 26 where Governor exercises, Executive Powers. He exercises Legislative Powers. There are  
 27 powers which are *quasi* legislative in nature. I may not My Lord. Please come to 154. And then  
 28 immediately I'll switch over to the judgments on this. "On true construction of Article 200, the  
 29 Governor is entrusted with four options." My Lords I have narrated. "Neither context...

30 **CHIEF JUSTICE B. R. GAVAI:** Page number?

31 **TUSHAR MEHTA:** 154. I'm sorry My Lords, 154.

1 **CHIEF JUSTICE B. R. GAVAI:** 151?

2 **TUSHAR MEHTA:** 154. "Neither contextually nor textually, it is possible to conclude that  
3 the term withhold will have to be read as a temporary suspension of power, of granting assent  
4 till first proviso works out, there is no concept of temporary withholding of any Bills. If the  
5 framers of the Constitution would have intended to link the term withhold in the main part of  
6 Article 200, to read only in the context of the first proviso, two things would have been  
7 provided:

8 (a). The term withhold in the main part would have been qualified by the term 'subject to first  
9 proviso' mentioned therein. In the main part, they would have said that you withhold subject  
10 to following the provision.

11 And (b). The first proviso would have mentioned that the Bill 'so withheld' shall be  
12 reconsidered by the House", which is not dead. I am going on textual interpretation. "In other  
13 words, the power of withholding in the main part of Article 200 is an independent and  
14 unqualified power. However, out of three possible powers contemplated in the main part,  
15 having not been resorted to by the Governor by giving an opportunity to the Assembly under  
16 the first proviso the Governor cannot fall back again on the main part and withhold the Bill  
17 passed once again, with or without suggestions of the Governor. In other words, if the  
18 Governor wants to withhold the bill, that is resultantly the 'Bill falls through'." Please mark  
19 these words. These are the words I have borrowed, which are used consistently by the larger  
20 Benches. "The Bill falls through, he has to do it at the outset. If he chooses not to exercise that  
21 power at the outset, he is denuded of that power, if he chooses to return the Bill under the first  
22 proviso." Because of the last part of the first proviso. "The Governor is expected and  
23 empowered to withhold the Bill in the main part of Article..."

24 **CHIEF JUSTICE B. R. GAVAI:** It has been held by Five Judges Bench?

25 **TUSHAR MEHTA:** Five and one, seven judge also. No My Lord, all are five. I stand  
26 corrected. My Lord there is a judgment of ***Shamsher Singh***, but that is on discretion, not on  
27 withholding. ***Shamsher Singh*** is seven judge.

28 **JUSTICE VIKRAM NATH:** How do you... you must have dealt in your argument. What is  
29 the meaning of word 'withhold'? Why has this word 'withhold' been used in this?

30 **TUSHAR MEHTA:** Yes, My Lord, 'withhold' has its own meaning. And I will show, why this  
31 has a meaning and, why that meaning is required to be given in the main part, and what kind  
32 of rare contingencies which are contemplated, where you cannot assent...

1 **CHIEF JUSTICE B. R. GAVAI:** Normally, the concept of withholding is, suppose there is  
 2 some dispute, there are 2 crores. Out of that 1.5 crores is undisputed. Normally 1.5 would be  
 3 paid and 50 like would be withheld till the dispute is...

4 **TUSHAR MEHTA:** My Lord, that's not...

5 **CHIEF JUSTICE B. R. GAVAI:** That's the common parlance that I understand it.

6 **TUSHAR MEHTA:** But that's in a commercial parlance, yes that we withhold this issue.  
 7 Right now, we withhold the file. But that's not the way in which it is used. That's not the way  
 8 in which, and it will become very clear.

9 **JUSTICE VIKRAM NATH:** Is there any debate on the word 'withhold', the Constitutional  
 10 Assembly debates, why this word withhold is...

11 **TUSHAR MEHTA:** No, no, no because it has come...

12 **JUSTICE VIKRAM NATH:** Otherwise, simply they could have said, either he grants assent  
 13 or he refuses to grant the assent. Why withhold has been used?

14 **TUSHAR MEHTA:** Right from... this word has been taken from 1919 Act, 1935 Act and now,  
 15 present Act. So it is not debated in Parliament. We will have to independently examine. Your  
 16 Lordships will have to examine. We will assist Your Lordships in that. But just right now, My  
 17 Lord, please consider, without keeping in mind some egregious fact, where someone may  
 18 withhold without any application of mind, or just out of political frustrations. I'm just trying  
 19 to say that the Governor is not, that way, powerless. He has three options, subject to the fourth  
 20 option being, exercised. And all four options are independent of each other. Now please see,  
 21 the Governor is expected... Para 97 at page 155. "The Governor is expected and empowered to  
 22 withhold the Bill in the main part of the Article 200, when he finds that, the entire Bill is  
 23 beyond the legislative competence of the Legislature". Then he can't return it. If the entire Bill  
 24 covers atomic energy or defence or external affairs.

25 **CHIEF JUSTICE B. R. GAVAI:** Then, you can send it to the President...

26 **TUSHAR MEHTA:** It's repugnancy only, if the entire... kindly allow me. Then it's not a  
 27 question of re.. it's complete lack of legislative competence. It would be *ultra virus*. Then two,  
 28 "the entire Bill violates some Constitutional Provision or some fundamental rights." Entire  
 29 bill. If it is a part of it, he can say that I refer it to you. And you...

30 **JUSTICE VIKRAM NATH:** Delete it, amend it and come back.

1 **TUSHAR MEHTA:** If you still continue it, I can't withhold it, then it would be set aside by  
 2 the Supreme Court, if challenged or the High Court, if challenged. "Even though the Bill is  
 3 within legislative competence and does not violate any fundamental rights, it is so manifestly  
 4 arbitrary, that it cannot be assented to". This is where, My Lord, his statesmanly discretion  
 5 would come. I have given the examples. Please minutely observe, because this is how, based  
 6 upon Your Lordships' opinion, the quality of the country would govern. I am not arguing that,  
 7 present Governor, Government in Centre is 'A' political party, State as a 'B' political party. It  
 8 can be reversed also. There are political parties in the State, which is not same party at the  
 9 Centre. So, we are not on conferring discretion on the Governor to kill the bill. That's not the  
 10 idea. It's really the interpretation of the word 'withhold'. Political parties will keep on  
 11 changing, in the respect...

12 **CHIEF JUSTICE B. R. GAVAI:** We are not concerned with that. We are only concerned  
 13 with the provision as it is.

14 **TUSHAR MEHTA:** So therefore, my attempt is as a neutral student of law. This is how I  
 15 pursue the Constitution interpretation to be. Even '98, "in case the Governor feels that either  
 16 only a part of a Bill is beyond the legislative competence or a part of the Bill which violates  
 17 some Constitutional Provision, or abridges fundamental rights, he may return the Bill so as to  
 18 allow the Legislature to cure the defect." The first *proviso* in case of a Bill where the defect  
 19 found by the Governor is curable. When the Governor feels that some part is curable. If you  
 20 make a legislation for, say, a Defence of India, then it's not a curable bill, and I would not, as a  
 21 Governor do, that I'll return it because thereafter I can't even withhold it. So that is where the  
 22 term 'withhold' at the first instance comes. Then 99. "If the above interpretation is not given,  
 23 it will result in disastrous consequences. Normally, it is presumed that all legislatures, in their  
 24 collective wisdom, will not pass a Bill which is manifestly unjust or arbitrary in its entirety.  
 25 The power of withholding of the Bill in the main provision, therefore, shall have to be used  
 26 sparingly and only in extraordinary situations, when the very constitutional existence of the  
 27 Governor, who represents the democratic wheel of the nation, manifested by the President of  
 28 India would be frustrated.

29 Now see, My Lord, examples I have given. These are hypothetical examples. For example, if  
 30 the Legislature were to pass following bills, the Governor would be abdicating his duty if he  
 31 does not withhold the bills, as he can neither assent to the Bill nor reserve the Bill for  
 32 presidential reference, one. If the Legislature were to remove the concept of reservation itself  
 33 in the entire state. Two. If the Legislature while removing the reservation based upon the  
 34 parameters of Article 15 and 16 provides for reservation only based on religions, that only  
 35 Hindus will get reservation or Muslims only will get reservation. 15, 16 we are not bound.

1 Third, one state Legislature passing a bill, preventing residents of other states from entering  
 2 in that state. My Lord this is a state subject, but the Governor may feel. And this has happened  
 3 My Lord. I'm on a slight deviation. This has happened not by way of a legislation during  
 4 COVID. I'll not name the states My Lord and everyone was doing in their own right. There was  
 5 My Lord one state whose hospitals were flooding with patients, so they were sending the  
 6 patients to the neighbouring states, and the neighbouring states was fearing that we will also  
 7 now feel shortage.

8 **CHIEF JUSTICE B. R. GAVAI:** That matter was before me.

9 **TUSHAR MEHTA:** Your Lordships knows. So barricades were created that one state people  
 10 will not come in the other state. It was a different fact situation. But suppose a Bill is passed.  
 11 I'm just giving My Lord an example. The State Legislature mandating use of only one  
 12 particular language as a mandatory requirement for all residents of that state. My Lord, it is  
 13 subject of the state list. It can do. "The Legislature excludes a particular class of people from  
 14 exercising right to vote, either based on caste, sex, education, or any other ground." Earlier My  
 15 Lord only there was limited franchise. All citizens of India were not entitled to vote, pre-  
 16 constitution. "A Bill is passed by Legislature giving complete immunity to the entire Cabinet  
 17 or all elected members from criminal prosecution. My Lord then I cannot, as a Governor, act  
 18 on the aid and advice for the very nature of things, My Lord. "A Bill prohibiting central  
 19 agencies like Income Tax Authority, etc. from exercising the statutory powers within the  
 20 geographical limits of that state. A Bill providing for provisions which undermine the authority  
 21 of high constitutional functionaries like the President, the Prime Minister, the Judges of the  
 22 Honourable Supreme Court, etc."

23 Now last. "A Bill which deals with jurisdiction of the Honourable Supreme Court of India  
 24 itself." My Lord before I examine this, please see the second proviso to Article 200, second  
 25 proviso. My Lord, please come back to page 150. This is the classic example My Lord, My Lord  
 26 I'm not saying My Lord, elected people are responsible people. They act through their  
 27 collective wisdom, but there can be one circumstance out of 1000 where such an aberration  
 28 happened. My Lord please see the second proviso to Article 200 My Lords. "Provided further  
 29 that...", Your Lordship gets My Lord? "The Governor shall not assent to, My Lord first proviso  
 30 said he My Lord return it to the house Governor shall not assent to, but shall reserve for the  
 31 consideration of the President any Bill which in the opinion of the Governor, would, if it  
 32 became law, so derogate from the powers of the High Court as to endanger the position with  
 33 the Court is by the position of which that Court is, by this Constitution designed to fill."  
 34 Suppose the Act says something, and My Lord as per the true reading there can be a local law



1 with regard to the powers of the High Court. That would be mandatorily subject to Presidential  
2 Assent. We are not concerned with it.

3 **CHIEF JUSTICE B. R. GAVAI:** Could it not be read in that manner that wherever the  
4 Constitution provided as to in which cases assent should not be granted, it is so specifically  
5 provided.

6 **TUSHAR MEHTA:** I'm on a different point. Forget High Court. Suppose the Legislature  
7 passes some Act.

8 **CHIEF JUSTICE B. R. GAVAI:** When a specific power has been granted to the Governor  
9 not to assent to in a particular circumstance, and can it not be read that, that power is not  
10 granted in other matter, in that?

11 **TUSHAR MEHTA:** No, it cannot grant. I'll come My Lord on that textual interpretation also  
12 yes, but I'm just giving an example that suppose Legislature passes a Bill which directly deals  
13 with the powers of the Supreme Court. If it is High Court, I'm not on that whether...I show that  
14 My Lord only to show the absurdity of the potential bill. Your Lordships are trying to find a  
15 solution, find some conclusion. I'm still on the problem. And after Your Lordships sees the  
16 problem My Lord, possibly Your Lordships may be in a better position to find out the solution.  
17 Suppose, in case of a High Court, the Governor is bound to send it, in other cases he may, he  
18 may not. That's the discretion. Because the main part says 'he may assent', 'he may withhold',  
19 'he may refer', but proviso says 'he shall refer'. So I am using it against the proposition.

20 Please see My Lord, just to immediately answer Your Lordships question. The main provision  
21 says, "The Governor shall be present.... Houses the Legislature of the State, it shall be  
22 presented to the Governor, shall declare that either he assents or he does this or he does this".  
23 So there are three options. But here there is no option. Here he has to preserve it for the  
24 President, and therefore my submission that in the main part, there are three options  
25 available, gets fortified. Be that as it may, My Lord, I'll come to that.

26 Now My Lords, please see para 104. "It is pertinent to note that nowhere in the substantive  
27 part of Article 200, the term "as soon as possible" has been used." This is again on the time,  
28 but when we are on Article 200, as soon as possible is proviso when he returns the Bill. It was  
29 there earlier with time limits in the Pre-Constitution regime which was taken away. "It is  
30 pertinent to note that nowhere in the subsequent part of Article 200, the term 'as soon as  
31 possible' has been used, which means that the Constitution did not intend to put any sense of  
32 time limit during the exercise of first three options. Moreover, the Governor under substantive  
33 part of Article 200 can simply sit or withhold assent to a Bill if he believes that the Bill is

1 unconstitutional and beyond any remedial changes, in which case the Bill shall fall through or  
 2 lapse, as has been observed in several decisions of this Honourable Court referred hereunder.  
 3 The framers of the Constitution consciously avoided putting any timeline for exercise of  
 4 powers either under Article 200 and 201 which is evident from the fact." This is again on the  
 5 question of timeline. But let me complete this, so that that also assists Your Lordships. "The  
 6 time limit prescribed, as shown in the history, was consciously dropped in Article 111 and was  
 7 replaced by the expression 'as soon as possible'."

8 And "(b) The very next Article 201 in its proviso stipulates the time limit for six months." Now,  
 9 My Lord, I have given dictionary meaning of the term "withhold".

10 **JUSTICE VIKRAM NATH:** The time limit of six months is for the House, not for the...

11 **TUSHAR MEHTA:** Not for the Governor or the President.

12 **JUSTICE VIKRAM NATH:** Not the Governor or the President?

13 **TUSHAR MEHTA:** No.

14 **JUSTICE VIKRAM NATH:** That is for the House to reconsider and...

15 **TUSHAR MEHTA:** I'm grateful. So My Lord then...

16 **CHIEF JUSTICE B. R. GAVAI:** Suppose, it could be read within six months. The House  
 17 doesn't reconsider...

18 **TUSHAR MEHTA:** It lapses.

19 **CHIEF JUSTICE B. R. GAVAI:** Then the Bill would lapse.

20 **TUSHAR MEHTA:** Lapse. My Lord the point I'm making is not what happens to the Bill.  
 21 The point I'm making, trying to make is that whenever time is stipulated it is provided for, you  
 22 cannot read into it. It amounts to amendment of the Constitution. That's a separate point, I'll  
 23 come to that. Now, what is the dictionary meaning of the term 'withhold'? This is not  
 24 considered by the debate, in the Constituent Assembly debates, as Your Lordships had asked  
 25 me. 106. My Lord, "As per the new international dictionary, 'withhold' means to hold back,  
 26 keep from action, to desist, or refrain from granting, giving or allowing, keeping one  
 27 possession or control. Refusing is also a part of the term 'withhold'. Refrain from granting is  
 28 also. Then, 'return' means, to go back or come back again, to pass back to an earlier passover."  
 29 Then, My Lord, Black's Law Dictionary says, 'withhold' means to retain in one's possession,

1 that which belongs to or is claimed by another, and 'return' means, to bring, carry or send  
 2 back, to place in the custody of, to restore to redeliver to send back." Now, My Lords, kindly  
 3 come to 108. "It is of utmost relevance to note that the Constitutional requirement of  
 4 expediency or a sense of urgency is incumbent upon the Governor, only when he decides to  
 5 return the Bill to the State Legislature for reconsideration." This is evident from the expression  
 6 which, I'll come to a little later. Please now come to, directly, to the judgment.

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Which judgement?

8 **TUSHAR MEHTA:** I'll just My Lord... Please come to page 164. I'm sorry... Page 168. Then  
 9 I'll take Your Lordships to the potential X, which are... there are possible X under the state list,  
 10 within the legislative competence of the State Legislature, but cannot be assented to, there is  
 11 no question of referring to the President and returning is out of question, because even if I  
 12 return it as a Governor, and if it comes back, then I have no power of withholding, so I will  
 13 have to use that discretion on the first occasion. I have given the examples, I'll come to little  
 14 later. Kindly, have a look at page 166, some examples. Where? What would the Governor do?  
 15 He is not just a postman. He represents the Union of India, appointed by the President.  
 16 President is elected by the entire nation by way of an indirect election, and that is also a way  
 17 of democratic expression. An individual who is not directly elected, is no lesser than the  
 18 individual who is indirectly elected. And again, the President acts as per aid and advice of  
 19 Council of Ministers. And Council of Ministers are responsible to the entire Parliament. This  
 20 is the framework, My Lord. This is the check and balance which is there. Please come to page  
 21 166. These are the examples. "A legislative session Bill fixes only two sitting days per year. It  
 22 is presented before the Governor." Then, "A confidence motion bill, requiring two-thirds super  
 23 majority to test the Council's confidence, directly contrary to the Constitution, etc., etc."

24 Now, My Lord, kindly come to page 168, the case law. Before I read the case law, the two Judge  
 25 Bench in ***Tamil Nadu***, forget the facts, I repeatedly say. The Two Judge Bench in ***Tamil***  
 26 ***Nadu*** relies upon a Three Judge Bench in ***State of Punjab versus Union of India***." State  
 27 of Punjab takes the view, that the word 'withhold' will have to be read with first proviso, that  
 28 you withhold and return, which in my submission, is erroneous on textual interpretation and  
 29 is in ignorance of several Five Judge Bench judgments exactly on the point." And those  
 30 judgments, now I place for Your Lordships' consideration. Page 1. We may start at 2:00, My  
 31 Lord.

32 **CHIEF JUSTICE B. R. GAVAI:** Sorry for withholding you for 15 minutes.

- 1 **TUSHAR MEHTA:** No, no, My Lord, on the contrary. That was, My Lord, temporary. This  
2 is not withholding as, My Lord, we understand.
- 3 **CHIEF JUSTICE B. R. GAVAI:** That was withholding as Mr. Sibal and the others  
4 understand.
- 5 **TUSHAR MEHTA:** Yes.
- 6 **CHIEF JUSTICE B. R. GAVAI:** Soli is on your side today.
- 7 **JUSTICE SURYA KANT:** Always this side.
- 8 **CHIEF JUSTICE B. R. GAVAI:** Always on?
- 9 **JUSTICE SURYA KANT:** He is always on the right side.
- 10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Wrong side.
- 11 **TUSHAR MEHTA:** We are always on right side of law. My Lord, we are always on Your  
12 Lordship's right side.
- 13 **CHIEF JUSTICE B. R. GAVAI:** No, no. Last week Mr. Kaul was on this side.
- 14 **TUSHAR MEHTA:** And we were on the same side opposing each other.
- 15 **CHIEF JUSTICE B. R. GAVAI:** So, you were on the same side till you changed your view  
16 after the review.
- 17 **TUSHAR MEHTA:** Your Lordships.
- 18 **NEERAJ KISHAN KAUL:** For which I was not given more for a cup of coffee. Your  
19 Lordships, grateful.
- 20 **TUSHAR MEHTA:** My Lord, on this withholding, let me say something. My Lord, I have one  
21 distinct advantage. And therefore, My Lord, what I am saying is really on the interpretation of  
22 the Constitution, why I say I have a distinct advantage. I had been a Law Officer of a State  
23 where State Government was of a different political dispensation. Central Government was of  
24 a separate political dispensation.
- 25 **CHIEF JUSTICE B. R. GAVAI:** It was a reverse situation.

1 **TUSHAR MEHTA:** Today, it is a reverse situation.

2 **CHIEF JUSTICE B. R. GAVAI:** That time, it was a reverse situation.

3 **TUSHAR MEHTA:** It was a reverse situation. My Lord, today also...

4 **JUSTICE VIKRAM NATH:** Mr. Sibal would have been that side and you would have been  
5 this side.

6 **TUSHAR MEHTA:** Yes, My Lord. So, I know My Lord...

7 **CHIEF JUSTICE B. R. GAVAI:** He wouldn't have been on this side. He would have been  
8 somewhere else.

9 **TUSHAR MEHTA:** Your Lordships are right. So, My Lord, functionally, how it functions,  
10 I'm aware of it. So it's not, My Lord, my attempt to protect the power of the Governor anyhow.  
11 But I must, My Lord, request Your Lordships that these are all plenary Constitutional powers  
12 vested upon high Constitutional functionaries. A possibility of misuse or abuse may perhaps  
13 not guide Your Lordship's interpretation. My Lord, for example, I...

14 **CHIEF JUSTICE B. R. GAVAI:** Your presumption is that the power in such high  
15 Constitutional functionaries will be exercised *bona fide*.

16 **TUSHAR MEHTA:** Correct, My Lords. My Lord, time and again, Your Lordships, while  
17 sitting in the Supreme Court or on the Division Bench have said that this was an abuse of writ  
18 jurisdiction. But then the problem is not with the writ jurisdiction. If we examine the contours  
19 of writ jurisdiction, it will have to be examined that it would be used for the purpose it is  
20 conferred upon the Constitution. My Lord, now, before I take Your Lordships to the  
21 judgments, may I request Your Lordships to read 200 and 201, My Lord, the way I like to read  
22 it. And I am reading it as a student of law, the way it is to be construed. If there is a power of  
23 withhold as I understand, My Lord, let us not give any interpretation which kills the power.  
24 Whoever is the Governor, whichever is the Party in power in State, Centre, doesn't really  
25 matter. But kindly have a look at, My Lord, even at the cost of repetition, 150, My Lord. Please  
26 have a look at it, My Lords. And then, My Lord, I will immediately come to the judgments.

27 "When a..." My Lord, Page 150. "When a Bill has been passed by Legislative Assembly of the  
28 State or the Council, it shall be presented to the Governor, and the Governor shall declare,  
29 either...", either, My Lord, would mean a choice, "either that he assents to the Bill or...", My  
30 Lord, this is the second option. "He withholds assent therefrom...", so I am withholding the

1 assent of the Bill. What is the meaning of withhold, I'll come to that. "Or that he reserves the  
 2 Bill for consideration of the President." He will have one of these three. "provided that the  
 3 Governor may...", here, it's not 'shall'. Fourth option is given. "As soon as possible after  
 4 presentation of him to the Bill for assent, return the Bill if it is not a Money Bill together with  
 5 a message requesting that the House or Houses will reconsider the Bill or any specified  
 6 provisions thereof, and in particular will consider the desirability of introducing any such  
 7 Amendment as he may recommend in this message. And when a Bill is so returned, the House  
 8 or Houses shall reconsider the Bill accordingly,. And if the Bill is passed again by the House or  
 9 Houses with or without Amendment and presented to the Governor for assent...", please mark.  
 10 "The Governor shall not withhold assent therefrom."

11 My Lord, how I give the meaning of the term 'withhold' used in the proviso? That you will not  
 12 kill it thereafter. Both words are used in the same provision and has the same meaning.  
 13 Correct, My Lord? Now, going it a little further. My Lord, suppose he reserves it for the  
 14 President, then 201 comes into play. Please have a look, My Lord. "When a Bill is reserved by  
 15 the Governor for the consideration of the President, the President shall declare either that he  
 16 assents to the Bill or that he withholds assent therefrom." My Lord, we take it that withhold  
 17 means temporarily withholding. Then, please see, My Lord, the distinction in the proviso.  
 18 "Provided that where the Bill is not a Money Bill, the President may direct the Governor to so-  
 19 and-so, so-and-so, so-and-so within six months of the date of receipt of such message. And if  
 20 it is again passed by the House or the Houses, with or without Amendment, it shall be  
 21 presented again to the President."

22 Because there is nothing, then it stands withhold... withheld, because there is nothing about  
 23 the President, My Lord. That does not... it neither says then the Governor... President shall  
 24 assent to the Bill. So, My Lord, both the provisions in the same document, namely the  
 25 Constitution, word 'withhold' used at two places in Article 201, My Lord, leads in my  
 26 submission to only one conclusion. That 'withhold' means in rarest of rare cases, but that... no,  
 27 sorry, this cannot be done. And I have given instances. For example, and without, My Lord,  
 28 giving any real instances. Central passes a law and some State Legislature pass... Central  
 29 means Parliament passes the law. And some State passes a law based upon whatever  
 30 considerations that this law will not apply in my State and the Bill is presented before the  
 31 Governor. Can he assent? Answer is no. Can he refer it to the President? Answer is no because  
 32 it's palpably wrong.

33 He can't return it because then he will be losing his right to withhold. Then, My Lord, withhold  
 34 is only in rarest of rare cases in, My Lord, exceptional circumstances. And therefore, I say that,  
 35 where his existence as a Constitutional functionary and his Oath of Office of defending the

1 Constitution requires him that I will have to withhold because he is the only person apart from  
 2 the President who takes oath of defending the Constitution. Unless, My Lord, this is read, the  
 3 Governor's Office will merely become a post office. He can either assent or withhold it and  
 4 send it back to the House. And if the House says no, nothing doing, we go ahead. Then he  
 5 cannot withhold or as a postman, he will send it to the President. I don't think that President's  
 6 position is envisaged in the Constitution as a postman. He has a wisdom. And in real life, My  
 7 Lord, how things work out, I can tell you Your Lordships. My Lord, as a matter of fact, every  
 8 matter doesn't come to Your Lordships. My Lord, Governors are also seasoned people.

9 Political leaders are also seasoned people, irrespective of the Party they represent. They have,  
 10 My Lord, years of political experience, public service to their credit. What happens is, My Lord,  
 11 whenever a Bill is presented, generally the Governor calls the Chief Minister and says that  
 12 these two provisions are doubtful. And I would have very serious reservations. If it is  
 13 repugnant, I'll have to refer it to the President. Sometimes, My Lord, the Chief Minister also  
 14 agree that, all right, we also don't labour much on this. I can promise you. You return it to the  
 15 House, we'll get it sorted out. And the matters are sorted out. My Lord, every problem which  
 16 may arise under the functioning of the Constitution may not have an answer or a solution in  
 17 legal proceedings.

18 My Lord, when the matter is referred... when the Bill is referred to the President of India, there  
 19 is a procedure stipulated under the Office Memorandum. My Lord, it goes to the President's  
 20 House. The President House narrates what are the repugnancies, which provision is  
 21 repugnant, how it is repugnant, whether it is repugnant. Thereafter, it is sent to the Ministry  
 22 of Law as well as Ministry, which is concerned Ministry, which is called the Nodal Ministry. If  
 23 it's Education, it goes to Education Ministry. Agriculture, it goes to Agricultural Ministry. Then  
 24 their feedback is received that, all right, there is some repugnancy, but both can coexist. It will  
 25 because... why there is a requirement of Presidential assent in some cases? That the Bill of the  
 26 State Legislature should not be in conflict with the National Policy formulated by the  
 27 Parliament.

28 And therefore, that is the ground on which the nodal agency says that though there is a  
 29 deviation in the State Law, it is, in fact, not affecting the National Policy. It is a State-specific  
 30 provision, though repugnant to the Central Law. Then the President gives the assent. And  
 31 otherwise, My Lord, in some cases, the President returns the Bill and if the Bill is again passed,  
 32 it comes back to the President and then it dies. It lapses. Because Article 201 Proviso does not  
 33 stipulate any consequence. My Lord, if we were to accept, if Your Lordships were to accept the  
 34 term 'withhold' in the main provision of Article 200 to mean temporarily decide not to grant  
 35 assent immediately. My Lord, kindly see this is third angle. My Lord, suppose the main part

1 of 200 would have contemplated that 'withhold' means kind of suspension of my powers that  
2 I'll not withhold.

3 And as State of Punjab judgment says, I will refer it to the House, then the word used would  
4 have been, 'if the House returns, the President shall grant assent'. But it says, "it will thereafter  
5 not withhold." Means your right to withhold ends if you do not exercise the first time.  
6 Otherwise, the only meaning, My Lord, which we can give if the interpretation given by Tamil  
7 Nadu is right that proviso last part says that "if the Bill is returned back by the House after  
8 reconsideration, he will grant assent", which is not there. He will not withhold it. That is, My  
9 Lord, the answer.

10 Now please come to the judgments, My Lord. Page 168, My Lord. The first judgment is  
11 **Kameshwar Singh**. Let's start with the judgment, page 168. But, My Lord, power being  
12 plenary in nature, it has to be left to his Constitutional discretion, whether it is a case  
13 exceptional, not exceptional, that he will have to decide. That's the way, My Lord,  
14 constitutional functionaries, powers, functions, responsibilities, limitations, they are  
15 interpreted. That's my respective...

16 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The exercise of power under the  
17 Constitution is never in a vacuum. When the laws were made originally, it was... an ideal  
18 situation was contemplated. Take classic example, Tenth Schedule. When the Law was made,  
19 everybody supported. The biggest authority who we all can rely on is the Speaker. Speaker is  
20 the best authority. So, therefore he should be the adjudicator. Now, today if we are asked to  
21 interpret Tenth Schedule where a challenge is made to the powers exercised by the Speaker,  
22 we would, with our experience, decide it in a different manner. Constitution is an...  
23 interpretation, is a process. We take into account how the system is working and it can't be  
24 frozen at a time when the Article is made and what ideal situation was there at that point of  
25 time.

26 **TUSHAR MEHTA:** My Lord are absolutely...

27 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** So, we'll interpret it on the basis of  
28 how these Constitutional functionaries are working and how its provisions have to be  
29 interpreted. But without reference to the political process which happens and it will be rather  
30 difficult for a Constitutional interpretation...

31 **TUSHAR MEHTA:** About which the Courts would have minimum knowledge, My Lords.  
32 Possibly...



- 1 **CHIEF JUSTICE B. R. GAVAI:** So, can the interpretation be static or does it [UNCLEAR].
- 2 **TUSHAR MEHTA:** No, no. The Constitution is a living document. Its interpretation...
- 3 **CHIEF JUSTICE B. R. GAVAI:** It's a living document. Like in that Telangana case, it was  
 4 sought to be argued that in earlier Constitution Benches, no time limit was framed as to within  
 5 how much time the Honourable Speaker should decide it. For the first time in... Justice  
 6 Nariman decided. It was sought to be argued. But then I observed that when the Bill was  
 7 discussed for amending the Constitution, Mr. Ashoke Sen, who was the then Law Minister, he  
 8 said that our experience is that in the Courts, the matters are pending for so long that in many  
 9 of the matters the petition become infructuous. So he gave an example of the Congress symbol.  
 10 He said that, though I think it was initially *bail jodi*, I think bullock cart, and then it was  
 11 changed to...
- 12 **TUSHAR MEHTA:** No, it was a cow and calf, My Lord.
- 13 **CHIEF JUSTICE B. R. GAVAI:** Whatever it maybe, yes. So, he said that by the time we own  
 14 the proceedings before the Election Commission, the proceedings had become infructuous,  
 15 and we had already succeeded on a different symbol. And therefore, in order to ensure  
 16 expediency in the matter, it was decided that the power should be given to the Honourable  
 17 Speaker. But with the experience I observed at that time, they did not anticipate when the  
 18 earlier Constitution Bench decided the matter that the Speakers would resolve the matters in  
 19 a situation which ends in operation successful, patient dead.
- 20 **TUSHAR MEHTA:** That happens, My Lord, in Court also, but I'll come to that. There is one  
 21 judgment, My Lord, that therefore I say that inability for good reasons, bad reasons of one  
 22 organ to do what is expected would not empower another organ to take over. I'll come to that,  
 23 My Lords, because...
- 24 **CHIEF JUSTICE B. R. GAVAI:** No, we believe in separation of powers, but then...
- 25 **TUSHAR MEHTA:** No, Mr. Sen was right. And he could say that because he was in  
 26 Parliament with, My Lord, privileges attached to it. But Your Lordships would also be, My  
 27 Lord, aware, and Your Lordships are aware that the Speaker under the...
- 28 **CHIEF JUSTICE B. R. GAVAI:** That I have already observed that we are [UNCLEAR]  
 29 because the speaker has been held to be a Tribunal amenable to the jurisdiction of this Court  
 30 and the [UNCLEAR].

1 **TUSHAR MEHTA:** Therefore, that's the point. My Lord, he's the Tribunal.

2 **CHIEF JUSTICE B. R. GAVAI:** And he does not enjoy the Constitutional immunity as a  
3 Speaker because of proceedings before the Speaker are not the...

4 **TUSHAR MEHTA:** He's a Tribunal. He's not a leader of the House.

5 **CHIEF JUSTICE B. R. GAVAI:** ...proceedings before the Legislative Council. So, I have  
6 observed that with a few riders why were we issuing a mandamus to the Honourable Speaker.

7 **TUSHAR MEHTA:** Yes, certainly. My Lord, Your Lordships fixed the time limit and rightly  
8 in case of Tenth Schedule because Speaker right from *Kihoto Hollohan*, he is held to be a  
9 Tribunal. He is not exercising, My Lord, any plenary...

10 **CHIEF JUSTICE B. R. GAVAI:** Is the Tribunal amenable to the jurisdiction of High Court  
11 under 226 Prudence and Discord under 136.

12 **TUSHAR MEHTA:** So, My Lord, let me come to page 168. I'll come to that judgment, My  
13 Lord. That is one of the judgments relied upon by the other side. And therefore, I'm going to  
14 say that. My Lord, as a matter of fact and it would be interesting, I'll go in detail when I reach  
15 that stage. My Lord, the Parliament amended the Law that because Judiciary is unable to do  
16 within a particular time limit...

17 **CHIEF JUSTICE B. R. GAVAI:** Judiciary as well as the Election Commission.

18 **TUSHAR MEHTA:** No, no, not in that matter. Some other matter.

19 **CHIEF JUSTICE B. R. GAVAI:** No, Mr. Ashok Sen specifically says in his judgment that  
20 the proceeding before the Judiciary and the Election Commission takes so long...

21 **TUSHAR MEHTA:** No, I'm on a different judgment, but I'll read that judgment. Symbol  
22 matter, My Lords.

23 **CHIEF JUSTICE B. R. GAVAI:** The Election symbol.

24 **KAPIL SIBAL:** I never want to touch on those subjects.

25 **CHIEF JUSTICE B. R. GAVAI:** I think, it was a cow and calf and then I think they won the  
26 elections on *panja*.

27 **TUSHAR MEHTA:** Yes, My Lord. The cow was, My Lord, quite auspicious for them.

- 1 **KAPIL SIBAL:** That's right.
- 2 **CHIEF JUSTICE B. R. GAVAI:** We will not go in to those issues. We will restrict ourselves  
3 to the...
- 4 **TUSHAR MEHTA:** Let's not go into it.
- 5 **KAPIL SIBAL:** Just a comment, My Lords.
- 6 **TUSHAR MEHTA:** No, in any case, I am asking the wrong question, My Lord now. My Lord,  
7 Page 168. Please have a look, My Lord, please.
- 8 **CHIEF JUSTICE B. R. GAVAI:** 1?
- 9 **TUSHAR MEHTA:** 168. My Lord, the judgment. This is a five judgment... judgment. ***State***  
10 ***of Bihar versus Kameshwar Singh.*** My Lord, for two purpose I'm relying upon. (a), the  
11 Governor is a part of the Legislature, and whatever function he exercises is quasi Legislative.  
12 The power of assent is quasi Legislative. And there are judgments on that, My Lord, point.  
13 Please come to My Lord, page 169... My Lord, my learned friend is right. It's Legislative. My  
14 Lord, 198, I have just highlighted. I'm not right now saying this, My Lord. I'll come to it  
15 separately. The legislation of Madhya Pradesh... Legislature of Madhya Pradesh consists of  
16 Governor and the Legislative Assembly, but relevant is 235 at page 170.
- 17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Where are you reading this?
- 18 **TUSHAR MEHTA:** I'm sorry, My Lord. Page 168 the judgment starts. It's ***State of Bihar***  
19 ***versus Kameshwar Singh.***
- 20 **CHIEF JUSTICE B. R. GAVAI:** Para 198?
- 21 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Have you quoted in your para, okay.
- 22 **TUSHAR MEHTA:** Yes. It's quoted, My Lord. It is a Constitution Bench. It is a five-judge  
23 bench judgment, My Lords. Kindly see at 169. My Lord, I am at the foot. My Lord, please come  
24 to page 168, para 20. Mr. Somayya's argument, Your Lordship gets that? My Lords get that?  
25 Mr. Somayya's argument based on Clause 3 of Article 31, which...
- 26 **CHIEF JUSTICE B. R. GAVAI:** So, you are at page 168 bottom? Bottom?

**TUSHAR MEHTA:** Page 168, at the foot, My Lord, *State of Bihar versus Kameshwar Singh*, para 20. "Mr. Somayya's argument based on Clause 3 of Article 31, to which reference has been made earlier, is equally untenable. It is true that the Legislature of the State includes the Governor and that a Bill passed by such Legislature cannot become a law until...", please mark... "until it receives the Governor's assent. Article 200, however, contemplates one of the three courses being adopted by the Governor when a Bill is presented to him after it is passed by the House or Houses of Legislature. One, to give his assent, or two, withhold assent, or three, to reserve the Bill for consideration of the President." Correct, My Lords?

"The first proviso to that Article deals with a situation where the Governor is bound to give his assent and has no relevance here. The second proviso makes reservation compulsory where the Bill would, if it became law, derogate from the powers of the High Court. But such reservation, it is important to note, should be made without the Governor himself having assent to the Bill... giving assent to the Bill. It is significant that the article does not contemplate the Governor giving in assent... his assent. And thereafter, when the Bill has become a full-fledged law, reserving it for the consideration of the President. Indeed, the Governor is prohibited from giving his assent where such reservation by him is made compulsory. The Constitution would thus seem to contemplate only Bills passed by the House, etc." Please come to 235 at page 170. "Great...

**CHIEF JUSTICE B. R. GAVAI:** How do you... the first proviso to that Article deals with the situation where the Governor is bound to give his assent?

**TUSHAR MEHTA:** My Lord, if it returns. If it is returned, My Lord. That's what they say. Obviously, My Lord, he cannot withhold. Then he has to... My Lord, he can withhold, or he can give assent, or he can even still refer. He can still refer. He may give an opportunity to the Legislature that...

**CHIEF JUSTICE B. R. GAVAI:** No, according to that, it is his choice. Either he can withhold or send it to the... or return it to the Legislative House.

**TUSHAR MEHTA:** I'm sorry, My Lord. I'll again, My Lord, make myself clear. He has three options in the main proviso. He can grant assent straightaway. He can withhold, which, according to me, the Bill lapses or Bill falls through, as Supreme Court says. And third option, refer it to the President. Fourth option, other than these three is, when he feels that there is some repugnancy somewhere, or there is some tweaking required somewhere, then with his message, he will send it. He will return it to the House with a request to reconsider it. When the House reconsiders it, then the embargo is, he cannot withhold. But he can still say that, 'all

1 right, you have not considered my suggestion. You have not removed the repugnancy or  
 2 whatever difficulty I have suggested. I now refer the matter to the President for his assent'.  
 3 That is not prohibited. Correct, My Lord?

4 Now please come to 235. "Great stress is laid on the words 'law' and the 'Legislature of a State'.  
 5 It is stated that the Clause postulates a Law made by the Legislature of a State. Reference is  
 6 then made to Article 168, which provides that for every State, there shall be a Legislature which  
 7 shall consist of the Governor. And so far as Madhya Pradesh is concerned, of one House, that  
 8 is Legislative Assembly. The argument is that Article 31(3) requires that a law must be reserved  
 9 for the consideration of the President. If a Bill passed by the Assembly is reserved by the  
 10 Governor for consideration of the President without giving his own assent thereto, it cannot  
 11 be said that a law is reserved for consideration of the President, for up to that State, the Bill  
 12 remains a Bill and has not been passed into law.

13 Therefore, it is urged that after a Bill is passed by the State Assembly, the Governor must assent  
 14 to it, so that the Bill became Law. And then that Law to have effect must be reserved for  
 15 consideration of the President. This admittedly not having been done, the provisions of Article  
 16 31(3) cannot be said to have been complied with. And therefore, the Act cannot have any effect  
 17 at all. I am unable to accept this line of reasoning for one thing. It assumes that a Bill passed  
 18 by the State Assembly can become a Law only by the assent of the Governor. That is not so."  
 19 Now, please see. "The procedure to be followed after a Bill is passed by the State Assembly is  
 20 laid down in Article 200. Under that Article, the Governor can do one of three things. Namely,  
 21 he may declare that he assents to it, in which case the Bill becomes a Law. Or he may declare  
 22 that he withholds assent therefrom, in which case the Bill falls through."

23 **CHIEF JUSTICE B. R. GAVAI:** Falls through unless the procedure indicates due process  
 24 is followed.

25 **TUSHAR MEHTA:** Yes, falls through. So if he does not choose, My Lord, the option of  
 26 proviso, the Bill falls through. So 'unless' means that's the option. Either I withhold or I return  
 27 the Bill. Otherwise, it has no meaning. Falls through has no meaning. Therefore, 'unless' is an  
 28 exception. "That if he withholds at the first instance, it falls through, unless, he resorts to the  
 29 proviso. Unless the procedure indicated in the proviso is followed or he may declare that he  
 30 reserves the Bill for the consideration of the Parliament, in which case the President will adopt  
 31 the procedure laid down in Article 201. Under that Article, the President shall declare either  
 32 that he assents to the Bill, in which case the Bill will become Law or that he withholds assent  
 33 therefrom, in which case the Bill falls through unless the procedure indicated in the proviso is  
 34 followed". So 'falls through' has only one meaning.

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Why is it combined with 'unless', the  
2 proviso?

3 **TUSHAR MEHTA:** Because it's an option given.

4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That is a completely separate  
5 disjunctive and independent of falling through according to your case. According to your  
6 reading, proviso is completely different to the declaration...

7 **TUSHAR MEHTA:** The fourth option.

8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The fourth option.

9 **TUSHAR MEHTA:** So, My Lord, what it says is, I'll put it, I rephrase myself. My Lord, unless  
10 he exercises the fourth option...

11 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Then there is no declaration of  
12 withholding. The Governor cannot on one hand declare that he's withholding...

13 **TUSHAR MEHTA:** That's exactly what I'm saying, My Lord.

14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** At the same time exercising Option 4.

15 **TUSHAR MEHTA:** Correct, My Lord. Therefore, I'm saying that he has to assent, withhold,  
16 or reserve unless he chooses the fourth option. Otherwise, one of the three options are  
17 complete in themselves. So, therefore, My Lord, my submission is that the Proviso is an  
18 exception to first, second, and third in the main part. He may not grant assent. He can return  
19 it. He may not withhold. He may return it. He may not reserve it for President. He may return  
20 it. But after returning, if it is passed, one option is taken away. He can either assent or...

21 **JUSTICE SURYA KANT:** Is it your argument, Mr. Solicitor, that if the Governor exercises  
22 Option No. 2, that means withhold. If he exercises, let us say, rather otherwise. If the Governor  
23 decides to exercise the Option 1, 3, or 4, then he cannot fall back on Option No. 2, 'withhold'.

24 **TUSHAR MEHTA:** Yes.

25 **JUSTICE SURYA KANT:** But if he exercises Option No. 2 as the Option No. 1...

26 **TUSHAR MEHTA:** First option.

27 **JUSTICE SURYA KANT:** ...he still have the prerogative to exercise Option No. 4?

- 1 **TUSHAR MEHTA:** No, My Lord, he cannot thereafter.
- 2 **CHIEF JUSTICE B. R. GAVAI:** According to him, once... according to him, if the Governor  
3 chooses to exercise option 2, 'withhold ', the Bill falls through.
- 4 **JUSTICE SURYA KANT:** Bill falls through, but then...
- 5 **TUSHAR MEHTA:** 'Unless' is the word used in the judgment. It's not in the Article.
- 6 **CHIEF JUSTICE B. R. GAVAI:** Schedule, yes.
- 7 **JUSTICE SURYA KANT:** Unless the procedure indicated in the Proviso is followed.
- 8 **TUSHAR MEHTA:** Meaning thereby...
- 9 **JUSTICE SURYA KANT:** So, beforehand.
- 10 **TUSHAR MEHTA:** Meaning thereby, he can assent or follow the proviso. He can withhold  
11 or follow the proviso. He can reserve it for the President or follow the proviso. But if he  
12 withholds, there is no question of following the proviso. That is why it says... the Proviso says  
13 that then you cannot withhold because then you have abandoned your right of withholding at  
14 the...
- 15 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** So there are in two ways you would  
16 look at second option of withholding. One is standalone withholding. But when... at the  
17 commencement, the Governor says that I withhold, standalone, it will come to an end. There  
18 is no further adjudication.
- 19 **TUSHAR MEHTA:** That's my submission.
- 20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Second situation is, where he seeks to  
21 withhold, but he will first resort to the proviso and then send it back. And after it comes back,  
22 he can't withhold. That's what you're saying?
- 23 **TUSHAR MEHTA:** He cannot. Yes, My Lord. That out of three, he says...
- 24 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** You're saying it?
- 25 **TUSHAR MEHTA:** I'll... yes, My Lord. Out of three...

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** But your contention, basically, is that  
2 the standalone withholding and straightaway tell him that I am not going to grant you any  
3 further will disentitle the Governor from invoking the proviso second time?

4 **TUSHAR MEHTA:** I am grateful, My Lord.

5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** But that takes you to the larger  
6 question of... of course, we'll test this also.

7 **TUSHAR MEHTA:** My Lord, that's why we have...

8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Therefore, the question of Judicial  
9 Review becomes far more important. There your stand is there is no judicial review. There is  
10 not...

11 **TUSHAR MEHTA:** There is... no, I'm not saying that there is no...

12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's why the...

13 **TUSHAR MEHTA:** I'm sorry. I'm sorry. I am saying, it's not justiciable and Supreme Court  
14 has said. Supreme Court has said.

15 **JUSTICE SURYA KANT:** That's why the expressions, two expressions, 'shall declare'  
16 acquires lot of eminence and importance because 'shall declare' means that it's not a simple  
17 empty declaration. If you want to withhold, then that declaration must also assign brief  
18 reasons of withholding. Otherwise, how to exercise the power of Judicial Review?

19 **TUSHAR MEHTA:** My Lord, Your Lordships are... I am yet to argue on Judicial Review and  
20 Justiciability. My Lord, there are several powers under the Constitution, where we are not, My  
21 Lord... for example, President also, My Lord, can...

22 **JUSTICE SURYA KANT:** All right. Secondly, in the context you're saying, that if the second  
23 option, he exercises withholding, that he withholds, and then he can't exercise the other  
24 options?

25 **TUSHAR MEHTA:** Yes, My Lord.

26 **JUSTICE SURYA KANT:** You are talking of...

27 **TUSHAR MEHTA:** Other option of returning, yes.



1 **JUSTICE SURYA KANT:** Mr. Mehta, if we are talking of the wider powers of the Governor,  
 2 then why this curtailment? Today, he decides to withhold it, because he feels that this Bill is  
 3 completely extra-Constitutional, this is so-and-so. Then later on, on an advice he feels that,  
 4 okay, with certain amendments, certain modification, this Bill can also pass the muster of the  
 5 Constitution.

6 **TUSHAR MEHTA:** Then, he can...

7 **JUSTICE SURYA KANT:** Therefore, what prevents him to exercise Option No. 4 to return  
 8 it with that message? Let us... how to read this curtailment of power under two of your  
 9 argument?

10 **TUSHAR MEHTA:** In a fact situation, My Lord, suppose he withholds...

11 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It's absolutely right. I'll tell you  
 12 because that's the political process how it occurs? Not like...

13 **TUSHAR MEHTA:** Exactly, My Lord. That's actually possible that the Chief Minister may  
 14 go and say that, please don't withhold.

15 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Yes. No, that the way political process  
 16 occurs is not adjudicatory where a decision is taken. It's nothing like a decision taken. Even  
 17 assuming that the Governor says that, I withhold, again political process can again knock on  
 18 his door. He can still open it and say, okay, all right. I see a reason. Then I'll send it back to  
 19 you. Reconsider and then send it back. But to say, that first time when he says, I withhold,  
 20 matter comes to an end. That can't be like that. It can't be because it's counterproductive to  
 21 the powers of the Governor, counterproductive to the Legislative process also. So, it has to be  
 22 in a situation where it should be open ended, that first he might say 'no'. We see the point in  
 23 what you are saying. If it is grossly a case falling directly under List 1, he could say 'no'. But he  
 24 could also say, 'please modify it, rectify it'. And then...

25 **TUSHAR MEHTA:** No, suppose the entire... suppose, My Lord, take an example. Entire Act  
 26 is in List 1? There's no question of returning it.

27 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It may, but he can still say that, please  
 28 look at it because your whole Act is falling under List 1. But to say that, don't go back again...

29 **TUSHAR MEHTA:** So, My Lord if...

- 1 **CHIEF JUSTICE B. R. GAVAI:** To decide on a lot of legislative competence because... [NO  
2 AUDIO].
- 3 **TUSHAR MEHTA:** My Lord, suppose... I'm sorry.
- 4 **JUSTICE VIKRAM NATH:** [NO AUDIO] and the bold portion which you are just reading,  
5 "The procedure to be followed after a Bill is passed by the State Assembly is laid down in Article  
6 200. Under that Article, the Governor can do one of three things". Now let us go one by one.
- 7 **TUSHAR MEHTA:** It's not a statute. It's paraphrasing. Let's read it as a judgment.
- 8 **CHIEF JUSTICE B. R. GAVAI:** It's a judgment by five judges.
- 9 **JUSTICE VIKRAM NATH:** Five judges.
- 10 **TUSHAR MEHTA:** No, no, it's a judgment. It's not...
- 11 **JUSTICE VIKRAM NATH:** Fine. "Namely, he may declare that he assents to it, in which  
12 case the Bill becomes a Law." This is first. Out of three, one. "or he may declare that he  
13 withholds assents therefrom..."
- 14 **TUSHAR MEHTA:** Complete second.
- 15 **JUSTICE VIKRAM NATH:** "In which case, the Bill falls through unless the procedure  
16 indicated in the Proviso is followed." This is second. Then comes 'or', the third one. "Or he may  
17 declare that he reserves the Bill for the consideration of the President, in which case the  
18 President will adopt the procedure laid down in Article 201." So, these three situations are  
19 contemplated to be taken up by the Governor once the Legislature passes a Bill and sends it to  
20 him, correct? Now this, unless Proviso is invoked, it's coupled with holding the assent.
- 21 **TUSHAR MEHTA:** The difficulty is, My Lord, the Supreme Court here is paraphrasing 200.  
22 And we are reading instead of 200...
- 23 **JUSTICE VIKRAM NATH:** This is not paraphrasing. This is interpreting 200.
- 24 **TUSHAR MEHTA:** No, My Lord, it... 'unless' is a separate option. Textually also, it is a  
25 separate option.
- 26 **JUSTICE VIKRAM NATH:** Therefore, we had asked you that question earlier, whether  
27 withholding would mean that he withholds and he exercises the proviso?

1 **TUSHAR MEHTA:** Kindly, kindly give...

2 **JUSTICE VIKRAM NATH:** That is what this judgment says.

3 **TUSHAR MEHTA:** Otherwise, in which case the Bill falls through has no meaning, No. 1.  
4 No. 2, My Lord, suppose... My Lord, kindly...

5 **JUSTICE VIKRAM NATH:** No. He may withhold it, declare it, and not refer it under the  
6 Proviso.

7 **TUSHAR MEHTA:** Correct, My Lord. Certainly.

8 **JUSTICE VIKRAM NATH:** Then it will fall through.

9 **TUSHAR MEHTA:** Correct.

10 **JUSTICE VIKRAM NATH:** But at the same time of withholding again...

11 **TUSHAR MEHTA:** He can...

12 **JUSTICE VIKRAM NATH:** ...exercise the Proviso also.

13 **TUSHAR MEHTA:** It's possible... My Lord, kindly appreciate. My Lord, that depends upon  
14 the facts. My Lord, suppose a State Legislature were to pass a law...

15 **JUSTICE VIKRAM NATH:** Just trying to understand what this... the language used in this  
16 judgement, what does this ultimately reflect, and how do we interpret it?

17 **TUSHAR MEHTA:** Correct, My Lord. Your Lordships are also in the five-judge bench.

18 **JUSTICE VIKRAM NATH:** Yes.

19 **TUSHAR MEHTA:** I'm not on that, My Lords. Please appreciate, My Lord, to take example  
20 of a State, where there's Legislative Assembly for good reason because of the feelings in the  
21 State passes a law that we will not enter into any trade or commerce with a particular foreign  
22 country. My Lord, Trade or Business is in the Second Schedule. There is no question of, My  
23 Lord, repugnancy. But it ultimately, My Lord, is the subject of External Affairs with the  
24 Country. The President may say that, no, you can do this. There are several examples, My Lord,  
25 which we can give, where something is so abnormal that President will have to say that,  
26 withhold, I can't... My Lord, suppose that a Bill is passed, My Lord, regarding defence of the  
27 Country. My Lord, he will have to withhold. He can't return it to the House because his

1 decision to withhold is based on the premise that you did not have the competence to do this.  
 2 Then, My Lord, **Raja Bhairebendra Narayan Bhup...**

3 **CHIEF JUSTICE B. R. GAVAI:** In any case, the **Kameshwar** would be with regard to  
 4 protection under 31A and 31B. The question with regard to 200...

5 **TUSHAR MEHTA:** No. 200 is, My Lord, examined. 200 is examined, My Lord. This is  
 6 precisely... that was the question which fell for consideration and it is there. My Lord, if we  
 7 want to find out a distinction, there can be other distinctions.

8 **CHIEF JUSTICE B. R. GAVAI:** No, no. We'll... because every judgment has to be read in  
 9 the facts, in the context of the facts.

10 **TUSHAR MEHTA:** I bow down, My Lord. To that proposition, there cannot be any difficulty,  
 11 My Lords.

12 **CHIEF JUSTICE B. R. GAVAI:** Well, the main argument appears to be...

13 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It was a different context in the sense  
 14 that it is answering a question saying that it becomes automatically law. He says in reply,  
 15 saying it doesn't become automatically law unless it is assented by the Governor. In that  
 16 context, it was said.

17 **TUSHAR MEHTA:** My Lord, **Raja Bhairebendra Bhup** was under the Government of  
 18 India Act. But the same words, I have already pointed out to Your Lordships, My Lord, are  
 19 used. Please see. "Dealt with the constitutional validity of Assam State acquisition of  
 20 Zamindari Act and whether it was within the competence of the State Legislature in the  
 21 peculiar facts, etc." My Lord, please turn the page over. "Broadly speaking, it may be said that  
 22 a Bill begins to pend with its introduction in the Legislative Chamber. And it ceases to pend  
 23 (a), when it lapses under Section 73(4); (b), when the Governor declares that he assents in His  
 24 Majesty's name to the Bill, in which case the Bill ripens into an Act; or (c), when the Governor  
 25 declares that he withholds his assent therefrom, in which case the Bill falls through, or when  
 26 being reserved by the Governor for the consideration of the Governor General, the Governor  
 27 General acting under Section 76 declare that he assents in His Majesty's name to the Bill, in  
 28 which case also the Bill becomes an Act; or when having been so reserved by the Governor, the  
 29 Governor General declares that he withholds his assent therefrom, in which case, again, the  
 30 Bill falls through.

1 (f), When the Bill having been reserved by the Governor general for the signification of His  
 2 Majesty's pleasure thereon under Section 76(1), the Governor, under Section 76(2), makes  
 3 known by public notification that His Majesty has assented thereto in which case, again, the  
 4 Bill becomes an Act. And lastly, when no such notification is issued by the Governor within 12  
 5 months from the date on which it was presented, in which event also the Bill comes to an end."  
 6 My Lord, because there was a time limit, otherwise it would lapse. "In short, a Bill may be said  
 7 to be pending as long as it does not lapse or it does not become an Act by receiving the assent  
 8 by the appropriate authority or is not terminated by withholding of assent by such authority."  
 9 'Withholding' has been given this meaning, and this meaning only. It's a complete event, My  
 10 Lord. Once the Governor says I withhold, My Lord, if that is not a wise thing, then it is for the  
 11 Parliament to amend. But this is how judicially it has been interpreted. The contention of the  
 12 appellant is that when the Bill under...

13 Yes. My Lord, now, please see page 173, **Purushothaman Nambudiri**. My Lord, again, a  
 14 five-judge bench judgment. What I read was also a five-judge bench judgment. Then **Valluri**  
 15 **Basavaiah Chaudhary**, My Lord, I have cited at two places, but I'll read it at page 173. One  
 16 was cited to say that it is a Legislative Act. Grant of assent is a Legislative Act. And therefore,  
 17 My Lord, I would come to that submission that there is no principles of natural justice or  
 18 reasons etc. It's a Legislative Act. It's a plenary Constitutional Power to be exercised by a high  
 19 Constitutional Authority whose, My Lord, wisdom or *bona fides* are not to be doubted.

20 My Lord, please see at the foot, 173. "It is submitted that **Union of India versus Valluri**  
 21 **Basavaiah Chaudhary...**", My Lord, it's again a five-judge bench judgment. My Lord, none  
 22 of these judgments are cited in **Punjab, State of Punjab versus Union of India**, three-  
 23 judge bench, not even referred to.

24 **CHIEF JUSTICE B. R. GAVAI:** And Tamil Nadu?

25 **TUSHAR MEHTA:** Tamil Nadu refers, but I'll show, My Lord, how it says there... Tamil  
 26 Nadu relies on Punjab and say that these are *per incuriam* or something. I'll come to that.

27 **CHIEF JUSTICE B. R. GAVAI:** *Per incuriam*? How did two judges say that five-judges  
 28 bench are *per incuriam*?

29 **TUSHAR MEHTA:** My Lord, there is one at... **Pavitra** is, My Lord, a two-judge bench  
 30 judgment, where all this is considered and Tamil Nadu...

31 **CHIEF JUSTICE B. R. GAVAI:** **Pavitra 1** or **Pavitra 2**?

- 1 **TUSHAR MEHTA: *Pavitra 2***. My Lord, it follows seven-judge bench of ***Shamsher***  
2 ***Singh***. And the...
- 3 **CHIEF JUSTICE B. R. GAVAI: *Pavitra 2*** was with regard to reservation.
- 4 **TUSHAR MEHTA:** Correct, My Lord. But it was reserved for the President and this question  
5 squarely arose about the justiciability, etc.
- 6 **CHIEF JUSTICE B. R. GAVAI:** No, I think one of the ***Pavitras*** was two judges.
- 7 **TUSHAR MEHTA:** Both had two judges. The one which is declared *per incuriam* is by  
8 Justice...
- 9 **CHIEF JUSTICE B. R. GAVAI:** I was part of that Bench.
- 10 **TUSHAR MEHTA:** No, My Lords were not. What is...
- 11 **CHIEF JUSTICE B. R. GAVAI:** I was in *Pavitra*... involved in some matter.
- 12 **COUNSEL:** That is in ***Jarnail Singh*** with Justice...
- 13 **TUSHAR MEHTA:** But that is on the question of reservation,
- 14 **CHIEF JUSTICE B. R. GAVAI:** On the reservation.
- 15 **TUSHAR MEHTA:** On the reservation. My Lords were sitting with Justice Nageswara Rao  
16 and Justice Khanna in, My Lord, ***Jarnail Singh***. But that is on a different point, that's on  
17 reservation.
- 18 **CHIEF JUSTICE B. R. GAVAI:** But that is on the subject of reservation, yes.
- 19 **TUSHAR MEHTA:** Not on this 200, My Lord. Here, My Lord, ***Pavitra***, this question  
20 squarely arose. ***Pavitra*** refers...
- 21 **CHIEF JUSTICE B. R. GAVAI:** Submission of quantifiable data.
- 22 **TUSHAR MEHTA:** Yes, My Lord.
- 23 **CHIEF JUSTICE B. R. GAVAI:** Submission of quantifiable data.

1 **TUSHAR MEHTA:** Correct, correct. Quantifiable data and designated commission, etc., My  
 2 Lord. But that was a separate issue, My Lord. We are not concerned. Here, My Lord, **Pavitra**  
 3 dealt with Article 200 and 201. With these judgments, two-judge bench judgment, My Lord,  
 4 Justice Chandrachud and Justice Lalit, which is declared to be *per incuriam* and relying upon  
 5 **Punjab** in **Tamil Nadu** case. My Lord, now see **Union of India...**

6 **CHIEF JUSTICE B. R. GAVAI:** I'm surprised when you said the **Tamil Nadu** judgment  
 7 says that the Constitution benches are *per incuriam*.

8 **KAPIL SIBAL:** Only on one point, My Lord. That is...

9 **TUSHAR MEHTA:** On one point, My Lord. I'll read that. I'll read that. I'm not criticising the  
 10 judgment, My Lord. I'll read what is written, My Lord. I can't improve upon it. I can neither  
 11 improve upon the text of the law or the judgment, My Lord. I can only place it. My Lord,  
 12 **Union of India versus Valluri Basavaiah Chaudhary.** Again, My Lord, five judges,  
 13 not cited in Punjab. "The Governor is, however, made a component part of the Legislature of  
 14 the State under Article 168 because every Bill passed by the State Legislature has to be reserved  
 15 for the assent under Article 200. Under that Article, the Governor can adopt one of the three  
 16 courses. Namely, he may give his assent to it, in which case a Bill becomes a Law. Two, he may,  
 17 except in case of a Money Bill withhold his assent therefrom, in which case the Bill falls  
 18 through, unless..."

19 **JUSTICE VIKRAM NATH:** Again, 'unless' is added here.

20 **TUSHAR MEHTA:** Correct.

21 **JUSTICE VIKRAM NATH:** This is the same language as before.

22 **TUSHAR MEHTA:** Correct, My Lord. It is an exception to 1, 2, and 3. I have no difficulty,  
 23 but it's not an exception to 2.

24 **CHIEF JUSTICE B. R. GAVAI:** But there is no direct judgment so far which holds that the  
 25 Governor has the power to withhold the Bill permanently.

26 **TUSHAR MEHTA:** My Lord, I have read one judgment. It says, it falls through.

27 **CHIEF JUSTICE B. R. GAVAI:** No, but both the judgements says, it falls through... no, that  
 28 judgement which you are relying... no, no. It doesn't consider 200. It considers the  
 29 Government of India Act of 1935.

- 1 **TUSHAR MEHTA:** The same identical, *pari materia*.
- 2 **CHIEF JUSTICE B. R. GAVAI:** No, wherein timelines were also provided.
- 3 **TUSHAR MEHTA:** Timeline has no, My Lord, relevance.
- 4 **CHIEF JUSTICE B. R. GAVAI:** Timelines. According to you, it's all on the timelines. The  
5 1935 Act provided for timeline.
- 6 **TUSHAR MEHTA:** I'm sorry, My Lord. I'm sorry. It can be distinguished on another ground.  
7 Timeline is a separate...
- 8 **CHIEF JUSTICE B. R. GAVAI:** The text of 200 maybe *pari materia* to 73, 74 of the 1935  
9 Act.
- 10 **TUSHAR MEHTA:** Correct, My Lord.
- 11 **CHIEF JUSTICE B. R. GAVAI:** But there is a slight distinction, it's not... as the words are  
12 not 100% imported from the 1935 Act.
- 13 **TUSHAR MEHTA:** I will, My Lord, show the distinction. I'll show, My Lord, the... both the  
14 provisions. My Lord, timeline is the seventh option that if it's not done within 12 months, then  
15 it lapses. That's the only addition. My Lord, there is no change. My Lord, as a matter of fact,  
16 Government of India Act which is considered had no timeline. But even if, My Lord, there is a  
17 timeline, it is the last option. Then, it lapses. It's an option of the Legislature. My Lord, please  
18 see page 143 is that provision. Page 143, My Lord. Your Lordships have read it, My Lord. 143,  
19 My Lord. 75 of Government of India Act. *Pari materia* provisions, My Lord. And there was no  
20 timeline stipulated. The court says that if it is returned by the President... I'm sorry, My Lord,  
21 Chief Justice is reading.
- 22 **KAPIL SIBAL:** In the provision, "in his discretion." 35 Act, 'in his discretion'.
- 23 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Where are you reading?
- 24 **TUSHAR MEHTA:** I know, I have highlighted it. You possibly missed when I was arguing.  
25 Yes.
- 26 **KAPIL SIBAL:** There's a difference.
- 27 **TUSHAR MEHTA:** My Lord, I can have a discretion of A, B, C.



- 1 **JUSTICE VIKRAM NATH:** Correct.
- 2 **TUSHAR MEHTA:** Correct, My Lord, one provision. Second provision says that I may do A,  
3 B, C. So the word 'discretion' being taken away...
- 4 **JUSTICE VIKRAM NATH:** No, but the judgments which you have been reading just now,  
5 they club your 'may' with 'to'.
- 6 **TUSHAR MEHTA:** No, My Lord. I'm saying something else. I am on discretion. That the  
7 word...
- 8 **JUSTICE VIKRAM NATH:** No, no. You are replying to Mr. Sibal. You address the Court.  
9 Why do you have to reply to him?
- 10 **TUSHAR MEHTA:** I am responding to his interjection, My Lord, which was out of context.
- 11 **CHIEF JUSTICE B. R. GAVAI:** No. Because in that *Raja Bhairebendra Narayan*  
12 *Bhup*, there's also a reference to Section 73(4) of the Government of India Act. So, we don't  
13 have that Section 73(4) here.
- 14 **KAPIL SIBAL:** We do My Lords. It is [UNCLEAR].
- 15 **CHIEF JUSTICE B. R. GAVAI:** In the notes, it is not here.
- 16 **TUSHAR MEHTA:** No, no. Only Mr. Sibal...
- 17 **ABHISHEK MANU SINGHVI:** [INAUDIBLE].
- 18 **CHIEF JUSTICE B. R. GAVAI:** Dr. Singhvi is back.
- 19 **ABHISHEK MANU SINGHVI:** I've been tracking every day well before my turn comes.
- 20 **TUSHAR MEHTA:** No, he tracks every court. Not only this court. He tracks every court.
- 21 **ABHISHEK MANU SINGHVI:** Because I don't need all the accommodation he gets to pass  
22 over as well...
- 23 **TUSHAR MEHTA:** No, he tracks every court.
- 24 **CHIEF JUSTICE B. R. GAVAI:** There appears to be some different scheme under the 1935  
25 Act.

- 1 **TUSHAR MEHTA:** No, My Lord, let me show that scheme. I'm there, Mr. Sibal. You can rest  
2 assured.
- 3 **KAPIL SIBAL:** PDF 382. No, you just said, it's the same. Therefore, I was saying. It's PDF  
4 382. And all this logic, just as an aside, if you apply this to 111 of the Constitution, if the  
5 Parliament passes a Bill, the President of India can withhold it, and it will lapse. The same  
6 logic will apply to 111.
- 7 **TUSHAR MEHTA:** Why are you angry? If that is so, then that is so.
- 8 **CHIEF JUSTICE B. R. GAVAI:** No, but then he distinguishes that... no, no. His answer to  
9 that is that the President has no discretion, whereas the Governor has a discretion.
- 10 **TUSHAR MEHTA:** No, he has...
- 11 **KAPIL SIBAL:** No, but how can he...
- 12 **TUSHAR MEHTA:** It's the scheme.
- 13 **KAPIL SIBAL:** It's a language of 111 is he can give assent or withhold assent. Just see 111.
- 14 **TUSHAR MEHTA:** My Lord, but President is supposed....
- 15 **KAPIL SIBAL:** If Parliament passes a law, he can withhold his assent. How can that be  
16 accepted as a Constitutional principle?
- 17 **TUSHAR MEHTA:** It's too general a proposition. How can something be accepted as a  
18 proposition, but that is the Constitutional provision. President is bound by aid and advice.  
19 There is no option.
- 20 **JUSTICE SURYA KANT:** Let us understand the plain language of the Constitutional  
21 Provision instead of the consequences.
- 22 **TUSHAR MEHTA:** Correct.
- 23 **JUSTICE SURYA KANT:** Consequences will come later on. First, let us understand this  
24 provision. I think, the problem is that probably two Constitutional judgments say the way...
- 25 **TUSHAR MEHTA:** No, there are further. But can I complete the judgment?

- 1 **CHIEF JUSTICE B. R. GAVAI:** Okay, yes. But the scheme under the old 74 and 200  
2 appears to be somewhat different.
- 3 **KAPIL SIBAL:** 75 also, My Lords...
- 4 **TUSHAR MEHTA:** No, let Mr. Sibal...
- 5 **KAPIL SIBAL:** No, no. I'm just pointing out the page, the PDF...
- 6 **CHIEF JUSTICE B. R. GAVAI:** No, no. We are saying that there are no timelines, if you  
7 read 74. 74(2), there is a specific timeline of 12 months.
- 8 **TUSHAR MEHTA:** Having a timeline has no relevance with this part of the judgment. That's  
9 what I'm saying. My Lord, can I... again... let us again... can I read it?
- 10 **CHIEF JUSTICE B. R. GAVAI:** Therefore, when we interpret 200, we'll be more guided by  
11 *Kameshwar* and *Valluri Basavaiah* than that Bhaire...
- 12 **TUSHAR MEHTA:** Can I read?
- 13 **CHIEF JUSTICE B. R. GAVAI:** That *Raja Bhairebendra*.
- 14 **TUSHAR MEHTA:** My Lord, can I remove that impression of timeline affecting the  
15 judgment?
- 16 **CHIEF JUSTICE B. R. GAVAI:** No. But when we have judgments directly on 200, why  
17 should we go on a judgment of a British Act? You yourself argue that we have independent  
18 Indian Law. So why should we go to the American and...?
- 19 **TUSHAR MEHTA:** It's not American. It's an Indian law.
- 20 **CHIEF JUSTICE B. R. GAVAI:** So, 74, Government of India Act?
- 21 **TUSHAR MEHTA:** No, it's Supreme... Your Lordship's judgment.
- 22 **CHIEF JUSTICE B. R. GAVAI:** But now we have our own Constitution.
- 23 **TUSHAR MEHTA:** My Lord, *Bhup* is Your Lordship's judgment.
- 24 **CHIEF JUSTICE B. R. GAVAI:** Our judgment interpreting 74?

- 1 **TUSHAR MEHTA:** I can't argue, My Lord, if Your Lordships are a Respondent.
- 2 **CHIEF JUSTICE B. R. GAVAI:** No, no. It's our judgment interpreting 74?
- 3 **TUSHAR MEHTA:** Correct, My Lord.
- 4 **CHIEF JUSTICE B. R. GAVAI:** But when we have direct judgments interpreting 200 of  
5 our Constitution, why should we go to the interpretation on 74?
- 6 **TUSHAR MEHTA:** Scheme is same, number is different.
- 7 **CHIEF JUSTICE B. R. GAVAI:** It is your way of saying *prima facie* it doesn't appear to be  
8 identical.
- 9 **TUSHAR MEHTA:** Therefore, My Lord, that *prima facie* impression, can I...?
- 10 **CHIEF JUSTICE B. R. GAVAI:** Why don't we restrict ourselves with the interpretation of  
11 200 when there are judgments on interpretation of 200?
- 12 **TUSHAR MEHTA:** Can I, My Lord, remove that *prima facie* impression?
- 13 **CHIEF JUSTICE B. R. GAVAI:** Yes.
- 14 **TUSHAR MEHTA:** My Lord, kindly have a look at Section 74. "Subject to the provisions of  
15 this section, a Bill shall not be deemed to have been passed by the Chambers of the Legislature  
16 of a province having a Legislative Council, unless it has been agreed by both." My Lord, we are  
17 not concerned. Then, Your Lordships may kindly come to 75, My Lord. 75 is relevant. My Lord,  
18 at page 383.
- 19 **JUSTICE VIKRAM NATH:** 383? Volume 4.1?
- 20 **TUSHAR MEHTA:** My Lord, if Your Lordships can... it's same, My Lord. 73, My Lord.  
21 Section 75.
- 22 **KAPIL SIBAL:** [UNCLEAR] both discretion.
- 23 **TUSHAR MEHTA:** My Lord, I would request Mr. Sibal to... these are *prima facie*  
24 observations. Neither I should feel discouraged nor should...
- 25 **CHIEF JUSTICE B. R. GAVAI:** No, no. We are hearing you, but since we should  
26 understand the subject, there would be... we must know.

1 **TUSHAR MEHTA:** Yes, exactly. I am just, My Lord, requesting Mr. Sibal not to be happy.  
2 It's a little too early to be happy. That's all I'm saying. Para 7...

3 **CHIEF JUSTICE B. R. GAVAI:** There is no question of one thing, happy or unhappy. You  
4 do your duties. We do our duties.

5 **JUSTICE VIKRAM NATH:** We are capable of making him happy and you happy, both. Let  
6 him...

7 **TUSHAR MEHTA:** But here it's a Presidential reference. Nobody wins or loses. 75. This was  
8 more on interjection by him, not on the court asking questions. Obviously, My Lord, we are  
9 bound to answer. "A Bill which has been passed by the Provincial Legislative Assembly, or in  
10 case of a Province having a Legislative Council...", we read State. That was the only thing. "has  
11 been passed by both the Chambers of the Provincial Legislature shall be presented to the  
12 Governor and the Governor in his discretion..." My learned friend would again interject and  
13 say there was a discretion. There is none in 200. I am conscious of that. "discretion shall  
14 declare either that he assents in His Majesty's name to the Bill or that he withholds assent  
15 therefrom, or that he reserves the Bill for the consideration of the Governor General. Provided  
16 that the Governor may, in his discretion, return the Bill together with message requesting that  
17 the Chamber or Chambers will reconsider the Bill or any specified provisions thereof, and in  
18 particular will consider the desirability of introducing any such Amendment as he may  
19 recommend in his message. And when a Bill is so returned, the Chamber or Chamber shall  
20 reconsider it accordingly". Correct, My Lord? 76 is 201, My Lord, if he refers. So My Lord, it is  
21 the same thing.

22 **JUSTICE SURYA KANT:** The same thing, exactly.

23 **TUSHAR MEHTA:** The time limit, I'm just, My Lord, trying to address My Lord's right query  
24 that there was a time limit, but that has nothing to do with the interpretation of 74 and 75.

25 **CHIEF JUSTICE B. R. GAVAI:** So 74 appears to be analogous to 196 in the present  
26 Constitution.

27 **TUSHAR MEHTA:** Possibly, My Lord. I have not checked up that.

28 **CHIEF JUSTICE B. R. GAVAI:** We are just trying to compare.

29 **TUSHAR MEHTA:** Yes, My Lord, possibly. 196 and 197, possibly, I'm told.

1 **CHIEF JUSTICE B. R. GAVAI:** Now let us see. You're saying that there are many more  
2 judgments. So, you go to them.

3 **TUSHAR MEHTA:** Yes, My Lord. My Lord, now *Hoechst*. My Lord, here, only one addition  
4 which the Supreme Court makes is with regard to Money Bill, which is not provided in the first  
5 part of Article 200. President cannot withhold Money Bill. (a) Conventionally, Money Bill is  
6 never to be withheld. Hope everything is fine?

7 **JUSTICE SURYA KANT:** Yes, yes.

8 **TUSHAR MEHTA:** My Lord, now, there is a three-judge bench judgment of *Hoechst*.

9 **JUSTICE VIKRAM NATH:** *Hoechst*, yes.

10 **TUSHAR MEHTA:** *Hoechst* or, My Lord, *Hoechst*. *Hoechst*, My Lord. My Lord, here  
11 Money Bill... because this might be a distinction without any difference or difference without  
12 any distinction. There is a Money Bill issue, but we are not concerned because Money Bill  
13 conventionally can never be withhold. And No. 2, under the Constitution, Article 207(4),  
14 please bear in mind, Money Bill is always introduced on recommendation of the Governor. So,  
15 there is no question of he is withholding. Now in this context, please, My Lords, see para 85.  
16 "The Constitutional position of a Governor is clearly defined. The Governor is made a  
17 component part of the Legislature of a State under Article 168 because every Bill passed by the  
18 State Legislature has to be reserved for assent of the Governor under Article 200. Under that  
19 Article, the Governor can adopt one of the three courses. Namely, one, he may give his assent  
20 to it, in which case the Bill becomes a Law; or two, he may except in the case of a Money Bill,  
21 withhold his assent therefrom, in which case Bill falls through unless the procedure indicated  
22 in the first proviso is followed". That's his option, either withhold or return, My Lord.

23 **CHIEF JUSTICE B. R. GAVAI:** That doesn't appear to be the plain reading of that sentence.

24 **TUSHAR MEHTA:** That's my contention, My Lord. That's how I interpret it, My Lords.  
25 'Unless' otherwise will have no meaning. And 'falls through' will have no meaning at all. Or  
26 every judgment uses the word, 'if he withholds, it falls through'. My Lord, I'll... again, please  
27 examine from one angle and please remove for the time being that impression.

28 **CHIEF JUSTICE B. R. GAVAI:** We don't... we are not there to gather...

29 **TUSHAR MEHTA:** I'm sorry.

30 **CHIEF JUSTICE B. R. GAVAI:** No, we have not gathered any impressions so far. We are...

1 **TUSHAR MEHTA:** No, no. That why 'unless', 'unless' is to... that impression, My Lord.  
2 'Unless' is to be read. My Lord, the meaning of the word 'falls through' means...

3 **CHIEF JUSTICE B. R. GAVAI:** We quite understand that you want to distinguish a  
4 situation where he withholds or where he decides to return it to the Assembly. Then in that  
5 case, his power to withhold will be temporary. And if the Legislature on the second occasion  
6 decides to go by the Bill, then he will have to grant assent.

7 **TUSHAR MEHTA:** Go by the Bill with or without modification. Even if...

8 **CHIEF JUSTICE B. R. GAVAI:** Yes, he will be bound. But when he exercises his powers  
9 only to withhold, then he can do it absolutely.

10 **TUSHAR MEHTA:** I'm grateful.

11 **CHIEF JUSTICE B. R. GAVAI:** It will be the opposite case.

12 **TUSHAR MEHTA:** No, whether Your Lordship accepts or not, this is what I...

13 **CHIEF JUSTICE B. R. GAVAI:** That is your argument.

14 **TUSHAR MEHTA:** That's my submission.

15 **CHIEF JUSTICE B. R. GAVAI:** So we have... so, your argument is rightly registered by us.

16 **TUSHAR MEHTA:** Pardon, My Lords?

17 **CHIEF JUSTICE B. R. GAVAI:** It's rightly registered by us.

18 **TUSHAR MEHTA :** Registered, My Lord?

19 **CHIEF JUSTICE B. R. GAVAI:** Yes, registered, yes.

20 **TUSHAR MEHTA:** Yes. Your Lordships have rightly registered my argument. "Bill falls  
21 through unless the procedure indicated in the first proviso is followed, that is return the Bill  
22 to the Assembly for consideration with a message, or he may on the advice of Council of  
23 Ministers, reserve the Bill for consideration of the President, in which case the President will  
24 adopt the procedure laid down in Article". My Lord, now, kindly similar the incongruity which  
25 will arise. My Lord, suppose the Governor is supposed to act on the aid and advice of the  
26 Council of Ministers generally, unless, My Lord, the question of withholding comes. Why I say  
27 this? No Council of Ministers would say that my Assembly has passed a Bill, you please

1 withhold it. My Assembly has passed a Bill. There are circumstances where the Ministry would  
 2 advise that you refer it to the President. And I'll tell Your Lordships why? There are certain  
 3 provisions, which I will show, where a Presidential assent is mandatory. It is not at the  
 4 discretion of the Governor.

5 And therefore, it will be in the interest of the Ministry, the Council of Ministers to advise the  
 6 Governor that you please take assent of the President. Otherwise, My Lord, for withholding of  
 7 the Bill, there would not be any question. And unless, My Lord, that is read as a discretion  
 8 conferred upon the Governor, My Lord, there are several situations I'll come to, which will not  
 9 be able to reconcile with the Constitutional scheme. Even the Ministries, Council of Ministers  
 10 can request him to withhold. My Lord, please take pre-Tenth Schedule scenario, where there  
 11 was no Whip. Correct, My Lords? There is a Council of Ministers consisting of 15 people. They  
 12 lose majority and a Bill is passed in the House, which is not of the liking of the Council of  
 13 Ministers. There was no Tenth Schedule, My Lord, prior to '84. And we are dealing with Article  
 14 200, which is since '47.

15 Maybe the Council may advise him to withhold saying that I'm not agreeing to this. And he  
 16 may, in his discretion can still say that, no, it is passed by majority in the House. You may not  
 17 enjoy confidence of the House, but it is passed by the House. I will grant assent, or he may, in  
 18 his wisdom, call the Chief Minister and say that I am returning it to the House. You go and  
 19 convince your people. That is where, My Lords, his statesmanship comes. My Lord, what we  
 20 are undertaking an exercise is that a rogue Governor would act in this particular fashion. And  
 21 therefore, we have to interpret in such a manner that he cannot act in this fashion. Therefore,  
 22 My Lord, I am repeatedly requesting the Honourable Court and my arguments are moulded  
 23 accordingly that consider an ideal situation and interpret. My Lord, keep possibility of abuse  
 24 in mind.

25 **CHIEF JUSTICE B. R. GAVAI:** No, we quite appreciate your submission. But, when a  
 26 power is vested with a high Constitutional Functionary, it is to be presumed that the power  
 27 will be exercised properly and in a *bona fide* manner. And we can't proceed on a presumption  
 28 that the power would be...

29 **TUSHAR MEHTA:** Everybody would misuse, or in all cases, it would be misused.

30 **CHIEF JUSTICE B. R. GAVAI:** Or a possibility of the misuse of power cannot be a ground  
 31 to challenge the validity of a power.

32 **TUSHAR MEHTA:** Or even interpret it differently, My Lord, if the intention is very clear.



- 1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Don't be under the impression that  
2 we are asking because we are prejudiced in the way the Governors are acting. That has got  
3 nothing to do...
- 4 **TUSHAR MEHTA:** No, I'm very confident...
- 5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It is a proposition, that's all.
- 6 **TUSHAR MEHTA:** My Lords, it is that confidence with which we have come before Your  
7 Lordships that please advise us.
- 8 **CHIEF JUSTICE B. R. GAVAI:** We are also not aware about how the Governors are acting.
- 9 **TUSHAR MEHTA:** How the Governors... yes, My Lord. There are several situations. My  
10 Lord, these are all political issues, and I'll come to that as a legal proposition.
- 11 **CHIEF JUSTICE B. R. GAVAI:** So therefore, at least, I always say that, let this not be a  
12 battleground for political... we will decide, we'll interpret the Constitution as it has to be  
13 interpreted.
- 14 **TUSHAR MEHTA:** My Lord, there are several issues where the solution lies elsewhere.  
15 Every problem need not be and cannot be solved by the third... My Lord, one of the organs,  
16 namely the Judiciary.
- 17 **CHIEF JUSTICE B. R. GAVAI:** Third Chamber. Like Pandit Jawaharlal Nehru, while  
18 introducing 31(A) and 31(B), he said, that when we determine the compensation in order to  
19 advance the social and economic justice...
- 20 **TUSHAR MEHTA:** Court will not go into it.
- 21 **CHIEF JUSTICE B. R. GAVAI:** We expect that the Supreme Court and the High Courts  
22 would not act as a Third Chamber.
- 23 **TUSHAR MEHTA:** Third Chamber, yes. My Lord, in fact, thereafter, it was prohibited also  
24 that the Court cannot go into it.
- 25 **CHIEF JUSTICE B. R. GAVAI:** Yes, but that we'll set aside. That those arguments have  
26 been set aside not once, but twice.

1 **TUSHAR MEHTA:** My Lord, the Executive or Legislature has never been permitted to  
2 encroach upon the third organ of the State. I'll leave it at that.

3 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** You want us to comment on that, no?

4 **TUSHAR MEHTA:** No, no. No, My Lords. My statement was like 'withhold', complete.

5 **CHIEF JUSTICE B. R. GAVAI:** In spite of *Kesavananda Bharati*, those two provisions  
6 under Article 13 and 368 were again sought to be reintroduced, and they were again set aside.

7 **TUSHAR MEHTA:** Yes, My Lord. So, My Lord, therefore, I say that Executive and  
8 Legislature has never been permitted to encroach upon the Judiciary.

9 **CHIEF JUSTICE B. R. GAVAI:** No comments from this side.

10 **TUSHAR MEHTA:** Yes, My Lord. No, no, there is one judgment on that, My Lord. There is  
11 one judgment on that. I am going to rely upon it, My Lord, on Justiciability. Now, please come  
12 to, My Lord, *State of Punjab versus Governor of Punjab*. My Lord, this is that three-  
13 judge judgment... three-judge bench judgment. My Lord, please mark... please note the  
14 judgments which I read before Your Lordships...

15 **CHIEF JUSTICE B. R. GAVAI:** Were not noticed by this Bench?

16 **TUSHAR MEHTA:** Is not noted, My Lord.

17 **CHIEF JUSTICE B. R. GAVAI:** Either not brought to the notice or not noticed?

18 **TUSHAR MEHTA:** Correct. My Lord, it is correct.

19 **CHIEF JUSTICE B. R. GAVAI:** So your argument would be this is *per incuriam* of the  
20 Constitution Bench judgment?

21 **TUSHAR MEHTA:** It could have said that it does not mean what I'm contending. I didn't  
22 appear, My Lord. I'm just hypothetically, whoever appeared. It could have said that these  
23 judgments do not apply or it applies in facts. But nothing, My Lord, it's in ignorance of those  
24 judgments. My Lord, kindly see para 20 at page 175. "The present case turn upon..." I'm sorry.  
25 My Lord, I'm on page 175.

26 **CHIEF JUSTICE B. R. GAVAI:** *Punjab*?

1 **TUSHAR MEHTA: *Punjab*.** My Lord, Justice Narasimha is writing. No, I'll start after Your  
2 Lordship finishes the noting... taking note.

3 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Go ahead.

4 **TUSHAR MEHTA:** Para 20. "The present case turn upon how the first proviso is to be  
5 construed. In construing the first proviso, it needs to be noted that the substantive part of  
6 Article 200 provides the Governor with three options; an option to assent, an option to  
7 withhold assent, and an option to reserve the Bill for consideration of the President. The first  
8 proviso opens with the expression, the Governor may in contrast to the second proviso, which  
9 begins with the expression, the Governor shall, shall not assent. The 'may' in the first proviso  
10 is because the first proviso follows the substantive part, which contains three options for the  
11 Governor. The first proviso does not qualify the first option where the Governor assents to the  
12 Bill, nor the third option reserving the Bill for consideration of the President." Please pause  
13 here for a minute.

14 My Lord, I am putting a question to myself. Why? The Governor may say that there is  
15 repugnancy. I am sending the Bill back. The Bill may be passed with/without modification,  
16 with modification, with slight modification. The Governor may still feel that this repugnancy  
17 continues, and I will now refer it to the President. What is prevented is he cannot withhold,  
18 not that he cannot thereafter refer it to the President. On the textual... on the only available  
19 interpretation or reading of Article 200, contains, "The first proviso does not qualify the first  
20 option where the Governor assents to the Bill, nor the third option reserving Bill for the  
21 consideration of the President. The first proviso attaches to the second option, withholding of  
22 assent. And hence, begins with an enabling expression, 'may' by the mandate of the second  
23 proviso. In fact, if it would have said 'shall', then this finding would have been right.

24 'May' by the mandate of the second proviso, there is an embargo on the Governor assenting to  
25 a Bill which derogates from the powers of the High Court under the Constitution. The  
26 Governor is, by the mandate of the Constitution, required to reserve such a Bill for  
27 consideration of the President." That is High Court's power, etc. "A proviso as is well settled  
28 may fulfil the purpose of being an exception."

29 My Lord, kindly pause here for a minute. Series of judgments that proviso is unless context  
30 otherwise requires is an exception to the main provision. "Sometimes, however, a proviso may  
31 be in the form of an explanation or in addition to the substantive provision of a statute." But  
32 this is fourth option. The Court says, it is only a limb of the second option. "The first proviso  
33 allows the Governor, where the Bill is not a Money Bill, to send it back to the Legislature

1 together with a message. In terms of the message, the Legislature may be requested by the  
 2 Governor to reconsider the entirety of the Bill. This may happen for instance where the  
 3 Governor believes that the entire Bill suffers from an infirmity." My Lord, kindly pause here  
 4 for a minute. This again is wrong. With profound respect. He can refer for several reasons. In  
 5 entirety, Bill may not be...

6 **CHIEF JUSTICE B. R. GAVAI:** [UNCLEAR].

7 **TUSHAR MEHTA:** Partly, it...

8 **CHIEF JUSTICE B. R. GAVAI:** That's what they say in the next sentence. That sometimes,  
 9 if you feel that the entire Bill suffers from illegality, sometimes the Governor may feel that a  
 10 part of the Bill is not in accordance with law. And therefore, he may refer part of the Bill for  
 11 reconsideration.

12 **TUSHAR MEHTA:** Exactly. But here, My Lord, the Governor believes that the entire Bill  
 13 suffers from infirmity. "Alternatively, the Governor may request the Legislature to reconsider  
 14 any specific provision of the bill. While returning the bill, the Governor may express the  
 15 desirability of introducing an amendment in the bill. The desirability of an amendment may  
 16 arise with a view to cure an infirmity or deficiency in the bill." This, again, is wrong. The  
 17 Governor may say that instead... for example, it's an age limit. That instead of 25, make it 21,  
 18 or instead of 21, make it 25. This is my suggestion. This is my recommendation. Desirability  
 19 means not legality or constitutionality. Desirability means something which the Governor  
 20 wants to add.

21 "The concluding part of the first proviso, however, stipulates that if the Bill is passed again by  
 22 the Legislature, either with or without amendments, the Governor shall not withhold assent  
 23 therefrom upon presentation. The concluding phrase 'shall not withhold assent therefrom' is  
 24 a clear indicator that the exercise of the power under the first proviso is relatable to the  
 25 withholding of the assent by the Governor to the Bill in the first instance. That is why, in the  
 26 concluding part, the first proviso indicates that upon the passing of the Bill by the Legislature,  
 27 either with or without amendments, the Governor shall not withhold assent. The role which is  
 28 ascribed by the first proviso to the Governor is recommendatory in nature, and it does not bind  
 29 the State Legislature. The substantive part of Article 200 empowers the Governor to withhold  
 30 assent to the Bill. In such an event, the Governor must mandatorily follow the course of action,  
 31 which is indicated in the first proviso of coming to the State Legislature as soon as possible."

32 My Lord, question of withholding and return would come. My Lord, what is withhold? That, I  
 33 do not grant assent. I do not refer it. I withhold. My Lord, now, the way in which this is read...

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1 please, My Lord, see, this is a nuanced thing. If this finding is to be right, the wording of the  
 2 Proviso should have ended, Governor after reconsideration and return to him will assent the  
 3 bill. Kindly read it again. "The substantive part of Article 200 empowers the Governor to  
 4 withhold assent to the Bill. In such an event, the Governor must mandatorily follow the course  
 5 of action, which is indicated in the first proviso of communicating to the State Legislature as  
 6 soon as possible, a message warranting reconsideration of the bill. The expression 'as soon as  
 7 possible' is significant. It conveys a Constitutional imperative of expedition. Failure to take a  
 8 call and keeping a Bill duly passed for intermediate... indeterminate period is a course of action  
 9 inconsistent with that expression".

10 My Lord, but that expression is used only when the fourth option is being used. My Lord, I do  
 11 not say that it can be held... hold up indeterminate. That's not the contention. But 'as soon as  
 12 possible' is fourth option. And that expression is available only in the first proviso, not in the  
 13 first part. For various reasons, before assenting, the Governor may give some time for the  
 14 situation to cool down. There may be a hasty legislation, My Lord. The Constitution has said  
 15 that there may be some hasty legislation because of some emotions of the people. He might  
 16 want the matter to calm down. He might be in consultation with the Chief Minister etc., etc.  
 17 So the time limit being absent in the main provision is conscious. But if you want to return it  
 18 back, you do it as soon as possible. And 'as soon as possible' is...

19 **CHIEF JUSTICE B. R. GAVAI:** So, according to you, with regard to withholding, there are  
 20 two options possible? One, permanently withholding; and secondly, temporarily withholding  
 21 when he wants to exercise the powers under the proviso? So, when he...

22 **TUSHAR MEHTA:** No, My Lord, my submission is assent, first option, unless he returns...

23 **CHIEF JUSTICE B. R. GAVAI:** Yes.

24 **TUSHAR MEHTA:** Before granting assent. Withhold, second option. And if he exercises that  
 25 option, he cannot withhold it if it comes back. Therefore, no return. And third, reference to the  
 26 President. And after, if he exercises the fourth option of returning it to the House and the  
 27 House reconsiders with or without modifications...

28 **CHIEF JUSTICE B. R. GAVAI:** Then he is bound by it.

29 **TUSHAR MEHTA:** He is bound by it. Bound by it, My Lord, so far as withholding is  
 30 concerned, but he can still refer it for Presidential assent because that is not prohibited. He  
 31 may say that there is repugnancy, but I don't wish to straightaway directly send it to the  
 32 President. I return it to the House with a message that this section is repugnant. The House in

1 its wisdom says, no, it is not repugnant. But the Governor can still say that I think I need  
2 Presidential assent, and he can assent.

3 **JUSTICE SURYA KANT:** Again, we are seeking a clarification, Mr. Solicitor. According to  
4 you, if the fourth option is to be exercised, namely, returning to the House with a message for  
5 reconsideration only if Option No. 2 is also [UNCLEAR].

6 **TUSHAR MEHTA:** Grateful, My Lord.

7 **JUSTICE SURYA KANT:** This is what you want to...

8 **TUSHAR MEHTA:** I'm grateful.

9 **JUSTICE SURYA KANT:** In other words, according to you, if it has been withheld, then  
10 Option No. 3 and 4 are defunct. Is it your argument?

11 **TUSHAR MEHTA:** Yes, My Lord. It comes to that. Yes, correct, My Lords. Yes, correct.  
12 Exactly, it falls through.

13 **JUSTICE SURYA KANT:** Let's be very clear in that...

14 **TUSHAR MEHTA:** Your Lordships are right, My Lord. That, My Lords, have rightly  
15 understood my submission, but I'm grateful.

16 **JUSTICE SURYA KANT:** And to that proposal that two five-judge benches, which have  
17 used the expression, 'unless the Governor decides to return it to the'... according to you that  
18 'unless' expression means that if he withholds, then there is no question of it?

19 **TUSHAR MEHTA:** Grateful. I'm grateful, My Lord.

20 **JUSTICE SURYA KANT:** This is what probably you are trying to...

21 **TUSHAR MEHTA:** I am grateful. My Lord, whether that finds favour with Your Lordships  
22 or not...

23 **JUSTICE SURYA KANT:** No, that's a different issue. You should understand that...

24 **TUSHAR MEHTA:** That's the satisfaction of a lawyer, My Lord, when we can communicate  
25 what is...

- 1 **CHIEF JUSTICE B. R. GAVAI:** The words, by Mr. Solicitor, the words beginning from  
2 'unless' have to be referred to the fourth option, are referable to the fourth option and not to  
3 the second option.
- 4 **TUSHAR MEHTA:** Yes, yes, My Lord.
- 5 **JUSTICE SURYA KANT:** Fourth option provided that second option is not referred to.
- 6 **JUSTICE VIKRAM NATH:** Why is the fourth option been placed as a proviso and why not  
7 in the main... why did they need a proviso for that? If that was a separate, independent exercise  
8 or one of the four routes which the Governor could follow, one is accept, two is withhold, three  
9 is refer to the President, and fourth is to return back to the House.
- 10 **TUSHAR MEHTA:** I'll show, My Lord.
- 11 **JUSTICE VIKRAM NATH:** Why proviso for that? The fourth could have been a part of the  
12 main provision.
- 13 **TUSHAR MEHTA:** I'll answer that.
- 14 **JUSTICE VIKRAM NATH:** That proviso...
- 15 **TUSHAR MEHTA:** I... My Lord, there are two answers. If the way in which it is being read  
16 here, how Article 200 would have been worded I have shown. And perhaps, it is maintained  
17 in the proviso because historically it was always a proviso.
- 18 **JUSTICE VIKRAM NATH:** Then, according to you, the Constitution benches of 1952 and  
19 '56 have not correctly interpreted the Article 200 and the proviso?
- 20 **TUSHAR MEHTA:** No, My Lord. I am relying upon this.
- 21 **CHIEF JUSTICE B. R. GAVAI:** He is relying on that.
- 22 **TUSHAR MEHTA:** I'm relying upon that.
- 23 **CHIEF JUSTICE B. R. GAVAI:** He says that the word beginning from 'unless' has to be  
24 referable only to the proviso.
- 25 **JUSTICE VIKRAM NATH:** No, 'unless' is attached to withholding.
- 26 **TUSHAR MEHTA:** No, My Lords.

- 1 **JUSTICE VIKRAM NATH:** Yes.
- 2 **TUSHAR MEHTA:** It cannot be.
- 3 **JUSTICE VIKRAM NATH:** Therefore, that has been wrongly decided.
- 4 **TUSHAR MEHTA:** You can say rather than conveying through me.
- 5 **NEERAJ KISHAN KAUL:** I am saying that what you are putting to us, why does the word  
6 'unless' in the judgment appear after 'withholding of assent'?
- 7 **JUSTICE VIKRAM NATH:** Yes, as the second option for the Governor. We need to be very  
8 clear as to what is your submission and what the Constitution Benches have decided.
- 9 **NEERAJ KISHAN KAUL:** But the reason the word 'unless' appears relatable to  
10 'withholding' is this, that when an assent is given, there is no question of a Bill falling?
- 11 **JUSTICE VIKRAM NATH:** Correct.
- 12 **NEERAJ KISHAN KAUL:** When a Bill is reserved or sent to the President, there is no  
13 question of a Bill falling. The consequence of a Bill falling only arises when, under Article 200,  
14 the Governor declares that he is withholding assent. It is in that context that the judgment says  
15 that the Bill falls through unless you send it to the Assembly. It doesn't mean, it becomes an  
16 adjunct of...
- 17 **TUSHAR MEHTA:** Second option.
- 18 **NEERAJ KISHAN KAUL:** ...of withholding. It still an independent option. The reason in  
19 the Constitution Bench judgment 'unless' appears is because either when the assent is given  
20 or it is sent to the President, there is no question of a Bill falling. In this case, there is a case of  
21 a Bill falling. It finishes the Bill. That is why they say, it will not finish if you exercise the fourth  
22 option and send. And historically, My Lords...
- 23 **JUSTICE VIKRAM NATH:** No, no. Then the second option is not even exercised. If it is  
24 referred under the proviso, where is the question of the Governor declaring that it has withheld  
25 the assent?
- 26 **NEERAJ KISHAN KAUL:** [NO AUDIO].
- 27 **JUSTICE VIKRAM NATH:** Then there is no withholding by the Governor.



- 1 **NEERAJ KISHAN KAUL:** [No AUDIO]. It cannot fall, but be sent back.
- 2 **JUSTICE VIKRAM NATH:** Correct. Then there is no withholding?
- 3 **NEERAJ KISHAN KAUL:** Historically...
- 4 **JUSTICE VIKRAM NATH:** After withholding, can the Governor send in?
- 5 **NEERAJ KISHAN KAUL:** [NO AUDIO] declares a withholding...
- 6 **JUSTICE VIKRAM NATH:** Correct.
- 7 **NEERAJ KISHAN KAUL:** ...the Bill falls.
- 8 **JUSTICE VIKRAM NATH:** Right, and that's the end of it. No proviso. No President,  
9 nothing.
- 10 **TUSHAR MEHTA:** But he has an option of sending rather than withholding.
- 11 **NEERAJ KISHAN KAUL:** [UNCLEAR] sending to the Legislative Assembly. My Lords, he's  
12 stated that historically from the Government of India Act of 1990... 1935, always the fourth  
13 option was there. Now, whether it was in the proviso or in the main part of the provision is a  
14 different issue. But the fourth option has always been there of sending it back to the Legislative  
15 Assembly. The Learned Solicitor will show that to Your Lordships. The option of sending it to  
16 the Legislative Assembly or Parliament is a fourth option always.
- 17 **JUSTICE SURYA KANT:** Yes. Mr. Kaul, then I think probably you are adding a little more  
18 confusion to it. Now you say, the option is always there. The point was which we are trying to  
19 get the clarification is, thus provided, this Option 4, can it be exercised after Option No. 2 has  
20 been exercised? This is what we are asking you the question.
- 21 **TUSHAR MEHTA:** No, it cannot.
- 22 **NEERAJ KISHAN KAUL:** [NO AUDIO] for the simple reason.
- 23 **JUSTICE SURYA KANT:** Therefore, according to you, the power under proviso is subject  
24 to Option No. 2?
- 25 **NEERAJ KISHAN KAUL:** It's subject to [UNCLEAR]... it's an independent option to be  
26 sent to the Legislative Assembly.

- 1 **JUSTICE SURYA KANT:** But if it is independent, then how are you making dependent on  
2 Option 2?
- 3 **NEERAJ KISHEN KAUL:** [NO AUDIO] option, My Lords. That is the...
- 4 **CHIEF JUSTICE B. R. GAVAI:** The Constitution benches have made it?
- 5 **NEERAJ KISHAN KAUL:** Please, My Lords?
- 6 **JUSTICE VIKRAM NATH:** According to the language.
- 7 **CHIEF JUSTICE B. R. GAVAI:** The Constitution benches have made... added that.
- 8 **NEERAJ KISHAN KAUL:** No, My Lords. What the Constitution Benches have said is what?  
9 The Constitution Benches have said, firstly [NO AUDIO] the options given are in the main  
10 body are either 'shall declare an assent', 'shall withhold' or 'reserve it for the President'. The  
11 proviso is the fourth option, has always been the fourth option. The Constitution Bench  
12 judgment also says, 'can reserve it for the President', 'can assent', 'can withhold assent' and the  
13 Bill will fall. But it will not fall if it is sent to the Legislative Assembly. And I'll tell Your  
14 Lordships...
- 15 **JUSTICE VIKRAM NATH:** That's the whole thing. Then there is no withholding.
- 16 **NEERAJ KISHEN KAUL:** My Lords, may I say, with respect that...
- 17 **TUSHAR MEHTA:** Proviso applies to first and third option.
- 18 **JUSTICE VIKRAM NATH:** If there is a declaration for... for withholding also, there has to  
19 be a declaration.
- 20 **NEERAJ KISHEN KAUL:** [NO AUDIO] is concerned, why it can't be linked to withholding,  
21 I'll give an example to Your Lordships. A Governor may be inclined to give assent, maybe  
22 inclined to give assent to a Bill, maybe largely in agreement with the Bill, but may feel certain  
23 tweaking, modification, etc., has to take place because that ultimately is part of a Legislative  
24 process. This function of the Governor is part of a Legislative process. The heading of the part  
25 in the Constitution is Legislative procedure where Article 196 begins and then goes on to 200.  
26 It's part of the Legislative process that Your Lordships have heard. Now, there he may feel that  
27 some tweaking is required. So, he sends it back for certain modifications. Even before the  
28 assent, he may be inclined to assent. Now a situation may arise where he may feel that, yes, it  
29 needs to be referred to the President.

1 Yet, he may feel that before it goes to the President, whether on issue of repugnancy,  
2 Constitutional concerns or anything else, we may need some tweaking or modification or a  
3 consultative process with the Legislative Assembly, and I may then send it to the President. So  
4 it can't be said that the fourth option is only related to the withholding. That is not the idea.  
5 Withholding in this context, it...

6 **JUSTICE VIKRAM NATH:** If you read it again, the intention is that withholding could be  
7 permanent or it could be temporary. And temporary would be when proviso would be  
8 exercised along with withholding. And after that, when it comes back, either if it is reiterated,  
9 then he has... with or without amendment, then he has no option but to grant the assent.  
10 Correct?

11 **TUSHAR MEHTA:** Or could refer or refer to the President, but he cannot withhold.

12 **JUSTICE VIKRAM NATH:** He cannot withhold then, thereafter.

13 **TUSHAR MEHTA:** Withhold, yes.

14 **JUSTICE VIKRAM NATH:** Correct. So therefore, till that time, it is withheld...

15 **NEERAJ KISHEN KAUL:** The Governor can [NO AUDIO].

16 **JUSTICE VIKRAM NATH:** ...when the proviso is not exercised.

17 **NEERAJ KISHEN KAUL:** [NO AUDIO].

18 **JUSTICE VIKRAM NATH:** Yes.

19 **NEERAJ KISHEN KAUL:** [NO AUDIO].

20 **JUSTICE VIKRAM NATH:** Therefore, if the Governor declares that he is withholding the  
21 assent, the Bill, then it falls permanently. The proviso is not exercised by him.

22 **NEERAJ KISHEN KAUL:** [NO AUDIO].

23 **JUSTICE VIKRAM NATH:** Shall declare withheld. And if he can declare it to withhold  
24 along with exercise of the proviso.

25 **NEERAJ KISHEN KAUL:** [NO AUDIO] send it back. They just send it back.

- 1 **CHIEF JUSTICE B. R. GAVAI:** Why? Then if he sends it back, then he's bound by whatever  
2 the decision is the second time.
- 3 **NEERAJ KISHEN KAUL:** And when it comes back, he cannot withhold assent.
- 4 **TUSHAR MEHTA:** Then he has to [UNCLEAR].
- 5 **CHIEF JUSTICE B. R. GAVAI:** So therefore, Learned Solicitor's argument is that, as we  
6 understand, that withholding and exercising the power under proviso are two different things.
- 7 **TUSHAR MEHTA:** Correct, My Lords.
- 8 **CHIEF JUSTICE B. R. GAVAI:** If he decides to withhold, he may decide to withhold at the  
9 threshold.
- 10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Exactly.
- 11 **CHIEF JUSTICE B. R. GAVAI:** And only in case, if he finds that reconsideration is  
12 necessary, then the recourse will be taken to the proviso.
- 13 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** So, instead of withholding, he will  
14 exercise the option of sending it Assembly.
- 15 **CHIEF JUSTICE B. R. GAVAI:** So, that will be not an exercise of withholding, but referring  
16 it to the Legislature for reconsideration.
- 17 **TUSHAR MEHTA:** It could be applicable to first and third options.
- 18 **NEERAJ KISHEN KAUL:** [NO AUDIO] instead of withholding.
- 19 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Right away, right away?
- 20 **NEERAJ KISHEN KAUL:** Instead of withholding, right away, sending it to...
- 21 **CHIEF JUSTICE B. R. GAVAI:** No. Then your argument is contrary to what the Learned  
22 Solicitor is arguing there.
- 23 **NEERAJ KISHEN KAUL:** Just keeping it as a fourth option. The fourth option of returning  
24 it as part of a Legislative process can be considered as a consultative process with the  
25 [UNCLEAR].

- 1 **CHIEF JUSTICE B. R. GAVAI:** No, no. You are saying that withholding... withholding, and  
2 in the meantime sending it back?
- 3 **NEERAJ KISHEN KAUL:** Instead of withholding, I said.
- 4 **CHIEF JUSTICE B. R. GAVAI:** So, you said it.
- 5 **NEERAJ KISHEN KAUL:** I said, that is what I thought fell also from My Lord, instead of  
6 withholding. Withholding is one option. Assent is the second option. Reference to the  
7 President is the third option.
- 8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That is why the expression which says  
9 'instead of', it gets colour, provided that the Governor may as soon as possible after the  
10 presentation of the Bill return it.
- 11 **NEERAJ KISHEN KAUL:** Return it.
- 12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Return it as soon as possible. Instead  
13 of withholding has a doubt about its...
- 14 **NEERAJ KISHEN KAUL:** As Your Lordships rightly said, the words used in the proviso are  
15 'after the presentation to him of the Bill for assent', not withholding of assent. It says after as  
16 soon as possible after...
- 17 **JUSTICE SURYA KANT:** You are also arguing that if the power to withhold has been  
18 exercised, then Option No. 2 and 3 becomes defunct. He's not left with Power No. 2...
- 19 **TUSHAR MEHTA:** 1 and 3. Withhold is 2.
- 20 **JUSTICE SUYRA KANT:** Withholding is 2. So that means 3 and 4. But 1 in any case goes.
- 21 **TUSHAR MEHTA:** 1, 3, and 4, yes.
- 22 **JUSTICE SUYRA KANT:** 1... see, 1 is not there.
- 23 **TUSHAR MEHTA:** Obviously. My Lords are right.
- 24 **JUSTICE SUYRA KANT:** Assent is not there. That falls through. So, once the Governor  
25 exercises Option No. 2, then Option No. 3 and 4 become defunct.

1 **NEERAJ KISHEN KAUL:** Because, My Lords, the Bill falls through as we are seeing the  
2 judgment. If the Bill falls through, then how is it kept alive?

3 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Brother has correctly said it.

4 **JUSTICE SURYA KANT:** We are interpreting a Constitutional provision which will lead to  
5 rendering two provisions if not fully partially defunct.

6 **NEERAJ KISHEN KAUL:** No, My Lords, no.

7 **TUSHAR MEHTA:** No, no, My Lords. It would be contrary, that is our submission.

8 **NEERAJ KISHEN KAUL:** My Lords, there are three options that they are available, and  
9 one option is exercised. Because of exercise of that one option, if the other two options become  
10 unavailable, there is nothing wrong with that constitutional interpretation.

11 **JUSTICE SURYA KANT:** Why an embargo which is not visible in Article 200, why do you  
12 want to read that embargo on Governor's power? If you want to... according to you, the  
13 Governor has very wide optional powers there. So today, why... as my brother Vikram Nath  
14 has pointed out, today he decides to withhold it, withhold it because he knows that this Act in  
15 the present form cannot be allowed to be passed. So he withholds it. After that, there is a  
16 deliberation. There are re-examinations. And then he finds that partially it can be modified or  
17 substantially it can be replaced, and then he give a chance to the Assembly that now you can  
18 go ahead.

19 **TUSHAR MEHTA:** But thereafter, he loses his right of withholding.

20 **NEERAJ KISHEN KAUL:** My Lords, but a Governor can absolutely also come to a  
21 conclusion that a Bill in its entirety needs to be withheld. It need not be sent back.

22 **CHIEF JUSTICE B. R. GAVAI:** That's what is argued by the Learned Solicitor.

23 **TUSHAR MEHTA:** My Lord, suppose it's...

24 **JUSTICE VIKRAM NATH:** That is why the word 'withhold' has been used. Otherwise, he  
25 would then decline to grant assent.

26 **NEERAJ KISHEN KAUL:** My Lords, otherwise, the main body...

27 **JUSTICE VIKRAM NATH:** Why word, 'withhold'?

- 1 **NEERAJ KISHEN KAUL:** ...withhold... no, the main body could have said, withhold and  
2 return. The main body could have said, withhold and return.
- 3 **CHIEF JUSTICE B. R. GAVAI:** Mr. Kaul, it is better that I think we...
- 4 **NEERAJ KISHEN KAUL:** Yes, My Lords, I'll do that.
- 5 **CHIEF JUSTICE B. R. GAVAI:** Yes. Let the solicitor complete, then we'll come to you as  
6 per your turn.
- 7 **TUSHAR MEHTA:** Yes, My Lord. These are the judgments, My Lord, I have cited. My Lord,  
8 Now please come to...
- 9 **CHIEF JUSTICE B. R. GAVAI:** We are through with all the judgments?
- 10 **TUSHAR MEHTA:** On this, My Lord, 200... on options. On options, My Lord. I was reading,  
11 My Lords, last the judgment in Punjab.
- 12 **CHIEF JUSTICE B. R. GAVAI:** Then, no, para 25 would also be important to that...
- 13 **TUSHAR MEHTA:** I'll read it, My Lords. 176, My Lords.
- 14 **CHIEF JUSTICE B. R. GAVAI:** 176.
- 15 **TUSHAR MEHTA:** Yes. "The Governor as an unelected Head of the State is representing the  
16 President who is appointed by, who is first of all elected." Let us understand this, My Lord. My  
17 Lord, this is the impression which is carrying in everyone's mind that Governor is an unelected  
18 man. What can he do? What are his powers? But we must understand...
- 19 **CHIEF JUSTICE B. R. GAVAI:** He's a representative of the Central Government there. He  
20 is a representative of the President.
- 21 **TUSHAR MEHTA:** No, something else. He is representing President of India. President of  
22 India is elected indirectly by the entire nation. And President acts on the aid and advice of the  
23 Council of Ministers, which has the electoral mandate. So he is not just a nobody or a person.
- 24 **CHIEF JUSTICE B. R. GAVAI:** No, nobody says 'nobody'. They are only saying that he's  
25 an unelected Head of the State.
- 26 **TUSHAR MEHTA:** That word...

- 1 **CHIEF JUSTICE B. R. GAVAI:** The scheme which you took us yesterday, clearly showed  
2 the distinction between nomination and the election.
- 3 **TUSHAR MEHTA:** I understand.
- 4 **CHIEF JUSTICE B. R. GAVAI:** And the Constituent Assembly decided to go by nomination  
5 and not by election.
- 6 **TUSHAR MEHTA:** I bow down.
- 7 **CHIEF JUSTICE B. R. GAVAI:** So, therefore he is a... as a matter of fact, he is nominated.
- 8 **TUSHAR MEHTA:** My Lord, this word 'unelected', in case of Executives at least, is always  
9 used as if he's a power...
- 10 **CHIEF JUSTICE B. R. GAVAI:** Like we are appointed by the President.
- 11 **JUSTICE VIKRAM NATH:** Not elected.
- 12 **CHIEF JUSTICE B. R. GAVAI:** What is wrong in that term?
- 13 **TUSHAR MEHTA:** My Lord, I'll not go into it. But therefore, I said, in case of Executive,  
14 'unelected' is used as a...
- 15 **CHIEF JUSTICE B. R. GAVAI:** We won't go into that aspect. We'll go back to...
- 16 **TUSHAR MEHTA:** Yes, My Lord. "The Governor..."
- 17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It's unnecessary to dig up that issue.
- 18 **TUSHAR MEHTA:** Not necessary, My Lord. I... Your Lordships are right. "The Governor as  
19 an unelected..."
- 20 **CHIEF JUSTICE B. R. GAVAI:** It is better if it would have been the Governor as a  
21 nominated Head of the State.
- 22 **TUSHAR MEHTA:** Anyway, My Lord, it's... anyway, My Lord, I'll not elaborate it further.  
23 "Governor as an unelected Head of the State is entrusted with certain Constitutional powers.  
24 However, this power cannot be used to thwart the normal course of law making by the State  
25 Legislature". There cannot be any doubt about, My Lord, this proposition. Consequently, if the  
26 Governor decides to withhold assent under the substantive part of Article 200, the logical



1 course of action..." the Court is not interpreting. According to the bench, "The logical course  
2 of action is to pursue the course indicated in the first proviso of remitting the Bill to the State  
3 Legislature for reconsideration". So the Court says, he is unelected. You cannot thwart the  
4 elected person's process. And therefore, as a logical consequence, you resort to the Proviso.

5 "The logical course of action is to pursue. In other words, the power to withhold assent under  
6 the substantive part of Article 200 must be read together with the consequential course of  
7 action to be adopted by the Governor under the first proviso. If the first proviso is not read in  
8 juxtaposition to the power to withhold assent conferred by the substantive part of Article 200,  
9 the Governor as the unelected Head of State..." again, My Lord, this is weighing with everyone.

10 "State would be in a position to virtually veto the functioning of the Legislative domain by a  
11 duly-elected Legislature by simply declaring that assent is withheld without any further  
12 recourse. This may not be...", My Lord, in view of the Bench, a possible course of action in a  
13 democracy. But then the remedy lies, My Lord, in amending in the political process, not by  
14 way of interpretation of the judgment. "Such a course of action would be contrary to  
15 fundamental principles of a Constitutional democracy based on a Parliamentary pattern of  
16 governance. Therefore, when the Governor decides to withhold assent under the substantive  
17 part of Article 200, the course of action which is to be followed is that which is indicated in the  
18 first proviso."

19 Please pause here for a minute, My Lord. If this is law, then Your Lordships would be  
20 rendering... an interpretation of Your Lordships would render the power of withhold  
21 redundant. Because if power of withhold is to be read with the Proviso, the moment I resort to  
22 the Proviso as a Governor, I lose my right of withhold because then I have no option to  
23 withhold. My Lord, then how do we give meaning to the first part, the second option, withhold,  
24 if withhold has to follow, My Lord, the Proviso...

25 **JUSTICE VIKRAM NATH:** No, no. That's what I said. Withhold may not necessarily follow  
26 the Proviso. Withhold can be a clear and discrete withhold. That's it.

27 **TUSHAR MEHTA:** Correct, My Lord. Possible.

28 **JUSTICE VIKRAM NATH:** But it can also be attached to the Proviso.

29 **TUSHAR MEHTA:** Then, My Lord, the Governor then should be clear.

- 1 **JUSTICE VIKRAM NATH:** It is then the decision of the Governor or his discussion what  
 2 he wants to do? He wants to withhold for the time being, exercise the Proviso, and then further,  
 3 otherwise...
- 4 **TUSHAR MEHTA:** Permanent. He may take a call that this is a case where I will rather than  
 5 blocking permanently...
- 6 **JUSTICE VIKRAM NATH:** It is also open to him to clearly say, all right, he has declared  
 7 that it is withheld, finished, and not exercise the proviso?
- 8 **TUSHAR MEHTA:** Yes, My Lord. I'm grateful, but that's the submission. But if he chooses  
 9 to go as per Proviso...
- 10 **JUSTICE VIKRAM NATH:** So as all the Constitution Benches said, 'withhold unless he had  
 11 exercised the Proviso'.
- 12 **TUSHAR MEHTA:** My Lord, otherwise... but when he chooses to go for the Proviso, he loses  
 13 the right to withhold it thereafter. If he wants to withhold, it has to be at the outset. But in a  
 14 given facts of the case, he may choose that, all right, I'll lose my right of withholding. I will  
 15 eventually refer it to the President.
- 16 **CHIEF JUSTICE B. R. GAVAI:** So according to you, at the threshold, he has to exercise  
 17 one of the four options, either to give...
- 18 **TUSHAR MEHTA:** Correct. Four options. Yes, My Lord, one of the four options.
- 19 **CHIEF JUSTICE B. R. GAVAI:** Either to give assent or to withhold it or to send it, refer it  
 20 to the President, or fourth, to refer it to the Legislature to reconsider it with his message.
- 21 **TUSHAR MEHTA:** And fifth, My Lord. As My Lord, Justice Vikram Nath has suggested that  
 22 I forego as a Governor... I means the Governor foregoes the permanent withholding.
- 23 **CHIEF JUSTICE B. R. GAVAI:** No, not fifth. That will be the part of the fourth, the Proviso.
- 24 **TUSHAR MEHTA:** But then I will not withhold. I will not be able to withhold.
- 25 **CHIEF JUSTICE B. R. GAVAI:** So, therefore, yes, once you decide to exercise the fourth  
 26 choice of sending it to the Governor, you are dependent on what the Legislature does.
- 27 **TUSHAR MEHTA:** Absolutely.

1 **CHIEF JUSTICE B. R. GAVAI:** If it comes back as it is, you are bound to...

2 **JUSTICE VIKRAM NATH:** As it is or with amendment it has to be...

3 **TUSHAR MEHTA:** No. Then I will have two options. Governor will have two options, either  
4 to grant assent or ...

5 **CHIEF JUSTICE B. R. GAVAI:** To refer it to the President.

6 **TUSHAR MEHTA:** Because that is not prohibited under the Proviso. My Lord, can I start  
7 tomorrow?

8 **CHIEF JUSTICE B. R. GAVAI:** As per the timeline, I think by Tuesday, you are...?

9 **TUSHAR MEHTA:** We will not cross the time allotted to us together. Your Lordships have  
10 given four days. Today is the second day. We will so adjust, My Lord, that...

11

12

13

14

***END OF DAY'S PROCEEDINGS***