

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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CHIEF JUSTICE B. R. GAVAI: Mr. Sankaranarayanan, you are on which side?

TUSHAR MEHTA: He's always here.

CHIEF JUSTICE B. R. GAVAI: No, whether you are on a fence or a...

GOPAL SANKARANARAYANAN: [INAUDIBLE] For your opinion one shouldn't take extreme [UNCLEAR]

JUSTICE PAMIDIGHANTAM SRI NARASIMHA: Who are you appearing for?

TUSHAR MEHTA: Intervener.

GOPAL SANKARANARAYANAN: Interventions have been allowed on the first day. We are giving advice to the President of India.

TUSHAR MEHTA: No, no, not we. Courts, the court is giving. Yes, no the 143 empowers only the court to give advice to the President.

CHIEF JUSTICE B. R. GAVAI: Without your assistance we cannot give orders.

TUSHAR MEHTA: Assisting the court My Lord. We are not advising the Governor. Yes.

KAPIL SIBAL: May I just put this down because we can't see, Your Lordships. We'll put it back My Lord at the end.

CHIEF JUSTICE B. R. GAVAI: Even the learned Solicitor was...desiring. Need not put it back as long as the CB goes on.

TUSHAR MEHTA: Because here there is no Petitioner and Respondent. And genuinely, I'm saying this My Lord without any other meaning. Mr. Sibal My Lord, I am looking forward to his arguments because he has been a Parliamentarian. He has been an elected person answerable to the people. And My Lord, we know...

CHIEF JUSTICE B. R. GAVAI: He has been a person answerable to the Parliament also.

TUSHAR MEHTA: Parliament. That's why I was coming to that... That he was also in the governance and how it affects the governance. When I come to My Lord the question of judicial

1 review or My Lord justiciability, because people your Lordships are aware of since last 20 - 25
2 years, My Lord you cannot take a voter on ride. They catch the elected people.

3 **CHIEF JUSTICE B. R. GAVAI:** You cannot?

4 **TUSHAR MEHTA:** ... Take voters on a ride, which earlier used to happen. They catch you,
5 that I have this problem, you are not solving me. And that is why My Lord, I always say that
6 irrespective of the colour of the political party, an elected person cannot be denounced that he
7 is just an elected person and...

8 **CHIEF JUSTICE B. R. GAVAI:** Who says that?

9 **TUSHAR MEHTA:** I will show. I'll show who said that My Lord. I'll not going into. Your
10 Lordships have not said. Your Lordships have not said My Lord, but I'm going to show that.
11 But we are answered.

12 **CHIEF JUSTICE B. R. GAVAI:** I have always said that...of power and...

13 **TUSHAR MEHTA:** My Lords have always said. This bench I'm not referring to, My Lord
14 when we say

15 **CHIEF JUSTICE B. R. GAVAI:** I have so many times deprecated the... I've said that the
16 judicial activism has to remain, but it should not turn into judicial terrorism or judicial
17 adventurism.

18 **TUSHAR MEHTA:** Judicial terrorism or judicial adventurism My Lord, that's correct. And
19 as rightly submitted by Mr. Sankaranarayanan, and we have to assist Your Lordships and Your
20 Lordships will give the opinion. My Lord, so far as yesterday's argument My Lord, which I will
21 not stretch it beyond it because I know Your Lordships have got what is my interpretation of
22 Article 200. But I have tried to kind of calibrate it, so that instead of what is better explained
23 by me the way I am reading it. And it's very easy chart My Lord, it would not... I'm sorry, my
24 apologies. I thought I'd given... Yes. I can share digital also. Share digital also. Rest of...it is
25 shared with on digital... for rest. Your Lordships, kindly bear with me only for five minutes
26 and I'll switch over to the next point.

27 The Governor shall declare, I'm not repeating. Declaration has its meaning. It's a
28 Constitutional Declaration. He has three options. First, let us come to the first option, grant
29 assent. Now, what are the facets of granting of assent. My Lord, please see the left hand side
30 route which the Governor can take. At the outset he grants assent the Bill becomes an act.

1 Correct, My Lords? But he can defer grant of assent and take a decision to resort to the proviso,
 2 that is returning the Bill to the House, that is the fourth option in the proviso. Bill is returned
 3 by the House to the Governor, with or without modification, then he will have two options.
 4 Then he will have two options. He can grant assent, that all right, my recommendations or
 5 whatever...

6 **CHIEF JUSTICE B. R. GAVAI:** No. We have gone through the charts. These only debates
 7 what you argued yesterday.

8 **TUSHAR MEHTA:** But second, My Lord, let me at the cost of repetition show what is second.
 9 Second is a withhold option, which in my submission is a standalone option, and it is a
 10 complete action of the Constitutional functionary.

11 **CHIEF JUSTICE B. R. GAVAI:** So, according to you *Punjab* has been wrongly decided?

12 **TUSHAR MEHTA:** Yes, but he has a choice. Right side, at the outset if he withholds for
 13 reasons which I have explained some things is so patently unconstitutional or something going
 14 against the nation or clearly in the first schedule etc., then the Bill falls through. Now, the
 15 question was, instead of, this is where "instead of" comes. Instead of taking this root of at the
 16 outset withholding resorts to the proviso instead of withholding. Then it is returned to the
 17 House and if it comes back he will have two options. He will grant assent that, okay, I'm bound
 18 because, I cannot now withhold because I have resorted to the proviso, or he can reserve the
 19 Bill for consideration of the President. Third is there is one new element which I have
 20 [INAUDIBLE] and there cannot be any dispute on this element. When he reserves the Bill at
 21 the outset for the consideration of the President, for Presidential assent, first can be in case of
 22 repugnance. If he feels that it is repugnant to some Central law, he will refer it. Second column,
 23 which is a bigger column, Your Lordships need not read. There are certain provisions in the
 24 Constitution itself which mandates that if your State Legislature is passing this law,
 25 mandatorily Presidential assent is required. It's nobody's discretion, neither Governor nor
 26 Council of Ministers. Nobody, My Lord. For example, Article 31(3)... 31(a) before amendment,
 27 then second proviso to Article so and so, so and so, so and so. There are several provisions. Or
 28 any other reason which he feels that I want to reserve it for the President. This is what My
 29 Lords were pleased to indicate. This is just to calibrate it and put it in a comprehensive
 30 manner. But all four options are independent of each other. At least 1, 2, and 3 are
 31 independent, with an option to resort to Option 4, not a mandate to resort to Option 4, as
 32 decided in *Punjab*. That is my case.

33 Now, My Lord may kindly come to...

1 **CHIEF JUSTICE B. R. GAVAI:** Put your arguments.

2 **TUSHAR MEHTA:** That argument is over. I'm coming to the next argument. There are some
3 judgments which I have cited, how proviso is to be interpreted, but I don't wish to cite it here.
4 It's a fairly settled proposition, and Your Lordships are fully aware. It is cited for ready
5 reference.

6 **CHIEF JUSTICE B. R. GAVAI:** Very well-known phrase.

7 **TUSHAR MEHTA:** Yes. So, page 187. This is the second question which I am addressing.
8 The first part is over. 200 and 201 is over. Whether Governor is bound by the aid and advice
9 tendered by the Council.

10 **CHIEF JUSTICE B. R. GAVAI:** That is page number?

11 **TUSHAR MEHTA:** 187 of my written submissions. Your Lordships have PDF page or the
12 physical file? I can accordingly... PDF page is 94, para 166. My Lord the question is whether
13 the Governor is bound by aid and advice of the Council of Ministers. 163, I have read My Lord.
14 I'll read the first part- 163(1) so that My Lord for just immediate reference. "There shall be a
15 Council of Ministers with the Chief Minister at the head to aid and advice the Governor in
16 exercise of his functions, except in so far as he is by or under this Constitution, required to
17 exercise his discretion or any of them in his discretion." Correct, My Lords? So, functions can
18 be discretionary, based on discretion, or as per aid and advice. What is the demarcation? That
19 is the question before Your Lordship. My Lord, here minimum... I'll skip what is not relevant,
20 but the minimum Constituent Assembly debate, My Lord, which is relevant for Your Lordships
21 to consider the question, is at page 187, bottom. My Lord, Mr. Kamath objected this discretion,
22 and it was answered by Mahavir Tyagi, please have a look at Mr. Kamath's objection. "When
23 you, sir, raised a very important issue the other day, Dr. Ambedkar clarified this Clause by
24 saying that the President is bound to accept the advice of his ministers in exercise of all his
25 functions, but here, Article 143 vests certain discretionary powers in the Governor. And to me,
26 it seems that even as it was, it was bad enough. But now, after having amended Article 131
27 regarding election of the Governor, and accepted nominated Governors, it would be wrong in
28 Principle and contrary to tenets of principle of Constitutional Government which you are going
29 to build up in this country. It would be wrong, I say, to invest a Governor with these additional
30 powers, namely discretionary powers. I feel that no departure from the principle of
31 Constitutional Government should be favoured except for reasons of emergency, and these
32 discretionary powers must be done... done away with. I hope this Amendment of mine will
33 commend itself to the House."

1 Then, My Lord this argument is responded to by Shri. Mahavir Tyagi, which is here. "I beg to
 2 differ from my honourable radical friends, Mr. Kamath and Professor Shibban Lal Saxena, and
 3 I think the more powers are given to Provinces, the stiffer must be the guardianship and
 4 control of the Central in the exercise of those powers. That, in my view, we have now given up,
 5 the old idea of creating Autonomous States, and are now keeping a reserve of powers in the
 6 Centre, and we are going to have nominated Governors. Those Governors are not to be there
 7 for nothing. After all, we have to see that the policy of the Centre is carried out. We have to
 8 keep the State linked together and the Governor is the agent, or rather, he is the agency which
 9 will press for and guard the Central Policy. In fact, our previous conception has now been
 10 changed altogether. The whole body politic of a country is affected and influenced by the policy
 11 of the Centre. Take, for instance, subjects like defence involving questions of peace or war, of
 12 relationship with foreign countries, of our commercial relations, exports and imports, all these
 13 are subjects which affect the whole body politic, and the provinces cannot remain unaffected,
 14 they cannot be let free of the policy of the Centre. The policy which is evoked in the Centre
 15 should be followed by all the States, and if the Governors were to be in the hands of Provincial
 16 Ministries, then, there will be various policies in various Provinces, and the policy of each
 17 Province shall be as unstable as the Ministry. For there would be Ministries of various types
 18 having different party levels and different programs to follow.

19 Their policies must differ from one another. It will therefore be all the more necessary that
 20 there must be coordination of programs and policies between the State and the Central
 21 Government. The Governor being the agency of the Centre, is the only guarantee to integrate
 22 various Provinces or the States. The Central Government also expresses its thought itself
 23 through the Provincial States along with their own administration, they have also to function
 24 on behalf of the Central Government. A Governor shall act as the agency of the Centre and
 25 we'll see the central policy is sincerely carried out. Therefore, the Governor's discretionary
 26 power should not be interfered with. Democratic trends are like a wild mist. Say what you will,
 27 democracy goes by the whims and fancies of parties and the masses. There must be some such
 28 machinery which will keep this wild beast under control. I do not deprecate democracy.
 29 Democracy must have its way, but do not let it derogate... degenerate into chaos. Moreover,
 30 the State Governments may not be quite consistent in their own policies. Governments may
 31 change after months or years, with them will change their policies. The Governors may change
 32 too. But the policy and instructions given by the Centre to the Governors will remain
 33 practically unchanged. The more the powers given to the States, the more vigilant must be the
 34 control. The Governor must remain as the guardian of the Central policy on one side and
 35 Constitution on the other. His powers, therefore should not be interfered with." He is not for
 36 nothing. He's not just a showpiece.

1 My Lord, thereafter, Your Lordships may kindly turn the page, Pandit Thakur Das Bhargava
 2 continues the discussion. "Sir, I beg to propose the amendment of Mr.... Oppose the
 3 amendment of Mr. Kamath. Under Article 143, the Governor shall be, and in the exercise of
 4 his functions by the Council of Ministers, it is clear so far... Article 143, Governor shall be aided
 5 in the exercise of his functions by a Council of Ministers. It is clear so far. I gave notice of an
 6 amendment which appears on the order page at so and so which I have not moved. In that
 7 amendment, I have suggested that the Governor will be bound to accept the advice of his
 8 ministers on all matters except those which are under this Constitution required to be
 9 exercised by him in his discretion. My submission is that it is wrong to say that Governor shall
 10 be a dummy or an automation. As a matter of fact, according to me, the Governor shall exercise
 11 very wide powers and very significant powers too. If we look at Article 144, it says the
 12 Governor's ministers shall be appointing, shall be appointed by him and shall hold office
 13 during his pleasure." So he has the power to appoint his Ministers. But when the ministers are
 14 not in existence, who shall advise him in discharge of his functions? There can be a vacuum.
 15 One ministry goes, another has not been installed. In that context...

16 **CHIEF JUSTICE B. R. GAVAI:** Whenever there is a President's rule, there are advisors to
 17 the Governor.

18 **TUSHAR MEHTA:** Correct. They're appointed by the Centre. But, can we read further?

19 **CHIEF JUSTICE B. R. GAVAI:** In the vacuum also, normally if one CM resigns or if it loses
 20 the majority till the new CM takes over, he acts as a caretaker of the Chief Minister.

21 **TUSHAR MEHTA:** Kindly My Lord have a look at this once. Suppose the tenure has gone.
 22 The Governor tenure doesn't go. The new election takes place. It is considered, and it is
 23 considered subsequently in judgments also. One seven judgment considers this aspect. "Then
 24 again, when the Governor calls upon the leader of a Party for the choice of ministers after a
 25 previous ministry has been dissolved, in that case, there will be no ministry in existence. And
 26 who will be there to advise him? Therefore, he will be exercising his functions in his discretion.
 27 It is wrong to assume that the Governor will not be charged with any function which he will
 28 exercise in his discretion. Article 175 and 188 are other articles which give him certain function
 29 which he has to exercise in his discretion." That is Article 200, and 188 is emergency powers.
 30 My submission is that, according to me, the Governor shall be a guide, philosopher and friend
 31 of the Ministry, as well as people in general, so that he will exercise certain functions, some of
 32 which will be in the nature of unwritten conventions, and some will be such as will be expressly
 33 conferred by this Constitution. He will be a man above party and he will look at the Ministry
 34 and Government from a detached standpoint. He will be able to influence the ministers and

members of the Legislature, in such a manner, that the administration will run smoothly. In fact to say that a person like him is a mere dummy and automation or a dignitary without powers, is perfectly wrong. It is quite right that so far as our conception of a Constitutional Governor goes, he will have to accept the advice of his ministers in many matters. But there are many other matters in which the advice will neither be available, nor will he be bound to accept that advice. My Lord, thereafter, Dr. Ambedkar's speech, which I have read in a different context. So My Lord, I am not reading it here, but he substantially echoes the Mahavir Tyagi view and the view of Pandit Thakur Das.

Now My Lords may kindly come to... My Lord, I have quoted **Seervai**. If Your Lordships can come to, I'll not read it. Page 192. What are the discretionary powers of the Governor and the President? My Lord, H. M. Seervai has elaborately dealt with. I may not read it. Your Lordships may kindly read it. It would really assist Your Lordships. Now please come to 194. These are the judgments on the question of discretion. My Lord, please see 188, at the foot of page 194. "It is..." Your Lordship gets that?

CHIEF JUSTICE B. R. GAVAI: Page is what?

TUSHAR MEHTA: 194. PDF is 101. Para 188. "It is submitted that this Honourable Court has carved out an exception to the general rule of the aid and advice which is not expressly stated in the Constitution. However, which is in consonance with the intent of framers of the Constitution of India and also with the scheme of functions and powers of Governor provided therein. A reading of the judgments discussed below and other provisions of the Constitution of India would show that *inter alia*, the following are the exceptions to the general rule of aid and advice where the Constitution expressly provides for the same." For example, Article so and so, so and so, so and so, where he will not be bound by the aid and advice, and there cannot be any dispute these are constitutional mandates. "(b). Where the legislative intent emerging from the interpretation of any provision of the Constitution, like the powers under Article 200, 356, or the power to dismiss the Government, which has lost confidence but refuses to quit, as has been mentioned in the report of Justice M. M. Punchhi Commission and have been conquered by a five judge bench of this Honourable Court in **Nabam Rebia**." I'll read My Lord very illuminating paragraph of **Nabam Rebia** where the Constitutional Courts specifically declare that certain functions ought to be exercised by the Governors on his own. Your Lordships have developed this law, by judicial decision-making. "Power to summon or provoke the House of Legislature, Legislative Assembly under Article 174 when there are strong reasons and material to show that incumbent Chief Minister and his Council of Ministers seemed to have lost the majority of the House." Then, "situations are matters where... situations or matters where the bias is inherent in the aid and advice of Council of

Ministers, like the case of grant of sanction for prosecution of Council of Ministers." 197 sanction or Section 17 PC Act goes before the Governor in case of Chief Minister, then obviously he would not be guided by the aid and advice and MP judgment I'll show, that that makes it very clear.

Now, Your Lordships may kindly see My Lord. This is My Lord... I'll skip that judgment. Please come to 197, ***Shamsher Singh***. ***Shamsher Singh*** is a seven bench Judgment. At the outset, I may point out that ***Shamsher Singh***, a seven-judge bench Judgment is taken note of in ***State of Punjab versus Union of India***, but the relevant paragraphs appear to have missed it. It doesn't take care of the relevant paragraph. I can make that statement. If it is challenged, we can show it from the... it's not there. In ***State of Punjab versus Union of India***, the three judge bench for a 2024 judgment, takes note of Shamsher Singh, but it has escaped the attention of the bench of these two paragraphs, which according to me is the real law of the [NO AUDIO]. If Your Lordships would find that judgment at page 11669. Just put a note, My Lord. That judgment, My Lord, Volume 5.29, judgment starts at page 11660.

CHIEF JUSTICE B. R. GAVAI: Volume?

TUSHAR MEHTA: Volume 5.29 at page, it starts at page 11660, ***Shamsher Singh*** is cited at para 16. Para 16, at page 11669. My Lord, only two paragraphs are noticed. Your Lordships may come to 11669. My Lord, Justice Narasimha has that? Para 16, My Lord said... My Lord, the Chief Justice...

CHIEF JUSTICE B. R. GAVAI: Does it start from 11660?

TUSHAR MEHTA: It starts from 11660, but I am at one 11669 where ***Shamsher Singh*** is noted. "These principles have been well established..." Your Lordship gets, My Lord? "Since the decision in ***Shamsher Singh versus State of Punjab***, where this Honourable Court held under the Cabinet System of Government as embodied in our Constitution, the Governor is the Constitutional or formal head of the State, and he exercises all his powers and functions conferred on him, by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres, where the Governor is required by or under the Constitution to exercise his function in his discretion. It is a fundamental principle of English Constitutional Law that ministers must accept responsibility for every executive act. In England, the Sovereign never acts on his own responsibility. The power of Sovereign is considered by the practical rule that Crown must find advisors to bear responsibility for his action. Those advisors must have the confidence of House of Commons. This rule of English Constitutional Law is incorporated in our Constitution. The Indian Constitution envisages a Parliamentary

1 and responsible form of Government at the Centre and in the States and not a Presidential
 2 form of Government. The powers of the Governor as the Constitutional Head, are not
 3 different." These paras are quoted. What, Your Lordships... Justice Surya Kant has the right
 4 copy, I believe.

5 **JUSTICE SURYA KANT:** I am supposed to...

6 **TUSHAR MEHTA:** I thought so. Volume V - 29. My Lord, can I give my copy for immediate
 7 reference?

8 **CHIEF JUSTICE B. R. GAVAI:** *State of Punjab vs...*

9 **TUSHAR MEHTA:** 11669, para 16.

10 **JUSTICE SURYA KANT:** Paragraph 16?

11 **TUSHAR MEHTA:** Paragraph 16, I'm grateful.

12 **JUSTICE SURYA KANT:** *Shamsher Singh*.

13 **TUSHAR MEHTA:** *Shamsher Singh* is noted. Para 28 and 32 are quoted, which I read.
 14 May I re- read it? Or may I re-read them again?

15 **JUSTICE SURYA KANT:** Yes.

16 **TUSHAR MEHTA:** Yes, "under the Cabinet System of Government as embodied in our
 17 Constitution, the Governor is the Constitutional or formal head of the State, and he exercises
 18 all his powers and functions conferred on him by or under the Constitution on aid and advice
 19 of his Council of Ministers, save in spheres where Governors is required by or under the
 20 Constitution to exercise his function in his discretion. It is a fundamental principle of English
 21 Constitutional Law that ministers must accept responsibility for every executive act. In
 22 England, the Sovereign never acts on his own responsibility. The power of the Sovereign is
 23 considered by the practical rule that the Crown must find advisors to bear responsibility for
 24 his action. Those advisors must have confidence of the House of Commons. This rule of
 25 English Constitutional Law is incorporated in our Constitution. The Indian Constitution
 26 envisages a Parliamentary and responsible form of Government at the Centre and in the States
 27 and not a Presidential form of Government. The powers of the Governor as the Constitutional
 28 Head are not different." My Lord, these two paras are quoted. What is missed from
 29 *Shamsher Singh* is in my written submission at page 197. My Lord, these two paragraphs.
 30 Your Lordships are at page...

1 **JUSTICE VIKRAM NATH:** Other than those two paragraphs, nothing else is referred of
2 ***Shamsher Singh***? 54 and 55 onwards...

3 **TUSHAR MEHTA:** And this is what I'm now showing. ***Shamsher Singh*** is separate. My
4 Lord please see para 54 and 56. "The Provisions of the Constitution...", Your Lordship gets
5 that? "The Provisions of the Constitution, which expressly require the Governor to exercise his
6 powers in his discretion are contained in articles to which reference has been made to illustrate
7 Article 239(2) states that, where a Governor is appointed an administrator of an adjoining
8 Union Territory, he shall exercise his functions as such administrator independently of his
9 Council of Ministers. The other articles which speak of discretion of the Governor are para so
10 and so para so and so and so Sixth Schedule and Article so and so and so. The discretion
11 conferred on the Governor means that as the Constitutional or Formal Head of the State, the
12 power is vested in him. In this connection reference may be made to Article 356 which states
13 that the Governor can send a report to the President that a situation has arisen in which the
14 Government of the State cannot be carried on in accordance with Provisions of the
15 Constitution. Again, Article 200 requires the Governor to reserve for consideration. Any Bill
16 which in his opinion, if it became law, would so derogate from the powers of the High Court
17 as to endanger the position with the High Court is designed to fulfil under the Constitution."

18 Now 55. "In making a report under Article 356, the Governor will be justified in exercising his
19 discretion, even against the aid and advice of the Council of Ministers. The reason is that the
20 failure of Constitutional machinery may be because of the conduct of the Council of Ministers.
21 This discretionary power is given to the Governor to enable him to report to the President,
22 who, however, must act on the aid and advice of Council of Ministers of the Centre in all
23 matters. In this context, Article 163(2) is explicable that the decision of the Governor in his
24 discretion shall be final and the validity shall not be called in question. The action taken by the
25 President on such a report is a different matter. The President acts on aid and advice of Council
26 of Ministers in other matters where the Governor acts in his discretion, he will act in harmony
27 with his Council of Ministers. The Constitution does not aim at providing a parallel
28 administration within the State by allowing the Governor to go against the advice of Council
29 of Ministers."

30 Now please see, 56 is important. "Similarly, Article 200 indicates another instance where the
31 Governor may act irrespective of any advice from the Council of Ministers. In such matters
32 where the Governor is to exercise his discretion, he must discharge his duties to the best of his
33 judgment. The Governor is required to pursue such course which are not detrimental to the
34 State."

Now I'll come to that My Lord and my learned friend also will take assist Your Lordships on that. My Lord, in the judgment of Tamil Nadu, this distinguished by the honourable two judge bench My Lord, relying upon a concurring opinion in the seven judge bench judgment. One paragraph of the concurring judgment. I'll come to that. Now My Lord, next judgment is **MP Special Police Establishment Act**, again five judges and did not notice was not noticed by the **State of Punjab** judgment.

Para 11. I'll skip the first part. First part gives the facts. What were the facts of that case, which may not be relevant for the present, but I have put it for ready reference. Para 11. "Mr. Sorabjee submits that even though normally the Governor acts on the aid and advice of Council of Ministers, but there can be cases where the Governor is, by or under the Constitution, required to exercise his functions or any of them in his discretion. The Constitution of India expressly provides for contingencies so and so, so and so, so and so. However, merely because the Constitution of India expressly provides, in some cases, for the Governor to act in his discretion, can it be inferred that the Governor can so act only where the Constitution expressly so provides? If that were so, then Sub-clause 2 of Article 163 would be redundant. A question whether a matter is or is not a matter in which the Governor is required to act in his discretion can only arise in cases where the Constitution has not expressly provided that the Governor can act in his discretion. Such a question cannot arise in respect of matters where constitution expressly provides that the Governor is to act in his discretion. Article 163(2) therefore postulates that there can be matters where the Governor can act in his discretion, even though the Constitution has not expressly so provided. Mr. Sorabjee relies on the **Shamsher Singh vs. State of Punjab**. A seven judge bench of this Court, *inter alia* considered whether the Governor could act by personally applying his mind and or whether, under all circumstances, he must act only on the aid and advice of Council of Ministers. It was *inter alia* held as follows." Para 54 to 56.

JUSTICE VIKRAM NATH: Which you just read?

TUSHAR MEHTA: Which I just read, which appears to have escaped the attention of the bench in **State of Punjab**. Now My Lord, again **MP judgment** again starts. "Thus, as rightly pointed out by Mr. Sorabjee, a seven judge bench of this court has already held that the normal rule is that the Governor acts on the aid and advice of Council of Ministers and not independently or contrary to it. But, there are exceptions under which the Governor can act in his own discretion. Some of the exceptions are as set out herein above. It is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is also recognized that the concept of Governor acting in his discretion or exercising independent judgment is not alien to the constitution. It is recognized that there may be situations where by reason of peril

1 to Democracy or Democratic Principles, an action may be compelled which form its very
 2 nature, not amenable to ministerial advice. Such a situation may be where bias is inherent
 3 and/or manifest in the advice of the Council of Ministers." This judgment of MP, five judge
 4 bench is not considered My Lord. It has escaped the attention.

5 Now I come to most important judgment. **Nabam Rebia** a relatively recent judgment.
 6 Arunachal Pradesh issue. My Lord, I must say this is again My Lord, not... It has escaped the
 7 attention of the bench in **State of Punjab**. It was placed for consideration in Tamil Nadu
 8 judgment but it quotes some paragraphs, Tamil Nadu judgment. But para, which I am going
 9 to read again, has missed the attention of the bench. Kindly see, "similarly, in **Nabam**
 10 **Rebia**", para 151, 152. "The Honourable Court referred to the Punchhi Commission's
 11 formulation that Governor's discretionary powers include to give assent or withhold or refer a
 12 Bill for Presidential assent under Article 200 and expressly endorse and adopt it. It was held
 13 as under." My Lord, 151. "The important observation in Justice M. M. Punchhi Commission
 14 Report with reference to Article 163(2) are contained in para 4.5. The relevant extract of the
 15 same is as under. Article 163(2) gives an impression that the Governor has a wide, undefined
 16 area of discretionary powers, even outside situations where the Constitution has expressly
 17 provided for it. Such an impression needs to be dispelled. The Commission is of the view that
 18 the scope of discretionary powers under Article 163(2) has to be narrowly construed,
 19 effectively dispelling the apprehension, if any, that the so-called discretionary powers extends
 20 to all the functions that the Governor is empowered under the Constitution. Article 163 does
 21 not give the Governor a general discretionary power to act against or without the advice of his
 22 Council of Ministers. In fact, the area for exercise of discretion is limited, and even in his
 23 limited area, his choice of action should not appear to be arbitrary or fanciful. It must be a
 24 choice dictated by reason, activated by good faith and tempered by caution. The Governor's
 25 discretionary power are the following: To give assent..." This is Punchhi Commission. "The
 26 Governor's discretionary powers are the following: To give assent or withhold or refer a Bill
 27 for Presidential assent under Article 200. The appointment of Chief Minister under Article
 28 164. Dismissal of Government, which has lost confidence but refuses to quit. Since the so and
 29 so, so and so and so." Now, My Lord, **Nabam Rebia** five judge bench again, quotes with
 30 approval this observations and says, "we are of the considered view that the inferences drawn
 31 in the judgment M.C Punchhi Commission Report extracted herein above are in consonance
 32 with the scheme of the functions and powers assigned to the Governor with reference to the
 33 executive and legislative functioning of the State and more particularly with reference to the
 34 interpretation of Article 163. We endorse and adopt the same as a correct expression of
 35 constitutional interpretation with reference to the issue under consideration."

1 If Your Lordships were to see how this is dealt with in Tamil Nadu judgment, Volume 31. This
 2 ***Nabam Rebia*** is missed in Punjab judgment. Tamil Nadu judgment takes note of it. But
 3 please see, so far as these two paragraphs are concerned, that again has missed the attention
 4 of the bench in Tamil Nadu.

5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Which para?

6 **TUSHAR MEHTA:** Page 12432, para 301. Your Lordship gets? 301. "Another Constitution
 7 bench of this Court in ***Nabam Rebia*** had the occasion..." My Lord, thereafter...

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

9 **TUSHAR MEHTA:** I'm sorry, 12432.

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

11 **TUSHAR MEHTA:** Para 301. "Another Constitution Bench of this Court in ***Nabam Rebia***."
 12 ***Nabam Rebia*** is taken note of. Then, My Lord, the Hon'ble Court is pleased to quote para
 13 147.1, 147.2, 148, 149 and at page 12435, possibly misses 151 and 152, which I read. And comes
 14 to 154. And this discussion in Tamil Nadu is directly while dealing with the question of
 15 discretion. These two paragraphs, since it escaped the attention of the two judge bench, I'm
 16 placing for Your Lordships' consideration.

17 Now, I come to the next judgment i.e. ***BK Pavitra***. This is two judge bench judgment, which
 18 is declared...

19 **JUSTICE VIKRAM NATH:** Just one minute. Come back to page 12432. The Tamil Nadu
 20 judgment refers to paragraphs 147, 148, 149 and then it jumps to paragraph 154. 151 and 152
 21 are left out.

22 **TUSHAR MEHTA:** That's what I submitted My Lord with profound respect. That two
 23 paragraphs seems to have escaped the attention of the bench My Lord. Because from 149, it
 24 directly goes to 154. And in my submission, the real law is laid down in 151 and 152. And this
 25 is My Lord while discussing discretion. The point which I am arguing My Lord, whether in all
 26 cases aid and advice is binding or there is a room for discretion.

27 **JUSTICE VIKRAM NATH:** Yes.

28 **TUSHAR MEHTA:** Now please come to page 200 of my submissions My Lords. ***BK***
 29 ***Pavitra*** judgment. My Lord this issue was squarely there...

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Can you repeat 154 with Tamil Nadu
2 refers to... underlined...which comes after 152, the same very page.

3 **TUSHAR MEHTA:** 1...

4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 154 of Tamil Nadu, follows 151 and
5 153

6 **CHIEF JUSTICE B. R. GAVAI:** He is between the....

7 **TUSHAR MEHTA:** 154 is *Nabam*.

8 **CHIEF JUSTICE B. R. GAVAI:** 151 is not there.

9 **TUSHAR MEHTA:** My Lord 154 is slightly different from 151, 152. It is not slightly My Lord,
10 substantially. My Lord now kindly come to **BK Pavitra**, page 200. This is of course a two
11 judge judgment. But it is declared *per incuriam*. And I'm not repeating the argument My Lord,
12 but this itself was sufficient enough for a reference under 145(3). My Lord, apropos Your
13 Lordships very correct, the proposition My Lord, the Chief Justice says at the outset, that in
14 every matter we are not supposed to look at 145(3)..

15 **CHIEF JUSTICE B. R. GAVAI:** As far as justiciability is concerned, paragraph 155.5,
16 *Nabam Rebia*.

17 **TUSHAR MEHTA:** Yes, but 155 will have to be read in context of 151...

18 **CHIEF JUSTICE B. R. GAVAI:** But then even if you read 155.5...

19 **TUSHAR MEHTA:** The underlined portion, highlighted part. "Fifthly, the submission
20 advanced on behalf of the Respondents that the exercise of discretion under Article 163(2), is
21 final and beyond the scope of judicial review, cannot be accepted. Firstly, because we have
22 rejected the submission..." but this is on judicial review, not on discretion. "Reject advanced
23 by the Respondent that the scope and extent of discretion vested with the Governor has to be
24 ascertained from Article 163(2) on the basis whereof the submission was canvassed. And
25 secondly, any discretion exercise beyond the Governor's jurisdictional authority would
26 certainly be subject to judicially." It was on judicial review. And it is, if it is beyond one or
27 obviously, Governor...

28 **CHIEF JUSTICE B. R. GAVAI:** According to you, under 200, he has an ample discretion.

1 **TUSHAR MEHTA:** That's what **Nabam Rebia** says My Lord. That's my contention. He has
 2 ample discretion My Lord. Situations may differ. The instances which are given in all the
 3 judgments are illustrative, not exhaustive. But they say that it is wrong to say that in every
 4 matter like President, he is bound in every matter by aid and advice of the Council of Ministers.
 5 **Shamsher Singh** also about seven judge bench says that there are discretionary areas,
 6 including Article 200. Specifically Article 200, every Constitution Bench mentions. That was
 7 precisely My Lord the question in Tamil Nadu. I'm not deviating from this point, but just to
 8 kind of respectfully respond. My Lords have very rightly said that in every case, it's not
 9 necessary that the court would examine 145(3). A bail petition comes. It would involve Article
 10 21, but it won't become a Constitutional interpretation question that it has to be referred to
 11 the larger bench. But this was a case where only issue was Constitutional interpretation. Facts
 12 were not My Lord much in dispute. Anyway, leave it at that.

13 Please come to **BK Pavitra**, para 66. This is My Lord, declared to be *per incuriam* by the two
 14 judge bench in Tamil Nadu. I'll show My Lord that. "Where a Bill is not a Money Bill...", Your
 15 Lordship gets? "Where a Bill is not a Money Bill, the Governor may return the Bill for
 16 reconsideration upon which the House or Houses, as the case may be, we'll reconsider the
 17 desirability of introducing the amendments with the Governor as recommended. If the Bill is
 18 passed again by the House or Houses, as the case may be, the Governor cannot thereafter
 19 withhold assent. The second proviso to Article 200 stipulates that the Governor must not
 20 assent to the Bill, but necessarily reserve it for the consideration of the President if the Bill,
 21 upon being enacted, would derogate from the powers of the High Court in a manner that
 22 endangers its position under the Constitution. Save and accept for Bills falling within the
 23 description contained in the second proviso, where the Governor must reserve the Bill for
 24 consideration of the President, a discretion is conferred upon the Governor to follow one of
 25 the courses of action enunciated in substantive part of Article 200. Aside from Bills which are
 26 covered by the second proviso where the Governor is obliged to reserve the Bill for
 27 consideration of the President, the substantive part of Article 200 does not indicate
 28 specifically. the circumstances in which the Governor may reserve a Bill for consideration of
 29 the President. The Constitution has entrusted this discretion to the Governor. The nature and
 30 scope of the discretionary power of the Governor to act independent of or contrary to aid and
 31 advice of Council of Ministers under Article 163 was discussed in **Nabam Rebia versus** so
 32 and so." Where 154 is quoted My Lord, I've read. I'll skip that.

33 Then para 67 of **B.K. Pavitra**. "The framers carefully eschewed defining the circumstances
 34 in which the Governor may reserve a Bill for a consideration of the President." They did not
 35 give instances, they left it open-ended. "By its very nature, the conferment of power cannot be
 36 confined to specific categories. Exigencies may arise in the working of the Constitution, which

1 justify a recourse to the power of reserving a Bill for the consideration of the President. They
 2 cannot be forced in with the vision of a soothsayer. The power having been conferred upon a
 3 constitutional functionary, it is conditioned by the expectation that it would be exercised upon
 4 careful reflection and for resolving legitimate concerns in regard to the validity of the
 5 legislation. The entrustment of a constitutional discretion to the Governor is premised on the
 6 trust that the exercise of authority would be governed by constitutional statesmanship. In a
 7 federal structure, the conferment of this constitutional discretion is not intended to thwart
 8 democratic federalism. The State Legislatures represent the popular will to those who elect
 9 their representatives. They are the collective embodiment of the Bill. The act of reserving a Bill
 10 for assent of the President must be undertaken upon careful reflection, upon a doubt being
 11 entertained by the Governor about the constitutional legitimacy of the Bill, which has been
 12 passed. Article 200 contains the source of the constitutional power which is conferred upon
 13 the Governor to reserve a Bill for consideration of the President. Article 254(2) is an
 14 illustration of the Constitutional Authority of the Governor to..." My Lord, Justice Surya Kant
 15 has the same file?

16 **JUSTICE SURYA KANT:** Yes.

17 **TUSHAR MEHTA:** "Article 200 contains the source of the constitutional power which is
 18 conferred upon the Governor to reserve a Bill for consideration of the President. Article 254(2)
 19 is an illustration of the constitutional authority of the Governor to reserve a law enacted by the
 20 State Legislature for consideration of the President in a specified situation, where it is
 21 repugnant to an existing law or to a Parliamentary Legislation on a matter falling in the
 22 concurrent list. Eventually, which is specified in Article 254(2) does not exhaust the ambit of
 23 the power entrusted to the Governor under Article 200 to reserve a Bill for consideration of
 24 the President. Apart from repugnancy in matters falling in the concurrent list between state
 25 and the Parliamentary Legislation, a Governor may have sound constitutional reasons to
 26 reserve a Bill for consideration of the President." Apart from the repugnancy issue. "Article
 27 200 in its second proviso mandates that a Bill which derogates from the powers of the High
 28 Court must be reserved for consideration of the President. Apart from Bills which fall within
 29 the description set out in the second proviso, the Governor may legitimately refer a Bill for
 30 consideration of

31 **11:34:09 AM**

32 the President upon entertaining a legitimate doubt about the validity of the laws. By its very
 33 nature, it would not be possible for this Court to reflect upon the situations in which the power
 34 under Article 200 can be exercised. This was noticed in the judgment of this Court in..."

1 **CHIEF JUSTICE B. R. GAVAI:** *Hoechst*.

2 **TUSHAR MEHTA:** "In *Hoechst*, so and so..." I'm sorry. I am always confused with this
3 pronunciation. "Excluding it's from Judicial scrutiny, the Court withheld..." I have read this,
4 when I read *Hoechst*. So I'm not reading it, My Lords. Now, Your Lordships may kindly come
5 to... this point is over, My Lord. There are some issues which we have divided to save time. My
6 learned friend also would assist Your Lordships would supplement without repeating, My
7 Lord, they would be able to more and effectively assist Your Lordship. Kindly come to 204.

8 **CHIEF JUSTICE B. R. GAVAI:** In a louder manner.

9 **TUSHAR MEHTA:** Yes, sir.

10 **CHIEF JUSTICE B. R. GAVAI:** Both of them.

11 **MANINDER SINGH:** Remains, not survives.

12 **TUSHAR MEHTA:** Anything remains, not survives.

13 **CHIEF JUSTICE B. R. GAVAI:** You'll have to put off the mics.

14 **TUSHAR MEHTA:** There was an interesting incident, I'll not share it here. My Lord, Justice
15 Narasimha, me and my colleague, we went to Pune for one... arguing one matter before NGT
16 Pune, but I'll... some other day, not in the matter. Question number... page 204.

17 **CHIEF JUSTICE B. R. GAVAI:** Why are you unnecessarily...? Either you should have not
18 mentioned, or you should have mentioned it fully. Unless it is not embarrassing to my learned
19 brother.

20 **TUSHAR MEHTA:** No, it's not embarrassing to His Honour.

21 **JUSTICE VIKRAM NATH:** What happened in NGT, Pune?

22 **TUSHAR MEHTA:** I'll just say with his permission. I'll say that with his...

23 **CHIEF JUSTICE B. R. GAVAI:** You can't stop halfway.

24 **TUSHAR MEHTA:** I'll say that with permission of my learned friend and with an apology.
25 It's not intended to insult. NGT Pune is a small courtroom. It's like a little, slightly bigger
26 bedroom. It's in a government building. My learned friend, all of us were on the same side. He
27 was arguing in his own way, Justice Kingaonkar...

1 **CHIEF JUSTICE B. R. GAVAI:** In his own volume.

2 **TUSHAR MEHTA:** Justice Kingaonkar was presiding over the bench. So at some stage, he
 3 didn't like this. So, my learned friend understood that the Hon'ble judge is unable to cope up
 4 with my speed. So he continued the same volume, but reduced the speed. Then I requested my
 5 learned friend that the trouble is with the volume, not the speed. And the judge complemented
 6 me by saying that thank you, you prevented Punjab Mail... Sorry, but he's like my brother. I
 7 can take this liberty.

8 Page 204. My Lord, this is something very, very serious and Your Lordships may take this into
 9 consideration. One Constitutional organ prescribing time limits for another Constitutional
 10 organ... I can, My Lord... I have no quarrel and I will never argue, and I'll teach my argument
 11 that Statutory functionaries can be bound by a time limit. The Deputy Collector deciding to
 12 grant or withhold non-agricultural permission. But would it apply to Constitutional
 13 functionalities which are coordinate Constitutional functionaries? These are the two
 14 questions, which are Question No. 5 and Question No. 7. I have incorporated the debate which
 15 I have already read. In one line, I may just refresh Your Lordships' memory. Wherever time
 16 limit was stipulated at the time of drafting of the Constitution, the time limit was deleted.

17 And in that very provision, wherever time limit was required, time limit is added. So
 18 Constitutional framers are very conscious of the fact that some functions need a timebound
 19 exercise of power, and some functions needs a kind of leeway, and we may not bind the
 20 Constitutional functionaries with the power. My Lord, please come to page 208. And I'm not
 21 going to read this. Only for Your Lordships assistance at page 209, My Lord I have compiled
 22 the Constitutional Provisions where Constitution itself stipulates the time limit. I'm not
 23 reading it. This is just My Lord with a view to see that Your Lordships gets it My Lord at one
 24 place. 209, Article 22, Article 62, et cetera, et cetera., the list goes on till, at page 224. Wherever
 25 the Constitution has thought it appropriate for the object with that particular provision seeks
 26 to achieve, the Constitution provides for a time limit. Wherever the Constitution has, Framers
 27 have considered...

28 Yes, My Lord kindly note one more thing. Tamil Nadu judgment which mandatorily stipulate
 29 time limits for the Honourable President and the Honourable Governor relies upon the report
 30 of Punchhi Commission and Sarkaria Commission. It itself says at the end, and obviously so,
 31 that these are our recommendations and we recommend suitable Constitutional amendments.
 32 Meaning thereby, the reliance on the report itself, My Lord in my respectful submission, may
 33 not be correct because, commission does not say that do it by way of a judicial adjudication. It
 34 has to be, My Lord logically, I don't have to stretch this point any further. If a commission is

1 appointed by the Central Government, the Central Government of the day will consider
2 whether to bring it by way of an amendment or not.

3 But very interestingly, My Lord, a converse situation has arisen. My Lord, in one judgment
4 which Your Lordships would find at page 231, where one organ of the state, namely the
5 legislature, provided for the time limit for another organ of the state, namely the judiciary.
6 And matter went before My Lord, seven-judges bench. And Your Lordships would find the
7 judgment at page 231.

8 **CHIEF JUSTICE B. R. GAVAI:** 238?

9 **TUSHAR MEHTA:** 231. I'm sorry, My Lord. One fact, My Lord, I missed. My Lord, there are
10 judgments which I have cited from page 224 to 231, that even in statutes, Court cannot add
11 words, supplement words or delete words. My Lord, the leading judgment.

12 **CHIEF JUSTICE B. R. GAVAI:** It's a power of omission.

13 **TUSHAR MEHTA:** Yes, it is conscious omission. And even if the court were to do it, court
14 can suggest that we recommend, or we suggest that the competent Legislature may exercise
15 its amending power, either Constitutional provision or so. But My Lord one judgment, which
16 is... I'm not reading, page 228. 228, is the judgment, where My Lord Justice Narasimha was
17 also My Lord on the bench. ***Supriyo vs. Union of India***. This is a five-judge bench, but I
18 found My Lord that it is not reportable. It has not been reported anywhere. This was that right
19 of LGBT community My Lord were seeking, where My Lord the court said that we cannot read
20 words into the statute. My Lord this judgment remains unreported. Thereafter, there are two
21 judgments which relies upon this judgment. And those two judgments My Lord, including
22 electoral bond, they are reported, but this judgment My Lord remains unreported. As a matter
23 of fact, that's all. Otherwise, My Lord, it's a leading landmark judgment, laying down several
24 issues of seminal constitutional importance, not only for the country, but for the society. I
25 leave it at that. My Lord, Page 231.

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

27 **TUSHAR MEHTA:** Page 231, My Lord. When, My Lord, Legislature provided for timeline
28 for the Judiciary. This is where we say, the separation of powers. Constitutional Committee,
29 between or amongst three or co-ordinate organs of the State. In ***P. Ramachandra Rao***
30 ***versus State of Karnataka***, that is seven judges, "has been held at, time limits for criminal
31 trials cannot be prescribed." Your Lordships would see, sometimes facts may justify time limit,
32 but, justification does not confer jurisdiction. We may come across a situation where we feel

1 that it is fully justified that, some time limit should be done. But if there is no jurisdiction,
 2 there is no jurisdiction. Justification can never confer jurisdiction. Let My Lord...Kindly see
 3 what the Seven Judge Bench is pleased to observe, when one organ fixes time limit for the
 4 other. Incidentally, here it's a converse. Legislature fixing it for the judiciary. Para 225, My
 5 Lord, of this judgment, I have quoted. "During the course of its judgment also, the Constitution
 6 Bench made certain observations which need to be extracted and reproduced. But, then,
 7 speedy trial or other expirations conveying the said concept are necessarily relative in nature."
 8 Kindly pause here for a minute. There are several considerations, lack of staff, lack of...the
 9 burden of cases, several considerations.

10 **CHIEF JUSTICE B. R. GAVAI:** Depending on case to case.

11 **TUSHAR MEHTA:** Case to case.

12 **CHIEF JUSTICE B. R. GAVAI:** Bomb blast case, there might be 200, 300 witnesses.

13 **TUSHAR MEHTA:** Witnesses. That is the justification. Why I am pausing here? My Lord, in
 14 case of decisions of the nature which Governor or the President takes, they are poly-centric
 15 decisions. They are not ticking the boxes. That, yes, complied with, complied with, complied
 16 with. They may decide, they may choose to call the Gover...they choose to call the Chief
 17 minister, they may take some other consultative process to ensure that there is no impasse,
 18 etc., etc., and therefore, there may be several reasons for the delay. "One may ask, speedy
 19 means, how speedy? How long a delay, is too long? We do not think it's possible to lay down
 20 any time schedule for conclusion of criminal proceedings. The nature of offense, the number
 21 of accused, the number of witnesses, the workload in the particular court, means of
 22 communication, and several other circumstances have to be kept in mind. It is neither
 23 advisable, nor feasible, to draw or prescribe an outer time limit, for conclusion of all criminal
 24 proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also
 25 not satisfied that, without such an outer limit, the right becomes illusory. Even apart from
 26 Article 21, courts in this country have been cognizant of undue delay in criminal matters, and
 27 whenever there were inordinate delay, or whether proceedings were pending, where the
 28 proceedings were pending for too long, and any further proceedings were deemed to be
 29 oppressive and unwarranted, they were put an end to, by making appropriate orders.
 30 Prescribing periods of limitation, at the end of which, the trial would be obliged to terminate
 31 the proceedings, and necessarily acquit or discharge the accused, and further making such
 32 directions applicable to all the cases in the present and for future, amounts to Legislation,
 33 which, in our opinion, cannot be done by judicial directives and within the arena of judicial

1 lawmaking power available to the Constitutional Courts, however liberally we may interpret,
2 Article 32, 21, 141 and 142 of the Constitution.

3 The dividing line is fine but perceptible. Courts can declare the law. They can interpret the law.
4 They can remove obvious lacune and fill the gaps, but they cannot entrench upon the field of
5 legislation properly meant for Legislature. Binding decisions can be issued for enforcing the
6 law and appropriate directions may issue including laying down of timelines or chalking out a
7 calendar for proceedings to follow to redeem the injustice done or for taking care of rights
8 violated. In a given case or set of cases, depending on facts brought to the notice of the court."
9 Now, this court says this, My Lord, which generally reserves its own domain. "This is
10 permissible for the judiciary to do." Legislature cannot. "But it may not, like the Legislature,
11 enact a provision akin to or on the lines of chapter, so and so of the Code of Criminal
12 procedure." So, Legislature cannot. Here also, I think the provision was... My Lord, it was
13 judgment of the Supreme Court which put time limits on completion of the trials. Recently in
14 Allahabad High Court judgment also, where the Asian Resurfacing judgment that it will have
15 to be decided within six months or Interim Order will be deemed to have been vacated.

16 **CHIEF JUSTICE B. R. GAVAI:** That is [UNCLEAR] ordered. That is recalled.

17 **TUSHAR MEHTA:** That is recalled by a five judge bench, five judge bench. Here, the
18 judgment said judiciary's power is untrammelled, as per all the judgments that, if it is not
19 decided within six months, the Interim Order is deemed to have been vacated. We are also
20 dealing with a lot of similar situation where it is deemed assent, etc. I'll come to that.

21 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Outer limit at all... Your question is,
22 isn't there an outer limit? Can the Constitutional interpretation be left to a vacuum, creation
23 for a vacuum long term...

24 **TUSHAR MEHTA:** There are two answers.

25 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** You have had that, there's nothing
26 like a pocket veto and keep it and don't respond. That's not permissible. But though you can't
27 specify a time limit but at the same time, there must be some way in which the process works
28 out. Can it be a situation where not acting on a Bill which is sent to the Governor?

29 **TUSHAR MEHTA:** That is...

30 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That itself is a full stop. No further, is
31 it?

1 **TUSHAR MEHTA:** I'll answer.

2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** This is where we need your
3 assistance.

4 **TUSHAR MEHTA:** Yes. I'll answer My Lord in two ways. (a) What Your Lordships very
5 rightly feels pained at, is a justification for fixing time limit, but will not confer jurisdiction to
6 fix time limits. Number two, if that is so, we are not flooded with cases where such situations
7 have arisen. There are instances where one or two States have come with such situations. If
8 that is the problem, and that may be the problem, the remedy lies with the Constitutional
9 framers, with the Parliament. The Parliament will have to be done. Your Lordships have said
10 time and again in several judgments that, in view of this, we request the Parliament, Your
11 Lordship never direct. Your Lordships never direct coordinate Constitutional functionary.
12 Even if the notice goes to a Constitutional functionary, Your Lordships registries form is also
13 different. You are called upon to remain present, is not there. You are requested to put your
14 appearance, because that's the Constitutional Committee. Your Lordships have said in large
15 number of cases that the desirability of the Parliament to consider this. But the practical
16 answer, if I were to assist Your Lordships, is the political answer. Suppose a particular
17 Governor is not sitting over the Bill, there are political solutions. And such solutions are taking
18 place and it is not everywhere that State is advised to rush to the Supreme Court. The Chief
19 Minister goes and requests the Prime Minister. Chief Minister goes and meets the President.
20 There are delegations which go that this is the Bill which is pending, please talk to the
21 Governor. Let him take decision one way or the other. Telephonically, they are sorted out.
22 There is a joint meeting with Prime Minister, Chief Minister and the Governor or the
23 President, Chief Minister and the Governor, and such impasses solved. That would not confer
24 jurisdiction to lay down a guideline by a judgment. That is the question, that in absence of a
25 Constitutionally provided time limit, can it be read even if there is a justification?

26 And My Lord genuinely My Lord, I'm urging Your Lordships to consider such issues are arising
27 in every state since last many decades, I'm not talking of this Government or that Government.
28 But the statesmanship, the political maturity, the political statesmanship, they are at play.
29 They meet the constitutional functionaries at the Centre. They discuss, debate, because all Bills
30 are not contentious Bills. They are kept, My Lord, for one reason or the other. There is some
31 impasse, some lack of communication. Some clarification might be required, which might be
32 wanting. Then My Lord they come together and a political solution is found that all right, if
33 you don't want to do it, refer it to the President. President will examine.

1 My Lord these are the solutions of the problem. My Lord, I am therefore My Lord at the cost
 2 of making a little unpleasant argument My Lord saying that every problem in this country may
 3 not have solutions here. There are problems followed My Lord in the country where you must
 4 find solutions within the system. This is what Your Lordships have said in this judgment, that
 5 there is a question of delay. Article 21 is affected. People are languishing in jail. But solution
 6 will have to be found from within the system. And Your Lordships are doing a lot from within
 7 the system for streamlining, for ensuring that timely trials take place with assistance of the
 8 Legislature. Now we have the legislative provisions that even summons can be served through
 9 electronic mode, even a WhatsApp message is a good service of summons, how responsibilities
 10 are fixed for the officers to bring in witnesses, et cetera. But this is a collaborative exercise.
 11 Suppose, My Lord. There is a Bill passed by the Parliament... Kindly, My Lord...

12 Suppose there is a Bill passed by the Parliament that people of the country are approaching us
 13 that my trial is pending since 30 years. My son is in jail and it is not being taken up. I'm posing
 14 a question to myself, My Lord, can the Executive, maybe the President of India, say that, no, I
 15 understand there is a problem and therefore your trial is treated to have been terminated. You
 16 are deemed to have been acquitted. You have already undergone 30 years. It cannot be done.
 17 Justification can never confer jurisdiction. And this separation of power, My Lord I'm saying
 18 without mincing words, must be a two-way street.

19 My Lord I'll just show Your Lordships *Allahabad Judgment*, where there was again a
 20 judicial verdict, where within six weeks if it is not done... six months, then it is vacated. Then
 21 My Lord, this Court, My Lord speaking through five-judges bench set aside that no time limit
 22 can be prescribed. Now, please come to another judgment, which is, again, a landmark
 23 judgment, My Lord

24 **JUSTICE SURYA KANT:** Mr. Solicitor, that against the inaction of the Governor in a
 25 particular given view it can vary from state to state. It can vary from action to action or inaction
 26 to inaction...

27 **TUSHAR MEHTA:** My apologies.

28 **JUSTICE SURYA KANT:** In a particular case of inaction if the aggrieved state or it's
 29 functionaries, if they approach the Court, the power of judicial review according to is
 30 completely bad?

31 **TUSHAR MEHTA:** Right now. I am on the point, I'm not on justiciability or judicial review.
 32 I am on the point that by a judgment the court cannot fix time limit, that you do it within three
 33 months.

- 1 **JUSTICE SURYA KANT:** All right. You will expand this argument, and then we'll also
2 enlighten then what kind of the...
- 3 **CHIEF JUSTICE B. R. GAVAI:** Remedy available
- 4 **JUSTICE SURYA KANT:** Remedies the Court would...
- 5 **TUSHAR MEHTA:** Therefore, My Lord I answered...
- 6 **CHIEF JUSTICE B. R. GAVAI:** If there is a wrong, then there has to be a remedy.
- 7 **TUSHAR MEHTA:** Or be just a remedy, I understand. But there are problems which all
8 problems in the country may not be this forum to be the only solution. There are solutions My
9 Lord within the system and people are finding out those solutions.
- 10 **CHIEF JUSTICE B. R. GAVAI:** As the Custodians of the Constitution, this Court is the
11 Custodian of the Constitution.
- 12 **TUSHAR MEHTA:** Each organ is My Lord. Each organ is, in their own respective fields.
- 13 **11:59:09 AM**
- 14 **CHIEF JUSTICE B. R. GAVAI:** Suppose, if a Constitutional functionary, which is entrusted
15 with a certain function, refuses to discharge those functions, without any valid reasons,
16 whether the courts of...the Constitutional Court would be tied, and say that, no, we are
17 powerless?
- 18 **TUSHAR MEHTA:** It's not, My Lord, an argument of...
- 19 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Power of interpretation, only the
20 Supreme Court has, of the connotation.
- 21 **TUSHAR MEHTA:** That is the feeling, My Lord, that all problem...
- 22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Interpretation [INAUDIBLE]
- 23 **TUSHAR MEHTA:** Interpretation, yes, My Lord, but not legislation. Now, there is a
24 problem, you do it in three months, kindly see My Lord, the way...

1 **CHIEF JUSTICE B. R. GAVAI:** For that, cannot we go to the Constitutional debates, find
 2 out what was the intention of the Constitution Assembly behind enacting such provisions?
 3 Can't we do that?

4 **TUSHAR MEHTA:** Your Lordships can consider, whichever way. My argument is this, My
 5 Lord, that time limit cannot be stipulated.

6 **JUSTICE SURYA KANT:** If the power of interpretation of the Constitution, if the power of
 7 interpretation of the Constitution vests in the Supreme Court, then the [NO AUDIO] of
 8 interpretation of law are to be tried by the court?

9 **TUSHAR MEHTA:** Then, my answer is one answer... [NO AUDIO] is something else, adding
 10 words or amending the Constitution itself, Your Lordships said, even Statute cannot be
 11 amendment by judgment, is something else. Generally, and this is my answer...

12 **CHIEF JUSTICE B. R. GAVAI:** We have to go on the first principle, literal interpretation.

13 **TUSHAR MEHTA:** Basically, My Lord, what a 'tap on the back' jurisdiction, My Lord, as we
 14 understand, you can always say that, just look into it. You can call the Law Officer to just look
 15 into it and see that it is done, and it is generally done, My Lord. But please see the directions,
 16 My Lord. I would, respectfully, urge Your Lordships to see...

17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** See, we agree. The extreme view is
 18 taken, is no justification to argue that, you can't, therefore, take any view at all. You are not at
 19 the two extremes of prescribing time limits, now here within one week or so, or on the
 20 alternative, don't have a power at all to do it.

21 **TUSHAR MEHTA:** My Lord, I'm coming...

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** By which you make the Constitution
 23 work, process work.

24 **TUSHAR MEHTA:** Flexibility has to be there. The system must work smoothly.

25 **CHIEF JUSTICE B. R. GAVAI:** There is no doubt that these are all that you must have
 26 prepared in the Joints.

27 **TUSHAR MEHTA:** Kindly see the direction for my satisfaction, page 12569, Volume 31,
 28 Volume 31, V-31

- 1 **CHIEF JUSTICE B. R. GAVAI:** They begin at 12569.
- 2 **TUSHAR MEHTA:** No, the relevant part, the directions, My Lord, where in our submission,
3 My Lord. This amounts to amending the...
- 4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Para?
- 5 **TUSHAR MEHTA:** Para is XIV, of the Conclusions. I am reading the Conclusions.
- 6 **CHIEF JUSTICE B. R. GAVAI:** 125692?
- 7 **TUSHAR MEHTA:** 12569. Your Lordships, it starts with timelines. Kindly come to 12568
8 first, what is this, My Lord? Your Lordships would...and with profound respect, every
9 judgment deserves the respect, My Lord. And maybe, there may be a justification for doing
10 this but my argument is, justification do not confer jurisdiction. My Lord, 14, "keeping in mind
11 the Constitutional significance..." My Lord, Justice Narasimha gets that?
- 12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Yes.
- 13 **TUSHAR MEHTA:** "Keeping in mind the Constitutional significance of Article 200, and the
14 role it plays in the federal polity of the country, the following timelines are being prescribed.
15 Failure to comply with these timelines, would make the inaction of the Governor, subject to
16 judicial review by the Courts. In case of either withholding of assent or reservation of the bill
17 for consideration of the President, upon aid and advice of the State Council of Ministers, the
18 Governor is expected to take such action forth with subject to a maximum period of one month.
19 In case of withholding of assent contrary to the advice..."
- 20 **CHIEF JUSTICE B. R. GAVAI:** In case of either withholding of assent or reservation of the
21 Bill for consideration of the President upon the aid and advice of...
- 22 **TUSHAR MEHTA:** Then one month.
- 23 **CHIEF JUSTICE B. R. GAVAI:** The Government is expected to take such action for this.
24 What action?
- 25 **TUSHAR MEHTA:** Either withholding, assenting or reserving, etc. But the Governor may
26 choose that I'll call the Chief Minister, we will have debate, discussions, persuasions. What is
27 the problem I am facing? If you can again go back to your Cabinet and sort out the situation,
28 nothing. Then, (2) "In case of withholding of assent contrary to the advice of the State Council
29 of Minister, the Governor must return the Bill together with a message within a maximum

1 period of three months. In a case of reservation of Bills for the consideration of the President
 2 contrary to... contrary to the advice of the State Council of Ministers, the Governor shall make
 3 such reservation within a maximum period of three months. In case of presentation of a Bill
 4 after reconsideration in accordance with the first proviso, the Governor must grant assent
 5 forthwith, subject to a maximum period of one month." My Lord, this My Lord is...

6 And thereafter they say that a President will... There are two things. And My Lord, I'll try to be
 7 as modest as possible in placing this, and I'll come to that. It's a separate chapter, but let me
 8 at this stage say. The second direction given is My Lord, that President and Governor will
 9 record reasons. And if they do not follow these guidelines, this timeline, States can come to
 10 the High Court... go to the High Court or come to us. Meaning thereby, this Hon'ble Court, one
 11 institution of the three coordinate branches is directing the Hon'ble President of India that
 12 you decide within three months. You better give reasons. And you the State, if she doesn't
 13 decide, file a petition in 226 or come here under 32. This is the direction. I respect the
 14 directions, My Lord. There may be justification, but justification cannot confer jurisdiction.
 15 Have amended the Constitution...

16 **CHIEF JUSTICE B. R. GAVAI:** No, this *Pavitra* is in ignorance of *Shamsher Singh*.

17 **TUSHAR MEHTA:** No, Tamil Nadu judgment...

18 **CHIEF JUSTICE B. R. GAVAI:** No, no. Tamil Nadu Judgement, *Pavitra* which says that...

19 **TUSHAR MEHTA:** For *in curiam*.

20 **CHIEF JUSTICE B. R. GAVAI:** For *in curiam* *Shamsher Singh*.

21 **TUSHAR MEHTA:** Yes, which it is not. I'll show that paragraph.

22 **CHIEF JUSTICE B. R. GAVAI:** We are just wondering because it's 12:10. So, whether the
 23 Ld. Solicitor would be asking for a comfort break?

24 **TUSHAR MEHTA:** No, I'm generally comfortable till 01:00. That word is coined during
 25 Corona, comfort break. That's a good word, My Lord.

26 **CHIEF JUSTICE B. R. GAVAI:** Even in the conferences now, they use that word.

27 **TUSHAR MEHTA:** Yes.

28 **CHIEF JUSTICE B. R. GAVAI:** Comfort break for 15 mins.

- 1 **KAPIL SIBAL:** Sense of humour is always welcome in this Court. There's a sense of humour
2 is always welcome in this Court.
- 3 **TUSHAR MEHTA:** Yes, otherwise My Lord, the proceedings are generally boring.
- 4 **CHIEF JUSTICE B. R. GAVAI:** Boring and monotonous.
- 5 **TUSHAR MEHTA:** Monotonous, boring, the subject is also boring and...
- 6 **CHIEF JUSTICE B. R. GAVAI:** Subject is not boring.
- 7 **KAPIL SIBAL:** Not at all.
- 8 **TUSHAR MEHTA:** No, subjects means the law as a subject, not this subjects. You need not
9 oppose me everywhere. I'm not saying this subject is boring. Generally, law as a subject is not
10 a very interesting subject My Lord for others.
- 11 **KAPIL SIBAL:** I don't agree at all. The most interesting subject.
- 12 **TUSHAR MEHTA:** My learned friend is H.V. Kamath... he is Mr. Kamath. He is Mr. Kamath
13 My Lord, he opposes everything I say.
- 14 **CHIEF JUSTICE B. R. GAVAI:** Hari Vishnu Kamath.
- 15 **TUSHAR MEHTA:** Yes. My Lord now on the timeline, there is a direct judgment of the five-
16 judge bench. My Lord, kindly come to page 233.
- 17 **CHIEF JUSTICE B. R. GAVAI:** 230?
- 18 **TUSHAR MEHTA:** 233.
- 19 **CHIEF JUSTICE B. R. GAVAI:** Your notes?
- 20 **TUSHAR MEHTA:** Yes, my written submissions. 233. Article 200 was considered from the
21 point of view of timeline, and timeline was not prescribed. Your Lordships may kindly keep
22 one thing in mind, Article 200 follows with Article 201, obviously. In Article 201, timeline is
23 stipulated. If the President returns the bill to the Legislative Assembly within six months.
- 24 **CHIEF JUSTICE B. R. GAVAI:** Six months.

TUSHAR MEHTA: Wherever, My Lord, I have not read the list, and I don't intend to, but all provisions where it was necessary that timeline has to be prescribed, it is so prescribed by the Constitution. The only question is, can it be done by a judgment even if there is a justification, in a particular case? Maybe the Court may confront maybe confronted with some My Lord extraordinary fact situation and feel that this is something extraordinary, then the remedy will not again My Lord be the judicial remedy.

Now, please have a look at page 233. Five judge-bench. Judgment of ***Purushothaman Nambudiri vs State of Kerala***, para 15. This was a case where a Bill would lapse because of non-prescription of the time limit, because one Assembly may pass a Bill, present it to the Governor and thereafter My Lord Assembly's tenure is over. Or, Assembly resigns, new assembly is formed, et cetera. My Lord kindly see para 15. Your Lordships have para 15. "It is clear that if a Bill pending the assent of the Governor or the President is held to lapse on dissolution of the Assembly, it is not unlikely that a fair number of bills which may have been passed by the Assembly, say, during the last six months of its existence, may be exposed to the risk of lapse consequent on the dissolution of the Assembly, unless, assent is either withheld or granted, before the date of the dissolution. If we look at the relevant provisions of Article 200 and 201, from this point of view, it would be significant that, neither Article provides for a time limit, within which, the Governor or the President should come to a decision on the Bill referred to him for his assent. Where it appeared necessary and expedient to prescribe a time limit, the Constitution has made appropriate provisions in that behalf. Vide Article so and so, so and so, so and so." My Lord, the court cites only three examples, but in my list, I have given at least 30 examples.

JUSTICE PAMIDIGHANTAM SRI NARASIMHA: More than 2 dozen, yes.

TUSHAR MEHTA: Where, time is prescribed, wherever it is so felt necessary. In fact, the proviso to Article 201 requires that, "The House, to which the Bill is remitted with a message from the President, shall reconsider it accordingly, within a period of six months from the date of receipt of such message. Therefore, the failure to make any provision, as to the time within which the Governor or the president should reach a decision, may suggest that the Constitutional Makers knew, that a Bill, which was pending the assent of the Governor or the President, did not stand the risk of lapse, on the dissolution of the Assembly. That is why no time limit was prescribed by Article 200 and 201."

My Lord, kindly visualize a situation, where the Outgoing Assembly passes a Bill, places before the Governor. The new government is formed, may be, of a different political party. A new Council of Ministers can give advice to the Governor to withhold that Bill, that it was passed

1 by the earlier Minister... earlier Assembly. Now, the new Assembly is formed, we would like to
 2 have debate on that. The Outgoing Cabinet also may say, that, now our tenure is over, you
 3 grant assent to the Bill. Now, in view of the judgment, you have to do it within one month. The
 4 Governor may choose that, now, this is Outgoing Ministry. Let me wait, till the fresh election
 5 takes place. Maybe, the fresh mandate of the electorate, returns somebody else, and they will
 6 apply their mind. Outgoing people, who have lost their time of electoral mandate, may not
 7 impose, their decision on the incoming. So, My Lord, these are all poly-centric circumstances,
 8 which Governor, My Lord, as Constitution Framer may envisage, as a friend, philosopher,
 9 guide, as a person who is there, as a Centre's representative, to ensure that everything
 10 functions smoothly. There are several considerations, which way.

11 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Question in *Purushothaman*
 12 *Nambudiri*, was it considering an issue of lapse of a Bill?

13 **TUSHAR MEHTA:** It was lapsing.

14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Or was it considering delays?

15 **TUSHAR MEHTA:** Lapse, lapse.

16 **CHIEF JUSTICE B. R. GAVAI:** That's what the Bill on the event of dissolution of the
 17 Assembly.

18 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It won't lapse. Therefore, they
 19 answered the question that, it won't lapse.

20 **TUSHAR MEHTA:** No, they have answered the question.

21 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Correlative, but not saying,
 22 considering that it won't lapse, one should assume...

23 **CHIEF JUSTICE B. R. GAVAI:** But these observations, are on a true [UNCLEAR]

24 **TUSHAR MEHTA:** Main observation, My Lord, that...

25 **CHIEF JUSTICE B. R. GAVAI:** The truth is, what you have to considered is this, have you
 26 cited before the...?

27 **TUSHAR MEHTA:** Wherever, My Lord...It not only confines to the lapsing or not lapsing. It
 28 says, that time limit cannot be prescribed for, wherever it is necessary, it is so prescribed, and

1 give examples. And whenever it is not prescribed, it is consciously not prescribed. Therefore,
2 we cannot do it.

3 **CHIEF JUSTICE B. R. GAVAI:** Was it cited before the learned...?

4 **TUSHAR MEHTA:** Yes, My Lord, and it is dealt with at, para 235. I'll just, My Lord, show
5 that.

6 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 235 of your note or the...?

7 **TUSHAR MEHTA:** It says, My Lord, that, it was in the context of lapsing.

8 **JUSTICE VIKRAM NATH:** Page number?

9 **TUSHAR MEHTA:** 12379. Learned judges, My Lord, is pleased to quote *Nambudiri*.

10 **CHIEF JUSTICE B. R. GAVAI:**12...

11 **TUSHAR MEHTA:** 12379, 12379 at 236.

12 **CHIEF JUSTICE B. R. GAVAI:** 232 *se start ho gaya*.

13 **TUSHAR MEHTA:** Yes. This para is quoted. It was cited, My Lord. And please My Lord, bear
14 in mind, *Nambudiri* is a five judge bench. Para 236, may I read? Can I show the facts of
15 *Nambudiri* first if Your Lordships would like to see. My Lord Justice Narasimha, 1186 is the
16 page number of Volume 3.

17 **JUSTICE VIKRAM NATH:** Volume?

18 **TUSHAR MEHTA:** 5.3 at page 1186. My Lord, even if the context was lapsing what I read is
19 the ratio. Five judge bench says that.

20 **CHIEF JUSTICE B. R. GAVAI:** Wherever the Assembly required timelines to be provided.

21 **TUSHAR MEHTA:** They have provided them. And therefore we cannot provide for a
22 timeline. The prayer was this, that you provide for a timeline otherwise it would lapse. First, I
23 am reading 1186 which is *Nambudiri*. The facts of *Nambudiri*. My Lord, the Chief Justice
24 has? 1186. The facts of *Nambudiri*, just above 1186. Para 2.

25 **JUSTICE VIKRAM NATH:** Last one, 1185, yes.

1 **TUSHAR MEHTA:** The Kerala Agrarian Relations Bill. Your Lordship gets?

2 **JUSTICE VIKRAM NATH:** Yes.

3 **TUSHAR MEHTA:** "The Kerala Agrarian Relations Bill, which has ultimately become the
 4 Act, was published in the Government gazette of Kerala on December 18, 1957 and was
 5 introduced in Kerala Legislative Assembly on December 21, 1957 by the Communist
 6 Government, which was then in power. The Bill was discussed in the Assembly and was
 7 ultimately passed by it on June 10, 1959. It was then reserved by the Governor of the State for
 8 the assent of the President under Article 200 of the Constitution. Meanwhile, on July 31, 1959,
 9 within less than a month, or more than a month, the President issued a proclamation under
 10 Article 356 and the Assembly was dissolved. In February 1960, midterm general elections took
 11 place in Kerala and as a result, a coalition Government came into power. On July 27, 1960, the
 12 President for whose assent the Bill was pending, sent it back with his message requesting the
 13 Legislative Assembly to reconsider the Bill in light of the specific amendment suggested by
 14 him. On August 2, 1960, the Governor returned the Bill remitted by the President with his
 15 message and the amendment suggested by him to the New Assembly for consideration. On
 16 September 26, the Amendment suggested by the President was taken up for consideration by
 17 the Assembly, and ultimately, on October 15, 1960 the Bill, as amended in light of the
 18 President's recommendation, was passed by the Assembly. It then received the assent of the
 19 President on January 21, 1961, and after this, thus became law." This was the facts, and the
 20 issue was whether the Bill would lapse or not?

21 Now, Your Lordships may kindly come to para 14.

22 **CHIEF JUSTICE B. R. GAVAI:** 14?

23 **TUSHAR MEHTA:** 14, which is at page 1193. Your Lordship gets? 1193. My Lord gets para
 24 14?

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

26 **TUSHAR MEHTA:** "In this connection, it is necessary to consider Article 200 and 201,
 27 which deal with Bills reserved for the assent of the Governor or the President. Article 200
 28 provides *inter alia* that when a bill has been passed by the Legislative Assembly of a state. It
 29 shall be presented to the Governor and the Governor shall declare either that he assents to the
 30 Bill, or that he withholds assent therefrom, or that he reserves the Bill for consideration of the
 31 President. The proviso..." it's paraphrasing the proviso My Lord.

1 **CHIEF JUSTICE B. R. GAVAI:** You had already read paragraph 15(2). Either you or the
2 Ld. Attorney, either of you.

3 **TUSHAR MEHTA:** No, I read just now. I just now read My Lord. Just now I read My Lord
4 that court said that, no, we cannot read into any timeline. My Lord why the court is seeking
5 197(1)(b). Please have a look at 197(1)(b), this para 15 reads 197. "The restriction on power of
6 Legislative Council as to Bills other than Money Bill." Where there is a time limit stipulated.
7 This question was considered. It is a ratio, not a passing reference. This is a statement of law.
8 My Lord, it's again, paraphrasing. They should read one line. It refers to 197, para 14 and 15
9 both refers to 197. And 197 provides for a Bill, for a time limit for a Bill.

10 **CHIEF JUSTICE B. R. GAVAI:** Under 197, there are specific time lines?

11 **TUSHAR MEHTA:** Yes, and 200 does not have. So virtually the prayer was that you read
12 some timeline in 200.

13 **CHIEF JUSTICE B. R. GAVAI:** And the argument was that the Bill had lapsed, that was
14 rejected?

15 **TUSHAR MEHTA:** Yes. Article 196, Sub-Article 5. And the Supreme Court says it doesn't
16 lapse because there is no timeline. And whenever timeline was required, it is stipulated.

17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That was the question.

18 **KAPIL SIBAL:** That's right.

19 **TUSHAR MEHTA:** So it is a statement of law. It's not a passing observation of a Constitution
20 Bench. That is why My Lord the Constitution Bench gives the dates also. Time was the issue
21 My Lord whether it should have been done within particular time limit. Now My Lord again,
22 **B.K. Pavitra.** I have read, My Lord. I'll not repeat that, My Lord.

23 Now, My Lord the court relies upon three judgments for fixing the time limit. I'm sorry, this
24 **Keisham** judgment, My Lord that is that Manipur Assembly speaker, I don't wish to, My
25 Lord...

26 **CHIEF JUSTICE B. R. GAVAI:** **Keisham**, I've already distinguished.

27 **TUSHAR MEHTA:** It was a Tribunal

- 1 **CHIEF JUSTICE B. R. GAVAI:** Because all the Constitution Benches have it, that speaker,
 2 while acting under para 6, acts as a Tribunal and therefore is amenable to the jurisdiction of
 3 the High Court under Article 226, 227 and this Court under 136, and while discharging those
 4 functions, it does not enjoy the Constitutional immunity under 112 and 212 .
- 5 **TUSHAR MEHTA:** Yeah, that *Raja Ram Pal* judgment 212, et cetera, My Lord will not
 6 apply. Because he is a Tribunal, and therefore...
- 7 **CHIEF JUSTICE B. R. GAVAI:** It's a Tribunal and right-wrong, court has been consistently
 8 held that he doesn't enjoy the Constitutional immunity.
- 9 **TUSHAR MEHTA:** Immunity under the privilege, et cetera,...
- 10 **CHIEF JUSTICE B. R. GAVAI:** 112 , this whoever the Speaker and Chairman and...
- 11 **TUSHAR MEHTA:** 212 for...
- 12 **CHIEF JUSTICE B. R. GAVAI:** As for as State Legislatures are concerned.
- 13 **TUSHAR MEHTA:** Yes. So it is... that can never be a justification for prescribing guideline
 14 for a Constitutional functionary exercise...
- 15 **CHIEF JUSTICE B. R. GAVAI:** *Keisham* also does not lay down guidelines in general.
- 16 **TUSHAR MEHTA:** It's only for Tenth Schedule.
- 17 **CHIEF JUSTICE B. R. GAVAI:** It says in the facts of the case.
- 18 **TUSHAR MEHTA:** Yes. It doesn't mind other speakers.
- 19 **CHIEF JUSTICE B. R. GAVAI:** Because an argument was made that like the UP case, the
 20 court itself should exercise the powers and declare them to be disqualified because the
 21 disqualifier was aberrant.
- 22 **TUSHAR MEHTA:** Mayawati judgment, My Lord
- 23 **CHIEF JUSTICE B. R. GAVAI:** Mayawati judgment, Raja Ram...
- 24 **TUSHAR MEHTA:** It was My Lord, Rajendra Singh Rana....
- 25 **CHIEF JUSTICE B. R. GAVAI:** Rajendra Singh Rana was...

1 **TUSHAR MEHTA:** It was a *Mulayam Singh Yadav vs. Mayawati*. Court said that
2 [UNCLEAR] have left...

3 **CHIEF JUSTICE B. R. GAVAI:** From Mayawati's party, the 13 MLAs had defected to
4 Mulayam Singh Yadav, he had given a letter that Mulayam Singh should be made the Chief
5 Minister.

6 **TUSHAR MEHTA:** That was treated.

7 **CHIEF JUSTICE B. R. GAVAI:** And the court disqualified that. The very fact that the MLAs
8 elected from BSP wrote a letter that those...they are...

9 **TUSHAR MEHTA:** The leader should be...

10 **CHIEF JUSTICE B. R. GAVAI:** The leader of the SP should be made a Chief Minister, itself
11 was sufficient enough ground to disqualify the matter. And passed an order of disqualification,
12 directly in the Supreme Court.

13 **TUSHAR MEHTA:** And they said, but the Hon'ble Court said, in *Rajendra Singh Rana*
14 that, "their writing a letter, requesting the President to invite the other Party's Leader,
15 amounts to their voluntarily giving up membership of their original political party. Now, two
16 months of the Assembly session is left, and therefore, there is no point in returning the matter
17 to the Speaker, and therefore, we decide it here and declare them disqualified." But, that is
18 again My Lord, Speaker is a Tribunal. That, in my respectful submission, My Lord, I may not
19 labour much.

20 **CHIEF JUSTICE B. R. GAVAI:** That has been followed in *Nabam Rebia* and *Subhash*
21 *Desai*.

22 **KAPIL SIBAL:** I've been making this argument for five years, that it's a Tribunal, My Lord.
23 Then, every time, the resistance was, but he's a Speaker. Luckily, My Lord, we have Your
24 Lordship's Judgment, My Lords. But for five years, I've been saying.

25 **CHIEF JUSTICE B. R. GAVAI:** The Constitution...

26 **KAPIL SIBAL:** I know, but five years, we've been saying, because Speakers are not deciding
27 issues, years, they were not deciding. And I was saying, they are Tribunals. But for five years,
28 My Lord, nobody accepted that position because, the other side would say, he's a Speaker.
29 Then, Your Lordships decided the matter. We are so happy that you did, My Lords. At least
30 that put a quite a few...

1 **CHIEF JUSTICE B. R. GAVAI:** We are well, that we don't want to create a situation of,
 2 operation successful and patient dead. We have said that, we don't want to create a situation
 3 that, operation successful and patient dead.

4 **TUSHAR MEHTA:** My Lord, kindly come to page 238. Interpretation of "as soon as
 5 possible". Your Lordships have seen, two things, in Article 200, main part, no time limit.
 6 Article 200, main part, does not prescribe time limit. The proviso says, "as soon as possible".
 7 In this context, I'm just giving one judgment on "as soon as possible". Please come to page
 8 238. This was a case of preventive detention and therefore, directly Article 21 was involved.
 9 Article 21 and Article 22. Personal liberty, fundamental rights. *Abdulla Kunhi versus*
 10 *Union of India*, in *Francis* ...so and so.

11 **JUSTICE SURYA KANT:** Which page number?

12 **TUSHAR MEHTA:** I'm sorry. 238.

13 **CHIEF JUSTICE B. R. GAVAI:** 238, para 253.

14 **TUSHAR MEHTA:** At the foot, para 14. "In *Francis Coralie Mullin versus WC* so and
 15 so, Justice Chinnapa Reddy, while dealing with the time imperative for consideration of
 16 representation, has emphasized, we, however, hasten to add, that the time imperative can
 17 never be absolute or obsessive. The court's observations are not to be so understood, there has
 18 to be leeway, depending on the necessities. We refrain from using the word, 'circumstances' of
 19 the case. One may well imagine a case, where a detainee, does not make a representation."
 20 Then, it is various situations concerning detainee. I have given the situations which the
 21 Governor may say. Ultimately, My Lord, the bold line, "but allowance must surely be made for
 22 the necessary consultation, where legal intricacies and factual ramifications are involved."
 23 Here, in this case, political considerations, politics, not in the derogative sense of the term.
 24 There can be a political statesmanship, which is at play. There may be a good reason, for him,
 25 to let the situation calm down. It might be, My Lord, having some impact on the National
 26 Policy. He might be in consultation with the President of India. There can be several. These
 27 are all poly-centric decisions. These are not A versus B. Whether A is right or B is right. It has
 28 consequences, it has fallouts. It has social implications, it has economic implications, it has
 29 implications outside the State. My Lord, similar is the case in *Joglekar*, I'm not reading it.
 30 It's the same ratio. Then at 240, I'm not reading it. The court's reliance on Sarkaria
 31 Commission and Justice Punchhi Commission is wrong because they also say that ultimately
 32 these are our recommendations, which the Government which appointed them, did not accept.

1 But that apart, they also recommended that accordingly amend the Constitution. They also did
2 not even remotely suggest that the Court can do that.

3 Then, manner of exercise of power, which is at page 242. I'm not taking Your Lordship's much
4 time, because I would earnestly request my learned senior friend to deal with that. The
5 question is this, My Lord. Can the manner of exercise of the power be prescribed by the court
6 that you will give reasons? When there is a judgment where, there are some observations that
7 some reasons are necessary. I'm not going into it because this is not a list. I'm just seeking the
8 advice of Your Lordships whether a judgment can say that? I have earmarked page 245, Para
9 272. I'll read only one para.

10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** One minute. But first, that portion of
11 the two Judge bench judgement where reasons were...

12 **TUSHAR MEHTA:** Yes.

13 **CHIEF JUSTICE B. R. GAVAI:** That may be valid for when some member of the executive
14 exercises administrative powers.

15 **TUSHAR MEHTA:** Statutory powers. We can...

16 **CHIEF JUSTICE B. R. GAVAI:** Wherein, some order inviting adverse fuel consensus to a
17 party's...

18 **TUSHAR MEHTA:** Correct. For example, the Deputy Collector deciding whether to grant...

19 **CHIEF JUSTICE B. R. GAVAI:** License or not.

20 **TUSHAR MEHTA:** License, grant non-agricultural land use permission or not, etc., etc. I
21 don't think we can reduce Constitutional functionaries of coordinate benches to this. I'll just
22 find... show directions. Your Lordships, only give me a minute. We are just trying to find out.
23 I'll just find out. We are unable to immediately lay our hands, but Your Lordships can take it...

24 **CHIEF JUSTICE B. R. GAVAI:** There are directions that the...

25 **TUSHAR MEHTA:** There are directions...

26 **CHIEF JUSTICE B. R. GAVAI:** ... That governance recorded...

1 **TUSHAR MEHTA:** President and Governor, both would decide in a particular time frame.
 2 Second direction, both would give reasons. And third, in case of non-compliance, the State can
 3 approach the High Court and the Supreme Court. These are the three directions.

4 **JUSTICE VIKRAM NATH:** It was a contempt of Court Act.

5 **TUSHAR MEHTA:** No, My Lord...

6 **CHIEF JUSTICE B. R. GAVAI:** I thought it was seeking advice.

7 **TUSHAR MEHTA:** No, that is third.

8 **CHIEF JUSTICE B. R. GAVAI:** That will be in case of violation of timeline.

9 **TUSHAR MEHTA:** In case of violation of timelines, we can come for a mandamus that the
 10 High Court will direct the President of India.

11 **JUSTICE VIKRAM NATH:** That you have already issued, why a fresh mandamus is
 12 required? General mandamus...

13 **TUSHAR MEHTA:** It may be a contempt action.

14 **CHIEF JUSTICE B. R. GAVAI:** Kind of, you should which is binding to everyone within
 15 the territory of India, under 141.

16 **TUSHAR MEHTA:** It is 141. Please come to page 245 of my submissions. Why the nature of
 17 exercise, the manner of exercise of powers by coordinate Constitutional Functionaries? It may
 18 not be a good comparison, but suppose the Parliament or the Executive were to say that courts
 19 should not give 600 page judgments. It's manner of exercise of power. Maybe in some cases,
 20 it may be required, but justification does not confer jurisdiction. That's my fundamental point,
 21 that write a judgment, not a thesis, sometimes. This is my word, not Hon'ble President's view.
 22 It should not be an article to be published in some law review. It should be a judgment deciding
 23 the list between the Parties.

24 My Lord, please come to page 245, para 272.

25 **12:39:09 PM**

26 "It is also vital to state here that for certain functions of the Governor, the Constitution itself
 27 prescribes conditions for the exercise of power. Illustrations of such functions are enumerated

below. Article 192(2) provides that before giving any decision on the question of disqualification of a member of the House of Legislature, the Governor has to obtain the opinion of the Election Commission." Constitutional mandate, this is how you will exercise your power. "Functions under Article 233, 234 have to be exercised in consultation with the High Court", manner of exercise of power stipulated by the Constitution. "The Governor has to exercise functions under Article 160 that is contingency function, in accordance with the provisions made by the President in that behalf." Again, manner of exercise of power. "The power under Article 187(3) has to be exercised in consultation with the Speaker of the House. Under Article 208(3) the Governor makes rules of procedure as to, the procedure with respect to communication between two Houses after consultation with the Speaker of the Legislative Assembly and Chairman of the Legislative Council." Again, manner of the exercise of power by the Governor, controlled by the Constitution. "Power under Article 258(a) has to be exercised with the consent of the Government of India. Article 316, 318, which deal with appointment, condition of service, and removal of Chairman and Members of State Public Service Commission also stipulates certain conditions", how he would exercise those powers.

My Lord in Fifth Schedule also, My Lord I have not added this My Lord, but there is a tribal advisory council and he has to consult them. So My Lord, wherever the manner of exercise of power is to be circumscribed or to be stipulated, the Constitution stipulates. In my respectful submission cannot be added by way of a judicial pronouncement. So that is my... and there are other judgments My Lord which I have cited.

Now, My Lord, I come to another important fresh question, whether the exercise of power of the President either under Article 111 i.e. the power to grant assent and that of the Governor under Article 200 and the President under 201, is justiciable? My Lord there is a difference between power of judicial review and justiciability. And in my respectful submission, My Lord the view that it is not just justiciable, is supported by My Lord more than one judgment, My Lord few of which are Constitutional Bench judgments, that these powers are not justiciable. Kindly bear in mind, all judgments have said that the power of assent, My Lord the title of Article 200 is 'Power of Assent', is a Legislative Act, because the Governor is a part of the Legislature. And otherwise also as a coordinate Constitutional organ, the power is not justiciable, the exercise is not justiciable, My Lord that is the law.

My Lord if I can invite Your Lordships attention to page 248. My Lord, when we say... My Lord and kindly take this as a Constitutional argument. In Britain, the concept is Parliamentary Supremacy. The courts cannot go into the validity of the law also. India, fortunately

CHIEF JUSTICE B. R. GAVAI: Except with human rights.

1 **TUSHAR MEHTA:** Yes, with human... because of one particular act.

2 **CHIEF JUSTICE B. R. GAVAI:** Particular act, that too only the Supreme Court.

3 **TUSHAR MEHTA:** Only the Supreme Court, not other...

4 **CHIEF JUSTICE B. R. GAVAI:** Not the High Court.

5 **TUSHAR MEHTA:** And only on the ground of it not being compatible...

6 **CHIEF JUSTICE B. R. GAVAI:** Only with regard to the human rights. They can't set aside
7 Legislation like the High Court like the India can do.

8 **TUSHAR MEHTA:** It is only a declaration. My Lord even the Legislation continues. That's
9 the situation. But fortunately My Lord, Your Lordships therefore My Lord I always say that
10 Supreme Court of India is the most powerful court in the world. Your Lordships can set aside
11 the Parliamentary Legislation, State Legislation, any, any act, et cetera, et cetera.
12 Constitutional amendment also, complete. But this is a Legislative Act and it is act or a
13 function of a coordinate Constitutional organ. Now My Lord, in this context,

14 **12:44:09 PM**

15 I have divided, but this is a major point, My Lord. The rest of the points, now remaining points
16 would be minor, but this would be a major point. Please come to page 248. We do not... I was
17 just saying, My Lord, that, Britain has Parliamentary Supremacy, we have Constitutional...

18 **CHIEF JUSTICE B. R. GAVAI:** Constitutional Supremacy.

19 **TUSHAR MEHTA:** We do not have Judicial Supremacy also, Parliament Supremacy also.
20 Nobody is supreme. All are sovereign, in their respective fields, and in that background...

21 **CHIEF JUSTICE B. R. GAVAI:** Sovereign, is the Constitution.

22 **TUSHAR MEHTA:** Sovereign, is the Constitution.

23 **CHIEF JUSTICE B. R. GAVAI:** All three organs work under the spheres allotted to them...

24 **TUSHAR MEHTA:** Under the Constitution, and they are Sovereign in their respective fields.
25 But, supreme is the Constitution. Unlike, My Lord, Parliamentary Supremacy, which is
26 accepted in Britain. Now, My Lord, I have divided, in these, points. Para 276, the nature of
27 power and its justiciability. Your Lordship gets, My Lord, page 248?

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Governor and President.

2 **TUSHAR MEHTA:** Governor and President. Now President has two powers, 111 and 201.
 3 And Governor has 200. "While exercising justiciability of exercise of power by the President
 4 and the Hon'ble Governor, under so and so, the submission is divided in the following
 5 categories. The nature of power and its justiciability, non-justiciability, as a facet of
 6 independence of three co-ordinate organs under the Constitution. All the three organs have
 7 certain core functions, or plenary powers which are reserved exclusively for each of the organ."
 8 My Lord, for example, Article 356, is the power of the Governor. But, it is justiciable. But, there
 9 are certain functions, which are core Constitutional functions, and I will elaborate, and explain
 10 how, My Lord, I distinguish them.

11 Then judicial restraint and consistent view of this Hon'ble Court against Judicial Legislation.
 12 Even when judicial review is undisputed, justiciability is variable. Even if Your Lordships have
 13 the power of judicial review, it's justiciability would vary. Your Lordships may still say that I
 14 have the power of judicial review, but for A, B, C, D reasons, I will treat this to be non-
 15 justiciable. National security, et cetera, et cetera, foreign policy, et cetera. One organ of the
 16 State under the Constitution cannot arrogate the functions...

17 **CHIEF JUSTICE B. R. GAVAI:** You don't have to seek our permission.

18 **KAPIL SIBAL:** No, but I always do. We have a tradition.

19 **CHIEF JUSTICE B. R. GAVAI:** If we have granted it to Dr. Singhvi, we have to grant it to
 20 everyone.

21 **KAPIL SIBAL:** No, no, but I...

22 **TUSHAR MEHTA:** No, Mr. Sibal always follows the procedure.

23 **KAPIL SIBAL:** I follow some traditions, My Lord...

24 **TUSHAR MEHTA:** Tradition, and one more thing I must say, which I learned from him, My
 25 Lord, that during Constitution Bench, he always sits throughout.

26 **CHIEF JUSTICE B. R. GAVAI:** Throughout, that we have seen.

27 **TUSHAR MEHTA:** Yes, that is something.

1 **KAPIL SIBAL:** This is the tradition of the Bar. If we just lose this also, we are left with very
2 little.

3 **CHIEF JUSTICE B. R. GAVAI:** Mr. Subramaniam is also sitting.

4 **KAPIL SIBAL:** We always do that.

5 **TUSHAR MEHTA:** Mr. Subramaniam has been sitting, but, we have done many
6 Constitution Benches together, Mr. Sibal and me. Therefore, this is what I must admit, I have
7 learned, My Lord. This is a tradition, which must be followed.

8 **KAPIL SIBAL:** I'm obliged.

9 **CHIEF JUSTICE B. R. GAVAI:** Except the comfort break.

10 **TUSHAR MEHTA:** My Lord, please see... Now, My Lord, kindly come to, *Hoechst*, I have
11 read, My Lord, so I'll not read it, My Lord. But no, I'm...I have not read this *Hoechst*. This
12 paragraph, My Lord, I have not read.

13 **CHIEF JUSTICE B. R. GAVAI:** 'O' is silent, so next time you won't have problem.

14 **TUSHAR MEHTA:** *Hoechst*. Why classical concept of judicial review will not apply, My
15 Lord, even if there is a judicial review because of justiciability, because of the very nature of
16 the function. And in that, My Lord, *Hoechst Pharmaceuticals*, para 84, which I did not
17 read because I read it for a different purpose, for a different point. Para 80, for My Lord,
18 Justice Narasimha would get it, 250, page 250 of my Written Submissions. This is a judgment
19 of three Hon'ble Judges.

20 **12:49:09 PM~~**

21 And Your Lordship may kindly bear in mind, the title of 200 is, "Assent of the Governor." So,
22 it encompasses all options which are available with the Governor, where... Sorry. "There was
23 quite some discussion at the bar as to whether the assent of the President is justiciable. It was
24 submitted that since not only Sub-section 1, of Section 5, of the Act, which provides for the
25 levy of surcharge on dealers having a gross turnover of Rs. 5 lakh in a year, but also Sub-section
26 3, thereof, which interdicts that no such dealer shall be entitled to recover the amount of
27 surcharge collected from him are both relatable to Entry 54 of List 2 of the [INAUDIBLE].
28 There was no occasion for the Governor to have referred the Bill under Article 200 to the
29 President for his assent." The challenge was that his act of referring the Bill to President is
30 unconstitutional. "It is somewhat strange that this argument should be advanced for the first

1 time after a lapse of 30 years of the inauguration of the Constitution. Immediate provocation
 2 for this argument appears to be an *obiter dictum* of Lord Diplock while delivering the
 3 judgment of so and so, that the courts are not powerless when there is a failure to exercise the
 4 power of revocation of a proclamation of emergency, issued by the Ruler of Malaysia under
 5 Section, so and so, of Internal Security Act. The ultimate decision of the Privy Council was that
 6 since by virtue of Section 47(2) of that Act, the security area proclamation remained lawful
 7 until revoked by resolution of both Houses of Parliament or by the Ruler, it could not be
 8 deemed to lapse because the condition upon which the Ruler had exercised the discretion to
 9 make the proclamation was no longer in existence. That being so, the decision in ***Teh Cheng***
 10 ***Poh*** case is not an authority..." This is now Hon'ble Supreme Court says in ***Hoechst***. "That
 11 being so, the decision of ***Teh Cheng Poh*** is not an authority for the proposition that the
 12 assent of the President is justiciable. Nor can it be spelled out that the Court can inquire into
 13 the reasons why the Bill was reserved by the Governor under Article 200 for the assent of the
 14 President, nor whether the President applied his mind to the question whether there was
 15 repugnancy between the Bill reserved for his consideration and received his assent under
 16 Article 254(2). There is no provision in the Constitution which lays down that a Bill which has
 17 been assented to by the President would be ineffective as an Act, if there was no compelling
 18 necessity for the Governor to reserve it for the assent of the President. A Bill which attracts
 19 Article 254(2) or Article 30(4)(b) where it is introduced or moved in the Legislative Assembly
 20 of a State without the previous sanction of the President or which attracted Article 31(3) as it
 21 was then enforced, or falling under the second proviso to Article 200, as necessarily to be
 22 reserved for the consideration of the President.

23 There may also be a Bill passed by the State Legislature where there may be a genuine doubt
 24 about the applicability of provisions of the Constitution which require the assent of the
 25 President to be given to it in order that it may effectively be an Act." The Governor is confused
 26 whether there is repugnancy or not, but he errs on the safer side that there may be a
 27 repugnancy and refers. "There may also be Bill passed any provision so and so." I'm sorry.
 28 "Even if it is ultimately turns out that there was no necessity for the Governor to have reserved
 29 a Bill for the consideration of the President, still, he having done so and obtained the assent of
 30 the President, the Act so passed, cannot be held to be unconstitutional on the ground of want
 31 of proper assent. This aspect of the matter, as the law now stands, is not open to scrutiny by
 32 the Courts. In the instant case, the Finance Bill, which ultimately became an Act in question,
 33 was a consolidating Act related to different subjects, and perhaps the Governor felt that it was
 34 necessary to reserve it for the assent of the President. We have no hesitation in holding that
 35 assent of the President is not justiciable, and we cannot spell out any infirmity arising out of
 36 the decision to give such assent."

1 Now, Your Lordships may kindly take ***Kaiser-I-Hind***. This is five judge bench judgment.
 2 Can I begin at 02:00? It's almost time.

3 **12:54:09 PM**

4 So that this is.... a few more paragraphs are to be read in this.

5 **COUNSEL:** Your Lordship, may I mention one matter for listing tomorrow? Fresh matter,
 6 Your Lordships, there is...

7 **CHIEF JUSTICE B. R. GAVAI:** This is before...Justice [UNCLEAR]... not before this
 8 bench.

9 **COUNSEL:** Okay.

10 **TUSHAR MEHTA:** I would respectfully, My Lords, request Your Lordships to take volume
 11 V17, V17. Page 6664. This is ***Kaiser-I-Hind*** judgment, My Lords. Sorry, not V, 5.

12 **CHIEF JUSTICE B. R. GAVAI:** Page?

13 **TUSHAR MEHTA:** 6664.

14 **CHIEF JUSTICE B. R. GAVAI:** 6664?

15 **TUSHAR MEHTA:** 6664. This is ***Kaiser-I-Hind***, My Lord, Constitution Bench judgment.
 16 I'll just read three paragraphs.

17 **CHIEF JUSTICE B. R. GAVAI:** 517.

18 **JUSTICE SURYA KANT:** No, 517 *main woh sab aa jaayega*.

19 **JUSTICE VIKRAM NATH:** ***Kaiser-I-Hind***?

20 **TUSHAR MEHTA:** ***Kaiser-I-Hind***, yes, My lord.

21 **JUSTICE SURYA KANT:** Versus ***NTC***, yes.

22 **TUSHAR MEHTA:** ***Kaiser-I-Hind v. National Textile Corporation***. Para 1, 2 and 3
 23 gives what the issue was before the Court "short...", Your Lordships gets para 1. "Short but
 24 important question involved in these matters is whether the assent given by the President
 25 under Article 254(2) of the Constitution of India with regard to the repugnancy of the State

1 Legislation and the earlier law made by Parliament or the existing law could only be *qua* the
 2 assent sought by the State with regard to repugnancy of the laws mentioned in the submission
 3 made to the President for consideration before the grant of assent, or would it prevail *qua*
 4 other laws for which no assent was sought."

5 Your Lordships would mark 254(2) is just, My Lord, the cause for exercise of 200. 254(2) says
 6 that if there is repugnancy between Central and State Law, then President would go under 200
 7 and seek assent. "The contention is, once the President grants the assent to the State
 8 Legislation, the State Law would prevail on the said subject and such assent would be deemed
 9 to be an assent *qua* all earlier enactments made by the Parliament on the subject. The
 10 contention is negative for the reason recorded herein after. It is held that consideration by the
 11 President and his assent under Article 254(2) is limited to the proposal made by the State
 12 Government. The State Legislation would prevail only *qua* the laws for which repugnancy was
 13 pointed out and the assent of the President was sought for. Proposal by the State is a *sine qua*
 14 *non* for consideration and assent."

15 My Lord, just to broadly point out. My Lord, suppose the Honourable Governor feels that it is
 16 in repugnant to two Central Acts and forwards, My Lord, for the assent of his Honourable
 17 Governor. But it is found that it was repugnant to five Central Laws. What would be the effect
 18 of the assent? And one of the main question which arose was, can the assent ever be
 19 justiciable? I'm sorry, My Lords for this. Kindly now come to para 23. Para 23, 6673. "The
 20 Learned Senior Counsel, Mr. Nariman, next submitted that the assent given by the President
 21 is not justiciable and placed reliance upon the decisions of this... decision of this Court in
 22 ***Bharat Sevashram Sangh versus State of Gujarat***, wherein this Court observed thus:
 23 'It cannot be said that the assent which was given by the President was conditional. The records
 24 relating to the above proceedings were also made available to the Court. On going through the
 25 material placed before us, we are satisfied that the President had given assent to the Act. And
 26 it is not correct to say that it was a qualified assent. The Act, which was duly published in the
 27 official Gazette contains the recitals that the said Act had received the assent of the President
 28 on so-and-so. Moreover, questions relating to the fact whether assent is given by the Governor
 29 or the President cannot be agitated also in this manner. In ***Hoechst versus so-and-so***, this
 30 Court has observed, 'we have no hesitation in holding that the assent of the President is not
 31 justiciable and we cannot spell out any infirmity arising out of his decision to give such
 32 assent'."

33 My Lord, now Your Lordships may kindly see ***Hoechst*** is again quoted, which I have read. I'll
 34 skip, My Lord. Para 25. "In our view for finding out whether the assent was given *qua* the
 35 repugnancy between the State Legislation and the earlier law made by Parliament, there is no

1 question of deciding validity of such assent, nor the assent is subjected to any judicial review.
 2 That is to say, merely looking at the record, for which assent was sought would not mean that
 3 the Court is deciding whether assent is rightly, wrongly, or erroneously granted.

4 The consideration by the Court is limited to the extent that whether the State has sought assent
 5 *qua* particular earlier law or laws made by the Parliament prevailing in the State or it has
 6 sought general consent. In such a case, the Court is not required to decide the validity of the
 7 assent granted by the President. In the present case, the assent was given after considering the
 8 extent and nature of repugnancy between Bombay Rent Act and Transfer of Property Act as
 9 well as the Presidency so-and-so. Therefore, it would be totally unjustified to hold that once
 10 the assent is granted by the President, the State Law would prevail."

11 My Lord, that is on the facts of the case. Now, My Lord, I would respectfully substantiate this
 12 submission on the ground of Doctrine of Separation of Powers, and on the ground that non-
 13 justiciability of Constitutionally-coordinated organs is a part of Separation of Powers. And that
 14 is how, My Lord, Your Lordships have construed. My Lord, if Your Lordships can now consider
 15 coming to another angle from which this can be seen. My Lords, suppose, assent is granted as
 16 per the aid and advice of the Council of Ministers, there is no dispute between the Governor,
 17 the view of the Governor, and the view of the Council.

18 My Lord, Article 163(3) specifically prohibits the Court from examining what advice was
 19 granted. Consequently, as a consequence, My Lord, it would also prohibit the Honourable
 20 Court from enquiring why and for what reason the assent was granted. This is one facet.
 21 Second, My Lord, suppose, assent is granted justiciability, according to two judgments, it's not
 22 justiciable. Suppose, the Honourable Governor chooses the route provided under the Proviso
 23 that, first, I would send it back with a message. Then, even that would be subject matter of
 24 judicial review. After the Proviso, My Lord, operates and the Bill is again presented to him,
 25 with or without modifications, he may choose to refer it to the President. That again can be
 26 subject matter of judicial challenge.

27 Therefore, My Lord, my respectful.... thereafter it, would go to the President. The President
 28 also may again choose to send it back to the Legislature under Article 201. That, again, can be
 29 a subject matter of challenge. Thereafter, My Lord, the President may grant assent that would
 30 also be a subject matter of challenge. My Lord, the question is, in the scheme of things, when
 31 the Governor and the President are exercising Legislative Powers, being part of the Assembly
 32 and the Parliament respectively, is such multi-pronged attacks by way of a judicial review is
 33 contemplated. And My Lord, in my respectful submission, the answer is 'no'. If your Lordships
 34 can only come to My Lord, page...

- 1 **CHIEF JUSTICE B. R. GAVAI:** See, if the assent is granted...
- 2 **TUSHAR MEHTA:** Yes, My Lord.
- 3 **CHIEF JUSTICE B. R. GAVAI:** ...by the Governor or the President, no question, because it
4 becomes a law. If it chooses to go through the Proviso, whatever, it is taken to the logical end.
5 So, either he grants assent or not.
- 6 **TUSHAR MEHTA:** Can I just interrupt here with Your Lordships' permission?
- 7 **CHIEF JUSTICE B. R. GAVAI:** But if the Governor withholds it for unlimited period...
- 8 **TUSHAR MEHTA:** My Lord, again, I'm not repeating it. Withhold is permanent withhold.
9 It's an act by...
- 10 **CHIEF JUSTICE B. R. GAVAI:** Yes, permanent withhold because from your chart,
11 permanent withhold and temporary withhold.
- 12 **TUSHAR MEHTA:** Yes, My Lord. That can be, that's a possibility.
- 13 **CHIEF JUSTICE B. R. GAVAI:** Yes.
- 14 **TUSHAR MEHTA:** Please see, My Lord, the title of Article 200. It says, "Assent of the
15 Governor". Assent is one. It has three facets: grant, withholding, reserving. So, what in my
16 respectful submission is not justiciable is exercise of powers under Article 200 and 201.
- 17 **CHIEF JUSTICE B. R. GAVAI:** So according to you, 200 is totally beyond the scope of
18 judicial review and justiciability?
- 19 **TUSHAR MEHTA:** My Lord, it is not justiciable. I'll not say, My Lord, again, contrary to
20 the..
- 21 **JUSTICE SURYA KANT:** Justiciable in the sense, it's a decision and decision-making
22 process. The decision is not justiciable, that why the President or the Governor has assented
23 to it. That cannot be... Court may not examine it. The Court can examine this aspect, if there
24 is a question of repugnancy or question of Constitutionality of Law will come. There, the Court
25 will not examine the assent. The Court will examine the very competence of the Legislation.
- 26 **TUSHAR MEHTA:** And the Act itself.

1 **JUSTICE SURYA KANT:** Act itself, exactly. Here the question is of decision-making
 2 process, not the decision ultimately taken. So, in the decision-making process, the Court as
 3 rightly observed by the Constitutional Bench will call for the file, for what purpose the State
 4 wants to assent, to what extent, what were the laws? That process can be examined by the
 5 Court. So it will fall within the ambit of Judicial Review. What is not justiciable is decision,
 6 assent, but the process is...

7 **TUSHAR MEHTA:** My Lord, my difficulty is... my difficulty means the difficulty which I
 8 foresee is multi-level challenges. For example, if grant of assent *per se* can be challenged, the
 9 option of the Governor to send it... return it to the House also is a decision under 200, first
 10 option. That also can be challenged, My Lord, that he could not have because there is no
 11 repugnancy or Governor can also send it without repugnancy.

12 **JUSTICE SURYA KANT:** Yes, it may not be challenged.

13 **TUSHAR MEHTA:** It cannot be challenged, My Lord. That's my submission. My Lord,
 14 suppose he chooses that I would refer it to the President for Presidential assent, that is also a
 15 decision under 200. And all this, My Lord, are isolated and independent powers, but can be
 16 exercised consequentially also. For example, My Lord, Governor may say that, right now, I am
 17 not granting assent. I am returning the Bill with amendment. The amendment may not be
 18 based upon repugnancy argument. He may just... the Proviso say, even desirability. The
 19 Governor says, that it is desirable that instead of, say, age is the subject matter. I am just giving
 20 a hypothetical example. Age is the subject matter. That instead of 21 years of age you are fixing,
 21 make it 25. It goes back. That is a decision, again, My Lord, subject to challenge, if Your
 22 Lordships holds that it is justiciable.

23 Thereafter, My Lord, the Assembly would return it with or without the acceptance of his
 24 recommendation. Then also, his option is available, if it is repugnant or otherwise required to
 25 be referred to the President of India. He can again refer it to the President of India. At that
 26 stage also, My Lord, if it is justiciable, it can be put to challenge. Same thing would happen
 27 when the Bill is received by the President of India, referred by him. The President may again
 28 send it back to the House, that I am suggesting something else or according to me, the
 29 Governor has not found it, but I am finding it, there is something repugnant and I am
 30 returning it back. My Lord, there is no prohibition. The President can do that. That is a
 31 decision under Article 201. My Lord, again, that would be justiciable.

32 Therefore, My Lord, my respectful submission is that this being plenary Legislative powers
 33 exercised by co-ordinate Constitutional functionaries are outside the pale of justiciability. My

1 Lord, because if it is a grant of assent, the question of challenge will not arise because then the
 2 Act will be under challenge. Act can be under challenge, My Lord, and there is no difficulty
 3 about it. My Lord, there cannot be any argument. My Lord, kindly have a look at page 254.
 4 What... first, 253. My Lord, I'll just... I have read it, but just for ready reference. "Council of
 5 Ministers to aid and advice the Governor". 253. My Lord, it is always safe to save the
 6 jurisdiction of the Court. And I am conscious of that fact, but as it would make... I would try to
 7 make it clear subsequently. My Lord, this theory, Separation of Powers amongst co-ordinate
 8 Constitutional functionaries is a theory accepted in our Constitutional principles.

9 Therefore, in case of 200 and 201, My Lord, it is, according to me, non-justiciable. My Lord,
 10 please see 163, "Council of Ministers to aid and advice the Governor". But please see (3). "The
 11 question whether any, and if so, what advice was tendered by Ministers to the Governor shall
 12 not be enquired into in any Court." Kindly pause here for a minute, My Lord, and let me give
 13 one hypothetical example. My Lord, the outgoing Government has hurriedly passed a Bill. It
 14 is sent to the Governor. The new Government is formed. The new Government is not the same
 15 Government. Some other Party forms the Government or some other Leader becomes the
 16 Chief Minister. He may even advice the Governor to withhold the assent that now, I would like
 17 to have a fresh mandate from the fresh electorate, from fresh Assembly. My Lord, the
 18 Constitutional Prohibition is what advice he has given, you cannot go into. So, in my
 19 submission, as a consequence, what is done by the Governor after that advice is, also, My Lord,
 20 non-justiciable. Court cannot go into it. Now, please see, My Lord, page 254, ***State of Punjab***
 21 ***v. Sodhi Sukhdev Singh***, where My Lord 163(3) came to be considered by the Constitution
 22 Bench of this Court, My Lord. Only highlighted part, My Lord, may be read.

23 "It is hardly necessary to recall that advice given by the Cabinet to Rajpramukh or the
 24 Governor is expressly saved by Article 163(3) of the Constitution and in the case of such advice,
 25 no further question need to be considered. The same observation falls to be made in regard to
 26 the advice tendered by Public Service Commission to the Council of Ministers." My Lord, then
 27 next, 107, page 255. "Under Article 163(3) of the Constitution, the question, whether any and
 28 if so, what advice was tendered by Ministers to the Governor shall not be enquired into in any
 29 Court. In view of the Constitutional protection and the reason underlying such protection, I
 30 hold that in present case, the District Court was right in sustaining the Claim of Privilege."

31 This Article itself, My Lord, gives an indication that there are some communications amongst
 32 *inter se* Constitutional functionaries which are put by the Constitution beyond the
 33 examination by the Court. Council of Ministers is also a Constitutional body. Their
 34 communication with the Governor, if it cannot be examined, My Lord, then the Governor's
 35 communication with the President also cannot be examined. And similarly, any exercise of

1 power under Article 200 would be beyond judicial review, My Lord, or would be just non-
2 justiciable. I'll not use the word judicial review, non-justiciable.

3 My Lord, Your Lordships may... I'm just for reminding, para 297, **Kameshwar Singh and**
4 **Valluri Chaudhary**. My Lord, **Kameshwar Singh and Valluri Chaudhary**, which I
5 referred to. My Lord, kindly come to page 255, para 297. Both have, My Lord, held, both five-
6 judge bench judgments, "That exercise of power under Article 200 and as a necessary
7 consequence, 201, is Legislative in nature". My Lord, I have said **Bihar versus Kameshwar**
8 **Singh and Valluri Chaudhary**, "It has been noted that the Governor and the President are
9 part of Legislature and assent powers are a part of Legislative process. It is in this light that
10 the question of non-justiciability must be examined. It is submitted that once a Bill is reserved
11 and receives assent, judicial enquiry into the propriety or necessity of such reservation is
12 restricted."

13 [INAUDIBLE] A Government or B Government? The question is, as I have put it, My Lord, in
14 page 258, there are two issues. I'm not reading it. (a)... 258, My Lords. I'm not reading. I'm
15 just, My Lord, paraphrasing my submission. My Lord, the decisions are polycentric in nature.
16 The very nature of the decision is such that Your Lordships may perhaps not have any
17 judicially-manageable standard based upon which Your Lordships would examine. Existence
18 or non-existence is one thing, whether there is an assent or not is one thing. But if there is an
19 assent, assent would mean all options, then My Lord, based upon what, I'm posing a question
20 to myself. The Court could examine whether this assent was rightly given or wrongly given.

21 Second, My Lord, there is a concept of Constitutional Committee. And the Constitutional
22 Committee under our Constitution is, respect for one organ by the other organ. We do not
23 have, My Lord, hierarchical system that ultimately every organ's decision or conclusion would
24 rest in one organ. There are checks and balances. For example, My Lord, Legislative Act
25 enactment is subject matter of Your Lordships' judicial review. It's not a hierarchical position,
26 but Your Lordships' power of judicial review. Any decision taken by the Executive which is not
27 a plenary Constitutional power, the Executive takes several decisions. My Lord, the Ministry
28 makes a policy. Ministry takes a particular decision. There are several Executive functions,
29 administrative functions. They are all subject to judicial review, My Lord.

30 But when it comes to Constitutional plenary powers, more particularly of the nature which are
31 Legislative, justiciability should be denied, My Lord. That is my respectful submission, My
32 Lord, on which My Lord I am placing reliance upon one judgment: **Indira Nehru Gandhi**
33 **v. Raj Narain**. My Lord, here, Your Lordships have seen a adjudication by the Court by an
34 enactment was sought to be upturned. Please have a look at, My Lord, page 258. I'm skipping

1 through most of the things. I'm paraphrasing it now. My Lord, Page 258, para 313. My Lords
2 have it?

3 **JUSTICE VIKRAM NATH:** Yes.

4 **TUSHAR MEHTA:** My Lord, the Chief justice has it? Page 258, para 313.

5 **CHIEF JUSTICE B. R. GAVAI:** Para 313?

6 **TUSHAR MEHTA:** 313. My Lord, *Indira Nehru Gandhi v. Raj Narain*, para 577.
7 "There is ample evidence in the Constitution itself to indicate that it creates a system of checks
8 and balances by reason of which powers are so distributed that none of three organs is set up...
9 it sets up can become so predominant as to disable the others from exercising and discharging
10 powers and functions entrusted to them. Though the Constitution does not lay down the
11 Principle of Separation of Powers in all its rigidity, as is the case in United States Constitution,
12 yet it envisages such a separation of... such a separation to a degree as was found in
13 *Ranasinghe* case ***so-and-so versus so-and-so***.

14 The judicial review provided expressly in our Constitution means Article 226 and 32 is one of
15 the features upon which hinges the system of checks and balance. Neither of three
16 Constitutionally-separate organs of the State can, according to the basic scheme of our
17 Constitution today, leap outside the boundaries of its own Constitutionally-assigned sphere or
18 orbit of authority into that of the other. This is the logical and natural meaning of the Principle
19 of Supremacy of the Constitution. But no Constitution can survive without a conscious
20 adherence to its fine checks and balances. Just as Courts ought not to enter into problems
21 entwined in the political thicket, Parliament must also respect the preserve of the Courts. The
22 principle of separation of power is a principle of restraint."

23 My Lord, it is not a prohibition. It is a principle of restraint. My Lord, the very nature of the
24 function, at the cost of repetition, My Lord, I am respectfully urging is such that it is entwined
25 with political thicket. There may be 50 considerations weighing with the Constitutional
26 functionaries for which Your Lordships may not have a judicially-manageable standard to
27 examine and decide whether it is valid or invalid. My Lord, then next judgment, I'll read only
28 the highlighted part. ***M.P. Oil Extraction versus State of MP***. "The supremacy of each of
29 three organs of the State: Legislature, Executive, and Judiciary in their respective fields of
30 operation needs to be emphasised. The power of judicial review of the Executive and
31 Legislative action must be kept within the bounds of Constitutional scheme, so that there may
32 not be any occasion to entertain misgivings about the role of Judiciary in outstepping its limit

1 by unwarranted judicial activism being very often talked of in these days. My Lord, this is 1997
2 judgment.

3 **CHIEF JUSTICE B. R. GAVAI:** Now we are in '25.

4 **TUSHAR MEHTA:** Now we are in 2025, My Lord. And now again, My Lord, this discussion
5 is going on. And My Lord, some... mostly Your Lordships' intervention has been for the benefit,
6 but sometime it is believed that it is in the domain of Executive. For example, My Lord, one of
7 the High Courts since I have appeared without naming, virtually the COVID Management was
8 being administered by the High Court. And all our officers who were supposed to be working
9 on the ground were sitting in my chamber and we were preparing the status reports. What is
10 the vaccine available, what are the number of companies which manufacture Remdesivir?
11 Which each company has by way of their raw material? What is the production capacity? What
12 is the production capacity of each company? In how many days, how many Remdesivir drugs
13 will be...?

14 **CHIEF JUSTICE B. R. GAVAI:** Remdesivir.

15 **TUSHAR MEHTA:** ...made available, etc., etc., etc. So, My Lord, that is something, which is
16 avoidable.

17 **CHIEF JUSTICE B. R. GAVAI:** No, that is micromanagement of the Government function.

18 **TUSHAR MEHTA:** Your Lordships have always, My Lords...

19 **CHIEF JUSTICE B. R. GAVAI:** That we'll never interfere in that to... we can't ask you how
20 a district is to be administered, how your collective could function. But suppose, if a particular
21 function is entrusted to the Governor, the Honourable Governor, and if for years together, he
22 withholds it, will that also be beyond the scope of judicial review of this Court?

23 **TUSHAR MEHTA:** My Lord, I would say...

24 **CHIEF JUSTICE B. R. GAVAI:** When this Court has set aside the Constitutional
25 Amendment itself, which had taken away the powers of Judicial Review that no amendment
26 should be called in question by this Court, it has been found to be hitting at the basic structure
27 of the Constitution. So, that judgment... with those judgments, can we say that everything,
28 however, the highest Constitutional authority may be, if it does not act, still the Court would
29 be powerless?

1 **TUSHAR MEHTA:** No, My Lord. My argument, please do not misunderstand. My argument
2 is not that the Court is powerless. I am on justiciability. My Lord, there is difference. There
3 can be a power...

4 **CHIEF JUSTICE B. R. GAVAI:** Therefore... No, no. Assent is given, not given. Reasons, we
5 may not go into that as to whether the President was justified in giving the assent, as to why
6 he has given the assent, as to why the Governor has given that assent. But suppose if an Act
7 asked by a competent Legislature, if the Honourable Governor only sits over it, then could it
8 still go to Courts?

9 **TUSHAR MEHTA:** Yes, I'll answer that, My Lord, in two ways. First of all, Your Lordships
10 would not decide whether there is any justiciable power in Your Lordship or not based upon
11 an extreme situation, My Lord, which may arise. That is my first answer. And second...

12 **CHIEF JUSTICE B. R. GAVAI:** Like you said yesterday, the hard cases lay down a bad law.

13 **TUSHAR MEHTA:** Bad law.

14 **CHIEF JUSTICE B. R. GAVAI:** And my Learned Brother said that the hard cases lay down
15 on a good law.

16 **TUSHAR MEHTA:** Hard cases always lay down a bad law, My Lord.

17 **TUSHAR MEHTA:** No, no. Not at all.

18 **JUSTICE VIKRAM NATH:** They will agree with me and disagree with you.

19 **CHIEF JUSTICE B. R. GAVAI:** Mr. Hari Vishnu Kamath agrees, like Justice Vikram Nath...

20 **TUSHAR MEHTA:** No, My Lord. He is a very respected person, My Lord, but this is...

21 **CHIEF JUSTICE B. R. GAVAI:** In a lighter vein.

22 **TUSHAR MEHTA:** On a lighter vein, My Lord. But this is like a candidate celebrating based
23 only on the Ruzaan coming in the morning My Lord, and distributing sweets. That's what, My
24 Lord, the other candidate would hope that these are only Ruzaan and not the real picture. So,
25 My Lord, Your Lordships would in that case, even if the Governor sits on the Bill, the solution
26 does not lie here. The solution lies elsewhere.

27 **CHIEF JUSTICE B. R. GAVAI:** Where? Where?

1 **TUSHAR MEHTA:** Solution lies in the political sphere. These are all political decisions. Such
 2 cases do happen and such cases are, My Lord, solved through that democratic process. My
 3 Lord, it is wrong to believe that there can be circumstances where every other organ would
 4 fail, and therefore, the only available organ would be this organ. My Lord, this organ has
 5 protected fundamental rights, and Your Lordships are custodian of the Constitution. No
 6 dispute on that. But there are certain problems which are, My Lord, not solvable by the
 7 judiciary. They are to be solved, My Lord, by political democratic process. When such a thing
 8 happens, My Lord, we have to expect and accept that there are Constitutional functionaries
 9 who are responsible and responsive. Because they are answerable to the people every day and
 10 at least every five years. In a situation like this...

11 **CHIEF JUSTICE B. R. GAVAI:** The Honourable Governor is not answerable to anyone.

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

13 **CHIEF JUSTICE B. R. GAVAI:** The Honourable Governor is not answerable to anyone.

14 **TUSHAR MEHTA:** Governor, My Lord, I'll answer that. I'll answer that immediately. The
 15 Governor is the most vulnerable office. He can be removed without anything else. My Lord,
 16 the moment the Chief Minister goes to the Prime Minister or the President, they look at the
 17 facts of this case. This is what has happened. And such things do happen that when Governor
 18 sits over it, My Lord, for good reasons, bad reasons, no reason whatever, then political process
 19 takes over and Governor can be called back. Governor can be... some other person can go as a
 20 Governor. Why not, My Lord? And why can we not trust other Constitutional functionaries?
 21 It's a matter of, My Lord, the Chief minister talking to the other Constitutional functionaries
 22 that we are facing a Constitutional problem.

23 My Lord, whenever something happens in the Judiciary, I'm not giving a comparative
 24 example. My Lord, the system takes care of it. There is an in-built system, My Lord. Every
 25 problem does not come here on the judicial side. Your Lordship takes a decision on the
 26 administrative side. So, every problem is not solvable under Article 32 or 226, and thereafter,
 27 136. There are problems, My Lord, under... I'm sorry.

28 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Constitutional immunity to some
 29 extent is clearly worded in what advice given by the Governor, polycentricity decisions
 30 involved in such a decision making, why an assent is given, why a withhold has taken place,
 31 and why he refers it to the President for his opinion with a message. All these stand on one
 32 footing, and there is a Constitutional immunity provided to all those. But we are actually today

1 in this case referring to the procedure prescribed, which stands on a completely different
2 footing. As regards to the procedure, where is the Constitutional immunity?

3 **TUSHAR MEHTA:** No, no, there is no immunity... I'm sorry.

4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's number one. Number two, it is
5 exactly in this very context that the *Kaiser-I-Hind* what you have read...

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

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** They drew that distinction, saying
8 that, whether there is no question of deciding the validity of an assent there, but the... whether
9 it was with respect to one part of it, another part of it, to examine it, they will look into it is
10 what they said.

11 **TUSHAR MEHTA:** That, My Lord, I...

12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Therefore, an enquiry which is to be
13 made, whether the Constitutional process as Honourable Chief Justice has said, Constitutional
14 process of granting, not granting, or referring, not being done, to what extent any kind of an
15 immunity applies unending is the question. So, we are not on the merits of this.

16 **TUSHAR MEHTA:** I bow down, My Lord. I have understood the question. My Lord, first of
17 all, I am not basing my argument on any immunity. No, there is no immunity from judicial
18 adjudication of any dispute except those issues which are not justiciable. I am not saying, My
19 Lord, immunity. For example, the Governor takes the decision of 356. Your Lordships have
20 even held such decisions to be *mala fide* in *Bihar* case. In case of *Bihar*, Your Lordships
21 were, *Buta Singh*, the Court said that he was acting *mala fide*. He's not immune.

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** He didn't use that expression
23 immune here. He substituted with judicial review.

24 **TUSHAR MEHTA:** My Lord, I am putting it slightly differently. My Lord, not even judicial
25 review, justiciability.

26 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Okay, put it in... replace it with
27 justiciability, then answer it.

28 **TUSHAR MEHTA:** Yes, justiciability, My Lord...

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It is not, then there will be a
 2 Constitutional logjam then. Then there will be a logjam. You are saying that the only way to
 3 answer it is through political process.

4 **TUSHAR MEHTA:** My Lord, every logjam may not have a problem... may not have a solution
 5 with the Judiciary. With profound respect, kindly don't take this as an arrogant way of, My
 6 Lord, putting it. I am saying Constitutionally, every problem may not have solution before the
 7 Court. There are several problems where the problems will have to be sorted out as per the
 8 Constitutionally-prescribed democratic, political process. And the Court would be holding its
 9 hands, My Lord, saying that it is non-justiciable. We do not have any standards like...

10 **CHIEF JUSTICE B. R. GAVAI:** Our powers under 356 are for a temporary period. The
 11 President's Rule cannot be...

12 **TUSHAR MEHTA:** It can't be...

13 **CHIEF JUSTICE B. R. GAVAI:** Then there are in-built safeguards.

14 **TUSHAR MEHTA:** Correct, My Lords.

15 **CHIEF JUSTICE B. R. GAVAI:** Yes. Within a limited period, it has to be placed before both
 16 the Houses of the Parliament.

17 **TUSHAR MEHTA:** Correct, My Lord,

18 **CHIEF JUSTICE B. R. GAVAI:** Then, if there is a dissolution, then after six months or so,
 19 under 200, if we hold that the Honourable Governor has an unlimited power withheld for time
 20 immemorial.

21 **TUSHAR MEHTA:** My Lord, just allow me to make the distinction. Article 3...

22 **CHIEF JUSTICE B. R. GAVAI:** Then what is the safeguard for a duly-elected Legislature?
 23 Suppose, a Legislature which is elected by say two-third majority, unanimously passes a Bill.
 24 You were giving example yesterday that if it is repugnant with the Central Act, then he may
 25 withhold it or for some other reasons, National Security so-and-so. If that be so, then if he
 26 doesn't exercise the Proviso, it will be making the Legislature totally defunct, the persons who
 27 are elected from that State. And if such a... it is not as if the... if such an Act is repugnant, then
 28 it is always subject to challenge. Or if it is contrary to...

1 **TUSHAR MEHTA:** My Lord, may I answer? May I answer, My Lord? 356 is an Executive
2 Power. It's not a Legislative power, first of all, My Lord. And therefore, My Lord, there is...

3 **CHIEF JUSTICE B. R. GAVAI:** To be ratified by the Legislature, Central Legislature.

4 **TUSHAR MEHTA:** Correct, My Lord. But that's not the question here, My Lord, is the
5 decision taken in exercise of Executive Power under 356 is subject matter of judicial review.
6 My Lord, again, Your Lordships' concern, is a concern that what happens? But the answer is
7 this forum is not the solution. The solution is either Amendment of the Constitution. And till
8 that happens, the political process and such process does take place. Every State does not take
9 a confrontation position. My Lord, they do exercise their diplomatic options, meeting the
10 Constitutional functionaries. They pursue it, discuss, debate. If there is some gap between one
11 thinking and another, they try to bridge the gap. And ultimately, the problems are solved. Your
12 Lordships are not flooded with State Government saying that my Bills are pending.

13 So, therefore, I am, My Lord, repeatedly cautioning not to examine the matter based upon
14 some extraordinary or exceptional situations. Now, I'll again come back to, My Lord, page 259,
15 ***State of Rajasthan versus Ramesh Chandra Mundra***. Because here, again, My Lord,
16 we would be creating a Constitutional hierarchy that ultimately every problem will... the buck
17 will stop here only or for every problem in the country, which is not in my respectful
18 submission, My Lord, the real heart and soul of the Separation of Power. Some problems are
19 problem of such nature where the solution cannot be here. Please come to, My Lord, page 260.
20 My Lord, ***Kalpana Mehta***. My Lord, it again talks of the Separation of Power. My Lord, I'll
21 not repeat it. I may not repeat it. Please come to, My Lord, 264. And I will just read two
22 paragraphs, and My Lord, move on.

23 My Lord, I have already pointed out that there are certain core functions, core functions. My
24 Lord, for example, Governor exercises several powers, but there are certain functions which
25 are core Constitutional functions in the nature of a Legislative function. My Lord, there the
26 Doctrine of Separation of Powers, the problems... kindly pardon me for giving this example. It
27 may not be a comparable example also. My Lord, Supreme Court decides hundred cases,
28 hypothetically, per month. There are several cases where they are changed in the curative
29 jurisdiction. There is a possibility that even after curative jurisdiction being exercised, some
30 may feel that, still, we have not got justice. Somewhere, something will have to stop. The buck
31 will have to stop somewhere. My Lord, the justiciability argument being met with that what
32 happens if this situation arises is, in my respectful submission, ignores an argument that in
33 every sphere of the Constitutionally-framed three organs, there are some issues where buck
34 will have to stop somewhere.

1 It need not reach here, My Lord. I'm sorry. I am trying to phrase it the way it is possible. Now,
 2 kindly see. I'll skip, My Lord, rest of the things. And please come to, My Lord, **Aravali Golf**
 3 **Club**. I am now on, My Lord, other directions which are given three months period, give
 4 reasons. My Lord, the Tamil Nadu Judgment, the three months' time-fix, give reasons, and
 5 deemed assent. I'll come to, My Lord, last point is deemed assent, whether there can be any
 6 conceptual concept of a deemed assent or not. And I have also enlisted the provisions where,
 7 wherever the Constitution stipulated that in absence of a particular Act, something will be
 8 deemed, the Constitution has provided. There is one beautiful passage, My Lord, in **Aravali**
 9 **Golf Club versus Chander Hass**. My Lord, please see the highlighted part only.

10 **CHIEF JUSTICE B. R. GAVAI:** Page?

11 **TUSHAR MEHTA:** Page 272.

12 **CHIEF JUSTICE B. R. GAVAI:** 270?

13 **TUSHAR MEHTA:** 272.

14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** For the proposition on deemed?

15 **TUSHAR MEHTA:** No, My Lord, justiciability. My Lord, restraint, judicial restraint, that
 16 every problem need not be solution here. My Lord, they have used one very popular statement
 17 of Justice Cardozo. "Judges must exercise judicial restraint and must not encroach into the
 18 Executive or Legislative domain *vide* so-and-so. Under our Constitution, the Legislature, the
 19 Executive, and the Judiciary, all have their own broad spheres of operation. Ordinarily, it is
 20 not proper for any of these three organs of the State to encroach upon the domain of another.
 21 Otherwise, the delicate balance in the Constitution will be upset and there will be a reaction.
 22 Judges must know their limits... I'm sorry, My Lord, I am reading the judgment.

23 **CHIEF JUSTICE B. R. GAVAI:** Yes, you are reading it loudly. No difficulty as such.

24 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Why you feel sensitive? If we don't
 25 have, then we don't have it.

26 **CHIEF JUSTICE B. R. GAVAI:** We also know that whenever a petition comes before us.

27 **TUSHAR MEHTA:** Your Lordships have always, My Lords, the separation of power is kept
 28 in.

1 **CHIEF JUSTICE B. R. GAVAI:** Yeah, whenever... we don't want to name the petitioners,
2 we show such direction to the Union of India to frame this law. We always say that it is within
3 the domain of the Legislature and within the domain of the Executive.

4 **TUSHAR MEHTA:** Single litigators, My Lord, as I say.

5 **CHIEF JUSTICE B. R. GAVAI:** Something is done and the first petitions are filed with two
6 or three pages and... so therefore, the then Chief Justice came with this policy *In Re* so-and-
7 so.

8 **TUSHAR MEHTA:** *Re* so-and-so, My Lord.

9 **CHIEF JUSTICE B. R. GAVAI:** Otherwise...

10 **TUSHAR MEHTA:** But that was suggested by me because there used to be a fight that mine
11 is filed first, but his petition is registered first by the Registry. So therefore, I suggested that
12 instead that it should be *Re* so-and-so. "Judges must know their limits and must not try to run
13 the government. They must..." My Lord, kindly ignore it. 21.

14 **CHIEF JUSTICE B. R. GAVAI:** You can read that. Don't...

15 **TUSHAR MEHTA:** "The theory of Separation of Powers, first propounded by the French
16 Thinker, Montesquieu, in his book, 'The Spirit of Laws' broadly holds the field in India too. In
17 Chapter 11 of his book, 'The Spirit of Laws'..." My Lord, I can skip Montesquieu. Kindly turn
18 the page over, My Lords. I'm sorry, My Lords. Page 274, para 30. Para 30, Your Lordships
19 have?

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

21 **TUSHAR MEHTA:** "The justification often given for judicial encroachment into the domain
22 of the Executive or Legislature is that other two organs are not doing their jobs properly. Even
23 assuming this so, the same allegation can be... can then be made against the Judiciary too
24 because there are cases pending in Courts for half a century, as pointed out by this Court in
25 so-and-so. If the Legislature or the Executive are not functioning properly, it is for the people
26 to correct the defects by exercising their franchise properly in the next election and voting for
27 candidates who will fulfil their expectations or by other lawful methods, that is, peaceful
28 demonstrations. The remedy is not in the Judiciary taking over the Legislative or Executive
29 functions because that will not only violate the delicate balance of power enshrined in the

1 Constitution, but also the Judiciary has neither the expertise nor the resources to perform such
2 functions."

3 My Lord, kindly turn the page, para 35. "The Constitutional trade-off for independence is that
4 judges must restrain themselves from the areas reserved to other separate branches. Thus,
5 judicial restraint complements the twin overarching values of the independence of Judiciary
6 and the Separation of Powers. In ***Lochner versus so- and-so***, Mr. Justice Holmes, in
7 dissenting judgment, criticised the majority of the Court becoming a super-Legislature by
8 inventing a Liberty of Contract theory, thereby, enforcing in particular *laissez-faire* economic
9 philosophy." My Lord, kindly skip some parts. "In the nature of judicial process, Justice
10 Cardozo remarked...", and this, My Lord, in my respectful submission, has withstood the test
11 of time and is being quoted often.

12 "Justice Cardozo remarked, the judge is not a knight-errant roaming at will in his pursuit of
13 his own ideal of beauty and goodness." My Lord, in ***Maratha Reservation***, also this is cited.
14 My Lord, knight-errant, it's kind of a... it's a fictional character which used to roam around at
15 night and whatever he thought is improper or illegal in the society...

16 **CHIEF JUSTICE B. R. GAVAI:** Robinhood.

17 **TUSHAR MEHTA:** ...he would correct it. Therefore, they say that this is something which
18 should not be there. My Lord, kindly skip the pages. My Lord, page 282. "One organ of State
19 cannot arrogate to itself the functions of another organ." This is, My Lord, when we say, if you
20 don't do it within a particular period, there would be a deemed assent, or we would examine
21 whether you had justification of not doing it, not doing it in a particular way, not doing it on a
22 particular time, etc., etc., would be violative of Separation of Powers.

23 **CHIEF JUSTICE B. R. GAVAI:** This is in Para 38 also?

24 **TUSHAR MEHTA:** Para 353.

25 **CHIEF JUSTICE B. R. GAVAI:** 38, page 275.

26 **TUSHAR MEHTA:** Oh, I'm sorry, My Lord. I'm sorry, para 38, "The moral of this story is
27 that the Judiciary does not exercise restraint and overstretches its limits, there is bound to be
28 reaction from politicians and others. The politician..." My Lord, I'll avoid it. "The politicians
29 will then..."

30 **CHIEF JUSTICE B. R. GAVAI:** Why avoid it? It's in the print here. It's in the print.

- 1 **TUSHAR MEHTA:** Sometimes, My Lord, politicians...
- 2 **CHIEF JUSTICE B. R. GAVAI:** No. Merely because Mr. Sibal and Dr. Singhvi are here, it
3 doesn't mean that you shouldn't read that.
- 4 **TUSHAR MEHTA:** No, no. They are respectable politicians, My Lord.
- 5 **CHIEF JUSTICE B. R. GAVAI:** They are in the real capacity.
- 6 **TUSHAR MEHTA:** Even Mr. Wilson is here.
- 7 **CHIEF JUSTICE B. R. GAVAI:** Mr. Wilson is not to be seen. Mr. Reddy is also there.
- 8 **TUSHAR MEHTA:** And Mr. Reddy is here, My Lord. We have three MPs.
- 9 **S. NIRANJAN REDDY:** In the morning, he was remarking, My Lord, when he was
10 mentioning about the Parliamentarians. If Dr. Singhvi would be here when Wilson was there,
11 there would have been four of us in a row.
- 12 **TUSHAR MEHTA:** And despite the Parliament being in session, four of them are here.
- 13 **CHIEF JUSTICE B. R. GAVAI:** That is how... Parliament is adjourned now.
- 14 **TUSHAR MEHTA:** On the lighter side.
- 15 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The moral of the story is?
- 16 **TUSHAR MEHTA:** Your Lordships have read it. I'll read, there is nothing. "The moral of the
17 story is that if the Judiciary does not exercise...
- 18 **ABHISHEK MANU SINGHVI:** May I just interrupt for 30 seconds. Whether there is this
19 about this Parliament and this... Mr. Jaitley and I were coming out of the House, and Mr.
20 Yechury was also coming out. He had just given a speech in Parliament asking for a law to
21 prohibit Doctors, Lawyers, Chartered Accountants, and anybody else to be a MP. So when we
22 came out, both of us spontaneously told him. We said, Sitaram, you want Parliament to be a
23 community of unemployed and unemployables. This actually happened with us, that all three
24 of us were together.
- 25 **TUSHAR MEHTA:** My Lord, I was on page 282, but please come to page 283, ***State of***
26 ***Rajasthan versus Union of India.*** My Lord, this is a seven-judge bench judgment.

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** *Bommai* case.

2 **TUSHAR MEHTA:** [NO AUDIO]. But this is precursor to *Bommai*. *Bommai*, I'll not read.
 3 I'll just paraphrase why, Your Lordships, would not rely upon *Bommai*, though Tamil Nadu
 4 relies upon *Bommai*. My Lord, just the bold part. "But it cannot assume unto itself the powers
 5 of Constitution lodged elsewhere, or undertake tasks entrusted by the Constitution to other
 6 departments of the State which may be better equipped to perform them. The scrupulously-
 7 discharged duties of all guardians of the Constitution include the duty not to transgress the
 8 limitations of their own Constitutionally-circumscribed powers by trespassing into what is
 9 properly the domain of other Constitutional organs. Questions of political wisdom or
 10 Executive policy only could not be subjected to judicial control.

11 No doubt Executive policy must also be subordinated to Constitutionally-sanctioned purposes.
 12 It has its sphere and limitations. But so long as it operates within that sphere, its operations
 13 are immune from Judicial interference. This is also a part of the Doctrine of Rough Separation
 14 of Powers under the Supremacy of Constitution repeatedly propounded by this Court, and to
 15 which the Court unswervingly adheres, even when its views differ or change on the correct
 16 interpretation of a particular Constitutional provision." Then, bottom. "A scrupulous
 17 adherence to this scheme is necessary for the smooth operation of our Constitutional
 18 mechanism of checks and balances. It implies due respect for and confidence in each organ of
 19 our Republic by the other two."

20 My Lord, particularly when we are dealing with the highest Constitutional functionaries of co-
 21 ordinate organs, in their Constitutional capacity, not in their Executive capacity. In their
 22 plenary power, which is Legislative in nature, My Lord. Similar are other judgments. I'm not
 23 troubling Your Lordships with, My Lord. May be treated as read, My Lord. Thereafter, My
 24 Lord, I have said...

25 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Even *Bommai* is not completely
 26 against you.

27 **TUSHAR MEHTA:** No, it's not. In fact...

28 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Because even with this judgment in
 29 the...

30 **TUSHAR MEHTA:** It says there are manageable standards.

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Specifies what are outside the ken
2 of... some portions.

3 **TUSHAR MEHTA:** Exactly. I'm immensely grateful, My Lords. I have said, restraint in
4 exercise of Judicial power in case of high Constitutional functionary is a facet of Separation of
5 Powers, which is a basic structure of the Constitution. And therefore, such restraint and non-
6 justiciability should be read as a part of basic structure of the Constitution, to respect the
7 Separation of Powers. My Lord, then page 285, that even when there are undisputed judicial
8 review, positions, My Lord, that Legislature, Executive Policy, etc., etc. There are in-built, self-
9 imposed restrictions, My Lord. Judicial restraint is always a self-imposed restriction. Now,
10 page 287. Your Lordships must have these judgments. I'm not reading them. But world over,
11 these are judgments from other jurisdictions.

12 **CHIEF JUSTICE B. R. GAVAI:** But you always say that we should follow...

13 **TUSHAR MEHTA:** I'm not reading them.

14 **CHIEF JUSTICE B. R. GAVAI:** We should only follow our jurisdiction.

15 **TUSHAR MEHTA:** Absolutely, My Lord. Therefore, I'm not... I say that Your Lordship must
16 have it, but without going into it. My Lord, Thames cannot be more pious than Ganga, that is
17 the Mississippi for that matter. Potomac, My Lord. Washington has Potomac, anyway. My
18 Lord, in some concurring opinion of **Shamsher Singh**. My Lord, now, please come to 304.
19 My Lord, I'll not trouble Your Lordships because the propositions are known. My Lord, there
20 are three judgments cited in Tamil Nadu case for the purpose of justiciability. First is
21 **Bommai** case as My Lord, Justice Narasimha has said, My Lord. And I respectfully take that,
22 My Lord, that there the Honourable Supreme Court came to a conclusion that there are
23 judicially-manageable standards. This was not a case of assent. **Bommai** was a case of 356.
24 And therefore, it was an Executive Act. And there were standards, whether you could have
25 done it or you could not have done it. And therefore, the judicial review was exercised. My
26 Lord, I have quoted the relevant paragraphs of Justice Ahmadi, Justice Verma, Justice
27 Yogeshwar Dayal but I don't wish to read them. My Lord, second judgment which is cited is
28 **Manipur Tribunal**, that Tenth Schedule.

29 That again, Speaker is a Tribunal, and therefore there is no dispute that he is amenable to
30 judicial review. He's not functioning inside the House or as a Leader of the House while
31 discharging functions as adjudicatory body under Clause 6 of the Tenth Schedule. And another
32 judgment which is cited, which is relied upon by Tamil Nadu judgment, is **Maru Ram and**
33 **Perarivalan**. That if we can have judicial review over that function of the President, why not

1 this? *Maru Ram and Perarivalan* were cases where the Honourable President exercise
 2 purely Executive act of pardon which is subject matter of judicial review, My Lord. And it was
 3 a case of Article 21 of a citizen. It was not, My Lord, a political question that way. Political not
 4 in any derogatory sense. Political questions means questions arising out of functioning of a
 5 functional Democracy in a quasi-Federal Constitution. My Lord, so these three judgments
 6 would not lead to any conclusion that it is justiciable. My Lord, *Hoechst* and *Kaiser* in my
 7 respectful submission holds the field.

8 Then Your Lordship may kindly come to page 321. 321 raises Question No. 9, My Lord, which
 9 the Honourable President has sought Your Lordships' advice is this. "Are the decisions..." My
 10 Lord, Page 321. "Are the decisions of the Governor and the President under Article 200 and
 11 Article 201 of the Constitution of India, respectively, justiciable at a stage anterior into the law
 12 coming into force?" Meaning, thereby, My Lord, this is a subset that it is still at the stage of
 13 grant of assent, withholding of assent, returning the Bill etc., etc. Can someone come and say
 14 that this Act under Article 200 and 201 is unconstitutional? My Lord, please have a look at it.
 15 Para 410, My Lord. My Lord, I would only read...

16 **JUSTICE SURYA KANT:** There's no Act under 200. Under 200, there is no Act. It's still at
 17 the Bill stage. So only when the assent give... goes, the Act... and then of course Act is said to
 18 be...

19 **TUSHAR MEHTA:** Then the Bill can be challenged on all grounds possible. Pardon, My
 20 Lords.

21 **JUSTICE SURYA KANT:** Exercise of 200.

22 **TUSHAR MEHTA:** Yes, yes. Act, Capital A. Yes, yes, My Lord.

23 **CHIEF JUSTICE B. R. GAVAI:** But if there is no decision, you have framed a question.
 24 "Are the decisions of the Governor and President under Article 200 and Article 201 of the
 25 Constitution of India respectively justiciable at a stage anterior into the law coming into
 26 force?"

27 **TUSHAR MEHTA:** Yes, My Lord. My Lord, but law comes into force when...

28 **CHIEF JUSTICE B. R. GAVAI:** Assent is granted.

29 **TUSHAR MEHTA:** ...is granted. But before that, it should have been granted should not
 30 have been granted, should not have been referred to the President, should not have been

1 returned to the House. Because here, My Lord, we have faced the case where at that stage, the
 2 Court has said that assent is deemed to have been granted. Then, this is possibly, My Lord...
 3 not possibly, a 100%, first time where the Act came into force with the assent granted by the
 4 Supreme Court of India. Your Lordships on this side and on that side have seen Acts which
 5 starts with this Bill having been assented to by the President or Governor of India *vide* order
 6 dated so-and-so. My Lord, these Acts in Tamil Nadu mentions in the Gazette the Bill having
 7 been assented by the Supreme Court of India *vide* judgment dated so-and-so.

8 The Court has exercised its jurisdiction at a stage anterior to the law coming into force. That
 9 is, My Lord... and only see, My Lord, one para, 414. Your Lordships would now again go back
 10 to ***Kihoto***. ***Kihoto***, judicial review is available. Correct, My Lord? No dispute on that because
 11 Speaker is a Tribunal. Still five-judge bench in ***Kihoto*** says that no *quia timet* action is
 12 permissible. We can finally set it aside, but we can do nothing at an interim stage. My Lord,
 13 please have a look at this.

14 **CHIEF JUSTICE B. R. GAVAI:** That has been interpreted that any such order which
 15 prevents the Speaker from exercising his powers could not be permissible. But any order by
 16 the Court which enables the Speaker to proceed further would be permissible.

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

18 **CHIEF JUSTICE B. R. GAVAI:** That *quia timet* has been interpreted in so many
 19 judgments.

20 **TUSHAR MEHTA:** Yes, My Lord. But, My Lord, point I am trying to make is that even where
 21 judicial review is undisputed, it is at a stage where the action is performed. The Order is
 22 passed. My Lord, please have a look, for my satisfaction, page 322, what ***Kihoto Hollohan***
 23 says on this. Para 110, only one para is relevant.

24 **JUSTICE SURYA KANT:** Tamil Nadu was a reverse case, Mr. Solicitor. Here. the complaint
 25 was that action is not being taken. That was a completely reverse case.

26 **TUSHAR MEHTA:** Correct, My Lord. That is justiciability, whether Court could have done
 27 something or not. Correct, My Lords.

28 **CHIEF JUSTICE B. R. GAVAI:** No, no. So, therefore, we are not in an appeal of the
 29 judgment.

30 **TUSHAR MEHTA:** I'm not...

- 1 **CHIEF JUSTICE B. R. GAVAI:** What is in our minds from day one, if for four years?
- 2 **TUSHAR MEHTA:** My Lord, that Your Lordships will have to remove while answering this
3 question. Your Lordships' interpretation cannot be based upon one particular incident.
- 4 **JUSTICE SURYA KANT:** His Honourable Chief Justice is asking a hypothetical question.
5 That suppose there is a... it's not in one State.
- 6 **CHIEF JUSTICE B. R. GAVAI:** And you are saying that, it's... at least, I think we are having
7 petitions from two to three States now.
- 8 **KAPIL SIBAL:** Yes, yes.
- 9 **CHIEF JUSTICE B. R. GAVAI:** Kerala. Then...
- 10 **KAPIL SIBAL:** West Bengal.
- 11 **CHIEF JUSTICE B. R. GAVAI:** West Bengal, then Punjab.
- 12 **TUSHAR MEHTA:** Yeah. I was missing you.
- 13 **CHIEF JUSTICE B. R. GAVAI:** How can he be missed?
- 14 **TUSHAR MEHTA:** I was missing you here. No, there are fixed seats, My Lord.
- 15 **CHIEF JUSTICE B. R. GAVAI:** No. You objected to his Petition on Monday itself, so...
- 16 **TUSHAR MEHTA:** Yes, My Lord. And Your Lordships now knows why they were opposing
17 reference to a five-judge bench.
- 18 **CHIEF JUSTICE B. R. GAVAI:** But then we said that whatever we decide here will reflect
19 on all these matters.
- 20 **TUSHAR MEHTA:** Certainly. That was on the lighter side, My Lord. Nothing to turn on the
21 merits.
- 22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The fallacy of this...
- 23 **CHIEF JUSTICE B. R. GAVAI:** No, we quite appreciate whether a time-bound programme
24 could be issued such a... three months, one month, and then deemed and all that. But to
25 consider a situation, where the Governor is bound to either way, grant assent. But if for four

1 years it just sits for, then what happens to the democratic setup of the Government? What
2 happens to the will of two-third of the majority of the Legislature of that State?

3 **TUSHAR MEHTA:** I would not like to, My Lord, answer the way I am going to answer. But
4 suppose, My Lord, the President at the cost of repetition is...

5 **CHIEF JUSTICE B. R. GAVAI:** We are not talking about Honourable President. We're
6 talking about the Governor.

7 **TUSHAR MEHTA:** The Governor. My Lord, I'm giving an example of a President of India
8 where a citizen approaches him that my trial is pending since 10 years and the Sessions Judge
9 is not taking up the matter. And my offence is punishable with only seven years of
10 imprisonment and my husband is in jail. Can inaction on part of the Judiciary empower the
11 President to declare him as having only undergone the sentence. It may not be a comparable
12 example, but this is how Separation of Power... this is how Separation of Power. My Lord, this
13 presuppose that every problem will have a solution only ultimately at the doors of this Court,
14 and political solutions or democratic solutions are no solutions. My Lord, there has to be...
15 there are solution... My Lord, problems in functioning of the Constitution where, My Lord,
16 there may not be a solution necessarily by judicial adjudication. It's not necessary, My Lord,
17 to hypothetically believe that every solution...

18 **CHIEF JUSTICE B. R. GAVAI:** No, we are not hypothetically believing it. We are having
19 petitions at least from four States.

20 **TUSHAR MEHTA:** No, no, I am saying something else. My Lord, that necessarily
21 presuppose a belief that ultimately we will have to solve every problem. And my respectful
22 submission is, there are problems where this may not be the only solution or this may not be
23 the solution. That's my respectful submission, My Lord. I'll proceed further.

24 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Like, for example, how political
25 executive came up with Tenth Schedule, it's not a Court's invocation. That's what you were
26 suggesting, Tenth Schedule.

27 **TUSHAR MEHTA:** Yes, My Lord. Parliament did it because there was a problem of *Aaya*
28 *Ram Gaya Ram*, as we say. Defection was rampant.

29 **CHIEF JUSTICE B. R. GAVAI:** The Preamble itself... the Preamble of the Constitutional
30 Amendment itself begins with that problem.

TUSHAR MEHTA: Correct. So, My Lords, some problems, the solution can come only from within the system. That is, My Lord, the Doctrine of Separation of Powers. There are certain core Legislative functions. There are certain core Executive functions. There are certain core Judicial functions. But at the moment, Executive tries to step in the Judicial domain, Your Lordships have restricted it. And rightly so, on the ground of Separation of Powers. My Lord, that is how NJSC went. NJSC was, My Lord, declared illegal. The entire political spectrum of the country was on one page, unanimous. It was passed unanimously, ratified by the two-third of the State. But Your Lordships protected the Separation of Powers.

That, no, one person also from the Executive would not be a part of the Collegium. My Lord, respectful submission is the Separation of Power is a balancing act which balances the Constitution. And it will have to be a two-way street. Some issues are non-justiciable, but that's the respectful submission. My Lord, kindly come to 324. "Is it permissible for the Court..." My Lord, 324. And I'll just, My Lord, orally argue, but I'm not reading it. "Is it permissible for the Courts...", and this is a very, very important, My Lord, question, which the Honourable President wants Your Lordships' guidance on. "Is it permissible for the Courts to undertake Judicial adjudication over contents of a Bill in any manner before it becomes Law." My Lord, why this question is...

CHIEF JUSTICE B. R. GAVAI: But I think...

JUSTICE PAMIDIGHANTAM SRI NARASIMHA: Because this question, it doesn't arise...

TUSHAR MEHTA: I'll tell Your Lordships why it has arisen. What is, My Lord, the scheme of the Constitution? The Governor assents the Bill, withholds the Bill or refers it to the President. Forget two options. Forget fourth option. He refers it to the President. The question has arisen where there is a two-judge bench judgment which says that it is prudent for the President before granting assent to make a reference under Article 143 of the Constitution to this Court. Because the question of repugnancy is a legal question, meaning thereby, the President will come before Your Lordships by way of a reference that I have received this many Bills from the State... My Lord, kindly take that direction. And it is otherwise imprudent for me as this Supreme Court has said to take decision on my own. And therefore, I am now requesting you to tell me whether it is repugnant or not. It proceeds on two fundamentally flawed assumptions: (a) the Honourable President... or in this case, Honourable President is unable to decide for herself whether there is repugnancy or not. And (2) Your Lordships will examine the Bill at a stage anterior to it being an Act and decide whether there is any repugnancy or not.

1 And if Your Lordship says no, you grant assent. Then the President will grant an assent. My
 2 Lord, do we have a dual structure where before granting assent to a Bill, unless the President
 3 is herself or himself is of the opinion that we need opinion? My Lord, there are two or three
 4 references made on the Bill that I would like the Honourable Supreme Court to examine and
 5 guide me. But otherwise, do we presume that President will not be able to on her own take a
 6 call, and therefore it is prudent that President in every case comes before the Court under a
 7 reference with 143, My Lord. I'll just read it, My Lord. Your Lordships need not open.

8 "Whenever, in exercise of powers under Article 200 of the Constitution, a Bill is reserved for
 9 consideration of the President on grounds of patent unconstitutionality that are of such a
 10 nature so as to cause peril to the principles of representative Democracy, the President must
 11 be guided by the fact that it is the Constitutional Courts which have been entrusted with the
 12 responsibility of adjudicating upon the questions of Constitutionality and Legality of an
 13 Executive or Legislative action. Therefore, as a measure of prudence, the President ought to
 14 make a reference to this Court in exercise of his powers under Article 143 of the Constitution."
 15 So before the Bill becomes an Act...

16 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's Question No. 12. We will
 17 examine that 12 in that context. But this issue relating to examining the Bill at a Bill stage is
 18 consequence of that question. This question doesn't stand on its own. This 12 doesn't stand on
 19 its own for the reason that nobody is asking the Bill to be examined.

20 **CHIEF JUSTICE B. R. GAVAI:** Because he has framed that question because of those
 21 observations.

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** It's coming before it...

23 **CHIEF JUSTICE B. R. GAVAI:** Before the President decides whether to grant assent or
 24 not.

25 **TUSHAR MEHTA:** My Lord, kindly see the... kindly see the hazard of this. My Lord, kindly
 26 see the hazard.

27 **CHIEF JUSTICE B. R. GAVAI:** To readily agree with you that what should be the answer
 28 to that question.

29 **TUSHAR MEHTA:** Kindly see the hazard. I'll give a simple example, My Lord, and there is
 30 no answer to that example.

- 1 **CHIEF JUSTICE B. R. GAVAI:** I don't think that they would be opposing...
- 2 **TUSHAR MEHTA:** They would be, My Lord. Let me place it. Let me place it. My Lord,
3 suppose...
- 4 **CHIEF JUSTICE B. R. GAVAI:** Mr. Sibal has a [UNCLEAR] which was filed in this area.
- 5 **TUSHAR MEHTA:** My Lord, they should not because it's not A Government or B
6 Government...
- 7 **CHIEF JUSTICE B. R. GAVAI:** No, no, for rewriting the Constitution.
- 8 **TUSHAR MEHTA:** Yes, My Lord. My Lord, the difficulty would be this. If in every case, the
9 President as...
- 10 **CHIEF JUSTICE B. R. GAVAI:** Well, then we will have to leave all other work and only
11 devote ourselves to giving advice to the Honourable President under 145(3).
- 12 **TUSHAR MEHTA:** My Lord, the difficulty would be, it would be a matter between Your
13 Lordships and the President. There would not be anyone else. Your Lordship says that, no,
14 there is no repugnancy.
- 15 **CHIEF JUSTICE B. R. GAVAI:** No, but then under 145(3), we have to sit in a bench of five
16 for giving that opinion.
- 17 **TUSHAR MEHTA:** Minimum five, My Lord.
- 18 **CHIEF JUSTICE B. R. GAVAI:** Minimum five, yes.
- 19 **TUSHAR MEHTA:** Minimum five is when the Constitution was framed, where the total
20 strength was seven judges. It is that, My Lord...
- 21 **CHIEF JUSTICE B. R. GAVAI:** So, now you want to make it 21?
- 22 **JUSTICE VIKRAM NATH:** At least.
- 23 **CHIEF JUSTICE B. R. GAVAI:** Out of 34?
- 24 **TUSHAR MEHTA:** My Lord, difficulty is suppose the President comes before... the
25 Honourable President requests Your Lordships' opinion, Your Lordship says, either way that
26 it is not repugnant. But I am a citizen of India. I am affected by that Act. How do I challenge

1 that Act before the High Court because it has already got an approval from Your Lordships at
 2 a pre-Act stage? Therefore, My Lord, this question. I'll not labour it, My Lord, beyond the
 3 point. Then, My Lord, may kindly see... and another point, My Lord, just for the purpose of
 4 stating. My Lord, Article 143 is an enabling or empowering provision. It's not a...

5 **CHIEF JUSTICE B. R. GAVAI:** It is a discretion of the President.

6 **TUSHAR MEHTA:** It is a discretion. It's not a mandate.

7 **CHIEF JUSTICE B. R. GAVAI:** Whether the President wants to seek advice or not, it is for
 8 her or him to decide.

9 **TUSHAR MEHTA:** Advice is always a discretion, whether to take advice.

10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Unless the President making a power,
 11 more justice to empower.

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

13 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's what actually he invokes...

14 **TUSHAR MEHTA:** It's an enabling provision, My Lord.

15 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** ...to invoke that for the thing, invoke
 16 that, but doing justice..

17 **TUSHAR MEHTA:** That is what, My Lord, I have... page 327 is this question. I'll not labour
 18 much on this. In page 327, "In light of the Constitutional Scheme governing the powers of the
 19 President..." Your Lordship gets it? And My Lord, I am not arguing as an appeal.

20 **CHIEF JUSTICE B. R. GAVAI:** It is all connected. All these three are connected.

21 **TUSHAR MEHTA:** I'm not arguing an appeal because this question is likely to arise now.
 22 Therefore, I'm before Your Lordships under 143. It's not an intra-Court appeal. The argument
 23 from the other side would be that you will be sitting in appeal. I'm not...

24 **CHIEF JUSTICE B. R. GAVAI:** No, that preliminary objection has already been heard.

25 **TUSHAR MEHTA:** Yes. Then, My Lord, Your Lordships have seen the question? My Lord,
 26 Justice Narasimha has seen? Please come to page 370 directly, My Lords.

1 **CHIEF JUSTICE B. R. GAVAI:** 370.

2 **TUSHAR MEHTA:** 370. My Lord, this is deemed assent. Whether there can be a deemed
3 assent, My Lord, this is a facet of Article 142.

4 **JUSTICE SURYA KANT:** 370 of?

5 **TUSHAR MEHTA:** 370.

6 **CHIEF JUSTICE B. R. GAVAI:** 370 of the submissions.

7 **TUSHAR MEHTA:** 370.

8 **CHIEF JUSTICE B. R. GAVAI:** Of the submissions.

9 **TUSHAR MEHTA:** My Lord, this is a limb of Article 142. Your Lordships are aware of Article
10 142. My Lord, I am not citing any judgments. I have quoted, My Lord, for Your Lordships'
11 ready reference, but deemed assent is granted under Article 142. The question is, My Lord, can
12 this Honourable Court substitute itself in place of another Constitutional functionary, and do
13 what the Constitution requires that another functionary to do? Deemed assent would mean,
14 Your Lordships substituted Your Lordships as the Governor, and Your Lordships declared that
15 the assent is deemed to have been granted. My Lord, on this, please come to page 375. My
16 Lord, 142 cannot be used to amend the Constitution. My Lord, forget deemed assent for
17 reading time limits, for directing time limits, for reading... for directing a manner of exercise
18 of power, etc., etc., is not part of Article 142. That is my respectful submission.

19 That Your Lordships have used, My Lord, to do complete justice when there is a cause, when
20 there are two Parties, where there is no other Constitutional or Legal solution, but it can never
21 be used for... to amend the Constitution. And so far as deeming is concerned, please come to
22 page 375. We have collated the provisions of the Constitution...

23 **CHIEF JUSTICE B. R. GAVAI:** ...wherever deeming is provided for.

24 **TUSHAR MEHTA:** Wherever deeming is provided... contemplated, the Constitution
25 provides. That if this doesn't happen within this time, it is deemed to have happened. That
26 only the Constitution can do, and not, My Lord, under 142. My Lord, the one question, Justice
27 Narasimha initially said, that Article 32, and 300, and 131, that Your Lordships may perhaps
28 not like to answer that question.

29 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** I issued, that's all.

1 **TUSHAR MEHTA:** No, that can be kept open. My Lord, I have no difficulty. Otherwise, we
 2 can assist Your Lordships. Whether a State can file a petition under Article [INAUDIBLE]
 3 when there is a....

4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The last issue, the last question that
 5 are posed to us.

6 **TUSHAR MEHTA:** 397, My Lord.

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Read that.

8 **TUSHAR MEHTA:** Because this is a Federal dispute, a dispute between State and the Centre,
 9 of course, through President and through Governor, but ultimately, dispute between two
 10 federating units. Question 14, "Does the Constitution bar any other jurisdiction of the Supreme
 11 Court to resolve dispute between the Union Government and the State Government, except by
 12 way of a suit under Article 131 of the Constitution of India." All federal questions, My Lord, are
 13 amenable under 131. My Lord, tomorrow, Your Lordships may have a writ petition by one State
 14 against another State regarding some other dispute.

15 For that, 131 is the Provision, Constitutional Provision. That all Federal issues amongst
 16 federating units, State-Centre, State, two States, etc., will be adjudicated upon only and only
 17 by this Court only, but under 131. Whether a 32 petition would lie because 32 petition lies only
 18 for violation of Fundamental Rights.

19 **CHIEF JUSTICE B. R. GAVAI:** Fundamental Rights. But you know the nature of 32
 20 petitions that we are faced with every day, in and out.

21 **TUSHAR MEHTA:** This is the time, My Lord, now to say that 32 is something...

22 **KAPIL SIBAL:** I think that you need not answer.

23 **TUSHAR MEHTA:** It's a very sacrosanct remedy.

24 **KAPIL SIBAL:** Such a question need not be answered in this fashion, My Lord. That's my
 25 respectful submission.

26 **TUSHAR MEHTA:** My Lord, let me also consider...

27 **KAPIL SIBAL:** Especially if it does not directly arise...

- 1 **CHIEF JUSTICE B. R. GAVAI:** We will keep it for some other time.
- 2 **TUSHAR MEHTA:** Yes, My Lord, I'll make a request. But this is a Presidential reference,
3 not a petition or SLP. Therefore, instead of my taking a decision...
- 4 **CHIEF JUSTICE B. R. GAVAI:** No, no. We will say that in the facts.
- 5 **TUSHAR MEHTA:** Can I come back, My Lord? If necessary, I'll take 20 minutes.
- 6 **CHIEF JUSTICE B. R. GAVAI:** No, no. There is ample time. You can come back by
7 Tuesday.
- 8 **TUSHAR MEHTA:** Therefore, I'm saying, but I'll have to take instructions, My Lord.
9 Presidential reference has its own sanctity, My Lord. It cannot be...
- 10 **CHIEF JUSTICE B. R. GAVAI:** If it comes from the Honourable President that the
11 Honourable President doesn't desist from this question.
- 12 **TUSHAR MEHTA:** Therefore, My Lord, let me have that.
- 13 **KAPIL SIBAL:** Otherwise, it doesn't arise also.
- 14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** What is the direction on Tamil Nadu
15 case...
- 16 **CHIEF JUSTICE B. R. GAVAI:** We know what happens to 131 suits.
- 17 **KAPIL SIBAL:** Yes, yes.
- 18 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Yes.
- 19 **TUSHAR MEHTA:** But again, My Lord...
- 20 **CHIEF JUSTICE B. R. GAVAI:** Now, I couldn't even frame the issues between you and Mr.
21 Kapil Sibal?
- 22 **TUSHAR MEHTA:** My Lord, I'm posing a question to myself on a lighter side. Can, My Lord,
23 on that ground, the President frame it? That is Separation of Powers, My Lord. There are
24 always problems, My Lord. There are always issues which are genuine issues. Your Lordships
25 are flooded with litigation.

- 1 **CHIEF JUSTICE B. R. GAVAI:** Let us not touch those issues. Those are...
- 2 **TUSHAR MEHTA:** But I'll, My Lord, take instruction because I can't withdraw...
- 3 **CHIEF JUSTICE B. R. GAVAI:** No, it's better you first...
- 4 **TUSHAR MEHTA:** Take instructions.
- 5 **CHIEF JUSTICE B. R. GAVAI:** Yeah, Take instructions.
- 6 **TUSHAR MEHTA:** My Lords were asking something, My Lord Narasimha, I'm extremely
7 sorry.
- 8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** I just wanted to see where the
9 direction in Tamil Nadu case, about directing it.
- 10 **CHIEF JUSTICE B. R. GAVAI:** The Honourable President to seek opinion of this Court.
11 Where is the direction to that judgment?
- 12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Opinion.
- 13 **TUSHAR MEHTA:** Yes, I'll just... on prudence, My Lord?
- 14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** No, no, that direction.
- 15 **CHIEF JUSTICE B. R. GAVAI:** Tamil Nadu judgement.
- 16 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** When there is a repugnancy, the
17 President must seek the opinion of, how is it couched, you just say...
- 18 **TUSHAR MEHTA:** My Lord, Page 12575, direction number XX. Your Lordship gets, My
19 Lord? May I read, My Lord?
- 20 **CHIEF JUSTICE B. R. GAVAI:** It is in which volume?
- 21 **TUSHAR MEHTA:** It is Volume 531, page 12575.
- 22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** President must be guided.
- 23 **CHIEF JUSTICE B. R. GAVAI:** Page number?

- 1 **TUSHAR MEHTA:** Page 12575. There are other places also, but this is in the direction
2 portion.
- 3 **JUSTICE VIKRAM NATH:** XX or IX?
- 4 **TUSHAR MEHTA:** XX.
- 5 **JUSTICE VIKRAM NATH:** XX.
- 6 **TUSHAR MEHTA:** Your Lordship gets, My Lord?
- 7 **CHIEF JUSTICE B. R. GAVAI:** Yes.
- 8 **TUSHAR MEHTA:** "Whenever in exercise of the powers under Article 200 of the
9 Constitution, a Bill is reserved for consideration of the President on grounds of patent
10 unconstitutionality that are of such a nature so as to cause peril to the principles of
11 representative Democracy, the President must be guided by the fact that it is the Constitutional
12 Courts which have been entrusted with the responsibility of adjudicating upon questions of
13 Constitutionality and Legality of an Executive or Legislative action. Therefore, as a measure of
14 prudence, the President ought to make a reference to this Court in exercise of his powers."
15 Otherwise, President would be in contempt. Even repugnancy is ultimately to be decided by
16 Your Lordships, My Lord.
- 17 **CHIEF JUSTICE B. R. GAVAI:** No, repugnancy at the stage prior to consideration by the
18 Honourable President.
- 19 **TUSHAR MEHTA:** Therefore, the question, that can it be examined at a stage anterior to it
20 becoming an Act?
- 21 **CHIEF JUSTICE B. R. GAVAI:** At least, Mr. Sibal has considered that he will not argue on
22 that.
- 23 **KAPIL SIBAL:** My Lord, there are better things to...
- 24 **CHIEF JUSTICE B. R. GAVAI:** Tacitly, yes. Dr. Singhvi may.
- 25 **ABHISHEK MANU SINGHVI:** I am reserving my comment till next week, My Lords.
- 26 **TUSHAR MEHTA:** My Lord, these are my respectful submissions. If there is anything to be
27 in the Rejoinder, we'll submit, My Lords.

- 1 **CHIEF JUSTICE B. R. GAVAI:** Who else are in the argument? Mr. Maninder Singh, Mr.
2 Srivastava?
- 3 **TUSHAR MEHTA:** My Lord, Mr. Salve would be assisting Your Lordships. Mr. Kaul, Mr.
4 Maninder Singh. Perhaps, Mr. Jethmalani, but we'll My Lord adjust...
- 5 **CHIEF JUSTICE B. R. GAVAI:** Mr. Guru, Guru is also there.
- 6 **TUSHAR MEHTA:** Yes, Guru is here, I am sorry. And Mr. Navare is also there, My Lord.
- 7 **CHIEF JUSTICE B. R. GAVAI:** But you divide the timing somehow yourself for Tuesday.
- 8 **TUSHAR MEHTA:** We shall.
- 9 **NEERAJ KISHEN KAUL:** My Lords, we'll do that. We'll finish on Tuesday, My Lord. We'll
10 do that.
- 11 **CHIEF JUSTICE B. R. GAVAI:** And that by 04:00.
- 12 **NEERAJ KISHEN KAUL:** Absolutely, not the other matter.
- 13 **JUSTICE VIKRAM NATH:** In any case, before 04:00.
- 14 **CHIEF JUSTICE B. R. GAVAI:** You people sit till 05:30.
- 15 **NEERAJ KISHEN KAUL:** Yes, I plead guilty to it, My Lords.
- 16 **CHIEF JUSTICE B. R. GAVAI:** We wanted to finish it before we start this.
- 17 **NEERAJ KISHEN KAUL:** Yes, yes, My Lords. Yes. May I, with Your Lordships' permission?
18 Some of the issues will be overlapping because we have to present our...
- 19 **CHIEF JUSTICE B. R. GAVAI:** Your arguments always begin that I will never repeat what
20 has been already said. That is only to be followed in briefs.
- 21 **NEERAJ KISHEN KAUL:** Yes. But, My Lords, the nature is such that I have to repeat some
22 of this...
- 23 **CHIEF JUSTICE B. R. GAVAI:** The ordinary matter that is followed in briefs. So in such a
24 matter, it is gone to it.

- 1 **NEERAJ KISHEN KAUL:** Yes. My Lords, firstly...
- 2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Do you have submissions? Are your
3 submissions here?
- 4 **NEERAJ KISHEN KAUL:** No, My Lords. I'll formulate with the next...
- 5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We are just asking.
- 6 **NEERAJ KISHEN KAUL:** ...one hour. I'll formulate in my own words, some of the issues,
7 important issues.
- 8 **CHIEF JUSTICE B. R. GAVAI:** Yes, yes.
- 9 **NEERAJ KISHEN KAUL:** My Lords, as far as construction of Article 200 is concerned.
- 10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** You are for which State?
- 11 **NEERAJ KISHEN KAUL:** For the State of Madhya Pradesh.
- 12 **CHIEF JUSTICE B. R. GAVAI:** As far as...?
- 13 **NEERAJ KISHEN KAUL:** As far as the construction of Article 200 is concerned, My Lords,
14 the issue of Governor sitting on a Bill, not acting, what are the options available to the Court,
15 I'll deal with later. That has issues of justiciability, judicial review in it, I'll deal with it later.
16 On the pure construction of the Article itself. Our respectful submission for Your Lordships'
17 kind consideration is...
- 18 **CHIEF JUSTICE B. R. GAVAI:** No, you formulate your proposition. As far as construction
19 of Article 200 is concerned...
- 20 **NEERAJ KISHEN KAUL:** ...concerned, there are three options in the main body of the
21 Article.
- 22 **CHIEF JUSTICE B. R. GAVAI:** In the main provision?
- 23 **NEERAJ KISHEN KAUL:** Yes. Each have a finality and a consequence attached to them.
24 And each have to be preceded by an affirmative act of a declaration.
- 25 **CHIEF JUSTICE B. R. GAVAI:** And each...?

1 **NEERAJ KISHEN KAUL:** Each is followed by... each is preceded by an affirmative act of a
2 declaration. The words used are 'shall declare' and then the words used are 'either' that he
3 assents to the Bill.

4 **CHIEF JUSTICE B. R. GAVAI:** Each is preceded by an act of declaration.

5 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Declaration.

6 **NEERAJ KISHEN KAUL:** Declaration, which says that either that he assents to the Bill or
7 that he...

8 **CHIEF JUSTICE B. R. GAVAI:** Therefore, since you begin, now it has to be preceded by a
9 declaration?

10 **NEERAJ KISHEN KAUL:** Yes.

11 **CHIEF JUSTICE B. R. GAVAI:** So, if the Honourable Governor for time immemorial
12 doesn't even declare that he is withholding the sanction, then even in such a case, this Court
13 would be powerless.

14 **NEERAJ KISHEN KAUL:** My Lords, that is why I respectfully submitted when I opened
15 that the issue of justiciability and the supposed inaction of some Governor, I'll deal with later.
16 Let me first deal with the construction of Article 200, and then what would be the options
17 available to Your Lordships in exercise of Your Lordships' jurisdiction if a situation does
18 emerge where there is a Governor who's been sitting on a Bill for years, not acting on it. We
19 had the benefit of Your Lordships' views and I'll attempt to address that question later. But for
20 the moment, My Lords, let me first address 200 as it stands, the reading of 200. Now, My
21 Lords, each of these actions, as I said, declarations, has a consequential effect. In the case of
22 an assent, it becomes an Act, the Bill. In the case of withholding assent, Constitution Benches
23 have said that the Bill falls.

24 **CHIEF JUSTICE B. R. GAVAI:** Falls unless.

25 **NEERAJ KISHEN KAUL:** My Lords, I'll come to that. I'll come to that. And the third part
26 is, it goes to the President. It is reserved and goes for the opinion of the President too. The
27 fourth option, My Lords, is actually in the nature of what fell from My Lords, more in the
28 nature of a preliminary option. That is, as part of the consultative process because as Your
29 Lordships will recollect, Article 396, where the sub-chapter begins, the heading is 'Legislative

1 Procedure'. And Your Lordships have said that even the Governor's decision in this is part of
2 the Legislative process.

3 **CHIEF JUSTICE B. R. GAVAI:** It's a part of the Legislature.

4 **NEERAJ KISHEN KAUL:** Legislature and Legislative process. So heading is 'Legislative
5 Procedure'. 196 is preceded by saying 'Legislative Procedure'. And I'll show the judgment, My
6 Lords. I'll show the judgment on the point. The purpose of that is, My Lords, under the Proviso
7 is that there is a consultative process also envisaged, where the Governor may send
8 recommendations, may want the House to reconsider. It could be a case where he's willing to
9 assent, but feels certain things require a bit of tweaking, may think that there are
10 Constitutional concerns or issues of repugnancy or many other issues and I need to send it to
11 the President. But before sending it to the President, let me at least first send it to the House,
12 expressing what my views are. And after that, it comes, I can always send it back. What he
13 can't do after returning it, is that he cannot thereafter himself withhold assent. Only word used
14 there is 'shall not withhold assent', shall assent or reserve for the President are not mentioned
15 there. That's the only thing, the only option which goes away after you return the Bill. But this
16 returning the Bill, My Lords, (a) is presentation to him of the Bill for assent. The words used
17 in the proviso are 'not' on withholding of assent, he must return it. The words used are
18 'presentation to him of the Bill for assent'.

19 Now, if return of a Bill was to be treated as an adjunct, as has been sought, to withholding of
20 assent, it could have easily said in the main body withhold assent and return. The words used
21 in the proviso are "as soon as possible after presentation to him of the Bill for assent." And I'll
22 tell Your Lordships why the words used 'as soon as possible here are'. The reason 'as soon as
23 possible here are' that the framers of the Constitution imbibed an expediency to it, given that
24 this is really the preliminary option. Where first the consultative process takes place before he
25 could exercise any of the three other options. It's not that he needs to do it, but if he chooses
26 to do this, then let it come back after that so that either of the three options which are there in
27 the main part, could be exercised. The reason, My Lords, the Constitution Bench Judgment,
28 after saying he has three options referring to the main part, adds the word 'unless' to the
29 second option and does not add it to any other option is this My Lords, that if the Honourable
30 Governor gives his assent, naturally the Bill becomes the Act; it doesn't fall through. If he
31 reserves it and sends it to the President, it still is a Bill which goes to the President for his
32 consideration. It is only in the case of where the withholding of the Bill takes place by a
33 declaration that it falls through. So the words used are in the judgment are that this bill will
34 fall through unless of course...

1 **CHIEF JUSTICE B. R. GAVAI:** Unless.

2 **NEERAJ KISHEN KAUL:** ...it is sent to the, that is the purpose of the Bill. That unless in a
3 Constitution Bench judgment can't be picked up to mean that the proviso to Article 200 says
4 that the return of the Bill is an adjunct to withholding of assent. That's why My Lords, I
5 respectfully started by saying that the first words in Article 200 are a positive affirmative act
6 of shall declare and shall declare with those three options. Shall declare withholding assent, it
7 falls. Shall declare giving his assent, it becomes an Act. Shall declare, it is reserved for the
8 President, it goes to the President. But there is a preliminary option given there, which, of
9 course, the rider that if you exercise that option, then one of those three options are taken away
10 from you, which is the second option of withholding assent. That goes. There's no doubt about
11 it. No quibbling with that.

12 **CHIEF JUSTICE B. R. GAVAI:** That goes so, either he has an option either to give assent
13 or to send it to the President. That would be your submission.

14 **NEERAJ KISHEN KAUL:** Grateful, My Lord, because... I am very grateful to the
15 Honourable The Chief Justice, that the words used then in the proviso are the Governor shall
16 not withhold assent therefrom. It could have said, shall assent, didn't say that. Shall not
17 withhold is the second option...

18 **CHIEF JUSTICE B. R. GAVAI:** The option of withholding goes.

19 **NEERAJ KISHEN KAUL:** Yes.

20 **CHIEF JUSTICE B. R. GAVAI:** But still according to you two options remain.

21 **NEERAJ KISHEN KAUL:** Yes.

22 **CHIEF JUSTICE B. R. GAVAI:** Either to give assent or send it to the President.

23 **NEERAJ KISHEN KAUL:** That's right. Because My Lords, as I respectfully submitted, the
24 whole philosophy behind it is that as being part of the Legislative procedure or process, there
25 is also an inbuilt consultative mechanism and I'll come to some of these memorandums My
26 Lords, when I come to the issue of timeline and I'll show to Your Lordships. That even Dr.
27 Ambedkar, while dealing with the duties of the Governor, said he must advise. It is his duty to
28 advise. It is his duty to interact with the Ministry's concern on proposed legislations. I'll come
29 to that Article.

30 **CHIEF JUSTICE B. R. GAVAI:** Friend, philosopher and guide.

NEERAJ KISHEN KAUL: Friend, philosopher and guide. Very grateful. So under Article 167 of the Constitution, My Lord a Chief Minister is duty bound to ensure that all Ministries send the requisite information and material to the Governor on any proposed Legislation, and I'll build that argument as I go along. The purpose being that he is not sitting there as a rubber stamp. That is why judgments of this Court have held that there is explicit discretion vested, and there is implicit discretion vested in the Governor. Word 'discretion' may not have been mentioned in Article 200, but Your Lordships in Your Lordships' various Constitution Benches have said he's not bound by the aid and advice, irrespective of the aid and advice, the discretion is there to act on his own. It is part of that consultative process that he, in his wisdom, may be with recommendations, maybe without recommendations, maybe with suggestions, maybe without suggestions, sends a Bill back as a fourth option to the Assembly to debate on it. He no doubt in the process then, gives up his second option of withholding. That's the framer's thought is the best option. That's in their wisdom they've decided. We are bound by it. But to say that the proviso means that the moment you withhold assent, you are duty bound to send it to the Legislative Assembly is wrong, because, My Lord, neither does the Constitution provide for it, nor does that textual context provide for it, and there is no basis for it to come to this conclusion at all. And that is why I started by saying, My Lords, that the word 'shall declare' and all Constitution Benches, even for the main part have said three options, and the words used are 'either'. 'Either' are all three options mentioned there. There is no basis to say that because it uses the word 'as soon as possible', this is an adjunct to withholding and thus should be sent back. There is no Constitutional basis for this at all.

My Lords, my next argument for Your Lordship's kind consideration under the same head is, that if Your Lordships were to also see the historical significance and evolution of Article 200, Your Lordships would see that under the Government of India Act 1919, under Section 12 return of the Bill for reconsideration to the Council was an option. Withholding of assent was also an option. It wasn't that it was an adjunct. It was an option. And the words My Lords used in the Article were, 'instead of declaring that he assents to or withholds his assent from the Bill, return the Bill to the Council for consideration, for reconsideration.'

CHIEF JUSTICE B. R. GAVAI: We need not go to the pre-independence statutes because 200 has been now enacted after due deliberations in the Constituent Assembly, and therefore we could be guided by the deliberations in the Constituent Assembly rather than going to the...

NEERAJ KISHEN KAUL: Absolutely. No, My Lords, I'm very grateful. The only reason I said was...

1 **CHIEF JUSTICE B. R. GAVAI:** We will follow up the learned Solicitor in that rather than
2 following the British laws now we follow the...

3 **NEERAJ KISHEN KAUL:** Yes, My Lords, except for saying that this proviso always existed
4 as an option. That's the only limited point I'm making. I'm not saying that Your Lordship needs
5 to go to the Government of India Acts for interpretation, but to have it as an option is not an
6 unknown thing. It is historically, as an independent option always existed. And in fact, My
7 Lords, only to this limited extent, the Government... it's really a discretion argument, the
8 Government of India Act, 1935 had the word 'discretion' in it. Article 200 did not have the
9 word 'discretion' in it. And despite that Constitution Benches of this Court said that
10 irrespective of the aid and advice of the Council of Ministers, independent discretion is vested
11 in the Governor while exercising power under Article 200. The purpose I'm saying so, My
12 Lord, when I marry it into the time argument, the timeline argument is, the Constitution
13 envisages are back and forth between the State and the Centre, between the Ministry and the
14 Governor, information being given, deliberation, application of mind, formation of opinion,
15 sending back to the Assembly for reconsideration. It's a whole process which is provided for.
16 It's not as if a Bill comes, immediately declare one way or the other, and that's the end of it.
17 That's not what it envisages. My second argument, My Lords...

18 **CHIEF JUSTICE B. R. GAVAI:** Thought the word 'discretion' is not mentioned...

19 **NEERAJ KISHEN KAUL:** Yes.

20 **CHIEF JUSTICE B. R. GAVAI:** But still, options are given. So when more than one options
21 are given, it is presumed that there is a discretion.

22 **NEERAJ KISHEN KAUL:** Yes, yes.

23 **CHIEF JUSTICE B. R. GAVAI:** And Article 163 discussions would also show that...

24 **NEERAJ KISHEN KAUL:** Absolutely.

25 **CHIEF JUSTICE B. R. GAVAI:** That they said that Dr. Ambedkar as well as T. T.
26 Krishnamachari, they said that as and when we progress towards the other Articles, the
27 provision in 163 is to safeguard that wherever discretion is provided in the foregoing Articles,
28 same would be preserved. It can't be a [UNCLEAR] generalist speaker.

29 **NEERAJ KISHEN KAUL:** I can't put it better. And 163(1) and 163(2) both. And then the
30 discussion, on it says, that there is explicit discretion, there is implicit discretion and clearly

1 this is a case which is now interpreted no longer *res integra* that that discretion does exist,
 2 and for good reason it exists. My Lords one more question, My Lord, and justice in particular,
 3 put to me when I briefly intervened on the last date, was that if one option is exercised, would
 4 it mean when we are answering a constitutional reference, would it render the other options,
 5 *otiose*? My Lords, that's a question. Please correct me if I'm wrong. That's a question which
 6 fell from My Lords. The answer to that would be, my respectful submission would be, the very
 7 fact that the Article gives three or four options, obviously gives you a choice to choose one.
 8 Merely because you choose one, does not make the others *otiose*. It's a matter of choice. So if
 9 for instance, an assent is given, naturally, then assent can't be withhold. Then it naturally can't
 10 be sent to the President. If it is sent to the President, naturally it can't be withheld or assent be
 11 given. So the natural consequence of opting for one of the four options is that the others have
 12 not been opted for, but this is not an *otiose* situation where an interpretation to a Clause or a
 13 part of the Constitution renders another Article or a Clause as what happens, say in any other
 14 case, *otiose*. It's not an *otiose* situation, that's all that I'm saying, My Lords. It's an exercise of
 15 discretion by the Governor on one of the options provided to me.

16 **JUSTICE SURYA KANT:** The other facet of this very argument was that whether the power
 17 of the Governor to withhold also include the power to withhold temporarily.

18 **NEERAJ KISHEN KAUL:** My Lords, yes.

19 **JUSTICE SURYA KANT:** The question is not taking away the power. Question of reading
 20 the power of the Governor, whether the power to withhold, also include the power to withhold
 21 temporarily?

22 **NEERAJ KISHEN KAUL:** To answer that, and taking cue from what fell from Justice
 23 Narasimha yesterday, that, that is why I started by saying that also the proviso, in a way,
 24 becomes out of the four, a kind of...

25 **CHIEF JUSTICE B. R. GAVAI:** Option.

26 **NEERAJ KISHEN KAUL:** ...the first preliminary option of before taking... all three others
 27 have a categorical finality to it. Assent, Act, withhold, falls, reserve for President, goes to the
 28 President. So before that, as part of the Legislative process, as part of the consultative process,
 29 send it. So to that extent, My Lords, that's what my answer is.

30 **CHIEF JUSTICE B. R. GAVAI:** According to you it's possible for the Governor, for the
 31 Honourable Governor to first exercise the option under proviso. Then, after the Bill comes,
 32 then exercise either of those three options?

1 **NEERAJ KISHEN KAUL:** Either of the two.

2 **CHIEF JUSTICE B. R. GAVAI:** Either of two, because 'withhold it' goes.

3 **NEERAJ KISHEN KAUL:** That he knows the moment he sends it back, he is given because
 4 the Constitution mandates that, even if he wanted, he can't do that. So that goes. But the other
 5 two options remain. But he thinks in his wisdom, and I said, My Lord, there may be cases leave
 6 aside withholding, there may be cases where the Governor actually feels this is a Bill which is
 7 fit for an assent. But I feel something needs to be tweaked or changed. Let me send it back
 8 once. Or he may think, yes, there are serious constitutional concerns of repugnancy. Or
 9 otherwise I need it to be sent to the President. But before it is sent to the President, let me first
 10 suggest to the House...

11 **CHIEF JUSTICE B. R. GAVAI:** Let them have an opportunity to...

12 **NEERAJ KISHEN KAUL:** Yes. Let them give it. So, that is why I respectfully submitted this
 13 whole argument that a proviso is a necessary adjunct to option two, is wrong. It is contrary to
 14 the bare reading of the provision itself, and there is a reason why it's been put the way it's been
 15 put. An option, as a fourth option is nothing new, which has been done. It's not an argument
 16 being made by us for the first time. It has a historical basis. That's the only limited point, I said
 17 this one.

18 **JUSTICE SURYA KANT:** All of you will also enlighten us that what is the meaning of 'shall
 19 declare'.

20 **NEERAJ KISHEN KAUL:** What My Lords?

21 **JUSTICE SURYA KANT:** What is the import and meaning of the expression 'shall declare'?

22 **NEERAJ KISHEN KAUL:** Shall declare. Yes My Lord.

23 **JUSTICE SURYA KANT:** Is it a kind of formal declaration, informal declaration, implied
 24 declaration, express declaration?

25 **NEERAJ KISHEN KAUL:** Yes, My Lords. Yes, My Lords. Implied or expressed, My Lords.
 26 I'll have a look at it. Very grateful, My Lords.

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END OF DAY'S PROCEEDINGS