

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: Today is the last day on your side?

NEERAJ KISHAN KAUL: Yes, My Lords.

CHIEF JUSTICE B. R. GAVAI: Last day on your side?

TUSHAR MEHTA: We have accordingly arranged.

CHIEF JUSTICE B. R. GAVAI: Yes, yes. That's okay.

RESPONDENT'S COUNSEL: I have left this thing of Chhattisgarh, I don't know for how long...

CHIEF JUSTICE B. R. GAVAI: No, we don't know. We are just... From day one, we have said that four days this side, four days this side and we have been telling the learned Attorney as well as SG that the timelines have to be followed. No, no. No accommodation. You redistribute the time amongst yourself, if you so desire. Please proceed.

NEERAJ KISHAN KAUL: My Lords, very briefly, I will just recap. I was concluding my arguments on the interpretation of...

CHIEF JUSTICE B. R. GAVAI: Already concluding...

NEERAJ KISHAN KAUL: Yes, on Article 200, My Lords. On Article 200. Just very briefly, I'll recap, and then go on to the next point. My Lords, I had respectfully submitted before Your Lordships...

CHIEF JUSTICE B. R. GAVAI: So, you stopped at three options.

NEERAJ KISHAN KAUL: Yes. So, I said that there are three clear options in the main part, which talk about "shall declare"; and each has a finality or a consequence attached to it. "Withhold of assent" means the Bill falls; "assent" means it becomes a legislation and "reservation for the President" means it goes to the President for his assent. The proviso is more in the nature of a preliminary option or a consultative...

CHIEF JUSTICE B. R. GAVAI: That you have already argued.

1 **NEERAJ KISHAN KAUL:** Very [UNCLEAR]. The words at the end of it, which are "shall
2 not withhold assent" have been sought to be argued to mean that, it is an adjunct to
3 withholding assent; which it is not.

4 **CHIEF JUSTICE B. R. GAVAI:** They have not yet started the argument.

5 **NEERAJ KISHAN KAUL:** No, My Lord, even in the ultimately, My Lords, somewhere or
6 the other, what was argued in the Tamil Nadu matter comes in, and that is, I am just saying
7 this that one of the arguments forwarded was, that since the last line of the proviso says, shall
8 not withhold assent. It necessarily means that the proviso is an adjunct to "withholding shall
9 declare" and "withhold assent". My Lords, as I respectfully submitted, that neither the textual
10 context indicates it. The judgments clearly say "shall fall" and unless can surely, even by the
11 ordinary dictionary meaning, as used in those judgments never be meant to mean that if you
12 withhold assent, it must be sent to the assembly. "Unless" can never mean that. "Unless" is a
13 consequence that it shall fall through, unless of course it is said, where then it's deliberated
14 again. That was as far as 200 is concerned. My next argument, My Lords, for Your Lordships
15 kind consideration and the historical significance I had shown, Your Lordships said there's no
16 need to go into it because there are judgments on the point. "Returning" was a distinct option
17 given, earlier from the 1919 Act, right through. "Return" was a distinct option. Three, in the
18 main part, and Proviso. There it was in the main part, in the 1919 Act, then it evolved and
19 became a proviso. But it was always a distinct option, given therein, My Lords.

20 The second point for Your Lordship's kind consideration, My Lords, is that, does discretion
21 exist in Article 200 and 201 or not. My Lords, Your Lordship's repeated judgments on the
22 points have said that, "this decision will be made irrespective of any advice from the Council
23 of Ministers and the exercise of this discretion; the Governor must discharge his duties to the
24 best of his judgment", is what **Shamsher Singh** says and followed then in **Nabam Rebia**
25 and **B. K. Pavitra**. It was again sought to be argued that discretion is completely bound, and
26 there is no independent discretion by the aid and advice that was specifically rejected and this
27 is what was there. Now, My Lord, please have Article 167 of the Constitution, for a minute.

28 **JUSTICE SURYA KANT:** 167?

29 **NEERAJ KISHAN KAUL:** 167. My Lords, it says, it shall be the duty of the Chief Minister
30 of each state, and please have (b), "to furnish such information relating to the administration
31 of the affairs of the State and proposals for legislation, as the Governor may call for." The *pari*
32 *materia* provision for the President My Lords is Article 78. The reason I'm citing this, My
33 Lords, is that even with regard to Article 167, which in the draft Constitution was Article 147,

1 it was sought to be argued that what is the need for information to be given to the Governor.
 2 For a proposed legislation why does Governor need information at all from the Ministry? Why
 3 is the Chief Minister or the Prime Minister, the words in 78 are Prime Minister, why is the
 4 Prime Minister or the Chief Minister duty bound to give information to the Governor, because
 5 after all, he just has to give his assent. And Dr. Ambedkar, My Lord's, there specifically said,
 6 that in fact, the Governor's duty and is part of his duty, he must get this information, because
 7 it is his duty to advise, to warn, to suggest, to suggest alternatives, to suggest reconsideration,
 8 is part of his duty. And he has to be given that information, because if you do not give this
 9 information, what is the Governor there for? That's what Dr. Ambedkar said, because he
 10 ultimately is not a representative of a political party, but represents the people of the state. As
 11 the President is the highest constitutional authority in the country represents the people, and
 12 Dr. Ambedkar went on to say that otherwise he would be an absolutely unnecessary
 13 functionary, no good at all. And then said, he's not a representative of the party. He's the
 14 representative of the...

15 **CHIEF JUSTICE B. R. GAVAI:** He is a vital link between the State Government and the
 16 Central Government.

17 **NEERAJ KISHAN KAUL:** Very grateful. Very grateful. And, My Lords, why I'm citing this
 18 example is that the reason information on proposed legislations. There are memorandums in
 19 existence where information when a Bill goes to the President or the Governor, memorandums
 20 on information is asked from Ministries on Centre- State implications, on repugnancy, on
 21 issues of constitutional concerns, and after this information is exchanged, an independent
 22 judgment, an application of mind takes place, and that is why the Constitution Benches say,
 23 irrespective of the aid and advice of the Council of Ministers. That's the point I'm seeking to
 24 make for Your Lordship's kind consideration. In fact, My Lord's and **BK Pavitra's** case...

25 **CHIEF JUSTICE B. R. GAVAI:** According to you, even if second time also, the Council of
 26 Minister reiterates the Bill still, the Governor has a discretion not to give assent to it.

27 **NEERAJ KISHAN KAUL:** No, My Lords, even if the Assembly reiterates the Legislation,
 28 the Constitution is very clear. Then, after that he can either give an assent or send it to the
 29 President. He shall not withhold assent. I'm not saying that he can still withhold assent,
 30 because that would be in the teeth of what the Constitution says. All that I am saying is, that
 31 the exercise of discretion by the President or the Governor as far as this issue is concerned
 32 involves an independent exercise of opinion and judgment. As far as shall withhold assent is
 33 concerned, as far as shall assent is concerned, as far as shall declare that it is being reserved to
 34 be sent to the President. It is his independent exercise is all that I am saying. I'm not for a

1 minute suggesting My Lords, that if he sends it for reconsideration is the fourth option as a
 2 part of a consultative process, because ultimately My Lords, the Governor under 168, is also
 3 part of the Legislature and Your Lordships have said that he is part of the legislative
 4 component, is what Your Lordship said. So, as part of that Legislative procedure and
 5 component, as part of it, if he sends it back with suggestions, with considerations as I
 6 respectfully submitted on the last date there could be cases where he's willing to give assent,
 7 because he feels some things need to be tweaked. It could be cases he feels, before it sent to
 8 the President, certain things need to be addressed, so that is part of that consultative process
 9 that he sends it back to, but, yes, of course, after that, if the legislature and its wisdom
 10 reiterates it, in whatever form, he is right to withhold those. But his right to withhold in the
 11 main part is an independent exercise of his discretion and the consequence of it is contained
 12 in the Constitution Bench judgments to say that it shall fall. That is what I was saying. The
 13 second argument...

14 **CHIEF JUSTICE B. R. GAVAI:** That has already been argued by the learned Solicitor.

15 **NEERAJ KISHAN KAUL:** Yes. So, the second argument that I'm making for Your
 16 Lordship's kind consideration is, this independent exercise of judgment and discretion as is
 17 borne out by these judgments. This is his judgment which matters. In fact, My Lord, in **B.K.**
 18 **Pavitra's** case an issue arose that when the Governor refers a matter for consideration of the
 19 President, should there be grounds on which he can refer it? My Lords, this Court answered it
 20 by saying that the framers of the Constitution deliberately and carefully eschewed defining the
 21 circumstances. You can't define circumstances under which a Governor refers to the President.
 22 There are issues and issues of constitutional concerns, complexities which will arise and you
 23 can't put them in a straightjacket formula. That will have to be left to the wisdom of the
 24 Governor and that's for him to define and decide. And they said that the very nature of
 25 conferment of power cannot be confined to specific categories or the words used by the
 26 Supreme Court. That's the very nature of conferment of power that is granted there. So you
 27 can't say this will be in this straight jacket formula, only then we'll do it. That has to be left to
 28 his wide discretion which is vested. Now My Lords, as far as the issue of discretion is
 29 concerned, My Lord, is as My Lord also pointed out under Article 163. (1) is by and under the
 30 Constitution, then there is 163(2). And Your Lordships in any number of judgments have said
 31 that it could be explicit or it could be implicit depending on the facts of a case. For instance,
 32 My Lords, under Article 174, normally My Lords held in **Shivraj Chouhan's** case and other
 33 judgments, a House is summoned or a session is summoned on the aid and advice of the
 34 Ministers. Yet, there can be a situation where the Governor is of the view that the Council of
 35 Ministers or the Government has lost the confidence of the House and in that case he's not
 36 going to wait. Which Council of Minister which has lost the confidence of the House is going

1 to suggest there should be a floor test? That's an independent view in discretion that he
 2 exercises under 174 to have a floor test or summoning the House to prove your majority on the
 3 floor of the House. All that I'm saying is, there are any number of instances where, My Lords,
 4 the discretion has been vested in the Governor or the President, whether explicitly or
 5 implicitly.

6 My next submission My Lords, for Your Lordship's kind consideration is on the issue of
 7 timelines. My Lords in ***Purushothaman Nambudiri***, the judgment which the learned
 8 Solicitor had also cited. It has been clearly held...

9 **CHIEF JUSTICE B. R. GAVAI:** Which judgement?

10 **NEERAJ KISHAN KAUL:** My Lords, ***Purushothaman Nambudiri***. Just give the
 11 citation to...

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

13 **NEERAJ KISHAN KAUL:** Yes. My Lords, that was 1961 SCC Online Supreme Court 361,
 14 Volume 3 of the compilation. It's a judgment of a constitution bank. The issue was also My
 15 Lords, does a Bill lapse with the Assembly, with the life of an Assembly? They said no. Even
 16 when life of an assembly comes to an end...

17 **CHIEF JUSTICE B. R. GAVAI:** It does not.

18 **NEERAJ KISHAN KAUL:** For the reason that there is no timeline provided.

19 **CHIEF JUSTICE B. R. GAVAI:** That the learned Solicitor has already pointed out.

20 **NEERAJ KISHAN KAUL:** Yes, so I said so, My Lord, the learned Solicitor pointed out there
 21 is no timeline. Where in fact, My Lord, the timeline requires to be provided, the timeline in
 22 the Constitution is categorically provided therein.

23 **CHIEF JUSTICE B. R. GAVAI:** That chart also learned Solicitor has...

24 **NEERAJ KISHAN KAUL:** Yes. So, for instance, under 201, there is a time period given.

25 **CHIEF JUSTICE B. R. GAVAI:** You may argue what is not argued.

26 **NEERAJ KISHAN KAUL:** Very well, very well, My Lords. So, My Lords, as far as timelines
 27 are concerned, My Lords, our respectful submission for Your Lordships' kind consideration is

1 that, again, as far as those memorandums, etc., are concerned where information from
2 Ministries is asked for, Memorandums are considered, et cetera; it is impossible to say that
3 within this timeline the Governor or the President must decide, because there will be all kinds
4 of procedure and substantial complexities. There will be issues. There will be a back and
5 forth...

6 **CHIEF JUSTICE B. R. GAVAI:** That is already argued.

7 **NEERAJ KISHAN KAUL:** Yes. Next point.

8 **CHIEF JUSTICE B. R. GAVAI:** At length.

9 **NEERAJ KISHAN KAUL:** At length. Next point for Your Lordships' kind consideration. My
10 Lords, Your lordships have time and again, on the issue of Judicial Review said, there is... and
11 on this I'll devote some time, My Lords, that...

12 **CHIEF JUSTICE B. R. GAVAI:** Scope of Judicial Review.

13 **NEERAJ KISHAN KAUL:** Scope of Judicial Review...

14 **CHIEF JUSTICE B. R. GAVAI:** While considering the discretion exercised by the
15 Governor...

16 **NEERAJ KISHAN KAUL:** That's right. Including the issue, My Lords, which My Lords
17 flagged to me, that suppose there's a constitutional vacuum, Your Lords were kind enough to...
18 That's a concern. I will deal with that. My Lords, there is no doubt that, in any number of
19 judgments, Your Lordships have held that the power of Judicial Review is implicit in a written
20 Constitution, unless expressly excluded. There's no doubt about it. It is written in for every
21 power vested under every provision. The power of Judicial Review is there. But Your Lordships
22 have also consciously, My Lords, in *A.K. Kaul*, downwards, in judgments, have held that, as
23 a facet of Judicial Review is justiciability. And there is a difference between Judicial Review
24 and justiciability of a particular action. And Your Lordships have also held...

25 **CHIEF JUSTICE B. R. GAVAI:** That is also argued by the learned...

26 **NEERAJ KISHAN KAUL:** My Lords, I need to argue something, My Lords. I am just
27 developing...

28 **CHIEF JUSTICE B. R. GAVAI:** No, you can argue. We are requesting please don't place
29 arguments which are already....

- 1 **NEERAJ KISHAN KAUL:** I'll just develop and just leave it.
- 2 **CHIEF JUSTICE B. R. GAVAI:** Otherwise Mr. Jethmalani will never get a chance.
- 3 **NEERAJ KISHAN KAUL:** Yes. No, My Lords...
- 4 **CHIEF JUSTICE B. R. GAVAI:** If all of you are going to again argue what has been argued
5 by the Solicitor.
- 6 **NEERAJ KISHAN KAUL:** No, My Lords we won't. The reason I'm saying so is, My Lords,
7 the reason I'm saying so, is that the action of Judicial Review is always tested on the touchstone
8 of the Constitution. Now, as far as justiciable, manageable standards are concerned, My Lords,
9 Your lordship says that where there exists none, the action is not susceptible to judicial
10 process. That's all that I am saying in these cases. Now why I am...
- 11 **CHIEF JUSTICE B. R. GAVAI:** Please repeat your argument.
- 12 **NEERAJ KISHAN KAUL:** My Lords, I am saying that where there are no justiciable
13 standards on a particular action...
- 14 **CHIEF JUSTICE B. R. GAVAI:** Where there are no justiciable standards...
- 15 **NEERAJ KISHAN KAUL:** For a certain action...
- 16 **CHIEF JUSTICE B. R. GAVAI:** One minute.
- 17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** No justiciable...
- 18 **NEERAJ KISHAN KAUL:** Manageable, justiciable, judicially manageable standards, is
19 what *A.K. Kaul* refers to.
- 20 **CHIEF JUSTICE B. R. GAVAI:** Judicially manageable...
- 21 **NEERAJ KISHAN KAUL:** Judicially manageable standards. Where there are no judicially
22 manageable standards to judge an action, it will not be susceptible to judicial process. So,
23 within Judicial Review, although it's inbuilt into the Constitution under every provision, there
24 will be actions which are non-justiciable because, as the Supreme Court says, there are no
25 judicially manageable standards for them. So, no one is saying that the power of Judicial
26 Review is not implicit. The power of Judicial Review is implicit in every provision, but there
27 will be certain powers, there will be certain discretions vested which do not have justiciability

aligned to them because they are incapable of being adjudicated upon, and I'll tell Your Lordships, I'll give Your Lordships examples as far as this exercise of power are concerned. Any judicially manageable standard requires an objective, ascertainable [UNCLEAR]. Now, effectively, My Lords, in exercise of all these decisions, there is a certain operational and substantial complexity, there are considerations of stakeholders, there are interstate relations, there are consultations with Ministries, there are private and public interests which are involved, there are constitutional conventions and not just basic fixed rules involved. And that is why I say, My Lord, this cannot be compared to the exercise of power under Article 356, and I'll just come to that. This is *sui generis* in itself as far as the exercise of power by the Governor and the President is concerned. Under 356, My Lords, for instance, and Your Lordships in **Bommai** and other judgments dealt with, there is a failure of a constitutional machinery. There is either a report from the Governor or otherwise and a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, that the Court felt in the given circumstances was something subject to Judicial Review and, of course, if arbitrariness or malafides are shown therein. All that I'm saying is, this form of judgment and exercise of opinion of the Governor and President by its very nature is not justiciable. Now, the question that Your Lordships posed to me on the last date.

CHIEF JUSTICE B. R. GAVAI: The discretion exercise by the Governor under 356?

NEERAJ KISHAN KAUL: Yes.

CHIEF JUSTICE B. R. GAVAI: Is justiciable?

NEERAJ KISHAN KAUL: Yes.

CHIEF JUSTICE B. R. GAVAI: Then why not a discretion...?

NEERAJ KISHAN KAUL: That's exactly what I'm answering that there, there are contours where it is justiciable, break down a machinery, failure, report of a Governor the Government cannot carry on any longer. All that I said was there are lot of substantial and constitutional complexities when a decision is made under 200 and 201. Stakeholders, interstate relations, constitutional concerns, constitutional conventions, and then a judgment in his wisdom is made on these parts. And that is why Your Lordship said that even an assent given by the President is non-justiciable. Your Lordships categorically held that neither the legality nor the deliberation, as far as the assent by the President is concerned is justiciable. In **Kaiser-i-Hind** and other judgments Your Lordships, have categorically held and annexed, I think, that the assent given by the President is non-justiciable. And why did Your Lordships say that the assent given by the President is not justiciable, I'm trying to draw sustenance through that

1 argument by saying, because there are no legally manageable standards to determine that.
 2 That's an issue which is decided in the wisdom by relevant material which is before them. And
 3 the argument cannot be, My Lords, the argument cannot be that what happens, what happens
 4 if a Governor sits on a Bill indefinitely? For the simple reason, My Lords that Your Lordships
 5 have time and again said that the Court will not likely presume abuse or misuse. And then
 6 what Your Lordships said that the...

7 **CHIEF JUSTICE B. R. GAVAI:** When the Power is exercised by the high functionary...

8 **NEERAJ KISHAN KAUL:** At the highest constitutional functionary of the country or of the
 9 state. And then the words used by Your Lordships were that the Court would as it should in
 10 *Bommai*, the words used were the Court would as it should tread verily making allowance for
 11 the fact that the President and the Union Council of Ministers are the best judges of the
 12 situation, that they alone are in a possession of information and material...

13 **CHIEF JUSTICE B. R. GAVAI:** President and Council of the Ministers.

14 **NEERAJ KISHAN KAUL:** And. "And" because that, there it was of the advice on dismissal.
 15 The issue here is they said the words used were that the Constitution has trusted their
 16 judgment in the matter. Why I am emphasizing this, My Lords, is that the starting point can't
 17 be that there will be a misuse. If there is a misuse, My Lords, the argument is not that the court
 18 is powerless.

19 The question is, is it something... very often, My Lords, Your Lordships have said in this and
 20 many other matters, Your Lordships has said and on many issues, Parliament shall rethink.
 21 Then Your Lordships have said that at the cost... In fact, the words used in one of the
 22 judgments was My Lords, at the cost of repetition, we observed that it is for the Parliament to
 23 take a call on that. There are issues which can only be decided by Parliament or in the political
 24 sphere. So, if a situation arises of an egregious conduct by the Governor or any other
 25 constitutional authority, then Parliament has to take care of it. The answer can't be, the answer
 26 can't be today to lay down a timeline and then say this timeline will be judicially reviewable.
 27 The answer can't be that and My Lords, My Lord the Chief Justice self had pointed out on the
 28 last date, I'm not even going the root of those *Telangana* and other judgments. Your
 29 Lordships said with regard to the Speaker. Your Lordship said Tribunal and not only that, My
 30 Lord, Your Lordship also said...

31 **CHIEF JUSTICE B. R. GAVAI:** There is no immunity available to the Speaker, when he
 32 acts as...

1 **NEERAJ KISHAN KAUL:** Not only that My Lord, the other thing which weighed with Your
 2 Lordship was that the life of an Assembly is five years. And why should anyone, why should
 3 anyone who is otherwise incurred the wrath of defection should continue as a member of the
 4 House and that was one of the considerations.

5 **CHIEF JUSTICE B. R. GAVAI:** On the same analogy when the Houses, both the Houses of
 6 the Legislature, on two occasions have given their approval to a particular Bill, why should the
 7 President sit on it, Governor sit on it for an indefinite period of time?

8 **NEERAJ KISHAN KAUL:** I am not for a minute suggesting, My Lord, that you should sit
 9 on it for an indefinite period of time. I am only arguing that...

10 **CHIEF JUSTICE B. R. GAVAI:** We may appreciate that we may not fix our timetable. 15
 11 days, 30 days, 30-45 days. But if somebody sits on Bill from 2020 to 2025, would the Court be
 12 still powerless?

13 **NEERAJ KISHAN KAUL:** My Lords, that is why I started on the presumption that...

14 **CHIEF JUSTICE B. R. GAVAI:** We appreciate your submission that for considering a
 15 validity of a provision, the abuse of process or the abuse of powers, when particularly they are
 16 exercised by the highest [UNCLEAR], should not be strictly assumed by the court. We
 17 appreciate your submission. That is also the submission made by the learned Solicitor.

18 **NEERAJ KISHAN KAUL:** And also My Lords, Your Lordship's judgment which say that
 19 the presumption is raised that the power will not be misused.

20 **CHIEF JUSTICE B. R. GAVAI:** Yes, we are aware about that.

21 **NEERAJ KISHAN KAUL:** Absolutely. So all that I am saying is My lord, if a situation like
 22 that arises, I am not for a minute suggesting that egregious conduct on the part of the
 23 Governor. Then the question is, who takes care of it. My respectful submission is, this is an
 24 area which is best left to Parliament to decide on. Because Your Lordships in many judgments
 25 have said, Your Lordships in many judgment have said that it is time for Parliament to rethink.
 26 Your Lordships have also said that it is for Parliament to take a call on that

27 **CHIEF JUSTICE B. R. GAVAI:** *Telangana* judgement...

28 **NEERAJ KISHAN KAUL:** Absolutely. In fact, I know those are, Your Lordships, the lines.
 29 However, at the cost of repetition we observe that it is for the Parliament to take a call on that.
 30 So, all that I am saying is My Lords, that ultimately when Your Lordships interpret a provision

1 also including the five Judges in *Manoj Narula*, Your Lordships said that ultimately some
 2 interpretation has to be based on some resting pillar or strength on the basis of some words in
 3 the Constitution. Your Lordships have repeatedly said that when an interpretation is given,
 4 there has to be a resting pillar. There has to be some strength to it, to words in the Constitution.
 5 You can't rewrite the Constitution. Those are Your Lordship's words, is all that I'm saying. So,
 6 an interpretation which completely rewrites or introducing timelines which are not conceived,
 7 which are not there, because it is presumed that if it is misused, this should be the timeline.
 8 That's why I said, My Lords, in all humility, the starting point of this debate can't be that there
 9 could be a vacuum, we apprehend someone could misuse, it may have happened in a particular
 10 case. I am not on any particular case, I'm on the principle. It can't be that the presumption will
 11 be that there will be a misuse. And thus we must, as a constitutional Court, set it right by
 12 setting down timelines. That's all that I'm saying. Because after all Your Lordships have said
 13 that it will not be likely presumed that the power will be abused and we'll tread very verily and
 14 carefully as far as these issues are concerned. That's all that I'm seeking to say.

15 **CHIEF JUSTICE B. R. GAVAI:** That's what the Solicitor has also said.

16 **NEERAJ KISHAN KAUL:** Yes. Now My Lords, the next point for your Lordship's kind
 17 consideration is...

18 **CHIEF JUSTICE B. R. GAVAI:** You call the same argument that why lawyers would not
 19 make it strong.

20 **NEERAJ KISHAN KAUL:** No, I'm just completing. I'm just completing. I'm just completing
 21 in 10. Give me 10 minutes and I'll complete it.

22 **CHIEF JUSTICE B. R. GAVAI:** We are only saying that it doesn't mean that you say...

23 **NEERAJ KISHAN KAUL:** No, we are just in ten minutes and we are completing.

24 **CHIEF JUSTICE B. R. GAVAI:** We appreciate it if somebody comes up with a new point.

25 **NEERAJ KISHAN KAUL:** Yes. My Lords. My Lords, as far as "deemed assent" is concerned,
 26 in any matter, was given therein, My Lord, under Article 142, my respectful submission is only
 27 one, My Lords, that this is completely impermissible, judicial reallocation of Constitutional
 28 functions from a high plenary constitutional authority that is the President or the Governor to
 29 the Supreme Court. It is completely impermissible, that such judicial reallocation under the
 30 constitutional functions can take place. It is impermissible. As far, My Lords, as the question
 31 of seeking the opinion of the Supreme Court is concerned before any assent being given, my

1 respectful submission is, My Lords, in repeated judgments of Lordships have held, that
 2 judgment opinion of the President on assent is non-justiciable. He weighs well within his
 3 rights to take a decision, and it's not an idle formality, when he takes this decision. It's in a
 4 discretion vested in him and not as an idle formality that he takes this decision. Whether it's
 5 under 200, 201 or Article 254 or any other article; and surely the opinion of the Supreme Court
 6 when he wants it, he seeks that opinion, and then it's for Your Lordships to answer or not
 7 answer it. I'm very grateful, My Lord. I won't take any more of Your Lordships' time.

8 **CHIEF JUSTICE B. R. GAVAI:** Thank you.

9 **NEERAJ KISHAN KAUL:** I am very, very grateful for Your Lordships' kind consideration.

10 **RESPONDENT'S COUNSEL:** Your Lordships, from Maharashtra, Mr. Harish Salve is
 11 appearing online, so Lordship, may...

12 **CHIEF JUSTICE B. R. GAVAI:** That you have to decide.

13 **TUSHAR MEHTA:** Yes, we have another sequence. We have a sequence.

14 **CHIEF JUSTICE B. R. GAVAI:** As per the sequence, Mr. Salve comes. Unmute *kar do*.

15 **HARISH SALVE:** May I please My Lords.

16 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Salve.

17 **HARISH SALVE:** My Lord, I have written out skeletal so that we can go quickly. I believe,
 18 starts at page 630.

19 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The submissions, is it?

20 **HARISH SALVE:** No, My Lord, it is not a detailed written submission, these are more like
 21 headline points and some arguments. And, I will quickly, only for giving the background of
 22 what the points which I would endeavour to underscore, My Lord. I may have to just state
 23 certain points, which Your Lordship may have heard. So, Your Lordship may just give me that
 24 accommodation. I will not argue those points. In the first five paragraphs, first four
 25 paragraphs, is what I call the background to the interpretation. Article 200 is a part of our
 26 Legislative procedure and that's noted. My Lords, before Your Lordships read this, may I tell
 27 My Lord, what is the nuance which I propose to place before Your Lordships' consideration?
 28 In my respectful submission, My Lord, we have to be careful we don't place the cart before the
 29 horse. We are a constitutional construct which resembles a federalism, which is like a

1 federalism. But the word federalism like all political constructs, may be of various kinds. Your
 2 Lordships may have heard this over and over again. The important point is, My Lord, how do
 3 we define our constitutional federalism? Do we look at our Constitution to see how a
 4 federalism had been created, or do we interpret the provisions relating to the relationship
 5 between the Union of the States with a *priori notion* that these have to be understood to
 6 confirm to some theoretical concept of federalism. And I make bold to say the framers of our
 7 Constitution have created a system in which the Union can refuse a Bill passed by an Assembly
 8 from becoming law. So My Lords, this what is uncharitably characterized as a veto, and I'll say
 9 why I call it uncharitably characterized, that exists anyway in the Constitution, unless we
 10 rewrite Article 201.

11 **CHIEF JUSTICE B. R. GAVAI:** So, according to you, the Union can reject a Bill passed by
 12 the offices of the State Legislature?

13 **HARISH SALVE:** Yes, My Lord. Should it, as a matter of high discretion. We always say...

14 **CHIEF JUSTICE B. R. GAVAI:** We are not going into question of should it or should it not.

15 **HARISH SALVE:** Exactly.

16 **CHIEF JUSTICE B. R. GAVAI:** According to you the Union has the power to do so.

17 **HARISH SALVE:** Yes, My Lord. And that is plain from the language of the proviso to 201.
 18 So, this entire exercise of trying to avoid a veto like power overlooks that the language of 201
 19 does not admit of any such limitation. Now, if that is the starting point of the debate and we
 20 give up the notion that finding a veto is antithetical or erodes a federalism as envisaged by the
 21 Constitution, then we come to very different conclusions. My Lord, two articles which have
 22 not been addressed are the width of 361 and Judicial Review and ultimately My Lords we all
 23 come to the... They will all lead to the same conclusion. Whether you look at it from the
 24 justiciability point of view or you look at it from the functional and the operational point of
 25 view of how these articles operate. The conclusion will be the same and that's what I proposed
 26 to put across for Your Lordships' kind consideration. If vetoes are not an anathema to the
 27 constitutional scheme, then let us start without any preconceived notions seeing what the
 28 language of Article 200 leads to.

29 **CHIEF JUSTICE B. R. GAVAI:** So, according to you the Governor has a veto power under
 30 Article 200 to withhold assent.

1 **HARISH SALVE:** My Lords, using words like veto perhaps are a uncharitable
2 characterization. The Governor has the power to withhold assent.

3 **CHIEF JUSTICE B. R. GAVAI:** You only argued that if vetoes are not anathema to the
4 Constitution...

5 **HARISH SALVE:** My Lords, I said what is uncharitably characterized as veto. My Lords, I
6 said what is uncharitably characterized as a veto. But it's a convenient shorthand expression.
7 My Lord I call it... That's why also, I said it's uncharitably characterized as veto. Veto has
8 certain pejorative consequences which we don't use for high functionaries. My Lord, a veto or
9 something you use for personal interest. Nobody here acts in personal interests. Now to get to
10 where I have, My Lord there are two or three basic points which we need to keep in mind and
11 this is our federalism. What defines our federalism? Let's be clear, My Lord. The Constitution,
12 if Your Lordships have para 1.2. I made this point, "We have a marked difference in the scheme
13 in relation to the legislative provisions relating to the Union and the role of the President, vis-
14 a-vis the Union Government as against the legislative provisions relating to the States." So we
15 start from there.

16 **CHIEF JUSTICE B. R. GAVAI:** Just for the sake of clarification...

17 **HARISH SALVE:** Yes?

18 **CHIEF JUSTICE B. R. GAVAI:** Your argument was that the Union has a right to reject a
19 Bill passed by the Legislature?

20 **HARISH SALVE:** Yes.

21 **CHIEF JUSTICE B. R. GAVAI:** So, whether that power can also be exercised by the Union
22 in respect of List II?

23 **HARISH SALVE:** Yes, I'll make it good. I'll make it good.

24 **CHIEF JUSTICE B. R. GAVAI:** Even if there is no repugnancy with the Central Law?

25 **HARISH SALVE:** Absolutely, My Lord. Under Article 201, there is no such limitation. My
26 Lord, we have always started this with certain preconceived notions. There is a separate...
27 254(2) is a different matter.

1 **CHIEF JUSTICE B. R. GAVAI:** What happens to the Constitution reserving subjects in List
 2 I only for the Union, subjects in List II only for the State Legislature, and in the List III for
 3 concurrently?

4 **HARISH SALVE:** But that is 254(2) My Lord, not 200(1) proviso. There are separate powers.

5 **CHIEF JUSTICE B. R. GAVAI:** While reading 200, we have to ignore 254?

6 **HARISH SALVE:** No, My Lord, they are independent powers operating in independent
 7 circumstances. Some of them have conditions, precedent. Some of them do not. If we start
 8 stitching up these provisions, we are eroding...

9 **CHIEF JUSTICE B. R. GAVAI:** The principle which we know is of harmonious
 10 construction.

11 **HARISH SALVE:** My Lord, there is no disharmony. There is absolutely no disharmony. If
 12 we start with a premise that any such timing of a Bill, made by the State, is antithetical to the
 13 Constitution, if we start with that premise, then the disharmony starts. If we read the
 14 Constitution to understand, what was the structure the founding fathers had in mind, then the
 15 disharmony disappears. So, that's why I start by saying, we don't start with any preconceived
 16 notion. Let's try and find out what the constitution says. And that's why, My Lord, I don't
 17 propose to cite any judgement, I invite Your Lordships to read the Article.

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

19 **HARISH SALVE:** The first is, My Lords, let me cut to the chase. If Your Lordships pick up
 20 201, and Your Lordships have been told this repeatedly and long reasons have been given, I
 21 need to only state it. Each word of these provisions was carefully calibrated. Look at 201,
 22 "When a Bill is reserved by a Governor for the consideration of the President, The President
 23 shall declare that he assents to the Bill or that he withholds the assent therefrom. Provided
 24 where the Bill is not a Money Bill, the President may direct the Governor to return the Bill to
 25 the House, or, as the case may be, Houses of the Legislature of the State, and with such
 26 message as may be mentioned; and when the Bill is returned, the House or Houses shall
 27 reconsider within a period of six months and again, if it is passed by the House, with or without
 28 amendment." Please mark the words, "It shall be presented again to the President for his
 29 consideration." Now, My Lords, and Your Lordship has seen the language of the first proviso
 30 to 200. I don't need to go to it right now. I will at some point, deal with the language. The
 31 words, "shall not withhold assent therefrom" are conspicuous by their absence and cannot be
 32 read here. We would be rewriting this proviso. This defines Indian federalism and, My Lord,

1 there's nothing shocking about this. High constitutional functionaries in a democracy are in
2 the ultimate analysis. Democracy functions by the good sense of the people.

3 **CHIEF JUSTICE B. R. GAVAI:** Dr. Ambedkar in his speech of 3rd November, 1949,
4 elaborately discusses about how our federalism works and how it is different from the
5 American system.

6 **HARISH SALVE:** Yes. Correct and that is very important. If Your Lordship... the speech has
7 been shown. The essence of that speech was...

8 **CHIEF JUSTICE B. R. GAVAI:** What he says that except the situation of emergency, the
9 States will work within the fields assigned to them, and the Union would work within the
10 spheres allotted to them. And only when there is an internal or external emergency, the Power
11 shall stand vested, with all the portion of the stand vested with the Central Government. So,
12 that the country is united and strong at the time of peace, as well as, war. That is the words he
13 uses.

14 **HARISH SALVE:** My Lord, that is in a completely... May I explain the, unfortunately, in
15 some of the cases also, the understanding of 200 and 201 has become competence centric.

16 **CHIEF JUSTICE B. R. GAVAI:** Has become...?

17 **HARISH SALVE:** Legislative competence centric, where, Dr. Ambedkar also said it's only in
18 emergency that these two powers become available to Parliament. Otherwise, the States have
19 their own sphere and must function on their own. Let's start by propositions which cannot be
20 doubted. The State Legislatures are what the Constitution calls them, Legislatures who have
21 the right to make laws. Having conferred this right to make laws, in our Federation, we have
22 two parallel models, the Union Legislature and the State Legislature. And My Lord, where the
23 Constitution treats the two differently, we cannot remove that difference by reading down or
24 reading up any provisions relating to either of the two organs. Your Lordship has seen the
25 structure, Article 74. Your Lordship has Article 74? For example, and see the difference in
26 language and the difference of how the framers of the Constitution made it. 74. And there are
27 two dimensions to 74. And since I'm showing the provision, let me make that point also. "There
28 shall be a Council of Ministers with a Prime Minister at the head to aid and advise the
29 President, who shall..." Please mark, Your Lordship knows these words. "... who shall, in the
30 exercise of his functions, act in accordance with such advice." And here it says, "Provided the
31 President may require the Council to reconsider such advice, either generally or otherwise, the
32 President shall act in accordance with the advice tendered after such reconsideration." Mark
33 this, My Lord, with the contrast to the proviso to 201.

1 Then My Lord, we have the legislative procedure in Part 5, which begins from Article 107 and
 2 this culminates in 111, and I don't need to labour the point that the assent is the last step in the
 3 legislative procedure. And 111 says, "Where a Bill has been presented by the Houses of
 4 Parliament, it shall be presented to the President and the President shall declare that he
 5 assents or that he withholds assent therefrom." There is no, My Lords, any further question of
 6 referring the Bill to anybody or seeking Your Lordship's opinion or anything of the sort,
 7 nothing. "Provided that the President may as soon as possible after the presentation of the Bill
 8 for assent, return the Bill, if it is not a Money Bill with a message requesting that they will
 9 reconsider the Bill or any specified provision, and in particular, any desirability, of introducing
 10 any such amendments as he may recommend. And when a Bill is so returned, the Houses shall
 11 reconsider the Bill accordingly. And if the Bill is passed by the Houses, with or without
 12 amendment, and presented to the President for assent, the President shall not withhold assent
 13 therefrom." My Lord, this article would have had very different connotations if 74 had not
 14 been on the statute book because all these functions are to be exercised on the aid and advice
 15 of the Cabinet. My Lord, the Cabinet cannot alter the Bill. If the President, in a dialogue with
 16 the Union Cabinet, feels that the Bill needs to be corrected he can request and the Executive
 17 Government, the Union Cabinet takes it back to the Parliament. The Parliament may or may
 18 not re-enact it. But what comes out of Parliament then, is the last word. So this is perfectly
 19 consistent.

20 The difference here is the President, even while doing so, is acting on the aid and advice of the
 21 Union Cabinet because 74 is untrammelled and we do not have any discretionary functions of
 22 the President, My Lord, that's settled. So, My Lord, this distinction the Constitution has
 23 marked in para 1.2, the point, therefore, which I want to make is marked difference in the
 24 scheme in relation to legislative provisions relating to the Union and the role of the President
 25 vis-à-vis Union Government. As against the legislative provision, this distinction is a
 26 characteristic of federalism in India. So this is how our federalism is defined in our
 27 Constitution. The approach, which is based on testing and interpretation of the plain language
 28 on the premise that one or the other would be consistent with the principles amounts to
 29 defining Indian federalism and abstract terms and then testing the interpretation of provisions
 30 on whether the interpretation furthers or distracts from the abstract notion of federalism. This
 31 approach overlooks that the founding fathers carefully crafted the provisions and defined the
 32 roles of the two legislative bodies in the provisions of a language which language does not
 33 admit of any ambiguity.

34 Reading down any such language on the premise that the consequence would be incompatible
 35 with federalism, overlooks that the plain language has to be read to defy federalism as
 36 understood in the Constitution. So, My Lord when we say this is not consistent with

1 federalism, where the language is compelling, you don't stand outside the Constitution to
 2 define federalism and then say this construction creates disharmony. By itself there is no
 3 disharmony between two provisions, no disharmony. And one of the points which I will
 4 address, My Lord, as I go along, is the 254(2) versus 200. It is indisputable that the States have
 5 their own identity, but not sovereignty and where the language of the provisions of the
 6 Constitution is broad and undefined, an interpretation consistent with broad ideas of
 7 Federalism may be aberrant, but to read down the express language of a provision on the
 8 ground that it is incompatible with federalism suffers from the fallacy of circumlocution
 9 because, My Lord, these provisions define federalism. What is our Federalism is what these
 10 provisions provide.

11 The second principle, My Lord...

12 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Salve?

13 **HARISH SALVE:** Yes, My Lord.

14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The issue is not so much about
 15 whether we can use the expression veto or withholding, occurring by virtue of Article 201
 16 proviso by the end of it. By the interplay of 200 and 201, eventually, when a President, by
 17 virtue of Article 201, says the Bill shall be presented again to the President, and the buck stops
 18 there.

19 **HARISH SALVE:** Yes.

20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We are not so much on that issue. We
 21 are much more on Article 201 substantive question read with the proviso which the Union says
 22 can't be done, and the substantive provision stands on its own thereby the power of
 23 withholding stands on its own and the Governor can withhold a Bill.

24 **HARISH SALVE:** My Lord, the problem found... I'm so sorry.

25 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** So therefore, when you
 26 independently exercise the power of withholding, then this gives rise to a fourth option or the
 27 adjunct to the second option. That in the event the Bill is sent back with a message by the
 28 Governor, then the Assembly will consider and then send it back. That aspect has a little
 29 problematic because at the threshold, the Governor, not the President; at the threshold, the
 30 Governor withholds the Bill, even textually, there is a problem, because if that is the power,
 31 even a Money Bill he can withhold. The question of proviso won't apply there. There's a big

1 problem in that interpretation. Assuming for a minute, it is permissible to read the substantive
 2 provision along with the proviso, and inevitably, the Governor sends it back in the event he
 3 thinks that it needs to be withheld, then it comes back to him. At the second stage, perhaps the
 4 Governor will be able to send it to the President, which, of course, **Tamil Nadu** says it can't
 5 be done.

6 **HARISH SALVE:** Yes.

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** And when it goes back to the
 8 President, it is then, it is only then, that under 201 proviso the process will come to an end. Till
 9 that point of time the process, the legislative process commences with the Assembly, goes to
 10 the Governor, comes back from the Governor to the Assembly and then again goes back to the
 11 Governor. At that time, he'll make an option of either accepting by virtue of the first proviso,
 12 or sending back to the President, only then it stops. If you don't construct it in that manner,
 13 what will happen is, even at the threshold a Bill can be withheld, or, as you say, the process of
 14 veto will occur. That's the doubt. How do you construct..?

15 **HARISH SALVE:** Yes, My Lord. May I answer that straight away?

16 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** [INAUDIBLE] with proviso.

17 **HARISH SALVE:** May I answer that straight away? I have a full-dress reply, but my
 18 immediate response is as follows: The difficulty which Your Lordship is pleased to put to me,
 19 which has been felt, arises because of the perceived consequences of reading in such a power,
 20 not because of the language of 300... 200.

21 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 200.

22 **HARISH SALVE:** 200 language is playing. But the argument is that means that he can.

23 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** How do you understand the proviso
 24 which says that, except in case of a Money Bill, so, then that's not occurring in the substantive
 25 provision.

26 **HARISH SALVE:** Correct.

27 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** If your construction is accepted, then
 28 a Money Bill can be withheld straight away. Then the proviso won't apply.

29 **HARISH SALVE:** Yes.

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** He can stop a Money Bill straight
2 away at the...

3 **HARISH SALVE:** Yes, My Lord, he can. Yes, he can.

4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Then read it with the proviso now.

5 **HARISH SALVE:** Yes, My Lord. That's what I'm saying. For a minute, please look at it a
6 completely different way. Let's put the proviso to one side, first.

7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Please explain.

8 **HARISH SALVE:** Yes. My Lord, look at it in the reverse.

9 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Salve.

10 **HARISH SALVE:** Yes, My Lord, please look at it in the reverse. Without any preconceived
11 notions I pick up the book and I start reading 200. Where a Bill has been passed by the
12 Legislative Assembly of a State, or the State having a Council having been passed, it shall be
13 present to the Governor and the Governor shall declare either he holds assent or that he
14 withholds assent therefrom, or that he reserves the Bill for consideration of the President. This
15 is untrammelled by any such limitation. If the framers of the Constitution knew that there is a
16 separate class of legislation called the Money Bill and made detailed provisions for Money
17 Bills, all that they had to do is, shall either assents to the Bill, or in case of Bills other than a
18 Money Bill says he withholds assent. Simple. That is how, what I would have expected to find
19 if 200 was not to apply to Money Bills.

20 What we are doing is, we are picking up words from outside the provision and adding it to the
21 provision because we feel that there should be some limitation. Now, look at the proviso.
22 "Provided that the Governor may as soon as possible after the presentation to him of a Bill for
23 assent, return the Bill if it is not a Money Bill", which means one of his three options is limited.
24 What are the three options the Governor has, My Lords, I tried to formulate it in para 1.5 and
25 1.6 of my note. The Governor is under a duty to make a declaration when a Bill reaches him.
26 I'm not getting into a timelines, I think enough has been said. The Governor has a duty to make
27 a declaration. The plain language says, "The Governor shall declare." So, he has to make a
28 declaration. So, the three declarations are, I tried to paraphrase them in 1.6, My Lords,
29 declaring that he assents to the Bill, declaring that he withholds assent therefrom, declaring
30 that he reserves the Bill for consideration of the President. He then has a fourth option. He
31 returns the Bill together with a message to the Assembly. Now, the fourth option is being used

1 to emasculate the first option. My Lord, that is, in my humble submission, a complete... unless
 2 you start with a premise that, oh, it could not have been ever intended that the Governor may
 3 have this power. So, let's search for some kind of limitation, some implied limitation. If we
 4 read the plain language, it's very clear and these are high constitutional functionaries acting
 5 in enacting legislation. There are so many pointers in the language of 200, which if carefully
 6 read, will show this entire exercise would not really...

7 The second important thing, My Lord and this is telltale. This is almost compelling logic which
 8 shows that the proviso cannot be read into the main part. Please turn to the language of the
 9 proviso. The proviso is, My Lord, the interpretation of reading the proviso into the main part
 10 is correct, then the simple expedient would have been provided that the Governor shall as soon
 11 as possible return the Bill for which assent is withheld. It would have been as simple as that.
 12 There would be a question of may. Where is the question of saying, provided the Governor
 13 "may" as soon as possible? And in the same proviso, which uses at the end the word "shall".
 14 So we can't even say that it is high constitutional functionaries so the lawmaker use the word
 15 "may" and may really mean "shall" because for the same constitutional functionary, in the
 16 same proviso, it uses two expressions, "may" and "shall."

17 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The "may" is used in the context of
 18 two other options that the Governor has, when he is referring...

19 **HARISH SALVE:** Correct.

20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** He will send back for reconsideration
 21 of the Bill, of any provisions and in particular will consider the desirability of introducing any
 22 such amendments as he may recommend in his...

23 **HARISH SALVE:** I'm sorry, My Lord, the moment we say this is an option we have displaced
 24 the premise that this has to be read into the main part. This is then a separate option and it is
 25 "may", it is not that if he withholds assents, he "shall" send. We have to rewrite these
 26 provisions, My Lord, to come to the conclusion that this power to withhold is limited only to
 27 cases of sending back.

28 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** But how do you reconcile this issue
 29 about the Bill? That's my last question to you. How do you how do you reconcile that a Money
 30 Bill can be rejected at the outset by the Governor...?

31 **HARISH SALVE:** Yes, it can.

- 1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** By the substantial provision and then
2 the later portion says, then again, he has the option...
- 3 **HARISH SALVE:** Correct.
- 4 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** ... to return the Bill if it is not a Money
5 Bill...
- 6 **HARISH SALVE:** So, My Lord, as far as...
- 7 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** He can only withdraw it... He can only
8 withhold at the outset. Money Bill he can withhold only at the outset.
- 9 **HARISH SALVE:** Yes, My Lord.
- 10 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** ... can reconcile in the proviso with
11 the Money Bills.
- 12 **HARISH SALVE:** Yes. My Lord, it's not a question of reconciling. It is asking the question
13 with great respect, asking the question, why did they make it for other than Money Bills. The
14 answer is very simple. Grant of assent...
- 15 **TUSHAR MEHTA:** Mr. Salve, only if you can give me a minute?
- 16 **HARISH SALVE:** Yes, absolutely.
- 17 **TUSHAR MEHTA:** 207 is the answer My Lords, to My Lord Justice Narasimha's question
18 Special Provisions as to Financial Bills. My Lord, 199 is My Lord Financial Bills which is...
- 19 **CHIEF JUSTICE B. R. GAVAI:** Money Bill.
- 20 **TUSHAR MEHTA:** Yes, My Lord.
- 21 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 207, we have.
- 22 **TUSHAR MEHTA:** Yes, My Lord. A Bill or amendment making provision for any of the
23 matters specified in (a) to (f) of Clause 1 of Article 199 shall not be introduced or moved except
24 on the recommendation of the Governor. So, he cannot... there's no question of withholding.

1 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Therefore, then your argument that
 2 he can withhold under the substantive provision goes. In the substantive provision, your whole
 3 argument is that it is open ended and it can be withheld by the commoner...

4 **TUSHAR MEHTA:** No, no. There is no occasion for withholding a Money Bill because the
 5 introduction itself is with the recommendation of the Governor.

6 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Therefore, in the Money Bill, there is
 7 no withholding.

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

9 **MANINDER SINGH:** The presentation is with recommendation.

10 **TUSHAR MEHTA:** Yes, yes. Your Lordships are right.

11 **NEERAJ KISHAN KAUL:** 207, requires the consent of the Governor.

12 **TUSHAR MEHTA:** My apologies.

13 **HARISH SALVE:** May I, My Lord, point out there may be a third situation. I was going to
 14 deal with 207, My Lord, but there may be a third situation. I just want to test it. A Money Bill
 15 is introduced with the recommendation of the Governor. The Bill may undergo changes on the
 16 floor of the house. It doesn't say that the Money Bill is introduced has to be passed. If what is
 17 approved finally doesn't accord with what was recommended by the Governor, the Governor
 18 may withhold assent. The point is important that the framers of the Constitution created a
 19 separate safeguard in 207 and perhaps did not consider it necessary in the light of that to
 20 extend the fourth option to Money Bills. I wonder if my point is clarified. I am not saying that
 21 the assent to a Money Bill cannot be withheld on its plain language. But it will be extremely
 22 odd and therefore an argument of abuse which should never be brought in, to say that having
 23 recommended a Bill, the Governor will then withhold the Bill. My Lord, where the power
 24 should be exercised, how the power should be exercised, and the existence of power are two
 25 very different questions. What your Lordships question is, and I assume, that's what I'm
 26 addressing, the existence of power, not how it will be exercised.

27 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** No, we are not on the question of
 28 abuse at all. We are on constitutional interpretation.

29 **HARISH SALVE:** Exactly, existence of power. That's right. So, My Lords, existence of power
 30 to withhold.

1 **CHIEF JUSTICE B. R. GAVAI:** While deciding this matter, we will not be looking at the
2 *Tamil Nadu* matter.

3 **HARISH SALVE:** My Lord, I see that. I see the wisdom of that, My Lord. Because one
4 hard...The old story of hard facts bad law, My Lord, should not visit any such matter of such a
5 moment. Article 200, My Lord, in the fourth option of sending back removes Money Bill,
6 because that has already been done. If despite that if the Money Bill as recommended is
7 accepted, I'm answering, My Lord, Justice Narasimha's question, If the Money Bill as extended
8 is what is passed as recommended by the Governor, in theory, he may have power withhold,
9 but the question of exercising the power would not really arise. But if the Money Bill as
10 recommended by the Governor is not accepted, nothing prevents, My Lord, on the house to
11 make.... floor of the house to make changes to the Money Bill. A Bill which finally comes for
12 assent may not accord with what was recommended. The Governor may withhold consent.
13 Now, if the fourth proviso did not accommodate Money Bills being sent back, it was because
14 if your recommendation has already been there. If that recommendation has been
15 disregarded, there is no question of sending it back. Then you decide you either grant assent
16 or don't grant assent. The proviso was meant in recognition of a very important principle in a
17 democracy, the Principle of Consensus. That if the Governor sends a message and it goes to
18 the Assembly; he is then trusting it to the wisdom of the Assembly. The wisdom will act with
19 responsibility. We'll consider the Governor's message, and then we'll pass it. And in which case
20 there word, as far as they are concerned, the Governor then doesn't have the power to withhold
21 assent. Now, the argument against this construction, that do not construe this so widely as
22 recognising this power, is because you are creating a veto. My Lord, this word veto doesn't fit...

23 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** In constitutional language.

24 **HARISH SALVE:** In constitutional debate. What we are saying is, you are creating a power,
25 or you are interpreting the provision to show, that the power of this high constitutional
26 functionary may extend to stymying a Bill and prevent it from becoming law. Well, I submit
27 that is quite consistent with the scheme of the Constitution when you read 201. So, if the
28 Governor sends it back and it comes back to the Governor, then his two out of four options are
29 ruled out. He then can either grant assent or he reserves the Bill for President's consideration.
30 Withholding assent is ruled out, and he has already gone through the Assembly. He can't send
31 it back the second time. In other words, the controversy then moves between the Union and
32 the State. My Lords, the judgments have been shown, and that's why I'm not citing any of those
33 cases, that the Governor ultimately is the points person, he is the nodal agency for harmony
34 between the Union and the States. So, he is the first stop. And My Lord, it will be in real
35 constitutional sense, it will be hard to believe that a Governor will really act on his own, where

1 there is a strong push from the Assembly to pass a law. He may well, to start with, refer it to
 2 the President, or he may try working with the Assembly. And if it doesn't work, he may refer it
 3 to the President. But the basic notion that once a law is made by the Assembly, then an assent
 4 must follow, is wrong.

5 If it is not a feature of Indian constitutional federalism, that a assent must follow after one or
 6 two rounds or three rounds of confabulations. And the Assembly must have the same power
 7 to have the last word as Parliament does. If that is not the scheme of the Indian Constitution
 8 then, My Lord, we have to go back to the drawing board and define what is our federalism.
 9 And it is a limited federalism in the hope that all framers, that all these high dignitaries who
 10 have been conferred with this power, will act with wisdom, will act to protect the Constitution
 11 and will act to further the values of democracy. Because these are the assumptions I have to
 12 make. This is how it was done, with a final check or safeguard saying in rare, rare cases, the
 13 moment a law made under the heat of the moment in a State may not be allowed to become
 14 law. The political process will resolve. The political crisis which may follow. But that's not then
 15 in the realm of Constitutional Law. This is the absolute plain meaning of the compelling
 16 language unless we start rewriting express provisions such as 200, 201, 254(2), etc., etc. So,
 17 My Lord, I close these points saying...

18 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Mr. Salve?

19 **HARISH SALVE:** Yes, My Lord.

20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 111.

21 **HARISH SALVE:** Yes.

22 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** If the President withholds without
 23 application of the proviso, here also, there is an expression "may" in the proviso.

24 **HARISH SALVE:** My Lord, 74(2) will come into play. He can be advised to present. The
 25 President has no discretion, he has to act on the aid and advice. So the manner in which these
 26 power will be exercised becomes qualitative [UNCLEAR.]

27 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** 74(2). How does it?

28 **HARISH SALVE:** Yes, please see 74(2).

29 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** The question whether any and if so,
 30 what advise was tendered by the Minister.

1 **HARISH SALVE:** I'm sorry. 74(1). I misspoke. 74(1).

2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** (1) proviso you mean?

3 **HARISH SALVE:** No, the main one. Is that the head to aid are President in exercise of his
4 functions and this is untrammelled, all his functions, act in accordance with such advice. So if
5 he is advised, if in discussion, he can have... In all these, there is an element of political
6 processes recognized. So, the President may call the Union Government and say, I have these
7 doubts, do you mind taking it to the Parliament? They may say, yes, we take it to the
8 Parliament, or if the advice is no, that please give assent. He has to give assent, because 74(1)
9 is the marked difference and Your Lordship has been shown all the cases, difference between
10 the Governor and the President.

11 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** That's right.

12 **HARISH SALVE:** So, My Lord, this is why I submit. Now My Lord, apply 74(1) to 201 proviso
13 and that is the scheme of Indian federalism when it is presented to the President for his
14 consideration, it means and President will obviously act on the aid and advice to the Union
15 Government.

16 **TUSHAR MEHTA:** Possibly, he didn't know Your Lordships are conferring. Mr. Salve didn't
17 know that, Your Lordships are conferring.

18 **HARISH SALVE:** I'm so sorry, My Lord .

19 **CHIEF JUSTICE B. R. GAVAI:** According to you the President is bound by the aid and
20 advice of the Council of Ministers and the Union. The same is not insofar as States is
21 concerned, the Governor has its own discretion.

22 **HARISH SALVE:** That's clearly the position. That's a sharp difference between the two. And
23 in the same Constitution, My Lord where we have two structures, it was for the founding
24 fathers to have decided, they could have created a similar structure for these States, but they
25 did not.

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

27 **HARISH SALVE:** Now, My Lord textually, I have, therefore, concluding my submissions in
28 para 1.7. The proviso uses two expressions, "may" and "shall". The founding fathers could have
29 provided that the Governor upon withholding assent shall refer the Bill to the Assembly if the
30 intent was to limit the power of withholding only for the purposes of sending the Bill with a

1 message. The second proviso, My Lord, this is another interpretational aid. The second proviso
 2 is mandatory in nature, leaves no discretion to the Government. So, My Lord, when they
 3 wanted to make it "shall" they have made it "shall." So, these are very carefully crafted
 4 provisions. The general principle that in certain cases "may" must mean shall, because when
 5 you are referring to high constitutional functionaries, you would use the word "may" even
 6 when you are casting a duty cannot apply to these provisions because when they want to, they
 7 use the word "shall". And therefore, My Lords, on textual interpretation, the scheme of 200
 8 leaves no manner of doubt that the founding fathers did not intend to make the referral of a
 9 Bill to the House with a message a necessary consequence of withholding assent. The obvious
 10 reason for not doing so was whether Governor withholds a assent in circumstances, where
 11 there is a sharp political division and in the opinion of the Governor, the Bill should not be
 12 allowed to become law. There may be cases like this. Needless to add, this is a far reaching
 13 power. And if it is likened to a veto, it only means that the founding fathers wanted to reserve
 14 a veto. The fact that such a veto does not detract from the federal character of the... that there
 15 is such a veto, does not detract from the federal character as defined in the Constitution. This
 16 is our federal character. We, My Lord, first see these provisions and say whether India has a
 17 federal Constitution or not, and to what extent. It's not the other way around that we start with
 18 that India has a federal Constitution, now, let's start chipping and recasting provisions which
 19 don't fit.

20 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Yes, Mr. Salve, please.

21 **HARISH SALVE:** Now My Lords, para 1.9, I close this point. It is obvious that the power of
 22 withholding assent is to be exercised by the Governor in larger public interest, with wisdom
 23 and for the purpose of preserving and protecting the Constitution. To assume that a Governor
 24 would be oblivious to the quasi federal character of the Constitution is to assume that the
 25 Governor would abuse the power which is not a permissible principle of interpretation. May I
 26 continue, My Lord?

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

28 **HARISH SALVE:** May I continue?

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

30 **HARISH SALVE:** Now, My Lord, a slightly different but connected point in 110. Article 200
 31 does not set out a time limit in which the Governor has to exercise his discretion in issue of
 32 one of the three declarations or exercise the power under proviso. The obvious reason is that
 33 the Governor has to take a considerate decision on the future course of action in a manner

1 which will be consistent with the constitutional balance between the institutions while
 2 maintaining due deference to the wisdom of the Legislature of the State. It cannot be assumed
 3 that in every case, when the Governor has not issued the declaration immediately or in a short
 4 period of time, the Governor is guilty of inactivity. My Lord, political processes take place
 5 behind the scenes, discussions take place, negotiations take place, consensus building takes
 6 place, My Lord. It may be achieved in 15 days, and in one case may take four months in the
 7 other case. We cannot have timelines. Because a lot goes on before one or the other decision
 8 is taken, and it should go on. This can't be sitting in an ivory tower and making decision. The
 9 real politics takes over, consensus building is required. That's all that I have to say on the
 10 timeline, My Lord. Other points have already been made. The proviso to 201, unlike the
 11 proviso to 200, makes it clear, it is for the President to be satisfied that the bill has been duly
 12 reconsidered. Now, if the President is not satisfied, the Bill has passed, the President may
 13 withhold us. And it is not suggesting that the President is duty bound to act in the same way
 14 as the Governor, whether Governor exercises discretion to refer the Bill to the Legislative
 15 Assembly. I've already made that point, My Lord. The fallacy in arguing that there is a veto
 16 which would come about in the first proviso is not read into the power of the Governor to
 17 withhold assent, is apparent when the language of the provider of 201 is taken into account. If
 18 the President refuses to assent, it would, by the same token, be characterized as the veto by
 19 the President. Reading 200 and 201 makes it clear that, unlike Union Parliament the powers
 20 of the State Legislatures are subject to the ascent of legislation, India ultimate analysis by the
 21 President of India. I pause here, My Lord. There is a reason why I put it like this. My Lord, the
 22 Governor is appointed by the President, and the Governor holds office during the pleasure of
 23 the President. So, My Lord, we have to realize, and this is not, My Lord, outside the
 24 Constitution, this is within the Constitution; the Governor is appointed by the President of
 25 India and holds office virtually at the pleasure of the President of India. So, My Lord, in one
 26 sense, he is the channel of communication between the Union and the States. And in real life,
 27 it would be hard to believe that in a serious matter, where there is a problem brewing between
 28 the Union and the States over the Union not requiring or not accepting a Bill by the State and
 29 the Governor reacting by withholding assent, it's hard to believe, that My Lord, that the Union
 30 would have had no role to play. And for this, one doesn't have to look to Constitutional
 31 Provisions. This is how the Constitution works. So, My Lord, in my respectful submission, you
 32 have to see the complete package to define Indian federalism. And in para 113, My Lord, I close
 33 this point about why textually also, this would be doing violence, incorporating the proviso by
 34 an interpretational process into the main body of 200 as a measure to prevent a veto being
 35 read into the Constitution overlooks the plain language of the first proviso. The founding
 36 fathers took away the power of the Governor to withhold assent where he acts under the first
 37 proviso and causes the Legislature to have a second look at the Bill along with the

gubernatorial message. However, if the matter is not resolved, the Governor can reserve the Bill for consideration of the President. The founding fathers used three expressions in Article 200. My Lords, this is a little important. The founding fathers use three expressions in Article 200, assents to the Bill, withhold assents therefrom, reserves the Bill for consideration by the President. The proviso takes away the power to withhold assent, therefrom. There is nothing in the proviso which takes away the power to reserve a Bill for the consideration by the President or grant assent. So, in the ultimate analysis, without rewriting the proviso to 201, no interpretation of the Constitution can obviate what is uncharitably characterized. My Lords, the Chief Justice asked me, My Lord, I have put it, in fact I said, this is uncharitably characterized as a veto over the State legislation, a better interpretation which accords to the plain language and harmonizes with the functions of the Governor and the President, who acts on the aid and advice of the Union Cabinet marches in step with the principle that discretionary power conferred upon high constitutional functionaries cannot be interpreted on the angle of possible abuse, would be to read the provisions as they are plainly read, he has the power to withhold assent. That, My Lord, is on the interpretation of these provisions, unless there is something more I can say on this, My Lord, I now propose to move on to the next point, Judicial Review.

Your Lordships have seen all the cases formed against Judicial Review. There are three points, which I propose to add. First, the question of Judicial Review of the powers of the Governor would flow from the definition of these powers based on interpretation of 200 and 201. It is always My Lord, for a Court to delineate the scope of the power. So, there is no doubt that the delineation of power is for the Court. In fact, My Lord, the furthest the English Court has ever gone in Judicial Review was, My Lord, the... what's called the second *Gina Miller* case where the prorogation of Parliament was challenged. And the argument was, you are getting into the working of Parliament. They said, no, we are delineating the power. So, My Lord, delineating powers, interpreting 200, interpreting 201 is undoubtedly a judicial function, which Your Lordships are doing today. Once Your Lordships have delineated the power, the exercise of that power by a high constitutional functionary within the limits delineated by the Court is not amenable to Judicial Review. Let me clarify what I mean. Suppose Your Lordships hold that no, the Governor has no right to withhold on a reading of 200. That's another matter. That is delineating the power. But the moment it is accepted that he has a right to withhold, then his declaration in a particular case of withholding, is it amenable to Judicial Review? My respectful answer is, no.

Now, why do I say that? So, first of all, My Lord, when we discuss justiciability, we have to first define justiciability of what. If there is a power and that power is accepted to be a high discretion vested in a high constitutional functionary. Is there then, any scope left for Judicial

1 Review of that particular power? And this cannot be argued by analogy. Each power and each
 2 exercise of power and each nature of function will have to be tested by itself. That's the first
 3 point which I wanted to make on first principles.

4 Now, if we are right, then why do we say? Because Your Lordships have seen all the judgments
 5 saying no judicially manageable standards. Why do we say that there are no judicially
 6 manageable standards? My Lord, judicially manageable standards are not defined from some
 7 general standing principles. Judicially manageable standards are to be found within the
 8 Constitution itself. If a power is hedged in by any express defined conditions. If the power says
 9 that if the high functionary is satisfied, then the Court is entitled to make sure that the high
 10 functionary is satisfied. **Liversidge vs. Anderson** has stood the test of time. If the
 11 constitutional provision does not expressly create any such precondition for the exercise of
 12 power, the Court cannot read in a precondition and then create this justiciability. If a
 13 constitutional provision says, if you are satisfied that there is a breakdown of law and order,
 14 whether or not that test is satisfied, may be a matter which may give a very narrow sliver of
 15 area of Judicial Review. But look at 200, it gives you no indication, no indication when he
 16 should withhold, when he should assent, when should he reserve it for the President or when
 17 should he send it back. So, there is no judicially manageable standard by which the Court can
 18 test has he rightly exercised that power. Did he have to fulfil any condition before exercising
 19 the power? The answer is, no. That's the important point on justiciability.

20 **CHIEF JUSTICE B. R. GAVAI:** Mr. Salve, you can proceed.

21 **HARISH SALVE:** Yes, I was My Lord... I thought, Your Lordships were in conference. So,
 22 my first point on justiciability is this, My Lord, that where the Constitution does not set out
 23 any conditions expressly...

24 **CHIEF JUSTICE B. R. GAVAI:** Do you want to compare Article 200 with 356?

25 **HARISH SALVE:** My Lord...

26 **CHIEF JUSTICE B. R. GAVAI:** The argument would be, under 356 the conditions are
 27 specified as to...

28 **HARISH SALVE:** Yes.

29 **CHIEF JUSTICE B. R. GAVAI:** As to what circumstances the government may recommend
 30 proclamation of emergency.

1 **HARISH SALVE:** Correct.

2 **CHIEF JUSTICE B. R. GAVAI:** Such a provision is not in existence in 200.

3 **HARISH SALVE:** Correct.

4 **CHIEF JUSTICE B. R. GAVAI:** And therefore, the Court cannot interfere with the judicial...
5 with the decision exercised by the Governor.

6 **HARISH SALVE:** That's the short point, My Lord. And judicially manageable standards are
7 discerned from the nature of the limits on your power. That's the proposition which I want you
8 to put across. So, there are two judicially manageable standards. One is delineating the power.
9 What exactly is the power conferred on a constitutional functionary? Why? Because the court
10 says, we read a provision, we apply the principles of interpretation, and this is what we
11 understand this to mean. That's clearly justiciable. So, a challenge of absence of power is
12 something which a Court can and must decide. Once the power is delineated, the exercise of
13 that power, is it subject to Judicial Review. One of the compelling circumstances is where the
14 power is in a high constitutional functionary.

15 **CHIEF JUSTICE B. R. GAVAI:** That's argued by everyone.

16 **HARISH SALVE:** Yes.

17 **CHIEF JUSTICE B. R. GAVAI:** The assumption is that the power is exercised, *bona fide*.

18 **HARISH SALVE:** No, My Lord, I am not saying *bona fide*. I am saying, how do you discern?
19 Because My Lord, Your Lordships is...

20 **CHIEF JUSTICE B. R. GAVAI:** Then you agree that it is not exercised *bona fide*?

21 **HARISH SALVE:** No, My Lord. I'm not on that at all. Your Lordship has been repeatedly
22 told that... My Lord, I'm not pursuing the abuse theory, My Lord. That has been put
23 sufficiently. I'm saying something slightly different. That, how do you find judicially
24 manageable standards in reviewing this, where there are no pre-conditions prescribed? That's
25 the point which I was making. Not on abuse. Because My Lord, I gave that example, the
26 ***Liversidge vs. Anderson*** example. If it had said, 'if the Governor satisfied that'. Now, if
27 that is so, then whether or not the Governor is satisfied is a fact. And on there My Lord, there
28 are some little areas of Judicial Review. Did he take into account relevant considerations? Did
29 he ignore irrelevant considerations? The whole satisfaction of Judicial Review formula and
30 where the lawmakers want the power to be amenable to Judicial Review, they add those words.

1 200 finds no such words. So, there are no judicially manageable standards in 200, that's the
2 point I was making.

3 The second one, and this is a very important point to focus on in this case because this has not
4 been focused on in another case. The language of 361. 361, My Lord, which stands outside, and
5 there are a number of immunity provisions. But over and above that there is an immunity
6 provision. For example, My Lord, in 74 itself it says, no court will inquire into the advice given.
7 Legislative provision of the State also, it says, no court will inquire, no court will inquire. But
8 after making all those provisions towards the tail end of the Constitution, My Lords, the
9 framers added 361. And if Your Lordships read 361 with me for a minute. The words of 361
10 are, "The President or the Governor...", please mark the words, "... shall not be answerable to
11 any court for the exercise and performance of the powers and the duties of his office." Now,
12 what is the meaning of the phrase, "answerable to any court"? My Lord, this is not that he can't
13 be *eo nomine* made a party. It goes much beyond that. If My Lord, we are right, and we don't
14 need to repeat that point again. If Your Lordships accept our position of the existence of power
15 to withhold assent; to ask a Governor, why have you withheld assent, is not a question which
16 can be answered by Secretary or by the record. It is making the Governor answerable to the
17 Court for his exercise of his discretion.

18 Where there are no judicially manageable standards for testing the discretion, asking him I
19 want to satisfy myself that you have acted within the implied limits on your power or in the
20 larger interests of the Constitution or consistent with the basic structure, etc., etc., is asking
21 him to answer. And My Lord, this answer can only be given by the Governor. The same
22 principle doesn't apply to the President because the President acts on the aid and advice of the
23 Union. So My Lords, the Union Government always answers. They don't answer what is the
24 advice they gave to the President. But where the Governor acts on his own, 361 will completely
25 make judicial review of the Governor's withholding of assent beyond the pane of Judicial
26 Review, whether 226 or 32. 32 has separate problems. Because either way, he's being made
27 answerable to the Court. That's one important... second important dimension of justiciability.
28 And My Lord, these provisions cannot be read so as to minimize their effect.

29 The third, because My Lords, without making the Governor answerable, there is no way in
30 which you can test the correctness of the exercise of the power to withhold. And thirdly My
31 Lord, a dimension of this therefore, let us test. The inability of a court to effectively redress is
32 supposedly wrong withholding of assent, is a factor which would establish that judicial review
33 in such situations is not contemplated by the Constitution. This is a very important dimension,
34 My Lord. I've put this in para 2.4. Let's test this, My Lord. Where, if a Court was to find, My
35 Lord, or if a Court was to entertain a petition as to why a Governor has not granted assent;

1 first of all, the Court would have to ask the Governor, why have you not granted the assent
 2 because there is no requirement in 300 to give reasons and there is no principle which says
 3 reason shall be given, point number one. So, the Governor will have to be made answerable
 4 for the decision he took. Now, if the Court finds that he wrongly granted or wrongly withheld
 5 assent, on whatever principle, there are no known principles anyway, whatever principles. The
 6 Court cannot issue a *mandamus* to the Governor saying, now you grant assent. And this cannot
 7 be remedied by, say, under Article 142, we declare this law is deemed to be passed. My Lord,
 8 assent to a law cannot be given by a Court. A assent to a law has to be given either by the
 9 Governor or by the President of India. Wide are the powers of the court are 142 is to do
 10 complete justice. It cannot expand the power of the court to granting assents to legislation. All
 11 those points have been made rigorously, I don't need to... I need to only state it. Now, if you
 12 can't follow that formula, that in 142 we will grant the assent. You must have the Governor,
 13 who you tell that, no send this to the President, do this, do that, which is completely in the
 14 teeth of 361.

15 So My Lord, the complete absence of any judicially manageable standards, the bar under 361
 16 creates a situation where neither can you ask him to explain why he did, what he did; nor can
 17 you direct him to do what you think is the right thing to do. And there cannot be therefore be
 18 a greater construct in which Judicial Review stands excluded. I, My Lord want to make it clear
 19 and I put that in para 2.5, there are different inquiries. For example, My Lord, 254(2), My
 20 Lord, had asked me. In 254(2), there is an inquiry as to legislative competence. Now, while
 21 deciding legislative competence a question may arise as to, to what extent does the presidential
 22 approval cover laws. And that is the inquiry, My Lord, for example, in *Kaiser-e-Hind*, Your
 23 Lordship said we can look at the files. If Your Lordship, just see the language of 254(2). "Where
 24 a law made by the legislature of a State with respect to one of the matters enumerated in the
 25 Concurrent List, contains any provision repugnant to the earlier law or existing law, then the
 26 laws so made by the legislature shall, if it has been reserved for the consideration of the
 27 President..." Please mark the word first of all, "if", not "shall be reserved for the consideration
 28 of the President." If, My Lord, was incumbent of the Governor to refer it to the President every
 29 time there was an inconsistent law, Your Lordship would not have found the word "if" in Sub-
 30 Article (2). There is so much constitutional editing one will have to do, to get to the
 31 conclusions. The conclusions which Your Lordships are, by the submissions of the other side,
 32 invited to [INAUDIBLE] will require substantial rewriting of constitutional provisions scoring
 33 out words, adding words. Secondly, My Lord...

34 **CHIEF JUSTICE B. R. GAVAI:** Your para 2.5 says...

35 **HARISH SALVE:** Yes.

1 **CHIEF JUSTICE B. R. GAVAI:** Please repeat.

2 **HARISH SALVE:** "Where a law made by the Legislature one of the matters in the Concurrent
3 List contains any provision is repugnant to the provisions of an earlier law made by Parliament
4 or an existing law, then, the law so made by the Legislature of..."

5 **CHIEF JUSTICE B. R. GAVAI:** Your note, paragraph 2.5.

6 **HARISH SALVE:** Yes. 361 doesn't bar an inquiry into any decision taken by the Governor if
7 the... where inquiry into any decision... My Lord, challenge to a decision is different. If a
8 question arises, has the Governor granted assent or has the Governor withheld. You can always
9 ask, we want to know what has the Governor done. We are not saying, why...

10 **CHIEF JUSTICE B. R. GAVAI:** The Court can ask the Governor, why he is withholding.

11 **HARISH SALVE:** No, no, not why. What you have done? My Lord, there may be a doubt as
12 to whether ultimately assent has been withheld.

13 **TUSHAR MEHTA:** My Lord, this arose in *Kaiser-e-Hind* where the contention was that
14 the Governor whether has granted assent or has not granted assent and if he has granted,
15 whether it's partial or conditional. For that purpose, the Courts say that we can look into the
16 file, joining the Secretary to the Governor as a party, and find out whether the assent is
17 conditional or unconditional, not whether that is legal or illegal.

18 **HARISH SALVE:** My Lord, the Court can ask, what is your decision, it cannot say, why have
19 you taken this decision? Put it in very simple English. Because there may be a doubt in a
20 particular case. Sometimes these are not properly articulated. The Court may say, please
21 explain what is your decision. Are you saying this law can partly go through, wholly go through,
22 what is it that you're saying not why are you saying this. So, *Kaiser-e-Hind* as the learned
23 Solicitor rightly submitted Your Lordships a moment ago, was what is it that has been done,
24 not why. There was a doubt as to in the Governor's report how many... because there was My
25 Lords, a question it conflicted with a number of Union laws. The President says, I assent to
26 this law. They said, does this assent cover this particular repugnancy or does it not. So, they
27 wanted to see what's the width of the assent? Not why the President has assented, why he has
28 not assented, or why was this not asked or why was that not asked? That's the difference.
29 That's, My Lords, my submissions on justiciability.

30 **CHIEF JUSTICE B. R. GAVAI:** Yes. Now on the maintainability.

1 **HARISH SALVE:** Yes, My Lord. I'll take that very quickly. May I continue, My Lord?

2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Wait a minute.

3 **HARISH SALVE:** May I continue, My Lord?

4 **CHIEF JUSTICE B. R. GAVAI:** Yes, of course, yes.

5 **HARISH SALVE:** On maintainability, My Lord. It's a very simple point, My Lord. "There is
6 no jurisdictional bar on the making of a reference by the President. Even where a question of
7 law has been decided by the court. In theory, the correctness of the judgment of the Supreme
8 Court can be a doubt which requires to be resolved by the Supreme Court itself. Article 141 of
9 the Supreme Court was carefully worded. It provides that a law declared by the Supreme Court
10 shall be binding on all Courts within the territory of India. It is settled law that Article 141 does
11 not bar the Supreme Court from revisiting the law laid down by the Supreme Court. 141 does
12 not, in express terms say that the law laid down by the Supreme Court is binding on the
13 President of India. The Constitution of India proceeds on the fundamental belief that
14 constitutional authorities who are co-equal will respect each other's bounds. It is the domain
15 of the Supreme Court to lay down the law. And ordinarily, the Executive is expected to abide
16 by the law. Interpreting 143 as permitting a reference even where there is a judgment which
17 decides an issue would not in any manner diminish the position of the Supreme Court as the
18 last word on the law. The Supreme Court has evolved certain principles to guide the exercise
19 of power and Article 143. These are not jurisdictional constraints, but strong principles that
20 provide for certainty and clarity in the law and avoid the opportunity for the Executive to
21 sidestep the law laid down by the Supreme Court, by making references that lack merit. The
22 Supreme Court has construed 143 as enabling it to decline to answer the reference and one of
23 those considerations is where existing judgments would show that there is no real doubt as to
24 the state of the law. Undoubtedly, the judgment on a reference with the Supreme Court under
25 143 does not eviscerate the operations of the principles of *res judicata*. And a judgment given
26 in a particular case can only be reopened in a manner known to law. Some of the submissions
27 confuse the effect of *res judicata* with the general principles, including those of *stare decisis*
28 which have been evolved by the Court to discipline the exercise of the power under Article
29 143." So, these are my short submissions. I don't think they need any elaboration.

30 The only thing is the last point which I propose to make, My Lord. "Where a State has resorted
31 to Article 32, challenge the withholding of the assent by the President and Article 200 and the
32 matter was decided *sub silentio*. That by itself is one important factor to be taken into account
33 while examining the questions of law if they purportedly are covered by a judgment in such a

1 case. *A fortiori*, where the judgments of the Supreme Court purport to decide the case
 2 involving substantial questions of law as to the interpretation of the Constitution, without
 3 following the discipline of 145(3), the principle of restraint in the matter of exercising
 4 references in 143, which may impinge on the correctness of any existing judgments may not
 5 apply."

6 Your Lordships have held that, I only want to add, there is some purpose behind 145(3). They
 7 are co-equal institutions. Important constitutional law. Your Lordships are the last word in
 8 delineating powers of constitutional functionaries. And it said 5, today My Lord, 5 is a small
 9 number, but it said five at a time where five was almost near *en banc*, the Court. The whole
 10 idea, My Lord is to have the wisdom of a larger bench of judges to decide a case. That's what
 11 our Constitution provides. This is not coming from outside, our Constitution provides. And
 12 that is a discipline which has to be respected. And I would submit the fact that three of the
 13 judges have laid down... I dare say, whether or not the plain language of Article 200 should be
 14 read by reading in the proviso, itself is a substantial question of law. Because it has far-
 15 reaching consequences and was clearly a case for 145(3). If that has not been done, that will
 16 be one of the factors Your Lordship can take into account in saying yes, now in a Bench of five,
 17 in a reference, we will re-examine that provision. That, My Lord, is my submission. Unless,
 18 there's anything else I can assist the Court with My Lord. Those are additional points.

19 **MANINDER SINGH:** For the State of Rajasthan, My Lord. For the State of Rajasthan, I have
 20 filed a written submission which is Volume 1.3 and a couple of judgments which need not be
 21 cited, but wherever it is needed, My Lord, it is included in the note, and I'll just show
 22 something which has not been seen by Your Lordships. But before I do that, if Your Lordship
 23 may just permit me to see 200 with me once again because there are importance attached to
 24 the act of declaration and also the event of presentation. Kindly see that, My Lord, in Article
 25 200. The legislative process is on, My Lord, the State Legislature has prepared the Bill. The
 26 process is continuing as a component of that legislative process. Please see 200 where the
 27 concept is of presentation followed by a declaration. Kindly have a look at that, My Lords.
 28 Please see, My Lord, 200, "Assent to Bills" and just permit me to read it very carefully and
 29 slowly for my benefit, My Lord. "Where a Bill has been passed..." So, My Lord, it presupposes
 30 the legislative exercise is on for some time which have now thrown up a Bill by the State
 31 Legislature. "... and when a Bill has been passed by the Legislative State Assembly..." Your
 32 Lordships may skip for the time being, the Counsel, because we are arguing to understand
 33 200. "... have been passed, it shall be presented." My emphasis, My Lord, is the distinction to
 34 be appreciated with the event of presentation. It is not some presentation or some prize or
 35 something. It is a presentation in a legislative process of an outcome of that legislative process
 36 resulting into a Bill, and Bill is to be presented to the Governor. My Lord, from this stage, the

1 exercise for examination for discretion of the Hon'ble Governor, the process starts. Please see
 2 that, My Lord. It shall be presented to the Governor. And what is in-built here, is the
 3 examination by him in the Constitutional Scheme where one observation is also made, it's a
 4 duty of the Chief Minister that if something is needed to be understood by the Governor, he
 5 can ask him to come. And then please see further, "... shall be presented to the Governor and
 6 Governor shall..." Here, Your Lordships have seen time and again, three particular events
 7 which are described as options becoming available to the Hon'ble Governor, "... shall declare
 8 either that he assents to the Bill, or that he withhold assent therefrom, or that he reserves the
 9 Bill for the consideration of the President." Now, My Lord, the submission which I made is
 10 presentation followed for all three events by a declaration.

11 And the declaration is the manifestation of the decision taken by the Hon'ble Governor. It does
 12 not create any connect with the proviso; they are independently workable on their own. So,
 13 please come to the second option. After presentation and consideration, at the time of taking
 14 a decision to make a declaration, the constitutional provision in a test clearly permits the
 15 Governor to withhold assent therefrom, and which Your Lordships have interpreted to say that
 16 situation will necessarily result into falling of the Bill. And my first submission, therefore, is in
 17 continuation, that these are two different event, that is, presentation, followed by a
 18 declaration, connected intrinsically with those three events, and they are independently
 19 workable without the proviso. Now, proviso if Your Lordships may kindly see, in my respectful
 20 submission it is of a hybrid nature. The first part of the proviso expands the option. There are
 21 three options in the main provision. The first part of the proviso expands that option to make
 22 it four. Now, My Lord, the second part of the proviso, then creates a restriction by a negative
 23 postulation, which I will read, My Lord, Your Lordships may kindly see the proviso in the
 24 relevant parts with me.

25 'Provided that...' So, the stage of presentation declaration is now the fourth option, which is
 26 becoming available under the proviso in its first part for expansion. "Provided that the
 27 Governor may, as soon as possible after the presentation to him of the Bill for assent." Now,
 28 fourth option, My Lord, starts in the second sentence, that is, "return". My Lord, "return" is
 29 not envisaged in the main provision; those are three independent options, independently
 30 workable. Now fourth option from the second sentence with the word "return" in my respectful
 31 submission is the expansion of the main proviso to make available the fourth option to the
 32 Hon'ble Governor. The Bill, if it is not a Money Bill which Your Lordships have seen Article
 33 167, together with a message requesting that the
 34 House... because the message, My Lord, also gets connected with the word accordingly, in the
 35 latter part, I'll show it to Your Lordships. "Together with a message requesting that the House
 36 or Houses will reconsider", so when it is returned, it is returned for reconsideration. The return

1 can be accompanied by a message or it can be without a message from the Hon'ble Governor,
 2 "reconsider the Bill or any specified provision thereof, and in particular will consider the
 3 desirability of introducing any such amendment as he may recommend in his message. And
 4 when a Bill is so returned, the House shall reconsider the Bill accordingly."

5 So, My Lord, if it is with a message and a recommendation for some, seeing a specific provision
 6 or to make an amendment, My Lord, the word 'accordingly' is that the reconsideration
 7 necessarily by the House will direct itself to that recommendation or a message and give its
 8 reconsideration accordingly. And if the Bill is passed again by the House or Houses, with or
 9 without amendment, and please mark the next word, "the second presentation"; it is not the
 10 first presentation which is continuing, it is the second presentation which is ordained by the
 11 provision to the Governor for assent. And please see, My Lord, "for the assent" is followed by
 12 a negative stipulation. "The Governor shall not withhold assent therefrom". I pause there for
 13 a moment. My Lord, the moment this obligation is there to present it afresh by the House, the
 14 situation this return with the presentation again to the Governor, the Bill comes back to the
 15 first part of the main provision of Article 200.

16 Now, kindly see, it will travel with the second presentation to the main provision of Article
 17 200, that is the first part. But the three options, which may again become available to the
 18 Governor in the main provision, the second part is controlled by the last line of the proviso,
 19 "shall not withhold consent therefrom", the negative words are carved to make sure that there
 20 is no misconception or no misunderstanding, that the third option to the Governor in the main
 21 provision is not made non-existent. Please see it, My Lord. "If the Bill is returned to the
 22 Governor again, presented again", please come back to the main provision, last two lines, "he
 23 shall grant assent", which is available.

24 The second is taken away by the restriction in the second part of the proviso. We said that you
 25 will not withhold. It could have easily said, My Lord, it could have stopped at the Governor for
 26 assent in the last line and the Governor shall grant assent. A positive stipulation is not made
 27 there because of my understanding, My Lord, that it was to remove any possible doubt that if
 28 it is returned again, the Governor will not have third option, because the reason also is not far
 29 to see. Supposing the Bill comes, and it is sent back, it is reconsidered. Originally, there is no
 30 issue of any constitutional requirement to seek the consent of the President, or it has nothing
 31 to do with any item in the Third List, where that 254 occasion can arise. The recommendation
 32 or the message which is sent by the Hon'ble Governor for reconsideration now throws up in
 33 the return, something which is required to be assented by the Hon'ble President. This third
 34 option can never be taken away because the second presentation brings it back to the main

1 provision of Article 200. The only thing which is taken away is that he shall not withhold
2 consent by a negative word and not that the Governor...

3 **CHIEF JUSTICE B. R. GAVAI:** Is it your argument that those two options are still available
4 to him, either to give assent or to again reserve it for the....

5 **MANINDER SINGH:** Because My Lord, kindly see My Lord in the proviso, when the fourth
6 option of return is made available, there is no declaration. My Lord, in the main substantive
7 provision, the presentation in all three option is followed by a declaration, but in the fourth
8 option it is returned.

9 **JUSTICE SURYA KANT:** [INAUDIBLE]

10 **MANINDER SINGH:** I'm sorry, My Lord?

11 **JUSTICE SURYA KANT:** First, the three options are preceded by the declaration. There
12 has to be first, a declaration, then only...

13 **MANINDER SINGH:** And the return does not require any declaration. It's...

14 **JUSTICE SURYA KANT:** There is already word of advice. This message is already there.
15 So, therefore, no declaration.

16 **MANINDER SINGH:** So, therefore, My Lord, when the fourth... My Lord, first of all, my
17 submission is that the first part of the proviso throws up a fourth option. So, proviso can be
18 read in two forms. That it expands the option in the main provision, or it acts as a condition
19 or an exception. My respectful submission is, this proviso is of a mix of both. In the first part,
20 it expands and in the second part, by a negative counting, because the Constitution makers
21 were conscious that we could easily say, now, grant assent. But they don't say that because no
22 grant assent would have eliminated the third declaration option that he can now reserve the
23 Bill for the consideration by the Hon'ble President. So, therefore, My Lord, the first main
24 provision, the presentation is followed by a declaration; the first part of the proviso is a fourth
25 option; and fourth option is that part of the proviso which expands the main provision; and
26 the second part of the proviso then, makes continuation of option number one and three for
27 making a declaration, because if he has to make a declaration even of one, he has to come back
28 to the main provision of Article 200. Because the declaration is not available My Lord, under
29 the proviso. Kindly see, My Lord, if I read the proviso again, there is no declaration. I'll come
30 back My Lord after lunch.

1 **CHIEF JUSTICE B. R. GAVAI:** Solicitor, you decide the timing amongst yourselves.

2 **TUSHAR MEHTA:** We will conclude, My Lord.

3 **MANINDER SINGH:** I'll not repeat, My Lord, whatever is said.

4 **CHIEF JUSTICE B. R. GAVAI:** That everybody says, but does the same thing.

5 **MANINDER SINGH:** My Lords, Your Lordship will always stop us.

6 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Maninder.

7 **MANINDER SINGH:** Now, My Lord, at 200, the submission for Your Lordships' kind
 8 consideration is this one after whatever little bifurcation of various provisions which I made
 9 in the scheme of Article 200. The submission is, My Lord, at the original consideration on the
 10 first presentation of the Bill. It can't be said, My Lord, under the Constitutional scheme that
 11 the Governor has no jurisdiction at all to withhold the Bill, which Your Lordships have
 12 interpreted to mean that it would fall. That is only with the second presentation when the route
 13 followed is of the Proviso. If, My Lord, the Constitutional Provision of 200 is to be read in the
 14 manner as it is being presented, then it would necessarily, inevitably result in deletion of
 15 Option 2 at the original stage itself.

16 And that would, My Lord, with utmost respect, would constitute rewriting of the
 17 Constitutional Provision. Let me put it in the other way. The Constitution makers had always
 18 thought it fit to provide for that eventuality that a situation might arise where at the first stage
 19 of original consideration on the first presentation, the Governor takes his discretionary
 20 decision that it is, to not to be returned, it is not to be granted assent, and the assent has to be
 21 withheld. Because any other opinion, My Lord, by Your Lordships would necessarily render
 22 the second option at the original stage of consideration as *otiose* and non-existent. And, My
 23 Lord, with regard to two other arguments which are being conversed, and are being considered
 24 once again at our request in the opinion by the Honourable President, about the Judicial
 25 Review and providing a timeline, etc., Your Lordships are well aware of the distinction
 26 between Article 74 at one end and Article 163. Just have a look at that, My Lord.

27 **CHIEF JUSTICE B. R. GAVAI:** That has been already argued earlier. By the Learned
 28 Attorney, it has been read and reread.

29 **MANINDER SINGH:** My Lord, I'm only flagging...

1 **CHIEF JUSTICE B. R. GAVAI:** We have to tell the same thing, which we told to Mr. Kaul
2 that, merely, because if five lawyers repeat the argument, the argument doesn't make it strong.

3 **MANINDER SINGH:** My Lord, the only submission was that 74 which is the Provision, it
4 does not having the provision *pari materia* to Article 163(2).

5 **CHIEF JUSTICE B. R. GAVAI:** But that has been already argued that under 74 or after the
6 advice is sought by the President whatever opinion is given by the Council of the Ministers that
7 is binding on the President, but that is not so insofar as Governor under 163 is concerned.

8 **MANINDER SINGH:** Now, My Lord, just come only as a matter of example, just note a few
9 provisions, only one, one line each. Kindly come to 197(2) on the points, My Lord, which Your
10 Lordships have already considered. I'm only giving the number and reading one, one line, My
11 Lord, that wherever the timeline was to be...

12 **CHIEF JUSTICE B. R. GAVAI:** The Learned Solicitor has given the entire chart for that.

13 **MANINDER SINGH:** I just wish to read, My Lord, that in the Money Bill, etc., if Your
14 Lordship may kindly see 109.

15 **CHIEF JUSTICE B. R. GAVAI:** Because the Learned Solicitor has given a chart showing
16 the provisions wherever the timelines are provided, wherever the members of the Constitution
17 preside that for a particular theme, particular timeline has been provided, it has been
18 specifically provided in that.

19 **MANINDER SINGH:** And also, My Lord, for the deemed assent also wherever the provision
20 had... where the Constitutional scheme had required, it is provided. Now My Lord, I'll not
21 bother Your Lordships...

22 **JUSTICE VIKRAM NATH:** Yes. Anything new, Mr. Maninder Singh?

23 **CHIEF JUSTICE B. R. GAVAI:** There is nothing new, but then everybody has to show his
24 presence here. That you have already shown your presence here.

25 **MANINDER SINGH:** So, My Lord, I'll just run through only those judgments which I have
26 not shown. I'm not reading it. Only on the proposition, My Lord, I'll just show it to Your
27 Lordships the written submission which has been made available on my behalf. My Lord, it
28 starts from page 536. My Lord, this hard copy is available to Your Lordships?

29 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Rajasthan, right?

1 **MANINDER SINGH:** Yes, My Lord. 1.3.

2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** Page 530...?

3 **MANINDER SINGH:** 536. I'll just run through it. And I'll conclude, My Lord, so that others
4 are able to finish within the time granted by Your Lordships.

5 **JUSTICE VIKRAM NATH:** Yes.

6 **MANINDER SINGH:** My Lord, with regard to 145(3) and 143, one submission, why the
7 word 'minimum' has been provided. My Lord, there are two routes for Your Lordships under
8 the Constitutional scheme. My submission was at 145, 145(3), and 143, My Lord. Your
9 Lordships, the Constitution scheme provide at least two routes, My Lord. There may be more,
10 at least two routes. My Lord, for correcting a view, if Your Lordship... whenever Your
11 Lordships so desire, one is, My Lord, Your Lordships referring it to a larger bench. And other
12 is, My Lord, 143, the Honourable President coming forward and asking for Your Lordships'
13 opinion. Why I'm explaining is that the why minimum of five under 145(3). Now, supposing
14 the... further, My Lord, the opinion is also permissible, and legitimate, and entirely
15 constitutional. That's left to seek an opinion. Even when there exists a judgment of Your
16 Lordships, more than one, and there is a consistency which needed to be obtained because of
17 some ambiguity or for some change of circumstance or by passage of time.

18 And secondly, My Lord, there is no decision at all by Your Lordships. Both the situation, 143
19 would be maintainable, legitimate, and constitutional. My Lord, but wherever... supposing and
20 I'm going to give Your Lordships in my note a situation which had arisen, where the... not
21 reference, but when the reference was made by Your Lordships to a larger bench, it was only
22 because a scheme which is framed by this Honourable Court via five-judges Constitution
23 Bench Judgment is reconsidered by 11-judge bench judgment. And where it is held at the
24 scheme framed by Your Lordships which is only traceable to Article 142, this Honourable court
25 11-judges bench, My Lord, in that *Unnikrishnan* and *TMA Pai* has held that not only the
26 earlier view is to be overruled, but Your Lordships went to the extent of saying that the earlier
27 review was unconstitutional.

28 I will show that only in one line. Now, My Lord, therefore, when this 145(3) has minimum of
29 five, a situation may arise where the existing judgment is of particular number of Honourable
30 judges, which may be five, and Your Lordships want to achieve a consistency, clarity, and
31 authoritativeness for the purpose of implementing 141 of the Constitution or 144. Your
32 Lordships can... the reference can be to more than five judges under article 143. My Lord,
33 there's nothing new. And My Lord, out of the references where the list has been given, if Your

1 Lordship may kindly see, there are two references in para 18 on my written note, 547, at least
2 two references are there, which is by seven Honourable judges under Article 145(3). Now, My
3 Lord, if Your Lordship may kindly come to third part of the submission at page 550.

4 Only, My Lord, a couple of judgments which have not been shown, which I'm not reading. The
5 relevant portions have been reproduced, My Lord, on the point that it is a Legislative Act under
6 200, and it is a component and part of the Legislative process. And My Lord, if Your Lordships
7 may kindly come to para 30, which is a Constitution Bench judgment in ***Union of India***
8 ***versus Valluri***, para 30 at page 551. The Constitution bench of Your Lordships, and kindly
9 come to the bold portion at 552.

10 **CHIEF JUSTICE B. R. GAVAI:** This judgement has also been cited twice by the Learned
11 Solicitor as well as Mr. Kaul.

12 **MANINDER SINGH:** My Lord, the portion which I am... only one line which I wish to read
13 is in that bold portion. And I would stand corrected, My Lord, if this is... because my presence
14 told me that perhaps this portion was not read.

15 **JUSTICE VIKRAM NATH:** All right. So, 552?

16 **MANINDER SINGH:** Because the Learned Solicitor General had also, My Lord, set up that
17 a few portions of some judgment was skipped. I am only saying that this one line if Your
18 Lordship may kindly see, the last line of the portion...

19 **CHIEF JUSTICE B. R. GAVAI:** Learned Solicitor would not skip anything.

20 **JUSTICE VIKRAM NATH:** Actually, Learned Solicitor took all of you by a ride. He said,
21 I'm leaving certain points for other, my friends who argue. He argued everything.

22 **MANINDER SINGH:** And My Lord, that ride, most of the time...

23 **JUSTICE VIKRAM NATH:** It was your this thing to check the Solicitor from arguing all
24 those points which he had allotted to all of you.

25 **MANINDER SINGH:** My Lord, that ride is all... most of the time, it's very mysterious.

26 **JUSTICE VIKRAM NATH:** Yes. *Haan*.

27 **MANINDER SINGH:** Kindly see the last line of the bold portion.

1 **JUSTICE VIKRAM NATH:** Yes.

2 **MANINDER SINGH:** "The only other Legislative function of Governor is that of
3 promulgating ordinance". And this was with reference to the Act of Assent. So Act of Assent is
4 Legislative and the other Act is to promulgate ordinance where it has been read, My Lord. And
5 if Your Lordship now kindly come to page 554. My Lord, where Your Lordships' judgments
6 with regard to grant of approval for the rules with Your Lordships' name either for the... under
7 Article 129 for the functioning, and My Lord, the dispersal of various emoluments to the
8 employees and of the High Court, where Your Lordships have held that even if the Government
9 approval is not forthcoming, Your Lordship will refuse to issue any *mandamus* because that,
10 even to that subordinate Legislation, the grant of assent is totally Legislative. That, My Lord,
11 is quoted in para 48 at page 556. Para 48 at 556.

12 **JUSTICE VIKRAM NATH:** Yes.

13 **MANINDER SINGH:** "It is contented by the Learned Attorney General, the functions of
14 President of India approving for rules framed by the Honourable Chief Justice relating to
15 salaries, etc., is analogous to the President of India giving assent to a Bill. It is difficult to accept
16 the contention that the functions of President approving the rule is analogous to give assent to
17 a Bill. The rules framed by the Chief Justice of India, though it's a piece of subordinate
18 Legislation, it is not a full-fledged Legislative Act requiring assent of the President of India."
19 Then, My Lord, similar thing Your Lordships have...

20 **CHIEF JUSTICE B. R. GAVAI:** How is this relevant?

21 **MANINDER SINGH:** My Lord, the assent here, even under 200 is a full-fledged Legislative
22 Act, which cannot be conditioned with any timeline. And it can never be...

23 **CHIEF JUSTICE B. R. GAVAI:** How does this observations of [UNCLEAR] bench...

24 **MANINDER SINGH:** Because the deemed assent has been read, My Lord, in the reference
25 which Your Lordships are considering. It's only from that perspective, My Lord, it is being
26 placed...

27 **CHIEF JUSTICE B. R. GAVAI:** We will appreciate only if relevant is pointed out because
28 otherwise it unnecessarily increases our homework.

29 **MANINDER SINGH:** No, My Lord. That the respectful submission, maybe I'm wrong in my
30 understanding, My Lord. But the submission is this, that if grant of assent, My Lord, which is

1 in any case, being a Governor, being a component of Legislative process, it is essential
 2 Legislative Function, then grant of assent is also essentially Legislative. And therefore, My
 3 Lord, there would not be any occasion for issuance of any *mandamus* or to laying down any
 4 timeline or in the present context...

5 **CHIEF JUSTICE B. R. GAVAI:** You can move to other things. This has been now...

6 **MANINDER SINGH:** So, Your Lordship may skip it, My Lord. Kindly, My Lord, now see...
 7 kindly see para 55 at the next page.

8 **JUSTICE VIKRAM NATH:** 55?

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

10 **MANINDER SINGH:** In page 558, there para 55 quoted. I'm not reading it. Your Lordship
 11 may just make a note. Then, My Lord, please see para 40. My Lord, similar thing is said in
 12 [UNCLEAR] *Zaki*. I'm not reading it in the next judgment paragraph 40 of Your Lordship's
 13 judgment. Page 560, My Lord, the relevant portions have been highlighted. Then, My Lord,
 14 the Constitution Bench in Allahabad High Court case followed where there 30-days stipulation
 15 was read, which is already read, is mentioned in para 41. I am not reading it. Kindly, My Lord,
 16 the judgment only two, three paragraph, which I wish to read it at page 563. Constitution
 17 Bench, My Lord, on the issue of desirability and imminent necessity in the process... in the
 18 thought process, which should be a part of the Constitution scheme does not consult
 19 jurisdiction, which the Learned Solicitor General has submitted in detail. If Your lordships
 20 may just permit me to read four or five paragraphs of *Manoj Narula*, My Lord, which the
 21 17046 in the compilation which I have given, which is Volume 43.

22 **JUSTICE VIKRAM NATH:** You've already extracted paragraphs you want to read?

23 **MANINDER SINGH:** In *Manoj Narula*, I have not done that because there are four or
 24 five paragraphs. I can leave it with the number, My Lord. I just want to Your Lordships' *amicus*
 25 submission which were made and which then are dealt with and...

26 **JUSTICE VIKRAM NATH:** In paragraph 44, the quoted part is from which judgment?

27 **MANINDER SINGH:** Your Lordships will see it in para 64, but I wish to... kindly come to
 28 the quoted portion itself. There was something more. So I said if Your Lordships...

29 **JUSTICE SURYA KANT:** Because something more is missed out.

1 **MANINDER SINGH:** Anyway, My Lord, I'll read it from here. My Lord, if Your Lordships
 2 may come to the judgments? Kindly come to, My Lord, para number 38, which is the 17079 in
 3 the Judgment Compilation. Para 38, I didn't reproduce it here. If Your Lordships may permit
 4 me to read it from here? Para 38 at 17079. This was, My Lord, the necessity and desirability
 5 which was thought fit for introduction as a disqualification in the representation of People Act,
 6 which was under question and Your Lordships considered the submission. My Lord, Para 38,
 7 Your Lordship may just make a note. The submission made by Mr. Parasaran, My Lord. And
 8 in the last three lines that if such a submission is to be introduced by interpretation, that it
 9 would be travelling beyond the jurisdiction. Thereafter, Your Lordship may kindly come to
 10 para 64, at page 17090. Your Lordship may just make a note. And then please come to 67. My
 11 Lord, para 64, last three lines, "In the absence of any Constitutional prohibition or statutory
 12 embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1),
 13 and Article 164(1)". Last three lines of para 64. Kindly come to para 67. "The question this is
 14 to be posed here is whether taking recourse to this..."

15 **CHIEF JUSTICE B. R. GAVAI:** No, one minute.

16 **MANINDER SINGH:** I'm sorry, My Lord. Para 67. And this is, My Lords, Your Lordships
 17 may just note. Your Lordships are aware of it, where under Article 74, 75, the submission was
 18 by interpretation. You read a further disqualification in the appointment of Minister. Kindly
 19 see 67, four lines. "The question that is to posed here is whether taking recourse to the purpose
 20 of advancing Constitutional culture, can a court read a disqualification to the already
 21 expressed disqualification provided under the Constitution and 1951 Act. The answer has to
 22 be in the inevitable negative, for there are express provisions stating the disqualification and
 23 second, it would tantamount to crossing the boundaries of judicial review". Thereafter, My
 24 Lord, one paragraph 98 at page 17100. Para 98. 98, My Lord. And please see last four lines of
 25 para 98. The entire para I wish to read, but Your Lordship may just permit me the last five
 26 line, "The Framers of the Constitution".

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

28 **MANINDER SINGH:** "The Framers of the Constitution left many a thing unwritten by
 29 reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that
 30 there has to be an emergence of Constitutional governance, which would gradually grow to
 31 give rise to the Constitution renaissance. So, then, it is what the... then Your Lordship may just
 32 make a note of 99 and 100, last two lines of 99. Last two lines of 99. "We have already held
 33 that prohibition cannot be brought in within the province of 'advice', but indubitably, the
 34 concepts, especially the Constitutional trust, can be allowed to be perceived in the act of such

advice". So, this Honourable Court left it and said that, we would not have any jurisdiction under our judicial review to lay down any further disqualification which is specifically provided.

Now, My Lord, this is followed in a subsequent Constitution bench judgment, at page 17133 of the same volume, which is also mentioned in the note, 17133 on the similar lines, My Lord. And I'm not reading it. It is also a Constitution bench which also was after **Manoj Narula**. Coming back to my note, My Lord, which I've furnished, I was at page 563. At 571, My Lord, the timeline can't be laid down under 200. I'm not reading it. It is mentioned at page 571. Then 574 onwards, My Lord, 574 onwards, at page 577, the Tenth Schedule direction which have been issued from time to time on various occasions for laying down the timeline at page 577 in **Padi Kaushik Reddy**, which is mentioned in paragraph 57 of the note. The para 30 of the judgment is quoted, My Lord. And kindly see first five lines of para 30 at page 577. "It can thus be seen that this Court, in unequivocal terms, has held that it was inappropriate to claim that the determinative jurisdiction of the Speaker in the Tenth Schedule to the Constitution was not a judicial power and was within the non-justiciable Legislative area".

This was rejected. Because the judicial review and justiciability norms and the standards, My Lord, are different whenever it is a Legislative function as compared to the quasi-Judicial functioning. With regard to 202, the overruling of the view, Your Lordships have already seen the Learned Solicitor has made submission, overruling a judgment and overruling a view. And My Lord, only 581 if Your Lordship may kindly see, these in my respectful submission are the four main area which the... existing in the second column in that table, the existing views on that aspect with the relevant para numbers. In the second column, the aspect is in the first column. The second column with the existing views and the para numbers, My Lord. And this is how this has been... this has not been, My Lord, in our respectful submission, first of all, it had deserved as the Learned Attorney General had made a submission in the Tamil Nadu case that this case would require to be considered by a larger bench.

My Lord, at that juncture, it is my respectful submission, the submission which was made by the Learned Attorney General in the facts of that case and the existing various, differing views or a differing view is to be taken, had deserved, My Lord, with utmost respect, consideration for acceptance to refer the matter to the larger bench. Because in a number of cases I've cited the judgment, My Lord, in Your Lordships... in this written submission, where Your Lordships have said, that it ought to have been referred to a larger bench at that very stage. Now, if Your Lordships may proceed further, 588. These submissions I've already made, My Lord. They are put in my note in the form of table and the following paragraphs. Then the relevant portions of **Pavitra** which have already been read. It's only mentioned in page, My Lord, 592 onwards.

1 And then Your Lordships may kindly come to page 601, which, My Lord, the direction 142 My
 2 Lord if it is individual rights are being determined to do complete justice. To that extent, Your
 3 Lordships have said 142 would always be utilised. But My Lord where it seeks to lay down
 4 something as a matter of policy of uniform application, which is law, then Your Lordships have
 5 said that that may not be permissible. The first judgment in para 96 at page 602, My Lord, was
 6 a Constitution bench of Your Lordship, where the former President of the Bar Council of India
 7 had met with a punishment here. And that was considered by Your Lordship that that
 8 jurisdiction belonged to the Bar Council of India. And Your Lordships recall that order, and
 9 My Lord had referred the matter. In that context, My Lord, the observations which have been
 10 made in para 97, quoted at 603, para 47 at page 97. And at page 603, My Lord, page 602 in
 11 para 97, the Constitution bench decision, the relevant para 47 has been reproduced.

12 And My Lord, if Your Lordship may kindly see at page 604, last five lines in that bold portion
 13 on the top, "To the extent that this court may..." The fifth line from top and that bold portion,
 14 "To the extent, this Court makes the statutory authorities and other organs of the State
 15 perform their duties in accordance with law, its role is unexceptionable, but it is not
 16 permissible for the Court to take over the role of the statutory bodies or other organs of the
 17 State and perform. their functions." Then, My Lord, in judgment in **ONGC's** case, which is
 18 para 19. In the bold portion, Your Lordships have held that wherever it is a part of a policy of
 19 Legislation, Your Lordship will not exercise and decline to exercise in 142. And something
 20 more, My Lord, with regard to timeline, these special laws, laying down the outer limit for the
 21 Courts to condone the delay and where there strict timelines are laid down, most... in a number
 22 of occasions, this Court felt that perhaps this strict interpretation of such restricted timeline
 23 may not do justice. But Your Lordships have said, we will not exercise our power under Article
 24 142 because it is nothing, but rewriting the provision of law itself.

25 Then if Your Lordships may kindly see para 103, **Unnikrishnan**. Your Lordships may recall
 26 Mohini Jain in '92. Your Lordships, in the two-judge bench judgment had laid down that there
 27 is a fundamental right to education. You'll read it under Article 21, the Constitutional provision
 28 of Directive Principle of Article 45 had permitted it only up to the age of 14 years. So, when
 29 this was done, this was considered. The **Mohini Jain** was considered in **Unnikrishnan**.
 30 And Your Lordships said that this right is to be restricted only to 14. And then proceeded to
 31 frame a scheme by Your Lordships, My Lord, to be adhered to, and followed by converting it
 32 to other conditions of eligibility or for qualification and recognition, etc., as a statutory
 33 provision. And that held to be, My Lord, a statutory exercise to lay down the law which was
 34 then considered by 11 judges in **TMA Pai**. Only two portions, para 45, which is reproduced at
 35 page 608. So, a statutory... a virtually scheme is laid down on Your Lordships' judgment that

1 50% seats would be free, 35% would be for a particular amount, and 15 NRI, and this must be
2 followed by everyone. This judgment is delivered in 1993.

3 It held the field under Article 141 till 2002 when this 11 judges considered. In para 45, that
4 view and scheme is overruled. And in Para in 161, that Question No. 9, which was framed, Your
5 Lordships held that the framing of that scheme, why the Supreme Court was unconstitutional?
6 Now, My Lord, supposing in 1993... I'll just make a humble submission for Your Lordships'
7 kind consideration, whereafter one decade the scheme framed in the judgment of this
8 Honourable Court, which is implemented as Article 141 by all High Courts and by all the States
9 is then re-examined by 11 judges. And Your Lordship says, the scheme was unconstitutional.
10 Please visualise the situation. That a reference was preferred to be made by the Honourable
11 President in 1993 itself, when the judgment came, because the judgment may be taking away
12 rights of various parties.

13 The reference would have been maintainable. And My Lord, this situation left a scheme to
14 operate as Article 141 as lawmaking for 10 years, and which eventually Your Lordships laid
15 down to be as unconstitutional. Kindly come to the next page, My Lord. 610. From 610 to 625,
16 the questions, My Lord, which are... were the four aspects which I tabulated in the earlier part
17 of the Written Submission that on which the views are already existing, even by larger benches.
18 And the State of Tamil Nadu has taken a differing view, My Lord, which would require this
19 Presidential request to be considered. My Lord, I have only given the relevant portions for
20 Your Lordships' convenience here itself. And My Lord, at page 626. 626, My Lord, the
21 reasoning is not appearing at page 626 with continuation of para 412 from 625 and 413, that
22 why a particular situation in Sri Lanka is accepted and the position, which is equivalent to our
23 Constitution and was prevalent in Canada is not accepted or disregarded in rendering the
24 judgment in the Tamil Nadu case.

25 So, therefore, my respectful submission in support of the submissions which I've already made
26 that the reference would deserve to be considered and answered in the light of the submission
27 with respect. I am deeply obliged, My Lord, for your consideration.

28 **TUSHAR MEHTA:** Your Lordships are right. My Lord, I did say that we will distribute and
29 we discussed. But it was felt that this being a reference from the Honourable President, it's
30 better that the Central Government put forward its view in entirety. Others may submit.

31 **JUSTICE VIKRAM NATH:** No, no. We understand everything on that.

32 **TUSHAR MEHTA:** Rather than, My Lord, one State saying something, another State
33 objecting to it, better the Central Government says on all points.

1

2 **K. M. NATARAJ:** Yes. I've taken the clue from the Court, what has fallen from the Court that
 3 Learned Solicitor General has covered everything, but still I'll take only five minutes in the
 4 matter. Kindly take Volume 1.

5 **CHIEF JUSTICE B. R. GAVAI:** You're for whom?

6 **K. M. NATARAJ:** Two states, that is State of Odisha and Uttar Pradesh. And the written
 7 notice, on behalf of Odisha. Written note that is submitted on behalf of State of Odisha in
 8 Volume I(vi). In light of the reference made by the Honourable President, actually, so far as
 9 the States are concerned, we have made three issues which fall for consideration. That is at
 10 page no. 662. That is, first one is, whether it would be a permissible for the Judiciary to impose
 11 a timeline or time limit for disposing of Bills by the Governor. Two, whether the failure to
 12 adhere to such timeline or time limit would *ipso facto* make the Bill a Legislation by deemed
 13 assent. Third one, whether the situation prior to or anterior to the assent would be justiciable.

14 So I'll be focusing only on three issues with regard to... in the context of all the reference made
 15 by the Honourable President. These issues will have to be considered by keeping in mind one
 16 of the key factors that is the functional autonomy, functional autonomy of the President and
 17 the Governor. The President and the Governors, they enjoy an absolute functional autonomy
 18 within their discretionary functions or within their spheres. To substantiate that we have taken
 19 the shelter under three articles, that is, number one is, Article 60 or 159, with reference to their
 20 oath, which categorically says, the oath will be taken by the Honourable President and the
 21 Honourable Governor to preserve, protect, and defend the Constitution. It is in contrast or
 22 with all other Constitutional functionaries in the Third Schedule will be taking oath to defend
 23 the Constitution, whereas the absolute autonomy of the President and the Governor is one of
 24 the factors which is indicative from these two articles, 60 and 159.

25 Then, thereafter, again, Article 200, where the discretion has been given to the President and
 26 the Governor, which is already argued by the... this one, this is the second factor. The third
 27 one is Article 361. From these three articles, it can be made out without any doubt that the
 28 President and the Governor have the absolute discretion in their functioning, a stage prior to
 29 grant of assent. Now, it is a functional autonomy of the President and the Governor. Now, this
 30 is a situation where we are examining not the... we are not examining the correctness of the
 31 decision taken by the President or the Governor. It is a stage prior to the grant of assent or the
 32 decision taken by the President or the Governor.

In all early decisions, whether it's **Kihoto Hollohan** or all other Constitutional judgments, the decision of the Governor, including in **S. R. Bommai's** case, that was the decision where the decision was examined in the context by analysing it as a Tribunal. Now, we are examining the stage prior to the decision yet to be taken by the Governor by granting, not granting assent at the particular time and thereby, the court fixing a particular timeline. Yes, if the assent is not given within a particular time, what should happen and whether the *mandamus* can be issued to the President or the Governor. This is a stage prior to that. Now, this is yet... one more aspect is the word specifically expressed in Article 200, which is again 'as soon as possible', which is already argued by the others. Therefore, he has absolute discretion with reference to his functioning even under Article 200.

Now, in support of this one, now I have quoted from **S. R. Bommai's** case at page no. 667. Two factors, that is from para 240, where they refer to Encyclopaedia on American Judicial System by Justice Ramaswami which was a concurring judgment at page 240... para 240, which is available at page no. 667. May I read it?

CHIEF JUSTICE B. R. GAVAI: Yes.

K. M. NATARAJ: "The standard of assessing constitutionality must be the words of the Constitution, not what the judges would prefer the Constitution to mean. The Constitutional supremacy necessarily assumes that the superior rule is what the Constitution says. It is not what the judges prefer it to be". So the absolute supremacy or the autonomy, what the Governor... the President, or the Governor enjoys, that cannot be read into by saying something beyond what is specifically set in the Constitution, which is nothing but either reading down is not permissible or supplying *casus omissus* to the Constitution, it is not permissible with regard to the interpretation of the Constitution. Then again kindly turn to para 238 of that **S. R. Bommai's** case at page number 667 I quoted. Para 238, after about five lines, I have put it in bold letters, "But such an interpretation". "But such an interpretation in our respectful view is not permissible, when we are called upon to interpret the organic Constitution and working the political institutions created therein. When Parliament has had an opportunity to consider what exactly is going wrong with the political system designed by the Constitution but took no steps to amend the Constitution in this behalf, it is a principle of legal policy, that the law should be altered deliberately, rather than casually by a sidewind only, by major and considered process".

Then, again further, in **Kihoto Hollohan** case at page no. 668, in para 17, I have quoted, where the *quia timet* orders are... whether it's a permissible or not, that has been referred to in five-judges bench of Kihoto Hollohan in para 110. Para 110 of **Kihoto Hollohan**. "In view

of the limited scope of judicial review that is available on account of the finality clause in Paragraph 6 and also having regard to the Constitutional intendment and the status of the repository of the adjudicatory power i.e., Speaker/Chairman, Judicial review cannot be available at a stage prior to the making of a decision by the Speaker/Chairman and a *quia timet* action would not be permissible".

So that exactly is the situation where now here we are considering a stage prior to either grant of assent. In such a situation, even *quia timet* order cannot be granted by even Judicial review is also may not be permissible at that stage because of the functional autonomy he has. Now to say that by supplying the *cassus omissus*, again in para 111 of the same judgment, **Kihoto Hollohan**, the second sub para. "However, having regard to the Constitutional Schedule in the Tenth 26 Schedule, Judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen". That is by assuming that he is the Tribunal, by assuming that for the sake of argument. "Having regard to the Constitutional intendment and the status of the repository of the adjudicatory power, no *quia timet* actions are permissible, the only exception for any interlocutory interference being cases of interlocutory disqualifications or suspensions which may have grave, immediate and irreversible repercussions and consequence."

So, this is now the situation. Even as we are examining a stage prior to the grant of either assent or the function... which he has absolute power or function to consider or to decide a particular case within his discretionary power. Now we can't equate it to the position of the Tribunal. Like the Speaker's addition, which was a subject matter of review, or even 356. That was a post-decisional review of the order passed or the reference made by the Honourable Governor, that was under consideration. See, here the situation is a stage prior to that of, therefore, there is even *quia timet* order or the Judicial review of any of the action or justiciability, that is not at all permissible. And while interpreting the Constitutional provision, especially Article 200, there is no question of supplying *casus omissus*. *Casus omissus* cannot be supplied at all to the interpretation of the Constitutional provisions. Therefore, when the language is very clear, the Articles are clear, we need not, or we should not supply *casus omissus* to the Provisions of the Constitution and say that, yes, because there is some kind of deficiency, there is some kind of issue arises for consideration, therefore, the Judiciary steps in and issues a direction... issuing a direction, that may not be permissible. Then the question may arise in certain situations where the wrong decisions are either not taken or something is happening. Then whether it would be, the Judiciary can step in. I can put it in the words of the [UNCLEAR] report itself, which I refer to in paragraph 20 of the note at page no. 669.

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

1 **K. M. NATARAJ:** That's the extract from the *Common Cause* case. Last about six lines in
 2 page no. 669. "If the Legislature... page no. 669 of the note. "If the Legislature or the Executive
 3 are not functioning properly, it is for the people to correct the defects by exercising their
 4 franchise properly in the next elections and voting for candidates who will fulfil their
 5 expectations, or by other lawful means, e.g., graceful demonstrations and agitation, but the
 6 remedy is not surely not by the Judiciary in taking over the functions of the other organs."

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

8 **K. M. NATARAJ:** I'll read it again, the para. That's at para 40 at page no. 669. "The
 9 justification given for judicial activism is that the Executive and the Legislatures have failed in
 10 performing their functions. Even if this allegation is true, does it justify the Judiciary in taking
 11 over the functions of the Legislature or the Executive? In our opinion, it does not, firstly,
 12 because that would be in violation of the high Constitutional principles of Separation of Powers
 13 between three organs of the State. And secondly, because the Judiciary has neither expertise
 14 nor the resource for this. If the Legislature or the Executive are not functioning properly, it is
 15 for the people to correct the defects by exercising their franchise properly in the next elections
 16 and voting for candidates who will fulfil their expectations or by other lawful means, e.g.,
 17 peaceful demonstrations and agitations. But the remedy is not surely not by the Judiciary
 18 taking over the functions of other organs."

19 This is as has been put by this Honourable Court itself in the *Common Cause* case. So, my
 20 submission would be Judiciary cannot be the pill for every disease. By assuming that there is
 21 some kind of defect or some kind of problem in functioning of these two offices in some
 22 situations also, it may not be proper for the Judiciary to step in and issue a direction which
 23 would be totally hit by the principles of Separation of Power, and that may not be permissible.
 24 Therefore, by keeping in mind, three aspects. Number one, the functional autonomy of the
 25 decision, the scope of interference by another organ in the such important or the discretionary
 26 function of the high Constitutional functionaries, a pre-decisional Judicial review or
 27 justiciability is not at all permissible. Therefore, to that extent, with reference to three
 28 questions I have framed, kindly consider these three aspects and leave it. I'm grateful to you.

29 **VIKRAMJIT BANERJEE:** Everything has been submitted and I come and point towards
 30 the very end, My Lords. My Lords, I have a note which I'll give, which sort of takes care of most
 31 of my submissions which I want to. But I'll summarise it in two points, which I want to largely
 32 highlight. And My Lords, both are some one which has been...

33 **CHIEF JUSTICE B. R. GAVAI:** You're appearing for whom?

1 **VIKRAMJIT BANERJEE:** I'm sorry, My Lords.

2 **CHIEF JUSTICE B. R. GAVAI:** You are appearing for whom?

3 **VIKRAMJIT BANERJEE:** State of Goa, My Lords. My Lords, the rest of it is in the notes
4 and submission. I'm not going over that. I've made extensive submissions on that. My Lords,
5 the two points which I want to submit is, one, on deemed assent which has been addressed by
6 Mr. Salve extensively also. But my point on that is, and I'll summarise the point, and then I'll
7 quote from the judgments which I've extracted in my notes. It is very clear in terms of the
8 decisions of this Court that the process... I'm not saying the Governor is a part of the
9 Legislature. I am saying that the process of Legislation...

10 **CHIEF JUSTICE B. R. GAVAI:** Governor is not part of the Legislation.

11 **VIKRAMJIT BANERJEE:** My Lords, I am not saying. I'm qualifying it. I'm taking it one
12 step ahead. I am not saying that. I am saying that the process of Legislation cannot be complete
13 unless it receives the assent of the Governor. So because the process cannot be completed,
14 there is no question of deemed assent. Because no one but the Governor as specified in the
15 Constitution can give that assent for the process of the Legislation to be completed. The courts
16 can... number one, the Constitution does not envisage a concept of deemed assent. Number
17 two, the Judiciary cannot insert itself into a position whereby such deemed assent can be given
18 at all. My Lords, there are two judgments, one which has been quoted. But I have quoted that
19 in my note, My Lords, **B. P. Singhal** has been quoted. I'm just quoting that so it's easier. My
20 Lords will please come to page no. 14, para 28. My Lords, I'll just read it out from that, so it's
21 easier.

22 **CHIEF JUSTICE B. R. GAVAI:** **B. P. Singhal**?

23 **VIKRAMJIT BANERJEE:** **B. P. Singhal**, My Lords, it's been cited. The Constitution
24 observed the role of the Governor... in the case of **B. P. Singhal**, a Constitution bench
25 observed the role of the Governor as part of the Legislature. "Position of a Governor under the
26 Constitution. The Governor constitutes an integral part of the Legislature of the State. He is
27 vested with the Legislative power to promulgate ordinances while the Houses of the
28 Legislature are not in session. The Executive power of the State is vested in him and every
29 Executive action of the Government is taken in his name. He exercises the sovereign power to
30 grant pardons, reprieves, respites or remissions of punishment. He is vested with the power
31 to summon each House of the Legislature to prorogue either House or to dissolve the
32 Legislative Assembly. No Bill passed by the Houses of the Legislature can become law unless
33 it is assented to by him. He has to make a report when he finds that a situation has arisen in

1 which the Government of the State cannot be carried on in accordance with the Constitution.
2 He thus occupies a high Constitutional office".

3 Similarly, My Lords, I have another judgment called *State of Kerala versus Mar*
4 *Appraem*, which I don't think is part, which I have also quoted, which is at para 30. I'll just
5 read that para, quoting para 50. "Broadly speaking, law-making is exclusively the function of
6 the Legislatures. The President and the Governor are a part of the Union or the Legislatures
7 of the State. As far as the Parliament is concerned, the Legislative process is complete as soon
8 as the procedure prescribed under 107 of the Constitution and connected provisions are
9 followed and the Bill passed by both the Houses of Parliament has received the assent of the
10 President under Article 111. Similarly, a State Legislation becomes an Act as soon as a Bill has
11 been passed by the State Legislature and it has received the assent of the Governor in
12 accordance with Article 200". I'm sorry, My Lords. So, the Act of Assent is integral to the
13 completion of the process of Legislation. There cannot be a deemed assent. The Constitution,
14 number one, does not provide, unlike, in many cases, My Lords, has in British Constitutional
15 Law, where there's a possible of the second time it is passed... it is taken that the Sovereign has
16 given assent. There is no concept of deemed assent. And in the present case, the process is only
17 complete if there is an assent of the Governor.

18 **JUSTICE SURYA KANT:** Aiming is only a fixer.

19 **VIKRAMJIT BANERJEE:** I'm sorry.

20 **JUSTICE SURYA KANT:** But deeming is only a fixture, that something which does not
21 happen in law, still it will be presumed that it has happened.

22 **VIKRAMJIT BANERJEE:** My Lords, there are a number... if the Constitution provides a
23 certain process to be followed, it has to be followed. And in this case, present case, deemed
24 assent, the only sort of example which I can sort of see, the discussion of deemed assent
25 happens in the Sovereign in British Constitutional Law. But there is no provision, there is no
26 example whereby the Courts can grant deemed assent in any Constitutional law to my
27 understanding of... or my looking at. The second issue, My Lords, I know that it has been
28 placed, MP Special Establishment Act. This is the second issue which I want to place. But para
29 12 of MP Special Establishment needs reading. It's an extensive paragraph where Mr.
30 Sorabjee's argument is quoted in relation to *Shamsher Singh*. But, My Lords, the most
31 important part is towards the end of it is My Lords will come to my note at para 35.

32 **TUSHAR MEHTA:** At page 375 of my submissions, I have, My Lord, given a chart of all
33 provisions where the Constitution says that it would be deemed to have happened or not.

1 **CHIEF JUSTICE B. R. GAVAI:** Some of the charts, wherever it is, one chart wherever
 2 timelines, where the prosecution wanted to provide timeline, those provisions and timelines
 3 are provided, and wherever the Constitution wanted the deeming provision to be there...

4 **TUSHAR MEHTA:** It is specifically there.

5 **CHIEF JUSTICE B. R. GAVAI:** It's specifically mentioned there. And therefore, according
 6 to you, since there is no such deeming provision under 200, you can't... the Courts can't read
 7 deeming provisions.

8 **TUSHAR MEHTA:** Correct.

9 **JUSTICE SURYA KANT:** In the case of timeline where timeline is due at you and suppose
 10 the timeline expires, is it also the contention that in that case deeming...

11 **CHIEF JUSTICE B. R. GAVAI:** No, according to them, there's no... no timeline can be
 12 provided because there is no such deeming provision. And therefore, no timelines can...

13 **TUSHAR MEHTA:** No, there are... apropos, My Lord's question, there are provisions, where
 14 timeline is prescribed, but consequence is not contemplated or contemplated. For example,
 15 My Lord...

16 **JUSTICE SURYA KANT:** So deemed consequence is still silent. Deemed consequence, even
 17 after expiry of the time, according to you is still not there?

18 **TUSHAR MEHTA:** Yes, My Lord. There are several provisions, My Lord. If I can show, My
 19 Lord, only one provision where both are provided, My Lord. Please come to 198, My Lord. I'll
 20 just read. Your Lordships, My Lord, may not read. 193, "If the Legislative Assembly accepts
 21 any of the recommendations of the Legislative Council, the Money Bill shall be deemed to have
 22 been passed by both Houses with the amendment, etc."

23 **JUSTICE SURYA KANT:** That's right.

24 **TUSHAR MEHTA:** But Your Lordships wants, My Lord, to see whether time limit and
 25 deeming both are provided. I'll answer that. Let me examine that, My Lord, and I will answer
 26 that. I'm sorry, I'm told 198(5). "If a Money Bill is passed by the Legislative Assembly and
 27 transmitted to the Legislative Council for its recommendation, is not returned to the
 28 Legislative Assembly within the said period of 14 days..."

29 **JUSTICE SURYA KANT:** It shall be deemed to have been passed.

1 **TUSHAR MEHTA:** "It shall be deemed to have been passed".

2 **JUSTICE SURYA KANT:** That's right.

3 **TUSHAR MEHTA:** So, wherever time limit is stipulated, deeming is also stipulated. And
4 without time limit also, deeming is stipulated. So, Constitution does not keep any lacunas or
5 any gaps which can be filled up, My Lord, by Judicial process.

6 **VIKRAMJIT BANERJEE:** In addition to the Learned Solicitors, my submission is that the
7 process of Legislation also at no point of time nowhere can also envisage that the Judiciary can
8 intervene and direct a Legislation... assent to be given to Legislation. It is unknown to
9 Constitutional process of Legislation. As I said, the only exception is possibly the Sovereign in
10 British Constitutional Law at the second passing of the Bill. But that's... also there is no way
11 that the Judiciary can intervene to do that. My Lords, in relation to the second point, in
12 relation to MP Special Police Establishment Act, that's what I've quoted at para 35. My Lords,
13 this entire paragraph needs to be read because **Shamsher Singh** is quoted in extenso. My
14 Lords, but I will come... My Lords will please come to para 35 first. So, My Lords at para 35,
15 over the page at 56, **Shamsher Singh** is quoted, where it mentions over the page, My Lords.
16 Similarly, 200 indicates another instance where the Governor may act, irrespective of any
17 advice from the Council of Ministers. The entire paragraph deals with discretionary powers of
18 the Governor. My Lords, I can read it in extenso if Your Lordships are so inclined. This power...

19 **JUSTICE VIKRAM NATH:** Which page are you reading? Page 18?

20 **VIKRAMJIT BANERJEE:** Page 135, 18, My Lords. Constitution Bench, 12. Mr. Sorabjee
21 relies on the case of **Shamsher Singh**, a seven-judge bench of this Court, *inter alia*
22 considered whether Governor could act by personally applying his mind, or whether under all
23 circumstances, he must act only on the aid and advice of the Council of Ministers. It was *inter*
24 *alia* held as follows. "The provisions are expressly require the Governor to exercise his powers
25 in his discretion as contained in Articles to which reference has been made. To illustrate,
26 239(2) state that where a Governor is appointed Administrator, he shall exercise his function
27 as such administrator independently of his Council of Ministers. The other articles which
28 speak of discretion of the Governor are paragraphs 9(2), 18(3) of the Sixth Schedule, Articles
29 371(1), (b), 371A(1)(d) and 371A(2)(b). The discretion conferred on the Governor means that
30 as the Constitutional or formal head of the State, the power is vested in him. In this connection,
31 reference may be, made to Article 356 which states that the Governor can send a report to the
32 President that a situation has arisen in which the Government of the State cannot be carried
33 on in accordance with the provisions of the Constitution. Again, Article 200 requires the

1 Governor to reserve for consideration for any Bill which in his opinion if it became law, would
2 so derogate from the powers of the High Court as to endanger.

3 My Lords, then over the page at 56. "Similarly Article 200 indicates another instance where
4 the Governor may act irrespective of any advice to the Council of Ministers. In such matters
5 where the Governor is to exercise his discretion, he must discharge his duties to the best of his
6 judgment. The Governor is required to pursue such course which are not detrimental to the
7 State". And My Lords, then at the end of the paragraph, over the page, he summarises what is
8 the law.

9 "Thus, as rightly pointed out by Mr. Sorabjee, a seven-judge bench of this Court has already
10 held that the normal rule is that the Governor acts on the aid and advice of the Council of
11 Ministers and not independently or contrary to it. But there are exceptions under which the
12 Governor can act in his own discretion. Some of these exceptions are set out as here and
13 above." So, there are two parts. One is the discretionary power which are narrated in the
14 Constitution. But it seems to indicate, the MP Special Establishment also seems to indicate
15 that there are exceptional powers in addition to this. And where he acts on his own, on his
16 consideration, and these are largely in some ways Constitutional, political consideration. "It
17 is, however, clarified that the exceptions mentioned in the judgment are not exhaustive. It is
18 also recognised that the concept of the Governor acting in his discretion or exercising
19 independent judgment is not alien to the Constitution. It is recognised that there may be
20 situations whereby reason of peril to democracy or democratic principles an action may be
21 compelled which from its very nature is not amenable in ministerial advice. Such a situation
22 may be where bias are inherent and/or manifest in the advice of the Council of Ministers."

23 My Lords, of course, this is in relation to sanctions to be given or not. But nonetheless, beyond
24 discretionary powers, there are exceptional powers which the Governor has to apply his mind
25 independently. So, My Lords, taking this into account, My Lords, this obviously would be on
26 a large number of concession which would not be judicially amenable. Obligated.

27 **MAHESH JETHMALANI:** My Lord, I am for the State of Chhattisgarh.

28 **CHIEF JUSTICE B. R. GAVAI:** Mr. Banerjee appeared for Goa, I think?

29 **MAHESH JETHMALANI:** Yes, he appeared for Goa, I believe.

30 **JUSTICE SURYA KANT:** You are for whom, Mr. Jethmalani?

- 1 **MAHESH JETHMALANI:** My Lord, a State which Your Lordship is very familiar with, the
2 State of Chhattisgarh.
- 3 **CHIEF JUSTICE B. R. GAVAI:** Which States are left now? Uttar Pradesh is done, I think.
- 4 **MAHESH JETHMALANI:** There are many States which haven't appeared before Your
5 Lordships.
- 6 **CHIEF JUSTICE B. R. GAVAI:** Rajasthan, I think, is remaining.
- 7 **JUSTICE SURYA KANT:** No, Rajasthan has appeared.
- 8 **MAHESH JETHMALANI:** Maninder Singh appeared.
- 9 **CHIEF JUSTICE B. R. GAVAI:** Maninder Singh was for Rajasthan.
- 10 **MANINDER SINGH:** I do not to travel a lot, so I was very close to Delhi, My Lords. I just
11 came...
- 12 **CHIEF JUSTICE B. R. GAVAI:** Haryana is also left, right.
- 13 **COUNSEL:** We are the supporting the [UNCLEAR].
- 14 **CHIEF JUSTICE B. R. GAVAI:** You're not appearing for Telangana?
- 15 **COUNSEL:** Not this time.
- 16 **CHIEF JUSTICE B. R. GAVAI:** So, you have a choice for both.
- 17 **COUNSEL:** Yeah, [UNCLEAR].
- 18 **CHIEF JUSTICE B. R. GAVAI:** United Andhra before bifurcation.
- 19 **COUNSEL:** I [UNCLEAR].
- 20 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Jethmalani.
- 21 **MAHESH JETHMALANI:** My Lord, I don't want to traverse any of the ground. And My
22 Lord, there have been very able voices that have traversed that ground. So I will only
23 supplement, My Lord, on basically... and My Lord, I've have a little... few words to say on
24 justiciability and maintainability. Just a few words. My Lord, my written submissions are

1 essentially based on supplementing what I consider to be, respectfully, the most important
 2 aspect of this matter, which is Article 200. My Lord, and I want to place before Your Lordships
 3 certain circumstances which I don't believe have been placed which militate against a
 4 construction, which says that the Proviso is necessarily attached to the option in the
 5 substantive part of withholding assent.

6 Now, My Lord, may I first take Your Lordships straight away... and there is support, there's
 7 overwhelming support in the Constituent Assembly debates, and I put this also... I'm not going
 8 to read it out. I put it in my written submissions. Dr. Ambedkar himself has emphasised that
 9 discretion is not contrary to... discretion in the Governor is not contrary to responsible or
 10 responsive Government. So discretion in the Governor is mandated by the Constituent
 11 Assembly. The question is only one of scope. The question is only one of scope. And, My Lord,
 12 any remedy for its violation, discretion arbitrarily used. Now, My Lord, if Your Lordship kindly
 13 turn to 200.

14 So, apart from, My Lord, the fact that the Proviso to... the substantive part has been invoked
 15 by the two judgments which are not before Your Lordships, but which are germane to it, the
 16 State of Punjab and the State of Tamil Nadu have used the Proviso, and used the Proviso to
 17 replace the wording of the substantive part, which is not permissible. So, My Lord, on a rule
 18 pertaining to construction of provisos that if the words of the substantive part of the Article
 19 are clear and express, you can't import words from a Proviso which don't belong there. Now,
 20 My Lord, the first part is undoubtedly discretionary. Nobody can deny that. The first part,
 21 which is the substantive part of Article 200, prior to the Proviso gives the Governor three
 22 options.

23 Now, My Lord, that is necessarily discretionary. He can choose between Option 1 and... 2 and
 24 3, which of those options is up to him. In a Cabinet system of Government that is more so
 25 because, My Lord, the Legislative process in a Cabinet system of Government is that the Bills
 26 are laid on the floor of the House by the Government, particularly the Minister in charge of
 27 the department to which the Bill pertains. On the principle of collective responsibility, the
 28 entire Cabinet has a definite interest in seeing the successful passing of that Bill. So,
 29 undoubtedly, when the Bill is passed in the Cabinet system, the aim will be... and if the matter
 30 was discretionary, the only discretion which will be available to the Governor would be to give
 31 his assent to the Bill passed.

32 Which is why, it would then render the other two options *otiose*, that of withholding or
 33 reference to the President. So, the first part is necessarily discretionary. He can choose

1 between these three options. Now, My Lord, what does it mean, and that's the controversial
2 part. What does it mean, when it is said that he withholds assent?

3 My Lord, the same word is used in many Commonwealth jurisdictions where the President or
4 the Governor is replaced by the Sovereign, the Monarch in that country. The same words are
5 used. And My Lord, the word, 'withholding assent' means, in effect, rejecting the Bill.
6 Withholding doesn't mean delaying. Withholding means rejection. So, he has the option to
7 assent which the Cabinet which introduces a Bill would undoubtedly like him to do. He has
8 the option of rejecting the Bill outright. And the third option is when he has a doubt regarding
9 the Constitutionality of the Bill or the Legislative competence thereof, he can reserve the Bill
10 for the consideration of the President because he perhaps thinks that the President is more
11 qualified since he's advised by the Central Government to dispose of the issue where he has
12 that doubt.

13 So, My Lord, these three are all discretionary. Now, My Lord, we come to the troubling part.
14 And My Lord, the attachment of the Proviso by two judgments of this Court to the withholding
15 of assent. It has been said that it's inextricably linked, that it attaches, the Proviso attaches to
16 the second option. Now, My Lord, kindly see the wording and for three reasons, apart from a
17 construction and use of a Proviso to replace... My Lord, a Proviso can be an exception, but it
18 can be an exception to the entire substantive part. You can't pick and choose and say that the
19 Proviso will qualify only one part of it, unless the words permit it. There must be the clearest
20 intention that the Proviso intends only to qualify a part of the substantive part.

21 Otherwise, the Proviso qualifies the entire... is an exception to the entire three parts. Now, My
22 Lord, please see the wording of the Proviso. And My Lord, there are three aspects of the
23 Proviso which militate against the construction of attachment. My Lord, both Courts used that
24 word, so I'm using it. I know, My Lord, those Courts' judgments are not before Your Lordship.
25 But since they have taken that view and even the words pocket veto and absolute veto are used
26 by that judgment, the **Madras** judgment. Now, My Lord, the words used are in the Proviso
27 which are extremely important is that, first of all, the Governor may. Now, My Lord, as far as
28 the substantive part is, he shall mandatorily choose between the three options, provided that
29 the Governor may.

30 So, My Lord, the first distinction which stands out is that the Proviso is discretionary on the
31 part of the Governor. If at all, it is the Governor... if at all, it is the Governor who has to invoke
32 the Proviso. My Lord, as per the Constituent Assembly debates, I may point out, Dr. Ambedkar
33 has said that in a responsible Government giving advice to amend or redraft a Bill does not
34 conform to responsive Government. It's best left to the Government to do that. So, My Lord,

1 where does this Proviso emanate from? Is it the Governor who invokes the Proviso or is it the
 2 Council of Ministers on whose aid and advice he would otherwise act? But, My Lord, that's
 3 irrelevant to the construction.

4 Because even if it is the Council of Ministers who wants to invoke the Proviso, the Governor
 5 may do it. He may accept that suggestion of the Council. He's not bound by it because the word
 6 may is used and shall, and not shall. Now, My Lord, the next words are, the next phrase in the
 7 Proviso is "as soon as possible." Now, My Lord, as soon as possible is totally incompatible with
 8 the... first of all, there is no timeline in the substantive Proviso. I don't have to go with it, it has
 9 been repeated. There's a chart by the ASG, by the Honourable Solicitor about timelines where
 10 they are used.

11 And My Lord, I may just point out at this stage that where timelines are used in the
 12 Constitution, it is always timelines for compliance by the Legislature or one wing of it. But
 13 where it is a high Constitutional authority, on the ground that he is a high Constitutional
 14 authority and he will act with Constitutional statesmanship, timelines are not given to
 15 Governors and Presidents. Not even for that matter, timelines are given to Speakers, although
 16 there have been judgments of the Courts where there is Speaker. But timelines are never
 17 prescribed by the Constitution. It is then as Your Lordships have seen in 198 for the
 18 Legislature, particularly the Legislative Council to speedily pass Bill sent to them in the nature
 19 of Money Bills. So, My Lord, that's where timelines come in. But for Constitutional Authorities,
 20 My Lord, it is impermissible. My Lord, it is almost disrespectful to put timelines. So, My Lord,
 21 the second is in, as soon as maybe. And My Lord, Your Lordships have been referred to the
 22 1962 judgment, a very old judgment of **Namboothiri**. My Lord, In **Namboothiri's** case on
 23 the construction of Article 196(5), it was held that even if both Houses of the Legislature,
 24 Council and Assembly, were to pass a Bill, but the Presidential assent is not given or the
 25 Governor's assent is not given or the Presidential assent, in case he refers it to the President,
 26 the Bill does not lapse on dissolution. They held that that was permissible, so five years.

27 **CHIEF JUSTICE B. R. GAVAI:** We're listening to the case, I think, fourth or fifth time.

28 **MAHESH JETHMALANI:** Yes, My Lord. I'm saying it doesn't lapse only for one reason.
 29 I'm now using that judgment in the context of as soon as possible. It is, if you can pass a Bill,
 30 if you can pass a Bill at leisure almost, the assent of the Governor does not have to be as soon
 31 as possible certainly. It can languish for some time as well, including beyond the life of a given
 32 Assembly. That was the facts of **Namboothiri's** case. Then My Lord, 'as soon as possible',
 33 conflicts with a substantive part. So it can't attach if withdrawal of assent, if withholding of
 34 assent requires no timeline or there's no timeline mandated for it, 'as soon as possible' is not

1 a Constitutional imperative for the Governor. The third part of the Proviso is almost conclusive
2 on this aspect of the matter that is attaching.

3 'As soon as possible' of what? 'As soon as possible', My Lord, the next words are very
4 important, "after the presentation to him of the Bill for assent." He has not yet exercised any
5 of the three options in the substantive part of the Article. It is as soon as possible after the
6 presentation to him of the Bill. He has not exercised... and particularly for the purposes of my
7 argument, he has not exercised the withholding part at all. So, this does not necessarily attach
8 and can't attach to that option of the Governor under the substantive part of withholding his
9 assent. It cannot. By the very nature of things, it cannot. And My Lord, this is corroborated by
10 Constitutional debates. It is corroborated by, as I've set it out in my Written Submissions
11 where, and underlined the relevant portions. And also, My Lord, by Constitutional Bench
12 judgments of this Court. I don't have to repeat them, **Shamsher Singh, Valluri**. I'm not
13 going with the passages, **Hoechst**. And My Lord, latest **Nabam Rebia**, where the part is
14 discretionary under 200.

15 And My Lord, I take it when they say discretionary, it refers to every act required of the
16 Governor under Article 200, not just the substantive part. Even the Proviso is discretionary.
17 And My Lord, I fortify that with the plain words of the Proviso. One is, 'may'. The second is...
18 My Lord, it bears repetition. The second is 'as soon as possible', and the third is 'on
19 presentation of the Bill'. These three take the fulcrum of those two judgments, Punjab and
20 Tamil Nadu, out of that attachment of the two, the Proviso and withholding of assent.
21 Withholding of assent as Your Lordships have noted from the two judgments in **Valluri** and
22 in **Hoechst**, causes the Bill to fall through. It's the end of the matter. So, My Lord, based on
23 this, based on the construction of the Proviso, based on the plain words... and My Lord, based
24 on the Constituent Assembly debates, all of which I have set out in my Written Submissions,
25 it is not as if the Proviso follows withholding of assent as cause to effect. My Lord, that is the
26 supplemental part I wanted to put it.

27 Now, My Lord, we come to the other questions. The first is of just... I adopt the arguments of
28 the Honourable SG, Mr. Salve, and all the others who have said that justiciability does not
29 arise in the case of, certainly the President. Because, My Lord, in 201, the last word is 'for his
30 consideration'. Not 'he shall assent'. Those words are not used, and that is because this is part
31 of Central-State relationships. And the President represents the Centre because the Governor
32 represents... the Governor is appointed by the President under 155. And the President is bound
33 by the aid and advice of the Union of... the Council of Ministers or the Union Government.

1 Now, My Lord, if that is the case, what is the remedy, in case this assent is wrongly withheld?
 2 My Lord, there is no... certainly, My Lord, one thing is for sure that Article 32 petitions are not
 3 the remedy because Article 32 is strictly for enforcement of fundamental right of a citizen. A
 4 dispute between a Constitutional authority being the representative of the Centre at the State
 5 and the Government of that State doesn't fall within the scope of an Article 32 petition. There
 6 may be a remedy elsewhere in the Constitution. I'm not into that, but certainly a 32 petition
 7 does not lie.

8 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We are not considering the 32
 9 petition today.

10 **MAHESH JETHMALANI:** So My Lord, what is the enforceability? So, what is the
 11 enforceability when there is any breach, either of time, either of delay, or withholding assent
 12 altogether without ostensible reason. What is it? There is nothing else. My Lord, there may be
 13 something in the Constitution. But, My Lord, I am not advancing that argument today. There
 14 may be some other provision which permits that, but I am not advancing that argument today.
 15 So, My Lord, having said that, as far as timelines are concerned, Your Lordships have heard
 16 enough. My Lord, there are judgment, which says that it can spill over to post the dissolution
 17 of the Assembly. My Lord, 361 is a bar, so also 145(3) is a bar on maintainability. It should
 18 have been referred to a larger bench.

19 And My Lord, the fact that the point was not taken up at that stage doesn't prevent the
 20 operation of that very mandatory provision that it should be brought up before a five-judge
 21 bench and it was raised. One of the submissions said, it wasn't even raised. One of the
 22 submissions said, it wasn't...

23 **CHIEF JUSTICE B. R. GAVAI:** Because we are not sitting in an appeal of that judgment.
 24 We are only here to answer the questions of the... we are referring to...

25 **MAHESH JETHMALANI:** But, My Lord, one of the applications on the other side talk
 26 about maintainability on the ground that...

27 **CHIEF JUSTICE B. R. GAVAI:** That issue is already closed.

28 **MAHESH JETHMALANI:** Closed.

29 **CHIEF JUSTICE B. R. GAVAI:** That is already closed. We have said that we will decide
 30 that...

- 1 **MAHESH JETHMALANI:** My Lord, I have to apologise to Your Lordships on the ground
2 that I did not know that since I was not here. A fault entirely of mine, I take the blame.
- 3 **CHIEF JUSTICE B. R. GAVAI:** The difficulty is that most of the Counsels come here for
4 some time.
- 5 **MAHESH JETHMALANI:** Yes.
- 6 **CHIEF JUSTICE B. R. GAVAI:** They say that they will not repeat anything which is already
7 argued. But they are not aware about what has already been argued and...
- 8 **MAHESH JETHMALANI:** Yes.
- 9 **CHIEF JUSTICE B. R. GAVAI:** The same things are again thrust on our mind.
- 10 **MAHESH JETHMALANI:** My Lord, with that, I've supplemented on 200. My Lord, my
11 other submissions are in the written submissions. I am deeply obliged for the brief reply which
12 I was allowed to.
- 13 **CHIEF JUSTICE B. R. GAVAI:** Only Mr. Sibal who has been consistently present in the
14 Court though Mr. Solicitor claimed to follow him.
- 15 **JUSTICE VIKRAM NATH:** Gopal Subramaniam.
- 16 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Gopal Subramaniam and Mr. Sibal.
- 17 **TUSHAR MEHTA:** I was required somewhere for... otherwise, I have been here.
- 18 **CHIEF JUSTICE B. R. GAVAI:** Largely, you have been here.
- 19 **TUSHAR MEHTA:** Yes.
- 20 **CHIEF JUSTICE B. R. GAVAI:** But Mr. Sibal and...
- 21 **TUSHAR MEHTA:** They are continuous. Your Lordships are right.
- 22 **CHIEF JUSTICE B. R. GAVAI:** On one or two occasions with the leave of the Court, but we
23 see Mr. Subramaniam not the same chair...
- 24 **TUSHAR MEHTA:** Yes, My Lord.

- 1 **CHIEF JUSTICE B. R. GAVAI:** From morning to evening.
- 2 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** And same smile.
- 3 **CHIEF JUSTICE B. R. GAVAI:** He's glued on the chair from morning till evening.
- 4 **MAHESH JETHMALANI:** My Lord, if my absence is supposed to be a censure of me, I can
5 only say in my defence, I had compelling reasons to go abroad and come back.
- 6 **CHIEF JUSTICE B. R. GAVAI:** No, it's all right.
- 7 **MAHESH JETHMALANI:** And My Lord, I told the Solicitor, I can only appear on Tuesday.
8 And he was very kind to give me a little bit of time. I am obliged.
- 9 **CHIEF JUSTICE B. R. GAVAI:** Yes, Mr. Navare, you're from which State now? Not from
10 Maharashtra. Maharashtra has already been argued.
- 11 **VINAY NAVARE:** I appear for the Union Territory of Puducherry.
- 12 **CHIEF JUSTICE B. R. GAVAI:** Union Territory of?
- 13 **JUSTICE VIKRAM NATH:** Puducherry.
- 14 **VINAY NAVARE:** My Lord, I want to show five provisions of the Constitution, which are...
- 15 **CHIEF JUSTICE B. R. GAVAI:** We hope that nobody is appearing for Union Territory of
16 Chandigarh. It doesn't have a legislation. Union territory of Chandigarh, also Daman and Diu,
17 and Silvassa.
- 18 **VINAY NAVARE:** My Lord, I'm going to show five provisions of the Constitution which are
19 not so far shown to Your Lordships. [INAUDIBLE] Constitution which are not so far shown to
20 Your Lordships and they are extremely pertinent, insofar, as the question which was posed by
21 My Lord, the Chief Justice, in the first session, in the morning. Your Lordships asked a
22 question if even a Bill passed with respect to the State subject, can there be a withholding
23 permanently, that is rejection of the Bill? And My Lord, in my submission, there is answer to
24 that in four provisions. First, have a look at Article 253. My Lord, I may be showing five
25 provisions. Please, My Lord, have those provisions so that My Lord...
- 26 **JUSTICE VIKRAM NATH:** 252?

VINAY NAVARE: 253. My Lord, may I read? "Notwithstanding anything in the foregoing provisions of this chapter..." What are the foregoing provisions? 246, which, My Lord, give the three lists, etc. So notwithstanding that distribution of Legislative subjects, please read, My Lord. "Parliament has power to make any law for the whole or any part of the Territory of India". So, My Lord, all states, any part of India, "for implementing any treaty, agreement, or convention with any other country or countries or any decision made at any international conference, association or other body". My Lord, even a State subject covered by a Bill, if it is covered by 253, the President or the Governor shall have the right, the power to say no.

Because that is notwithstanding earlier provisions of this chapter, one. Now, please have a look at 286. May I read, My Lord? "Restrictions as to imposition of tax on the sale or purchase of goods. No law of a State..." My Lord, this is about state. "No law of a State shall impose or authorise the imposition of a tax on the supply of goods or services, or both, where such supply takes place. (a) Outside the state or in the course of the import of the goods or services or both into or export of the goods or services or both out of the territory of India. The Parliament may, by law, formulate principles for determining when a supply of goods or services or both in any of the ways mentioned in Clause 1". So, My Lord, if by any chance a State Law covers what is prohibited under 286, veto has to be there. Otherwise, My Lord, it will be impossible to give effect to Article as I said 253, 286. Then next provision is 287.

"Exemption from taxes on electricity. Save insofar as Parliament may, by law, otherwise provided, no law of a State shall impose or authorise the imposition of a tax on the consumption or sale of electricity, whether produced by a Government or other persons, which is (a) consumed by Government of India or sold to the Government of India for consumption of by that Government, or, consumed in the construction, maintenance, or operation of any railway by the Government of India or a railway company operating that railway or sold to that Government or any such railway company for consumption in the construction, maintenance, or operation of any railway. And any such law imposing or authorising the imposition of a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption of that Government or to any such railway company as aforesaid for consumption in the construction, maintenance, or operation of any railway shall be less than... less by the amount of the tax than the price charged to the consumers of a substantial quantity of electricity."

So, My Lord, first part clearly prohibits making of law with respect to those two subjects. If, My Lord, a State law seeks to do that, will it not be within the powers of the Governor or the President to say no? So, My Lord, this is third instance of a Constitutional provision. Please

1 have a look at Article 303, read with 304. I'm sorry, 302 read with 303. May I read because
2 that becomes necessary for 303.

3 **CHIEF JUSTICE B. R. GAVAI:** 303?

4 **VINAY NAVARE:** 302 first, and then 303. "Power of Parliament to impose restrictions on
5 trade, commerce, and intercourse. Parliament may by law impose such restrictions on the
6 freedom of trade, commerce, or intercourse between one State and another, or within any part
7 of the Territory of India, as may be required in the public interest." Now, My Lord, please see
8 303. "Notwithstanding anything contained in Article 302, neither Parliament, nor the
9 Legislature of a State, shall have power to make any law giving or authorising the giving of any
10 preference to one State or another or making or authorising the making of any discrimination
11 between one State and another by virtue of any entry relating to trade and commerce in any of
12 the lists..."

13 Please mark this. "...in the Seventh Schedule. Nothing in Clause 1 shall prevent the... so
14 Parliament is authorised to make law with respect to that. My Lord, 3(1) Clause 1, categorically
15 prohibits making of such law. If State Legislature passes a Bill, as my Learned Friend, Mr.
16 Solicitor suggested, and perhaps, I was not complete in my arguments, it's not only that
17 Governor or the President can. They are bound to reject that Bill because the language is no
18 law. That's the language. Now, My Lord, please see the consideration of the... Your Lordships
19 were hesitant. And My Lord, so I was, when I started thinking about it, how can in a Federal
20 structure, the President or the Governor have the power to use some kind of veto.

21 My Lord, scrutiny of these provisions show that if that Provision 200(1) is read in a restrictive
22 way, then these four provisions cannot be given effect. Practically, these provisions will be
23 without any enforceability if no such power exists. You may recognise the power either in the
24 Governor or in the President, but that power is contemplated under the Constitutional
25 Provision. One popular view, and that is what is carrying most of the advocates, and even
26 sometimes judges is that, yes, power is only if there is repugnancy. Power of, My Lord, sending
27 it to the President. My Lord, that's not correct. For that, please have a look at Article 213.

28 **CHIEF JUSTICE B. R. GAVAI:** 213?

29 **VINAY NAVARE:** Yes, My Lord. This is, My Lord, Legislative power of the Governor. May I
30 read, My Lord? "If at any time, except when the Legislative Assembly of a State is in session or
31 where there is a Legislative Council in a State, except when both Houses of the Legislature are
32 in session, the Governor is satisfied that circumstances exist which render it necessary for him
33 to take immediate..."

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

2 **VINAY NAVARE:** I'm, My Lord, on the second part. I'm reading this only to show what is
3 the background, but please see the Proviso. "...provided that the Governor shall not without
4 instructions from the President promulgate any such ordinance, if..." My Lord, I will read all
5 three and show what my argument is. "(a) A Bill containing the same provisions would, under
6 this Constitution, have required the previous sanction of the President." My Lord, Article 304
7 of the Constitution requires previous sanction. My Lord, I did not know this provision till I
8 read this and tried to search for that. So, My Lord, previous sanction of the President for the
9 introduction thereof into the Legislature. (b) and (c) are relevant, but I will read (b) and (c),
10 and then make my submission.

11 "He would have deemed it necessary to reserve a Bill containing the same provisions for the
12 consideration of the President. (c) or..." this is what I said, repugnancy. "An act of the
13 Legislature of the State containing the same provisions would, under this Constitution, have
14 been invalid unless having been reserved for the consideration of the President, it had received
15 the assent of the President." So, My Lord, Clause (c) takes care of repugnancy. I ask a question
16 for consideration of Your Lordship, raise a question rather. What is the purport of (b)? Please
17 now have a look at (b) again. (c) is covering repugnancy aspect. Apart from repugnancy, (b) is
18 a provision. Please see this.

19 "He would have deemed it necessary to reserve a Bill containing the same provisions for the
20 consideration of the President." So, My Lord, apart from repugnancy, there may be situations
21 and situations where the Governor may deem it necessary to reserve it for the consideration
22 of the President. If it can be reserved for the consideration of the President, it's not a formality.
23 President must have a power to say no. Otherwise, this Clause (b) will be completely *otiose*.
24 My Lord, that's how I read the Proviso to Article 213. And Your Lordships have consistently
25 held that each provision of a Statute or Constitution is made with a specific purpose. It can't
26 be read to be redundant or with [UNCLEAR] etc.

27 So, My Lord, (b) can have a meaning only if, apart from repugnancy issue, the Governor has a
28 power to refer it for the consideration of the President. And once it is sent to the consideration
29 of the President, that also cannot be formality unless there is a power to say no. My Lord, this
30 is how I read the totality of the scheme of 200, 201 read with... now I take Your Lordships to
31 situations where the President may be required to exercise that power. My Lord, Preamble
32 says, the unity and integrity of India. My Lord, we have even in short span of... I say a short
33 span of 78 years because for a nation which has had the background of thousands of years, 78

1 years is hardly a time. But even within that 78 years of our experience, we had very extremely
2 turbulent times in some bordering States.

3 My Lord, even companies like Tatas were actually paying the extortion money to the ULFA
4 terrorists, etc. Legislative Assembly's members sometimes may not be able to function because
5 of some kind of pressure that may be exerted by the insurgent groups in the area. Bills may be
6 passed. My Lord, what is the solution? Solution is this power which is vested in the Governor
7 or the President. My Lord, Assembly may be under coercion, compulsion, some compelling
8 circumstances. Where do we go? One of the aspirations is unity and integrity of India. This is
9 just one example. I'm giving another example. I come from Maharashtra. My Lord,
10 Maharashtra, Karnatak has a border issue. And sometimes, My Lord, there are pressure
11 groups. We see that even in that border district of Belgaum, etc., Kannada should be imposed.
12 That gives rise to some kind of turbulence in bordering districts of Maharashtra and even
13 Mumbai. Your Lordships know Mumbai has many reasons for that. Governor can use...
14 keeping it pending as a tool to defuse the tension. Please imagine the situations where there
15 may be situations and situations when, My Lord, not taking a decision... Narasimha Rao used
16 to say, Prime Minister, that not taking a decision also is a decision. He was, My Lord, accused
17 of procrastination. So, My Lord, it may be a conscious action on the part of the Governor...

18 **CHIEF JUSTICE B. R. GAVAI:** We should follow their advice.

19 **KAPIL SIBAL:** Judicial precedent.

20 **ABHISHEK MANU SINGHVI:** Your Lordship has asked give his Judicial precedent.

21 **VINAY NAVARE:** No, My Lord, what I am saying is, there may be situations where the
22 Governor may be using...

23 **KAPIL SIBAL:** As rendering a judgment...

24 **VINAY NAVARE:** ...keeping it pending as a tool to diffuse tension. My Lord, please don't
25 prescribe any timeline. Every day, we come across this situation.

26 **CHIEF JUSTICE B. R. GAVAI:** Twelve minutes are left on your side.

27 **VINAY NAVARE:** My Lord, I will finish within one minute or maybe two more minutes.

28 **CHIEF JUSTICE B. R. GAVAI:** You have to decide.

1 **VINAY NAVARE:** Every day, My Lord, we as Advocates, Counsel, make a request to Your
 2 Lordships. My Lord, would My Lords direct the High Court to decide in a few months? The
 3 answer that we receive is...

4 **CHIEF JUSTICE B. R. GAVAI:** We request.

5 **VINAY NAVARE:** ...Constitutional... no, it's a Constitutional Court. We cannot.

6 **CHIEF JUSTICE B. R. GAVAI:** We cannot direct. At the most, we request.

7 **VINAY NAVARE:** I apply that analogy with respect to the highest Constitutional post, My
 8 Lord, in the country. My Lord, if that is the principle that Your Lordships...

9 **CHIEF JUSTICE B. R. GAVAI:** If we apply that, then we can say rather than *mandamus*,
 10 we request the...

11 **VINAY NAVARE:** Precisely, precisely. I fully understand. I fully understand. And that's
 12 where some kind of, My Lord... I don't say that if the Governor just sits on the Bill, Your
 13 Lordships may not be... will be helpless. But what I have to submit is, My Lord, timeline,
 14 *mandamus* to the highest Constitutional dignitary is something... My Lord, there are...

15 **JUSTICE VIKRAM NATH:** Of the consequences of the time.

16 **VINAY NAVARE:** My Lord, there are two more aspects of the matter. I will just take one
 17 minute, one minute, each. My Lord, it has already come that it's a Legislative function. My
 18 Lord, a Legislative function can be subject matter of challenge before a Constitutional Court
 19 after it is exercised. Your Lordships have consistently and which, My Lord...

20 **CHIEF JUSTICE B. R. GAVAI:** That has been argued that *quia timet* action is not
 21 permissible.

22 **VINAY NAVARE:** I'm making some... Mr. Salve's...

23 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** *Quia timet*, that is the Tribunal. We
 24 are talking about Constitutional procedure specifically provided. If there is a variation or in
 25 the interpretation of the method by which the Bills are passed, then on the interpretation, it
 26 stands on a different footing from that of [UNCLEAR] *quia timet* order, that's a Tribunal.
 27 Before passing the final order, you can't pass an interim order. That's all that it says.

1 **VINAY NAVARE:** No, My Lord, insofar as Tribunal is concerned, no difficulty. My Lord, in
 2 the midst of the lawmaking process, can that be subject matter of scrutiny? That's, My Lord...
 3 there has to be a foundational principle for that. In jurisprudence, the way in Telangana
 4 matter, Your Lordships said that it's a...

5 **CHIEF JUSTICE B. R. GAVAI:** It was said that we are issuing the *mandamus* because it
 6 has been consistently hailed that the Speaker acts as a Tribunal and amenable to jurisdiction
 7 under Article...

8 **VINAY NAVARE:** I'm relying upon that. I'm relying upon that.

9 **CHIEF JUSTICE B. R. GAVAI:** And plus, he does not enjoy the immunity under 112 and
 10 212.

11 **VINAY NAVARE:** Yes, I'm relying upon that. Because Your Lordships did that on the basis
 12 of one foundational principle. The principle is, it's a Tribunal. My Lord, what is the
 13 foundational principle for issuing any kind of direction to a lawmaking authority? To my
 14 understanding, I don't find anyone. There is one more aspect which last submission on my
 15 part, although I had some others also, but time constraint. My Lord, there are political
 16 solutions, not in the form of the taking delegations, meeting the Constitutional dignitaries. My
 17 Lord, for a democracy to be vibrant, it's the expression of people's voice. That is a must in the
 18 democracy. That has happened in the country. Navnirman Movement in Gujarat in '70...
 19 Navnirman Movement in Gujarat forced the corrupt Chief Minister... Indira Gandhi as a Prime
 20 Minister, dissolved her own Ministry, one.

21 My Lord, that happened similarly in case of *N. Bhaskara Rao* in Andhra Pradesh, when
 22 with 12 MLAs, Bhaskara Rao wanted to form the ministry with the patronage of the Central
 23 Government. My Lord, it is not the Court. It is the people's power. MLAs were not able to stay
 24 at their houses because of the pressure. And My Lord, that's how N. Bhaskara Rao Government
 25 ultimately failed and Rama Rao came back. That, My Lord, shows the vibrancy of the people
 26 democracy. And My Lord, I'm sorry to say, but two or five persons, My Lord, sitting having the
 27 temptation that I have a solution perhaps may not be a right way for democracy to be a vibrant
 28 democracy. It's political solutions that has to happen within the society. My Lord, I am
 29 extremely obliged.

30 **CHIEF JUSTICE B. R. GAVAI:** It is passed by the representative of the people.

31 **VINAY NAVARE:** Yes, My Lord.

- 1 **CHIEF JUSTICE B. R. GAVAI:** By two-third majority or three-fourth majority.
- 2 **VINAY NAVARE:** I understand. There are, My Lord, countering forces. I don't say that...
- 3 **CHIEF JUSTICE B. R. GAVAI:** You're saying that the will of the people has to be given to...
- 4 **VINAY NAVARE:** I see that.
- 5 **KAPIL SIBAL:** So, bypass the Legislature.
- 6 **GURUKRISHNA KUMAR:** There's no option for me to say. I'll take 5 minutes, 10 minutes.
- 7 I have only that limited time, My Lords.
- 8 **CHIEF JUSTICE B. R. GAVAI:** You're the last person.
- 9 **A. D. N. RAO:** No, no. I'm there, My Lords. [UNCLEAR] the arguments are not so good that
- 10 the time limit, My Lord [UNCLEAR] that consideration should be given to other people for 10,
- 11 15 minutes.
- 12 **CHIEF JUSTICE B. R. GAVAI:** No, no. We have made it clear that you will not go...
- 13 **GURUKRISHNA KUMAR:** My Learned Friend has intervened...
- 14 **CHIEF JUSTICE B. R. GAVAI:** Mr. Luthra has been very candid enough to say that the
- 15 Andhra Pradesh Government is trying to support the [UNCLEAR].
- 16 **GURUKRISHNA KUMAR:** Just two legal submission made...
- 17 **CHIEF JUSTICE B. R. GAVAI:** You're for whom?
- 18 **GURUKRISHNA KUMAR:** Haryana. Just two...
- 19 **CHIEF JUSTICE B. R. GAVAI:** Why you're the last? You're the most nearest. That's why
- 20 Mr. Surya Kant was looking for you.
- 21 **JUSTICE SURYA KANT:** Desperately.
- 22 **GURUKRISHNA KUMAR:** I thought it was a one day match, My Lord. Now I'm in T20. I'll
- 23 take... just three propositions I'll give.

1 **TUSHAR MEHTA:** I may not get... on the last occasion when the matter was heard, I was
 2 put a question, whether Article 32, 131 question, maintainability of a writ before the High
 3 Court as well as before this Honourable Court against the inaction or action of the Governor
 4 or the President, whether the Government would like to invite that. I would be getting the
 5 instruction today. If I am pressing it, My Lord, then give me...

6 **CHIEF JUSTICE B. R. GAVAI:** You can argue it in your Rejoinder.

7 **TUSHAR MEHTA:** My Lord, no, nobody has argued so far. Nobody has argued so far. I have
 8 also not argued. Your Lordships would bear with me on that. Then give me 20 minutes by the
 9 clock only on that question. Because I have not argued, Your Lordships would bear me out.
 10 My Lord, I have not argued. I'll receive instructions. If I receive, then don't press it. Then that's
 11 an end of the matter. Otherwise, I'll put a note. And by 20 minutes, by the clock.

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

13 **GURUKRISHNA KUMAR:** My Lords, three points. Point 1, there are Constitutional
 14 silences which need to be deferred to. That's Point 1. This, My Lords, is a principle. In the
 15 normal course, somebody would say a *videshi* approach. But our Courts, the Honourable
 16 Supreme Court has acknowledged and applied this principle. Wherever Constitutional silences
 17 are there, they are to be deferred to. My Friend, Mr. Maninder Singh referred to **Manoj**
 18 **Narula's** case. **Narula's** case, Volume 43. I will not read given the constraint of time. I will
 19 not ask My Lords to take it. I'll give it in a written note, My Lords. Related to prescription of
 20 disqualifications other than what is provided Constitutionally and in the RP Act.

21 Question came, whether that could be done through the process of Judicial review? My Lord
 22 said... drew the line and said, where there are silences, they have to be deferred to. I'll just
 23 read, My Lords. It will take only two, three minutes. It's a little important. It in turn refers to
 24 **Bhanumati's** case. **Narula** is a Constitution bench. Now, **Narula** is for 2014, 9SCC, page
 25 1. Now I am reading from para 65 of Narula. I'll give the page numbers, etc., from the volumes

26 **CHIEF JUSTICE B. R. GAVAI:** Para 65 was already read to us.

27 **GURUKRISHNA KUMAR:** No, but 65 is a different context.

28 **CHIEF JUSTICE B. R. GAVAI:** 65, 66, 67, all were read.

29 **GURUKRISHNA KUMAR:** Correct. But now Constitutional silence issue was really not
 30 placed before My Lords. I'm just placing that. "The next principle that can be thought of is

1 Constitutional silence or silence of the Constitution or Constitutional abeyance. The said
 2 principle is a progressive one. It is applied as a recognised, advanced Constitutional practice.
 3 It has been recognised by the court to fill up the gaps in respect of certain areas in the interests
 4 of justice and larger public interest. Liberalisation of the concept of *locus standi*." Then, they
 5 give the examples of how this is applied in the reverse to expand. But then that dichotomy, I
 6 will explain, My Lords. It came in a subsequent judgment. But in both ways, in our case,
 7 whether it is applied to hold back or whether it is applied to supply something, in either case,
 8 this is not something where, My Lords, 200 can be interpreted to introduce a timeline. That's
 9 the submission I'm making for My Lords' consideration. Now, My Lords, para 65, please make
 10 a note of. It talks about the instances where silences are looked at as gaps to supply some
 11 solution. Now please come to 66. In this context, it is profitable to refer to the authority in
 12 ***Bhanumati vs State of UP*** 2010, 2SEC1 wherein this Court was dealing with the
 13 Constitutional validity of the UP Panchayat Act. I'll cut short, My Lords. Panchayat Act
 14 provision for disqualification through a no confidence motion. The argument was, Part 9 of
 15 the Constitution does not make any provision for no confidence motion. Therefore, can this be
 16 brought in, is it unconstitutional?

17 My Lords, in that context, look at Constitutional silences. Ultimately, My Lords say that no
 18 confidence can be brought in because it's not contrary to Part 9. But the principle is extracted
 19 there, which is very, very pithy, My Lords, and really explains the position in my respectful
 20 submission. Where para 49 of the judgment, My Lords, it is referring to the discussion in
 21 Foley's book. I have, in fact, the relevant extract from Foley's Constitutional Silences, I'll
 22 circulate that also, My Lords. Please see the arguments... para 49 of ***Bhanumati***. "Apart from
 23 the aforesaid reasons, the arguments by the appellants cannot be accepted in view of a very
 24 well-known Constitutional doctrine, namely the Constitutional Doctrine of Silence. Michael
 25 Foley, in his treatise on The Silence of Constitutions has argued that in a Constitution..." this
 26 is important, My Lords, "...abeyances are valuable. Therefore, not in spite of their obscurity,
 27 but because of it."

28 This is very, very important. These abeyances are important not because they are obscured,
 29 because they have to be obscured. Please see the nature of the office they are looking at. Please
 30 see the nature of the function which is being performed. In fact, my second point will really be
 31 flowing from that. My Lords will see from the very language of 200 where the Constitution
 32 makers wanted timeframes, they brought it in in the Proviso. Proviso says, while he wants to
 33 send it back to the Legislature, he says, 'as soon as possible'. I hope I make myself clear, My
 34 Lords. Main part, there is no timeframe. But where the Constitution makers wanted a
 35 timeframe to come in...

1 **CHIEF JUSTICE B. R. GAVAI:** But in the Second Proviso, six months' time is given to the
2 Legislature.

3 **GURUKRISHNA KUMAR:** Exactly. Therefore, where it is required, My Lords, and for the
4 Governor itself.

5 **CHIEF JUSTICE B. R. GAVAI:** The Learned SG has given the entire list of...

6 **GURUKRISHNA KUMAR:** That's correct, My Lords. I'm saying only in the context of 'as
7 soon as possible' in the Proviso, where it wanted the Governor to act, it said so. Therefore,
8 paragraph 50, where Foley is referred to, it's two more sentences. Now they say, "therefore,
9 they are significant for the attitudes and approaches to the Constitution that they evoke rather
10 than the content or substance of their structures." This citing should animate, My Lords, the
11 consideration of the Governors... consideration of an assent and its withholding. Then third
12 point, My Lords. The second, I've already covered. How it is provided in so many words in 200
13 itself, where the timeframe was required.

14 **JUSTICE PAMIDIGHANTAM SRI NARASIMHA:** We can infer much more from your
15 silence.

16 **TUSHAR MEHTA:** Yes, that was one of the...

17 **GURUKRISHNA KUMAR:** The third point. Just one last point, just one last point. Now,
18 My Lords have repeatedly asked the question. Is it then that the Courts will be powerless or
19 that the will of a Legislature can be held back by the Governor not assenting at all, is there
20 some concept of temporary withhold? I would respectfully submit, My Lords, temporary
21 withhold or withholding is incidental to the withholding which is envisaged in the main part.
22 One more thing, My Lords, one more aspect. I ask myself this question. Now somebody moves
23 the Court, as it has been done in one of these case... two of these cases. Now, how long is too
24 long for the Governor to have not acted? Is this something which can be looked at, My Lords?

25 The question is, in what situation will the Court draw a line? In what circumstances will the
26 Court say, yes, this is long enough or this is not long enough? Now, My Lords have always
27 looked at the sanctified principle that there can be no *mandamus* to Legislature. Now, as part
28 of the Legislative process, the Governor in respect of, in view of so many polycentric
29 considerations, withholds the assent. Now will the Court step in and say three months have
30 gone by, therefore, now he has to exercise his discretion. Even for...

31 **CHIEF JUSTICE B. R. GAVAI:** We are not sitting in an appeal for that. We are here for...

1 **GURUKRISHNA KUMAR:** No, I'm only saying for interpretation of 200, My Lords.

2 **CHIEF JUSTICE B. R. GAVAI:** Yes, we'll decide that...

3 **GURUKRISHNA KUMAR:** Yes, I'll just circulate a note. I'm obliged, My Lords.

4 **A. D. N. RAO:** My Lord, one small thing.

5 **TUSHAR MEHTA:** Interveners, My Lord cannot... he has some...

6 **A. D. N. RAO:** It's correct, My Lord. I am appearing for the former Chief Secretary who is...

7 **CHIEF JUSTICE B. R. GAVAI:** When the Counsels are here, why should we bother then?

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END OF DAY'S PROCEEDINGS