B.R. Kapoor vs State Of Tamil Nadu And Anr on 21 September, 2001

Author: Brijesh Kumar

Bench: S.P.Bharucha, Ruma Pal, Brijesh Kumar

CASE NO.:
Writ Petition (civil) 242 of 2001

PETITIONER:
B.R. KAPOOR

RESPONDENT:
STATE OF TAMIL NADU AND ANR.

DATE OF JUDGMENT: 21/09/2001

BENCH:
S.P.BHARUCHA & G.B.PATTANAIK & Y.K.SABHARWAL & RUMA PAL & BRIJESH KUMAR

JUDGMENT:

JUDGMENT With W.P.(C) No. 245 of 2001, W.P.(C) No. 246 of 2001, W.P.(C) No. 261 of 2001, , T.C. (C) No. 26 of 2001 @ T.P.(C) No. 382 of 2001. & C.A. No. 6589 of 2001 @ S.L.P. (C) No. 11763 of 2001 DELIVERED BY:

S.P.BHARUCHA, J., BRIJESH KUMAR, J.

G.B.PATTANAIK Bharucha, J.

Leave granted.

A question of great constitutional importance arises in these matters, namely, whether a person who has been convicted of a criminal offence and whose conviction has not been suspended pending appeal can be sworn in and can continue to function as the Chief Minister of a State.

The second respondent, Ms. J. Jayalalitha, was Chief Minister of the State of Tamil Nadu between 1991 and 1996. In respect of that tenure in office she was (in CC 4 of 1997 and CC 13 of 1997) convicted for offences punishable under Section 120B of the Indian Penal Code read with Sections 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 and for the offence under Section 409 of the Indian Penal Code. She w as sentenced to undergo 3 years rigorous imprisonment and pay a fine of Rs.10,000 in the first case and to undergo 2 years rigorous imprisonment and pay a

fine of Rs.5000 in the second case.

The fine that was imposed in both cases was paid.

The second respondent preferred appeals against her conviction before the High Court at Madras. The appeals are pending. On applications filed by her in the two appeals, the High Court, by an order dated 3rd November, 2000, suspended the sentences of imprisonment under Section 389(3) of the Code of Criminal Procedure and directed the release of respondent No.2 on bail on the terms and conditions specified in that order. Thereafter, she filed petitions in the two appeals seeking the stay of the operation of the judgments in the two criminal cases. On 14th April, 2001 a learned Single Judge of the High Court at Madras, Mr.Justice Malai Subramanium, dismissed these petitions since the convictions were, inter alia, for offences under Section 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act, 1988. These orders were not challenged.

In April, 2001 the second respondent filed nomination papers for four constituencies in respect of the general election to be held to the Tamil Nadu Assembly. On 24th April, 2001 three nomination papers were rejected on account of her disqualification under Section 8(3) of the Representation of the People Act, 1951, by reason of her conviction and sentence in the two criminal cases. The fourth nomination paper was rejected for the reason that she had filed her nomination for more than two seats. The correctness of the orders of rejection was not called in question.

On 13th May, 2001 the results of the election to the Tamil Nadu Assembly were announced and the AIADMK party, which had projected the second respondent as its Chief Ministerial nominee, won by a large majority. On 14th May, 2001, consequent upon the result of the election, the AIADMK elected the second respondent as its leader.

On 14th May, 2001 the second respondent was sworn in as Chief Minister of the State of Tamil Nadu.

These writ petitions and appeal contend that the second respondent could not in law have been sworn in as Chief Minister and cannot continue to function as such. They seek directions in the nature of quo warranto against her.

The provisions of the Prevention of Corruption Act, 1988, that are relevant to the second respondents conviction and sentence read thus :

> 13. Criminal misconduct by a public servant (1) A public servant is said to commit the offence of criminal misconduct, -
>
> (a) ..
>
> (b) ..

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so; or

(d) if he, -

i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage;

or

iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) ..

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

Section 409 of the Indian Penal Code, also relevant to the conviction and sentence, reads thus :

409. Criminal breach of trust by public servant, or by banker, merchant or agent Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For the purposes of answering the question formulated earlier, the following provisions of the Constitution of India are most relevant:

163(1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

164. Other provisions as to Ministers (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the

Governor:

Provided that in the State of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(4) A minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule.

173. Qualification for membership of the State Legislature A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he

a) is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;

b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and in the case of a seat in the Legislative Council, not less than thirty years of age; and

c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

177. Rights of Ministers and Advocate-General as respects the Houses Every Minister and the Advocate-General for a State shall have the right to speak in, and otherwise to take part in the proceedings of, the Legislative Assembly of the State or, in the case of a State having a Legislative Council, both Houses, and to speak in, and otherwise to take part in the proceedings of, any committee of the Legislature of which he may be named a member, but shall not, by virtue of this article, be entitled to vote.

191. Disqualifications for membership (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State -

a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

b) if he is of unsound mind and stands so declared by a competent court;

c) if he is an undischarged insolvent;

d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

e) if he is so disqualified by or under any law made by Parliament.

Explanation For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule.

Provisions of a similar nature with regard to Parliament are to be found in Articles 74, 75, 84, 88 and 102.

The Representation of the People Act, 1951 was enacted to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. The relevant provisions of that Act for our purposes are Sections 8, 8A, 9, 9A, 10 and 10A. They read thus:

> 8. Disqualification on conviction for certain offences (1) A person convicted of an offence punishable under -

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) or the Indian Penal Code (45 of 1860), or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of untouchability, and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing or exporting prohibited goods) or the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of section 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (a) of sub-section (2) of section 136 (offence of Fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or] [(j) section 6 (offence of conversion of a place or worship) of the Places of Worship (Special Provisions) Act 1991; [or] [(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971);] shall be disqualified for a period of six years from the date of such conviction.

(2) A person convicted for the contravention of

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); or

(d) any provisions of the Commission of Sati (Prevention) Act, 1987 (3 of 1988), and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to sub- section (1) or sub-section (2)] shall be disqualified from the

date of such conviction and shall continue to be disqualified for a further period of six years since his release.] [(4) Notwithstanding anything [in sub-section (1), sub-section (2) and sub-section (3)] a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation In this section

(a) law providing for the prevention of hoarding or profiteering means any law, or any order, rule or notification having the force of law, providing for

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage,transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) drug has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) essential commodity has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) food has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

Central to the controversy herein is Article 164, with special reference to sub-Article (4) thereof. This Court has considered its import in a number of decisions. In Har Sharan Verma Vs. Shri Tribhuvan Narain Singh, Chief Minister, U.P. and Another [1971 (1) SCC 616], a Constitution Bench rendered the decision in connection with the appointment of the first respondent therein as Chief Minister of Uttar Pradesh at a time when he was not a member of either House of the Legislature of that State. The Court said :

> 3. It seems to us that clause (4) of Article 164 must be interpreted in the context of Articles 163 and 164 of the Constitution. Article 163(1) provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Under

> clause (1) of Article 164, the Chief Minister has to be appointed by the Governor and the other Ministers have to be appointed by him on the advice of the Chief Minister. They all hold office during the pleasure of the Governor. Clause (1) does not provide any qualification for the person to be selected by the Governor as the Chief Minister or Minister, but clause (2) makes it essential that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. This is the only condition that the Constitution prescribes in this behalf.
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> 6. It seems to us that in the context of the other provisions of the Constitution referred to above there is no reason why the plain words of clause (4) of Article 164 should be cut down in any manner and confined to a case where a Minister loses for some reason his seat in the Legislature of the State. We are assured that the meaning we have given to clause (4) of Article 164 is the correct one from the proceedings of the Constituent Assembly and the position as it obtains is England, Australia and South Africa.

The Court set out the position as it obtained in England, Australia and South Africa and observed that this showed that Article 164(4) had an ancient lineage.

In Har Sharan Verma Vs. State of U.P. and Another [1985 (2) SCC 48], a two Judge Bench of this Court considered a writ petition for the issuance of a writ in the nature of quo warranto to one K.P. Tewari, who had been appointed as a Minister of the Government of Uttar Pradesh even though he was not a member of either House of the State Legislature. Reliance was placed upon the earlier judgment in the case of Tribhuvan Narain Singh and it was held that no material change had been brought about by reason of the amendment of Article 173(a) in the legal position that a person who was not a member of the State Legislature might be appointed a Minister, subject to Article 164(4) which said that a Minister who for any period of six consecutive months was not a member of the State Legislature would at the expiration of that period cease to be a Minister.

Another two Judge Bench of this Court in Harsharan Verma Vs. Union of India and Another [1987 (Supp.) SCC 310] considered the question in the context of membership of Parliament and Article 75(5), which is similar in terms to Article 164(4). The Court said that a person who was not a member of the either House of Parliament could be a Minister for not more than six months; though he would not have any right to vote, he would be entitled, by virtue of Article 88, to participate in the proceedings of Parliament.

In S.P. Anand, Indore Vs. H.D. Deve Gowda and Others [1996 (6) SCC 734], the first respondent, who was not a member of Parliament, was sworn in as Prime Minister. This was challenged in a writ petition under Article 32. Reference was made to the earlier judgments. It was held, on a parity of reasoning if a person who is not a member of the State Legislature can be appointed a Chief Minister of a State under Article 164(4) for six months, a person who is not a member of either House of Parliament can be appointed Prime Minister for the same period.

In S.R. Chaudhuri Vs. State of Punjab & Ors. [2001 (5) SCALE 269], one Tej Parkash Singh was appointed a Minister of the State of Punjab on the advice of the Chief Minister, Sardar Harcharan Singh Barar. At the time of his appointment as a Minister Tej Parkash Singh was not a member of the Punjab Legislative Assembly. He was not elected as a member of that Assembly within a period of six months and he submitted his resignation. During the same legislative term Sardar Harcharan Singh Barar was replaced as Chief Minister by Smt. Rajinder Kaur Bhattal. On her advice, Tej Parkash Singh was appointed a Minister yet again. The appointment was challenged by a writ petition in the High Court seeking a writ of quo warranto. The writ petition was dismissed in limine and an appeal was filed by the writ petitioner in this Court. The judgments aforementioned were referred to by this Court and it was said :

> 17. The absence of the expression from amongst members of the legislature in Article 164 (1) is indicative of the position that whereas under that provision a non-legislator can be appointed as a Chief Minister or a Minister but that appointment would be governed by Article 164(4), which places a restriction on such a non-member to continue as a Minister or the Chief Minister, as the case may be, unless he can get himself elected to the Legislature within the period of six consecutive months from the date of his appointment. Article 164(4) is, therefore, not a source of power or an enabling provision for appointment of a non-

legislator as a Minister even for a short duration. It is actually in the nature of a disqualification or restriction for a non-member who has been appointed as a Chief Minister or a Minister, as the case may be, to continue in office without getting himself elected within a period of six consecutive months.

The Court said that in England the position was this :

> In the Westminster system, it is an established convention that Parliament maintains its position as controller of the executive. By a well settled convention, it is the person who can rely on support of a majority in the House of Commons, who forms a government and is appointed as the Prime Minister. Generally speaking he and his Ministers must invariably all be Members of Parliament (House of Lords or House of Commons) and they are answerable to it for their actions and policies. Appointment of a non- member as a Minister is a rare exception and if it happens it is for a short duration. Either the individual concerned gets elected or is conferred life peerage.
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> The Court noted the constitutional scheme that provided for a democratic parliamentary form of Government, which envisaged the representation of the people, responsible Government and the accountability of the Council of Ministers to the legislature. Thus was drawn a direct line of authority from the people through the legislature to the executive. The position in England, Australia and Canada showed that the essentials of a system of representative Government, like the one in India, were that, invariably, all Ministers were chosen out of the members of the legislature and only in rare cases was a non- member appointed a Minister and he had to get

himself returned to the legislature by direct or indirect election within a short period. The framers of the Constitution had not visualised that a non-legislator could be repeatedly appointed a Minister, for a term of six months each, without getting elected because such a course struck at the very root of parliamentary democracy. It was accordingly held that the appointment of Tej Parkash Singh as a Minister for a second time was invalid and unconstitutional.

Mr. K.K. Venugopal, learned counsel for the second respondent, was right when he submitted that the question that arises before us has not, heretofore, arisen before the courts. This is for the reason that, heretofore, so far as is known, no one who was ineligible to become a member of the legislature has been made a Minister. Certainly, no one who has earned a conviction and sentence covered by Section 8 of the Prevention of Corruption Act would appear to have been appointed Chief Minister.

To answer the question before us, three sub-Articles of Article 164 need, in our view, to be read together, namely, sub-Articles (1),(2) and (4). By reason of sub-Article (1), the Governor is empowered to appoint the Chief Minister; the Governor is also empowered to appoint the other Ministers, but, in this regard, he must act on the advice of the Chief Minister. Sub-Article (2) provides, as is imperative in a representative democracy, that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State. The political executive, namely, the Council of Ministers, is thus, through the Legislative Assembly, made representative of and accountable to the people of the State who have elected the Legislative Assembly. There is necessarily implicit in these provisions the requirement that a Minister must be a member of the Legislative Assembly and thus representative of and accountable to the people of the State. It is sub-Article (4) which makes the appointment of a person other than a member of the Legislature of the State as a Minister permissible, but it stipulates that a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister. Necessarily implicit in sub-Article (4) read with sub-

Articles (1) and (2) is the requirement that a Minister who is not a member of the legislature must seek election to the legislature and, in the event of his failing to secure a seat in the legislature within six months, he must cease to be a Minister. The requirement of sub- Article (4) being such, it follows as the night the day that a person who is appointed a Minister though he is not a member of the legislature shall be one who can stand for election to the legislature and satisfy the requirement of sub-Article (4). In other words, he must be one who satisfies the qualifications for membership of the legislature contained in the Constitution (Article 173) and is not disqualified from seeking that membership by reason of any of the provisions therein (Article 191) on the date of his appointment.

The provision of sub-Article (4) of Article 164 is meant to provide for a situation where, due to political exigencies or to avail of the services of an expert in some field, it is requisite to induct into the Council of Ministers a person who is not then in the legislature. That he is not in the legislature

is not made an impassable barrier. To that extent we agree with Mr. Venugopal, but we cannot accept his submission that sub-Article (4) must be so read as to permit the induction into the Council of Ministers of short term Ministers whose term would not extend beyond six months and who, therefore, were not required to have the qualifications and be free of the disqualifications contained in Articles 173 and 191 respectively. What sub-Article (4) does is to give a non-legislator appointed Minister six months to become a member of the legislature. Necessarily, therefore, that non-legislator must be one who, when he is appointed, is not debarred from obtaining membership of the legislature : he must be one who is qualified to stand for the legislature and is not disqualified to do so. Sub-Article (4) is not intended for the induction into the Council of Ministers of someone for six months or less so that it is of no consequence that he is ineligible to stand for the legislature.

It would be unreasonable and anomalous to conclude that a Minister who is a member of the legislature is required to meet the constitutional standards of qualification and disqualification but that a Minister who is not a member of the legislature need not. Logically, the standards expected of a Minister who is not a member should be the same as, if not greater than, those required of a member.

The Constituent Assembly Debates (Volume VII) note that when the corresponding Article relating to Members of Parliament was being discussed by the Constituent Assembly, Dr. B.R. Ambedkar said:

> .. The first amendment is by Mr. Mohd.
>
> Tahir. His suggestion is that no person should be appointed a minister unless at the time of his appointment he is an elected member of the House. He does not admit the possibility of the cases covered in the proviso, namely, that although a person is not at the time of his appointment a member of the House, he may nonetheless be appointed as a minister in the cabinet subject to the condition that within six months he shall get himself elected to the House. The second qualification is by Prof. K.T. Shah. He said that a minister should belong to a majority party and his third qualification is that he must have a certain educational status. Now, with regard to the first point, namely, that no person shall be entitled to be appointed a Minister unless he is at the time of his appointment an elected member of the House. I think it forgets to take into consideration certain important matters which cannot be overlooked. First is this, - it is perfectly possible to imagine that a person who is otherwise competent to hold the post of a Minister has been defeated in a constituency for some reason which, although it may be perfectly good, might have annoyed the constituency and he might have incurred the displeasure of that particular constituency. It is not a reason why a member of the Cabinet on the assumption that he shall be able to get himself elected either from the same constituency or from another constituency. After all the privilege that is permitted is a privilege that extends only for six months. It does not confer a right to that individual to sit in the House without being elected at all..

> (Emphasis supplied) What was said by Dr. B.R. Ambedkar is self-explanatory. It shows clearly that the Constituent Assembly envisaged that non- legislator Ministers would have to be elected to the legislature within six months and it proceeded on the basis that the Article as it read required this. The manner in which we have interpreted Article 164 is, thus, borne out.
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> It was submitted on behalf of the respondents that it was not open to the Court to read into Article 164 the requirement that a non- legislator Minister must be elected to the legislature within six months. No qualifications or disqualifications could, it was submitted, be read into a constitutional provision. Reliance was placed upon passages from the some of the judgments in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala, [1973 (Supp.) S.C.R. 1].
>
> What we have done is to interpret Article 164 on its own language and to read sub-Article (4) thereof in the context of sub- Articles (1) and (2). In any event, it is permissible to read into sub- Article (4) limitations based on the language of sub-Articles (1) and (2).

A Constitution Bench in Minerva Mills Ltd. & Ors. Vs. Union of India & Ors. [1981 (1) SCR 206], considered in some detail the judgment in Kesavananda Bharati. It was considering the validity of the clauses introduced into Article 368 by the Constitution (Forty- second Amendment) Act. They provided :

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before on after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.
>
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

Chandrachud, C.J. noted in his judgment that the avowed purpose thereof was the removal of doubts. He observed that after the decision in Kesavananda Bharti, there could be no doubt as regards the existence of limitations on Parliaments power to amend the Constitution. In the context of the constitutional history of Article 368, the true object of the declaration contained in clause (5) was the removal of those limitations. Clause (5) conferred upon Parliament a vast and undefined power to amend the Constitution, even so as to distort it out of recognition. The theme song of the Court in the majority decision in Kesavananda Bharti had been, Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity. The majority judgment in Kesavananda Bharti conceded to Parliament the right to make alterations in the Constitution so long as they were within the basic framework. The Preamble assured the people of India of a polity whose basic structure was described therein as a Sovereign

Democratic Republic; Parliament could make any amendments to the Constitution as it deemed expedient so long as they did not damage or destroy Indias sovereignty and its democratic, republican character. Democracy was a meaningful concept whose essential attributes were recited in the Preamble itself : Justice, social, economic and political : Liberty of thought, expression, belief, faith and worship; and Equality of status and opportunity. Its aim, again as set out in the Preamble, was to promote among the people an abiding sense of Fraternity assuring the dignity of the individual and the unity of the Nation. The newly introduced clause (5) demolished the very pillars on which the Preamble rested by empowering Parliament to exercise its constituent power without any limitation whatever. No constituent power could conceivably go higher than the power conferred by clause (5) for it empowered Parliament even to repeal the provisions of this Constitution, that is to say, to abrogate democracy and substitute for it a totally antithetical form of government. That could most effectively be achieved, without calling democracy by any other name, by denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificient ideal of a society of equals. The power to destroy was not a power to amendment. Since the Constitution had conferred a limited amending power on Parliament, Parliament could not under the exercise of that limited power enlarge that very power into an absolute power. A limited amending power was one of the basic features of the Constitution and, therefore, the limitations on that power could not be destroyed. In other words, Parliament could not, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power could not by the exercise of that power convert the limited power into an unlimited one.

All this was said in relation to the Article 368(1) and (5). Sub- Article (1) read thus :

> 368. Power of Parliament to amend the Constitution and procedure therefor (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

Nothing can better demonstrate that is permissible for the Court to read limitations into the Constitution based on its language and scheme and its basic structure.

We hold, therefore, that a non-legislator can be made Chief Minister or Minister under Article 164 only if he has the qualifications for membership of the legislature prescribed by Article 173 and is not disqualified from the membership thereof by reason of the disqualifications set out in Article 191.

The next question is : Was the second respondent qualified for membership of the legislature and not disqualified therefor when she was appointed Chief Minister on 14th May, 2001.

It was submitted by learned counsel for the respondents that the suspension of the sentences passed against the second respondent by the High Court at Madras was tantamount to the suspension of the convictions against her. Our attention was then drawn to Section 8(3) of the Representation of

the People Act, which says that a person convicted of any offence and sentenced to imprisonment for not less than two years shall be disqualified.. In learned counsels submission, for the purposes of Section 8(3), it was the sentence alone which was relevant and if there were a suspension of the sentence, there was a suspension of the disqualification. The sentences awarded to the second respondent having been suspended, the disqualification under Section 8(3), in so far as it applied to her, was also suspended.

Section 389 of the Code of Criminal Procedure on the basis of which the second respondent was released on bail by the Madras High Court reads, so far as is relevant, as follows :

> 389. Suspension of sentence pending the appeal;

release of appellant on bail (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(Emphasis supplied) It is true that the order of the High Court at Madras on the application of the second respondent states, Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be released on bail.., but this has to be read in the context of Section 389 under which the power was exercised. Under Section 389 an appellate court may order that the execution of the sentence or order appealed against be suspended... It is not within the power of the appellate court to suspend the sentence; it can only suspend the execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the execution of the sentences, therefore, does not remove the disqualification against the second respondent. The suspension of the sentence, as the Madras High Court erroneously called it, was in fact only the suspension of the execution of the sentences pending the disposal of the appeals filed by the second respondent. The fact that she secured the suspension of the execution of the sentences against her did not alter or affect the convictions and the sentences imposed on her and she remained disqualified from seeking legislative office under Section 8(3).

In the same connection, learned counsel for the respondents drew our attention to the judgment of a learned single Judge of the High Court at Madras, Mr. Justice Malai Subramanium, on the application of the second respondent for stay of the execution of the orders of conviction against her. The learned Judge analysed Section 8 of the Representation of the People Act and came to this conclusion:

> In this case, sentence of imprisonment has already been suspended. Under such circumstances, in my view, there may not be any disqualification for the petitioner to contest in the election.

Learned counsel submitted that it was because of this conclusion that the learned Judge had not stayed the execution of the orders, and his conclusion bound the Governor. In the first place, the interpretation of the provision by the learned Judge is, as shown above, erroneous. Secondly, the reason why he refused to stay the execution of the orders was because the second respondent had been found guilty of offences under the Prevention of Corruption Act. Thirdly, the learned Judge was required by the application to consider whether or not the execution of the orders against the second respondent should be stayed; the consideration of and conclusion upon the provisions of Section 8 of the Representation of the People Act was wholly extraneous to that issue. Fourthly, the conclusion was tentative, as indicated by the use of the word may in the passage quoted from his judgment above. Lastly, as will be shown, we are not here concerned with what the Governor did or did not do; we are concerned with whether the second respondent can show that she was, when she was appointed Chief Minister, qualified to be a legislator under Article 173 and not disqualified under Article 191.

In relation to the difference in the periods of disqualification in sub-sections (1), (2) and (3) of Section 8 of the Representation of the People Act an argument similar to that which was raised and rejected in Raghbir Singh Vs. Surjit Singh [1994 Supp (3) SCC 162] was advanced. This Court there said :

5. Section 8 prescribes disqualification on conviction for certain offences. Sub-section (1) provides the disqualification for a period of six years from the date of conviction for the offences specified in clauses (a) to (i) thereof. In sub-

section (1), the only reference is to conviction for the specified offences irrespective of the sentence awarded on such conviction. Sub-section (2) then prescribes that on conviction for the offences specified therein and sentence to imprisonment for not less than six months, that person shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. Thus, in case of conviction for the offences specified in sub-section (2), the disqualification is attracted only if the sentence is of imprisonment for not less than six months and in that event the disqualification is for a period of not merely six years from the date of such conviction but commencing from the date of such conviction it shall continue for a further period of six years since his release. Sub-section (3) then prescribes a similar longer period of disqualification from the date of such conviction to continue for a further period of six years since his release where a person is convicted of any offence and sentenced to imprisonment for not less than two years, other than any offence referred to in sub-section (1) or sub-section (2). The classification is clear. This classification is made with reference to the offences and the sentences awarded on conviction. In sub-section (1) are specified the offences which are considered to be of one category and the period of six years disqualification from the date of conviction is provided for them irrespective of one sentence awarded on such conviction. In sub-section (2) are specified some other offences, the conviction for which is considered significant for disqualification only if the sentence is of imprisonment for not less than six months and in that case a longer period of disqualification has been considered appropriate. Then comes sub-section (3) which is the residuary

provision of this kind wherein the disqualification is prescribed only with reference to the period of sentence of imprisonment of not less than two years for which the longer period of disqualification is considered appropriate. The legislature itself has classified the offences on the basis of their nature and in the residuary provision contained in sub-section (3), the classification is made only with reference to the period of sentence being not less than two years.

6. In sub-section (3) of Section 8, all persons convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] are classified together and the period of disqualification prescribed for all of them is the same. All persons convicted of offences other than any offence referred to in sub-section (1) or sub-section (3) and sentenced to imprisonment of not less than two years constitute one class and are governed by sub-section (3) prescribing the same period of disqualification for all of them. The category of persons covered by sub-sections (1), (2) and (3) being different and distinct, the question of comparison inter se between any two of these three distinct classes does not arise. Without such a comparison between persons governed by these different sub- sections being permissible, the very basis of attack on the ground of discrimination is not available. Prescription of period of disqualification for different classes of persons convicted of different offences is within the domain of legislative discretion and wisdom, which is not open to judicial scrutiny.

It was pointed out by learned counsel for the respondents that under Section 8(3) of the Representation of the People Act the disqualification was attracted on the date on which a person was convicted of any offence and sentenced to imprisonment for not less than two years. It was pointed out, rightly, that the law contemplated that the conviction and the sentence could be on different dates. It was submitted that it was unworkable that the disqualification should operate from the date of conviction which could precede the date of sentence; therefore, the conviction referred to in Section 8(3) should be taken to be that confirmed by the appellate court because it was only in the appellate court that conviction and sentence would be on the same day. We find the argument unacceptable. In those cases where the sentence is imposed on a day later that the date of conviction (which, incidentally, is not the case here) the disqualification would be attracted on the date on which the sentence was imposed because only then would a person be both convicted of the offence and sentenced to imprisonment for less not that two years which is cumulatively requisite to attract the disqualification under Section 8(3).

The focus was then turned upon Section 8(4) of the Representation of the People Act and it was submitted that all the disqualifications set down in Section 8 would not apply until a final court had affirmed the conviction and sentence. This was for the reason that the principle underlying Section 8(4) had to be extended to a non legislator as, otherwise, Article 14 would stand violated for the presumption of innocence would apply to a sitting member till the conviction was finally affirmed but in the case of a non-legislator the disqualification would operate on conviction by the court of first instance. It was submitted that Section 8(4) had to be read down so that its provisions were not restricted to sitting members and in all cases the disqualification applied only when the conviction and sentence was finally upheld.

Section 8(4) opens with the words Notwithstanding anything in sub-section (1), sub-section (2) and sub-section (3), and it applies only to sitting members of legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be reading up the provision, not reading down, and that is not known to the law.

In much the same vein, it was submitted that the presumption of innocence continued until the final judgment affirming the conviction and sentence was passed and, therefore, no disqualification operated as of now against the second respondent. Before we advert to the four judgments relied upon in support of this submission, let us clear the air. When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates and the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. In many cases, the accused is released on bail so that the appeal is not rendered infructuous, at least in part, because the accused has already undergone imprisonment. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it had never existed and the sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that it is not to say that the presumption of innocence continues after the conviction by the trial court. That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well.

Learned counsel cited from the judgment of this Court in Padam Singh Vs. State of U.P. [2000 (1) SCC 621] the passage which reads :

> It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence.
>
> (Page 625 C) The passage is relevant to the duty of an appeal court. It is the duty of an appeal court to look at the evidence afresh to see if the case against the accused has been established by the prosecution beyond reasonable doubt, uninfluenced by the decision of the trial court; in other words, to look at it as if the presumption of the innocence of the accused still applied. The passage does not support the proposition canvassed.
>
> In Maru Ram Vs. Union of India and Ors. [1981 (1) SCC 107] it was stated :
>
> When a person is convicted in appeal, it follows that the appellate Court has exercised its power in the place of the original court and the guilt, conviction and sentence

must be substituted for and shall have retroactive effect from the date of judgment of the trial Court. The appellate conviction must relate back to the date of the trial Courts verdict and substitute it.

There is no question of the correctness of what is set out above but it has no application to the issue before us. What we are concerned with is whether, on the date on which the second respondent was sworn in as Chief Minister, she suffered from a disqualification by reason of the convictions and sentences against her.

In Dilip Kumar Sharma and Others Vs. State of Madhya Pradesh [1976 (1) SCC 560], this Court was concerned with Section 303 of the Indian Penal Code, which provided : Whoever being under sentence of imprisonment for life, commits murder shall be punished with death. Sarkaria, J., in his concurring judgment, held, on an interpretation of the section, that once it was established that, at the time of committing the murder, the prisoner was under a sentence of life imprisonment, the court had no discretion but to award the sentence of death, notwithstanding mitigating circumstances. The provision was, therefore, Draconion in its severity. It was in these circumstances that he held that the phrase being under sentence of imprisonment for life had to be restricted to a sentence which was final, conclusive and ultimate so far as judicial remedies were concerned for the other alternative would lead to unreasonable and unjust results. The observations of the learned Judge are relevant to the case before him; they do not have wider implications and do not mean that all convictions by a trial court do not operate until affirmed by the highest Court.

Lastly, in this connection, our attention was drawn to the case of Vidya Charan Shukla Vs. Purshottam Lal Kaushik [1981 (2) SCC 84]. The Court held that if a successful candidate was disqualified for being chosen, at the date of his election or at any earlier stage of any step in the election process, on account of his conviction and sentence exceeding two years imprisonment, but his conviction and sentence was set aside and he was acquitted on appeal before the pronouncement of the judgment in the election petition pending against him, his disqualification was retrospectively annulled and the challenge to his election on the ground that he was so disqualified was no longer sustainable. This case dealt with an election petition and it must be understood in that light. What it laid down does not have a bearing on the question before us: the construction of Article 164 was not in issue. There can be no doubt that in a criminal case acquittal in appeal takes effect retrospectively and wipes out the sentence awarded by the lower court. This implies that the stigma attached to the conviction and the rigour of the sentence are completely obliterated, but that does not mean that the fact of the conviction and sentence by the lower court is obliterated until the conviction and sentence are set aside by an appellate court. The conviction and sentence stand pending the decision in the appeal and for the purposes of a provision such as Section 8 of the Representation of the People Act are determinative of the disqualifications provided for therein.

Our conclusion, therefore, is that on the date on which the second respondent was sworn in as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act

and the sentences of imprisonment of not less than two years, for becoming a member of the legislature under Section 8(3) of the Representation of the People Act.

It was submitted by learned counsel for the respondents that, even so, the court could do nothing about it. It was submitted that in the case of a Chief Minister or Minister appointed under Article 164(1) read with (4) the people, who were the ultimate sovereign, had expressed their will through their elected representatives. For the period of six months the locus penitentiae operated as an exception, as a result of which, for that period, the peoples will prevailed in a true parliamentary democracy, especially as no provision was made for adjudicating alleged disqualifications, like the holding of an office of profit or a subsisting contract for the supply of goods or execution of works. In this area of constitutional governance, for the limited period of six months, it was not open to the court to import qualifications and disqualifications for a minister qua minister when none existed in Article 164(4). The Governor, not being armed with the machinery for adjudicating qualifications or disqualifications, for example, on the existence of subsisting contracts or the holding of offices of profit, and having no power to summon witnesses or to administer an oath or to summon documents or to deliver a reasoned judgment, the appointment made by him on the basis of the conventions of the Constitution could not be challenged in quo warranto proceedings so that an appointment that had been made under Article 164 could not be rendered one without the authority of law. If it did so, the court would be entering the political thicket. When qualifications and disqualifications were prescribed for a candidate or a member of the legislature and a machinery was provided for the adjudication thereof, the absence of the prescription of any qualification for a Minister or Chief Minister appointed under Article 164(1) read with (4) and for adjudication thereof meant that the Governor had to accept the will of the people in selecting the Chief Minister or Minister, the only consideration being whether the political party and its leader commanded a majority in the legislature and could provide a stable government. Once the electorate had given its mandate to a political party and its leader to run the government of a State for a term of five years, in the absence of any express provision in the Constitution to the contrary, the Governor was bound to call the leader of that legislature party to form the government. There was no express, unambiguous provision in the Constitution or in the Representation of the People Act or any decision of this Court or a High Court declaring that a person convicted of an offence and sentenced to imprisonment for a period of not less than two years by the trial court shall not be appointed Chief Minister during the pendency of his first appeal. In such a situation, the Governor could not be expected to take a position of confrontation with the people of the State who had voted the ruling party to power and plunge the State into turmoil. In the present case, the Governor was entitled to proceed on the basis that the appeals of the second respondent having been directed, in October, 2000, to be heard within two months, it would be open to the second respondent to have the appeals disposed of within the time limit of six months and, in case of an acquittal, no question of ineligibility to contest an election within the period of six months would arise. If the Governor invited the leader of the party which had a majority in the legislature to form a government, it would, if the leader was a non legislator, thereafter not to be open to the court in quo warranto proceedings to decide that the Chief Minister was disqualified. Otherwise, this would mean that when the Governor had invited, in accordance with conventions, the leader to be Chief Minister, in the next second the leader would have to vacate his office by reason of the quo warranto. The court would then be placing itself in a position of prominence among the three organs of the State, as a

result of which, instead of the House deciding whether or not to remove such a person through a motion of no confidence, the court would take over the function, contrary to the will of the legislature which would mean the will of the people represented by the majority in the legislature. In then deciding that the Chief Minister should demit office, the court would be entering the political thicket, arrogating to itself a power never intended by the Constitution, the exercise of which would result in instability in the governance of the State.

We are, as we have said, not concerned here with the correctness or otherwise of the action of the Governor in swearing the second respondent in as Chief Minister in the exercise of the Governors discretion.

But submissions were made by learned counsel for the respondents in respect of the Governors powers under Article 164 which call for comment. The submissions were that the Governor, exercising powers under Article 164(1) read with (4), was obliged to appoint as Chief Minister whosoever the majority party in the legislature nominated, regardless of whether or not the person nominated was qualified to be a member of the legislature under Article 173 or was disqualified in that behalf under Article 191, and the only manner in which a Chief Minister who was not qualified or who was disqualified could be removed was by a vote of no- confidence in the legislature or by the electorate at the next elections. To a specific query, learned counsel for the respondents submitted that the Governor was so obliged even when the person recommended was, to the Governors knowledge, a non-citizen, under-age, a lunatic or an undischarged insolvent, and the only way in which a non-citizen or under-age or lunatic or insolvent Chief Minister could be removed was by a vote of no-confidence in the legislature or at the next election.

The nomination to appoint a person who is a non-citizen or under-age or a lunatic or an insolvent as Chief Minister having been made by the majority party in the legislature, it is hardly realistic to expect the legislature to pass a no-confidence motion against the Chief Minister; and the election would ordinarily come after the Chief Minister had finished his term.

To accept learned counsels submission is to invite disaster. As an example, the majority party in the legislature could recommend the appointment of a citizen of a foreign country, who would not be a member of the legislature and who would not be qualified to be a member thereof under Article 173, as Chief Minister under Article 164(1) read with (4) to the Governor; and the Governor would be obliged to comply; the legislature would be unable to pass a no- confidence motion against the foreigner Chief Minister because the majority party would oppose it; and the foreigner Chief Minister would be ensconced in office until the next election. Such a dangerous such an absurd interpretation of Article 164 has to be rejected out of hand. The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution. The Governor is a functionary under the Constitution and is sworn to preserve, protect and defend the Constitution and the laws (Article 159). The Governor cannot, in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws. It is another thing that by reason of the protection the Governor enjoys under Article 361, the exercise of the Governors discretion cannot be questioned. We are in no doubt at all that if the Governor is asked by the majority party in the legislature to

appoint as Chief Minister a person who is not qualified to be a member of the legislature or who is disqualified to be such, the Governor must, having due regard to the Constitution and the laws, to which he is subject, decline, and the exercise of discretion by him in this regard cannot be called in question.

If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary unsupported by any authority must be rejected.

The judgment of this Court in Shri Kumar Padma Prasad Vs. Union of India and Others [1992(2) SCC 428] is a case on point. One K.N. Srivastava was appointed a Judge of the Gauhati High Court by a warrant of appointment signed by the President of India. Before the oath of his office could be administered to him, quo warranto proceedings were taken against him in that High Court. An interim order was passed directing that the warrant of appointment should not be given effect to until further orders. A transfer petition was then filed in this Court and was allowed. This Court, on examination of the record and the material that it allowed to be placed before it, held that Srivastava was not qualified to be appointed a High Court Judge and his appointment was quashed. This case goes to show that even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.

It was submitted that we should not enter a political thicket by answering the question before us. The question before us relates to the interpretation of the Constitution. It is the duty of this Court to interpret the Constitution. It must perform that duty regardless of the fact that the answer to the question would have a political effect. In State of Rajasthan and Others Vs. Union of India and Others [1977(3) SCC 592], it was said by Bhagwati, J. , But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution, if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political . So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert the clearest possible terms, particularly in the context of recent history, that the Constitution is suprema lex, the paramount law of the land and there is no department or branch of Government above or beyond it.

We are satisfied that in the appointment of the second respondent as Chief Minister there has been a clear infringement of a constitutional provision and that a writ of quo warranto must issue.

We are not impressed by the submissions that the writ petitions for quo warranto filed in this Court are outside our jurisdiction because no breach of fundamental rights has been pleaded therein; that

the appeal against the decision of the Madras High Court in the writ petition for similar relief filed before it was correctly rejected because the same issue was pending here; and that the transferred writ petition for similar relief should, in the light of the dismissal of the writ petitions filed in this Court, be sent back to the High Court for being heard. Breach of Article 14 is averred in at least the lead writ petition filed in this Court (W.P.(C) No.242 of 2001). The writ petition which was dismissed by the High Court and against which order an appeal is pending in this Court was filed under Article 226, as was the transferred writ petition. This Court, therefore, has jurisdiction to issue a writ of quo warranto. We propose to pass the order in the lead writ petition, and dispose of the other writ petitions, the appeal and the transferred writ petition in the light thereof.

We are not impressed by the submission that we should not exercise our discretion to issue a writ of quo warranto because the period of six months allowed by Article 164(4) to the second respondent would expire in about two months from now and it was possible that the second respondent might succeed in the criminal appeals which she has filed. We take the view that the appointment of a person to the office of Chief Minister who is not qualified to hold it should be struck down at the earliest.

We are aware that the finding that the second respondent could not have been sworn in as Chief Minister and cannot continue to function as such will have serious consequences. Not only will it mean that the State has had no validly appointed Chief Minister since 14th May, 2001, when the second respondent was sworn in, but also that it has had no validly appointed Council of Ministers, for the Council of Ministers was appointed on the recommendation of the second respondent. It would also mean that all acts of the Government of Tamil Nadu since 14th May, 2001 would become questionable. To alleviate these consequences and in the interest of the administration of the State and its people, who would have acted on the premise that the appointments were legal and valid, we propose to invoke the de facto doctrine and declare that all acts, otherwise legal and valid, performed between 14th May, 2001 and today by the second respondent as Chief Minister, by the members of the Council of Ministers and by the Government of the State shall not be adversely affected by reason only of the order that we now propose to pass.

We are of the view that a person who is convicted for a criminal offence and sentenced to imprisonment for a period of not less than two years cannot be appointed the Chief Minister of a State under Article 164(1) read with (4) and cannot continue to function as such.

We, accordingly, order and declare that the appointment of the second respondent as Chief Minister of the State of Tamil Nadu on 14th May, 2001 was not legal and valid and that she cannot continue to function as such. The appointment of the second respondent as Chief Minister of the State of Tamil Nadu is quashed and set aside.

All acts, otherwise legal and valid, performed between 14th May, 2001 and today by the second respondent acting as Chief Minister of the State of Tamil Nadu, by the members of the Council of Ministers of that State and by the Government of that State shall not be adversely effected by reason only of this order.

Writ Petition (C) No.242 of 2001 is made absolute in the aforesaid terms.

In the light of this order, the other writ petitions, the appeal and the transferred writ petition stand disposed of.

No order as to costs.

Brijesh Kumar, J.

Leave granted in SLP c 11763/2001.

I have the advantage of going through the judgment prepared by Brother Bharucha, J. I am in respectful agreement with the same. While doing so, I propose to record my views in addition, on a few points only, in brief, since such points had been argued at some length and with all vehemence. The points are also no doubt important.

Amongst other points, the learned counsel for the respondents submitted that the appointment of respondent No.2 as Chief Minister by the Governor, could not be challenged, in view of the provisions under Article 361 of the Constitution, providing that the Governor shall not be answerable to any Court for the exercise and performance of the powers and duties of his office. It was also submitted that in appointing the Chief Minister, the Governor exercised his discretionary powers, therefore, his action is not justiciable. Yet another submission is that the Governor had only implemented the decision of the majority party, in appointing the respondent No.2 as a Chief Minister i.e. he had only given effect to the will of the people.

In so far it relates to Article 361 of the Constitution, that the Governor shall not be answerable to any Court for performance of duties of his office as Governor, it may, at the very outset, be indicated that we are considering the prayer for issue of writ of Quo Warranto against the respondent No.2, who according to the petitioner suffers from disqualification to hold the public office of the Chief Minister of a State. A writ of Quo Warranto is a writ which lies against the person, who according to the relator is not entitled to hold an office of public nature and is only an usurper of the office. It is the person, against whom the writ of quo warranto is directed, who is required to show, by what authority that person is entitled to hold the office. The challenge can be made on various grounds, including on the grounds that the possessor of the office does not fulfill the required qualifications or suffers from any disqualification, which debars the person to hold such office. So as to have an idea about the nature of action in a proceedings for writ of quo warranto and its original form, as it used to be, it would be beneficial to quote from Words and Phrases Permanent Edition, Volume 35A page 648. It reads as follows:-

> The original common-law writ of quo warranto was a civil writ at the suit of the crown, and not a criminal prosecution. It was in the nature of a writ of right by the King against one who usurped or claimed franchises or liabilities, to inquire by what right he claimed them. This writ, however, fell into disuse in England centuries ago,

and its place was supplied by an information in the nature of a quo warranto, which in its origin was a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown. Long before our Revolution, however, it lost its character as a criminal proceeding in everything except form, and was applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only; and such, without any special legislation to that effect, has always been its character in many of the states of the Union, and it is therefore a civil remedy only. Ames v. State of Kansas, 4 S.Ct.437, 442,111 U.S. 449,28 L.Ed.482; People v. Dashaway Assn, 24 P.277,278,84 Cal.114.

In the same Volume of Words and Phrases Permanent Edition at page 647 we find as follows:-

The writ of quo warranto is not a substitute for mandamus or injunction nor for an appeal or writ of error, and is not to be used to prevent an improper exercise of power lawfully possessed, and its purpose is solely to prevent an officer or corporation or persons purporting to act as such from usurping a power which they do not have. State ex inf.McKittrick v. Murphy,

148.S.W.2d 527,529,530,347 Mo.484. (emphasis supplied) Information in nature of quo warranto does not command performance of official functions by any officer to whom it may run, since it is not directed to officer as such, but to person holding office or exercising franchise, and not for purpose of dictating or prescribing official duties, but only to ascertain whether he is rightfully entitled to exercise functions claimed. State ex inf.

Walsh v. Thatcher, 102 S.W.2d 937,938,340 Mo.865. (emphasis supplied) In Halsburys Laws of England Fourth Edition Reissue Volume-I Para 265, Page 368 it is found as follows:-

266. In general. An information in the nature of a quo warranto took the place of the absolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim, in order what the right to the office or franchise might be determined. (Emphasis supplied) Besides the above, many High Courts as well as this Court have, taken the view that a writ of quo warranto lies against a person, who is called upon to establish his legal entitlement to hold the office in question. Reference:

AIR 1952 Trav. Cochin 66, (1944) 48 Cal.

W.N. 766, AIR 1977 Noc. 246, AIR 1952 Nag.

330, AIR 1945 Cal.249 and AIR 1965 S.C. 491.

In view of the legal position as indicated above it would not be necessary to implead the appointing authority as respondent in the proceedings. In the case in hand, the Governor need not be made answerable to Court. Article 361 of the Constitution however does not extend any protection or immunity, vicariously, to holder of an office, which under the law, he is not entitled to hold. On being called upon to establish valid authority to hold a public office, if the person fails to do so, a writ of quo warranto shall be directed against such person. It shall be no defence to say that the appointment was made by the competent authority, who under the law is not answerable to any Court for anything done in performance of duties of his office. The question of fulfilling the legal requirements and qualifications necessary to hold a public office would be considered in the proceedings, independent of the fact as to who made the appointment and the manner in which appointment was made. Therefore, Article 361 of the Constitution would be no impediment in examining the question of entitlement of a person, appointed by the Governor to hold a public office, who according to the petitioner/relator is usurper to the office.

The other point which was pressed, with no less vehemence was that in making the appointment of the Chief Minister, the Governor acts in exercise of his discretionary powers. In this connection, learned counsel for the respondents referred to Article 163 of the Constitution to indicate that there shall be a Council of Ministers headed by the Chief Minister to aid and advise the Governor in exercise of his functions except where, under the Constitution the Governor has to discharge his functions in his discretion. Thereafter, Article 164 of the Constitution has been referred to indicate that Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advise of the Chief Minister. It is submitted that the Governor appoints the Chief Minister at a time, when there is no Council of Ministers to aid or advise him. The Governor makes the appointment in his own discretion. Learned counsel for the respondent No.2 submitted that the party in majority by means of a resolution had chosen respondent No.2 as their leader. Accordingly, the respondent No.2 was appointed as the Chief Minister. It has been very categorically submitted, without any ambiguity, that the Governor is bound to appoint any person whosoever is chosen by majority party, as the Chief Minister. This argument cuts against his own submission made earlier that the Governor appoints the Chief Minister in exercise of his discretionary powers. If it is right, that the Governor is bound by the decision of the majority party, the element of discretion of Governor, in the matter, disappears. In the scheme of Constitutional provisions the Governor is to act with the aid and advise of the Council of Ministers headed by the Chief Minister. He is bound to act accordingly. The other functions which the Governor performs in which aid and advice of the Council of Ministers is not necessary, he acts in his own discretion. He is not bound by decision/advice of any other agency. It is no doubt true that even in the written Constitution it is not possible to provide each and every detail. Practices and conventions do develop for certain matters. This is how democracy becomes workable. It is also true that the choice of the majority party regarding its leader for appointment as Chief Minister is

normally accepted, and rightly. But the contention that in all eventualities whatsoever the Governor is bound by the decision of the majority party is not a correct proposition. The Governor cannot be totally deprived of element of discretion in performance of duties of his office, if ever any such exigency may so demand its exercise. The argument about implementing the will of the people in the context indicated above is misconceived and misplaced.

PATTANAIK, J.

Leave granted.

I have my respectful concurrence with the conclusions and directions in the judgment of Brother Bharucha, J. I am conscious of the fact that plurality of judgments should ordinarily be avoided. But, having regard to the importance of the question involved, and the enormity of the consequences, if the contentions of Respondent No. 2 are accepted, I consider it appropriate to express my thoughts on some aspects. It is not necessary to reiterate the facts which have been lucidly narrated in the judgment of Brother Bharucha,J. The question that arises for consideration is whether a non elected member, whose nomination for contesting the election to the Legislative Assembly stood rejected, and that order of rejection became final, not being assailed, could still be appointed as the Chief Minister or the Minister under Article 164 of the Constitution, merely because the largest number of elected members to the Legislative Assembly elects such person to be their leader. Be it be stated, that the nomination of such person had been rejected, on the ground of disqualification incurred by such person under Section 8(3) of the Representation of People Act, 1951, the said person having been convicted under the provisions of the Prevention of Corruption Act, and having been sentenced to imprisonment for 3 years. The main basis of the arguments advanced by Mr. Venugopal, the learned senior counsel, appearing for respondent no. 2, and Mr. PP Rao, learned senior counsel appearing for the State of Tamil Nadu, is that Article 164 of the Constitution conferring power on the Governor to appoint a person as Chief Minister, and then appoint Ministers on the advice of such Chief Minister, does not prescribe any qualification for being appointed as Minister or Chief Minister, and on the other hand, Sub-Article (4) of Article 164 enables such a Minister to continue as a Minister for a period of six months and said Minister ceases to be a Minister unless within that period of six months gets himself elected as a member of the Legislaure of the State. As such, it would not be appropriate to import the qualifications enumerated for the members of the State Legislature under Article 173, or the dis- qualifications enumerated in respect of a person for being chosen as or for being a member of the Legislative Assembly under Article 191 of the Constitution. According to the learned senior counsel, the Governor, while exercising power under Article 164, is duty bound to follow the well settled Parliamentary convention and invites a person to be the Chief Minister, which person commands the confidence of the majority of the House. In

other words, if a political party gets elected to the majority of seats in a Legislative Assembly and such elected legislatures elected a person to be their leader, and that fact is intimated to the Governor then the Governor is duty bound to call that person to be the Chief Minister, irrespective of the fact whether that person does not possess the qualifications for being a member of the Legislative Assembly, enumerated under Article 173, or is otherwise disqualified for being chosen, or being a member of the Legislative Assembly on account of any of the dis- qualifications enumerated under Article 191. The aforesaid contention is based upon two reasonings. (1) The lack of prescription of qualification or dis-qualifications for a Chief Minister or Minister under Article 164, and (2) that in a Parliamentary democracy the Will of the people must prevail. Necessarily, therefore, the provisions of Article 164 of the Constitution requires an indepth examination, and further the theory that in a Parliamentary democracy, the Will of the people must prevail under any circumstance, as propounded by Mr. Venugopal and Mr. Rao, requires a deeper consideration. I would, therefore, focus my attention on the aforesaid two issues.

It is no doubt true, that Articles 164(1) and 164(4) do not provide any qualification or disqualification, for being appointed as a Chief Minister or a Minister, whereas, Article 173 prescribes the qualification for a person to be chosen to fill a seat in the Legislature of a State. Article 191 provides the disqualification for a person for being chosen as or being a member of the Legislative Assembly or Legislative Council of a State. In the case in hand, the respondent no. 2 was disqualified under Article 191(1)(e) read with Section 8(3) of the Representation of the People Act, 1951, in as much as the said respondent no. 2 has been convicted under Section 13 of the Prevention of Corruption Act, and has been sentenced to imprisonment for a period of 3 years, though the execution of that sentence has been suspended by the Appellate Court while the appeal against the conviction and sentence is pending before the High Court of Madras.

According to Mr. Venugopal, under the Constitution of India, when no qualification or disqualification exists under Article 164(1) or 164(4), it necessarily postulates that in the area of constitutional governance for the limited period of six months, any person could be appointed as a Chief Minister or Minister and it would not be open to the Court to import qualifications and disqualifications, prescribed under the Constitution for being chosen as a member of the Legislative Assembly. According to the learned counsel, the reasonable conclusion to be drawn from the aforesaid constitutional provision is that the constitution does not contemplate the scrutiny of the credentials of a non-member Prime Minister or Chief Minister or Minister, as in constitutional theory it is the House, consisting of the majority thereof which proposes him for this transient, temporary and limited period of six months. It is also contended by Mr. Venugopal that people who are the ultimate sovereign, express their will through their elected representatives for selecting a non-elected person as their leader and could be appointed as Chief Minister and Article 164(4) unequivocally provides a period of six months as locus poenitentia which operates as an exception in deference to the voice of the majority of the elected members, which in fact is the basis of a Parliamentary Democracy. Mr. Venugopal also urged that a disqualification being in the nature of a

penalty unless expressly found to be engrafted in the constitution or in other words, in Article 164, it would not be appropriate for the Court to incorporate that disqualification, which is provided for being chosen as a member of the legislative assembly into Article 164 and pronounce the validity of the appointment of respondent No. 2, which has purely been made on the strength of the voice of the majority of the elected members. I am unable to accept these contentions of the learned counsel, as in my considered opinion, the contentions are based on a wrong premise. In a Parliamentary system of government, when political parties fight elections to the legislative assembly or to the Parliament for being chosen as a member after results are declared, it would be the duty of the President in case of Parliament and the Governor in case of Legislative Assembly of the State, to appoint the Prime Minister or the Chief Minister, as the case may be. When the President appoints the Prime Minister under Article 75 or the Governor appoints a Chief Minister under Article 164, the question that weighs with the President or the Governor is, who will be able to provide a stable government.

Necessarily, therefore, it is the will of the majority party that should ordinarily prevail and it is assumed that the elected members belonging to a majority political party would elect one amongst them to be their leader. Constitution, however does not prevent the elected members belonging to a political party commanding the majority of seats in the legislative assembly or the Parliament to elect a person who never contested for being chosen as a member or a person who though contested, got defeated in the election for one reason or the other and it is in such a situation that person on being elected as a leader of the political party commanding the majority in the House, could be appointed as the Prime Minister or the Chief minister. But the constitution certainly does not postulate such elected representatives of the people belonging to a political party commanding a majority in the Parliament or the Assembly to elect a person as their leader so as to be called by the President or the Governor to head the government, who does not possess the qualification for being chosen, to fill a seat in the Parliament or in the legislative Assembly, as contained in Articles 84 and 173 respectively of the Constitution or who is disqualified for being chosen as or for being a member of the House of Parliament or the legislative Assembly, as stipulated under Articles 102 and 191 of the Constitution respectively. At any rate, even if a person is elected as the leader by the elected members of the legislative Assembly, commanding a majority of seats in the Assembly and such person either does not possess the qualification enumerated under Article 173 or incurs disqualification for being chosen as, or for being a member of the legislative Assembly, enumerated under Article 191, then the Governor would not be bound to respect that will of the elected members of the political party, commanding the majority in the House, so as to appoint that person as the Chief Minister under Article 164(1) of the Constitution. When Article 164(1) itself confers the discretion on the Governor to appoint a Chief Minister at his pleasure and when the Governor has taken oath under Article 159 of the Constitution to preserve, protect and defend the Constitution and the law and shall devote himself to the service and for the well-being of the people, it would be against such oath, if such a person who does not possess the qualification of being chosen as a member or has incurred disqualification for being chosen as a member is appointed as a Chief Minister, merely because Article 164 does not provide any qualification or disqualification for being appointed as a Chief Minister or Minister. It is indeed axiomatic that the necessary qualification in Article 173 and the disqualification in Article 191 proprio vigore applies to a person for being appointed as the Chief Minister or a Minister inasmuch as in a Parliamentary system of government,

a person is required to be chosen as a member of the Legislative Assembly by the electorate of a constituency and then would be entitled to be appointed as the Chief Minister or a Minister on the advice of the Chief Minister. Non-prescribing any qualification or disqualification under Article 164 for being chosen as the Chief Minister or Minister would only enable the Governor to appoint a person as the Chief Minister or Minister for a limited period of six months, as contained in Article 164(4) of the Constitution, only if such person possesses the qualification for being chosen as a member of the legislative Assembly, as required under Article 173 and is not otherwise disqualified on account of any of the disqualifications mentioned in Article 191. Any other interpretation by way of conferring an unfettered discretion on the Governor or conferring an unfettered right on the elected members of a political party commanding a majority in the legislative Assembly to elect a person who does not possess the qualifications, enumerated under Article 173 or who incurs the disqualifications enumerated in Article 191 would be subversive of the constitution and would be repugnant to the theory of good governance and would be contrary to the constitution itself, which constitution has been adopted, enacted and given to the people of India by the people of India.

In this connection it would be appropriate to notice that even under the Government of India Act, 1935 where Sections 51(1) and 51(2) were somewhat similar to Article 164 of the Constitution, even the Joint Committee Report on Indian Constitutional Reforms would indicate that a disqualified person could not have been appointed as a Minister, as is apparent from the following sentence:

> It was, therefore, suggested to us that the Governor ought not to be thus restricted in his choice, and that he ought to be in a position, if the need should arise, to select a Minister or Ministers from persons otherwise qualified for appointment but to whom the doubtful pleasures of electioneering might make no appeal.
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> Even in the Constituent Assembly Debates when Mohd. Tahir, an M.P. suggested an amendment to Article 144(3) of the Draft Constitution, which corresponds with Article 164(4) of the Constitution to the effect:
>
> That a member shall, at the time of his being chosen as such be a member of the Legislative Assembly or the Legislative council of the State, as the case may be.
>
> and urged that it is wholly against the spirit of democracy that a person who was not being chosen by the people of the country, should be appointed as a Minister, Dr. Ambedkar did not accept the amendment on the ground that tenure of a minister must be subject to the condition of purity of administration and confidence of the House. He further stated:
>
> It is perfectly possible to imagine that a person who is otherwise competent to hold the post of a Minister has been defeated in a constituency for some reason which, although it may be perfectly good, might have annoyed the constituency and he might have incurred the displeasure of that particular constituency.

If purity of administration and otherwise competence to hold the post of Minister were the factors which weighed with the founding fathers to allow a competent person to be appointed as Chief Minister or a Minister for a limited period of six months, who might have been defeated, it is difficult to conceive that a person who is not an elected member, does not possess even the minimum qualification for being chosen as a member or has incurred the disqualification for being chosen as a member could be appointed as a Chief Minister or Minister, on the simple ground that Article 164 is quite silent on the same and the Court cannot import anything into the said Article. Thus on a pure construction of provisions of Article 164 of the Constitution, the discussions made in the Constituent Assembly, referred to earlier, the pre-existing pari materia provision in the Government of India Act, 1935 as well as the discussion of the Joint Committee on Indian Constitutional Reforms referred to earlier, make it explicitly clear that notwithstanding the fact that no qualification or disqualification is prescribed in Article 164(1) or Article 164(4) but such qualification or disqualification provided in Articles 173 and 191 of the Constitution for being chosen as a member will have to be read into Article 164 and so read, respondent No. 2, who had incurred the disqualification under Article 191(1)(e) read with Section 8(3) of the Representation of the People Act, could not have been appointed as the Chief Minister, whatever may be the majority of her party members being elected to the legislative assembly and they elected her as the leader of the party to form the Government.

One ancillary argument raised by Mr. Venugopal, in this connection requires some consideration. According to the learned counsel, no adjudicatory machinery having been provided for in Article 164, in the event the qualifications and disqualifications prescribed for being chosen as a member of the legislative assembly under Articles 173 and 191 are imported into Article 164, then it will be an impossible burden for the Governor at that stage to decide the question if the opponent raises the question of any disqualification and no Governor can adjudicate on each one of the disqualifications, enumerated in Article 191 read with Sections 8 to 11 of the Representation of the People Act.

According to the learned counsel, the constitution has avowedly not prescribed any qualification or disqualification with regard to a non-member minister or Chief minister and the only limitation is that such minister or Chief minister must get elected within six months or else would cease to become a minister. In my considered opinion, the appointment of a non-member as the Chief Minister or Minister on the advice of a Chief Minister is made under Article 164 on the Governors satisfaction. If any of the disqualifications mentioned in Article 191(1)(e) are brought to the notice of the Governor which can be accepted without any requirement of adjudication or if the Governor is satisfied that the person concerned does not possess the minimum qualification for being chosen as a member, as contained in Article 173, then in such a case, there is no question of an impossible burden on the Governor at that stage and on the other hand, it would be an act on the part of the Governor in accordance with the constitutional mandate not to appoint such person as the Chief Minister or Minister notwithstanding the support of the majority of the elected members of the

legislative assembly. In a given case, if the alleged disqualification is dependant upon the disputed questions of fact and evidence, the Governor may choose not to get into those disputed questions of fact and, therefore, could appoint such person as the Chief Minister or Minister. In such a case, Governor exercises his discretion under Article 164 in the matter of appointment of the Chief Minister or a Minister. But in a case where the disqualification is one which is apparent as in the case in hand namely the person concerned has been convicted and has been sentenced to imprisonment for more than two years and operation of the conviction has not been stayed and the appeal is pending, thereby the disqualification under Article 191(1)(e) read with Section 8(3) of the Representation of the People Act staring at the face, the Governor would be acting beyond his jurisdiction and against the constitutional inhibitions and norms in appointing such a disqualified person as the Chief Minister on the sole reasoning that the majority of the elected members to the legislative council have elected the person concerned to be their leader. The constitution does not permit brute force to impede the constitution. The people of India and so also the elected members to the legislative assembly are bound by the constitutional provisions and it would be the solemn duty of the peoples representatives who have been elected to the legislative assembly to uphold the constitution. Therefore, any act on their part, contrary to the constitution, ought not to have weighed with the Governor in the matter of appointment of the Chief Minister to form the Government. In my considered opinion, therefore, the arguments of Mr. Venugopal, on this score cannot be sustained.

One of the arguments advanced on behalf of the respondents was the immunity of the Governor under Article 361 of the constitution. The genesis of the said arguments is that the Governor of a State not being answerable to any Court in exercise of performance of the powers and duty of his office or for any act done or purported to be done by him in the exercise and performance of those powers and duties and respondent No. 2 having been appointed as Chief Minister in exercise of powers of the Governor under Article 164, the said appointment as well as the exercise of discretion by the Governor is immune from being challenged and is not open to judicial review. The arguments of the counsel for the respondents is also based on the ground that any consideration by the Court to the legality of such an appointment is not permissible as it is a political thicket. The decision of this Court in R.K. Jain vs. Union of India, 1993(4) SCC 119 has been relied upon. At the outset, it may be stated that the immunity provided to the Governor under Article 361 is certainly not extended to an appointee by the Governor. In the present proceedings, what has been prayed for is to issue a writ of quo warranto on the averments that respondent No. 2 was constitutionally disqualified to usurp the public office of the Chief Minister, who has been usurping the said post unauthorisedly on being appointed by the Governor. In fact the Governor has not been arrayed as a party respondent to the proceedings. In the very case of R.K. Jain, it has been held by this Court in paragraph 73 that judicial review is concerned with whether the incumbent possessed of qualification for appointment and the manner in which the appointment came to be made or the procedure adopted whether fair, just and reasonable. It has been further stated in paragraph 70 of the said judgment that in a democracy governed by rule of law surely the only acceptable repository of absolute discretion should be the courts. Judicial review is the basic and essential feature of the Indian constitutional scheme entrusted to the judiciary. It is the essence of the rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority, should be within the constitutional limitation and if any practice is adopted by the executive, which is in violation of its

constitutional limitations, then the same could be examined by the Courts. In S.R. Bommai vs. Union of India, 1994(3) SCC Page 1, this Court held that a proclamation issued by the President on the advice of the council of ministers headed by the Prime Minister is amenable to judicial review. Even Justice Ahmadi, as he then was, though was of the opinion that the decision making of the President under Article 356 would not be justiciable but was firmly of the view that a proclamation issued by the President is amenable to judicial review. Justice Verma and Justice Yogeshwar Dayal held that there is no dispute that the proclamation issued under Article 356 is subject to judicial review. So also was the view of Justice Sawant and Justice Kuldip Singh and Justice Pandian, where Their Lordships have stated that the exercise of power by the President under Article 356(1) to issue Proclamation is subject to the Judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not. According to Justice Ramaswamy, the action of the President under Article 356 is a constitutional function and the same is subject to judicial review and according to the learned Judge, the question relating to the extent, scope and power of the President under Article 356 though wrapped up with political thicket, per se it does not get immunity from judicial review. According to Justice Jeevan Reddy and Agarwal, JJ, the power under Article 356(1) is a conditional power and in exercise of the power of judicial review, the court is entitled to examine whether the condition has been satisfied or not. But in the case in hand, when an application for issuance of a writ of quo warranto is being examined, it is not the Governor who is being made amenable to answer the Court. But it is the appointee respondent No. 2, who is duty bound to satisfy that there has been no illegal usurpation of public office. Quo warranto protects public from illegal usurpation of public office by an individual and the necessary ingredients to be satisfied by the Court before issuing a writ is that the office in question must be public created by the constitution and a person not legally qualified to hold the office, in clear infringement of the provisions of the constitution and the law viz. Representation of the People Act has been usurping the same. If this Court ultimately comes to the conclusion that the respondent No. 2 is disqualified under the constitution to hold public office of the Chief Minister, as has already been held, then the immunity of Governor under Article 361 cannot stand as a bar from issuing a writ of quo warranto. In the present case, it is the State Government who has taken the positive stand that there has been no violation of the constitutional provisions or the violation of law in the appointment of respondent No. 2, as Chief Minister, the correctness of that stand is the subject matter of scrutiny.

I am tempted to quote some observations of the United States Supreme Court in the case of Lucas vs. Colorado General Assembly 377 US 713, 12 L ed 2d 632, 84 S Ct 1472. It has been held in the aforesaid case: Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a Court of equity to refuse to act. It has been further held : The protection of constitutional rights is not to be approached either pragmatically or expediently, and though the fact of enactment of a constitutional provision by heavy vote of the electorate produces pause and generates restrain we can not, true to our oath, uphold such legislation in the face of palpable infringement of rights. It is too clear for argument that constitutional law is not a matter of majority vote. Indeed the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority. What has been stated therein should more appropriately be applicable to a case where the constitution is the supreme document which should bind people of India as well as all

other constitutional authorities, including the Governor, and, therefore if respondent No. 2 is found to have been appointed as the Chief Minister, contrary to the constitutional prohibition and prohibition under the relevant law of the Representation of the People Act, there should be no inhibition on the Court to issue a writ of quo warranto and the so-called immunity of the Governor will not stand as a bar.

According to Mr. P.P. Rao, learned senior counsel appearing for the State of Tamil Nadu, Parliamentary Democracy is admittedly a basic feature of the Constitution. It would be the duty of every functionary under the Constitution, including the Governor, and the judiciary to give effect to the will of the people as reflected in the election to the Legislative Assembly of a State. Once the electorate has given its mandate to a political party and its leader to run the Government of the State for a term of five years, in the absence of any express provision in the Constitution to the contrary, the Governor is bound to call upon the leader of that Legislature Party, so elected by the elected members, to form the Government. According to Mr. Rao, there is no express, unambiguous provision in the Constitution or in the provisions of Representation of People Act, declaring that a person convicted of an offence and sentenced to imprisonment for a period not less than 2 years by the Trial Court shall not be appointed as Chief Minister during the pendency of the first appeal. In such a situation, the Governor is not expected to take a position of confrontation with the people of the State who voted the ruling party to power and plunge the State into a turmoil. In support of this contention, observation of this Court in the case of Shamsher Singh vs. State of Punjab (1974 (2) SCC

831), The head of the State should avoid getting involved in politics, was pressed into service. I am unable to persuade myself to agree with the aforesaid submission of Mr. Rao, inasmuch as, in my considered opinion, the people of this country as well as their voice reflected through their elected representatives in the Legislative Assembly, electing a disqualified person for being chosen as a member of the Legislative Assembly, to be their leader are as much subservient to the Constitution of India as the Governor himself. In a democracy, constitutional law reflects the value that people attach to orderly human relations, to individual freedom under the law and to institutions such as Parliament, political parties, free elections and a free press. Constitution is a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of government within the State and declares the principles by which those organs must operate. Constitution refers to the whole system of the governance of a country and the collection of rules which establish and regulate or govern the government. In our country, we have a written constitution, which has been given by the people of India to themselves. The said Constitution occupies the primary place. Notwithstanding the fact, we have a written Constitution, in course of time, a wide variety of rules and practices have evolved which adjust operation of the Constitution to changing conditions. No written constitution would contain all the detailed rules upon which the government depends. The rules for electing the legislature are usually found not in the written Constitution but in the statutes enacted by the legislature within limits laid down by the Constitution. A Constitution is a thing antecedent to a government, and a government or a good governance is a creature of the Constitution. A documentary Constitution reflects the beliefs and political aspirations of those who had framed it. One of the principle of constitutionalism is what it had developed in the democratic traditions. A primary function that is assigned to the written

Constitution is that of controlling the organs of the Government. Constitutional law pre-supposes the existence of a State and includes those laws which regulate the structure and function of the principal organs of government and their relationship to each other and to the citizens. Where there is a written Constitution, emphasis is placed on the rules which it contains and on the way in which they have been interpreted by the highest court with constitutional jurisdiction. Where there is a written Constitution the legal structure of Government may assume a wide variety of forms. Within a federal constitution, the tasks of government are divided into two classes, those entrusted to the federal organs of government, and those entrusted to the various states, regions or provinces which make up the federation. But the constitutional limits bind both the federal and state organs of government, which limits are enforceable as a matter of law. Many important rules of constitutional behaviour, which are observed by the Prime Minister and Ministers, Members of the Legislature, Judges and Civil servants are contained neither in Acts nor in judicial decisions. But such rules have been nomenclatured by the Constitutional Writers to be the rule of the positive morality of the constitution and some times the authors provide the name to be the unwirtten maxims of the constitution. Rules of constitutional behaviour, which are considered to be binding by and upon those who operate the Constitution but which are not enforced by the law courts nor by the presiding officers in the House of Parliament. Sir Ivor Jennings, in his book, Law and the Constitution had stated that constitutional conventions are observed because of the political difficulties which arise if they are not. These rules regulate the conduct of those holding public office and yet possibly the most acute political difficulty can arise for such a person is to be forced out of office. The Supreme Court of Canada stated that the main purpose of conventions is to ensure that legal frame work of the constitution is operated in accordance with the prevailing constitutional values of the period. (see (1982) 125 DLR(3d) 1, 84). But where the country has a written constitution which ranks as fundamental law, legislative or executive acts which conflicts with the constitution must be held to be unconstitutional and thus illegal. The primary system of Government cannot be explained solely in terms of legal and conventional rules. It depends essentially upon the political base which underlies it, in particular on the party system around which political life is organised. Given the present political parties and the electoral system, it is accepted that following a general election, the party with a majority of seats in the State legislature or the Parliament will form the Government. This is what the Constitution postulates and permits. But in the matter of formation of Government if the said majority political party elects a person as their leader, whom the Constitution and the laws of the country disqualifies for being chosen as a member of the Legislative Assembly, then such an action of the majority elected member would be a betrayal to the electorates and to the Constitution to which they owe their existence. In such a case, the so called will of the people must be held to be unconstitutional and, as such, could not be and would not be tolerated upon. When one speaks of legislative supermacy and the will of the people, the doctrine essentially consists of a rule which governs the legal relationship between the legislature and the court, but what is stated to be the legislative supermacy in the United Kingdom has no application in our country with a written Constitution limiting the extent of such supermacy of the Legislature or Parliament. In other words, the people of the country, the organs of the Government, legislature, executive and judiciary are all bound by the Constitution which Hon. Justice Bhagwati, J. describes in Minerva Mills case (1980 (3) Supreme Court Cases, 625) to be suprema lex or the paramount law of the land and nobody is above or beyond the Constitution. When Court has been ascribed the duty of interpreting the Constitution and when Court finds that manifestly there is an

unauthorised exercise of power under the Constitution, it would be the solemn duty of the Court to intervene. The doctrine of legislative supermacy distinguishes the United Kingdom from those countries in which they have a written constitution, like India, which imposes limits upon the legislature and entrust the ordinary courts or a constitutional court with the function of deciding whether the acts of the legislature are in accordance with the Constitution. This being the position, the action of the majority of the elected members of a political party in choosing their leader to head the Government, if found to be contrary to the Constitution and the laws of the land then the Constitution and the laws must prevail over such unconstitutional decision, and the argument of Mr. Rao, that the will of the people would prevail must give way. In a democratic society there are important reasons for obeying the law, which do not exist in other forms of government. Our political system still is not perfect and there are always the scope for many legislative reforms to be made. But the maintenance of life in modern society requires a willingness from most citizens for most of the time to observe laws, even when individually they may not agree with them.

In the aforesaid premises, and in view of the conclusions already arrived at, with regard to the disqualifications the respondent no. 2 had incurred, which prevents her for not being chosen as a member of the Legislative Assembly, it would be a blatant violation of Constitutional laws to allow her to be continued as the Chief Minister of a State, howsoever short the period may be, on the theory that the majority of the elected members of the Legislative Assembly have elected her as the leader and that is the expression of the will of the people.

One other thing which I would like to notice, is the consciousness of the people who brought such Public Interest Litigation to the Court. Mr. Diwan in course of his arguments, had raised some submissions on the subject - Criminalisation of Politics and participation of criminals in the electoral process as candidates and in that connection, he had brought to our notice the order of the Election Commission of India dated 28th of August, 1997. But for answering the essential issue before us, it was not necessary to delve into that matter and, therefore, we have not made an in-depth inquiry into the subject. In one of the speeches by the Prime Minister of India on the subject- Whither Accountability, published in the Pioneer, Shri Atal Bihari Vajpayee had called for a national debate on all the possible alternatives for systematic changes to cleanse our democratic governing system of its present mess. He has expressed his dissatisfaction that neither Parliament nor the State Vidhan Sabhas are doing with any degree of competence or commitment what they are primarily meant to do: Legislative function. According to him, barring exceptions, those who get elected to these democratic institutions are neither trained, formally or informally, in law-making nor do they seem to have an inclination to develop the necessary knowledge and competence in their profession. He has further indicated that those individuals in society who are generally interested in serving the electorate and performing legislative functions are finding it increasingly difficult to succeed in todays electoral system and the electoral system has been almost totally subverted by money power, muscle power, and vote bank considerations of castes and communities. Shri Vajpayee also had indicated that the corruption in the governing structures has, therefore, corroded the very core of elective democracy. According to him, the certainty of scope of corruption in the governing structure has hightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate. Yet they capture and survive in power due to inherent

systematic flaws. He further stated casteism, corruption and politicisation have eroded the integrity and efficacy of our civil service structure also. The manifestoes, policies, programmes of the political parties have lost meaning in the present system of governance due to lack of accountability. Lot of arguments had been advanced both by Mr. Venugopal and Mr. Rao, on the ground that so far as the offences under Section 8(3) of the Representation of the People Act are concerned, mere conviction itself will not incur the disqualification, but conviction and sentence for not less than two years would disqualify a person and, therefore, in such a case, a person even being convicted of an offence under the Prevention of Corruption Act, will not be disqualified, if the trying Judge imposes the punishment of imprisonment for a term of one year, which is the minimum under Section 13(2) of the prevention of Corruption Act and thus less than two years, which is the minimum sentence required under Section 8(3) of the Representation of the People Act, to disqualify a person for being chosen as a member or continuing as a member. As has been discussed in the Judgment of Brother Bharucha, J, the validity of providing different punishments under different sub-sections of Section 8, has already been upheld by this Court in the case of Raghbir Singh vs. Surjit Singh, 1994 Supp.(3) S.C.C. 162. But having regard to the mass scale corruption which has corroded the core of elective democracy, it is high time for the Parliament to consider the question of bringing the conviction under the Prevention of Corruption Act, as a disqualification under Section 8(1) of the Representation of the People Act, 1951, so that a person on being convicted of an offence, punishable under the provisions of Prevention of Corruption Act, could be disqualified for being chosen, as a member or being continuing as a member of the Legislative Assembly or the Parliament. I hope and trust, our representatives in the Parliament will bestow due thought over this issue.

These Writ Petitions, Special Leave Petition/Civil Appeal and Transferred case stand disposed of in terms of the directions contained in the judgment of Brother Bharucha,J.
