CASE NO.:
Appeal (civil) 765 of 2007

PETITIONER:
SRI RAJENDRA SINGH RANA & ORS

RESPONDENT:
SWAMI PRASAD MAURYA & ORS

DATE OF JUDGMENT: 14/02/2007

BENCH:
CJI K.G. BALAKRISHNAN,H.K. SEMA DR. AR. LAKSHMANAN P.K. BALASUBRAMANYAN & D.K. JAIN

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C) No.4664 of 2006)
[With Civil Appeal Nos.766-771 of 2007 arising out of
S.L.P.(C) No. 4669 of 2006, S.L.P.(C) No.4671 of 2006,
S.L.P.(C) No.4677 of 2006, S.L.P.(C) No. 6323 of 2006,
S.L.P.(C) No. 10497 of 2006 and S.L.P.(C) No. 10498 of 2006]

P.K. BALASUBRAMANYAN, J.

1. Leave granted.

2. The elections for the constitution of the 14th Legislative Assembly of the State of Uttar Pradesh were held in February 2002. Since, none of the political parties secured the requisite majority, a coalition Government was formed, headed by Ms. Mayawati, leader of the Bahujan Samaj Party (hereinafter referred to as, 'B.S.P.'). B.S.P was admittedly a recognised national party. The ministry was formed in May, 2002. On 25.8.2003, the cabinet is said to have taken a unanimous decision for recommending the dissolution of the Assembly. Based on it, on 26.8.2003, Ms. Mayawati submitted the resignation of her cabinet. Apparently, after the cabinet decision to recommend the dissolution of the Assembly and before Ms. Mayawati cabinet actually resigned, the leader of the Samajwadi Party staked his claim before the Governor for forming a Government. On 27.8.2003, 13 Members of the Legislative Assembly (hereinafter referred to as, 'M.L.As.') elected to the Assembly on tickets of B.S.P., met the Governor and requested him to invite the leader of the Samajwadi Party to form the Government. Originally, 8 M.L.As. had met the Governor and 5 others joined them later in the day, making up the 13.

3. The Governor did not accept the recommendation of Mayawati cabinet for dissolution of the Assembly. On 29.8.2003, the Governor invited the leader of the Samajwadi Party, Mr. Mulayam Singh Yadav to form the Government and gave him a time of two weeks to prove his majority in the Assembly. On 4.9.2003, Mr. Swami Prasad Maurya, leader of the Legislature B.S.P filed a petition before the Speaker in terms of Article 191 read with the Tenth Schedule to the Constitution of India, praying that the 13 B.S.P. M.L.As. who had proclaimed support to Mulayam Singh Yadav before the Governor on 27.8.2003, be disqualified in terms of paragraph 2 of the Tenth Schedule to the Constitution on the basis that they had voluntarily given up their membership of B.S.P., their

original political party. On 05.09.2003, a caveat was also filed on behalf of the B.S.P. before the Speaker of the Legislative Assembly requesting the Speaker to hear the representative of B.S.P. in case any claim of split is made by the members who had left the Party. On 06.09.2003, a request was made by 37 M.L.As., said to be on behalf of 40 M.L.As. elected on B.S.P. tickets, requesting the Speaker to recognise a split in B.S.P. on the basis that one third of the Members of the B.S.P. legislature party consisting of 109 legislators, had in a body separated from the Party pursuant to a meeting held in the M.L.A.'s hostel, Darulshafa, Lucknow on 26.8.2003. The Speaker took up the said application for recognition of a split, the same evening. He verified that the 37 Members who had signed the application presented to him had in fact signed it since they were physically present before him. Overruling the objections of Maurya, the leader of the legislature B.S.P., the Speaker passed an order accepting the split in B.S.P. on the arithmetic that 37 out of 109 comprises one third of the Members of the legislature Party. This group came to be known as the Lok Tantrik Bahujan Dal. But, the said Dal was short lived. For, the Speaker, a little later, on 6.9.2003 itself, accepted that the said Dal had merged with the Samajwadi Party. It is relevant to note that in the order dated 6.9.2003, the Speaker did not decide the application made by B.S.P. seeking disqualification of 13 of its M.L.As. who were part of the 37 that appeared before the Speaker and postponed the decision on that application. It appears that on 8.9.2003, three more M.L.As. appeared before the Speaker stating that they supported the 37 M.L.As. who had appeared before him on 6.9.2003 and were part of that group. The Speaker accepted their claim as well.

4. On 29.9.2003, Writ Petition No. 5085 of 2003 was filed in the High Court of Judicature at Allahabad before the Lucknow Bench challenging the said order of the Speaker. On 1.10.2003, it came up before a Division Bench of the High Court, and it is seen from the Order Sheet maintained by the High Court that the Writ Petition was directed to be listed on 8.10.2003 for further hearing. It was adjourned to 13.10.2003 and then again to 22.10.2003 and to 29.10.2003 and further to 5.11.2003. It is recorded in the Order Sheet that on 5.11.2003, learned counsel for the writ petitioner was heard in detail. No order was passed, but the matter was adjourned to the next day at the request of counsel, who was apparently representing the Advocate General of the State. From 6.11.2003, the matter was adjourned to 10.11.2003 and on the request of the learned Advocate General, it was directed to be listed on 14.11.2003. The same day, the Speaker before whom the petition filed by the writ petitioner Maurya seeking disqualification of 13 of the members of the B.S.P. was pending, after noticing what he had done earlier on 6.9.2003 and 8.9.2003, passed an order adjourning the petition seeking disqualification, on the ground that it would be in the interests of justice to await the decision of the High Court in the pending Writ Petition since the decision therein on some of the issues, would be relevant for his consideration. It was therefore ordered that the petition for disqualification may be placed before him for disposal and necessary action after the High Court had decided the Writ Petition.

5. In the High Court, the Writ Petition had a chequered career. On 14.12.2003, when it came up, it was directed to be listed the next week before the appropriate

Bench. On 16.4.2004, it was directed to be put up on 22.4.2004. On 22.4.2004, it was dismissed for default with an observation that neither any counsel on behalf of the writ petitioner nor on behalf of the Speaker was present. It may be noted that on 5.11.2003, the High Court had recorded that it had heard counsel for the writ petitioner in full and the adjournment for further hearing was at the behest of the Advocate General. Even then, on 22.4.2004, the High Court chose to dismiss the Writ Petition for default on the ground that counsel on both sides were not present. An application for restoration was filed on 27.4.2004 and this application was kept pending for about 8 months until on 20.12.2004, an order was passed recalling the order dated 22.4.2004 dismissing the Writ Petition for default and restoring it to its original number with a further direction to list the Writ Petition before the appropriate Bench on 4.1.2005. On 4.1.2005, the Writ Petition was adjourned at the request of the Advocate General to the next day. On 5.1.2005, it was noticed by the Bench that the matter appeared to have been heard in detail at the admission stage and the Writ Petition had neither been admitted nor any notice ordered to the respondents and counsel for the writ petitioner was again heard on the question of admission and the application for interim relief he had filed and it was recorded that he had concluded his arguments with the further direction to put up the Writ Petition the next day. On 6.1.2005, it was recorded that counsel for the writ petitioner did not press for interim relief at that stage and hence the application for interim relief was being rejected.

6. On 6.1.2005, the Writ Petition was admitted after hearing counsel for the writ petitioner and some counsel who appeared for the respondents. Notices were ordered to be issued to the opposite parties, the group of M.L.As. who had moved the Speaker for recognition of a split. After some further postings, on 18.2.2005, orders were passed regarding service of notice and the Writ Petition was directed to be posted for hearing on 10.3.2005. On 10.3.2005, finding that there was some attempt at evasion of notices, the court ordered substituted service of notices and directed the listing of the Writ Petition on 11.4.2005. On 11.4.2005, service of notice was declared sufficient and the matter was directed to be posted on 2.5.2005 for hearing. After a number of adjournments mainly at the instance of the respondents in the Writ Petition, arguments were commenced. On 12.5.2005, counsel for the writ petitioner concluded his arguments and the case was further adjourned to 25.5.2005 for further hearing after taking certain counter affidavits on record. Ultimately, the argument of one of the counsel for the respondents was started and the matter was adjourned to 6.7.2005 for completion of his arguments and for arguments by other counsel for the respondents in the Writ Petition.

7. Meanwhile, on 7.9.2005, the Speaker passed an order rejecting the petition filed by Maurya for disqualification of 13 M.L.As. of B.S.P. It may be noted that the Speaker had earlier adjourned that application for being taken up after the Writ Petition was decided. Meanwhile, the arguments went on in the High Court and the Writ Petition was directed to be put up on 17.8.2005 for further arguments. The matter was adjourned to the next day and again to subsequent dates.

8. On 8.9.2005, an application was made on behalf of

the respondents seeking dismissal of the Writ Petition in view of the order of the Speaker dated 7.9.2005 dismissing the application seeking disqualification of 13 M.L.As. filed by the writ petitioner. The said application was dismissed the same day. On 9.9.2005, arguments were heard and the matter was adjourned for further hearing.

9. On 21.10.2005, an application was made on behalf of the writ petitioner praying for an amendment of the Writ Petition. It was directed to be listed granting time to the respondents in the Writ Petition to file objections. On 22.11.2005, the Order Sheet records an order by one of the judges as follows:

"The matter was listed today only for consideration and disposal of the amendment application together with application for further hearing and by 4.00 PM arguments with respect to amendment application could be concluded. As indicated in the order passed on the application brother M.A. Khan (J) took out a typed and signed 'order' rejecting the application for amendment. Like previous order, brother Hon'ble M.A. Khan again took out a duly typed and signed judgment/ his opinion and directed the bench Secretary to place the same on record as his "judgment" in the main writ petition. The draft of the said judgment was also not circulated to me nor was I ever been consulted by him. It is further pointed out that brother Hon'ble M.A. Khan (J) did not indicate at any time that he had already written out the judgment. Further at no point of time, I had indicated to brother M.A. Khan (J) that the judgment in the writ petition may be prepared by him. It goes without saying that neither the orders passed on the application nor the so called judgment on the merits of the writ petition have been dictated in the open court by brother Hon'ble M.A. Khan(J)."

10. Apparently, in view of these happenings, the learned Chief Justice constituted a Full Bench for hearing the Writ Petition. The amendment prayed for was allowed and the Writ Petition ultimately heard finally and disposed of by the judgment under appeal. As per the judgment under appeal, the Writ Petition was dismissed by the learned Chief Justice while the other two learned Judges quashed the orders of the Speaker and directed the Speaker to reconsider the matter with particular reference to the petition for disqualification of 13 M.L.As. filed by the writ petitioner and pass appropriate orders. Feeling aggrieved, these appeals have been filed.

11. Whatever may be our ultimate decision on the merits of the case, we must express our unhappiness at the tardy manner in which a matter of some consequence and constitutional propriety was dealt with by the High Court. More promptitude was expected of that court and it should have ensured that the unfortunates happenings (from the point of view of just and due administration of justice) were avoided. Though we are normally reluctant to comment on the happenings in the High Court, we are constrained to make the above observations to emphasis the need to ensure that no

room is given for criticism of the manner of working of the institution.

12. The respondents in the Writ Petition, the M.L.As. constituting 37 B.S.P. members who left the party, are the appellants in all the appeals except the appeal arising out of Special Leave Petition (Civil) No. 6323 of 2006 filed by the writ petitioner \026 Maurya. Whereas, the respondents in the Writ Petition challenge the decision of the majority of the Bench remitting the matter to the Speaker, the writ petitioner, in his appeal challenges the order of remand made by the majority on a plea that on the pleadings and the materials available, the High Court ought to have straightaway allowed the petition filed by the writ petitioner for disqualification of the 13 M.L.As. According to him, a remand was unnecessary and considering the circumstances, a final order ought to have been passed by the High Court.

13. Article 191 of the Constitution of India deals with the disqualification for membership of legislative assemblies just like Article 102 deals with disqualification for membership to the Houses of Parliament. Article 102 and Article 191 came to be amended by the Constitution (Fifty-second Amendment) Act, 1985 with effect from 1.3.1985 providing that a person shall be disqualified for being a member of either Houses of Parliament or of Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule to the Constitution of India. The Tenth Schedule was also added containing provisions as to disqualification on ground of defection. The constitutional validity of this amendment was challenged before this Court in KIHOTO HOLLOHAN Vs. ZACHILLHU & ORS. [(1992) 1 S.C.R. 686]. This Court upheld the validity of the amendment subject to the finding that paragraph 7 of the Tenth Schedule to the Constitution of India required ratification in terms of Article 368(c) of the Constitution of India and it had not come into force, so that there was no need to pronounce on the validity of paragraph 7 to the extent it precluded a judicial review of the decision of the Speaker. But it held that judicial review could not be kept out, though such review might not be of a wide nature. We are proceeding to examine the relevant aspects in the light of that decision.

14. The application by writ petitioner - Maurya to the Speaker, in the present case, was made under paragraph 2 of the Tenth Schedule to the Constitution on the ground that the 13 Members who met the Governor on 27.8.2003 had voluntarily given up their membership of B.S.P., their original political party as defined in the Tenth Schedule. The claim on behalf of the M.L.As. sought to be disqualified and those who claimed to have gone out with them from B.S.P. is that the disqualification at the relevant time is subject to the provisions of paragraphs 3, 4 and 5 of the Tenth Schedule and since there has been a split in B.S.P in terms of paragraph 3 of the Tenth Schedule and a subsequent merger of the 40 M.L.As. with the Samajwadi Party in terms of paragraph 4 of the Tenth Schedule, they could not be held to be disqualified on the ground of defection in terms of paragraph 2(1)(a) of the Tenth Schedule. The Speaker, as noticed, did not pass any order on the application for disqualification of 13 M.L.As. made by Maurya, the leader of the B.S.P. Legislature Party in terms of paragraph 2 of the Tenth Schedule but proceeded to pass an order on the petition filed by 37 M.L.As. before him, claiming

that there has been a split in B.S.P. and they constituted one third of the Legislature Party which had 109 members. When he passed the order on the claim of the M.L.As. who had left B.S.P., the then Speaker postponed the decision on the petition for disqualification filed by Maurya, later adjourned it to await the decision in the Writ Petition, but still later, the successor Speaker went back on that order and proceeded to dismiss it after entertaining an alleged preliminary objection even while the Writ Petition was still pending and it was being argued, on the ground that he had already recognised the split.

15. It was thereafter that the writ petitioner sought for an amendment of the Writ Petition which was subsequently allowed.

16. We will now revert to the action that triggered the controversy. Eight of the M.L.As. of B.S.P. followed by five other members of B.S.P. handed over identically worded letters to the Governor on 27.8.2003. A running translation of the letters is as under:

"We under mentioned M.L.As. whose signatures are marked below humbly request you that Shri Mulayam Singh Yadav Ji be invited to form Government because the public of Uttar Pradesh neither want election nor want President Rule."

These members were the members who belonged to B.S.P. and they were requesting the Governor to invite the leader of the opposition to form the Government. It is based on this action, that Maurya, the leader of the Legislature B.S.P., had filed the petition before the Speaker seeking disqualification of these 13 members on the ground that they had voluntarily left B.S.P., recognised by the Election Commission as a national party. It was while this proceeding was pending that on 6.9.2003, an application for recognition of a split was moved by the 37 M.L.As. before the Speaker. Since the leader of B.S.P. had filed a caveat before the Speaker, the Speaker chose to hear the caveator while passing the order. Considering the nature of the controversy involved, it appears to be proper to quote the said representation or application made by the 37 M.L.As. before the Speaker. The running translation of the same reads:

"We, the following Members of the Legislative Assembly, are notified as Members belonging to Bahujan Samaj Party. There is dissatisfaction prevalent among the members of BSP on account of dictatorial approach, wrong policies and misbehaviour towards the Members as practiced by the BSP Leader Km. Mayawati. Being aggrieved on account of the aforesaid reasons, Members, office bearers and workers of the Bahujan Samaj Party held a meeting in Darulsafa on 26.08.2003. All present unanimously stated that Km. Mayawati is occupied with fulfilment of her personal interests alone at the cost of interests of the State of U.P. and society.

Hence, it was unanimously resolved that

the Bahujan Samaj Party be split up and a new faction in the name of Loktantrik Bahujan Dal be constituted under the Leadership of Shri Rajendra Singh Rana, Member Legislative Assembly. We, the undersigned Members of Legislative Assembly have constituted a separate group which represents the new faction arising out of the split. Our number is more than one third of the total number of Members of the erstwhile Bahujan Samaj Party of the Legislative Assembly.

It is, therefore, requested that the aforesaid Loktantrik Bahujan Dal be recognised as a separate group within the Legislative Assembly and a separate arrangement for their seating inside the Assembly be made."

It was signed by 37 M.L.As.

17. It is on this application that the Speaker passed an order the same evening and it is that order that is the subject matter of challenge in the Writ Petition filed before the High Court. The order of the Speaker records that as per the contents of the application, a meeting of members, office bearers and Members of Legislative Assembly belonging to B.S.P. was held on 26.8.2003 in the Darulshafa and in this meeting, it was unanimously resolved that a new faction in the name of Loktantrik Bahujan Dal under the leadership of Rajendra Singh Rana be constituted. The Speaker proceeded to reason that the number of members who have constituted the group are seen to be 37 out of 109 and that would constitute one-third of the total number of Legislators belonging to B.S.P. In view of the objections raised by Maurya, who had filed the caveat before him, the Speaker verified whether 37 members had signed the representation or application. Since they were present before him and were identified, he proceeded on the footing that 37 M.L.As. of B.S.P. had appeared before him with the claim. The Speaker noticed the contention of the caveator that the burden of proving any split in the original political party lay on the 37 M.L.As. and that unless they establish a split in the original political party, they could not resort to paragraph 3 of the Tenth Schedule to the Constitution and claim that there has been a split in the political Party and consequently they have not incurred disqualification under paragraph 2 of the Tenth Schedule. Further, overruling the contention of the caveator that the decision relating to the split could be taken only by the Election Commission and overruling the contention that the original 13 members who had left the Party or voluntarily given up their membership of the Party did not constitute one-third of the total number of the Legislators belonging to B.S.P. and hence they are disqualified, the Speaker proceeded to say that the first condition to satisfy the requirement of paragraph 3 of the Tenth Schedule was only that the members must have made a claim that the original legislature Party had split and they should show that as a consequence, the legislature Party has also split and that the split group had one-third of the members of the legislature Party. Therefore, the Speaker taking note of the one-third legislators before him proceeded on the basis that it would be sufficient if a claim is made of a split in the original political Party. The Speaker formulated the position thus:

"Under para 3 following conditions have to be fulfilled:-

1. The making of a claim by any Member of a House that he and some other members of his legislature party have constituted a group representing a faction which has arisen as a consequence of split in his original political party.

2. The newly constituted group has at least one third of the total number of members of such legislature party.

If in a case the aforesaid two conditions are fulfilled, the person making such a claim and the other members will not be disqualified from the membership of the Legislative Assembly on the grounds mentioned in para 2 of the 10th Schedule."

The Speaker also overruled the argument that only 13 M.L.As. had originally quit the original political party and they should be disqualified and the others subsequently joining them would not improve the position. The Speaker proceeded to observe that he had to decide the question of disqualification of the 13 M.L.As. raised by Maurya functioning as a Tribunal and he would be taking a decision thereon at the appropriate time. It was thus that the claim of 37 members of a split, was recognised by the Speaker. The Speaker thus did not decide whether there was a split in the original political party, even prima facie.

18. The same day, the Speaker also entertained another application from the 37 M.L.As. and ordered that he was recognising the merger of the Lok Tantrik Bahujan Dal in the Samajwadi Party.

19. The Speaker had relied on an observation in Ravi S. Naik Vs. Union of India [(1994) 1 S.C.R. 754] to justify the acceptance of the position adopted by the 37 M.L.As. for recognition of a split that it was enough if they made a claim of split in the original political party. In paragraph 36 of that judgment, after setting down the two requirements as :

(i) The member of a House should make a claim that he and other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original party; and
(ii) Such group must consist of not less than one-third of the members of such legislature party.

This Court observed:
"In the present case the first requirement was satisfied because Naik has made such a claim. The only question is whether the second requirement was fulfilled."

But the Speaker failed to notice the following sentence in paragraph 38 of the same judgment wherein it was stated:

"As to whether there was a split or not has to be determined by the Speaker on the basis of the material placed before him."

Thus, there was no finding by the Speaker that there was a split in the original political party, a condition for application of paragraph 3 of the Tenth Schedule.

20. Now we may notice the position adopted by the High Court in the judgment under Appeal while dealing with the Writ Petition filed by Maurya challenging the order of the Speaker. The learned Chief Justice took the view that the Speaker was justified in finding a split on the basis of a claim of split in the original political party and one-third members of the legislature party separating by taking into account all events upto the time of his taking a decision on the question of split. The learned Chief Justice held that the snowballing effect of a split could be taken note of and that the Speaker had not committed any illegality in not considering and deciding the petition filed by Maurya seeking disqualification of 13 M.L.As. in the first instance and in keeping it pending. He thus upheld the decision of the Speaker. But the other two learned judges, though they gave separate reasons, basically took the view that the Speaker was in error in not deciding the application seeking disqualification of the 13 members first and in proceeding to decide the application for recognition of a split made by the 37 legislators before him. Since the proceeding arose out of a petition seeking a disqualification in terms of paragraph 2 of the Tenth Schedule to the Constitution, in terms of paragraph 6 of the Tenth Schedule, a decision on the claim for disqualification could not be kept by, even while recognising a split. They therefore quashed the order of the Speaker and directed the Speaker to reconsider the question of defection raised by the writ petitioner \026 Maurya, in the light of the stand adopted by some of the M.L.As. before the Speaker that there has been a split in terms of paragraph 3 of the Tenth Schedule and so they have not incurred the disqualification in terms of paragraph 2 of the Tenth Schedule. This majority view and the interference with the order of the Speaker is challenged by the various respondents in the Writ Petition forming the group of 37. The writ petitioner himself has challenged that part of the order which purports to remand the proceeding to the Speaker by taking up the position that on the materials, the High Court ought to have straightaway held that the defence under paragraph 3 of the Tenth Schedule to the Constitution has not been made out by the 37 members of B.S.P. and that the 13 of them in the first instance and the balance 24 in the second instance stood disqualified in terms of paragraph 2(1)(a) of the Tenth Schedule to the Constitution.

21. Elaborate arguments have been raised before us on the interpretation of the Tenth Schedule, the content of the various paragraphs and on the facts of the present case. Based on the arguments it is first necessary to deal with the scope and content of the Tenth Schedule in the light of the object with which it was enacted.

22. The Constitution (Fifty-Second Amendment) Act, 1985 amended Articles 102 and 191 of the Constitution by introducing sub-articles to them and by appending the Tenth Schedule introducing the provisions as to disqualification on the ground of defection. They were introduced to meet the

threat-posed to democracy by defection. A ground of disqualification from the membership of the Parliament or of the Assembly on the ground of defection was introduced. The constitutional validity of the amendment and the inclusion of the Tenth Schedule was upheld by this Court in Kihoto Hollohan (supra) except as regards paragraph 7 thereof, which was held to require ratification in terms of Article 368(2) of the Constitution. It is not in dispute that paragraph 7 of the Tenth Schedule is not operative in the light of that decision. The constitution Bench held that the right to decide has been conferred on a high dignitary, namely, the Speaker of the Parliament or the Assembly and the conferment of such a power was not anathema to the constitutional scheme. Similarly, the limited protection given to the proceedings before the Speaker in terms of paragraph 6 of the Tenth Schedule to the Constitution was also justified even though the said protection did not preclude a judicial review of the decision of the Speaker. But that judicial review was not a broad one in the light of the finality attached to the decision of the Speaker under paragraph 6(1) of the Tenth Schedule and the judicial review was available on grounds like gross violation of natural justice, perversity, bias and such like defects. It was following this that the Ravi S. Naik (supra) decision was rendered by two of the judges who themselves constituted the majority in Kihoto Hollohan (supra) and the observations above referred to but which were explained subsequently, were made. Suffice it to say that the decision of the Speaker rendered on 6.9.2003 was not immune from challenge before the High Court under Articles 226 and 227 of the Constitution of India.

23. Learned counsel for the writ petitioner raised an interesting argument. He submitted that the Speaker in terms of paragraph 6 of the Tenth Schedule was called upon to decide the question of disqualification and only to a decision by him on such a question, that the qualified finality in terms of paragraph 6(1) got attached and not to a decision independently taken, purporting to recognise a split. He pointed out that in this case, the Speaker had not decided the petition for disqualification filed against the 13 M.L.As., and the Speaker had only proceeded to decide the application made by 37 members subsequently for recognising them as a separate group on the ground that they had split from the original B.S.P. in terms of paragraph 3 of the Tenth Schedule. He submitted that no such separate decision was contemplated in a proceeding under the Tenth Schedule since the claim of split was only in the nature of a defence to a claim for disqualification on the ground of defection and it was only while deciding the question of defection that the Speaker could adjudicate on the question whether a claim of split has been established. When an independent decision is purported to be taken by the Speaker on the question of split alone, the same was a decision outside the Tenth Schedule to the Constitution and consequently, the decision of the Speaker was open to challenge before the High Court just like the decision of any other authority within the accepted parameters of Articles 226 and 227 of the Constitution. In other words, according to him, the qualified finality conferred by paragraph 6(1) of the Tenth Schedule was not available to the order of the Speaker in this case.

24. On behalf of the 37 M.L.As., it is contended that it is not correct to describe paragraphs 3 and 4 of the Tenth

Schedule merely as defences to paragraph 2 and the allegation of defection, that paragraphs 3 and 4 confer independent power on the speaker to decide a claim made under those paragraphs. It is submitted that reliance placed on paragraph 6 and the contention that a question of disqualification on the ground of defection must arise, before the Speaker could decide as a defence or answer, the claim of split or the claim of merger was not justified. Whatever be the decisions that were taken by the Speaker in terms of paragraph 3, paragraph 4 or paragraph 2 of the Tenth Schedule, enjoyed the qualified immunity as provided in paragraph 6 of the Tenth Schedule.

25. In the context of the introduction of sub-Article (2) of Article 102 and Article 191 of the Constitution, a proceeding under the Tenth Schedule to the Constitution is one to decide whether a Member has become disqualified to hold his position as a Member of the Parliament or of the Assembly on the ground of defection. The Tenth Schedule cannot be read or construed independent of Articles 102 and 191 of the Constitution and the object of those Articles. A defection is added as a disqualification and the Tenth Schedule contains the provisions as to disqualification on the ground of defection. A proceeding under the Tenth Schedule gets started before the Speaker only on a complaint being made that certain persons belonging to a political party had incurred disqualification on the ground of defection. To meet the claim so raised, the Members of the Parliament or Assembly against whom the proceedings are initiated have the right to show that there has been a split in the original political party and they form one-third of the Members of the legislature of that party, or that the party has merged with another political party and hence paragraph 2 is not attracted. On the scheme of Articles 102 and 191 and the Tenth Schedule, the determination of the question of split or merger cannot be divorced from the motion before the Speaker seeking a disqualification of a member or members concerned. It is therefore not possible to accede to the argument that under the Tenth Schedule to the Constitution, the Speaker has an independent power to decide that there has been a split or merger of a political party as contemplated by paragraphs 3 and 4 of the Tenth Schedule to the Constitution. The power to recognise a separate group in Parliament or Assembly may rest with the Speaker on the basis of the Rules of Business of the House. But that is different from saying that the power is available to him under the Tenth Schedule to the Constitution independent of a claim being determined by him that a member or a number of members had incurred disqualification by defection. To that extent, the decision of the Speaker in the case on hand cannot be considered to be an order in terms of the Tenth Schedule to the Constitution. The Speaker has failed to decide the question, he was called upon to decide, by postponing a decision thereon. There is therefore some merit in the contention of the learned counsel for the B.S.P. that the order of the Speaker may not enjoy the full immunity in terms of paragraph 6(1) of the Tenth Schedule to the Constitution and that even if it did, the power of judicial review recognised in the court in Kihoto Hollohan (supra) is sufficient to warrant interference with the order in question.

26. In a sense, this aspect may not be of a great importance in this case since going by the stand adopted on behalf of the 37 M.L.As., the Speaker was justified in keeping the petition seeking disqualification of 13 M.L.As. pending,

even while he proceeded to accept a case of split in the B.S.P.. The question really is whether the Speaker was justified in doing so. As we have indicated above, the whole proceeding under the Tenth Schedule to the Constitution is initiated or gets initiated as a part of disqualification of a member of the House. That disqualification is by way of defection. The rules prescribed by various legislatures including the U.P. legislature contemplate the making of an application to the Speaker when there is a complaint that some member or members have voluntarily given up his membership or their memberships in the party. It is only then that in terms of the Tenth Schedule, the Speaker is called upon to decide the question of disqualification raised before him in the context of paragraph 6 of the Tenth Schedule. Independent of a claim that someone has to be disqualified, the scheme of the Tenth Schedule or the rules made thereunder, do not contemplate the Speaker embarking upon an independent enquiry as to whether there has been a split in a political party or there has been a merger. Therefore, in the context of Articles 102 and 191 and the scheme of the Tenth Schedule to the Constitution, we have no hesitation in holding that the Speaker acts under the Tenth Schedule only on a claim of disqualification being made before him in terms of paragraph 2 of the Tenth Schedule.

27. The Speaker, as clarified in Kihoto Hollohan (supra), has necessarily to decide that question of disqualification as a Tribunal. In the context of such a claim against a member to disqualify him, that member, in addition to a plea that he had not voluntarily given up his membership of the Party or defied the whip issued to him, has also the right to show that there was a split in the original political party that other legislators have also come out of the legislature party as a consequence of that split, that they together constituted one-third of the total number of legislators elected on the tickets of that party. He has also the right to take up a plea that there has been a merger of his party with another party in terms of paragraph 4 of the Tenth Schedule. Call it a defence or whatever, a claim under paragraph 3 as it existed prior to its deletion or under paragraph 4 of the Tenth Schedule, are really answers to a prayer for disqualifying the member from the legislature on the ground of defection. Therefore, in a case where a Speaker is moved by a legislature party or the leader of a legislature party to declare certain persons disqualified on the ground that they have defected, it is certainly open to them to plead that they are not guilty of defection in view of the fact that there has been a split in the original political party and they constitute the requisite number of legislators or that there has been a merger. In that context, the Speaker cannot say that he will first decide whether there has been a split or merger as an authority and thereafter decide the question whether disqualification has been incurred by the members, by way of a judicial adjudication sitting as a Tribunal. It is part and parcel of his jurisdiction as a Tribunal while considering a claim for disqualification of a member or members to decide that question not only in the context of the plea raised by the complainant but also in the context of the pleas raised by those who are sought to be disqualified that they have not incurred disqualification in view of a split in the party or in view of a merger.

28. The decision of a Full Bench of the Punjab & Haryana High Court in Prakash Singh Badal Vs. Union of India & Ors. [A.I.R. 1987 Punjab & Haryana 263] was relied

upon to contend that the Speaker gets jurisdiction to render a decision in terms of the Tenth Schedule to the Constitution of India only when in terms of paragraph 6 thereof a question of disqualification arose before him. The Full Bench by a majority held:

"Under, para. 6, the Speaker would have the jurisdiction in this matter only if any question arises as to whether a member of the House has become subject to disqualification under the said Schedule and the same has been referred to him for decision. The purpose of requirement of a reference obviously is that even when a question as to the disqualification of a member arises, the Speaker is debarred from taking suo motu cognizance and he would be seized of the matter only when the question is referred to him by any interested person. The Speaker has not been clothed with a suo motu power for the obvious reason that he is supposed to be a non-party man and has been entrusted with the jurisdiction to act judicially and decide the dispute between the conflicting groups. The other prerequisite for invoking the jurisdiction of the Speaker under para. 6 is the existence of a question of disqualification of the some member. Such a question can arise only in one way, viz., that any member is alleged to have incurred the disqualification enumerated in para 2(1) and some interested person approaches the Speaker for declaring that the said member is disqualified from being member of the House and the claim is refuted by the member concerned."

It was argued on behalf of the 37 M.L.As. that this position adopted by the Full Bench does not reflect the correct position in law since there is nothing in the Tenth Schedule which precludes the Speaker from rendering an adjudication either in respect of a claim under paragraph 3 of the Schedule or paragraph 4 of the Schedule, independent of any question arising before him in terms of paragraph 2 of the Schedule. Considering the scheme of the Tenth Schedule in the context of Articles 102 and 191 of the Constitution and the wording of paragraph 6 and the conferment of jurisdiction on the Speaker thereunder, we are inclined to the view that the position adopted by the majority of the High Court of Punjab & Haryana in the above decision as to the scope of the Tenth Schedule, reflects the correct legal position. Under the Tenth Schedule, the Speaker is not expected to simply entertain a claim under paragraphs 3 and 4 of the Schedule without first acquiring jurisdiction to decide a question of disqualification in terms of paragraph 6 of the Schedule. The power if any, he may otherwise exercise independently to recognise a group or a merger, cannot be traced to the Tenth Schedule to the Constitution. The power under the Tenth Schedule to do so accrues only when he is called upon to decide the question referred to in paragraph 6 of that Schedule.

29. In the case on hand, the Speaker had a petition moved before him for disqualification of 13 members of the

B.S.P. When that application was pending before him, certain members of B.S.P. had made a claim before him that there has been a split in B.S.P. The Speaker, on the scheme of the Tenth Schedule and the rules framed in that behalf, had to decide the application for disqualification made and while deciding the same, had to decide whether in view of paragraph 3 of the Tenth Schedule, the claim of disqualification has to be rejected. We have no doubt that the Speaker had totally misdirected himself in purporting to answer the claim of the 37 M.L.As. that there has been a split in the party even while leaving open the question of disqualification raised before him by way of an application that was already pending before him. This failure on the part of the Speaker to decide the application seeking a disqualification cannot be said to be merely in the realm of procedure. It goes against the very constitutional scheme of adjudication contemplated by the Tenth Schedule read in the context of Articles 102 and 191 of the Constitution. It also goes against the rules framed in that behalf and the procedure that he was expected to follow. It is therefore not possible to accept the argument on behalf of the 37 M.L.As. that the failure of the Speaker to decide the petition for disqualification at least simultaneously with the petition for recognition of a split filed by them, is a mere procedural irregularity. We have no hesitation in finding that the same is a jurisdictional illegality, an illegality that goes to the root of the so called decision by the Speaker on the question of split put forward before him. Even within the parameters of judicial review laid down in Kihoto Hollohan (supra) and in Jagjit Singh vs. State of Haryana (2006(13) SCALE 335) it has to be found that the decision of the Speaker impugned is liable to be set aside in exercise of the power of judicial review.

30. There is another aspect. The Speaker, after he kept the determination of the question of disqualification pending, passed an order that the said petition will be dealt after the High Court had taken a decision on the Writ Petition pending before it and directed that the said petition be taken up after the Writ Petition was disposed of. Then, suddenly, without any apparent reason, the Speaker took up that application even while the Writ Petition was pending and dismissed the same on 7.9.2005 by purporting to accept a so called preliminary objection raised by the 13 M.L.As. sought to be disqualified, to the effect that his recognition of the split of the 37 M.L.As. including themselves, has put an end to that application. This last order is clearly inconsistent with the Speaker's earlier order dated 14.11.2003 and still leaves open the question whether the petition seeking disqualification should not have been decided first or at least simultaneously with the application claiming recognition of a split. If the order recognising the split goes, obviously this last order also cannot survive. It has perforce to go.

31. Considerable arguments were addressed on the scope of paragraph 2 and paragraph 3 of the Tenth Schedule with particular reference to the point of time that must be considered to be relevant. Whereas it was argued on behalf of leader of B.S.P. that the liability or disability is incurred at the point of voluntarily giving up the membership of the political party, according to the 37 M.L.As. who left, the relevant point of time is the time when the Speaker takes a decision on the plea for disqualification. As a corollary to the above, the contention on the one side is that if on the day the disqualification is incurred there has been no split in terms of paragraph 3, those disqualified who had given up their

membership of the party must be declared disqualified, the argument on the other side is that if by the time the Speaker takes the decision, the persons sought to be disqualified are able to show that there has been a split in the original party and by that time they have a strength of one third of the Legislature party, the Speaker will have necessarily to accept the split and reject the petition for disqualification. In other words, according to this argument all developments until the point of decision by the Speaker are to be taken note of by him, while deciding the question of disqualification. They canvas the acceptance of what the learned Chief Justice of the High Court has called the snowballing effect of persons severing their connections with the original party and joining the quitters subsequently and not confining the decision to the point of their alleged severing their connection with the original party.

32. It is argued on behalf of 37 MLAs that the disqualification on the ground of defection should not be held as a sword of Damocles against honest political dissent and the prevention of honest political dissent is not the object sought to be achieved by the Tenth Schedule. This submission is sought to be supported by the argument that at the relevant time paragraph 3 provided that if on the basis of a split in the original party one third of the members of the Legislature party have voluntarily give up their membership of the original political party, they could not be disqualified. The relevant observations in Kihoto Hollohan (supra) are referred to. It is also pointed out that paragraph 4 which is still retained, also contemplates leaving of one's own party by merging of that party with another political party though by definition, that may also amount to defection in terms of paragraph 2.

33. It may be true that collective dissent is not intended to be stifled by the enactment of sub-article (2) of Articles 102 and 191 of the Tenth Schedule. But at the same time, it is clear that the object is to discourage defection which has assumed menacing proportions undermining the very basis of democracy. Therefore, a purposive interpretation of paragraph 2 in juxtaposition with paragraphs 3 and 4 of the Tenth Schedule is called for. One thing is clear that defection is a ground for disqualifying a member from the House. He incurs that disqualification if he has voluntarily given up his membership of his original political party, meaning the party on whose ticket he had got elected himself to the House. In the case of defiance of a whip, the party concerned is given an option either of condoning the defiance or seeking disqualification of the member concerned. But, the decision to condone must be taken within 15 days of the defiance of the whip. This aspect is also relied on for the contention that the relevant point of time to determine the question is when the Speaker actually takes a decision on the plea for disqualification.

34. As we see it, the act of disqualification occurs on a member voluntarily giving up his membership of a political party or at the point of defiance of the whip issued to him. Therefore, the act that constitutes disqualification in terms of paragraph 2 of the Tenth Schedule is the act of giving up or defiance of the whip. The fact that a decision in that regard may be taken in the case of voluntary giving up by the Speaker

at a subsequent point of time cannot and does not postpone the incurring of disqualification by the act of the Legislator. Similarly, the fact that the party could condone the defiance of a whip within 15 days or that the Speaker takes the decision only thereafter in those cases, cannot also pitch the time of disqualification as anything other than the point at which the whip is defied. Therefore in the background of the object sought to be achieved by the Fifty Second Amendment of the Constitution and on a true understanding of paragraph 2 of the Tenth Schedule, with reference to the other paragraphs of the Tenth Schedule, the position that emerges is that the Speaker has to decide the question of disqualification with reference to the date on which the member voluntarily gives up his membership or defies the whip. It is really a decision ex post facto. The fact that in terms of paragraph 6 a decision on the question has to be taken by the Speaker or the Chairman, cannot lead to a conclusion that the question has to be determined only with reference to the date of the decision of the Speaker. An interpretation of that nature would leave the disqualification to an indeterminate point of time and to the whims of the decision making authority. The same would defeat the very object of enacting the law. Such an interpretation should be avoided to the extent possible. We are, therefore, of the view that the contention that only on a decision of the Speaker that the disqualification is incurred, cannot be accepted. This would mean that what the learned Chief Justice has called the snowballing effect, will also have to be ignored and the question will have to be decided with reference to the date on which the membership of the Legislature party is alleged to have been voluntarily given up.

35. In the case on hand, the question would, therefore be whether on 27.3.2003 the 13 members who met the Governor with the request to invite the leader of the Samajwadi Party to form the Government had defected, on 27.8.2003 and whether they have established their claim that on 26.8.2003 there had been a split in the Bahujan Samaj Party and one third of the members of the Legislature of that party had come out of that party. It may be noted that the clear and repeated plea in the counter affidavit to the writ petition is that a split had occurred on 26.8.2003. This was also the stand of the petitioner before the Speaker for recognition of a split. The position as on 6.9.2003 when the 37 MLAs presented themselves before the Speaker would not have relevance on the question of disqualification which had allegedly been incurred on 27.8.2003.

36. The question whether for satisfying the requirements of paragraph 3, it was enough to make a claim of split in the original political party or it was necessary to at least prima facie establish it, fell to be considered in the decision in Jagjit Singh Vs. State of Haryana (supra) rendered by a Bench of three Judges to which one of us, (Balasubramanyan, J.) was a party. Dealing with an argument that a claim of split in the original political party alone is sufficient in addition to showing that one-third of the members of the legislature Party had formed a separate group, the learned Chief Justice has explained the position as follows:

"Learned counsel for the petitioner, however, relies upon paragraph 37 in Ravi S. Naik’s case in support of the submission that only a claim as to split has to be made and it is not necessary to prove the split. The said

observations are:

'In the present case the first requirement was satisfied because Naik has made such a claim. The only question is whether the second requirement was fulfilled.'

The observations relied upon are required to be appreciated in the light of what is stated in the next paragraph, i.e., paragraph 38, namely:

'As to whether there was a split or not has to be determined by the Speaker on the basis of the material placed before him.'

Apart from the above, the acceptance of the contention that only claim is to be made to satisfy the requirements of paragraph 3 can lead to absurd consequences besides the elementary principle that whoever makes a claim has to establish it. It will also mean that when a claim as to split is made by a member before the speaker so as to take benefit of paragraph 3, the Speaker, without being satisfied even prima facie about the genuineness and bonafides of the claim, has to accept it. It will also mean that even by raising a frivolous claim of split of original political party, a member can be said to have satisfied this stipulation of paragraph 3. The acceptance of such broad proposition would defeat the object of defection law, namely, to deal with the evil of political defection sternly. We are of the view that for the purposes of paragraph 3, mere making of claim is not sufficient. The prima facie proof of such a split is necessary to be produced before the Speaker so as to satisfy him that such a split has taken place."

37. Thus, in the above decision, it has been clarified that it is not enough that a claim is made of a split in the original party, in addition to showing that one third of the members of the Legislature Party have come out of the party, but it is necessary to prove it at least prima facie. Those who have left the party, will have, prima facie, to show by relevant materials that there has been a split in the original party. The argument, therefore, that all that the 37 MLAs were required to do was to make a claim before the Speaker that there has been a split in the original party and to show that one third of the members of the Legislature party have come out and that they need not produce any material in support of the split in the original political party, cannot be accepted. The argument that the ratio of the decision in Jagjit Singh (supra) requires to be reconsidered does not appeal to us. Even going by Ravi S. Naik (supra) it could not be said that the learned Judges have held that a mere claim in that behalf is enough. As pointed out in Jagjit Singh (supra) the sentence in paragraph 37 in Ravi S. Naik's case (supra) cannot be read in isolation and it has to be read along with the relevant sentence in

paragraph 38 quoted in Jagjit Singh (supra).

38. Acceptance of the argument that the legislators are wearing two hats, one as members of the original political party and the other as members of the legislature and it would be sufficient to show that one third of the legislators have formed a separate group to infer a split or to postulate a split in the original party, would militate against the specific terms of paragraph 3. That paragraph speaks of two requirements, one, a split in the original party and two, a group comprising of one third of the legislators separating from the legislature party. By acceding to the two hat theory one of the limbs of paragraph 3 would be made redundant or otios. An interpretation of that nature has to be avoided to the extent possible. Such an interpretation is not warranted by the context. It is also not permissible to assume that the Parliament has used words that are redundant or meaningless. We, therefore, overrule the plea that a split in the original political party need not separately be established if a split in the legislature party is shown.

39. On the side of the 37 M.L.As., the scope of judicial review being limited was repeatedly stressed to contend that the majority of the High Court had exceeded its jurisdiction. Dealing with the ambit of judicial review of an order of the Speaker under the Tenth Schedule, it was held in Kihoto Hollohan (supra):

"In the present case, the power to decide disputed disqualification under Paragraph 6(1) is preeminently of a judicial complexion.
39. The fiction in Paragraph 6(2), indeed, places it in the first clause of Article 122 or 212, as the case may be. The words "proceedings in Parliament" or "proceedings in the legislature of a State" in Paragraph 6(2) have their corresponding expression in Articles 122(1) and 212(1) respectively. This attracts an immunity from mere irregularities of procedures.
That apart, even after 1986 when the Tenth Schedule was introduced, the Constitution did not evince any intention to invoke Article 122 or 212 in the conduct of resolution of disputes as to the disqualification of members under Articles 191(1) and 102(1). The very deeming provision implies that the proceedings of disqualification are, in fact, not before the House; but only before the Speaker as a specially designated authority. The decision under paragraph 6(1) is not the decision of the House, nor is it subject to the approval by the House. The decision operates independently of the House. A deeming provision cannot by its creation transcend its own power. There is, therefore, ho immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6(1) of the Tenth Schedule."

After referring to the relevant aspects, it was held:
"By these well-known and accepted tests of what constitute a Tribunal, the Speaker or the Chairman, acting under paragraph 6(1) of the Tenth Schedule is a Tribunal."

It was concluded:

"In the light of the decisions referred to above and the nature of function that is exercised by the Speaker/Chairman under paragraph 6, the scope of judicial review under Articles 136, and 226 and 227 of the Constitution in respect of an order passed by the Speaker/Chairman under paragraph 6 would be confined to jurisdictional errors only viz., infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity."

The position was reiterated by the Constitution Bench in Raja Ram Pal Vs. The Hon'ble Speaker, Lok Sabha & Ors. [JT 2007 (2) SC 1]. We are of the view that contours of interference have been well drawn by Kihoto Hollohan (supra) and what is involved here is only its application.

40. Coming to the case on hand, it is clear that the Speaker, in the original order, left the question of disqualification undecided. Thereby he has failed to exercise the jurisdiction conferred on him by paragraph 6 of the Tenth Schedule. Such a failure to exercise jurisdiction cannot be held to be covered by the shield of paragraph 6 of the Schedule. He has also proceeded to accept the case of a split based merely on a claim in that behalf. He has entered no finding whether a split in the original political party was prima facie proved or not. This action of his, is apparently based on his understanding of the ratio of the decision in Ravi S. Naik's case (supra). He has misunderstood the ratio therein. Now that we have approved the reasoning and the approach in Jagjit Singh's case and the ratio therein is clear, it has to be held that the Speaker has committed an error that goes to the root of the matter or an error that is so fundamental, that even under a limited judicial review the order of the Speaker has to be interfered with. We have, therefore, no hesitation in agreeing with the majority of the High Court in quashing the decisions of the Speaker.

41. In view of our conclusions as above, nothing turns on the arguments urged on what were described as significant facts and on the alleged belatedness of the amendment to the Writ Petition. It is undisputable that in the order that was originally subjected to challenge in the Writ Petition, the Speaker specifically refrained from deciding the petition seeking disqualification of the 13 M.L.As. On our reasoning as above, clearly, there was an error which attracted the jurisdiction of the High Court in exercise of its power of judicial review.

42. The question then is whether it was necessary for the majority of the Division Bench of the High Court to remand the proceeding to the Speaker or a decision could have been taken whether the 13 members stand disqualified or not and if

they are found to be disqualified, the balance 24 of the 37 would also stand disqualified, since in that case, there will be no one third of the Legislature party forming a separate group as claimed by them. It is contended on behalf of the Bahujan Samaj Party that there is absolutely no material to show that there was any meeting of the party on 26.8.2003 as claimed by the 37 members and it has not been shown that there was any convention of the original political party or any decision taken therein to split the party or to leave the party by some of the members of that party. It is also pointed out that no agenda of the alleged meeting or minutes of the alleged meeting is produced. No other material is also produced. Even prior to 6.9.2003, when the claim of split before the Speaker was made and 26.8.2003, when the split is claimed to have occurred, the 24 members of the 37, had sat with the Bahujan Samaj Party in the Legislative Assembly and that itself would show that there had been no split on 27.8.2003 as now claimed. It is also pointed out that on 2.9.2003, the day of the convening of the Assembly, the 13 members of the B.S.P. who had met the Governor on 27.8.2003, had sat with members of the Samajwadi Party in the Assembly and an objection was raised to it. The Speaker got over the situation by saying that the only business on the agenda that day was obituary references and the question need not be raised that day. It is, therefore, contended that on the facts, it is crystal clear that the 13 members sought to be disqualified had defected and the defection is manifest by their meeting the Governor on 27.8.2003 requesting him to call upon the leader of the Samajwadi Party to form the Government.

43. As against these submissions, it is contended that it was for the Speaker to take a decision in the first instance and this Court should not substitute its decision for that of the Speaker. It is submitted that the High Court was therefore justified in remitting the matter to the Speaker, in case this Court did not agree with the 37 MLAs that the decision of the Speaker did not call for interference.

44. Normally, this Court might not proceed to take a decision for the first time when the authority concerned has not taken a decision in the eyes of law and this Court would normally remit the matter to the authority for taking a proper decision in accordance with law and the decision this Court itself takes on the relevant aspects. What is urged on behalf of the Bahujan Samaj Party is that these 37 MLAs except a few have all been made ministers and if they are guilty of defection with reference to the date of defection, they have been holding office without authority, in defiance of democratic principles and in such a situation, this Court must take a decision on the question of disqualification immediately. It is also submitted that the term of the Assembly is coming to an end and an expeditious decision by this Court is warranted for protection of the constitutional scheme and constitutional values. We find considerable force in this submission.

45. Here, the alleged act of disqualification of the 13 MLAs took place on 27.8.2003 when they met the Governor and requested him to call the leader of the opposition to form the Government. The petition seeking disqualification of these 13 members based on that action of theirs has been allowed to drag on till now. It is not necessary for us to consider or comment on who was responsible for such delay. But the fact remains that the term of the Legislative Assembly that was constituted after the elections in February 2002, is coming to

an end on the expiry of five years. A remand of the proceeding to the Speaker or our affirming the order of remand passed by the High Court, would mean that the proceeding itself may become infructuous. We may notice that the question of interpretation of the Tenth Schedule and the question of disqualification earlier raised in regard to members of the prior assembly of this very State, which led to the difference of opinion between two of the learned Judges of this Court and which stood referred to a Constitution Bench, was, disposed of on the ground that it had become infructuous in view of the expiry of the term of the Assembly. Paragraph 3 of the Tenth Schedule has also been deleted by the Parliament, though for the purpose of this case, the scope of that paragraph is involved. Considering that if the 13 members are found to be disqualified, their continuance in the Assembly even for a day would be illegal and unconstitutional and their holding office as ministers would also be illegal at least after the expiry of six months from the date of their taking charge of the offices of Ministers, we think that as a Court bound to protect the Constitution and its values and the principles of democracy which is a basic feature of the Constitution, this Court has to take a decision one way or the other on the question of disqualification of the 13 MLAs based on their action on 27.8.2003 and on the materials available.

46. The main thrust of the argument on the side of the 13 MLAs included in the 37 MLAs, has been that it was enough if a claim of a split in the original political party had been made and it was not necessary to establish any such split and it was enough for them to show that 37 of them had signed the petition filed before the Speaker on 6.9.2003. We have held on an interpretation of paragraph 3 and in approval of the ratio in Jagjit Singh (supra) that the 37 MLAs which includes the 13 MLAs in question had to establish a split in the original political party, here BSP, before they can get the protection offered by paragraph 3. The question is whether they have proved at least prima facie any such split.

47. The first act on the part of the 13 MLAs which is relevant is the giving of letters by them to the Governor, the contents of which we have quoted earlier in paragraph 16. Therein, there is no claim that there was a split in the Legislature Party on 26.8.2003 as was put forward in the representation on 6.9.2003 by 37 members. It is interesting to note that in the counter-affidavit to the writ petition filed by Rajendra Singh Rana who can be described as the leader of the 13 (for that matter of the 37), it has been repeatedly asserted that on 26.8.2003 a new party called Lok Tantrik Bahujan Dal was formed. Therefore, this was a case in which the theory of snow balling adverted to by the learned Chief Justice in the Judgment under appeal had no relevance. The issue was, whether on 26.8.2003 there had been a split in the original political party, the BSP and whether by that split, 37 of the MLAs of that Legislature Party had come out of that party. As rightly pointed out by learned counsel for BSP, no material is produced either to show that a meeting of the members of BSP was convened on 26.8.2003 or that a meeting took place at Darulshafa in which a split in the original political party occurred. On the other hand, the letters given to the Governor on 27.8.2003 by the 13 members sought to be disqualified, is totally silent on any such split in the original political party or on a new party being formed by certain members of the original political party. This is followed by the fact that on 2.9.2003 only the members who had met the Governor, sat with the members of the Samajwadi Party

abandoning their seats with BSP in the Assembly and the other 24, which made up the 37, remained in their seats along with the BSP. More over, no notice of a proposed meeting of the party on 26.8.2003, or evidence of any announcement of such a proposed meeting is produced. No agenda of any such meeting is also produced. No minutes evidencing any decision to split the party taken at such a meeting, is also produced. These relevant aspects clearly demonstrate that the story of a split in the original political party put forward in the letter dated 6.9.2003 was only an afterthought. Even before us, no material was referred to, to suggest or establish that there was a split on 26.8.2003 and the formation of a Lok Tantril Dal as claimed in the counter affidavit to the writ petition. The attempt was only to argue that we must leave the decision to the Speaker in the first instance and that the challenge to the meeting on 26.8.2003 was only raised belatedly in the writ petition. On a scrutiny of the pleadings in the original writ petition, we cannot also agree with that latter submission.

48. The act of giving a letter requesting the Governor to call upon the leader of the other side to form a Government, itself would amount to an act of voluntarily giving up the membership of the party on whose ticket the said members had got elected. Be it noted that on 26.8.2003, the leader of their party had recommended to the Governor, a dissolution of the Assembly. The first eight were accompanied by Shivpal Singh Yadav, the General Secretary of the Samajwadi Party. In Ravi Naik (supra) this Court observed:

"A person may voluntarily give up his membership of an original political party even though he has not tendered his resignation from the membership of that party. Even in the absence of a formal resignation from the membership, an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs."

49. Clearly, from the conduct of meeting the Governor accompanied by the General Secretary of the Samajwadi Party, the party in opposition and the submission of letters requesting the Governor to invite the leader of that opposition party to form a Government as against the advise of the Chief Minister belonging to their original party to dissolve the assembly, an irresistible inference arises that the 13 members have clearly given up their membership of the BSP. No further evidence or enquiry is needed to find that their action comes within paragraph 2(1)(a) of the Tenth Schedule. Then the only question is whether they had shown at least prima facie that a split had occurred in the original political party on 26.8.2003 and they had separated from it along with at least 24 others, so as to make up one-third of the legislature party.

50. The learned Chief Justice who declined to interfere with the decision of the Speaker on his interpretation of paragraphs 2 and 3 of the Tenth Schedule to the Constitution with which we have disagreed, himself stated:

"As per the dicta in the case of Naik, reported 1994 (Suppl.)2 SCC 641, the going of the 13 MLAs to the Governor on 27.8.2003 is a conduct which leads to the inference that they had voluntarily given up their membership of the Bahujan Dal. They asked the governor to call the leader of the main opposing party, to

be requested to demonstrate his strength. In paragraph 11 in Naik's case, it is said that an inference can be drawn from the conduct of a member that he was voluntarily given up his membership. That inference has to be drawn in regard to the conduct of 27.08.2003 most certainly."

He has also observed while considering whether the Speaker had to consider paragraph 2 of the Tenth Schedule first or he is to consider paragraph 3 first.
"The order of consideration will yield diametrically opposite results. Even, in this case, if he had considered paragraph 2 first, he might well have had to disqualify all 37, as they did not walk away at one and the same time. But because he considered paragraph 3 first, because he though as a matter of law that the requirements of paragraph 3 being satisfied, it obviated the necessity of considering paragraph 2 separately for any part of the whole group, he gave a decision for the respondents."

The learned Chief Justice has further held:
"Even if 37 out of 109 Bahujan MLAs have walked out, only the legislature party is split. This is defined in paragraph 1(b), which has been set out earlier; but in this case of ours, where is the proof before the Speaker of the split in the original party? Were any minutes tendered before the Speaker showing that so many lacs or millions of the original Bahujan Dal decided to split? A claim that on 26.08.2003, there were some party members along with the MLAs at the Darulshafa in Lucknow is not enough; it is too inadequate. The Bahujan Dal is too big; its party membership is too numerous for it to suffer a split in such a comparatively minor meeting, even if it took place on 26.8.2003. There was no intimation that one group was going to split; even the name Loktantrik Bahujan Dal found its place for the first time on paper on 6.9.2003; there were no Newspaper reports; there were no statements of dissatisfied party members; the core of the Bahujan Dal was not asked to "rectify" its behaviour or else. The threat of a split was not even made imminent; nothing like this happened; only one evening, it is claimed, the Bahujan Dal had split and a faction had arisen. This is so cursory as not to class as a split in the original party at all. Look at the split in Congress-O, which resulted in Congress-I coming into being; Looking at the split in Congress-I in West Bengal and the resulting Trinamul Congress coming into being, was there anything like that here? The answer is a big no."

51. One of the learned Judges who constitutes the majority has held:
"\005\005\005. but the court cannot certainly close its eyes to the fact that had the application for disqualification dated 4.9.2003 been treated

with the same promptitude and constitutionally required urgency, the 13 MLAs whose Membership in question was hanging in the balance could not have been counted along with 24 others, who joined hands to conjure up the minimum required member\005\005."

52. As we have indicated, nothing is produced to show that there was a split in the original political party on 26.8.2003 as belatedly put forward or put forward at a later point of time. But still, the plea was of a split on 26.8.2003. On the materials, the only possible inference in the circumstances of the case, is that it has not been proved, even prima facie, by the MLAs sought to be disqualified that there was any split in the original political party on 26.8.2003 as claimed by them. The necessary consequence would be that the 24 members, who later joined the 13, could not also establish a split in the original political party as having taken place on 26.8.2003. In fact even a split involving 37 MLAs on 26.8.2003 is not established. That was also the inference rightly drawn by the learned Chief Justice in the judgment appealed against.

53. In view of our conclusion that it is necessary not only to show that 37 MLAs had separated but it is also necessary to show that there was a split in the original political party, the above finding necessarily leads to the conclusion that the 13 MLAs sought to be disqualified had not established a defence or answer to the charge of defection under paragraph 2 on the basis of paragraph 3 of the Tenth Schedule. The 13 MLAs, therefore, stand disqualified with effect from 27.8.2003. The very giving of a letter to the Governor requesting him to call the leader of the opposition party to form a Government by them itself would amount to their voluntarily giving up the membership of their original political party within the meaning of paragraph 2 of the Tenth Schedule. If so, the conclusion is irresistible that the 13 members of BSP who met the Governor on 27.8.2003 who are respondent Nos.2,3,4,5,6,9,10,14,16,19,20,21 and 37, in the writ petition filed by Maurya, stand disqualified in terms of Article 191(2) of the Constitution read with paragraph 2 of the Tenth Schedule thereof, with effect from 27.8.2003. If so, the appeal filed by the writ petitioner has to be allowed even while dismissing the appeals filed by the 37 MLAs, by modifying the decision of the majority of the Division Bench. Hence the writ petition filed in the High Court, will stand allowed with a declaration that the 13 members who met the Governor on 27.8.2003, being respondent numbers 2, 3, 4, 5, 6, 9, 10, 14, 16, 19, 20, 21 and 37 in the writ petition, stand disqualified from the Uttar Pradesh Legislative Assembly with effect from 27.8.2003.

54. The appeals filed by the 37 MLAs are dismissed and the appeal filed by the writ petitioner is allowed in the above manner. The disqualified members will pay the costs of the writ petitioner, here and in the High Court.