A CONSUMER EDUCATION & RESEARCH SOCIETY

v.

UNION OF INDIA & ORS.

(WP(C) NO. 448 OF 2006)

AUGUST 24, 2009

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[K.G. BALAKRISHNAN, CJI., R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.]

Parliament (Prevention of disqualification) Act, 1959

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s.3[as amended by Parliament (Prevention of Disqualification) Amendment Act, 2006] – Certain offices of profit not to disqualify – Addition to offices of profit with retrospective effect – Challenged – Held: The impugned legislation is constitutionally valid – Power of Parliament to enact a law under Article 102(1)(a) of the Constitution includes the power to enact such law retrospectively – A law can be made retrospectively to remove the disqualification incurred on account of holding offices of profit – Which 'offices' should be excluded for the purpose of disqualification is a matter to be addressed by Parliament – Nothing has been pointed out to suggest that any of the offices exempted under the Amendment Act, 2006 suffers from any impropriety so as to be prejudicial to the constituency or affect independence of the Member – Constitution of India, 1950 – Articles 101 to 104.

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Constitution of India, 1950:

Articles 101(3)(a), 102(1)(a) and 103(1) – Member of Parliament – Accepting 'office of profit' – Incurring disqualification – Vacancy of seat – Held: A declaration by the President of India under Article 103(1) in case of disqualification under Article 102(1) and a declaration by the Speaker or the Chairman under para 6 of the 10th Schedule

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in the case of disqualification under Article 102(2) is a condition precedent for the vacancy of the seat -A Member continues as such until the decision of the President, and when the outcome of the decision is that he /she is disqualified , it relates back to the date when the said disqualification was incurred – Therefore, while a disqualification results in the vacation of the seat of a Member, the vacancy occurs only when the President declares the disqualification under Article 103 – In the instant case, when the Parliament (Prevention of Disqualification) Amendment Act, 2006 retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of profit was freed from the disqualification retrospectively and as none of such Members have been declared to be disqualified, they continued as Members – Parliament (Prevention of Disqualification) Act, 1959 – s. 3 [as amended by Parliament (Prevention of Disqualification) Amendment Act, 2006].

Article 102 – Disqualification of Members of Parliament – For holding of an office of profit – Exclusion of certain offices for purpose of disqualification – Held: Is a question that lies in the legislative domain – What kind of office would amount to an 'office of profit' under the Government and whether such an office of profit is to be exempted is a matter to be considered by Parliament.

Article 14 – Challenge to the Parliament (Prevention of Disqualification) Amendment Act, 2006 merely because several other similar offices of profit are not included in the exempted category, has no basis – Each office of profit may have different effects and consequences – Parliament (Prevention of Disqualification) Act, 1959 as amended by Amendment Act, 2006.

CONSTITUTIONALISM:

Constitutional conventions – Office of profit – Exemption of, from disqualification – Practice of matters being referred

A *to Joint Committee – Held: This was merely a parliamentary procedure and not a constitutional convention – Once Parliament is recognized as having the power to exempt from disqualification and to do so with retrospective effect, any alleged violation of any norm or traditional procedure cannot* B *denude Parliament of its power to make a law.*

The instant writ petitions were filed challenging the constitutional validity of the Parliament (Prevention of Disqualification) Amendment Act, 2006, amending the Parliament (Prevention of Disqualification) Act, 1959 and C **making additions to the list of 'Offices of Profit', exempt from disqualification for becoming a Member of Parliament.**

The questions for consideration before the Court D **were : (i) whether the Amendment Act retrospectively exempting certain offices of profit from disqualification, violated Articles 101 to 104 of the Constitution and was, therefore, invalid; and (ii) whether exemption of as many as 55 offices relating to statutory bodies/non-statutory** E **bodies, without referring the proposal to the Joint Committee would render the Amendment a colourable legislation and violated any 'constitutional convention' or Article 14 of the Constitution.**

F **Dismissing the writ petitions, the Court Held:**

1.1. The impugned legislation is constitutionally valid. [Para 40] [709-B-C]

1.2. The power of Parliament to enact a law under G **Article 102 (1)(a) of the Constitution of India includes the power to enact such law retrospectively. Thus, a law can be made retrospectively to remove the disqualification incurred on account of holding offices of profit. [Para 16] [687-B]**

H *Srimati Kanta Kathuria v. Manak Chand Surana* **(1969)**

3 SCC 268; *Indira Nehru Gandhi v. Raj Narain,* **(1975) Supp. SCC 1;** *Nongthombam Ibomcha Singh v. Leisangthem Chandramani Singh & Ors.* **(1976) 4 SCC 291, relied on** A

1.3. The use of the words "becomes subject to" in Article 101 and in Article 103 of the Constitution clearly demonstrate that these Articles contemplate a situation where a sitting MP incurs the disqualification during his tenure and they do not apply to a candidate who held a disqualifying office of profit before being elected as a Member of Parliament. Separate provisions deal with pre-election disqualification, as is indicated by ss. 36 and 100 of the Representation of the People Act, 1951. Where a person was under a disqualification at the time of his election, the provisions of Articles 101 (3)(a) and 103 will not apply. He/She will continue as a member unless the High Court in an election petition filed on that ground, declares that on the date of election, he/she was disqualified and consequently, declares his/her election to be void. It follows, therefore, that if an elected candidate was under a disqualification when he was elected, but no one challenges his/her election, he/she would continue as a Member irrespective of the fact that he/she was under a disqualification when elected. [Para 19-20 and 22] [691-C-E; 649-B-D] B C D E

Election Commission, India v. Saka Venkata Subba Rao & Union of India **(1953) 3 SCR 1144;** *Brundaban Nayak v. Election Commission of India* **(1965) 3 SCR 53, referred to.** F

1.4. The constitutional scheme is that a person shall be disqualified from continuing as a Member of Parliament if he/she holds any disqualifying office of profit. Such a disqualification can result in the vacation of his/her seat when the Member admits or declares that he/she is holding the disqualifying office of profit. However, if he/she does not make a voluntary declaration about the same, the question whether he/she is G H

A disqualified or not, if raised, shall have to be referred for a decision by the President of India and the same will be made after obtaining the opinion of the Election Commission of India. It is only after the President decides that the Member has incurred an alleged disqualification B that the particular member's seat would become vacant. The words "if any question arises as to whether a Member of either House of Parliament has become subject to any disqualifications" conclusively show that the question whether a Member has become subject to C any disqualification under clause (1) of Article 102 has to be decided only by the President. Such a question would be a mixed question of fact and law. It is only after such a decision is rendered by the President, that the seat occupied by an incumbent MP becomes vacant. [Para 24] D [695-A-F]

2.1. The question of a person being disqualified under Article 102(1) and the question of his seat becoming vacant under Article 101(3)(a) though closely interlinked, are distinct and separate issues. The E constitutional scheme in Articles 101 to 104 indicates that the vacancy of the seat would occur only when a decision is rendered by the President under Article 103 and not at the point of time when the Member is alleged to have incurred the disqualification. The vacancies F contemplated in Article 101(3)(a) will arise only when the disqualification is decided upon and declared by the President under Article 103(1) or declared by the Chairman or the Speaker of the House under Para 6(1) of Tenth Schedule. Therefore, in the case of vacancy G under Article 101(3)(a), the vacancy of the seat is not automatic consequent upon incurring the disqualification, but would occur only upon a declaration of the disqualification by the designated authority.With regard to disqualification under Article 102(2) on the H ground of defection, the vacancy of the seat would

become operative only when a decision is rendered by the Chairman or the Speaker of the House, as the case may be, declaring his disqualification. Therefore, upon a proper construction of the provisions of Articles 101 to 103, it is evident that a declaration by the President under Article 103(1) in the case of a disqualification under Article 102(1) and a declaration by the Speaker or the Chairman under Para 6 of the Tenth Schedule in the case of a disqualification under Article 102(2) is a condition precedent for the vacancy of the seat. [Para 24,25,28 and 30] [695-F-G; 698-F-H; 699-B-C; 700-D-F]

2.2. When the President adjudicates on the subject of whether a Member was disqualified or not and gives a finding that he/she is disqualified, such person is merely deemed to have ceased being a Member from the date he/she had incurred the disqualification. It follows that a Member continues as such until the decision of the President and when the outcome of the decision is that he/she is disqualified it relates back to the date when the said disqualification was incurred. If the President holds that the Member has not incurred the disqualification, the person continues as a Member. [Para 35] [706-E-G]

2.3. There is no doubt that the disqualification, when declared by the President will become operative from the date the Member accepted the `office of profit'. It is also not in doubt that the vacation of the seat is consequential. However, the seat of the Member does not become vacant without anything more when a person accepts an `office of profit'. If the Member does not make a voluntary declaration that he/she has incurred a disqualification and if no one raises a dispute about the same, the Member would continue in spite of accepting an office of profit. Therefore, while a disqualification results in the vacation of the seat of a Member, the vacancy occurs only when the President decides and

A declares the di qualification under Article 103. [Para 36] [706-G-H; 707-A-D]

2.4. When the Amending Act retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of B profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President, s.4(2) was not attracted and consequently they continued as C Members. [Para 37] [707-D-F]

3.1. Which 'offices' should be excluded for the purpose of disqualification, is a question that properly lies in the legislative domain. What kind of office would D amount to an 'office of profit' under the Government and whether such an office of profit is to be exempted is a matter to be considered by Parliament. The key concern that certain offices or places held by an MP may be either incompatible with his/her duty as an elected E representative of the people or affect his/her independence and thus weaken his/her loyalty to his/her constituency and, therefore, should disqualify the holder thereof, is a matter to be addressed by Parliament. [Para 38] [707-F-H; 708-A]

F 3.2. While making the legislation exempting any office, the question whether such office held by a person is incompatible with his/her position as an MP and whether his/her independence would be compromised and whether his/her loyalty to his/her constituency will be G affected, should no doubt be kept in mind to safeguard the independence of the Members of the legislature and to ensure that they are free from any kind of undue influence from the executive. Nothing has been pointed out to suggest that any of the newly exempted 'offices' H suffer from any such impropriety or will be prejudicial to

the constituency or affect the independence of the Member. [Para 38] [708-B-D] A

4. The plea regarding violation of Article 14 of the Constitution merely because several other similar offices of profit are not included in the exempted category, has no basis. As each office of profit may have different effects and consequences on the Member, there is no viable basis for the assumption that all offices of profit are equal and that all offices of profit should be excluded. [Para 38] [708-D-E] B C

5. It is not in serious dispute that ever since Bhargava Committee submitted its report in November, 1955, whenever an office of profit had to be exempted the matter used to be referred to a Joint Committee and its opinion whether the office should be exempted or not, was being taken and only when there was a recommendation that a particular office should be exempted, the Act was being amended to add that office to the list of exemptions. However, this was merely a parliamentary procedure and not a constitutional convention. Once the Parliament is recognized as having the power to exempt from disqualification and to do so with retrospective effect, any alleged violation of any norm or traditional procedure cannot denude Parliament of its power to make a law. Nor can such law which is otherwise valid be described as unconstitutional merely because a procedure which was followed on a few occasions was not followed for the particular amendment. [Para 39] [708-E-H; 709-A-B] D E F

Case Law Reference: G

(1969) 3 SCC 268	**relied on**	**para 13**
(1975) Supp. SCC 1	**relied on**	**para 17**

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(1976) 4 SCC 291	**relied on**	**para 18**
(1953) 3 SCR 1144	**referred to**	**para 21**
(1965) 3 SCR 53	**referred to**	**para 21**

B CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 448 of 2006.

Under Article 32 of the Constitution of India.

WITH

C W.P. (C) No. 411 of 2006.

Gopal Subramanium, Mohan Parasaran, ASG, Ravindra Shrivastava, Sr. Adv. E.R. Kumar, Sameer Parekh, Kunal Verma, Ranjeeta Rohtagi, Diksha Rai, Rajul Shrivastav, Anup D Jain, K. Krisna, Supriya Jain, Ajay K. Jha (for Parekh & Co.), P. Parmeswaran, Raghenth Basant, Aman Ahluwalia, Balaji Subramaniam, Gaurav Agrawal, Tapesh K. Singh, B.K. Prasad, D.L. Chidananda, Gaurav Dhingra, K.K. Senthivelan, C.S. Bhardwaj for the appearing parties.

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The Judgment of the Court was delivered by

K. G. BALAKRISHNAN, CJI. 1. These two writ petitions filed under Article 32 of the Constitution by way of public interest litigation, challenge the constitutional validity of the F Parliament (Prevention of Disqualification) Amendment Act, 2006 (Act No. 31/2006, Hereinafter 'Amendment Act'). It amended the Parliament (Prevention of Disqualification) Act, 1959 (Hereinafter 'Principal Act'). The Amendment Act adds to the list of 'Offices of Profit' which do not disqualify the holders G thereof for being chosen as, or for being the Members of Parliament.

Historical background

H 2. The expression 'Office of Profit' is not defined in the

Constitution. The view that certain offices or positions held by a Member of Parliament (Hereinafter also referred to as 'MP') may be either incompatible with his/her duty as an elected representative of the people, or affect his/her independence, and thus weaken the loyalty to his/her constituency and, therefore, should disqualify the holder thereof, had its origin in the Parliamentary history of the United Kingdom. (See: The Introduction to the Bhargava Committee Report on Office of Profit, dated 22.10.1955). The concept of 'office of profit' has a history of more than four centuries in United Kingdom and it has evolved through many phases. The first was the "privilege" phase (prior to 1640). The second was the "corruption" phase (from 1640). The third was the "ministerial responsibility" phase (after 1705). Initially the English Parliament claimed priority over the services of its Members and it was considered derogatory to its privilege if any of its Members accepted some other office which would require a great deal of their time and attention. This led to the evolution of the idea that the holding of certain offices would be incompatible with the responsibilities of a Member of Parliament. This was the first phase. During the second phase, there was a protracted conflict between the Crown and the House of Commons. Loyalty to the King and the loyalty to the House of Commons representing the will of the people became growingly irreconcilable and it was thought that if any Member accepted an 'Office of Profit' under the Crown, there was every chance of his loyalty to Parliament being compromised. Subsequently came the third phase. The King was reduced to the position of a constitutional head and the cabinet, functioning in the name of the Crown became the centre of the executive government. The Privy Councilors, who during the second phase were invariably considered to be the henchmen of the King and were as such looked upon with suspicion by the House of Commons, yielded place to the Ministers, who for some time were also disqualified from holding a seat in the House. Later it came to be recognized that the application of the disqualification rule to incumbent ministers was too extreme and with the intent of ensuring effective

A coordination between the executive and the legislature, it was accepted that the Members of the executive should be represented in the Parliament. This recognition led to the passing of several enactments by the British Parliament. The Re-Election of Ministers Act enacted by the British Parliament B in 1919 and 1926 required any Member who was appointed to a 'political office' to seek re-election.

3. As we have adopted the British Parliamentary form of Government, the concept of 'office of profit' was also adopted with some modifications. The concept of 'office of profit' began C to develop with the entry of non-official members in the Legislature. A clear and precise statement in this regard was made in Section 26(1)(a) of the Government of India Act, 1935 which provided that a person shall be disqualified for being chosen as, and for being, a Member of either Chamber if he D held any office of profit under the Crown of India, other than an office declared by Act of the Federal Legislature not to disqualify its holder.

4. When the Constitution of India came into force on 26th E January, 1950 declaring that a person holding an office of profit would be disqualified, the explanation to Article 102 clarified that a person who is a Minister (either for the Union or for any State) shall not be deemed to hold an office of profit. However, there existed Ministers of State as also Deputy Ministers in the F Union Government who were not specifically exempted from disqualification under Article 102 because the expression 'minister' was construed as referring only to a Cabinet Minister. In order to address this situation, the Parliament (Prevention of Disqualification) Act, 1950 was enacted. Section 2 of the G said Act provided:

> "2. *Prevention of disqualification for membership of Parliament:* A person shall not be disqualified for being chosen as, and for being a member of Parliament by reason only of the fact that he holds any of the following H offices of profit under the Government of India or the

Government of any State, namely, an office of Minister of State or a Deputy Minister, or a Parliamentary Secretary or a Parliamentary Under Secretary." A

5. This was followed by the Parliament (Prevention of Disqualification) Act, 1951 declaring that certain offices (specified in Section 2 thereof) under the government shall not disqualify, and shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, Members of Parliament. The said Act was given retrospective effect from 26.1.1950. B C

6. In 1954, a Committee was constituted under the chairmanship of Pandit Thakur Das Bhargava to study the various matters connected with the disqualification of MP's and to make recommendations in order to enable the government to consider the manner in which a comprehensive legislation should be brought. The Committee submitted its report in 1955. In 1959 the Parliament (Prevention of Disqualification) Act, 1959 was enacted, thereby declaring that certain offices of profit under the government shall not disqualify the holders thereof for being chosen as or for being, Members of Parliament. Section 3 of the Principal Act (amended from time to time) declared that none of the following offices in so far as it is an office of profit under the government of India or the government of any State, shall disqualify the holder thereof for being chosen as, or for being, a Member of Parliament: D E F

"(a) any office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether ex officio or by name;

(aa) the office of a Leader of the Opposition in Parliament; G

(ab) the office of Deputy Chairman, Planning Commission;

(ac) the office of each leader and deputy leader of a H

A recognized party and recognized group in either House of Parliament;

(b) the office of Chief Whip. Deputy Chief Whip or Whip in Parliament or of a Parliamentary Secretary;

B (ba) the office of Chairperson of -

(i) the National Commission for Minorities constituted under Section 3 of the National Commission for Minorities Act, 1992 (19 of 1992);

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(ii) the National Commission for the Scheduled Castes and Scheduled Tribes constituted under clause (I) of article 338 of the Constitution;

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(iii) the National Commission for Women constituted under Section 3 of the National Commission for Women Act, 1990 (20) of 1990;

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(c) the office of member of any force raised or maintained under the National Cadet Corps Act, 1948 (56 of 1948), or the Reserve and Auxiliary Air Forces Act, 1952 (62 of 1952);

F (d) the office of a member of a Home Guard constituted under any law for the time being in force in any State;

(e) the office of sheriff in the city of Bombay, Calcutta or Madras;

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(f) the office of chairman or member of the syndicate, senate, executive committee, council or court of a university or other body connected with a university;

H (g) the office of a member of any delegation or mission

sent outside India by the Government for any special purpose; A

(h) the office of chairman or member of a committee (whether consisting of one or more members), set up temporarily for the purpose of advising the Government or any other authority in respect of any matter of public importance or for the purpose of making an inquiry into, or collecting statistics in respect of, any such matter, if the holder of such office is not entitled to any remuneration other than compensatory allowance; B C

(i) the office of Chairman, director or member of any statutory or non-statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part I of the Schedule, (ii) the office of chairman or secretary of any statutory or non-statutory body specified in Part II of the Schedule; D E

(j) the office of village revenue officer, whether called a lambardar, malguzar, patel, deshmukh or by any other name, whose duty is to collect land revenue and who is remunerated by a share of, or commission on, the amount of land revenue collected by him, but who dies not discharge any police functions." F

7. The trigger for the present controversy arose when a Member of the Rajya Sabha – Mrs. Jaya Bachchan was appointed as the Chairperson of the Uttar Pradesh Film Development Council on 14.7.2004. A complaint was made that this amounting to the holding of an 'office of profit' on her part and thus, she was not entitled to continue as a Member of G H

A the Rajya Sabha in view of Article 102(1)(a) of the Constitution. A Presidential Order was passed under Article 103(1) of the Constitution of India by which the said Member of the Rajya Sabha was disqualified from being a Member of the Rajya Sabha on the ground that she was holding an 'office of profit'. B That order was challenged before this Court in *Jaya Bachan v. Union of India,* (2006) 5 SCC 266, and the challenge was rejected by this Court. Thereafter, it was discovered that a large number of MPs' were holding 'Offices of Profit' and they also would incur the same disqualification. A Bill titled the Parliament C (Prevention of Disqualification) Amendment Bill, 2006 was therefore introduced on 16th of May, 2006 in the Lok Sabha and was passed on the same day. On the next day, it was introduced in the Rajya Sabha and was debated on and passed on the same day. The Bill was sent to the President of India D for his assent on 25th May, 2006. The President returned the Bill on 30th May, 2006 to the Parliament for reconsideration under Article 111 of the Constitution of India. The Bill was passed again by both the Houses without amendment and presented to the President for assent and the said assent was E given on 18.8.2006. Thus, the Amendment Act came into existence.

8. Section 2 of the Amendment Act inserted the following clauses as (ad) after clause (ac) of section 3 of the Principal Act:

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> "(ad) the office of the chairperson of the National Advisory Council constituted by the Government of India in the Cabinet Secretariat vide Order No. 631/2/1/2004-Cab, dated the 31st May, 2004;"

G Section 2 of Amendment Act also inserted after clause (j) the following clauses, which were to be deemed to have been inserted with effect from the 4th day of April, 1959, namely:

> "(k) the office of Chairman, Deputy Chairman, Secretary H or Member (by whatever name called) in any

statutory or non-statutory body specified in the Table; A

(l) the office of Chairperson or trustee (by whatever name called) of any Trust, whether public or private, not being a body specified in the Schedule; B

(m) the office of Chairman, President, Vice-President or Principal Secretary or Secretary of the Governing Body of any society registered under the Societies Registration Act, 1860 or under any other law relating to registration of societies, not being a body specified in the Schedule." C

Section 3 of the Amendment Act inserted a Table referred to in Section 2(k), listing 55 statutory and non-statutory bodies, following the Schedule in the Principal Act, which was also deemed to have been inserted with effect from 4th April, 1959. D

Section 4 contained a special provision as to validation and other matters and it is extracted below:

"4.(1) Notwithstanding any judgment or order of any court or tribunal or any order or opinion of any other authority, the offices mentioned in clauses (ad), (k), (l) and (m) of Section 3 of the Principal Act shall not disqualify or shall be deemed never to have disqualified the holders thereof for being chosen as, or for being, as member of either House of Parliament as if the Principal Act as amended by this Act and been in force at all material times. E F

(2) Nothing contained in sub-section (l) shall be construed as to entire any person who has vacated a seat owing to any order or judgment, as aforesaid, to claim any reinstatement or any other claim in that behalf. G

(3) For the removal of doubts, it is hereby clarified that any petition or reference pending before any court H

A or other authority on the date of commencement of this Act, shall be disposed of in accordance with the provisions of the Principal Act, as amended by this Act."

B **Relevant constitutional provisions:**

9. In order to understand the scope, applicability and impact of the Amendment Act, it is necessary to refer to the constitutional provisions (Article 101 to 104 of the Constitution of India) which deal with the disqualification of Members of C Parliament. Article 101 enumerates the circumstances in which the seats of Members of Parliament will become vacant. Portions of Article 101 are extracted below:

"101. Vacation of seats.-(1) No person shall be a member D of both houses of Parliament and provision shall be made by Parliament by law for the vacation by a person who is chosen a member of both houses of his seat in one house or the other.

(2) No person shall be a member both of Parliament and E of a House of the Legislature of a State, and if a person is chosen a member both of Parliament and of a House of the Legislature of (a State), then, at the expiration of such period as may be specified in rules made by the President, that person's seat in Parliament shall become F vacant, unless he has previously resigned his seat in the Legislature of the State.

(3) If a member of either House of Parliament -

G (a) becomes subject to any of the disqualifications mentioned in [clause (1) or clause (2) of article 102], or

(b) resigns his seat by writing under his hand addressed to the Chairman or the Speaker, H as the case may be, and his resignation is

accepted by the Chairman or the Speaker, as the case may be.

his seat shall thereupon become vacant:"

Article 102 enumerates the various disqualifications for membership and it is extracted below:

"102. Disqualifications for membership.

(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-

(a) *If he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament 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 acknowledgment 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 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 either House of Parliament if he is so disqualified under

A the Tenth Schedule."

[emphasis supplied]

Article 103 deals with the procedure to be followed in case a decision is required as to the disqualification of sitting MPs. B Article 104 lays down the penalty for sitting and voting, by disqualified Members. The said Articles are extracted below:

> *"103. Decision on questions as to disqualifications of members*
>
> C (1) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of article 102, the question shall be referred for the decision of the President and his decision shall be final.
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> D (2) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion."
>
> E *"104. Penalty for sitting and voting before making oath or affirmation under article 99 or when not qualified or when disqualified* – If a person sits or votes as a member of either House of Parliament before he has complied with the requirement of article 99, or when he knows that he is F not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provision of any law made by Parliament, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the Union."

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The corresponding provisions relating to disqualification of members of the State Legislature are Articles 190, 191, 192 and 193. They correspond to and are substantially similar to Articles 101, 102, 103 and 104 which are applicable to H Parliament.

10. Article 102(1)(a) lays down that a Member of either House of Parliament shall be disqualified if he holds any 'office of profit' under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder. Section 101(3)(a) provided that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in Article 102(1), his seat shall thereupon become vacant. Article 103 provides for reference of any question as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102(1) to the decision of the President, whose decision on the question is made final.

Contentions

11. The learned senior counsels Shri Harish Salve and Shri Ravinder Srivastava who appeared on behalf of the petitioners contended that the amendment that retrospectively exempted certain offices of profit from the disqualification rule was violative of the constitutional scheme of Articles 101 to 104 of the Constitution. It was submitted that the purpose of removal of disqualification by a retrospective amendment to the Act was to ensure that persons who had ceased to be MP's on account of incurring disqualifications would be re-inducted to Parliament without election, and that was impermissible and unconstitutional. It was asserted that several MP's were holding "offices of profit under the Government of India or the State Government, other than offices declared by Parliament by law not to disqualify their holder" (for short 'the disqualifying offices of profit') when they were elected. It was further stated that several others had accepted the disqualifying offices of profit, after becoming Members, i.e. during their tenure as Members of Parliament. Hence , it was reasoned that a person holding such office of profit, was disqualified to become or be a Member of Parliament and that such Member's seat would become vacant on the very day when they were elected (with respect to those who were already holding the disqualifying

A office of profit, when they were elected) and on the day they accepted the disqualifying office of profit (with respect to those who accepted such disqualifying offices of profit during their tenure as Members of Parliament). It was submitted that when a Member's seat had already became vacant by virtue of B incurring a constitutional disqualification, his/her membership cannot be revived by enacting a legislation which retrospectively removed the applicable disqualification. According to the petitioner, a legislation retrospectively removing the disqualification will help a person to continue to be a Member, C only if he/she had continued as a Member and his/her seat had not fallen vacant. The reasoning advanced was that in instances where the seat had already become vacant on account of incurring a constitutional disqualification, any legislative attempt to revive the membership of the Member whose seat had D become vacant, would violate Articles 102(1) read with Article 101(3)(a) of the Constitution.

12. Alternatively, it was submitted that the objects and reasons as well as the provisions of the Amendment Act made it obvious that retrospective operation had been given to its E provisions with the sole intention of enabling the continuance of MPs' who would have otherwise been disqualified under Article 102(1)(a) of the Constitution. Therefore, such retrospective operation is unconstitutional. It is submitted that ever since the recommendations of the Bhargava Committee F in November, 1955, a constitutional convention had evolved wherein every Lok Sabha had a Joint Committee for the purpose of identifying and classifying 'offices of profit'. Whenever a particular 'office" had to be exempted from the disqualification rule, the Joint Committee's opinion was sought G on the question of whether the said office was an 'office of profit' or not, whether the holding of such office by a MP would conflict with his duties, and whether or not the office should be granted exemption. It was only after a report was given by the Joint Committee recommending exemption, that a particular H 'office' would be exempted. It was contended that the said

constitutional convention which has been followed for more than half a century was violated when 55 offices were given a 'wholesale' exemption with retrospective effect without obtaining any report from the Joint Committee on the question of whether the said "offices of profit" deserved to be exempted or not. It was hence argued that the Amendment Act was a colourable legislation which violated a well established constitutional convention. It was also contended that the provisions of the impugned legislation violated the guarantee of "equality before law and equal protection of the laws" that has been enshrined in Article 14 of the Constitution. It was contended that the offices under certain bodies which had been enumerated in the Schedule, were included without any basis in discernible principles. It was argued that there was no rational criterion for the wholesale exemption of the enumerated 55 'offices of profit' from the disqualification rule, by means of the impugned legislation.

13. On the other hand, Shri Gopal Subramaniam and Shri Mohan Parasaran, learned Additional Solicitors General, opposed these contentions on behalf of the respondents. In response to the first contention, it was submitted that the power of Parliament to enact a law declaring with retrospective effect that certain offices of profit will not disqualify the holder from being chosen as, and for being a Member of Parliament has already been upheld by this court in *Srimati Kanta Kathuria v. Manak Chand Surana,* (1969) 3 SCC 268. It was further submitted that a Member's seat would become vacant, not at the point of accepting the disqualifying office of profit, but after the President of India has decided and declared under Article 103(1) of the Constitution, with the aid and advice of Election Commission of India, that the Member had incurred the alleged disqualification. Hence it was contended that till such a decision by the President, a Member who is alleged to have incurred a disqualification continues to be a Member. It was submitted that since there was no declaration of disqualification by the President and because the Amendment Act had retrospectively

A removed the disqualifications, the seats of Members (who had accepted the disqualifying office of profit) did not fall vacant. Reference was made to section 4(2) of the Amendment Act which makes it clear that nothing contained in sub- section (1) thereof, shall be construed as to entitle any person who has B vacated a seat owing to any order or judgment as aforesaid, to claim any reinstatement or any other claim in that behalf. It was submitted that no Member who held an office of profit in respect of which the grounds for disqualification was removed by the Amendment Act, would incur disqualification and C consequently all of them would continue to be Members and their seats did not fall vacant under Article 101(3).

14. The respondents also contended that the Amendment Act did not violate Article 14. They submitted that the past practice of seeking the opinion of a Joint committee on any D proposal to add to the list of exempted offices of profit cannot be described as 'Constitutional Convention'. It was submitted that even if there was a practice of referring such questions to a Joint Committee, the same cannot denude the power of Parliament to make a law under Article 102(1)(a) of the E Constitution.

15. The aforesaid contentions give rise to the following questions for consideration by this Court:

F (i) Whether the Amendment Act retrospectively exempting certain offices of profit from disqualification, violates Articles 101 to 104 of the Constitution and is therefore invalid?

G (ii) Whether exemption of as many as 55 offices relating to statutory bodies/non-statutory bodies, without referring the proposal to the Joint Committee would render the Amendment a colourable legislation which violated any 'constitutional convention' or Article 14 of the H Constitution?

Re : Question (i) A

16. The question of whether a law can be made retrospectively to remove the disqualification incurred on account of holding offices of profit is no longer *res integra*. This Court in *Srimati Kanta Kathuria* (supra) has clearly laid down B that the power of Parliament to enact a law under Article 102(1)(a) includes the power of Parliament to enact such law retrospectively. In that case, the appellant Mrs. Kanta Kathuria, an Advocate practicing at Bikaner was appointed as a Special Government Pleader. She was subsequently elected to the C Rajasthan Legislative Assembly. The respondent therein challenged her election alleging that she was disqualified to be chosen as a Member of the Legislative Assembly since she held the office of Special Government Pleader, which was an office of profit under the Government of Rajasthan. The High D Court accepted the contention and allowed the Election Petition. The elected candidate preferred an appeal to the Supreme Court on August 2, 1968. During the pendency of the appeal, The Rajasthan State Legislature passed the Rajasthan Legislative Assembly Members (Prevention of Disqualification) E Act, 1969 which removed the disqualification that had been applicable to Government pleaders, Government Advocates and Special Government Pleaders with retrospective effect. The respondent contended that the Rajasthan State Legislature was not competent to remove the disqualification retrospectively. F Two opinions were delivered – one by Hidayatullah. C.J. (for himself and Mitter J), and another by Sikri, J, (as he then was) (for himself, Ray, J. and Jaganmohan Reddy, J) since there was a difference of opinion on the question whether, on the date of her election, the appellant held an office of profit. The minority G view was that she did, whereas the majority view was that she did not. However, there was unanimity in respect of the finding that the state legislature was competent to enact a law for the purpose of removing the disqualification with retrospective effect. Hidayatullah, C.J. had made the following observations in the majority opinion (at Para. 26, 40 and 43 respectively): H

A "... In other words, the Legislature of a State is empowered to declare that an office of profit of a particular description or name would not disqualify its holder." (Para. 26)

"... It has been held in numerous cases by this Court that *the State Legislatures and Parliament can legislate retrospectively subject to the provisions of the Constitution.* Apart from the question of fundamental rights, no express restriction has been placed on the power of the Legislature of the State, and we are unable to imply, in the context, any restriction." (Para. 40)

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"... The apprehension that it may not be a healthy practice and this power might be abused in a particular case are again no grounds for limiting the powers of the State Legislature." (Para. 43)

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(emphasis supplied)

The minority concurred and held as follows (Sikri, J. at Para. 12 and 13):

E "12. At the hearing our attention was drawn to a number of such Acts passed by our Parliament and the Legislatures of the States. It seems that there is a settled legislative practice to make validation laws. It is also well-recognised that Parliament and the Legislatures of the States can make their laws operate retrospectively. *Any law that can be made prospectively may be made with retrospective operation except that certain kinds of laws cannot operate retroactively. This is not one of them.*

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13. This position being firmly grounded we have to look for limitations, if any, in the Constitution. Article 191 (which has been quoted earlier) itself recognises the power of the Legislature of the State to declare by law that the holder of an office shall not be disqualified for being chosen as a member. The Article says that a person shall be disqualified if he holds an office of profit under the

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Government of India or the Government of any State unless that office is declared by the Legislature not to disqualify the holder. Power is thus reserved to the Legislature of the State to make the declaration. *There is nothing in the words of the article to indicate that this declaration cannot be made with retrospective effect.* It is true that it gives an advantage to those who stand when the disqualification was not so removed as against those who may have kept themselves back because the disability was not removed. That might raise questions of the propriety of such retrospective legislation but not of the capacity to make such laws. Regard being had to the legislative practice in this country and in the absence of a clear prohibition either express or implied we are satisfied that the Act cannot be declared ineffective in its retrospective operation."

(emphasis supplied)

17. In *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp. SCC 1, another Constitution Bench of this Court reiterated *Kantha Kathuria*. The following observations were made by A.N. Ray, C.J. (at Para. 138 and 139):

"... The power of the Legislature to pass a law includes a power to pass it retrospectively. An important illustration with reference to retrospective legislation in regard to election is the decision of this court in *Kantha Kathuria*'s case." (Para. 138)

"... *A contention was advanced that the legislative measure could not remove the disqualification retrospectively, because the Constitution contemplates disqualification existing at certain time in accordance with law existing at that time.* One of the views expressed in that case is that Article 191 recognizes the power of the Legislature of the State to declare by law that the holder of the office shall not be disqualified for being chosen as a member. Power is reserved to a Legislature of the State

A to make the declaration. *There is nothing in the Article to indicate that this declaration cannot be made with retrospective effect.* The act was held not to be ineffective in its retrospective operation on the ground that it is well recognized that Parliament and State Legislatures can B make their laws operate retrospectively. Any law that can be made prospectively can be made with retrospective operation." (Para. 139)

(emphasis supplied)

C 18. *Kanta Kathuria* and *Indira Gandhi* were followed by a three judge bench of this Court in *Nongthombam Ibomcha Singh v. Leisangthem Chandramani Singh & Ors.*, (1976) 4 SCC 291, where this Court affirmed the decision of the High Court that the respondent therein was not disqualified from D seeking election because of the fact that he held the office of the Speaker. The following reasoning was given by H.R. Khanna, J. (at Para. 3):

"... We find that the Manipur Legislature has now passed E the Manipur Legislature (Removal of Disqualifications) (Amendment) Act, 1975 (Manipur Act 1 of 1975). As a result of this amendment, a person holding the office of Speaker of Manipur Legislative Assembly shall not be disqualified from seeking election to the Legislative Assembly of that State because of his holding that office. F The amending Act, according to Clause (2) of Section 1, shall be deemed to have come into force on February 6, 1973. *The fact that the legislature is competent to enact such a law with retrospective operation is well - established (see Kanta Kathuria v. Manak Chand Surana G – 1969 (2) SCC 268 and Indira Nehru Gandhi v. Raj Narain – 1975 Supp. SCC 1. In view of the above amending Act, the respondent cannot be held to be disqualified from seeking election to the Legislative Assembly of Manipur on account of his having held the*

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office of the Speaker of the Legislative Assembly," A

(emphasis supplied)

19. We now proceed to examine another aspect of the first question. Article 101(3) provides that if a Member of either House of Parliament *becomes subject to* any of the B disqualifications mentioned in Article 102, his seat will thereupon become vacant. Article 103 provides that if any question arises as to whether a Member of either House of Parliament has *become subject to* any of the disqualifications mentioned in clause (1) of Article 102, the question shall be C referred to the decision of the President and his decision shall be final. The use of the words "*becomes subject to*" in Article 101 and in Article 103 clearly demonstrates that these Articles contemplate a situation where a sitting MP incurs the disqualification during his tenure and they do not apply to a D candidate who held a disqualifying office of profit before being elected as a Member of Parliament.

20. This does not mean that a Member, who was holding a disqualifying office of profit when he was elected and sworn in as a MP, is immune from challenge. Separate provisions E deal with pre-election disqualifications. Section 36 of Representation of the People Act, 1951 (Hereinafter 'RP Act') provides that the Returning Officer shall examine the nomination papers and shall decide all objections which may be made to any nomination and may after a summary inquiry, if any, reject F the nomination if he is of the view that on the date fixed for the scrutiny of nominations the candidate was either not qualified or was disqualified for being chosen to fill the seat under the provisions of Article 102 or 191. Even if his/her nomination is not rejected and a person holding a disqualifying office of profit, G is elected as a MP, an election petition can be filed under section 100(1)(a) of RP Act which provides that if the High Court is of opinion that on the date of his election, a returned candidate was disqualified from being chosen to fill the seat under the Constitution, the High Court shall declare the election H

A of the returned candidate to be void.

21. This position was clearly settled by the decisions of two Constitution Benches of this Court in *Election Commission, India v. Saka Venkata Subba Rao & Union of India,* 1953 SCR 1144, and *Brundaban Nayak vs. Election Commission of India,* (1965) 3 SCR 53. Both these decisions referred to and dealt with Article 190 and 192 which are applicable to State Legislatures and whose provisions are identical with the provisions of Articles 101 and 103 relating to Parliament. In *Saka Venkata Subba Rao*, this Court observed thus (Patanjali Shastri, C.J. at Para. 17):

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> "17. The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of members", viz., articles 190 to 193, should be read together, and as articles 191 to 193 clearly cover both pre-existing and supervening disqualifications, articles 190 to 192 should also be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in articles 190(3) and 192(1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of Legislative", and a person who, being already disqualified, gets elected, can, not inappropriately, be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound. Article191, which lays down the same set of disqualifications for election as well as for continuing as a member, and article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not

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necessarily follow that articles 190(3) and 192(1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. *Not only do the words "becomes subject" in article 190(3) and "has become subject" in article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in article 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. ... "*

(emphasis supplied)

In *Brundaban Nayak* (supra), This Court reiterated the principle enunciated in *Saka Venkata Subba Rao.* Gajendragadkar, C.J. held as follows (at Para. 7):

"... As we have already indicated, respondent No. 2's case is that the appellant has incurred the disqualification under Art. 191(1)(e) read with section 7(d) of the Act, and this disqualification has been incurred by him subsequent to his election. *It is well-settled that the disqualification to which Art. 191(1) refers, must be incurred subsequent to the election of the member. This conclusion follows from the provisions of Art. 190(3)(a).* This Article refers to the vacation of seats by members duly elected. Sub-Article (3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1) of Art.191, his

A seat shall thereupon become vacant. Incidentally, we may add that corresponding provisions with regard to the disqualification of members of both Houses of Parliament are prescribed by Articles 101, 102 and 103 of the Constitution. ..."

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[emphasis supplied]

22. Thus, it is clear that where a person was under a disqualification at the time of his election, the provisions of Articles 101(3)(a) and 103 will not apply. He/She will continue C as a Member unless the High Court in an election petition filed on that ground, declares that on the date of election, he/she was disqualified and consequently, declares his/her election to be void. It follows therefore that if an elected candidate was under a disqualification when he was elected, but no one D challenges his/her election, he/she would continue as a Member irrespective of the fact that he/she was under a disqualification when elected.

23. We now consider the third aspect of the first question. E Article 102(1)(a) provides that a person shall be disqualified for being a Member of either House of Parliament if he holds any office of profit under the Government of India or Government of any State other than an office declared by Parliament by law not to disqualify its holder. Article 101(3)(a) provides that if a Member of either House of Parliament becomes subject to any F of the disqualifications mentioned in clause (1) of Article 102, his seat shall thereupon become vacant. Article 103 provides that if any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the G question shall be referred for the decision of the President and his decision shall be final. Article 104 provides that if a person sits or holds as a Member of either House of Parliament when he knows that he is disqualified for membership thereof, he shall be liable in respect of each day on which he so sits or H votes, to a penalty of five hundred rupees to be recovered as

a debt due to the Union. A

24. The constitutional scheme therefore is that a person shall be disqualified from continuing as a Member of Parliament if he/she holds any disqualifying office of profit. Such a disqualification can result in the vacation of his/her seat when B the Member admits or declares that he/she is holding the disqualifying office of profit. However, If he/she does not make a voluntary declaration about the same, the question of whether he/she is disqualified or not, if raised, shall have to be referred for a decision by the President of India the same will be made C after obtaining the opinion of the Election Commission of India. The question of whether a particular member has incurred a disqualification can be referred for the decision of the President by any citizen by means of making an application to the President. It is only after the President decides that the Member has incurred an alleged disqualification that the particular D member's seat would become vacant. The words "*if any question arises as to whether a Member of either House of Parliament has become subject to any disqualifications*" conclusively shows that the question of whether a Member has become subject to any disqualification under clause (1) of E Article 102 has to be decided only by the President. Such a question would of course be a mixed question of fact and law. The Constitution provides the manner in which that question is to be decided. We are of the view that it is only after such a decision is rendered by the President, that the seat occupied F by an incumbent MP becomes vacant. The question of a person being disqualified under Article 102(1) and the question of his seat becoming vacant under Article 101(3)(a) though closely interlinked, are distinct and separate issues.

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25. The constitutional scheme in Articles 101 to 104 contains several irrefutable indications that the vacancy of the seat would occur only when a decision is rendered by the President under Article 103 which declares that a Member has incurred a disqualification under Article 102(1) and not at the H

A point of time when the Member is alleged to have incurred the disqualification.

26. We may first refer to the different circumstances in which a seat of a Member becomes vacant:

B (i) Clause (2) of Article 101 provides that where a person is chosen as a Member both of the Parliament and of a House of Legislature of a State then at the expiry of such period as may be specified in the rules made by the President, that C person's seat in Parliament *shall become vacant* unless he/she has previously resigned from his/her seat in the legislature of the State.

(ii) Clause 3(a) of Article 101 provides, that if a D Member of either House of Parliament becomes subject to any disqualification mentioned in clause (1) of Article 102, his/her seat *shall thereupon become vacant*. Clause (1) of Article 102 refers to five circumstances in which a person shall be E disqualified for being chosen and for being a Member of Parliament, (one of which is if he/she holds any office of profit under the government of India or government of any State other than an office declared by the Parliament by law not to disqualify its holder). Article 103 provides that if any question F arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President whose decision shall be final.

G (iii) Clause 3(a) of Article 101 also provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (2) of Article 102, his/her seat *shall* H *thereupon become vacant*. Clause (2) of Article

102 refers to a person being disqualified for being a Member of either House of Parliament on ground of defection under the Tenth Schedule to the Constitution. Paragraph (6) of Tenth Schedule provides that if any question arises about whether a Member of a House has become subject to disqualification under the Tenth Schedule, the question shall be referred for the decision of the Chairman, or as the case may be, the Speaker of such House and his/her decision shall be final.

(iv) Clause 3(b) of Article 101 provides that if a Member of either House of Parliament resigns his/her seat and his/her resignation is *accepted* by the Chairman or the Speaker, as the case may be, his/her seat shall *thereupon* become vacant.

(v) Clause (4) of Article 101 provides that if for a period of 60 days a Member of either House of Parliament is without permission of the House absent from all meetings thereof, the House *may declare* his/her seat vacant.

27. It can be seen from the above-mentioned permutations that there are several possibilities may lead to a seat becoming vacant. It is also clear that a seat becomes vacant only on after an adjudication in cases falling under Article 101(3)(a), whereas, the seats become vacant without any adjudication on the happening of specified events in respect of vacancies arising under Article 101(2), 101(3)(b) and 101(4). A vacancy under Article 101(3)(a) would occur in the case of disqualifications enumerated under Article 102(1) only after there has been a decision on the subject of such disqualification by the President. The exception to this proposition would of course arise when there is a voluntary admission of the disqualification by a particular Member to the Speaker/Chairman of the House, as the case may be. The vacancy under Article 101(3)(a) will occur in the case of the

A disqualification mentioned under Article 102(2), only after a decision has been made on the subject of such disqualification by the Chairman or the Speaker of such House as the case may be. Thus, Para. 6(1) of Tenth Schedule of the Constitution is analogous to Article 103(1) of the Constitution and both B contemplate adjudication by an authority on the subject of disqualification, albeit with respect to distinct grounds. On the other hand, in case of a person who resigns, the vacancy occurs [as per Art. 103(3)(b)] when the resignation is accepted by the Chairman or the Speaker and in such case, the C Constitution does not contemplate any adjudication on the subject of disqualification. Similarly, in the case of a Member being absent without permission for a period of 60 days the vacancy arises when the House *declares* his seat vacant and there is no provision for adjudication about such disqualification. D In the case of a person having a dual membership of Parliament and a State Legislature, on the expiration of 15 days (provided by the Prohibition of Simultaneous Membership Rules 1950), the person's seat in Parliament becomes vacant without any further adjudication.

E 28. Thus we find that for a vacancy to occur under Article 101(4), there should be a declaration by the House, for a vacancy to occur under Article 101(3)(b) there should be acceptance of resignation by the Chairman or the Speaker of the House and under Article 101(2) the vacancy arises F automatically on the expiry of 15 days after the point of time that the particular MP became a Member of the State Legislature. However, the vacancies contemplated in Article 101(3)(a) will arise only when the disqualification is decided upon and declared by the President under Article 103(1) or G declared by the Chairman or the Speaker of the House under Para. 6(1) of Tenth Schedule. Therefore in the case of vacancy under Article 101(3)(a), the vacancy of the seat is not automatic consequent upon incurring the disqualification but would occur only upon a declaration of the disqualification by the designated H authority. For example, if a Member gives up membership of

a political party or votes or abstains from voting in the House in a manner that is contrary to the directions issued by his/her political party, Para. 2 of Tenth Schedule provides that the said Member of the House shall be disqualified. However, the vacancy of his/her seat does not become operative on the day he/she gives up membership of the political party or when he/she votes or abstains from voting in a manner that is contrary to the directions issued by his/her political party. With regard to disqualification on the ground of defection, the vacancy of the seat would become operative only when a decision is rendered by the Chairman or the Speaker of the House as the case may be declaring his disqualification. Similarly in respect of the disqualification on the ground of holding an office of profit, the vacancy of the seat would become operative only when the President decides the issue on the subject of the alleged disqualification and declares that a particular Member has incurred the same. Such a decision may be made either on the basis of an adjudication where the question is disputed, or on the basis of an admission by the Member concerned.

29. We also find support for this view from a reading of Sections 147, 149 and 151A of the RP Act. Section 147 deals with a casual vacancy in the Council of States and Section 149 deals with casual vacancies in the House of People, on account of the seat of a Member *becoming vacant or being declared vacant* or his election being declared void. Section 151A provides that when such casual vacancy arises, the Election Commission shall have to fill up the vacancy by holding bye-elections within a period of six months from the date of *occurrence of the vacancy*. There is no difficulty in calculating this six month period where a Member's seat becomes vacant on account of his/her seat being declared vacant under Article 101(4) or when it becomes vacant on account of his/her resignation being accepted by the Chairman or the Speaker under Article 101(3)(b). However, the position will be different when the vacancy to be filled up arises on account of any of the disqualifications mentioned in clause (1) or clause (2) of

A Article 102. For example if a person gives up his membership of a political party or if he votes or abstains from voting in a manner that is contrary to the directions issued by his/her political party, the election cannot be held within six months from that date. Similarly when a Member accepts an office of profit B on a particular day, it is not possible to hold election within six months from the date of such acceptance of office of profit on the ground that he/she was disqualified on that day. In such cases if the vacancy of the seat is automatic, the bye-elections will have to be held within six months from such date of incurring C disqualification. However in many cases, the Election Commission may not even know about the occurrence of the disqualification. Furthermore, the very occurrence of disqualification is likely to be disputed in most cases. Therefore, even though the occurrence of a vacancy is an D automatic consequence of incurring a disqualification, the same would arise only after the disqualification is declared by the decision of the appropriate authority (President, Speaker, or Chairman of the House as the case may be).

30. Therefore, upon a proper construction of the provisions E of Articles 101 to 103, it is evident that a declaration by the President under Article 103(1) in the case of a disqualification under Art. 102(1) and a declaration by the Speaker or the Chairman under Para. 6 of Tenth Schedule in the case of a disqualification under Article 102(2) is a condition precedent F for the vacancy of the seat. If Article 101(3)(a) is interpreted otherwise, it will lead to absurd results thereby making it impossible to implement or enforce the relevant provisions of the Constitution or the RP Act. Let us visualize some of these possibilities. Assume a scenario where a political party states G that one of its Members gave up his/her membership, and on the other hand the concerned member denies the same fact. The six month period prescribed for conducting a bye-election cannot obviously be computed from the alleged date of surrender of membership. The said period should be properly H computed from the date on which a decision on the subject of

disqualification is given by the Chairman or Speaker of the House. Similarly when somebody alleges that a sitting MP had accepted an office of profit, there would be no automatic vacancy of the seat, as the question whether the Member accepted any office of profit or not, may be a disputed issue. Therefore under the constitutional scheme, the vacancy would occur only when the dispute is resolved by a decision of the President which could then result in a declaration of disqualification. Hence, it is tenable to hold that when Article 101(3)(a) states that when a Member of House of Parliament becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of Article 102, it means when the President or the Speaker/Chairman as the case may be, by his decision declares that Member had incurred the disqualification and not earlier. There is however no doubt that the decision of the President or Chairman/Speaker of the House, is merely an adjudication and confirmation of a pre-existing fact. Therefore the disqualification is not created by the decision of the President. However, the vacancy of the seat is a consequence of the decision arrived at by the designated authority.

31. In this context, we may refer to the following observations of the Constitution Bench in *Brundaban Nayak* in respect of Article 192 (which equally apply to Article 103) which makes it clear that a decision/declaration by the Governor/President is not optional, but a necessity in cases under 191(1) and 101(1). It was held that, [(1965) 3 SCR 53, Gajendragadkar, J. at Para. 14]:

> "*It is true that Art. 192(2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative Assembly, it has to be forwarded by the Governor to the Election Commission for its opinion.* It is conceivable that in some cases, complaints made to the Governor may be frivolous or fantastic; but if they are of such a character, the Election

A Commission will find no difficulty in expressing its opinion that they should be rejected straightaway. The object of Art.192 is plain. *No person who has incurred any of the disqualifications specified by Art.191(1), is entitled to continue to be a member of the Legislative Assembly of* B *a State, and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Art.190(3)(a), there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that* C *any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Art.191(1) and should, therefore, vacate his seat. The whole object of democratic elections is to constitute legislative chambers composed of members who are entitled to that status,* D *and if any member forfeits that status by reason of a subsequent disqualification, it is in the interest of the constituency which such a member represents that the matter should be brought to the notice of the Governor and decided by him in accordance with the provisions of Art.192(2).*"

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(emphasis supplied)

Kanta Kathuria also clearly held that when a Member accepts an office of profit and incurs a disqualification, and such F disqualification is retrospectively removed, the Member would continue to be a Member.

32. However, the petitioners have contended that *Kanta Kathuria* had failed to notice the two earlier Constitution Bench judgments on this aspect in *Saka Venkata Subba Rao* and G *Brundaban Nayak* and therefore, may not be good law. On a careful examination of these precedents, we find no merit in this contention. The petitioners contended that *Saka Venkata Subba Rao* had held that the seat became vacant automatically when the Member accepted the office of profit and therefore,

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retrospective removal of disqualification will not revive the membership. The issue in *Saka Venkata Subba Rao* was whether Articles 190(3) and 192(1) applied to a Member who had already incurred a disqualification at the time of being elected. The issue as to when a Member's seat would become vacant, if he accepts an office of profit during his tenure as a legislator did not arise in that case. The observations relied on (extracted in Para. 21 above) was made in the context of distinguishing between a person who had already incurred under a disqualification at the time of being elected and a person who allegedly incurred a disqualification after having becoming a Member. What this Court stated was that a person under disqualification when elected does not vacate his seat under Article 190(3)(a), but will continue until his/her election is set aside under Section 100 of RP Act. The question of when the seat of a sitting member (who incurs disqualification by accepting an office of profit during the tenure of his membership) would become vacant, neither arose for consideration and nor was it decided in the said case.' Therefore *Saka Venkata Subba Rao* is of no assistance to contend that there is an automatic vacation of seat when a Member accepts an office of profit and incurs a disqualification during his tenure.

34. In *Brundaban Nayak*, a private citizen (second respondent) complained to the Governor that the appellant had incurred disqualification under Article 191(e), subsequent to his election as a Member of the Orissa Legislative Assembly. The Governor forwarded the said complaint of the second respondent to the Election Commission which issued a notice to the appellant for an enquiry into the complaint. The appellant challenged the jurisdiction of the Election Commission to hold an enquiry into such complaint. This court while examining the said issue observed that no *person who has incurred any of the disqualifications specified by Art.191(1), is entitled to continue to be a Member of the Legislative Assembly of a*

A *State, and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Article 190(3)(a) there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any Member of the*
B *Legislative Assembly has incurred one of the disqualifications mentioned in Article 191(1) and should, therefore, vacate his seat.* The observation was thus in the context of considering the jurisdiction of the Election Commission and the right of a citizen to make a complaint under Article 191(1). In fact, the
C observations lend support to the view that it is only after the decision by the Governor under Art. 192 (corresponding to the decision by the President under Art. 103) declaring that a Member has incurred a disqualification, that such a Member's seat would become vacant.

D 35. The petitioners next placed reliance on observations in another Constitution Bench decision in *P.V. Narasimha Rao v. State (CBI/SPE)*, (1998) 4 SCC 626. S.P. Bharucha, J. noted as follows (at Para. 80):

E "*The question for our purposes is whether having regard to the terms of Articles 101, 102 and 103, the President can be said to be an authority competent to remove a member of Parliament. It is clear from Art. 101, that the seat of the member of the Parliament becomes vacant*
F *immediately upon his becoming subject to the disqualifications mentioned in Article 102, without more. The removal of a member of Parliament is occasioned by operation of law and is self operative. Reference to the President under Article 103 is required only if a question arises as to whether a Member of Parliament has earned*
G *such disqualification*; that is to say, if it is disputed. The President would then have to decide whether the Member of Parliament had become subject to the automatic disqualification contemplated by Article 101. His order would not remove the Member of Parliament from his seat
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> or office but would declare that he stood disqualified. *It would operate not with effect from the date upon which it was made but would relate back to the date upon which the disqualification was earned"*
>
> (emphasis supplied)

The aforesaid observations are made, as noticed above, in the context of examining whether the President can be said to be an authority competent to remove a Member. The question was answered by holding that he/she merely adjudicates whether a Member had incurred disqualification and he/she does not disqualify a Member. The observations relied on by the petitioner that "the removal of a Member is occasioned by operation of law and is self operative" and that "the seat of the Member of Parliament becomes vacant immediately upon his becoming subject to the disqualifications mentioned in Article 102, without more" are therefore to be understood in relation to the nature of powers vested with the President under Article 103. The question which was being considered and the context in which these observations were made was completely different. It is also of some interest to note that the said observations were made by Bharucha and Rajendra Babu, JJ (as they then were). S.C. Agrawal, J. [for himself and Dr. Anand J. (as he then was)] explained the position differently (at Para. 183):

> "... The said function of the President is in the nature of an adjudicatory function which is to be exercised in the event of a dispute giving rise to the question whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102 being raised. *If the President hold that the Member has become subject to a disqualification mentioned in clause (1) of Article 102, the Member would be treated to have ceased to be a Member on the date when he became subject to such disqualification.* If it is

A not disputed that a Member has incurred a disqualification mentioned in clause (1) of Article 102, the matter does not go to the President and the Member ceases to be a Member on the date when he incurred the disqualification. The power conferred under Article 103(1) cannot, therefore, B be regarded as a power of removal of a Member of Parliament. ..."

(emphasis supplied)

The fifth Member of the Bench (G.N. Ray, J.) in his separate C opinion agreed with S.C. Agrawal and Dr. Anand, JJ. with respect to one issue and with S.P. Bharucha & Rajendra Babu, JJ., in respect of another issue. The learned judge did not express any view with regard to Article 101. Therefore reliance on the observations of Bharucha and Rajendra Babu, JJ (as D they then were) to contend that the seat of a sitting MP stands vacated on the date on which he/she accepts the disqualifying office of profit and not on the date when the President declares him/her to be disqualified, would be contrary to the provisions of Article 101 to 104 as well as the Constitution Bench E decisions of this Court in *Kanta Kathuria*, *Brundaban Nayak* and *Indira Gandhi*. It is evident from the said decision in *P.V. Narasimha Rao* that when the President adjudicates on the subject of whether a Member was disqualified or not and gives a finding that he/she is disqualified, he/she is merely deemed F to have ceased being a Member from the date that he/she had incurred the disqualification. It follows that a member continues to be one until the decision of the President and when the outcome of the decision is that he/she is disqualified it relates back to the date when the said disqualification was incurred. If G the President holds that the Member has not incurred the disqualification, the person continues as a Member.

36. There is no doubt that the disqualification, when declared by the President will become operative from the date the Member accepted the 'office of profit'. It is also not in doubt

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that the vacation of the seat is consequential. However, the question is whether the seat of the Member become vacant without anything more when a person accepts an 'office of profit'? The obvious answer is 'no'. If the Member does not make a voluntary declaration that he/she has incurred a disqualification and if no one raises a dispute about the same, the Member would continue in spite of accepting an office of profit. There is nothing strange about this position. We have already noted that when a person who has incurred a disqualification offers himself /herself as a candidate and is subsequently elected and if no one objects and if the Returning Officer accepts the nomination and if no election petition is filed challenging the election, then he/she would continue as a Member in spite of the disqualification. Therefore, our considered opinion is that while a disqualification results in the vacation of the seat of a Member, the vacancy occurs only when the President decides and declares the disqualification under Article 103.

37. When the Amending Act retrospectively removed the disqualification with regard to certain enumerated offices, any Member who was holding such office of profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President, Section 4(2) was not attracted and consequently they continued as Members.

Re : Question (ii)

38. Which 'offices' should be excluded for the purpose of disqualification, is a question that properly lies in the legislative domain. In this case, what kind of office would amount to an 'office of profit' under the Government and whether such an office of profit is to be exempted is a matter to be considered by the Parliament. The key concern that certain offices or places held by a MP may be either incompatible with his/her

A duty as an elected representative of the people or affect his/her independence and thus weaken his/her loyalty to his/her constituency and, therefore, should disqualify the holder thereof, is a matter to be addressed by the Parliament. It is also not possible to classify and include the offices exempted from the B said disqualification in a generic sense. While making the legislation exempting any office, the question whether such office is incompatible with his/her position as a MP and whether his/her independence would be compromised and whether his/her loyalty to his/her constituency will be affected, C should no doubt be kept in mind to safeguard the independence of the Members of the legislature and to ensure that they are free from any kind of undue influence from the executive. The learned counsel for the petitioners have not advanced any contention that any of the newly exempted 'offices' suffer from D any such impropriety or will be prejudicial to the constituency or affect the independence of the member. The plea regarding violation of Article 14 merely because several other similar offices of profit are not included in the exempted category, has no basis. As each office of profit may have different effects and consequences on the Member, there is no viable basis for the E assumption that all offices of profit are equal and that all offices of profit should be excluded. The argument based on Article 14 of the Constitution is highly illogical and without any force.

39. This brings us to the last question. It is not in serious F dispute that ever since Bhargava Committee submitted its report in November, 1955, whenever an office of profit had to be exempted the matter used to be referred to a Joint Committee and its opinion whether the office should be exempted or not, was being taken and only when there was a G recommendation that a particular office should be exempted, the Act was being amended to add that office to the list of exemptions. However, this was merely a parliamentary procedure and not a constitutional convention. Once the Parliament is recognized as having the power to exempt from

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disqualification and to do so with retrospective effect, any alleged violation of any norm or traditional procedure cannot denude the power of Parliament to make a law. Nor can such law which is otherwise valid be described as unconstitutional merely because a procedure which was followed on a few occasions was not followed for the particular amendment.

40. For the aforesaid reasons, we are of the opinion that the impugned legislation is constitutionally valid and the writ petitions are without any merits and are dismissed, however, without costs.

R.P. Writ Petitions dismissed.