IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 490 OF 2005

Lily Thomas ... Petitioner

Versus

Union of India & Ors. ... Respondents

WITH

WRIT PETITION (CIVIL) NO. 231 OF 2005

Lok Prahari, through its General Secretary
S.N. Shukla ... Petitioner

Versus

Union of India & Ors. ... Respondents

JUDGEMENT

A. K. PATNAIK, J.

These two writ petitions have been filed as Public Interest Litigations for mainly declaring sub-section (4) of Section 8 of the Representation of the People Act, 1951 as *ultra vires* the Constitution.

The background facts

2. The background facts relevant for appreciating the challenge to sub-section (4) of Section 8 of the Act are that

the Constituent Assembly while drafting the Constitution intended to lay down some disqualifications for persons being chosen as, and for being, a member of either House of Parliament as well as a member of the Legislative Assembly or Legislative Council of the State. Accordingly, in the Constitution which was finally adopted by the Constituent Assembly, Article 102(1) laid down the disqualifications for membership of either House of Parliament and Article 191(1) laid down the disqualifications for membership of the Legislative Assembly or Legislative Council of the State. These two Articles are extracted hereinbelow:

> **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.

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

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

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

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any 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 specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

A reading of the aforesaid constitutional provisions will show that besides the disqualifications laid down in clauses (a), (b), (c) and (d), Parliament could lay down by law other disqualifications for membership of either House of Parliament or of Legislative Assembly or Legislative Council of the State. In exercise of this power conferred under Article 102(1)(e) and under Article 191(1)(e) of the Constitution, Parliament provided in Chapter-III of the Representation of the People Act, 1951 (for short 'the Act'), the disqualifications for membership of Parliament and State Legislatures. Sections 7 and 8 in Chapter-III of the Act, with which we are concerned in these writ petitions, are extracted hereinbelow:

> **7**. **Definitions.**—In this Chapter,—
>
> (a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State, the State Government;
>
> (b) "disqualified" means disqualified for being chosen as, and for being, a member

of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.

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

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

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

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

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

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

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

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

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

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]

[(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991], [or]

[(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971), [or]

[(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or]

[(m) the Prevention of Corruption Act, 1988 (49 of 1988); or]

[(n) the Prevention of Terrorism Act, 2002 (15 of 2002),]
[shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(2) A person convicted for the contravention of—

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

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

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); and sentenced to imprisonment for not less

than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

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

Explanation. —In this section, —

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

(I) the regulation of production or manufacture of any essential commodity;
(II) the control of price at which any essential commodity may be bought or sold;

> (III) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;
> (IV) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;
>
> (b) "drug" has the meaning assigned to it in the Durgs and Cosmetics Act, 1940 (23 of 1940);
>
> (c) "essential commodity" has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);
>
> (d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

3. Clause (b) of Section 7 of the Act quoted above defines the word “disqualified” to mean disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or of Legislative Council of State. Sub-sections (1), (2) and (3) of Section 8 of the Act provide that a person convicted of an offence mentioned in any of these sub-sections shall stand disqualified from the date of conviction and the disqualification was to continue for the specific period mentioned in the sub-section. However, sub-section (4) of Section 8 of the Act provides that

notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) in Section 8 of the Act, a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. It is this saving or protection provided in sub-section (4) of Section 8 of the Act for a member of Parliament or the Legislature of a State which is challenged in these writ petitions as *ultra vires* the Constitution.

Contentions on behalf of the Petitioners

4. Mr. Fali S. Nariman, learned Senior Counsel appearing for the petitioner in Writ Petition No. 490 of 2005 and Mr. S.N. Shukla, the General Secretary of the Petitioner in Writ Petition No. 231 of 2005, submitted that the opening words of clause (1) of Articles 102 and 191 of the Constitution make it clear that the same disqualifications are provided for a person being chosen as a member of either House of

Parliament, or the State Assembly or Legislative Council of the State and for a person being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State and therefore the disqualifications for a person to be elected as a member of either House of the Parliament or of the Legislative Assembly or Legislative Council of the State and for a person to continue as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of the State cannot be different. In support of this submission, Mr. Nariman cited a Constitution Bench judgment of this Court in *Election Commission, India v. Saka Venkata Rao* (AIR 1953 SC 210) in which it has been held that Article 191 lays down the same set of disqualifications for election as well as for continuing as a member. Mr. Nariman and Mr. Shukla submitted that sub-section (4) of Section 8 of the Act, insofar as it provides that the disqualification under sub-sections (1), (2) and (3) of Section 8 for being elected as a member of either House of Parliament or the Legislative Assembly or Legislative Council of State shall not take effect in the case of a person who is already a member of

Parliament or Legislature of a State on the date of the conviction if he files an appeal or a revision in respect of the conviction or the sentence within three months till the appeal or revision is disposed of by the Court, is in contravention of the provisions of clause (1) of Articles 102 and 191 of the Constitution.

5. Mr. Shukla referred to the debates of the Constituent Assembly on Article 83 of the Draft Constitution, which corresponds to Article 102 of the Constitution. In these debates, Mr. Shibban Lal Saksena, a member of the Constituent Assembly moved an Amendment No. 1590 on 19.05.1949 to provide that when a person who, by virtue of conviction becomes disqualified and is on the date of disqualification a member of Parliament, his seat shall, notwithstanding anything in this Article, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this provision, he

shall not sit or vote. Mr. Shukla submitted that this amendment to Article 83 of the Draft Constitution was not adopted in the Constituent Assembly. Instead, in sub-clause (e) of clause (1) of Articles 102 and 191 of the Constitution, it was provided that Parliament may make a law providing disqualifications besides those mentioned in sub-clauses (a), (b), (c) and (d) for a person being chosen as, and for being, a member of either House of Parliament and of the Legislative Assembly or Legislative Council of a State. Mr. Shukla submitted that despite the fact that a provision similar to sub-section (4) of Section 8 of the Act was not incorporated in the Constitution by the Constituent Assembly, Parliament has enacted sub-section (4) of Section 8 of the Act.

6. According to Mr. Nariman and Mr. Shukla, in the absence of a provision in Articles 102 and 191 of the Constitution conferring power on Parliament to make a provision protecting sitting members of either House of Parliament or the Legislative Assembly or the Legislative Council of a State, from the disqualifications it lays down for a person being chosen as a member of Parliament or a State

Legislature, Parliament lacks legislative powers to enact sub-section (4) of Section 8 of the Act and sub-section (4) of Section 8 of the Act is therefore *ultra vires* the Constitution.

7. Mr. Nariman next submitted that the legal basis of sub-section (4) of Section 8 of the Act is based on an earlier judicial view in the judgment of a Division Bench of this Court in *Shri Manni Lal v. Shri Parmal Lal and Others* [(1970) 2 SCC 462] that when a conviction is set aside by an appellate order of acquittal, the acquittal takes effect retrospectively and the conviction and the sentence are deemed to be set aside from the date they are recorded. He submitted that in *B.R. Kapur v. State of T.N. and Another* [(2001) 7 SCC 231] a Constitution Bench of this Court reversed the aforesaid judicial view and held that conviction, and the sentence it carries, operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well. He submitted that this later view has been reiterated by a Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* [(2005) 1 SCC 754]. Mr. Nariman argued that thus as soon as a person is convicted

of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act, he becomes disqualified from continuing as a member of Parliament or of a State Legislature notwithstanding the fact that he has filed an appeal or a revision against the conviction and there is no legal basis for providing in sub-section (4) of Section 8 of the Act that his disqualification will not take effect if he files an appeal or revision within three months against the order of conviction. He submitted that in case a sitting member of Parliament or State Legislature feels aggrieved by the conviction and wants to continue as a member notwithstanding the conviction, his remedy is to move the Appellate Court for stay of the order of conviction. He cited the decision in *Navjot Singh Sidhu v. State of Punjab and Another* ([2007) 2 SCC 574] in which this Court has clarified that under sub-section (1) of Section 389 of the Code of Criminal Procedure, 1973 power has been conferred on the Appellate Court not only to suspend the execution of the sentence and to grant bail, but also to suspend the operation of the order appealed against, which means the order of conviction. He submitted that in appropriate cases,

the Appellate Court may stay the order of conviction of a sitting member of Parliament or State Legislature and allow him to continue as a member notwithstanding the conviction by the trial court, but a blanket provision like sub-section (4) of Section 8 of the Act cannot be made to keep the disqualification pursuant to conviction in abeyance till the appeal or revision is decided by the Appellate or Revisional Court.

8. Mr. Nariman and Mr. Shukla submitted that in *K. Prabhakaran v. P. Jayarajan etc.* (supra) the validity of sub-section (4) of Section 8 of the Act was not under challenge and only a reference was made to the Constitution Bench of this Court on certain questions which arose in civil appeals against judgments delivered by the High Court in election cases under the Act. They submitted that the Constitution Bench of this Court framed three questions with regard to disqualification of a candidate under Section 8 of the Act and while answering question no.3, the Constitution Bench indicated reasons which seem to have persuaded Parliament to classify sitting members of the House into a separate category and to provide in sub-section (4) of Section 8 of the

Act that if such sitting members file appeal or revision against the conviction within three months, then the disqualification on account of their conviction will not take effect until the appeal or revision is decided by the appropriate court. They submitted that the opinion expressed by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra) regarding the purpose for which Parliament classified sitting members of Parliament and State Legislatures into a separate category and protected them from the disqualifications by the saving provision in sub-section (4) of Section 8 of the Act are *obiter dicta* and are not binding *ratio* on the issue of the validity of sub-section (4) of Section 8 of the Act.

9. Mr. Nariman and Mr. Shukla submitted that sub-section (4) of Section 8 of the Act, in so far as it does not provide a rationale for making an exception in the case of members of Parliament or a Legislature of a State is arbitrary and discriminatory and is violative of Article 14 of the Constitution. They submitted that persons to be elected as members of Parliament or a State Legislature stand on the same footing as sitting members of Parliament and State

Legislatures so far as disqualifications are concerned and sitting members of Parliament and State Legislatures cannot enjoy the special privilege of continuing as members even though they are convicted of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act.

Contentions of behalf of the respondents

10. Mr. Siddharth Luthra, learned ASG appearing for the Union of India in Writ Petition (C) 231 of 2005, submitted that the validity of sub-section (4) of Section 8 of the Act has been upheld by the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra). He submitted that while answering question no.3, the Constitution Bench has held in *Prabhakaran's* case that the purpose of carving out a saving in sub-section (4) of Section 8 of the Act is not to confer an advantage on sitting members of Parliament or of a State Legislature but to protect the House. He submitted that in para 58 of the judgment the Constitution Bench has explained that if a member of the House was debarred from sitting in the House and participating in the proceedings, no sooner the conviction was pronounced followed by sentence of imprisonment, entailing forfeiture of his membership,

then two consequences would follow: first, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong and the Government in power may be surviving on a razor-edge thin majority where each member counts significantly and disqualification of even one member may have a deleterious effect on the functioning of the Government; second, a bye-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted member being acquitted by a superior criminal court. Mr. Luthra submitted that for the aforesaid two reasons, Parliament has classified the sitting members of Parliament or a State Legislature in a separate category and provided in sub-section (4) of Section 8 of the Act that if on the date of incurring disqualification, a person is a member of Parliament or of a State Legislature, such disqualification shall not take effect for a period of three months from the date of such disqualification to enable the sitting member to file appeal or revision challenging his conviction, and sentence and if such an appeal or revision is filed, then

applicability of the disqualification shall stand deferred until such appeal or revision is disposed of by the appropriate Court.

11. Mr. Luthra next submitted that the reality of the Indian judicial system is that acquittals in the levels of the Appellate Court such as the High Court are very high and it is for this reason that Parliament has provided in sub-section (4) of Section 8 of the Act that disqualification pursuant to conviction or sentence in the case of sitting members should stand deferred till the appeal or revision is decided by the Appellate or the Revisional Court. He submitted that the power to legislate on disqualification of members of Parliament and the State Legislature conferred on Parliament carries with it the incidental power to say when the disqualification will take effect. He submitted that the source of legislative power for enacting sub-section (4) of Section 8 of the Act is, therefore, very much there in Articles 101(1)(e) and 191(1)(e) of the Constitution and if not in these articles of the Constitution, in Article 246(1) read with Entry 97 of List I of the Seventh Schedule of the Constitution and Article 248 of the Constitution, which confer powers on

Parliament to legislate on any matter not enumerated in List II and List III of the Seventh Schedule of the Constitution.

12. Mr. Paras Kuhad, learned ASG, appearing for the Union of India in Writ Petition (C) No.490 of 2005 also relied on the judgment of the Constitution Bench of this Court in *K. Prabhakaran v. P. Jayarajan etc.* (supra) on the validity of sub-section (4) of Section 8 of the Act and the reasoning given in the answer to question no.3 in the aforesaid judgment of this Court. He further submitted that sub-section (4) of Section 8 of the Act does not lay down disqualifications for members of Parliament and the State Legislatures different from the disqualifications laid down for persons to be chosen as members of Parliament and the State Legislatures in sub-sections (1), (2) and (3) of Section 8 of the Act. He submitted that sub-section (4) of Section 8 of the Act merely provides that the very same disqualifications laid down in sub-sections (1), (2) and (3) of Section 8 of the Act shall in the case of sitting members of Parliament and State Legislatures take effect only after the appeal or revision is disposed of by the Appellate or Revisional Court as the case may be if an appeal or revision

is filed against the conviction. He submitted that Parliament has power under Article 102(1)(e) of the Constitution and Article 191(1)(e) of the Constitution to prescribe when exactly the disqualification will become effective in the case of sitting members of Parliament or the State Legislature with a view to protect the House. He also referred to the provisions of Articles 101(3)(a) and 190 (3)(a) of the Constitution to argue that a member of Parliament or a State Legislature will vacate a seat only when he becomes subject to any disqualification mentioned in clause (1) of Article 102 or clause (1) of Article 191, as the case may be, and this will happen only after a decision is taken by the President or the Governor that the member has become disqualified in accordance with the mechanism provided in Article 103 or Article 192 of the Constitution.

13. Mr. Kuhad further submitted that Mr. Nariman is not right in his submission that the remedy of a sitting member who is convicted or sentenced and gets disqualified under sub-sections (1), (2) or (3) of Section 8 of the Act is to move the Appellate Court under Section 389 of the Code of Criminal Procedure for stay of his conviction. He submitted

that the Appellate Court does not have any power under Section 389, Cr.P.C. to stay the disqualification which would take effect from the date of conviction and therefore a safeguard had to be provided in sub-section (4) of Section 8 of the Act that the disqualification, despite the conviction or sentence, will not have effect until the appeal or revision is decided by the Appellate or the Revisional Court. He submitted that there is, therefore, a rationale for enacting sub-section (4) of Section 8 of the Act.

Findings of the Court

14. We will first decide the issue raised before us in these writ petitions that Parliament lacked the legislative power to enact sub-section (4) of Section 8 of the Act as this issue was not at all considered by the Constitution Bench of this Court in the aforesaid case of *K. Prabhakaran* (supra). In *The Empress v. Burah and Another* [(1878) 5 I.A. 178] the Privy Council speaking through Selborne J. laid down the following fundamental principles for interpretation of a written constitution laying down the powers of the Indian Legislature:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribes these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

The correctness of the aforesaid principles with regard to interpretation of a written constitution has been re-affirmed by the majority of Judges in *Kesavananda Bharti* v. *State of Kerala* (AIR 1973 SC 1465) (See the *Constitutional Law of India*, H.M. Seervai, Fourth Edition, Vol.I, para 2.4 at page

174). Hence, when a question is raised whether Parliament has exceeded the limits of its powers, courts have to decide the question by looking to the terms of the instrument by which affirmatively, the legislative powers were created, and by which negatively, they are restricted.

15. We must first consider the argument of Mr. Luthra, learned Additional Solicitor General, that the legislative power to enact sub-section (4) of Section 8 of the Act is located in Article 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution. Articles 246 and 248 of the Constitution are placed in Chapter I of Part XI of the Constitution of India. Part XI is titled "Relations between the Union and the States" and Chapter I of Part XI is titled "Legislative Relations". In Chapter I of Part XI, under the heading "Distribution of Legislative Powers" Articles 245 to 255 have been placed. A reading of Articles 245 to 255 would show that these relate to distribution of legislative powers between the Union and the Legislatures of the States. Article 246(1) provides that Parliament has exclusive power to make laws with respect

to any of the matters enumerated in List I in the Seventh Schedule of the Constitution and under Entry 97 of List I of the Seventh Schedule of the Constitution, Parliament has exclusive power to make law with respect to any other matter not enumerated in List II or List III. Article 248 similarly provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List (List III) or State List (List II) of the Seventh Schedule of the Constitution. Therefore, Article 246(1) read with Entry 97 and Article 248 only provide that in residuary matters (other than matters enumerated in List II and List III) Parliament will have power to make law. To quote from Commentary on the Constitution of India by Durga Das Basu (8th Edition) Volume 8 at page 8988:

> "In short, the principle underlying Article 248, read with Entry 97 of List I, is that a written Constitution, which divides legislative power as between two legislatures in a federation, cannot intend that neither of such Legislatures shall go without power to legislate with respect of any subject simply because that subject has not been specifically mentioned nor can be reasonably comprehended by judicial interpretation to be included in any of the Entries in the Legislative Lists. To meet such a situation, a residuary power is provided, and in the Indian

> Constitution, this residuary power is vested in the Union Legislature. Once, therefore, it is found that a particular subject-matter has not been assigned to the competence of the State Legislature, "it leads to the irresistible inference that (the Union) Parliament would have legislative competence to deal with the subject-matter in question."

Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative

Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr. Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Articles 246(1) read with Entry 97 of List I of the Seventh Schedule and 248 of the Constitution, if not in Articles 102 (1)(e) and 191 (1)(e) of the Constitution.

16. Articles 102(1)(e) and 191(1)(e) of the Constitution, which contain the only source of legislative power to lay down disqualifications for membership of either House of Parliament and Legislative Assembly or Legislative Council of a State, provide as follows:

> "102(1)(e). A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament-(e) if he is so disqualified by or under any law made by Parliament."

> "191(1)(e). "A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—(e) if he is

> so disqualified by or under any law made by Parliament.

A reading of the aforesaid two provisions in Articles 102(1)(e) and 191(1)(e) of the Constitution would make it abundantly clear that Parliament is to make one law for a person to be disqualified for being chosen as, and for being, a member of either House of Parliament or Legislative Assembly or Legislative Council of the State. In the language of the Constitution Bench of this Court in *Election Commission, India v. Saka Venkata Rao* (supra), Article 191(1) [which is identically worded as Article 102(1)] lays down "the same set of disqualifications for election as well as for continuing as a member". Parliament thus does not have the power under Articles 102(1)(e) and 191(1)(e) of the Constitution to make different laws for a person to be disqualified for being chosen as a member and for a person to be disqualified for continuing as a member of Parliament or the State Legislature. To put it differently, if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature. This is so because the

language of Articles 102(1)(e) and 191(1)(e) of the Constitution is such that the disqualification for both a person to be chosen as a member of a House of Parliament or the State Legislature or for a person to continue as a member of Parliament or the State Legislature has to be the same.

17. Mr. Luthra and Mr. Kuhad, however, contended that the disqualifications laid down in sub-sections (1),(2) and (3) of Section 8 of the Act are the same for persons who are to continue as members of Parliament or a State Legislature and sub-section (4) of Section 8 of the Act does not lay down a different set of disqualifications for sitting members but merely states that the same disqualifications will have effect only after the appeal or revision, as the case may be, against the conviction is decided by the Appellate or the Revisional Court if such appeal or revision is filed within 3 months from the date of conviction. We cannot accept this contention also because of the provisions of Articles 101(3)(a) and 190(3)(a) of the Constitution which are quoted hereinbelow:

"**101(3)(a). Vacation of seats**.-
(1) …….
(2) …….
(3) If a member of either House of Parliament-
(a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 102.
his seat shall thereupon become vacant"

"**190(3)(a). Vacation of seats**.-
(1) …….
(2) …….
(3) If a member of a House of the Legislature of a State- (a) becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 191.
his seat shall thereupon become vacant"

Thus, Article 101(3)(a) provides that if a member of either House of Parliament becomes subject to any of the disqualifications mentioned in clause (1), his seat shall thereupon become vacant and similarly Article 190(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), his seat shall thereupon become vacant. This is the effect of a disqualification under Articles 102(1) and 190(1) incurred by a member of either House of Parliament or a House of the State Legislature. Accordingly, once a person who was a member of either House of Parliament or House of the State Legislature becomes

disqualified by or under any law made by Parliament under Articles 102(1)(e) and 191(1)(e) of the Constitution, his seat automatically falls vacant by virtue of Articles 101(3)(a) and 190(3)(a) of the Constitution and Parliament cannot make a provision as in sub-section (4) of Section 8 of the Act to defer the date on which the disqualification of a sitting member will have effect and prevent his seat becoming vacant on account of the disqualification under Article 102(1)(e) or Article 191(1)(e) of the Constitution.

18. We cannot also accept the submission of Mr. Kuhad that until the decision is taken by the President or Governor on whether a member of Parliament or State Legislature has become subject to any of the disqualifications mentioned in clause (1) of Article 102 and Article 191 of the Constitution, the seat of the member alleged to have been disqualified will not become vacant under Articles 101(3)(a) and 190(3)(a) of the Constitution. Articles 101(3)(a) and 190(3)(a) of the Constitution provide that if a member of the House becomes subject to any of the disqualifications mentioned in clause (1), "his seat shall thereupon become vacant". Hence, the seat of a member who becomes subject to any of the

disqualifications mentioned in clause (1) will fall vacant on the date on which the member incurs the disqualification and cannot await the decision of the President or the Governor, as the case may be, under Articles 103 and 192 respectively of the Constitution. The filling of the seat which falls vacant, however, may await the decision of the President or the Governor under Articles 103 and 192 respectively of the Constitution and if the President or the Governor takes a view that the member has not become subject to any of the disqualifications mentioned in clause (1) of Articles 102 and 191 respectively of the Constitution, it has to be held that the seat of the member so held not to be disqualified did not become vacant on the date on which the member was alleged to have been subject to the disqualification.

19. The result of our aforesaid discussion is that the affirmative words used in Articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State

and for a person who is a sitting member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution.

20. Looking at the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit

Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution.

21. We do not also find merit in the submission of Mr. Luthra and Mr. Kuhad that if a sitting member of Parliament or the State Legislature suffers from a frivolous conviction by the trial court for an offence given under sub-section (1), (2) or (3) of Section 8 of the Act, he will be remediless and he will suffer immense hardship as he would stand disqualified on account of such conviction in the absence of sub-section (4) of Section 8 of the Act. A three-Judge Bench of this Court in *Rama Narang v. Ramesh Narang & Ors.* [(1995) 2 SCC 513] has held that when an appeal is preferred under Section 374 of the Code of Criminal Procedure [for short 'the Code'] the appeal is against both the conviction and sentence and, therefore, the Appellate Court in exercise of its power under Section 389(1)

of the Code can also stay the order of conviction and the High Court in exercise of its inherent jurisdiction under Section 482 of the Code can also stay the conviction if the power was not to be found in Section 389(1) of the Code. In *Ravikant S. Patil v. Sarvabhouma S. Bagali* [(2007) 1 SCC 673], a three-Judge Bench of this Court, however, observed:

> "It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.

In the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from

contesting the election to the Legislative Assembly under sub-section (3) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Indian Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-section (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the Appellate Court under Section 389 of the Code or the High Court under Section 482 of the Code.

22. As we have held that Parliament had no power to enact sub-section (4) of Section 8 of the Act and accordingly sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution, it is not necessary for us to go into the other issue raised in these writ petitions that sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution. It would have been necessary for us to go into this question only if sub-section (4) of Section 8 of the Act was held to be within the powers of the Parliament. In other

words, as we can declare sub-section (4) of Section 8 of the Act as *ultra vires* the Constitution without going into the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution, we do not think it is necessary to decide the question as to whether sub-section (4) of Section 8 of the Act is violative of Article 14 of the Constitution.

23. The only question that remains to be decided is whether our declaration in this judgment that sub-section (4) of Section 8 of the Act is *ultra vires* the Constitution should affect disqualifications already incurred under sub-sections (1), (2) and (3) of Section 8 of the Act by sitting members of Parliament and State Legislatures who have filed appeals or revisions against their conviction within a period of three months and their appeals and revisions are still pending before the concerned court. Under sub-sections (1), (2) and (3) of Section 8 of the Act, the disqualification takes effect from the date of conviction for any of the offences mentioned in the sub-sections and remains in force for the periods mentioned in the sub-sections. Thus, there may be several sitting members of

Parliament and State Legislatures who have already incurred disqualification by virtue of a conviction covered under sub-section (1), or sub-section (2) or sub-section (3) of Section 8 of the Act. In *Golak Nath and Others* vs. *State of Punjab and Another* (AIR 1967 SC 1643), Subba Rao, C.J. speaking on behalf of himself, Shah, Sikri, Shelat and Vaidialingam, JJ. has held that Articles 32, 141, 142 of the Constitution are couched in such a wide and elastic terms as to enable this Court to formulate legal doctrines to meet the ends of justice and has further held that this Court has the power not only to declare the law but also to restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise, that were effected on the basis of the earlier law. Sitting members of Parliament and State Legislature who have already been convicted for any of the offences mentioned in sub-section (1), (2) and (3) of Section 8 of the Act and who have filed appeals or revisions which are pending and are accordingly saved from the disqualifications by virtue of sub-section (4) of Section 8 of the Act should not, in our considered opinion, be affected by the declaration now made by us in

this judgment. This is because the knowledge that sitting members of Parliament or State Legislatures will no longer be protected by sub-section (4) of Section 8 of the Act will be acquired by all concerned only on the date this judgment is pronounced by this Court. As has been observed by this Court in *Harla v. State of Rajasthan* (AIR 1951 SC 467):

> "……..it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with exercise of due diligence have acquired any knowledge."

However, if any sitting member of Parliament or a State Legislature is convicted of any of the offences mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act and by virtue of such conviction and/or sentence suffers the disqualifications mentioned in sub-sections (1), (2) and (3) of Section 8 of the Act after the pronouncement of this judgment, his membership of Parliament or the State Legislature, as the case may be, will not be saved by sub-section (4) of Section 8 of the Act which we have by this judgment declared as *ultra vires* the Constitution

notwithstanding that he files the appeal or revision against the conviction and /or sentence.

24. With the aforesaid declaration, the writ petitions are allowed. No costs.

.....J.
(A. K. Patnaik)

.....J.
(Sudhansu Jyoti Mukhopadhaya)

New Delhi,
July 10, 2013.