

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)
PERMOHONAN SEMAKAN KEHAKIMAN NO. R6(R3)-25-25-2009

Dalam perkara Fasal-Fasal XV(2), XVI(6) dan XVI(7) Undang-Undang Tubuh Kerajaan Negeri Perak.

Dan

Dalam perkara permohonan di bawah Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980.

Dan

Dalam perkara remedi-remedi dan relif-relif di bawah seksyen 25(2) dan perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964.

Dan

Dalam perkara remedi-remedi dan relif-relif di bawah seksyen-seksyen 41, 44, 50, 51 dan 52 Akta Spesifik Relif 1950.

Dan

Dalam perkara Artikel 8 Perlembagaan Persekutuan.

Dan

Dalam perkara permohonan untuk antara
lainnya deklarasi, writ bersifat 'quo warranto',
injunksi dan gantirugi.

Dan

Dalam perkara pertikaian undang-undang di
antara Dato' Seri Ir Hj Mohammad Nizar bin
Jamaluddin dan Dato' Dr Zambry bin Abd. Kadir
berhubung dengan jawatan Menteri Besar
Perak Darul Ridzuan

ANTARA

**DATO' SERI IR HJ MOHAMMAD NIZAR BIN
JAMALUDIN**

...

PEMOHON

DAN

DATO' DR ZAMBRY BIN ABD. KADIR

...

RESPONDEN

KORUM

**DATO' ABDUL AZIZ BIN ABDUL RAHIM
HAKIM**

**MAHKAMAH TINGGI KUALA LUMPUR
(BAHAGIAN RAYUAN KUASA-KUASA KHAS)**

JUDICIAL REVIEW NO. R3-25-25-2009

GROUND OF JUDGMENT

In this judicial review, the applicant seeks the following relief:

- (A) A declaratory order that the applicant is and at all material times the Menteri Besar of Negeri Perak ["MB Perak"].

- (B) A declaratory order on the interpretation of Article XV1(6) of the Perak's State Constitution that in the circumstances where:
 - (i) MB Perak desires, and has advised, the dissolution of the State of Perak Legislative Assembly ["the State Assembly"];
 - (ii) The State Assembly not dissolved;
 - (iii) There is no vote of confidence was passed and accepted by and in the State Legislative Assembly against the MB Perak; and
 - (iv) There is no resignation of the office of the MB Perak.whether the office of the MB Perak falls vacant or has been vacated.

- (C) A writ in the nature of 'quo warranto' be issued to the respondent commanding the respondent to show cause and to give information as to how and under what basis or power or which authority the respondent purported right to hold the office of MB Perak and purportedly and/or to carry out and/or to discharge the responsibilities, functions and duties of the MB Perak.
- (D) Declaratory order that the respondent had no right or did not hold the office of MB Perak and is not the MB Perak at any material time.
- (E) An injunction order to restrain the respondent and/or respondent's agents, servants from acting and/or carrying out and/or discharge the responsibilities, functions and duties of MB Perak.

In paragraph (f), (g) and (h) of Enclosure 1, the applicant also prays for punitive, aggravated and exemplary damages; an inquiry and assessment of damages and costs respectively and other consequential orders. However at the end of the hearing leading counsel for the applicant

Tuan Haji Sulaiman Abdullah, informed that the applicant is not pursuing the prayers in paragraph (f), (g) and (h) in Enclosure 1. Thus the only prayers left to dealt with are prayers in paragraph (1) (a) to (e).

The application is supported by two affidavits. The first affidavit is the applicant's affidavit affirmed on 12.2.2009 and the second affidavit is by Sivakumar a/l Varatharaju Naidu also affirmed on 12.2.2009.

In the statement filed together with the application pursuant to O53 r3(2) RHC 1980 the applicant states inter alia that he is a member of a political party known as Parti Islam Se Malaysia [PAS] and a member of the State Legislative Assembly for Pasir Panjang (N15) and the MB Perak. He also states that the grounds for his application are as stated in the two affidavits mentioned above. In summary these grounds are: the applicant is the MB Perak appointed on 17.3.2008. However on 6.2.2009 the respondent claimed to have hold the office of MB Perak and the applicant challenged this claim. The applicant states that at any material time there was never a no vote of confidence against him as MB Perak in the State Legislative Assembly and one was never proposed. The applicant also states that he has not resigned or being dismissed

from the office of the MB Perak. Further the applicant states that he has requested for the dissolution of the State Legislative Assembly as it is appropriate and convenient to hold an election for the State Legislative Assembly to overcome the deadlock in the State Legislative Assembly and in affairs and administration of the State Government of Perak. However, the request was rejected. In the circumstances the applicant states that he is still the lawful MB Perak. However, actions were taken to restrain the applicant from carrying out his duties as the MB Perak including evicting the applicant from the office of the MB Perak.

The applicant claims that the respondent meanwhile continues to represent to the people of Malaysia that the respondent is the MB Perak and that this has confused the people. The statement also states that the respondent has and still is unlawfully usurp the office of the MB Perak and carrying out the responsibilities, function and duties of MB Perak illegally and in contravention of the Perak's State Constitution.

The applicant goes on to say that the respondent has no basis whatsoever, power or authority at law to hold, act and carry out the responsibilities, functions and duties of the MB Perak under the Perak's

State Constitution. The applicant denies that the respondent is the MB Perak. Therefore the applicant states that there is a dispute as to the constitutional law between the applicant and respondent on the status of the office of the MB Perak. In particular, the applicant states that under the Perak's State Constitution the applicant does not hold office of MB Perak at the pleasure of His Royal Highness. There is no provision under the Perak's State Constitution to direct the applicant to resign, and that if the applicant refuses, the office of MB Perak deems vacant. The applicant also states that there is no provision for the dismissal of the MB Perak under the Perak's State Constitution. It is further stated that the issue of losing the confidence of the majority of the State Legislative Assembly against the applicant as MB Perak never arises and that in whatever circumstances, the issue of lost of confidence of the majority of the State Legislative Assembly against the applicant was never decided by the State Legislative Assembly which is the sole authority to determine that issue. Finally the applicant states that the disputes as stated therein require the court deliberations and inter alia the interpretation of Article XVI(6) of Perak's State Constitution.

The Honourable Attorney General applied to intervene in this proceedings on the grounds inter alia that the issues involved are of public interest and public importance and also on the ground of public policy as the issues for determination by the court require the court's interpretation on several constitutional provisions of the Perak State Constitution, in particular Article XVI(6), which are similar or pari material with the provisions in the Federal Constitution, in particular Article 43(4). The court granted the application and the Attorney General appeared in this proceedings as an intervener.

In his affidavit in support (Enclosure 3) of the application, affirmed on 12.2.2009, the applicant deposed that in the general election for the State Legislative Assembly held on 8.3.2008, the Pakatan Rakyat (which consists of three parties namely Parti Keadilan Rakyat [PKR], PAS and Democratic Action Parti [DAP]) [for convenience all three parties shall be referred to as the PAKATAN] won a total of 31 seats in the State of Perak Legislative Assembly whereas the Barisan Nasional won 28 seats. Thus, the PAKATAN has a clear simple majority of 3 seats. On that basis, the PAKATAN led by the applicant had approached His Royal Highness the Sultan of Perak for consent to form a Government in the State of Perak.

This was granted and the applicant was duly sworn in as the MB Perak on 17.3.2008 pursuant to Article XII and XV1 of Perak's State Constitution. A copy of the instrument of appointment of the applicant as MB Perak is exhibited as Exhibit MNJ-2 in the applicant's affidavit in support.

In paragraph 11 of his affidavit, the applicant deposed that by letters dated 30.1.2009 addressed to the Speaker, two of the elected assemblymen from PKR namely Encik Jamaluddin Mohd Radzi for Behrang (N59) and Encik Mohd Osman Mohd Jailu for Changkat Jering (N14) had resigned as members of State of Perak Legislative Assembly effective from 30.1.2009. The two letters are exhibited as Exhibit MNJ-3 in the affidavit. The applicant also affirmed that the Speaker had accepted the resignation of the two PKR assemblymen and had declared that their seats for Behrang (N59) and Changkat Jering (N14) respectively, vacant and that the Speaker had also informed the Suruhanjaya Pilihan Raya Malaysia about the matter. The applicant further deposed that on 2.2.2009 he had audience with His Royal Highness the Sultan of Perak to inform His Royal Highness about the

resignation letter of Jamaluddin and Osman and the current political situation then.

Then the applicant said in his affidavit that he was informed by the Speaker that by letter dated 3.2.2009 addressed to the Speaker another member of the State Legislative Assembly had resigned as member of the State Legislative Assembly effective from 3.2.2009. That member was assemblywomen from DAP Puan Hee Yit Foong for Jelapang (N31). The letter of resignation by Puan Hee Yit Foong is exhibited as Exhibit MNJ-4.

The applicant deposed that the Speaker again accepted the resignation of Puan Hee Yit Foong for Jelapang pursuant to Article XXV Perak's State Constitution and declared that the seat for Jelapang vacant.

For convenience from hereon all the three members of the State Legislative Assembly above who have purportedly resigned their positions will be referred to collectively as 'the three ADUN'.

Sivakumar a/l Varatharaju, the Speaker, also affirmed an affidavit [Enclosure 4] on 12.2.2009 as the applicant's second affidavit in support.

In his affidavit, Sivakumar supports the depositions in the applicant's affidavit in support as to the purported resignation of the three ADUN and the fact that he had declared the 3 seats involved as vacant and has informed the SPR accordingly.

The above facts are not in dispute. However it pertinent to note that in the letters of resignations in Exhibit MNJ-3 and MNJ-4, the respective assemblyman and assemblywoman merely states that he or she resigned as member of the State Legislative Assembly with immediate effect. The 2nd paragraph of Exhibit MNJ-3, the resignation letter by Osman and Jamaluddin, reads:

"Saya dengan ini secara rasmi meletak jawatan sebagai Ahli Dewan Undangan Negeri Perak Darul Ridzuan dengan kadar segera."

And the first paragraph of Exhibit MNJ-4, the resignation letter by Puan Hee Yit Foong, reads:

"Saya, seorang Ahli Dewan Undangan Negeri Perak dengan ini ingin memberitahu Tuan bahawa saya meletak jawatan sebagai

Ahli Dewan Undangan Negeri Perak kawasan N.31 Jelapang
dengan serta merta.”

There is nothing in the letters that shows the assemblymen and woman concerned has resigned because they no longer supported the PAKATAN government or had lost confidence in the applicant. This observation is pertinent and relevant in the light of the respondent's contention that the applicant as MB Perak has lost the confidence or command of the majority of the State Legislative Assembly; a fact which is denied by the applicant and in dispute.

As a result of the three resignations, none of the two alliances group in the State Legislative Assembly i.e the PAKATAN or the Barisan Nasional has a clear majority to form a legitimate government as of 3.2.2009. Each has only 28 seats. In the circumstances, the applicant then wrote a letter dated 4.2.2009 which is Exhibit MNJ-5 addressed to His Royal Highness the Sultan of Perak requesting for the dissolution of the State Legislative Assembly. The material part of the letter reads:

“Ehwal adalah patik dengan segala hormat dan takzimnya
merafakkan sembah maklum bahawa patik mohon perkenan ke
Bawah Duli Tuanku untuk pembubaran Dewan Negeri Perak

Darul Ridzuan. Patik dengan sukacita dan besar hati pohon
apalah sudi kiranya Ke Bawah Duli Tuanku perkenan maklum di
atas perkara ini.”

Again it is to be noted that in the letter Exhibit MNJ-5 to His Royal Highness, the applicant did not make any reference to any provision in the Perak’s State Constitution for dissolution of the State Legislative Assembly. The letter is a general request to His Royal Highness to exercise His Royal Highness royal prerogative to dissolve the State Legislative Assembly in the light of the recent development in the political scene of Perak as deposed in the applicant affidavit in support.

At this juncture it will be appropriate to refer to Article XXXVI Perak’s State Constitution on His Royal Highness power to summon, prorogue or dissolve the State Legislative Assembly. Article XXXVI (1) and (2) of Perak’s State Constitution reads:

“(1) His Royal Highness shall from time to time summon the Legislative Assembly and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session.

(2) His Royal Highness may prorogue or dissolve the Legislative Assembly."

Article XXXVI(2) above is the general power given to His Royal Highness to prorogue or dissolve the State Legislative. The Article is silent as to the time or reason for doing so. The power is exercised at absolute discretion of His Royal Highness and may be exercised at any time on the advice of the MB Perak.

In the absence of reference to any specific provisions of the Perak's State Constitution by the applicant in his letter Exhibit MNJ-5 to His Royal Highness requesting His Royal Highness consent for the dissolution of the State Legislative Assembly, it would be reasonable to think that in his letter Exhibit MNJ-5 the applicant was appealing to His Royal Highness to exercise His Royal Highness royal prerogative under Article XXXVI (2) of the Perak's State Constitution to dissolve the State Legislative Assembly to overcome the deadlock of having no clear majority by either the PAKATAN or Barisan Nasional in the State Legislative Assembly as deposed by the applicant in paragraph 17 of his affidavit in support. I say reasonable because that Article is the general provisions for dissolution of the State Legislative Assembly and also

because it is evident that the applicant's leadership of the government was never challenged on a vote of no confidence in the State Legislative Assembly up to the 4.2.2009.

However, there was no decision by His Royal Highness on the request for the dissolution of State Legislative Assembly made by the applicant in his letter Exhibit MNJ-5. Instead the applicant was summoned by His Royal Highness for an audience at Istana Kinta. And that until the Office of His Royal Highness issued the Media Statement Exhibit PS-7 on 5.2.2009, announcing that respondent has command the confidence of the majority of members of the Legislative Assembly, there was a deadlock.

The applicant deposed in his affidavit in support that he did have an audience with His Royal Highness on 4.2.2009 at about 5.00pm; and at that audience he again requested the consent of His Royal Highness to dissolve the State Legislative Assembly. This fact is not disputed. What is disputed is what actually transpired during the royal audience (at which audience the State Legal Advisor Dato' Ahmad Kamal Mohd Said was also presence) with regard to the request by the applicant to dissolve the State Legislative Assembly.

The State Legal Advisor in his affidavit affirmed on 8.4.2009 [Enclosure 28A] deposed, in paragraph 7 of the affidavit, that the applicant informed His Royal Highness that two assemblymen and one assemblywoman have left the PAKATAN and that there was political uncertainty as to which alliance, the PAKATAN or Barisan Nasional that has the command of the majority of the members of the State Legislative Assembly. The State Legal Advisor also deposed that the applicant has requested that the State Legislative Assembly be dissolved in accordance with Article XVI(6) Perak's State Constitution and that at the same time the applicant handed to His Royal Highness a Proclamation for that purpose to be assented to by the His Royal Highness. The Proclamation is exhibited as Exhibit PSLA-1 to the State Legal Advisor's affidavit. The State Legal Advisor further deposed that His Royal Highness informed the applicant that His Royal Highness required some time to consider the request by the applicant to dissolve the State Legislative Assembly pursuant to Article XVI(6) Perak's State Constitution and did not assented to the Proclamation on that day. The audience ended at about 5.30 p.m. that day.

The applicant disputed the deposition by the State Legal Advisor. In his third affidavit in support [Enclosure 31], affirmed on 20.4.2009, the applicant averred that the State Legal Advisor had affirmed the affidavits of 8.4.2009 and 21.4.2009, [Enclosure 28A and 34 respectively] as interested person because he had, as the State Legal Advisor, acted and represented the respondent in this case prior to his withdrawal from the case on the objection by the applicant's counsel. The applicant also denies the averments in paragraph 7 of the State Legal Advisor's affidavit. Instead the applicant averred that during the audience with His Royal Highness, he never stated, informed or proposed to His Royal Highness that he had lost the confidence of the majority of the State Legislative Assembly and he had never proposed to His Royal Highness for the dissolution of State of Perak Legislative Assembly pursuant to Article XVI(6) Perak's State Constitution. The applicant also deposed in his 3rd affidavit in support that the issue as to lost of confidence and the issue of dissolution of the State Legislative Assembly pursuant to Article XVI(6) Perak's State Constitution was never discussed by His Royal Highness during the brief audience. The applicant further reiterated in his third affidavit in support that during the audience with His Royal Highness on 4.2.2009 he informed His Royal Highness that because of

the resignation by the three ADUN, they were no longer member of the State Legislative Assembly and have no rights to get involve in the business or matters that concern the State Legislative Assembly and that all three of them could not be contacted and were 'missing'. The applicant averred that he requested His Royal Highness to dissolve the State Legislative Assembly as he considered it appropriate and proper to have an election for the State Legislative Assembly to overcome the deadlock and that he subsequently handed over to the His Royal Highness the draft Proclamation of Dissolution of the State Legislative Assembly [as in Exhibit PSLA-1] and that on being presented with the Proclamation His Royal Highness did not say anything.

The applicant also denies the averments in paragraph 13 of the State Legal Advisor's affidavit in Enclosure 28A. The applicant deposed that the version stated in that paragraph is incorrect. According to the applicant, the correct version is that when His Royal Highness informed the applicant on 5.2.2009 that His Royal Highness would not accede to the applicant's request to dissolve the State Legislative Assembly, the applicant requested and was granted about 15 minutes to explain and state his case for the dissolution of the State Legislative Assembly by

stating *inter alia* that to dissolve the State Legislative Assembly would be the most honourable thing to do in the circumstances and that by acceding to the request for dissolution, the Royal Institution and the Sovereign would be held in the highest esteem and with the greatest respect for being neutral in the conflict and reminded His Royal Highness of His Royal Highness own words that under normal circumstances it is taken for granted that the Yang Di Pertuan Agong would not hold his consent to a request for the dissolution of Parliament because his role is purely formal. The applicant then went on to state that after he had finished presenting his case for dissolution to the His Royal Highness, the latter looked up and told the applicant that he is not granting the request to dissolve the State Legislative Assembly and then His Royal Highness left.

However the State Legal Advisor in his second affidavit in reply [Enclosure 34] stood his grounds and insisted that his version and chronology of event as deposed in his first affidavit [Enclosure 28A] is the correct version.

To resolve the conflict in the disputed version of the actual event that took place before His Royal Highness during the audience on 4.2.2009 and 5.2.2009, the parties in this case have consented, on an application by the applicant, to have the applicant and Dato' Kamal the State Legal Advisor cross-examined on their depositions and averments in their respective affidavits.

Under cross examination the State Legal Advisor was challenged as to his neutrality, impartiality and credibility of his depositions and averments in his affidavits. Having heard his testimony, I am of the view that the State Legal Advisor has no personal or pecuniary interest or otherwise in the outcome of the case. There is nothing to show that the State Legal Advisor would benefit one way or the other if the case is decided in favour of the respondent or otherwise.

However with regard to the State Legal Advisor neutrality in relation to the case, I will take that with a pinch of salt. By his own admission the State Legal Advisor said that he was instructed to sworn the affidavits; and he testified that instruction was from the solicitors who had taken over the respondent case because the solicitors were aware of his

knowledge about the events on the 4th - 6th February 2009. The word 'instruct' or 'instructed' is a strong word. It connotes that when one is under instruction one is under the control or command of another who is more superior. Thus whatever one does under such instruction may not be out of one's own freewill. The State Legal Advisor is a very senior and experienced official and also trained in law. Surely he could have a better choice of word when answering the question by counsel for the applicant whether he i.e. the State Legal Advisor was requested to affirm the affidavit or whether he volunteered to affirm the affidavits because he has knowledge of the events on the 4th - 6th February 2009. But he chose to tell the Court that he was instructed. To me that means the State Legal Advisor in affirming the affidavits on instruction of someone else is not completely neutral or impartial. Whatever he deposed in his affidavits would, I think, to a certain extent be coloured by the instructions that he received. In other words in the circumstances the State Legal Advisor may not have applied his independent mind and judgment as to the facts he deposed in his affidavit. I am of the view because the State Legal Advisor testified under cross examination when he was given the draft proclamation for the dissolution of the State Legislative Assembly soon after the audience with His Royal Highness, he did not

make any effort to contact the applicant to correct the proclamation. This fact is important. The State Legal Advisor testified he read the draft proclamation [Exhibit PSLA-1 in his affidavit Enclosure 28A] after it was given to him and by then he should have realized that in Exhibit PSLA-1 the applicant made no reference to Article XVI(6); instead the provision of Perak's State Constitution that was mentioned in Exhibit PSLA-1 was Article XXXVI (2). In the light of the State Legal Advisor averment in his affidavit that the applicant had requested the dissolution under Article XVI(6) Perak's State Constitution I would think that he would have contacted the applicant to point out the mistake in the draft Proclamation and to suggest correction to it so that it would be in accord with the applicant's request for dissolution before His Royal Highness. What is strange is that the State Legal Advisor testified that he did not take that course of action because His Royal Highness had not decided on the applicant request for dissolution. I consider it strange because as legal advisor to the State, it is his duty, as provided under Article XXXVI C Perak's State Constitution, to advise on all legal matters referred to him by His Royal Highness or the State Government. That, I think, includes to advise the applicant who was then still the MB Perak and the Chief Executive of the State of Perak on the draft Proclamation.

In the circumstance I would prefer the version by the applicant that the request for dissolution on 4.2.2009 was made pursuant to Article XXXVI (2) Perak's State Constitution and that issue of lost of confidence in the State Legislative Assembly was never raised or became an issue. The averment by the State Legal Advisor also is not supported by contemporaneous document in the form of Exhibit PSLA-1. I am fortified in this conclusion when the State Legal Advisor confirmed, under re examination by the Attorney General, that in Exhibit PSLA-1, Article XXXVI (2) Perak's State Constitution is the ground for dissolution.

At this juncture I will digress for a while to mention that from my reading of the respondent Table of Chronology of Events [Enclosure 50 and which is also found in the respondent's affidavit in reply] it appears that the respondent has disputed the resignations and the resignation letters of the three ADUN. The respondent contended that after the Speaker had made the announcement of the resignation through media statement ADUN for Changkat Jering and Behrang wrote letters [at Tab 5 and 6 of respondent's Core Bundle of Documents – Enclosure 49] to His Royal Highness denying the resignation and the writing of the letter of

resignation and claiming that they were still ADUN for their respective constituency. The ADUN also wrote [letters at Tab 7 and 8 of Enclosure 49] on the same day i.e. 1.2.2009 to the Speaker denying their resignation and denying sending any letter of resignation to the Speaker. They also lodged a police report on the matter as can be seen at Tab 12 and 13 of Enclosure 49.

On 3.2.2009 the applicant had an audience with His Royal Highness on the resignation of ADUN Changkat Jering and Behrang. On the same day the ADUN wrote to His Royal Highness [vide letters at Tab 14 and 15 of Enclosure 49] to inform His Royal Highness that they have lost their confidence in the applicant and will not support the applicant as the MB Perak and that Barisan Nasional now has a majority in the State Legislative Assembly. At the same time the two ADUN also wrote to the President of PKR and the Speaker [as per letters at Tab 16 and 17 of Enclosure 49] declaring inter alia that they have lost their confidence in PKR and are leaving the Party and denouncing their membership of the Party with immediate effect.

Following in the footsteps of ADUN Changkat Jering and Behrang was ADUN for Jelapang, Puan Hee Yit Foong. She also wrote a letter [at Tab 20 Enclosure 49] to the Speaker stating that her purported letter of resignation was *void ab initio* and that she has lost confidence in DAP and is leaving the Party and denounced her membership in the Party. She also wrote similar letter [at Tab 22 Enclosure 49] to the Secretary of DAP. On the same day she also wrote to His Royal Highness to inform that he has lost confidence in the applicant and that she will not support the applicant as MB Perak and that the Barisan Nasional now has the majority of the support of the members of the State Legislative Assembly. She also lodged a police report.

For the purpose of this case, however the issue whether the three ADUN did or did not resign as member of the State Legislative Assembly or whether they did or did not write the purported letters of resignation or whether they are still members of the State Legislative Assembly are not issues for determination here. These issues are the subject matter of other proceedings before the High Court in Ipoh and they are still pending. I have alluded to the facts (disputed or otherwise) surrounding the purported resignations merely as a background to the contention by

the respondent that the applicant has lost the command of the majority in the State Legislative Assembly; so that the contention may be appreciated in its proper perspective.

The respondent in his affidavit in reply [Enclosure 51] affirmed 10.4.2009 states in paragraphs 6 and 7 of the affidavit the dispute in this case relates primarily to an interpretation of Article XVI (2) and (6) Perak State Constitution and the exercise of the royal prerogative of the His Royal Highness in giving effect to the said provisions. The respondent contends that as a matter of law the issues at hand relate to decisions of His Royal Highness that within His Royal Highness personal prerogative and are therefore not justiciable. The respondent also deposed that at about 3.00pm on 4.2.2009 His Royal Highness received letters from the three ADUN stating that they supported the Barisan Nasional and have lost their confidence in the applicant and were leaving their respective political parties but maintain their position as a member of the State Legislative Assembly. Further the respondent deposed that on 5.2.2009, Dato' Seri Najib Tun Abdul Razak in his capacity as the Chairman of the Perak Barisan Nasional had an audience with His Royal Highness the Sultan of Perak. At the audience Dato' Seri Najib Tun Abdul Razak

presented to His Royal Highness the letter of support for the Barisan Nasional from the 27 members of the State Legislative Assembly who were aligned to the Barisan Nasional and letters of support from the three ADUN. It was also deposed by the respondent that Dato' Seri Najib Tun Abdul Razak had brought all the 31 members of the State Legislative Assembly (including the three ADUN) to Istana Kinta and all the 31 members of the State Legislative Assembly pledged their support to the Barisan Nasional. The respondent also states in his affidavit that His Royal Highness interviewed the three ADUN and also Encik Nasaruddin, the assemblyman for Bota (who had earlier quit Barisan Nasional) and that all the four ADUN told His Royal Highness that they pledge their support for Barisan Nasional voluntarily and without any coercion from any party. Therefore the respondent contended in his affidavit in reply that having satisfied that Barisan Nasional has the majority support of the members of the State Legislative Assembly and that the applicant ceased to command the confidence and support of the majority of the members of the State Legislative Assembly, His Royal Highness the Sultan of Perak was entitled to refuse the applicant's request for dissolution of the State Legislative Assembly in accordance with Article XVI(6) Perak's State Constitution; and that along with His

Royal Highness decision declining the applicant request for dissolution of the State Legislative Assembly, the applicant, in accordance with Article XVI(6) Perak's State Constitution was deemed to have resigned his post as MB Perak. And therefore His Royal Highness may appoint the respondent as the MB Perak because His Royal Highness has, in his judgment, satisfied that the respondent has the command or support of the majority of the members of the State Legislative Assembly. It was also contended by the respondent that once the applicant has lost the support of the majority of the members of the State Legislative Assembly, the applicant must resign his post as MB Perak. It was contended that he must do so because the language of Article XVI(6) is mandatory. And at paragraph 17 (b) of his affidavit in reply the respondent deposed as follows:

“(b) Accordingly, the Perak State Constitution provides that the applicant must step down as the Menteri Besar rendering the position vacant.”

Implicit in this statement by the respondent in his affidavit is that the respondent recognizes the fact that the office will not be vacant until the incumbent or the sitting MB Perak resigns from the Office. Until the

applicant tenders his resignation, the Office of the MB Perak cannot be said to be vacant.

In a nutshell the respondent case is this: the applicant requested His Royal Highness to dissolve the State of Perak Legislative Assembly. His Royal Highness refused to dissolve the State of Perak Legislative Assembly. His Royal Highness was satisfied that respondent has the command or support of the majority in the State Legislative Assembly and the applicant has ceased to command the confidence of the majority in the State Legislative Assembly. Therefore the applicant is deemed to have resigned and His Royal Highness exercised his prerogative to appoint the respondent as the MB Perak and that decision is not justiciable.

The applicant contends however that review is only against the respondent holding and continuing to hold the office of MB Perak when the applicant has not resigned from that Office. It is also the applicant's contention that under Article XVI (6) Perak's State Constitution the Office of MB Perak does not become vacant or that the applicant be deemed to have ceased being the Menteri Besar unless there is vote of

no confidence being take against the applicant in the State Legislative Assembly.

It is not in dispute that His Royal Highness had exercised the royal prerogative in this case pursuant to Article XVI (2)(a) and (6) of the Perak's State Constitution. However the applicant is not asking the Court to review His Royal Highness prerogative to appoint the respondent as MB Perak or His Royal Highness prerogative to withhold consent to dissolve the State Legislative Assembly. The applicant concedes that the two royal prerogatives are not subject to review and non justiciable. That is the reason, the applicant said, His Royal Highness was not made a party to the present disputes.

In his submissions 'Dato' Cecil Abraham, learned counsel for the respondent, submitted that the contention by the applicant is misconceived. He submitted that the issues that need to be examined in this case relates primarily to the exercise of the royal prerogative which is not justiciable.

Dato' Abraham also submitted that based on contemporaneous documents in the form of respondent own letters and the media statement released by the Palace [which are all exhibited in the respondent's affidavit in reply] the contention by the applicant that he was not seeking dissolution pursuant to Article XVI(6) but under the 'general provisions' Perak's State Constitution is misconceived. It was further submitted that the applicant has expressly referred to Article XVI(2), (6) and (7) Perak's State Constitution in the intitlement of his Judicial Review Application. Therefore the applicant cannot raise any other provisions of the Perak State Constitution to ground his application.

The issue whether the applicant has requested for dissolution under Article XVI(6) or some other general provisions of the Perak's State Constitution is a disputed fact between the parties. For the reasons I stated above earlier when I discussed the depositions by the State Legal Advisor in his affidavits, I preferred the version by the applicant that the request was made under Article XXXVI (2) Perak's State Constitution rather than Article XVI(6). Furthermore, Dato' Abraham in his submissions did not seriously challenge the applicant's right to raise as

an issue that the request was in fact under Article XXXVI (2) of Perak's State Constitution. To be fair to Dato' Abraham, he did submit that the applicant is bound by his pleadings and therefore the applicant should confine his submissions to Article XVI(6) of Perak's State Constitution only. He cited the Court of Appeal decision in **V Paul Raj Chelladurai v Jabatan Telekom Malaysia Bhd & Ors [2000] 4 CLJ 882** as his authority. However that case was decided before the amendment to O53 which came into force on 21.9.2000 vide PU(A) 342/2000. Under new O53 after the amendment, the scope of O53 is wider – see Court of Appeal decision in **Ahmad Jefri bin Mohd Jahri @ Md. Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773**. In fact under **O53 r7(1) RHC 1980** the court may allow any amendment to the statement for so long as no one party is prejudiced by the amendments. And in this case the respondent is not prejudiced if the applicant is allowed to raise an issue with regard to Article XXXVI (2) of Perak's State Constitution because this issue has been canvassed in the affidavits filed by the applicant in this case.

In the light of the factual matrix of this case, the court is invited to decide on the interpretation of Article XVI of Perak's State Constitution

in particular Article XVI(6) and to decide whether on the satisfaction of His Royal Highness the Sultan of Perak that the applicant has lost the confidence of the majority in the State Legislative Assembly, the applicant ceases to be the MB Perak and whether the applicant is deemed to have resign from the office of MB Perak on him losing the confidence of the majority in the State Legislative Assembly, if he had refused to do so, and that the office of the MB is deemed vacant. Finally the court is invited to consider whether in the context of Article XVI(6) of Perak's State Constitution it is necessary for vote of no confidence to be passed in the State Legislative Assembly before the MB is asked to resign.

For ease of reference Article XVI of Perak's State Constitution is reproduced below:

"16. The Executive Council.

- (1) His Royal Highness shall appoint an Executive Council.
- (2) The Executive Council shall be appointed as follows, that is to say -
 - (a) His Royal Highness shall first appoint as Menteri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly; and

- (b) he shall on the advice of the Menteri Besar appoint not more than ten nor less than four other members from among the members of the Legislative Assembly;

but if an appointment is made while the Legislative Assembly is dissolved a person who was a member of the Last Legislative Assembly may be appointed but shall not continue to hold office after the first sitting of the next Legislative Assembly unless he is a member thereof.

- (3) Notwithstanding anything in this Article, a person who is a citizen by naturalization or by registration under Article 17 of the Federal Constitution shall not be appointed Menteri Besar.

- (4) In appointing a Menteri Besar, His Royal Highness may, in his discretion, dispense with any provision in the Constitution of the State restricting his choice of a Menteri Besar, if in his opinion it is necessary to do in order to comply with the provisions of this Article.

- (5) The Executive Council shall be collectively responsible to the Legislative Assembly.

- (6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

- (7) Subject to Clause (6) a member of the Executive Council other than the Menteri Besar shall hold office at His Royal Highness' pleasure, but any member of the Council may at any time resign his office.

- (8) A member of the Executive Council shall not engage in any trade, business or profession connected with any subject or department for which he is

responsible and shall not, so long as he is engaged in any trade, business or profession, take part in any decision of the Executive Council relating to that trade, business or profession or in any decision likely to affect his pecuniary interests therein."

The Constitution, is not ordinary law. It is the fundamental law which lays down the political, social and economic framework of a Nation or a State, as the case may be. From its pages emanates the principles with which the Country is governed. Its provisions are sacrosanct and must be treated as such. By its provisions other statutes or lesser law or acts (administrative or otherwise) are determine as to their constitutionality. Therefore in interpreting the Constitution or any of its provisions, what matters is the provision of the Constitution itself and not some political theory by some thinkers and neither should it be overridden by the extraneous principles of other constitutions: **Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187** and **Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1**.

Bearing the above in mind, the golden rule of interpretation is that the words of a statute should be given it plain and ordinary meaning, if the words are plain and not ambiguous. If the words or language use is ambiguous then the court may resort to one of the approaches generally

apply in interpreting a statute in order to ascertain the intention of the legislature; and most common of these approaches are the purposive rule and the mischief rule. However it must be reiterated that this situation arises only if there is ambiguity in the language used in the statute that requires the interpretation.

Under Article XVI(2) of Perak's State Constitution His Royal Highness shall appoint as Menteri Besar a member of the State Legislative Assembly who in His Royal Highness judgment is likely to command the confidence of the majority of the members of the State Legislative Assembly. In this regard the Attorney General as intervener submitted that His Royal Highness in appointing the respondent was merely performing his duty under the Perak's State Constitution and that to ensure there is no irregularities His Royal Highness has took it upon himself to meet and interview the 31 members of the State Legislative Assembly. The respondent readily adopt this submissions.

I never had any doubt that the exercise of royal prerogative to appoint a Menteri Besar pursuant to Article XVI(2) Perak's State Constitution is solely based on personal judgment of His Royal Highness and that His

Royal Highness may resort to any means in order to satisfy himself and accordingly to form his judgment as to whom who is likely to command the confidence of the majority of the State Legislative Assembly that he can be appointed as the Menteri Besar to lead the Executive Council.

I also have no doubt that His Royal Highness has absolute discretion with regard to the appointment of a Menteri Besar and the withholding of consent to a request for the dissolution of the State Legislative Assembly. This is plain and obvious from the reading of Article XVIII (1) and (2) (a) and (b) of Perak's State Constitution.

However, once a Menteri Besar is appointed, he does not hold office at the pleasure of His Royal Highness and collectively with his Executive Council responsible to the State Legislative Assembly. This is quite obvious from the provisions in Article XVI(5), XVI(6) and XVI(7) of Perak's State Constitution, that if the Menteri Besar ceases to command the confidence of the majority of the members of the State Legislative Assembly, he shall tender the resignation of the Executive Council, or under that circumstance the Menteri Besar may request His Royal Highness to dissolve the State Legislative Assembly.

Reading Clauses (2), (5), (6) and (7) of Article XVI of Perak's State Constitution it is obvious that once a Menteri Besar is appointed he is answerable to the State Legislative Assembly and to no one else. What that means is that once appointed, the Menteri Besar governs the State through the Executive Council and advises His Royal Highness on the affairs of the State as provided under Article XVIII (1) of Perak's State Constitution, whose advice His Royal Highness shall act upon except in matters where the Constitution provides that His Royal Highness may act in his own absolute discretion. However, because the Menteri Besar holds office not at the pleasure of His Royal Highness, the Menteri Besar cannot be dismissed from his office by His Royal Highness.

On this point the Attorney General submitted that the contention by the applicant that by virtue of Article XVI(7) the Menteri Besar cannot be dismissed from office must be seen in the context of Article XVI(6). Specifically the Attorney General submitted that Article XVI(7) must be read subject to Article XVI(6) Perak's State Constitution. He further submitted that Article XVI(6) uses the word 'shall tender his resignation', so he said what will happen if the Menteri Besar does not

resign under the circumstance of Article XVI(6) Perak's State Constitution? He went on to suggest that not resigning when one is without a majority is against democratic principles. He submitted that it is an established convention to resign in such circumstances. The Attorney General further submitted that the Constitution is a living piece of legislation and that the Government has to function. The Attorney General cited the case of **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha & Tun Mohd Said Keruak & 8 Ors [1995] 4 CLJ 184** as an authority for the proposition that where the Menteri Besar has lost command of the majority and he refuses to resign, then the office is deemed to be vacant. This submissions of the Attorney General is also adopted by the respondent.

I do not agree with the submissions. I do not find anything in Clause (7) of Article XVI that warrants it to be read subject to Clause (6) of the same Article in the manner suggested by the Attorney General as to the dismissal of the Menteri Besar. There is no ambiguity in the language in Clause 7. That Clause simply provides except for the Menteri Besar that other members of the Executive Council hold office at the pleasure of His Royal Highness. This means that they (the members of the Executive

Council except the Menteri Besar) may be removed from office by His Royal Highness acting on advice of the Menteri Besar. As for the Office of Menteri Besar, Clause 7 of Article XVI Perak's State Constitution says that the Menteri Besar does not hold office at the pleasure of His Royal Highness. However the qualifier at the beginning of Clause 7 suggests that the Menteri Besar shall tender his resignation pursuant to Clause 6 of Article XVI if he ceases to command the confidence of the majority in the State Legislative Assembly. **Amir Kahar** case does not support Attorney General contention. In **Amir Kahar**, the Chief Minister Dato' Pairin had resigned. In **Amir Kahar**, also there was no issue as to whether the Chief Minister had ceased to command the confidence of the majority. This is so because in that case Dato' Pairin had accepted that fact and tendered this resignation. The issue in that case is whether Dato' Pairin's cabinet was also deemed resigned when in the letter of resignation submitted to the Governor, Dato' Pairin did not tender together with his resignation, the resignation of his Cabinet. The decision in **Amir Kahar** is correct on its own facts. The formation of a Cabinet is at the instance of the Chief Minister. The Chief Minister is the head of the Cabinet and the Cabinet functions collectively in carrying out its collective responsibility. Therefore, when the Chief Minister resigns

the Cabinet resigns with it; whether or not the letter of resignation by the Chief Minister expressly stated the resignation of his cabinet as well. Thus, whatever the Court said in **Amir Kahar** regarding the requirement for vote of no confidence in the Legislative Assembly is only obiter that was never an issue before the Court in that case.

The fact that the dismissal of the Menteri Besar by His Royal Highness or by any one else is not within the contemplation of Article XVI(6) is clearer if one is to look at the legislative history of that provisions. An identical provision to Article XVI(6) Perak's State Constitution is found in Article 43(4) of the Federal Constitution; of course in that Article it refers to Prime Minister instead of Menteri Besar. Article 43(4) Federal Constitution has its origin in Article 36(2) in the draft Federation of Malaya Constitution proposed by the Reid Commission: See **Report of the Federation of Malaya Constitutional Conference (No. 6 of 1956 – Appendix II)**. The draft Article 36(2) reads:

"The Yang di-Pertuan Besar shall appoint from among the members of the House of Representatives a Prime Minister who is in his judgment most likely to command the confidence of the majority of the members of that House and, if the Prime Minister ceases to command such confidence, the Yang di-

Pertuan Besar shall either, at the request of the Prime Minister, dissolve Parliament or remove the Prime Minister from office.”

In that original draft the Reid Commission had clearly proposed that the Prime Minister may be removed if he refuses to resign in the circumstances the Prime Minister ceases command the confidence of majority in the House. That proposal however was rejected and as a result we have our present Article 43(4) in the Federal Constitution. Similar provision was drafted for States Constitution and by virtue of Article 71 read together with the Eighth Schedule in the Federal Constitution, that similar provision was included and formed part of State Constitutions for all the States in Malaysia. From the brief legislative history of Article 43(4) of the Federal Constitution mentioned above and the fact that Article XVI(6) is identical to the said article 43(4), except to the reference of Menteri Besar instead of the Prime Minister, it is my opinion that dismissal of the Menteri Besar by His Royal Highness or by any one else is never contemplated under the Article XVI(6) Perak's State Constitution.

The issue on the power of the Governor to dismiss the Chief Minister was also discussed and decided in **Stephen Kalong Ningkan v Tun Abang**

Haji Openg and Tawi Sli [1966] 2 MLJ 187. In that case the Court was dealing with Article 7(1) of the Constitution of the State of Sarawak which is in pari material with Article XVI(6) Perak's State Constitution. It was argued in that case that since the Governor has the power under Article 6(3) of the Sarawak Constitution to appoint a member of the Council Negeri who in his judgment is likely to command its confidence and approval it follows that by section 21 of the Interpretation Ordinance that only when Council Negeri has shown lack of confidence (and lack of approval) can the Governor's power to dismiss, if exists, be exercised. It was also argued in that case the under Article 7(3) [which is in pari material with Article XVI(7) Perak's State Constitution] of the Sarawak Constitution the Chief Minister may be removed for a cause. The argument was rejected by the court in that case. At p. 194 the learned Judge says this :

"In my view, however, the suggested interpretation is altogether false. Article 7(3) clearly means that the governor may dismiss ministers but may not dismiss the chief minister in any circumstances".

In **Ningkan**, supra, the Court refused to follow the decision of the Privy Council in **Adegbenro v Akintola [1963] 3 WLR 63**, on the ground that facts in that case are distinguishable in that in **Akintola**, the Constitution

of Nigeria [the country from which the case originated] has express power that the Governor can remove the Prime Minister and that all Ministers including the Prime Minister held office during the Governor's pleasure.

The Attorney General and Dato' Abraham for the respondent do not dispute that there is no power of dismissal under the Perak's State Constitution to dismiss the Menteri Besar. However, both the Attorney General and Dato' Abraham argued that since His Royal Highness the Sultan of Perak had found that the respondent has had command of the majority in the State Legislative Assembly, it must as corollary to it that the applicant has lost the command of the majority in the State Legislative Assembly; therefore applicant must tender his resignation together with resignation of the Executive Council, and that if the applicant refuses to resign, the office of the Menteri Besar shall deem to be vacant. The effect of this argument is that Menteri Besar is deemed to have resigned. The reason for this, they argued, is that Article XVI(6) of Perak's State Constitution reads:

"If the Menteri Besar ceases to command the confidence of the majority of the member of the Legislative Assembly he shall tender the resignation of the Executive Council."

Dato' Abraham for the respondent even go further to suggest that if the applicant refuses to resign, the Constitution in the form of Article XVI(6) will dismiss him as Menteri Besar. The Attorney General and the respondent have argued that the words 'shall tender his resignation' in Article XVI(6) are very strong words. They are mandatory.

To interpret the above provision one must look at the Constitution as whole. In **NS Bindra's Interpretation of Statues, 9th Edition at page 1182 and 1183**, the following passage is found as to the principles to be applied in interpreting a provision of the Constitution:

"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that not one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous. If the plain meaning of an uncontradicted constitutional provision is to be disregarded, it must be one in

which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. This gives rise to the universally recognized incontrovertibly established rule for construction that it is presumed that words appearing in a Constitution have been used, according to their plain, natural and usual signification and import. The words of the Constitution, however, are to be taken in natural and obvious sense, and not in a sense invariably restrained or enlarged. The courts are not at liberty to disregard the plain meaning of the words of a Constitution in order to search for some other conjectured intent. A word which has been plainly used in a limited sense in the article of the Constitution relating to the legislative and executive departments, must be understood as retaining the same sense when employed in an article relating to the judicial department.

In construing a constitutional provision, it is the duty of the court to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. The subject, the context, and the intention of the body inserting a word in the Federal Constitution are all to be considered in determining its construction."

And at page 1216 the same learned author said:

“The proposition that the ordinary rules for construing Acts of Parliament do not apply to the Constitution may be true in one sense, namely, that the Constitution is not a Code going into minute details of the means by which the government is to be carried into effect by the sovereign power created by it. There are many powers necessary to that end which are conferred and one would expect them to be conferred – by necessary implication, rather than in express words. It is, however, always a question of construction, whether we are called upon to construe the terms of section, or to decide whether powers are necessarily to be implied in addition to those which are expressed. In this respect, the same rules of interpretation apply to any other written document. A court, in construing a provision of the Constitution may, imply negative from affirmative words where the implication promotes, but not where it defeats the intention. The doctrine of construction by implication is limited to the extent of preventing judicial amendment of the fundamental law. Thus, the Supreme Court has declared that a court has no right to insert any clause in the Constitution which is not expressed and cannot be fairly implied.”

In *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ,

356, Abdoolcader J said as follows:

“It will be necessary in connection with my discussion in this regard to deal with and construe certain provisions of the

Federal Constitution and I should perhaps before doing so advert somewhat briefly and generally to the principles of constitutional interpretation which apply. The Privy Council held in *Minister of Home Affairs v. Fisher* (at page 329) that a Constitution should be construed with less rigidity and more generosity than other statutes (also *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds* (at page 655)) and as *sui generis*, calling for principles of interpretation of its own, suitable to its character, but added that respect must be paid to the language which has been used, and in *The Cheng Poh alias Char Meh v. Public Prosecutor* said (at page 468) that in applying constitutional law the court must look behind the label to the substance. Barwick C.J., said in the High Court of Australia in *Attorney-General of the Commonwealth ex relatione McKinlay v. The Commonwealth of Australia* (at page 17): 'The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning'.

I said in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.* (at page 120) that the Constitution is not to be construed in any narrow or pedantic sense (*James v. Commonwealth of Australia* (at page 614) but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution on the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. The High Court of Australia in *Amalgamated Society of Engineers v. The Adelaide Steamship*

co. Ltd. eschewed so-called 'political criteria' in the interpretation of the Australian Constitution and so lessened considerably the range of circumstances where it might be called upon to intervene more directly in political processes."

It is clear from the above passages that the provision of the Constitution is not to be construed in a narrow or pedantic sense. It must be construed liberally. However in so doing, the Court is not at liberty to stretch or pervert the language of the Constitution for the purpose of supplying omission or of correcting supposed errors. Applying this principle, can a deeming provision, (as suggested by the Attorney General and Dato' Abraham for the respondent) be read into Article XVI(6) Perak's State Constitution to deem that the Office of the Menteri Besar falls vacant when the applicant refused to resign? A deeming provision is a legal fiction. It refers to something which does not exist but to be taken as in existence. Ordinarily a deeming provision would be expressly provided for by the draftsman in a statute if the legislature wants the particular provision of the statute to be read in that manner. In the absence of such express provision I do not think that a deeming provision should be read into Article XVI(6). To do so would be to do violence to the language of the Article XVI(6) Perak's State Constitution which in my opinion contains no ambiguity whatsoever. But in my view no matter how

mandatory is the word 'shall' in Article XVI(6), it cannot be read to mean that the office of Menteri Besar becomes or deemed to be vacant if the Menteri refuses to resign under the circumstance of Article XVI(6) Perak's State Constitution. It cannot be done because the language of Article XVI(6) is so plain and obvious. What is so plain and obvious in Article XVI(6) is that the Menteri Besar shall tender his resignation if he faces the circumstances specified in the said Article which is that he has ceased to command the confidence of the majority in the State Legislative Assembly. I will reiterate what NS Bindra said about the doctrine of implied construction which is that the doctrine is limited to the extent of preventing judicial amendment of the fundamental law and that the Court has no right to insert any clause in the Constitution which is not expressed and cannot be fairly implied. What if the Menteri Besar refuses to tender his resignation and he cannot be removed from office? It is obvious that there is a lacuna in the said Article. But that lacuna cannot be filled up by reading into the Article a deeming provision. The lacuna must be filled up by amendment to the said Article.

The Attorney General and the respondent submitted that the State Constitution is a living legislation and it must be interpreted to give meaning to its purpose and objective. It was further submitted that Article XVI(6) Perak's State Constitution cannot be interpreted as to lead to absurdity. This argument was also considered in Ningkan's case. And it was rejected. The relevant passage in that case is found at page 194, paras E-I right hand column and it reads:

"A word may be said on what is the position if a chief minister has in fact ceased to command the confidence of a majority, and yet refuses to resign. In this situation at least, Mr. Le Quesne claims that the Governor must have a right of dismissal; otherwise the Constitution would be unworkable. Mr. Le Quesne's argument in effect is: if there is a gap, it must be filled: if there is no express power to enforce the resignation of a Chief Minister that power must by implication lie with the Governor. I do not agree that stop gaps can be as it were improvised. just because a Chief Minister or a Governor does not go when he ought to go is not sufficient reason for implying in the Constitution an enforcing power vested in some individual."

For the same reason I would gladly adopt the reasoning in **Ningkan** case and reject the Attorney General submission on this point.

Has the applicant ceased to command the confidence of the majority of the State Legislative Assembly? The respondent contention is that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly following the resignation of the three ADUN which resignation was later, as claimed by the respondent and the three ADUN, were retracted. Subsequently however, as evident by the letters by the three ADUN exhibited in the respondent affidavit in reply as well as the affidavit by His Royal Highness's private secretary [Enclosure 29] affirmed on 8.4.2009, all the three ADUN challenged the resignation and claimed that they never resigned and stated their support for the Barisan Nasional. It is undisputed fact that His Royal Highness had met the three ADUN and the 27 other members of the State Legislative Assembly who were aligned to Barisan Nasional on the 5.2.2009 at Istana Kinta to ascertain their support for the Barisan Nasional. Having satisfied himself to the fact, His Royal Highness informed the applicant that his request for dissolution was refused and he i.e. the applicant was to tender his resignation immediately. Thereafter the Palace issued a Media Statement as in Exhibit PS-7 in affidavit by His Royal Highness's private secretary. Exhibit PS-7 contains statement as to the meeting with Dato' Seri Najib Tun Abdul Razak and the 31 members of State

Legislative Assembly aligned to Barisan Nasional and His Royal Highness command for the applicant to tender his resignation as MB Perak together with his Executive Council.

The applicant contends that he never ceases to command the confidence of the majority in the State Legislative Assembly. There was never a vote of no confidence passed against him in the State Legislative Assembly. The applicant contends that the fact is that there was a deadlock in the State Legislative Assembly following the resignation of the three ADUN. The applicant further contended that he had requested for His Royal Highness consent to dissolve the State Legislative Assembly to overcome the deadlock but the consent was refused.

In this regard the Attorney General submitted and again it is adopted by the respondent that the request for dissolution of the State Legislative Assembly is possible only in two situations. One, under Article XXXVI (1) and (2) when life term of 5 years of the State Legislative Assembly has come to end; and two, when the Menteri Besar has ceased to command the confidence of the State Legislative Assembly. I do not agree with

this submissions. It is true the request may be made only under two provisions of Perak's State Constitution i.e. Article XVI(6) and Article XXXVI (1) and (2). But the circumstances under which the request can be made is unlimited. The request under Article XVI(6) is specific to a situation where the Menteri Besar ceases to command the confidence of the majority in the State Legislative Assembly; whereas under Article XXXVI (1) and (2), situation is unlimited. It is up to the Menteri Besar to choose his time to make the request. However once a request is made under whichever of the two provisions, it is entirely up to the His Royal Highness discretion whether to grant or otherwise the consent to dissolve the State Legislative Assembly. Of course His Royal Highness may withhold his consent; but under normal circumstances to withhold the consent would be conventionally unconstitutional though it is not illegal.

In a democratic society and under the framework of constitutional monarchy, the ruler is expected to discharge his constitutional role and function in accordance with the provision of the Constitution. He is expected to act and decide in the best interest of the country in discharging his duty under the Constitution to give effect to the

democratic principles enshrined in the Constitution. In this respect, it is wise to recall what High Royal Highness Sultan Azlan Shah in his book **‘Constitution of Monarchy, Rule of Law and Good Governance on the Role of the Yang di-Pertuan Agong’** (and this will also applicable to the Rulers and Governors in the States) on giving on withholding consent to dissolve Parliament (or the State Legislative Assembly on the case may be). His Royal Highness said, “..under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.”

In this case it is very easy to be swayed by the fact that His Royal Highness has satisfied himself as to whom has command of the majority in the State Legislative Assembly and to conclude that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly. But the stark fact is that there never was any vote of no confidence taken against the applicant in the State Legislative Assembly and the applicant had not come to His Royal Highness to request dissolution because he had lost command of the majority. So how could one say that the applicant has ceased to command the

confidence of the majority in the State Legislative Assembly for the purpose of Article XVI(6) Perak's State Constitution?

In my view it is alright if His Royal Highness takes upon himself to determine who commands the confidence of the majority in the State Legislative Assembly that he can appoint as the Menteri Besar. Such determination however is only good for the purpose of appointing a Menteri Besar pursuant to Article XVI(2)(a) Perak State Constitution. This is so because that provision speaks of 'who in his judgment is likely to command the confidence of the majority'. The language use therein requires the exercise of a personal judgment on the part of His Royal Highness.

But the same thing cannot be said with regard to Article XVI(6) in deciding whether the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly. In this case His Royal Highness, through his enquires has judged that the respondent has the support of the majority. But that finding does not necessarily means His Royal Highness can formed an opinion that the applicant ceases to command the confidence of the majority of the members of

the legislative. One reason for this is that the expression 'in his judgment' is not used in Article XVI(6). It is trite that in construing a provision of a Constitution or a statute every word used in the Act or section or clause must be given its plain and ordinary meaning. If a clause or sub-section in the same section of the Act is worded differently on the same issue, such as in relation to the issue of command of the confidence of majority in this case, then the clause or sub-section must be read in such a manner with regard to the same issue to give effect to the difference in the wordings. On this premise I am of the view that just because His Royal Highness had formed a judgment that the respondent is likely to command the confidence of the majority for the purpose of Article XVI(2)(a) to appoint the respondent as Menteri Besar it does not mean that His Royal Highness opinion or judgment is applicable in deciding that the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. In another word, one cannot say that because His Royal Highness has judged that the respondent is likely to command the confidence of the majority in the Legislative Assembly therefore the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. I would say that the personal opinion or judgment

of His Royal Highness is irrelevant to the construction of Article XVI(6). The second reason is that Article XVI(5) Perak State Constitution states that the Executive Council shall be collectively responsible to the Legislative Assembly. Under Article XVI(2)(a) the Menteri Besar is appointed to preside over the Executive Council. Article XVI(6) speaks of "If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly..". Reading these three provisions in Article XVI Perak State Constitution it is logical and in fact Article XVI(6) requires it to be so, that it is the Legislative Assembly that determines whether it has confidence in the Menteri Besar as the Head of the Executive Council. The Legislative Assembly may make the determination through a vote of no confidence against the Menteri Besar.

In Cook Islands, Reference by the Queen 's Representative [1985] LRC (Const), the Court of Appeal was asked to decide *inter alia* whether under Article 13(2) of the Constitution of Cooks Island the appointment of the Prime Minister under that provision that requires a vote in the Parliament expressing confidence in the Prime Minister. In that Article 13(2), the expression 'who commands the confidence of a majority of

the members of the Parliament' is used. In construing this phraseology, Sir Graham Speight, the Chief Justice, who delivered the opinion of the Court, said at p.62 as follows:

"on their face these words appear to refer to a situation of fact and not to require any exercise of judgment or discretion...That actual command would be evidenced by a vote of confidence in the candidate or some other unequivocal act of the legislature endorsing the candidate."

In the same case, the learned Chief Justice, in considering the personal judgment of the Queen's Representative in determining who command the confidence of a majority of the members of Parliament for appointment as the Prime Minister, said at p. 63:

"There can however be no guarantee that his judgment will turn out to be the correct one, and even if correct to begin with, alignments may change before Parliament first meets. In either case, indeed in any case, should not Parliament be given the opportunity and have responsibility to resolve any doubt?."

The provisions under discussion in the above case from Cooks Islands are not exactly the same as Article XVI Perak State Constitution. But the provisions contains similar phraseology as to the command of confidence of a majority in a Legislative Assembly. As such the views

expressed by the Court in that case as to a similar phraseology found in Article XVI Perak State Constitution should be highly persuasive. On that premise I would say that phrase 'ceases to command the confidence of the majority of the members of the Legislative Assembly' in Article XVI(6) ought to be construed as to have ceased to command the confidence of the majority after the a vote of no confidence had been taken in the Legislative Assembly.

It was urged on me that the evidence as to lost of confidence may be taken from various sources and not necessarily on the vote of no confidence in the State Legislative Assembly. Once again the respondent relied on **Amir Kahar's** case where the Court in that case refused to follow the decision in **Ningkan's** case which decided that the only vote of no confidence that counts is the one that is passed on the floor of the Council Negeri. The Court in **Amir Kahar** had refused to follow **Ningkan** on this point because in **Akintola** which was referred to in both **Amir Kahar** and **Ningkan**, the Privy Council had ruled that the Governor in that case is not limited in his search for evidence of supports of majority. The Governor may rely on various sources. However it is to be noted that **Akintola** was decided in such a way on its own peculiar facts; and one of

which is that under the Nigerian Constitution then the word used was 'support' not 'confidence'. This distinction was recognized by the learned Judge in **Ningkan**. I think the distinction is material. It is more so in this instant case when the situation on 4.2.2009 was that the PAKATAN and Barisan Nasional each has equal number of 28 seats in State of Perak Legislative Assembly.

As I have said earlier that once a Menteri Besar is appointed he is answerable only to the State Legislative Assembly. This is provided for in Article XVI(5) Perak's State Constitution which reads:

"(5) The Executive Council shall be collectively responsible to the Legislative Assembly."

Therefore based on democratic practices any measure of lost of confidence in the MB Perak's leadership should be taken by vote of no confidence against him on the floor of the State Legislative Assembly. Only in this manner can the Menteri Besar be forced to resign.

On the issue of writ in the nature of quo warranto, Dato' Cecil Abraham for the respondent submitted, that this an ancient remedy and in England it is a dead letter. That may be so. But the remedy is available

to any party that can justify its application. One reason for this is that the remedy is provided for under the Schedule to the Courts of Judicature Act 1964. Another reason is **O53 r1 (1) RHC 1980** provides for the procedure that governs all applications for relief specified in paragraph 1 of the same Schedule which relief includes that of writ of quo warranto. The provision for such procedures would be meaningless if the remedy is a dead letter as claimed by the respondent counsel. Tuan Haji Sulaiman, leading counsel for the applicant, submitted that the law reports of India are replete with cases of quo warranto challenging the positions of, among others, Judges, Prime Minister, Chief Justice and Chief Minister. In Malaysia, the position of the Industrial Court Chairperson was successfully challenge by way of writ of quo warranto in **All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 4 CLJ 195** and the remedy was available in **Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148** : [See the passage by Abdoolcader J at p.150 right hand column of the judgment]. And more recently in **Badan Peguam Malaysia v Kerajaan Malaysia [2009] 1 CLJ 833**. In the latter, the learned Gopal Sri Ram JCA (now a Federal Court Judge) said that, with reference to Lim Cho Hock (supra) said at p. 857

that "Today either quo warranto or declaratory relief are available to challenge the appointments made under the Constitution or other written law.". On these authorities, therefore, it is not correct to say that writ of quo warranto is a dead letter as a legal remedy where appropriate in our jurisdiction.

For a writ of quo warranto to be granted the applicant must satisfy three pre-conditions. The first condition is that the office in question must have been created by law i.e either by the Constitution or statute. The second condition is that the office is a public office and thirdly, the person proceeded against is not legally or properly qualified to hold the office, and has been in actual possession or user of the particular office : see M.P. Jain & S.N. Jain , 'Principles of Administrative Law, (Enlarged Edition Volume 2) at pp. 2137-2149.

In **B.R. Kapur v State of Tamil Nadu and Another AIR 2001 SC 3435**, the Indian Supreme Court was invited to decide, in the nature of quo warranto, whether the 2nd respondent in that case, could have been sworn in as Chief Minister which is a constitutional appointment, and continue to function as such, when she had a criminal conviction and

was not a member of the Tamil Nadu Legislative Assembly. Bharuja J, who delivered one of the judgments of the Court in that case, said at paragraph 51 at p. 3455 of the report as follows:

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

In the same case, the learned judge referred to another Indian Supreme Court decision where the appointment of a High Court Judge by a warrant of appointment signed by the President of India was called into question on a writ in the nature of quo warranto as to as the said judge qualification to hold the office; and on examination the Supreme Court found that the judge was not qualified to be appointed as a High Court Judge and the appointment was quashed. With regard to this, the learned judge said this, at paragraph 52 at p. 3455 of the report:

‘...even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.’

In his instant case, the applicant has fulfilled the three pre-conditions for the issue of a writ in the nature of quo warranto. The Office of Menteri Besar Perak was created by the Perak State Constitution under Article XVI(2). The Office is a public office. As to the third condition, it is acknowledged that the respondent is a member of the State Legislative Assembly. So his qualification is not an issue. But the applicant is challenging the appointment and the right of the respondent to continue to hold the Office of Menteri Besar Perak on the ground that his appointment was not in accordance with the provisions of the Perak State Constitution because at the time of the appointment the applicant has not resigned and is still the Menteri Besar Perak.

The Indian Supreme Court cases referred to above, are illustrations of the fact that even a constitution appointment, by a person or body whose exercise of the power of the appointment cannot be question, can be examined on a writ in the nature of quo warranto. Pattanaik J,

another Indian Supreme Court Judge who delivered the judgment in **B.R.**

Kapur (supra) said, at paragraph 70 at page 3460 of the report :

'...when an application for issuance of a writ of *quā warrantō* is being examined, it is not the Governor who is being made amenable to answer the Court. But it is the appointee...who is duty bound to satisfy that there has been no illegal, usurpation of public office. *Quo warrantō* protects public from illegal usurpation of public office by an individual and the necessary ingredients to be satisfied by the Court before issuing a writ is that the office in question must be public created by the Constitution and a person not legally qualified to hold office, in clear infringement of the provisions of the Constitution and the law...'

On the above principles and on the facts in this case I am of the view that a writ in the nature of the *quo warrantō* can be issued at the instant of the applicant against the respondent. There is no dispute that the respondent appointment was by His Royal Highness the Sultan of Perak in the exercise of His Royal Highness royal prerogative; but at the time of the appointment there is already a Menteri Besar Perak that is the applicant. He has not resigned and there is no vote of no confidence passed against him on the floor of the State Legislative Assembly. There

is no provisions in Perak State Constitution that allow the appointment of two Menteri Besar at the same time.

On the issue of justiciability in this case my views are these. There is no dispute that the decision of His Royal Highness to appoint a Menteri Besar pursuant to Article XVI(2) and to withhold consent to dissolve the State Legislative Assembly pursuant to Article XVI(6) and Article XXXVI (1) and (2) Perak's State Constitution cannot be questioned. And I also accept the Attorney General submissions that the Court also cannot question the manner His Royal Highness goes about in determining the facts under those provisions in order to form an opinion for the purpose of exercising His Royal Highness discretion and royal prerogative under the provisions.

But in this case the applicant is not asking the Court to do that – i.e. to question the validity or constitutionality of His Royal Highness decision. The applicant is seeking a declaratory relief by asking the Court to look at the relevant provisions of the Perak's State Constitution and in particular Article XVI(6) and to decide whether he is still, under the said provisions and on the facts of this case, the MB Perak. If he is still the

MB, then how could the respondent assumed the office. There cannot be two Menteri Besar in one state at the same time. In other words the main issue in the present application revolves around the interpretation of the Perak's State Constitution and the alleged usurpation of the office of Menteri Besar by the respondent. This distinction is a fine one but extremely important in this case. Bearing in mind this distinction, one can see that the issue of non justiciability does not arise at all.

In Supreme Court case of **Tun Datuk Haji Mohamed Adnan Robert v Tun Datu Haji Mustapha bin Datu Harun; Datuk Joseph Pairin Kitigan v Tun Datu Haji Mustapha bin Datu Harun [1987] 1 MLJ 471**, the Court had to decide whether the appointment of Tun Datu Mustapha by the Governor was valid and that the subsequent revocation of his appointment and the appointment of Datuk Joseph Pairin Kitingan as Chief Minister were ultra vires and therefore null and void. Before the High Court in Kota Kinabalu, the appellants (before the Supreme Court) raised a preliminary objection as to the jurisdiction of the court in respect of the proceedings on the basis that the issues raised were not justiciable. The appellant contended that the issues in that case involved purely a political question and therefore calls for political

solution and the matter was accordingly beyond the scope of judicial determination. The High Court dismissed the objection and ruled that justiciable issues do in fact arise in the case for judicial determination and the matter falls within the jurisdiction of the court for adjudication.

The learned Tan Chiaw Thong J, who presided over the case in the High Court said, at p. 474 :

“I had earlier listed out, among the main issues to be tried in this action, that relating to the alleged dismissal of the Plaintiff as Chief Minister. In my view the issue of dismissal and applicability of the Stephen Kalong Ningkan’s case (1966) (*supra*) and alleged legal power of dismissal as pleaded in the defence are issues that are legal and constitutional in nature, and are therefore, in my opinion, issues that are justiciable and within the jurisdiction of the Court to try them.

As to the issue of appointment, an important point to consider, in my view, is whether the issues to be tried include any issue giving rise to an examination as to how the 1st Defendant had exercised his discretion on the matter of an appointment of the Chief Minister, and the factors he took into consideration in exercising such a discretion. If such an issue is involved, then, on the authorities, including Stephen Kalong Ningkan’s case (1968)(*supra*), it would appear that such an issue is not justiciable and the Court has no jurisdiction to try it. Indeed this conceded by learned senior counsel for the Plaintiff. However,

in my view, the issue regarding the alleged appointment of the Plaintiff as Chief Minister does not appear to be one of such nature as has just been mentioned. The Plaintiff alleges that he has been lawfully and constitutionally appointed, but his is denied by the Defendants who contend that there was no appointment on the grounds that no instrument of appointment had been given and because the oath of office subscribed by the Plaintiff resulted from conspiracy, misrepresentation, fraud and duress and hence any appointment is null and void and can be annulled, rescinded, rectified, revoked and dismissal can be lawfully made. Hence, in my opinion, the issues on appointment are not those regarding whether the discretion of the 1st Defendant as the Head of State has been exercised lawfully and constitutionally; or what factors the 1st Defendant took, or should take into account in exercising his discretion on the appointment of the Chief Minister. Rather they are issues as to whether there was in law an appointment, and this is related to the issues regarding the validity of the oath taken by the Plaintiff and whether the taking of an oath implies appointment....Accordingly, I am of the view, and rule that on the pleadings, the issue of appointment is justiciable and the Court has jurisdiction to try this issue."

The appellant appealed to the Supreme Court on the ruling; but the Supreme Court dismissed the appeal and agreed with the High Court. In dismissing the appeal, Abdul Hamid C.J. (Malaya) (as he then was) said, at p.484 as follows:

"The central issues in this matter are the validity of the initial appointment of the respondent as the Chief Minister which itself has been called in question by the appellant themselves on the allegation that this was procured by conspiracy, misrepresentation, fraud and duress, the power of the 1st appellant to revoke the appointment and the consequential validity *vel non* of the appointment of the 2nd appellant as Chief Minister of the State. Now all this must certainly entail a delicate exercise in constitutional interpretation on a consideration of the background and attendant circumstances alleged and involved."

Then at p. 485, the Court said this :

"The subsequent purported revocation of the appointment would also raised legal and constitutional issues attracting legal considerations. We are therefore of the view that justiciable issues do in fact arise for judicial determination and the matter falls within the jurisdiction of the Court for adjudication.

The mere fact that a litigant seeks the protection of a political right does not mean that it presents a political question. whether a matter raises a political question; whether it has been committed by the Constitution to another branch of government is itself a matter for judicial determination because the Constitution has made the Courts the ultimate interpreter of the Constitution. The Courts accordingly, cannot reject a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."

Accepted that the facts in Tun Datuk Haji Mohamed Adnan Robert (supra) are not exactly on all fours with the instant case; nevertheless the principle that can be deduced from that case is relevant and applicable to the instant case. The principle is that whenever an issue arises from the exercise of a power under the Constitution or any written law which is seemingly political in nature or that issue involve the exercise of a discretion by the Governor (or the Ruler as the case may be) which requires a legal and constitutional interpretation then the issue is justiciable and the Courts can adjudicate the issue for the reason that the Courts are the ultimate interpreter of the Constitution.

In this instant case, the applicant contention is that he is still the Menteri Besar Perak because he has never resigned and that he has no reason to resign because there was never a vote of no confidence against him in the State Legislative Assembly. But the applicant conceded that there was deadlock in the State Legislative Assembly with no one party or group having a clear majority. That notwithstanding, His Royal Highness had, on his own enquiries, formed an opinion or judgment that the respondent has had the command of the majority of the State Legislative

Assembly and therefore His Royal Highness appointed the respondent as the Menteri Besar Perak pursuant to Article XVI(2) Perak State Constitution. His Royal Highness had asked the applicant to resign but the applicant refused on the ground that there was no vote of no confidence against him. The office of His Royal Highness then issued a media statement which among other things deemed that the Office of Menteri Besar Perak vacated pursuant to Article XVI(6) Perak State Constitution.

It is important to note is that in the Media Statement in Exhibit PS-7, the second last paragraph reads:

"Sekiranya YAB Dato' Seri Ir. Mohammad Nizar bin Jamaluddin tidak meletak jawatan sebagai Menteri Besar Perak bersama ahli-ahli MMK, maka jawatan Menteri Besar serta ahli-ahli MMK tersebut dianggap telah dikosongkan."

In my view the above passage in the Media Statement in Exhibit PS-7 tantamount to dismissal of the applicant as MB Perak for his refusal to tender his resignation and that, I have said earlier, is not permissible under Article XVI(6) Perak's State Constitution.

Thus the issue of the appointment the respondent as Menteri Besar Perak, and the deemed vacation of the Office of Menteri Besar by the applicant involves the interpretation of Article XVI Perak State Constitution and in particular Article XVI(6) namely as to the question whether there must be a vote of no confidence in the State Legislative Assembly against the applicant before he be asked to resign; and whether in a situation where the applicant who was then de facto Menteri Besar has not resigned, his Office can be deemed to be vacated in law and under the Perak State Constitution; and whether in such situation also the respondent can lawfully assumed the Office of the Menteri Besar. In the light of the above principles I am of the view that these issues are justiciable as they requires the interpretation of the Perak State Constitution.

In **G.D. Karkare v T.L. Shevde and Ors AIR [1952] Nagpur 330**, it was said at p. 333 that:

“What the Constitution establishes is supremacy of law and not of men, however high placed they might be. Unless there be a provision excluding a particular matter from the purview of the Courts, it is for the Courts to examine how far any act done in pursuance of the Constitution is in conformity with it..”

Therefore it is the duty of this Court to interpret the Constitution. The Court must perform that duty regardless of the fact the answer that it gives would have a political effect.

The granting of declaratory relief is discretionary on the part of the Court. There is no limit to the Court discretion to declaratory relief. It was said in one case that the limit is only the Court's own discretion. The current trend is that the Courts no longer subscribe to the view that declarations should be granted sparingly. Instead the Court would readily invoke this remedy if invited in appropriate case in order to do justice between the parties: see Supreme Court decision in **Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697**.

And in cases where a declaratory relief is appropriate and available the court should not shun to decide seemingly political questions when the Constitution or a statute has to be interpreted to answer them: **Dinesh Chandra Pande v Chaudhury Charan Singh & Ors AIR 1980 Delhi 114**.

Finally, one may ask this question. If the respondent claim in this case is truly undeniable that it has, after the three ADUN had stated their support, commanded the confidence of the majority of the members of the State Legislative Assembly and that His Royal Highness has refused to consent to the request by the applicant to dissolve the State Legislative Assembly, why the respondent representing the Barisan Nasional did not request His Royal Highness to summon the State Legislative Assembly which was not in session then, for a special sitting so that a motion of a vote of no confidence can be made and passed against the applicant. That would be more in accord with the democratic principles and practices.

In **Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187**, Raja Azlan Shah F.J. (as His Royal Highness then was) said, in delivering the judgment of the Court, at page. 188:

'Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that it is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions – see *Adegbenro v Akintola & Anor*. Each country frames its constitution according to its genius and for the good of its own society. We look at other

Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.”

Guided by the wise words of His Royal Highness in the above passage, it is my view that the genius in our Constitution is that we have chosen a system of Government anchored on the principles and practices of Constitutional Monarchy and parliamentary democracy whereby the Yang di Pertuan Agong and the Rulers constitutional roles are set out in the Constitution and the people is given the freedom to elect a government of their choice in a free election with the elected government being made answerable to the elected legislature. It is to this genius in our Constitution that the Prime Minister or the Menteri Besar, as the case may be, must answer. For that reason, I hold the view that in construing Article XVI(6) Perak State Constitution, a vote of no confidence on the floor of the Legislative Assembly is require to remove the Prime Minister or the Menteri Besar.

For all the above reasons, and in the circumstances stated in prayer (1)(b)(i), (ii), (iii) and (iv) and I am of the view that Office of MB Perak has not become vacant or vacated.

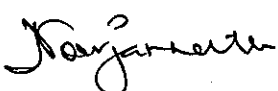
Accordingly there shall judgment for the applicant in term of prayer (1)(a), (b), (c), (d) and (e).

Earlier, Tuan Haji Sulaiman leading Counsel for applicant informed the Court that the applicant is not pursuing prayer (f), (g) and (h) and the applicant is also not asking for costs. I therefore make no order on them and there shall no order as to costs.



(DATO' ABDUL AZIZ BIN ABDUL RAHIM)
Hakim
Mahkamah Tinggi Malaya
(Bahagian Rayuan dan Kuasa-Kuasa Khas)

SALINAN DIAKUI SAH



Neer Jannaton Naamah bt Yeeb
Setiausaha kepada
Hakim Dagang &
Mahkamah Tinggi Kuala Lumpur