

(1965) 02 GAU CK 0005

In the Gauhati High Court

Case No : Civil Rules No's. 286 and 303 of 1964

Edwingson Bareh and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 05-02-1965

Acts Referred:

Constitution of India, 1950 — Article 1, 1(3), 132, 143(1), 153

Government of India Act, 1935 — Section 49(1)

Lushai Hills District (Change of Name) Act, 1954 — Section 2, 3

Citation : (1965) 02 GAU CK 0005

Hon'ble Judges : G. Mehrotra, C.J.; S.K. Dutta, J.; C.S. Nayudu, J

Bench : Full Bench

Advocate : S.M. Lahiri, S.K. Ghose, P. Choudhuri, N.M. Lahiri and B.M. Mahanta, for the Appellant; J.C. Medhi and M.C. Pathak, Sr. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G. Mehrotra, C.J.—These two rules raise common questions of law and are disposed of by one judgment. Mainly the validity of the Notification No. TAD/R/50/64 issued by the Governor of Assam on the 23rd November 1964 has been challenged. This notification will be referred to as "the Notification" hereinafter and reads as follows:

In exercise of the powers conferred by Clauses (c), (e) and (g) of sub-paragraph (3) of Paragraph 1 of the Sixth Schedule of the Constitution, the Governor of Assam after consideration of the report of the Commission appointed in this behalf under this Department Notification No. TAD/Con/21/62/293, dated the 28th August 1963 is pleased to create a new autonomous district to be called the Jowai District by excluding the Jowai Subdivision of the (sic) Khasi-Jaintia Hills District with effect from 1st December 1964. The boundaries of the Jowai District shall be the boundaries of the Jowai Subdivision of the United Khasi-Jaintia Hills District.

The Petitioner Edwingson Bareh in the petition giving rise to Civil Rule No. 286 of 1964 is the Chief Executive Member, District Council, United Khasi-Jaintia Hills and the Petitioner Gilbert Lyton in the petition giving rise to Civil Rule No. 303 of 1964 is an elector of Jowai Constituency and at present the Secy. of the Jaintia Durbar. The back-ground of the whole controversy is that by this notification the area of the Jowai Sub-Division has been taken out of the existing Autonomous District of United Khasi-Jaintia Hills District and constituted into a new autonomous district.

2. Article 244(2) of the Constitution provides that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam. This Article does not define the tribal areas in the State of Assam. It only provides that whatever is the tribal area in the State of Assam will be governed by the provisions of the Sixth Schedule. What are the tribal areas in the State of Assam are set out in Paragraph 20 of the Sixth Schedule. Paragraph 21 of the Sixth Schedule provides:

21(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as reference to such Schedule as so amended.

(2) No such law as is mentioned in subparagraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

Thus the purpose of setting out the extent of the tribal areas in the State of Assam in the Schedule and not in Article 244 of the Constitution is that if the tribal area is to be varied, it can be done simply by legislation of Parliament as it will only involve the amendment of the Schedule and recourse will not have to be taken to the provisions of Article 368 of the Constitution for the said purpose.

3. Mr. Lahiri who appears for the Petitioners, contends firstly that the notification issued by the Governor of Assam amounts to amendment of Paragraph 20 of the Sixth Schedule, which could only be done by an Act of Parliament as provided for under Paragraph 21, of the said Schedule, Secondly, he urges that even if the power of amending Paragraph 20 is assumed to have been given to the Governor under Paragraph 1(3), such a power has not been exercised by the Governor as will be evidenced from the language of the notification. Thirdly, it is contended that the power given under the Sixth Schedule paragraph 1(3)(c) only authorises the Governor to create a new autonomous district. If an autonomous district is created comprising of the area which was already part of an existing autonomous district, it cannot be said that it is a creation of a new autonomous district. In the present case as the new autonomous district of Jowai comprises of the area of the Jowai Subdivision, which was part of the existing autonomous district of Khasi and Jaintia Hills, it cannot be said that it is a creation of a new autonomous district and thus the notification does not come within the ambit of the Sixth Schedule paragraph 1(3)(c).

It was urged in support of this contention that the power to create a new autonomous district could only be exercised in respect of the areas specified in Table-Part B of Paragraph 20 of the Sixth Schedule, if and when by a notification under Paragraph 18 the provisions of this Schedule are applied to that area. It is then urged that if the notification is issued without amending Paragraph 20, it will be ineffective inasmuch as under Article 244 of the Constitution the provisions of unamended Paragraph 20 will continue to apply and thus will lead to an inconsistent position. Fifthly, it was urged that the proviso to Paragraph 1(3) has not been complied with and thus the notification issued by the Governor is invalid. This argument slated more explicitly is that Paragraph 14(2) of the Sixth Schedule has not been complied with. Lastly it is urged that the Governor has not acted in accordance with the recommendations of the Commission inasmuch as the Commission recommended the creation of a new autonomous district council and not a new autonomous district.

4. At this stage it will be convenient to set out certain relevant provisions of the Constitution. Paragraph 1 of the Sixth Schedule reads as follows:

1.(1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to Paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Schedule Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,

(a) include any area in Part A of the said table,

(b) exclude any area from Part A of the said table,

(c) create a new autonomous district,

(d) increase the area of any autonomous district.

(e) diminish the area of an autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(g) define the boundaries of any autonomous district:

Provided that no order shall be made by the Governor under Clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of Paragraph 14 of this Schedule.

Paragraph 18 of the Sixth Schedule reads as follows:

18.(1) The Governor may--

(a) Subject to the previous approval of the President, by public notification, apply

all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to Paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions, and

(b) With like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of Article 240 shall, apply thereto as if such area or part thereof were a Union territory specified in that article.

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion.

Paragraph 20 of the Sixth Schedule reads as follows:

20.(1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem:

Provided that for the purposes of Clauses(e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, subparagraph (2), Clauses (a), (b) and (d) of sub-Paragraph (3) and sub-paragraph (4) of paragraph 8, and Clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District and the Mizo District) or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution:

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

TABLE. PART A.

1. The United Khasi-Jaintia Hills District. 2. The Garo Hills District. 3. The Mizo District.... 4. The North Cachar Hills. 6. The Mikir Hills.

PART B.

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

Paragraph 21 of the Sixth Schedule reads as follows:

21.(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in subparagraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

5. The argument of Mr. Lahiri, in my opinion, assumes the following things: (1) that the amendment of paragraph 20 is a condition precedent for the exercise of the power under Paragraph 1(3) of the Schedule, (2) what is set out in Paragraph 20 is not the extent of the tribal area but the area of the autonomous districts, (3) that though a new autonomous district has been created, it cannot be called "new" inasmuch as it comprises of an area which forms part of an existing autonomous, district, and (4) that the power of amendment of Paragraph 20 conferred on the Governor under Paragraph 1(3) requires that the notification should contain in express terms a direction for amending Paragraph 20.

I do not think that on the plain language of Paragraph 1(3) and Paragraphs 20 and 21 of the Sixth Schedule there is any justification for such an assumption. As I have already indicated, Article 244(2) of the Constitution only lays down that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam. What is the extent of the tribal areas is set out in Paragraph 20. Paragraphs 1 to 17 set out the manner in which the area specified in part. A of the table appended to Paragraph 20 of the Constitution is to be governed. Paragraph 18 deals with the administration of the area set out in table B of Paragraph 20 of the Schedule The administration of this area is to be carried on by the Governor of Assam as the agent of the President till a notification is issued by the Governor with the approval of the President applying the other provisions of this schedule to the area set out in Part B of the table. If the Parliament thinks that the area set out in table B should be administered in the same manner as the area set out in Part A, it can amend the schedule and include the whole or part of the area set out in table B in table A, and thus by its own force, the provisions of paragraphs 1 to 17 will be all acted to this area.

The same results can be achieved by the issue of a notification by the Governor under paragraph 18(1)(a). But if the tribal area in the State of Assam is to be increased or decreased the amendment of the Constitution may be necessary. If any alteration in Paragraph 20 is to be done the schedule is to be amended. But

if paragraph 18(1)(a) is pressed into service, no amendment of the Constitution will be required. Paragraph 20 as I have already indicated, sets out the tribal areas in the State of Assam. The table appended to it only sets out certain districts. What is the extent of the Districts mentioned in part A of the table is set out in sub-paragraphs (2) and (3) of Paragraph 20 of the Schedule. The subparagraphs of Paragraph 20 only give the area of the tribal area in the State of Assam and so long as no alteration or subtraction is to be done from this area, that is, so long as it is not intended that any area set out in Paragraph 20 will cease to be a tribal area in the State of Assam, the amendment of Paragraph 20 will not be required. So long as it is also not intended that any area in the State of Assam which was not a tribal area should be considered as a tribal area of Assam, no amendment of paragraph 20 will be required. There is no question also in the present case of including any area which is set out in part B of the table in table A, nor vice versa.

6. Mr. Lahiri's contention is that when paragraph 20 is read with Paragraph 1, it is four that the areas which are set out in table Article A are coextensive with each autonomous district and thus if the area of any of these autonomous districts is diminished or increased and a new district formed out of that area, it necessarily involves the amendment of Paragraph 20. The answer to this argument is two fold: (1) that even if as a consequence of the issue of a notification which otherwise the Governor is competent to do, the provisions of Paragraph 20 stand amended to that extent, it cannot be said that the amendment of Paragraph 20 is a condition precedent for the exercise of the power under Paragraph 1(3). What is the ambit of the power of the Governor to issue a notification and what are the conditions precedent for the exercise of that power are to be decided on the plain language of Paragraph 1 of the Schedule. (2) That the notification does not necessarily amount to the amendment of Paragraph 20. Paragraph 1(1) only says that the tribal areas in each item of Part A of the table appended to Paragraph 20 of this Schedule shall be an autonomous district

This provision is subject to the other provisions of the said paragraph. The words "subject to the provisions of this paragraph in Paragraph 1(1) only mean that the declaration made in Paragraph 1(1), namely that each item of the area specified in Part A of the table shall be an autonomous district, is subject to any order which may be passed by the Governor. Thus each item of part A of the table can be equated with the autonomous district under paragraph 1(1), so long as it is not modified by issue of a notification by the Governor. Clause (e) of subparagraph (3) of Paragraph 1 authorises the Governor to diminish the area of an autonomous district. As the area is diminished by means of this notification, it does not cease to be a tribal area, so long as Paragraph 20 is not amended and the area is to be administered in accordance with the provisions of the Sixth Schedule in view of the provisions of Article 244 of the Constitution, It cannot be administered in accordance with the provisions of paragraphs 1 to 17 of the Sixth Schedule, unless it has a district council. It cannot have a district council unless

it is formed into an autonomous district and thus power has been given to the Governor under Paragraph 1(3)(e) to create a new autonomous district comprised of this area

If such a power was not given in respect of the tribal areas set out in part A of table of Paragraph 20, the power to diminish or to increase the area of any autonomous district would be rendered infructuous. So long as the area is a tribal area and is part of the area set out in part A table of Paragraph 20. any internal arrangement for its administration in accordance with the provisions of the Sixth Schedule has necessarily to be done by the Governor in the exercise of its executive authority and to meet such a contingency numerous and extensive powers have been given to the Governor under Paragraph 1(3). It cannot be said that the notification will be ineffective unless Paragraph 20 is amended. As soon as the new autonomous district is created, all the provisions of the Sixth Schedule are attracted on their own (sic) and the notification becomes fully effective. The only limitation on the exercise of the power by the Governor under Paragraph 1(3) is the one set out in the proviso and not the prior amendment of Paragraph 20.

If the effect of the issue of a notification is that Paragraph 20 stands amended, such an effect will follow from the exercise of the power itself conferred under Paragraph 1(3) and not by the amendment of the provisions of the Sixth Schedule. There is also no force, in the contention that the word "new" necessarily implies the creation of an autonomous district comprising of the area which was never the part of any existing autonomous district. The word "new" qualifies "autonomous district". When a fresh autonomous district of Jowai is created, it will nonetheless be a new autonomous district, even though the area of it was previously part of the autonomous district of United Khasi-jaintia Hills.

7. In the case of Debi Prasad Mukherjee Vs. Smt. Sandhya Debi, it was held by a Bench of this Court that the provisions of Paragraph 20 are subject to the provisions of Paragraph 1 and it was open to the Governor by a notification to take out an area from the area specified in part A of table of Paragraph 20 of the Sixth Schedule. The following passage may be quoted:

It is common ground that the area within which the offence occurred has been excluded from the area of Part A of the table attached to the Sixth Schedule. This seems to be the effect of the notification dated 13th April, 1951. Paragraph 20 of the Schedule provides in express terms that "the areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam." In Paragraph 21 power is reserved to the Parliament to amend by way of addition variation or repeal any of the provisions of the Schedule. Paragraph 20 which specifies the area in Parts A and B also forms part" of the Schedule. Amendment of the Schedule is possible only under Paragraph 21 by Parliament.

Notwithstanding these provisions the Governor could by public notification include any area in Part A or exclude any area from the part A of the said table

vide Paragraph 1(3)(a) and (b), as the provisions of paragraph 1 override the provisions contained in paragraph 20. Paragraph 1(1) expressly provides that subject to the provisions of this paragraph, the tribal areas in each item of part A of the table appended to Paragraph 20 of this Schedule shall be an autonomous district. The provisions contained in Paragraph 20 thus may be altered by action under Paragraph 1.

Broadly, in our opinion, this lays down the correct law.

8. There is no reason to confine subparagraph (8) to Paragraph 1 to the ease where by a notification under Paragraph 18 the provisions have been made applicable to the area set out in Part B of table appended to Paragraph 20. Mr. Lahiri relied upon certain instances when Paragraph 20 was amended by legislative action. Parts A and B of table of Paragraph 20 as they stood at the time of coming in force of Constitution in the 1950 were as follows:

TABLE PART A

1. The United Khasi-jaintia Hills District.
2. The Garo Hills District.
3. The Lushai Hills District.
4. The Naga Hills District.
5. The North Cachar Hills.
6. The Mikir Hills.

PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.
2. The Naga Tribal Area.

In the year 1954 Parliament passed an Act known as the Lushai Hills District (Change of Name) Act, 1954 (No. 18 of 1954). By Section 2 of this amending Act it was provided that the tribal area in Assam now known as the Lushai Hills District shall, as from the commencement of this Act, be known as the Mizo District. Section 3 amended Paragraph 20 of the Sixth Schedule by adding subparagraph (2A) after sub-paragraph 2 in the following terms:

(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

Paragraph 20(3) was amended by adding the words and the Mizo District" after the words "United Khasi-Jaintia Hills District" and further in Part A of the table, for the words "The Lushai Hills District" the words "The Mizo District" were substituted by Section 3.

Again in the year 1957 the Naga Hills-Tuensang Area Act, 1957 (No. 42 of 1957) was passed. By Section 3 of this Act the following amendments were made in the Sixth Schedule to the Constitution in Paragraph 20:

(a) after sub-paragraph (2A), the following sub-paragraph shall be inserted. namely:

(2B) The Naga Hills-Tuensang Area shall comprise the areas which at the commencement of this Constitution were known as the Naga Hills District and the Naga Tribal Area.;

(b) in sub-paragraph (3), after the words "Administrative; area", the brackets and words "(other than the Naga Hills Tuensang Area)" shall be inserted;

(c) in Part A of the Table, item 4 shall be omitted; and

(d) in Part B of Table, for item 2, the following item shall be substituted, namely:

2. The Naga Hills-Tuensang Area.

Further other amendments were made in other Acts which were consequential upon this change in the Sixth Schedule to the Constitution. In the year 1962 the State of Nagaland Act, 1962 (Act 27 of 1962) was passed by Parliament. The Act provided for the formation of the State of Nagaland and for matters connected therewith. By Section 5 of this Act the Sixth Schedule of the Constitution was amended in the following terms:

As from the appointed day, in the Sixth Schedule to the Constitution

(a) in Paragraph 20

(i) sub-paragraph (2B) shall be omitted;

(ii) in sub-paragraph (3), the brackets and words "(other than the Naga Hills-Tuensang Area)" shall be omitted.

(b) in the Table appended to Paragraph 20, in Part B, the item 2. The Naga Hills Tuensang Area" shall be omitted.

9. These instances are relied upon by Mr. Lahiri to show that whenever any amendment of the Paragraph 20 was made, a Parliamentary Act was passed and further he argues that these instances show that any change in the name or area of the autonomous district requires an amendment of the Constitution. We do not think that these instances give any assistance as to the interpretation of the provisions of Paragraph 1 of the Sixth Schedule. None of these amendments made by the Acts of Parliament were followed or preceded by any notification of the Governor under Paragraph 1 of the Sixth Schedule and thus these were the independent cases when power was exercised by Parliament under Paragraph 21 of the Sixth Schedule. In these cases power was exercised neither as a condition precedent for the issue of any notification, nor in consequence of any notification issued by the Governor under Paragraph 1(3). It is always open to the Parliament

acting under Paragraph 21 to amend the provisions of the Sixth Schedule.

But this does not necessarily mean that the power of the Governor to issue a notification under Paragraph 1(3) is conditioned by the exercise of the power of amendment under Paragraph 21 by the Parliament. Moreover, examining these Acts carefully it will appear that the Acts have not given effect to any notification issued by the Governor but they deal with matters which necessarily involved the alteration either of the name of the District set out in Paragraph 20 or taking out of some area from Paragraph 20 or transferring some area from Part A to Part B of Table or vice versa. Further Paragraph 21 confers a general power of amending the provisions of the Schedule, while Paragraph 1(3) confers an express power of constituting any autonomous district as a consequence of which Paragraph 20 stands amended. The general power must, therefore, yield to a specific power given under the Schedule itself.

10. It was then argued that the power conferred on the Governor under Paragraph 1(3) to issue a notification authorises him to form an administrative decision to be followed by a legislative Act of amending the Constitution and unless that action is taken, no new autonomous district can come into existence. Such an interpretation, in our opinion, is not warranted by the plain language of Paragraph 1(3). The power conferred is one of creating a new autonomous district and not only forming "an administrative opinion that such a district should be created. Paragraph 20 does not create an autonomous district. It is Paragraph 1 which creates an autonomous district.

11. The next point urged is that the proviso to sub-paragraph (3) of Paragraph 1 has not been complied with. The only limitation placed on the power of the Governor to issue a notification under sub-paragraph (3) of Paragraph 1 is firstly that the Governor should appoint a commission under sub-paragraph (1) of Paragraph 14 and secondly that he should consider the report of the said Commission before issuing a notification. It is not disputed that in the present case a Commission was appointed. As disclosed in the report of the Commission, due to repeated representations, a Commission was appointed by a notification of the Governor dated the 26th August 1968 to examine and report in the matter of creation of a new autonomous district for the Jowai Subdivision of the United Khasi-Jaintia Hills Autonomous District by excluding the areas comprising of the said Subdivision from the United Khasi-Jaintia Hills Autonomous District. The reference in express terms related to Clauses (c), (e) and (g) of Paragraph 1(3) of the Sixth Schedule. It is also not averred in the affidavit filed in support of the petition that the Governor did not consider the report of the Commission before issuing the notification in question. Thus the two condition precedents set out in the proviso to Paragraph 1(3) have been fulfilled.

If should be pointed out at this stage that the issue of the notification is not conditioned by complying with all the provisions of Paragraph 14 of the Sixth Schedule. Paragraph 1(3) of the Sixth Schedule does not say that it is subject to the provisions of Paragraph 14, it only requires the formation of a Commission

under Paragraph 14(1). As the Commission has been appointed under Paragraph 14(1), the Commission has submitted its report to the Governor and the Governor has considered it before issuing the notification, the provisions of Paragraph 1(3) have been complied with in this case, In this view of the matter it was not necessary to examine the question as to whether in the present case the provisions of Paragraph 14(2) have or have not been complied with.

12. Paragraph 14 of the Sixth Schedule to the Constitution reads as follows:

The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in Clauses (c), (d), (e) and (f) of subparagraph (3) of Paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new or special legislation in respect of such districts and regions; and

(c) the administration of laws, rules and regulations made by the District and Regional Councils; and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of autonomous districts and autonomous regions in the State.

Paragraph 14(1) empowers the Governor to appoint a commission to examine and report on a number of matters including the matters specified in Clauses (c), (d), (e) and (f) of Paragraph 1(3) of the Schedule. This paragraph thus is not confined to the appointment of a Commission to inquire into the matters specified in Clauses (c) to (f) of Paragraph 1(3) of the Schedule. But the ambit and the scope of the inquiry by such a Commission is much wider and thus the Constitution makers have put down Paragraph 14(2) to enable the Legislature to be acquainted with the work of the Commission. Sub-paragraph (2) of Paragraph 14 cannot be said to be incorporated in the Constitution with a view to put a check on the exercise of the power by the Governor under Paragraph 1(3)

13. In Paragraph 18 of the petition giving rise to Civil Rule No. 286 of 1964 the non-compliance of Paragraph 14 is set out as follows:

That your Petitioner submits that the report of the Commission with the

explanatory memorandum having been laid before the Legislative Assembly without the recommendation, if any, of the Governor, the impugned notification has been issued in violation of the mandatory provisions of sub-paragraph (2) of Paragraph 14 of the Sixth Schedule of the Constitution of India and the same is illegal and ultra vires of the Constitution of India.

Similar averment has been made in paragraph 18 of the petition giving rise to Civil Rule No. 303 of 1964. In the counter-affidavit filed by the State the following has been set out in reply to the averment made in paragraph 18 of the petition:

That the submission made in paragraph 18 of the petition is not tenable in law I submit that the requirements of Paragraph 14(2) were duly complied with. I further submit that the provisions of sub-paragraph (2) of Paragraph 14 of the Sixth Schedule of the Constitution of India are directory and not mandatory and Paragraph 1(3) is independent of Paragraph 14(2) of the Sixth Schedule and the latter does not govern the former. The Governor has full power to issue a notification under Clause 1(3) after consideration of the Report of the Commission independently of the compliance of Paragraph 14(2) of the Sixth Schedule.

Before this in paragraph 9 the details as to how the report of the Commission was considered by the Council of Ministers of Assam and how it was placed before the Governor are set out in the counter-affidavit.

14. We have already held that the requirement of Paragraph 14(2) is not a condition precedent for the exercise of the power under Paragraph 1(3) and thus even if it was not complied with, it will not vitiate the notification. But in the circumstances set out in the two petitions it cannot be said that there has been non compliance with the provisions of Paragraph 14(2). Paragraph 14(2) requires three things (1) that the report of the Commission should be placed before the Legislature, (2) it should be accompanied with the recommendation of the Governor and (3) it should be accompanied with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam. It is not denied that the report of the Commission was placed before the Legislature. It is also not denied that the explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam was also placed before the Legislature. The only defect pointed out is that the report of the Commission was not accompanied with the recommendation of the Governor. Paragraph 14(2) nowhere says that the recommendation of the Governor should be in writing signed by him. The memorandum which was placed before the legislature is annexure II to the petition and is headed as follows:

Recommendations of the Governor and the action proposed to be taken by the Government of Assam on the report of the United Khasi-Jaintia Hills Autonomous District Commission.

The concluding portion of the memorandum reads as follows:

The Commission submitted its report on the 24th January 1964 and this report is laid on the Table of the House. After a careful consideration of the report and on the recommendation of the Governor, the Government has decided to accept the recommendations of the Commission and give effect to them by taking necessary administrative and other steps in this direction.

This memorandum was placed before the Legislature and the statement in this memorandum that the proposed action is based on the consideration of the report and the recommendation of the Governor necessarily means that the recommendation of the Governor was before the Legislature. The recommendation of the Governor was in effect embodied in this memorandum itself and in the absence of any requirement that there should be a separate written recommendation with the signature of the Governor, the submission of this memorandum with the report constitutes itself the recommendation of the Governor and there has been substantial compliance with the provisions of Paragraph 14(2) of the Sixth Schedule. It is not necessary that the Governor should make any particular suggestion to the Government as to how it should act in accordance with the report. If the Governor intends to suggest any other "manner of implementation of the report or any addition or substitution of the recommendation of the Commission, obviously the Governor has to give it out for the benefit of the members of the Legislature. But if the Governor accepts the report, the only form of recommendation contemplated by Paragraph 14(2) is its communication to the Legislature to accept the said report.

15. During the course of the argument the counsel for the State placed before us the Secretarial record and from a perusal of the same it appears that the memorandum after discussion amongst the members of the Cabinet was placed before the Governor and he has noted therein "Seen. Thanks." No doubt this cannot be said to be a recommendation by the Governor placed before the Legislature as the Governor signified his assent to the memorandum. But the memorandum states that the proposed action is based on consideration of the report and the recommendation of the Governor and this averment is accepted to be correct by the Governor. Thus when this memorandum was placed before the Legislature, the recommendation of the Governor was in effect placed before the Legislature.

16. In this connection it should also be mentioned that Paragraph 14(2) of the Sixth Schedule to the Constitution is meant for the benefit of the members of the Legislature, so that they may be apprised of the work done by the Commission and as such it is only for the members of the Legislature to object to the procedure adopted in passing the resolution. But the object of this sub-paragraph is not to limit the powers of the Governor under Paragraph 1(3).

17. There is no substance in the last point urged by Mr. Lahiri that the notification does not accept the recommendation of the Commission. It is urged that in the concluding portion of the report the Commission has recommended the creation of a new autonomous district council for the Jowai Subdivision of the

United Khasi-Jaintia Hills Autonomous District and not the creation of any autonomous district. This argument ignores the back-ground under which the Commission was appointed and the powers of the Commission to report and its binding effect. The terms of reference in express terms lay down that the Commission has to examine and report in the matter of creation of a new autonomous district for the Jowai Subdivision of the United Khasi-Jaintia Hills Autonomous District. The recommendation although uses the words "the creation of a new Autonomous District Council", it further lays down that such a district council is to be created for the Jowai Sub-Division of the United Khasi and Jaintia Hills Autonomous District. After examining the whole matter carefully the Commission makes the recommendation chiefly based on administrative differences which appear to them irreconcilable and thus the Commission suggested a distinct administrative unit for that area.

How that administrative unit can be brought into existence was a matter which necessarily had to be left to the Government and in order to give effect to the recommendations of the Commission, namely to form a new administrative unit for his subdivision, the Governor had to resort to his powers under Paragraph 1(3). In what manner and what power the Governor had to exercise in order to give effect to the recommendations of the Commission was not a matter, on which the Commission could have said anything. It was for the Governor to decide what executive steps he could take to implement the report. If the Governor had followed the letter of the recommendation of the Commission and created an autonomous district council, the action would have been ultra vires. To bring into existence an autonomous district, council for the Jowai Subdivision it was necessary to create an autonomous district comprising of the Jowai Subdivision, which the Governor did. It cannot, therefore, be said that because the Governor did not by the notification create an autonomous district council for the Jowai Subdivision which he could not do, he has not accepted the terms of the Commission and thus the notification is ultra vires.

18. In the result, therefore, we dismiss these petitions with costs. The hearing fee is fixed at Rs. 100/- in each case.

C.S. Nayudu, J.

19. These two Civil Rules question the validity and the constitutionality of the Notification No. TAD/R/50/64 issued by the Secretary to the Government of Assam, Tribal Areas and Welfare of Backward Class Department, purporting to have been issued by the Governor on the 23rd, November, 1964 and published in the Assam Gazette Extraordinary dated 23rd November, 1964, which purported to create a new autonomous district to be called Jowai District with the Jowai Sub-division area of the United Khasi-Jaintia Hills Autonomous District with effect, from 1st December, 1964. This notification stated that it was being issued in exercise of the powers conferred on the Governor of Assam by Clauses (c), (e) and (g) of sub-para (3) of Para 1 of the Sixth Schedule of the Constitution, and, under it, the Governor of Assam is pleased to create a new autonomous district

to be called the Jowai District, the boundaries whereof are to be the boundaries of the Jowai Sub-division of the United Khasi-Jaintia Hills District. This creation is effected by excluding the Jowai Subdivision from the United Khasi-Jaintia Hills District.

20. I have had the advantage of reading through the judgment of My Lord the Chief Justice which has just been pronounced. With great respect, I regret I am unable to agree either with the conclusion reached or the reasoning thereof.

21. As the validity and the constitutionality of the Notification is questioned in these proceedings, it would be useful to extract the same, which is incorporated as Annexure III to the Civil Rule No. 286 of 1964 and Annexure II to the Civil Rule No 303 of 1964:

GOVERNMENT OF ASSAM ORDER BY THE GOVERNOR TRIBAL AREAS DEPARTMENT.

NOTIFICATION The 23rd November. 1964.

No. TAD/R/50/64: In exercise of the powers conferred by Clauses (c), (e) and (g) of Sub-paragraph (3). of paragraph 1 of the Sixth Schedule of the Constitution, the Governor of Assam after consideration of the report of the Commission appointed in this behalf under this Department Notification No, TAD/Con/21/112/293, dated the 28th August, 1963 is pleased to create a new autonomous district to be called the Jowai District by excluding the Jowai Sub-division of the. United Khasi -Jaintia Hills District with effect from 1st December, 1964. The boundaries of the Jowai District shall be the boundaries of the Jowai Subdivision of the United Khasi-Jaintia Hills District

Sd. S. Barkataki, Secy. to the Government of Assam, T.A.O.B. and W.B.C. Dept.

It would also be necessary to refer in the various provisions of the Sixth Schedule of the Constitution in this connection. Para 1 of the Schedule is as follows:

Autonomous Districts and Autonomous Regions: (1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be an district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions,

(3) The Governor may, by public, notification:

(a) include any area in Part A of the said table,

(b) exclude any area from Part A of the said table,

(c) create a new autonomous district,

- (d) increase the area of any autonomous district.
- (e) diminish the area of an autonomous district.
- (f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,
- (g) define the boundaries of any autonomous district:

Provided that no order shall be made by the, Governor under Clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration" of the report of a Commission appointed under sub-paragraph (1) of para graph 14 of this Schedule.

As may be seen from the above, the proviso to this paragraph makes it imperative that the Governor could act under Clauses (c), (d) (e) and (f) of sub-paragraph (3) of Para graph 1 of the Schedule only after consideration of the report of a Commission appointed under sub-paragraph (1) of Paragraph 14 of the Schedule, which runs as follows:

14. Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions: (1) The Governor may at any time "appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in Clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on

(a) the provision of educational and medical facilities and communications in such districts, and regions;

(b) the need for any new or special legislation in respect of such districts and regions; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils:

and define the procedure to be followed by such Commission.

it would also be necessary to refer to Article 244(2) of the Constitution, which is as follows:

The provisions of the Sixth Schedule shall apply in the administration of the tribal areas in the State of Assam.

The tribal areas in the. State of Assam have been set out in Paragraph 20 of the Sixth Schedule, which, as finally is as follows:

20. Tribal Areas: (1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam,

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem:

Provided that for the purposes of Clauses (e) and (f) of sub-paragraph (1) of Paragraph 3, Paragraph 4, Paragraph 5, Paragraph 6, sub-paragraph (2), Clauses (a), (b) and (d) of sub-paragraph (3) and Sub-paragraph (4) of Paragraph 8 and Clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

(3) Any reference in the table below to any district (other than the United Khasi Jaintia Hills District and the Mizo District) or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution:

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

TABLE PART A

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.
3. The Mizo District.
4. (Omitted)
5. The North Cachar Hills
6. The Mikir Hills.

PART B

1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

Paragraph 21 of the Sixth Schedule provides "for the amendment of the Schedule, which runs as follows:

21. Amendment of the schedule: (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference in this Schedule in this Constitution shall, be construed as a reference to such Schedule as so

amended

(2) No such law as is mentioned in subparagraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 308.

22. To summarise (be above provisions:

(1) The provisions of the Sixth Schedule to the Constitution apply to the administration of tribal areas in the State of Assam as set out in Paragraph 20 of the Sixth Schedule.

(2) Any amendment of the provisions of the Sixth Schedule could only be made by Parliament by law: such an amendment can be effected by a simple majority of the members present in the Parliament, as Article 308, which would otherwise apply to an amendment of the Constitution, not Inning been made applicable.

(3) Power is given to the Governor by public notification, inter alia to create a new autonomous district.

(4) This power, however, cannot be exercised by the Governor, except after consideration of the report of a Commission appointed under sub-paragraph (1) of Paragraph 14 of the Sixth Schedule.

23. In the instant case, the following facts are beyond dispute:

(1) That a Commission was appointed under sub-paragraph (1) of Paragraph 14 of the Sixth Schedule.

(2) That the Commission has submitted its report.

(3) That the Commission recommended the creation of a new autonomous District Council for the Jowai Subdivision of the United Khasi-Jaintia Hills Autonomous District, by excluding the areas comprising the areas of the said Subdivision from the United Khasi-Jaintia Hills Autonomous District. They did not, in so many words, recommend the formation of a separate Autonomous District for the Jowai Subdivision of the United Khasi Jaintia Hills Autonomous District.

24. The Petitioners rely on the following points in support of their petitions:

(1) That the Notification issued in the case is invalid, inoperative and unconstitutional ;

(2) The Notification in question could not be valid, as the Governor had not considered the report of the Commission appointed under sub-paragraph (1) of Paragraph 14 of the Sixth Schedule and had not made recommendations thereon;

(3) As the recommendation of the Commission was only for the formation of a District Council and not of a separate Autonomous District for the Jowai Sub-division, the acceptance of the report could not involve the formation of a separate Autonomous District;

(4) Power under Paragraph 1, Clause (3)(c) of the Sixth Schedule could only be

exercised if in the formation of an area into an Autonomous District such area did not already form part of an Autonomous District:

(5) Assuming that all the points relied on by them are found against the Petitioners, the Notification can have no effect so long as Paragraph 20 of the Sixth Schedule is not amended by carrying into effect the result of the Notification, that is. by amending Paragraph 20 so as to include Jowai Subdivision as an Autonomous District and by amending the description of the United Khasi-Jaintia Hills District and its boundaries so as to conform to the Khasi Hills District, which would cease to be the United Khasi Jaintia Hills District, alter the formation of a new Autonomous District, comprising of the Jowai Hills District

(6) This power of amendment resting only in the Parliament under Paragraph 21 of the Schedule could only be given effect to by Parliament by amendment and till this is done, the notification purporting to have been issued by the Governor under sub-paragraph 3) of Paragraph 1 of the Schedule would be ineffective and cannot by itself result in the coming into existence of the new Autonomous District of Jowai Hills; and

(7) That the requirements of Paragraph (2) of the Sixth Schedule had not been complied with in that the recommendations of the Governor with respect to the report of the Commission appointed under Paragraph 4(1) had not been laid before the Legislature of the State by the Minister concerned, although the report of the Commission with the explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam had been placed.

25. In reply to this, the Respondents including the State of Assam contended that the Jaintia Hills has no connection with the Khasi States in the Khasi Hills, that the Khasi Hills and the Jaintia Hills formed into two separate administrative units before and during the advent of the British Rule, that the Khasi and Jaintia Hills belong to two different Scheduled Tribes and that it is only under the Constitution of India that one autonomous District has been formed comprising both the Hills. It is further contended that as sub-paragraph (1) of Paragraph I contains the words "subject to the provisions of this paragraph," the Governor could act under paragraph 1 without any legislation by Parliament and that consequently the action taken by the Governor in the creation of the new autonomous district or District Council would not amount to transgression on the power of the Parliament.

It is further claimed that the Commission under Paragraph 14 of the Sixth Schedule was appointed as a result of many representations for over a period of six or seven years and that the report of the Commission was considered by the Council of Ministers of Assam and their advice for acceptance of the recommendations of the Commission was placed before the Governor of Assam and that the Governor accepted the recommendations of the Commission. It is further pointed out that the Governor agreed with the Cabinet decision and the explanatory memorandum -prepared by the Government of Assam and that in

any event the statement of the Minister-in-charge on the floor of the House that the Governor has recommended the acceptance of the report of the Commission is sufficient compliance with paragraph 14(2) of the Sixth Schedule. It is further contended that the action taken by the Governor in creating a new Autonomous District is well within his powers as he could diminish the area of any Autonomous District and define the boundaries thereof by public notification and to give effect to this, no amendment to the Sixth Schedule is necessary to be made by the Parliament and that it did not attract Paragraph 21 of the Sixth Schedule.

It is further claimed that Paragraph 14(2) of the Sixth Schedule is only directory and not mandatory and that Paragraph 1(3) is independent of Paragraph 14(2) thereof and does not govern the exercise of Governor's powers under Paragraph 1(3) of the Sixth Schedule. It is claimed that the Governor has full powers to issue a notification under Paragraph 1(3) of the Schedule after consideration of the report of the Commission independently of the compliance with Paragraph 14(2) of the Sixth Schedule. It is denied that the recommendations of the Governor were not made and that in any case as the notification was issued by one of the authorised officers in the name of the Governor it could not be questioned. The Respondents further contended that the Commission, although had recommended the creation of a new District Council, must necessarily have also recommended the creation of a new autonomous district. Accordingly, it is claimed that the notification purporting to have been issued by the Governor under paragraph 1(3) of the Schedule creating the new autonomous district comprising Jowai Subdivision was valid in law and was in consonance with the provisions of the Constitution.

26. For the sake of completeness, a few facts and dates require to be mentioned. To examine and report in the matter of creation of a new autonomous district for the people of Jewie Subdivision of the United Khasi-Jaintia Hills Autonomous District and exclusion of the area from the United Khasi-Jaintia Autonomous District for the creation of the new autonomous district, a Commission was appointed by order dated 26th August 1963, in exercise of the powers conferred by subparagraph (1) of Paragraph 14 of the Sixth Schedule to the Constitution of India. The terms of reference to the Commission were.

to examine and report in the matter of creation of a new autonomous district for the Jewie Subdivision of the United Khasi-Jaintia Hills Autonomous District by excluding the areas comprising of the said subdivision from the United Khasi-Jaintia Hills Autonomous district.

The Commission, accordingly, held an enquiry into the subject matter of reference and submitted its report on the 20th January, 1964, after receiving such memoranda and evidence, and arriving at the following elusions; as set out in para 123 of its report, which would be relevant for the purposes of these matters, to extract:

To sum up, we feel that if the inhabitants of the Jaintia Hills work together and maintain the existing system of administration, there is no reason why a separate District Council for Jowai should not be a success, The establishment of a separate District Council would, we think resolve the prevailing tension and bitterness, due to a lack of uniformity in administration, between them and the. Khasis, and we hope, lead to a better understanding between them.

We accordingly recommend the creation of a new Autonomous District Council for the Jowai Subdivision of the United Khasi and Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Subdivision from the United Khasi and Jaintia Hills Autonomous District. As we see it, the main obstacle to smooth working of the new District Council will be the Jaintias who are opposed to bifurcation.

x x x x

x x x x

In conclusion, we may point out that, according to the 1961 Census, the area of Jowni Sub division is 1,515 square miles with a population of 82,147 compared with 1,888 square miles and population of 54,319 in the North Cachar Hills, where there is already a separate District Council.

This report together with the explanatory memorandum regarding the action proposed to be taken by the Government of Assam was placed before the Legislative Assembly on the 25th September, 1904. Thereupon the Assam Legislative Assembly passed a resolution approving the action proposed to be taken by the Government of Assam on the report of the United Khasi-Jaintia Hills Autonomous District Commission, on the 8th October, 1904. Thereafter, on the 23rd November, 19064 as already pointed out, the notification in the name of the Governor was issued, purporting to create a new autonomous district to be called the Jowai District by excluding the Jowai Subdivision of the United Khasi-Jaintia Hills District with effect from the 1st December, 1904, purporting to be in exercise of the powers conferred on the Governor of Assam by Clauses (c). (e) and (g) of sub-para (3) of Paragraph 1 of the Sixth Schedule of the Constitution, and the notification in question was published on the same date in the Official Assam Gazette as Gazette Extraordinary.

27. The first objection taken by the Petitioners in these Civil Rules is as to the constitutional validity and the operative character of this notification. In support of this objection, the Petitioners contend that the Governor did not consider the report of the Commission appointed under Paragraph 14(1) of the Sixth Schedule and therefore could not have and did not make any recommendations on that report. The argument in effect comes to this, namely, that the Governor who is charged with the duty of considering the report and making recommendations had not done so and secondly the notification purporting to have been issued in the name of the Governor under Paragraph 1(3), hereinafter referred to as the notification, could not be a valid notification, inasmuch as the exercise of (hat

power under the sub-paragraph of that paragraph pre-supposes the Governor himself considering the report and applying his mind to it and there after drawing up his recommendations on the report, and that it is only after he takes these steps that he should decide whether the proposed new autonomous district should be created or not and whether, accordingly a notification under sub-paragraph (3) of Paragraph 1. creating the new autonomous district should not be issued.

28. Before I go into the actual facts in the case, it would be necessary to consider and examine the nature of the powers that are to be exercised by the Governor under the Sixth Schedule of the Constitution, and before this is done, as the contention on behalf of the Respondents at one stage was that the Governor was only a constitutional figure-head and that whatever has to be done, is to be done by the Minister concerned, or the Cabinet, without reference to the Governor, the general powers of the Governor under the Constitution would, also call for examination, in order to (sic) take the consideration of the Governor's powers under the Sixth Schedule of the Constitution.

29. Article 153 of the Constitution declares that there shall be a Governor for each State. There is a proviso to the Article which permits the appointment of the same person as the Governor for Two or more States. Article 154 deals with the executive power of the State and declares that it shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The expression "executive authority" occurring in Section 49(1) of the Government of India Act, 1935, was held by the Privy Council in AIR 1948 156 (Privy Council) to have been used in a broader sense as including both the decision as to action and the carrying out of that decision. Similarly the expression "executive power" occurring in our Constitution was held by the Supreme Court to have similar meaning, in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, where that Court observed:

The executive function comprises both the determination of the Policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare...in fact the carrying on or supervision of the general administration of the State.

30. The Governor of a State shall be appointed by the President by warrant under his hand and seal (Article 155), and shall hold office during the pleasure of the President and subject to this, shall hold office for a term of five years, unless he resigns his office earlier by writing under his hand addressed to the President. Article 157 prescribes the qualifications for appointment as Governor and Article 158 declares that, he shall not be a member of either House of Parliament or of a House of the Legislature of any State specified in the First Schedule to the Constitution. He is also debarred from holding any office of profit. Clause (3) of Article 158 entitles the Governor to the use of his official residence without payment of rent and to other emoluments, allowances and privileges as may be

determined by Parliament by law and until so determined, to those specified in the Second Schedule. Article 161 confers powers on the Governor to grant pardons, reprieves, respites or remissions of punishment or to suspended remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

31. Article 162 lays down the extent of the executive power of the State as extending to the matters with respect to which the Legislature of the State has power to make laws. Article 163 provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under the Constitution required to exercise his functions or any of them in his discretion. Clause (2) of the Article declares that the decision of the Governor shall be final as to whether any matter is or is not a matter as respects which the Governor is required to act in his discretion by or under the Constitution. Article 164(1) provides for the appointment by the Governor of the Chief Minister of the State and of the other Ministers by the Governor on the advice of the Chief Minister, the Ministers holding office during the pleasure of the Governor.

32. Article 165(1) provides for the Governor of a State appointing a qualified person to be the Advocate-General for the State, who shall hold office during the pleasure of the Governor and shall receive such remuneration as the Governor may determine. Article 316(1) gives powers to the Governor to appoint the Chairman and other members of the State Public Service Commission. The proviso to Article 309 gives power to the Governor to make Rules regulating the recruitment and conditions of service of persons appointed to the posts and services in connection with the affairs of the State until the State Legislature passes an appropriate Act". Article 310 lays down that every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor.

33. Article 166 provides for the conduct of Government business and lays down that all executive action of the Governor of the State shall be expressed to be taken in the name of the Governor. Clause (2) of the Article provides for the Governor making rules for authenticating orders and other instruments made and executed in the name of the Governor in the manner specified therein. Clause (3) provides for the Governor making rules for the more convenient transaction of the business of the Government of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. It is under this Clause and Clause (2) of this Article, we find that the rules known as "The Assam Rules of Executive Business" were framed by the Governor for use in the State of Assam, to which reference would require to be made later in this judgment.

34. Article 167 lays down that it shall be the duty of the Chief Minister of each State to communicate to the Governor of the State all decisions of the Council of

Ministers relating to the administration of the affairs of the State and proposals for legislation and to furnish such information relating thereto as the Governor may call for, and if the Governor so requires, to submit for the consideration of the Council of Ministers, any matter on which decision had been taken by a Minister but which matter had not been considered by the Council of Ministers.

35. Article 168, which deals with the constitution of Legislatures in States, declares the Governor as forming part of the Legislature of the State. Article 174 gives power to the Governor to summon the House or Houses of the legislature of the State from time to time and to prorogue the House or Houses from time to time and dissolve the Legislative Assembly. Article 180(1) gives power to the Governor to appoint a Member of the Assembly to perform the duties of the offices of the Speaker and the Deputy Speaker falling vacant. Article 192(1) declares that if any question arises as to whether a Member of a House of Legislative Assembly has become subject to any of the disqualifications mentioned for membership of the House, that question shall be referred for the decision of the Governor whose decision shall be final.

36. Article 200 requires that when a Bill has been passed by the Legislative Assembly of a State or both the Houses where there is a Legislative Council, it shall be presented to the Governor for his assent, on which the Governor shall either declare that he assents to the Bill or that he withholds the assent therefrom or that he reserves the Bill for the consideration of the President. The provisos thereto contain further details of the procedure to be followed in the particular case. Article 202 provides that the Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State the "annual financial statement that is, a statement of the estimated receipts and expenditure of the State for that year. Article 213 deals with the legislative powers of the Governor to promulgate Ordinances during the period of the recess of the legislature of the State.

37. from a general survey of the above referred provisions dealing with the various powers and duties of the Governor under the Articles of the Constitution they seem to fall broadly into the following categories:

- (1) Exercise of Governor's powers in consultation with and on the advice of the Council of Ministers,
- (2) Exercise of powers by the Governor in the exercise of his discretion when so specified in the Constitution; and
- (3) Exercise of powers on the Governor's own initiative and without reference to the Council of Ministers.

38. The first one relates to the common and general performance of executive duties by the Governor. In doing so, he could act directly, that is, by himself, or indirectly through his subordinates, namely, the Ministers and the Officers of the State. That Ministers are subordinate to the Governor has been laid down by the

Privy Council in AIR 1945 156 (Privy Council) This decision, no doubt, was given under the Government, of India Act. 1935, but the provisions in our Constitution are similar and the above decision would therefore apply to the Constitution and accordingly a State Minister would be an Officer subordinate to the Governor of the State. For this purpose, namely, the performance of executive duty, provision is made for the preparation of the Rules of Executive Business guiding and specifying the mode of exercise of the Governor's executive power indirectly through his subordinates.

Even such exercise of power, except in ordinary and routine mailers, where important decisions of policy or other decisions are involved affecting the welfare of the State and the people, the Governor has to be consulted and his views and orders obtained. This has been enjoined because the Governor does not belong to any party and he is charged with the duty of ensuring fair administration to the people of the State. It would be wrong, therefore, to equate the Governor even in the matter of his exercising the executive functions under Article 154(1) to a mere constitutional figure-head, who could be bypassed or ignored by the Chief Minister or the Council of Ministers in taking important decisions affecting the people and the well-being of the State, so that, even where the performance of the ordinary executive business is involved, in all important matters, the Governor must be in the picture of things that are happening and his approval or concurrence has, as a rule, to be obtained; for, otherwise, the responsibility for anything good or bad done without the consent or knowledge of the Governor who is responsible for the fair and proper administration of the State of which he is the head under the Constitution, would still fall on the Governor.

This is clearly supported by the language of Article 154(1) and of Article 163 which imposes a duty on the Council of Ministers to aid and advise the Governor in the, exercise of his functions under the Constitution.

(2) As regards the second category of the Governor's functions, there could be no difficulty as the Constitution itself imposes restriction on the power to be exercised or the duty to be performed by the Governor, laying down that he should do so acting in his own discretion without being influenced, guided or affected by the judgment or the inclination of any body howsoever august it might be, including the State Cabinet. Hence, in such matters the Council of Ministers will have no voice or concern.

(3) Although the Constitution, in effect, has not said in so many places that a certain constitutional duty should be performed or power exercised by the Governor in his own discretion, or on his own initiative, in several instances the circumstances are such that the duty has to be performed by the Governor on his own responsibility and by himself, without consulting or being influenced by the Council of Ministers. To give two straightforward examples, there is the power in regard to giving or withholding an assent to the Bill passed by the State Legislature under Article 200, or the duty of giving a decision under Article 192 regarding the disqualification of a Member. In such and similar matters, and

there are a number of them--the Council of Ministers can have no voice in the discharge of the functions by the Governor.

39. Besides the above, there are the powers and duties of the Governor exercisable and performable under the Sixth Schedule of the Constitution with which we are mainly concerned in the instant case.

40. Before I refer to the provisions contained in the Sixth Schedule with respect to the administration of the tribal areas in Assam, it would be useful for a better appreciation of the points falling for determination in these matters to briefly examine the historical background leading to the enactment of the Sixth Schedule in the Constitution, as exclusively applicable to these tribal areas. The United Khasi-Jaintia Hills Autonomous District comprises territories which before the commencement of the Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding areas comprised within the Cantonment and Municipality of Shillong but including so much of the area within the Municipality of Shillong as formed part of the Khasi State of Myiliem before the Constitution. The substantial part of the Khasi Hills consisted of territories or Sates of semi-independent native chiefs generally known as Siems in a kind of subsidiary alliance with the then British Government.

Of such Khasi States, there were in all twenty live of which sixteen were Siemships, three of the other Chiefs were known as Byngdohs and five of the remaining as Sirdars and a confederacy known as Sheila Confederacy under Wahadadars who were elected officers. The Chiefs of these States are generally from the same family, the inheritance following through the female. In some of these States the succession appears to have been hereditary, but in most of them, the Chief by whatever name he was known was elected either by what was equivalent to an electoral College or by the people generally, the election in many cases being confined to members of certain families known as the Chief's families. The Khasi Hills came under the British Government following the massacre of British subjects in 1829, which was sought to be avenged by a series of military expeditions which resulted in the surrender of the most powerful among the Khasi Chiefs by name Tirot Singh in 1838, and this was followed by a general pacification arrangement under which the Khasi Chiefs were allowed to (sic) a large measure of independence, subject to the general control of the Political Agent.

Since then, the succession of Khasi Chief whether hereditary or by election as aforesaid was made subject to ratification by the British Government and the new Chief was required on investiture to confirm succession to the paramount power a half of the minerals, elephants, forests and other natural products of his State. Besides, it would appear that the British Government through the Crown Representative as paramount power reserved to itself, the right of removing the Chief in the event of proved misconduct, oppression or dereliction of duty but before taking such action the prevailing custom in the particular State regarding the ascertainment of the wishes of the electoral College or the people, as the

case may be, was followed. The Deputy Commissioner of the District also exercised some control over the Chiefs.

41. The Jaintia Hills formed part of the territories of the Raja of Jaintia divided for purposes of administration into twelve Dolloiships under the suzerainty of the Raja of Jaintiapur. The Dollois were elected by the people of the villages comprised in their respective jurisdiction and exercised both Civil and Criminal powers. Consequent on the immolation of three British subjects by one of the dependent Chieftains of Jaintia at the shrine of Kali, the Jaintia Raja inclined to the displeasure of the British which resulted in the annexation by the British of the plains areas of Jaintia Raja by way of retributive justice. Following this deprivation of the valuable plains territories, the Raja declined to retain possession of the Hill tracts, whereupon the entire Jaintia Kingdom was annexed by the British, resulting in the Jaintia Hills area being placed by the British under the administration of their Political Agent at Cherrapunji, who was also in charge of the Khasi Hills, for the sake of administrative convenience. In 1868 the Jaintia Hills were formed into a subdivision with headquarters at Jowai and made part of the Khasi and Jaintia Hills District.

42. In the territories of Khasi States, the people did not pay any revenue to the British Government. The relation of landlord and tenant between the ruling chiefs and cultivators was not recognized.

43. On the eve of the Indian Independence, the Khasi States formed themselves into a federation and signed the Stand-Still Agreement with the Government of India. The paramountcy of the British Government having lapsed on the 15th August, 1947, when India became a dominion, the twenty five Khasi Chiefs executed Instruments of Accession with the Government of India, declaring that they acceded to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion Authority shall by virtue of the Instrument exercise in relation to the Khasi States such functions as may be vested in them by or under the Government of India Act, 1935, which was accepted by the Governor-General of India on August 17, 1948. By this Instrument, the Chiefs individually as well as collectively as members of the Federation acceded to the Dominion of India, by which all existing administrative arrangements between the Government of India on the one hand and the Khasi States on the other were to continue in force until new or modified arrangements were made subject to certain exceptions as to judicial and administrative powers. This position continued till the Constitution came into force. Thus there was no merger as such of the twenty five Khasi States, in India before the 26th January, 1950.

44. The Constituent Assembly appointed a Sub-Committee on the North-East Frontier (Assam) Tribal and Excluded Areas to advise it on the future administrative set up in those areas. This Committee recommended the creation of six autonomous districts including the District of the United Khasi and Jaintia Hills. Each of these districts was to have a District Council with at least twenty

and not more than forty members, of whom not less than three-fourths shall be elected by adult franchise. The District Councils were to have powers to make laws for the areas under their respective jurisdictions in regard to various matters and given powers which included the establishment of the system of judicial administration and powers of taxation. On the basis of the above recommendations of this Committee, the Drafting Committee of the Constituent Assembly prepared the Sixth Schedule to the Constitution, applicable only to the Tribal Areas in Assam.

In Part-A of the Table at the end of the Sixth Schedule, the six autonomous districts that were formed and named when the Constitution came into force were:

1. The United Khasi-Jaintia Hills District;
2. The Garo Hills District;
3. The Lushai Hills District;
4. The Naga Hills District;
5. The North Cachar Hills;
6. The Mikir Hills.

In Part B of the Table the following areas were included;

- 1 North East Frontier Tract including Balipara Frontier Tract. Tirap Frontier Tract, Abor Hills District and Misimi Hills District:
2. The Naga. Tribal Area.

Although there was (sic) twenty five Khasi States with India before the. 26th January, 1950, the Constitution nevertheless by the First Schedule which defined the territories of Assam, merged the Khasi States into the newly formed State of Assam, which was to consist of the territories which immediately" before the commencement of the Constitution comprised of the Province of Assam, the Khasi States and the Assam Tribal areas.

Thus by the Constitution, the Khasi States were merged in the State of Assam and any power of the Khasi Chiefs so far as the administration was concerned came to an end. But, by Article 244(2) of the Constitution, special provisions were made in the Sixth Schedule applicable to the administration of the Tribal Areas in the State of Assam as distinguished from the plains portion of Assam which, more or less, covered the rest of the State of Assam Thus, after coming into force of the Constitution, the position was that; the Chiefs lost whatever (sic) or administrative powers they had by the merging of these twenty five States in Assam and the governance of these States was to be carried on according to the special provisions of the Sixth Schedule.

Thus, although the rights of the Khasi Chiefs as such had ceased to exist, the

territories covered by their States which are included in the United Khasi and Jaintia Hills Autonomous District were declared to be governed by a special form of administration laid down in the Sixth Schedule, under which the Tribal Areas covered by the territories of these Chiefs assumed an autonomous character, in that they would be governed by laws made by their own District Councils comprised of the representatives from these areas to whom power is given to make laws, both regarding administrative, executive and judicial (sic) including the power to levy (sic) and realise revenue. Hence, although the territories covered by these Tribal Areas are included as part of the State of Assam they continued to retain an independent autonomous status in many respects as distinguishable from the areas forming part of the remaining State of Assam, namely the area covered by what was previous to the Constitution the Province of Assam. At the same time, in matters not affecting the autonomy of the District Councils of the Autonomous Districts, the State Legislature has usual legislative powers and in that regard (sic) representation to the representatives of the tribal areas is provided for in the State Legislative Assembly.

45. As already pointed out although the historical background of the Jaintia Hills and the Khasi Hills had not been uniform and the Khasi Hills and the Jaintia Hills continued separate administrative units up to the time of the British annexation there, were many features in common between the two Hills areas. The bulk of the inhabitants of Khasi Hills are Khasis and of the Jaintia Hills the Syntengs or Pils, both of whom are Mon-Khmer in origin and belong to the Mon-Khmer group ordinarily the expression "Khasis" has been treated as including the inhabitants of "both Khasi and Jaintia Hills.

46. Sir Edward Gait K.C.S.I., C.I.E in his well-known book: "A History of Assam" recorded as follows:

There is practically no difference between the inhabitants of the Khasi and those of Jaintia Hills. They are both of the same physical type and they speak the same language Khasi which is remarkable as being the only surviving dialect in India, excluding Burma of the Mon-Khmer family of languages. As stated elsewhere, dialects of this linguistic family are believed to have been spoken by the earliest Mongolian Invaders of India, and at one time they were probably current over a considerable area. The evidence of Philology, therefore, suggests the hypothesis that the Khasis and Syntengs are a remnant of the first Mongolian overflow into India who established themselves in their present habitat at a very remote period, who owing to their isolated position. maintained their independence....

A peculiar feature of this country is furnished by the curious monoliths which the Khasis and Syntengs used to erect in memory of their dead.

This author regards Syntengs as a Khasi tribe inhabiting the Jaintia Hills.

47. All the inhabitants of Khasi and Jaintia Hills speak the Khasi language although there may be slight difference in the dialects A study of the religious customs discloses a common underlying principle of animism in the religious

practices of both the Khasis and Syntengs, the management of the family and the properly vesting throughout in the wife and not in the husband, following the triarchat system which is universally prevalent. The Chief of a Khasi State, where the succession is hereditary, is succeeded by his sister's son and not by his own. The customs are again similar in the matter of marriage, birth and burial ceremonies. This is, apparently the reason why when the Constitution was passed the Constituent Assembly accepted the recommendations of the Bordoloi Committee to form the United Khasi and Jaintia Hills District as covering both the Khasi States and the Khasi and Jaintia Hills district. In paragraph 20 of the Sixth Schedule the tribal areas comprised in the United Khasi and Jaintia Hills District has been declared to comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District excluding any areas for the time being comprised in the Cantonment and Municipality of Shillong but including so much of the area comprised within the Municipality of Shillong as formed part of the Khasi State of (sic)

It is also declared that for purposes of certain clauses of the Schedule, no part of the area comprised within the Municipality of Shillong shall be deemed to be within the District. It is thus clear that the formation of the autonomous district under the name and style of the United Khasi and Jaintia Hills Autonomous District was advisedly done by the Constituent Assembly.

48. I shall now deal with the circumstances in which the Sixth Schedule had been amended in regard to the Autonomous Districts in Part A and the other tribal areas in Part B of the Table to Paragraph 20 of the Sixth, Schedule. Originally when the Constitution was passed the list of Autonomous Districts in Part A to the Table in Paragraph 20 had six autonomous districts, as already pointed out Act XVIII of 1954 (The Lushai Hills District (Change of Name) Act, 1954) amended this list by changing the name of the tribal area in Assam known as the Lushai Hills District to be known as the Mizo District. Consequential changes were made in the body of paragraph 20 of the Sixth Schedule by adding sub-para (2A) after sub-para (2) which is as follows:

(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

Paragraph 20(H) was amended by adding the words:

"and the Mizo District" after the words "United Khasi-Jaintia Hills District."

49. Subsequently, by the Naga Hills Tuensang Area Act, 1957 (Act 42 of 1957), Item 4 of Part A of the Table to Paragraph 20 of the Sixth Schedule, the Naga Hills District was omitted and The Naga Hills-Tuensang area was included for the Naga Tribal area under item 2 in Part B of the Table in Paragraph 20 of the Schedule. By Section 3 of this Act, the following amendments were made in Paragraph 20 of the Sixth Schedule:

(a) after subparagraph (2A), the following sub-paragraph shall be inserted,

namely:

(2B) The Naga Hills-Tuensung Area

shall comprise the areas which at the commencement of this Constitution were known as the Naga Hills District and the Naga Tribal Area;

(b) in sub-paragraph (3), after the words "Administrative area", the brackets and words "(other than the Naga Hills Tuensang Area)" shall be inserted;

(c) in Part A of the Table, item I shall be omitted: and

(d) in Part B of the Table, for item 2, the following item shall be substituted, namely:

2. The Naga Hills-Tuensung Area.

Other amendments were made in other Acts consequential upon this change in the Sixth Schedule to the Constitution, Then, subsequently by Act XXVII of 1962 (The State of Nagaland Act, 1962) the Naga Hills Tuensang Area was removed from the Table B and a separate State of Nagaland was created, the same was thus excluded from the operation of the Sixth Schedule and treated as one of the States of the Indian Union, the First Schedule of the Constitution having been suitably amended. The consequential amendments carried out in Paragraph 20 to the Sixth Schedule were as follows:

As from the appointed day, in the Sixth Schedule to the Constitution

(a) in Paragraph 20

(i) sub-paragraph (2B) shall be omitted;

(ii) in sub-paragraph (3), the brackets and words "(other than the Naga Hills Tuensang Area)" shall be omitted:

(b) in the Table appended to paragraph 20. In Part B, the item "2. The Naga Hills Tuensang Area" shall be omitted.

From this, it is contended that any amendment to the Sixth Schedule which has been framed by the Constitution makers was being effected in (sic) with Paragraph 21 of the Sixth Schedule, by Parliament passing an Act and that on no occasion was the amendment to Paragraph 20 relating to the internal structure or the list or the nomenclature of the autonomous district had been effected by the (lover nor by notification only This point will be dealt with later.

50. This brings us to the consideration of the provisions of the Sixth Schedule, which I shall refer briefly in regard to the administration of the tribal areas in Assam Most of the provisions of this Schedule had been ably summarised in the decision of the Supreme Court in *T. Cajee v. U. Jomonik Stem* AIR 1961 SC 270 at p. 278 As already pointed out, by Paragraphs 1 and 20 of the Sixth Schedule, the whole tribal area in Assam is divided into two categories: (1) the

autonomous districts set out in Part A of the Table to paragraph 20; and (2) the two other areas set out in Part B of the Table to Paragraph 20 of the Sixth Schedule. Paragraphs 2 to 17 deal with the administration of autonomous districts and autonomous legions. Paragraph 18 deals with the tribal areas specified in Part B of the Table appended to Paragraph 20,

Under Paragraph 18(2). the administration of the tribal areas specified in Part B of the said Table or any part thereof, as the case may be, is required to be carried on by the President through the Governor of Assam as his Agent, and the provisions of Article 240 were made applicable thereto as if such area or part thereof were a Union territory specified in that Article. It is further laid down by sub-paragraph (3) of paragraph 18 that in the discharge of the functions under sub-paragraph (2) of Paragraph 18 as the Agent of the President, the Governor shall act in his discretion. In other words, so far as the tribal areas covered by Part B of the Table to Paragraph 20 are concerned, the Governor is all in all and the Assam State Legislature or the Assam State Cabinet has nothing to do with their administration and cannot claim to advise the Governor in such administration, it is true that under Paragraph 18(1) the Governor is given the power subject to the previous approval of the President to apply by public notification all or any of the foregoing provisions of Paragraphs 1 to 17 of the Schedule to any tribal area specified in Part B of the Table appended to Paragraph 20 or any part of such area, and thereupon such area or part shall be administered in accordance with such provisions. But until any such notification is issued, the position of the Governor in regard to these areas is as already indicated.

51. Paragraph 19 of the schedule deals with the transitional provisions It lays down that the Governor as soon as possible after the commencement of the Constitution shall take steps for the constitution of a District Council for each autonomous district in the State under the Schedule, and until a District Council is so constituted, the administration of the District shall be vested in the Governor, and in such a case the following provisions shall apply to the administration of these areas within such district instead of the provisions in Paragraphs 1 to 17, namely:

(1) No Act of Parliament or of the Assam State Legislature shall apply to any such area unless the Governor by public notification so directs, and where the Governor gives such direction he may direct that the Act shall in its application to the area or to any specified part thereof have effect subject to such exceptions or modifications as the Governor thinks fit;

(2) The Governor may make regulations for; the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area. These Regulations, however, would have no force until they are submitted to the President, which the Governor is required to do forthwith, and until the President assented to those regulations.

52. Paragraph 21, as already pointed out, deals with the amendment of the Sixth Schedule, which lays down that Parliament may from time to time by law amend the provisions of the Schedule, and in making the amendment the Parliament need not conform to the requirements of Article 368.

53. Paragraph 2 of the Sixth Schedule deals with the constitution of District Councils and Regional Councils and the Governor is given the power to make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and these rules are to provide for the composition of the District and Regional Councils and the allocation of seats therein, the delimitation of territorial constituencies for the purpose of elections to these Councils, the qualifications for voting at such elections and the preparation of electoral rolls therefor; the qualifications for being elected as members of such Councils; the term of office of these members and any other matter relating to or connected with elections or nominations to such Councils, the procedure and the conduct of business in these Councils and the appointment of officers and staff of these Councils.

After the formation of the District or Regional Councils, these very powers were conferred on them, along with certain other powers for the formation of subordinate local Councils and Boards and their procedure and conduct of business, and generally in regard to all matters relating to the transaction of business pertaining to the administration of the district or the region, as the case may be. Further, Paragraph 2, sub-paragraph (4) provides that the administration of an autonomous district shall, in so far as it is not vested under the Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region. Paragraph 2, sub-paragraph (6) deals with adjustment of powers in an autonomous district with Regional Councils and lays down that the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council. In addition to the powers conferred on it by the Schedule with respect to such areas.

The first proviso to sub-paragraph (7) of Paragraph 2 lays down that until rules are made, by the District or the Regional Council under the sub-paragraph in question the rules made by the Governor under sub paragraph (6) at the time of the first constitution of the Councils shall continue to have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council. The second proviso relates to the North, Cachar and Mikir Hills and provides for the Deputy Commissioner or the Sub Divisional Officer, as the case may be, to be the Chairman, ex-Officio of the District Council in respect to these territories for a period of six years after, the first constitution thereof, subject to the control of the Governor to annul or modify any resolution or decision of the District Council or to issue such instructions as the Governor

may consider appropriate and the District Council shall comply with every such instruction so issued.

54. Paragraph 8 of the Schedule gives power to the District and Regional Councils to make laws with respect to various matters specified therein including the allotment, occupation or use of land not included in a reserve forest, for the purpose of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town; the management of any forest not being a reserved forest; the use of any canal or water-course for the purpose of agriculture; the regulation of the practice of jhum or other forms of shifting cultivation; the establishment of village or town committees or councils and their powers, and any other matter relating to village or town administration, including village or town police and public health and sanitation; the appointment or succession of Chiefs or Headmen; and the inheritance of property, marriage and social customs. These laws are required to be submitted to the Governor, without whose assent they are not to come into force.

55. Paragraphs 4 and 6 of the Schedule deal with the administration of justice in the autonomous districts and autonomous regions. Provision is made for the constitution of village councils and courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, to the exclusion of any court in the State and for the appointment of suitable persons to be members of such village Councils or presiding officers of such courts by the District Council and where there is a Regional Council, by the Regional Council. Power is also given to them to appoint officers necessary for the administration of laws made in paragraph 2 of the Schedule.

Under sub-paragraph (2) of Paragraph 4 it is provided that notwithstanding anything in the Constitution, the Regional Council for an autonomous region and the District Council for the District excluding the area of the autonomous region, or any court constituted in that behalf by the Regional Council for the autonomous region or by the District Council for the District, shall have the power of exercising the powers of a court of appeal in respect of all suits and cases triable by a village council or court constituted under sub-paragraph (1); and it is further declared that no other Court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

Sub-paragraph (3) of Paragraph 4 provides that the High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of Paragraph 4 apply, as the Governor may from time to time by order specify. Sub-paragraph (4) of this paragraph provides for the making of rules by the Regional Council or the District Council, as the case may be, with the previous approval of the Governor, regulating the constitution of village councils and courts and the powers to be exercised by them; the procedure to be followed by these village councils or courts in the trial of suits and cases under subparagraph (1): the procedure to be followed by the Regional

or District Council or any court constituted by such Council in appeals and other proceedings under sub-paragraph (2); the enforcement of decisions and orders of such Councils and Courts; and all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1), (2) and (4) of this paragraph.

Paragraph 5 provides for the conferment of powers on the District Council or the Regional Council, as the case may be, or on courts constituted by such District Council such powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, as the Governor deems appropriate. Power is also given to the Governor to confer such power on any officer appointed in this behalf by the Governor. It is further declared that on conferment of such powers the said Council, court or officer, shall try the suits, cases or offences in exercise of the powers so conferred. Sub-paragraph (2) provides that the Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, court or officer under sub-paragraph (1) of this paragraph. Sub-paragraph (3) declares that except as provided in sub-paragraphs (1) and (2), the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

56. It may thus be seen:

(1) that the District and the Regional Councils for the district and region for which they are formed may constitute:

(i) village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within those areas and appoint suitable persons to be members of such village councils or presiding officers of such courts and also such officers as may be necessary for the administration of laws made by the Councils;

(ii) courts of appeal in respect of the aforesaid suits, whose decisions would only be subject to the midsection of the High Court and the Supreme Court; and

(iii) make rules in regard to the exercise of jurisdiction by the courts and the procedure and other matters to be followed by them with the previous approval of the Governor;

(2) that the Governor is given the powers of conferring powers on the District Council or the Regional Council or on courts constituted by such District Council, or on any officer appointed "by the Governor in that behalf under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898. where the trial of suits arose out of any law in force in the autonomous district or region specified by the Governor in that behalf and in the case of trial of offences, where the offences are punishable with death, trans partition for life or imprisonment for a term not less than five years under the Indian Penal Code or under any law for the time being applicable to the district or the region. The

Governor is also given the power to withdraw or modify any of the powers so conferred.

57. It is further declared in sub-paragraph graph (3) of this paragraph that save as expressly provided in this paragraph the CPC 1908. and the Code of Criminal Procedure 1898 shall not apply to the trial of any suits, cases or offences in an autonomous district of in any autonomous region to which the provisions of this paragraph apply

58. Paragraph 6 gives power to the District Council to establish, construct or manage primary schools, dispensaries, markets cattle pounds, ferries, fisheries, roads and waterways. Paragraphs 7, 8 and 9 deal with financial matters and Paragraph 7(1) provides for the constitution of a District or Regional fund, as the case may be, to which shall be credited all moneys received respectively by the respective councils in the course of the administration of such district or the region, as the case may be, in accordance with the provisions of the Constitution. Sub-paragraph (2) provides for the making of rules by the District Council or the Regional Council, as the case may be, for the management of the Fund, subject to the approval of the Governor.

Paragraph 8 empowers the District Council in the autonomous district or the Regional Council in the regional area, as the case may be, in respect of lands in those areas, to assess and collect revenue in accordance with the, principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally, and to levy and collect tuxes on lands and buildings, and tolls on persons resident within such areas. In addition, the District Council is given the power to levy and collect taxes on professions, trades, callings and employments; taxes on animals, vehicles and boats; taxes on the entry of goods into a market for sale therein and tolls on passengers and goods carried in ferries; and taxes for the maintenance of schools, dispensaries or roads. Sub-paragraph (4) provides for the making of regulations to regulate the levy and collection of the above taxes.

59. Paragraph ft provides for the sharing of the royalties accruing each year from licence or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district, in the manner agreed upon by the Government of Assam and the District Council of each district, and the payment of the due share to that District Council. Sub-paragraph (2) of Paragraph ft provides that if any dispute arises as to the share of such royalties to be made to a District Council, it shall be referred to the Governor for determination, who shall determine the amount, acting in his discretion, and thereupon such amount shall be paid to the District Council as decided by the Governor whose decision is final.

60. Paragraph 10 confers power on the District Council of an autonomous district to make regulations for the control of money-lending or trading within the district by persons other than the Scheduled Tribes resident in the district Sub-

paragraph (2) refers to certain specific cases in respect of which regulations could be made. Sub-paragraph (3) requires that all these regulations shall be submitted forthwith to the Governor and they shall have no effect until assented to by him. Paragraph 11 of the Schedule provides that all laws, rules and regulations made under this Schedule by a District Council or a Regional Council, as the case may be, shall be published forthwith in the Official Gazette of the State and on such publication shall have the force of law.

61. Paragraph 12 of the Schedule deals with the application of Acts of Parliament and of the Legislature of the State to the autonomous districts and the autonomous regions. Clause (a) of Sub-paragraph (1) of Paragraph 12 provides that notwithstanding anything in the Constitution, no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule being matters with respect to which a District Council or a Regional Council may make laws, and no Act of the State Legislature prohibiting or restricting the consumption of any no distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction, may direct that the Act shall in its application to such district or region or any part thereof have effect, subject to such exceptions or modifications as it think fit. Clause (b) of sub-paragraph (1) of paragraph 12 provides that the Governor may by public notification direct that any Act. of Parliament or of the State Legislature to which the provisions of Clause (a) of this subparagraph do not apply, shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.

62. Paragraph 13 provides that the estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and thereafter, be shown separately in the annual financial statement of the State to be laid by the Governor before the legislature of the State under Article 202 of the Constitution.

63. Paragraph 14, as already noticed, provides for the appointment of a Commission by the Governor at any time, to enquire into and report on the administration of autonomous districts and autonomous regions and in particular on the provision of education, medical facilities, communications and the need for any new or special legislation in and in respect of such districts and regions and also the administration of the laws, rules and regulations made by the District and Regional Councils. Subparagraph (2) of paragraph 14 requires that the report of every such commission together with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned, together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam Sub

paragraph (3) enables the Governor to place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State in allocating the business of the Government of the State.

64. Paragraph 15 of the Schedule gives power to the Governor to annul or suspend any act or resolution of the District and Regional Council if he is satisfied that it is likely to endanger the safety of India, and in such an event to take such steps as considered necessary by him including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council to prevent the commission or continuance of such act, or the giving effect to such a resolution. Sub-paragraph (2) of paragraph 15 declares that any such order made by the Governor under Subparagraph (1) together with the reasons thereof shall be laid before the Legislature of the State as soon as possible and the order shall continue for a period of twelve months unless revoked by the Legislature of the State. The proviso to this sub-paragraph lays down that the order of the Governor under sub-paragraph (1) shall continue in force for a further period of twelve months on the State Legislature passing a resolution approving the continuance in force of such order, unless cancelled by the Governor earlier.

65. Paragraph 18 gives power to the Governor on the recommendation of the Commission appointed under paragraph 14, to order the dissolution of the District or the Regional Council by public notification and order a fresh election and in the meantime assume the administration of the area to himself subject to the previous approval of the Assam State Legislature. Paragraph 17 deals with the forming of the constituencies for the Assam Legislative Assembly. Paragraph 18 has already been noticed earlier. Paragraph 19 which deals with the transitional provisions has also been noticed earlier in detail. Under Paragraph 19, all the administrative and legislative powers were vested in the Governor (ill the District Councils were constituted. In exercise of the powers conferred on him under paragraph 2(6) for the first constitution of the District Councils and Regional Councils and in consultation with the existing tribal councils or other representative tribal organizations within the autonomous districts or regions concerned, the Governor framed rules in 1951 called the "Assam Autonomous Districts (Constitution of District Councils) Rules. 1951"

These rules provide inter alia for an. Executive Committee with the Chief Incentive Member as the head and two other members to exercise the executive functions of the District Council They also specify the matters which are excepted from the purview of the Executive Committee, though in an emergency the Executive Committee of some of the autonomous districts is authorised to take action with respect to excepted matters as might be necessary, but every such case has to be laid before the District Council at its next session In pursuance of these Rules, the District Council for the United Khasi-jaintia Hills District came into being from June 1952. Thus the Governor in the first instance, the District Council thereafter, were vested with the powers to carry on the administration

which included the power to appoint and remove the personnel for carrying on the administration.

66. On a careful consideration of the relevant provisions of the Constitution, it would be quite clear that special attention had been extended by the Constitution to the Scheduled Tribes. Article 244(2) with reference to the administration of the tribal areas in Assam as provided for in the Sixth Schedule has already been noticed. Article 214(1) contains reference to the First Schedule, which has been declared to apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the State of Assam. It is clear from a comparative study of the Fifth and the Sixth Schedules that the Scheduled Tribes in the State of Assam are treated by the Constitution as on an entirely different footing from the Scheduled Tribes and Areas in other States, for the administration and control whereof, provision is made in the Fifth Schedule, whereas the Sixth Schedule applies exclusively to the Scheduled Tribes in the State of Assam. A careful consideration of the provisions of the Sixth Schedule in the background of the historical details of these areas and particularly with reference to the United Khasi-jaintia Hills District with which we are concerned in these proceedings lead us to the following conclusions:

(1) Prior to the advent of the Constitution the Province of Assam and its Government had nothing to do with the tribal areas now included in the State of Assam under the Constitution.

(2) This inclusion was effected by including in the First Schedule in the description of the State of Assam, the territories which immediately before the commencement of the Constitution were comprised in the Khasi States and the Assam Tribal Areas, besides what was the Province of Assam under the Government of India Act, 1935.

(3) This inclusion of the tribal areas in the State of Assam did not destroy the character of the tribal areas which was carefully preserved by special provisions for their administration in the Sixth Schedule to Constitution, by making part of these areas into autonomous Districts and the rest to be administered directly by the President through the agency of the Governor

(4) The tribal areas under the Sixth Schedule have their own system of administration which is autonomous in the autonomous districts, and the self governing character of these areas was preserved along with the various tribal customary laws and regulations in force in these areas

(5) The tribal areas covered by Part B of the Table to Paragraph 20 of the Sixth Schedule are to be governed by the Governor acting as the Agent of the President who has the overall responsibility for their administration,

(6) The tribal areas covered by Part A of the Sixth Schedule are administered by the District and Regional Councils formed for the Districts and Regions in these tribal areas, which are autonomous and independent of any external control

other than that of the Governor, in the matter of making laws, establishing courts, levying and collecting revenues by imposing taxes and in all matters provided for in the Sixth Schedule of the Constitution. These District Councils or the Regional Councils, as the case may be, are thus self-governing units and are autonomous except to the extent to the power given to the Governor in the matter of giving assent to and approving the laws, the rules and the regulations made by the District Council or the Regional Council, as the case may be.

(7) This being the case, there can be no question of the Assam State Legislature or the ordinary executive Government of the State of Assam in any manner interfering with or exercising any control upon the activities or actions of the District Councils or the Regional Councils within the ambit of the provisions of the Sixth Schedule. This conclusion is further supported by the fact that in the Fifth Schedule, which applies to the administration and control of Scheduled Areas and Scheduled Tribes outside the State of Assam, Para 2 is as follows.

2. Executive power of a State in Scheduled areas: Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

It is significant to note that such a provision is absent from the Sixth Schedule, which supports the conclusion that the Executive Power of the State of Assam, as such, does not extend to the Tribal Areas in Assam for the administration of which provision is specially made in the Sixth Schedule.

(8) From this it follows that the reference to the Governor in the Sixth Schedule does not and cannot mean the Governor acting with the Council of Ministers in whom the Executive Power of the rest of the State is vested. Wherever the Governor is referred to in the Sixth Schedule, it refers to the Governor acting on his own and not Governor aided and assisted by the Council of Ministers for the Assam State. He is not either to be advised by or to act under the influence and advice of his Council of Ministers.

67. That this conclusion is the correct conclusion to come to in regard to the constitutional position of the Governor of Assam vis-a-vis the tribal areas on the one side and the Council of Ministers forming the Executive Government of the State on the other, is buttressed by the provisions of the Sixth Schedule themselves. The following will illustrate this.

(1) The Governor is given the power to make rules under Paragraph 2(6) of the Schedule for the first constitution of the District Councils and the Regional Councils in consultation with the existing tribal councils or other representative tribal organisations within the autonomous districts and the regions concerned. The omission of the "Executive Government of the State of Assam" is significant.

(2) Paragraph 3(3) requires that all laws made under paragraph 3(1) by the District Council and the Regional Council, as the case may be, shall be submitted forthwith to the Governor, whose assent is a prerequisite to their having any

effect This power of assent to the laws made by the District Council corresponds and is similar to the power of the Governor under Article 200 to assent to ha Bills passed by the legislature of the State, which power is exercised by the Governor on its own responsibility.

(3) Under Paragraph 4, sub-paragraph (3), the jurisdiction of the High Court of Assam over suits and cases to which sub-para (2) of Paragraph 4 applies is dependent on the Governor specifying from time to time the nature and extent of that jurisdiction. Obviously, this power could not be influenced or controlled by the Executive Government of the State, namely, the Council of Ministers.

(4) Again, sub-paragraph (4) of Paragraph 4 requires the previous approval of the Governor to the rules made by the Regional Council or the District Council as the case may be. This approval of the Governor obviously cannot be dependent on the whim and fancy of an outside body like the Council of Ministers of the State. A perusal of Paragraph 5 shows that the conferment of powers in regard to the trial of offences and suits and in regard to certain courts and officers empowered to try the same, is dependent on the Governor and the qualifying words used are "as he deems appropriate". Paragraph 9 refers to the Government of Assam as distinct and separate from the Government of the Autonomous Districts by the District Councils, thereby indicating that there are two independent bodies--both independent and autonomous. Sub-paragraph (2) of Paragraph 9 constitutes the Governor as the Judge to decide the dispute relating to the share of royalties between the District Council on the one side and the Government of Assam on the other and declares that the decision of the Governor acting in his discretion shall be final.

(5) Again paragraph 10, which gives power to the District Council to make regulations in certain matters, provides in sub-paragraph (3) that the regulations so made shall be submitted to the Governor for his assent and until assented to by him shall have no effect. This power again corresponds to the power of giving assent under Article 200, and, obviously, had to be exercised by the Governor acting on his own responsibility and not influenced by or acting under the advice of the Council of Ministers.

(6) Coming to Paragraph 12 of the Sixth Schedule, the District Council is given the power to decide and direct by notification whether and to what extent any Act of the Legislature of the Slate in regard to matters covered by Paragraph 3 of the Schedule in. respect of which matters, power is given to the-District Council or the Regional Council, as the case may be, to make laws, would apply to the area covered by the District Council, and unless such notification is made, the Act of the Legislature of the State would have no application at all to any autonomous district or autonomous region. Again in Clause (b) of sub-paragraph (1) of Paragraph 12, power is given to the Governor to direct by public notification that any Act of Parliament or of the Legislature of the State to which Clause (a) of sub-paragraph (1) of Paragraph 12 does not apply shall not apply to an autonomous district or autonomous region or shall apply with such

modifications or exceptions as he may specify in the notification. Obviously, the power exercisable by the Governor under this clause cannot be affected by or controlled by the Council of Ministers.

(7) The other powers exercisable under the other paragraphs of the Sixth Schedule, such as, annulment or suspension of acts and resolutions of the District and Regional Councils, the dissolution of a District or a Regional Council, extension of the application of the provisions in Paragraphs 1 to 17 to the areas specified in Part B of the Table to Paragraph 20 and the power to make transitional provisions under Paragraph 19 are all powers exercisable by the Governor on his own responsibility and on his own initiative, and in the nature of things has nothing to do with the Council of Ministers of the State of Assam and cannot in any manner be influenced or affected by the Council of Ministers, attempting to advise the Governor, as they otherwise do in matters connected with the ordinary executive Government of the rest of the State of Assam, excluding the Tribal Areas

(8) Thus as the Assam State Legislature has no power or jurisdiction to make laws on matters covered by the Sixth Schedule and interfere in any manner with the administration of the autonomous districts and regions which is vested in the autonomous District Councils and Regional Councils which are declared autonomous under the Sixth Schedule, a fortiori the Executive Government of the State of Assam comprising of the Council of Ministers have no power or jurisdiction to interfere with, control, order or otherwise alter or change the autonomous character of the District Councils or the exercise of their powers, jurisdiction, duties etc. under the Sixth Schedule.

68. Taking all these matters into consideration, I am satisfied that the powers exercisable by the Governor under the provisions of the Sixth Schedule are only to be exercised by him on his individual responsibility, and the Council of Ministers could not validly have any voice in the matters of the exercise of these powers by the Governor; and if any rules of executive business purporting to have been framed under Article 166(3) of the Constitution delegating these duties to the Ministers or others were framed to include any matters covered by the Sixth Schedule, the rules must necessarily be regarded as ultra vires and unconstitutional, particularly in view of Article 162 which makes it clear that the Executive Power of the State shall extend only to the matters with respect to which the Legislature of the State alone has power to make laws, and in regard to matters covered by the Sixth Schedule, the Legislature of the State has, as already pointed out, obviously no power to make laws and therefore the Executive Power of the State does not and cannot extend to controlling the activities of and actions, discharge of duties and exercise of powers by the District Council or the Regional Council under the Sixth Schedule. This also supports the conclusion that the Governor exercising power under the Sixth Schedule does not and ought not to act on the advice of the Council of Ministers, but is bound to act on his own initiative and responsibility and cannot in any

manner be influenced by the Council of Ministers, in making the decisions required to be made exercising the powers and performing the duties prescribed under the Sixth Schedule; and a fortiori. any delegation of these powers, duties etc. to any one else, such as the Council of Ministers or otherwise would be unconstitutional.

69. This being the constitutional position so far as the powers exercisable and the duties performable under the Sixth Schedule by the Governor are concerned, it would be next necessary to examine whether, in the instant case, the Governor had himself considered the subject matter of these proceedings and dealt with and acted in the same himself. The Secretariat File relating to the issue of the notification under Paragraph 1 was produced before us on behalf of the Government in which I find the following statement occurring in the noting on the file under date 28-8-1964:

In the present case we have not referred the matter to H.E. (His Excellency) at any stage.

A perusal of the noting on the file confirms this above noting. It is only after the Chief Minister and the Cabinet had decided upon the action to be taken in regard to the formation of a new District Council and the new autonomous district for the Jowai Subdivision that the file was informally passed to the Governor for his seeing and the Governor merely endorsed on the file under date 21-9-1961 "Seen Thanks."

It is clear from the file that the Governor had no opportunity at any stage of considering the report of the Commission and a fortiori examining it and making his recommendations thereon. The entire matter seems to have been dealt with by the Executive Government of the State of Assam, namely the Ministers without reference to and obtaining the orders of the Governor at all, whereas under the Sixth Schedule of the Constitution the entire matter could only have been dealt with by the Governor himself and not by the Executive Government of the State. Even the notification under Paragraph 1 in the case was issued by or under the direction of the Government of Assam as distinct from the Governor and the mere fact that the notification purports to issue in the name of the Governor would not in any manner cure the most serious omission, namely, the matter not having been considered at all at any stage by the Governor and the action not having been authorised by the Governor applying his mind to it and passing the orders initiating and ordering the action purporting to have been taken under the impugned notification.

Thus, the question whether the notification under Paragraph I could be issued or not in the light of the report of the Commission appointed under Paragraph 14(1) had not been considered by the Governor, and no decision had been made by him in this regard. Obviously, the notification, which is Annexure III to the Civil Rule No. 280 of 1964 and Annexure II to the Civil Rule No. 303 of 1964, "purporting to have been issued by the Governor was not issued by him or under

his orders or his approval and consent. Such being the case, the notification in question, in my opinion, has no legal or constitutional validity and cannot, therefore, in any manner affect the composition of the United Khasi-Jaintia Hills District, which figures as item No. 1 in Part A of the Table under paragraph 20 of the Sixth Schedule. I am, therefore, clearly of opinion that the writ prayed for by the Petitioners in these cases must issue, quashing the said notification, declaring the same null and void and of no legal effect. This would dispose of points Nos. 1 and 2 raised by the Petitioners in their arguments before us, and the contentions of the Respondents with reference to these points.

70. Regarding the third point, namely, that as the recommendation of the Commission was only for the formation of a District Council and not a separate autonomous District for the Jowai Subdivision, the acceptance of the report could not involve the formation of a separate autonomous district. On this question, there is no doubt, as already pointed out in the extract from its report earlier in the judgment, that the Commission had recommended only the creation of a new Autonomous District Council for the Jowai Subdivision of the United Khasi and Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Subdivision from the United Khasi and Jaintia Hills Autonomous District. It is not clear from the recommendation made by the Commission whether they were intending to propose that the Governor should, in exercise of the power under Paragraph 1 sub paragraph (2) of the Sixth Schedule, form an autonomous region out of the Jowai Subdivision and constitute a Regional Council for that region, or whether they were intending that there should be a District Council constituted for the Jowai Subdivision.

The basis on which the Commission made their recommendations would seem to support the former conclusion, for, it is only by the exercise of the powers under sub-paragraph (2) of Paragraph 1 that the Governor could constitute a Council for the autonomous region of Jowai, separating the same for the purpose of such constitution from the United Khasi and Jaintia Hills District Council without forming it into a separate autonomous District. Under the Sixth Schedule such a Regional Council could function for the autonomous region of Jowai within the Autonomous District independently of the District Council of the United Khasi and Jaintia Hills District, without any out and out separation and without constituting a separate autonomous district for that area.

If, on the other hand, we should accept the second alternative, the recommendation itself would appear to be unconstitutional as under the Sixth Schedule, there could be no constitution of a District Council unless, first of all, an autonomous district as such is formed, and this has not been recommended by the Commission. If this had been the intention of the Commission they would certainly have recommended the formation of an autonomous district for the Jowai Subdivision in the first instance, followed by the constitution of a separate District Council for that district. Since this had not been done, the only way in which some legal and constitutional validity could be imported to the

recommendations of the Commission would be to accept the recommendation on the basis of the first alternative, above suggested, namely the formation of a Regional Council for the area covered by the Jowai Subdivision. All these matters should have been the subject of serious consideration and examination by the Governor himself, so that he could decide to what extent and in what manner and on what basis he could accept and act upon the recommendations of the Commission. Unfortunately this has not been done.

As it is, we find that the Governor had not, in fact, considered and examined the report, applied his mind to it and come to any conclusion or decision on the report of the Commission. Obviously, until that stage is reached, there could be no question of the issue of the notification under Paragraph 1 sub-paragraph (3) by the Governor, and any such notification so issued, would for that reason alone be bad and ineffective, having regard to the plain language of the proviso to Paragraph 1 sub-paragraph (3), which is mandatory.

71. As regards the fourth point relied on by the Petitioners, namely, that the power under Paragraph 1 sub-paragraph (3)(c) of the Sixth Schedule could only be exercised by the Governor if the autonomous district that is formed by him, is formed out of the territory which did not already form part of an autonomous district, it would be necessary to refer to the provisions in Paragraph 1 subparagraph (3) in some detail. This sub-paragraph gives power to the Governor, apart from the power to create a new autonomous district to include in or exclude any area from Part A of the Table to Paragraph 20, increase or diminish the area of any autonomous district, unite two or more autonomous districts or parts thereof so as to form one autonomous district and define the boundaries of any autonomous district. It is significant, however, to note that subparagraph (3), while it * refers to different actions that could be taken by the Governor, does not give him the power to divide an existing autonomous district into two or more autonomous districts. The omission appears to be intentional, as the process of dividing the existing autonomous district into two would involve the exercise of a more drastic power involving serious and far-reaching consequences. It may be for this reason that this power is advisedly omitted from Paragraph 1, sub-paragraph (8).

72. In this connection it would be useful to refer to Articles 2 and 3 of the Constitution. Article 8 gives similar powers to the Parliament to effect by law somewhat similar changes in regard to the States. Article 2 is as follows:

Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Article 3 is as follows:

Parliament may by law

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State:

(e) alter the name of any State. Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President, and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

Clause (1) of Article 4 of the Constitution provides that any law referred to in Article 2 or Article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary. Clause (2) of Article 4 provides that the law referred to in Articles 2 and 3 shall not be deemed to be an amendment of the Constitution for the purpose of Article 368.

73. A comparative study of Articles 2 and 3 of the Constitution alongside of Paragraph 1, sub-paragraph (3) of the Sixth Schedule shows that while Arts 2 and 3 provide specifically for the establishment or the formation of a new State by separation of territory from any existing State, or by uniting two or more existing States or parts of such States or by uniting any territory to a part of any such State, Paragraph 1 sub-paragraph (3) of the Sixth Schedule gives no such or similar power in regard to autonomous districts, except the power, to unite two or more autonomous districts or parts thereof as to form one autonomous district and to create an entirely new autonomous district. It is thus clear that where the constitution-makers intended that a new State could be formed by separation of territory from any existing State or by uniting two or more existing States or parts thereof or by uniting any territory to a part of any State, they expressly gave the power, whereas the power under Paragraph 1 sub-paragraph (3) is limited only to uniting two autonomous districts or parts thereof to form one autonomous district and to the creation of a new autonomous district.

This significant difference in the language and scope of Articles 2 and 3 on the one side and Paragraph 1, sub-paragraph (3) on the other, coupled with the fact that no power is given in Paragraph 1 sub-paragraph (3) to divide an existing autonomous district into two autonomous districts. leads to the inevitable conclusion that the power contemplated in Paragraph 1 sub-paragraph 3(c) of creating a new autonomous district relates and should be regarded as confined to the creation of a new autonomous district by bringing into existence an entirely fresh autonomous district, that is, from the areas which were not

previously included in any autonomous district, such as the areas specified in Part B to the Table in Paragraph 20. The expression "create" has been defined in the Larger Oxford Dictionary as:

To make, form, constitute, or bring into legal existence what was not existing before.

Hence, it implies bringing into existence something for the first time, and added to it the adjective "new" reinforces this meaning and signifies that the creation has to be with reference to an area which was not an autonomous district before. This view seems to me to reasonably follow. From the language employed in sub-paragraph (3) of Paragraph 1 of the Sixth Schedule, which indicates that the Governor's power under sub-paragraph (3)(c) of Paragraph 1 must be confined to the creation of a new autonomous district and not to the formation of an autonomous district by dividing into two autonomous districts an existing autonomous district. For this reason also, the notification appears to be unconstitutional and the Governor cannot be said to have powers under Paragraph 1 sub-Paragraph (3) to divide an existing autonomous district and to form on such division two new autonomous districts from the area covered by the existing single autonomous district.

74. The fifth point taken by the Petitioners is that even assuming that the earlier four points were to be found against them, the notification in question could have no effect so long as Paragraph 20 of the Sixth Schedule is not amended by making necessary provision therein for the formation of a new autonomous district by suitable amendment to Part A of the Table to Paragraph 20 by deleting "The United Khasi-Jaintia Hills District" and substituting whatever name may be given to the residue thereof after excluding the Jowai Sub-division area from it, and also deleting the description of the boundaries of the United Khasi-Jaintia Hills District and incorporating the boundaries of the two autonomous Districts formed from it. In other words, the contention is that the notification and the unamended Paragraph 20 of the Sixth Schedule cannot exist side by side as they would be inconsistent and would not fit in with each other. According to Mr. Lahiri, the learned Counsel for the Petitioners, if the notification under paragraph 1 of the Schedule were to be held valid, the following amendments must necessarily be carried out *pari passu* in Paragraph 20:

1. In sub-paragraph 2 of Paragraph 20, the reference, to the United Khasi-Jaintia Hills District would have to be omitted and in its place the name of the autonomous district covering the area of the previous United Khasi Jaintia Hills District minus the Jowai Sub-division area would have to be substituted;
2. The description of the territories converted by this autonomous district should be substituted in place of the existing description, which relates to the United Khasi Jaintia Hills District;
3. There should be a sub-paragraph introduced in Paragraph 20 in regard to the formation of the autonomous district covering the Jowai Subdivision area

together with whatever name that may be given to it. There should also be the description of the boundaries of the territories covered by this autonomous district included in and covered by this autonomous district:

4. Sub-paragraph (3) should omit reference to the United Khasi and Jaintia Hills District;

5. Item 1 of Part A of the Table to Paragraph 20 has to be deleted and in its place the name of the autonomous district representing the residue from the United Khasi and Jaintia Hills District after excluding the Jowai Sub-division area should be mentioned;

6. An item should be added to Part A of the Table including the name of the newly formed Jowai Subdivision Autonomous District.

It is accordingly contended that as any amendment to the Sixth Schedule could only be made by Parliament, having regard to Paragraph 21 thereof. Parliament alone can bring about these changes, and until these changes are made by the law passed by Parliament, no constitutional changes in the structure of the existing autonomous districts in Assam and particularly of the existing United Khasi Jaintia Hills Autonomous District could be effected it is not disputed that the Parliament has made no law bringing about any such amendments to the Sixth Schedule and particularly to Paragraph 20 thereof. That an amendment of Paragraph 20 is ultimately necessary in this context has not been seriously questioned on behalf of the Government It was sought to be faintly argued for the Respondents that the Governor himself could effect the necessary changes in Paragraph 20 in view of the fact that Paragraph 1 sub paragraph (1) lays down as follows:

Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the Table appended to Paragraph 20 of this Schedule shall be an autonomous district.

and because the phrase "subject to the provisions of this paragraph" occurs in Paragraph (1) sub-paragraph (1), it was sought to be argued that whatever is to find a place in Paragraph 20 must be regarded as subject to whatever is done under Paragraph 1, and that, therefore, the issue of a notification under Paragraph 1 sub-paragraph (3) would ipso facto result in law in bringing about the amendment to Paragraph 20 -- an argument, to say the least, is most extraordinary, apart from the fact that it runs counter to the express provisions of Paragraph 21 of the Sixth Schedule which enacts that any amendment to the Sixth Schedule could only be effected by Parliament.

In this context, it should be mentioned that it is not contended on behalf of the Government that the Governor did amend or purport to amend Paragraph 20 of the Sixth Schedule to bring it in conformity with the notification issued in this case. On a careful consideration of the matter, I am clearly of the opinion that the plain language of Paragraph 21 of the Sixth Schedule would have to lie given

effect to and any amendment to the Schedule could only be effected by Parliament by law, whether the amendment was by way of addition, variation or repeal of any of the provisions of the Sixth Schedule. This provision, in fact, corresponds to the provisions contained in Article 4(1) of the Constitution which had been referred to earlier.

75. In this context, it would be useful to refer to the decision of the Supreme Court in the President's Reference in what is known as the "Berubari Case" reported in Reference by President of India under Article 143(1) In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India, In that case, the Prime Ministers of India and Pakistan entered into what is known as the Indo-Pakistan Agreement, on 10-9-1958, with a view to remove certain border area disputes and problems. One of the items related to the division of Berubari Union No 12, and another related to the exchange of old Cooch-Bihar enclaves. A doubt arose whether the implementation of the Agreement relating to these matters required any legislative action either by way of a suitable law of Parliament relatable to Article 3 of the Constitution or by way of suitable amendment of the Constitution in accordance with the provisions of Article 368 thereof. Accordingly, the President referred certain questions for the opinion of the Supreme Court under Article 143(1) of the Constitution.

On an elaborate and careful consideration of the questions that fell to be determined in the reference, the Supreme Court held that the implementation of the agreement by way of cession or alienation of a part of the Indian territory in favour of Pakistan naturally involved the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution It was further held that legislative action was necessary for the implementation of the Agreement but the law of Parliament should be relatable to Article 808 of the Constitution and that Parliament may make a law acting under Article 368 to Rive effect to and to implement the Agreement in question. In this context, the following observations may he emoted with advantage: (at page 859):

Prima facie Article 3 may appear to deal with the problems which would arise on the reorganisation of the constituent States of India on linguistic or any other basis; but that is not the entire scope of Article 3. Broadly stated it deals with the internal adjustment inter se of the territories of the constituent States of India. Article 3(a) enables Parliament to form a new State and this can be done either by the separation of the territory from any State, or by uniting two or more States or parts of States or by uniting any territory to a part of any Slate. There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under Article 1(3)(c) is included in the last clause of Article 3(a) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Article 3(a). Thus Article 3(a) deals with the problem of the formation of a new State and indicates the modes by, which a

new Slate can be formed.

Article 3(b) provides that a law may be passed to increase the area of any State. This increase may be incidental to the reorganisation of State in which case what is added to one State under Article 3(b) may have been taken out from the area of another State. The increase in the area of any State contemplated by Article 3(b) may also be the result of adding to any State any part of the territory specified in Article 1(3)(e). Article 3(d) refers to the alteration of the boundaries of any State and such alteration would be the consequence of any of the adjustments specified in Article 3(a), (b) or (c). Article 3(e) which refers to the alteration of the name of any State presents no difficulty, and in fact has no material bearing on the questions with which we are concerned.

Article 3(c) deals with the problem of the diminution of the area of any State. Such diminution may occur where a part of the area of a State is taken out and added to another State, and in that sense Articles 3(b) and 3(c) may in some cases be said to be correlated:

* * * *

Prima facie it appears unreasonable to suggest that the makers of the Constitution wanted to provide for the cession of national territory

under Article 3(c)

* * * *

Therefore, even if Article 3(c) receives the widest interpretation it would be difficult to accept the argument that it covers a case of cession of a part of national territory in favour of a foreign State. The diminution of the area of any State to which it refers postulates that the area diminished from the State in question should and must continue to be a part of the territory of India....

Lower down, Gajendragadkar, J. (as he then was) observed as follows:

We have already held that the agreement amounts to a cession of a part of the territory of India in favour of Pakistan; and so its implementation would naturally involve the alteration of the content" of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution, because such implementation would necessarily lead to the diminution of the territory of the Union of India. Such an amendment can be made under Article 368. This position is not in dispute and has not been challenged before us; so it follows that acting under Art 368 Parliament may make a law to give effect to, and implement the Agreement in question covering the cession of a part of Berbari Union No. 12 as well as some of the Cooch-Behar Enclaves which by exchange are given to Pakistan. Parliament may, however, if it so chooses, pass a law amending Article 3 of the Constitution so as to cover cases of cession of the territory of India in favour of a foreign State. If such a law is passed then Parliament may be competent to make a law under the amended Art 3

implement the Agreement in question. On the other hand, if the necessary law is passed under Article 368 itself that alone would be sufficient to implement the Agreement.

Accordingly, the Supreme Court answered the questions referred for its opinion by pointing out that legislative action of the Parliament was necessary for the implementation of the Agreement relating to the Berubari Union and that it is necessary that the law of the Parliament should be related to Article 368 of the Constitution.

It is clear from the above that although the Executive Government of the State has in effect acted under Articles 2 and 3 of the Constitution, such Agreement or action would not be valid and effective until Parliament by law brings about the necessary amendments to the Constitution by amending Article 1, Clause (3) and the first Schedule to the Constitution. On the same analogy, it is clear that although power is given to the Governor to bring about certain territorial changes in the tribal areas in the autonomous districts referred to in Part A of the Table to Paragraph 20 of the Sixth Schedule, such changes would not have any validity in law until Parliament by law gives effect to these changes by appropriately amending Paragraph 20 by incorporating therein the details contained in the notification issued by the Governor, and until such a thing is done, the notification standing by itself would have no legal validity and cannot have any operation in the eye of law. This disposes of also the point No 6, which is raised by the learned Counsel for the Petitioners, and which is closely connected with point No 5. Having regard to what has been stated above, I am clearly of the opinion that certain observations to the contrary found in the decision in AIR 1054 Gau 07 which are more or less obiter, cannot be regarded as correct particularly after the decision of the Supreme Court in the *In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India*,

76. I shall now deal with the last and the final point taken by the learned Counsel for the Petitioners, namely, point No. 7. This rests on the contention that the requirements of Paragraph 14 sub-paragraph (2) of the Sixth Schedule had not been complied with. Paragraph 14 sub-paragraph (2) reads as follows:

The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

This sub-paragraph requires that the report of the Commission appointed under sub paragraph (1) of Paragraph 14 of the Sixth Schedule together with the recommendations of the Governor thereon shall be laid before the Legislature of the State together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam. In the instant case, the only difference between the contentions of the Petitioners and the

Government is that while the Petitioners contend that the report and the memorandum of the Government of Assam have been put before the Legislature, the recommendations of the Governor had not been put.

As already, pointed out earlier in the judgment, there is no scope or possibility of the recommendations of the Governor having come into existence, as the report itself does not appear to have been submitted to the Governor and considered by him. In any case, no record of any recommendation had been produced and the file that is produced contains none. But the non-compliance with this provision does not appear to have any bearing on the validity or otherwise of the action taken by the Governor, if it is so taken under paragraph 1 sub-paragraph (3) because there is no provision in the Sixth Schedule which says what action, if any, the Legislature of the State has to take on compliance with Paragraph 14(2) of the Sixth Schedule, and what consequence would follow if Paragraph 14(2) is not strictly complied with. In that view of the matter, it would appear that the failure or omission to strictly comply with Paragraph 14(2) may not in any way affect one way or the other the validity of the action taken under Paragraph 1, sub-paragraph (3) if the action is otherwise validly taken. But, what is more important and in fact, fatal is the omission on the part of the Governor to consider the report under Paragraph 14(1) and himself taking a decision on it, apart from his not making any recommendations on it. This aspect of the matter, has already been dealt with earlier in this judgment.

77. To summarise:

I. Under the general provisions of the Constitution, as the Executive power of the State vests in the Governor and could be exercised by him directly, or indirectly through his subordinates:

(a) The Governor himself may directly initiate action in consultation with the Minister concerned or with the Council of Ministers;

(b) Executive action may be taken by his subordinates including the Ministers or Government Officers of the Departments concerned under the Rules of Executive business framed by the Governor; (Articles 154(1) and Article 166(3))

(c) The Council of Ministers are bound to aid and advise the Governor in the exercise of his functions, and cannot bypass and ignore the Governor in making important decisions and taking action thereon, which involve policy matters, the well-being of the State and the welfare of the people, which the Governor is charged with the duty of looking after. (Article 163(1)).

III. The Governor should not take the advice of the Council of Ministers or act according to their advice:

(a) Where he has to act in his own discretion under the specific direction given in the Constitution;

(b) Where, in the nature of things, he must necessarily act on his own

responsibility, independent of and without consulting or allowing himself to be influenced by the Council of Ministers.

III. As regards the powers exercisable and the duties performable by the Governor under the Sixth Schedule:

(1) The Executive power of the State of Assam does not extend to the administration of the tribal areas covered by the Sixth Schedule, for which provisions are made in the Constitution itself by the Sixth Schedule, which is self-contained, and these provisions including the administration of the autonomous districts and oilier tribal areas, their names, composition, extent and boundaries as well as all matters covered by the Sixth Schedule are not subject to the legislative power of the Assam State Legislature, and as the Executive Power of the State is regarded as co-extensive with the legislative power of the State Legislature, the Executive Government of the Assam State cannot be held to have any voice or control over the matters covered by the Sixth Schedule and relating to the formation etc., of the autonomous Districts and District and Regional Councils as well as the other tribal areas in Assam, and their rights and powers, conferred by the Sixth Schedule

(2) Consequentially:

(a) The Governor has to act exclusively in his own discretion in regard to the action to be taken under sub-paragraph (3) of Paragraph 9 and sub-paragraph (2) of Paragraph 18 of the Sixth Schedule:

(b) In regard to the exercise of powers and the performance of duties under all other Paragraphs of the Sixth Schedule, the Governor has to act on his own initiative and responsibility.

IV. The notification purporting to have been issued by the Governor under Paragraph 1, sub-paragraph (8) of the Sixth Schedule is invalid and unconstitutional and Inoperative:

(a) as the notification has not been issued under the orders, or with the approval, of the Governor, and instead, at the instance of the Executive Government of the State of Assam, that is the Council of Ministers only;

(b) as the report of the Commission appointed under Paragraph 14(1) had not been considered by the Governor as required by the mandatory provision contained in the proviso to subparagraph (3) of Paragraph 1, before the issue of the notification in question;

(c) as the Governor has no power under sub-paragraph (3) of Paragraph 1 to divide an existing autonomous district into two separate autonomous districts, which the Impugned notification purports to do;

(d) as the power to create a new autonomous district involves only the power to bring into existence for the first time an auto nomous district, that is, consisting of areas which did not form part of an autonomous district prior to such creation,

whereas the notification merely purports to form an autonomous district from out of and by cutting up an existing autonomous district;

(e) as the Impugned notification purporting to have been issued under paragraph 1(3), Proposes an action not recommended by the Commission appointed under Paragraph 14(1) and not approved by the Governor;

(f) as giving effect to the notification would nullify and be in conflict with Paragraph 20 of the Sixth Schedule;

(g) as giving effect to the notification issued under Paragraph 1. sub paragraph (3) would necessarily involve the amendment to Paragraph 20 of the Sixth Schedule and as the power to amend the Sixth Schedule is only given to Parliament under Paragraph 21, unless and until Parliament passes a law amending. Paragraph 20 of the Sixth Schedule by incorporating the changes brought about by the notification, the said notification purporting to be issued under Paragraph 1 sub-paragraph (3) of the Sixth Schedule would have no legal effect or validity, until such law is passed by Parliament.

78. I would, accordingly, make the rule absolute in both the cases and allow the petitions with costs.

S.K. Dutta, J.

79. I have had the advantage of reading the judgment of my Lord the Chief Justice I agree with his views and concur in the orders proposed. I have nothing to add.

Per Curiam:

80. In view of the decision of the majority, these petitions are dismissed with costs, which we assess at Rs. 100/- in each case. The stay order is vacated.

Certificate under Article 132 of the Constitution of India is granted as prayed for. Mr. Lahiri has further prayed for the stay of further proceedings, and, in the alternative he has prayed that the stay order may continue for three weeks to enable him to get a stay order from the Supreme Court The majority is of the opinion that it is not a case where such a stay order should be granted.