
(1981) 01 GAU CK 0007
In the Gauhati High Court
Case No : Civil Rule 28 of 1981

Jogendra Nath Hazarika

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-01-1981

Acts Referred:

Constitution of India, 1950 — Article 163, 163(1), 163(2), 164, 164(1)

Citation : AIR 1982 Guw 25

Hon'ble Judges : K. Lahiri, J

Bench : Single Bench

Advocate : J.C. Medhi, D.K. Bhattacharyya and D.K. Das, for the Appellant; P.K. Barua, Sr. Govt. Advocate and D.N. Choudhury, Jr. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K. Lahiri, J.—In this application the petitioner prays for a Writ of quo warranto directing respondent 3 to vacate the office of the Chief Minister of Assam and respondents 4 to 12 to vacate the offices of the Council of Ministers and a Writ in the nature of mandamus for declaration that the order of appointments of the Chief Minister and the Council of Ministers appointed by the Governor of Assam under Article 164 of the Constitution as illegal, unconstitutional and invalid. He prays for a declaration that he is the Chief Minister of Assam and he should be allowed to resume his office to exercise his powers and discharge the duties of the Chief Minister.

2. An apercu of the petitioner's case may be summed up as follows:--

The petitioner is an M.L.A. On 4-9-1979 the then Ministry resigned in face of a no-confidence motion whereupon the Governor of Assam being satisfied that the petitioner enjoyed the confidence of the majority of the Members of the Assam Legislative Assembly, hereinafter referred as "the Assembly", appointed him Chief Minister. He was sworn in and he formed his Council of Ministers who were

appointed on his advice; a no-confidence motion was tabled against his Ministry but the motion was withdrawn and/or not pressed. "The Assembly" was prorogued by the Governor on 11-9-1979. The petitioner claims that his Ministry continued to aid and advise the Governor and performed their duties as required by and under the Constitution. However, by a notification No. GSR 6/88 (E) dated 12th Dec., 1979 the President of India imposed Presidential Rule in Assam under Article 356 of the Constitution on the basis of a report from the Governor of Assam and other information and being satisfied that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution; the operation of the Articles 163, 164 and 174(1) was suspended. The petitioner states that there did not exist any situation which called for imposition of the Proclamation. However, the petitioner was enjoying a comfortable majority in the Legislature at all relevant time. By a notification No. GSR/684/(E) dated 6th December, 1980 the President revoked the Proclamation issued on 12-12-79.

The petitioner states that the Presidential Rule was imposed to ensure that the Government of the State might be carried on in accordance with the provisions of the Constitution. The petitioner claims that he was holding the office of the Chief Minister on the date of the issuance of the Proclamation as well as on the date of revocation of the Proclamation. On revocation of the Proclamation he was entitled to hold the office. Notwithstanding his right to continue in the office the Governor by notifications dated 6th Dec., 1980 appointed respondent 3 as Chief Minister and respondents 4 to 8 as Ministers and later appointed respondents 9 to 12 as Ministers, under Article 164 of the Constitution. Being aggrieved the petitioner made a representation to the Governor requesting him, (i) to call upon the Chief Minister to resign; (ii) on dismissal of the Ministry headed by respondent 3 reinstate his Ministry "after the reconstitution of the cabinet" and (iii) not to allow respondent 3 to exercise powers and functions of the Chief Minister.

3. Dr. J.C. Medhi appearing on behalf of the petitioner has contended, (i) that there did not exist any situation which called for the Presidential Rule; (ii) that the petitioner never resigned from the office of the Chief Minister nor was he dismissed and as such the petitioner continued to be the Chief Minister immediately after the Proclamation was revoked. Therefore, without dismissing the petitioner the Governor could not have appointed respondent 3 Chief Minister and respondents 4 to 12 Council of Ministers; (iii) that the petitioner had a comfortable majority in the Assembly having 126 seats. Respondent 3 belongs to Congress (I) and her party could secure only 8 seats in the Assembly. As such, the appointment of respondent 3, representing a minority political party in the Assembly, was violative of Article 164(1). The appointments have been questioned as violative of the provisions contained in Article 163 as well as Article 164(1) of the Constitution. The learned counsel submits that there is a prima facie case.

Mr. P.K. Barua and Mr. D. N. Choudhury, Government Advocates appear on behalf of all the respondents. They have submitted that the long spell of the Presidential Rule is just over, the Governor has restored the working of a democratic institution by setting the ball of the Legislative Assembly in motion and the peace and quiet restored might not be disturbed. In any view of the matter, the petitioner to obtain a Rule Nisi must make out a prima facie arguable issue, more so when the action involves sensitive matters of appointment of the constitutional functionaries like the Chief Minister and the Council of Ministers. According to the counsel, the petitioner has completely failed to make out a prima facie case. Counsel submits that notwithstanding long hearing afforded to the petitioner he has failed to establish a prima facie case. Counsel submits that the appointment made by the Governor cannot be questioned in view of the express provisions contained in Article 163(2). Counsel submits that the Ministers hold their offices during the pleasure of the Governor; replacement of the former Ministry by the present Ministry has been made by the Governor by and under the Constitution and in his discretion, which is not justiciable. Counsel further submits that the exercise of the discretion is final and the validity of the acts of the Governor cannot be called in question on the ground that he ought or ought not to have acted in his discretion which is precisely the contention of the petitioner.

The learned counsel for the petitioner has urged that some political consequences have cropped up as a result of the impugned orders and it has generated a considerable amount of public attention which entails issuance of a Rule Nisi. I am of the firm opinion that these are irrelevant considerations to issue a Rule Nisi. It is neither appropriate nor just to consider that a large section of the public is interested in the question. The counsel for the petitioner submits that the petitioner invokes questions of interpretation of Articles 163 and 164. I feel that it is triflingly easy to raise questions touching one or the other provisions of the Constitution in every writ application and to contend that they are controversial questions relating to construction of constitutional provisions and Rule should be issued. In my opinion, the real test is whether an arguable issue has been raised by the petitioner. The petitioner, in a case of this nature, must satisfy the Court that he has a prima facie case, before a Rule Nisi can be issued by this Court. In my opinion, the moot questions are: (i) Does the Governor in appointing and/or dismissing a Chief Minister and/or Council of Ministers and/or in withdrawing his pleasure in a Ministry by replacing another Ministry act in his sole discretion? (ii) If so, whether the exercise of the discretion under Articles 164(I) and 163 can be called in question in writ proceedings on the ground that the Governor ought or ought not to have acted in any particular manner, in his discretion? (iii) Whether any of the above questions is an arguable issue?

4. The following state of affairs clearly emerge from the petition as well as the contentions of the learned counsel for the petitioner : (a) That there is absolutely no allegation that respondents 3 to 12 are not qualified to hold the offices; (b)

Even assuming that there are alleged defects in the appointments, these cannot be immediately cured and followed by reappointment of the respondents. It is not questioned that the Governor can rectify the alleged irregularity by expressly dismissing the outgoing Ministry, if he has not so done as yet, and forthwith reappoint respondents 3 to 12; (c) That during the Ministry headed by the petitioner there was a failure of the constitutional machinery in Assam and the Government could not be carried on in accordance with the provisions of the Constitution. It could not be denied by the counsel for the petitioner that failure of the constitutional machinery in a State is a serious lapse on the part of those in charge of the Government; (d) that there was a difference of opinion between the Governor and the President on the one side and the petitioner on the other side as to whether there was a failure of the constitutional machinery, before the Presidential Rule was imposed. The petitioner contends in the petition that there was no such failure whereas the report of the Governor is otherwise. As such, loss of confidence by the Governor in the petitioner and/or his Ministry is writ large; (e) It has been honestly stated by the petitioner (in para 17 of his petition) that the presidential Rule was imposed to ensure that the Government of the State could be carried in accordance with the provisions of the Constitution. Indeed, the object of Presidential Rule is to instal a stable Government in whom the Governor can have confidence; (f) That the present Ministry is composed of some of the Ministers who were in the Council of Ministers of the petitioner holding responsible position. It is admitted by the learned counsel for the petitioner that respondents 4, 6 and 12 were Ministers in the Ministry of the petitioner, vide Assam Gazette (Extraordinary), dated Sept. 11 and 17, 1979. As such, at least 3 of the Ministers in the Council of Ministers of the petitioner left his Ministry and joined the present Ministry. It is an added factor to establish loss of confidence of the Governor in the petitioner; (g) The petitioner himself admits in his representation to the Governor, vide Annexure "E", that his cabinet required "reconstitution". It follows therefore that, (i) the Council of Ministers required "reconstitution" when the Governor had exercised his discretion to appoint the present Ministry. It is a factor which supports the legitimacy of loss of confidence by the Governor; (ii) it also establishes that there was no Council of Ministers in fact which the Governor could consult; (h) The next Session of the Assembly is round the corner. The Assembly, it has been stated at the Bar, is likely to be convened in the next month or in early March. It is beyond question that the petitioner and/or the Members of the Assembly can have their domestic remedy in the next Session of the Assembly itself. Therein, the petitioner and his followers can call upon the present Ministry to establish its strength and cause its downfall. It shows existence of an alternative forum which can right the alleged wrongs and grant positive and affirmative relief to the petitioners. (i) There is absolutely no allegation that the Ministry is that of any particular political party. It has been merely alleged in the petition that respondent 3 belongs to Congress (I), however, there is no averment in the petition or contended before me that the other Ministers are of any particular political party or parties and/or the Ministry was of a particular recognised

political party.

5. The learned counsel for the petitioner submits that the petitioner has standing to present the application and relied on *King v. Speyar* (1916) 1 KB 595. I assume that the petitioner has locus standi. The contention of the petitioner is prima facie justified.

6. The second contention of the learned counsel for the petitioner is that a writ of quo warranto can be issued in respect of public office which is of substantive character created by the Statute and/or Constitution to which the respondents are not legally qualified to hold the office or to remain therein or if the appointment has been made in violation of any mandatory provisions of the Constitution or Statute, such a writ can issue when the alleged defect in the appointment cannot be cured. The contentions are impeccable. However, the petitioner contends that without expressly dismissing the petitioner and/or his Ministry, the present appointments under Article 164 are blatantly illegal. But the petitioner has faltered and flopped to show that there is any provision in the Constitution as to the specific manner of dismissal of a Ministry and/or any positive or even a qualified procedure for such dismissal enjoined in the Constitution. The petitioner submits that it can be done by the Governor after hearing the petitioner and by an express order notifying the same in the Official Gazette. The procedure verbalized is not to be found in the Constitution.

Counsel for the petitioner has not been able to point out that there is any such mandatory requirement for such hearing or for expressly replacing or dismissing a Ministry under the Constitution. I have no hesitation that they are merely formalities. No hearing is necessary as the loss of confidence is based . on subjective satisfaction. Announcement of dismissal of a Ministry is required to inform the public, submits the counsel for the petitioner. Appointment of Chief Minister and Council of Ministers automatically replaces the earlier Ministry and the appointments have been duly published. The petitioner has completely failed to show that in the matter of replacements and/or dismissal of the old Ministry and appointments of respondents 3 to 12, the Governor violated any constitutional mandate. The Ministers hold office during the pleasure of the Governor. The Governor is the sole and exclusive authority to appoint a Chief Minister. The pleasure can be withdrawn. The authority empowered to appoint can dismiss the appointee; there is no fetter or restriction nor is there any procedure laid down in the Constitution or any rules made thereunder as to the manner of withdrawal of the pleasure and/or dismissal of a Chief Minister or a Ministry. The counsel has miserably failed to show any violation of mandatory provision in dismissing and/or replacing the petitioner and/or his Ministry and/or in appointing respondents 3 to 12 in the offices. The petitioner admits that the Governor is competent to dismiss a Chief Minister and he had power to dismiss a Ministry at his pleasure. When the act of dismissal or replacement of a Ministry does not require pre or post publication the Governor can render the order of dismissal in his file and cause the replacement of the Ministry. Dismissal of

Ministers requires no publication in any official Gazette nor does non-publication violate any provision of any law and/or any constitutional provision. For want of confidence the Governor replaced the petitioner and/or his Ministry and the installations or assignments have, been made as the Governor had his confidence in respondent 3. It is just in consonance with the spirit and letters of the Constitution.

Assuming these to be the procedure let me fathom the consequences of non-compliance. It is indubitable that immediately upon issuance of a rule the Governor can forthwith dismiss the petitioner and/or his Ministry in the manner desired by the petitioner and designate the respondents as Ministers. It would be a futile exercise to issue a Rule Nisi, more so when the Governor has lost confidence in the petitioner and/or his Ministry and has reposed confidence in respondent 3 and her Ministry. When the Governor has the undoubted and positive power to re-appoint respondents 3 to 12 on rectifying the alleged defects, in my opinion, the petitioner is not entitled to a Rule Nisi. Besides, it is not a case where the Governor has appointed persons not qualified to hold the offices. Respondents 3 to 12 have all the qualifications to hold the offices. Under these circumstances, in my opinion, the petitioner is not entitled to a Rule Nisi.

6-A. Further, in this Writ of "quo warranto" the petitioner questions the validity of appointments of respondents 3 to 12 but he has himself produced the notifications of their appointments issued by the competent appointing authority, namely, the Governor of Assam. In an information in the nature of quo warranto the relator for the information, "How and under what authority do you hold the office?" has himself furnished the information by producing the Writs of appointment and admits that respondents 3 to 12 have been appointed by the competent authority under Article 164(1) of the Constitution.

7. An information in the nature of a quo warranto is not issued as a matter of course, and when a relator applies for an information it is the discretion of the Court to refuse or grant it according to the facts and circumstances of each case. Where an information would be futile in its result (as in the present case-- vide reason in the foregoing para), or when there is an alternative remedy which is equally appropriate and effective this Court ought not to issue a Writ. In the instant case there is a democratic institution, an august body, constitutionally elected by the people to judge the validity of selections made by the Governor. The sitting of the Assembly, as stated, is round the corner. The Court must pay due regard to the august body and ought to leave the decision as to whether respondent 3 enjoys the confidence of the majority or not to the Legislative Assembly. The body is the most appropriate institution to determine the controversy in question. The Court, in my humble view, should not meddle with matters which are of vital importance to the Assembly. The Court should not encroach the jurisdiction of the Legislative organ of the State. Instead, with due deference to the democratic organ, the Court should leave the resolution of the matters to the wisdom and judgment of "the Assembly". The Legislative

Assembly is an independent organ of the State like the Judiciary. There must be mutual respects, the organs are not competing forces but they are complementary to each other and the common goal of the organs is "the good of the people". Situated thus, I feel that it is my solemn duty to leave the matters to the wisdom and judgment of the august body.

8. The Courts, on principle, ought not to grant leave to relator to file a quo warranto information as a matter of course because a reasonable doubt as to the legal validity of the title is shown. It is the bounden duty of the Court to consider the consequences which would be likely to follow should the information be granted and also should take into consideration all the circumstances of the application. The Court will refuse to disturb the peace and quiet by granting leave to file an information where there has been mere irregularity in the selection or appointment which has not caused any public injury or harm (vide Halsbury's Laws of England, 4th Edn. Vol. 1, paras 169 and 177). All the above deterrent factors which call for refusal to issue an information in the nature of quo warranto are present in the instant case.

9. Dr. Medhi does not dispute that a Mandamus to restore the office to the petitioner cannot be granted unless the office is vacant. If the office is in fact full, the prime question to be considered is whether a Writ in the nature of quo warranto is maintainable to oust respondents 3 to 12 who are in possession of the offices. A mandamus will go only on the supposition that there is nobody holding the office. As such, Dr. Medhi admits that the question of mandamus can only arise after the determination of the question as to whether the appointment of respondents, 3 to 12 is prima facie illegal and void. Therefore, the only crucial question to be determined at this stage is whether the petitioner has been able to make out a prima facie case in which an arguable issue has been raised for issuance of Rule Nisi for a writ of quo warranto. A Rule Nisi ought to issue if there is such a prima facie case. Therefore, the petitioner was called upon to satisfy the Court as to whether the Governor, in appointing or dismissing or withdrawing his pleasure in a Chief Minister or the Ministry acts at his pleasure and/or in his sole discretion? If so, whether the discretion or the pleasure of the Governor can be called in question in a writ proceeding before a High Court?

As alluded, the warrants of appointments of respondents 3 to 12 have been produced by the petitioner himself. They are prima facie evidence of valid appointments under Article 164(1) of the Constitution. The petitioner admits that the holder of office under Article 164(1) is removable "at pleasure" as opposed to removal "for cause" such as unfitness or neglect of duty. From *R. v. Stratford-on-Avon (Mayor)* (1670) 1 Lev 291, to *R. v. Darlington School Governors* (1844) 6 QB 682, it was the dicta that the holder of an office subject to removal "at pleasure" as opposed to "removal for cause" has no right to be heard before removal. *Ridge v. Baldwin* (1964) AC 40 approved the dicta in *Darlington School Governors* (supra). It may be stated here that the office under Article 164(1) is held at pleasure and there is no constriction or restriction as to how, when and

under what circumstances and following what procedure the pleasure should be exercised by the Governor before removing the holder of the office. However, we find that exercise of similar pleasures has been circumscribed by innumerable restrictions in Article 311 and other provisions. Further, no information can be issued against the Crown when such pleasures are exercised. Although I have grave doubt as to whether a Writ can be issued against the Crown and/or the Governor for exercising his pleasure in such matters, I leave them for consideration in a suitable case.

10. Let me turn to the main contentions of Dr. Medhi. The learned counsel submits that the appointments of respondents 3-12 are invalid as they were made, (a) without consulting the Council of Ministers of the petitioner; (b) without dismissing or replacing the petitioner and his Council of Ministers; and, (c) the appointments were colourable as the Chief Minister (respondent 3) did not enjoy the confidence of the majority of the members of the House. She belongs to Congress (I) and her party could muster only 8 seats in the Assembly having 126 seats.

Before answering the questions I would observe that I have already held that (i) there has been no violation of any mandatory provision of the Constitution or Statute law in appointing respondents 3 to 12; (ii) it would be futile to issue Rule as the Governor can forthwith dismiss the petitioner and his disarrayed Council of Ministers in the manner desired by the petitioner and forthwith re-appoint the respondents; (iii) the answering respondents are qualified to hold the offices; (iv) the petitioner has himself furnished the required information by producing the writs of appointment of respondents 3 to 12; (v) the sole authority to appoint Chief Minister is the Governor and the Ministers hold office during the pleasure of the Governor; (vi) the "Assembly" is the most appropriate forum which can decide the judgment of the Governor. The Assembly will be in sessions in February/March, 1981, as such, the petitioner has an alternative and efficacious remedy; (vii) the Governor has set the ball of working of the democratic institution and appointed Chief Minister in whom he had confidence. The Court would ordinarily refuse to disturb the peace and quiet by granting any Rule Nisi at this stage. I would observe that the main object to issue Rule in respect of the important public offices is to protect "public interest" and not to uphold private interest. Unfortunately, in the petition, there is no allegation that the application has been made to uphold "public interest"; the petitioner desires a Rule Nisi for his own private interest. I would reiterate that there is a domestic jurisdiction to resolve the dispute in the Assembly, and under such circumstances the Court should be very shy to entertain a proceeding for "quo warranto".

11. Now let me turn to the arguments. One of the contentions is that it is a Congress (I) Ministry. However, in the petition the political colour of the Ministers has not been pointed. It is now revealed that even the Camp-followers of the petitioner and his Council of Ministers have joined hands with respondent 3. It is true that Congress (I) could secure only 8 seats but the present Ministry consists

of three members belonging to the Council of Ministers" of the petitioner. It is a damaging factor and the petitioner has conveniently masked the material fact in his petition. The effect is anyone's guess. Further, the petitioner has never stated his strength or the strength of respondent 3 in Assembly. On a vague allegation that respondent 3 does not have the majority in the House and in the absence of the positive statement of fact as to the exact number of the petitioner's followers in "the Assembly" it is hardly possible to accept the allegations and to act upon the vague statement about his claim of comfortable majority. The Governor, as the head of the State, is the sole Judge to ascertain as to who commanded support of the majority in "the Assembly". When the petitioner's own Ministers have joined the present Ministry and when the petitioner has conveniently omitted to state the material fact in his petition I have no hesitation but to ditto the judgment of the Governor. The suppression is meaningful as well as eloquent. There is no statement in the petition as to whether the petitioner's Ministers joined the present Ministry after they had joined Congress (I) or they joined the present Ministry as independents or as members of any other political party. In any view of the matter the assumption of the petitioner that he commands majority is purely a guess-work. The real Judge to determine the question was the Governor and he determined it in favour of respondent 3. I hold that the contention has no merit.

Be that as it may the real position that emerges is that it is the common case of the parties that the Governor, acting in exercise of his power under Article 164(1) appointed respondent 3 Chief Minister and respondents 4 to 12 Council of Ministers. Whether this power of the Governor is conditioned by any restriction created by or under the Constitution? Article 164(1) does not impose any restriction or condition or fetter upon the power of the Governor to appoint a Chief Minister. As to the appointment of other Ministers the Governor is required to act on the advice of the Chief Minister.

Dr. Medhi submits that the Governor was bound to take prior advice of the petitioner and his Ministers before appointing respondent 3. The contention that to appoint Chief Minister the Governor is to act on the advice of the Council of Ministers, is misleading and directly antithetical of what is there in Article 164(1). It is like asking the question whether egg came first or the chicken. There is no warrant for the proposition that before a Chief Minister is appointed, the Governor is required to consult a Council of Ministers. The Council of Ministers follow the appointment of the Chief Minister. Article 164(1) clearly provides that the Ministers hold office during the pleasure of the Governor. The exercise of this pleasure has not been fettered by any condition or constriction or restriction. The Governor has wide and large power in these matters. Withdrawal of pleasure is entirely in the discretion of the Governor and the Governor alone. Article 164(2) which provides that the Ministers shall be collectively responsible to the Assembly does not in any way fetter or constrict his power to withdraw pleasure while the Ministers hold office. Article 164 (2) expresses that the Council of Ministers is answerable to the Assembly. A majority of the members of the

Assembly can express its want of confidence in the Ministry; and, that is the limit to which the Assembly can go. It has no power to dismiss or remove the Council of Ministers from the offices. The power of removal or withdrawal of pleasure is entirely and exclusively that of the Governor, The repository of power to appoint Chief Minister and the Council of Ministers or to withdraw the pleasure contemplated under Article 164(1) and/or dismissal of the Ministry are exclusive pleasure-cum-discretion of the Governor. There is no limitation or condition of the unfettered pleasure prescribed in Article 164(1). It follows, therefore, that the right of the Governor to withdraw pleasure, during which the Ministers hold office, is absolute, unrestricted and unfettered. There is no manner or method of withdrawal of his pleasure. There is nothing that it should be printed or published in the official Gazette.

Now, if we turn to Article 163(2) we note that, the exercise of the discretion in withdrawing the pleasure is a matter which is a prohibited area for the court. The exercise of the function of the Governor under Article 163(1), that is, appointment and/or dismissal or withdrawal of pleasure or any decision of the Governor in connection therewith, exercised in his discretion, have been made final. Finality of the decision alone perhaps could have left the door of the High Court open to examine the discretion, had it not been provided that the validity of anything done by the Governor shall not be called in question on any ground "that he ought or ought not to have acted in his discretion". Therefore, his decision is final and the question of validity or invalidity of anything done cannot be questioned on the ground that he ought not to have withdrawn his pleasure in withdrawing his confidence in the petitioner and/or his Ministry or ought to have asked him to continue or ought not to have appointed respondent 3 Chief Minister and respondents 4 to 12 Council of Ministers. The command of the Constitution forbids a person to question the validity of any such function and also shuts the door of the court to question the validity of the appointment and/or withdrawal of the assignments.

12. Dr. Medhi has submitted that the Governor ought to have consulted the petitioner who was the Chief Minister prior to the Presidential Rule and his Council of Ministers before appointing respondent 3 as Chief Minister; absence of advice of the Council of Ministers of the petitioner invalidated the appointment of Respondent 3 in terms of Article 164, accordingly her appointment is invalid, The petitioner admits the undoubted power of the Governor to dismiss the Ministry and/or to withdraw his pleasure. When the Chief Minister is appointed, it is not at all necessary to consult anybody as the provision of Article 164(1) clearly speaks that the Chief Minister shall be appointed by the Governor and nothing more. As such, the question of taking the aid and advice of the Chief Minister and/or his Council of Ministers did not arise in appointing respondent 3. While appointing respondents 4 to 12, the Governor took the advice of the Chief Minister (respondent 3) and accordingly, the appointment of respondents 3 to 12 must be held to be impeccable. On termination of the Presidential Rule it was for the Governor to consider whether the petitioner and his Council of Ministers should

be allowed to continue or the pleasure should be withdrawn and respondent 3 should be appointed Chief Minister and respondents 4 to 12 appointed Council of Ministers. It was for him to make such enquiries as he thought proper to ascertain who amongst the members of the Legislative Assembly ought to be appointed Chief Minister after determining as to who would be in a position to enjoy the confidence of the majority in "the Assembly."

The learned counsel for respondents 3 to 12 has rightly contended that apparently the Governor lost confidence in the petitioner as the constitutional machinery failed to function when he was the Chief Minister at the relevant time. Counsel for the respondent further submits that three of the Council of Ministers of the petitioner having lost confidence in the petitioner joined the present Ministry, namely, respondents 4, 6 and 12. Counsel for the respondents submit that admittedly there was a difference of opinion between the petitioner and the Governor about the failure of the constitutional machinery. There was a sharp difference between the petitioner on one side and the Governor and the President on the other side as evident from the petition wherein the petitioner contends that there was no failure of the constitutional machinery but the Governor as well as the President took the contrary view. This is another facet indicating the ground for loss of confidence of the Governor in the petitioner.

In any view of the matter it appears crystal clear that the Governor had lost confidence in the petitioner wherefor the petitioner and his Ministry were replaced by the present Ministry. The Governor functioned, exercised his discretion and it is final. What he ought or ought not to have done is out of bounds for the Court. Anything done by him, whether right or wrong, cannot be questioned on the ground that he ought or ought not to have acted in his discretion. Where is the check or brake of those discretionary functions, questions the counsel for the petitioner. The answer is that the effective check is in the floor of the Assembly where exercise of wrong discretion can be set right by the Assembly. A Ministry installed by the Governor shall fall if it fails to command majority in the next Sessions of the Assembly. Further, the Governor is undoubtedly answerable to the Cabinet via the President. Whatsoever may be the political sanction the fact remains that the Courts have no power or jurisdiction to interfere where a Governor withdraws his pleasure or appoints Ministers or Chief Minister.

From the decision of *Samsher Singh Vs. State of Punjab and Another*, the following relevant propositions emerge: (1) Our Constitution embodies Parliamentary or Cabinet form of Government on the British model for the Union as well as for the States; (2) The fundamental principles of English Constitutional Law that the Sovereign does not act on its own responsibility but on the advice of the Ministers who accept responsibility and command the confidence of the House of Commons, have been embodied in our Constitution. The President and the Governors are the Constitutional heads of the Union and the States, and they act with the aid and advice of the Council of Ministers except where a contrary

provision is made by the Constitution. Article 163 provides the Council of Ministers to aid and advise the Governor except insofar as the Governor is by or under the Constitution required to exercise his function in his discretion; if any question arises as to whether any matter is not a matter in respect of which a Governor is by or under the Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion; (3) Article 163 provides for a Council of Ministers to aid and advise the Governor in the exercise of his function, but he is the sole and final Judge whether any function is to be exercised in his discretion or on the advice of the Council of Ministers; (4) Article 74 provides for a Council of Ministers to aid and advise the President but it does not confer any discretionary power on the President and there is no provision in Article 74 corresponding to Article 163(2). In fact, Article 163 (2) makes the Governor the sole judge in matters where he is required to exercise his function in his own discretion. It follows, therefore, that when the Governor acts on the aid and advice of the Council of Ministers, the Governor cannot be sued in respect of such action. When the Governor in the exercise of his functions or any of them acts in his discretion the decision of the Governor shall be final and the validity of anything done cannot be called in question on the ground that he ought or ought not to have acted in his discretion. In making a report under Article 356 to the President that a situation has arisen in which the Government of the State cannot be carried on, the Governor will be justified in exercising his discretion even against the aid and advice of the Council of Ministers, The reason is that the failure of constitutional machinery may be due to the conduct of the Council of Ministers. The discretion conferred on the Governor is to enable him to report to the President who, however, must act on the aid and advice of his Council of Ministers in all matters; (5) In this context, Article 163(2) is explicit; the decision of the Governor in his discretion is final and the validity thereof cannot be called in question. The Governor acts on the aid and advice of the Council of Ministers in executive action; while describing the discretionary power of the Governor Iyer, J. observed (para 138);

"Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Article 74 has no discretionary powers; the latter too has none, save in the tiny strips covered by Article 163(2)... .. These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions..... In all his constitutional "functions" it is the Ministers who act; only in the narrow area specifically marked out for discretionary exercise by the Constitution he is untrammelled by the State Ministers" acts and advice. Of course, a limited free-wheeling is available regarding choice of Chief Minister and dismissal of the Ministry, as in the English practice adapted to Indian conditions."

13. While illustrating the functions of the Governor qua Governor, it has been

stated that the power to make appointments including that of the Chief Minister under Article 164 falls within this category, Iyer, J. observed (at para 153):

"Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though the choice is by the paramount consideration that he should command a majority in the House, (b) the dismissal of a Government, (c) the dissolution of the House."

These are exceptional powers created by the Constitution and functions are to be exercised by or under the Constitution. In Halsbury's Laws of England, 4th Edn. Vol. VIII (Para 1130), it has been stated about the dismissal of Ministers:

"The Sovereign may legally dissolve the Ministry at any time by dismissal, but the exercise of this power in order to assert the Sovereign's personal wishes However, in cases where the Ministry still retains the confidence of the House of Commons, but the Crown has reason to believe that the House no longer represents the sense of the electorate, the dismissal of the Ministry or the dissolution of Parliament, would be constitutional....."

It follows, therefore, if the Governor has reason to believe that the Ministry no longer represents the majority in the Assembly, the dismissal of the Ministry by the Governor would be constitutional. This undoubted power of dismissal or withdrawal of pleasure is inherent in Article 164 of the Constitution. When he discharges the function or duty it cannot be questioned in the court. In my opinion, the decisions in *Samsher Singh Vs. State of Punjab* and *Another*, and *Mahabir Prasad Sharma Vs. Prafulla Chandra Ghose and Others*, make the position beyond any controversy.

14. Dr. Medhi submits that the petitioner has alleged mala fide and, therefore, rule nisi should be issued. The allegation of mala fide is based on no material at all. A bald allegation has been made that respondent 3 was appointed on political pressure with the full knowledge that she did not command the confidence of majority in the Assembly. There is no allegation that the Council of Ministers belong to any political party. It is true that respondent 3 has been ascribed as belonging to Congress (I). However, there is no averment as to the political affiliation of respondents 4 to 12, There is no material to indicate when, how and in what manner the Governor was politically pressurised. The question, as to whether the petitioner's assessment is correct or the assessment of the Governor was correct, is a matter of guess and can only be determined on the floor of the Assembly.

15. In the result, I hold that the appointments of respondents 3 to 12 are valid appointments and in accordance with the provisions of the Constitution, On appointment of respondent 3, the petitioner and his ministry was replaced and/or dismissed, The proper venue to fight out the issue is on the floor of the Assembly and the court is prohibited to enter into this area. In this regard. I also rely on the decision of the Supreme Court reported in *State of Rajasthan and Others Vs. Union of India and Others*, *State of Rajasthan v. Union of India*, I come to the

conclusion that the petitioner has failed to raise any arguable issue. The Governor in making the appointment of the Chief Minister under Art, 164(1) acted in his sole discretion. The appointments of Council of Ministers. Respondents 4 to 12, under Article 164(1) are valid and constitutional. The exercise of discretion by the Governor in the matter of appointments of respondents 3 to 12 and withdrawal of his pleasure, are not justiciable or in other words, cannot be called in question in writ application in this court.

16. Dr. Medhi has relied on a decision of the Supreme Court reported in *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, *University of Mysore v. Govinda Rao*, The decision is not an authority for the proposition with which we are concerned in the instant case. It is not an authority for the proposition to decide the ambit of power and jurisdiction of the Governor under Articles 163 and 164 of the Constitution of India, I have referred to the decisions of *Samsher Singh Vs. State of Punjab and Another*, as well as *Mahabir Prasad Sharma Vs. Prafulla Chandra Ghose and Others*, which have direct bearing. In my opinion, the decision is not helpful to decide any of the issues. A close look at the decision would clearly show that the ratio thereof is directly against the contentions of Dr. Medhi. It is a case of appointment of a Reader of a University wherein the petitioner contended that appellant No. 2 had not had the requisite qualifications. The Supreme Court held that there was no allegation about violation of any statutory provisions, Further, the Supreme Court held that when the qualifications of the Reader was adjudged by a competent Board of Appointments of the University of Mysore, the High Court fell into grave error to differ from the opinion of the Board when it was likely that the Board might have taken the view that the Degree of Master of Arts, Durham University, which the appellant No. 2, had obtained, was equivalent to a high Second Class Master Degree of an Indian University. Their Lordships held that such determinations are academic matters and the High Court should have hesitated to express an opinion. The Supreme Court allowed the appeal of the appointee and observed, *inter alia*, that it was wise and safe for the Court to leave the decisions of academic matters to those who are more familiar with the problems. I find that the decision does not help the petitioner but supports the view that I have already taken.

A faint submission has been made that the proclamation issued by the President under Article 356 was invalid. However, there is no prayer to declare the proclamation to be invalid. Realising the futility to question the validity of the proclamation when it has been recalled by the President not much argument has been advanced on the point. The grievance of the petitioner is that there was no constitutional breakdown. It is his personal opinion. However, the President of India on the basis of other informations as well as the report of the Governor was satisfied that there was failure of the constitutional machinery in Assam. There is no allegation of mala fide or bad faith against anyone.

Dr. Medhi has strenuously submitted that the action of the Governor was too

drastic. I have no hesitation in holding that it was constitutional and flowed from a strong desire to set right a critical situation. I would conclude as Bacon said: "No remedies cause so much pain as those which are efficacious."

17. For the reasons alluded I have no hesitation in dismissing the application in limine which I hereby do. However, there will be no order as to costs.

18. Before parting I would love to record that in the instant case I have derived considerable benefit from the erudite and well reasoned argument emanating from Dr. Medhi for the petitioner and Mr. P. K. Barua, Senior Government Advocate and Mr. D. N. Choudhury, Junior Government Advocate appearing for the Respondents.