

(1979) 12 CAL CK 0013
In the Calcutta High Court
Case No : C.O. No. 10725 (W) of 1979

Madan Murari Verma

APPELLANT

Vs

Choudhuri Charan Singh and Another

RESPONDENT

Date of Decision : 11-12-1979

Acts Referred:

Constitution of India, 1950 — Article 164(1), 226, 74(1), 75, 75(3)

Citation : AIR 1980 Cal 95 : (1980) 1 CALLT 126 : 84 CWN 145

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Advocate : Party in person, for the Appellant; Milan Kumar Banerjee, Addl. Solicitor General of India, Amitava Dutta, (For No. 1), S.K. Acharya, General, West Bengal, Soumen Bose, Sudipto Sarkar and Umesh Banerjee, (For No. 2), for the Respondent

Final Decision : Dismissed

Judgement

Sabyasachi Mukharji, J.—The petitioner in this application is a citizen of India. In his application filed under Article 226 of the Constitution on 3rd of September 1979 he has asked for a rule nisi upon the two respondents to show cause under what authority the respondent no. 1 and his colleagues resolved to advise the President to dissolve the Lok Sabha on 20th of August, 1979 and also a rule nisi upon the respondents to show cause why writ or order or direction in the nature of quo warranto should not be issued calling upon Choudhuri Charan Singh to show cause why he should not be removed from the office of the Prime Minister. The petitioner also prays for an ad interim order of injunction restraining the respondent no. 1 from functioning as the Prime Minister of India till the disposal of the petition. After the application was filed it came up in the list on the 4th of September 1979 and instead of issuing a rule nisi I directed the respondents to file affidavits and the respondents have filed affidavits and I have heard this matter as a contested application.

2. It is not necessary for me to set out in detail the events that took place after

the monsoon session of the Union Parliament began on the 9th of July, 1979. These events are of very recent origin and are fresh in public memory. It is not necessary to recapitulate them and these have been practically in near exhaustive manner set out in the Full Bench decision of the Madras High Court in the case of S. Ramaswami v. Sri Charan Singh (W.P. No. 3671 of 1979), and O. V. Alagesan v. Union of India (W.P. No. 3742 of 1979). The judgment was delivered on 10-10-1979. I will only, therefore, refer to certain relevant facts which are necessary for the purpose of determining the issues involved in this case. It is necessary to set out the contents of certain letters. The first one is the letter whereby the President invited the respondent No. 1 to become the Prime Minister of India and form the Government. It may be mentioned that before that the President had asked Sree Morarji Desai, leader of the Janata Party in Lok Sabha and who had prior thereto tendered resignation of himself and his Council of Ministers on 15th July, 1979 without facing the no-confidence motion and whose resignation had been accepted and who had been asked by the President "to continue in office till a new Government is formed" had made his claim to form the new Government on the basis of his supporters.

The President who had asked the respondent No. 1 to submit the list of his followers to judge his ability to form the Government had also submitted his list. Thereafter the following correspondence followed, The following is the text of the President's letter to Mr. Charan Singh:

"Dear Mr. Charan Singh.

Please refer to the correspondence resting with your letter dated 25th July and the discussion which your representatives and those of Mr. Morarji Desai held with my secretary yesterday evening and this morning. After consideration of all relevant aspects of the matter, I find that you enjoy the support of more members of the Lok Sabha than Mr. Morarji Desai. I, therefore, call upon you to form a Government. Please let me have the names of persons to be appointed to the Council of Ministers.

I trust that in accordance with the highest democratic traditions and in the interest of establishing healthy conventions you would seek a vote of confidence in the Lok Sabha at the earliest possible opportunity, say, by the third week of August 1979."

Following is the text of Mr. Charan Singh's letter dated August, 20, 1979 addressed to the President of India.

"My Dear Rashtrapatiji,

The Cabinet met this morning and took a decision as follows:--

"We had formed the Government with a view to restoring effective democracy and secularism. We had further hoped that we would be able to bring light into the life of the deprived and the down-trodden, to restore confidence amongst the minorities and weaker sections which had badly been shaken especially during

previous regime, we regret, however, that communal and authoritarian forces have conspired to defeat our aims of building a society, by and large, based on the teachings of Gandhiji. The Cabinet, therefore, decides to resign. It further resolves to advise the President that in view of the present situation, arrangements should be made for a fresh mandate being obtained from the People."

In the light of the above, I hereby tender my resignation and that of my Council of Ministers.

Further, I advise that in view of the present situation, arrangements may be made for a fresh mandate being obtained from the people.

Yours Sincerely Sd/- Charan Singh"

3. I may incidentally mention that these two letters were not originally annexed by the respondents in their affidavits-in-opposition in this case. But I had directed learned Additional Solicitor General to produce before me the copies of these two letters. The hearing of this application was adjourned for one day for this purpose. Learned Additional Solicitor General has informed me that those copies might be made available but that will take time as according to the contention production of these documents would require the personal sanction of the President and as the President was on tour out of the capital it would take a little time. But he very fairly submitted that he did not want to hold up the hearing of this application and on instruction on behalf of the respondents Nos. 1 and 2 he submitted to me these two reproductions of the newspaper reports of letters to be authentic copies of the letters and may be relied on by the Court.

4. On the 20th of August, 1979 the President of India wrote to the Prime Minister as follows:--

"Rashtrapati Bhavan, New Delhi No. F. 2-CA(1)/79 20th August 1979,

My dear Sri Charan Singh,

I have received your letter dated the 20th August, 1979 tendering your resignation and that of your Council of Ministers. I accept the resignations and request to you and your colleagues to continue in office till other arrangements are made. Regards,

Yours Sincerely, Sd/- Sanjiva Reddy"

This is part of the annexure to the affidavit-in-opposition by the Secretary, Ministry of Home Affairs of the Government of India, as well as part of the annexure of the affidavit by Choudhuri Charan Singh filed in these proceedings.

5. In view of the points taken in this petition, in my opinion, the following questions arise for consideration:--

(1) Whether the President of India was justified in calling upon the respondent No. 1 to form the Ministry as he did?

(2) Whether the respondent No. 1 and his Council of Ministers were competent to function "to aid and advise" the President in terms of Article 74(1) of the Constitution of India until the respondent No. 1 and his Council of Ministers tendered resignations on the 20th August, 1979?

(3) Whether the President called upon the respondent No. 1 to form the Government upon the condition that respondent No. 1 and his Council of Ministers obtained the sanction of the Lok Sabha by the 3rd week of August, 1979 and if so, whether the President was competent to impose such a condition and whether the respondent No. 1 and his Council of Ministers were competent to function without fulfilling the said condition?

(4) Whether the respondent No. 1 was competent to resign and advise the dissolution of the Lok Sabha simultaneously, in the facts and the circumstances of this case?

(5) Whether, after the resignations of the respondent No. 1 and Council of Ministers were accepted by the President the respondent No. 1 and the Council of Ministers were competent of function without taking any fresh oaths of office under Article 75(4) of the Constitution?

6. The first question, therefore, is whether the President was justified in calling upon the respondent No. 1 to form the Ministry and to advise the President about the formation of the Council of Ministers as he did, in the facts and circumstances, of the case. Both by the British conventions as well as by the decisions of the Supreme Court of India this point, in my opinion, is settled. Reliance in this connection may be placed on the observations of the Supreme Court in the case of *Samsher Singh Vs. State of Punjab* and *Another*, where Chief Justice Ray observed at page 2199 of the report as follows:--

"This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. (See *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, ; *A. Sanjeevi Naidu, etc. Vs. State of Madras and Another*, ; *U.N.A. Rao Vs. Smt. Indira Gandhi*, . In *Ram Jawaya Kapur*'s case (Supra) Mukherjea, C. J. speaking for the Court stated the legal position as follows. The executive has the primary responsibility for the formulation of governmental policy and its transmission into law. The condition precedent to the exercise of this responsibility is that the executive retains the confidence of the legislative branch of the State. The initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, the carrying on the general administration of State are all executive functions. The executive is to act subject to the control of the legislature. The executive power of the Union is vested in the President. The President is the formal or constitutional head of the executive. The real executive powers are vested in the Ministers of the Cabinet. There is a Council of Ministers with the Prime Minister as the head to aid and advise the President in the exercise of his functions".

(underlined by me).

7. In this connection it is also instructive to refer to the observations of Mr. Justice Krishna Iyer at page 2212 of the report where His Lordship observed as follows:--

"103. The law of our Constitution, any student of Indian political history and of comparative constitutional sys-terms will agree, is partly eclectic but primarily an Indo-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions -- basically a blended brew of the British Parliamentary system, and the Government of India Act 1935 and near-American, nomenclature wise and in some other respects.

104. Not the Potomac, but the Thames, fertilises the flow of the Yamuna, if we may adopt a revering imagery. In this thesis we are fortified by precedents of this Court, strengthened by Constituent Assembly proceedings and reinforced by the actual working of the organs evolved for about a "silver jubilee" span of time".

But the material portion in my opinion which is very relevant for the present purpose is the observations of Mr. Justice Krishna Iyer in his Lordship's concurring judgment appearing at page 2230 of the report where his Lordship observed as follows:--

"We declare the law of this branch of our Constitution to be that the President and the Governor, custodians of all executive and other powers under various Articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office;; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory."

It has to be borne in mind that even before the 42nd Amendment of the Constitution Chief Justice Ray had observed in the passage quoted above that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary System. It is, therefore, material to bear in mind the conventions that guide the exercise of discretion in the British Parliamentary System. For this purpose reference must necessarily be

made to Halsbury's Laws of England, Fourth Edition, Volume 8, pages 540-541 at paragraphs 818 and 819. There it has been recognised that existence of some conventions is certain and could be defined accurately. The nature and the existence of others are subject to varying degrees of doubt. In this connection Halsbury refers to the part played by the Sovereign in choosing a Prime Minister when there is no clear majority in the House of Commons. The learned editors also recognised at paragraph 818 referred to hereinbefore, that there could therefore be no authoritative source to which reference can be made to ascertain whether a convention exists or what it is. One could only refer to the works on constitutional law or on constitutional or political history or the biographies of public figures, more especially where they deal with crises of one kind or another. At paragraph 819 the learned editors however recognised that the paramount convention is that the Sovereign must act on the advice tendered to her by her ministers, in particular the Prime Minister. She must appoint as Prime Minister, that member of the House of Commons who commands the confidence of the House and must appoint such persons to be members of the ministry and the Cabinet as he recommends. She must, in ordinary circumstances, accept any recommendation he may submit that Parliament be dissolved. In this connection the learned editors also observed that no Prime Minister in the United Kingdom has been refused a dissolution over a century, although in 1924 Asquith expressed the opinion that a Prime Minister leading a minority government was not entitled to dissolution and George V regarded himself as exercising an unfettered discretion in granting a dissolution to Mac Donald. According to the learned editors it would seem, therefore, that the Sovereign is not in all circumstances obliged to grant a Prime Minister's request for dissolution. The exercise of the royal prerogative in this respect is unlikely to be determined solely by past usages and precedents. The minimum criteria which are likely to be met before the Sovereign would consider refusing such a request from the Prime Minister are (1) belief that the existing Parliament was still vital, viable and capable of doing its job; (2) belief that a general election would be detrimental to the national economy; and (3) an alternative Prime Minister could be found who would be capable of commanding a working majority in the House of Commons and thus able to form a government for a reasonable period. A clear distinction must be drawn between the existence of the prerogative to refuse a request for a dissolution and the question whether in any particular set of circumstances the Sovereign would regard it as the best interest of the nation to refuse a dissolution. In this context, therefore, it may not be inappropriate to refer to certain observations from the Constitutional and Administrative Law by S. A. de Smith, Third Edition, where the learned author has referred to the conventions of the Constitution and at pages 104-105 the learned author has mentioned about the conventions that guide situations of this nature. Here also the author has recognised that in 1924, George V granted a dissolution to Mac Donald when the first Labour Government was defeated on a matter of confidence in the House. He did not, however, consider himself constitutionally obliged to grant the request. Refusal must still be more readily justifiable according to the learned

author if the rebels were known to be prepared to form a coalition Government with an opposition party, or if the country was in the throes of serious economic crisis or widespread civil strife. A Prime Minister who has actually been repudiated by his own parliamentary party in favour of one of his colleagues can claim no constitutional right at all to demand a dissolution. The learned author has also recognised that it is possible to imagine a marginal situation in which the fact that the General Election had been held only a short while previously might tip the balance against granting a request for a dissolution and at page 148 the learned author has summarised the modern conventions concerning the Prime Minister and the Cabinet and item 4 of the summary states that the general rule is that in appointing a Prime Minister, the Queen should commission that person who appears best able to command the support of a stable majority in the House of Commons. At page 153, there the author has recognised that when the Parliament is dissolved the Government continues in office; it vacates office only if the election results show that it has lost its majority in the House, in which case it must resign. Similarly, reference may be made to O. Hood Phillips' Constitutional and Administrative Law, Sixth Edition where at page 104 the learned author has described the nature and purpose of constitutional conventions and at pages 344 and 145 has discussed the conventions regarding the prerogative of dissolution. The petitioner strongly relied on convention (e) at page 145 where it is stated by the learned author that if the Government is defeated in the House of Commons on a motion of confidence or a motion of no confidence, the Prime Minister must either ask for a dissolution or tender resignation of himself and his ministerial colleagues. Where there is a dissolution which is the usual course, Ministers retain office during the ensuing general election. The petitioner relied on this passage in support of his contention that it is only an alternative for the Prime Minister when the Government is defeated or lost the confidence of the Parliament, he can either ask for a dissolution or tender resignation. He cannot simultaneously do both.

8. This question is also in my opinion to a very large extent covered by the observations of the Supreme Court in the case of U.N.A. Rao Vs. Smt. Indira Gandhi, , where Chief Justice Sikri observed as follows:--

"Now comes the crucial Clause (3) of Article 75. The appellant urges that the House of People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this clause that it was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as best as he can with the aid of the Services. As we have shown above- Article 74(1) is mandatory and therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Article 75(3) with Article 74(1) and Article 75(2). Article 75(3) brings into existence what is usually called "Responsible Government". In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not

dissolved under Article 85(2)(b), Article 75(3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it is prorogued. In the context, therefore, this clause must be read as meaning that Article 75(3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House of People takes place under Article 83(2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in Section 14 of the Representation of the People Act, 1951".

It may incidentally be referred to that it is advisable in constitutional matters for this Court to decide only those points which arise for determination on the facts of the case. See the observations of the Supreme Court in the case of U.N.A. Rao Vs. Smt. Indira Gandhi, .

9. In view of the aforesaid decisions and the conventions of the British Parliamentary System which have been more or less accepted in this country, in my opinion, though under Article 74(1) of the Constitution of India the President is bound to act in discharge of his functions on the advice given by the Prime Minister and his Council of Ministers, even though that was the position judicially recognised before the 42nd Amendment of the Constitution and now made expressly obligatory by the 42nd Amendment, in making a choice the President has to act in his own discretion and naturally he must take various factors into consideration and the primary factor is his assessment as to who as Prime Minister and which body of Council of Ministers will enjoy the confidence of the Parliament in terms of Article 75(3) of the Constitution. But the President is not fettered in his choice except by his own assessment. Therefore, in the event that had happened since the resignation of Shri Morarji Desai as Prime Minister being the leader of the Janata Parliamentary Party and the recommendation of the leader of the opposition that the respondent No. 1 should be asked to form the Government, in my opinion, the President of India in the facts and circumstances of this case legally and constitutionally was justified in calling upon the respondent No. 1 to form the Ministry as he did. Whether he was politically so justified or not is not a matter for this Court to determine. This Court cannot sit in judgment on the political assessment of the President. For that, in a democratic country he is answerable at the bar of the popular verdict. The question No. 1 must therefore be decided in favour of the respondents in view of the authorities noted and in view of the conventions so far followed and recognised.

10. So far as the question No. 2 is concerned, in my opinion, so long as there was a Council of Ministers and as there was a Parliament functioning to which constitutionally and theoretically the said Council of Ministers were responsible, in my opinion, the respondent No. 1 and his Council of Ministers were competent constitutionally and legally to function and aid and advise the President in terms

of Article 74(1) of the Constitution until 20th of August, 1979. Here, again whether they were justified to so function politically or not is also not a matter for this Court to determine. The question No. 2 indicated before must naturally therefore be again answered in favour of the respondents.

11. The next question that falls for consideration is whether in fact the President called upon the respondent No. 1 to form the Government upon the Condition that the respondent No. 1 and his Council of Ministers obtain sanction of Lok Sabha by 3rd week of August, 1979. Reading the communication which I have set out hereinbefore whereby the respondent No. 1 was asked to form the Government by the President, in my opinion, this was not a condition of appointment. But the President, if one may say so with respect, that in the uncertain period through which parliamentary affairs were passing at that stage, suggested the course he did; he was justified in suggesting that the respondent No. 1 and his Council of Ministers should publicly demonstrate their responsibility by seeking a vote of confidence at the earliest possible opportunity say by 3rd week of August, 1979. Strictly speaking, in terms of the Constitution the President was not competent to impose any condition. But as I have read the letter I have found that no such condition was in fact imposed. So I need not decide in this application whether in view of the fact that the Council of Ministers continue in office "at the pleasure of the President" the President was competent to impose such a condition. This is certainly a matter of some doubt. But this doubt does not call for a solution, in the facts and circumstances, of this case as I have found that the President did not impose any condition but merely made a suggestion in which if I may say so with great respect the President acted with the highest propriety. This disposes of the question posed before.

12. The next question that calls for consideration, is, whether the respondent No. 1 and his Council of Ministers were competent to resign and advise the President the dissolution of the Lok Sabha simultaneously in the fact's and circumstances of this case. Here, again, the circumstances under which the letters of resignation were sent have been set out-in the petition briefly and not incorrectly and also set out in Full Bench decision of the Madras High Court referred to hereinbefore. It is true in some cases after being defeated in the House of Commons in England the Prime Minister either continues in office and asks for dissolution of the House and verdict from the people and in some cases he resigns to give the Crown or the Sovereign the liberty to choose the succeeding Prime Minister. It is in that context perhaps de Smith at page 145 of his book referred to hereinbefore has spoken in the alternative and not as a conjunctive power of the Prime Minister. But the President retains as a prerogative his right to accept the advice of dissolution tendered by the Prime Minister. As we have seen, George V accepted the advice of a minority Government to dissolve the Parliament. It is, here, again in my opinion, the President has a wide choice to make and he must act on his own discretion. He is not bound to accept the advice tendered by the Prime Minister though in normal situation he should accept by the constitutional precedents and conventions. In this case, there are

various factors which the President has to take into consideration. Sri Morarji Desai was the leader of the Janata Parliamentary Party and as such leader of the Parliamentary Party in the Lok Sabha he was the Prime Minister, because he apprehended that he had lost the confidence of the House, he tendered his resignation before the vote of no confidence was taken up for consideration. But in tendering his resignation the Prime Minister had not asked for dissolution of the House. He, therefore, did not at that time seek any vote of confidence from the people, leaving the President the choice either to call someone else in his discretion to form the Government or to dissolve the House. The President following the ordinary convention asked the leader of the opposition who had tabled the vote of no confidence to form the Government. After some negotiations and attempts the leader of the opposition expressed his inability to form the Government and conveyed his request t'o the President to ask the respondent No. 1 to form the Government. In the meantime, Sri Morarji Desai had again made a claim to form the Government. The President asked both respondent of No. 1 and Sri Morarji Desai as leader of the Janata Party to submit lists of their supporters. On the assessment of the said lists it was found by the President that the respondent No. 1 had a chance of being able to form a stable Govt. for sometime. He accordingly called upon the respondent No. 1 to form the Government in the manner indicated before. But before respondent No. 1 could face the vote of confidence tabled by him some of his supporters withdrew support and the President accepted the resignation on the decision and the advice of the Cabinet to dissolve the Parliament. It was felt by some that he should have asked Sri Jagjivan Ram who had in the meantime been elected Leader of the Janata Party, a party whose leader was the Prime Minister and who had resigned because he thought that he lacked the confidence of the House and who had not advised dissolution of the House. Whether the President should have asked the same party by the mere fact that there was change in the leadership to form the Government or accept the advice of the Prime Minister and his Council of Ministers and dissolve the House, is a matter which constitutionally and by convention is within the discretion of the President. He must act on his own assessment. He is not bound constitutionally and legally by the advice given by such a Prime Minister and Council of Ministers nor was he bound to call upon the new leader of the same party which had not faced the vote of confidence to form the Ministry. Whether the President thought that it was a futile exercise or whether the President thought that the special provisions of the Constitution for the scheduled castes and scheduled tribes must be continued for some more years by amendment of the Constitution which was not possible with the present composition of the House and as such there was urgent necessity of convening a new House, is a matter for the political assessment by the President with which this Court is not concerned and competent to judge. In that view of the. matter, in my opinion, tha advice of the Cabinet was tendered when the Cabinet was functioning in terms of Article 75(3) and under Article 74(1) the President should normally accept such an advice and therefore the advice tendered on the 20th of August, 1979, by respondent No. 1 in my opinion,

is not legally and constitutionally improper but the President was, however, free to accept that advice or not to accept that advice. If the President had accepted that advice then the President cannot be said to have acted unconstitutionally.

13. In that view of the matter the question No. 4 as indicated before must be answered in the manner indicated.

14. On the question that after the respondent No. 1 and members of his Council of Ministers had tendered resignation as Prime Minister and after acceptance of the said resignations by the President if they were to continue in office then they should have taken fresh oaths of office, reliance was placed on the observations of the Supreme Court in the case of Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others, . That case, however, was dealing with the question of prospective resignation of a High Court Judge and the Court was concerned with Article 217(1), proviso (1). The Court held that prospective resignation of a Judge could be withdrawn as the same could also be done by the other government employees/or servants. But unlike other government employees resignation of the High Court Judge required no act of acceptance, but mere expression of intention and act of relinquishment.

15. In the aforesaid decision the Supreme Court, further reiterated that whether and under what circumstances the resignation of constitutional functionaries would be effective would depend upon the nature of the office and the conditions governing the same. It is in this connection necessary to bear in mind that the Ministers including the Prime Minister hold office "during the pleasure of the President" under Article 75(2) of the Constitution while under Article 217(1) of the Constitution there is no such condition in case of Judges of the High Courts, Judges of the Supreme Court, they do not hold office during the pleasure of the President. They hold office for the tenure of age fixed, 62 in one case and 65 in another and therefore, there is no question of any action of acceptance on the part of the President or the Governor of their resignations. Now, in this case as the Prime Minister and the Council of Ministers were holding office on the 20th of August, 1979 "during the pleasure of the President", there fore, the condition that the President imposes that is to say either relinquishment of their office if so directed by the President immediately or continuance in office till alternative arrangements are made become imperative obligations for them. In those circumstances, there cannot be any question of resignations of the Prime Minister or the Council of Ministers becoming effective unilaterally and their further continuance until alternative arrangements are made is not a question of reappointment and therefore no question of taking fresh oaths of office and secrecy arises. In those circumstances, the point taken in this application on this aspect of the matter cannot, in my opinion, be therefore sustained. The provisions are clear. I do not find prima facie any ground for issuing any rule nisi on this point in the view I have taken, on this aspect of the matter which is question 5 as indicated aforesaid.

16. There is another aspect of the matter. This defect of not taking fresh oaths of

office, which I hold was not defect at all because of the reasons mentioned before, can immediately be cured. On those circumstances any writ of quo warranto would be futile. The Courts should not issue futile writs. Reliance in this connection may be placed on the observations of Lord Reading, C. J. in the case *R. v. Speyer* (1916) 1 KB 595 and the observations of the Full Bench of the Delhi High Court in the case of *P.L. Lakhanpal Vs. A.N. Ray and Others*, . Furthermore it appears that whenever the Prime Minister and Council of Ministers resign and their resignations are accepted and they are asked to continue in office until alternative arrangements are made or new Government is formed either by the Crown in England or the President of India they never take fresh oaths of office and secrecy -- at least no contrary precedent was brought to my notice. A different situation might however arise if the Crown asks the Prime Minister where resignation is accepted to "form a new Administration" -- see Sir Ivor Jennings, *Cabinet Government* 3rd Edn., P. 85. This seems to be well settled convention sanctified by practice both in England and in India. There is logic behind it -- They are bound by the previous oaths until released by the "pleasure of the President"¹ in India and "pleasure of the Crown" in England. The challenge on this ground is therefore rejected.

17. Reliance was placed on the decision in the case of *M. P. Sharma v. P. C. Ghosh* (1968) 72 C WN 328. There Mr. Justice B. C. Mitra was concerned with the action taken by the Governor under Article 164(1) of the Constitution in dismissing the Chief Minister on the ground that he failed to convene the Legislative Assembly as desired by the Governor to prove his majority and in appointing Shri P. C. Ghosh as the Chief Minister. The facts of that case as would be apparent from what is stated hereinbefore are significantly different from the facts with which I am concerned in this application. I must also observe that Article 164(1) is slightly different from Article 74(1) of the Constitution specially after the 42nd Amendment of the said Constitution. While under Article 74(1) the advice given by the Council of Ministers is binding on the President by virtue of Article 74(1), Article 164(1), does not in express terms so indicate. I am concerned on this aspect with the question only how far and to what extent and under what circumstances the advice tendered by the Council of Ministers is binding on the President. The said decision also reiterated that the very fact that public controversy or public interest has been roused was no ground for issuing a rule nisi but the only test for issuing a rule nisi was the prima facie satisfaction of the Court that arguable issues have been raised. Judged by that standard on some of the points as I shall indicate later I am satisfied that prima facie arguable issues have been raised in this case.

18. Learned Advocate General drew my attention to some of the observations in the book of Louis Fisher. *The Constitution Between Friends* where Louis Fisher at Page 47 of the book had quoted that the observance of the written law is a high duty of a public official, but not the highest. The laws of self-preservation and national security claimed a higher priority: "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty,

property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means. "The executive may act outside the law when necessity demands it, explain his actions, and ask the legislature for acquaintance. These observations, however, must be applied in India with great caution. Though, it is true that in some extraordinary circumstances a single unconstitutional act, later explained or pronounced unconstitutional is preferable to an act, dressed up in some spurious precedent setting claim of legitimacy. But as I mentioned before this view must be applied with great caution in India. Speed and efficiency are not the only requirements of Government. Justice must be the supreme ideal, and that only can be ensured by a Government responsible to the Parliament which is responsive to the wishes of the people. As Sir Ivor Jennings has reminded us that dogs might bark in Parliament but if there were no Parliament to which the Government is responsible the people might bite.

19. A point was taken on behalf of the respondents that in this case political questions have been raised and the Court should be reluctant to enter into these political controversies. This plea, in my opinion, can best be met by the famous observations of Mr. Justice Brennan in the case of *Baker v. Carr* (1962) 369 US 186, when he said "The mere fact that the suit seeks protection of political right does not mean that it presents a political question". The said sentiment was approved by Mr. Justice Bhagwati of the Supreme Court in the case of *State of Rajasthan and Others Vs. Union of India and Others*, of the report. The facts of that case, however, were entirely different. That case was concerned with the scope of Article 356 of the Constitution and whether the President could direct dissolution of the Legislative Assembly of the State after the faking over of the administration of the State under Article 356 of the Constitution. There is no actual precedent of any situation like this especially the situations enumerated in questions 3 and 4 indicated before. But I must also indicate that the House has been dissolved. Notification has already been issued for holding of a fresh election. Therefore, it would be futile, in my opinion, to issue a rule nisi on the points raised by the petitioner in this case now even though some of the arguable points have been raised. The House of the People was dissolved on 22nd August, 1979 and this application came up in the list on 4th September, 1979. The Courts must in exercising jurisdiction under Article 226 of the Constitution avoid administrative and constitutional vacuum and deadlock. Constitutional problems must be viewed in a pragmatic way with public good in mind.

20. There is, however, one fundamental question that has to be kept in view that, our Constitution proceeds upon division of powers. An elected legislature representing the wishes and the views of the people, a responsible executive responsible to the legislature of which the President is the formal Head, who must act, except in certain exceptional cases, as I have indicated before on the advice of Council of Ministers and an independent judiciary holding the balance or checking the excesses. In order to tender advice to the President which is binding on him by virtue of Article 74(1) or by virtue of the constitutional

precedents the condition precedent is the responsibility of the executive to the legislative branch. The executive must act subject to the control of the legislature.

That is clear from the observations of Chief Justice Ray in the case of *Samsher Singh v. State of Punjab* (supra) which I have underlined before and that is also clear from the mandate of Article 75(3) of the Constitution. But if there is no legislature after the dissolution of the House under Article 85(2)(b) of the Constitution, then, whether Article 75(3) has any operation and as such whether the advice given by the Council of Ministers which is not or cannot be responsible to the House of the People is a delicate and difficult question. Though there are some observations dealing with this aspect in the case of *U. N. Rao v. Smt. Indira Gandhi* (supra) which I have referred to hereinbefore. But there the Court observed that nobody has said that the Council of Ministers does not enjoy the confidence of the House when it is prorogued. But the question becomes more complicated and becomes without any precedent where the Council of Ministers which is tendering advice to the President had never proven its responsibility to the House or whose responsibility to the House had not been proven or demonstrated as in this case, and where the Council resigned before facing a vote of confidence. There is no constitutional precedent for a situation of this nature, i.e., whether the respondent No. 1 and his Council of Ministers, who never obtained and who had never proven their majority in the House of People, after their resignations have been accepted and after the dissolution of the House can tender such advice which will be binding on the President in terms of Article 74(1) of the Constitution. As I have indicated before, Article 75(2) indicates that the Ministers hold office during the "pleasure of the President". The President has accepted the resignation of the respondent No. 1 and his Council of Ministers and has asked them to continue in office "till other arrangements are made". It is the limited pleasure indicated and in that field only in my opinion the respondent No. 1 and his Council of Ministers can function. There is no mention of any care-taker Government as such, in our Constitution or in the constitutional law, though Sir Ivor Jennings has described in his book -- *Cabinet Government*, Third Ed. p. 85 the ministry that was formed by Mr. Churchill in England after the war before and pending the General election in 1945 as care-taker Government. But an extraordinary situation like the present, in my opinion, calls for a care-taker Government and therefore, the respondent No. 1 and his Council of Ministers can only carry on day-to-day administration in office which are necessary for carrying on "for making alternative arrangements". In effect the President, in my opinion is therefore, not obliged to accept the advice that the respondent No. 1 and his Council of Ministers tender to him except for day-to-day administration and the Council of Ministers and the respondent No. 1 should not make any decisions which are not necessary except for the purpose of carrying on the administration until other arrangements are made. This in effect means that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the respondent number 1 and his Council of Ministers. With this

limitation the respondent No. 1 and the Council of Ministers can only function. And in case whether such advice is necessary to carry on the day-to-day administration till "other arrangements are made" or beyond that, the President, in my opinion, is free to judge. It is true again that this gives the President powers which have not been expressly conferred by the Constitution. But, in my opinion, having regard to the basic principle behind this Constitution under Article 75(3) read with Article 74(1) in the peculiar facts and circumstances of this case is the only legitimate, legal and workable conclusion that can be made.

21. I, therefore, decline to issue a rule nisi for the reasons given above. But I direct that the respondent No. 1 and his Council of Ministers must act only in the manner indicated before and in case of any doubt the decision must be left by the respondent No. 1 and his Council of Ministers to the President.

22. With these observations this application is disposed of without any order as to costs.