
(1968) 02 CAL CK 0020
In the Calcutta High Court
Case No : Civil Order No. 46 (W) of 1968

Mahabir Prasad Sharma

APPELLANT

Vs

Prafulla Chandra Ghose and Others

RESPONDENT

Date of Decision : 06-02-1968

Acts Referred:

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

Citation : AIR 1969 Cal 198 : (1968) 1 CALLT 353 : 72 CWN 328

Hon'ble Judges : B.C. Mitra, J

Bench : Single Bench

Advocate : N.C. Sen, Naresh Chandra Ganguly and Nirmal Kumar Ghosal, for the Appellant; S.K. Acharya, J.N. Haldar and D.P. Kundu for Jyoti Basu, A.P. Chatterjee and N.N. Gupta for Niranjan Sen Gupta, K.B. Roy, for Somnath Lahiri, Somanath Chatterjee, for Harekrishna Konar, S.N. Ghorai, for Ajoy Mukherjee and Shushil Dhara, R.N. Banerjee, for Hemanta Bose, R.C. Deb, General, Gouri Mitra and S.C. Bose for State and S.D. Banerjee and Salil Kumar Dutta for Union of India, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Mitra, J.—This is an application for a rule nisi in a petition for a writ of quo warranto. The petition was moved on January 12, 1968, when an order was made directing the petitioner to serve notice of this application on the respondents. Pursuant to this order notice has been served upon the respondents who have appeared in this application, but some of them opposed the issue of a rule nisi, while others supported the petitioner.

2. Briefly stated the events that have led to this application are as follows:--

After the last General Election several political parties, whose members are members of the Legislative Assembly and the Legislative Council of West Bengal, formed a coalition under the name and style of "United Front". The members of the United Front in the Legislative Assembly, enjoyed the support of the majority, and the Governor appointed the respondent No. 12, who was the leader of the

United Front, as the Chief Minister of the State, and on the recommendation of the Chief Minister, the Governor appointed the respondent No. 1 and the respondents Nos. 13 to 29 as the other Ministers. On or about November 1, 1967, the respondent No. 1 resigned the office of a Minister, and this resignation was accepted by the Governor with effect from November 6, 1967. On the same day, namely, November 6, 1967, the respondent No. 1, with some other members of the Legislative Assembly, claimed that the United Front had ceased to command the support of the majority of the members of the Assembly, and therefore, its leaders in the Legislative Assembly had no right to function as the Council of Ministers of the State. On the same day the Governor requested the Council of Ministers, headed by the respondent No. 12, to call the Legislative Assembly into session as early as possible, and not later than the third week of November, 1967, on the ground that doubts had been raised about the support of the majority of the members of the Legislative Assembly to the United Front Ministry. On or about November 14, 1967, the Governor requested the respondent No. 12 to call the Legislative Assembly into session on November 23, 1967. The Council of Ministers, however, declined to accede to the Governor's request, as it had decided to call the Legislative Assembly into session on December 18, 1967. On or about November 16, 1967, the Governor again requested the Council of Ministers to agree to the Legislative Assembly being summoned not later than November 30, 1967. The Council of Ministers, however, informed the Governor that the session of the Legislative Assembly could not be called before December 18, 1967. On November 21, 1967, the Governor made an order that the respondent No. 12 should cease to hold the office of the Chief Minister of the State with immediate effect and also that the Council of Ministers headed by him stood dissolved and the other Ministers should cease to hold office. This order was followed by another order of the same day whereby the Governor appointed the respondent No. 1 to be the Chief Minister of the State and on the advice of the Chief Minister, he appointed the respondents Nos. 2 and 3 to be members of the Council of Ministers. These two orders made by the Governor on November 21, 1967 are the subject matter of this application for a rule nisi.

3. The first point urged by Mr. Nirmal Chandra Sen for the petitioner was that the Governor in appointing a Chief Minister and other Ministers, in exercise of his powers under Article 164(1) of the Constitution could not act in his own discretion, and that he was bound to act in accordance with the advice of the Chief Minister. It was further argued that the Governor acting in his discretion, had no power to dismiss a Chief Minister or a Council of Ministers. Mr. Sen referred to the Notification No. 3777-A.R. dated November 21, 1967, published in the Calcutta Gazette of the same date, whereby in exercise of the powers conferred by Clause (1) of Article 164 of the Constitution, the Governor ordered that the Chief Minister Shri Ajoy Kumar Mukherjee should cease to hold office with immediate effect. This order was followed by another direction and declaration that the Council of Ministers headed by Shri Ajoy Kumar Mukherjee

stood dissolved and the other Ministers ceased to hold office. By another Notification of the same date being No. 3778 A. R. the Governor appointed Dr. P. C. Ghose to be the Chief Minister of the State of West Bengal and on the advice of the Chief Minister Shri Harendra Nath Majumdar and Dr. Amir Ali Molla were appointed to be the members of the Council of Ministers.

4. With regard to the said Notification No. 3777-A.R. whereby the Governor ordered that Shri Ajoy Kumar Mukherjee, and the Council of Ministers headed by him, ceased to hold office, it was argued that the Governor had no power under Article 164(1) to dismiss either the Chief Minister or the Council of Ministers, although under Article 164(1) the Ministers held office during the pleasure of the Governor. It was contended that the provision in the Constitution that the Ministers held office during the pleasure of the Governor, did not confer upon the Governor the power to dismiss the Chief Minister and the Council of Ministers at his discretion. The Governor, it was argued, was bound to act on the advice of the Council of Ministers, or at any rate, of the Chief Minister in the matter of dismissing the Chief Minister or the Council of Ministers. Reliance was placed by Mr. Sen on Clause (1) of Article 74 of the Constitution which provides that there should be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the exercise of his functions. This provision corresponds to Clause (1) of Article 163 which makes similar provision with regard to a State. Reference was also made to clauses (1) and (3) of Article 75, Clause (a) of Article 78 and Clause (a) of Article 167.

5. It was next argued that the pleasure of the Governor contemplated by Clause (1) of Article 164, did not confer upon the Governor an arbitrary or discretionary power to dismiss the Ministers. In support of this contention reliance was placed on Clause (1) of Article 310 which provided that members of the Defence Service or Civil Service of the Union or an All India Service or persons who held any Civil post under the Union or a State held office during the pleasure of the President or the Governor. It was argued that the pleasure of the President and of the Governor was conditioned by and made subordinate to the restrictions imposed by Clauses (1) and (2) of Article 311 of the Constitution.

6. It was next contended that where it was intended that the Governor should act solely in his own discretion, specific provision was made to that effect, as in Clause (2) of Article 239 of the Constitution in which provision had been made for the President to appoint a Governor of a State as an Administrator of an adjoining union territory and in such cases the Governor exercised his functions as such Administrator, independently of his Council of Ministers. Therefore, it was argued, a mere provision that the Ministers held office during the pleasure of the Governor, did not imply that the Governor could act in his own discretion without the advice of the Chief Minister or the Council of Ministers, and in so far as he acted in his own discretion in dismissing the Council of Ministers headed by Shri Ajoy Kumar Mukherjee the order of the Governor must be held to be illegal and void.

7. It was next urged that under Cl. (1) of Article 154 of the Constitution the executive power of the State was vested in the Governor and was to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Clause (1) of Article 154 read with Clause (1) of Article 163, Mr. Sen argued, made it amply clear that the Governor could act only on the advice of the Council of Ministers.

8. The next point of Mr. Sen was that under Clause (2) of Article 164 the Council of Ministers was collectively responsible to the Legislative Assembly of the State, and that being so, the Legislative Assembly of the State was the only authority which could remove the Council of Ministers. It was argued that the power conferred upon the Governor by Clause (1) of Article 164 could be exercised only subject to the provisions in Clause (2) of that Article. Collective responsibility of the Council of Ministers to the Legislative Assembly of the State, it was argued, clearly implied that the Legislative Assembly was the only authority in the State which could remove a Council of Ministers from office.

9. Mr. Sen next referred to Article 160 of the Constitution which provided that the President might make such provision as he thought fit for the discharge of the functions of the Governor of a State in any contingency not provided for in Chapter VI of the Constitution. Reference was also made to Clause (1) of Article 356 of the Constitution under which if on receipt of a report from a State or otherwise the President was 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 President might by a proclamation assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State, and declare that the powers of Legislature of the State should be exercised by or under the authority of the Parliament, and also make such incidental and consequential provisions as appeared to the President to be necessary for giving effect to the objects of the proclamation. It was argued that as a situation had been created which had the effect of a constitutional deadlock, there were ample provisions in Arts, 160 and 356 for removal of the deadlock. But, it was argued, the Governor had no power or authority vested in him, to act in his own discretion in removing a Chief Minister or a Council of Ministers, merely because he thought that the Council of Ministers had ceased to enjoy the confidence of the majority in the Legislative Assembly.

10. It was next argued by Mr. Sen that some of the powers conferred upon the Governor of a State, under the Constitution, were powers which a Governor could exercise in his sole and absolute discretion. There were other powers, it was argued, as those created by Article 154, which could be delegated by him. But the third group of powers of the Governor created by the Constitution were powers which could be exercised by him only upon the advice of the Council of Ministers, and could not be exercised by him arbitrarily in exercise of his own

discretion. The power of the Governor created by Clause (1) of Article 164, it was argued, fell under the third group of powers mentioned above, and as such the power to appoint the Chief Minister and other Ministers and to remove them from Office could be exercised by the Governor only on the advice of the Council of Ministers.

11. I shall now refer to the cases relied upon by Mr. Sen in support of his contentions mentioned above. The first case relied upon was a decision of the Judicial Committee in *Adegbenro v. Akintola*, reported in (1963) 3 All ER 544. In that case upon receipt of a letter signed by a majority of the members of the Legislature of Western Nigeria stating that they no longer supported the Premier, the Governor removed him from office. An action was commenced by the former Premier against the Governor and the new Premier for a declaration that the Governor's act was unconstitutional and the two questions formulated by the trial Court and referred to the Federal Supreme Court of Nigeria for decision were:

"(1) Can the Governor validly exercise power to remove the Premier from office u/s 33 (10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

(2) Can the Governor validly exercise power to remove the Premier from office u/s 33 (10) on the basis of any materials or information extraneous to the proceedings of the House of Assembly?"

It was held that the Governor could validly exercise the power to remove the Premier from office u/s 33 (10) of the Constitution of Western Nigeria without a prior decision or resolution on the floor of the Assembly to show that he no longer commanded the support of the majority of the House and that the Governor could act on the basis of material or information extraneous to the proceedings of the House of Assembly. Reliance was placed on the observations of Viscount Radcliffe at p. 548 of the report where in considering the meaning of the words "the Premier no longer commands the support of a majority of the members" it was held that the phrase recognised a basic assumption of the British Constitution that so long as the House of Representatives was in being, a majority of its members who were prepared to act together with some cohesion was entitled to determine the effective leadership of the Government of the day. It was argued by Mr. Sen that the floor of the Legislative Assembly of West Bengal was the only place where the question, namely, if Shri Ajoy Kumar Mukherjee enjoyed the support of the majority, could be determined and that it was not open to the Governor to assume, from extraneous materials that the Council of Ministers headed by Shri Ajoy Kumar Mukherjee had lost the support of the majority in the Legislative Assembly of the State. This contention on behalf of the petitioner, however, cannot be accepted. In the first place, the decision of the Judicial Committee turned on the terms of Section 33 (10) of the Nigerian Constitution which are as follows:--

"(10) Subject to the provisions of Sub-sections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure: Provided that (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and (b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier."

Secondly, in spite of the specific provision in the Nigerian Constitution, that the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commanded the support of the Majority of the members of the House of Assembly, the Judicial Committee held that the Governor could validly exercise the power to remove the Premier without there having been a prior decision or resolution on the floor of the House of Assembly and also that he could act on the basis of material or information extraneous to the proceedings of the House of Assembly. The provisions in our Constitution do not require, as in case of the Nigerian Constitution, that the Governor shall not remove the Chief Minister unless it appeared to him that the Chief Minister no longer commanded the support of the majority in the Legislature. Article 164(1) of the Constitution is as follows:

"164(1). The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor."

There is nothing in this Article to indicate that before the Governor removes a Chief Minister and other Ministers he must be satisfied that the Chief Minister and the other Ministers have lost the support of the majority of the members of the Legislative Assembly. A comparison of the provisions in Article 164(1) of our Constitution with those in Section 33 (10) of the Constitution of Western Nigeria can leave no room for doubt that the powers of the Governor under Article 164(1) are wider in scope and concept

12. The next case relied upon by Mr. Sen is a decision of the Supreme Court in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, . In that case a petition under Article 32 of the Constitution was filed by persons who carried on the business of preparing, printing, publishing and selling of text books, prescribed for schools in Punjab. The Education Department of the Punjab Government pursuing a policy of nationalisation of text books, issued notifications regarding printing, publication and sale of these books. The petitioners' case was that these notifications not only imposed unwarrantable restrictions upon the rights of the petitioners who carried on their business, but practically ousted them from the business altogether and this was infringement of the petitioners' fundamental rights under Article 19(1)(g) of the Constitution. This infringement, it was further alleged, was made by executive order without proper legislation. In these facts the petitioners prayed for writs in the nature of mandamus directing the Punjab Government to withdraw the impugned

notifications. The passage in the judgment of B. K. Mukherjea, C. J., on which reliance was placed is at p. 555 of the report and is as follows:

"Our Constitution though federal In structure is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State."

To my mind these observations are of no assistance to the petitioner in support of his contentions in this case. The Supreme Court did not in that case consider the question of the power of a State Governor to dismiss the Chief Minister and a Council of Ministers. The passage relied upon affirms the principle established in the Constitution that the executive Government in discharge of its duties and responsibility must retain the confidence of the legislative branch of the State.

13. Reliance was next placed on a decision of the Nagpur High Court reported in AIR 1952 Nag 330. That was an application under Article 226 for a writ of quo warranto challenging the appointment of the Advocate-General of the State of Madhya Pradesh by an order of the Governor. The person who was appointed the Advocate-General relinquished his office as a High Court Judge on account of his age and the petitioner's contention was that as he retired as a Judge of the High Court on attainment of the age of sixty, he could not be appointed the Advocate-General or act as such. The contention on behalf of the respondents in that case that because the Governor was not amenable to the process of the Court, the Court could not examine the order appointing the Advocate-General and pronounce upon its legality, was rejected and it was held that the immunity afforded by Article 361 was personal to the Governor and that the Article did not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of the Courts. It was further held that unless there was a provision excluding a particular matter from the purview of the Court, it was for the Courts to examine how far any act done in pursuance of the Constitution was in conformity with it. This decision again is of no assistance to the petitioner as in that case the appointment was made in violation of Clause (1) of Article 165 of the Constitution which provides that the Governor shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State and quite clearly the person appointed, having exceeded the age limit, the appointment was made in contravention of the provisions of the Constitution. It was held that a person was not qualified for appointment as the Advocate-General after the age of sixty years. It was however also held at p. 336 of the report that if the provision in first Clause of Article 217 regarded as a guarantee of tenure of office of a Judge until the age of sixty was not available to the Advocate-General, because he held office during the pleasure of the Governor, there was no compelling reason why the same provision construed as a disability should be made applicable to him. The Nagpur High Court, therefore, clearly recognised that in terms of Article 165(3) the

Advocate-General of a State held office during the pleasure of the Governor. In any case the observations upon which reliance was placed are of no assistance to the petitioner in this case as there are no conditions attached to the exercise of the powers of the Governor under Article 164(1) of the Constitution, as in the case of the appointment of the Advocate-General of a State under Article 165(1) of the Constitution.

14. The next case relied upon was a decision of the Supreme Court -- The University of Mysore and Another Vs. C.D. Govinda Rao and Another, . Reliance was placed on this decision for the proposition that quo warranto proceedings involve an enquiry into the title of a person to hold a public office, and it confers jurisdiction on the Court to control executive actions in the matter of making appointment to public offices. It was argued that it was not enough for a person whose appointment was challenged in an application for a writ of quo warranto merely to produce a warrant of appointment or a notification in the official gazette regarding the appointment, but that the question of legality or validity of the appointment made by the executive authority could be enquired into by the Court. This contention of the petitioner, in my view, is well founded.

15. The next case relied upon was a decision of the Travancore-Cochin High Court reported in AIR 1953 Trav-Co 140. That was a writ petition challenging the proceedings of the Travancore Government sanctioning retirement of an Additional District and Sessions Judge. Reliance was placed on this decision for the proposition that there was no function which the Rajpramukh was to exercise in his discretion. But it was held that by no stretch of imagination the appointment or removal of an Additional District Judge which the Rajpramukh was to do in consultation with the High Court could be taken to be a business in which the Constitution required the Rajpramukh to act in his own discretion. It was, however, held that compulsory retirement did not amount to removal as contemplated by Article 311 of the Constitution and the petition was dismissed. The Court clearly affirmed that as in the matter of appointment or removal of a District Judge the Governor was required to act in consultation with the High Court, in making the appointment or removing a District Judge the Constitution did not require the Governor to act in his discretion. This decision, to my mind is again of no assistance to the petitioner as there is no fetter or restriction imposed upon the Governor in the matter of exercise of his power under Article 164(1) corresponding to the limitations and restrictions created by Article 311.

16. I shall now proceed to deal with the contentions raised by Mr. S.K. Acharyya, who appearing for the respondent No. 13 supported the petitioner. The first contention of Mr. Acharyya was that in an application for a writ of quo warranto it was not enough for the person, who was holding a public office merely to produce the notification or the warrant of appointment, but that the legality and validity of the appointment must be enquired into by the Court, and if the appointment was found to be illegal or invalid the order making the appointment should be quashed. As I have said earlier this contention is well founded. It is not

enough for a person holding a public office, whose appointment is challenged in a quo warranto proceeding, merely to produce the warrant or the notification. He must go further and satisfy the Court that the appointment is legal and valid. It was argued that an order of the Governor under Article 164(1) appointing or dismissing a Chief Minister and a Council of Ministers must be a valid order according to the Constitution, namely, that the Governor in making the order must act on the advice of the Chief Minister, and if the Governor failed to act according to the advice of the Chief Minister in making an order purporting to be an order under Article 164(1), such an order, it was argued, could not be treated to be a valid order made according to the Constitution, and for that reason it could be questioned in appropriate proceedings and quashed, if found to be invalid and illegal. In support of this contention, reliance was placed on a decision of this Court reported in *Jyoti Prakash Mitter Vs. Union of India*, . In other words, it was argued, that the order of the Governor dismissing Shri Ajoy Kumar Mukherjee as Chief Minister, and also the Council of Ministers headed by him, and the appointment of Dr. P. C. Ghose as the Chief Minister, not being an order in accordance with Article 164(1) of the Constitution, the provision in Article 361 could not be invoked, and the validity of the order could be enquired into by this Court and set aside and quashed, if found to be invalid. This argument was based on Mr. Acharyya's contention that although Article 164(1) provided that the Ministers held office during the pleasure of the Governor, the Governor could not act in his discretion and was bound in all circumstances to act on the advice of the Chief Minister, and in the absence of such advice, the only course left open to the Governor was to make a report to the President under Article 356(1) of the Constitution. I shall revert to this contention of Mr. Acharyya later.

17. It was next contended by Mr. Acharyya that where the Constitution required the Governor to act in his own discretion, without the advice of the Council of Ministers, specific provision to that effect and for that purpose, was made in the Constitution. He argued that such provisions were to be found in Clause (2) of Article 239 of the Constitution, in Clause (2) of Item 9 and cl. (3) of Item 18 of the Sixth Schedule to the Constitution. It was submitted that beyond the powers specified in these provisions the Governor had no right to act in his own discretion in any other matter.

18. Reliance was next placed by Mr. Acharyya on a decision of the Supreme Court, *P. Joseph John Vs. The State of Travancore-Cochin*, . Reliance was placed on the following observations of the Supreme Court at p. 165 of the report;

"It is an elementary principle of democratic Government prevailing in England and adopted in our Constitution that the Rajpramukh or the Governor as head of the State is in such matters merely a constitutional head and is bound to accept the advice of his Ministers."

This proposition, to my mind, is of no assistance to Mr. Acharyya's client in this case as the observations of the Supreme Court were made in connection with the

questions raised in that case, namely, that it was only the Maharaja who could appoint a Commission of enquiry under the Travancore Public Servants (Inquiries) Act. "Such matters" mentioned in the observations of the Supreme Court referred to the appointment of the commission of enquiry under the said Act.

19. The last case relied upon by Mr. Acharyya was also a decision of the Supreme Court, Himansu Kumar Bose Vs. Jyoti Prokash Mitter, . Reliance was placed on this decision in support of the contention that a rule nisi ought to be issued by this Court as arguable issues involving important questions had been raised by the petitioner, Mr. Acharyya submitted that the Governor had been charged with mala fide and such a charge required an investigation by this Court and such investigation could best be made after a rule nisi was issued, and parties had the opportunity of controverting or supporting the charges on affidavit. Mr. Acharyya concluded his arguments by submitting that as a prima facie case had been made out against dismissal of the Council of Ministers headed by Shri Ajoy Kumar Mukherjee and the appointment of Dr. P. C. Ghose as the Chief Minister and also of the other Ministers, a rule nisi ought to be issued in this case.

20. Mr. A.P. Chatterjee, learned Advocate for the respondent No. 22, adopted the arguments of Mr. S.K. Acharyya and supported the petitioner. He further argued that Article 164 was based on Section 51(1) of the Government of India Act, 1935, but the framers of the Constitution, it was submitted, made a conscious departure from the provisions in Section 51(1) of the Government of India Act. It was argued that u/s 51(1) of the Government of India Act, the Governor was given the power to choose, summon and dismiss the Ministers, and therefore in so choosing or dismissing Ministers he was given a discretion which Article 164(1) had denied to the Governor of the State. It was argued that this omission to give the Governor of the State the power to choose, summon and dismiss the Chief Minister, and the other Ministers, was a deliberate and conscious departure from the provisions in the Government of India Act 1935 because the choice of the Chief Minister under Article 164(1) must be confined to the leader of the party which commanded the support of the majority in the Legislative Assembly, and therefore the appointment of such a Chief Minister was, Mr. A.P. Chatterjee submitted, automatic. Mr. A.P. Chatterjee further sought to, strengthen this contention by a reference to the preamble to the Constitution in which it is stated that the people of India solemnly resolved to constitute India into a sovereign democratic republic, and that being so, it was submitted, the Governor must appoint as Chief Minister a member of the Legislature who commanded the support of the majority in the Legislative assembly.

21. The next contention of Mr. A.P. Chatterjee was that the principle of harmonious construction should be followed in interpreting clauses (1) and (2) of Article 164. It was argued that while clause (1) provided that the Ministers should hold office during the pleasure of the Governor, Clause (2) enjoined that the Council of Ministers should be collectively responsible to the Legislative

Assembly of the State. The discretion of the Governor in appointing the Chief Minister, it was submitted, must be held to be fettered and restricted by the condition in Clause (2) namely, that the Council of Ministers must enjoy the confidence of the majority of the Legislative Assembly, and the Governor could not appoint a member of the Legislature as the Chief Minister, unless it was proved on the floor of the Legislative Assembly that the person appointed as the Chief Minister had the support of the majority in the Legislative Assembly. Mr. A.P. Chatterjee, however conceded that if the Chief Minister or the Council of Ministers lost the support of the majority in the Legislative Assembly, the Governor had the power to dismiss the Chief Minister and the Council of Ministers.

22. Mr. A.P. Chatterjee next relied upon several passages in the 9th Edition of Dicey on the Law of the Constitution. Reference was made firstly to a passage at pp. 426-427 where it is stated that to say that a Cabinet when outvoted on a vital question are bound to retire from office, is equivalent to the assertion, that the Crown's prerogative to dismiss its servants at the will of the King must be exercised in accordance with the wish of the Houses of Parliament. Reliance was next placed on a passage at p. 429 that the ultimate object and end of the conventions is to secure that the Parliament or the Cabinet shall in the long run give effect to the will of that power which in Modern England is the true political sovereign of the State -- the majority of the electors or the nation. Reliance was next placed on another passage at p. 468 which is as follows:--

"The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagchot describes the power which can still legally be exercised by the Crown without consulting the Parliament; and should remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative Chamber which in its turn obeys the behests of the electors."

23. Relying upon these statements in Dicey relating to the prerogatives of the Crown and the conventions of the Constitution, Mr. A.P. Chatterjee contended that in a democratic republic like India the Governor in exercise of his powers under Article 164(1) could not arbitrarily dismiss a Chief Minister or appoint Someone as Chief Minister according to his own sweet will and without the sanction or approval of the Legislative Assembly. In support of this contention, reliance was placed on Clause (1) of Article 189 of the Constitution.

24. Lastly, Mr. A.P. Chatterjee contended that there was no power in the Governor to act in his own discretion except those mentioned in Schedule VI to the Constitution to which reference has already been made earlier in this judgment and in support of this contention reliance was placed on a decision of this Court reported in Biman Chandra Bose Vs. Dr. H.C. Mukherjee, Governor and Others, .

25. Mr. A.P. Chatterjee also referred to the observations regarding King's pleasure in May's *The Law, Privileges, Proceedings and Usages of Parliament*, 5th Edition at p. 798.

26. Before concluding his contentions, Mr. A.P. Chatterjee submitted that his client had not filed any affidavit-in-opposition, but the allegation in the following paragraphs were denied and disputed by him:--

Regarding paragraph 1 he submitted that respondents Nos. 18 and 20 had not become members of the West Bengal Legislative Assembly as a result of the General Election, but that they were members of the Legislative Council.

Regarding paragraph 7, he submitted that the Governor was secretly informed of the claim of the respondent No. 1 and he disputed the allegations in the rest of the paragraph.

Regarding paragraph 13, the allegations in this paragraph were denied.

Regarding paragraph 25, the allegation that the United Front headed by the respondent No. 12 called upon the people of West Bengal to defy and to break the orders u/s 144 of the Code of Criminal Procedure, with a view to oust the said Council of Ministers from office by force, is denied.

27. Mr. Somnath Chatterjee for the respondent No. 17 adopted the arguments of Mr. S.K. Acharyya and Mr. A.P. Chatterjee and also supported the petitioner for issue of a rule nisi. He further argued that all that the petitioner was required to do at this stage was to establish a prima facie case for issue of a rule nisi and in support of this contention he relied upon a decision of the English Court of Appeal -- *Auten v. Rayner* (1958) 3 All ER 566. The question, however, in that case was whether a plaintiff in an action could successfully challenge the decision of the Secretary, of State for Home Affairs to withhold from production certain documents specified in an affidavit. It was in that connection that it was held that by a prima facie case was meant no more than a case which called for an answer. The question whether a prima facie case had been made out in an application for a rule nisi in a writ proceeding, was not considered by the Court and that decision, therefore, in my view, is of no assistance to the petitioner. In support of the contention that a rule nisi ought to be issued Mr. Somnath Chatterjee also relied upon the decision of the Supreme Court *Himansu Kumar Bose Vs. Jyoti Prokash Mitter*, .

28. On the same point reliance was placed on a decision of the Special Bench of this Court, *Jyoti Prokash Mitter Vs. The Hon'ble Mr. Justice H.K. Bose*, Chief Justice of High Court, Calcutta, . Reliance was placed on the observations of S. P. Mitra, J., at p. 496 of the report.

29. Mr. Somnath Chatterjee also referred to another decision of this Court reported in 71 Cal WN 205=(1968 Lab IC 731) for the proposition that where the petition disclosed a prima facie case or raised some arguable issue or made allegation of mala fide or the like, a rule nisi should be issued calling for a return

upon the allegations made by the petitioner. Reliance was also placed on another decision of the Supreme Court, *British India Corporation Ltd. and Others Vs. The Industrial Tribunal, Punjab and Another*, for the proposition that where allegations of mala fide were made the Court should hear the parties after issuing notice to the respondents. This decision, to my mind, is of no assistance to the petitioner as in this case notice has been issued to all the respondents who have appeared in this matter and have advanced their respective contentions. Reliance was also placed on another decision of the Supreme Court -- *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur*, in which the Supreme Court held that it was constrained to set aside the order of the High Court rejecting a petition for a rule nisi as no indication as to the grounds on which the High Court rejected the petition was given and a prima facie case was made out which might require investigation and trial. Before concluding his arguments Mr. Somnath Chatterjee submitted and I think rightly that the decision of the Judicial Committee in (1963) 3 All ER 544 (supra) had no application in the facts of this case as the decision in that case turned on the terms of the written Constitution of Western Nigeria which were entirely different from the terms of Article 164(1) of our Constitution.

30. Mr. S.N. Ghorai for the respondent No. 14 adopted the arguments advanced by Mr. S.K. Acharyya, Mr A.P. Chatterjee and Mr. Somnath Chatterjee. He, however, further argued that under Article 164(1) the Chief Minister was to be appointed by the Governor and the other Ministers were to be appointed by the Governor on the advice of the Chief Minister. In this case the Governor appointed Dr. P. C. Ghose as the Chief Minister and Shri Harendranath Majumdar and Dr. Amir Ali Molla as the other Ministers by the same notification, namely, No. 3778-A.R. dated November 21, 1967. This, Mr. Ghorai argued, was clearly invalid as the Governor could appoint the other Ministers on the advice of the Chief Minister, only after he had been duly appointed. In this case, it was argued, the appointment of the Chief Minister and the two other Ministers were simultaneous and therefore the appointment was bad.

31. The learned Advocate-General for the respondents Nos. 1 to 11, and 33 contended that the petitioner and the supporting respondents failed to make out a prima facie case for a rule nisi. He argued that in order to make out a prima facie case the petitioner must raise arguable issues, and if he failed to do so, the Court should not issue a rule nisi. The question in this case, it was submitted, turned on the interpretation of Article 164(1) of the Constitution and it was to be seen if the Governor had the power to appoint the respondent No. 1 as the Chief Minister in exercise of his powers under Article 164(1) of the Constitution. The pleasure of the Governor contemplated by Article 164(1) was, it was argued, unrestricted and unlimited in its scope and extent. This pleasure, it was argued, was not conditioned by any restrictions imposed by the Constitution. The provisions in Article 164(2) that the Council of Ministers shall be collectively responsible to the Legislative Assembly did not in any way, it was argued, control or restrict the Governor's right to act according to his pleasure under Article

164(1).

32. It was next argued by the learned Advocate-General that Article 163(2) provided that in the event of a question being raised if a matter was one with regard to which the Governor was under the Constitution required to act in his discretion, the Governor's decision in his discretion should be final and the validity of anything done by the Governor should not be called in question that he ought or ought not to have acted in his discretion. In order to appreciate this contention I set out below Article 163(2) and Article 164(1) and 164(2):

"163(2). If any question arises whether any matter is or is not a matter as respect which the 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.

164(1). The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor;

Provided that in the State of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

164(2). The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State." In this case a question clearly has been raised if the Governor could, in exercise of his power under the Constitution, act in his discretion in appointing the respondent No. 1 as the Chief Minister. It was, therefore, submitted that as the Governor had already decided that he had a discretion in the matter of appointing the respondent No. 1 as the Chief Minister, and in exercise of that discretion he made the appointment, the appointment could not be called in question on the ground that the Governor ought not to have acted in his discretion.

33. It was next contended by the learned Advocate-General that although the application was for a rule nisi for a writ of quo warranto, the petitioner and the supporting respondents had also challenged the order of the Governor as set out in the Notification No. 3777-A.R. dated November 21. 1967, whereby he directed that Shri Ajoy Kumar Mukherjee should cease to hold the office of Chief Minister, and the other Ministers also should cease to hold their offices. Ground (c) of the Grounds set out under paragraph 28 is directed against the said order. It was argued by the learned Advocate-General that the said order of the Governor directing that Shri Ajoy Kumar Mukherjee and the other Ministers should cease to hold the office of Chief Minister and other Ministers, could not be the subject of a writ of quo warranto. It was submitted that if the petitioner was aggrieved by the order removing Shri AJOY Kumar Mukherjee and the Council of Ministers headed by him, from their offices, the proper remedy of the petitioner was by way of an action.

34. The next contention of the learned Advocate-General was based on Article 361(1) of the Constitution. It was argued that the Governor of West Bengal not being answerable to any Court, for the exercise and performance of his powers and duties, or for any act done or purporting to be done by him in the exercise and performance of those powers and duties, the petitioner in this application could not challenge the validity of the appointment of Dr. P. C. Ghose and the other Ministers, as the appointments were made by the Governor in the exercise of duties conferred upon him by the Constitution. In support of this contention reliance was placed on a decision of this Court reported in *Biman Chandra Bose Vs. Dr. H.C. Mukherjee, Governor and Others*, . That was an application for a writ of mandamus directing the Governor of West Bengal to recall the nomination of nine members to the State Legislative Council of West Bengal and also for a further direction upon him to forbear from giving effect to the notification containing the nomination. It was held that the Governor was not answerable to the Court by reason of Article 361 and that the validity of the nominations could not be enquired into by the Court and the Governor not being liable to justify the nomination, was not bound to disclose any facts relating to such nominations.

35. The next contention of the learned Advocate-General was that there was no substance in the charge of mala fide and that in the petition no charge of mala fide had been laid by the petitioner,

36. The learned Advocate-General next referred to a passage at p. 77 of the *Constitutional and Administrative Law*, 4th Edition by Hood Phillips which is as follows:--

"Our suggested definition of constitutional conventions is: rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the Courts or by the Houses of Parliament."

It was argued that the conventions of the British Constitution required that the British Cabinet should remain in office so long as it enjoyed the confidence of the majority in the House of Commons, but this convention could not be enforced in a Court of law. It was argued that even though this convention was applied in this country a writ of quo warranto could not be issued by this Court for enforcing such a convention.

37. Mr. S. Banerjee appearing for the respondent No. 34 adopted the arguments of the learned Advocate General, and submitted that on the averments in the petition a Rule nisi could not be issued. He argued that some of the most material allegations in the petition, namely, those made in paragraphs 1 to 12, 14 to 21, 24, 25, 29, 38 and 41 were based on newspaper reports, and as no affidavit had been filed from the Editor of the newspaper in support of those allegations, no reliance could be placed on those allegations. This argument, though attractive, cannot be accepted. Notice of this application had been served upon the respondents and an affidavit disputing or denying those allegations

could have been filed by Mr. Banerjee's client, but that had not been done. It is, therefore, not open to Mr. Banerjee to contend that no reliance should be placed on those allegations. Mr. Banerjee, however, advanced another argument based on the averments in the petition, which in my view has a good deal of force behind it. This argument was based on paragraph 13 of the petition which is as follows:

"(13) That meanwhile the State of West Bengal was passing through an acute condition of famine and lawlessness on a wide scale."

It was argued that the petitioner's case being that acute famine condition was prevailing in the State, which was also passing through lawlessness on a wide scale, the Governor was entirely right and justified, having regard to the information and materials in his possession, in demanding that Shri Ajoy Kumar Mukherjee should agree to the Legislative Assembly being summoned as early as possible to establish that he had the support of a majority of members of the Legislative Assembly. The Governor could not, it was argued, let the administration remain in the hands of a Council of Ministers, which according to the Governor's information lost the support of the majority, at a time when an acute condition of famine and lawlessness on a wide scale prevailed. It was argued that if Shri Ajoy Kumar Mukherjee, and the Council of Ministers headed by him, enjoyed the support of the majority in the Legislative Assembly, he should have readily agreed to an early meeting of the Legislative Assembly as suggested by the Governor. That being the case of the petitioner, it is not open to him, it was argued, to contend that the Governor should have allowed a Council of Ministers to remain in charge of the administration, though it had no right to do so. In my view, there is good deal of force in this contention of Mr. Banerjee.

38. These are all the contentions raised on behalf of the petitioner and the supporting respondent and also on behalf of the respondent opposing the issue of a rule nisi.

39. All that I am concerned with in this application is if a rule nisi ought to be issued on the materials set out in the petition and the contentions advanced by the learned Advocates for the petitioner and the supporting respondent. Notice of this application was directed by this Court to be served upon the respondents who appeared and advanced their contentions. The question, in my view, must depend on interpretation of Article 163(2) and Article 164(1) of the Constitution. The Governor has acted in the exercise of the powers under Article 164(1) of the Constitution, which provides that the Chief Minister shall be appointed by the Governor. The question, therefore is: Is the Governor's power to appoint a Chief Minister conditioned by any restriction created by the Constitution? To my mind, on the answer of this question must depend the answer to the questions raised by the petitioner and the supporting respondents in this application.

40. As I read Article 164(1) of the Constitution, I do not see anything in the language of Article 164(1), which imposes any restriction or condition 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. In my view, to read into Article 164(1), a condition that the Governor must act on the advice of a Council of Ministers as provided in Article 163(1), in the matter of the appointment of the Chief Minister, would be reading into the Article a condition and a restriction which is not there, and for which there is no warrant in the Constitution itself. The question before me at the moment is if a rule nisi ought to be issued in this application for a writ of quo warranto to examine the validity of the appointment of the respondents Nos. 1, 2 and 3. The order of the Governor removing the Ministry, of which Shri Ajoy Kumar Mukherjee was the Chief Minister is, in my view, beyond the scope of this application. A good deal of time has been occupied in advancing arguments on the question of the pleasure of the Governor in the matter of the holding of the office by the Ministers. The question whether the Governor could withdraw his pleasure in the matter of the holding of the office by the Ministers is in my view, beyond the scope of this application. As I said earlier the only question in this application is the validity of the appointment of the respondent No. 1 as the Chief Minister and on his advice, of the other Ministers, who now constitute the Council of Ministers. But it was strenuously argued before me that the removal of Shri Ajoy Kumar Mukherjee as the Chief Minister and also of the Council of Ministers headed by him was illegal. It was however argued, though somewhat faintly on behalf of some of the supporting respondents that the appointment of Dr. P. C. Ghose as the Chief Minister, was itself illegal on the ground that the removal of Shri Ajoy Kumar Mukherjee was invalid, and if Shri Ajoy Kumar Mukherjee continued to be the Chief Minister even after the Notification issued by the Governor, Dr. P. C. Ghose could not be lawfully appointed the Chief Minister. I shall, therefore, express my views on the contention that the removal of Shri Ajoy Kumar Mukherjee by the Notification No. 3777-A.R. dated November 21, 1967, and also of the Council of Ministers headed by him was invalid.

41. Article 164(1) provides that the Ministers shall hold office during the pleasure of the Governor. This exercise of pleasure by the Governor, however, has not been fettered by any condition or restriction. The withdrawal of the pleasure by the Governor is, in my view, a matter entirely in the discretion of the Governor. The provision in clause (2) of Article 164, that the Ministers shall be collectively responsible to the Legislative Assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office. Collective responsibility contemplated by Cl. (2) of Article 164 means that the Council of Ministers is answerable to the Legislative Assembly of the State. It follows that a majority of the members of the Legislative Assembly can at any time express its want of confidence in the Council of Ministers. But that is as far as the Legislative Assembly can go. The Constitution has not conferred any power on the Legislative Assembly of the State to dismiss or remove from office the Council of Ministers. If a Council of Ministers refuses to vacate the office of Ministers, even after a motion of no-

confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers hold office. The power to appoint the Chief Minister, and the Council of Ministers on the advice of the Chief Minister, and the power to remove the Ministers from office, by withdrawing the pleasure contemplated by Article 164(1) have been conferred upon the Governor of the State exclusively.

42. There are other provisions in the Constitution which empower the Governor to make an appointment to an office. As for example, the power under Article 165(1) to appoint a person as the Advocate-General of the State. This power, however, has been conditioned by the restrictions imposed thereby, namely, that a person can be appointed Advocate-General if he is qualified to be a Judge of a High Court. If this condition is violated, and a person is appointed who is not qualified to be a Judge of a High Court, the appointment can certainly be questioned in writ proceedings as was done in the writ petition filed in the Nagpur High Court. Then again under Article 310(1) various public servants mentioned therein hold office during the pleasure of the President and a Governor, But Article 310(1) opens with the words; "except as expressly provided by this Constitution". Article 311 provides for dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or the States, and the pleasure of the President or the Governor contemplated by Article 310(1) is conditioned by the limitations prescribed by Article 311 of the Constitution. If the conditions and the limitations created by Article 311 are violated in dismissing, removing or reducing in rank a servant of the Union or a State, the order of the President or the Governor can be questioned in appropriate proceedings. But there is no such limitation or condition to the pleasure of the Governor prescribed by Article 164(1) and it must, therefore, be held that the right of the Governor to withdraw the pleasure, during which the Ministers hold office, is absolute and unrestricted. Furthermore having regard to the provisions in Clause (2) of Article 163 the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this proceeding.

43. I shall now turn to the contention raised by the learned Counsel for the supporting respondents that the Governor in all circumstances is bound to act on the advice of the Council of Ministers, in appointing a Chief Minister, and if the appointment of a Chief Minister is made without the advice of a Council of Ministers, such an appointment could not be held to be an appointment in terms of Article 164(1), and therefore must be held to be invalid. In my view, there is an inherent fallacy in this argument. Upon a motion of no confidence being passed against a Council of Ministers, it would be open to the Chief Minister to advise dissolution of the Legislative Assembly of the State, and require a fresh general election. But the Governor may require the Council of Ministers to continue in office until a new Council of Ministers is appointed. It may be that the general election may not secure to the outgoing Council of Ministers, a majority in the Legislative Assembly. Can it be said that the Governor is bound to act, in

appointing a Chief Minister, on the advice of the outgoing Chief Minister who has lost his majority in the Legislative Assembly as a result of the General Election? I think not. Then again, the President may under Article 356(1) issue a proclamation and assume to himself the functions of the State Government as provided in sub-clause (a) of Article 356(1) of the Constitution. This presidential proclamation may sometime later be followed by a General Election, and at that time there would be no Chief Minister to advise the Governor with regard to the appointment of a Chief Minister under Article 164(1). Can it be said that in such circumstances because the Governor appointed a Chief Minister in exercise of his powers under Article 164(1) without the advice of a Chief Minister, the appointment of the new Chief Minister must be held to be invalid? I again think not. In appointing a Chief Minister therefore the Governor must act in his own discretion. It is for him to make such enquiries as he thinks proper, to ascertain who among the members of the Legislature ought to be appointed the Chief Minister and would be in a position to enjoy the confidence of the majority in the Legislative Assembly of the State. To my mind, it is clear that there is no force in the contention raised on behalf of the petitioner, and the supporting respondents, that the appointment of Dr. P. C. Ghose as the Chief Minister is invalid because it was made by the Governor in his own discretion and without the advice of the Council of Ministers.

44. Let me now proceed to examine the events, in the sequence in which they happened, as alleged in the petition, immediately preceding the impugned orders of the Governor. It will then have to be seen, if a charge of mala fide, even if it is contended that such a charge is implied, can be sustained.

45. On November 6, 1967, the respondent No. 1 and some other members of the Assembly claimed that the United Front had ceased to command the support of the majority of the members of the Legislative Assembly, and as such had no right to continue to function as the Council of Ministers. On the same day the Governor asked the Council of Ministers headed by the respondent No. 12 to call the Legislative Assembly into session as early as possible, but not later than the third week of November, 1967, as he had doubts if the United Front Ministry commanded the support of a majority of the members of the Legislative Assembly and accordingly he required that the issue should be settled in a session of the Legislative Assembly. This was followed by a second request from the Governor on November 14, 1967, to the respondent No. 12 to call the Legislative Assembly into session on November 23, 1967; but the respondent No. 12 declined to accede to the Governor's request as it was decided by the Council of Ministers to call the Assembly Session on December 18, 1967. On or about November 16, 1967, the Governor for the third time requested the respondent No. 12 to agree to the summoning of the Legislative Assembly not later than November 30, 1967. But again the Council of Ministers informed the Governor that the Assembly could not be summoned before December 18, 1967. This was followed by a letter from the respondent No. 12 to the President of India on November 18, 1967, requesting a reference to Supreme Court for its opinion of

the Constitutional questions under Article 143 of the Constitution. On or about November 21, 1967 the President of India refused to refer the said questions for the opinion of the Supreme Court. On November 21, 1967, the Governor made the impugned orders which are the subject matter of this application.

46. It is clear from the averments in the petition that the Governor had in his possession materials which raised a doubt in his mind about the Council of Ministers' continued enjoyment of the support of the majority of the members of the Legislative Assembly. To dissolve and dispel these doubts he thrice requested the respondent No. 12 to agree to the Legislative Assembly being called into session not later than November 30, 1967.

47. No doubt the Governor was anxious, and rightly so, that having regard to the acute famine conditions and lawlessness on a wide scale then prevailing in the State, as alleged by the petitioner, the vital questions involved in the claim made by the respondent No. 1 should be settled on the floor of the Legislative Assembly as early as possible. If the Governor felt that having regard to the conditions then prevailing in the State, the strings of Administration should not be left in the hands of a Council of Ministers, whose right to continue in charge and control of the administration has been challenged, unless it was proved without delay that the challenge was without substance, can it be said that the impugned orders of the Governor are tainted with mala fide? I think not.

48. A large number of decisions of different Courts have been relied upon by the petitioner and also the supporting respondents. I have already referred to those decisions earlier in this judgment, and in my view, none of those decisions are decisive of the questions raised in this application. A good deal of emphasis was laid on the decision of this Court reported in (1967) 71 Cal WN 926 for the proposition that the Governor's decision not being in accordance with Article 164(1), the decision could be called in question in this proceeding and set aside if found to be invalid. But this decision is no authority on the question of the Governor's power under Article 164(1) as all that was held so far as that decision is of any assistance to the petitioner in this case, was that Article 217(3) of the Constitution imposed a quasi judicial obligation and a hearing, therefore, ought to be given to the party to be affected before making an order. This decision, to my mind, is of no assistance to the petitioner in the instant case as it has not even been suggested, much less argued, that the Governor's power under Article 164(1) of the Constitution was quasi-judicial in nature.

49. The only question is if the petitioner and the supporting respondents have made out a prima facie case in which arguable issues have been raised. No doubt, having regard to the political consequences arising out of the impugned orders made by the Governor, the questions raised in this case have attracted a considerable amount of public attention. It is also clear from the averments in the petition that a large measure of controversy has been raised and is vigorously pursued in the press. But, in my view, it is not just enough for the issue of a rule nisi in this case that a section of the public, and even a large

section of the public is interested in the questions raised by the petitioner. It is again not just enough that controversial questions relating to the Constitution have been raised by the petitioner. It is easy for a petitioner in writ proceedings to raise questions touching one or other provisions in the Constitution. It is equally easy for a petitioner in writ proceedings to contend that controversial questions relating to interpretation of the Constitution have been raised. But in considering the question if a rule nisi ought to be issued, the test is, as it always must be, if arguable issues have been raised by the petitioner. That was the test prescribed by the Supreme Court in *Himansu Kumar Bose Vs. Jyoti Prokash Mitter*, , and that test must be satisfied before a rule nisi can be issued by this Court in this proceeding.

50. In my view, the petitioner has failed to make out a prima facie case, He has failed to raise any arguable issues. The Governor in making the appointment of the Chief Minister under Article 164(1) of the Constitution acts in his sole discretion. There is no scope for argument on this question. The exercise of this discretion by the Governor cannot be called in question in writ proceedings in this Court.

51. For the reasons mentioned above, this application is rejected. There will be no order as to costs.