
(1988) 06 GAU CK 0034
In the Gauhati High Court
Case No : Civil Rule No. 1414 of 1988

Vamuzo

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-06-1988

Acts Referred:

Constitution of India, 1950 — Article 226, 226, 356, 356, 356(1)

Citation : (1988) 2 GLJ 468

Hon'ble Judges : A.Raghuvir, C.J. and B.L.Hansaria, J

Bench : Division Bench

Advocate : A.K.Das, K.P.Pathak, W.A.Shishak , Subhasini, S.K.Chand
Mohammad, S.J.Sorabjee, K.Parasaran, J.P.Bhattacharjee, H.K.Sharma,
H.K.Saikia, D.K.Mishra, B.N.Sharma, N.N.Saikia, Advocates appearing for Parties

Judgement

Raghuvir, C. J.

This writ petition relates to Nagaland which is one of the seven States in North Eastern Region of India. Who are Nagas and how they live in their day to day life is beautifully summed up in the following words by an unknown Naga? Truly, we are a peculiar people. We are all equals. Men and women have an equal status. We have no caste divisions... We believe in that form of democratic government which permits the rule not of the majority but of people as a whole. We have no land tax, no wine tax, water tax, Forests, and woodlands belong to the people for their exploitation without paying taxes... We have no beggars ... And, wonder of wonder, we have no jails. We do not "arrest" or "imprison" anybody ??? We fear nobody, individually or collectively. We are a healthy people and fear corrupts the health of men ... We talk freely, live freely and often fight freely too. We have no inhibitions of any kind wild ? Yes... But free. There is order in this chaos, law in this freedom. If I were to choose a country, it would be my Nagaland, my fair Nagaland again and again.?

The issues raised in the writ petition relates to Nagaland Legislative Assembly which was recently dissolved by the President of India under Article 356 of the

Constitution. The Proclamation of the President of India is assailed in the writ petition. It may be necessary to state some facts which are relevant for the determination of issues that have been raised in the instant writ petition.

In November, 1987 Elections were held for Nagaland Assembly for 60 seats. The position of the parties after election was Indira Congress 35, Naga National Democratic Party 13 and Independents 7. The Indira Congress Party formed the Government. Hokishe Sema was elected as the Chief Minister. In the month of July he was at Japan in connection with the inauguration of India Festival, when he returned to India on August 2 there occurred a 'split' in the Chief Minister's ruling party of 34 members as by that date one among his party member died. The split had occurred now in the following circumstances.

On July 28, 1988, 13 MLAs among the 34 of Congress (I) ruling Party informed the Speaker of the Nagland Assembly to have separated from the ruling party and formed a separate party called Congress Regional Party. The group of 13 requested the Speaker for allotment of separate seats for them, in the Assembly in the session which was to be commenced on August 28, 1988. The names of the 13 with their signatures were sent to C.Chongshen the Speaker of the Assembly, one out of them was at Madras undergoing treatment therefore he did not sign the letter but he later confirmed that he formed the group of 13 and member of the newly formed Congress Regional Party.

The Speaker on July 30 on the representation received held a 'split' within the meaning of the Tenth Schedule of the Constitution in the ruling party had occurred in that three exMinisters, one Minister of State, one Deputy Speaker, three Chair Persons of Corporations, five Legislators K.L.Chishi as the President, Yeang Phong Konyak as General Secretary of the group formed a new political party in Nagaland.

Vamuzo one among the separated 13 MLAs informed the Governor to have secured the support of 35 out of the 59 members (signed by 32 persons sent to the Governor on 31st July, 1988) for forming Ministry in the State. The Chief Secretary, Nagaland thereupon informed Vamuzo on August 3 that group of 13 persons according to information received by him were wrongfully confined by him. Vamuzo informed the Chief Secretary that the 13 M.L.As. are free persons and the Chief Secretary if he is so minded can verify from them individually. Thereupon the Superintendent of Police and the District Magistrate at the instance of the Chief Secretary both visited Tourist Lodge on August 5 where the separated members were lodged and from them were obtained statements showing they are not wrongfully confined. This is one or first part of the story in this episode.

The Governor of Nagaland visited Kohima the capital of Nagaland State on August 6 and he sent a report to the President of India about the formation of Congress Regional Party. He in his report reported in Nagaland, in the past for a quarter of century eleven Governments were formed by the Congress (I).

Hokishe Sema formed the Government in 1987. Chishi attempted to bring down and destabilise the Government. To achieve that end he offered money and lured the separated group of 13 to step out from the ruling party. The Governor called the episode 'incredible lack of political morality and complete disregard of the wishes of the electorates on the part of the breakaway congressmen.' That none of them therefore had ever expressed any grievances to the Chief Minister at any time in the past. The 13 persons are kept under forcible confinement by K.L.Chishi and Vamuzo. The split of the party is not true. 'It is obvious that what may be called a political Group of the darkest hue has been stated in his absence contrary to the noble Naga character and democratic traditions'. The recognition by the Speaker was done in haste. The entire incident manifests political horse trading and machinations. He added there is proof that they are the group of 13 persons have not separated from the ruling party voluntarily.

Further he reported insurgency situation in Nagaland has been continuing but abated due to the efforts of the Government. Some of the members of the Legislative Assembly had contacts with the underground insurgent groups. The stability of the State may suffer due to the episode and if the present affairs are allowed to continue a serious development may ensue. Such an adverse development should be avoided as it has deleterious impact on the neighbouring States who subscribed to the Shillong Agreement in 1985

The Chief Minister after deliberations in the Cabinet decided to resign and recommended the Assembly be dissolved. Therefore, in his report to the President the Governor recommended the President's Rule be imposed in the State.

The President of India on August 7, 1988 considering the report and other information received in this regard from the Council of Ministers the President was to be satisfied that a situation had arisen in the State of Nagaland wherein Government cannot be carried on in accordance with the provisions of the Constitution of India. The President exercising his power under Article 356 invested the powers of the Legislature to be exercised by Parliament and consequential orders were issued on the same day. The functions of the Government of the State of Nagaland were resumed by the President by virtue of Clause (a) of the proclamation. The 'control' of the President was ordered to be exercised by the Governor of the State of Nagaland.

The two proclamations of the President are sought to be quashed in this writ petition. In this writ petition the Speaker of the Nagaland Legislative Assembly, the State of Nagaland, the Union of India and the other dissident group have been impleaded as party respondents.

In the writ petition it is averred the new Regional Congress Party with 13 members of the Legislative party was properly formed. The Speaker of the Nagaland Legislative Assembly recognised the group of 13 as a separate party which secured the support of 35 persons. The Assembly was to be in session on

August 28, 1988. The petitioner complained he was deprived of forming a ministry on August 28.

The report of the Governor in the writ petition that it bears no rational nexus with power vested in him under Article 356 of the Constitution. The President's proclamation in the facts and circumstances of the case is a colourable exercise of power. The satisfaction of the President it was alleged founded on extraneous consideration therefore the proclamation of the President and consequent order of the dissolution it is prayed to be quashed.

In opposition of the writ petition the State of Nagaland averred the Governor of the State made a report to the President of India under Article 356 of the Constitution of India. That under Article 361 of the Constitution of India affords protection to the Governor therefore he is not answerable to any Court for discharging of the duties of his high office as Governor of a State.

The President it is further averred acted on the aid and advice of the Council of Ministers therefore his actions cannot be questioned in any Court and no Court can determine what information was made available to the President of India under Clause (2) of Article 74. Therefore this Court cannot speculate as to the grounds which weighed with the Council of Ministers which resulted in the proclamation issued by the President. These two aspects are stated as the preliminary submissions to hold the writ petition in the instant case is not maintainable.

It is further added in the counter matters that are brought to the notice of the President and the decisions of the President are not justiciable. The proclamation issued under Article 356 of the Constitution of India vide Notification on August 7, 1988 was laid before each House of Parliament and was approved after due deliberation by resolutions of both the Houses of Parliament. In view of the resolutions of the Parliament the instant writ petition is not maintainable. It is specifically alleged that the 13 Legislators were held under forcible confinement in the Tourist Lodge and they are not allowed to move freely and carry on normal political activities.

In the counter affidavit on behalf of the Union of India it is averred that the decision of the President is based on the report of the Governor and other matters brought to his notice and the decision so taken by the President is not justiciable. The President acts on the advice and recommendation of the Council of Ministers under Article 74 (2) of the Constitution of India. The material on the basis of which the President has issued the proclamation cannot be made the subject of inquiry before any proceedings in a Court.

The proclamation was laid before each House of Parliament and after due deliberation by resolutions of both Houses of Parliament the decision of the President was approved. It was averred the resort of the Governor is not justiciable document and the instant writ petition is not maintainable under the provisions of the Constitution.

These aspects which have been set out in the respective counters of the Union of India and the State of Nagaland bring forth largely the following aspects:

(a) The legality of the report submitted by the Governor under Article 356 of the Constitution.

(b) In the absence of the Governor as a party in this proceeding in this Court whether it is permissible for this Court to consider the legality of the report of the Governor.

(c) On what material the President of India has passed the proclamation for dissolution of the Nagaland Legislative Assembly and whether this Court can call for the production of all the materials from Union of India.

(d) If the President accepted the advice of the Council of Ministers and on other information based on which the President has published the proclamation, whether it is competent for this Court now after these events to go into that question and adjudicate the validity of the impugned proclamation.

In this case for any relief to be granted in the writ petition it is necessary that the report of the Governor should be considered by this Court. The report is made available to the Court.

One of the objections that has been taken by the learned Advocate General of Nagaland on behalf of the Governor is that the Governor cannot be impleaded as a party in this proceedings and since he cannot be impleaded therefore the legality of the report submitted by him to the President also cannot be considered by this Court. The plea is sought to be supported that without giving opportunity to the Governor to state his case in support of his report the report also cannot be scrutinised by the Court. Objection is taken from the perspective of Article 361 of the Constitution of India that the Constitution protects the President as well as the Governor. The two high dignitaries are not answerable to any Court proceedings. The performance of the Governor or exercise of power by the Governor or any act done purporting to be done by him in the exercise and performance of duties are not justiciable.

This aspect of the objection fortunately is no more *res integra*. It is not necessary to enter into an elaborate discussion as the subject is covered by the cases. I may refer to the decision in AIR 1952 Nagpur 330 (G. D. Karkare vs. T. L. Shevde) where a similar objection has been taken and that Court observed? We cannot accede to the contention that because His Excellency the Governor is not amenable to the process of the Court, this Court cannot examine his action in appointing the nonapplicant and pronounce upon its legality? (page 333). This issue was again considered by the Bombay High Court in AIR 1960 Bombay 502 (State vs. K. M. Naoavati)?The Advocate General also contended that the Governor's action cannot be challenged in this proceeding, because the Governor is not represented before us and also because under Article 361 of the Constitution the Governor is not answerable to any Court for the exercise and

performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. This Article only gives personal protection to the Governor. No proceeding is however being held against the Governor. He is not being asked to answer for anything done by him. It is also not proposed to quash or set aside his order. The legality of his order has to be examined only in order to determine whether there is a valid return to the writ issued by this Court. If we had come to the conclusion that the Governor's order was invalid, we would have issued a writ to the officer now holding the accused in custody to hand him over. No writ or order would have been issued to the Governor. Consequently, it is not necessary that the Governor should be a party to the proceeding in order to enable us to decide whether there were good and sufficient reasons for not complying with the order of this Court,? (para 6 page 505). This aspect was considered by the Supreme Court in AIR 1971 SC 530 (Madhav Rao Scindia vs. Union of India). We may quote para 47 in full as the discussion illustrates the question in all its aspects" and in that case it was held : ?The charge of mala fide action in this connection can only mean want of good faith. Good faith according to the definition in the General Clauses Act means a thing which is in fact done honestly, whether it is done negligently or not. In other words an act done honestly must be deemed to be done in good faith. Mr. Palkhivala described the act as wanting in good faith and relying on many cases contended that want of good faith must avoid the act. It is hardly necessary to refer to those cases here as it is well settled that lack of bona fides unravels every transaction. I do not think that it is open to Mr. Palkhivala to describe the act as wanting in good faith without pleading any collateral fact. Further it is not open to me to probe the reasons for a decision by the President. To begin with under Article 74 (2) the question, whether any and if so what, advice was tendered by the Ministers to the President cannot be inquired into by any Court. Again by Article 361 (1) the President is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties except in an investigation of a charge under Article 61. All that is saved is that appropriate proceedings against the Government of India can be taken. Therefore, whether the President acted rightly or wrongly in the matter may be decided against the Government of India the conduct of the President. Therefore, the only question open is whether the act of the President was ultra vires the Constitution.? (emphasis supplied).

We hold that notwithstanding the provisions under Article 361 of the Constitution of India it is open for this Court to scrutinise the impugned report of the Governor of Nagaland.

The next issue raised is as to the contents of the report" We have earlier stated that 13 out of 34 members of the Congress (I) Party formed a new party called Congress Regional Party and they have approached the Speaker of the Assembly for purposes of recognition of the event as a split in the Congress (I) Party. The decision of the Speaker was invited by the group of 13 persons and they were

recognised as a separate party by the Speaker of the Nagaland Assembly. The Tenth Schedule of the Constitution has been incorporated recently in March 1, 1985. It is necessary to extract paragraphs 3, 6 and 7 of the Tenth Schedule of the Constitution for deciding this aspect of the matter.

3. Disqualification on ground of defection not to apply in case of split. Where a member of a House makes a claim that he and any other members of his legislature party constitute the group representing a faction which has arisen as a result of a split in his original political party and such group consists of not less than one-third of the members of such legislature party,

(a) he shall not be disqualified under subparagraph (1) of paragraph 2 on the ground

(i) that he has voluntarily given up his membership of his original political party; or

(ii) that he has voted or abstained from voting in such House contrary to any direction issued by such party or by any person or authority authorised by it in that behalf without obtaining the prior permission of such party, person or authority and such voting or abstention has not been condoned by such party, person or authority within fifteen days from the date of such voting or abstention; and

(b) from the time of such split, such faction shall be deemed to be the political party to which he belongs for the purpose of subparagraph (1) of paragraph 2 and to be his original political party for the purposes of this paragraph.

6. Decision on questions as to disqualification on ground of defection. (1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final.

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under subparagraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of Article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of Article 212.

7. Bar of jurisdiction of courts. Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule.

On a reading the above three paras it is clear that under this Schedule when a

group of members of the Assembly fall out and form a group and that group consist of not less than onethird of the members of such legislature party the members are not to be disqualified. The person who is to be satisfied about the split according to paragraph 6 is the Speaker of the Legislative Assembly. The Speaker is the authority to determine whether there was a split or otherwise. In the instant case it is seen the Speaker had recognised that there occurred a split and the group of 13 is recognised as a separate party. Therefore their recognition was proper.

The decision of the Speaker cannot be questioned in any Court of law. The Speaker is the final and ultimate authority to decide one way or the other whether or not there occurred a split, whether the "split" was true and whether what followed therein was legal. The jurisdiction of the Courts is barred in para 7 extracted above.

Now the question is whether the Speaker acted with undue haste as the Governor recites in the report. The Governor does not possess power to hold the recognition by the Speaker is illegal. The Governor also has no supervisory power over the Speaker under the Constitution to hold the recognition was done in undue haste. Therefore this part of the report of the Governor cannot be sustained in law.

The second question is with respect to 13 members whether they have voluntarily formed a party named Regional Congress Party. We have earlier indicated that there was some correspondences between the writ petitioner and the Speaker of the Assembly in which a question has been raised whether that group of 13 persons voluntarily formed a group or whether they were wrongfully confined. On that question there was also an investigation by the two State Officers. The report of the Governor does not refer to the inquiry made by the two State Officers at the instance of the Chief Secretary of the State. The statements obtained from the 13 persons cannot be stated to be irrelevant materials. Nevertheless the report of the Governor to the President does not make a mention of it. The statements reduced to writing by the two State Officers that the group of 13 were free persons. Thus relevant material which was available was not looked into and not adverted to by the Governor.

In the report of the Governor it is stated that the entire episode showed an incredible lack of political morality. The wishes of the electorate was disregarded by the breakaway congressmen. That none of the 13 expressed grievances to the Chief Minister. The democratic methods which could have been adopted were not adopted. The group of 13 persons and the Chief Minister could have thrashed out their problems on August 28, 1938 on the floor of the Assembly. There was horse trading and political machinations played a large part in the episode. Some of the members of the Assembly had contact with the Naga insurgents. The conduct of the 13 persons would have reflection on the Shillong Agreement of 1985. It is needless to mention that none of the aspects are relevant for exercise of power under Article 356 of the Constitution of India.

Therefore on a consideration of all relevant aspects of the report of the Governor I hold the report cannot be sustained in law.

It is argued next in this regard by Shri Sorabji on behalf of the petitioner that Courts will not permit to be achieved indirectly what cannot be achieved directly. For this proposition the case

AIR 1962 SC 527 (Manohar Lal Chopra vs. Seth Hiralal) (para 38) and AIR 1975 SC 865 (State of UP. vs. Rajnarain) (para 64) are cited. It was further argued that no one howsoever highly placed and no authority howsoever lofty can claim to be the sole judge of the extent of its power under the Constitution. It is for the Courts to uphold the constitutional values and to enforce the constitutional limitations. It is urged when the President acts on material, partly relevant or partly irrelevant, it is impossible to say to what extent the mind of the President was affected by the irrelevant material used by it in arriving at its finding. To support this plea cases in AIR 1955 SC 271 at page 273 (Chiranjilal vs. Commissioner of Income tax), AIR 1959 SC 1259 at para 14 (M/s Lal Chand Bhagat Ambica Ram vs. IT Commissioner) and AIR 1957 SC 164, para 4 (Dwarkanadas vs. State of J. & K.) are cited to accept the plea raised in this regard. The learned counsel for the petitioner elaborated even if it is accepted that there was other material which affected the satisfaction and conclusion reached by the President even then the President's satisfaction is vitiated in law and has to be quashed. A large number of cases of the State High Courts and the Supreme Court have been cited in support of this contention.

It is not necessary to set out all the cases relied on by the learned counsel for the petitioner except the case in AIR 1957 SC 164 (Dwarkanadas vs. State of J &K.) which was a case under the Detention Act and another similar like case in AIR 1958 M.P. 397 (Maurisinba vs. State of M.P.) and another case on the same point is dealt in AIR 1967 SC 1353 (State of Maharashtra vs. B. K. Takkamore). The Supreme Court dealt this aspect and held""The principle underlying these decisions appears to be this. An administrative or quasijudicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are nonexistent or irrelevant, and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds. On the other hand, an order based on several grounds some of which are found to be nonexistent or irrelevant, can be sustained if the Court is satisfied that the authority would have passed the order on the basis of the other relevant and existing grounds, and the exclusion of the irrelevant or nonexistent grounds could not have affected the ultimate opinion or decision.?

The facts in the case were considered and the above principle was applied in the following manner: ?Now the opinion of the State Government that the Corporation was not competent to perform the duties imposed on it by or under the Act, was based on two grounds one of which is relevant and the other irrelevant, Both the grounds as also other grounds were set out in paragraphs 1 and 2 read with the annexures 1 and 2 of the showcause notice dated July 21,

1965. Para 3 of the showcause notice stated, "And whereas the grounds aforesaid jointly as well as severally appear serious enough to warrant action under section 408 (I) of the said Act". The order dated September 29, 1965, read with the notice dated July 21, 1965 shows that in the opinion of the State Government the second ground above was serious enough to warrant action under S. 408 (1) and was sufficient to establish that the Corporation was not competent to perform its duties under the Act. The fact that the first ground mentioned in the order is now found not to exist and is irrelevant, does not affect the order. We are reasonably certain that the State Government would have passed the order on the basis of the second ground alone. The order is, therefore valid and cannot be set aside". The principle adumbrated in the above case apply to the facts of the case. We may not accept the Governor's report but with that we cannot hold the proclamation of the President also gets vitiated in law.

Now we may look into the President's power under Article 356 of the Constitution. It is seen since 1950 Article 356 was enforced seventy five times. In 1950-1954 three times, 1960-1964 two times, 1965-1969 nine times 1970-1974 nineteen times and in 1980-1987 eighteen times this power has been exercised by the President of India. This power under the Constitution it is accepted is to be exercised sparingly when constitutional machinery in a State may break down due to political crisis, internal subversion, physical breakdown or due to noncompliance with the constitutional directions of the Union Executive.

The same principle is stated in negative term, the power under Article 356 of the Constitution cannot be used for securing a good Government. The power cannot be used for installing an alternative Government, without enforcing the "floor test" in the Legislative Assembly. The power cannot be used where in the entire election ruling party suffered a massive defeat, or where internal disturbance not amounting to or verging on abdication of its Governmental powers have not been exhausted, power under Article 356 can be used to take immediate action otherwise where it will lead to disastrous consequence and the Government of a state cannot be carried on. The use of Article 356 power to sort out internal differences or intraparty problem is not admissible in law. Power cannot be legitimately exercised on the ground of stringent financial exigencies of the State. Power also cannot be invoked merely on the ground that there are serious allegations of corruption against the Ministry.

Bearing the above principles in mind the issue that arises for consideration is if the Governor's report is not sustainable in law whether it is open for this Court can quash the proclamation made by the President of India? Many sub clauses of Article 356 were relied on by the learned Attorney General in this regard who appeared for the Union of India. Therefore we extract Article 356 of the Constitution of India:

""356. Provisions in case of failure of constitutional machinery in States.(1) If the President, on receipt of report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot

be carried on in accordance with the provisions of this Constitution, the President may by Proclamation,

(a) 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 any body or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State :

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation :

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years :

Provided further if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of People.

(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

* * *

The learned Attorney General relied on the events that have had transpired immediately after the proclamation of the President and argued these events make the instant writ petition infructuous as in the present circumstances of the case no relief can be granted to the petitioner because of those events. The circumstance in particular referred is the approval of the proclamation by the two Houses of the Parliament and thus the President's order was given effect to and the Nagaland Legislative Assembly as on today stands dissolved. The learned Attorney General argued for a minimum period of two months even without the approval of the Parliament the President's order can be given effect in situations when it is imperative to act expeditiously and when recourse to the Parliamentary process may delay or impair "the functioning of the democracy." The Constitution therefore he argued provided safetyvalves to meet extraordinary situations. Such a proposition it is urged has an "imperious garb and a repressive content? but the structure is designed to save not to destroy, democracy. The learned Attorney General exhorted in this regard because power may sometime be abused, is no ground denying the existence of the power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all the legitimate needs and at the same time incapable of mischief. That within the duration of two months, the counsel elaborated, the President may take recourse on the advice of the Council of Ministers under clauses (a) to (c) of Article 356 (1) taken without the approval of the Parliament,

may be irrevocable. It is in such frame work of the powers under the provisions of Article 356 the Nagaland State Assembly was dissolved and fresh elections are ordered by the President therefore no relief can be granted by this Court in the instant writ petition.

Looking at the structure and frame work of the powers the Constitution expressly confers vast and varied powers to the President. Actions taken during the two months referred in clause 3 of Article 356 are irrevocable. The learned Attorney General therefore rightly urged once the President dissolved the Assembly and assumed the power under the proclamation, it would be impossible to restore the status quo ante even when proclamation is not approved by both the Houses of Parliament. The instant case is a fortiorari case as the two House of Parliament approved the President's proclamation and dissolved the Legislative Assembly under Article 174 (2)(b).

In the facts and circumstances of the case the hands of the clock cannot be out back therefore no relief can be accorded when the two Houses of Parliament approved the proclamation of the President of India.

Reverting to the legality of the Proclamation it is seen on receipt of report from the Governor on the basis of report ?or otherwise? the President was satisfied on the material submitted by the Cabinet Minister for issuing a proclamation. It is in this regard Article 74 of the Constitution was relied on by the learned Attorney General. The plea that is raised are two foldthat under Article 74 this Court cannot probe into what advice was tendered to the President by the Council of Ministers. The next objection the material or documents which are offered to the President of India are a class of documents which are privileged under section 123 of the Evidence Act therefore no Court can compel the Union of India to produce document before the Court.

Article 74 reads as under :

?74. Council of Ministers to aid and advise President.(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice :

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court.?

The learned Attorney General argued that the satisfaction of the President is not merely based upon the report of the Governor. It is based upon the advice that is given by the Union Cabinet Ministers and this aspect is spelled out from words ? otherwise? in Article 356 of the Constitution of India read with Article 74 of the Constitution it is argued the advice tendered to the President cannot be investigated by any Court as there is a constitutional bar to inquire into under

clause (2) of Article 74 of the Constitution.

In this regard all the relevant cases pronounced by the Supreme Court have been referred. We do not think it is necessary to refer to all the cases. Suffice it to refer AIR 1971 SC 530 (Madhava Rao Scindia vs. Union of India) which we have already referred earlier and in that case the Supreme Court held : "... it is not open to probe the reasons for decision by the President. To begin with under Article 74 (2) the question, whether any and if so, what advice was tendered by the Ministers to the President cannot be inquired into by any Court. Again by Article 361 (1) the President is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done by him in the exercise of those powers and duties except in an investigation of charge under Article 361."

Shri Sorabji, the learned counsel for the petitioner argued the Court is empowered to accord relief to the petitioner once the President does not offer before the Court what material was made available to him. This argument was elaborated by the counsel stating merely because a question has a political colour, the Court cannot fold its hands and declare "Judicial hands off". So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. It is stressed it is a constitutional obligation of this Court to do so. This aspect is emphasised notwithstanding the provision in Article 74 of the Constitution of India.

The satisfaction of the President under Article 356 is a subjective satisfaction and cannot be tested by reference to any objective tests. Political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be discovered by applying judicial norms for determination. It is a political judgment based on assessment of diverse and varied factors. The question in simple terms in my understanding boils down to the issue whether the Court can call for the information from the President notwithstanding the bar in Article 74 (2) of the Constitution. In my opinion the answer is this Court cannot call for the information from the President of India.

This aspect has been highlighted in its varied aspects in Rajasthan case AIR 1977 SC 1361 (State of Rajasthan vs. Union of India). In that case it is held "Court have consistently held issues raising questions of mere sufficiency of grounds of executive action, such as the one under Article 356(1) no doubt is to be nonjusticiable. Article 74 (2) lays down that "the question whether any, and if so, what advice was tendered by the Ministers to the President, shall not be inquired into in any Court". It is true that, as indicated above, the advice tendered by the Ministers to the President cannot be inquired into. It is also clear beyond doubt that the amended Article 74 (1) of the Constitution makes it obligatory on the President to act in accordance with the advice tendered by the Union Council of

Ministers, to him through the Prime Minister. Nevertheless, if all the grounds of action taken under Article 356 (I) of the Constitution are disclosed to the public by the Union Government and its own disclosure of grounds reveals that a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved by a proclamation under Article 356 of the Constitution, this Court will not shirk its duty to act in the manner in which the law may then oblige it to act? (p. 1390). In that case it was held if the Union of India does not disclose the information they cannot be found fault as they are empowered to do so. The same aspect was expressed by one of the Judges to hold?That it would be dangerous exercise for the Court both because it is not a fit instrument for the determining a question of this kind and also because the Court would thereby usurp the function of the Central Government and in doing so, enter the "political thicket", which it must avoid if it to retain its legitimacy with the people. In fact it would not be possible for the Court to undertake this exercise, apart from total lack of jurisdiction to do so since by reason of Article 74, clause (2), the question whether any and if so what advice was tendered by the Ministers to the President cannot be enquired into by the Court?. It was however stated?But one thing is certain that if the satisfaction is malafide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be (sicno ?) satisfaction of the President in regard to the matter in which he is required to be satisfied?, (p. 1414). Again in another part of the judgment of that case it is held?It must of course be conceded that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Article 356, clause (1) even on this limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is malafide or based on wholly extraneous and irrelevant grounds?. (p. 1415). Further it was held in that case?There can, therefore, be no doubt that the decision under Article 356 of the Constitution which is made by the President is a decision of the Council of Ministers. Because certain reasons are given in the letter of the Home Minister, it cannot be said that those will be the only grounds which will weigh with the Council of Ministers when they finally take a decision when the advice has been rejected by the Chief Ministers. There are so many imponderables that may intervene between the time of the letter and the actual advice of the Council of Ministers to the President?, (p. 1420).

Finally it was concluded?In the very nature of things the President must be left to be the sole judge, of course, on the advice of his Council of Ministers, for his satisfaction as to whether there exists or not a situation in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution?. There is one observation made to counter balance this aspect which reads..?If, without entering into the prohibited area, remaining on the fence, almost on the face of the impugned order or the threatened action of the President it is reasonably possible to say that in the eye of law it is no order or

action as it is in flagrant violation of the very words of a particular Article, justifying the conclusion that the order is ultra vires, wholly illegal or passed mala fide, in such a situation it will be tantamount in law to be no order at all?, (p. 1422;.

In AIR 1982 SC 149 (T. P. Gupta and ors vs. President of India and ors) the question as to the powers of the Court under Article 74 (2) was elaborately discussed and Rajasthan case was accepted laying down the principle correct. As to the next aspect of privilege under the Evidence Act, recently in a case AIR 1988 SC 782 \\M/s Doypack Systems Pvt. Ltd. vs. Union of India) the cases were reviewed and it is stated?It is settled law and it was so clearly recognised in Raj Narain's case (AIR 1975 SC 865) (supra) that there may be classes of documents which public interest requires should not be disclosed, no matter what the individual documents in those classes may contain or in other words, the law recognises that there may be classes of documents which in the public interest should be immune from disclosure. There is one such class of documents which for years has been recognised by the law as entitled in the public interest to be protected against disclosure and that class consists of documents which it is really necessary for the proper functioning of the public service to withhold from disclosure. The documents falling within this class are granted immunity from disclosure not because of their contents but because of the class to which they belong. This class includes cabinet minutes, minutes of discussions between heads of departments, high level interdepartmental communications and dispatches from ambassadors abroad (vide Conway vs. Rimmer (1968 AC 910 at pp. 952, 973, 979, 987 and 993) and Reg vs. Lewes J. K. Exprte Home Secretary (1973) AC 388 at 412. Papers brought into existence for the purpose of preparing a submission to cabinet vide I.anyon Property Ltd. vs. Commonwealth 129 Commonwealth IR 650 and indeed any documents which relate to the framing of government policy at a high level (vide re. Grosvenor Hotel, London (1964) 3 All ER 354 (CA)?

""Cabinet papers are, therefore, protected from disclosure not by reason of their contents but because of the class to which they belong. It appears to us that Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet. See Geoffrey Wilson Cases and Materials on Constitutional and Administrative Law, 2nd Edition pages 462 to 464. At page 463 para 187, it was observed %

?The real damage with which we are concerned would be caused by the publication of the actual documents of the Cabinet for consideration, and the minutes recording its discussions and its conclusions. Criminal sanctions should apply to the unauthorised communication of these papers.?

I am of the view the Union of India cannot be compelled to tender any information to this Court covered by Article 74 of the Constitution relevant to the dissolution of the Nagaland Assembly. I am also of the view that the Union of India can legally claim all documents relevant to the dissolution of the Nagaland

Assembly as privileged document and a ?class? documents under section 123 of the Evidence Act. Therefore, the objection that the Courts do not have power to call for the information from the President of India in view of Article 74 (2) of the Constitution is sustained. Since the Nagaland Legislative Assembly is dissolved by the two Houses of the Parliament no relief can be granted in the circumstances of this Case.

For all the aforesaid reason this writ petition is dismissed. No costs.

Hansaria, J :

This petition under Article 226 of the Constitution assails imposition of President's rule in the State of Nagaland by proclamation No. V/I IOI3/13/88CSR dated 7.8.88. The proclamation has been issued in exercise of power under Article 356 of the Constitution. Introduction :

2. Ours is basically a quasifederal polity, The conferment of power on the Central Government, inter alia, by Articles 355 and 356 of the Constitution undoubtedly constitutes "invasion" by the Centre on the Statefield. The framers of the Constitution were conscious of this and their desire was to see that the invasion is not ?wanton, arbitrary and unauthorised by law.? (See para 6.2.05 of the Commission on CentreState relations headed by Shri Justice R. S. Sarkaria, hereinafter referred to as the Sarkaria Commission). It is because of this that no less a person than Dr. Ambedkar, the Chairman of the Drafting Committee, emphasised the need for caution and restraint in the application of the provisions contained in Articles 355 and 356 of the Constitution. He observed :

?I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the provinces. In fact, I share the sentiments?. that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these power will take proper precautions before actually suspending the administration of the provinces. I hope the first thing he will do would be to issue a mere warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If that warning fails, the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when these two remedies fail, that he would resort to this article.? (Emphasis supplied).

Strong view were expressed in this regard by Shri H. V. Kamath and Prof. Sibban Lai Saksena. According to Shri Kamath ?(t)here are grave dangers lurking in the article...the dangers are that on the pretext of resolving a ministerial crisis or on the pretext of purifying or reforming maladministration obtaining in a particular State, the President may have recourse to this article 278. I am sure this article is not intended for resolving any ministerial crisis that might arise in a particular State?. According to Prof. Saksena, by these articles the autonomy of a State

was being reduced to a farce as these articles would reduce the State Governments to great subservience to the Central Government?

3. Ultimately, however, the framers of the Constitution regarded these powers as bulwark of the Constitution, an ultimate assurance of maintaining or restoring representative government in States responsible to the people as mentioned in paragraph 6.2.14 of the Sarkaria Commission's report. Despite the hopes and expectations emphatically expressed by the framers, in the years upto 1987, Article 356 was brought into action no less than 75 times. In the year 1987, Article 356 has been invoked, as is known, in many cases.

4. As observed in para 6. 3. 22 of the Sarkaria Commission's report, imposition of the President's Rule brings to an end, for the time being, a Government in the State responsible to the State Legislature. The Commission states that indeed this is a "very drastic power". Exercised correctly, it may operate as a safety mechanism for the system. Abuse or misuse can destroy the constitutional equilibrium between the Union and the State. As further pointed out in para 6. 3. 23, any abuse or misuse of this drastic power damages the fabric of the Constitution whereas the object of this article is to enable the Union to take remedial actions consequent upon break down of the constitutional machinery so that the governance of the States in accordance with the provisions of the Constitution is restored. The Commission further points out that a wide literal construction of Article 356 (1) is to reduce constitutional distribution of the powers between the Union and the State to a licence dependent on the pleasure of the Union Executive. Further, it will enable the Union Executive to cut at the root of the democratic parliamentary form of Government in the State.

Facts :

5. We can trace the history of the imposition of the President's Rule in the present case from November. 1987, when general elections were held in Nagaland. Out of the total 60 seats, Congress (I) captured 34, NNDP (Naga National Democratic Party) 18 and NPP (Naga People's Party) 1. The remaining 7 seats went to the independents. On 28.7.88, 13 members of Congress (I) wrote to the Chief Minister and to the Speaker that they had formed a new party under the name and style of "Congress Regional Party" and a split had taken place. On 30.7.88, the Speaker interviewed the 12 Members who were available at Kohima. The Speaker passed an order on that day itself stating that there was every reason and basis to be convinced that there was split in NPCC (I) (Naga Provincial Congress Committee (I)). He, therefore, recognised the split in the party. On 31.7.88, the petitioner informed the Governor that the legislators belonging to the NNDP, the Congress Regional Party of Nagaland, the NPP and four likeminded independents decided to work and sit together both within and outside the Legislative Assembly under the name and style of "Joint Regional Legislature Party". The letter also informed the Governor that the petitioner had been unanimously elected as the Leader of this party and Shri K. L. Chishi as Deputy Leader of the Party. The petitioner claimed that out of effective strength

of 59 Member, the Joint Regional Legislature Party has a combined strength of 35 Members and so it was stated that the petitioner was in a position to form a stable alternative Government. The Governor was, therefore, requested to dismiss the Government headed by Mr. Sema which was reduced to a minority and to invite the petitioner to form an alternative Government. On 2.8.88 a letter was written by 32 MLAs to the Governor stating that the minority Government of Shri Sema be dismissed and the petitioner be invited to form the Government. In the letter it was mentioned that two of the MLAs, namely, Shri T. Kikon and Shri Noke who belong to the regional party were also with them but they could not put their signatures in the letter as Shri Kikon was in Madras in connection with medical treatment and Shri Noke was lying seriously ill at home in Mon. The letter stated that even without them the signatories were in clear majority. 6. The Chief Secretary and the Special Secretary to the Governor wrote to the petitioner that the MLAs had been forcibly kept by the petitioner. After receipt of this letter, the petitioner replied that the said officers may verify the allegations. Pursuant to this, the Deputy Commissioner and the Superintendent of Police recorded the statement of each of the MLAs on 5.8.88 all of whom stated that they were staying in the Tourist Lodge out of their own volition and not due to force. On 6.8.88. the petitioner wrote to the Governor that the allegations of keeping the MLAs forcibly at the Tourist Lodge was belied by the statements recorded. On that day itself the Governor came to Kohima from Imphal and recommended the imposition of the President's Rule by his secret crash message of the same day. Pursuant to this, President's rule was imposed on 7th August, 1988. This proclamation issued by the President of India stated, inter alia, that the President had ?received a report from the Governor of the State of Nagaland and after considering the report and other information? received by the President, he was satisfied that a situation had arisen in which the Government of the State of Nagaland could not be carried on in accordance with the provisions of the Constitution of India. President's rule was, therefore, imposed in exercise of power conferred by Article 356 of the Constitution.

Political thicket and judicial handsoff.

7. Learned Attorney General laid great emphasis on the political nature of the decision to impose President's rule, and submitted that the Court may not enter the political thicket to retain the Court's legitimacy with the people. In this connection, he referred to the observations made by Bhagwati, J. (as he then was) in para 144 of the State of Rajasthan vs. Union of India, AIR 1977 SC 1361, hereinafter referred to as the Rajasthan case. Before we come to what was stated in para 144, we may refer to the following views expressed in para 143 :

?Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink

from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. Constitution is a matter of purest politics..... ?.

? The Hon''ble Judge, thereafter, referred to Baker vs. Carr, (1962) 369 US ''196, which was regarded as an epochmaking decision in the American Constitutional history where it was pointed out that ?the mere fact that the suit seeks protection of a political right does not mean that it presents a political question?. The Supreme Court of the United States further held in Baker''s case that it was within the competence of the Courts to entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection class. The Court clearly decided a controversy in this case which was political in character, but it did so because the constitutional question of violation of the equal protection class was directly involved and that question was plainly and indubitably within the jurisdiction of the Court to decide. It was then observed that merely because a question has a political colour, the Court cannot fold its hands in despair and declare ?judicial handsoff?. It was then stated that so long a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it would be its constitutional obligation to do so. It was emphasised that a Constitution is the supreme lex, the law of the land and there is no department or branch of Government above or beyond it. Every organ of the Government be it executive, or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution.

8. After stating thus in para 143, the Hon''ble Judge stated in para 144 that there may be wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of the United States has described as ? judicially discoverable and manageable standards?. It would be largely a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and responsibility of different classes of people and a host of other considerations. By the very nature a subject matter cannot be a fit one for judicial determination and hence it is left to the subjective satisfaction of the Central Government which is best placed to decide the matter. The Court cannot in the circumstances go into question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. By doing so, the Court would usurp the function of the Central Government and in doing so enter the ''political thicket?, which the Court must avoid to retain its legitimacy with people.

9. Shri Sorabjee, however, brought to our notice the observations made by Mitter J. in *Madhav Rao Scindia vs. Union of India*, AIR 1971 SC 530, wherein it was stated in para 143 ;

?..... The President is not invested with any political power transcending the Constitution, which he may exercise to the prejudice of citizens. The power of the President arise from and are defined by the Constitution. Validity of the exercise of these powers is always amenable to the jurisdiction of the Courts, unless the jurisdiction is by precise enactment excluded. Powers of this Court under Article 32 or of the High Court under Article 226, cannot be by passed under the claim that the President has exercised political power?.

9A. Learned Attorney General rebutted this by bringing to our notice the observations made by Bhagwati, J. (as he then was) in para 105 of *Minerva Mills vs. Union of India*, 1980 SC 1789, wherein while dealing with the question of declaration of emergency, it was stated that it would largely be a political judgment based on assessment of diverse and varied factors, fastchanging situations, potential consequences and a host of other imponderables. Despite having stated so, the learned Judge stated that if the satisfaction is mala fide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. Where, therefore, the satisfaction is absurd or perverse or mala fide or based on wholly extraneous or irrelevant grounds, it would be no satisfaction at all and it would be liable to be challenged before a Court notwithstanding clause 5 (a) of Article 352, as it then stood.

10. It has been contended by Shri Sorabjee that the observations relating to fastchanging situation etc. made in the aforesaid two cases have no application in the matter at hand inasmuch as unlike the Rajasthan case where after issuance of the letter by the Home Minister and speech by the Law Minister many things might have happened before imposition of the President's Rule ; the same is not the position here inasmuch as President's Rule has already been imposed and that too on 7th August after receipt of the report of the Governor dated 6th August, 1988. There is thus no hiatus between the receipt of the report and the imposition of the President's Rule.

11. We are finally referred by Shri Sorabjee to certain passages finding place in *A. K. Roy vs. Union of India*, AIR 1982 SC 710. In para 25 of this judgment, reference has been made to Seervai's observations in the "Constitutional Law of India" (Second Edition, Volume III, pages 1795 to 1797) to the effect that ?there is no place in our Constitution for the doctrine of political question ?since the doctrine is based on, and is a consequence of, a rigid separation of power i in the U. S. Constitution, and our Constitution is not based on rigid separation of powers. In this connection, reliance was placed on the following observations of Shah, J. (as he then was) in *Privy Purse case*, AIR 1971 SC 530, in which it was observed :

?Constitutional mechanism in democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted Courts.?

In the same case, Hegde, J., had stated that there is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens.

12. Reference was then made to Baker vs. Carr (supra) and it was ultimately stated in para 29 that in America the phrase "political question" has become a "little more than a play of words".

13. Lastly, we were referred to para 27 of A.K.Roy (supra) wherein it was stated as below :

?The Rajasthan case (AIR 1977 SC 1361) is often cited as an authority for the proposition that the Courts ought not to enter 'political thicket'. It is to be borne in mind that at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any Court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observation made in Rajasthan case on the basis of that case cannot any longer hold good. It is arguable that the 44th Constitution Amendment Act leaves no doubt that the judicial review is not totally excluded in regard to question relating to the President's satisfaction?.

14. In view of the above, we have no doubt in our mind that this Court cannot adopt the attitude of 'judicial hands off' merely because the question of imposing President's rule is a political question. Nonetheless, let it be stated clearly that this Court is not empowered to decide whether President's rule should have been imposed; it is really concerned to see whether it could have been imposed within the parameters of law. In trying to see this, it shall have to be examined by this Court whether the satisfaction of the President was arrived at by relying on extraneous considerations or by ignoring relevant materials or was mala fide or perverse or fraud on power. Justifiability of the Presidential proclamation :

15. All important question is whether it is within the competence of this Court to examine the legality of the proclamation imposing President's rule. Shri Sorabjee first submitted that judicial review is a basic feature of the Constitution and we should keep this in mind while interpreting Article 356. To satisfy us in this regard, our attention was drawn to what was stated by Bhagwati, J. (as he then was) in para 105 of *Minerva Mills*, AIR 1980 SC 1789, wherein it was clearly stated that the power of judicial review is a part of basic structure of the Constitution and hence any provision debarring judicial review would be open to attack on the ground that it is unconstitutional and void as damaging or destroying the basic structure. Reference was also made in this regard to para 5

of P. Shambamurty vs. State of Andhra Pradesh, AIR 1987 SC 663.

16. With the aforesaid preface, we were referred to Rajasthan Case which is a leading decision of the Apex Court on the question of justifiability of imposing President's rule in exercise of the powers conferred by Article 356 of the Constitution. It would be necessary to understand the ratio of this decision by referring to the views expressed by different Hon''ble Judges. We may start with the views expressed by Beg, CJ.

17. In para 35, the Hon''ble Chief Justice stated that question of political wisdom or executive policy could not be subjected to judicial control. Learned Attorney General relied on this observation of the learned Chief Justice, but then it was further observed in this para that the executive policy must also be subordinated to constitutionally sanctioned purposes. It was, therefore, stated that so long as the executive operates within marked sphere its operations are immune from judicial interference. It was, however, made clear in para 41 that which provisions of the Constitution are not being observed in a State or to what extent they cannot be observed are matters on which great difference of opinion is possible. In para 59, it was further observed that the Apex Court (and for that matter this Court) cannot at any rate interdict use of powers under Article 356 (1) unless and until resort to the provision, in a particular situation, is shown to be so grossly perverse and unreasonable as to constitute patent misuse of this provision or an excess of power on admitted facts. In para 65, it was made clear that if the satisfaction under Article 356 (1) is based on matters outside the ambit of this Article, the proclamation would be vitiated. But then, it is apparent as pointed out in paras 82 and 83 that question of sufficiency of the materials cannot be examined by the Court. A rider was, however, added in para 83 by stating that if all the grounds of action taken are disclosed to the public and the same reveals that a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved by a proclamation under Article 356, a writ Court would not shirk its duty to act in the manner in which the law may then oblige it to act. Question of policy, however, would be not amenable to writ jurisdiction except where patent or indubitable malafide or excess of power comes to light.

18. Chandrachud, J., (as he then was) stated in para 120 that the situation might arise which may require expeditious steps to strengthen the functioning of democracy. The provision of Article 356 (1) was regarded as safetyvalve to meet extraordinary situation. It was pointed out that such provisions are designed to save, not destroy democracy. It was further stated in para 127 that if the Government of India chooses to disclose the reasons because of which Presidential proclamation was contemplated or had taken place then it can be examined by the Court whether the reasons bear any rational nexus with the action proposed. If the reasons be wholly extraneous interference may be permissible on the ground of mala fide.

19. Bhagwati, J. (as he then was) with whom Gupta, J., (agreed) regarded

imposition of President's rule a serious inroad on the principle of federalism. The Hon'ble Judge, however, pointed out in para 121 that within a narrow minimal area the proclamation is subject to judicial review. This is emphasised by the learned Attorney General.

20. In so far as the views expressed by Goswami, J., is concerned, learned Attorney General brought to our notice what has been stated in para 169 where it has been mentioned by the Hon'ble Judge that so many imponderables may intervene between the desire to impose President's rule and the actual imposition of President's rule. So far as this observation is concerned, it may be pointed out that the same has practically no application to the case at hand inasmuch as President's rule was imposed on 7th August following the report of the Governor dated 6th August, 1988. It is worthwhile to point out that even according to Goswami, J., thinking if the decision to impose President's rule be mala fide or based on extraneous or irrelevant considerations interference by Court is permissible. Goswami, J., also thought that the reasons given must have reasonable nexus.

21. According to Untwalia, J. the decision of the present nature is purely political in nature and so not justiciable ; and the matter must be left to the satisfaction of the President. Great emphasis has been placed by the learned Attorney General on this observation. But, then, Untwalia, J., himself hastened to add in para 178 that there may be circumstances where the proclamation can be challenged in a Court of Law. This would be so where the order is ultra vires, wholly illegal or passed mala fide (see para 179). In such a situation, the order would amount in law to be no order at all. Such an order would be mere pretence or colourable or fraud on power. According to Untwalia, J., an order imposing President's rule is amenable to interference if by remaining on the fence the order can be struck down.

22. Fazal Ali, J. also thought in para 200 that a question of the present nature is intrinsically a political question and so the Council of Minister is the best Judge to decide whether imposition of President's rule is necessary or not. It was observed by the Hon'ble Judge in para 201 that 'the Council of Ministers are the best Judge to assess the need of the situation, the surrounding circumstances, the feelings and aspirations of the people and the temper of the times.' It was then stated that it was manifest that the Court does not possess the resources which are in the hands of the Government to find out the political needs that they seek to subserve and the feelings and/or aspirations of the nation that require a particular action to be taken at the particular time. It was pointed out that it is difficult for the Court to embark on an inquiry of this type. Despite these, the learned Judge stated in para 208 that if the reasons for President's rule be absolutely extraneous and irrelevant and based on personal and illegal considerations, the Courts are not powerless to strike down the order on the ground of mala fide, if proved. It was pointed out that the proclamation has to be for the welfare of the people and to preserve the Constitution.

23. The above bird's eye view of the Rajasthan case shows that though the learned Judges felt that the question of imposing President's rule was largely political even then Court's scrutiny in the matter is not completely ousted. It may be stated here that the Rajasthan case was decided when clause (5) of Article 356 had read as below :

Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground?

This subarticle has been regarded as a formidable hurdle by the Sarkaria Commission in the way of the Court in exercising their power of judicial review (See para 6. 6. 08 of the report.) As this clause has since been deleted by the Constitution (FortyFourth) Amendment Act, 1978; the power of the Courts to interfere with an order of the type at hand has definitely been widened.

24. It may also be pointed out that in the Rajasthan case, the action was only threatened whereas in the present case the action has already taken place. There is thus no possibility of fastchanging situations or many imponderables taking place in between the contemplation to take action and the actual taking of action.

25. Shri Sorabjee also referred in this connection to Padfield vs. Minister of Agriculture, 1968 (1) AH ? R 694 and Anisminic vs. The Foreign Compensation Commission, 1969 (1) All E R 208. What was stated by Lord Upjohn in Padfield was that in a matter like the one at hand interference is possible in any of the following circumstances : (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration.

26. What has been stated by Lord Reid in Anisminic at pages 213 and 214 is that even where statutory ban is created by a provision finding place in an Act, the same would not protect a decision or determination which is a nullity. In Anisminic, the concerned section had stated that ?The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law?. As to the ban of such type, Lord Reid stated : .

?But I do not think that it is necessary or even reasonable to construe the word ?determination? as including everything which purports to be a determination but which is, in fact, no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity.....?

?It has sometimes been stated that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ?jurisdiction? has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in a narrow and original sense of the tribunal

being entitled to enter on the enquiry in question. But there are many cases where although tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of enquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which under the provisions setting it, it had no right to take into account.?

27. What has been stated in *Anisminic* was adopted by Bhagwati, J., in *Rajasthan* case where his Lordship stated that if extraneous considerations are taken into account, the satisfaction of the President in the eye of law would be no satisfaction. It may be stated that the decision rendered in *Anisminic* was followed in *Union of India vs. Tarachand*, AIR 1971 SC 1558 and *M. L. Sethi vs. R. P. Kapur*, AIR 1972 SC 2379.

28. We may also refer to *Express Newspapers Ltd. vs. Union of India*, AIR 1986 SC 8"2, in para 118 of which the meaning of the expression "fraud on power" was explained by stating as below :

"Fraud on power void the order if it is not exercised bona fide, for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, or with best of intentions, some extraneous matters, or by ignoring relevant facts. That would render the impugned act or the order ultra vires. It would be a case of fraud on power. Misuse in bad faith arises, when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister..... A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an "alien" purpose other than the one for which the power is conferred is mala fide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of power.....?.

29. Learned Attorney General also referred to *S.R.K. Hanumantha Rao vs. State of Andhra Pradesh*, 1975(2) Andhra Weekly Reporters 277, which has stated that Courts cannot consider adequacy or appropriateness of the existence of grounds for taking action by the President under Article 356 of the Constitution. There is no dispute with this proposition. Same view was expressed by the Supreme Court in the *Rajasthan* case. In view of what has been stated in *Rajasthan* case, it is not necessary to dwell at length with the views expressed in the aforesaid decision by the Andhra Pradesh High Court.

30. During the period the judgment was under preparation, Shri Sorabjee brought to our notice a judgment of Full Bench of Lahore High Court in Writ Petition No. 3824/88 wherein dissolution of National Assembly by the President of Pakistan and of Provincial Assembly of Punjab by the Governor of Punjab was assailed. The contention of the respondents, inter alia, was that President's satisfaction was not justiciable and was beyond judicial review. The contention was rejected. It was also observed that if the required satisfaction of the concerned authority be based on wholly extraneous or irrelevant grounds, the Court shall have jurisdiction to examine it.

31. From what has been stated above, we hold that this Court has power and jurisdiction under Article 226 of the Constitution to examine the constitutionality and legality of the exercise of power under Article 356 of the Constitution. Of course, while doing so, it would not be open to this Court to examine the question of sufficiency of materials in arriving at the satisfaction contemplated by Article 356 ; but if the satisfaction is arrived at by placing reliance on wholly extraneous or irrelevant matters or is reached by ignoring relevant materials, or the action taken be mala fide or fraud on power, this Court can definitely interfere.

Governor's report and bar of Article 361.

32. Learned Attorney General, who was duly supported in this regard by the learned Advocate General, Nagaland, submitted that Article 361 would debar us from examining the soundness or otherwise of the report submitted by the Governor to the President of India relating to the matter at hand. It was contended that as the Governor is not to be advised by the Council of Ministers while sending a report mentioned by Article 356, the action is purely personal to the Governor and as he is not before us, and indeed could not be, we may not examine the validity or otherwise of the report submitted by him. It has not been disputed before us and rightly that in sending a report under Article 356, the Governor acts in his discretion. This was stated by Ray, C.J., speaking for the majority in para 55 of *Samsher Singh vs. State of Punjab*, AIR 1974 SC 2192. It has, therefore, to be seen whether Article 361 stands in our way of expressing our views on the nature of the report submitted by the Governor. In this connection, strong reliance was placed by the learned Attorney General on *Bijayananda vs. President of India*, AIR 1974 Orissa 52, wherein it was stated in para 22 that as the Governor acts in his discretion while sending a report under Article 356, the question whether a report is mala fide or based on extraneous facts cannot be questioned in any Court of law because of the protection and immunity given by Article 361(1) of the Constitution. It was observed that as the Governor cannot be summoned by any Court, the validity of his act cannot be examined in his absence. It was, therefore, held that the Governor's report is not justiciable in Court. As against the aforesaid submission of the learned Attorney General, it was contended by Shri Sorabjee that as no relief has been sought against the Governor in the present petition, Article 361 cannot stand in

the way of the petitioner.

33. Learned Attorney General also urged that we may not examine the merit of the Governor's report without the Governor being before the Court, which he cannot be, in view of what has been stated in Article 361 of the Constitution. According to the learned Attorney General the rule of *audi alterem partem* stands in our way of expressing any views on the reports sent by the Governor. In this connection our attention was invited to the judgment of Megarry, J. in *John ,ts. Rees*, 1969(2) All E R 274, where it was observed :

""As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of an unanswerable charges, which in the event, were completely answered ; of inexplicable conduct which was fully explained ; of fixed and unaltered determinations that by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feeling or resentments of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.?

34. The submission of Shri Sorabjee in this context was that as no relief has been sought against the Governor in the present petition, Article 3¹ cannot stand in the way of the petitioner to get his relief claimed if he be otherwise entitled to the same. It was urged that the immunity which is granted to the Governor is only personal and Article 361 does not place the action of the Governor beyond the scrutiny of the Courts. This was the views expressed in *G. D. Karkare vs. T L Shevde*, AIR 1952 Nagpur 330. It was pointed out in para 9 of this judgment that what the Constitution establishes is the supremacy of law and not of men, however, highly placed they might be. This decision of the Nagpur High Court was cited with approval by a Full Bench of Bombay High Court in *State vs. K. Nanavati*, AIR 1960 Bombay 502 In that case, a writ issued by the High Court directing arrest of the accused was returned unexecuted on account of an order passed by the Governor under Article 361 of the Constitution by which the sentence of the accused was suspended. It was stated in this connection that Article 361 was no bar to the examination by the Court of the legality of the Governor's order to enable it to determine whether there was a valid return to the writ issued by the Court. It was stated that it was not necessary to decide this matter for the Governor to be before the Court as a party to the proceeding. Reference was then made by Shri Sorabjee to *Privy Purses*" case, AIR 1971 SC 530, in which it was pointed out in para 47 that the question as to whether the President acted rightly or wrongly in the matter may be decided against the Government of India without questioning the conduct of the President. Shri Sorabjee also contended that what cannot be prevented directly cannot be prevented indirectly. To this, the answer of the learned Attorney General was that what cannot be done directly, cannot be done indirectly.

35. We have duly considered the submissions advanced by the learned counsel of both the sides. The three cases which Shri Sorabjee had cited in this connection had dealt with the matters in which the action has been taken in the name of the Governor, which was, however, not within his absolute discretion, in the sense that the Governor must have acted in those matters on the advice of the Council of Ministers. We have said so, because the Nagpur case has dealt with the question of appointment of Advocate General which, as is known, is a matter on which Cabinet takes a decision and so the Government is liable to answer to any challenge to the decision. In the Bombay case also, the question of suspension of the sentence was a matter which cannot be said to be within the discretionary power of the Governor. In so far as the Privy Purses case is concerned, apparently the President must have acted on the advice of the Council of Ministers.

36. Article 361 is in the following terms :

361. Protection of President and Governors and Rajpramukhs (I) The President, or the Governor or Rajpramukhs of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties :

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61 :

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceeding against the Government of India or the Government of a State,

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

(4) No civil proceeding in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

A perusal of Article 361 would show that in those matters in which the Governor acts on the advice of the Council of Ministers, the same can be assailed in a Court of law by bringing appropriate proceedings against the Government of the

State. In so far as the President is concerned, similar action can be brought against the Government of India relating to those matters on which the President acts on the advice of the Council of Ministers.

37. There is no difficulty so far. Important question is whether we can express any opinion relating to the action which the Governor undertakes in exercise of his discretionary power. As already adverted to, the report sent by the Governor as visualised by Article 356 of the Constitution, is in exercise of his discretionary power. We are of the view that despite this being the position, we would be within our jurisdiction to express our views on the report of the Governor inasmuch as what has been challenged in the present proceeding is the action taken by the Union of India, pursuant to the submission of report by the Governor. Thus, the actual challenge is to the action of the Union of India and not the report of the Governor. Indeed, no relief has been sought against the Governor. The Governor's report may be compared to a report of the enquiring officer in a departmental proceeding relying on which the departmental authority passes an order. It is wellknown that in such a case, the inquiry officer is not made a party unless, of course, there be allegation of mala fide or malice in fact against the enquiring officer. In the present case, the petitioner has not alleged any mala fide against the Governor but has challenged the action of the Union of India taken,, inter alia, on the basis of the report of the Governor. We are of the view that in such a situation, this Court would be within its right to examine the soundness of the report sent by the Governor to the President. We may give another analogy also in this regard. The same is that when a judgment is challenged before a higher Court, the judicial officer passing the judgment is not made a party. Despite this, the judgment is scanned by higher Court and opinion can be expressed regarding its tenability or otherwise. Similarly in our view we can express our opinion on the report; of the Governor despite his not being before us because of the bar contemplated by Article 361 of the Constitution.

38. Let us now see the report of the Governor. It reads : ?For Secretary to the President of India from General K. V. Krishna Rao (Retired) Governor of Nagaland. Following may kindly be placed before the President. Quote. My dear Respected President.

On 30th July, 1988, 13 members of Legislative Assembly of Congress > I) led by Shri K. L. Chisi sent a letter to Shri C. Chongshen the Speaker conveying their decision to break from the Congress (I) Party with immediate effect due to alleged nonperformance of the Congress (I) Government in Nagaland and seeking to be seated separately in the Assembly for the ensuing session. Subsequently on the same night, they are supposed to have presented themselves before the Speaker sought recognition to their split and formation of a new party them called Congress Regional Nagaland. The Speaker issued a bulletin number 25 dated July 30, 1988 conveying his decision of having accorded the desired recognition under the provisions of para 3 of the Tenth Schedule of the Constitution. A cyclostyled copy of bulletin was received in my

Secretariat on 31st July, 1988. But no intimation signed by the Speaker. On 31st July, 1988 Shri Vamuzo, the Leader of the Opposition, sent me a letter which I received on 1st August, 1988 informing me that the Legislators belonging to the National Democratic Party (NNDP his own party), the Congress Regional Nagaland Party, the Naga People's Party (NPP) and four Independent Members of Legislative Assembly decided to work together under the name and style Joint Regional Legislature Party (JRLP). He further stated that he himself was elected as Leader and Shri K. L. Chisi as Deputy Leader of the JRLP. Shri Vamuzo also demanded dismissal of the present Government headed by Shri Hokishe Sema on the plea that it has been reduced to a minority and sought invitation from me to form an alternative Government. Second August another letter was sent to me signed by 32 of the Members of Legislative Assembly belonging to the so called JRLP which I received on Third August, reiterating their demand to dismiss the Government headed by Shri Hokishe Sema and to invite Shri Vamuzo to form the Government. Two of the Members of Legislative Assembly were supposed to be not readily available had not signed the letter. Further, in a Press Release issued on August 2, 1988 it was stated that all the parties constituting the JRLP were going to merge into one party to be known as Nagaland People's Council (NPC).

2. On the basis of Shri Vamuzo's claim, the JRLP has a combined strength of 35 members comprising of NNDP 17, Congress Regional Nagaland (13), NPP 1 and Independents 4. The Congress (I) stands reduced to 21 members and there are 3 other Independent Members. " The effective strength of the Assembly is 59 Members out of 60 as one of the NNDP Members of Legislative Assembly died recently.

3. No communication had been sent to me either by Shri Chishi or by any of the Congress (I) Legislators who are reported to have broken away from the original party till enquiries were made by me nor did I receive the constitution of the so called Congress Regional Nagaland Party. I have not received any information from the dissidents as to the substantial grounds for their reported split. The party is yet to seek and get recognition by the Election Commission. However, within two days of the formation of the new Party, reportedly another decision was taken to merge the Congress Regional Nagaland Party with other opposition parties into the so called NPC. The manner in which a new party was formed by the dissident group overnight and the prompt decision taken to merge it with other opposition parties show that the aim of the dissident group was not really to function as an Independent Party with any ideology or objectives of service to the people, but really to topple the constitutionally elected ruling party Government by forging an alliance of convenience with the opposition, with an eye on offices of profit and attendant benefits. Out of the dissident group of 13 members, 3 are Ministers, 1 Minister of State, 1 Deputy Speaker and 6 are Chairmen of various Corporations. All these have had responsibilities to some extent or other in the functioning of the Government. The responsibility for the alleged nonperformance of the Congress (I) Government has to be shared by these Legislatures.

The Chief Minister, Shri Hokishe Sema was away to Japan during all this period in connection with the Festival of India Celebrations (.). He has since returned and informed me that the members of the Legislative Assembly concerned had never approached him with any serious grievances nor informed him of their intention to breakaway from the party. Infact, he has complained to me of unconstitutional and undemocratic methods having been used by the opposition to pressurise and threaten the members of Legislative Assembly and obtain their support. He has stated that even now the members of the Legislative Assembly have been kept under forcible confinement by Shri K.L. Chisi and Shri Vamuzo and that he has not been able to meet them. He has further indicated that many of them felt cheated by Shri Chisi as they never wanted to take the drastic step of leaving the party for the resolution of any of their problems and expressed their desire to return to the parent party but have not been allowed to do so. This information " has been confirmed from other reliable sources also. It is obvious that what may be called a political coup of the darkest hue has been staged in his absence contrary to the noble Naga character and democratic traditions. The undue haste with which recognition was accorded to the so called Congress Regional Party and Notification this effect issued soon thereafter without affording any opportunity whatsoever to the Chief Minister who was on foreign tour or even to the Deputy Chief Minister to meet the Members of the Legislative Assembly concerned, are indicative of unfortunate and unethical machinations. Further, it was reported that one of the Members of the Legislative Assembly supposed to have signed the Register in front of the Speaker was actually away in Calcutta at the time.

Para Five. In the general elections held in November 1987 the Congress (I) came back into power by capturing 34 out of 60 seats, while, the NNDP had won only 18 seats, NNPP (I) and there were 7 Independents who pledged their support to the Ruling Party. It was hoped that peace and stability brought to Nagaland after protracted efforts would be consolidated by the new Government formed under Shri Hokishe Sema. Efforts towards this end were well under way when the present unfortunate development has taken place. In the last 25 years since Nagaland gained Statehood, there have been 11 Governments and also one spell of President's Rule for over 2 years. However, for the last 6 years, the Congress (I) Government has been continuously in power. I may also mention that Shri Chisi attempted to bring down the present Government soon after its formation by forming a dissident group and threatening to break away if he and some others were not inducted into the Ministry, but this was temporarily resolved. The present efforts at destabilising the Government are obviously to achieve personal ends without regard to any scruples or ethics, rather than due to any reasons of performances or non performances of the Govt. Further, many of the members of the Legislative Assembly who constitute the dissidents group have a history of defections and redefections. Reports also indicate that free and extensive use of large amount of money and lure of office has also been resorted to in the present case. Para Six. While the claim regarding the strength of :>5 members needs

necessarily to be viewed in the context of incredible of political morality and complete disregard of the wishes of the respective electorates of the 13 breakaway Congressmen. It is equally relevant that 4 Independent Members of Legislative Assembly, whose support is being claimed by JRLP had on their own extended support to the Seroa Ministry right from the beginning. Shifting loyalties of these Independent legislators throws the Political scenario of the State open to practically inevitable disturbances. Since the process of destabilisations has started obviously due to patent inclination for personal aggrandisement of some Legislators. The remaining period of the life span of this Assembly is almost certain to be redevilled by political horsetrading in an endemic manner, it is essential to forestall this grave possibility and the most feasible action would lie in discouraging the greedy from enjoying the benefits of their unprincipled manoeuvres. Para Seven. A delegation of members of Legislative Assembly and opposition Leaders led by Vamuzo and including Shri Vizol and ExChief Minister and convenor of the socalled NPC called on me on Fourth August and reiterated their demand for the dismissal of the Hokishe Sema Ministry and sought invitation to the opposition for forming an alternative Govt. I had explained to them about the disconcerting report that I have been receiving from several reliable sources to the effect that some of the members of the Legislative Assembly were being under forcible confinement. And were not allowed to contact any one. I had advised them to ensure that the members of the Legislative Assembly concerned were allowed to move freely to carry on their political activities without fear or favour and the delegation agreed to take the necessary action in this regard. However till the time of this report they have not only not honoured their assurances but have continued to confine members of the Legislative Assembly thereby obstructing normal political activity and leading to serious escalation of tension. When the Opposition leaders talked of possible agitation and violence I had advised them to restore normalcy by freeing the members of the Legislative Assembly and not to do anything which would escalate tension and result in violence. Constitutional and democratic methods should be scrupulously adhered to. However it has been reported from reliable sources that Shri Vamuzo threatened of violence throughout Nagaland his demands were not met. Para Eight. The insurgency situation in Nagaland it has been contained to a considerable extent due to the efforts of the present Government and efforts were being made to get the underground leaders to the negotiating table. In view of the known links of the members of the Legislative Assembly with the Underground and their past conduct, our efforts at maintaining peace and resolution of any outstanding problems may suffer a serious set back. Already reports are being received regarding unusual moves of some insurgent groups Such an adverse development cm also have deleterious impact on the neighbouring States, particularly those affiliated by insurgencyThe signatories to the Shillong Agreement 1975 are also yet to come forward with their proposals under clause III. Para Nine. Separately on July, 8,1988, I had called the Assembly to Session, on the recommendation of the Chief Minister on 23rd August, 1988. Waiting for the Assembly Session and hoping for things to

settle down will not be desirable in view of the increasing tension building up in this State. During this intervening period there will not be doubt be efforts to engineer defection and redefection and outbreak of violence cannot be ruled out. Further, installing a Government comprising of a conglomeration of political parties and Independents brought together by unscrupulous means with no common ideology objective or programmes is unlikely to ensure or provide stability to the State or render any service to the people. Para Ten. Shri Hokishe Sema the Chief Minister has informed me that at a meeting held this morning it has been decided by the Cabinet that the Government should resign and the Assembly should be dissolved. I have requested him to carry on till alternative arrangements are made. Para Eleven. In the light of the foregoing, I am convinced that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution, I have therefore, come to the conclusion that the State should be immediately placed under the President's Rule and recommend accordingly after careful consideration of the pros and cons. I also recommend that the present Assembly be immediately dissolved. Para Twelve. With warmest regards Para Thirteen. Yours sincerely, Para Fourteen. Signed. General K.. V Krishna Rao (Retired), Unquote.?

39. The report can be summed up by stating that it starts from the split in the Congress (1) Party which took place on 30.7.88 when 13 ML As led by Shri K L. Chisi sent a letter to the Speaker conveying their decision to break from the Congress (1) Party with immediate effect The Speaker of the Assembly accorded the desired recognition as visualised ny para 3 of the Tenth Schedule to the Constitution. On 31st July, 1988, Shri Vamuzo, who is the petitioner before this Court and was the Leader of the opposition in the Assembly, sent a letter to the Governor desiring dismissal of Shri Hokishe Sema, the Chief Minister of Nagaland and sought for an invitation from the Governor to form the government. Another letter to the same effect was sent to the Governor on 2nd August, 1988, which was signed by 32 MLAs who had in the mean time formed a party named as ? Joint Regional Legislature Party?. The Governor, however, did not receive atoy communication from Shri Chisi and no constitution of the breakaway group was sent to the Governor. He also not informed as to why there was a split. The alliance reached by the breakaway group with the NNDP was regarded as ?an alliance of convenience? with an eye on officer of profit. It was also stated in the report that the MLAs were under pressure and threat and were kept in forcible confinement. According to the Governor what had happened was a political coup of darkest hue. The report further narrates that during the last 25 years there were 11 different Governments in Nagaland. It was also noted that Shri Chisi had wanted to topple the Government earlier also. The present effort had been taken according to the Governor without referring to any scruples or any ethics. Many of the MLAs of the dissident groups had history of defection and redefection. According to the Governor there was also indication regarding use of large amount of money. The shifting loyalties of the Independents threw the political scenario of the State open to inevitable disturbances. It was thought by the

Governor that the remaining term of the Assembly was sure to be bedeviled by the political horsetrading in an endemic manner. The Governor, therefore, thought that the greedy must be stopped from enjoying the benefits of their unprincipled manoeuvres. On 4th August, 1988, the Governor was met, *nrer alia*, by the petitioner who repeated his demand for dismissal of the Sema Ministry by the Governor and an invitation to the Opposition for forming an alternative government. He was told by the Governor about forcible confinement of some of the MLAs. The delegation led by the petitioner agreed to take necessary steps in this regard, but the assurances were not honoured according to the Governor. The report further stated that insurgency had been contained in the State due to the efforts of the Sema Ministry. The Governor felt that some of the concerned MLAs had links with the insurgents because of which the peaceful effort may receive serious set back if a Ministry with them was formed. The Governor further stated that the Assembly had been called to meet on 23rd of August, 1988, but he did not think it desirable to wait till 23rd August due to increasing tension during the intervening period in the course of which there may be defection and re defection and also out break of violence. The Governor felt that the installation of Government comprising of conglomeration of political parties and Independents will not prove stable as they have been brought together by unscrupulous means with no common ideology.

40. In view of the aforesaid situation, the Governor felt that a stage had come when the Government of the State could not be carried on in accordance with the provisions of the Constitution and he, therefore, recommended in position of the President's rule.

41. The above shows that the Governor did apply his mind to some relevant facts although some of the factors were not very relevant. This apart, the report had failed to mention about one very striking feature of the case which is related to the enquiry which had been made regarding the allegation of forcible confinement of the concerned MLAs. Shri Sorabjee produced before us certified copies of the statements recorded by the concerned authorities after meeting the concerned MLAs. All the MLAs categorically stated that no force had been applied on them to stay in the Tourist Lodge. Instead, they were staying of their own volition. This conclusively showed, according to Shri Sorabjee, that the MLAs were under no force to support the petitioner. The support given was rather voluntary and as 2 MLAs had pledged support in favour of the petitioner, the same clearly showed that the majority of the MLAs (it may be stated that at the relevant time there were 59 MLAs in the Assembly) supported the petitioner because of which the Governor was under obligation to invite the petitioner to form the Ministry. This vital aspect is missing in the report of the Governor. As the Governor, however, is not before the Court we do not know why this vital omission had occurred. In this connection, we may point out that in the affidavit filed on behalf of the State of Nagaland, it has been stated in para 6 (xiv) that the Governor came to Kohima on 6.8.88. Soon after his arrival on rechecking with the highly placed official sources, the factual position regarding the

confinement of the members of the Legislatures in the Government Tourist Lodge, it was found that the position had not changed as regards the forcible confinement of the concerned MLAs. We do not know the basis of this statement. This aspect, however, is very important and would have almost clinched the issue inasmuch as if majority of the MLAs were in support of the petitioner without any physical pressure on them, nothing really could have come in his way of being invited to form the Government.

42. All told, we are of the view that the impugned proclamation could not have been issued within the parameters of law relying solely on the report of the Governor inasmuch as a very relevant material had not found place in the report. We have taken this view because of what was stated by Lord Upjohn in *Padfield* and by the Apex Court in *Express Newspaper Ltd.* wherein it was observed that if a very relevant material is ignored, or omitted from consideration/ the satisfaction arrived at would be no satisfaction in the eye of law and according to *Express Newspaper* even a fraud on the power.

Other information and bar of Article 74 (2) of the Constitution.

43. This is, however, not all, as the impugned order shows that the President had arrived at his satisfaction not only on the basis of a report sent by the Governor but on the basis of "other information" also.

44. When the learned Attorney General was asked by the Court, what this "other information" was, learned counsel took the stand that the same cannot be divulged and the Court cannot ask for the same as the matter is covered by Article 74 of the Constitution which reads as below ;

"The question whether any; and if so what, advice was tendered by the Ministers to the President shall not be enquired into any Court."

The learned Attorney General took the stand that the advice which have been given by the Cabinet to the President covers the materials also on which the advice was based and as such the material would also be a privileged communication which the Court cannot ask for.

45. In so far as "other information" of which mention has been made in the Presidential Order, it may be stated that this is founded on the word "otherwise" which appears in Article 356 of the Constitution of which the relevant part reads as below :

"(1) If the President, on receipt from the report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by a proclamation :

* * *

It may be pointed out that when this Article was being debated in the Constituent Assembly, Shri H. V Kamath and Prof. Sibban Lal Saksena took

objection about the words "or otherwise" finding place in the Article. This is what Shri Kamath had then stated :

"What is the "otherwise" ? Do you mean to say that that the President even granting that he has to act upon the advice of Council of his Ministers, can intervene solely on the strength of his own judgment perhaps buttressed or reinforced by the advice given by the Council of Ministers at the Centre but without a report from the State Governor or ruler ? No. I shall not be a party to these transactions. This is a foul transaction, to set at naught the scheme of an even limited provincial autonomy which we have provided for in the Constitution, and I shall pray to god that he may grant sufficient wisdom to this House to see the folly, stupidity, the criminal nature of this transaction." (See page 140 of the Constituent Assembly Debates, Vol. IX)

Prof. Saksena also desired to delete the words "or otherwise" because according to him the result would be the ruler or the Governor will be a mere sham and mockery. According to him, there was no justification for the President to interfere with a State until atleast the Governor who is his own nominee reported to him.

46. To satisfy us the Article 74 (2) of the Constitution takes within its fold not only the advice rendered but also the materials on which it is founded, learned Attorney General referred to a recent decision of the Supreme Court in *Doyapeck System Pvt Ltd vs. Union of India*, AIR 1988 SC 782, in which it was held that the documents like official notes etc. are part of preparation of the documents leading to the formation of the advice tendered to the President and as such these would be privileged under Article 74 (2) of the Constitution. The Court would, therefore, be precluded from asking for preparation of these documents. In this connection, reference was also made to *State of U. P. vs. Raj Narain*, AIR 1975 SC 865. Shri Sorabjee, however, referred to *S. P. Gupta's case*, AIR 1982 SC 149. The learned counsel first referred to para 60 of the judgment wherein it has been stated as below :

"But the material on which the reasoning of the Council of Minister is based and the advice is given cannot be said to form the part of the advice."

It was further stated that :

"The material on which the advice tendered by the Council of Ministers is based cannot be said to be the part of the advice and the correspondence exchanged between the Law Minister, the Chief Justice of Delhi and the Chief Justice of India which constituted the material formed the basis of the decision of the Central Government must accordingly be held to be outside the exclusionary rule enacted in clause (2) of Article 74."

In para 61, it was stated as below :

"We are unable to appreciate how the report of the Public Service Commission which merely formed the material on the basis of which the Council of Ministers

came to its decision as recorded in the proceeding dated 11.8. 76 could be said to from the part of the advice.....?

The following observation finding place in para 929 was also brought to our notice :

"" It is the advice and its reasons tendered by the Council of Ministers to the President which are protects from enquiry by a Court, and no such protection extends to the materials from which the advice proceeds?. (All emphasis supplied).

47. As the decision in S. P. Gupta's case is by a Bench larger than the one which decided the case of Doypeck, we are inclined to accept the submission of Shri Sorabjee in this regard. As the material which formed part of ?other information? is not before us, and as the same does not form part of the advice tendered by the Council of Ministers, we have deemed it fit before expressing our final opinion on the matter at hand to give an opportunity to the Union of India to let this Court know about the same. For this purpose we grant 10 days" time. If the within this period they would fail to produce the material we shall have to render our opinion on the basis of the materials made available to us. If they would fail to do so, this Court would have no other alternative but to decide the matter on the basis of the materials placed before it. In this connection reference may be made to what was stated by Rustom Sidhwa, J. in the aforesaid case of Lahore High Court, wherein it was observed as follows at page 30 :

?If the they (meaning the Federal and Provincial Governments) do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer?.

43. In the result, we refrain from passing a final order on the petition at this stage; instead we call upon the Union of India to let this Court know about the materials which had formed part of ?other information? as mentioned in the impugned proclamation. Let this case be fixed for orders after 10 days.