ORISSA HIGH COURT

Bijayananda Patnaik

Vs

President of India

O.A.C. No. 334 of 1973

(G.K. Misra, C.J. and S.K. Ray, J.)

22.10.1973

JUDGMENT

G.K. Misra, C.J.

1. The writ application has been filed by 74 persons. They were all members of the Orissa Legislative Assembly which was dissolved by the Proclamation dated 3rd March, 1973 issued by the President of India under Article 358 of the Constitution (hereinafter to be referred to as the Proclamation).

2. The substantial averments in the Writ application may be stated short hereunder.
Shri Bijayananda Patnaik alias Biju Patnaik (petitioner No. 1) was the leader of the Pragati Party and of the Opposition in the Orissa Legislature. Petitioners 1 to 71 are members of the Pragati party, petitioner No. 72 is an independent member and petitioners Nos. 73 and 74 are members of the Jharkhand party. On 9th of January, 1971 the Swatantra jana Congress ministry resigned. The resignation was forthwith accepted by the Governor without asking the Chief Minister to carry on the administration until alternative arrangement was made. There was a constitutional void till 11th January, 1971 when a Proclamation under Article 356 was issued. In a subsequent proclamation issued on 21st January, 1971 the president dissolved the Legislative Assembly. The mid-term election was held on 5th of March, 1971. The strength of the parties and independent members after the election was as follows :

Congress (R)	-	49
Swatantra	-	35
Utkai Congress	-	31
P. S. P.	-	4
C. P. L	-	4
Jharkand	-	4
C P. I. (M)	-	2

Independents	-	4
Congress (O)	-	1
Jana Congress	-	1
Total	-	135

5 seats were vacant.
By-elections of the five seats were held in the month of May and September, 1971. Out of these five, three came to Utkal Congress, one to Independent and one to Swatantra.
After the by-election held on 27-9-1971 the strength of different Parties stood as follows :

Congress (R)	-	52
Swatantra	-	36 + 1
Utkal Congress	-	34 + 1
P. S. P.	-	4
C. P. I.	-	4
C. P. I. (M)	-	2
Jharkhand	-	3
Independents	-	2
Jana Congress	-	1
Total	-	140

(Three M. L. As. one from Congress (O), another from Jharkhand and an Independent member joined Con-gress (R) in March, 1971 soon after the 1971 elections)
Independent supporting the party.
Independent supporting.
-
In April, 1971 Swatantra, Utkal Congress Jharkhand and some other Independent members formed a United Front Assembly party and elected Sri Biswanath Das, an outsider, as the leader of the said Legislature party. Sri Biswanath Das claimed a majority support of 72 in s House of 135. 5 seats being vacant by then. He was called upon by the Governor as the leader of the United Front to form the Government. The council of Ministers under Shri. Biswanath Das was sworn into office on 3rd April, 1971. In May, 1972 the four M. L. As. belonging to the Praia Socialist Party joined the Congress (R). On 5-6-1972 six M. L. As. of the Swatantra party joined the Congress (R). On 6-6-72 three M. L. As. of the Utkal Congress party joined the Congress (R). On 9-6-1972 the Utkal Congress Legislature party passed a resolution, called merger resolution, whereunder all the legislators of the Utkal Congress unanimously decided to return to its parent body, the Congress (R).
On 9-6-1972 one M. L. A. from the Swatantra party joined the Congress (R).
On 10-6-1972 three M. L. As - two from the Swatantra and one from Jharkhand - joined the

Congress (R). Thus by 10-6-1972 the strength of the Congress (R) had swelled to 94 from the original number 49. The Congress (R) at the Centre had taken all possible undemocratic and undesirable steps to topple the ministry by defection with the sole object at installing a ruling Congress ministry. On the 9th June, 1972 Shri Biswanath Das tendered his resignation. On the 14th June, 1972 Congress (R) ministry was sworn into office with Shrimati Nandini Satpathy as Chief Minister.

Prior to the passing of the merger resolution dated 9th of June, 1972 the Central and Local leadership of the Congress had given firm commitment that all the M. L. As. of the Utkal Congress would be admitted to the ruling Congress Party and that only the case of Shri Bijayananda Patnaik would be considered at the highest level of the Congress Party. The commitment was given personally to Shri Nilamani Routray, the leader of the Utkal Congress Legislature party. On the basis of the commitment Sri Routray played an important role in persuading his colleagues to pass the merger resolution. Sri Routray was sworn in as a member of the Council of Ministers. In violation of the commitment, only 28 Utkal Congress M. L. As were admitted to the ruling Congress and the other six were not admitted. Sri Routray pressed upon the central and local leadership of the ruling Congress and the Primp Minister to honour the commitment and to admit the six Utkal Congress M. L. As. He failed in his effort which had been continued till the date of his resignation. On 22-12-1972 eleven M. L. As. of the Utkal Congress party who had joined the ruling Congress returned back to the Utkal Congress in pursuance of a resolution passed on 12th November, 1972. Even thereafter, Sri Routray continued to press upon the Congress leadership to fulfil its commitments and to bring about rapproachement between the Utkal Congress and the ruling Congress. Having failed in all his efforts Sri Routray resigned from the ruling Congress and rejoined the Utkal Congress on 28th February, 1973. At 6 A. M. on 1st March, 1973 twenty-one M. L. As intimated the Speaker of their having resigned from the ruling Congress and of having joined the Pragati Party. The respective strength of the ruling Congress and the Pragati party in the re at 6 a. m. on 1st March, 1973 follows :

Congress (R) - 57
Pragati Party - 68

On that very day four other M. L. As resigned from the ruling Congress and joined the Pragati party whose strength to 72. Out of 72 members of the Pragati party, two defected on that very day. At tea time the Governor drew up his report en 1st March, 1973 the strength of the Pragati party was 70 which constituted an absolute majority in a house of 139 excluding the Speaker. At the time the President issued the Proclamation on 3rd March, 1973 the strength of the Pragati party increased to 71 as a member of the Legislature from the ruling Congress joined the Pragati party on 2nd March, 1973. This fact was telegraphically intimated to the Governor and the President. On 1st March, 1973 the Appropriation Bill on the second supplementary statement of expenditure for the year 1972-73 was to be discussed amongst other official business. That day at 2 p.m. there was a by-election for one Rajyasabha seat. The contest was between Sri Bhairaba Chandra Mohanty as a nominee of Congress (R). and Sri. Debananda Amat, an independent candidate supported by the Pragati party. Jharkhand, C. P. I. (M) and some Independent M. L. As. Shri Debananda Amat was declared elected by 77 votes against 60 in favour of Sri Bhairaba Chandra Mohanty. The stand of the petitioners is that as the Pragati Party had an absolute majority of at least 70 Members in a House of 139 excluding the Speaker the Governor was bound to call the leader of the Pragati party to form the government; he did not do so in collusion

with the State and Central leadership of Congress (R): the Governor's report is actuated with mala fides and the Proclamation is to be declared a nullity as the President under the advice of the Central Cabinet issued the same, the advice given by the Central Cabinet to the President by which he was bound is the outcome of mala fides. The Proclamation was approved by the Parliament. The petitioners pray for issue of a writ of mandamus, certiorari or any other appropriate writ to quash –

(i) the report of the Governor dated 1-3-1973 which was vitiated by prejudice, malice and mala fides.
(ii) the order of the Governor dated 1-3-1973 proroguing the Orissa Legislative Assembly;
(iii) the impugned Proclamation;
(iv) The resolution of the Parliament approving the impugned Proclamation.

and to issue an injunction restraining the operation of the prorogation and the Proclamation.

3. Opposite parties 1 and 2 are the President of India and the Governor of Orissa. On 2-5-1973 this Court ordered that no notice would issue to opposite parties 1 and 2 as Article 381 of the Constitution is a bar. Notice was issued only to the Union of India (Opposite party No. 3) and the State of Orissa (Opposite party No. 4). Counter-affidavits have been filed by opposite parties 3 and 4. Most of the facts are not disputed. Opposite parties 3 and 4 challenge the facts alleging mala fides to the President the Governor and to them and plead that those questions cannot be gone into in the absence of opposite parties 1 and 2. The main objections certain to the maintainability of the writ application on various constitutional and legal grounds.

4. The main grounds of attack of the petitioners may be noticed in brief :

(i) The Governor in his report has accepted the position that the Pragati party had a strength of 70 in a House of 140. The President has accepted this report on assessment of the strength of the Pragati party by the Governor and on that basis has issued the Proclamation. Excluding the Speaker as prescribed in the second proviso to Article 179 a strength of 70 in a House of 139 constitutes absolute majority. Since the leader of the Pragati party requested the Governor to be called upon to form the Government no situation had arisen in which a Government could not have been formed and carried on in accordance with the provisions of the Constitution.
(ii) 2 M. L. As of Jharkhand Party, 2 M. L. As of C. P. I (M) and one Independent M. L. A. pledged their support to the leader of the Pragati Party if he is called upon to form the Government. These M. L. As personally appeared before the Governor at 4 P.M. of 1-3-1973. The leaders of the parties and the Independent M. L. A. told the Governor personally that they would support the leader of the Pragati party if he is called upon to form the Government. Thus the support of 76 M. L. As was demonstrated before the Governor. The Governor has given a false and distorted report to the President Proclamation based on such a report is vitiated by mala fides.
(iii) The statement attributed to Dr. Harekrishna Mahtab in the Governor's report

(Annexure - 10) is denied by him on affidavit. The Governor made a false statement and as such his report is tainted with mala fides.

(iv) Satisfaction of the President under Article 353 based on irrelevant consideration such as false report of the Governor attributing a false statement to Dr. Mahtab and ignoring the support of 76 members to the leader of the Pragati party is a nullity as being based on irrelevant consideration.

(v) The Proclamation was issued not because the Pragati party did not command absolute majority in the Legislature but because a Government formed by the Pragati party would not be stable end would not last lone. In other words, President's Rule was imposed on the State on the assumption that there was a likelihood of a situation arising in future in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

(vi) The concept of a particular leader commanding majority in a Legislature in not being allowed to constitute the ministry on the apprehension that it is not likely to be stable is alien to Article 356. Such a construction would have the effect of conferring powers on the Union Government to completely supersede and frustrate State autonomy and federalism provided for in the Constitution. If such ah interpretation is accented, by the exercise of the powers under Article 356 of the Constitution any political party in power at the Centre can assume to itself unfettered dictatorial powers by preventing formation of a Government by any other political party in any State. Such an interpretation would facilitate establishment of dictatorship.

5. The contentions advanced by the learned Advocate-General on behalf of opposite parties 3 and 4 may be enumerated.

(i) The Governor has not acted illegally or mala fide in not appointing petitioner No. Shri Bijayananda Patnaik as the Chief Minister who has no enforceable right to become Chief Minister.

(ii) Governor's report (Annexure-10) shows that the Governor was not satisfied that petitioner No. 1 would be able to form a stable Government which would command the majority support of the Legislature.

(iii) Governor's recommendation for imposition of President's Rule is not mala fide.

(iv) President's satisfaction is not vitiated by mala fides.

(v) The satisfaction reached by the President under Article 356 is not the satisfaction of the Union Government. As the President is not answerable to court under Article 361. President's satisfaction is not justiciable in court.

(vi) The continuance of the Proclamation beyond two months is subject to the approval of the Parliament. The propriety and legality of the President's Proclamation is thus impliedly excluded from the jurisdiction of the court.

(vii) In the exercise of the power under Article 356 political questions are involved. There is no indicia prescribed as to how the legality and propriety of such exercise of power would be tested in court.

6. Rival contentions require careful examination.

7. Before examining the various contentions raised it will be appropriate to extract the material part of the Proclamation (Annexure-11).

> "MINISTRY OF HOME AFFAIRS NOTIFICATION
>
> New Delhi, the 3rd March, 1973.
>
> G. S. R. 155 (E) - the following Proclamation by the President is published for general information :-
>
> Whereas, I. V. V. Giri, President of India have received a report from the Governor of the State of Orissa and after considering the report and other information received by me, I am satisfied that a situation has arisen in which the Government of that State cannot be carried on in accordance with the provisions of the Constitution of India (hereinafter referred to as "The Constitution"). Now, therefore, in exercise of the powers conferred by article 356 of the Constitution and of all other powers enabling me in that behalf. I hereby proclaim that I –
>
> (a) assume to myself as President of India all functions of the Government of the said State and all powers vested in or exercisable by the Governor of that State;
> (b) declare that the Powers of the legislature of the said State shall be ex-excisable by or under the authority of Parliament and
> (c) make the following incidental and consequential provisions which appear to me to be necessary or desirable for giving effect to the objects of this namely :-"

8. Mr. Patnaik urged that when the Ministry of Smt. Nandini Satpathy resigned on 1-3-1973 the Governor should have called the leader of the opposition as a matter of course to form ministry without testing its strength and that if strength was at all to be tested, it would have been on the floor of the House and that at any rate, on the Governor's own conclusion that the Pragati Party had a majority of 70 members out of 139 excluding the Speaker, its leader should have been call-ad to form ministry.

9. There is no constitutional provision making it incumbent upon the Governor to call upon the leader of the majority party to form the Government. Articles 163 and 164 which can throw some light run thus :

> "163(1) There shall he a Council of Minister with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have

acted in his discretion.

(3) The question whether any and if so, what, advice was tendered by ministers to the Governor shall not be inquired into any Court.

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

XX XX XX

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State."

There is nothing in the two Articles that the Governor is bound to call the leader of the party who commands the majority in the House to form a ministry. The Council of Ministers is collectively responsible to the Legislature. The Governor in the exercise of his functions is to normally act with the aid and advice of the Council of Ministers unless it appears otherwise in the context.

10. The Constitution is federal in structural. It is, however modelled on the British parliamentary system of Government. In *(Raj Saheb Ram Jawaya Kapur v. The State of Punjab[1])* Lordships observed thus :-

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

The executive function comprises both the determination of the policy as well as carrying it into execution, x x x x The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States, the Governor x x x occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the Legislature is like the British Cabinet, 'a hyphen which loins, a buckle which fastens the legislative part of the State to the executive part. The Cabinet enjoying, as it does, a majority in the Legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility the most important questions of policy are all formulated by them." The position was reaffirmed in *(U.N.R. Rao v. Smt. Indira Gandhi[2]*) The underlined expressions emphasise that Cabinet would command the majority in the Parliament or Legislative Assembly.

11. Some of the well-accepted conventions prevalent in Great Britain are :

(i) The party who command the majority in the House of Commons are entitled to have their leader placed in office as Premier with the right to select his colleagues.
(ii) A ministry which has lost the confidence of the House of Commons must retire from office, unless it advises and is granted a dissolution.
(iii) the Crown is normally bound to grant a dissolution on the request of a ministry which has riot recently received a dissolution.

(Constitutional Law by Keith, 7th Edn. at pp. 4-5).

12. High constitutional authorities nave laid down that the ministry would only command the majority in the Legislature and not a stable majority. The following passages from the Constitutional Law by Keith, 7th Edition, and from Sir Ivor Jenning's Cabinet Government 3rd Edition, would highlight point :

Keith :-

"The vital characteristic of the English constitutional system is the solution of the relations between executive and legislature by the plan of responsible government. Under it the powers of the Grown are in fact exercised by Ministers responsible to the majority of the House of Commons, and they in turn represent the will of the electorate. That will is necessarily formed by means of the party system". (P. 13)

Jennings :-

"If the Government has a majority, and so lone as that majority holds together, the House does not control the Government but the Government controls the House". (P. 18)
"The nature of the Queen's choice necessarily depends upon the state of parties in the House of Commons. The simplest case is that in which a Party has a clear majority. The Government must dearly be formed out of that majority and, if it has a recognized leader, he will be the Prime Minister." (pp. 24-25)
"The rule is that on the defeat and resignation of the Government the Queen should first send for the leader of the Opposition. This rule is the result of long practice, though it has hardened into a rule comparatively recently. Its basis is the assumption of the impartiality of the Crown. Democratic government involves competing policies and thus the rivalry of parties. The policy to be forwarded is that which secures the approval of the House of Commons, subject to the power of the Government to appeal to the electors. If, therefore, the Government is defeated in the House of Commons and does not appeal to
the people, or it having appealed to the people, it is defeated, a new Government has to be formed. The Queen's task is only to secure a Government, not to try to form a Government which is likely to forward a policy of which she approves. To do so, would be to engage in party politics. It is, moreover, essential to the belief in the monarch's impartiality not only that she should in feet act impartially, but that she should appear to act impartially. The only method by which this can be demonstrated clearly is to send at

once for the leader of the Opposition" (32).

"There is thus a long series of precedents covering more than a century. In each case the monarch has sent for the leader of Opposition. " (P. 40)

"The rule has for its corollary the rule that before sending for the leader of the Opposition the monarch should consult no one. If he takes advice first, it can only be for the purpose of keeping out the Opposition is its recognized leader. To try to keep out the Opposition is to take sides in a party issue. To try to defeat the claims of the recognized leader is to interfere in the internal affairs of the Chief Opposition party."

13. The underlined expressions' are significant. From the aforesaid extracts from Keith and Jennings the following conventions regarding asking the majority party to form Government and choice of Prime Minister are followed :

(i) If the Government is defeated in the House of Commons and does not appeal to the People or if having appealed to the people it is defeated a new Government has to be formed.

(ii) On the defeat and resignation of the Government, the Queen should first send for the leader of the Opposition.

(iii) Before sending for the leader of the Opposition, the monarch should consult no one.

(iv) The Queen would not engage in party politics. Not only she should in fact act impartially but she should appear to act impartially.

14. It is now well settled that the conventions which were prevalent in England at the time of framing of our Constitution are to be honoured, by different functionaries in the working out of the Constitution though they are not put into a written Instrument of Instructions. In the Constituent Assembly there was a debate whether the well accepted conventions followed in England should be out into a written Instrument of Instructions for guidance. The proposal was not accepted. Reasons have been given in the Indian Constitution by Granville Austin at PP. 138-139.

"The essence of Ambedkar's argument in December, 1948, when he moved the inclusion of the President's. Instrument of Instructions, was that the Instrument had moral force. It established a code of behaviour, of procedure. A provincial legislature or the Union Parliament, said Ambedkar, could by citing the Instrument, force a Governor, or the President to heed the advice of his ministers or face impeachment proceedings for violation of the Constitution, Ambedkar admitted that the provisions of the Instrument were not, strictly speaking, enforceable or justiciable. And he rejected Naziruddin Ahmad's suggestion that they be made justiciable - by allowing the President to be questioned as to whether he had followed the advice of his ministers - because they would permit the Courts to interfere in the affairs of Parliament and the Executive. The system of checks and balances would be unset.

Moving the deletion of Clause 62(5) end Schedule IIIA in October 1949, Ambedkar told the

Assembly that the members of the Executive, Legislature and Judicial branches of the Government 'know their functions, their limitations, and their duties..... The Executive is bound to obey the legislature without any kind of compulsory obligation laid down in the Constitution.' Thereupon this exchange ensued : Shri H.V. Kamath; If in any particular case the President does not act noon the advice of his ministers, will that be tantamount to a violation of the Constitution and will he be liable to impeachment ? The Honourable Dr. B.K. Ambedkar. There is not the slightest doubt about it. From this, one is forced to deduce that Ambedkar and the members of the Drafting Committee, perhaps under pressure from Nehru or Patel, had come to the conclusion that the written provisions of a non-justiciable Instrument of Instructions and the tacit conventions of Cabinet government had equal value; both were unenforceable, but both provided a mechanism by which the legislature could control the Executive; and of the two, conventions were the tidiest and the simplest, wav of limiting Executive authority. Not all the members of the Assembly were happy about the removal of the written conventions, although Ambedkar's categorical statement to Kamath had quitted most fears. Ayyar attempted to soothe the suspicions that remained. He warned the Assembly that including a partial list of conventions in the Constitution might cause the Executive to suppose that all powers not specifically denied them were theirs, and the result, he said, could be conflict between the Executive and the Legislature. Ayyar concurred with Ambedkar that a President who did not heed the advice of his ministers would in fact be thwarting the will of Parliament for which he could be impeached. With the Instrument of Instructions gone, the protection of parliamentary government in India was left to convention, to the vigilance of Parliament, and ultimately, 'to the will of that power which .. is the true political sovereign of the State - the majority of the electors or the nation'."
The underlined expressions deal with the core of the matter. The framers did not want the conventions to be out in a written Instrument of Instruction Protection of Parliamentary Government was left to tacit conventions, vigilance of the Parliament and the electorate. They were well aware that conventions are not enforceable through Courts. That position was accepted in AIR 1971 SC 1002 para 3 :

> "xx xx xx But it must be remembered that we are interpreting a Constitution and not an Act of Parliament a Constitution which establishes a parliamentary system of Government with a Cabinet In trying to understand, one may well keep in mind the conventions prevalent at the time the Constitution was farmed."

15. We now proceed to discuss the value of conventional usage. Relevant passages from standard Constitutional authorities are extracted hereunder :

> (i) "The rules relating to the choice and appointment of the ministry and the Cabinet, and those which govern the relations of the latter with the Crown, the Prime Minister, and Parliament depend upon conventional usages which have come to be regarded as constitutional necessities, but though necessary to be observed in order to ensure the harmonious cooperation of the legislature and the executive, they do not form substantive law recognized and enforced by the courts."

(Halsbury, Vol. 7. para 711).

(ii) "Conventions are mentioned separately because they are not laws, and the courts are therefore not bound to enforce them. They certainly do not amount to law, but they are regarded as being so fundamental a nature that it would be unthinkable that anyone should transgress them."

(Yardley at p. 4 in 'Introduction to British Constitutional Law')

(iii) "The conventions are rules which are not enforced by courts."

(Jennings at p. 103 in 'The Law and the Constitution).

(iv) "Breach of a convention in any case is far more likely to lead to political action than to proceedings in court being brought against the offender. The refusal of a defeated Ministry to resign, though ultimately it could lead to administrative action which Parliament would refuse to sanction or condone and thus lead to illegal acts for which the Courts would redress, would have much more rapid repercussions in the political field."

(Wade and Phillips. Constitutional Law at pp. 88 and 90) It is clear from the aforesaid extracts that in England which is the mother of the Parliamentary system of Government most of the practices are based on conventions. They are hardly dishonored. If they are disrespected, the ministry cannot last lone. If a ministry defeated on the floor of the Parliament does not vacate office, the budget cannot be passed and various legislative proposals would not receive the sanction of the Parliament Ultimately acts done by the executive without the authority of law would be illegal and auctioned in courts. But the breech of the conventions is not enforceable through courts. The ultimate sanction behind the conventions is the control to be exercised by the Parliament and the electorate in the last resort.

16. We would now examine whether the Governor came to a conclusion that the strength of the Pragati Party was 70 in a House of 139 excluding the Speaker. To appreciate this contention. Paragraphs 9 to 18 of Annexure 10 may be extracted :

"9. Shri Biju Patnaik, leader of the Opposition (Leader of the Orissa Pragati Legislature party) met me at 9-45 A.M. the same day and indicated that he would be able to form an alternative Government as he commanded a single majority party of 72 m a House of 140, on the basis of withdrawal of 25 Members of the Legislative Assembly from the Ruling Party as per list enclosed. I told him that the matter would receive my due consideration.

"10. From the copy of the letter signed by Shri N. Rath, Secretary of the Orissa Legislative Assembly (No. 3485/LA dated 1-3-1973) addressed to Shri Biju Patnaik. M. L. A. Leader of the Opposition (copy enclosed), the total number of Orissa Pragati Legislature party on 1-3-1973 is stated to be 72. One Member of the Legislative Assembly Sri Jagateswar Mirdha included in the above number of 72, has sent a letter to me about mid-day on the 1st March, 1973 that his signature was taken by force and he

was not willing to join the Orissa Pragati Legislature party. He has informed me in his letter that he will support Shrimati Nandini Satpathy the Leader of the Congress Legislature party, and her Government. Another letter which I have received, after I met the leaders of the Opposition along with their supporters, is from Shri Gopal Pradhan, M. L. A. at 9 P.M. on 1-3-4973, wherein he states that he was intimidated and threatened and, as such, he was forced to give his signature to escape from their clutches Copies of both the letters are attached for your kind perusal.

11. After these two letters are taken into consideration, the number of Members of the Orissa Pragati Legislature party has come down to 70 from 72.

12. At 4.00 P.M. on 1-3-1973. Sri Biju Patnaik, Dr. H.K. Mahtab, Shri Nilamoni Routary and Sri R.N. Singh Deo, with their supporters came and met me at Raj Bhawan. Besides the leaders of the Orissa Pragati Legislature party and their so-called supporters. I could observe, among them, the newly elected Rajya Sabha Member and some press Representatives. Shri Biju Patnaik requested me to invite him to form the Ministry as he claimed majority support He cited the result in the by- election to the Rajya Sabha held that day in which the candidate of the Ruling Congress party lost to the Independent supported by the opposition, by 17 votes.

13. During the discussion, Dr. Mahtab urged immediate permission to his party to form a Government and stated as follows :

"The greater the delay greater is the chance of losing the present majority. If there is delay in taking a decision, some Members who have come to us may so back - Aya Ram and Gaya Ram may take place."

Taking the views of Dr. Mahtab and taking into consideration the two letters which I have received from two members of the Legislative Assembly (Shri Jagateswar Mirdha and Shri Gopal Pradhan) within few hours after they claimed to have majority indicates that the present strength of Orissa Pragati Legislature party may not remain steady and is likely" to change under other Pressures such as ministry-making etc.

14. From the list of 25. M. L. As. stated to have joined the Orissa Pragati Legislature party 8 belong to Utkal Congress, 5 to Swatantra, 2 to Jharkhand parties all of whom joined the Congress party only in June, last 9 belong to the original Congress and one is Independent.

15. The trend of defection by the Legislators from one party to another is summarised below

1. Sri Balaram Sahoo	Originally they
2. Sri Raj Kishore Pradhan	belonged to the
3. Shri Debrai Sahoo	Utkal Congress

4. Sri Nilamoni Routray	Party. Subsequently
5. Sri Surendra Naik	joined the Congress
6. Sri Saharaj Oram	and now joined the
7. Sri N.B. Samant	Pragati Legislature
8. Sri Maheswar Majhi	party.
Swatantra -	
1. Sri Gangadhar Pradhan	Originally belonged to
2. Shri Hemendra Mohapatra	the Swatantra. Later
3. Shri Radhamohan Nayak	joined the Congress and
4. Shri Dhanraj Randhari	now again joined the
5. Shri Gopal Pradhan	Pragati Legislature party.
Jharkhand -	
1. Shri Ignace Majhi	Originally belonged to
2. Shri Sidhalal Murum	Jharkhand. Later joined the Congress and now Joined th
Independent -	
1. Shri Bansidhar Patnaik	Originally independent. Joined the Congress and now re

16. It will thus be clear that political defection by Members of the Legislative Assembly in this State from time to from either for consideration of office or for personal gains has become common and has affected the political life of the State adversely. This tendency is harmful to the functioning of democracy. Looking to the previous history of the legislators after the General Election in 1971, it is very clear that there is no guarantee that the present majority claimed by Shri Biju Patnaik and his supporters will remain stable, and if a Ministry is allowed to be formed under the leadership of Sri Patnaik, the said ministry may not remain for a long time.

17. The members at the present Orissa Pragati Legislature party belong to different parties having different political ideologies. In my view, the Govt. formed by such a party may not be stable as the Members may try to defect if they do not get office etc. Sri Biju Patnaik claims that he has got support of other members of the Legislature Assemble belonging to other political parties; but he has specifically mentioned in his letter that he had already 47 Members in his party and 25 M. L. As from the present Congress party have joined his group. This makes a total of 72. I have already received two letters from two Members of the Legislative Assembly (namely Sri Jagateswar Mirdha and Sri Gopal Pradhan) stating that they have not joined Sri Biju Patnaik's party, but that their signatures were taken forcibly. They have further stated that they are the supporters of Shrimati

> Nandini Satpathy and the Congress party. So far I have not received any letter from any of the other political parties who intend to support Sri Patnaik, as has been claimed by him. In the absence of any letters from other M. L. As., it is very difficult to believe that some other M. L. As will support him.
>
> 18. In view of the above facts, after a careful consideration of the political situation to the State. I am satisfied that no party or Parties with any substantial majority can form a stable Government. It will be better to obtain a fresh mandate from the people, I am of the opinion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. I, therefore, recommend that the President takes over the administration of this State under Article 350 of the Constitution of India and the Orissa Legislative Assembly be dissolved. "

17. An analysis of the aforesaid paragraphs would show that the Governor examined the claim of the Pragati party of having 72 members on withdrawal of 25 members from the Ruling party. He noticed that the figure '72' had been reduced by 2 within a few hours. After taking into consideration various aspects as mentioned therein he came to fee conclusion that there is no guarantee that the present majority claimed by Shri Biju Patnaik and his supporters will remain stable and if a ministry is allowed to be formed under the leadership of Sri Patnaik, the said ministry might not remain for a long time. Thus, the Governor did not call the leader of the Opposition to form the Ministry not because they had no majority but because he expected that the majority might fall at any moment and there would be no stable ministry.

18. In arriving at this conclusion the Governor did not honor the convention prevalent in Great Britain in the matter of formation of the Ministry. The breach was in the following way : On the resignation of the ministry of Smt. Nandini Satpathy having lost its majority support in the Assembly, the Governor should nave called the leader of the Opposition to form ministry. It was for the latter to say whether he would be able to form a ministry or not. The leader of the Opposition asserted that ha had a majority support and that is confirmed by the Governor's own finding that he had support of 70 members. Even assuming that the Governor wanted to test the exact support he should have called upon the leader of the Opposition to test his strength in the House itself which was in session. This was exactly what the Governor of West Bengal did when he dismissed the ministry of Shri Ajoy Mukherjee in November, 1967. The facts of the case as reported in *(Mahabir v. Prafulla Chandra*[3]) are that Sri Prafulla Chandra Ghose and some other M. L. As. left the United Front and claimed that the United Front had ceased to command the support of the majority of the members of the Assembly. The Governor wanted Sri Ajoy Mukherjee, the then Chief Minister, to call the Legislative Assembly into session by a particular date to test whether he had majority support. The Chief Minister deferred the sitting of the Assembly despite Governor's repeated requests. The Governor dismissed the ministry in exercise of his pleasure under Article 164(1). In that case Governor wanted to test the majority in the House itself even though it was not in session. The Assembly was
to be called into session only to test the majority. The Governor is not concerned whether the ministry could be stable in future. If the ministry which would have been formed by the leader of the Opposition would have fallen afterwards, the Governor would have been justified to recommend for the President's Rule if at that time no other person was in a position to form an

alternative ministry by having majority support.

19. We next examine if the Governor acts on the aid and advice of the Council of Ministers in submitting his report to the President under Article 356. By Article 154(1), the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. It was held in *(Golakh Behari Chhotray v. State of Orissa*[4]) that the Governor of Orissa has no function to exercise in his discretion though in certain matters he acts directly and does not act with the aid and advice of the Council of Ministers. In that connection the following observation was made :

> "Certain Articles of the Constitution vest the Governor with the power to act director even when he does not act in his discretion. Take, for instance, Article 356 of the Constitution. Provision has been made in this Article in case of failure of constitutional machinery in the State.
> X X X X
> When the Governor sends a report to the President that the constitutional machinery of the State has failed, he is to act directly and not with the aid and advice of the Cabinet."

20. We may refer to some other Articles where the Governor is to act directly without the aid and advice of the Council of Ministers. Under Article 154(1) the Chief Minister shall be appointed by the Governor. In selecting the Chief Minister the Governor has to keep in view a person who has the support of the majority in the Legislature. Before the formation of the ministry, there is no Council of Ministers and ministerial advice cannot be obtained in selecting the Chief Minister. The very Article prescribes that the Ministers shall hold office during the pleasure of the Governor. A Council of Ministers may refuse to vacate office alter a vote of no- confidence is passed En the House. It is open to the Governor to dismiss the ministry in the exercise of his pleasure as was done in AIR 1969 Calcutta 198. In such a case the question of his acting on ministerial advice does not arise. The exercise of pleasure is not hedged in by any limitation.

Article 167(b) and (c) run thus :

> "167. It shall be the duty of the Chief Minister of each State -
> (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for : and
> (c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a minister but which has not been considered by the Council."

In both the cases the Governor acts directly. Article 167(b) imposes a constitutional duty en him to know the administration of the affairs of the State and proposals for legislation even if the Council of Ministers does not want that the Governor should know them. If the Governor is not satisfied with the decision of a particular Minister, it is open to him to ask the matter to be placed before the Council of Ministers under Article 167(c). Article 200, second proviso, enacts that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the

High Court as to endanger the position which that Court is by the Constitution designed to fill. Here the Governor acts directly without the aid and advice of the Council of Ministers. His decision to reserve the Bill for the consideration of the President is not based on the advice of the Council of Ministers. An analysis of the aforesaid Arts has been made only to emphasize that there fire certain constitutional duties to be performed by the Governor directly in which he is not to act with the aid and advice of the Council of Ministers. In sending the report to the President under Article 358 the Governor is not to act with the aid and advice of the Council of Ministers.

21. We proceed to examine if the Governor's report is justiciable.

Article 361 of the Constitution so far as material, runs thus :

> "361. (1) The president or the Governor 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 proceedings 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."

Article 361(1) clearly lays down that the Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office.

22. In sending the report to the President under Article 356 the Governor does not act on behalf of the State Government. He acts directly without the aid and advice of the Council of ministers. In exercise of the functions of the Governor under Article 356, the Government of a State performs no act, in sending the report, which is impugned; the Governor is not answerable to any court. As the report is not the act of the State Government, it is also not answerable to the court for the act of the Governor. Whether the Governor's report is main fide or based on any extraneous farts cannot be questioned in a court of law. It is not justiciable as against the Governor because of the protection and immunity under Article 361(1). The Governor cannot be summoned by any court. Unless the person performing the act appears in Court, the validity of the act cannot be examined in his absence. Thus, the Governor's report is not justiciable in Court either against the Governor or against the State Government. The Court is not in a position to examine if the Governor's report is actuated with mala fides and is based on no materials. The Court will not go into any matter unless the person complained against is within its reach and before it. It is contended by Mr. Patnaik that bad faith would destroy immunity conferred under Article 361. He places reliance on *(Biman Chandra Bose v. Dr. H.C. Mukherjee*[5]). *(M.*

Gnanamani v. Governor of Andhra[6]) *(Madhab Rao Scindia v. Union of India*[7].) The proposition as presented in its bald form is unexceptionable. As was observed in AIR 1971 SC 530 Para 47 "lack of *bona fides* unravels every transaction". It is, however, well settled that the party alleging bad faith must prove it. It is not necessary to refer to all the decisions. In AIR 1970 SC 564 the validity of the Banking Companies Ordinance No. 8 of 1969 was questioned. AIR 1971 SC 530 dealt with an executive order of the President de-recognising the Rulers. The Ordinance and the executive order were passed by the President with the aid and advice of the Council of Ministers. The *bona fides* of the Union Government relating to the executive order and the Ordinance could be questioned in terms of the second proviso to Article 361. None of the decisions relied upon by Mr. Patnaik covers the point dealt with by us, so far as the Governor's report is concerned m which the Governor acts directly and not with the aid and advice of the Council of Ministers.

23. It was contended by Mr. Patnaik that a defeated Chief Minister cannot advise prorogation of the Assembly. Article 174(2) enacts thus :

> "174 (2) The Governor may from time to time.
> (a) prorogue the House or either House :
> (b) dissolve the Legislative Assembly".

Smt. Nandini Satpathy advised prorogation and dissolution of the Legislative Assembly while tendering her resignation. In *(State of Punjab v. Satya Pal*[8]) their Lordships held that Article 174(2) does not indicate any restrictions on the power of the Governor to prorogue. The power is untrammelled. In exercising this power of prorogation in certain cases the Governor may act with the aid and advice of the Council of Ministers and in certain other cases directly without such aid and advice. Prorogation can be directly made without the aid and advice in the following cases which are merely illustrative but not exhaustive.

> (i) There is a motion of no-confidence pending discussion in the Assembly. The Chief Minister to set over the difficulty may ask the Governor to prorogue the House. The Governor may not act upon such advice. He may refuse to prorogue so that the no-confidence motion may be discussed in the Assembly.
> (ii) The Government is in a minority in the Assembly. The Chief Minister may advise prorogation to perpetuate the continuance of the Ministry. The
>
> Governor may not act upon such advice and may dismiss the ministry in exercise of his pleasure under Article 164(1) of the Constitution.

In this case Smt. Nandini Satpathy advised prorogation of the Assembly while tendering resignation when 25 M. L. As. left her party and she was in a minority so as not to be able to continue the Government. When this position was brought to the notice of the Governor he could prorogue the Assembly, though he should have also called upon the lender of the Opposition to form the ministry and to test his strength on the floor of the House.

24. The next question for consideration is whether the satisfaction of the President under Article 356 is to be reached with the aid and advice of the Council of Ministers. Under Article 74(1)

there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the exercise of his functions. Article 74(2) prescribes that the question whether any and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court. In AIR 1970 SC 584 the satisfaction of the President under Article 123 was examined. In paragraph 21 their Lordships observed thus :

> "Under the Constitution, the President being the constitutional head, normally acts in all matters including promulgation of Ordinance on the advice of his Council of Ministers. Whether in a given case the President, may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the president and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances".

The same principle applies. In exercising powers under Article 356, the President is to act with the aid and advice of the Council of Ministers.

25. We now examine the scope and ambit of Article 356 of the Constitution.

> "356 (1) If the President on receipt of a 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 ell 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 exercise able 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 authorize 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 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 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 the 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 Home 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 date of the passing of the second of the resolutions approving the Proclamation under clause (3) :

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 :

Provide further that if the dissolution of the House of the People takes place during any such period of six months tend 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 is 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 site after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People".

The source of the information on which the President would reach his satisfaction is very wide. The word 'otherwise' imposes no restriction or limitation on the source of information. The President might have the information of the failure of the constitutional machinery from very secret sources like C. B. I. or C. I. D. The very amplitude and undefined character of the information on which the President is to be satisfied indicates that the satisfaction and the source thereof are not justiciable.

26. Mr. Patnaik does not dispute that the satisfaction of the President is subjective. The controversy is whether the expression "a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution" is subject to objective tests. In *(Bhagat Singh v. Emperor*[9]) Section 72 of the Government of India Act, 1919 came in for consideration. The relevant part of the section runs thus :

"72. The Governor-General may in cases of emergency make and Promulgate Ordinances for the peace and flood government of British India or any part thereof, x x x x x x"

The petitioner in that case contended that a state of emergency did not exist. There Lordships observed :-

> "That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action Ss Prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.

Yet, if the view urged by the petitioner is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the Ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board - after a contentious and protracted enquiry - that no state of emergency existed, and that the Ordinance with all that followed on it was illegal." In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it." It was next contended before their Lordships that the condition that the Ordinance was for the peace and good government of British India is subject to objective tests. Their Lordships said :

> "The same remark applies. The Governor-general is also the judge of that. The power given by Section 72 is an absolute cower, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it."

Their Lordships also held that even of the Governor-General expounded seasons which induced him to Promulgate the Ordinance, this was not in any way incumbent on him as a matter of law. In *(Emperor v. Benoarilal Sarma[10])* Section 72 of the
Government of India Act, 1935 came in for consideration Section 71, so tar as relevant, runs thus :

> "72. The Governor-General may in cases of emergency make and promulgate Ordinances for the peace and good Government of British India or any part thereof xx xx"

Section 72 of the Government of India Act, 1919 and Section 72 of the Government of India Act, 1935 are almost similar. Their Lordships referred to AIR 1931 PC 111 and said that it was plainly right. They observed thus :

> "It is to be observed that the paragraph does not require the Governor-General to state that there is an emergency or what the emergency is, either in the text of the Ordinance or at all and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists x x x x"

In *(The Hubli Electricity Co. Ltd. v. Province of Bombay*[11]) Section 4(1)(a) of the Electricity Act, 1910 came in for consideration. Section 4(1)(a), so far as relevant runs thus :

> "4(1) The Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the folio wine cases, namely;
> (a) where the licensee in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act.

Lord Uthwatt speaking for the Board observed thus :

> "Their Lordships are unable to see that there is anything in the language of the Sub-Section or in the subject-matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective tests. In terms the relevant matter is the opinion of the Government - not the grounds on which the opinion is based. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion.

Further the question on which the opinion of the Government is relevant is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default upon that point the opinion is the determining matter and - If it is not for good cause displaced as a relevant opinion - it is conclusive. But there the area of opinion ceases x x x" In *(Lakhi Narayan Das v. Province of Bihar*[12]) their Lordships examined Section 88 of the Government Of India Act, 1935. That section, so far as relevant, is as follows :

> "88(1) if at any time when the Legislature of a province is not in session the
> Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require :
> x x x x x"

Their Lordships observed thus :

> "It was urged, however, in the Court below and the argument was repeated before us that no circumstance existed as is contemplated by Section 88(1) which could justify the Governor in promulgating this Ordinance. This obviously is a matter which is not within the competence of Courts to investigate. The language of the section shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test it may be noted here that under the Government of India Act the Governor-General has powers to make ordinances in case of emergency and it was held by the Privy Council in *Emperor v. Benoarilal*[13] that the emergency which calls for

> immediate action has to be judged by the Governor-General alone. On promulgating an ordinance, the Governor General is not bound as a matter of law to expound reasons therefor nor is he bound to prove affirmatively in a Court of law that a state of emergency did actually exist. The language of Section 88 postulates only one condition, namely, the satisfaction of the Governor as to the existence of justifying circumstances, and the preamble to the Ordinance expresses in clear terms that this condition has been fulfilled, xxxx"

These decisions unmistakably lay down that whether the opinion or satisfaction is subject to objective tests would depend on the language of the enactment, its subject-matter and the policy behind it.

27. Mr. Patnaik places strong reliance on *(Berium Chemicals Ltd v. Company Law Board*[14] and *(Rohtas Industries Ltd v. S.D. Agarwall*[15] in support of his contention that existence of the failure of the constitutional machinery is a condition precedent to the formation of the satisfaction of the President and is to be objectively determined and that the Court can examine if the situation has existed and whether in making the order the President took into consideration extraneous circumstances. AIR 1967 SC 295 has been considered in AIR 1969 SC 707 it would be sufficient to refer to the latter decision only. In paragraph 24 Hegde, J. referred to AIR 1949 PC 136 and accepted it as laying good law. He made the following observations in paragraphs 24 and 25 :

> "x x x x In other words in their Lordships' opinion the subject-matter of a legislation has an important bearing in the interpretation of a provision, x x"

(Para 24).

> "x x x x The order in question to an extent depended on question of policy. It is not open for courts to decide questions of policy."

(Para 25)

AIR 1960 SC 707 is itself an authority for the proposition that both the satisfaction and the basis thereof are not open to judicial review if the order showing satisfaction involves a question of policy and the subject-matter of the legislation is such that there should not be judicial review, in the Rohtas Industries' case, AIR 1960 SC 707 Section 237(b) of the Indian Companies Act 1956 was under examination. Certain pre-conditions to the formation of opinion have been laid down in the section itself. On the language of that section, its subject-matter and the policy behind it their Lordships held that the basis of the opinion was justiciable. Reliance was placed by Mr. Patnaik on paragraph 22 of AIR 1970 SC 564 in support of his contention that satisfaction under Article 123 is justiciable. That passage is not authority on this point as their Lordships did not express any final opinion as would appear from paragraph 27.

> "x x We need express no opinion in Ibis case on the extent of the jurisdiction of the Court whether the condition relating to satisfaction of the President was fulfilled."

The language, subject-matter of, and the policy behind Article 356 indicate that both the satisfaction and the basis of the satisfaction are subjective and not justiciable. The article occurs in the Chapter of Emergency Provisions. In an extreme situation when the constitutional machinery fails to function in a State, the Article is to be invoked. The question involves high executive and administrative policy not susceptible of judicial determination. The power under the Article is not fettered by any limitations or pre-conditions. What exactly is the nature of the situation that the President would keep in view has not been indicated in the Article and no proper criteria have been prescribed in Article indicating the guidelines for the exercise of the power. On the aforesaid analysts, we are clearly of the opinion that the President's satisfaction and the basis thereof are subjective and are not subject to objective tests by judicial review. The Court will find out no standard for resolving it judicially except in respect of the subject-matter in Article 361(1) Proviso.

28. In view of the provisions under Article 74(2) and Article 361(1) the Court is not in a position to test the grounds of satisfaction. Article 74(2) lays down that the question whether any, and if so what advice was tendered by Ministers to the President snail not be inquired into in any court. Though the president is to act with the aid and advice of the Council of Ministers under Article 356. Courts cannot go into the question if the President has otherwise acted in contravention of the advice.

29. It was contended by the learned Advocate-General that Article 356(3) of the Constitution prescribing for the approval of Proclamation for its continuance beyond two months from the date of its promulgation by the Parliament impliedly bars the jurisdiction of the Court to go into the legality and propriety of the proclamation.
We agree with Mr. Patnaik that this provision for approval does not confer-powers on the Parliament to invalidate a Proclamation issued by the President Parliament cannot revoke the Proclamation. The Proclamation would continue in force for a period of two months. For its promulgation, approval of the Parliament is not necessary. Resolutions of Parliament shall not have the effect of validating a Proclamation which, was invalid and unconstitutional from its very inception. The President is given the full power to issue the Proclamation even if the Parliament is in session. This drastic provision indicates that finality has been rendered to the Proclamation during these two months. Supposing, soon after the Proclamation is issued. Court's jurisdiction is sought to grant an ad interim injunction. Should the Court grant it ? In our view devastating consequences would follow if the Court grants an injunction. The court is not in a position at that point of time to know the information on which the President has acted. Injunction shall have to be issued in a matter involving high administrative and executive policy. Even the Parliament while in session cannot quash the Proclamation within a period of two months. All these features lead to the conclusion that a discretion has been vested in the President not to be questioned either by the Parliament or the courts. The proclamation would automatically expire unless the Parliament gives the approval for continuance beyond two months. This again involves high policy that for a period of two months the President 13 to exercise the discretion without any interference from any quarter if it is unjust or otherwise bad, the Parliament would not give its approval for its continuance. Mr. Patnaik very seriously contended that ouster of jurisdiction cannot be implied from the provision for approval by Parliament. According to him, where jurisdiction of Courts is to be ousted express provisions have been made in the Constitution and it cannot be ousted by necessary implication. In this collection he places reliance on Articles 31(c), 74(2), 77(2), 122(2), 163(2), 163(3), 212, 262(2), 329, 361 and 363. Doubtless, under

these Articles, the jurisdiction of the Courts has been expressly ousted it does not, however, follow that the jurisdiction of the Court has not been ousted by necessary implication under other Articles. As has already been discussed, there are many provisions in the Constitution which cannot be worked out unless the Governor acts in accordance with conventions. If the Governor dishonors the conventions, Courts cannot enforce them. By necessary implication, Courts' jurisdiction has been ousted. So from the mere fact that in certain Articles of the Constitution, jurisdiction of the Court has been expressly ousted. It does not follow that Court's Jurisdiction cannot be ousted by necessary implication. If by the language and in the context of a particular Article Courts cannot enforce it. In AIR 1971 SC 530, their Lordships' in the majority judgment adverted to this aspect of the matter thus :

> "Act of the President is liable to be tested for its validity before the Courts unless their jurisdiction is by express enactment or clear implication barred."

(Para 132).

30. Part XVIII of the Constitution deals with Emergency Provisions. It contains Articles 352 to 360. The President is to issue Proclamation of emergency under Articles 352, 356 and 360. The question for examination is whether the Proclamations of emergency under Articles 352 and 360 are justiciable. The further question is, if those two Articles are not justiciable, whether the residual Article 356 in the same Chapter is justiciable.
Article 352(1) runs thus :

> "352(1). If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect."

Article 353 deals with the effect of Proclamation of emergency. The question is whether, the satisfaction of the President as to existence of grave emergency affecting the security of India in whole or part is justiciable in Court. The answer would be an unequivocal negative. The question whether India is threatened by external aggression or internal disturbance is a matter of high administrative policy which alone the President with the aid and advice of the Council of Ministers can take. There may be purely secret information on which the President is to act whether China or Pakistan would attack India and what precaution is to be taken in apprehension of that danger are not appropriate subjects which can be decided in Courts. The Courts must retrain from exercising their jurisdiction from the nature of the subject and the policy involved. Thus, Article 352(1) is not justiciable. This is plain common sense. Similarly, a Proclamation of emergency under Article 360 is not justiciable. Article 360(1) runs thus :

> " 360(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect."

The question whether financial stability or credit of India is threatened is a subject to be determined only by the President assisted by the Council of Ministers. It would be fantastic to

suggest that Courts would go into these matters. The policy involved and the subject-matter is such that Court will find no standard for resolving it judicially.
If the aforesaid two Articles are not justiciable in Court for reasons analysed, the residual Article 356(1) must be held to be non-justiciable both by analogy and independent examination of its essentials. This Article also involves questions of high policy and the subject-matter is such that there is no standard for determining it judicially nor can the Courts give a proper solution or relief in the matter. As was held in *(P.L. Lakhanpal v. Union of India[16])*, there is a presumption of *bona fides* in the acts of the President. The President as advised by the Council of Ministers is to take decisions which are most conducive to the welfare of the country. On those grounds all the three Articles have been put into a separate chapter under the emergency provisions. Article 355 also throws some light on the topic. It runs thus :

> "355. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution."

The duty of the Union to protect every State against external aggression and internal disturbance cannot be said to be justiciable. It is for the Central Government to
consider when external aggression or internal disturbance occurs. It is again for the Central Government to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. No writ application can lie at the instance of any citizen or anyone of the constituent States to force the Central Government to intervene on the allegation that there has been external aggression or internal disturbance or the Government of the State is not being carried on in accordance with the provisions of the Constitution. The Courts are not the appropriate forum where these questions can be gone into.

31. It is contended by the learned Advocate-General that Article 356 deals with a political issue and Court cannot probe into the exercise of the power under the Article. In AIR 1971 SC 530 their Lordships observed thus :

> "The functions of the State are classified as legislative, judicial and executive : The executive function is the residue which does not fall within the other two functions. Constitutional mechanism in a 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." (para. 96).
>
> "We further hold that the President is not invested with any political power transcending the Constitution, which he may exercise to the prejudice of citizens. The powers of the President arise from and are defined by the Constitution. Validity of the exercise of those powers is always amenable to the jurisdiction of the Courts, unless the jurisdiction is by precise enactment excluded. Power of this Court under Article 32 or of the High Courts under Article 226, cannot be by-passed under a claim that the President has exercised political power." (para. 143).

The aforesaid observations of the Supreme Court are conclusive on the question that the President has no political power. In issuing Proclamation under Article 356, the President acts with the aid and advice of the Council of Ministers and exercises no political power. Nature of the power and not of the issue being political is relevant.

32. Mr. Advocate-General next contended that in issuing the Proclamation under Article 396 the President exercised constitutional powers and not the powers of the Union Government. He developed his argument by saying that the investment of a constitutional power under Article 356 is an incident of the sovereign functions of the State entrusted with the President. The constitutional power of the President under Article 356 is not a part of the executive power of the Union Government which is co-extensive with the legislative power of the Parliament. The Parliament cannot pass any law in relation to Article 356 and thus the power under Article 356 is not a part of the executive power of the Union and is not justiciable. He placed reliance on *(State of Uttar Pradesh v. Babu Ram Upadhya*[17]); *(Jayantilal Amratlal Shodhan v. F.N. Rana*[18]) and *(Bk. Sardari Lal v. Union of India*[19]*).* The argument though ingenious is fallacious. The distinction between constitutional powers and powers of the Union Government has been pointed out in these decisions only to emphasize that in certain matters the President cannot delegate his powers under Article 77(1) and shall have to personally deal with them even though with the aid and advice of the Council of Ministers.

33. The position would be clear by extracting relevant passages from the aforesaid decisions.

In AIR 1961 SC 751 their Lordships observed thus :

> "x x x Article 154 speaks of the executive power of the State vesting in the Governor it does not deal with the constitutional powers of the Governor which do not form part of the executive power of the State, Article 162 says that, subject to the provisions of the Constitution, the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. If the Legislature of the State has no power to make a law affecting the tenure at pleasure of the Governor, the said power must necessarily fall outside the scope of the executive power of the State. As we will presently show, the Legislature has no such power and, therefore, it cannot be a part of the executive power of the State. That apart if the said power is part of the executive power in its general sense, Article 162 imposes another limitation on that power, namely, that the said executive power is subject to the provisions of the Constitution and, therefore, subject to Article 310 of the Constitution, In either view, Article 310 falls outside the scope of Article 154 of the Constitution. That power may be analogous to that conferred on the Governor under Articles 174, 175 and 176. Doubtless the Governor may have to exercise the said power, whenever an occasion arises, to the manner prescribed by the Constitution, but that in itself does not make it a part of the executive power of the State or enable him to delegate his power." (para. 17) :

In AIR 1964 SC 648 their Lordships observed thus :

"x x x The power to promulgate Ordinances under Article 123; to suspend the provisions of Articles 268 to 279 during an emergency : to declare failure of the constitutional machinery in States under Article 356; to declare a financial emergency under Article 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Article 309-to enumerate a few out of the various powers are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1) x x x x x."

(Para. 12).

This decision was followed in AIR 1971 SC 1547. The underlined sentences are significant.
In respect of certain matters, materials are to be placed before the President who shall be personally satisfied before he accords sanction. Merely because in the exercise of power under Article 358, the President is to be personally satisfied, it does not follow that the Union Government is not answerable although the exercise of the power was with the aid and advice of the Council of Ministers. We reject the contention of non-justiciability of Article 356 on this ground.

34. The learned Advocate-General placed reliance on *(K.K. Aboo v. Union of India*[20]) *(Ghasi Ram v. State*[21]) (under Article 352). *(Rao Birinder Singh v. The Union of India*[22]). *(Gokulananda Roy v. Tarapada Mukherjee*[23]). *(K.A. Mathialagan v. The Governor of Tamil Nadu*[24]*)* and two unreported decisions of the Andhra Pradesh High Court in Writ Petition No. 1481 of 1973 (A. Sreeramulu) decided on 19-3-1973 (Andh Pra) and *(P. Ghouse Mohiuddin v. Govt. of Andhra Pradesh*[25]*), decided on 21-8-1973.* These decisions support the contention of the learned Advocate-General that the Proclamation under Article 356 is not justiciable. Questions involved in this case did not directly arise in those cases. Facts are also different it is not necessary to discuss these cases in details.

35. It is contended by Mr. Patnaik that on the construction we have put on Article 356. both the Governor and President would be autocrats. The apprehension is not well founded. Constitution has provided sufficient checks and balances. If the Governor's report is untrue or mala fide. President would not act upon it if the Governor acts contrary to the Constitution, he may be removed by the President under Article 156(1) as the Governor holds office during the pleasure of the President Similarly the President may be impeached under Article 61 for violation of the Constitution. There is a presumption that high constitutional organs act bona fide. Courts are most ill-suited for granting reliefs relating to emergency provisions and cannot provide panacea for all ills.

36. Our conclusions may be summed up :

(i) In Great Britain the following conventions are prevalent.

(a) The party who command the majority in the House of Commons are entitled to have their leader placed in office as Premier with the right to select his colleagues.

(b) If the Government is defeated in the House of Commons and does not appeal to the

people or if having appealed to the people it is defeated, a new Government has to be formed.
(c) On the defeat and resignation of the Government the Queen should first send for the leader of the Opposition.
(d) Before sending for the leader of the Opposition the monarch should consult no one.
(e) The Queen would not engage in party politics. Not only she should to fact act impartially but she should appear to act impartially.
(ii) Those conventions were not included in a written instrument of instructions at the time the Constitution was drafted.
(iii) Nonetheless, there was a tacit understanding that those conventions would be followed in the working of the Parliamentary system of Government with a Cabinet under the Constitution.
(iv) Conventions are not enforceable through Courts.
(v) The Governor did not honour the conventions in the following way :
(a) When Smt. Nandini Satpathy tendered resignation of her Council of Ministers, the Governor should have called the leader of the Opposition to form the ministry without testing its strength.
(b) If the Governor wanted to be satisfied that the Pragati Party commanded a majority in the Legislature, he should have got it tested on the floor of the House whether it was to session or not.
(c) The stability of the contemplated ministry is not to be tested by delving into antecedent and contemporaneous conduct of the legislators or the ideologies of the constituents of the Pragati Party or even of a coalition but by physical counting of heads in the House itself.
(d) if the Pragati Party had failed to establish majority in the House which was in session, the ministry would have automatically fallen and the Governor would have recommended for President's Rule, if no alternative ministry was possible.
(vi) Governor's decision not to call the leader of the Opposition to form the ministry and to recommend for President's Rule under Article 356 was taken by him directly and not with the aid and advice of the Council of Ministers.
(vii) Governor's decision and report are not justiciable and no writ can lie to quash them for the following reasons.
(a) Breach of convention is not enforceable in Court.
(b) The decision was not of the State Government but of the Governor without the aid and advice of the Council of Ministers and as such Article 361(1) is a bar.
(c) The allegation of mala fides against the Governor cannot be gone into in his absence.
(viii) Governor's order proroguing the Legislature on 1-3-1973 was in accordance with his constitutional power.
(ix) In issuing the Proclamation under Article 356 the President has to act with the aid and advice of the Council of Ministers.
(x) The Proclamation is not, justiciable on the following grounds :

(a) The wide source of the information as contemplated by the expression 'otherwise' gives ample indication that the President's satisfaction is not justiciable.
(b) The satisfaction and the basis of satisfaction are both subjective and are not subject to judicial review.
(c) In view of the provisions under Article 74(2) and Article 361(1) the Court is not in a position to test the grounds of satisfaction.
(d) The provision for Parliamentary approval for continuance of the Proclamation beyond two months from the date of its promulgation gives clear indication that for a period of two months it cannot be questioned either by Parliament or by Courts. The fact that its continuance after two months has been subjected to Parliamentary approval gives a further indication that it is not justiciable in Court.
(e) The emergency provisions under Articles 352, 356 and 360 in Chapter XVIII of the Constitution are not justiciable.
(f) The satisfaction of the President is integrally connected with the question of enforcing the contention on the Governor's failure to call the leader of the Opposition to form the Ministry. The convention being not enforceable, the satisfaction based on a decision whether to honour the convention or not is equally unenforceable.

37. On our conclusion that Annexures - 10 and 11 are not justiciable, the writ application is not maintainable and is dismissed. In the circumstances, parties to bear their own costs. We place on record our high appreciation of the valuable assistance rendered to us by Mr. Patnaik and the learned Advocate-General in a difficult branch of Constitutional law.

S.K. Ray, J.

38. I agree.

Petition dismissed.

Cases Referred.

[1] AIR 1955 SC 549
[2] AIR 1971 SC 1002
[3] AIR 1969 Cal 198
[4] ILR (1971) Cut 954
[5] AIR 1952 Cal 799
[6] AIR 1954 Andhra 9
[7] AIR 1971 SC 530
[8] AIR 1969 SC 903
[9] AIR 1931 P.C. 111
[10] AIR 1945 P.C. 48
[11] AIR 1949 P.C. 136
[12] AIR 1950 FC 59
[13](AIR 1945 P.C. 48)
[14] AIR 1967 SC 295
[15] AIR 1969 SC 707

[16] AIR 1967 SC 243
[17] AIR 1961 SC 751
[18] AIR 1964 SC 648
[19] AIR 1971 SC 1547
[20] AIR 1965 Ker 229
[21] AIR 1966 Raj 247
[22] AIR 1968 Pun 441
[23] AIR 1973 Cal 233
[24] AIR 1973 Mad 198
[25] Writ Petition No. 4189 of 1973