

PUNJAB AND HARYANA HIGH COURT

Rao Birinder Singh

Vs

Union of India

Civil Writ No. 2803 of 1967

(Mehar Singh, C.J. and R.S. Narula, J.)

01.03.1968

ORDER

Mehar Singh, C.J.

1. In this petition under Articles 226 and 227 of the Constitution the petitioner, Rao Birinder Singh, former Chief Minister of Haryana State, seeks a writ, order or direction quashing the President's Proclamation, dated November 21, 1967, Annexure 'A', on the ground that it is unconstitutional and illegal.
2. The total number of members of the Haryana Legislative Assembly is 81. In the last General Election held in 1967, the members returned to the Assembly were 48 Congress, 12 Jan Singh; 3 Swatantra, 2 Republican Party, and 16 Independents. So the Congress party had a majority and formed the Government with Mr. Bhagwat Dayal Sharma as the Chief Minister on March 10, 1967. The Congress party suffered a setback on March 17, 1967, when the official Congress nominee for the office of the Speaker was defeated on account of 12 Congress members, including the petitioner voting against him; and in fact the petitioner was elected the Speaker. So 12 Congress members defected from that party. On March 22, 1967, the Congress Ministry resigned. The petitioner was elected leader of the Haryana Samyukta Dal which mustered strength of 47 members whereupon on March 24, 1967, he formed a Ministry of the Haryana Samyukta Dal with himself as the Chief Minister.
3. Thereafter there were efforts to win over members on both sides and so defections followed; but the petitioner continued to command a majority. The Governor of Haryana in his report; dated November 17, 1967, addressed to the President, newspaper copy Annexure 'B', after giving a brief narration of the circumstances in which defections continued from one party to the other, proceeds to say - "The defections have become very frequent. The Opposition could never reconcile itself to its position as a responsible opposition.

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The Government has also sought to maintain itself precariously in power by creating too many Ministers which is an abuse of its Constitutional powers. Such large number of Ministers and

Parliamentary Secretaries numbering at one stage 23 out of the ruling party's strength of 41, and 22 now out of total strength of 40, cannot be justified on any grounds of administrative requirement. The position is even worse if it is remembered that the 10 Jan Singh members in the Samyukta Dal have not accepted any office as Ministers, so that in reality, 22 out of the 30 remaining M.L.A.s are holding office. With all its good intentions; the Government cannot do much for the people because it is being kept preoccupied all the time with the problem of its very survival. Administration is paralyzed. With such a thin majority, individual M.L.A.s are able to make extravagant demands. It is bad enough that political support is being sought by offering Ministerial offices at the cost of the taxpayer, but what is worse is that individual members of the Legislature have realised their own importance. They can interfere in administration with impunity and make demands which, even if they are unreasonable, can hardly be resisted by the Chief Minister. With the best will in the world, the Chief Minister cannot refuse to oblige his party-men because of the constant threat of defections. Since the loyalty of its followers is so flexible the exact majority of the ruling party is not of any consequence (After referring to allegations about securing of support through corruption, bribery, political victimisation and distribution of offices, the report goes on to say.) While it is difficult to say how far these allegations are true there are good reasons to believe that the defections are being secured by not too honourable means. Opportunist legislators, whose number is fairly large, can wield tremendous power by threats of transferring their loyalties. They can do and are doing, incalculable damage by interfering in administration. Too frequent transfers at their instance is demoralizing the services. Since premature transfers cause a lot of inconvenience, junior officials often tend to succumb to such threats. In an Assembly with an effective strength of 79, some 30 members have defected one way or the others. Some members have defected not once but even three or four times.

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With such large-scale and frequent defections, it is impossible to find out whether the will of the majority in the Legislature does really represent the will of the people.

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I had hoped that the people would be tired of these defections and the epidemic of defection would cease and some stability reached. But it seems that in the present conditions of Haryana politics, defection has become endemic. * * * * *

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The manner in which defections have taken place and are taking place, leaves no room for doubt that it is not for any ideological reasons that members are defecting from one party to another. The motive is obviously to secure some personal gain. * * * * *

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Now that so many members of the Legislature have tasted power and have seen that by threatening to defect they can get what they want, it seems to me that no alternative stable

Ministry can be formed so long as there are such large number of members whose loyalties are so flexible. If the Assembly is convened and either the ruling party or the opposition can establish its majority, even then there will be no peace or stability in the present circumstances. Defections would continue and the majority on one day might be reduced to a minority the next day. What would be more unfortunate is that as soon as one party establishes its majority in a trial of strength in the Assembly, it would like to get the Assembly prorogued. It could then continue in power at least for the next six months without being required to convene the Assembly. Even during the inter-session period, attempts would be made, as are now being made, to win over from the rival group. Administration will continue to be paralysed since the Ministry will be kept busy only in maintaining itself in power. These defections, particularly the one by Mr. Hira Nand Arya after remaining as a Minister for five days have made a mockery of the Constitution and have brought democracy to ridicule. Members of legislature are being seduced from one party to another by dubious means and the entire political life in the State has been polluted. I have given the matter my utmost consideration and I am convinced that no alternative stable Ministry can be formed without holding a fresh election. It is my considered opinion that a situation has arisen in Haryana in which a stable Government cannot be carried on in accordance with the provisions of the Constitution. I, therefore, recommend that you will be pleased to take action under Article 356 of the Constitution, dissolve the State Assembly immediately, and assume to yourself all the functions of the Government of the State. * * * * *

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What Haryana badly needs now is a clean and efficient administration. Fresh elections may be arranged, as soon as possible, after the administration has been toned up by a brief spell of the Presidential rule." The President accepted the report of the Governor of Haryana and on November 21, 1967, issued this Proclamation under Article 356 of the Constitution.

"The following Proclamation by the President is published for general information.

Whereas I, Zakir Hussain, President of India, have received a report from the Governor of the State of Haryana 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 all other powers enabling me in that behalf, I hereby proclaim that -

- (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 exercisable 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 the Proclamation, namely, (then appear the incidental and consequential provisions)....."

The Haryana State Assembly was dissolved. It is the constitutionality and legality of this Proclamation which is questioned by the petitioner in this petition.

4. In his petition the petitioner first dilates at quite a length upon the attempts of the Congress leadership in dislodging him and failing in that, he then refers to a meeting called by the Union Home Minister where he, as Chief Minister of Haryana, and the Chief Minister of Punjab were present in connection with the arbitration by the Prime Minister to settle as to which side Chandigarh should go and says - "Pressure was put upon the petitioner that he should yield on this issue and arbitration should be accepted. The petitioner refused to budge an inch from his declared stand and publicly made statements that he would never allow arbitration to take place and that the Award of the Shah Commission should be implemented without any further inquiry. "The petitioner then points out that he was the proposer of Shri Subba Rao for the office of the Presidentship of India and then goes on to say that "In view of all these facts which have been stated above, the Central Government thought that the only way now to throw the petitioner out of power was to issue the Proclamation under Article 356 of the Constitution of India. By Parliamentary methods of Democracy the Central leadership had failed to throw out the petitioner since he commanded the majority of the Legislature Party in Haryana Assembly. He has been thrown out of power by a *mala fide* method and improper means". It is then said that "The Proclamation, Annexure 'A', has actually been issued on the advice of the Home Minister of India. According to the Government of India (Allocation of Business) Rules, 1961, it is provided that the Minister of Home Affairs will be in charge of the following items :-

Item No. 27. Matters relating to the Emergency Provisions of the Constitution other than those relating to financial emergency.

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The President of India is a Constitutional head. He, functions on the advice of the Cabinet and the particular subject of the issue of a Proclamation is directly under the Hon'ble Minister. The Proclamation has, therefore, been issued by the President of India in his name as advised by the Home Minister of India. The Proclamation states that it is issued on receipt of the report of the Governor of the State of Haryana and all other information. The other information has not been mentioned in the Proclamation at all and is not available to the petitioner. The report of the Governor is available to the petitioner as it has been published in the Press and the same is filed as Annexure 'B' to this petition. The Proclamation issued in the name of the President is, in sum and substance as also constitutionally, an order issued by the Government of India and is liable to be quashed in this writ petition."

5. The grounds upon which the constitutionality and legality of the President's Proclamation are questioned are broadly stated in the petition in this way - (a) that the petitioner commanded majority in the Legislative Assembly and as long as he had the majority, the Central Government was not competent to issue the Proclamation, which it could only issue when it had become impossible to carry on the Government of the State in accordance with Constitution, and the Proclamation does not show in what way the Government of the State could not be carried on and what are the provisions of the Constitution in accordance with which the Government could not be carried on, (b) that the satisfaction of the President while issuing the proclamation in fact means the satisfaction of the Union Home Minister, which must be based upon acts and

circumstances which are relevant to determine the issue that the Government of the State could not be carried on in accordance with the provisions of the Constitution, but no such facts have been mentioned in the Proclamation as the report of the Governor does not throw light on this aspect of the matter and in fact the Proclamation is not clear whether the report of the Governor has been accepted by the President, (c) that the report of the Governor makes it clear that in fact the Government of the State could be carried on according to the Constitution because the petitioner had continued to have majority in the Legislative Assembly, and that Article 356 of the Constitution only applies when there is a failure of constitutional machinery in a State which necessarily implies that there is no majority in the house which can run the Government, so that when admittedly the majority is there, the action to dissolve the Assembly can only be styled as *mala fide*, and (d) that the *mala fide* nature of the Proclamation is evident from the facts that the petitioner took a bold stand in saying that he would not allow arbitration by the Prime Minister in respect of Chandigarh and Bhakra Project and because efforts were made by the Centre to cause defections in the petitioner's party. These are broadly the grounds that are taken by the petitioner in the petition.

6. The petitioner made the Union of India through the Secretary in the Ministry of Home Affairs, Government of Shri Y.B. Chavan, Minister of Home Affairs, and the President of India as respondents to the petition. Sub-article (1) of Article 361 of the Constitution reads -

"361. (1) The President or the Governor or Rajpramukh 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."

7. In view of this provision in the Constitution, we issued rule *nisi* in this petition to respondents 1 and 2 but not to the President by our order of December 13, 1967. Respondent 2 has filed no return to the petition. A return has been filed by Mr. A. Dhar, Under Secretary to the Government of India in the Ministry of Home Affairs for and on behalf of respondent 1. The facts as stated in the petition are largely not denied, but where the petitioner has given his own assessment of the political situation that has not been admitted, nor are his inferences drawn from facts stated by him in the petition. It is admitted that on September 9, 1967, the Union Home Minister had a discussion with the Chief Ministers of Punjab, Haryana and Himachal Pradesh regarding the disputes relating to Chandigarh and Bhakra Project and also claims and counter-claims for territorial adjustments. Certain proposals to resolve those issues were discussed and formally communicated to the three Chief Ministers as they wanted to give further thought to the matter. But the allegation of the petitioner is denied that the Government of India tried to put pressure on the petitioner in this respect. It is stated that the allegation of *mala fides* against the Government is neither maintainable in law nor in fact, apart from it being vague and imprecise and not

capable of being answered. Then it is said that the power to issue Proclamation under Article 356 of the Constitution is not part of the executive power of the Union, the extent of which is given in Article 73 of the Constitution. Hence the issue of the Proclamation cannot be called an act of the Union Government carried out by the Home Minister of India in the name of the President. The issue of the Proclamation, it is stated, is an act of the President as distinguished from an act of the Government of India, and cannot be the subject-matter of any proceedings in any Court. No Court can ask the President to disclose it to the material on which the satisfaction of the President is based, nor can any Court investigate or pronounce upon the validity or invalidity of the President's satisfaction. In regard to the actual grounds taken by the petitioner in his petition, it is pointed out (a) that he had a precarious majority on November 17, 1967, and did not command majority on November 21, 1967, the day on which the Proclamation was issued by the President, that 'the proposition is not admitted and is controverted that so long as the petitioner had a majority it could not be said that a situation had arisen in which the Government of the State of Haryana could not be carried on in accordance with the provisions of the Constitution as such a situation can arise in a variety and that the framers of the Constitution did not intend to lay down those circumstances with an exactitude so as to make them capable of being objectively determined, the whole subjective satisfaction of the President who cannot be called to account by any Court, (b) that the report of the Governor clearly shows that a situation had arisen in which the Government of Haryana could not be carried on in accordance with the provisions of the Constitution, and that neither Article 356 of the Constitution nor any other provision or principle of law requires the President to show in the Proclamation in what way the Government of the State cannot be carried on and what are those provisions of the Constitution in accordance with which the Government cannot be carried on, (c) that the satisfaction of the President of India does not mean the satisfaction of the Union Home Minister, and as reasons for his satisfaction are not required to be set out in the Proclamation no Court can inquire into either the sufficiency or the relevancy of the reasons, (d) that the petitioner does not specify the persons whose *mala fides* are responsible for the Proclamation, (e) that if the issue of the Proclamation is against the spirit and essence of the Constitution, which it is not, the only remedy is provided by Article 61 of the Constitution, and (f) that no legal right of the petitioner or any other legislator has been infringed by the Proclamation as the legislators have no absolute legal right to continue for five years for they can only continue till the Legislature is dissolved whether at the end of ? five years or earlier.

8. At the hearing of the petition the learned counsel for the petitioner has only urged three arguments on behalf of the petitioner. The first argument is that the President is the Constitutional head, as has been held by their Lordships of the Supreme Court in *Rai Sahib Ram Jawala Kapur v. The State of Punjab*¹, and the same conclusion is available from the observations of their Lordships in *P. Joseph John v. State of Travancore-Cochin*², and *Partap Singh v. State of Punjab*³. The learned counsel has then referred to various sections of the Government of India Act, 1935, to show that there were provisions in that Act, which referred to the powers of the Governor-General to be exercised by him, in the exercise of his functions, in his discretion or in his individual judgment. Section 45 of that Act was a provision parallel to Article 356 of the Constitution. Sub-section (6) of section 45 of that Act said that 'the functions of the Governor-General under this section shall be exercised by him in his discretion'. The learned counsel has contended that in the Constitution no power has been left with the Head of the State to be exercised by him either in his discretion or in his individual judgment. All such power that was vested in the Governor-General by the Government of India Act, 1935, has been studiously

omitted from the Constitution. Rather according to sub-article (1) of Article 53, the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Sub-article (1) of Article 73, leaving out the executive power of the Union in relation to any treaty or agreement then provides that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has Power to make laws. Article 77 says -

"77. (1) All executive action of the Government of India shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an Order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business."

9. The argument of the learned counsel for the petitioner is that all executive power of the Union, though it vests in the President [Article 53(1)], but all executive action is expressed to be taken in his name [Article 77(1)] and nothing is to be done by the President himself. According to sub-article (3) of Article 77, the President must make rules for the more convenient transaction of the business of the Government of India and for allocation among Ministers of the said business. Pursuant to this power the President has made the Government of India (Allocation of Business) Rules, 1961, and rule 2 says that "the business of the Government of India shall be transacted in the Ministries, Departments, Secretariats and Officers specified in the First Schedule to these Rules (all of which are hereinafter referred to as 'department')". It is then pointed out that under the Ministry of Home Affairs, there is item 27 which refers to "Matters relating to the Emergency provisions of the Constitution. (other than those relating to financial emergency and Article 356 appears in Part XVIII of the Constitution under the heading 'Emergency Provisions'. When all these provisions are read together, the learned counsel says there is no manner of doubt left that the issue of a Proclamation by the President under Article 356 is an emergency provision in Part XVIII of the Constitution, which falls under item 27 of the rules of business of 1961, which rules have been made under article (3) of Article 77, and the President being the Constitutional Head must, therefore, make the Proclamation on the advice of the Union Home Minister. The learned counsel urges that if the President has not made the Proclamation on the advice of the Union Home Minister, it is illegal and unconstitutional, but if he has done so on the aid and advice of the Union Hon'ble Minister pursuant to item 27 in the rule of business of 1961 referring to the Ministry of Home Affairs, then the issue of the Proclamation is an act of the Union Government, Ministry of Home Affairs and it is not immune from challenge in a Court of law, because the second proviso to sub-article (1) of Article 361 says that nothing in that clause [sub-article (1)] shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India. Article 355 of the Constitution reads - "It shall be the duty of the Union to * * * * ensure that the Government of every State is carried on in accordance with the

provisions of this Constitution". The learned counsel points out that being the duty of the Union, it is within the executive power of the Union and, as the executive power of the Union can only be exercised by the President through the Ministers and in accordance with the rules made by him for the transaction of the business of the Government, as the rules of business of 1961, so the Proclamation issued by the President is an act of the Union Government and not that of the President himself which is immune from challenge in a Court of law under sub-article (1) of Article 361. All business of the Union Government, according to him, must be conducted according to the business rules made by the President under sub-article (3) of Article 77 and the issue of the Proclamation being within the executive power of the Union, the President must abide by those rules, so that he could not issue the Proclamation on his own: it is the act of the Union Government and hence open to challenge in this Court. The learned counsel stresses that if this was not so, Article 355 would become meaningless for how else will the Union discharge the duty laid upon it by that Article. That Article imposes a duty on the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution and Article 356 can only be attracted if the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The learned counsel has emphasized that these Articles must be read together and the conclusion is irresistible that the issue of the Proclamation under Article 356 is the function of the Union Government and hence can only be issued in the name of the President in accordance with Article 77 of the Constitution pursuant to the rules of business made under sub-article (3) of that Article. He then refers to Article 74 and points out that the Council of Ministers is to aid and advise the President in the exercise of his functions. So the President could not issue the Proclamation without such aid and advice from the Union Home Minister according to item 27 left to be dealt with by the Ministry of Home Affairs. According to him the word 'directly' as appearing in sub-article (1) of Article 53 has only reference to the appointment of the Prime Minister by the President according to sub-article (1) of Article 75, and he says that all other executive powers of the Union which vest in the President must only be exercised in accordance with Article 77 and the rules of business made by him for the convenient transaction of the business of the Government of India and in accordance with the allocation among the Ministers of the business. If the President acts independently of those provisions, then his action can be questioned in a Court of law. When action is according to those provisions, as the issue of the Proclamation in this case, it is open to challenge before a Court of law as the action of the Government of India. The learned counsel has referred to the stand taken in the return on behalf of respondent 1 that the issue of the Proclamation is not an act of the Government of India, but is an act of the President and he reiterates that in view of the provisions of Articles 53, 73, 74 and 77 and the rules of business of 1961, allocating the matters concerning Emergency provisions of the Constitution to the Ministry of Home Affairs in item 27 of the subjects left to that Ministry, this cannot be the correct constitutional position. He also cites as illustration section 44 of the Government of Union Territories Act, 1963 (Act 20 of 1963), to show that after the Constitution where it has been intended to leave any power to be exercised by a Constitutional Head in his discretion, it has been expressly so provided, and in regard to the powers of the President in the Constitution there is no such provision. The President under the Constitution must accept the advice of his Ministers according to Article 74 and this also applies, according to the counsel, to the President making a Proclamation, as in this case, under Article 356. To reinforce this argument the learned counsel refers to item 7 under the head 'Ministry of Home Affairs' in the rules of business of 1961, which item relates to the appointment, resignation and removal of the Chief Justice of India and Judges of the Supreme Court of India, and contends that the power in that respect can only be exercised by the President on the advice of

the Ministry of Home Affairs and not otherwise and that according to sub-article (2) of Article 124 it is the President who appoints the Chief Justice and the Judges of the Supreme Court. Similar, the learned counsel contends, is the position of the President with regard to the issue of a Proclamation under Article 356 of the Constitution.

10. The reply of the learned Attorney-General on behalf of the respondents to this argument is that there are executive powers of the Union which are, of course, to be exercised by the President having regard to Article 77 of the Constitution and the rules of business made by him under sub-article (3) of that Article in other words, the executive power of the Union is to be exercised by the Minister or the authority, who has been delegated the power in that behalf according to the business rules of 1961. But the learned Attorney-General points out that there are constitutional powers of the President which are apart and separate from the executive power of the Union, and the constitutional powers of the President includes the power to issue a Proclamation according to Article 356 of the Constitution. This has been expressly so held by their Lordships of the Supreme Court in *Jayantilal Amratlal Shodhan v. F.N. Rana*⁴, in which their Lordships observed - "An argument advanced at the Bar which proceeds upon an erroneous premise about the field in which Article 258(1) operates may, however, be noticed. That clause enables the President to entrust to the State the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union : it does not authorise the President to entrust to any other person; or body the powers and functions with which he is by the express provisions of the Constitution as President invested. 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)". Somewhat similar observations were made by their Lordships in *State of Uttar Pradesh v. Babu Ram Upadhyaya*⁵, , in regard to the powers of the Governor under Article 310 to terminate the services of a Government servant at pleasure and it was held that such power of the Governor is outside the scope of Article 154 which speaks of the executive power of the State vesting in the Governor. So the power of the President to issue a Proclamation under Article 356 is not the executive power of the Union referred to in Articles 52, 73 and 77, but it is the Constitutional power given to the President himself by the Constitution. Those Articles have no application in so far as the exercise of the power given to the President by the Constitution is concerned. The learned Attorney-General points out that the rules of business of 1961 have nothing to do with it because such a power, as held by their Lordships, cannot possibly be delegated. Clause (c) of sub-article (1) of Article 356 provides that, when making Proclamation under that Article, the President may make such incidental and consequential provisions as appear to him 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 the Constitution relating to any body or authority in the State, and the learned Attorney-General points out that item 27, under the heading 'Ministry of Home Affairs' in the rules of business of 1961 refers to such incidental or consequential provisions or orders pursuant to the same but has nothing to do with the power of the President under Article 356 to make the Proclamation. He has said that it may be that the President may have the aid and advice of his advisers according to sub-article (1) of

Article 74 in the exercise of such a constitutional function, but in view of sub-article (2) of that Article no Court can enquire into whether any advice in that respect was or was not tendered by a Minister or Ministers to the President, as the sub-article says that the question whether any, and if so, what, advice was tendered by the Minister to the President shall not be enquired into in any Court. This means not only that the nature of the advice cannot be enquired into but the very fact whether or not any advice was given cannot be enquired into in any Court.

11. It is thus settled that the Constitutional power of the President under Article 356 is apart and independent of the executive powers of the Union referred to in Articles 53, 73 and 77. Those Articles do not apply to the exercise of such a power by the President. On this approach the whole edifice of this argument on the side of the petitioner that the Proclamation was issued by the President in exercise of the executive powers of the Union and hence an executive act of the Union crumbles. This Court cannot even enquire into, in view of sub-article (2) of Article 74, whether any advice whatsoever was tendered by any Minister or the Union Home Minister to the President in connection with the issue of the impugned Proclamation under Article 356. So this argument on behalf of the petitioner cannot prevail.

12. The second argument urged by the learned counsel for the petitioner is that the impugned Proclamation is justiciable and open to consideration of this Court on the grounds (i) that it is the act of the Government of India, (ii) that Article 365, which provides that where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of the Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, read with Article 256, which says that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose, shows that the Government of India can issue directions to a State Government and the failure to comply with the same gives power to the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, and such directions can be questioned in Court, (iii) that in exercise of the power under Article 356 there are certain things which the President cannot possibly do, as, for instance, he cannot take over, according to the proviso to sub-article (1), the powers vested in and exercisable by a High Court, and that when he does that, that is a matter which the Court will consider and strike down an order to that effect by the President in his Proclamation as *ultra vires*, (iv) that the report or the other material upon which the satisfaction of the President is based in issuing a Proclamation under Article 356 has to be on material relevant to the issue of such a Proclamation and it will be for the Court to decide whether or not the material thus relied upon by the President is or is not relevant, though it will not be for it to go into the sufficiency of the same, and in this case the other information which the President had and has referred to in the Proclamation is not disclosed to the petitioner, and the report of the Governor refers to matters that are not relevant to justify the satisfaction of the President that the Government of Haryana State could not be carried on in accordance with the provisions of the Constitution, (v) that any recital in the Proclamation which is said to have been the basis of the satisfaction of the President can be shown by the petitioner to be wrong, and as the satisfaction of the President, referred to in Article 356 is a condition precedent, such a condition precedent can always be challenged before a Court of law and in this respect the

learned counsel relies upon *Emperor v. Sibnath Banerji*⁶, (vi) that the Proclamation does not show *ex facie* nor is there any such information available from the return for and on behalf of respondent 1 in regard to what provision of the Constitution, if any, Government of the State could not be carried on, (vii) that Article 356 of the Constitution postulates nothing else but the physical impossibility of carrying on the Government in accordance with the provisions of the Constitution, and it does not refer to and it has no application to a case where the Government is just not carried on well or in a good way. (viii) that Articles 74(2) 122(1) 163(3), 192, 329(a), 361(1) and 363(1) are illustrations when a matter is prohibited from being taken to a Court of law, but there is no constitutional inhibition in so far as Article 356 is concerned, (ix) that as the Proclamation affects the rights of the Members of the Legislative Assembly to continue as members and that arises out of the executive action of the Government of India, so it is a matter which can be considered by the Court, and (x) that the very fact that a heavy burden lies on the petitioner to establish that a recital in the Proclamation of the President is not correct or that the material on which the satisfaction of the President has been based is not relevant is itself a clear indication that the Proclamation is justiciable, and ? in this respect reliance is again placed on Sibnath Banerji's case.

13. In so far as the first two of these grounds are concerned, the same proceed on consideration that the impugned Proclamation has been issued in exercise of the executive power of the Union, which as has already been shown is not the case. There is no part of the Proclamation which deals with the taking over of the Power vested, in or exercisable by the High Court, and the third ground really is conjectural. When such a thing happens, then there will be occasion for consideration what is the effect of it having regard to the proviso to sub-article (1) of Article 356. In so far as the fourth ground is concerned, the learned counsel has urged that while the other information upon which the President's satisfaction has been based has not been available to the petitioner, the report of the Governor refers to irrelevant matters upon the basis of which the President could not have been satisfied, in the manner in which the Proclamation says that he was. It is said that it is not denied by the Governor that at all times the petitioner had the majority though it may have been a precarious majority. The Constitution does not recognise political parties. According to Article 163 there is to be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far he is by or under the Constitution required to exercise his functions or any of them in his discretion. So the Constitution requires not the majority of a party but the Chief Minister carrying with him majority of the members of the Assembly, who will support him in carrying on the Government of the State. The learned counsel has pressed that the report of the Governor itself shows that even at the time of making of the report the petitioner had a majority. The fact that certain instability was introduced in the situation because of defections or anticipated defections of some members of the Assembly is, according to him, irrelevant, for in that event another member of the Assembly who happened to command the majority support of the members would have become the Chief Minister. The statement in the report of the Governor that the Ministers were busy in maintaining themselves in power is again said to be irrelevant because that is what they are entitled to. In this respect he has referred to Sir Ivor Jennings' *Parliament*, 1957 Edition, page 22, where the learned author says-"The ministers and officers of the Royal household in the House of Commons number some sixty. Each minister has an unpaid private secretary bringing the total number of persons with an official or quasi official position unto more than one hundred. Where the parties are fairly evenly divided, it follows that the Government secures the approval of its proposals only because its members vote for themselves. In the Parliament of

1994 the Labour Prime Minister had only 191 supporters. Of these, fourteen were in the Cabinet and thirty-one were junior ministers. In other words the ministers and their parliamentary private secretaries comprised more than one-third of the regular supporters of the Government. The situation of a minority Government such as that of 1924 must necessarily be peculiar; but it must always be remembered that when 'control' by the House of Commons is spoken of the House for this purpose includes the ministers. The Government not only persuades its supporters to vote for it; it also votes for itself." So the learned counsel says that the number of Ministers referred to in the report was not a relevant factor nor was the fact that the Ministers were busy in maintaining themselves in saddle. He then points out that though there might have been instability, but that cannot mean that the Government of the State could not be carried on according to the Constitution so long as there was a member of the Assembly who could carry a majority of the members in support of him. His further criticism is that the Government officers continued to work in their jobs and merely because some may have been transferred or were threatened with transfer, that could not be read as failure of the Government not being carried on according to the Constitution. The learned counsel says that the substance of the report of the Governor is that the petitioner was maintaining his precarious majority in uncertain ? circumstances, which may be not acceptable means and there might have been some inconvenience to some Government servants, but all this meant only an unsatisfactory Government or not a good Government, to which situation Article 356 is not attracted. It is only attracted to a situation where the carrying on of the Government has become impossible, such as by a general strike or by circumstances in which the members of the Assembly are physically prevented from attending the Assembly or the like. So he has contended that the substance of the report of the Governor was irrelevant so far as the President was to be satisfied whether the Government of the State of Haryana could not be carried on according to the Constitution. The fifth ground is connected with the last, because it is an attempt to show that the recital in the Proclamation that the President was satisfied that the Government of Haryana State could not be carried on according to the provisions of the Constitution was not a correct recital. The reasoning in support of this is the same as put forth to support the earlier ground. No doubt in *Sibnath, Banerji's* case it was held by their Lordships of the Privy Council that the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of a condition necessary to the valid making of that order, can be questioned, but that was a case in which a detention order was said to have been made by the Governor, whereas it was admitted in Court that that was not so. No such inaccuracy or wrong recital appears in the impugned Proclamation. In this connection reference has also been made to *Bijoya Lakshmi Cotton Mills Ltd., v. State of West Bengal*⁷, in which at page 1150, their Lordships have pointed out that whether in making the order the Governor has acted in accordance with law still remains open to adjudication, and it is said that it is open to adjudication to see whether the President has made the impugned Proclamation in accordance with law. It has already been shown, while considering the first argument on the side of the petitioner that the Proclamation has been made in accordance with the provisions of the Constitution.

14. The reply of the learned Attorney-General is that the scheme of the Constitution is a democratic form of Government in which the electors elect their representatives. When they do so, they are persuaded by a programme or a philosophy of the party, which that party intends to carry out for the benefit of the electors. It is on that faith that the electors elect their representatives to the Assembly. If in a House of 81, something like 30 of their representatives keep on shifting their loyalty practically continuously, they deny the programme or the

philosophy on the basis of which they were elected to represent the electors. So they cease to represent those who elected them, of which the consequence is that the State cannot be said to have been governed according to the Constitution. The whole question is of a stable running and, maintaining of the Government and the report of the Governor shows that there was no stability whatsoever. If the Ministers were so busy in maintaining themselves in power that they were unable to attend to their daily work with the inevitable consequence that the administration suffered, the Government cannot be said to have been carried on according to the Constitution. Again, if the services were so demoralised by the threats of transfer that the administration was paralysed as was reported by the Governor, how can then it be said that the administration was being carried on according to the provisions of the Constitution. The Ministry as pointed out, merely existed for personal gains or advantages and not for a political ideology for which the electors had elected the members of the Assembly. So they were neither able to form any policy nor able to put any effect. There was almost constant crossing on the floor of the House with members shifting their loyalties far too frequently that it shook the stability in the Government and this they did to interfere not only with the policy of the Government, but also into the day-to-day working of the administration, the effect of which has been described in the report of the Governor as the paralysis of the administration. The judgment of the Ministers was not free from outside pressure by members, pressure exerted for personal ends only. He then points out that the report of the Governor makes a clear case that neither side was able to have a stable majority to form a Government, that administration was paralysed by the constant instability in the Government, that interference by individual members deprived the Chief Minister and the Ministers of their independence in the formulation and the execution of policies that there remained constant threat of the members to that effect, that the means adopted to win over members were not honourable, that officers were prone to succumb to threats of transfer, thus paralysing the administration, and that the political life of the State was polluted. All these considerations, the learned Attorney-General says, were relevant considerations for the Governor to state in his report and for the President to take into consideration in being satisfied or not whether the Government of the State was being carried on according to the Constitution. He then points out that as the Proclamation has been issued by the President in the exercise of his constitutional powers under Article 356, it was for him to be satisfied on a report of the Governor or otherwise whether the Government of the State could not be carried on in accordance with the provisions of the Constitution. He himself is not amenable to the jurisdiction of the Court. In his absence any recital made by him in his Proclamation cannot be a subject of controversy in this Court, and, therefore, the petitioner's side cannot be heard to criticise the recital in the Proclamation that the President was satisfied that the Haryana Government could not be carried on according to the provisions of the Constitution. The learned Attorney-General says that the recital has to be taken to be true as such and particularly when it proceeds from such a high authority. He further points out that the Proclamation not being an act of the Government of India, the satisfaction of the President as recited in it cannot be enquired into by a Court in any proceedings. In this respect he relies upon the judgment of Bose, J., in *Biman Chandra Bose v. Dr. H.C. Mukerjee, Governor, West Bengal*⁸, in which the learned Judge held that a comparison of clause (1) of Article 361 with clause (4) makes it clear that in respect of official acts an absolute bar is created, and so the matter cannot be agitated in a court.

15. There is then another aspect of the matter upon which the learned Attorney-General relies and that is this, that according to sub-article (3) of Article 356, every Proclamation under this Article has to be laid before each House of Parliament and it ceases to operate at the expiration of

two months unless before the expiration of that period it has been approved by a resolution of both the Houses of Parliament. Article 356 itself provides a machinery for reconsideration of the President's Proclamation by Parliament. It only continues if it is approved by Parliament according to sub-article (3), but ceases to operate if it is either not approved or if the approval is not forthcoming within two months of its date. All matters connected with such a Proclamation are thus open to debate in both the Houses of Parliament. So the Constitution has given power to Parliament to reconsider the Proclamation of the President. The learned Attorney-General contends that this Court cannot sit in judgment over the approval of the Proclamation of the President by Parliament. Nobody has denied that the impugned Proclamation has already been approved by Parliament according to sub-article (3) of Article 356 of the Constitution. In this respect the learned Attorney-General refers to the opinion of Madhavan Nair, J., in *K.K. Aboo v. Union of India*⁹, in which the learned Judge was of the opinion that the Proclamation under Article 356 by the very provisions of the Article requires approval of Parliament to be operative beyond a period of two months of its issue, and when the matter comes up before it, it is open to Parliament to withhold approval. If Parliament, in its supreme wisdom, is not impressed with the constitutionality, the legality or even the propriety of the Proclamation, it will not give its approval to it. The President who is an integral part of the Parliament (vide Article 79), may not be the executive head but the constitutional head of India.

16. In the first place, the President having issued the Proclamation pursuant to his constitutional power under Article 356 and it not being an executive act of Union, and the President not being amenable to the jurisdiction of this Court in view of sub-article (1) of Article 361, this Court cannot go into the validity or legality or propriety of his Proclamation. He cannot be present in Court and in his absence his Proclamation is open to consideration by this Court, not even the relevancy of the recital as to his satisfaction. None of the grounds urged by the learned counsel for the petitioner can alter this position. If there is any substance in those grounds, those would be the basis for a debate in both the Houses of Parliament on the question of approval or otherwise of the Proclamation. Secondly, the reconsideration of the Proclamation has specifically been vested by the Constitution in Parliament and that, in my opinion, excludes the jurisdiction in this Court in so far as the Proclamation is concerned in that respect. Nothing has been said against the power of Parliament to approve or to withhold approval of the Proclamation. There is not even a suggestion that Parliament has done anything beyond its Constitutional powers. It is a Constitutional power and it is a power which, as I have said, excludes the jurisdiction of this Court to consider any aspect of the Proclamation of the President having been expressly left by the Constitution within the sphere of powers of Parliament. So this argument on the side of the petitioner that the Proclamation of the President is justiciable in any aspect does not prevail either.

17. The third and the last argument on the side of the petitioner is that the Proclamation has been issued *mala fide*. No *mala fide* has been alleged in the President or in the Governor, and the Union Minister of Home Affairs does not come into the picture at all. This Court has no jurisdiction in view of Article 74(2) even to inquire whether he rendered any advice to the President in regard to the issue of the Proclamation. So, in so far as the question of malice in fact is concerned, no allegation in this respect can be considered in this petition. There remains the question of malice in law on the ground that the report of the Governor discloses no ground which would have satisfied the President that the Government of Haryana was not being carried on according to the provisions of the Constitution. In the first place, the report of the Governor

has to be taken as such and the facts stated in it, in my opinion, cannot be questioned. I am further of the opinion that any inference drawn by the Governor and the conclusions reached by him cannot be questioned in Court either. The reason is that those are matters for the consideration of the President while considering whether he would or would not be satisfied in regard to the Government being carried on according to the provisions of the Constitution, and within two months of the date of the Proclamation for Parliament to consider the constitutionality, legality and propriety of it. The Proclamation not being open to consideration by this Court, it cannot question the President's recital in regard to the basis of his satisfaction. The Court has no jurisdiction to require disclosure of material forming basis of the satisfaction of the President. Secondly, it has already been stated above that there is amply sufficient material in the report of the Governor that the administration of the State had been paralysed and its real functioning was almost not there because the Ministers were unable to attend not only to the making of the policies but also to execution of the same. So the third argument cannot be accepted either.

18. No other argument has been urged on behalf of the petitioner and so this petition fails and is dismissed, but, in the circumstances of the case, there is no order in regard to costs.

R.S. Narula, J.

19. I agree and have nothing to add.

Petition dismissed.

Cases Referred.

- 1AIR 1955 SC 549
- 2AIR 1955 SC 160
- 3AIR 1964 SC 72
- 4 AIR 1964 SC 648
- 5AIR 1961 SC 751
- 6AIR 1945 PC 156
- 7AIR 1967 SC 1145
- 8AIR 1952 Cal 799
- 9AIR 1965 Ker 229