

CASE NO.:
Writ Petition (civil) 257 of 2005

PETITIONER:
Rameshwar Prasad & Ors.

RESPONDENT:
Union of India & Anr.

DATE OF JUDGMENT: 24/01/2006

BENCH:
Y.K. Sabharwal, B.N. Agrawal & Ashok Bhan

JUDGMENT:
J U D G M E N T
[With W.P. (C) No.255 of 2005, W.P. (C) No.258 of 2005 and
W.P.(C) No.353 of 2005]

Y.K. Sabharwal, CJI.

The challenge in these petitions is to the constitutional validity of Notification dated 23rd May, 2005 ordering dissolution of the Legislative Assembly of the State of Bihar. It is a unique case. Earlier cases that came up before this Court were those where the dissolutions of Assemblies were ordered on the ground that the parties in power had lost the confidence of the House. The present case is of its own kind where before even the first meeting of the Legislative Assembly, its dissolution has been ordered on the ground that attempts are being made to cobble a majority by illegal means and lay claim to form the Government in the State and if these attempts continue, it would amount to tampering with constitutional provisions.

One of the questions of far reaching consequence that arises is whether the dissolution of Assembly under Article 356(1) of the Constitution of India can be ordered to prevent the staking of claim by a political party on the ground that the majority has been obtained by illegal means. We would first note the circumstances which led to the issue of impugned notification.

Factual Background

Election to the State of Bihar was notified by the Election Commission on 17th December, 2004. Polling for the said elections were held in three phases, i.e., 3rd February, 2005, 5th February, 2005 and 13th February, 2005. Counting of votes took place on 27th February, 2005. Results of the said elections were declared by the Election Commission. On 4th March, 2005, Notification was issued by the Election Commission in pursuance of Section 73 of Representation of People Act, 1951 (for short 'the RP Act, 1951') duly notifying the names of the members elected for all the constituencies along with party affiliation.

Bihar Legislative Assembly comprises of 243 members and to secure an absolute majority support of 122 Members of Legislative Assembly (in short 'MLAs'), is required. National Democratic Alliance (for short 'NDA'), a political coalition of parties comprising of the Bharatiya Janata Party (for short 'BJP') and the Janata Dal (United) (for short 'JD(U)') was the largest pre-poll combination

having the support of 92 MLAs. The party-wise strength in the Assembly was as under:

"(1)	NDA		92
(2)	RJD		75
(3)	LJP		29
(4)	Congress (I)	10	
(5)	CPI (ML)		07
(6)	Samajwadi Party	04	
(7)	NCP		03
(8)	Bahujan Samaj Party	02	
(9)	Independents	17	
(10)	Others	09	

Report dated 6th March, 2005 was sent by the Governor to the President, recommending newly constituted Assembly to be kept in suspended animation for the present. It reads as under:

"Respected Rashtrapati Jee,
The present Bihar Legislative Assembly has come to an end on 6th March, 2005. The Election Commission's notification with reference to the recent elections in regard to constitution of the new Assembly issued vide No. 308/B.R.-L.A./2005 dated 4th March 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005 is enclosed (Annexure-I)

2. Based on the results that have come up, the following is the party-wise position:

1.	R.J.D.	:	75	
2.	J.D.(U)	:	55	
3.	B.J.P.	:	37	
4.	Cong(I)	:	10	
5.	B.S.P.	:	02	
6.	L.J.P.	:	29	
7.	C.P.I.	:	03	
8.	C.P.I.(M)	:		01
9.	C.P.I.(M.L.):		07	
10.	N.C.P.	:	03	
11.	S.P.	:		04
12.	Independent:		17	

				243

The R.J.D. and its alliance position is as follows:

not recd.)	1.	R.J.D.	:	75	
	2.	Cong.(I)	:		10
	3.	C.P.I.	:	03	(support letter
	4.	C.P.I.(M)	:		01
	5.	N.C.P.	:	03	

					92

The N.D.A. alliance position is as follows:

1.	B.J.P.	:	37
2.	J.D.(U)	:	55
			92

3. The present C.M., Bihar, Smt. Rabri Devi met me on 28.2.2005 and submitted her resignation along with her Council of Ministers. I have accepted the same and asked her to continue till an alternative arrangement is made.

4. A delegation of members of LJP met me in the afternoon of 28.2.2005 and they submitted a letter (Annexure II) signed by Shri Ram Vilas Paswan, President of the Party, stating therein that they will neither support the RJD nor the BJP in the formation of Government. The State President of Congress Party, Shri Ram Jatan Sinha, also met in the evening of 28.2.2005.

5. The State President of BJP, Shri Gopal Narayan Singh along with supporters met me on 1.3.2005. They have submitted a letter (Annexure III) stating that apart from combined alliance strength of 92 (BJP & JD(U) they have support of another 10 to 12 Independents. The request in the letter is not to allow the RJD to form a Government.

6. Shri Dadan Singh, State President of Samajwadi Party, has sent a letter (Annexure IV) indicating their decision not to support the RJD or NDA in the formation of the Govt. He also met me on 2.3.2005.

7. Shri Ram Naresh Ram, Leader of the CPI (ML-Lib.), Legislature Party along with 4 others met me and submitted a letter (Annexure V) that they would not support any group in the formation of Government.

8. Shri Ram Vilas Paswan, National President of LJP, along with 15 others met me and submitted another letter (Annexure VI). They have reiterated their earlier stand.

9. The RJD met me on 5.3.2005 in the forenoon and they staked claim to form a Government indicating the support from the following parties :

1.	Cong(I) :	10	
2.	NCP	:	03
3.	CPI(M) :	01	
4.	BSP	:	02

(Copy enclosed as Ann.VII)

The RJD with the above will have only 91.

They have further claimed that some of the Independent members may support the RJD. However, it has not been disclosed as to the number of Independent MLAs from whom they expect support nor their names.

Even if we assume the entire

Independents totalling 17 to extend support to RJD alliance, which has a combined strength of 91, the total would be 108, which is still short of the minimum requirement of 122 in a House of 243.

10. The NDA delegation led by Shri Sushil Kumar Modi, MP, met me in the evening of 5.3.2005. They have not submitted any further letter. However, they stated that apart from their pre-election alliance of 92, another 10 Independents will also support them and they further stated that they would be submitting letters separately. This has not been received so far. Even assuming that they have support of 10 Independents, their strength will be only 102, which is short of the minimum requirement of 122.

11. Six Independent MLAs met me on 5.3.2005 and submitted a letter in which they have claimed that they may be called to form a Government and they will be able to get support of others (Annexure VIII). They have not submitted any authorization letter supporting their claim.

12. I have also consulted the Legal experts and the case laws particularly the case reported in AIR 1994 SC 1918 where the Supreme Court in para 365 of the report summarised the conclusion. The relevant part is para 2, i.e., the recommendation of the Sarkaria Commission do merit serious consideration at the hands of all concerned. Sarkaria Commission in its report has said that Governor while going through the process of selection should select a leader who in his judgment is most likely to command a majority in the Assembly. The Book "Constitution of India" written by Shri V.N. Shukla (10th edition) while dealing with Article 75 and Article 164 of the Constitution of India has dealt with this subject wherein it has quoted the manner of selection by the Governor in the following words :
"In normal circumstances the Governor need have no doubt as to who is the proper person to be appointed; it is leader of majority party in the Legislative Assembly, but circumstances can arise when it may be doubtful who that leader is and the Governor may have to exercise his personal judgment in selecting the C.M. Under the Constitutional scheme which envisages that a person who enjoys the confidence of the Legislature should alone be appointed as C.M."

In Bommai's case referred to above in para 153, S.C. has stated with regard

to the position where, I quote :
"After the General Elections held, no political party or coalition of parties or group is able to secure absolute majority in the Legislative Assembly and despite the Governor's exploring the alternatives, the situation has arisen in which no political party is able to form stable Government, it would be case of completely demonstrable inability of any political party to form a stable Government commanding the confidence of the majority members of the Legislature. It would be a case of failure of constitutional machinery."

13. I explored all possibilities and from the facts stated above, I am fully satisfied that no political party or coalition of parties or groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independents MLAs, a situation has emerged in which no political party or groups appears to be able to form a Government commanding a majority in the House. Thus, it is a case of complete inability of any political party to form a stable Government commanding the confidence of the majority members. This is a case of failure of constitutional machinery.

14. I, as Governor of Bihar, am not able to form a popular Government in Bihar, because of the situation created by the election results mentioned above.

15. I, therefore, recommend that the present newly constituted Assembly be kept in suspended animation for the present, and the President of India is requested to take such appropriate action/decision, as required."

Since no political party was in a position to form a Government, a notification was issued on 7th March, 2005 under Article 356 of the Constitution imposing President's rule over the State of Bihar and the Assembly was kept in suspended animation. Another notification of the same date was also issued, inter alia, stating that the powers exercisable by the President shall, subject to the superintendence, direction and control of the President be exercisable also by the Governor of Bihar. The object of the proclamation imposing President's rule was to give time and space to the political process to explore the possibility of forming a majority Government in the State through a process of political realignment as is reflected in the speech of Home Minister Shri Shivraj V. Patil in the Rajya Sabha on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was discussed. The Home Minister said :
"\005. But, I would like to make one point very clear. We are not very happy to

impose President's Rule on the State of Bihar. Let there be no doubt in the minds of any Members of the House; we are not happy. After the elections we would have been happy if Government would have been formed by the elected representatives. That was not possible and that is why, President's Rule was imposed. But we cannot take pleasure in saying "Look we did this". We are not happy about it. I would ensure that the President's Rule is not continued for a long time. The sooner it disappears, the better it would be for Bihar, for democracy and for the system we are following in our country. But, who is to take steps in this regard? It is the elected representatives who have to take steps in this respect. The Governor can and, I would like to request in this House that elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. Even if it is minority Government with a slight margin, there is no problem\005.."

The Home Minister gave a solemn assurance to the nation that the imposition of President's rule was temporary and transient and was intended to explore the possibility of forming a popular Government. According to the petitioners, process of realignment of forces was set in motion and several political parties and independent MLAs re-considered their position in terms of their commitment to provide a majority Government in deference to the popular wishes of the people and announced support to the NDA led by Shri Nitish Kumar. First such announcement was made by the entire group of 17 independent MLAs on 8th April, 2005. The signed declaration was released by these MLAs to the media. With the support of 17 independent MLAs the support base of the NDA rose to 109 MLAs. Later on, it rose to 115 MLAs with the declaration of support by the Samajwadi Party (SP), the Bahujan Samaj Party (BSP) and the Nationalist Congress Party (NCP). Governor of Bihar sent a report on 27th April, 2005 to the President of India, inter alia, stating that the newspaper reports and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received, indicated a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which was a disturbing feature. According to the said report, the situation was fast approaching a scenario wherein if the trend is not arrested immediately the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. That it would not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll. The report is reproduced below in its entirety.

"Respected Rashtrapati Jee,

I invite a reference to my D.O. No.33/GB dated the 6th March, 2005 through which a detailed analysis of the results of the Assembly elections were made and a recommendation was also made to keep the newly constituted Assembly (constituted vide Election Commission's notification No.308/BR-L.A./2005 dated the 4th March, 2005 and 464/Bihar-LA/2005, dated the 4th March, 2005) in a suspended animation and also to issue appropriate direction/decision. In the light of the same, the President was pleased to issue a proclamation under Article 356 of the Constitution of India vide notification NO.G.S.R. 162(E), dated 7th March, 2005, and the proclamation has been approved and assented by the Parliament.

2. As none of the parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government wherein they could claim a support of a simple majority of 122 in a House of 243, I had no alternative but to send the above mentioned report with the said recommendation.

3. I am given to understand that serious attempts are being made by JD-U and BJP to cobble a majority and lay claim to form the Government in the State. Contacts in JD-U and BJP have informed that 16-17 LJP MLAs have been won over by various means and attempt is being made to win over others. The JD-U is also targetting Congress for creating a split. It is felt in JD-U circle that in case LJP does not split then it can still form the Government with the support of Independent, NCP, BSP and SP MLAs and two-third of Congress MLAs after it splits from the main Congress party. The JD-U and BJP MLAs are quite convinced that by the end of this month or latest by the first week of May JD-U will be in a position to form the Government. The high pressure moves of JD-U/BJP is also affecting the RJD MLAs who have become restive. According to a report there is a lot of pressure by the RJD MLAs on Lalu Pd. Yadav to either form the Government in Bihar on UPA pattern in the centre, with the support of Congress, LJP and others or he should at least ensure the continuance of President's rule in the State.

4. The National Commission to review the working of the Constitution has also noticed that the reasons for increasing instability of elected Governments was attributable to unprincipled and opportunistic political realignment from

time to time. A reasonable degree of stability of Government and a strong Government is important. It has also noticed that the changing alignment of the members of political parties so openly really makes a mockery of our democracy.

Under the Constitutional Scheme a political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programmes. The 10th Schedule of the Constitution was introduced on the premise that political propriety and morality demands that if such persons after the elections changes his affiliation, that should be discouraged. This is on the basis that the loyalty to a party is a norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate.

5. Newspaper reports in the recent time and other reports gathered through meeting with various party functionaries/leaders and also intelligence reports received by me, indicate a trend to gain over elected representatives of the people and various elements within the party and also outside the party being approached through various allurements like money, caste, posts etc., which is a disturbing feature. This would affect the constitutional provisions and safeguards built therein. Any such move may also distort the verdict of the people as shown by results of the recent elections. If these attempts are allowed to continue then it would be amounting to tampering with constitutional provisions.

6. Keeping in view the above mentioned circumstances the present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practiced by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through a fresh poll.

7. I am submitting these facts before the Hon'ble President for taking such action as deemed appropriate."

According to the petitioners, Lok Janashakti Party (LJP) had contested elections on the plank of opposing the then Government led by Rashtriya Janata Dal (RJD), which again is a constituent of United Progressive Alliance (UPA) in the Centre. It had a strength of 29 MLAs in the new assembly. The leader of LJP Shri Ram Vilas Paswan had taken the stand that he was opposed to

RJD as well as NDA led by the BJP. MLAs belonging to LJP were in a rebellious mood. About 22 MLAs belonging to the LJP assembled on or around 21st May, 2005 and started working towards a major political realignment in the stand of the said party. According to them, 22 LJP members of the Legislative wing supported by members of the original political party reached a consensus subsequently to merge their party with the JD(U). That, with this the repolarisation of political forces was complete. According to them the proposed merger between two political formations was in consonance with the principles enumerated in para 4 of the Tenth Schedule to the Constitution. It provides that on a merger of the political party, all the members of the new political party with which the merger has taken place if and only if not less than two-third of the members of the said party have agreed to the said merger. It is their allegation that in order to thwart the formation of a Government led by JD(U) the Governor of Bihar sent another report from its Camp Office in Delhi on 21st May, 2005 to the President of India. It was reiterated in the report that from the information gathered through reports from media, meeting with various political functionaries, as also intelligence reports, a trend was indicated to win over elected representatives of the people. In his view a situation had arisen in the State wherein it would be desirable in the interest of State that assembly which has been kept in suspended animation be dissolved so that the people/electorate could be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course. The report dated 21st May, 2005 is reproduced in its entirety as follows :

"Respected Rashtrapati Jee,
I invite a reference to my D.O. letter No.52/GB dated 27th April, 2005 through which I had given a detailed account of the attempts made by some of the parties notably the JD-U and BJP to cobble a majority and lay a claim to form a Government in the State. I had informed that around 16-17 MLAs belonging to LJP were being wooed by various means so that a split could be effected in the LJP. Attention was also drawn to the fact that the RJD MLAs had also become restive in the light of the above moves made by the JD-U. As you are aware after the Assembly Elections in February this year, none of the political parties either individually or with the then pre-election combination or with post-election alliance combination could stake a claim to form a popular Government since they could not claim a support of a simple majority of 122 in a House of 243 and hence the President was pleased to issue a proclamation under Article 356 of the Constitution vide notification No. \026 GSR \026 162 (E) dated 7th March, 2005 and the Assembly was kept in suspended animation. The reports received by me in the recent past through the media and also through meeting with various political

functionaries, as also intelligence reports, indicate a trend to win over elected representatives of the people. Report has also been received of one of the LJP MLA, who is General Secretary of the party having resigned today and also 17-18 more perhaps are moving towards the JD-U clearly indicating that various allurements have been offered which is very disturbing and alarming feature. Any move by the break away faction to align with any other party to cobble a majority and stake claim to form a Government would positively affect the Constitutional provisions and safeguards built therein and distort the verdict of the people as shown by the results in the recent Elections. If these attempts are allowed it would be amounting to tampering with Constitutional provisions. Keeping the above mentioned circumstances, I am of the considered view that if the trend is not arrested immediately, it may not be possible to contain the situation. Hence in my view a situation has arisen in the State wherein it would be desirable in the interest of the State that the Assembly presently kept in suspended animation is dissolved, so that the people/electorate can be provided with one more opportunity to seek the mandate of the people at an appropriate time to be decided in due course."

The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs. (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly which has been impugned in these writ petitions.

Challenging proclamation dated 23rd May, 2005 issued under Article 356 of the Constitution ordering dissolution of Bihar Legislative Assembly, petitioners have also prayed for restoration of Election Commission notification dated 4th May, 2005 issued under Section 73 of the RP Act of 1951.

According to the petitioners, the condition precedent for dissolving the assembly is that there must be satisfaction of the President that a situation has arisen in which the Government of a State cannot be carried on in accordance with the provisions of the Constitution. That this satisfaction has to be based on cogent material. Power of dissolution cannot be used to prevent the staking of claim for the formation of a Government by a political party with support of others. That the assembly

was placed under suspended animation with the intention of providing time and space to political parties to explore the possibility of providing a majority Government in the State. No sooner the process of realignment was complete ensuring that the NDA led by Shri Nitish Kumar had the support of over 135 MLAs, report was sent by the Governor. The midnight meeting of the Cabinet was hurriedly called in order to prevent the formation of a Government. It was incumbent upon the Governor to make a meaningful and real effort for securing the possibility of a majority Government in the State. According to them the intention of the Governor was to prevent the formation of a Government led by Shri Nitish Kumar. That there was no material available or in existence to indicate that any political defection was being attempted through the use of money or muscle power. In the absence of any such material the exercise of power under Article 356 was a clear fraud on the exercise of power.

That allegations in the Governor's report of horse trading was factually incorrect and fictional. It was incumbent upon the Governor to verify the facts personally from the MLAs. That under the scheme of the Constitution the decision with regard to mergers and disqualifications on the ground of defection or horse trading is vested in the Speaker. The Governor could not have attempted to act on that basis and arrogated to himself such an authority. Relying heavily on the Nine Judge Bench judgment of this Court in S.R.Bommai & Ors. v. Union of India & Ors. [(1994) 3 SCC 1], it was contended that action of the Governor is mala fide in law; irrational, without any cogent material to support the conclusion arrived at and is based on mere ipse dixit and, thus, was not sustainable in law. It was contended that in exercise of judicial review this Court should quash the impugned notification and as a consequence restore the legislative assembly constituted by the Election Commission notification dated 4th March, 2005. Mr.Soli Sorabjee led the arguments in support of the challenge to the validity of the impugned notification contending that the dissolution of the Assembly when examined in the light of law laid down in Bommai's case (supra) is clearly unconstitutional and deserves to be set aside and the status quo ante at least as on 7th March, 2005 may be directed.

Mr.Viplav Sharma, advocate, appearing in person in writ petition No.258 of 2005 adopting the arguments of Mr.Sorabjee further contended that before even elected candidates making and subscribing oath or affirmation, as contemplated by Article 188 of the Constitution, even the Assembly could not be placed under suspended animation and status quo as on the date of issue of notification under Section 73 of the RP Act of 1951 deserves to be directed.

Mr. Narasimha, appearing in Writ Petition (C) No.353 for the petitioner, also adopted the arguments of Mr.Sorabjee but at the same time further contended that it is not legally permissible to order the dissolution of Assembly before its meeting even once and the MLAs being administered the oath as contemplated by the Constitution. This was also the submission of Mr. Viplav Sharma. Arguments on behalf of respondent \026 Union of India were led by learned Attorney General, Mr. Milon Banerjee, followed by learned Solicitor General and Additional Solicitor General, Mr. Gulam Vahanavati and

Mr. Gopal Subramaniam respectively. Mr. P.P. Rao, learned senior advocate argued for State of Bihar. We place on record our appreciation for excellent and very able assistance rendered by all the advocates. After hearing arguments on the question of the Governor not being answerable to any Court in view of immunity granted by Article 361(1) of the Constitution, we accepted the submission of the Government in terms of our order dated 8th September, 2005 that notice may not be issued to the Governor, giving brief reason in order to be followed by detailed reasons later. The said order reads as under :

"On the question whether the Governor could be impleaded in his capacity as the Governor and whether notice could be issued to him on the writ petitions in the context of averments made and the prayers contained in the petitions and other aspects highlighted in the order dated 31st August, 2005, we have heard Mr. Soli J. Sorabjee, learned senior counsel appearing in Writ Petition (C) No.257 of 2005, and Mr. Viplov Sharma, petitioner-in-person in Writ Petition (C) No.258 of 2005. We have also heard the submissions made by Mr. Milon K. Banerji, Attorney General for India, and Mr. Gopal Subramaniam, learned Additional Solicitor General.

The Constitution of India grants immunity to the Governor as provided in Article 361. Article 361(1), inter alia, provides that the Governor 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 exercise and performance of those powers and duties. It is submitted by learned Attorney General and Additional Solicitor General that in view of Article 361(1), this Court may not issue notice to the Governor. While we accept the submission but, at the same time, it is also necessary to note that the immunity granted to the Governor does not affect the power of the Court to judicially scrutinize the attack made to the proclamation issued under Article 356(1) of the Constitution of India on the ground of mala fides or it being ultra vires. It would be for the Government to satisfy the court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of law. Even, the expression "purporting to be done" in Article 361 does not cover acts which are mala fide or ultra vires and, thus, the Government supporting the proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the ground of mala fides or

proclamation being ultra vires would not be examined by the Court. At this stage, we have not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. That is a question still to be argued.

These are our brief reasons. We will give detailed reason later."

Under the aforesaid factual background, the points that fall for our determination are :

(1) Is it permissible to dissolve the Legislative Assembly under Article 174(2)(b) of the Constitution without its first meeting taking place?

(2) Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

(3) If the answer to the aforesaid question is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

(4) What is the scope of Article 361 granting immunity to the Governor?

After hearing elaborate arguments, by a brief order dated 7th October, 2005, the notification dated 23rd May, 2005 was held to be unconstitutional but having regard to the facts and circumstances of the case, relief directing status quo ante to restore the Legislative Assembly as it stood on 7th March, 2005, was declined. The Order dated 7th October reads as under :

"The General Elections to the Legislative Assembly of Bihar were held in the month of February 2005. The Election Commission of India, in pursuance of Section 73 of the Representation of the People Act, 1951 in terms of Notification dated 4th March, 2005 notified the names of the elected members.

As no party or coalition of the parties was in a position to secure 122 seats so as to have majority in the Assembly, the Governor of Bihar made a report dated 6th March, 2005 to the President of India, whereupon in terms of Notification G.S.R.162(E) dated 7th March, 2005, issued in exercise of powers under Article 356 of the Constitution of India, the State was brought under President's Rule and the Assembly was kept in suspended animation. By another Notification G.S.R.163(E) of the same date, 7th March, 2005, it was notified that all powers which have been assumed by the President of India, shall, subject to the superintendence direction and control of the President, be exercisable also by the Governor of the State. The Home Minister in a speech made on 21st March, 2005 when the Bihar Appropriation (Vote on Account) Bill, 2005 was being discussed in the Rajya Sabha said that the Government was not happy to impose President's Rule in Bihar and would have

been happy if Government would have been formed by the elected representatives after the election. That was, however, not possible and, therefore, President's Rule was imposed. It was also said that the Government would not like to see that President's Rule is continued for a long time but it is for elected representatives to take steps in this respect; the Governor can ask them and request them and he would also request that the elected representatives should talk to each other and create a situation in which it becomes possible for them to form a Government. The Presidential Proclamation dated 7th March, 2005 was approved by the Lok Sabha at its sitting held on 19th March, 2005 and Rajya Sabha at its sitting held on 21st March, 2005.

The Governor of Bihar made two reports to the President of India, one dated 27th April, 2005 and the other dated 21st May, 2005. On consideration of these reports, Notification dated 23rd May, 2005 was issued in exercise of the powers conferred by sub-clause (b) of Clause (2) of Article 174 of the Constitution, read with clause (a) of the Notification G.S.R.162(E) dated 7th March, 2005 issued under Article 356 of the Constitution and the Legislative Assembly of the State of Bihar was dissolved with immediate effect.

These writ petitions have been filed challenging constitutional validity of the aforesaid Proclamation dated 23rd May, 2005. Mr. Soli J. Sorabjee, Senior Advocate and Mr. P.S. Narasimha, Advocate and Mr. Viplav Sharma, advocate appearing-in-person have made elaborate submissions in support of the challenge to the impugned action of dismissing the assembly.

On the other hand, Mr. Milton K. Banerjee, Attorney-General for India, Mr. Goolam E. Vahanavati, Solicitor General and Mr. Gopal Subramaniam, Additional Solicitor General appearing for Union of India and Mr. P.P. Rao, Senior Advocate appearing for the State of Bihar also made elaborate submissions supporting the impugned Proclamation dated 23rd May, 2005.

Many intricate and important questions of law having far reaching impact have been addressed from both sides. After the conclusion of the hearing of oral arguments, written submissions have also been filed by learned counsel. Fresh elections in State of Bihar have been notified. As per press note dated 3rd September, 2005 issued by Election Commission of India, the

schedule for general elections to the Legislative Assembly of Bihar has been announced. According to it, the polling is to take place in four phases commencing from 18th October, 2005 and ending with the fourth phase voting on 19th November, 2005. As per the said press note, the date of Notification for first and second phase of poll was 23rd September and 28th September, 2005, date of poll being 18th October, 2005 and 26th October, 2005 respectively. Notifications for third and fourth phases of poll are to be issued on 19th and 26th October, 2005 respectively.

Keeping in view the questions involved, the pronouncement of judgment with detailed reasons is likely to take some time and, therefore, at this stage, we are pronouncing this brief order as the order of the court to be followed by detailed reasons later. Accordingly, as per majority opinion, this court orders as under:

1. The Proclamation dated 23rd May, 2005 dissolving the Legislative Assembly of the State of Bihar is unconstitutional.
2. Despite unconstitutionality of the impugned Proclamation, but having regard to the facts and circumstances of the case, the present is not a case where in exercise of discretionary jurisdiction the status quo ante deserves to be ordered to restore the Legislative Assembly as it stood on the date of Proclamation dated 7th March, 2005 whereunder it was kept under suspended animation."

POINT NO.1 - Is it permissible to dissolve the Legislative Assembly under Article 174(2) (b) of the Constitution without its first meeting taking place?

Article 174 of the Constitution deals with the power of the Governor to summon the House, prorogue the House and dissolve the Legislative Assembly. This Court never had the occasion to consider the question of legality of dissolution of a Legislative Assembly even before its first meeting contemplated under Article 172 of the Constitution. It has been contended on behalf of the petitioners by Mr. Narsimha and Mr. Viplav Sharma, appearing-in-person, that a Legislative Assembly can be dissolved under Article 174(2)(b) only after its first meeting is held as postulated by Article 172 of the Constitution. The argument is that there cannot be any dissolution without even members taking oath and the Legislative Assembly coming into existence. What does not exist, cannot be dissolved, is the submission. In this regard, the question to be considered also is whether the date for first meeting of the Legislative Assembly can be fixed without anyone being in a position to form the Government.

Let us first examine the relevant constitutional and statutory provisions.

Part VI of the Constitution dealing with the States has six chapters but relevant for our purpose are Chapter II and Chapter III. Chapter II comprising Article 153 to Article 167 relates to the executive, Chapter III comprising Article 168 to Article 212 relates to the State Legislature.

The federal structure under our Constitution contemplates that there shall be a Legislature for every State which shall consist of a Governor and one or two Houses, as provided in Article 168. Article 170 prescribes that the Legislative Assembly of each State shall consist of members chosen by direct election from territorial constituencies in the States. Article 170, therefore, brings in the democratic process of election.

Article 164 puts into place an executive Government. It enjoins upon the Governor to appoint the Chief Minister and other ministers on the advice of the Chief Minister. The Council of Ministers (Article 163) exercises the executive power of the State as provided under Article 154. Article 164(2) provides that the Council of ministers shall be collectively responsible to the Legislative Assembly of the State.

As provided in Article 172, every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly. Article 174(1) provides that the Governor shall from time to time summon the House to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Article 174(2) (b) provides that the Governor may from time to time dissolve the Legislative Assembly. Every member of the Legislative Assembly of the State shall, before taking his seat, make and subscribe before the Governor, an oath or affirmation, as provided in Article 188 of the Constitution.

The contention urged is that the function of the Governor in summoning the House and administering the oath or affirmation to the members of the Legislative Assembly are not the matters of privilege, prerogative or discretion of the Governor but are his primary and fundamental constitutional obligations on which the principles of parliamentary democracy, federalism and even 'separation of power' are dependent. Further contention is that another constitutional obligation of the Governor is to constitute the executive Government.

According to Mr. Narasimha, the Governor failed to fulfill these constitutional obligations. Neither the executive Government nor the Legislative Assembly has been constituted by the Governor. On the other hand, the Governor has frustrated the very object of exercise of his constitutional obligation by dissolving the Legislative Assembly under Article 174(2)(b) without the Legislative Assembly being even constituted. When the Legislative Assembly is not even constituted, where is the question of its dissolution, is the contention urged. The submission is that under the scheme of Indian Constitution, it is impermissible to dissolve a Legislative Assembly before its first meeting and members making oath or affirmation as required by Article 188. According to the petitioners, under Indian Constitution, the Legislative Assembly is

duly constituted only upon the House being summoned and from the date appointed for its first meeting. Article 172 which provides for duration of State Legislatures reads as under:

"172. Duration of State Legislatures -

(1) Every Legislative Assembly of every State, unless sooner dissolved shall continue for (five years) from the date appointed for its first meeting and no longer and the expiration of the said period of (five years) shall operate as a dissolution of the Assembly:

Provided that the said period, may while a proclamation of Emergency is in operation, be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

(2) The Legislative Council of a State shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.

The aforesaid constitutional provision stipulates that five years term of a Legislative Assembly shall be reckoned from the date appointed for its first meeting and on the expiry of five years commencing from the date of the first meeting, the Assembly automatically stands dissolved by afflux of time. The duration of the Legislative Assembly beyond five years is impermissible in view of the mandate of the aforesaid provision that the Legislative Assembly shall continue for five years and 'no longer'. Relying upon these provisions, it is contended that the due constitution of the Legislative Assembly can only be after its first meeting when the members subscribe oath or affirmation under Article 188. The statutory deemed constitution of the Assembly under Section 73 of the R.P. Act, 1951, according to the petitioners, has no relevance for determining due constitution of Legislative Assembly for the purpose of Constitution of India.

Reference on behalf of the petitioners has also been made to law existing prior to the enforcement of the Constitution of India contemplating the commencement of the Council of State and Legislative Assembly from the date of its first meeting. It was pointed out that Section 63(d) in the Government of India Act, 1915 which dealt with Indian Legislature provided that every Council of State shall continue for five years and every Legislative Assembly for three years from the date of its first meeting. Likewise, Section 72(b) provided that every Governor's Legislative Council shall continue for three years from its first meeting. The Government of India Act, 1919, repealing 1915 Act, provided in Section 8(1) that every Governor's Legislative Council shall continue for three years from its first meeting and in Section 21 provided that every Council of State shall continue for five years and every Legislative Assembly for three years from its first meeting. Likewise, the Government of India Act, 1935 repealing 1919 Act, had provision identical to Article 172 of the Constitution.

Section 73 of the R.P. Act 1951, in so far as relevant for our purposes, is as under:

"73. Publication of results of general elections to the House of the People and the State Legislative Assemblies. \027 Where a general election is held for the purpose of constituting a new House of the People or a new State Legislative Assembly, there shall be notified by [the Election Commission] in the Official Gazette, as soon as may be after [the results of the elections in all the constituencies] [other than these in which the poll could not be taken for any reason on the date originally fixed under clause (d) of section 30 or for which the time for completion of the election has been extended under the provisions of section 153] have been declared by the returning officer under the provisions of section 53 or, as the case may be section 66, the names of the members elected for those constituencies] and upon the issue of such notification that House or Assembly shall be deemed to be duly constituted."

In the present case, Notification under Section 73 of the RP Act, 1951 was issued on 4th March, 2005. The deemed constitution of the Legislative Assembly took place under Section 73 on the issue of the said notification. The question is whether this deemed constitution of Legislative Assembly is only for the purpose of the RP Act, 1951 and not for the constitutional provisions so as to invoke power of dissolution under Article 174(2)(b). The stand of the Government is that in view of aforesaid legal fiction, the constitution of the Legislative Assembly takes place for all purposes and, thus, the Legislative Assembly is deemed to have been 'duly constituted' on 4th March, 2005 and, therefore, the Governor could exercise the power of dissolution under Article 174(2)(b).

Section 73 of the RP Act, 1951 enjoins upon the Election Commission to issue notification after declaration of results of the elections in all the constituencies. The superintendence, direction and control of elections to Parliament and to the Legislature of every State vests in Election Commission under Article 324 of the Constitution. Article 327 provides that Parliament may make provision with respect to all matters relating to, or in connection with, elections to the Legislative Assembly of a State and all other matters necessary for securing the 'due constitution' of the House of the Legislature. Article 329 bars the interference by courts in electoral matters except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Article 327 read with Section 73 of the RP Act, 1951 provide for as to when the House or Assembly shall be 'duly constituted'. No provision, constitutional or statutory, stipulates that the 'due constitution' is only for the purposes of Articles 324, 327 and 329 and not for the purpose of enabling the Governor to exercise power under Article 174(2)(b) of the Constitution. In so far as the argument based on Article 172 is concerned, it seems clear that the due constitution

of the Legislative Assembly is different than its duration which is five years \026 to be computed from the date appointed for its first meeting and no longer. There is no restriction under Article 174(2)(b) stipulating that the power to dissolve the Legislative Assembly can be exercised only after its first meeting. Clause (b) of proviso to Section 73 of the RP Act, 1951 also does not limit the deemed constitution of the Assembly for only specific purpose of the said Act or Articles 324, 327 and 329 of the Constitution. The said clause provides that the issue of notification under Section 73 shall not be deemed to affect the duration of the State Legislative Assembly, if any, functioning immediately before the issue of the said notification. In fact, clause (b) further fortifies the conclusion that the duration of the Legislative Assembly is different than the due constitution thereof. In the present case, we are not concerned with the question of duration of the Assembly but with the question whether the Assembly had been duly constituted or not so as to enable the Governor to exercise the power of dissolution under Article 174(2)(b). The Constitution of India does not postulate one 'due constitution' for the purposes of elections under Part XV and another for the purposes of the executive and the State Legislature under Chapter II and III of Part VI. The aforementioned provisions existing prior to the enforcement of Constitution of India are also of no relevance for determining the effect of deemed constitution of Assembly under Section 73 of the RP Act, 1951 to exercise power of dissolution under Article 274 (2)(b).

In K.K. Abu v. Union of India and Ors. [(AIR 1965 Kerala 229)], a learned Single Judge of the High Court rightly came to the conclusion that neither Article 172 nor Article 174 prescribe that dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting. Once the Assembly is constituted, it becomes capable of dissolution. This decision has been referred to by one of us (Arijit Pasayat, J.) in Special Reference No.1 of 2002 (popularly known as Gujarat Assembly Election matter) [(2002) 8 SCC 237]. No provision of the Constitution stipulates that the dissolution can only be after the first meeting of the State Legislature. The acceptance of the contention of the petitioners can also lead to a breakdown of the Constitution. In a given case, none may come forth to stake claim to form the Government, for want of requisite strength to provide a stable Government. If petitioners' contention is accepted, in such an eventuality, the Governor will neither be able to appoint Executive Government nor would he be able to exercise power of dissolution under Article 174(2)(b). The Constitution does not postulate a live Assembly without the Executive Government. On behalf of the petitioners, reliance has, however, been placed upon a decision of a Division Bench of Allahabad High Court in the case of Udai Narain Sinha v. State of U.P. and Ors. [AIR 1987 All.203]. Disagreeing with the Kerala High Court, it was held that in the absence of the appointment of a date for the first meeting of the Assembly in accordance with Article 172(1), its life did not commence for the purposes of that article, even though it might have been constituted by virtue of notification under Section 73 of the RP Act, 1951 so as to entitle the Governor to dissolve it by exercising power under Article 174(2). It was held by the Division

Bench that Section 73 of the RP Act, 1951 only created a fiction for limited purpose for paving the way for the Governor to appoint a date for first meeting of either House or the Assembly so as to enable them to function after being summoned to meet under Article 174 of the Constitution. We are unable to read any such limitation. In our view, the Assembly, for all intents and purposes, is deemed to be duly constituted on issue of notification under Section 73 and the duration thereof is distinct from its due constitution. The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided, unless the provisions are so clear as not to call for any other interpretation. This case does not fall in the later category.

In Gujarat Assembly Election Matter, the issue before the Constitution Bench was whether six months' period contemplated by Article 174(1) applies to a dissolved Legislative Assembly. While dealing with that question and holding that the said provision applies only to subsisting Legislative Assembly and not to a dissolved Legislative Assembly, it was held that the constitution of any Assembly can only be under Section 73 of the RP Act, 1951 and the requirement of Article 188 of Constitution suggests that the Assembly comes into existence even before its first sitting commences. (Emphasis supplied by us).

In view of the above, the first point is answered against the petitioners.

POINT NO.2: Whether the proclamation dated 23rd May, 2005 dissolving the Assembly of Bihar is illegal and unconstitutional?

This point is the heart of the matter. The answer to the constitutional validity of the impugned notification depends upon the scope and extent of judicial review in such matters as determined by a Nine Judge Bench decision in Bommai's case. Learned counsel appearing for both sides have made elaborate submissions on the question as to what is the ratio decidendi of Bommai's case.

According to the petitioners, the notification dissolving the Assembly is illegal as it is based on the reports of the Governor which suffered from serious legal and factual infirmities and are tainted with pervasive mala fides which is evident from the record. It is contended that the object of the reports of the Governor was to prevent political party led by Mr. Nitish Kumar to form the Government. The submission is that such being the object, the consequent notification of dissolution accepting the recommendation deserves to be annulled.

Under Article 356 of the Constitution, the dissolution of an Assembly can be ordered on the satisfaction that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. Such a satisfaction can be reached by the President on receipt of report from the Governor of a State or otherwise. It is permissible to arrive at the satisfaction on receipt of the report from Governor and on other material. Such a satisfaction can also be reached only on the report of the Governor. It is also permissible to reach such a conclusion even without the report of the Governor in case the President has other relevant material for reaching the satisfaction contemplated by Article 356. The expression 'or otherwise' is of wide amplitude.

In the present case, it is not in dispute that the satisfaction that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution has been arrived at only on the basis of the reports of the Governor. It is not the case of the Union of India that it has relied upon any material other than the reports of the Governor which have been earlier reproduced in extenso.

The Governor in the report dated 6th March, 2005 has referred to Bommai's case as also to the recommendations of Sarkaria Commission. Sarkaria Commission Report in Chapter IV deals extensively with the role of the Governors. Since in this case, the dissolution of the Assembly is based solely on the reports of the Governor and the issue also is as to the role played by the Governor and submissions also having been made on role which is expected from a high constitutional functionary like Governor, it would be useful to first examine that aspect.

Role of Governor

The role of the Governor has been a key issue in the matters of Central-State relations. The Constitution of India envisages three tiers of Government \026 the Union, State and the Local Self-Government. From the functional standpoint, it is stated that such a Constitution "is not a static format, but a dynamic process" [Report of the Sarkaria Commission on Centre-State Relations (1988)]. In the context of Union-State relations it has been noted that "the very dynamism of the system with all its checks and balances brings in its wake problems and conflicts in the working of Union-State relations."

In the light of a volatile system prevailing today, it is pertinent to recognize the crucial role played by the Governors in the working of the democratic framework. Addressing the Conference of Governors in June 2005, the President of India Dr. A.P.J. Abdul Kalam stressed the relevance of recommendations of the Sarkaria Commission and observed that "While there are many checks and balances provided by the Constitution, the office of the Governor has been bestowed with the independence to rise above the day-to-day politics and override compulsions either emanating from the central system or the state system." The Prime Minister Dr. Manmohan Singh on the same occasion noted that "you are the representatives of the center in states and hence, you bring a national perspective to state level actions and activities."

In *Hargovind Pant v. Dr. Raghukul Tilak & Ors.* [(1979) 3 SCC 458], observing on the issue as to whether a Governor could be considered as an "employee" of the Government of India, this Court said "it is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India."

Referring to Article 356 of the Constitution, the Court reasoned that "one highly significant role which he (Governor) has to play under the Constitution is of making a report where he finds 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 further added that the Governor "is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he

carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India."

Fortifying the same, Justice V.R. Krishna Iyer has observed that the mode of appointment can never legitimize any form of interference in the working of the Governor, else the concept of "judicial independence" would not be tenable, as even the judges of the High Courts and the Supreme Court are appointed by the President. (V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow:Eastern Book Co., 2003) at p.44).

The then Vice-President of India, Shri G.S. Pathak, had remarked in 1970 that "in the sphere which is bound by the advice of the Council of Ministers, for obvious reasons, the Governor must be independent of the Centre" as there may be cases "where the advice of the Centre may clash with advice of the State Council of Ministers" and that "in such cases the Governor must ignore the Centre's "advice" and act on the advice of his Council of Ministers."

Relevant for the present controversy, very significant observations were made in Bommai's case, when it was said "He (Governor) is as much bound to exercise this power in a situation contemplated by Article 356 as he is bound not to use it where such a situation has not really arisen" (para 272 \026 Jeevan Reddy, J. \026 Emphasis supplied by us)

The role of the Governor has come in for considerable criticism on the ground that some Governors have failed to display the qualities of impartiality expected of them. The Sarkaria Commission Report has noted that "many have traced this mainly to the fact that the Governor is appointed by, and holds office during the pleasure of the President, i.e., in effect, the Union Council of Ministers."

Rejecting the suggestion of an elected Governor, the Constituent Assembly repeatedly stressed on consultation with the Provincial/State Government prior to the appointment of the Governor. Sir Alladi Krishnaswamy Ayyar is quoted to have stated that "a convention of consulting the provincial cabinet might easily grow up" as was said to be the case in Canada (White Paper on the Office of the Governor, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow: Eastern Book Co., 2003) at p.45). Shri Jawaharlal Nehru had also observed in the debate on the appointment of Governor in the Constituent Assembly that a Governor "must be acceptable to the Province, he must be acceptable to the Government of the Province and yet he must not be known to be a part of the party machine of that province." He was of the opinion that a nominated Governor shall have "far fewer common links with the Centre."

Querying as to what could be an objective and representative body which will fit into our Constitutional framework to facilitate the appointment of Governors on meritorious basis, the Sarkaria Commission has observed that "There is no gainsaying that a procedure must be devised which can ensure objectivity in selection and adherence to the criteria for selection and insulate the system from political pressures. Also, the new procedure must not only be fair but should be seen to be fair." (Chapter IV "Role of the Governor", Report of the Sarkaria

Commission on Centre-State Relations (1988) at para 4.6.30). Recommending that the Vice-President of India and the Speaker of the Lok Sabha should be consulted by the Prime Minister in selecting a Governor, the Sarkaria Commission has noted that "such consultation will greatly enhance the credibility of the selection process."

The other related issue of debate was regarding the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various articles of the Draft Constitution relating to the exercise of specified functions by the Governor 'in his discretion' were deleted. (Chapter IV "Role of the Governor", Report of the Sarkaria Commission on Centre-State Relations (1988) at para 4.2.07). Article 163 of the Constitution (then Draft Article 143) generated considerable discussion, and Dr. Ambedkar is stated to have "maintained that vesting the Governor with certain discretionary powers was not contrary to responsible Government." (Constituent Assembly Debates (Volume VIII, Revised Edition) at pp.00-502).

The expression "required" found in Article 163(1) is stated to signify that the Governor can exercise his discretionary powers only if there is a compelling necessity to do so. It has been reasoned that the expression "by or under the Constitution" means that the necessity to exercise such powers may arise from any express provision of the Constitution or by necessary implication. The Sarkaria Commission Report further adds that such necessity may arise even from rules and orders made "under" the Constitution.

Observing that the Governor needs to discharge "dual responsibility" to the Union and the State the Sarkaria Commission has sought to evaluate the role of the Governors in certain controversial circumstances, such as, in appointing the Chief Minister, in ascertaining the majority, in dismissal of the Chief Minister, in dissolving the Legislative Assembly, in recommending President's Rule and in reserving Bills for President's consideration.

Finding that the position of the Governor is indispensable for the successful working of the Constitutional scheme of governance, the Sarkaria Commission has noted that "most of the safeguards will be such as cannot be reduced to a set of precise rules of procedure or practice. This is so because of the very nature of the office and the role of the Governor. The safeguards have mostly to be in the nature of conventions and practices, to be understood in their proper perspective and faithfully adhered to, not only by the Union and the State Governments but also by the political parties." (Chapter IV "Role of the Governor", Report of the Sarkaria Commission on Centre-State Relations (1988) at para 4.5.07). It was further added that "the fact that it will be impossible to lay down a concrete set of standards and norms for the functioning of a Governor will make it difficult for a Parliamentary Committee or the Supreme Court to inquire into a specific charge against a Governor."

Instrument of Instructions:

The Constituent Assembly, pursuant to the Report of the Provincial Constitution Committee, had decided to insert an Instrument of Instructions to the Governors in the form of a Schedule to the Constitution. Such an instrument was found to be necessary, "because of the

mode of appointment and the injunction to act upon the advice of Ministers were not contained in the Constitution itself." (The framing of India's Constitution \026 Select Documents (Volume IV, B. Shiva Rao (ed.), New Delhi: Universal Law Publishing Cp, 2004) at p. 86. The complete test of the suggested Instructions is reproduced in pp.88-90). In the Government of India Act, 1935, the Instrument of Instructions appeared as instructions from the Sovereign.

The suggested list of instructions considered by the Constituent Assembly included value based standards that are expected of a Governor in discharging his duties vis-à-vis \026appointment of the Chief Minister after ascertaining a "stable majority"; appointments of Council of Ministers who "will best be in a position collectively to command the confidence of the Legislature"; to constitute an Advisory Board comprising of duly elected members of the Legislature, including the Leader of the Opposition, "to aid the Governor in the matter of making appointments under the Constitution" such as that of the Auditor-in-Chief for the State, Chairman of the State Public Services Commission; and mandating the Governor to do "all that in him lies to maintain standards of good administration, to promote all measures making for moral, social and economic welfare and tending to fit all classes of the population to take their due share in the public life and government of the State, and to secure amongst all classes and creeds co-operation, goodwill and mutual respect for religious beliefs and sentiments."

The instructions were proposed as a Schedule to the Constitution as the Assembly felt that "it is preferable not to put them into the body of the Constitution, because they are conventions rather than legal rules." However, the same was not appended to the Constitution and lamenting about it, Shri A.G. Noorani has stated that the Instrument of Instructions could have codified conventions between the President and the Governors if allowed to exist. (A.G. Noorani, Constitutional Questions in India \026 The President, Parliament and the States (New Delhi: Oxford University Press, 2000) at p.11)

The P.V. Rajamannar Committee (1969), Inquiry Committee constituted by the Government of Tamil Nadu to report on the Centre-State relations, and the Study Team of the Administrative Reforms Commission (1967) headed by Shri M.C. Setalvad, have been quoted to have opined that "a specific provision should be inserted in the Constitution enabling the President to issue Instruments of Instructions to the Governors. The Instruments of Instructions should lay down guidelines indicating the matters in respect of which the Governor should consult the Central Government or in relation to which the Central Government could issue directions to him."

(White Paper on the Office of the Governor, Government of Karnataka (22nd September, 1983) c.f. V.R. Krishna Iyer, A Constitutional Miscellany (Second Edition, Lucknow: Eastern Book Co., 2003) at p.47). Justice Krishna Iyer has stated that a "Handbook" setting out the guidelines for Governors must be prepared officially by the Law Commission and approved by the Parliament to be kept as a reference in the same status as that of an Instrument of Instructions. However, the Sarkaria Commission has observed that "considering the multi-faceted role of the Governor and the nature of his functions and duties, we are of the view that it would be neither feasible nor desirable to formulate a

comprehensive set of guidelines for the exercise by him of his discretionary powers. No two situations which may require a Governor to use his discretion, are likely to be identical."

Discretionary Powers of the Governor:

Expounding in detail on the exercise of discretionary powers by the Governor, the Sarkaria Commission has mainly recommended the following:

? Appointment of the Chief Minister \026 It is clear that the leader of the party which has an absolute majority in the Legislative Assembly should invariably be called upon by the Governor to form a Government. However, if there is a fractured mandate, then the Commission recommends an elaborate step-by-step approach and has further emphasized that "the Governor, while going through the process of selection as described, should select a leader who, in his (Governor's) judgement, is most likely to command a majority in the Assembly. The Governor's subjective judgement will play an important role." Upon being faced by several contesting claims, the Commission suggests that the most prudent measure on part of the Governor would be to test the claims on the floor of the House.

? Dismissal of the Chief Minister \026 Recommending a test of majority on the floor of the House to ascertain whether an incumbent Chief Minister continues to enjoy the majority, the Commission clearly dissuades the Governor from dismissing the Ministry based only on his "subjective satisfaction".

? Dissolution of the Assembly \026 Despite best efforts, if ultimately a viable Ministry fails to emerge, a Governor is faced with two alternatives \026 he may either dissolve the Assembly or recommend President's rule under Article 356, leaving it to the Union Government to decide the question of dissolution. The Commission expressed its firm view that the proper course would be "to allow the people of the State to settle matters themselves". The Commission recommended that "the Governor should first consider dissolving the Assembly and arranging for a fresh election and before taking a decision, he should consult the leaders of the political parties concerned and the Chief Election Commissioner."

Para 4.11.04 of Sarkaria Commission Report specifically deals with the situation where no single party obtains absolute majority and provides the order of preference the Governor should follow in selecting a Chief Minister. The order of preference suggested is :

1. An alliance of parties that was formed prior to the Elections.
2. The largest single party staking a claim to form the Government with the support of others, including "independents".
3. A post-electoral coalition of parties, with all the partners in the coalition joining the Government.
4. A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside.

The Sarkaria Commission has noticed that in a number of situations of political instability in States, the Governors recommended President's Rule under Article 356 without exhausting all possible steps under the Constitution to induct or maintain a stable Government.

The Governors concerned neither gave a fair chance to contending parties to form a Ministry, nor allowed a fresh appeal to the electorate after dissolving the Legislative Assembly. Almost all these cases have been criticized on the ground that the Governors, while making their recommendations to the President behaved in a partisan manner. The report further states that there has been no uniformity of approach in such situations and that these aspects have been dealt with in Chapter VI 'Emergency Provisions'.

In Chapter VI, Sarkaria Commission dealt with the emergency provisions noting the concern of framers of the Constitution of need for such provision in a country of our dimensions, diversities, disparities and "multitudinous people, with possibly divided loyalties". They took care to provide that, in a situation of such emergency, the Union shall have overriding powers to control and direct all aspects of administration and legislation throughout the country. They realised that a failure or breakdown of the constitutional machinery in a State could not be ruled out as an impossibility and a situation may arise in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

The common thread in all the emergency provisions is that the resort to such provision has to be in exceptional circumstances when there be the real and grave situation calling for the drastic action. Sarkaria Commission as also this Court has noted the persistent criticism in ever-mounting intensity, both in regard to the frequency and the manner of the use of the power under Article 356. The Sarkaria Commission has noticed that gravamen of the criticism is that, more often than not, these provisions have been misused, to promote the political interests of the party in power at the Centre. Some examples have been noted of situations in which the power of Article 356 was invoked improperly if not illegally. It is noted that the constitutional framers did not intend that this power should be exercised for the purpose of securing good Government. It also notices that this power cannot be invoked, merely on the ground that there are serious allegations of corruption against the Ministry.

Whether it is a case of existing Government losing the majority support or of installation of new Government after fresh elections, the act of the Governor in recommending dissolution of Assembly should be only with sole object of preservation of the Constitution and not promotion of political interest of one or the other party.

In the present context of fractured verdicts in elections, the aforesaid discussion assumes great importance and relevance. The criteria suggested in Sarkaria Commission Report for appointment of a person as a Governor is :

- (i) He should be eminent in some walk of life;
- (ii) He should be a person from outside the State;
- (iii) He should be a detached figure and not too intimately connected with the local politics of the State; and
- (iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.

It has not been seriously disputed by learned counsel appearing for the parties that, unfortunately, the

criteria has been observed in almost total breach by all political parties. It is seen that one day a person is in active politics in as much as he holds the office of the Chief Minister or Minister or a party post and almost on the following day or, in any case, soon thereafter, the same person is appointed as the Governor in another State with hardly any cooling period. Ordinarily, it is difficult to expect detachment from party politics from such a person while performing the constitutional functions as Governor.

On this issue, we would like to say no more and leave this aspect to the wisdom of the political parties and their leaders to discuss and debate and arrive at, if possible, a national policy with some common minimum parameters applicable and acceptable to all major political parties.

Defections

At this stage, we may consider another side issue, namely, defections being a great evil.

Undoubtedly, defection is a great evil. It was contended for the Government that the unprincipled defections induced by allurements of office, monetary consideration, pressure, etc. were destroying the democratic fabric. With a view to control this evil, Tenth Schedule was added by the Constitution (Fifty-Second Amendment) Act, 1985. Since the desired goal to check defection by the legislative measure could not be achieved, law was further strengthened by the Constitution (Ninety-first Amendment) Act, 2003. The contention is that the Governor's action was directed to check this evil, so that a Government based on such defections is not formed.

Reliance has been placed on the decision in the case of *Kihoto Hollohan v. Zachillhu & Ors.* [1992 Supp. (2) SCC 651] to bring home the point that defections undermine the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. It is also correct that to further strengthen the law in this direction, as the existing provisions of the Tenth Schedule were not able to achieve the desired goal of checking defection, by 91st Amendment, defection was made more difficult by deleting provision which did not treat mass shifting of loyalty by 1/3 as defection and by making the defection, altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule as amended by 91st Amendment. In *Kihoto's* case, the challenge was to validity of the Tenth Schedule, as it stood then. Argument was that this law was destructive of the basic structure of the Constitution as it is violative of the fundamental principle of Parliamentary democracy, a basic feature of the Indian Constitutionalism and is destructive of the freedom of speech, right to dissent and freedom of conscience as the provisions seek to penalize and disqualify elected representatives for the exercise of these rights and freedoms which are essential to the sustenance of the system of parliamentary democracy. It was also urged that unprincipled political defections may be an evil, but it will be the beginning of much greater evils if the remedies, graver than the disease itself, are adopted. It was said that the Tenth Schedule seeks to throw away the baby with the bath water.

Dealing with aforesaid submissions, the Court noted that, in fact, the real question was whether under the Indian Constitutional Scheme, is there any immunity

from constitutional correctives against a legislatively perceived political evil of unprincipled defections induced by the lure of office and monetary inducements. It was noted that the points raised in the petition are, indeed, far reaching and of no small importance-invoking the 'sense of relevance and constitutionally stated principles of unfamiliar settings'. On the one hand there was the real and imminent threat to the very fabric of Indian democracy posed by certain level of political behaviour conspicuous by their utter and total disregard of well recognised political proprieties and morality. These trends tend to degrade the tone of political life and, in their wider propensities, are dangerous to and undermine the very survival of the cherished values of democracy. There is the legislative determination through experimental constitutional processes to combat that evil. On the other hand, there may be certain side-effects and fall-out which might affect and hurt even honest dissenters and conscientious objectors. While dealing with the argument that the constitutional remedy was violative of basic features of the Constitution, it was observed that the argument ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of the changing times and needs. The people of this country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience. The unethical political defections was described as a 'canker' eating into the vitals of those values that make democracy a living and worthwhile faith.

It was contended that the Governor was only trying to prevent members from crossing the floor as the concept of the freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but would also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance - nay, indeed, its very survival. The contention is based on Para 144 of the judgment in Kihoto's case which reads thus :

"But a political party functions on the strength of shared beliefs. Its own political stability and social utility depends on such shared beliefs and concerted action of its Members in furtherance of those commonly held principles. Any freedom of its Members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance -- nay, indeed, its very survival. Intra-party debates are of course a different thing. But a public image of disparate stands by Members of the same political party is not looked upon, in political tradition, as a desirable state of things. Griffith and Ryle on

"Parliament, Functions, Practice & Procedure" (1989 Edn. page 119) say:

"Loyalty to party is the norm, being based on shared beliefs. A divided party is looked on with suspicion by the electorate. It is natural for members to accept the opinion of their Leaders and Spokesmen on the wide variety of matters on which those Members have no specialist knowledge. Generally Members will accept majority decisions in the party even when they disagree. It is understandable therefore that a Member who rejects the party whip even on a single occasion will attract attention and more criticism than sympathy. To abstain from voting when required by party to vote is to suggest a degree of unreliability. To vote against party is disloyalty. To join with others in abstention or voting with the other side smacks of conspiracy."

Clause (b) of sub-para (1) of Paragraph 2 of the Tenth Schedule gives effect to this principle and sentiment by imposing a disqualification on a Member who votes or abstains from voting contrary to "any directions" issued by the political party. The provision, however, recognises two exceptions : one when the Member obtains from the political party prior permission to vote or abstain from voting and the other when the Member has voted without obtaining such permission but his action has been condoned by the political party. This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression "Any Direction" in clause (b) of Paragraph 2(1) whether really all directions or whips from the party entail the statutory consequences or whether having

regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule. We shall deal with this aspect separately."

Our attention was also drawn to the objects and reasons for the 91st Constitutional Amendment. It states that demands were made from time to time in certain quarters for strengthening and amending the Anti-defection law as contained in the Tenth Schedule to the Constitution of India, on the ground that these provisions had not been able to achieve the desired goals of checking defections. The Tenth Schedule was also criticized on the ground that it allowed bulk defections while declaring individual defections as illegal. The provision for exemption from disqualification in case of splits as provided in paragraph 3 of the Tenth Schedule to the Constitution of India had, in particular, come under severe criticism on account of its destabilising effect on the Government.

Reliance has also been placed to the exposition of Lord Diplock in a decision of House of Lords in the case of Council of Civil Service Unions v. Minister for the Civil Service [1984 (3) All.ER 935] on the aspect of irrationality to the effect that "it applies to a decision may be so outrageous or in defiance of logic or of accepted moral standards that no sensible person who had applied his 'mind to the question to be decided, could have arrived at it". It is contended that the Governor has many sources information wherefrom led him to conclude that the process that was going on in the State of Bihar was destroying the very fabric of democracy and, therefore, such approach cannot be described as outrageous or in defiance of logic, particularly, when proof in such cases is difficult if not impossible as bribery takes place in the cover of darkness and deals are made in secrecy. It is, thus, contended that Governor's view is permissible and legitimate view.

Almost similar contention has been rejected in Bommai's case.

The other decision of House of Lords in Puhlhofer v. Hillingdon, London Borough Council [(1986) 1 All.ER 467 at 474] relied upon by the respondents, has been considered by Justice Sawant in Bommai's case. The reliance was to the proposition that where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the 'obvious' to the 'debatable' to the 'just conceivable', it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. But in the present case, the inference sought to be drawn by the Governor without any relevant material, cannot fall in the category of 'debatable' or 'just conceivable', it would fall in the category of 'obviously perverse'. On

facts, the inescapable inference is that the sole object of the Governor was to prevent the claim being made to form the Government and the case would fall under the category of 'bad faith'.

The question in the present case is not about MLAs voting in violation of provisions of Tenth Schedule as amended by the Constitution (91st Amendment), as we would presently show.

Certainly, there can be no quarrel with the principles laid in Kihoto's case about evil effects of defections but the same have no relevance for determination of point in issue. The stage of preventing members to vote against declared policies of the political party to which they belonged had not reached. If MLAs vote in a manner so as to run the risk of getting disqualified, it is for them to face the legal consequences. That stage had not reached. In fact, the reports of the Governor intended to forestall any voting and staking of claim to form the Government.

Undisputedly, a Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, has a concomitant duty and obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy. But on facts of the present case, we are unable to accept that the Governor by reports dated 27th April and 21st May, 2005 sought to achieve the aforesaid objective. There was no material, let alone relevant, with the Governor to assume that there were no legitimate realignment of political parties and there was blatant distortion of democracy by induced defections through unfair, illegal, unethical and unconstitutional means. The report dated 27th April, 2005 refers to (1) serious attempt to cobble a majority; (2) winning over MLAs by various means; (3) targeting parties for a split; (4) high pressure moves; (5) offering various allurements like castes, posts, money etc.; and (6) Horse-trading. Almost similar report was sent by the Governors of Karnataka and Nagaland leading to the dissolution of the Assembly of Karnataka and Nagaland, invalidated in Bommai's case. Further, the contention that the Central Government did not act upon the report dated 27th April, 2005 is of no relevance and cannot be considered in isolation since the question is about the manner in which the Governor moved, very swiftly and with undue haste, finding that one political party may be close to getting majority and the situation had reached where claim may be staked to form the Government which led to the report dated 21st May, 2005. It is in this context that the Governor says that instead of installing a Government based on a majority achieved by a distortion of the system, it would be preferable that the people/electorate could be provided with one more opportunity to seek the mandate of the people. This approach makes it evident that the object was to prevent a particular political party from staking a claim and not the professed object of anxiety not to permit the distortion of the political system, as sought to be urged. Such a course is nothing but wholly illegal and irregular and has to be described as mala fide. The recommendation for dissolution of the Assembly to prevent the staking of claim to form the Government purportedly on the ground that the majority was achieved by distortion of system by allurement, corruption and bribery was based on such general assumptions without any material which are quite easy

to be made if any political party not gaining absolute majority is to be kept out of governance. No assumption without any basis whatever could be drawn that the reason for a group to support the claim to form the Government by Nitish Kumar, was only the aforesaid distortions. That stage had not reached. It was not allowed to be reached. If such majority had been presented and the Governor forms a legitimate opinion that the party staking claim would not be able to provide stable Government to the State, that may be a different situation. Under no circumstances, the action of Governor can be held to be bona fide when it is intended to prevent a political party to stake claim for formation of the Government. After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party.

Interpretation of a Constitution and Importance of Political Parties

For principles relevant for interpretation of a Constitution, our attention was drawn to what Justice Aharon Barak, President of Supreme Court of Israel says in Harvard Law Review, Vol.116 (2002-2003) dealing particularly with the aspect of purposive interpretation of Constitution. Learned Judge has noticed as under :

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

It is further said that the political question doctrine, in particular, remits entire areas of public life to Congress and the President, on the grounds that the Constitution assigns responsibility for these areas to the other branches, or that their resolution will involve discretionary, polycentric decisions that lack discrete criteria for adjudication and thus are better handled by the more democratic branches.

In fact, the scope of judicial review as enunciated in Bommai's case is in tune with the principles sought to be relied upon.

In support of the proposition that in Parliament Democracy there is importance of political parties and that interpretation of the constitutional provisions should advance the said basic structure based on political parties, our attention was drawn to write up Designing Federalism \026 A Theory of Self-Sustainable Federal Institution and what is said about political parties in a

Federal State which is as under:

"Political parties created democracy and
\005 modern democracy is unthinkable
save in terms of parties.

Schattschneider 1942 : I

Here is a factor in the organisation of
federal Government which is of primary
importance but which cannot be ensured
or provided for in a constitution \026 a good
party system

Wheare 1953: 86

Whatever the general social conditions, if
any, that sustain the federal bargain,
there is one institutional condition that
controls the nature of the bargain in all
instances\005 with which I am familiar.

This is the structure of the party system,
which may be regarded as the main
variable intervening between the
background social conditions and the
specific nature of the federal bargain.

Riker 1964 : 136

In a country which was always to be in
need of the cohesive force of institutions,
the national parties, for all their faults,
were to become at an early hour primary
and necessary parts of the machinery of
Government, essential vehicles to convey
men's loyalties to the state.

Hofstadter 1969: 70-I

It is contended that the political parties are the
main means not only whereby provincial grievances are
aired but also whereby centralised and decentralised
trends are legitimised. This contention is made in
connection with the alleged stand of two-third MLAs of
LJP against the professed stand of that political party.
We are afraid that on facts of present case, the
aforesaid concept and relevance of political parties is not
quite relevant for our purpose to decide why and how the
members of political parties had allegedly decided to
adopt the course which they did, to allegedly support the
claim for formation of the Government.

Morality

We may also deal with the aspect of morality sought
to be urged. The question of morality is of course very
serious and important matter. It has been engaging the
attention of many constitutional experts, legal
luminaries, jurists and political leaders. The concept of
morality has also been changing from time to time also
having regard to the ground realities and the compulsion
of the situation including the aspect and relevance of
coalition governance as opposed to a single party
Government. Even in the economic field, the concept of
morality has been a matter of policy and priorities of the
Government. The Government may give incentive, which
ideally may be considered unethical and immoral, but in
so far as Government is concerned, it may become
necessary to give incentive to unearth black money.

{R.K. Garg & Ors. v. Union of India & Ors. [1981(4)
SCC 675, paras 18 and 31]}. It may be difficult to leave
such aspects to be determined by high constitutional
functionaries, on case to case basis, depending upon the
facts of the case, and personal mould of the
constitutional functionaries. With all these

imponderables, the constitution does not contemplate the dissolution of Assemblies based on the assumption of such immoralities for formation of the satisfaction that situation has arisen in which the Government cannot be of the Constitution of India.

Article 356 and Bommai's case

Article 356(1) of the Constitution is as follows :

"356.\027(1) Provisions in case of failure of constitutional machinery in State.--

(1) If the President, on receipt of report from the Governor of the 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\027

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

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

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

Power under Article 356(1) is an emergency power but it is not an absolute power. Emergency means a situation which is not normal, a situation which calls for urgent remedial action. Article 356 confers a power to be exercised by the President in exceptional circumstances to discharge the obligation cast upon him by Article 355. It is a measure to protect and preserve the Constitution. The Governor takes the oath, prescribed by Article 159 to preserve, protect and defend the Constitution and the laws to the best of his ability. Power under Article 356 is conditional, condition being formation of satisfaction of the President as contemplated by Article 356(1). The satisfaction of the President is the satisfaction of Council of Ministers. As provided in Article 74(1), the President acts on the aid and advice of Council of Ministers. The plain reading of Article 74(2) stating 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, may seem to convey that the Court is debarred from inquiring into such advice but Bommai has held that Article 74(2) is not a bar against scrutiny of the material on the basis of which the President has issued the proclamation under Article 356. Justice Sawant, in Para 86 states that :

"What is further, although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The Courts are not interested in either the advice given by the Ministers to the President or the reasons for such advice. The Courts are, however, justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an enquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material."

It was further said that the Parliament would be entitled to go into the material on basis of what the Council of Ministers tendered the advice and, therefore, secrecy in respect of material cannot remain inviolable. It was said that :

"When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provisions of Section 106 of the Evidence Act, the burden of proving the existence of such material would be on the Union Government."

On the similar lines, is the opinion of Jeevan Reddy, J. :

"Clause (2) of Art. 74, understood in its proper perspective, is thus confined to a limited aspect. It protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. In fact, CI. (2) is a reproduction of sub-sec. (4) of S. 10 of the Government of India Act, 1935. (The Government of India Act did not contain a provision corresponding to An. 74(1) as it stood before or after the Amendments aforementioned). The scope of CI. (2) should not be extended beyond its legitimate fields. In any event, it cannot

be read or understood as conferring an immunity upon the council of ministers or the Minister/ Ministry concerned to explain, defend and justify the orders and acts of the President done in exercise of his functions. The limited provision contained in Art. 74(2) cannot override the basic provisions in the Constitution relating to judicial review. If and when any action taken by the President in exercise of his functions is questioned in a Court of Law, it is for the Council of Ministers to justify the same, since the action or order of the President is presumed to have been taken in accordance with Art. 74(1). As to which Minister or which official of which Ministry comes forward to defend the order/ action is for them to decide and for the Court to be satisfied about it. Where, of course, the act/order questioned is one pertaining to the executive power of the Government of India, the position is much simpler. It does not represent the act/order of the President done/taken in exercise of his functions and hence there is no occasion for any aid or advice by the Ministers to him. It is the act/order of Government of India, though expressed in the name of the President. It is for the concerned Minister or Ministry, to whom the function is allocated under the Rules of Business to defend and justify such action/ order.

In our respectful opinion, the above obligation cannot be evaded by seeking refuge under Art. 74(2). The argument that the advice tendered to the President comprises material as well and, therefore, calling upon the Union of India to disclose the material would amount to compelling the disclosure of the advice is, if we can say so respectfully, to indulge in sophistry. The material placed before the President by the Minister/Council of Ministers does not thereby become part of advice. Advice is what is based upon the said material. Material is not advice. The material may be placed before the President to acquaint him -- and if need be to satisfy him -- that the advice being tendered to him is the proper one. But it cannot mean that such material, by dint of being placed before the President in support of the advice, becomes advice itself. One can understand if the advice is tendered in writing; in such a case that writing is the advice and is covered by the protection provided by Art. 74(2). But it is difficult to appreciate how does the supporting material, becomes part of advice. The respondents cannot say that whatever the President sees -- or

whatever is placed before the President becomes prohibited material and cannot be seen or summoned by the Court. Art. 74(2) must be interpreted and understood in the context of entire constitutional system. Undue emphasis and expansion of its parameters would engulf valuable constitutional guarantees. For these reasons, we find it difficult to agree with the reasoning in State of Rajasthan on this score, insofar as it runs contrary to our holding."

The scope of judicial review has been expanded by Bommai and dissent has been expressed from the view taken in State of Rajasthan's case.

The above approach shows objectivity even in subjectivity. The constitutionalism or constitutional system of Government abhors absolutism \026 it is premised on the Rule of Law in which subjective satisfaction is substituted by objectivity provided by the provisions of the Constitution itself. This line is clear also from Maru Ram v. Union of India & Ors. [(1981) 1 SCC 107]. It would also be clear on in depth examination of Bommai that declared the dissolution of three Assemblies illegal but before we further revert to that decision, a brief historical background including the apprehension of its abuse expressed by our founding fathers may be noted. Articles 355 and 356 of the Constitution set the tenor for the precedence of the Union over the States. It has been explained that the rationale for introducing Article 355 was to distinctly demarcate the functioning of the State and Union governments and to prevent any form of unprincipled invasions by the Union into the affairs of the State. It was felt that through the unambiguous language of Articles 355 and 356, the Union shall be constitutionally obliged to interfere only under certain limited circumstances as laid down in the provisions.

Referring to what is now Article 355, Dr. Ambedkar had reasoned that "in view of the fact that we are endowing the Provinces with plenary powers and making them sovereign within their own fields it is necessary to provide that if any invasion of the provincial field is done, it is in virtue of this obligation." (T.K. Thope, Dr. Ambedkar and Article 356 of the Constitution \026 [(1993) 4 SCC (Jour) 1]. Pursuant to this reasoning, Dr. Ambedkar further explained that before resorting to Article 356 "the first thing the President will do would be to issue warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution. If the warning fails the second thing for him to do will be to order an election allowing the people of the province to settle matters by themselves. It is only when those two remedies fail that he would resort to this Article." Dr. Ambedkar admitted that these articles were "liable to be abused" and that he cannot "altogether deny that there is a possibility of these articles being employed for political purposes." But he reasoned that such an "objection applies to every part of the Constitution which gives power to the Centre to override the Provinces" and added that the "proper thing we ought to expect is that such articles will never be called into operation and they would

remain a dead letter." (Constituent Assembly Debates (Volume IX, Revised Edition) at pp.175-177).
Scope of Judicial Review under Article 356 \026 State of Rajasthan v. Union of India :

In State of Rajasthan's case, there was a broad consensus among five of the seven Judges that the Court can interfere if it is satisfied that the power has been exercised mala fide or on "wholly extraneous or irrelevant grounds". Some learned Judges have stated the rule in narrow terms and some others in a little less narrow terms but not a single learned Judge held that the proclamation is immune from judicial scrutiny. It must be remembered that at that time clause (5) was there barring judicial review of the proclamation and yet they said that Court can interfere on the ground of mala fides. Surely, the deletion of clause (5) has not restricted the scope of judicial review but has widened it. Justice Reddy in Bommai's case has noticed, in so far as it was relevant, the ratio underlying each of the six opinions delivered by Seven Judge Bench in the case of State of Rajasthan (supra) as under :

"Beg, C. J. The opinion of Beg, C. J. contains several strands of thought. They may be stated briefly thus:

(i) The language of Article 356 and the practice since 1950 shows that the Central Government can enforce its will against the State Governments with respect to the question how the State Governments should function and who should hold reins of power.

(ii) By virtue of Article 365(5) and Article 74(2), it is impossible for the Court to question the satisfaction of the President. It has to decide the case on the basis of only those facts as may have been admitted by or placed by the President before the Court.

(iii) The language of Article 356(1) is very wide. It is desirable that conventions are developed channelising the exercise of this power. The Court can interfere only when the power is used in a grossly perverse and unreasonable manner so as to constitute patent misuse of the provisions or to an abuse of power. The same idea is expressed at another place saying that if "a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved" by the proclamation, it would be liable to be struck down. The question whether the majority party in the Legislative Assembly of a State has become totally estranged from the electorate is not a matter for the Court to determine.

(iv) The assessment of the Central Government that a fresh chance should be given to the electorate in certain States as well as the question when to dissolve the Legislative Assemblies are not matters alien to Article 356. It cannot be said that the reasons assigned by the Central Government for the steps taken by them

are not relevant to the purposes underlying Article 356. We may say at once that we are in respectful disagreement with propositions (i), (ii) and (iv) altogether. So far as proposition (iii) is concerned, it is not far off the mark and in substance accords with our view, as we shall presently show.

Y. V. Chandrachud, J. On the scope of judicial review, the learned Judge held that where the reasons disclosed by the Union of India are wholly extraneous, the Court can interfere on the ground of mala fides. Judicial scrutiny, said the learned Judge, is available "for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed". The Court cannot sit in judgment over the satisfaction of the President for determining whether any other view of the situation is reasonably possible, opined the learned Judge. Turning to the facts of the case before him, the learned Judge observed that the grounds assigned by the Central Government in its counter-affidavit cannot be said to be irrelevant to Article 356. The Court cannot go deeper into the matter nor shall the Court enquire whether there were any other reasons besides those disclosed in the counter-affidavit.

P. N. Bhagwati and A. C. Gupta, JJ. The learned Judges enunciated the following propositions in their opinion: The action under Article 356 has to be taken on the subjective satisfaction of the President. The satisfaction is not objective. There are no judicially discoverable and manageable standards by which the Court can examine the correctness of the satisfaction of the President. The satisfaction to be arrived at is largely political in nature, based on an assessment of various and varied facts and factors besides several imponderables and fast changing situations. The Court is not a fit body to enquire into or determine the correctness of the said satisfaction or assessment, as it may be called. However, if the power is exercised mala fide or is based upon wholly extraneous or irrelevant grounds, the Court would have jurisdiction to examine it. Even clause (5) is not a bar when the contention is that there was no satisfaction at all. The scope of judicial review of the action under Article 356, -- the learned Judges held -- is confined to a "narrow minimal area: May be that in most cases, it would be difficult, if not impossible, to challenge the exercise of power under Article 356(1) on the aforesaid limited ground, because the facts and circumstances on which the

satisfaction is based, would not be known. However, where it is possible, the existence of satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds."

We may say with great respect that we find it difficult to agree with the above formulations in toto. We agree only with the statements regarding the permissible grounds of interference by Court and the effect of clause (5), as it then obtained. We also agree broadly with the first proposition, though not in the absolute terms indicated therein.

Goswami and Untwalia, JJ. The separate opinions of Goswami and Untwalia, JJ. emphasise one single fact, namely, that inasmuch as the facts stated in the counter-affidavit filed by the Home Minister cannot be said to be "mala fide, extraneous or irrelevant", the action impugned cannot be assailed in the Court.

Fazal Ali, J. The learned Judge held that:
(i) the action under Article 356 is immune from judicial scrutiny unless the action is "guided by extraneous consideration" or "personal considerations".
(ii) the inference drawn by the Central Government following the 1977 elections to the Lok Sabha cannot be said to be unreasonable. It cannot be said that the inference drawn had no nexus with Article 356."

Bommai's case

The Nine Judge Bench considered the validity of dissolution of Legislative Assembly of States of Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Himachal Pradesh and Rajasthan. Out of six States, the majority held as unconstitutional the dissolution of Assemblies of Karnataka, Nagaland and Meghalaya as well. Six opinions have been expressed. There is unanimity on some issues, likewise there is diversity amongst several opinions on various issues.

Karnataka Facts

In the case of Karnataka, the facts were that the Janta Party being the majority party in the State Legislature had formed the Government under the leadership of Shri S.R. Bommai on August 30, 1988 following the resignation on August 1, 1988 of the earlier Chief Minister Shri Hegde who headed the ministry from March 1985 till his resignation. On 17th April, 1989 one legislator presented a letter to the Governor withdrawing his support to the Ministry. On the next day he presented to the Governor 19 letters allegedly written by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to the BJP which was supporting the ministry, withdrawing their support to the ministry. On receipt of these letters, the Governor is said to have called the Secretary of the Legislature Department and got the authenticity of the signatures on

the said letters verified. On April 19, 1989, the Governor sent a report to the President stating therein that there were dissensions in the Janta Party which had led to the resignation of Shri Hegde and even after the formation of the new party viz. Janta Dal, there were dissensions and defections. In support, the Governor referred to the 19 letters received by him. He further stated that in view of the withdrawal of the support by the said legislators, the Chief Minister Shri Bommai did not command a majority in the Assembly and hence it was inappropriate under the Constitution, to have the State administered by an Executive consisting of Council of Ministers which did not command the majority in the House. He also added that no other political party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356(1). The Governor did not ascertain the view of Shri Bommai either after the receipt of the 19 letters or before making his report to the President. On the next day i.e. April 20, 1989, 7 out of the 19 legislators who had allegedly sent the letters to the Governor complained that their signatures were obtained on the earlier letters by misrepresentation and affirmed their support to the Ministry. The State Cabinet met on the same day and decided to convene the Session of the Assembly within a week i.e. on April 27, 1989. The Chief Minister and his Law Minister met the Governor on the same day and informed him about the decision to summon the Assembly Session. The Chief Minister offered to prove his majority on the floor of the House, even by pre-poning the Assembly Session, if needed. To the same effect, the Governor however sent yet another report to the President on the same day i.e. April 20, 1989, in particular, referring to the letters of seven Members pledging their support to the Ministry and withdrawing their earlier letters. He however opined in the report that the letters from the 7 legislators were obtained by the Chief Minister by pressurising them and added that horse-trading was going on and atmosphere was getting vitiated. In the end, he reiterated his opinion that the Chief Minister had lost the confidence of the majority in the House and repeated his earlier request for action under Article 356(1) of the Constitution. On that very day, the President issued the Proclamation in dissolving the House. The Proclamation was thereafter approved by the Parliament as required by Article 356(3).

A writ petition filed in the High Court challenging the validity of dissolution was dismissed by a three Judge Bench inter alia holding that the facts stated in the Governor's report cannot be held to be irrelevant and that the Governor's satisfaction that no other party was in a position to form the Government had to be accepted since his personal bona fides were not questioned and his satisfaction was based upon reasonable assessment of all the relevant facts. The High Court relied upon the test laid down in the State of Rajasthan case and held that on the basis of materials disclosed, the satisfaction arrived at by the President could not be faulted.

Nagaland Facts

In the case of Nagaland, the Presidential Proclamation dated August 7, 1988 was issued under Article 356(1) imposing President's rule. At the relevant time in the Nagaland Assembly there were 60 legislators, 34 belonging to Congress (I), 18 to Naga National Democratic Party and 1 to Naga Peoples' Party and seven

were independent legislators. On July 28, 1988, 13 out of the 34 MLAs of the ruling Congress (I) party informed the Speaker of the Assembly that they have formed a separate party and requested him for allotment of separate seats for them in the House. The Session was to commence on August 28, 1988. By decision dated July 30, 1988 the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the Constitution. On July 31, 1988, Shri Vamuzo, one of the 13 defecting MLAs who had formed a separate party, informed the Governor that he commanded the support of 35 out of the then 59 Members in the Assembly and was in a position to form the Government. On August 3, 1988, the Chief Secretary of the State wrote to Shri Vamuzo that according to his information, Shri Vamuzo had wrongfully confined the MLAs who had formed the new party. The allegations were denied by Shri Vamuzo and he asked the Chief Secretary to verify the truth from the Members themselves. On verification, the Members told the Chief Secretary that none of them was confined as alleged. On August 6, 1988 the Governor sent a report to the President of India about the formation of a new party by the 13 MLAs. He also stated that the said MLAs were allured by money. He further stated that the said MLAs were kept in forcible confinement by Mr. Vamuzo and one other person, and that the story of split in the ruling party was not true. He added that the Speaker was hasty in according recognition to the new group of the 13 members and commented that horse-trading was going on in the State. He made a special reference to the insurgency in Nagaland and also stated that some of the Members of the Assembly were having contacts with the insurgents. He expressed the apprehension that if the affairs were allowed to continue as they were, it would affect the stability of the State. In the meantime the Chief Minister submitted his resignation to the Governor and recommended the imposition of the President's rule. The President thereafter issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Shri Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Gauhati High Court. The Petition was heard by a Division Bench. The Bench differed on the effective operation of Article 74(2) and hence the matter was referred to the third Judge. But before the third learned Judge could hear the matter, the Union of India moved this Court for grant of Special Leave which was granted and the proceedings in the High Court were stayed. Dealing with the implications of Article 74(2) of the Constitution Justice Sawant speaking for himself and Justice Kuldeep Singh came to the conclusion that although the advice given by the Council of Ministers is free from the gaze of the Court, the material on the basis of which the advice is given cannot be kept away from it and is open to judicial scrutiny. On the facts, Justice Sawant expressed the view that the Governor should have allowed Shri Vamuzo to test his strength on the floor of the House notwithstanding the fact that the Governor in his report has stated that during the preceding 25 years, no less than 11 Governments had been formed and according to his information, the Congress (I) MLAs were allured by the monetary benefits and that amounted to incredible lack of political morality and complete disregard of the wishes of the electorate. Meghalaya

Insofar as the Proclamation in respect of the Meghalaya is concerned, that was also held to be invalid. The ground on which dissolution was invalidated was the constitutional functionary had failed to realize the binding legal consequences of the orders of this Court and the constitutional obligation to give effect to the said order.

Facts of Madhya Pradesh, Rajasthan and Himachal Pradesh

Insofar as the cases of States of Madhya Pradesh, Rajasthan and Himachal Pradesh are concerned the dismissal of the Governments was a consequence of violent reactions in India and abroad as well as in the neighbouring countries where some temples were destroyed, as a result of demolition of Babri Masjid structure on 6th December, 1992. The Union of India is said to have tried to cope up the situation by taking several steps including banning of some organizations which had along with BJP given a call for Kar sevaks to march towards Ayodhya on December 6, 1992. The Proclamation in respect of these States was issued on January 15, 1993. The Proclamations dissolving the assemblies were issued on arriving at satisfaction as contemplated by Article 356(1) on the basis of Governor's report. It was held that the Governor's reports are based on relevant materials and are made bona fide and after due verification.

The Conclusion Nos. I, II, IV, VI, VII, IX and X in the opinion of Justice Sawant are as under:

"I. The validity of the Proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. When a prima facie case is made out in the challenge to the Proclamation, the burden is on the Union Government to prove that the relevant material did in fact exist. Such material may be either the report of the Governor or other than the report.

II. Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction.

IV. Since the provisions contained in cl. (3) of Article 356 are intended to be a check on the powers of the President under clause (1) thereof, it will not be permissible for the President to exercise powers under sub-clauses (a), (b) and (c) of the latter clause, to take irreversible actions till at least both the Houses of Parliament have approved of the Proclamation. It is for this reason that the President will not be justified in dissolving the Legislative Assembly by using the powers of the Governor under Article 174(2)(b) read with Article 356(1)(a) till at least both the Houses of Parliament approve of the Proclamation.

VI. In appropriate cases, the Court will

have power by an interim injunction, to restrain the holding of fresh elections to the Legislative Assembly pending the final disposal of the challenge to the validity of the Proclamation to avoid the fait accompli and the remedy of judicial review being rendered fruitless. However, the Court will not interdict the issuance of the Proclamation or the exercise of any other power under the Proclamation.

VII. While restoring the status quo ante, it will be open for the Court to mould the relief suitably and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

IX. The Proclamations dated April 21, 1989 and October 11, 1991 and the action taken by the President in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya challenged in Civil Appeal No. 3645 of 1989 and Transfer Case Nos. 5 and 7 of 1992 respectively are unconstitutional.

The Proclamation dated August 7, 1988 in respect of State of Nagaland is also held unconstitutional. However, in view of the fact that fresh elections have since taken place and the new Legislative Assemblies and Ministries have been constituted in all the three States, no relief is granted consequent upon the above declarations. However, it is declared that all actions which might have been taken during the period the Proclamation operated, are valid. The Civil Appeal No. 3645 of 1989 and Transfer case Nos. 5 and 7 of 1992 are allowed accordingly with no order as to costs. Civil Appeal Nos. 193-194 of 1989 are disposed of by allowing the writ petitions filed in the Gauhati High Court accordingly but without costs.

X. The Proclamations dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the States of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said proclamations are not unconstitutional. Civil Appeals Nos. 1692, 1692A-1692C, 4627-30 of 1993 are accordingly allowed and Transfer case Nos. 8 and 9 of 1993 are dismissed with no order as to costs."

Justice Jeevan Reddy has expressed opinion for himself and Justice Agrawal. The conclusions Nos. 2, 3, 7, 8 and 12 in paragraph 434 are relevant for our purpose and the same read as under:

"(2) The power conferred by Art. 356 upon the President is a conditioned power. It is

not an absolute power. The existence of material -- which may comprise of or include the report(s) of the Governor -- is a pre-condition. The satisfaction must be formed on relevant material. The recommendations of the Sarkaria Commission with respect to the exercise of power under Art. 356 do merit serious consideration at the hands of all concerned.

(3) Though the power of dissolving of the Legislative Assembly can be said to be implicit in clause (1) of Art. 356, it must be held, having regard to the overall constitutional scheme that the President shall exercise it only after the proclamation is approved by both Houses of Parliament under clause (3) and not before. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly under sub-clause (c) of clause (1). The dissolution of Legislative Assembly is not a matter of course. It should be resorted to only where it is found necessary for achieving the purposes of the proclamation.

(7) The proclamation under Article 356(I) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be mala fide or based on wholly irrelevant or extraneous grounds. The deletion of clause (5) (which was introduced by 38th (Amendment) Act) by the 44th (Amendment) Act, removes the cloud on the reviewability of the action. When called upon, the Union of India has to produce the material on the basis of which action was taken. It cannot refuse to do so. if it seeks to defend the action. The court will not go into the correctness of the material or its adequacy. Its enquiry is limited to see whether the material was relevant to the action. Even if part of the material is irrelevant, the court cannot interfere so long as, there is some material which is relevant to the action taken.

(8) If the court strikes down the proclamation, it has the power to restore the dismissed Government to office and revive and reactivate the Legislative Assembly wherever it may have been dissolved or kept under suspension. In such a case, the court has the power to declare that acts done, orders passed and laws made during the period the proclamation was in force shall remain unaffected and be treated as valid. Such declaration, however, shall not preclude the Government/ Legislative Assembly or other competent authority to review, repeal or modify such act orders and laws.

(12) The proclamations dated January 15,

1993 in respect of Madhya Pradesh, Rajasthan and Himachal Pradesh concerned in Civil Appeals Nos. 1692, I692A-I692C of 1993, 4627-4630 of 1990, Transferred Case (C) No. 9 of 1993 and Transferred Case No. 8 of 1993 respectively are not unconstitutional. The Civil Appeals are allowed and the judgment of the High Court of Madhya Pradesh in M.P.(C) No. 237 of 1993 is set aside. The Transferred Cases are dismissed."

Justice Jeevan Reddy has also expressed agreement with the conclusions I, II and IV to VII in the Judgment of Justice Sawant delivered on behalf of himself and Justice Kuldeep Singh.

Justice Pandian has expressed agreement with the opinion of Justice P.B. Sawant on his conclusions I, II and IV to VIII but so far as the reasoning and other conclusions are concerned, the learned Judge has agreed with the Judgment of Justice Reddy.

For determining the scope of judicial review in terms of law enunciated by Bommai, it is vital to keep in view that majority opinion in that case declared as illegal the dissolution of assemblies of Karnataka and Nagaland. At an appropriate place later, we will note the reason that led to this declaration.

Some observations made in the minority opinion of Justice K. Ramaswamy are also very significant. Learned Judge has said that the motivating factor for action under Article 356(1) should never be for political gain to the party in power at the Centre, rather it must be only when it is satisfied that the constitutional machinery has failed. It has been further observed that the frequent elections would belie the people's belief and faith in parliamentary form of Government, apart from enormous election expenditure to the State and the candidates. The Court, if upon the material placed before it, finds that satisfaction reached by the President is unconstitutional, highly irrational or without any nexus, then the Court would consider the contents of the Proclamation or reasons disclosed therein and in extreme cases the material produced pursuant to discovery order nisi to find the action is wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President or does not bear any rationale to the proximate purpose of the Proclamation. In that event, the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently, Proclamation issued under Article 356 would be declared unconstitutional.

It is apparent that Justice Ahmadi and Justice Ramaswamy though in minority, yet learned Judges have frowned upon the highly irrational action.

Now, let us see the opinion of Justice Sawant, who spoke for himself and Justice Kuldeep Singh and with whom Justice Pandian, Justice Jeevan Reddy and Justice Agrawal agreed, to reach the conclusion as to the invalidity of Proclamation dissolving assemblies of Karnataka and Nagaland.

Learned Judge has opined that the President's satisfaction has to be based on objective material. That material may be available in the report sent to the

President by the Governor or otherwise or both from the report and other sources. Further opines Justice Sawant that the objective material, so available must indicate that the Government of State cannot be carried on in accordance with the provisions of the Constitution. The existence of the objective material showing that the Government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the issue of the Proclamation. Reference has been made to a decision of the Supreme Court of Pakistan on the same subject, although the language of the provisions of the relevant Articles of Pakistan Constitution is not couched in the same terms. In Muhammad Sharif v. Federation of Pakistan, PLD 1988 (LAH) 725, the question was whether the order of the President dissolving the National Assembly on 29th May, 1988 was in accordance with the powers conferred on him under Article 58(2)(b) of the Pakistan Constitution. It was held in that case that it is not quite right to contend that since it was the discretion of the President, on the basis of his opinion, the President could dissolve the National Assembly but he has to have the reasons which are justifiable in the eyes of the people and supportable by law in a court of justice. He could not rely upon the reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects (Emphasis supplied by us). It would be instructive to note as to what was stated by the learned Chief Justice and Justice R.S. Sidhwa, as reproduced in the opinion of Justice Sawant:

"Whether it is 'subjective' or 'objective' satisfaction of the President or it is his 'discretion' or 'opinion', this much is quite clear that the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representative of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law. No doubt, the Courts will be chary to interfere in his 'discretion' or formation of the 'opinion' about the 'situation' but if there be no basis or justification for the order under the Constitution, the Courts will have to perform their duty cast on them under the Constitution. While doing so, they will not be entering in the political arena for which appeal to electorate is provided for."

Dealing with the second argument, the learned Chief Justice held:

"If the argument be correct then the provision 'Notwithstanding anything contained in clause (2) of Article 48' would be rendered redundant as if it was no part of the Constitution. It is obvious

and patent that no letter or part of a provision of the Constitution can be said to be redundant or non-existent under any principle of construction of Constitutions. The argument may be correct in exercise of other discretionary powers but it cannot be employed with reference to the dissolution of National Assembly. Blanket coverage of validity and unquestionability of discretion under Article 48(2) was given up when it was provided under Article 58(2) that 'Notwithstanding clause (2) of Article 48 \005 the discretion can be exercised in the given circumstances. Specific provision will govern the situation. This will also avoid expressly stated; otherwise it is presumed to be there in Courts of record\005. Therefore, it is not quite right to contend that since it was in his 'discretion', on the basis of his 'opinion' the President could dissolve the National Assembly. He has to have reasons which are justifiable in the eyes of the people and supportable by law in a Court of Justice..... It is understandable that if the President has any justifiable reason to exercise his 'discretion' in his 'opinion' but does not wish to disclose, he may say so and may be believed or if called upon to explain the reason he may take the Court in confidence without disclosing the reason in public, may be for reason of security of State. After all patriotism is not confined to the office holder for the time being. He cannot simply say like Caesar it is my will, opinion or discretion. Nor give reasons which have no nexus to the action, are bald, vague, general or such as can always be given and have been given with disastrous effects.....". Dealing with the same arguments, R.S. Sidhwa, J. stated as follows :

".....I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Arts. 58(2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer."

It is well settled that if the satisfaction is mala fide or is based on wholly extraneous or irrelevant grounds, the court would have the jurisdiction to examine it because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. On consideration of these observations made in the case of State of Rajasthan as also the other decisions {Kehar Singh & Anr. v. Union of India &

Anr. [(1989) 1 SCC 204] and Maru Ram v. Union of India [(1981) 1 SCC 107]], Justice Sawant concluded that the exercise of power to issue proclamation under Article 356(1) is subject to judicial review at least to the extent of examining whether the conditions precedent to the issue of Proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that the situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution. While considering the question of material, it was held that it is not the personal whim, wish, view or opinion or the ipse dixit of the President de hors the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. (Emphasis supplied by us). Although, therefore, the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from material is certainly open to judicial review. It has been further held that when the Proclamation is challenged by making a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the Government could not be carried on in accordance with the provisions of the Constitution. Since such material would be exclusively within the knowledge of the Union Government in view of the provisions of Section 106 of the Evidence Act, the burden of proof would be on the Union Government. Thus having reached the aforesaid conclusions as to the parameters of the judicial review that the satisfaction cannot be based on the personal whim, wish, view, opinion or ipse dixit de hors the legitimate inference from the relevant material and that the legitimacy of the inference drawn was open to judicial review, the report on basis whereof Proclamation dissolving the Assembly of Karnataka had been issued was subjected to a close scrutiny, as is evident from paragraphs 118, 119 and 120 of the opinion of Justice Sawant which read as under: "118. In view of the conclusions that we have reached with regard to the parameters of the judicial review, it is clear that the High Court had committed an error in ignoring the most relevant fact that in view of the conflicting letters of the seven legislators, it was improper on the part of the Governor to have arrogated to himself the task of holding, firstly, that the earlier nineteen letters were genuine and were written by the said legislators of their free will and volition. He had not even cared to interview the said legislators, but had merely got the authenticity of the signatures verified through the Legislature Secretariat. Secondly, he also took upon himself the task of deciding that the seven out of the nineteen legislators had written the subsequent letters on account of the pressure from

the Chief Minister and not out of their free will. Again he had not cared even to interview the said legislators. Thirdly, it is not known from where the Governor got the information that there was horse-trading going on between the legislators. Even assuming that it was so, the correct and the proper course for him to adopt was to await the test on the floor of the House which test the Chief Minister had willingly undertaken to go through on any day that the Governor chose. In fact, the State Cabinet had itself taken an initiative to convene the meeting of the Assembly on April 27, 1989, i.e., only a week ahead of the date on which the Governor chose to send his report to the President. Lastly, what is important to note in connection with this episode is that the Governor at no time asked the Chief Minister even to produce the legislators before him who were supporting the Chief Minister, if the Governor thought that the situation posed such grave threat to the governance of the State that he could not await the result of the floor-test in the House. We are of the view that this is a case where all canons of propriety were thrown to wind and the undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of mala fides. The Proclamation issued by the President on the basis of the said report of the Governor and in the circumstances so obtaining, therefore, equally suffered from mala fides. A duly constituted Ministry was dismissed on the basis of material which was neither tested nor allowed to be tested and was no more than the ipse dixit of the Governor. The action of the Governor was more objectionable since as a high constitutional functionary, he was expected to conduct himself more firmly, cautiously and circumspectly. Instead, it appears that the Governor was in a hurry to dismiss the Ministry and dissolve the Assembly. The Proclamation having been based on the said report and so-called other information which is not disclosed was, therefore, liable to be struck down. (Emphasis supplied by us)

119. In this connection, it is necessary to stress that in all cases where the support to the Ministry is claimed to have been withdrawn by some Legislators, the proper course for testing the strength of the Ministry is holding the test on the floor of the House. That alone is the constitutionally ordained forum for seeking openly and objectively the claims and counter-claims in that behalf. The assessment of the strength of the

Ministry is not a matter of private opinion of any individual, be he the Governor or the President. It is capable of being demonstrated and ascertained publicly in the House. Hence when such demonstration is possible, it is not open to bypass it and instead depend upon the subjective satisfaction of the Governor or the President. Such private assessment is an anathema to the democratic principle, apart from being open to serious objections of personal mala fides. It is possible that on some rare occasions, the floor-test may be impossible, although it is difficult to envisage such situation. Even assuming that there arises one, it should be obligatory on the Governor in such circumstances, to state in writing, the reasons for not holding the floor-test. The High Court was, therefore, wrong in holding that the floor test was neither compulsory nor obligatory or that it was not a pre-requisite to sending the report to the President recommending action under Article 356(1). Since we have already referred to the recommendations of the Sarkaria Commission in this connection, it is not necessary to repeat them here.

(Emphasis supplied by us)

120. The High Court was further wrong in taking the view that the facts stated in the Governor's report were not irrelevant when the Governor without ascertaining either from the Chief Minister or from the seven MLAs whether their retraction was genuine or not, proceeded to give his unverified opinion in the matter. What was further forgotten by the High Court was that assuming that the support was withdrawn to the Ministry by the 19 MLAs, it was incumbent upon the Governor to ascertain whether any other Ministry could be formed. The question of personal bona fides of the Governor is irrelevant in such matters. What is to be ascertained is whether the Governor had proceeded legally and explored all possibilities of ensuring a constitutional Government in the State before reporting that the constitutional machinery had broken down. Even if this meant installing the Government belonging to a minority party, the Governor was duty bound to opt for it so long as the Government could enjoy the confidence of the House. That is also the recommendation of the Five-member Committee of the Governors appointed by the President pursuant to the decision taken at the Conference of Governors held in New Delhi in November 1970, and of the Sarkaria Commission quoted above. It is also obvious that beyond the

report of the Governor, there was no other material before the President before he issued the Proclamation. Since the "facts" stated by the Governor in his report, as pointed out above contained his own opinion based on unascertained material, in the circumstances, they could hardly be said to form an objective material on which the President could have acted. The Proclamation issued was, therefore, invalid."
(Emphasis supplied by us)

The view of the High Court that the facts stated in the Governor's report had to be accepted was not upheld despite the fact that the Governor had got the authenticity of the signatures of 19 MLAs on letters verified from the Legislature Secretariat, on the ground that he had not cared to interview the legislators and that there were conflicting letters from the seven legislators. The conclusion drawn by the Governor that those seven legislators had written the subsequent letters on account of the pressure from the Chief Minister and not out of their own free will was frowned upon, particularly when they had not been interviewed by the Governor. It was further observed that it is not known from where the Governor got the information about the horse-trading going on between the legislators. Further conclusion reached was that the Governor had thrown all cannons of propriety to the winds and showed undue haste in inviting the President to issue Proclamation under Article 356(1) which clearly smacked of mala fides. It was noticed that the facts stated by the Governor in his report were his own opinion based on unascertained material and in the circumstances they could hardly be said to form the objective material on which the President could have acted.

When the facts of the present case are examined in light of the scope of the judicial review as is clear from the aforesaid which represents ratio decidendi of majority opinion of Bommai's case, it becomes evident that the challenge to the impugned Proclamation must succeed.

The case in hand is squarely covered against the Government by the dicta laid down in Bommai's case. There cannot be any presumption of allurement or horse-trading only for the reason that some MLAs, expressed the view which was opposed to the public posture of their leader and decided to support the formation of the Government by the leader of another political party. The minority Governments are not unknown. It is also not unknown that the Governor, in a given circumstance, may not accept the claim to form the Government, if satisfied that the party or the group staking claim would not be able to provide to the State a stable Government. It is also not unknown that despite various differences of perception, the party, group or MLAs may still not opt to take a step which may lead to the fall of the Government for various reasons including their being not prepared to face the elections. These and many other imponderables can result in MLAs belonging to even different political parties to come together. It does not necessarily lead to assumption of allurement and horse-trading.

As opposed to the cases of dissolution of Karnataka and Nagaland, while considering the cases of dissolution of assemblies of Madhya Pradesh, Rajasthan and

Himachal Pradesh, it was held in Bommai that the reports of the Governors disclosed that the State Governments had miserably failed to protect the citizens and property of the State against internal disturbances, it was found that the Governor's reports are based on relevant material and are made bona fide and after due verification. It is in the light of these findings that the validity of the Proclamation was unanimously upheld in respect of these three States.

Now, let us revert to the reasoning given in the opinion of Justice B.P. Jeevan Reddy, speaking for himself and Justice Agrawal.

As already noticed, Justice Reddy to the extent stated in para 324 expressed his dissent with the reasoning of State of Rajasthan case.

Before we examine paragraph 389, wherein Justice Reddy has noticed, in brief, eight reasons given by the Special Bench of the High Court in dismissing the writ petition and the opinion of learned Judge as contained in para 391, we feel that to fully appreciate Bommai's case which reversed Full Bench decision of Karnataka High Court, it would be quite useful to note what exactly was stated by the High Court in Paragraphs 28 to 34 of its judgment reported in S.R. Bommai & Ors. v. Union of India & Ors. [AIR 1990 Karnataka 5]. The said paragraphs read as under :

"28. Coming to the second facet of the contention of Mr. Soli Sorabjee, we find that the criticism levelled is that the inference drawn by the Governor that there is no other party which is in a position to form the Government, is not only vague but factually incorrect and hence the President had no relevant material to arrive at his satisfaction for proclamation issued by him.

The aforesaid contention again is without any merit for the reasons: (i) that the Governor formed the said satisfaction which can necessarily be the result of his own impressions. Narration of events in no way advances the case of satisfaction because the very satisfaction of the Governor is an integral part of the material relevant fact. It may also be that the Governor would have met several MLAs and enquired of them. But what transpired between them cannot be a matter of record. In the context where the Governor's personal bona fides are not in question, his satisfaction expressed is to be assumed as part of the relevant material facts in the sense that the very satisfaction stated therein comprehends within itself the idea of all the other necessary factors, (ii) the report of 19th April, 1989 has to be read with the second report of 20th April, 1989 wherein "atmosphere getting vitiated" and "horse-trading" were referred. "Pressurisation of MLAs", "Horse-trading" and "vitiating atmosphere" referred to in the report necessarily indicate the existence of facts for the satisfaction that

no other party was in a position to form the Government in accordance with the Constitution: The report could have been more explicit and, not adopting such a course by itself cannot nullify the essence of the report. If the President had any reason to doubt the veracity of those statements it was for him to seek a clarification or further report. However, if the President chose to accept the statement of the Governor as to the satisfaction that none else was in a position to form the Government it is because the President found it to be a sufficient arid acceptable statement as to the existence of factual situation. This statement in para 3 of the first report may also be weighed and understood in the background of the principle that in case the existing Ministry was found to have lost the majority in the House, it is left to the discretion of the Governor to call upon someone else to form the Ministry, whom he thinks is in a position to command majority in the House. Further, absolutely no material has been placed before us to show that any other party or individual staked his or her claim to form a stable Ministry; rather, throughout, the petitioners' case has been that the existing Ministry headed by Sri S. R. Bommai continued to enjoy the support of the majority in the House. This premise was held to be not correct for which material facts were given in both the reports made by the Governor.

29. It may be emphasised that a person holding majority does not require time to prove that majority. Instead of telling the Governor that he would prove majority on the floor of the House, the Chief Minister could have as well obtained the signatures of 113 MLAs and placed before the Governor to demonstrate his strength. Moreover, the second report of the Governor also conveys certain material facts; some of the MLAs who withdrew their support to Sri S. R. Bommai wrote again withdrawing the earlier letters with oscillation and ficklemindedness. Fluctuating loyalties leading to unhealthy practice are pointed out in the report. The democratic culture was being vulgarised. Vitiating of the atmosphere was felt by the Governor. In the context of the prevailing situation the Governor was certainly entitled to report to the President the aforesaid facts. We, are therefore, of the firm view that the two reports of the Governor conveyed to the President the essential and relevant facts from which the President could assess the situation for an action under Art. 356 of the Constitution.

30. Another major attack levelled against the reports of the Governor by Mr. Soli Sorabjee was that nowhere in the report's it is stated that the State Government cannot be carried on in accordance with the Constitution. In other words, there is no material on the record to show that there has been Constitutional breakdown of the machinery in the State. In support of his argument the learned counsel drew our attention to the statement in the report which reads:

"It is not appropriate under the circumstances to have the State administered by an Executive consisting of Council of Ministers who do not command the majority in the House."

What was sought to be argued by the learned counsel was to say that it is not appropriate is quite different from saying that there is a constitutional breakdown, and as the Governor only feels that it is not appropriate, there was no legal justification for taking the impugned action.

Again we find ourselves unable to agree with Mr. Soli Sorabjee. The words "it is not appropriate under the circumstances" have to be understood in the context of the report, especially the next sentence, so as to convey the meaning that the Executive which does not command the support of the majority in the House cannot administer the State in accordance with the Constitution. 'Inapp-ropriateness' stated here is referable to the meaning 'is not in accordance with law'. Reference to any dictionary would show that 'appropriateness' and 'compatibility' are interchangeable and, therefore, when something is said to be not appropriate it conveys the meaning that it is not compatible or not in accordance with law. Hence the statement of the Governor in this sentence clearly asserts his understanding of the true principle that an Executive having no majority support in the Legislature, if carries on the Government, will be administering the State not in accordance with the Constitution.

31. In view of the aforesaid discussion, we find no escape from the conclusion that the grounds stated and material supplied in the reports of the Governor are neither irrelevant nor vague, that the reasons disclosed bear a reasonable

nexus with the exercise of the particular power and hence the satisfaction of the President must be treated as conclusive, and that there is no scope at all for a finding that the action of the President is in flagrant violation of the very words of Art. 356(1).

32. Mr. Soli Sorabjee also contended that the factors like the alleged 'unethical methods adopted during the formation of Janata Dal' 'expansion of cabinet', 'horse-trading' and 'atmosphere getting vitiated' are not only vague but have no nexus at all with the question of failure of Constitutional machinery. The learned counsel also laid great stress by contending that the Governor by acting upon the letters given by 19 legislators had circumvented the Anti Defection legislation, the primary aim of which is to discourage the toppling game by legislators by changing their loyalties, and by acting upon those letters the legislators were permitted, in substance, to play the game of toppling the ruling Ministry without incurring the consequences of Anti-Defection law because, if these legislators had withdrawn their support in the House and voted against the Ministry, they would have incurred disqualification under Anti-Defection Law. Reliance upon these letters is contrary to the underlying purpose and the essence of Anti-Defection legislation and therefore illegitimate and prohibited. The learned counsel buttressed his arguments by contending that if the floor test had been held the legislators who had written letters might have changed their mind for several valid reasons e.g. (i) change in the style of functioning of leadership, (ii) change in the leadership, (iii) realisation for maintaining party unity, (iv) unwillingness to incur disqualification under Anti-Defection legislation and (v) not giving a pretext for imposition of President's Rule. In support of the contention that the floor test has always been recognised as the legitimate and relevant method, Sri Soli Sorabjee relied on the judgment of the Orissa High Court in *Bijayananda v. President of India*, Sarkaria Commission Report page 173 para 6.5.01, the judgment of Gauhati High Court in *Vamuzov. Union of India*, (1988) 2 Gauh LJ 468 at p. 483, Report of the Committee of Governors dated 1-10-1971, pages 208, 209, 210, 217-219, 221-219, 221- 223 and 234, and Address by Speaker of Lok Sabha on the occasion of Speakers' Conference on 16-7-1970 paras 13 and 14.

33. In our view, the aforesaid contentions/ points urged by the learned counsel do not in any way destroy the effect of the two material grounds on the basis of which the subjective satisfaction was arrived at by the President. The Governor honestly and truly has stated all the facts. They are not vague at all and are narrative in nature. What was happening in the State, the Governor has disclosed in the report. The Governor was assessing whether the first petitioner was commanding majority and he (Governor) was entitled to take into consideration the behaviour of the MLAs one way or the other.

It is expected that a Government to be effective should not only command a majority in the House but should also be backed by the majority members outside the house so that the Government would not be under a perennial pressure of being dislodged whenever the House meets again.

We have gone through the judgments of the Orissa and Gauhati High Courts mentioned above and find that the same are distinguishable. In Bijayanand's case the main fact was that the Leader of the Opposition who had shown his majority in the House was not tailed upon to form the Ministry not because he had no majority but because the Governor expected that the majority might fall at any moment and there may be no stable Ministry, and on this aspect G. K. Misra, C.J. observed that 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. But, in the instant case, the position is entirely different as at the initial stage itself the Governor has in unequivocal terms stated in his report that he is also satisfied that there is no other party which is in a position to form the Government.

Coming to the case of Vamuzo, (1988(2) Gauh LJ 468) the facts are :

"Hokishe Sema formed the Government in 1987. Chishi attempted to bring down and destabilise the Government. To achieve that end he offered money and lured the separated

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

If we look at those facts, again we find that there is absolutely no similarity of the aforesaid facts to the two material facts in the case on hand. In the said case, as found on those facts, the Governor was held to have exceeded his jurisdiction and the facts stated therein were found to be irrelevant to the provisions of An. 356(1), by the Gauhati High Court.

So far as Sarkada Commission Report, the report of the Committee of Governors and the Address of the Speaker of Lok Sabha are concerned, the views expressed therein are really commendable and it is expected that wherever any such drastic action, like the exercise of power under Art. 356(1), is taken, it should be ensured that the subjective satisfaction of the President is not based on any irrelevant, irrational or perverse ground. But, in the view we have taken on the facts of this case, the views expressed in those reports are of no assistance to the petitioners. Moreover these recommendations are to alter the exist-ing laws, which implies that till these recommendations are moulded into constitutionally enforceable norms the existing law would prevail.

34. Mr. Soli Sorabjee had made pointed reference to the Tenth Schedule i.e. Anti

Defection Law, for bringing home his point that the factum of the withdrawal of the support by 19 legislators was wholly irrelevant. This argument was advanced to prove his point that in the context of Anti Defection Legislation, floor test was the most relevant, legitimate and surest method to determine whether the Council of Ministers headed by Sri S.R. Bommai commanded the majority in the House or not. We are afraid, we are unable to agree with this submission of the learned counsel. The introduction of Tenth Schedule in the Constitution has not in any way affected the exercise of power under Art. 356 nor has it amended Art. 356 in any manner. The amending body which inserted the Tenth Schedule to the Constitution had before it several decisions (specially the Rajasthan Case as to the scope of Art. 356. There is a presumption that the law-making body was aware of the existing interpretation given by the Supreme Court on a provision of law or of a Constitutional provision. If the said Constitutional provision (Art. 356) was untouched while adding a new schedule to the Constitution elsewhere without reference to the existing provision (Art. 356), we have to presume that the existing interpretation of the said provision continues to govern the situation. It is not possible to hold that the interpretation given to Art. 356 in Rajasthan Case, if continued to govern it, would destroy the efficacy of the Tenth Schedule. Tenth Schedule to the Constitution is applicable to the transaction of business inside the House of Legislature. The anti defection activity outside the House is not penalised in any manner by Tenth Schedule. Concept of the failure of the Constitutional machinery of the Government is not confined to the loss of majority by a ministry in the House; it may be due to several reasons. Therefore, if meeting of the Legislature, was contemplated as a mandatory requirement preceding a report of the Governor for an action under Art. 356 and floor test was impliedly made the sole and exclusive test to judge the stability of the Ministry (after the Tenth Schedule was added to the Constitution), the Tenth Schedule would have been suitably worded, or Art. 356 would have been altered."

In para 389, Justice Reddy states that the High Court has dismissed the writ petition giving following reasoning :

"(1) The proclamation under Article 356(1) is not immune from judicial scrutiny. The

court can examine whether the satisfaction has been formed on wholly extraneous material or whether there is a rational nexus between the material and the satisfaction.

(2) In Article 356, the President means the Union council of ministers. The satisfaction referred to therein is subjective satisfaction. This satisfaction has no doubt to be formed on a consideration of all the facts and circumstances.

(3) The two reports of the Governor conveyed to the President essential and relevant facts which were relevant for the purpose of Article 356. The facts stated in the Governor's report cannot be stated to be irrelevant. They are perfectly relevant.

(4) Where the Governor's "personal bona fides" are not questioned, his satisfaction that no other party is in a position to form the government has to be accepted as true and is based upon a reasonable assessment of all the relevant facts.

(5) Recourse to floor test was neither compulsory nor obligatory. It was not a prerequisite to sending up a report recommending action under Article 356(1),

(6) The introduction of Xth Schedule to the Constitution has not affected in any manner the content of the power under Article 356.

(7) Since the proclamation has to be issued on the satisfaction of the Union council of ministers the Governor's report cannot be faulted on the ground of legal mala fides.

(8) Applying the test indicated in the State of Rajasthan v. Union of India, the court must hold, on the basis of material disclosed, that the subjective satisfaction arrived at by the President is conclusive and cannot be faulted. The proclamation, therefore, is unobjectionable."

Except for aforesaid reasons 1 and 2, other reasons were not accepted by Justice Reddy. Learned Judge did not accept the reasoning of the High Court that where Governor's personal bona fides are not questioned, his satisfaction that no party is in a position to form the Government has to be accepted as true as it is based on reasonable assessment of all the relevant facts. The Court also did not accept the reasoning that the Governor's report cannot be faulted on the ground of mala fides. Learned Judge has stated that the question whether government has lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The House is the place where the democracy is in action. It is not a question of subjective satisfaction of the Governor. It would be useful to note what has been observed in paragraph 391 which reads thus:

"391. We must also say that the observation under point (7) is equally

misplaced. It is true that action under Article 356 is taken on the basis of satisfaction of the Union Council of Ministers but on that score it cannot be said that 'legal mala fides' of the Governor is irrelevant. When the Article speaks of the satisfaction being formed on the basis of the Governor's report, the legal mala fides, if any, of the Governor cannot be said to be irrelevant. The Governor's report may not be conclusive but its relevance is undeniable. Action under Article 356 can be based only and exclusively upon such report. Governor is a very high constitutional functionary. He is supposed to act fairly and honestly consistent with his oath. He is actually reporting against his own Government. It is for this reason that Article 356 places such implicit faith on his report. If, however, in a given case his report is vitiated by legal mala fides, it is bound to vitiate the President's action as well. Regarding the other points made in the judgment of the High Court, we must say that the High Court went wrong in law in approving and upholding the Governor's report and the action of the President under Article 356. The Governor's report is vitiated by more than one assumption totally unsustainable in law. The Constitution does not create an obligation that the political party forming the ministry should necessarily have a majority in the Legislature. Minority Governments are not unknown. What is necessary is that that Government should enjoy the confidence of the House. This aspect does not appear to have been kept in mind by the Governor. Secondly and more importantly whether the council of ministers have lost the confidence of the House is not a matter to be determined by the Governor or for that matter anywhere else except the floor of the House. The principle of democracy underlying our Constitution necessarily means that any such question should be decided on the floor of the House. The House is the place where the democracy is in action. It is not for the Governor to determine the said question on his own or on his own verification. This is not a matter within his subjective satisfaction. It is an objective fact capable of being established on the floor of the House. It is gratifying to note that Sri R. Venkataraman, the former President of India has affirmed this view in his Rajaji Memorial Lecture (Hindustan Times dated February 24, 1994).

The substantial reasons given by the High Court in

paragraphs 28 to 34 for dismissing the writ petition did not find favour with this Court. Dealing with the report of the Governor in respect of Karnataka, it was held that in the circumstances it cannot be said that the Governor's report contained or was based upon relevant material. There could be no question of the Governor making an assumption of his own.

Clearly, Bommai's case expanded the scope of judicial review. True, observations by Justice Reddy were made in the context of a situation where the incumbent Chief Minister is alleged to have lost the majority support or the confidence of the House and not in the context of a situation arisen after a general election in respect whereof no opinion was expressed, but, in our view the principles of scope of judicial review in such matters cannot be any different. By and large, same principles will apply when making recommendation for dissolution of a newly elected Assembly and again plunging the State to elections.

Justice Reddy, for upholding the dissolution of the State Legislatures of Madhya Pradesh, Rajasthan and Himachal Pradesh also came to the conclusion that the reports of the Governor disclosed that the State Government had miserably failed to protect the citizens and the property of the State against the internal disturbances and on the basis of the said report, the President formed the requisite satisfaction. Dealing with the circumstances in the State of Madhya Pradesh, it was held that 'Governor's reports are based upon relevant material and are made bona fide and after due verification'. (Emphasis supplied by us)

Thus, it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not. The absence of these factors resulted in the majority declaring the dissolution of State Legislatures of Karnataka and Nagaland as invalid. In view of the above, we are unable to accept the contention urged by the ld. Attorney General for India, Solicitor General of India and Additional Solicitor General, appearing for the Government that the report of the Governor itself is the material and that it is not permissible within the scope of judicial review to go into the material on which the report of the Governor may be based and the question whether the same was duly verified by the Governor or not. In the present case, we have nothing except the reports of the Governor. In absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal ipse dixit of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be main player, but Council of Ministers should have verified facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what Governor stated. Clearly, the Governor has mislead the Council of Ministers which lead to aid and advice being given by the Council of Ministers to the President leading to the issue of the impugned Proclamation.

Regarding the argument urged on behalf of the Government of lack of judicially manageable standards and, therefore, the court should leave such complex questions to be determined by the President, Union Council of Ministers and the Governor, as the situation like the one in Bihar, is full of many imponderables, nuances, implications and intricacies and there are too many ifs and buts not susceptible of judicial scrutiny, the untenability of the argument becomes evident when it is examined in the light of decision in Bommai' case upholding the challenge made to dissolution of the Assemblies of Karnataka and Nagaland. Similar argument defending the dissolution of these two assemblies having not found favour before a Nine Judge Bench, cannot be accepted by us. There too, argument was that there were no judicially manageable standards for judging Horse-trading, Pressure, Atmosphere being vitiated, wrongful confinement, Allurement by money, contacts with insurgents in Nagaland. The argument was rejected.

The position was different when Court considered validity of dissolution of Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh.

In paragraphs 432 and 433 of the opinion of Justice Jeevan Reddy in Bommai's case, after noticing the events that led to demolition of Babri Masjid on 6th December, 1992, the assurances that had been given prior to the said date, the extraordinary situation that had arisen after demolition, the prevailing tense communal situation, the learned Judge came to the conclusion that on material placed before the Court including the reports of the Governors, it was not possible to say that the President had no relevant material before him on the basis of which he could form satisfaction that BJP Governments of Madhya Pradesh, Rajasthan and Himachal Pradesh cannot disassociate themselves from the action and its consequences and that these Governments, controlled by one and the same party, whose leading lights were actively campaigning for the demolition of structure, cannot be disassociated from the acts and deeds of the leaders of BJP. It was further held that if the President was satisfied that the faith of these BJP Governments in the concept of secularism was suspected in view of the acts and conduct of the party controlling these Governments and that in the volatile situation that developed pursuant to the demolition, the Government of these States cannot be carried on in accordance with the provisions of the Constitution, the Court is not able to say that there was no relevant material upon which he could be so satisfied. Under these circumstances, it was observed that the Court cannot question the correctness of the material produced and that even if part of it is not relevant to the action. The Court cannot interfere so long as there is some relevant material to sustain the action. For appreciating this line of reasoning, it has to be borne in mind that the same learned Judge, while examining the validity of dissolution of Karnataka and Nagaland Assemblies, agreeing with the reasoning and conclusions given in the opinion of Justice Sawant which held that the material relied upon by the Governor was nothing but his ipse dixit came to the conclusion that the said dissolution were illegal. The majority opinion and the correct ratio thereof can only be appreciated if it is kept in view that the majority has declared invalid the dissolution of

Assemblies of Karnataka and Nagaland and held as valid the dissolution of the Assemblies of Madhya Pradesh, Rajasthan and Himachal Pradesh. Once this factor is kept in full focus, it becomes absolutely clear that the plea of perception of the same facts or the argument of lack of any judicially manageable standards would have no legs to stand.

In the present case, like in Bommai's case, there is no material whatsoever except the ipse dixit of the Governor. The action which results in preventing a political party from staking claim to form a Government after election, on such fanciful assumptions, if allowed to stand, would be destructive of the democratic fabric. It is one thing to come to the conclusion that the majority staking claim to form the Government, would not be able to provide stable Government to the State but it is altogether different thing to say that they have garnered majority by illegal means and, therefore, their claim to form the Government cannot be accepted. In the latter case, the matter may have to be left to the wisdom and will of the people, either in the same House it being taken up by the opposition or left to be determined by the people in the elections to follow. Without highly cogent material, it would be wholly irrational for constitutional authority to deny the claim made by a majority to form the Government only on the ground that the majority has been obtained by offering allurements and bribe which deals have taken place in the cover of darkness but his undisclosed sources have confirmed such deals. The extra-ordinary emergency power of recommending dissolution of a Legislative Assembly is not a matter of course to be resorted to for good governance or cleansing of the politics for the stated reasons without any authentic material. These are the matters better left to the wisdom of others including opposition and electorate.

It was also contended that the present is not a case of undue haste. The Governor was concerned to see the trend and could legitimately come to the conclusion that ultimately, people would decide whether there was an 'ideological realignment', then there verdict will prevail and the such realigned group would win elections, to be held as a consequence of dissolution. It is urged that given a choice between going back to the electorate and accepting a majority obtained improperly, only the former is the real alternative. The proposition is too broad and wide to merit acceptance. Acceptance of such a proposition as a relevant consideration to invoke exceptional power under Article 356 may open a floodgate of dissolutions and has far reaching alarming and dangerous consequences. It may also be a handle to reject post-election alignments and realignments on the ground of same being unethical, plunging the country or the State to another election. This aspect assumes great significance in situation of fractured verdicts and in the formation of coalition Governments. If, after polls two or more parties come together, it may be difficult to deny their claim of majority on the stated ground of such illegality. These are the aspects better left to be determined by the political parties which, of course, must set healthy and ethical standards for themselves, but, in any case, the ultimate judgment has to be left to the electorate and the legislature comprising also of members of opposition.

To illustrate the aforesaid point, we may give two examples in a situation where none of the political party

was able to secure majority on its own :

1. After polls, two or more political parties come together to form the majority and stake claim on that basis for formation of the Government. There may be reports in the media about bribe having been offered to the elected members of one of the political parties for its consenting to become part of majority.

If the contention of the respondents is to be accepted, then the constitutional functionary can decline the formation of the Government by such majority or dissolve the House or recommend its dissolution on the ground that such a group has to be prevented to stake claim to form the Government and, therefore, a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

2. A political party stakes claim to form the Government with the support of independent elected candidates so as to make the deficient number for getting majority. According to the media reports, under cover of darkness, large sums of bribe were paid by the particular party to independent elected candidates to get their support for formation of Government. The acceptance of the contention of the respondents would mean that without any cogent material the constitutional functionary can decline the formation of the Government or recommend its dissolution even before such a claim is made so as to prevent staking of claim to form the Government.

We are afraid that resort to action under Article 356(1) under the aforesaid or similar eventualities would be clearly impermissible. These are not the matters of perception or of the inference being drawn and assumptions being made on the basis whereof it could be argued that there are no judicial manageable standards and, therefore, the Court must keep its hands off from examining these matters in its power of judicial review. In fact, these matters, particularly without very cogent material, are outside the purview of the constitutional functionary for coming to the conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.

The contention that the installation of the Government is different than removal of an existing Government as a consequence of dissolution as was the factual situation before the Nine Judge Bench in Bommai's case and, therefore, same parameters cannot be applied in these different situations, has already been dealt with hereinbefore. Further, it is to be remembered that a political party prima facie having majority has to be permitted to continue with the Government or permitted to form the Government, as the case may be. In both categories, ultimately the majority shall have to be proved on the floor of the House. The contention also overlooks the basic issue. It being that a party even, prima facie, having majority can be prevented to continue to run the Government or claim to form the Government declined on the purported assumption of the said majority having been obtained by illegal means. There is no question of such basic issues allegedly falling in the category of "political thicket" being closed on the ground that there are many imponderables for which there is no judicially manageable standards and, thus, outside the

scope of judicial review.

The further contention that the expression 'situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution' in Article 356 shows that the power is both preventive and/or curative and, therefore, a constitutional functionary would be well within his rights to deny formation of the Government to a group of parties or elected candidates on the ground of purity of political process is of no avail on the facts and circumstances of this case, in view of what we have already stated. Even if preventive, power cannot be abused.

Another contention urged is that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered and in that light of the expressions such as 'mala fide' or 'irrational' or 'extraneous' have to be seen with a view to ultimately find out whether the action is ultra vires or not. The contention is that the concept of malafides as generally understood in the context of executive action is unavailable while deciding the validity of legislative action. The submission is that the malafides or extraneous consideration cannot be attributed to a legislative act which when challenged the scope of inquiry is very limited.

For more than one reason, we are unable to accept the contention of the proclamation of the nature in question being a legislative act. Firstly, if the contention was to be accepted, Bommai's case would not have held the proclamation in case of Karnataka and Nagaland as illegal and invalid. Secondly, the contention was specifically rejected in the majority opinion of Justice Jeevan Reddy in paragraph 377. The contention was that the proclamation of the present nature assumes the character of legislation and that it can be struck down only on the ground on which a legislation can be struck down. Rejecting the contention, it was held that every act of Parliament does not amount to and does not result in legislation and that the Parliament performs many other functions. One of such functions is the approval of the proclamation under clause (3) of Article 356. Such approval can, by no stretch of imagination, be called 'legislation'. Its legal character is wholly different. It is a constitutional function, a check upon the exercise of power under clause (1) of Article 356. It is a safeguard conceived in the interest of ensuring proper exercise of power under clause (1). It is certainly not legislation nor legislative in character.

Mr. Subramaniam, learned Additional Solicitor General, however, contended that Bommai's case proceeded on the assumption that the proclamation under Article 356(1) is not legislative but when that issue is examined in depth with reference to earlier decisions in the cases of *In Re: The Delhi Laws Act, 1912*, the *Ajmer-Merwara (Extension of Laws) Act, 1947* and the *Part C States (Laws) Act, 1950* [1951 SCR 747 at page 970-971]; *Jayantilal Amrit Lal Shodhan v. F.N. Rana and Ors.* [(1964) 5 SCR 294 at 205-206]; *Rameshchandra Kachardas Porwal & Ors. State of Maharashtra & Ors.* [(1981) 2 SCC 722], *A.K. Roy v. Union of India & Ors.* [(1982) 1 SCC 271], it would be clear that the conclusion of Justice Reddy in para 377 requires re-look in the light of these decisions. We are unable to accept the contention. The decision of Nine

Judge Bench is binding on us. Though Bommai has widened the scope of judicial review, but going even by principles laid in State of Rajasthan's case, the existence of the satisfaction can always be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds. Apart from the fact that the narrow minimal area of judicial review as advocated in State of Rajasthan's case is no longer the law of the land in view of its extension in Bommai's case but the present case even when considered by applying limited judicial review, cannot stand judicial scrutiny as the satisfaction herein is based on wholly extraneous and irrelevant ground. The main ground being to prevent a party to stake claim to form the Government.

In State of Rajasthan's case, in para 185, Justice Untwalia observed that this Court is not powerless to interfere with such an order which is ultra vires, wholly illegal or mala fide as in such a situation it will tantamount in law to be no order at all. Further observing that it is incompetent and hazardous for the Court to draw conclusions by investigation of facts by entering into the prohibited area but at the same time it would be equally untenable to say that the Court would be powerless to strike down the order, if on its face, or, by going round the circumference of the prohibited area, the Court finds the order as a mere pretence or colourable exercise of the extraordinary powers given under certain Articles of the Constitution and thus in a given case it may be possible to conclude that it is a fraud on the exercise of the power. In the present case, we have reached the conclusion that the action of the Governor was a mere pretence, the real object being to keep away a political party from staking a claim to form the Government.

Referring to the opinion of Justice Reddy, in Bommai's case, it was contended for the respondents that the approach adopted in Barium Chemicals Ltd. and Anr. v. Company Law Board and Ors. [(1966) Supl. SCR 311] and other cases where action under challenge is taken by statutory or administrative authorities, is not applicable when testing the validity of the constitutional action like the present one. For proper appreciation of the contention, it may be useful to reproduce in full paragraphs 372 and 373 from which certain observations were relied upon. The same read as under:

"372. Having noticed various decisions projecting different points of view, we may now proceed to examine what should be the scope and reach of judicial review when a proclamation under Article 356(1) is questioned. While answering this question, we should be, and we are, aware that the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the Government of the States is carried on in accordance with the Constitution. We are equally aware that any misuse or abuse of this power is bound to play havoc with our constitutional system. Having regard to the form of Government we have adopted, the power is really that of the Union Council of Ministers with the Prime

Minister at its head. In a sense, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional Government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the centre for the time being nor is it supposed to be a weapon with which to strike your political opponent. The very enormity of this power --undoing the will of the people of a State by dismissing the duly constituted Government and dissolving the duly elected Legislative Assembly -- must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later. Sow a wind and you will reap the whirlwind. Wisdom lies in moderation and not in excess."

(Emphasis supplied by us)

Further, learned Judge states that :

"373. Whenever a proclamation under Article 356 is questioned, the court will no doubt start with the presumption that it was validly issued but it will not and it should not hesitate to interfere if the invalidity or unconstitutionality of the proclamation is clearly made out. Refusal to interfere in such a case would amount to abdication of the duty cast upon the court -- Supreme Court and High Courts -- by the Constitution. Now, what are the grounds upon which the court can interfere and strike down the proclamation? While discussing the decisions herein-above, we have indicated the unacceptability of the approach adopted by the Privy Council in *Bhagat Singh v. Emperor* (AIR 1931 PC 111) and *King Emperor v. Bengari Lal Sarma* (AIR 1945 PC 48). That was in the years 1931 and 1944, long before the concept of judicial review had acquired its present efficacy. As stated by the Pakistan Supreme Court, that view is totally unsuited to a democratic polity. Even the Privy Council has not stuck to that view, as is evident from its decision in the case from Malaysia *Stephen Kalong Ningkan v. Government of Malaysia* (1970 AC 379). In this case, the Privy Council proceeded on the assumption that such a proclamation is amenable to judicial review. On facts and circumstances of this case, it found the action justified. Now, coming to the approach adopted by the Pakistan Supreme Court, it must be said -- as indicated hereinbefore --that it is coloured by the nature of the power conferred upon the President by Section 58(2)(b) of the Pakistani Constitution.

The power to dismiss the federal Government and the National Assembly is vested in the President and President alone. He has to exercise that power in his personal discretion and judgment. One man against the entire system, so to speak --even though that man too is elected by the representatives of the people. That is not true of our Constitution. Here the President acts on the aid and advice of the Union Council of Ministers and not in his personal capacity. Moreover, there is the check of approval by Parliament which contains members from that State (against the Government/Legislative Assembly of which State, action is taken) as well. So far as the approach adopted by this Court in *Barium Chemicals* is concerned, it is a decision concerning subjective satisfaction of an authority created by a statute. The principles evolved then cannot ipso facto be extended to the exercise of a constitutional power under Article 356. Having regard to the fact that this is a high constitutional power exercised by the highest constitutional functionary of the Nation, it may not be appropriate to adopt the tests applicable in the case of action taken by statutory or administrative authorities -- nor at any rate, in their entirety. We would rather adopt the formulation evolved by this court in *State of Rajasthan* as we shall presently elaborate. We also recognise, as did the House of Lords in *C.C.S.U. v. Minister for the Civil Service* (1985 AC 374) that there are certain areas including those elaborated therein where the court would leave the matter almost entirely to the President/Union Government. The court would desist from entering those arenas, because of the very nature of those functions. They are not the matters which the court is equipped to deal with. The court has never interfered in those matters because they do not admit of judicial review by their very nature. Matters concerning foreign policy, relations with other countries, defence policy, power to enter into treaties with foreign powers, issues relating to war and peace are some of the matters where the court would decline to entertain any petition for judicial review. But the same cannot be said of the power under Article 356. It is another matter that in a given case the court may not interfere. It is necessary to affirm that the proclamation under Article 356(1) is not immune from judicial review, though the parameters thereof may vary from an ordinary case of subjective satisfaction."

The aforesaid paragraphs cannot be read in

isolation and have to be seen while bearing in mind that learned Judge invalidated dissolution of Assembly of Karnataka and Nagaland. Be that as it may, in the present case, the validity of the impugned notification is not being judged on application of principles available for judging the validity of administrative actions.

Further, para 376 of the opinion of Justice Jeevan Reddy is very instructive and it may be reproduced as under :

"We recognise that judicial process has certain inherent limitations. It is suited more for adjudication of disputes rather than for administering the country. The task of governance is the job of the Executive. The Executive is supposed to know how to administer the country, while the function of the judiciary is limited to ensure that the Government is carried on in accordance with the Constitution and the Laws. Judiciary accords, as it should, due weight to the opinion of the Executive in such matters but that is not to say, it defers to the opinion of Executive altogether. What ultimately determines the scope of judicial review is the facts and circumstances of the given case. A case may be a clear one -- like Meghalaya and Karnataka cases -- where the court can find unhesitatingly that the proclamation is bad. There may also be cases -- like those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh -- where the situation is so complex, full of imponderables and a fast-evolving one that the court finds it not a matter which admits of judicial prognosis, that it is a matter which should be left to the judgment of and to be handled by the Executive and may be in the ultimate analysis by the people themselves. The best way of demonstrating what we say is by dealing with the concrete cases before us.

(Emphasis supplied by us)

It is evident from the above that what ultimately determines the scope of judicial review is the facts and circumstances of the given case and it is for this reason that the Proclamations in respect of Karnataka and Nagaland were held to be bad and not those relating to Madhya Pradesh, Rajasthan and Himachal Pradesh.

We are not impressed with the argument based on a possible disqualification under Tenth Schedule if the MLAs belonging to LJP party had supported the claim of Nitish Kumar to form the Government. At that stage, it was a wholly extraneous to take into consideration that some of the members would incur the disqualification if they supported a particular party against the professed stand of the political party to which they belong. The intricate question as to whether the case would fall within the permissible category of merger or not could not be taken into consideration. Assuming it did not fall in the permissible arena of merger and the MLAs would earn the risk of disqualification, it is for the MLAs or the

appropriate functionary to decide and not for the Governor to assume disqualification and thereby prevent staking of claim by recommending dissolution. It is not necessary for us to examine, for the present purpose, para 4 of the Tenth Schedule dealing with merger and/or deemed merger. In this view the question sought to be raised that there cannot be merger of legislative party without the first merger of the original party is not necessary to be examined. The contention sought to be raised was that even if two-third legislators of LJP legislative party had agreed to merge, in law there cannot be any merger without merger of original party and even in that situation those two-third MLAs would have earned disqualification. Presently, it is not necessary to decide this question. It could not have been gone into by the Governor for recommending dissolution.

The provision of the Tenth Schedule dealing with defections, those of RP Act of 1951 dealing with corrupt practice, electoral offences and disqualification and the provisions of Prevention of Corruption Act, 1988 are legal safeguards available for ensuring purity of public life in a democracy. But, in so far as the present case is concerned, these had no relevance at the stage when the dissolution of the Assembly was recommended without existence of any material whatsoever. There was no material for the assumption that claim may be staked based not on democratic principles and based on manipulation by breaking political parties.

There cannot be any doubt that the oath prescribed under Article 159 requires the Governor to faithfully perform duties of his office and to the best of his ability preserve, protect and defend the Constitution and the laws. The Governor cannot, in the exercise of his discretion or otherwise, do anything what is prohibited to be done. The Constitution enjoins upon the Governor that after the conclusion of elections, every possible attempt is made for formation of a popular Government representing the will of the people expressed through the electoral process. If the Governor acts to the contrary by creating a situation whereby a party is prevented even to stake a claim and recommends dissolution to achieve that object, the only inescapable inference to be drawn is that the exercise of jurisdiction is wholly illegal and unconstitutional. We have already referred to the Governor report dated 21st May, 2005, inter alia, stating that 17 \026 18 MLAs belonging to LJP party are moving towards JDU which would mean JDU may be in a position to stake claim to form the Government. The further assumption that the move of the said members was itself indicative of various allurements having been offered to them and on that basis drawing an assumption that the claim that may be staked to form a Government would affect the constitutional provisions and safeguards built therein and distort the verdict of the people would be arbitrary. This shows that the approach was to stall JDU from staking a claim to form the Government. At that stage, such a view cannot be said to be consistent with the provisions of Tenth Schedule. In fact, the provisions of the said Schedule at that stage had no relevance. It is not a case of 'assumption', or 'perception' as to the provisions of Constitution by the Governor. It is a clear case where attempt was to somehow or the other prevent the formation of a Government by a political party - an area wholly prohibited in so far as the functions, duties and obligations of the Governor are

concerned. It was thus a wholly unconstitutional act. It is true as has been repeatedly opined in various reports and by various constitutional experts that the defections have been a bane of the Indian Democracy but, at the same time, it is to be remembered that the defections have to be dealt with in the manner permissible in law.

If a political party with the support of other political party or other MLA's stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. Governor is not an autocratic political Ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous. The ground of mal administration by a State Government enjoying majority is not available for invoking power under Article 356. The remedy for corruption or similar ills and evils lies elsewhere and not in Article 356(1). In the same vein, it has to be held that the power under Tenth Schedule for defection lies with the Speaker of the House and not with the Governor. The power exercised by the Speaker under the Tenth Schedule is of judicial nature. Dealing with the question whether power of disqualification of members of the House vests exclusively with the House to the exclusion of judiciary which in Britain was based on certain British legislature practices, as far as India is concerned, it was said in Kihoto's case that :

"It is, therefore, inappropriate to claim that the determinative jurisdiction of the Speaker or the Chairman in the Tenth Schedule is not a judicial power and is within the non-justiciable legislative area."

The Governor cannot assume to himself aforesaid judicial power and based on that assumption come to the conclusion that there would be violation of Tenth Schedule and use it as a reason for recommending dissolution of assembly.

The Governor, a high Constitutional functionary is required to be kept out from the controversies like disqualification of members of a Legislative Assembly and, therefore, there are provisions like Article 192(2) in the Constitution providing for Governor obtaining the opinion of the Election Commission and acting according to such opinion, in the constitutional scheme of things. Similar provision, in so far as, member of Parliament is concerned being in Article 103(2) of the Constitution {Brundaban Nayak v. Election Commission of India & Anr. [(1965) 3 SCR 53]; and Election Commission of India & Anr. v. Dr. Subramaniam Swamy & Anr. [(1996) 4 SCC 104]}.

For all the aforesaid reasons, the Proclamation dated 23rd May, 2005 is held to be unconstitutional.

POINT NO.3 : If the answer to the aforesaid questions is in affirmative, is it necessary to direct status quo ante as on 7th March, 2005 or 4th March, 2005?

As a consequence of the aforesaid view on point no. 2, we could have made an order of status quo ante as prevailing before dissolution of Assembly. However, having regard to the facts and the circumstances of the case, in terms of order of this Court dated 7th October, 2005, such a relief was declined. Reasons are the larger public interest, keeping in view the ground realities and taking a pragmatic view. As a result of the impugned Proclamation, the Election Commission of India had not only made preparations for the four phase election to be conducted in the State of Bihar but had also issued Notification in regard to first two phases before conclusion of arguments. Further, in regard to these two phases, before 7th October, 2005, even the last date for making nominations and scrutiny thereof was also over. In respect of 1st phase of election, even the last date for withdrawal of nominations also expired and polling was fixed for 18th October, 2005. The election process had been set in motion and was at an advanced stage. Judicial notice could be taken of the fact that considerable amount must have been spent; enormous preparations made and ground works done in the process of election and that too for election in a State like the one under consideration. Having regard to these subsequent developments coupled with numbers belonging to different political parties, it was thought fit not to put the State in another spell of uncertainty. Having regard to the peculiar facts, despite unconstitutionality of the Proclamation, the relief was moulded by not directing status quo ante and consequently permitting the completion of the ongoing election process with the fond hope that the electorate may again not give fractured verdict and may give a clear majority to one or other political party. The Indian electorate possessing utmost intelligence and having risen to the occasion on various such occasions in the past.

POINT NO.4 : What is the scope of Article 361 granting immunity to the Governor?

By order dated 8th September, 2005, we held that the Constitution of India grants immunity to the Governor as provided in Article 361. Article 361(1), inter alia, provides that the Governor 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 purported to be done by him in the exercise and performance of those powers and duties. We accepted the submissions made on behalf of the respondents that in view of this Article notice could not be issued to the Governor, at the same time, further noticing that the immunity granted does not affect the power of this Court to judicially scrutinise attack made on the Proclamation issued under Article 356(1) of the Constitution of India on the ground of malafides or it being ultra vires and that it would be for the Government to satisfy the Court and adequately meet such ground of challenge. A mala fide act is wholly outside the scope of the power and has no existence in the eyes of the law. We, further held that the expression 'purported to be done' in Article 361 does not cover acts which are mala fide or ultra vires and thus, the Government supporting the Proclamation under Article 356(1) shall have to meet the challenge. The immunity granted under Article 361 does not mean that in the absence of Governor, the grounds of mala fide or being ultra vires would not be

examined by the Court. This order was made at the stage when we had not examined the question whether the exercise of power by the Governor was mala fide or ultra vires or not. This question was argued later.

In our order dated 8th September, 2005 while giving the brief reasons we stated that detailed reasons will be given later.

Article 361(1) which grants protection to the President and the Governor reads as under :

"361. Protection of President and Governors and Rajpramukhs.--(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.

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

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

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

A plain reading of the aforesaid Article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as they are not answerable to any Court for the exercise and performance of their powers and duties. Most of the actions are taken on aid and advice of Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that

may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of malafides are required to be defended by Union of India or the State, as the case may be. Even in cases where the personal malafides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal malafides are made. Article 361 does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to President or Governor for even filing of affidavit to assist the Court. Filing of an affidavit on one's own volition is one thing than issue of direction by the Court to file an affidavit. The personal immunity under Article 361(1) is complete and, therefore, there is no question of the President or the Governor being made answerable to the Court in respect of even charges of malafides.

In *Union Carbide Corporation, etc., etc. v. Union of India, etc. etc.* [(1991) 4 SCC 584], dealing with Article 361(2) of the Constitution, Justice Venkatahalliah referred to the famous case of *Richard Nixon* [(1982) 457 US 731] about theoretical basis for the need for such immunity. It was said "Article 361(2) of the Constitution confers on the President and the Governors immunity even in respect of their personal acts and enjoins that no criminal proceedings shall be instituted against them during their term of office. As to the theoretical basis for the need for such immunity, the Supreme Court of the United States in a case concerning immunity from civil liability (*Richard Nixon v. Ernest Fitzgerald*, 457 US 731 : 73 Law Ed 2d 349) said:

".....This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our Government....."

".....In the case of the President the inquiries into history and policy though mandated independently by our case, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of

the President's office in a system structured to achieve effective Government under, a constitutionally mandated separation" of powers."

(L Ed p.367)

".....In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognise absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which of the President's innumerable "functions" encompassed a particular action....."

A division Bench of the Bombay High Court in the case of Shri Pratapsing Raojirao Rane & others v. The Governor of Goa & others [AIR 1999 Bombay 53] has correctly held that in respect of his official acts, the Governor is not answerable to the Court even in respect of charge of mala fide and that in such an eventuality the Governor cannot be said to be under the duty to deal with the allegations of mala fide. The Constitutional Law of India, 4th Edn. by H.M.Seervai has been rightly relied upon in the said judgment. The observations made by full Bench of the Madras High Court in K.A. Mathialagan & Ors. v. The Governor of Tamil Nadu & Ors. [AIR 1973 Madras 198] that the Governor would be under duty to deal with allegations of mala fide in order to assist the Court has been rightly described in Seervai's commentary being in direct conflict with the complete personal immunity of the Governor.

The words 'purported to be done' are of wide amplitude. In Biman Chandra v. Governor, West Bengal [AIR 1952 Calcutta 799] it was held that Article 361 affords immunity in respect of its exercise and performance of the power and duties of the office and any act done or purported to be done by him in exercise and performance of those powers and duties.

In G.D.Karkare v. T.L.Shevde [AIR 1952 Nagpur 330] construing the expression 'purporting to be done' it was held that any act, though not done in pursuance of the Constitution, may nevertheless be accorded this protection if the act professes or purports to be done in pursuance of the Constitution. It was further explained that though the Governor is not amenable to the process of the Court but it cannot be said that the High Court cannot examine his action and grant relief in the absence of authority making the decision.

In State v. Kavas Manekshaw Nanavati [AIR 1960 Bombay 502] full Bench of the High Court held that Article 361 only gives personal protection to the Governor. It is not necessary that the Governor should

be a party to the proceeding. Validity of actions can be considered and decided in the absence of the Governor. In *The State of West Bengal and Ors. v. Sallendra Nath Bose* [AIR 1964 Calcutta 184] it was held that a citizen is not without redress even though he cannot implead the Governor as a party but can be given relief.

The position in law, therefore, is that the Governor enjoys complete immunity. Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The immunity granted by Article 361(1) does not, however, take away the power of the Court to examine the validity of the action including on the ground of malafides.

In view of the above, while holding the impugned Proclamation dated 23rd May, 2005 unconstitutional, we have moulded the relief and declined to grant status quo ante and consequentially permitted the completion of ongoing election process.

All petitions are disposed of accordingly.