CHAPTER

SHADES OF JUDICIAL REVIEW UNDER PRESIDENT'S RULE

* Proclamation of President's Rule and Judicial Review
* Facts of Individual Cases
* Judicial Review of Article 356
Article 356 envisages proclamation of Presidential Rule in case of a break-down of constitutional machinery in the states. During the debate on the present article 356, in the constituent assembly it was realised that the provision is a necessary evil and is indispensable for a nascent democracy. But subsequent events proved that proclamation of Presidential Rule has become more a rule than an exception. It was invoked for about 101 times during 47 years.

The constitution 38th Amendment (1975) had placed proclamations issued under Articles 356 beyond the scope of judicial review "in any court on any ground", but the constitution 44th Amendment (1978) removed this impediment. It is clear that judicial review of a proclamation under Article 356 would be on any grounds upon which an executive determination which is found on subjective satisfaction can be questioned.

The legal experts say that after deletion of clause (5) by 44th Amendment leaves no doubt that judicial review is not totally excluded with regard to the question
relating to President's satisfaction. It is said that if the proclamation has been made upon a consideration which is wholly extraneous or irrelevant to the purpose for which the power under Article 356, had been confessed, namely, a breakdown of constitutional machinery in the state, or in other words, where there is no "reasonable nexus" between the reasons disclosed and the satisfaction of the President in such a case it can be said that there has been no satisfaction of the President, which is a condition precedent to exercise of the power under Article 356. It can also be questioned on the ground of malafide because a statutory order which lacks bonafides has no existence in law.

The Union Government is of the view that it cannot be compelled to disclose all the facts and materials leading to the satisfaction of the President. Article 74 would be a bar and the court would be precluded from going into the same. If the government does not give reasons, than the only scrutiny which the court can carry out is to examine whether the reasons given are wholly extraneous to the formation of the satisfaction.

It is impossible for the court to substitute its judgement for that of the Government. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is not a 'decision
which can be judicially discoverable by manageable standards. It can be based on, inter-alia, public reaction, motivation and response of different classes of people and then anticipated future behaviour, and a host of other consideration. This argument of the Union Government can be accepted at the time when Article 356 contained clause (5), which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) of Article 356 was made final and conclusive and that satisfaction was not open to be questioned in any court. But that cannot hold good after the 44th Amendment. Legal experts say it can be argued that the 44th constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the questions relating to the President's satisfaction.

In quasi-federal constitution like ours, Article 356 sticks out like a sore thumb—it is antifederal in character and spirit, and it has been one of the most frequently misused provisions of the constitution. The framers of our constitution expected that this extraordinary provision would be invoked rarely, in extreme cases—and as a last resort when all alternative correctives had failed. But the Sarkar's Commission (on centre-State Relations) truefully noted (in its Report in 1988) that "despite the hopes and expectations so emphatically expressed by the
framers. In the last 37 years, Article 356 has been brought into action no less than 75 times."

The power to declare President's rule has been challenged on many occasions for example before Kerela High Court in 1965, before Punjab High Court in 1968, before Andhra Pradesh and Orissa High Court in 1974 and before Supreme Court in 1977, 1989 and 1993. In these cases question of justiciability and validity of proclamation were involved and answered by the respective courts. This does not mean that the court are obliged to upset the declaration of every Presidential proclamation. It merely means that the courts are interested to consider the constitutionality of a proclamation. Courts were keen to consider many issues arose due to president rule e.g. to elucidate what a breakdown of the constitutional machinery in the state means, determination of governmental directive and threatened or imminent action, validity of proclamation and jurisdiction to consider disputes between governments of the states and the union relating to political question doctrine, interpretation of Article 356 in presence of 42nd Amendment Act 1976 and a part of these pivot issues more important issue of jurisdiction etc. Conclusion of these issues might not settled legal war but provided an academic satisfaction.

The first case in the arena of Indian High Courts
appeared in 1965 before Kerala High Court. On September 10, 1964, the president assumed the governance of the state consequent upon the resignation of the ministry. A general election held in March 1965, again resulted in a fragmented House, with no prospect of a state government. After consulting the party leaders, the Governor reported to the president that it was not possible to form the council of Ministers. The state legislature was dissolved again and President's rule imposed. A writ petition challenging the central action on the ground that the state legislature could not have been dissolved without its meeting at all, was rejected by Kerala High Court. The court also rejected the contention that the action of President was mala fide. This judgement makes it clear that the learned judge did not want to interfere in political matters. In evitabley, the judgement does not really elucidate what a breakdown of constitutional machinery in the state means. It was merely decided that there was a breakdown of the constitutional machinery in the state in this case.

The next case in which a High Court examined the propriety of a presidential proclamation arose in Rao Birinder Singh Vs. Union of India in Haryana. Here the president accepted the Governor's recommendation that President's rule should be imposed. The politics of the

Haryana assembly were torn apart by defections. The petitioner had a majority and naturally contended that the President's rule could not be imposed as long as he commanded a majority. He argued that the action was malafide.

Chief Justice Mehar Singh (for Justice Narula and himself) founded a rather novel and neat way out of the situation presented before him. He argued that the president's constitutional powers were not amenable to the jurisdictional control of High Court because the President did not act on behalf of the "executive" of the Union but in a constitutional capacity.

The approach of the High Courts have been interesting. The Kerala and Punjab High Courts managed to follow what we have called the "total ouster" approach while at the same time appearing to approve of the propriety of the action of President and Governor. The Orissa High Court in Bijiayanand's case accepted the total ouster" approach but expressed the opinion that the Governor may have acted in violation of the settled constitutional conventions. This was an interesting attempt to have it both ways. In re A. Sueeramula, Justice Chinnappa Ready had to consider the validity of a proclamation declaring President's rule in Andhra Pradesh. Justice Ready in this remarkable judgement, followed the "total ouster" approach and at the same time explained the court's helplessness by taking stock of the

1. Bijayanand Vs. President of India. A.I.R 1974 Ori. 52
2. A.I.R 1974 A.P. 106
realities of the power structure with in which the courts existed. But he also left upon another approach which is quite like what we have called the "Substantive review" approach. He took judicial notice of contemporary political events and satisfied himself that a presidential proclamation was necessary and proper. While it is true that this argument was a secondary and alternative argument, it contains within it possibilities of an extremely wide power of review.

None of these cases came before Supreme Court. After emergency an important case came before the Supreme Court when the newly elected Janta Party wanted to impose President's rule on nine states which had Congress ministers. Not unnaturally, the Supreme Court become the focus of attention. Not only had these provisions finally arrived at the Supreme Court, but they had arrived with a bang and not a whimper. This was the widest and most political use of the President's rule that independent India had ever seen.

**Mass Dissolution Case**

This case had a lot of political overtones because it arose as a result of series of political events. The general election which was held in March 1977, resulted in a land slide, victory for the newly formed Janta Party in Northern

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India even though the Congress Party held firm in Southern India. Soon after the Janta Government came into power, Charan Singh, the Home Minister, wrote letter on April 18, 1977 to the Chief Ministers of the nine northern states which had congress Governments. He advised the congress Chief Ministers of these goverments due to Janta victory in their states they should seek a fresh mandate from the people of those states. Mr. Shai Bhushan, Minister of Law in a radio interview widely reported in the newspapers suggested that if the states did not comply with this advice President's rule would be imposed on there states and these congress goverment would be forced to seek a fresh mandate from the people who inhabited their states.1 This interview was given on April 22, 1977. The various states responded to this in next two days filing petitions before Supreme Court under Article 131 of the constitution which gives the Supreme court the power, interalia, to decide disputes "between the Goverment and one or more States....if and so for dispute involves any question (whether of Law of fact) on which the exisstance of a legal rights depends...."The petitions were further supported by three members of legislative assemblies which were threatened with dissolution. These members of the

1. Ibid quoted judgement of Beg C.J, at pr. 22, p-1373
legislative assemblies argued that they had a right to property in the salaries they received as members of their legislative assembly. The threatened dissolution, they argued, interfered with their right to property which was guaranteed under Article 19 (1) (f) of the constitution.

All this had to making of drama. Nine states had filed applications along with three members of the legislative assembly and several interveners. The presence of multiple appeals and interveners, invariably widen the issues in a case before Supreme Court.

There was only one embarrassing factor in all this. The threatened Presidential proclamation had not yet been declared. The Supreme Court was thus being asked to consider a hypothetical question. The relief the petitioners wanted could be paraphrased as follows:

If the President were to pass a proclamation for the reasons suggested by Mr. Charan Singh in his letter and the law minister in his interview, such an action would be unconstitutional and an injunction even a permanent injunction, should be granted to restrain the President from considering such an action of the Council of Ministers to give him advice to follow such a course of action.

In the Dissolution case, there was only a threat that
some action might be taken. The Supreme Court had judicially found that the Charan Singh's letter was not a formal governmental directive. That being the case the court was not really considering an actual action of the government but a threatened or even imminent action.

The Supreme Court's willingness to hear a case in which the impugned governmental action had yet to be taken can be interpreted in various ways. The first and least generous interpretation is that the Supreme Court was used by states for symbolic litigation. Thus all the parties in the case were trying to get political mileage out of court. The second interpretation was that the Supreme Court was being used as a testing ground in order to show to people that the new Janta government was willing to deal with constitutional problems in a legal way. Not surprisingly, the proclamation was declared on April 30, 1977 - one day after the Supreme Court had agreed to dismiss the case. Thirdly, it would be argued that the Supreme Court had not really heard the case, but merely discussed some preliminary issues and found them to be not justiciable before the court. Fourthly, it would have been quixotic for the Supreme Court is that there was no issue before the court. Clearly, the common man would be baffled by such esoteric legal jugglery. This was certainly the view taken by justice Chandrachud who, writing his judgement after the proclamation had been issued, said:
But the proclamation having since been issued, it would be hypertechnical to discuss the writ petitions on the ground that there was no invasion of the petitioner's rights on the date when the petitions filed were in this court.

It does, however, seem strange that the court was prepared to adjudicate on the validity of a proclamation which petitioner's available for discussion when the court heard and dismissed the case.

A common sense view of the Supreme Court's stand would be that it was not willing to be seen to stay away from a problem presented to it simply because the problem had a political face to it. And so the Supreme Court assumed jurisdiction in this case. But it is clear as to what was the basis on which they assumed jurisdiction.

Quite apart from the hypothetical case argument, there was another jurisdictional question that the court did not wholly resolved. It was argued that the Supreme Court did not have jurisdiction to consider disputes between two governments of the states and the union but only disputes were between states and the union. Accordingly this case, it was alleged, was a dispute between the governments. The Janata government at the centre and various congress government in the states. It was not a dispute between the states and Union. This argument

1. Ibid at pr. 94 pp- 1393 - 4.
was accepted by three judges\textsuperscript{1} and rejected by another three judges. Chief Justice Beg assumed that the jurisdiction of Article 131 was very wide. It was a question as to whether Chief Justice Beg admitted jurisdiction in this case or not. If he did not, much of what was written in this case was clearly obiter dictum.

In many ways one of the crucial question which the court had to answer related to the 'Political question' doctrine. The real question was when can the court interfere in and adjudicate upon a political question? This question had never been discussed fully by the supreme Court. Chief Justice Subha Rao in some extrajudicial remarks had taken the view that the real clue to the problem was that the court was concerned with constitutional matters and could deal with political questions only on the basis that they raised constitutional issues.

Supreme Court's credibility would be very seriously affected if it declared what the Justice Bhagwati called a 'Judicial hands of\textsuperscript{2}' whenever a political question came up before the court. Though courts cannot enter what was called a political 'Prohibited area'\textsuperscript{3} or Political thicket\textsuperscript{4} they

\begin{enumerate}
\item State of Rajasthan Vs Union of India, A.I.R.1977 Sc 1361, at pr. 164, p. 1419 (per Justice Goswami) pr.175, p-1421 (per Justice Untwalia) per.191,p.1431 (Per Justice Fazal Ali).
\item Ibid. At para.142 p.1413.
\item Ibid. At para.144 ,p.1414.
\item Ibid. At para.351 A, p.1377-8.
\end{enumerate}
must adjudicate on all constitutional questions even though they may have a political complexation to them.

The real question in 'Dissolution Case' was how the Supreme Court would approach the interpretation of the Article 356. This was all the more important because the 42nd Amendment to the constitution added a clause to Article 356 which read:

'Notwithstanding anything in this constitution the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground.

The judges chose to ignore this clause. But in many ways the clause merely re-stated what has already been said in a lot of Privy Council decisions and by House of Lords. The import of these decisions was that the executive, and not the courts, would determine whether or not a particular emergency was justified or not. The court accepted the import of these rulings.

But this does not mean that the judges totally abandoned the idea that the exercise of these powers could be
subject to judicial review. The judges suggested that the review could take place on the following basis:

(a) Where the order was *malafide*.
(b) Where the authority passing the order took into account extraneous or irrelevant considerations.
(c) Where the authority passing the order failed to take into account relevant considerations.

To these Chief Justice Beg added a fourth restriction:
(d) The order should not be used for any purpose which was inconsistent with the provisions of the constitution.

But there was still one question which the Supreme Court did not tackle. The question was: what did the words "....the Government of a state cannot be carried on in accordance with the provisions of the constitution" in Article 356 of the constitution mean? Could they cover anything and everything? Could President's rule be declared in the situation where it would appear that the President's rule was being imposed in the states simply because the party in power in these states had suffered a severe set-back in general elections to the Lok Sabha? Most of the judges in the Supreme Court clearly did not answer this question fully. These matters were left to the satisfaction of the executive. At the same time it is clear that some of the judges appeared to approve of the constitutionality of the moves made.¹

¹. Ibid at pr. 170, p-1420, 1441, 1416-7.
Now let us turn to the petition of the Legislators that their fundamental rights were being taken away. This was not fully discussed by the judges. Chief Justice Beg and Justice Utwalia took the view that the petitioners had not made out a case without explaining why. Justice Chandrachud, Bhagwati, Gupta and Goswami did not even decide whether the legislators had a Fundamental Right to property in their salaries. They argued that the 'dissolution' had too remote an effect on their right such as it was.

The judgements of Supreme Court in the 'Dissolution case' are bound to give rise to some dismay. The court examined a hypothetical question. In that action complained was imminent and had not been taken. The court did not come to a clear ruling on whether it had jurisdiction to hear the case under Article 131. The court did not spell out the implications of the ouster clause in Article 356 (5) which had been introduced by the 42nd Amendment. But at the same time, the 'Dissolution case' did wake a significant contribution. It made clear the courts have a role to play even when they are confronted with political questions. At the same time, it spelled out that the courts would interfere if the provisions of Article 356 were being used for improper purposes.

S.R. Bommai Vs Union of India\textsuperscript{1}.

After the Dissolution case the next case was decided by the constitution bench of nine judges headed by Justice

\textsuperscript{1} 1994 (2) Scale pp - 37 - 228
Ratnavel Pandian on March 11, 1994 which upheld the validity of the proclamation of the President's rule in the states of Madhya Pradesh, Himachal Pradesh and Rajasthan in the wake of Ayodhya incidents of Dec. 6, 1992.

However, the bench which also comprised Justices A.M. Ahmadi, Kuldip Singh, J.S. Verma, P.B. Sawant, K. Ramaswamy, S.C. Agarwal, Yogeshwar Dayal and Jeevan Raidy held that similar impositions of President's rule in Nagaland (1988), Karnataka (1989) and Meghalaya (1991) were unconstitutional.
FACTS OF THE INDIVIDUAL CASES

(i) KARNATAKA:- Taking first the challenge to the proclamation issued by the President on 21.4.1989 dismissing Government of Karataka. The facts were that the Janta Party being the majority party in the state legislative had formed government under the leadership of Mr. S.R Bommai on 30.8.1988 following the resignation on 1.8.1988 of the earlier Chief Minister, Mr. Ram Krishna Hegde. In September 1988 the Janta Party and Lok Dal (B) merged into a new party called Janta Dal. On 17.4.1989 one Mr. K.R. Molakery, a legislator of Janta Dal defected from the party and presented letter to the Governor withdrawing his support to the ministry. On the next day he presented to the Governor 19 letters allegedly signed by 17 Janta Dal legislators, one independent but associate legislator and one legislator belonging to BJP who was supporting the ministry, withdrawing their support to this ministry. On 19.4.1989 the Governor sent a report to the President stating therein that there were dissensions and defections in newly formed Janta Dal. In Support of his case, he 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 Mr. S.R. Bommai did not command a majority in the
Assembly. He also added no other party was in a position to form the Government. He, therefore, recommended to the President that he should exercise power under Article 356 (1). On 24.4.1989 seven out of nineteen legislators who had allegedly written the said letter to the Governor sent letters to him complaining that their signatures were obtained on 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 27.4.1989. The Governor however, sent yet another report to the President on the same day i.e. 20.4.1989, 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 seven legislatures were obtained by Chief Minister by pressuring them and added that the 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). On that very day, the President issued the Proclamation in question. The Proclamation was, thereafter approved by the Parliament as required by Article 356 (3). Mr. Bommai and some other members of the council and Ministers challenged the validity of Proclamation before Karnataka High
Court. A three-Judge Bench of High Court dismissed the petition holding, among other things, that the facts stated in Governor's report could not held to be irrelevent and that the Governor's satisfaction was based upon reasonable assessment of all the relevant facts. The court also held that recourse to floor-test was neither compulsory nor obligatory and not was a pre-requisite to sending the report to the President. It was also held that Governors report could not be challenged on the ground of legal malafides since the Proclamation had to be issued on the satisfaction of the council of Ministers. Court further relied upon the test laid down in state of Rajesthan V. Union of India\(^1\) and held that on the basis of material disclosed, the satisfaction arrived at by the President could not be faulted.\(^2\)

(ii) MEGHALAYA:- The facts are that the writ petitioner G.S.Masser belonged to a Front known as Meghalaya united Parliamentary Party (MUPP) which had a majority in the Legislative Assembly and had formed in March 1990, a Government under the leadership of Mr. B.B. Lyndoh. On 27.7.1991, one Mr. Kyndish Arthree who was at the relevant

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2. 1994 (2) Scale at pp - 87 - 88.
time, the speaker of the House, was elected as leader of the opposition group known as United Meghalaya Parliamentary Forum (UMPF). The majority in this group belonged is the Congress Party. On his election Mr. Arthree claimed support of majority of the members in the Assembly and requested to the Governor o ivite him to form the Goverment. Thereupon Governor asked the then Chief Minister Mr. Lyndoh to prove his majority on the floor of House. Assembly was convened on 7.8. 1991 and a Motion of confidence was moved. Thirty legislators supported the Motion and 27 voted against it. Instead of announcing the result, the speaker declared that he had received a complaint against five independent MLAs of he ruling coalition frot alleging that they were disqualified as legislators under the anti-Defection Law and since they had become disentitled to vote, he was suspending their right to vote. On 11.8. 1991, the speaker issued show cause notices to the alleged defectors, the five independentt MLAs. The five MLAs replied to the notice denying that they had continued to be independent. On recipt of the replies, the speaker passed on order on 17.8. 1991 disqualifying he five MLAs on the ground that the four of them were ministers in the then ministry and one of them was the Deputy Goverment Chief whip. Assembly was summond secon time for of confidence but speaker did not send notices to
five MLAs and made arrangements to prohibit their entry in the Assembly. On 6.9.1991, the five MLAs, approached Supreme Court. The Court issued interim order staying the operation of the Speaker's orders. The Governor prorogued the Assembly indefinitely by his order dated 8.9.1991. Independent MLAs moved a contempt petition against Speaker in Supreme Court. On 8.10.1991 Court passed another order directing that all authorities of the state should ensure the compliance of the Court's interim order of 6.9.1991. After this order five independent MLAs received invitation to attend he session of the Assembly convened on 8.10. 1991. After the Motion of Confidence the ministry was put to vote, the Speaker declared that 26 voted for the Motion and 26 against it and excluded the votes of four independent MLAs. Thereafter, declaring that there was a tie in voting, he cast his vote against the Motion and declared that the Motion had failed and adjourned the House sine die. The thirty MLAs sent a letter to the Governor stating that they had voted against the favour of the ministry and had also passed a Motion of No-confidence against the Speaker. However, on 9.10. 1991, the Governor wrote a letter to the Chief Minister asking to resign in view of what had transpired in the session on 8.10. 1991. The Chief Minister moved the Supreme Court against the letter of the Governor. Court on 9.8. 1991, among other things asked the Governor to take into
consideration of the orders of the court and votes cast by the four independent MLAs before taking any decision on the question whether the Government had lost the Motion of confidence. In spite of this, the President on 11.10.1991 issued Proclamation under Article 356 (1). The Proclamation stated that the President was satisfied on the basis of the report from the Governor and other information received by him that the situation had arisen in which the Government of state could not be carried on in accordance with the provisions of the constitution. The Government was dismissed and Assembly was dissolved. Both Houses of Parliament met and approved the Proclamation issued by the President.¹

(iii) NAGALAND:- The President Proclamation dated 7.8.1988 was issued under Article 356 (1) imposing President's rule in the state of Nagaland. At the relevant time, in the Nagaland Assembly consisting of 60 members, 34 belonged to Congress (I), 18 to Naga National Democratic Party, one belonged to Naga Peoples Party and seven were independent. Mr. Set* the leader of ruling party was the Chief Minister. On 28th July, 1988, 13 of the 34 MLAs of the ruling Congress (I) party informed the speaker of the Assembly that they had formed a party separate from Congress (I) ruling party and requested him for allotment of separate seats for them in the House.

¹ 1994 (2) Scale at pp - 91-92
The session was to commence on 28.8.1988. By his decision of 30.7.88, the Speaker held that there was a split in the party within the meaning of the Tenth Schedule of the constitution. On 31.7.1988 Mr. 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 assembly and was in a position to form the Government. Allegation was made against Mr. Vamuzo for confinement of the MLAs. Mr. Vamuzo denied the said allegation and 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. On 6.8.1988, the Governor sent a report to the President of India about the formation of a new party by 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 of Mr. Vamuzo and one other person, and that the story of the 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 in the state. He expressed the apprehension that if the affair were allowed to continue as they were, it would affect the stability of the state. In the meantime Chief Minister submitted his resignation to the Governor and recommended the imposition of President's rule. The
President thereafter issued the impugned Proclamation and dismissed the Government and dissolved the Assembly. Mr. Vamuzo, the leader of the new group challenged the validity of the Proclamation in the Guwahati High Court. The Petition was heard by a Division Bench which differed on the effect and operation of Article 74 (2) and hence the matter was referred to third judge. But before the third judge could hear the matter, the Union of India moved the Supreme Court for grant of special leave which was granted and the proceedings in the High Court Stayed.¹

Now let us mention the facts of the Madhya Pradesh, Rajesthan and Himachal Pradesh. The elections were held to the legislative Assemblies in the states along with legislative Assembly of Utter Pradesh, in February, 1990. The BJP secured majority in the Assemblies of all the four states and formed Governments there.

Following appeals of some organisation including the BJP, thousands of KarSevaks from Utter Pradesh as well as from other states including M.P., Rajesthan and Himachal Pradesh gathered near the Babri Masjid on 6th December, 1992 and eventually some of them demolished the disputed structure. Following the demolition, on the same day the U.P. Government

¹. 1994 (2) Scale - 92 -93
resigned. Thereafter on the same day the President issued Proclamation under Article 356 (1) and dissolved the legislative Assembly of the state. The said Proclamation is not challenged.

Demolition in turn created further reaction in the country resulting violence and destruction of the property. The Union Government tried to cope up with the situation by taking several steps including a ban on several organisations including RSS, VHP and Bajrang Dal which had along with BJP given a call for Kar Sevaks to march towards Ayodhya. The ban order was issued on December 10, 1992 under the lawful Activities (prevention) Act, 1967. The dismissals of the state Governments in M.P., Rajasthan and Himachal Pradesh were admittedly a consequence of these developments and were effected by the issuance of Proclamation under Article 356 (1), all on the 15th December.

(iv) MADHYA PRADESH:- The Proclamation was a consequence of three reports sent by Governor to the President on December 8, 10 and 13, 1992. Reports referred to the fast deteriorating law and order situation in the wake of widespread acts of violence, arson and looting expressed his "lack of faith" in the ability of the state Government to stem the tide primarily because of the political
leadership' "overt and covert support to the associate communal organisations" which seemed to point out that there was a break-down of the administrative machinery of the state. The Governor also referred to the statement of the Chief Minister of M.P. Mr. Sunder Lal Patwa describing the ban of RSS and VHP as unfortunate. The Governor expressed his doubt about the credibility of the state Government to implement sincerely the Centre's direction to ban the said organisations. He recommended that considering the said facts & the fact that the RSS was contemplating a fresh strategy to chalk out its future plan, and also the possibility of the leaders of the banned organisations going under ground, particularly with the convenience of the State Administration, the situation demanded immediate issuance of the Proclamation. Hence President on December 15, 1992 issued the proclamation.\(^1\) The proclamation was challenged before M.P. High Court. The court in a historic judgement by 2-1 majority held that the Presidential order imposing President's rule in the state was invalid and unconstitutional as being beyond the scope of Article 356 of the constitution. The government at the Centre filed appeal against judgement in the Supreme Court.\(^2\)

\(^1\) Ibid at pp - 94-95

\(^2\) Pandey J.N. 'Constitutional Law of India,' 26th Ed.(1994) at p - 545.
(v) HIMACHAL PRADESH:- The proclamation issued by the President succeeded the report of Governor which was sent to him on 15.12. 1992. In his report Governor has stated, among other things that the Chief Minister and his Cabinet had instigated Kar Sevaks from Himachal Pradesh. The report of Governor was almost similar to the report of Governor of M.P. It was on the basis of this report that the Proclamation in question was issued.

(VI) RAJASTHAN:- The Presidential Proclamation was pursuant to the report of Governor sent to President that Goverment of Rajasthan had played "an obvious role" in the episode at Ayodhya. One of the Ministers had resigned and along with him, 22 MLAs and 15500 BJP workers has participated in Kar Seva at Ayodhya. They were given royal send-off and welcome. Report of Governor was identical as mentioned above in case of Himachal Pradesh.

The validity of the three Proclamations was challenged by writ petitions in their respective state High Courts. Proclamations in respect of the Goverments and the legislative Assemblies of Rajasthan and Himachal Pradesh which were pending in the respective High Courts transferred to the Supreme Court\(^1\).

\(^1\) 1994 (2) Scale at p - 96
JUDGEMENT:- In this case six judgements were delivered by Mr. Justice S.R. Pandian, Mr. Justice Ahmadi, Mr. Justice J.S. Verma on his behalf and on behalf of Mr. Justice Yogeshwar Dayal, Mr. Justice P.B. Sawant for himself and Mr. Justice Kuldip Singh, Mr. Justice K. Ramaswamy and Mr. Justice S.C. Agarwal.

The separate judgements were delivered on various grounds for example the judicial review of Article 356, Secularism, scope of reinduction of dismissed Governments etc. Let us discuss Separate judgements on these grounds.
JUDICIAL REVIEW OF ARTICLE 356

The following main question arises in this case:-

(i) Is Presidential Proclamation issued under Article 356 of the constitution subject to Judicial Review?

(ii) If so what are the parameters and scope of Judicial Review?

Justice Pandian held that since many learned brother have elaborately dealt with the constitutional provisions relating to the issue of the Proclamation and as I am in agreement with the reasoning given by B.P. Jeevan Reddy, J. it is not necessary for me to make further discussion on this matter except saying that I am of the firm opinion that the power under Article 356 should be used very Sparingly and only when President is fully satisfied that situation has arisen where the Government of the state cannot be carried on in accordance with the provisions of the Constitution.

Justice Ahmadi in his judgement held that a political party with an ideology different from the ideology of the political party in power in any state comes to power in the centre, the Central Government would not be justified in exercising power under Article 356 (1) unless it is shown
that the ideology of the political party in power in the state is inconsistent with the constitutional Philosophy and therefore, it is not possible for the party to run the affairs of the state in accordance with the provisions of the constitution. But where a State Government is functioning in accordance with the provisions of the constitution and its ideology is consistent with the constitutional Philosophy, the Central Government would not be justified in resorting to Article 356 (1) to get rid of the State Government 'solely' on the ground that a different political party has come to power at the centre with a landslide victory. Such exercise of power would be clearly malafide. The decision of this court in *State of Rajasthan v. Union of India* to the extent it is inconsistent with the above discussion does not, in my humble view, lay down the law correctly.

The decision to issue a proclamation is based on the subjective satisfaction of the President i.e. Council of Ministers, but the court would hardly be in a position to X-ray such a subjective satisfaction for want of expertise in regard to fiscal matters.

Justice Ahmadi further stated that the marginal note of Article 356 indicates that the power conferred by the

provision is exercisable 'in case of failure of constitutional machinery in the state. While the text of the said article does not use the same phraseology, it empowers the President, on his being satisfied than, 'a situation has arisen in which the Government of the states 'cannot' be carried on in accordance with the provisions of the constitution. This action he must take on receipt of a report from the Governor of the concerned state or 'otherwise' if he is satisfied therefrom about the failure of the constitutional machinery. The expression 'otherwise' is a very wide term and cannot be restricted to material capable of being tested on principles relevant to admissibility of evidence in courts of law. It would be difficult to predicate the nature of material which may be placed before the President. Since the President is not expected to record his reasons for his subjective satisfaction, it would be equally difficult for the court to enter the Political thicket to ascertain what weighed with the President for the exercise of power under the said provision. Therefore in my view the court cannot interdict the use of the constitutional power conferred on the President under Article 356 unless the same is shown to be malafide. In other words it can be challenged on the limited ground that the action is malafide or ultra vires Article 356 itself.
Justice Verna in his judgement and on behalf of Justice Yogeshwar Dayal said that there is no dispute that the proclamation issued under Article 356 is subject to judicial Review. The question now is of the test applicable to determine the situation in which the power of judicial review is capable of exercise or, in other words, the controversy is justiciable. The deeming provision in Article 356 is an indication that cases falling within its ambit are capable of judicial Scrutiny by application of objective standards.¹

Justice Sawant on behalf of Justice Kuldip Singh and himself held that 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 malafide 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 and such material may either the report of Governor or other than the report.

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. The acts of state Government which are

¹. Ibid at pp-53-54
calculated to subvert or sabotage secularism as enshrined in our constitution, can lawfully be deemed to give rise to a situation in which the Government of the state cannot be carried on in accordance with the provisions of the constitution.

The proclamation dated 21.4.1989 and 11.10.1991 and action taken by the President in removing the respective Ministries and Legislative Assemblies of the state of Karnataka and Meghalaya are unconstitutional. The proclamation dated 7.8. 1988 in respect of state of Nagaland is also held unconstitutional.

The proclamation dated 15th December 1992 and actions taken by the President removing the Ministries and dissolving the legislative Assemblies in the state of M.P., Rajesthan and Himachal Pradesh pursuant the said proclamations are not unconstitutional. Justice K. Ramaswamy in his separate judgement held that Article 74(2) is not a barrier for judicial review. It only places limitations to examine whether any advice and if so what advice was tendered by council of Ministers to the President. Article 74(2) receive only this limited protective canopy from disclosure, but the material on the basis of which the advice was tendered by the council of ministers is subject to judicial scrutiny

1. Ibid at pp - 107-108.
Judicial review is a basic feature of the constitution. This court/High Courts have constitutional duty and responsibility to exercise judicial review as centinel quevive. Judicial review is not concerned with the merits of the decision but with the manner in which the decision was taken. This court as final arbiter in interpreting the constitution, declares what the law is. Higher judiciary has been assigned the delicate task to determine what powers the constitution has conferred on each brance of the Goverment and whether the actions of that branch transgress such limitations, it is the duty and responsibility of this court/High Courts to lay down the law. The judicial review, therefore extends to examine the constitutionality of the proclamation issued by the President under Article 356. It is a delicate task, though loaded with political overtones, to be exercise with circumspection and great care. In deciding finally the validity of the proclamation there cannot be any hard and fast rules or fixed set of rules or principles as to when the President's satisfaction is Justicable and valid. The decision can be tested on the ground of legal malafides or high irrationality in the exercise of the discretion to issue Presidential proclamation.

1. Ibid at pp-153-156.
Justice B.P. Jeevan Reddy on behalf of Justice S.C. Agarwal and himself said on the point of judicial review of Article 356 that the power conferred by Article 356 upon the President is a conditioned power. It is not absolute power. The existence of material which may compose of or include the report of the Governor is a precondition. The satisfaction may be formed on relevant material. Article 74(2) merely bars an enquiry into the question whether any and if so, what advice was tendered by the ministers to the President. It does not bar the court from calling upon the union council of ministers (Union of India) to disclose to the court the material upon which the President had formed the requisite satisfaction. The proclamation under Article 356(1) is not immune from judicial review. The Supreme Court or the High Court can strike down the proclamation if it is found to be malafide 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 revivality of the action. When called upon the union of India as to produce the material on the basis of which action is 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 irrelevant, the court
cannot interfere so long as there is some material which is relevant to the action¹.

There was no difference of opinion among the judges that the Presidential proclamation under Article 356 was subject to judicial review.

ROLE OF THE GOVERNOR:

The apex court held that the key actor in the centre-state relations is the Governor, a bridge between the union and the state. The founding fathers deliberately avoided election to the office of the Governor. The President has been empowered to appoint him as executive head of the state under Article 155. The executive power of the state is vested in him by Article 154 and exercised by him with the aid and advice of the council of ministers, the Chief Minister as its head. Under Article 159 the Governor shall discharge his functions in accordance with the Oath "to protect and defend the constitution and the Law." The office of the Governor therefore, is intended to ensure protection and sustenance of the constitutional process of the working of the constitution by the elected executive and given him an empire's role. When a Gandhian economist member of the constituent Assembly wrote letter to Gandhiji of his

¹. Ibid at pp. 227-8
plea for abolition of the office of the Governor, Gandhiji wrote to him for its retention, thus: "The Governor had been given a very useful and necessary place in the scheme of the team. He would be an arbiter when there was a constitutional deadlock in the state and he would be able to play an impartial role. There would be administrative mechanism through which the constitutional crises would be resolved in the state".

The Governor thus should play an important role. In his dual undivided capacity as an head of the state should impartially assist the President. As a constitutional head of the state Government in times of constitutional crisis he should bring about sobereity. The link is apparent when we find that Article 356 would be put into operation normally passed on Governor's report. He should truthfully and with high degree of constitutional responsibility, in terms of path, inform the President that a situation has arisen in which the constitutional machinery in the state has failed and the state cannot be carried on in accordance with the provisions of the constitution, with necessary detailed factual foundation. The report normally is the foundation to reach the satisfaction by the President. So it must furnish material with clarity for later fruitful discussion by the Parliament. When challenged in a court it gives in sight into the satisfaction reached by the President. The governor
therefore, owes, constitutional duty and responsibility in sending the report with necessary factual details and it does require approval of the council of Ministers nor equally with their aid and advice.1

SECULARISM:

It is contended in this case that the imposition of President's rule in the states of M.P., Rajasthan and Himachal Pradesh was malafide, based on no satisfaction and was purely a political act. Mere fact that communal disturbances and or instances of arson and looting, took place is no ground of imposing President's rule. Indeed, such incidents took place in several Congress(I) ruled states as well as in the particular, in the state of Maharashtra on a much larger scale and yet no action was taken to displace those governments whereas action was taken only against BJP governments.

Justice Sawant on behalf of Justice Kuldip Singh and himself held that in view of the content of secularism adopted by our constitution, the question that poses itself for our consideration in these matter is whether the three governments could be trusted to carry on the governance of the

1. Ibid at p-117.
State in accordance with the provisions of the constitution and the President's satisfaction based on the said acts could be challenged in law. To recapitulate, the acts were (i) the BJP manifesto on the basis of which election were contested and pursuant to which elections of the three ministries came to power stated as "......hence party is committed to Shri Ram Mandir at Janmasthan be relocating superimposed Babri structure with due respect". (ii) Leaders of the BJP had consistently made speeches thereafter to the same effect, (iii) Some of the Chief Ministers and Ministers belonged to RSS which was banned organization at the relevant time (iv) The Ministers in the Ministries concerned exhorted people to join Kar Seva in Ayodhya on 6th December, 1992. One MLA belonging to ruling BJP in Himachal Pradesh made a public statement that he had actually participated in the destruction of the mosque, (v) Ministers had given public send off to Kar Sevaks and also welcomed them on their return after the destruction of mosque, (vi) At least in two states, Viz, Madhya Pradesh and Rajasthan there were atrocities against the Muslim and loss of lives and destruction of property.

Religious tolerance and equal treatment of all religious groups and protection of their life and property and of places of their worship are an essential part of secularism enshrined in our constitution. Any profession
and action which go counter to the aforesaid creed are \textit{prima-facie} proof of the conduct in defiance of the provisions of our constitution. We are therefore of the view that the President had enough material in the form of the aforesaid professions and acts of the responsible section in the political set up of the three states including the Ministries to form his satisfaction that the governents of the three states could not be carried on in accordance with the provisions of the constitution. Hence the proclamations issued could not said to be invalid. In short, secularism is part of the 'basic structure of the constitution'. Th acts of the state governent which are calculated to subvert or sabotage secularism as enshrined in our constitution, can lawfully be deemed to give rise a situation in which the governent of the state cannnot be carried on in accordance with the provisions of the constitution.\footnote{1}{Ibid at pp-105-107}

Justice K. Ramaswamy observed that the satisfaction reached by the President in issuing presidential proclamation and dissolving the legislative assemblies of M.P., Rajasthan and Himachal Pradesh cannot be faulted as it was based on the fact of violation of the secular features of the constitution which itself, a ground to hold that a situation has arisen in which the governent of the concerned states cannot be carried on in accordance with the provisions of the constitution.
Therefore, the satisfaction cannot be said to be unwarranted\textsuperscript{1}. He said that religion has no place in politics. No political party can simultaneously be a religious party. Any state government which pursues unsecular policies or unsecular course of action, acts contrary to the constitutional mandate and renders itself amenable to action under Article 356.\textsuperscript{2}

Justice Ahmadi said that I am in agreement with the views expressed by my learned colleagues Sawant, Ramaswamy and Reddy, JJ, that secularism is a basic feature of our constitution. They have elaborately dealt with this aspect of the matter and I can do not better than express my concurrence but I have said these few words merely to complement their views by pointing out how this concept was understood immediately before the constitution and till the 42nd Amendment. By the 42nd Amendment what was implicit was made explicit.\textsuperscript{3}

ROLE OF PARLIAMENT:

The Bench without difference of opinion held that it is necessary to interpret clause(1) and(3) of Article 356

\begin{enumerate}
\item Ibid at p. 157
\item Ibid at pp-175-179,228.
\item Ibid at p.48
\end{enumerate}
harmoniously since the provisions of clause (3) are obviously meant to check by Parliament (which also consist of members from the concerned states) on the powers of the President under clause (1). The check would become meaningless and renders in effective if the President takes irreversible actions while exercising his powers under sub-clause (a),(b) and (c) of clause (1) of the said Article. The dissolution of the Assembly by exercising the powers of the Governor under Article 174 (2) will be one such irreversible action. Hence it will have to held that in no case, the President shall exercise the Governor's power of dissolving the Legislative Assembly till at least both the Houses of Parliament have approved the Proclamation issued by him under clause (1) of the said Article. The dissolution of Assembly prior to the approval of Parliament under clause (3) of the said Article will be invalid. The President however may have the power of suspending the legislature under sub-clause (c) of clause (1) of the said Article.

Conclusion of the court, firstly, is that the President has no power to dissolve the Legislative Assembly of the state by using his power under sub-clause (1) of Article 356 till the Proclamation is approved by both Houses of Parliament under clause (3) of the said Article. He may have power only to suspend the Legislative Assembly under
sub-clause (c) of clause (1) of the said Article. Secondly, the Court may invalidate the Proclamation whether it is approved by parliament or not. The necessary consequence of the invalidation of the proclamation would be to restore the status quo ante therefore to restore the council of ministers and the Legislature Assembly as they stood on the date of issuance of the Proclamation.¹

SCAPE OF RE-INDUCTION OF DISMISSED GOVERNMENTS:

The question arises is whether the council of ministers and Legislative Assembly can be restored by the court when it declares the proclamation invalid? Justice Sawant replied in affirmative and held that there is no reason why the council of ministers and the Legislative Assembly should not stand restored as a consequence of the invalidation of the proclamation, the same being the normal legal effect of the invalid action. In the context of the constitutional provisions and in view of the power of the judicial review rested in the court such a consequence is also necessary constitutional fall-out. Unless such result is read, the power of judicial review rested in the judiciary is rendered nugatory and meaningless. To hold otherwise is

¹. Ibid at p - 86.
also tantamount to holding that the proclamation issued under Article 356 (1) is beyond the scope of judicial review. For when the validity of the proclamation is challenged, the court will be powerless to give relief and would always be met with the fait accompli. Article 356 would then have to read as an exception to judicial review. Such an interpretation, is neither possible nor permissible. Hence to necessary of the invalidation of the proclamation would be restoration of the ministry as well as Legislative Assembly, in the state. In this connection, we may refer to the decision of Supreme Court of Pakistan in Mian Mohammad Nawaz Sharief Vs. President of Pakistan and others.\(^1\) The court held that the impugned order of dissolution of National Assembly and dismissal of the Federal Cabinet were without lawful authority and, therefore, of no legal effect. As a consequence of the said declaration, the court declared that the National Assembly, Prime Minister and the Cabinet stood restored and entitled to function as immediately before the impugned order was passed. The court further declared that all steps taken pursuant to the impugned order including the appointment of care-taker cabinet and care-taker Prime Minister were also of no legal effect.

Justice Sawant concludes in following words "if proclamation issued is held invalid, then notwithstanding

\(^{1}\) 1993 PLD Sc 473.
the fact that it is approved by both Houses of Parliament, it will be open to the Court to restore the status quo ante to the issuance of the proclamation and hence restore the Legislative Assembly and Ministry.

Justice K. Ramaswamy observed that there is no express provision in the constitution to revive the Assembly dissolved under the Presidential Proclamation or to reinduct the removed government of the state. In interpreting the constitution of the working of the democratic institutions set up under the constitution, it is impermissible to fill the gaps or to give direction to revive the dissolve Assembly and to reinduct the dismissed government of the state into office.¹

Justice B.P. Jeevan Reddy held that 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 whenever it may have been dissolved or kept under suspension.²

The key operative part of the Supreme Court's landmark judgement on the use of Article 356 lies in the majority agreement reached on the following specific points:

1. Ibid at p - 157
2. Ibid at p - 228.
(a) 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 malafide exercise of 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." The material may be either the report of the Governor or something other than the report, but it must meet the new test.

(b) Article 74 (2), which bars judicial review so far as the advice given by the ministers to the President is concerned, is "not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction."

(c) The constitution places a check on executive power exercised in the name of the President by requiring parliamentary approval of a Presidential proclamation issued under Article 356. Therefore, "it will not be permissible for the president to exercise powers under sub-clauses(a),(b) and (c) of Article 356 (1) and to "take irreversible actions until at least both the Houses of parliament have approved of the proclamation." In other words, the Legislative Assembly of a state cannot be dissolved until" at least"
both the Houses of parliament approve the executive action.

(d) If the Presidential Proclamation is held invalid, "then not withstanding the fact that it is approved by both Houses of Parliament it will be open to the court to restore the Status quo ante" and bring back to life the Legislative Assembly and the Ministry.

(e) While the Court "will not interdict the issuance of a Presidential Proclamation or the exercise of any other power under the proclamation, in appropriate cases it will have the 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. This it can do to avoid a fait accompli and to prevent "the remedy of judicial review (from) being rendered fruitless."

The most far-reaching aspect of the Supreme Court's judgement lies in its splendidly uncompromising championing of secularism as a basic and inalienable feature of the constitution a feature nobody has any right to work against. The majority agreement on the secular imperative is contained in conclusion in the judgement delivered by Justice Sawant (on behalf of himself and Justice Kuldip Singh):" Secularism is a part of the basic structure of the constitution. The acts of a state government which are calculated to subvert or
sabotage secularism as enshrined in our constitution can lawfully be deemed to rise to a situation in which the government of the state cannot be carried on in accordance with the provisions of the constitution."

An excellent exposition of secularism is offered in Justice B.P. Jeevan Reddy's judgement (for himself and justice S.C. Agarwal): "While freedom of religion is guaranteed to all persons in India, from the point of the view of the state, the religion, faith or belief of a person is immaterial to the state, all are equal and are entitled to be treated equally. In matters of state, religion has no place. No political party can simultaneously be a religious party. Politics and religion cannot be mixed."

In this powerful exposition of secularism as something permanently embedded in the constitution, Justices Reddy and Agarwal demolish every one of the building blocks of Hindutva (and every other type of communal) ideology:

It is "absolutely erroneous to say the secularism is a 'Vacuous word' or a 'phantom concept'." The Indian constitution has several provisions which strongly express its commitment to secularism. This means equality, non discrimination and justice for all its citizens and no one can be permitted to be less or more equal liberty of
conscience. It is impermissible to treat minorities as "Second-Class citizens."

Secularism does not mean a hands-off state policy towards religion, but it certainly means the state has no religion and it is unconstitutional for it to tilt in favour of any religion. "In short, in the affairs of the state (in its widest connotation) religion is irrelevant; it is strictly a personal affair."

The founding father read the concept of equality, fairness-and-justice-based secularism into the constitution not because it was fashionable but because it was an imperative in the Indian context.

Above all, it is constitutionally illegitimate for either that state, or any political party, to mix up religion and politics; to use communalism as a political mobilisation strategy; and to fight elections "on the basis of a plank which has the proximate effect of eroding the secular philosophy of the constitution." A party or Organisation which "acts or behaves by word of mouth, print or in any other manner" to bring about the effect of mixing up religion and politics will certainly be "guilty of an act of unconstitutionality". It will "have no right to function as a political party".