Supreme Court of India
A.K. Kaul & Anr vs Union Of India & Anr on 19 April, 1995
Equivalent citations: 1995 AIR 1403, 1995 SCC (4) 73
Author: S Agrawal
Bench: Agrawal, S.C. (J)

PETITIONER:
A.K. KAUL & ANR

Vs.

RESPONDENT:
UNION OF INDIA & ANR

DATE OF JUDGMENT19/04/1995

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
FAIZAN UDDIN (J)

CITATION:
1995 AIR 1403 1995 SCC (4) 73
JT 1995 (4) 1 1995 SCALE (2)755

ACT:

HEADNOTE:

JUDGMENT:

S.C. AGRAWAL, J.:

1. Leave granted.

2. The appellants were employed as Deputy Central Intelligence Officers in the Intelligence Bureau in the Ministry of Home Affairs of the Government of India. On July 23, 1979, the employees of the Intelligence Bureau formed an Association called "the Intelligence Bureau employees Association" (IBEA) for the purpose of ventilating their grievances. Appellants, A.K.Kaul and Verghese Joseph, were elected as the General Secretaries of IBEA and appellant, B.B. Raval, was elected as the President. On May 3, 1980, the Joint Director of the Intelligence Bureau issued, a Circular Memorandum declaring that the formation of the IBEA was in violation of the Civil Services (Conduct) Rules and that those who take part in the activities of the IBEA will attract disciplinary action. Writ petitions (Civil) Nos. 1117-1119 were filed in this Court challenging the said circular.

This Court, on July 21, 1980, issued an order for issue of rule nisi on the said writ petitions and also passed an interim order directing that during the pendency of the writ petitions in this Court no disciplinary action shall be taken against any member of the IBEA for reasons mentioned in the circular. On December 26, 1980, orders were passed dismissing the appellants from service. One such order regarding the dismissal of appellant, A.K. Kaul, is in the following terms :

> "Shri A.K. Kaul, Deputy Central Intelligence Officer, Intelligence Bureau, New Delhi.
>
> Whereas the President is satisfied under sub-clause (c) of the proviso to clause(2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry in the case of Shri A. K. Kaul.
>
> And whereas the President is satisfied that on the basis of the information available, the activities of Shri A.K. Kaul are such as to warrant his dismissal from service. Accordingly, the President hereby dismisses Shri A.K. Kaul from service with immediate effect.
>
> (By order and in the name of President Sd/-
>
> (R. Mahadevan) Under Secretary to the Govt. of India Ministry of Home Affairs."

3. The orders for dismissal of appellants, Verghese Joseph and B.B. Raval are in the same terms. The appellants filed separate writ petitions (Nos. 205-207/81 1) in this Court under Article 32 of the Constitution to challenge the said orders of dismissal. After the constitution of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985, (hereinafter referred to as 'the Tribunal') the said writ petitions were transferred to the Tribunal for adjudication and they were registered as T.A. Nos. 1,2 and 3 of 1992.

4. Before the Tribunal the case put for-ward by the appellants was that they have been picked and chosen for punitive action for dismissal from service for the reason that they were important members of the IBEA, being office bearers as General Secretaries and the President, and that the real motive to pass the orders of dismissal was to penalise them for the active part they had taken in ventilating the grievances of the employees through the IBEA. The appellants also pleaded that they had an excellent record of service and that they had not conducted themselves in such manner as to warrant their dismissal from service. It was submitted that they were recipients of commendation certificates, appreciation letters and cash awards from time to time. It was also stated in the applications that they had not acted contrary to the interest of national security at any time. The said applications were contested by the respondents who pleaded that the orders of dismissal had been passed by the President on being satisfied on the basis of the material available that the activities of the appellants were such as to warrant their dismissal from service by dispensing with the requirements of Article 311(2) of the Constitution in the interest of security of the State. It was also pleaded on behalf of the respondents that the details of the material on the basis of which the satisfaction had been reached cannot be disclosed without detriment to public interest. It was denied that the authorities of the Intelligence Bureau have a hostile attitude towards IBEA and it

was stated that punitive action was taken on merits of each case and not because of the participation of the appellants in the activities of the IBEA. During the pendency of the applications before the. Tribunal the ap- pellants moved Misc. Petitions Nos. 1897/ 92 in T.A. Nos. 1 and 2/92 and Miscellaneous Petition No. 732/92 in T.A.- No. 3/92 whereby they prayed for directions to the respondents to produce the records specified in the said applications for inspection of the Tribunal and/or by the appellants and their counsel. The said applications were opposed by the respondents who claimed privilege invoking Article 74(2) of the Constitution and Sections 123 and 124 of the Evidence Act and for that purpose affidavit of Mr. Madhav Godbole, Secretary to the Government of India, Min- istry of Home Affairs, New Delhi (the Head of the Department) was filed before the Tribunal. Without prejudice to the said claim of privilege, the respondents had, however, stated that they had no objection whatsoever to the said documents relating to the dismissal of the appellants and those portions of documents that relate to the said dismissal orders being produced for perusal of the Tribunal in order to satisfy it that the claim of privilege against disclosure of the said official records is bona fide and genuine.

5. By judgment dated December 18, 1993 the Tribunal, after perusing the records that were placed for perusal of the Tribunal, upheld the claim of privilege and dismissed ,the applications filed by the appellants for inspection and production of the documents. On the basis of the said records the Tribunal has further found that the material considered by the President relate to the activities of the appellants which would prejudicially affect the security of the State and that the materials relied upon or the satisfaction of the President have nothing to do with the appellants' activities in relation to the IBEA. The Tribunal has held that there is no substance in the case of the appellants that the orders of the dismissal were not bona fide and they have been passed to victimise the appellants for promoting and participating in the activities of the IBEA. The Tribunal was of the view that the satisfaction had been arrived at after application of mind to the relevant materials without taking into consideration irrelevant factors and that the impugned orders of dismissal from service dated December 26, 1980 arc not liable for interference. The Tribunal, therefore, dismissed the applications of the appellants. Hence these appeals.

6.On behalf of the appellants it has been urged that the exercise of power under clause (c) of the second proviso to Article 3 11(2) of the Constitution is subject to judicial review and that an order passed under the said provisions is open to challenge before the courts on the ground that the satisfaction of the President or the Governor is vitiated by malafides or is based on considerations which have no relevance to the interest of the security of the State. In this connection, Shri Sorabjee has submitted that in a case where the employee assails the action taken against him under Article 311(2)(c) it is obligatory on the part of the concerned Government to place before the court the relevant material on the basis of which the action was taken and such material can only be withheld from the court in cases where the claim of privilege is found to be justified under the provisions of Sections 123 and 124 of the Evidence Act. Shri Sorabjee has urged that the said claim of privilege does not extend to the disclosure of the nature of the activities on the basis of which the alleged satisfaction has been arrived at and the privilege can only relate to the material which has been relied upon in support of the said activities.

7. The learned Additional Solicitor General, appearing for the respondents, has, however, submitted that an order under clause (c) of second proviso to Article 311(2) of the Constitution is to be passed by the President or the Governor on the basis of his subjective satisfaction. The material which forms the basis for arriving at the said satisfaction is not required to be disclosed both in view of Article 74(2) as well as under Sections 123 and 124 of the Evidence Act. The learned Additional Solicitor General has, in this context, pointed out that while under clause (b) of the second proviso to Article 311(2) the competent authority is required to record in writing the reason for its satisfaction that it is not reasonably practicable to hold an inquiry, there is no such requirement for recording the reason in clause (c) and, therefore, there is no requirement to disclose the reasons for arriving at the satisfaction for taking action under clause (c) of second proviso to Article 311(2).

8. Article 311(2), as amended by the Constitution (Fifteenth Amendment) Act, 1963, provides as follows :

> "(2) No such persons aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges :
>
> Provided that where it is proposed after such inquiry to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed Provided further that this clause shall not apply -
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) when the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing it is not practi- cable to hold such inquiry; or
>
> (c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry. "

9. The provision of the second proviso came up for consideration before the Constitution Bench of this Court in Union of India & Anr. v. Tulsiram Patel & Ors., 1985 Supp. (2) SCR 13 1, Madon, J., speaking for the majority, has observed that clause (2) of Article 311 gives a constitu- tional mandate to the principles of natural justice and audi alteram pattern rule by providing that a person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges and that this safeguard provided for a government, servant by clause (2) of Article 311(2) is, however, taken away when the second proviso to that clause becomes applicable. (Page

202). The Court has also pointed out that the paramount thing to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank and that before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank and once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry. (Pages 204-205). While dealing with clause (c) of the second proviso to Article 311(2) it has been stated :

> "The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is "in the interest of the security of the State". The interest of the security of the state may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is not expedient to hold an inquiry as contemplated by Article 311(2). The sat- isfaction of the President or Governor must, therefore, be with respect to the expediency or inexpediency of holding an inquiry in the interest of the security of the State. " (p.
>
> 277) "The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing danger to the interest or the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making, known such information may very often result in disclosure of the source of such information. Once known, the particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or the Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public." (p. 278)

10.The learned Judge did not consider it necessary to deal with the contention that the power of judicial review is not excluded where the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds and that in such a case, in law there would be no satisfaction of the President or the Governor at all for the reason that in the matters under consideration before this court all the materials, including the advice tendered by the Council of Ministers, had been produced and they clearly showed that the satisfaction of the Governor was neither reached malafide nor was it based on any extraneous or irrelevant ground. (Page 279). In the light of the provisions contained in Article 74(2) and Article 163(3) it was

submitted before the Court that leaving aside the advice given by the Ministers to the President or the Governor, the Government is bound to disclose at least the materials upon which the advice of Council of Ministers was based so that the court can examine whether the satisfaction of the President or the Governor, as the case may be, was arrived at mala fide or is based on wholly extraneous or irrelevant grounds so that such satisfaction would in law amount to no satisfaction at all and that if the Government does not voluntarily disclose such materials it can be compelled by the Court to do so. Dealing with the said submission it was observed :

> "Whether this should be done or not would depend upon whether the documents in question fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not. It is unnecessary to examine this question any further because in the cases under clause (c) before us though at first privilege was claimed, at the hearing privilege was waived and the materials as also the advice given by the Ministers to the Governor of Madhya Pradesh who has passed the impugned orders in those cases were disclosed." (p. 280)

11.It would thus appear that in Tulsiram Patel (supra) though the question whether the satisfaction of the President or the Governor under Article 311(2) is amenable to judicial review and the Government can be required to disclose the materials upon which the advice of the Council of Ministers was based so as to enable the court to exercise the power of judicial review has been left open, the Court, after considering the said material, has recorded the find- ing that the satisfaction of the Governor was neither recorded malafide nor was it based on any extraneous or irrelevant ground.

12.It is, therefore, necessary to deal with this question in the instant case., We may, in this context, point out that a distinction has to be made between judicial review and justiciability of a particular action. In a written constitution the powers of the various organs of the State,are limited by the provisions of the Constitution. The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary, it is vested with the power to test the validity of an action of every authority functioning under the Constitution on the touch stone of the constitution in order to ensure that the authority exercising the power conferred by the constitution does not transgress the limitations placed by the Constitutions on exercise of that power. This power of judicial review is, therefore, implicit in a written constitution and unless expressly excluded by a provision of the Constitution, the power of judicial review is available in respect of exercise of powers under any of the provisions of the Constitution. Justiciability relates to a particular field falling within the purview of the power of judicial review. On account of want of judicially manageable standards, there may be matters which are not susceptible to the judicial process. In other words, during the course of exercise of the power of judicial review it may be found that there are certain aspects of the exercise of that power which are not susceptible to judicial process on account of want of judicially manageable standards and are, therefore, not justiciable.

13. In the Slate of Rajasthan & Ors. v.

Union of India Etc. Etc., (1978) 1 SCR 1, one of the questions failing for consideration was whether satisfaction of the President in the matter of exercise of the power to make a Proclamation conferred under Article 356(1) of the Constitution is amenable to judicial review. At the relevant time when the impugned Proclamations were made there was an express provision in clause (5) of Article 356 which prescribed that "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." In spite of such an express provision P.N. Bhagwati J. (as the learned Chief Justice then was) speaking for himself and A.C. Gupta J., has held that "if the satisfaction is mala fides 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 which he is required to be satisfied." (p.82). Other learned Judges, with some variance, have adopted a similar approach. Beg CJ. has held that if it is revealed "that a constitutionally or legally prohibited or extraneous or collateral purpose is sought to be achieved by a proclamation under Article 356 of the Constitution, this Court will not shirk its duty to act in the manner in which the law may then oblige it to act." (p.46). Chandrachud J. (as the learned Chief Justice then was) has observed that if reasons given are wholly extrane- ous to the formation of the satisfaction, the Proclamation would be open to the attack that it is vitiated by legal mala fides." (p.60). Goswami J. has held that the Court "would not refuse to consider when there may be sufficient materials to establish that the Proclamation under Article 356(1) is tainted with mala fides."(p.92).Untwalia J. has said that the Court is not powerless to interfere with an order that is ultra vires, wholly illegal or passed mala fide. (p. 95). Fazal Ali J. has held that "on the reasons given by the President in his order if the Courts find that they are absolutely extraneous and irrelevant and based on personal and illegal considerations the Courts are not powerless to strike down the order on the ground of mala fide if proved." (p. 120).

14. Clause (5) of Article 356 was deleted by the Constitution (Forty Fourth Amendment) Act, 1978. In S.R. Bommai (supra) Sawant J. after noticing the observations in A.K. Roy v. Union of India 1982 (2) SCR 272, has observed that after deletion of clause (5) the judicial review of the Proclamation issued under Article 356 has become wider than indicated in the State of Rajasthan (supra). Similarly, Jeevan Reddy J. has said : "Surely the deletion of clause (5) has not restricted the scope of judicial review. Indeed, it has removed the cloud cast on the said power. The Court should, if anything, be more inclined to examine the constitutionality of the Proclamation after such deletion." (p. 255)

15. In S.R. Bommai (supra) differing views were expressed by the learned Judges on the scope and extent of the judicial review and justiciability of the action taken by the President in exercise of power conferred under Article 356(1). Sawant J., speaking for himself and Kuldip Singh J., had held that material on the basis of which the advice is given by the Council of Ministers and the President forms his satisfaction has to be scrutinised by Court within the acknowledged parameters of judicial review, viz., illegality, irrationality and mala fides. (p. 112). Referring to the ex-

pression "if the President .... is satisfied" in Article 356(1) the learned Judge has said :

> "Hence, it is not the personal whim wish, view or opinion or the ipse dixit of the President dehors 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 uncertainly about the state of things indi- cating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned the legitimacy of inference drawn from such material is certainly open to judicial review. " (p. 103)

16. According to the learned Judge, "Many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law and they can equally apply to the domain covered by the constitutional law." (p.94). The learned Judge has applied the tests laid down by this Court in Barium Chemicals Ltd. v. Company Law Board. 1966 Supp. SCR. 311.

17. Jeevan Reddy J., speaking for himself and one of us (Agrawal J.), did not, however, give such a wide scope to the power of judicial review in respect of a proclamation made under Article 356 (1). After pointing out that Barium Chemicals (supra) is a decision concerning subjective satisfaction of an authority created by a statute, the learned Judge has held that the principles enshrined in that case "cannot ipso facto be extended to the exercise of constitutional power under Article 35 of the Constitution and that "having regard to the fact that this is a high Constitutional functionary in 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." (p.267). He preferred to adopt the formulation that "if a Proclamation is found to be mala fide or is found to be based wholly on extraneous or irrelevant grounds, it is liable to be struck down." (p.268). The teamed Judge has observed: "The truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of mala fides takes in inter alia situations-where the Proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power cases where this power is invoked for achieving oblique ends." (p. 268). The learned Judge has further stated: "The court will not lightly presume abuse or misuse. The court would, as it should, tread wearily, making allowance for the fact that the President and the Union Council of Ministers are the best judges of the situation, that they alone are in possession of information and material sensitive in nature sometimes and that the Constitution has trusted their judgment in the matter. But all this does not mean that the President and Union Council of Ministers are the final arbiters in the matter or that their opinion is conclusive." (pp.268 269). Pandian J. has expressed his agreement with the judgment of Jeevan Reddy J.

18. Ahmadi J. (as the learned Chief Justice then was), while expressing his agree-

ment with the view expressed in the State of Rajasthan (supra) has held that a proclamation issued under Article 356(1) of the Constitution can be challenged on the limited ground that the action is mala fide or ultra vires Article 356 itself and has held that the test laid down in Barium Chemicals (supra) and subsequent decisions for adjudging the validity of administrative action can have no application for testing the satisfaction of the President under Article

356. (p.82)

19. Verma J., speaking for himself and Yogeshwar Dayal J., has taken the same view. The learned Judge has held though the Proclamation under Article 356 is subject to judicial review the area of justiciability is narrow. While holding that the test for adjudging the validity of an ad- ministrative action and the grounds of its invalidity indicated in Barium Chemicals "(Supra) and other cases of that category have no application for testing and invali- dating a Proclamation issued under Article 356, the learned Judge has said that the grounds of invalidity are those mentioned in State of Rajasthan (supra). (p. 85)

20. K. Ramaswamy J. has held: "The decision can be tested on the ground of legal mala fides, or high irrationality in the exercise of the discretion to issue Presidential Proclamation and the traditions parameters of judicial review, therefore cannot be extended to the area of exceptional and extraordinary power exercise under Article 356". The learned Judge has also held that the "doctrine of proportionality cannot be extended to the power exercised under Article 356." (p. 209)

21. It would thus appear that in S.R Bommai (supra) though all the learned Judges have held that the exercise of power under Article 356 (1) is subject to judicial review but in the matter of justiciability of the satisfaction of the President, the view of the majority (Pandian, Ahmadi, Verma, Agrawal, Yogeshwar Dayal and Jeevan Reddy JJ.) is that the principles evolved in Barium Chemicals (supra) for adjudging the validity of an action based on the subjective satisfaction of the authority created by statute do not, in their entirety, apply to the exercise of a constitutional power under Article 356. On the basis of the judgment of Jeevan Reddy J., which takes a narrower view than that taken by Sawant J., it can be said that the view of the majority (Pandian, Kuldip Singh, Sawant, Agrawal and Jeevan Reddy JJ.) is that :

(i) the satisfaction of the President while making Proclamation under Article 356(1) is justiciable;

(ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous and/or irrelevant grounds;

(iii)even if some of the materials on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;

(iv) the truth or correctness of the material cannot be questioned by the Court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President;

(v) the ground of mala fide takes in inter alia situations where the proclamation is found to be a clear case of abuse of power or what is sometimes called fraud on power;

> (vi) the court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgment in the matter; and
>
> (vii) this does not mean that the President and the Council of Ministers arc the final arbiters in the matter or that their opinion is conclusive.

22.As to the bar to an inquiry by the court imposed under Article 74(2) of the Constitution, all the Judges in S.R. Bommai (supra) have held that the said bar under Article 74(2) is confined to the advice tendered by the Council of Ministers to the President and it does not extend to the material on the basis of which the advice was tendered and, therefore, Articles 74(2) does not bar the production of the material on which the advice of the Council of Ministers is based. This is, however, subject to the right to claim privilege against the production of the said material under Section 123 of the Evidence Act.

23.Is there anything in the provisions of clause (c) of the second proviso to Article 311 (2) which compels a departure fro the principles laid down in S.R. Bommai (supra) governing justiciability of the satisfaction of the President in the matter of exercise of power under Article 356? We have not been able to discern any reason for making a departure. As compared the clause (c) of the second proviso to Article 311 (2), which deals with an individual employee, the power conferred by Article 356, resulting in displacement of the elected government of a State and imposition of President's rule in the State, is of much greater significance a. effecting large number of persons. We may, in this context, refer to clause (b) of the second proviso to Article 311 (2) whereunder it is permissible to dispense with the requirements of Article 311 (2) if the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. Clause (3) of Article 311 makes the said decision of the authority final. In spite of the said provision attaching finality to the decision this Court, in Tulsiram Patel (supra), has held :

> "The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are ir- relevant, then the recording of its satis- faction by the disciplinary authority would be, an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated." (p.274)

24.Clause (b) differs from clause (c) in as much as under clause (b) the competent authority is required to record in writing the reasons for its satisfaction and there is no such requirement in clause (c). This difference, in our opinion, does not mean that the satisfaction of the President or the

Governor under clause (c) is immune from judicial review and is not justiciable. It only means that the provisions contained in clause (c) are more akin to those contained in Article 356(1) which also does not contain any requirement to record the reasons for the satisfaction of the President. Since the satisfaction of the President in the matter of making a proclamation under Article 356(1) is justiciable within the limits indicated in S.R. Bommai (supra) the satisfaction of the President or the Governor, which forms the basis for passing an order under clause (c) of the second proviso to Article 311 (2), can also be justiciable within the same limits.

25.Under clause (c) of the second proviso to Article 311(2) the President or the Governor has to satisfy himself about the expediency in the interests of the security of the State to hold an enquiry as prescribed under Article 311 (2). Are the considerations involving the interests of the security of the State of such a nature as to exclude the satisfaction arrived at by the President or the Governor in respect of the matters from the field of justiciability? We do not think so. Article 19(2) of the Constitution permits the State to impose, by law, reasonable restrictions in the in- terests of the security of the State on the exercise of the right to freedom of speech and expression conferred by sub- clause (a) of clause (1) of Article 19. The validity of the law imposing such restrictions under Article 19(2) is open to judicial review on the ground that the restrictions are not reasonable or they are not in the interests of the security of the State. The Court is required to adjudicate on the question whether a particular restriction on the right to freedom of speech and expression is reasonable in the interests of the security of the State and for that purpose the Court takes into consideration the interests of the security of the State and the need of the restrictions for protecting those interests. If the Courts are competent to adjudicate on matters relating to the security of the State in respect of restrictions on the right to freedom of speech and expression under Article 19 (2) there appears to be no reason why the Courts should not be competent to go into the question whether the satisfaction of the President or the Governor for passing an order under Article 311 (2)

(c) is based on considerations having a bearing on the interests of the security of the State. While examining the validity of a law imposing restrictions on the right to freedom of speech and expression this Court has emphasised the distinction between security of the State and mainte- nance of public order and has observed that only serious and aggravated forms of public order which are calculated to en- danger the security of the State would fall within the ambit of clause (2) of Article 19. (See : Romesh Thappar v. The State of Madras, 1950 SCR 594, at p. 601). So also in Tulsiram Patel (supra) the Court has pointed out the distinction between the expressions 'security of the State', 'public order' and 'law and order' and has stated that situations which affect public order are graver than those which affect law and order and situations which affect security of the State are graver than those which affect public order. The President or the Governor while exercising the power under Article 311 (2) (c) has to bear in mind this distinction between situations which affect the security of the State and the situations which affect public order or law and order and for the purpose of arriving at his satisfaction for the purpose of passing an order under Article 311 (2) (c) the President or the Governor can take into consideration only those circumstances which have a bearing on the interests of the security of the State and not on situations having a bearing on law and order or public order. The satisfaction of the President or the Governor would be vitiated if it is based on circumstances having no bearing on the security of the State. If an order passed under Article 311(2) (c) is assailed before a court of law on the ground that the satisfaction of the President

or the Governor is not based on circumstances which have a bearing on the security of the State the Court can examine the cir- cumstances on which the satisfaction of the President or the Governor is based and if it finds that the said circumstances have no bearing on the security of the State the court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations.

26. It would be useful, in this context, to take note of the decision of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Services, 1985 (1) AC 374, which related to the Government Communications Head Quarters (GCHQ). The main functions of GCHQ were to ensure the security of military and official communications and to provide the government with signals intelligence which in- volved the handling of secret information vital to the national security. Since 1947 staff employed at GCHQ had been permitted to belong to national trade unions and most had done so. There was a well-established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the staff. On December 22, 1983 the Minister for the Civil Service gave an instruction for the immediate variation of the terms and conditions of service of the staff with the effect that they would no longer be permitted to belong to national trade unions. There had been no consultation with the trade unions or with the staff at GCHQ prior to the issuing of that instruction. The said in- struction was challenged by a trade union and six individuals who sought judicial review of the said instruction. Immunity from judicial review was claimed on the ground that the said instruction had been issued in exercise of the prerogative power of the Crown. The House of Lords held that executive action was not immune from judicial review merely because it was carried out in pursuance of the power derived from a common law or prerogative, rather than a statutory source, and a minister acting under a prerogative power might, depending upon its subject matter, be under the same duty to act fairly as in the case of action under a statutory power. On behalf of the Minister it was submitted that prior consultation would involve a real risk that it would occasion the very kind of disruption that was threat to national security and which it was intended to avoid. While recognising that the decision on whether the requirements of national security outweigh the duty of fairness in any particular case, is for the Government and not for the courts, Lord Fraser of Tully belton said "But if the decision is successfully chal- lenged on the ground that it has been reached by a process which is unfair then the Government is under an obligation to produce evidence that the decision was, in fact, based on grounds of national security," (p. 402) According to Lord Scarman "The point of principle in the appeal is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The question may arise in ordinary litigation between private persons as to their private rights and obligations: and it can arise as in this case in proceedings for judicial review of a decision by a public authority."

"But, however it arises, it is a matter to be considered by the court in the circumstances and context of the case. Though there, are limits dictated by law and common sense which the court must observe in dealing with the question the court does 'not abdicate its judicial functions. If the question arises as a matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power," [p. 404]

27. Similarly Lord Roskill has said:

> "The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. 'Mat that principle exists is 1 beyond doubt.?' [p. 420]

28.On the basis of the evidence that was adduced in that case it was held that the evidence established that the minister had considered, with reason, that prior consul- tation about her instruction would have involved a risk of precipitating disruption at GCHQ and revealing vulnerable areas of operation, and, accordingly, she had shown that her decision had in fact been based on considerations of national security that out weighed the applicants' legitimate expectation of prior consultation.

29. In Bakshi Sardari Lal (Dead) through LRs Ors. v. Union of India & Anr., 1987 (4) SCC 114, in a challenge to orders of dismissal passed under clause (c) of the second. proviso to Article 311 (2) it was contended on behalf of the appellants that the High Court was wrong in holding that the sufficiency of satisfaction of the Presi- dent was not justiciable. While dealing with the said contention, the court, after referring to the decision in Tulsiram Patel (supra), has observed :

> "The record of the case produced before us clearly indicates that the reason has been recorded though not communicated. That would satisfy, the requirements of the law as indicated in Tulsiram Patel Case . The plea of mala fides as had been contended before the High Court and causally reiterated before us arises out of the fact that typed orders dated June 3, 1971, were already on record in the file when the papers were placed before the President; such a contention is without any substance." [p. 121]

30.This would show that the court did go into the question whether the impugned orders were vitiated by mala, fides. As noticed earlier in Tulsiram Patel (supra) also the Court, while dealing with the Madhya Pradesh Police Forces matters, did examine the question whether the impugned orders of dismissal passed under Article 311(2)(c) were vitiated by mala fides or were based on irrelevant consid-

erations and after considering all the materials that were produced before the Court by the State Government, the Court recorded the finding that the facts leave no doubt that the situation was such that prompt and urgent action was necessary and the holding of inquiry into the conduct of each of the petitioners would not have been expedient in the interests of the security of the State.

31.We are, therefore, of the opinion that an order passed under clause (c) of the second proviso to Article 311 (2) is subject to judicial review and its validity can be examined by the court on the ground that the satisfaction of the President or the Governor is vitiated by mala fides or is based on

wholly extraneous or irrelevant grounds within the limits laid down in S.R Bommai (supra).

32.In order that the Court is able to exercise this power of judicial review effectively it must have the necessary material before it to determine whether the satisfaction of the President or the Governor as the case may be, has been arrived at in accordance with the law and is not vitiated by mala fides or extraneous or irrelevant factors. This brings us to the question whether the Government is obligated to place such material before the Court. It is no doubt true that unlike clause (b) of the second proviso to Article 311 (2) which requires the authority to record in writing the reason for its satisfaction that it is not reasonably practicable to hold such inquiry clause (c) of the second proviso does not prescribe for the recording of reasons for the satisfaction. But the absence of such a requirement to record reason for the satisfaction does not dispense with the obligation on the part of the concerned Government to satisfy the court or the Tribunal if an order passed under clause (c) of the second proviso to Article 311 (2) is chal- lenged before such court or tribunal that the satisfaction was arrived at after taking into account relevant facts and circumstances and was not vitiated by mala fides and was not based on extraneous or irrelevant considerations. In the absence of the said circumstances being placed before the court or the Tribunal it may be possible for the concerned employee to establish his case that the satisfaction was vitiated by mala fides or was based on extraneous or irrelevant considerations. While exercising the power under Article 311 (2) (c) the President or the Governor acts in accordance with the advice tendered by the Council of Ministers. (See : Samsher Singh v. State of Punjab, 1975 (1) SCR 814). Article 74(2) and Article 163 (3) which preclude the court from inquiring into the question whether any, and if so, what advice was tendered by the Ministers to the President or the Governor enable the concerned Government to withhold from the court the advice that was tendered by the Ministers to the President or the Governor. But, as laid down in S.R. Bommai (supra), the said provisions do not permit the Government to withhold production in the Court of the material on which the advice of the Ministers was based. This is, however, subject to the claim of privilege under Sections 123 and 124 of the Evidence Act in respect of a particular document or record. The said claim of privilege will have to be considered by the court or tribunal on its own merit. But the upholding of such claim for privilege would not stand in the way of the concerned Government being required to disclose the nature of the activities of the employee on the basis of which the satisfaction of the President or the Governor was arrived at for the purpose of passing an order under clause

(c) of the second proviso to Article 311 (2) so that the court or tribunal may be able to determine whether the said activities could be regarded as having a reasonable nexus with the interest of the security of the State. In the absence of any indication about the nature of the activities it would not be possible for the court or tribunal to determine whether the satisfaction was arrived at on the basis of relevant considerations. The nature of activities in which employee is said to have indulged in must be distinguished from the material which supports his having indulged in such activities. The non-disclosure of such material would be permissible if the claim of privilege is upheld. The said claim of privilege would not extend to the disclosure of the nature of the activities because such disclosure would not involve disclosure of any information connecting the employee with such activities or the source of such information.

33.In our opinion, therefore, in a case where the validity of an order passed under clause (c) of the second proviso to Article 111(2) is assailed before a court or a Tribunal it is open to the court or the Tribunal to examine whether the satisfaction of the President or the Governor is vitiated by mala fides or is based on wholly extraneous or irrelevant grounds and for that purpose the Government is obliged to place before the court or tribunal the relevant material on the basis of which the satisfaction was arrived at subject to a claim of privilege under Sections 123 and 124 of the Evidence Act to withhold production of a particular document or record. Even in cases where such a privilege is claimed the Government concerned must disclose before the Court or tribunal the nature of the activities in which the Gov- ernment employee is said to have indulged in.

34.In the present case the appellants had sought production and inspection of the following documents:

> (a) The records and files containing the "information" on the basis of which the President was "satisfied " for the purpose of exercising his powers under clause (c) of the second proviso to Article 311 (2).
>
> (b) The records and files containing the description of "activities of the petitioners which warranted their 'dismissal' from service".
>
> (c) The records and files containing the details of "misconduct" attributed to the petitioners, as covered in CCS (Conduct) Rules, 1965.
>
> (d) A copy of the charge of misconduct and the statement of allegation in support thereof framed by the Competent Authority against the petitioners before coming to the conclusion that "it is not expedient to hold an inquiry in the case of Shri B.B. Raval (petitioners)."
>
> (e) A copy of the original order passed by the President of India under Article 311 (2)(c) on the basis of which Shri R. Mahadevan, Under Secretary to the Government of India, Ministry of Honic Affairs issued the impugned order dated 26th December, 1980 "By order and in the name of the President".
>
> (f) A copy of the order of delegation of powers of the President of India authorising Shri R. Mahadevan, Under Secretary to authenticate the order of the President and issue the same in his name.
>
> (g) Records and files containing the de-

liberations, recommendations and findings of the Committee of Advisors (as envisaged in O.M. dated 26th July, 1980) advising th e President of India to exercise powers under Article 311 (2)(c) of the Constitution.

(h) Copies of any other records, files, notification or recommendations relevant to the issue of the impugned order, that the Hon'ble Tribunal may direct the respondents to produce for rendering full and effective assistance to the Hon'ble Tribunal in the interest of justice and for adjudication of this case.

35. Dr. Madhav Godbole in his affidavit claimed privilege under Article 74(2) as well as under Sections 123 and 124 of the Evidence Act. The Tribunal after referring the decision of this Court in S.P. Gupta & Ors., etc. etc. v. Union of India & Ors. etc. etc., 1982 (2) SCR 365, has observed that the following classes of documents are protected from disclosure :

> "(i) Cabinet minutes, minutes of discussions between heads of departments, high level inter-departmental communications and dispatches from ambassadors abroad.
>
> (ii) Papers brought into existence for the purpose of preparing a submission to cabinet.
>
> (iii) Documents which relate to the framing of the Government policy at a high level.
>
> (iv) Notes and minutes made by the respective officers on the relevant files, information expressed or reports made and gist of official decisions reached.
>
> (v) Documents concerned with policymaking within departments including minutes and the like by junior officials and correspondence with outside bodies."

36.The Tribunal, after examining the records produced before it, has observed that the records contain cabinet minutes, papers brought into existence for the purpose of preparing submission to the cabinet, notes made by the respective officers, information expressed and the gist of official decisions. Having regard to the fact that the appellants were working in a highly sensitive Organisation entrusted with the delicate job of gathering, collecting and analysing intelligence necessary to maintain the unity, integrity and sovereignty of the country and that secrecy is the essence of the organisation and exposure may tend to demolish the organisation and aggravate the hazards in gathering informa- tion and dry up the sources that provide essential and sensitive information needed to protect public interest, the Tribunal has held that it will not be in public interest to permit disclosure of such documents. The Tribunal has, therefore, upheld the claim of privilege. We do not find any ground to take a different view in the matter.

37.After looking into the records the Tribunal has recorded the finding that the materials considered by the President relate to the activities of the appellants which would prejudicially affect the security of the State and that the materials relied upon for the satisfaction of the President have nothing to do with the activities of the appellants in relation to IBEA and that the impugned orders have not been passed in violation of the interim order passed by this Court in W.P. O Nos. 1119 of 1980 and that there is no substance in the appellants' case that the orders of dismissal are not bona fide and had been passed to victimise the appellants for promoting and participating in the activities of IBEA. The learned Additional Solicitor General has submitted that the Tribunal has not committed any

error in adopting this course and has placed reliance on the decision of this Court in Jamaat-e-Islamdi Hind v. Union of India, 1995 (1) SCC 428.

38.In Jamaat-e-Islamdi Hind (supra) a notification had been issued by the Government of India under Section 3 of the Unlawful Activities (Prevention) Act, 1967 declaring that the Jamaat-e-Islami Hind was an unlawful Association. The said notification was referred for adjudication to the Tribunal constituted under the said Act. Before the Tribunal the only material produced by the Central Government was a resume prepared on the basis of some intelligence reports and the affidavits of two officers who spoke only on the basis of the records and not from personal knowledge. The Tribunal held that there was sufficient cause for declaring the Association to be unlawful and confirmed the notification. On behalf of the appellant it was urged that the only material produced at the inquiry does not constitute legal evidence for the purpose in as much as it was, at best, hearsay and that too without disclosing the source from which it emanates to give an opportunity to the appellant to effectively rebut the same. On the other hand, on behalf of the respondent it was submitted that the requirement of natural justice in such a situation was satisfied by mere disclosure of information without disclosing the source of the information. This Court, while holding that the minimum requirement of natural justice must be satisfied to make the adjudication mean- ingful, observed that the said requirement of natural justice in a case of this kind had to be tailored to safeguard public interest which must always out-weigh every lesser interest. It was said:

> "It is obvious that the unlawful activities of an association may quite often be clandestine in nature and, therefore, the source of evidence of the unlawful activities may require continued confidentiality in public interest. In such a situation, disclosure of the source of such information, and, may be, also full particulars thereof, is likely to be against the public interest. ..... However, the nondisclosure of sensitive information and evidence to the association and its office- bearers, whenever justified in pubic interest. does not necessarily imply its non-disclosure to the Tribunal as well." [p.447]

39.These observations in Jamaat-e-Islamdi Hind (supra) lend support to the view that in a case where the material is of such a nature that it requires continued confidentiality in public interest it would be permissible for the court or tribunal to look into the same while permitting the non-disclosure to the other party to the adjudication. It cannot, therefore, be said that the Tribunal, in the present case, was in error in looking into the record for the purpose of determining whether the satisfaction has been vitiated for any of the reasons mentioned by the appellants.

40. The learned counsel for the appellants have invited our attention to the averments contained in C.M. No. 8494 of 1980 filed on behalf of the respondent in W.P. No. 1117-19 of 1980 in this Court in support of their submission that the impugned orders of dismissal have been passed on the basis of the activities referred to in para 6 of the said application. This submission has to be, rejected in view of the finding recorded by the Tribunal that the materials considered by the President relate to the activities of the appellants which would prejudicially affect the security of the State and that the said materials have nothing to do with the activities of the appellant in relation to IBEA.

41. Having regard to the facts and circumstances of the case we are unable to hold that the impugned orders for the dismissal of the appellants are vitiated by malafides or are based on wholly extraneous or irrelevant grounds and we do not find any ground to interfere with the decision of the Tribunal. The appeals are, therefore, dismissed. But in the circumstances without any order as to costs.