

**IN THE SUPREME COURT OF INDIA  
CIVIL ORIGINAL JURISDICTION  
WRIT PETITION (C) NO.1368/2019**

**IN THE MATTER OF:**

PEOPLE'S UNION FOR CIVIL LIBERTIES & ANR. ...PETITIONERS

VERSUS

UNION OF INDIA & ORS. ...RESPONDENTS

**NOTE ON SUBMISSIONS BY SH. SANJAY PARIKH, SENIOR ADVOCATE  
FOR THE PETITIONERS**

1. The interpretation of Article 370 is clear from the historical background, the Instrument of Accession, the Constituent Assembly Debates as well as the judgment of this Hon'ble Court in *Prem Nath Kaul v. State of Jammu & Kashmir*, 1959 Supp (2) SCR 270.
2. The historical facts show that even prior to 1934, there was public agitation in Kashmir for establishment of a Government, leading to issuance of Regulation 1 of 1931 (1934). Five years thereafter i.e. 07.09.1939, Jammu and Kashmir Constitution Act, 1939 was promulgated. This was followed by Declaration of Manifesto (New Kashmir) in the Annual Session of the National Conference in 29-30.09.1944. In this Manifesto, the people of Jammu & Kashmir asserted their right to freedom of speech, freedom of assembly, meetings, right to work, right to receive education, equal rights for women etc. It was made clear by the people of Jammu & Kashmir, among others, that the said Manifesto alone would be acceptable to them. The people of the State had thus started asserting their rights even when it was a Princely State.
3. Maharaja Hari Singh signed the Instrument of Accession on 26.10.1947, thereby agreeing to accede to the Dominion of India as per Section 6 of the Government of India Act, 1935. By said Instrument of Accession, as per Schedule attached to the said Instrument of Accession, with respect to four topics- namely, defence, external affairs, communication and ancillary, the Dominant Legislature (Union of India) was given power to make laws for the

State of J&K. The said Instrument of Accession was accepted by Lord Mountbatten, Governor General of India dt 27.10.1947.

4. In the year 1948, by Proclamation, the Maharaja of Kashmir had appointed an Interim Government making Sheikh Mohammad Abdullah as the Prime Minister. Maharaja had also deputed four representatives of the State to represent J&K in the Constituent Assembly which was called for framing the Constitution of India.
5. On 17.10.1949, the Constituent Assembly of India had adopted Article 306-A (which is now Article 370) making special provision for constitutional relationship of the State of J&K with the Union of India. Sh. GopalaswamiAyyangar had introduced the motion and had also clarified why Article 306-A was required. In this statement, Sh. Ayyangar emphasized that it was commitment to the people and Government of Kashmir that no addition other than what is mentioned in the Instrument of Accession shall be made except with the consent of the Constituent Assembly called for the purpose of framing the Constitution of J&K. He clearly stated as follows:

*“Then we come to clause (2). You will remember that several of these clauses provide for the concurrence of the Government of Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State.*

[.....]

*“..the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the state, the President may, on the recommendation of that Constituent Assembly, issue an order that this Article 306A (370) shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issued any order of that kind, the recommendation of*

*the Constituent Assembly will be a condition precedent.*” (Emphasis supplied)

6. Article 370 came into force on 26.01.1950. From bare reading of the said provision, the following position becomes clear:
  - I. The marginal note says that it was a temporary provision with respect to State of Jammu & Kashmir and the provision begins with a non-obstante clause, namely, “Notwithstanding anything in this Constitution”, meaning thereby the constitutional provisions would apply to the extent permitted under Article 370.
  - II. Article 370(1)(b) limits powers of the Parliament to make laws in respect of the State of Jammu & Kashmir. According to 370(1)(b)(i), the President “in consultation” with the “Government of the State” can declare those matters in the Union list and concurrent list which correspond with the matters specified in the Instrument of Accession, meaning thereby that the matters which fall within the Instrument of Accession are relatable to items in the Union list and concurrent list will apply to State of Jammu & Kashmir.
  - III. As far as other matters in the said list i.e. Union list and concurrent list are concerned, as per Article 370(1)(b)(ii), the President may by order, with the “concurrence” of the Government of the State, can apply those Lists to the State of Jammu & Kashmir.
  - IV. The meaning of the term ‘Government of the State’ has been provided in the Explanation, namely, the person for the time being recognized as the Maharaja of Jammu & Kashmir acting on the advice of Council of Ministers as per Maharaja’s Proclamation dated 5<sup>th</sup> March 1948.
  - V. It is clear from the above that the President either *in consultation* with the Maharaja of Jammu & Kashmir or with the *concurrence* of Maharaja of Jammu & Kashmir could apply the items from the Union list as well as the Concurrent list to the State of J&K.
  - VI. Art. 370(1)(c) makes Article 1 and Article 370 of the Constitution of India directly applicable to the State of Jammu & Kashmir.
  - VII. Art. 370(1)(d) is important because most of the subsequent declarations by the President have been issued by using the said provision. According to Article 370(1)(d), the President may apply other provisions of the Constitution to the State of J&K *with such exceptions and modifications as*

the President may by order specify. There are two proviso attached to 370(1)(d). According to the first proviso, in relation to the matters specified in the Instrument of Accession, the President shall not issue an order except “in consultation with the Government of the State”. According to the second proviso, which relates to 370(1)(b)(ii) in issuing an order, the President shall require “concurrence of the Government”. The intention of 370(1)(d) is clear, namely, that if the President wishes to make any change in the Constitution in relation to matters concerning the Instrument of Accession, he could do that only with consultation with the Government of the State, and if the President wanted to make changes in the Constitution in relation to other items (other than the instrument of accession), he could have done so with the concurrence of the Government of the State.

VIII. The above power, which were given to the President/Government of the State (Maharaja at that time), was further subject to Article 370(2). It is important that 370(2) uses the term ‘concurrence of the government of the State’ referable to Article 370(1)(b)(ii) and second proviso to sub-clause (d) of Article 370(1). These provisions relate to items other than the Instrument of Accession, for which concurrence as against the consultation is mentioned. It further says that if the President is issuing a declaration seeking concurrence of the Government of the State and before the Constituent Assembly for framing the Constitution of the State i.e. J&K was convened, the said matter shall be placed before the Constituent Assembly and the Constituent Assembly shall take a decision on the issue. It means that where concurrence was sought from the State Government, it was provided that the matter shall be placed before the Constituent Assembly for its decision.

IX. Article 370(3) starts with a non-obstante clause. Art. 370(1) also starts with a non-obstante clause. The meaning of these two clauses will be that the provisions of this Article are notwithstanding the Constitution, which shall mean that the power given under Article 370(3) relates to what is provided in Article 370 and not relatable to other parts of the Constitution and that for Art. 370, power has been given to the President who may by public notification order that Art. 370 shall cease to be operative or shall be operative only with such exceptions and modifications and from such

date as he may specify. This power given to the President, however, is again subject to the proviso, which says that *before* President issues such a notification, *recommendation* of the constituent assembly shall be necessary. It is therefore, clear that for exercising the powers under 370(3), prior recommendation of the Constituent Assembly was necessary.

7. The first Presidential Order of 1950 under Article 370(1)(ii) related to the subjects already mentioned in the Instrument of Accession. Therefore, the term used was “consultation” with the Government of Jammu & Kashmir.
8. While the discussion in the Constituent Assembly was going on, Sheikh Abdullah made a statement on 11.08.1952 regarding the Delhi Agreement. It referred to the four representatives nominated from the State of J&K to the Constituent Assembly, that these representatives participated in the deliberations of the Constituent Assembly at a time when the bulk of the Indian Constitution had already been adopted. It was at that stage that the constitutional position of J&K was determined in the Constitution of India. The representatives of J&K had reiterated the association with India being based on the terms of the Instrument of Accession. It referred to the Constitution of India clearly envisaging the convening of the Constituent Assembly for the State of J&K which would be finally competent to determine the ultimate position of the State in respect of the sphere of its accession which would be incorporated as in the shape of “permanent provisions of the Constitution.”
9. This was followed by the Delhi Agreement, 1952, between the representatives of Kashmir Government and the representatives of Indian Government, which came into force on 21.08.1952. Among others, the main feature of the Agreement was that in view of uniform and consistent stand taken up by the Jammu & Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State. The Government of India agreed that while the residuary powers vested in the Centre in respect of all States other than Jammu & Kashmir, in the case of the latter, it vested in the State itself.
10. Second Presidential Order, 1952 was issued by the President on 15.11.1952 in consultation with Government of Jammu & Kashmir by which the earlier Order of 1950 was amended, as a result of which all references in the said

Order to the Rajpramukh shall be construed as references to the Sadar-i-Riyasat of Jammu & Kashmir. Similarly in the Second Schedule to the said Order some amendments were made.

11. On the same day, a Declaration (C. O.44) was made by the President under Art. 370 (3) of the Constitution that from November 17, 1952, the said Art. 370 shall be operative with the modification that for the explanation in el. (1) thereof the new explanation shall be substituted. The original explanation read as follows:

*“Explanation-For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948”*

The amended explanation under the 1954 Constitutional Order (C.O. 44) read as follows:

*“Explanation- For the purposes of this article, the Government of the State means the persons for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.”*

(Emphasis supplied)

12. The third Presidential Order dt 14.05.1954 was passed with concurrence of Government of J&K. This order superseded the Constitution (Application to Jammu & Kashmir) Order, 1950. The Presidential Order provided, among others, that:

- (i) The State was guaranteed territorial integrity. No change in the name or boundary of the State could be brought about without the consent of the State Legislature. This was added as a proviso to Article 3 of the Constitution of India.
- (ii) It introduced Article 35A which provided that the State could define its permanent residents and confer on them special rights and privileges with regard to employment under the State Government, acquisition of immovable property in the State, settlement in the State, and so forth.

- (iii) Proviso to Article 7 was added, which provided that the State's permanent residents, having migrated to Pakistan, returning to the State either under a permit for resettlement or under a law for permanent return, shall be deemed to be a citizen of India.
- (iv) In Article 367, Clause 4(a) to (f) were added as applicable to State of J&K.
- (v) Proviso was added to Article 368 which said that no amendment under Article 368 of the Constitution would apply to Jammu and Kashmir unless applied by order of the President under Article 370(1).

13. The Constitution of Jammu & Kashmir was adopted on 17.11.1956 and the Constituent Assembly was thereafter dissolved on 26.01.1957. It is submitted that with the enactment of the J&K Constitution and the dissolution of Constituent Assembly, the purpose of Article 370 also came to an end.

14. After the framing of Constitution of J&K, the first judgment which elaborately considered the historical background and the purpose of Article 370 was in *Prem Nath Kaul v. State of Jammu & Kashmir*, 1959 Supp (2) SCR 270 by a Constitution Bench of this Hon'ble Court. By this judgment, it was decided that it was the Constituent Assembly of the State which decided the relationship of J&K and the Union of India and with the framing of Constitution and dissolution of Constituent Assembly of Jammu & Kashmir, the purpose of temporary provision made in Article 370 also came to an end. In this case, the question was about validity of provisions of Jammu & Kashmir Big Landed Estates Abolition Act XVII/2007. This Hon'ble Court has traced out the entire history before the Instrument of Accession and thereafter. It has also considered Article 370, Presidential Orders 1950, 1952 and 1954. As regards the modification made in Explanation in Clause 1 of Article 370, it was held that (para 21):

*“The effect of this new explanation was that the government of the State meant the persons for the time being recognized by the President, on the recommendation of the Legislative Assembly of the State, as the Sadar-i-Riyasat of Jammu and Kashmir acting on the advice of the Council of Ministers of the State for the time being in force.”*

It was held that the execution of the Instrument of Accession did not affect in any manner the legislative, executive and judicial powers in regard to the

Government of the State, which then vested in the ruler of the State. It was also held that Yuvraj Karan Singh, authority and power as ruler of the State was rightly conferred with the proclamation by his father and therefore, the impugned Act was not void or invalid.

What is however relevant is the discussion on Article 370 of the Constitution, which commences from para 32 onwards. After quoting Article 370, the following interpretation has been given by the Court:

*32. [...] Clause (1)(b) of this Article deals with the legislative power of Parliament to make laws for the State; and it prescribes limitation in that behalf. Under para (1) of sub-clause (b) of clause (1) Parliament has power to make laws for the State in respect of matters in the Union List and the Concurrent List which the President in consultation with the Government of the State declares to correspond to matters specified in the Instrument of Accession; whereas in regard to other matters in the said Lists Parliament may, under para (ii), have power to legislate for the State after such other matters have been specified by his order by the President with the concurrence of the Government of the State. It is significant that para (i) refers to consultation with the Government of the State while para (ii) requires its concurrence. Having thus provided for consultation with, and the concurrence of, the Government of the State, the explanation shows what the Government of the State means in this context. It means according to the appellant, not the Maharaja acting by himself in his own discretion, but the person who is recognised as the Maharaja by the President acting on the advice of the Council of Ministers for the time being in office. It is on this explanation that the appellant has placed considerable reliance.*

*33. Sub-clauses (c) and (d) of clause (1) of the Article provide respectively that the provisions of Article 1 and of the present article shall apply in relation to the State; and that the other provisions of the Constitution shall apply in relation to it subject to exceptions and modifications specified by the Presidential order. These provisions are likewise made subject to consultation with, or concurrence of, the Government of the State respectively.*

*34. Having provided for the legislative power of Parliament and for the application of the articles of the Constitution of the State, Article 370 clause (2) prescribes that if the concurrence of the Government of the State required by the relevant sub-clauses of clause (1) has been given before the Constituent Assembly of Kashmir has been convened, such concurrence shall be placed before such Assembly for such decision as it may take thereon. This clause show that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final approval by the said Constituent Assembly in the said matters.*

*35. Clause (3) authorises the President to declare by public notification that this article shall cease to be operative or shall be operative only with specified exceptions or modifications; but this power can be exercised by the President only if the Constituent Assembly of the State*



*makes recommendation in that behalf. Thus the proviso to clause (3) also emphasises the importance which was attached to the final decision of the Constituent Assembly of Kashmir in regard to the relevant matters covered by Article 370.*

*38. On the said construction the question which falls to be determined is: Do the provisions of Article 370(1) affect the plenary powers of the Maharaja in the matter of the governance of the State? The effect of the application of the present article has to be judged in the light of its object and its terms considered in the context of the special features of the constitutional relationship between the State and India. The Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself; that is the main basis for, and purport of, the temporary provisions made by the present article; and so the effect of its provisions must be confined to its subject-matter. It would not be permissible or legitimate to hold that, by implication, this article sought to impose limitations on the plenary legislative powers of the Maharaja. These powers had been recognised and specifically provided by the Constitution Act of the State itself; and it was not, and could not have been, within the contemplation, or competence of the Constitution-makers to impinge even indirectly on the said powers. It would be recalled that by the Instrument of Accession these powers have been expressly recognised and preserved and neither the subsequent proclamation issued by Yuvaraj Karan Singh adopting, as far as it was applicable, the proposed Constitution of India, nor the Constitution order subsequently issued by the President, purported to impose any limitations on the said legislative powers of the Ruler. What form of Government the State should adopt was a matter which had to be, and naturally was left to be, decided by the Constituent Assembly of the State. Until the Constituent Assembly reached its decision in that behalf, the constitutional relationship between the State and India continued to be governed basically by the Instrument of Accession. It would therefore be unreasonable to assume that the application of Article 370 could have affected, or was intended to affect, the plenary powers of the Maharaja in the matter of the governance of the State. In our opinion, the appellant's contention based on this article must therefore be rejected."*

15. This judgment, therefore, clearly decides that the Constitution makers were clear that the constitutional relationship between the State of Jammu & Kashmir and Union of India should be decided by the Constituent Assembly of the State itself, and that was the main basis and purport of the said temporary provision.
16. The two judgments thereafter- *Sampat Prakash v. State of Jammu and Kashmir & Anr*, AIR 1970 SC 1118 and *Mohd. Maqbool Damnoo v. State of Jammu & Kashmir*, (1972) 1 SCC 536 which are again by Constitution

Benches and are relevant for the present discussion. Both these judgments have not referred to the Constitution Bench in *Kaul's* case.

In *Sampat Prakash (supra)*, this Hon'ble Court held that situation that existed when Article 370 was incorporated in the Constitution had not materially altered and therefore, the Presidential discretion to exercise application of Indian Constitution to J&K remained unchanged. The Court thereafter failed to notice the judgment of the Constitution Bench in *Prem Nath Kaul* and held that Article 370 never ceased to be operative. In para 6, it is observed that Article 370(2) refers only to the concurrence given by the Government of the State before the Constituent Assembly was convened and makes no mention of the completion of the work of the Constituent Assembly or its dissolution. The Court also referred, *inter alia*, to the In para 7, and noted that the provisions of Article 370 continued in force and remained effective even after the Constituent Assembly had passed the Constitution of the State. For that purpose, Article 370(3) has been interpreted by holding that the Constituent Assembly of the State did not make any recommendation nor was any order made by the President declaring that the Article shall cease to be operative. Thereafter, Presidential Order dt. 15.11.1952 was referred to, by which in the place of Rajpramukh, Sadar-i-Riyasat was incorporated in the Explanation to Article 370(1)(b). This modification has been interpreted to mean that the Constituent Assembly of the State did not desire that the Article should cease to be operative and expressed its agreement to continue its operation. In para 10, another reason has been given in support of continuation of Article 370 by referring to proviso to Article 368 of the Constitution in its application to J&K, which provides that an amendment to the Constitution under Article 368 shall have no effect in relation to the State of J&K unless applied by order of the President under Article 370(1). The said proviso has been interpreted to mean that the powers of the President under Article 370 must be exercised from time to time under Article 370. Therefore, it was held that Article 370 has never ceased to be operative.

17. In *Damnoo, (supra)*, this Court considered the Presidential Order of 1965. On 10.04.1965, J & K Constitution (6<sup>th</sup> Amendment) received the assent of the sadar-i-riyasat, by which sadar-i-riyasat was substituted by Governor. This Amendment was done under the J&K Constitution. However, on 24.11.1965, Presidential Order was issued, wherein in place of sub-clause b of clause 4 of

Article 367, Clauses (aa), (b) with proviso was added. The Petitioner challenged the said Presidential Order by contending, among others, that a fresh Constituent Assembly was required to be convened with the explanation. Para 28 is also important which deals with the argument that the Amendment made is through the back door. The Court answered it by saying that the Explanation containing references to *sadar-i-riyasat* became otiose which left the Court with two alternatives- firstly, to leave the Courts to interpret the word Government of the State and to give its legal meaning and secondly, to give legal meaning in a definition clause. What has been done is to refer to definition clauses in 367(aa) and (b) and therefore, the Amendment of Article 370(1) is not by the back door. The Court did not consider the judgment in *Prem Nath Kaul* (supra). The Amendment done under the J&K Constitution by substituting Governor in place of *sadar-i-riyasat* was within the limits of the J&K Constitution. Article 370 ceased to operate in 1957 after the Constitution came into effect. By virtue of 1965 Presidential Order, the modification was made in Article 370 and it was held that the Presidential Order under Article 370 will now require concurrence of the Governor. Firstly, the concurrence of the Governor is meaningless unless the other parts of Article 370(2) are read with Article 370(3). There is no finding with regard to the Constituent Assembly being dissolved and therefore, not in existence- a point specifically discussed in *Kaul*. This judgment therefore does not answer the question whether Article 370 can continue after the J&K Constitution was enacted. The only judgment which considers this is *Sampat Prakash* (supra).

18. *Damnoo* did not consider that from whom concurrence was taken to bring in 1965 Order because *sadar-i-riyasat* did not exist. Therefore, the 1965 Order was without concurrence of the “Government of the State”.
19. In addition to the above, it is worth mentioning that two more Constitution Bench decisions have considered related issues, though they express no opinion on the continuance of the power under Article 370. The judgment in *P.L. Lakhanpal v. State of Jammu & Kashmir*, 1955 (2) SCR 1101, in which the Presidential Order of 1954 was referred to, was prior to the dissolution of the Constituent Assembly and therefore, this question did not arise. Similarly, in *Puranlal Lakhanpal v. President of India*, (1962) 1 SCR 688, this Hon’ble Court upheld the power of the President to modify Article 81 in its application to Jammu & Kashmir under the Presidential Order of 1954. Though this

judgment was passed after the dissolution of the Constituent Assembly, the impugned provisions were in the Presidential Order of 1954, prior to the dissolution, and therefore, this question was not considered.

20. *Prem Nath Kaul (supra)* was referred to in the judgment by a three-judge Bench of this Hon'ble Court in *State Bank of India v. Santosh Gupta*, (2017) 2 SCC 538., wherein this Hon'ble Court held in para 17 that:

*“It then goes on to state that, whereas clause (1)(b)(i) of Article 370 requires only consultation with the Government of the State, paragraph (ii) requires concurrence, which scheme applies under sub-clause (d) of the said article in relation to the extension or modification of other provisions of the Indian Constitution as well. Under sub-clause (d), other provisions of the Constitution may, by Presidential Order, be held to apply to the State of Jammu & Kashmir. If matters specified in the Instrument of Accession are to be applied, then there is only consultation with the Government of the State, and if not, there must be concurrence. The scheme of Article 370(1), therefore, is clear. Since the Instrument of Accession is an agreement between the erstwhile Ruler of Jammu & Kashmir and the Union of India, it must be respected, in which case if a matter is already provided for in it, it would become applicable straightaway without more, and only consultation with the Government of the State is necessary in order to work out the modalities of the extension of the provisions of the Government of India Act corresponding to the Constitution of India referred to in it. However, when it comes to applying the provisions of the Constitution of India which are not so reflected in the Instrument of Accession, they cannot be so applied without the concurrence of the Government of the State, meaning thereby that they can only be applied if the State Government accepts that they ought to be so applied. Under Article 370(2), the concurrence of the Government of the State, given before the Constituent Assembly is convened, can only be given effect to if ratified by the Constituent Assembly. This legislative scheme therefore illustrates that the State of Jammu & Kashmir is to be dealt with separately owing to the special conditions that existed at the time of the Instrument of Accession.”*

21. However, the Court thereafter relied upon *Sampat Prakash (supra)* and *Lakhanpal (supra)*, which had failed to notice the judgment in *Prem Nath (supra)*, and held that *“nothing can ever be frozen so long as the drill under Article 370 is followed.”*(para 27). The Court, therefore, failed to consider that concurrence under Article 370(1)(d) was subject to ratification of the Constituent Assembly (under Article 370(2)) and therefore, upon dissolution of the Constituent Assembly, this power could no longer be exercised.

22. Therefore, in view of the above, only four Presidential Orders are in accordance with the provisions of Article 370. No other Presidential Order could have been issued as the future governance of J&K was already entrusted

to the Jammu & Kashmir Constitution, 1957 and thereafter, the Constituent Assembly itself dissolved. The idea clearly was that thereafter the civil, political, cultural and socio-economic rights should be governed by the Constitution of J&K and the aspirations of the people of Jammu & Kashmir.

23. This interpretation is in consonance with the intention of the people even before the Instrument of Accession, the Debates in Constituent Assembly while framing the Indian Constitution (Gopaldaswami Ayyangar), the Delhi Agreement, as well as the judgment in *Kaul (supra,)* which is neither referred to or distinguished in any of the subsequent CB judgments.

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