

I. The Constituent Assembly Debates on Article 370 (then Article 306-A) recognized that the Constituent Assembly of J&K will be the instrument to determine the Constitution of the State as well as the sphere of Union jurisdiction over the State. Clause 2 of Article 370 made 'concurrence' subject to the decision of the Constituent Assembly and Clause 3 of Art. 370 provided for 'recommendation' of the Constituent Assembly before issuance of the Presidential order for modification/exception or cessation of Article 370. The judgment of the Constitution Bench in *Prem Nath Kaul v. State of Jammu & Kashmir*, (1959) Supp. (2) SCR 270, after noticing the historical background, held while dealing with Article 370(2), that "the continuance of the exercise of power under Article 370(1)" is "*made conditional on the final approval of the Constituent Assembly*", and that similarly Clause (3) proviso to Art.370 "also emphasizes the importance which was attached to the final decision of the Constituent Assembly of Jammu & Kashmir". Thus Constituent Assembly of J&K and its decision has been recognised as final for the working of Art.370 as well as for determining the relationship between Jammu & Kashmir and India through the J&K Constitution.

Constitution of J&K framed by the Constituent Assembly of J&K came into force on 26.1.1957 and on the same day Constituent Assembly was dissolved.

II. The judgment of the Constitution Bench in *Sampat Prakash v. State of Jammu & Kashmir*, AIR 1970 SC 1118 (1969 (2) S.C.R. 365) was delivered post dissolution of the Constituent Assembly where Presidential Orders CO1959 and CO69 1964 issued after 1957 were challenged as being void. Without noticing the judgment of Constitution Bench in *Kaul* which found role of the Constituent Assembly as being final in working of Art.370, held that Article 370 continues to remain in force (in absence of the Constituent Assembly) for reasons(Para 5,6,7 and 8) which are unsustainable and even contrary to the judgment in *Kaul*.

III. The judgment in *Sampat(Supra)* and Mohd. Maqbool *Damnoo Vs State of J &K* 1972(1)SCC 536 upheld the Presidential Orders post-1957, issued under

Art.370(1) contrary to the findings in *Kaul* that under Article 370(2), the continuance of the exercise of power under Article 370(1) is “*made conditional on the final approval of the Constituent Assembly*” . Admittedly Constituent Assembly did not exist for the final approval.

- IV. The question which, therefore, arises is whether as per the Constituent Assembly Debates , wordings of Article 370 and the judgment in *Kaul*, after framing of the Constitution of J&K and dissolution of Constituent Assembly, the findings given in *Sampat* that Art. 370 continues to operate and post 1957 presidential orders are valid, are sustainable and whether the findings in *Sampat* and *Damnoo* are *per incurium*?