

## **SYNOPSIS**

The present petition seeks to challenge Presidential Orders being G.S.R. 551(E) (C.O. 272) dated 5<sup>th</sup> August, 2019 (hereinafter referred to as C.O. 272), G.S.R. 562(E) (C.O. 273) dated 6<sup>th</sup> August, 2019 (hereinafter referred to as C.O. 273) and The Jammu and Kashmir (Reorganisation) Act of 2019 (hereinafter referred to as the Reorganisation Act) which received Presidential assent on 9<sup>th</sup> August, 2019. The effect of these orders is that the only provision which is existent in Article 370 now is a provision as per which all provisions of the Indian Constitution, as amended from time to time, would apply to the State of J&K without any modification or exception. The above position is captured in a declaration being C.O. 273 which provides that this declaration would have effect notwithstanding any other instrument or treaty.

The said orders and the Reorganisation Act are challenged as unconstitutional, violative of the basic structure of the Constitution and violative of fundamental rights on the following basic grounds:

- (i) Article 370(3) clearly prescribes the conditions under which Article 370 would cease to operate. Article 370(3) makes it clear that Article 370 can cease to operate only on the recommendation of the Constituent Assembly of the State and thereafter a public declaration by the President.

- (ii) Admittedly, there has been no such recommendation by the Constituent Assembly before such a declaration was made by the President of India.
- (iii) An amendment has been made to Article 367 of the Constitution of India by which the reference to the expression "Constituent Assembly of the State" has been read as "Legislative Assembly of the State".
- (iv) The amendment is a colorable exercise of power. It also seeks to achieve indirectly what cannot be achieved directly. It seeks to force an interpretation of Article 370(3) which would not be possible on a plain reading of the terms of the Article 370(3) of the Constitution of India. At present, there is no Constituent Assembly which is in existence and hence a fundamental condition for the effectuation/invocation of Article 370(3) is absent.
- (v) It is further stated that the Legislative Assembly of the Jammu & Kashmir does not have power to alter the State's relationship with India on account of Article 147 of the Constitution of Jammu & Kashmir.
- (vi) The said act has the effect of undermining the very basis on which the (erstwhile) State of Jammu & Kashmir had integrated into India. Both the Instrument of Accession as also Article 370 envisage a special autonomous status of the State of Jammu & Kashmir which could only be changed upon a recommendation of the Constituent Assembly.

- (vii) The present action which has been effectuated without ascertaining the will of the people either through its elected Government or legislature or public means such as referenda, violates the basic principle of democracy, federalism, and fundamental rights.
- (viii) The unconstitutionality of the said act is further exacerbated by the fact that this declaration had been made with the concurrence of the Governor at a time when the State of Jammu & Kashmir was under President's rule. The powers under President's rule are co-terminus with that of the Legislative Assembly of the State of Jammu & Kashmir and the Legislative Assembly of Jammu & Kashmir is barred from seeking to make any change in the provisions of the Constitution of India as applicable in relation to the State.
- (ix) It has been completely overlooked that the object of transfer of power of the State Legislature to the Parliament under state of emergency under Article 356 is of a purely temporary nature during the existence of a proclamation under Article 356. Such a power could not have been used to change the very nature of the state/federal unit and to denude the power of the State Legislature itself.
- (x) These actions have been followed up by dismembering the erstwhile State of Jammu & Kashmir by downgrading the status of the State of Jammu & Kashmir to a union territory (with a legislature) and creating a Union Territory of Ladakh (without

legislature). Even this power could not have been exercised without the consent of the erstwhile State of Jammu & Kashmir. It is noteworthy that the status of the erstwhile state of Jammu & Kashmir was markedly different from that of other States. In the case of other states, only the views of their legislatures are ascertained by the President before recommending the introduction of a Bill relating to reorganisation of the areas of the state. But in the case of Jammu & Kashmir, no such Bill can be introduced in the Parliament unless the State Legislature consents to the same.

The brazen unconstitutionality of the act is unprecedented. By way of an amendment in Article 367, conditions have been sought to be read into Article 370(3) which has the effect of completely nullifying the effect of Article 370 and abrogating the Constitution of Jammu & Kashmir. Thereafter, the State itself has been dismembered by being downgraded as a Union Territory and part of it being split to form another Union Territory of Ladakh. This has been followed by a completely lock-in giving no scope to the people of Jammu & Kashmir to have any say in the entire exercise. The above action jeopardises and strikes at the very root of the integration of the erstwhile State of Jammu & Kashmir into India.

### **LIST OF DATES AND EVENTS**

- 16.03.1846 The Treaty of Amritsar was signed between the East India Company (British Government) and a Dogra Ruler, Maharaja Gulab Singh, whereby the independent possession of the Jammu & Kashmir region was transferred to Maharaja Gulab Singh and the heirs male of his body. Ever since then, the princely state of Jammu & Kashmir was ruled by the Jamwal Dogra Dynasty.
- 1925 The last ruling Maharaja of the princely State of Jammu & Kashmir, Hari Singh, ascended to the throne and continued to rule till 1949.
- 1939 The Jammu & Kashmir Constitution Act was promulgated. Jammu and Kashmir was governed under this constitutional scheme until the Constitution of 1957, unlike the relationship between the rest of the princely States and the Indian Union.
- 18.07.1947 & 15.08.1947 The Indian Independence Act, 1947 was passed on 18.07.1947 dividing the then British India into two independent Dominions, i.e. India and Pakistan, from 15.08.1947. Princely states could join either the Dominion of India or Pakistan or renegotiate terms with the British government but with no security guarantee. The then Maharaja of Jammu & Kashmir, Hari Singh, was still weighing his options when conflict erupted in

the state.

26.10.1947 After the princely State of Jammu & Kashmir was invaded by tribesmen from the Northwest Frontier Province, supported by Pakistan, Maharaja Hari Singh sought military help from India, which eventually resulted in him signing the 'Instrument of Accession of Jammu & Kashmir' with India (authority was given to the Union of India to legislate on defence, foreign affairs, and communication).

20.06.1949 Maharaja Hari Singh abdicated in favour of his son Yuvraj Karan Singh, who was made head of the State and subsequently served as Sadr-i-Riyasat and Governor of Jammu & Kashmir.

26.11.1949 The Rajpramukhs of the princely States that had acceded to the Union of India signed and adopted the Constitution in its entirety, except the Maharaja of the princely State of Jammu & Kashmir.

27.05.1949 The original draft of Article 370 was drawn up by the Government of Jammu & Kashmir. A modified version of the draft was passed in the Constituent Assembly of India on 27.05.1949 (as Article 306A, later modified as Article 370).

17.10.1949 Article 370 was included in the Indian Constitution by the Constituent Assembly. Article 370, in effect,

mirrored the terms of the Instrument of Accession, in particular, clauses (4) and (8).

26.01.1950 The Constitution of India came into force. Article 1(2) & Schedule I thereof identifies Jammu & Kashmir as a state of India. Article 370 provides for “temporary provisions” with respect to the State of Jammu and Kashmir.

01.05.1951 Yuvraj Karan Singh issued a proclamation for the convening of a Constituent Assembly for the State of Jammu & Kashmir.

31.10.1951 The Constituent Assembly for the State of Jammu & Kashmir, which is the body responsible for creating the state’s constitution, convened its first session.

1952 The Government of Jammu & Kashmir and the Government of India came out with a comprehensive agreement titled ‘Delhi Agreement, 1952’, to further the relationship of the state with the union. By way of the Agreement, it was agreed *inter alia* that:

(i) Sovereignty in all matters other than those specified in the Instrument of Accession would continue to reside in the State. It was agreed by the Government of India that while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu & Kashmir, in the

case of the latter they vested in the State itself.

(ii) While persons having domicile in Jammu & Kashmir were to be regarded as citizens of India, the State Legislature was given power to make laws to confer special rights and privileges on 'state subjects' in view of the State Subject Notifications of 1927 and 1932.

(iii) Though the Sadr-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was as such his nominee. However, the person to be appointed as the Head had to be a person acceptable to the Government of that State. No person not acceptable to the State Government could be thrust on the State as the Head.

(iv) It was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar position in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State. The question which remained to be determined was whether the



chapter on fundamental rights should form a part of the State Constitution or the Constitution of India as applicable to the State.

(v) Both parties agreed that the application of Article 356, dealing with suspension of the State Constitution and Article 360, dealing with financial emergency, was not necessary.

This was signed and ratified by both parties and also passed by both the Parliament as well as Constituent Assembly of Jammu & Kashmir.

14.05.1954 A presidential order, the same being 'The Constitution (Application to Jammu and Kashmir) Order, 1954', was passed, applying the terms of the Delhi Agreement. It introduced Article 35A, which protects laws passed by the state legislature regarding permanent residents from any challenge on the ground that they are in violation of Fundamental Rights. Also, a proviso was inserted in Article 3, which provides that no Bill altering the name/ boundary of the State of Jammu & Kashmir shall be introduced in the Parliament without the consent of the Legislature of the State.

The said order adopted all provisions of the Constitution of India that related to the State of Jammu & Kashmir as in force on 20.06.1954 together with

certain amendments and modifications.

17.11.1956 The Constitution of the (erstwhile) State of Jammu &  
& Kashmir was adopted on 17.11.1956 and came into  
effect on 26.01.1957. It was made clear that the  
26.01.1957 (erstwhile) State of Jammu & Kashmir is and shall  
remain an integral part of the Union of India. Article 3  
states that the State is and shall be an integral part of  
India. Article 5 states that the executive and legislative  
power of the State extends to all matters except those  
with respect to which Parliament has powers to make  
laws for the state under the provisions of the  
Constitution of India. The proviso to Section 147 of the  
Constitution of Jammu & Kashmir states that no  
legislative assembly can alter Sections 3 and 5 of the  
State Constitution and that there can be no  
amendment to the provisions of the Constitution of  
India applicable to the state.

1957 The first legislative elections for the (erstwhile) State of  
Jammu & Kashmir were held where its Constituent  
Assembly was dissolved and replaced by a Legislative  
Assembly.

May, 1965 The titles of Prime Minister and Sadr-i-Riyasat were  
officially changed to Chief Minister and Governor,  
respectively in the (erstwhile) State of Jammu &

Kashmir. A large number of additional Presidential Orders were subsequently passed, including on specific issues arising in relation to items on the Union and Concurrent Lists. Some eroded elements of Article 370, and expanded the areas in which the Indian Constitution could be applied in the state. None, however, removed all clauses of Article 370 and replaced them or Article 35A.

20.06.2018 Governor's Rule was imposed in the (erstwhile) State of Jammu & Kashmir as the State Government collapsed.

21.11.2018 The Legislative Assembly for the (erstwhile) State of Jammu & Kashmir was dissolved by the Governor.

19.12.2018 President's Rule was imposed in the (erstwhile) State of Jammu & Kashmir for the eighth time, which was subsequently approved by the Lok Sabha & Rajya Sabha.

12.06.2019 The Union Cabinet approved the extension of President's Rule in Jammu & Kashmir for a further period of six months with effect from 03.07.2019, under Article 356(4) of the Constitution of India.

05.08.2019 The Home Minister Shri Amit Shah introduced a Resolution in the Rajya Sabha seeking nullification of Section (2) of Article 370 by extending the Indian

Constitution in its entirety to Jammu and Kashmir, which was passed. Simultaneously, a Presidential Order, being G.S.R. 551(E) - 'The Constitution (Application to Jammu and Kashmir) Order, 2019', was passed by the President. The said Order supersedes the Constitution (Application to Jammu and Kashmir) Order, 1954. Also, it applied a newly added Clause (4) to Article 367 of the Constitution of India and made it applicable to the (erstwhile) State of Jammu & Kashmir.

05.08.2019 The Rajya Sabha passed the Jammu & Kashmir (Reorganisation) Bill, 2019 unanimously. Vide the said Bill, the existing State of Jammu & Kashmir is bifurcated into two Union territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly, and (2) the Union Territory of Ladakh without a Legislative Assembly.

06.08.2019 A Declaration, being G.S.R. 562(E), was issued by the President under Article 370(3) of the Constitution of India that:

*“...as and from the 6<sup>th</sup> August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely:-*

*370. All provision of this Constitution as amended*

*from time to time, without any modification or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any instrument, treaty or agreement as envisaged under article 363 or otherwise.”*

09.08.2019 The President gave assent to the Jammu and Kashmir  
(Reorganisation) Act, 2019.

\_\_\_08.2019 Hence, this Writ Petition.

**IN THE SUPREME COURT OF INDIA**  
**(Civil Original Jurisdiction)**  
**WRIT PETITION (CIVIL) No. \_\_\_\_\_ OF 2019**  
**(Public Interest Litigation)**

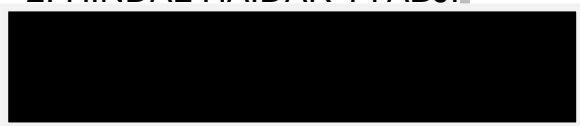
**In the matter of:**

1. RADHA KUMAR



... Petitioner No. 1

2. HINDAL HAIDAR TYABJI



... Petitioner No. 2

3. AIR VICE MARSHAL (RETD.) KAPIL KAK



... Petitioner No. 3

4. MAJOR GENERAL (RETD.) ASHOK KUMAR MEHTA



... Petitioner No. 4

5. AMITABHA PANDE



... Petitioner No. 5

6. GOPAL KRISHNA PILLAI



... Petitioner No. 6

v.

1. **UNION OF INDIA**

Through the Secretary  
Ministry of Home Affairs

Government of India  
North Block  
New Delhi – 110001

...Respondent No. 1

**2. UNION OF INDIA**

Through Secretary (Legislative)  
Ministry of Law & Justice  
Government of India  
Shastri Bhawan  
New Delhi – 110001

...Respondent No. 2

**MEMORANDUM OF WRIT PETITION UNDER ARTICLE 32 OF THE  
CONSTITUTION OF INDIA**

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA  
AND THE HON'BLE JUDGES OF THE  
SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE  
PETITIONERS ABOVE NAMED

**MOST RESPECTFULLY SHOWETH:**

1. The Petitioners have filed this Public Interest Litigation before this Hon'ble Court *inter alia* for issuance of a writ, order or direction quashing Presidential Order G.S.R. 551(E) (C.O. 272) dated 05.08.2019, Presidential Order G.S.R. 562(E) (C.O. 273) dated 06.08.2019, The Jammu and Kashmir (Reorganisation) Act of 2019, and all consequential actions flowing from the aforesaid Declaration/Orders and Act.

*Brief Description of the Petitioners:*

2. Petitioner No. 1, Prof. Radha Kumar is a former member of the Home Ministry's Group of Interlocutors for Jammu and Kashmir (2010-11), as well as an academic and policy analyst, has worked on conflicts and peacemaking in South Asia, Europe and Africa for over twenty years. She has studied Jammu and Kashmir for two decades, worked with civil society groups there and provided inputs for government policy on the state. As an interlocutor she, along with her 2 fellow interlocutors, MM Ansari and the late Dileep Padgaonkar, visited all 22 districts of the state over the period of one year, holding public meetings, receiving delegations and holding one on one meetings, covering all the political and community groups of the state, as well as administrators, security officials, media, and women's groups. The Group met over 8,000 people and summarized their findings in a Report presented to the Government of India through the Home Minister. The report goes into considerable detail on public opinions regarding Article 370, internal devolution and measures to address and resolve the different aspirations of different affected communities in the state. It also offers a Roadmap towards achieving the goals of peace and stability in the state, including how to approach the need to settle the 'temporary' status of Article 370. Dr. Kumar's extensive knowledge and experience of conflicts, peace negotiations and resolution, combining both research and on the ground mediation over a period of twenty years, has shown common lessons even from very different types of conflict:

- (i) Following the democratic norm of full consultation with all political and community representatives to achieve a



Constitutional or legally binding solution or measure is the best guarantee of its gaining social sanction and being peacefully implemented in the affected area.

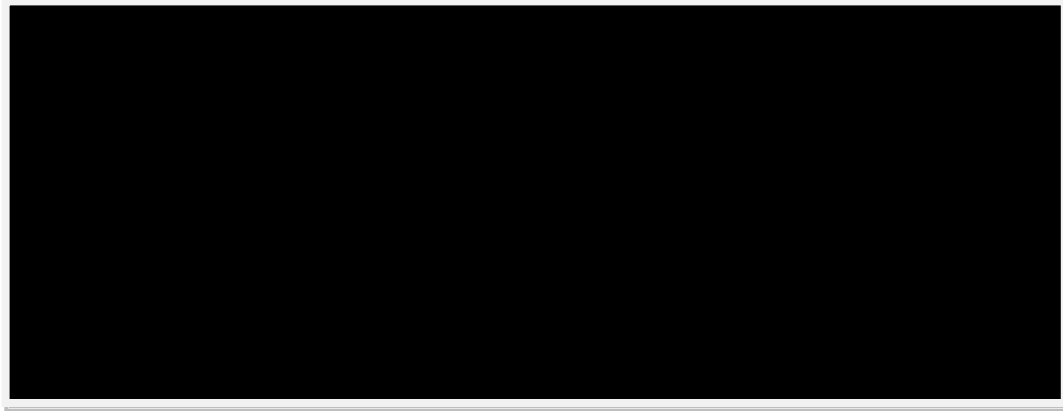
- (ii) Transparency and following due political and legislative process in determining fundamental alterations, such as to political and administrative arrangements or human and community rights, is the best guarantee of those alterations gaining social sanction and being peacefully implemented in the affected area/community.
- (iii) Violation or unilateral alteration of mutually agreed measures, especially Constitutional or other jointly agreed measures (even those that are not legally binding) almost always leads to renewal or intensification of conflict. The history of the Kashmir conflict also bears out this finding: every episode of internal conflict (as distinct from externally-driven conflict such as Pakistani invasions/wars and/or infiltration) has been triggered by erosions of what the Jammu and Kashmir constituent assembly termed 'internal autonomy'.
- (iv) The use of any kind of force, even massive though peaceful security presence, to push through a fundamental alteration is perceived as a means to impose the will of the Government (or any other dominant group in the absence of a functioning government) and leads to protracted conflict over a period of time.

As mandated by Order XXXVIII, Rule 12, it is disclosed as under:

Full Name of Petitioner: Radha Kumar



3. Petitioner No. 2, Hindal Haidar Tyabji served as an officer of the Indian Administrative Service of the Jammu and Kashmir cadre for over three decades, in both peacetime and high insurgency. He was Chief Secretary of the (erstwhile) State of Jammu and Kashmir during the period of President's Rule when General Krishna Rao was Governor. He has also served in the Ladakh region. After demitting office as Chairman of the Jammu & Kashmir Public Service Commission (1998-2003), he was called back to the State by the then Governor Shri N.N. Vohra as an Advisor during the period of Governor's Rule that followed the resignation of Mufti Sayeed in 2008, and ended with the swearing in of Omar Abdullah as Chief Minister. Three of his postings on central deputation were cut short when he was recalled to serve in Jammu and Kashmir: in 1986, when Governor Jagmohan recalled him from Ministry of Steel; in 1990 when Governor Jagmohan again recalled, this time from the Department of Defence Production; and in 1996 when then Chief Minister Farooq Abdullah recalled him from the Department of Justice under the Home Ministry. As mandated by Order XXXVIII, Rule 12, it is disclosed as under:  
Full Name of Petitioner: Hindal Haidar Tyabji



4. Petitioner No. 3, Air Vice Marshal (Retired) Kapil Kak AVSM VSM is a permanent resident/State Subject of the (erstwhile) State of Jammu and Kashmir, who served in the flying branch of the Indian Air Force for nearly 35 years. He is a post graduate in defence and strategic studies from the Universities of Madras and Allahabad and has written extensively on Jammu and Kashmir. As a young officer, Kapil Kak participated in the India-Pakistan Wars of 1965 and 1971 and undertook combat bombing missions in 1971 in both the Western and Eastern sectors. For distinguished service of an exceptional order the President of India awarded him Ati Vishist Seva Medal and Vishist Seva Medal. Over the last 20 years, the Petitioner has been closely associated with Track II initiatives of many public policy think tanks on peace building and conflict resolution in Jammu and Kashmir. As Deputy Director, Institute for Defence Studies and Analyses and Founding Additional Director of Centre for Air Power Studies, he has been involved with research and analysis of security-oriented public policy issues. He is a member of the Concerned Citizens Group formed after the severe deterioration of the security situation the Kashmir Valley in 2016. The Group toured extensively in the State and submitted five reports to the Prime Minister and Home Minister, among

others. These are in the public domain. He is currently the Governor's nominee on the Academic Council of the Cluster University, Jammu, and on the Board of National Security Studies, Central University, Jammu.

As mandated by Order XXXVIII, Rule 12, it is disclosed as under:



5. Petitioner No. 4, Major General (Retd.) Ashok Kumar Mehta was commissioned in the Indian Army in 1957 in the 5<sup>th</sup> Gorkha Regiment and retired from service in 1991. On commissioning, he was posted to the Uri Sector and posted to what was then called the Cease Fire Line. In 1963 he was posted south of the Pir Panjal in Rajouri and fought in the 1965 India-Pakistan war. His third deployment to Jammu and Kashmir was in the Kargil and Ladakh sectors for 3 years. He also served in the 1971 India-Pakistan war, both in eastern and western theatres of the conflict. Apart from this, he commanded the IPKF in Sri Lanka, fought counter-insurgency operations in Nagaland, and UN Peacekeeping Operations in 1962-63. He returned to Jammu & Kashmir in 1988 as a member of the Defence Planning Staff, Ministry of Defence. He has subsequently visited Jammu and Kashmir after

retirement in 1993 and in the mid-2000s as part of Track II assignments. His interest in Jammu and Kashmir has continued as a member of Track II seminars on India and Pakistan in the late 1990s, mainly in the United Kingdom. In 2003, he became the convenor of an annual India Pakistan conference which continued almost uninterrupted till 2018.

As mandated by Order XXXVIII, Rule 12, it is disclosed as under:



6. Petitioner No. 5, Amitabha Pande is a former member of the Punjab Cadre of the Indian Administrative Service. He retired in 2008 as the Secretary of the Inter State Council of the Government of India, a constitutional machinery for federal policy coordination, diversity management and consensus building between the Union of India and the States, and among the States. The Council is chaired by the Prime Minister of India and has all the Chief Ministers of the States as its members. The Council also represents India in the Forum of Federations - an international organisation for the promotion of federalism with headquarters in Ottawa, Canada. He has written several articles on the subject of intergovernmental relations in India

and in an article written for the India International Centre Quarterly Special Issue on J&K (2011) had tried to view the J&K problem within the dynamics of the interplay between democracy, diversity, identity and the idea of a monolithic 'nation state'. The Petitioner also had a long stint in the Ministry of Defence involving close interaction with the Armed Forces. That and his experience in Punjab during its most troubled period has given him insights into security related issues which have a bearing on the current situation in Jammu and Kashmir.

As mandated by Order XXXVIII, Rule 12, it is disclosed as under:

Full Name of Petitioner: Amitabha Pande



7. Petitioner No. 6, Shri Gopal Pillai is a former IAS Kerala Cadre officer, who retired as Union Home Secretary in June 2011. He has served as Under Secretary/Deputy Secretary in the Defence Ministry, Deputy Secretary Labour, Kerala Special Secretary for Industries, Secretary Health and Family Welfare, Principal Secretary to the Chief Minister of Kerala, Joint Secretary (North East) in the Home Ministry, Additional Secretary, Department of Commerce, Special Secretary, Commerce and Secretary, Department of Commerce, before becoming Union Home Secretary (2009-11).

As Union Home Secretary, he dealt closely with security, political, legal and humanitarian issues relating to Jammu and Kashmir, especially to the appointment of a team of Interlocutors for Jammu and Kashmir, and worked with Petitioner No.1 in that context. Along with the then Home Minister, he instituted the Multi-Agency Centre for security and intelligence coordination between the Centre and States (MAC), and floated the National Counter-Terrorism Centre (NCTC) and the Crime and Criminal Tracking Network System (CCTNS). In the Defence Ministry (1978-1982), he helped negotiate a series of defence purchases for modernizing the Air Force, including purchases of Mirage, Jaguar, AN-32, Mig-23, Mig-25, and Mig -27 aircraft.

As mandated by Order XXXVIII, Rule 12, it is disclosed as under:



8. The Petitioners do not have any personal interest or any personal gain or private motive or any other oblique reason in / for filing this Petition which is being filed in public interest alone.

9. The Petitioners have not approached the Respondents with any representation since the matter is of a nature that only an urgent judicial intervention from this Hon'ble Court can redress the grievances made herein.

10. All Respondents are "State" within the meaning of Article 12 of the Constitution of India and, hence, amenable to the writ jurisdiction of this Hon'ble Court.

### **FACTS OF THE CASE**

11. On 16.03.1846, the Treaty of Amritsar was signed between the East India Company (British Government) and a Dogra Ruler, Maharaja Gulab Singh, whereby the independent possession of the Jammu & Kashmir region was transferred to Maharaja Gulab Singh and the heirs male of his body. Ever since then, the princely state of Jammu & Kashmir was ruled by the Jamwal Dogra Dynasty.

12. In 1925, the last ruling Maharaja of the princely State of Jammu & Kashmir, Hari Singh, ascended to the throne and continued to rule till 1949.

13. Between 1925 and 1934 there was public agitation in Kashmir for the establishment of representative and responsible government. After appointing the Glancy Commission and then the Franchise Commission to look into grievances, Maharaja Hari Singh issued Regulation 1 of 1991 (1934). The Regulation opened with a statement of policy that it was the declared intention of the Maharaja to provide



for the association of his subjects in the matter of legislation and administration of the State and that it was in pursuance of the said intention that the Regulation was being promulgated.

14. Five years later the Maharaja promulgated the Jammu & Kashmir Constitution Act 14 of 1996 (1939). From the preamble to this Constitution it appears that, before its promulgation, the Maharaja had issued a proclamation on February 11, 1939, in which he had announced his decision as to the further steps to be taken to enable his subjects to make orderly progress in the direction of attaining the ideal of active cooperation between the executive and the legislature of the State in ministering to the maximum happiness of the people. In accordance with this desire the text of the Constitution contained in Regulation 1 of 1991 was thoroughly overhauled and an attempt was made to bring the amended text into line with that of similar Constitutions of its type.

15. While the State of Jammu & Kashmir was governed by the Maharaja and the second Constitution as amended from time to time was in operation, political events were moving very fast in India and they culminated in the passing of the Indian Independence Act, 1947. Under Section 7(1)(b) of this Act, the suzerainty of the British sovereign over the Indian States lapsed and with it lapsed all treaties and agreements in force at the date of the passing of the Act between the British sovereign and the Rulers of the Indian States, all obligations of the British sovereign existing at that date towards Indian States or the Rulers thereof, and all powers, rights, authority or jurisdiction

exercisable by the British sovereign at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise. The proviso to the said section, however, prescribed that, notwithstanding anything in para (b), effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as therein referred to in relation to the subjects enumerated in the proviso or other like matters until the provisions in question are denounced by the Ruler of the Indian State on the one hand or by the dominion or province concerned on the other hand, or are superseded by subsequent agreements. Thus with the lapse of British paramountcy, the princely State of Jammu & Kashmir, like the other Indian States, was theoretically free from the limitations imposed by the said paramountcy subject to the provisions of the proviso just mentioned.

16. While Maharaja Hari Singh was weighing his options, conflict broke out in the State as refugees streamed in from West Pakistan. Poonch region of Jammu was the site of most acute conflict and was virtually taken over by 'guerrillas' backed by Pakistan.

17. On October 22, 1947, tribal raiders from Pakistan, with support from sections of the Pakistan Government and led by officers of the Pakistan Army, invaded the territory of the State; and this invasion presented a problem of unprecedented gravity before the Maharaja. With the progress of the invading raiders the safety of the State was itself in grave jeopardy and it appeared that, if the march of the invaders was not successfully resisted, they would soon knock at the doors of Srinagar itself. This act of aggression set in motion a chain of

political events which ultimately changed the history and political constitution of Jammu & Kashmir with unexpected speed.

18. On October 26, 1947, the Maharaja signed an Instrument of Accession with India which had by then become an independent dominion. By the first clause of the Instrument, the Maharaja declared that he had acceded to the Dominion of India with the intent that the Governor-General of India, the Dominion, legislature, the Federal Court and any other Dominion Authority established for the purpose of the Dominion shall, by virtue of the Instrument of Accession, subject always to the terms thereof and for the purposes only of the Dominion, exercise in relation to the State of Jammu & Kashmir such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on August 15, 1947.

19. By clause 3, the Maharaja agreed that the matters specified in the schedule attached to the Instrument of Accession were matters with respect to which the Dominion legislature may make laws for the State. Clause 5 provided that the Instrument shall not be varied by any amendment of the Government of India Act, 1935, or of the Indian Independence Act, 1947, unless such amendment is accepted by the Maharaja by an Instrument supplementary to the original Instrument of Accession. By clause 7 it was agreed that the Maharaja would not be deemed to be committed to the acceptance of any future Constitution of India nor would his discretion be fettered to enter into agreements with the Government of India under any such future Constitution. Clause 8 is very important. It says that nothing in the Instrument affects

the continuance of the Maharaja's sovereignty in and over his State, or, save as provided by or under the Instrument, the exercise of any powers, authority and rights then enjoyed by him as Ruler of the State, or the validity of any law then in force in the State. The Schedule attached to the Instrument refers to four topics, defence, external affairs, communications and ancillary, and under these topics twenty matters have been serially enumerated as those in respect of which the Dominion Legislature had the power to make laws for the State. Thus, by the Instrument of Accession, the Maharaja took the very important step of recognizing the fact that his State was a part of the Dominion of India.

20. It is critical to take note of certain correspondence which took place between the Maharaja of Jammu & Kashmir and the Viceroy. This is because in the case of Jammu and Kashmir, the letters exchanged by the Maharaja and Viceroy are themselves a unique instance of the Instrument of Accession being accompanied by collateral documents which would suggest the conditional nature of the Instrument of Accession.

21. By letter dated October 26, 1947, the Maharaja stated as follows:

*“Geographically my State is contiguous to both the dominions. It has vital economic and cultural links with both of them. Besides my State has common boundary with the Soviet Republic and China. In their external relations, the Dominions of India and Pakistan cannot ignore this fact..... I want to take time to decide to which dominion I should accede, whether it is not in the best interest of both the*

*dominions and my State to stand independent, of course, with friendly and cordial relations with both.”*

He further mentioned that under the Standstill Agreement, the Pakistan Government was operating posts and telegraph systems in the State, that Pakistan had tried to put pressure on the state to accede culminating in the communal tribal raids and said:

*“With the conditions obtaining at present in my state and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian dominion. Naturally they cannot send the help asked for by me without my State acceding to the dominion of India. I have, accordingly decided to do so and I attach the Instrument of Accession for acceptance by your government. The other alternative is to leave my state and my people to free booters.”*

In his reply dated 27.10.1947, Lord Mountbatten stated as follows:

*“In the special circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to (the) dominion of India. Consistently with their policy that, in the case of any state where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my government’s wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the state’s accession should be settled by reference to the people.”*

Reference may also be made to the letter dated 17.05.1948 sent by PM Pt. Jawahar Lal Nehru to Sheik Abdullah with the concurrence of Vallabh Bhai Patel and N. Gopaldaswamy Ayyangar wherein it was stated:

*“It has been settled policy of Government of India, which on many occasions has been stated both by Sardar Patel and me, that the constitution of Jammu & Kashmir is a matter for determination by the people of the state represented in a constituent assembly convened for the purpose.”*

22. The Maharaja issued his final proclamation on June 20, 1949, by which he entrusted to Yuvraj Karan Singh Bahadur all his powers and functions in regard to the Government of the State because he had decided for reasons of health to leave the State for a temporary period. *“Now therefore I hereby direct and declare”,* says the proclamation, *“all powers and functions whether legislative, executive or judicial which are exercisable by me in relation to the State and its Government including in particular my right and prerogative of making laws, of issuing proclamations, orders and ordinances, or remitting, commuting or reducing sentences and of pardoning offenders, shall, during the period of my absence from the State, be exercisable by Yuvraj Karan Singh Bahadur”.* As subsequent events show this was the last official act of the Maharaja before he left the State.

23. After Yuvraj Karan Singh took the Maharaja's place and began to function under the powers assigned to him by the said proclamation, the interim popular Government installed earlier was functioning as before. On November 25, 1949, Yuvraj Karan Singh issued a proclamation by which he declared and directed that the Constitution of India, shortly to be adopted by the Constituent Assembly of India, shall, insofar as it is applicable to the State of Jammu & Kashmir, govern the constitutional relationship between the State and the contemplated

Union of India and shall be enforced in the State by him, his heirs and successors in accordance with the tenor of its provisions. He also declared that the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which were then in force in the State. The preamble to this proclamation shows that it was based on the conviction that the best interests of the State required that the constitutional relationship established between the State and the Dominion of India should be continued as between the State and the contemplated Union of India; and it refers to the fact that the Constituent Assembly of India which had framed the Constitution of India included the duly appointed representatives of the State and that the said Constitution provided a suitable basis to continue the constitutional relationship between the State and the contemplated Union of India. On January 26, 1950, the Constitution of India came into force.

24. This proclamation was followed by the Constitution (Application to Jammu & Kashmir) Order, 1950 (CO 10) which was issued on January 26, 1950, by the President in consultation with the Government of Jammu & Kashmir and in exercise of the powers conferred by clause (1) of Article 370 of the Constitution. It came into force at once. Clause (2) of this order provides that for the purposes of sub-clause (i) of Article 370 of the Constitution, the matters specified in the First Schedule to the order correspond to matters specified in the Instrument of Accession governing the accession of the princely State of Jammu & Kashmir to the Dominion of India as matters with regard to

which the Dominion Legislature may make laws for that State; and accordingly the power of Parliament to make laws for that State shall be limited to the matters specified in the said First Schedule. Clause (3) provides that, in addition to the provisions of Article 1 and Article 370 of the Constitution the only other provisions of the Constitution which shall apply to the State of Jammu & Kashmir shall be those specified in the Second Schedule to the Order and shall so apply subject to the exceptions and modifications specified in the said Schedule. The First Schedule to the Order specified 96 items occurring in the Union List; while the Second Schedule set out the articles of the Constitution made applicable to the State together with the exceptions and modifications.

25. The Yuvraj issued a proclamation on 20.04.1951, directing that a Constituent Assembly consisting of representatives of the people elected on the basis of adult franchise shall be constituted forthwith for the purpose of framing a Constitution for the State of Jammu & Kashmir. The proclamation sets out the manner in which members of the said Constituent Assembly would be elected and makes provisions for the holding of the said elections. It also authorised the Constituent Assembly to frame its own agenda and make rules for regulating its procedure and the conduct of its business. The preamble to this proclamation shows that the Yuvraj was satisfied that it was the general desire of the people that a Constituent Assembly should be brought into being for the purpose of framing a Constitution for the State and that it was commonly felt that the convening of the said Assembly could no longer be delayed without detriment to the future



wellbeing of the State. The Yuvraj also felt no doubt that the proclamation issued by the Maharaja on 05.03.1948 in regard to the convening of the national assembly as per clauses 4 to 6 no longer met the requirements of the situation in the State. Thus this proclamation was intended to meet expeditiously the popular demand for the framing of a democratic Constitution; and it indicates that a decisive stage had been reached in the political history of the State.

26. In accordance with this proclamation a Constituent Assembly was elected and it framed the Constitution for the State. By the Constitution thus framed, hereditary rule of the State was abolished, and a provision was made for the election of a Sadr-i-Riyasat to be at the head of the State. On 13.11.1952, the Yuvraj was elected to the office of the Sadr-i-Riyasat and with his election the dynastic rule of Maharaja Hari Singh came to an end.

27. On 15.11.1952, the Constitution (Application to Jammu & Kashmir) Second Amendment Order, 1952 (CO 43) was issued and it came into force on 17.11.1952. By this Order, 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 Sadr-i-Riyasat of Jammu & Kashmir. Similarly in the Second Schedule to the said Order some amendments were made. On the same day, a declaration (CO 44) was made by the President under Article 370 sub-article (3) of the Constitution that from 17.11.1952, the said Article 370 shall be operative with the modification that for the explanation in clause (1) thereof a new explanation shall be substituted. The effect of

this new explanation was that the Government of the State meant the person for the time being recognised by the President, on the recommendation of the Legislative Assembly of the State, as the Sadr-i-Riyasat of Jammu & Kashmir acting on the advice of the Council of Ministers of the State for the time being in force. On November 18, 1952, Yuvraj Karan Singh was recognised as the Sadr-i-Riyasat of Jammu & Kashmir.

28. In 1952, the Government of Jammu & Kashmir and the Government of India came out with a comprehensive agreement titled the 'Delhi Agreement, 1952', to further the relationship of the state with the union. It may be noted that the Delhi Agreement, 1952 was ratified by Parliament as well as the Constituent Assembly of Jammu & Kashmir. By way of the Agreement, it was agreed *inter alia* that:

- (i) Sovereignty in all matters other than those specified in the Instrument of Accession would continue to reside in the State. It was agreed by the Government of India that while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu & Kashmir, in the case of the latter they vested in the State itself.
- (ii) While persons having domicile in Jammu & Kashmir were to be regarded as citizens of India, yet the State Legislature was given power to make laws for conferring special rights and privileges on 'state subjects' in view of the State Subject Notifications of 1927 and 1932.
- (iii) Though the Sadr-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was as such his

nominee (A person who was not acceptable to the State Government could not be thrust on the State as the Head of State).

- (iv) It was accepted that the people of the State were to have fundamental rights. But in view of the peculiar position in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State. The question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution or the Constitution of India as applicable to the State.
- (v) Both parties agreed that the application of Article 356, dealing with suspension of the State Constitution and Article 360, dealing with financial emergency, was not necessary.

29. On 14.05.1954, a presidential order, being 'The Constitution (Application to Jammu and Kashmir) Order, 1954', was passed, incorporating terms of the Delhi Agreement. It introduced Article 35A, which protects laws passed by the State Legislature regarding the rights and privileges of State Subjects from challenge under the Indian Constitution. Also, a proviso was inserted in Article 3, which provides that no Bill altering the name/ boundary of the State of Jammu & Kashmir shall be introduced in the Parliament without the consent of the Legislature of the State.

30. The Constitution of Jammu & Kashmir, 1956 was adopted on 17.11.1956 and came into effect on 27.01.1957. It was drafted by a Constituent Assembly elected on the basis of adult franchise. Section 3 of the Constitution clearly stated that "*The State of Jammu and*

*Kashmir and shall be an integral part of the Union of India*". Section 5 of the Constitution provided that "*the Executive and Legislative powers of the State extends to all matters except those with respect to which the Parliament has the power to make laws for the State under the provisions of the Constitution of India*" (i.e. a reference to Article 370).

31. In 1957, the first legislative elections for the (erstwhile) State of Jammu & Kashmir were held where its Constituent Assembly was dissolved and replaced by a Legislative Assembly.

32. In May, 1965, the titles of Prime Minister and Sadr-i-Riyasat were officially changed to Chief Minister and Governor, respectively in the (erstwhile) State of Jammu & Kashmir. A large number of additional Presidential Orders were subsequently passed, including on specific issues arising in relation to items on the Union and Concurrent Lists. Some eroded elements of Article 370, and expanded the areas in which the Indian Constitution could be applied in the state. None, however, removed all clauses of Article 370 and replaced them or Article 35A.

33. On 20.06.2018, Governor's Rule was imposed in the (erstwhile) State of Jammu & Kashmir as the State Government collapsed.

34. On 21.11.2018, the Legislative Assembly for the (erstwhile) State of Jammu & Kashmir was dissolved by the Governor.

35. On 19.12.2018, Presidential Rule was imposed in the (erstwhile) State of Jammu & Kashmir for the eighth time, which was subsequently approved by the Lok Sabha & Rajya Sabha.

36. On 12.06.2019, the Union Cabinet approved the extension of President's Rule in Jammu & Kashmir for a further period of six months with effect from 03.07.2019, under Article 356(4) of the Constitution of India.

37. On 05.08.2019, a Presidential Order, being G.S.R. 551(E) - 'The Constitution (Application to Jammu and Kashmir) Order, 2019', was passed by the President of India. The said Order supersedes the Constitution (Application to Jammu and Kashmir) Order, 1954. Also, it has added Clause (4) to Article 367, making the Constitution of India applicable to the (erstwhile) State of Jammu & Kashmir. True copy of Presidential Order G.S.R. 551(E) (C.O. 272) dated 05.08.2019 is annexed herewith as **ANNEXURE P-1** [pg. to ].

38. On 05.08.2019, the Rajya Sabha passed The Jammu and Kashmir (Reorganisation) Bill, 2019 unanimously. Vide the said Bill, the existing (erstwhile) State of Jammu & Kashmir is bifurcated into two Union territories – (1) the Union Territory of Jammu & Kashmir with a Legislative Assembly, and (2) the Union Territory of Ladakh without a Legislative Assembly.

39. On 06.08.2019, a declaration, being G.S.R. 562(E), was issued by the President under Article 370(3) of the Constitution of India that:

*“...as and from the 6<sup>th</sup> August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely:-*

*370. All provision of this Constitution as amended from time to time, without any modification or exceptions, shall apply to the State of Jammu and Kashmir*

*notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any instrument, treaty or agreement as envisaged under article 363 or otherwise.”*

True copy of Declaration under Article 370(3), being G.S.R. 562(E) (C.O. 273) dated 06.08.2019 is annexed herewith as **ANNEXURE P-2** [pg. \_\_\_\_\_ to \_\_\_\_\_].

40. On 09.08.2019, the President gave assent to The Jammu and Kashmir (Reorganisation) Act, 2019. True copy of The Jammu and Kashmir (Reorganisation) Act, 2019 (Act 34 of 2019) dated 09.08.2019 is annexed herewith as **ANNEXURE P-3** [pg. to ].

41. The Petitioners have approached this Hon'ble Court under Article 32 of the Constitution of India seeking urgent intervention. They are public spirited persons who have worked with the State and the people of Jammu & Kashmir for decades and are also personally concerned as citizens of India about the sanctity of the federal, secular and plural nature of India's Constitution which has been put at risk by the impugned orders/actions. Further, Petitioner No. 3, Kapil Kak, as a permanent resident cum State subject of Jammu and Kashmir, is personally aggrieved that Article 370, that accords special status to the erstwhile State of Jammu & Kashmir, has been unilaterally and

arbitrarily nullified without any consultation with the people/residents of the State or their elected representatives. The petitioners seek to challenge the Presidential Orders G.S.R. 551(E) (C.O. 272) and G.S.R. 562(E) (C.O. 273) dated 05.08.2019 and 06.08.2019 respectively, and The Jammu and Kashmir (Reorganisation) Act, 2019 as illegal and unconstitutional, inter alia on the following grounds which are in the alternative and without prejudice to one another.

### **GROUND**

- I. *The erstwhile State of Jammu & Kashmir though an integrated part of India enjoyed a special autonomous status which was concretized in Article 370 of the Constitution of India.*
  - A. The (erstwhile) State of Jammu & Kashmir, though a State within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning because of certain events that took place at the time that the erstwhile ruler of Jammu & Kashmir acceded to the Indian union. The (erstwhile) State of Jammu & Kashmir was therefore dealt with by a special provision namely Article 370 of the Constitution.
  - B. The marginal note states that it is a temporary provision with respect to the (erstwhile) State of Jammu & Kashmir. However, unlike Article 369 which is also a temporary provision limited in point of time for five years from the commencement of Constitution, no such limit is to be found in Article 370. Despite the fact that it is, therefore, stated to be temporary in nature, clause (3) of Article 370 makes it clear that this Article shall cease to operate only from such date as the President may by

public notification declare and this cannot be done under the proviso to Article 370(3) unless there is a recommendation of the Constituent Assembly of the State to do so.

- C. A Constituent Assembly is completely different from a Legislative Assembly. A Constituent Assembly would be a legislative body which would be charged with the task of framing or revising a Constitution. This is different from a Legislative Assembly elected by adult franchise. The Constituent Assembly of the (erstwhile) State of Jammu & Kashmir stood dissolved on or about 26.01.1957, based on a Resolution passed on 17.11.1956. The issue is further complicated by the fact that, while the Jammu & Kashmir Constitution does allow for amendment (Section 147), it prohibits amendment of Sections 3 or 5 of the Jammu & Kashmir Constitution.
- D. Because, in the light of the special status and relationship of Jammu & Kashmir with India, and the historical context of the accession of the princely State of Jammu & Kashmir to India, it is not possible to substitute “constituent assembly” with “legislative assembly”. One cannot be a ‘constitutional substitute’ for the other. This is also apparent from the fact that under the Constitution of Jammu & Kashmir, the Legislative Assembly does not have the power to alter the State’s relationship with India (i.e. section 5). Even if such an interpretation is possible, reference to “legislative assembly” must necessarily be reference



to the elected representatives of the people of the state based on adult franchise in a free and fair election.

- E. Despite the above dissolution of the Constituent Assembly, it has been held by this Hon'ble Court that Article 370 would continue to exist. This is because the Constituent Assembly had made a recommendation that the Article should be operative with one modification to be incorporated in the Explanation to Clause (1) of the Article, namely, that the Maharaja of Jammu & Kashmir be substituted by the expression "Sadr-i-Riyasat" of Jammu and Kashmir.
- F. It may also be noted that Article 370(2) does not in any manner state that the Article shall cease on the completion of the work of the Constituent Assembly or its dissolution. Having regard to all these factors, this Hon'ble Court has clearly held that though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in Clause (3) of Article 370 takes place.
- G. The requirement in Article 370 to seek either the consent or the concurrence of the Constituent Assembly must be seen in the background of the solemn assurance given by the Governor-General of India at the time of accession of the State of Jammu & Kashmir that the question of accession should be decided in accordance with the wishes of the people of the State. The relevant extract of the said assurance is reproduced here-in-below for ready reference:

*“....question of accession should be decided in accordance with the wishes of the people of the State, it is my government’s wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the state’s accession should be settled by reference to the people.”*

- H. This procedure was held to be followed by the election of a Constituent Assembly. In that view of the matter, it was all the more obligatory on the respondents to ensure that before making the changes, a proper methodology for ascertaining the will of the people was followed in line with the constitutional imperatives of Article 370. The present action of the Union of India without ascertaining the will of the people either through its elected government or legislature or through public means such as referenda, the Union of India has undermined the basic principle of democracy.
- I. Because in the context of the special relationship and status of Jammu & Kashmir, transfer of legislative power to Parliament cannot be construed as transfer of ‘constituent/constitutional power’, the exercise of which was necessary for any alteration of Article 370.
- J. Because, in contrast to the phrases ‘consultation’ and ‘concurrence’, which are used in Article 370 for decisions regarding the applicability of provisions of the Indian Constitution to Jammu & Kashmir, Article 370(3) uses the phrase ‘recommendation’. The use of the phrase ‘recommendation’

elucidates that the proposal shall come only from the state, excluding interference by the centre in any respect.

- K. In case of the erstwhile State of Jammu & Kashmir, both Lok Sabha and Panchayat elections had been held recently, so there was no reason why Legislative Assembly elections could not have been held and these constitutional changes proposed and debated in the Assembly.

*Violation of Principles of Federalism*

- L. Because, as this Hon'ble Court has held on multiple occasions, federalism is a basic feature of the Indian Constitution. It is well established that India is a union of States which is quasi federal with a strong tilt to the Centre. In this regard, it may be mentioned that there are four indicia to a real federation:

- (a) A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union.

- (b) Supremacy of the Constitution which cannot be altered except by the component units. Our Constitution is undoubtedly supreme but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.
- (c) Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the State.
- (d) Supreme authority of the courts to interpret the Constitution and to invalidate action violative of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units.

It has been found that so far as States other than Jammu & Kashmir are concerned, indicia (a) and (b) were absent, whereas indicia (c) and (d) were present and this coupled with a reading of various other articles of the Constitution led a Constitution Bench of this Court to decide that the Federal Structure of the

Constitution tilts strongly towards the Central Legislature and the Central Government.

M. In so far as the (erstwhile) State of Jammu & Kashmir is concerned, it is clear that indicia (b) is absent. In so far as the other indicias are concerned, the State did have its own separate Constitution by which it was governed in all matters except those surrendered to the Union of India. The distribution of power between the Union and the (erstwhile) State of Jammu & Kashmir reflected that matters of national importance in which a uniform policy is desirable is retained with the Union of India and matters of local concern remain with the State of Jammu & Kashmir. Thus, with the State of Jammu & Kashmir, the quasi federal structure of the Constitution of India continues, but with certain differences. These have been on account of historical developments already explained hereinabove and in fact many states enjoy a special relationship in view of the peculiar facts and circumstances relating to that State. This is reflected in Article 371-A to 371-J which provide a special status, in different respects, to the states of Nagaland, Mizoram, Manipur, Maharashtra, Karnataka, Sikkim, and others. By the impugned acts, the respondent has sought to completely destroy the very basis on which the (erstwhile) State of Jammu & Kashmir had been integrated into India and, in the process, has also jeopardized the quasi federal balance envisaged by the Indian Constitution.

N. The principle of pluralistic federalism would be set at naught if *one* of the two parties to the federal relationship (i.e., the Union) can unilaterally amend the terms of their relationship, without even passing through the rigours of the amending process under Article 368.

O. Because the right to autonomous self government and the right to an identity within the federal framework are fundamental rights flowing from the right to life and other provisions contained in Part III of the Constitution. Their removal in a manner that has made a mockery of the “procedure established by law” is clearly in violation of fundamental rights and ought to be struck down forthwith.

II. *The Presidential Order G.S.R. 551(E) (C.O. 272) is constitutionally invalid*

P. Because Presidential Order C.O. 272, purportedly passed under Article 370(1) of the Constitution, is ultra vires the authority conferred by that Article. This is because, first, the Presidential Order incorrectly invokes Article 370(1)(d) to effectively amend the proviso to Article 370(3); secondly, the concurrence in question is an insufficient constitutional foundation upon which to base a Presidential Order of this nature; thirdly, the power under Article 370(1)(d) does not contemplate the wholesale application of “all provisions of the Indian Constitution” - at present and in perpetuity - to “apply in relation to the state of Jammu and Kashmir”; and fourthly, even if C.O. 272 was otherwise valid,

insofar as it seeks to amend Article 370(3), it is legally invalid, as the Legislative Assembly of the (erstwhile) State of Jammu & Kashmir has no power under the Constitution of Jammu & Kashmir to bring about an amendment to any provision under the Constitution of India. The Presidential Order purports to do indirectly what cannot be done directly.

- Q. Article 367 is a provision dealing with interpretation of terms. The impugned amendment is not really interpretational. It is substantive as it deletes the expression “constituent assembly” and replaces it with the expression “legislative assembly” which are two wholly different concepts.
- R. Because the “consent” to Order C.O. 272 was invalidly given, as powers under President’s Rule are co-terminus with that of the legislative assembly of the (erstwhile) State of Jammu & Kashmir. However, under the proviso to Article 147 of the Constitution of Jammu and Kashmir, the Legislative Assembly of the (erstwhile) State of Jammu and Kashmir is barred from “seeking to make any change in the provisions of the constitution of India as applicable in relation to the State”; consequently, since the Legislative Assembly could not have given its consent to Presidential Order C.O. 272, nor could the Governor.
- S. Because the Legislative Assembly of Jammu & Kashmir does not possess the constituent power to recommend a modification of Article 370. Proviso 2 of Section 147 of the Constitution of Jammu and Kashmir declares certain provisions of the

Constitution unamendable: these are Sections 3, 5, 147 of the Jammu & Kashmir Constitution, and provisions in the Indian Constitution that are related to the special status of Jammu & Kashmir (i.e, Article 370). Therefore, the legislative assembly does not have the constituent power to amend Article 370 or provisions related to the special status (Sections 3 and 5 of the Jammu & Kashmir Constitution).

T. The Presidential Order states that it has been made with “the concurrence of the Government of the State of Jammu and Kashmir.” However, as the (erstwhile) State of Jammu & Kashmir has been under President’s Rule since 19 December 2018, the consent – in fact – is that of the President himself, acting on the advice of the Union Cabinet. This, effectively, amounts to the same constitutional functionary taking its own consent, to effect a fundamental structural change without consultation or concurrence of the persons affected by that change, or their elected representatives. This, it is respectfully submitted, is contrary to the rule of law, and is manifestly arbitrary. The principle of Rule of Law is a basic feature of the Indian Constitution.

U. Because it is well established in law that the Governor has no other discretion except as provided under the Constitution of India. In all other cases, he is required to act under the aid and advice of the council of ministers. Giving of consent under Article



370 even post the amendment would imply that before giving the consent the Governor was required to seek the aid and advice of a council of ministers. As a matter of fact, the elected Legislative Assembly of Jammu & Kashmir was not in place.

V. Because the objective of transferring the power of the State Legislature to the Parliament in a state of emergency under Article 356 of the Constitution is of a purely temporary nature during the existence of the proclamation under Article 356. In the present case, the said power has been abused for an unconstitutional purpose, i.e., to change the very nature of the State/federal unit and to denude the power of the State legislature itself. In the present case, the recommendation of Parliament, as a substitute for the State Legislative Assembly is non-est in law, as it purports to exercise the power in an unconstitutional manner i.e., not for the purpose of law making in the State but to alter the nature of the State itself.

W. Because the impugned presidential orders, particularly when viewed in the context of the prevailing situation of President's Rule in Jammu & Kashmir, violate the constitutional principle of Separation of Powers inasmuch as they conflate the executive function with the legislative function, whereas the two are separate and distinct powers and functions, to be exercised by separate and distinct constitutional bodies/ functionaries.

- X. Because, it is respectfully submitted that in *NCT of Delhi v Union of India (2018) 8 SCC 501*, a Constitution Bench of this Hon'ble Court made it clear that representative democracy is a basic feature of the Constitution, and that the Constitution should be interpreted to advance - and not retard - this principle. It is respectfully submitted that an interpretation of Article 370(1)(d) that would include "governor" within the meaning of "government" **during the imposition of President's Rule** would destroy the principle of representative government, for the reasons stated above.
- Y. The impugned Presidential Order is a colorable exercise of power which subverts the democratic principle which is at the heart of the Constitution of India.
- Z. Because the method of abrogation of Article 370 adopted by the Respondents is manifestly arbitrary, contrary to the constitutional scheme, and violates the principal of the Rule of Law, which is part of the basic structure of the Constitution of India. Moreover, the method of altering Article 370 by purporting to apply the 'Interpretation' Article 367 with modifications to the State of Jammu and Kashmir is nothing but a fraud on the Constitution.
- III. *The power under Article 370(1)(d) does not extend to a wholesale replacement of the Constitution of Jammu and Kashmir*
- AA. Because clause 2 of the Presidential Order, that seeks to extend "all the provisions of this Constitution, as amended from time to

time”, *ipso facto* and in perpetuity, is *ultra vires* and beyond the authority conferred by Article 370(1)(d) of the Constitution.

BB. The purpose of this clause was to extend certain provisions of the Indian Constitution to the (erstwhile) State of Jammu & Kashmir, from time to time, based upon the exigencies of the situation (and this, indeed, is how it has been applied, through various Presidential Orders, from 1954). The intention was not to apply the Indian Constitution as a whole, through a single order, and until perpetuity, to the (erstwhile) State of Jammu & Kashmir (thus making the Constitution of Jammu & Kashmir redundant through a legislative back-door). Such a situation is contemplated only under the process outlined in Article 370(3).

CC. Because, in any event, the President does not have the power to change the provisions of the Constitution of India, as applied to Jammu & Kashmir, during President’s rule under Article 356(1). On the contrary, the rationale for introducing President’s Rule under Article 356(1) is that the activities of the State cannot be carried out in accordance with the Constitution of the State of Jammu & Kashmir. The very purpose of imposition is therefore, to strengthen and uphold the Jammu & Kashmir Constitution and not eliminate it.

IV. *Presidential Order G.S.R. 562(E) (C.O. 273) is constitutionally invalid*

DD. The Presidential Order C.O. 273, which purports - under authority of Article 370(3) - to abrogate all clauses of Article 370 [except for clause (1)] is constitutionally invalid. A presidential order under Article 370(3) of the Constitution of India requires the Constituent Assembly of Jammu & Kashmir to recommend a presidential notification under Article 370(3) declaring that Article 370 shall cease to be operative. The Jammu & Kashmir Constituent Assembly no longer exists and thus could not have made a recommendation to that effect.

EE. Because the invalidity of Presidential Order C.O. 273 follows from the invalidity of Presidential Order C.O. 272, since the Presidential Order C.O. 273 emerges from and is dependent on the Presidential Order C.O. 272.

FF. Because, it is respectfully submitted that the President has instead completely eliminated the Constitution of Jammu & Kashmir by altogether superseding the 1954 Order in impugned orders CO 272 and CO 273. In doing so, the President conflated powers under Article 370(1)(d) with the powers under Article 356 of the Constitution of India as applied to the (erstwhile) State of Jammu and Kashmir. It is submitted that the power of the President under Article 370(1)(d) is under the Constitution of India qua India, while the power of the President under Article 356 is under the Constitution of India as applied to Jammu and Kashmir, and that the merger of powers granted to the President in two separate capacities is unconstitutional.

IV. The Jammu and Kashmir (Reorganisation) Act, 2019 is constitutionally invalid.

GG. Because, in seeking to downgrade the status of the State of Jammu and Kashmir into a Union Territory (with a legislature), the Jammu & Kashmir (Reorganisation) Act is *ultra vires* Article 3 of the Constitution. Article 3 authorises the formation of new States, and the alteration of areas, boundaries or names of existing States, but it does not authorise the *degradation of the status of an existing state into a union territory*. This is made even clearer by Explanations I and II to Article 3, where the word “state” is to be read to include a “union territory”, and parliament’s power is deemed to include “the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.” It is respectfully submitted that Article 3 provides a range of powers involving the *inter-se* alteration of states, the *inter-se* alteration of Union Territories, but conspicuously *does not* authorise the degradation of the status of a state into a Union Territory.

HH. Because the act is violative of Article 14 of the Constitution of India inasmuch as no rationale or objects and reasons has been given for such dismembering of the State. Such an act arbitrarily enacted is *ultra vires* the Constitution.

II. Because even though the erstwhile State of Jammu & Kashmir forms a part of the territory of India, under Article 1(3), the Parliament can increase or diminish the area of the State of

Jammu & Kashmir, to alter its name or boundaries only if the legislature of Jammu & Kashmir consents.

JJ. Because the promulgation of C.O. 272 and C.O. 273 are arbitrary exercises of government power in violation of fundamental rights and further, are in violation of Constitutional morality.

KK. Because The Jammu and Kashmir (Reorganisation) Act, 2019 violates fundamental rights contained *inter-alia* in Articles 14, 19 and 21 of the Constitution.

LL. Because the impugned presidential orders violate the basic principle associated with the Rule of Law that what is prohibited to be done directly cannot also be done indirectly.

MM. Because the Impugned Act is contrary to the Constitutional Scheme and basic structure of the Constitution.

41. That the present Writ Petition has been filed without any delay or laches and there is no legal bar in entertaining the same.

42. That the Petitioners have no other efficacious alternative remedy except to file the present Writ Petition before this Hon'ble Court by invoking Article 32 of the Constitution. The Petitioners submit that it is a fit case to be entertained and decided by this Hon'ble Court. The present petition involves important questions regarding the interpretation of the Constitution of India.

43. That this is the first petition filed by the Petitioners seeking the reliefs hereunder. The Petitioners have not filed any other petition on the same subject matter or seeking same reliefs either in this Hon'ble Court or any High Court.

44. That this Petition has been filed bona fide and in public interest and the Petitioners crave leave of this Hon'ble Court to amend/alter its grounds at appropriate stage, as and when required.

45. In the present case, the impugned orders/acts are arbitrary and contrary to the basic structure principles of Rule of Law, Federalism, Democracy and the Separation of Powers, apart from violating fundamental rights of citizens of India. That this Hon'ble Court has the jurisdiction to entertain and decide this Petition under Article 32 of the Constitution of India.

### **PRAYER**

It is therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- (a) Issue an appropriate writ, order or direction declaring Presidential Order Presidential G.S.R. 551(E) (C.O. 272) dated 05.08.2019 unconstitutional, void, and inoperative; and
- (b) Issue an appropriate writ, order or direction declaring Presidential Order G.S.R. 562(E) (C.O. 273) dated 06.08.2019 unconstitutional, void, and inoperative; and

- (c) Issue an appropriate writ, order or direction declaring The Jammu and Kashmir (Reorganisation) Act of 2019 unconstitutional, void, and inoperative; and/or
- (d) Pass an appropriate writ, order or direction restraining the Respondents from taking any action pursuant to C.O. No. 272, C.O. No. 273, and the Jammu and Kashmir (Reorganisation) Act of 2019;
- (d) Pass any other writ, order(s) or direction(s) as this Hon'ble Court deems fit in the interests of justice and in the facts and circumstances of this case.

AND FOR THIS KINDNESS THE PETITIONERS  
ABOVENAMED SHALL AS IN DUTY BOUND EVER PRAY

Drawn by:  
Arjun Krishnan, Kaustubh Singh, Rajalakshmi Singh, Advocates

Settled by: Prashanto Sen, Senior Advocate

FILED BY:

ARJUN KRISHNAN  
Advocate for the Petitioners

New Delhi  
Filed on:



IN THE SUPREME COURT OF INDIA  
(Civil Original Jurisdiction)  
I.A. of 2019  
in  
WRIT PETITION (CIVIL) No. \_\_\_\_\_ OF 2019  
(Public Interest Litigation)

In the matter of:

RADHA KUMAR & ORS. ... PETITIONERS

VERSUS

UNION OF INDIA & ORS. ... RESPONDENTS

**APPLICATION FOR INTERIM RELIEF**

To  
The Hon'ble The Chief Justice of India  
& His Companion Judges of the Hon'ble  
Supreme Court of India

The Humble Application of the  
Petitioners Abovenamed

**MOST RESPECTFULLY SHOWETH:**

1. That the Petitioners have filed the accompanying petition under Article 32 of the Constitution of India in public interest declaring Presidential Orders G.S.R. 551(E) (C.O. 272) and G.S.R. 562(E) (C.O. 273) as unconstitutional, void, and inoperative and declaring The Jammu and Kashmir (Reorganisation) Act of 2019 as unconstitutional, void, and inoperative.
2. That the contents of the said writ petition are not repeated herein for the sake of brevity. The Petitioners crave leave of this Hon'ble Court to refer and rely on the same during the course of arguments.
3. Even prior to the passing of the impugned presidential orders as also the Reorganization Act, the Union of India had acted with speed to

prevent public opinion from expressing itself. The political leaders in the State had been put under preventive detention, imposing curfew and Section 144 on the State, snapping telephone and internet connections and flying 40,000 or more additional troops into the state. Thus, even while Parliament debated the Bill, the State was in lockdown and no attempt could be made to assess public opinion, let alone the will of the people.

4. Any post facto attempt to ascertain the will of the people, i.e. UT status, would be manifestly unjust and unfair since the status of their legislatures would have changed and they would be under a Lt. Governor. The question of an Assembly debate – whether Legislative or reconstituted Constituent Assembly (itself a moot question) – can only arise if the status quo ante as prevailing prior to the issuance of the impugned Presidential Orders and passing impugned legislation i.e. The Jammu and Kashmir (Reorganisation) Act 2019 is restored.

5. Balance of convenience is in favour of the petitioners. Grave harm and prejudice would be caused if the interim prayers are not granted. No grave harm or prejudice would be caused to the respondents if the said relief is granted. The situation which existed prior to the enactment of the impugned Presidential Orders and the Reorganization Act had been there since independence for the last 65 years and this is an additional reason why status quo ante ought to be granted.

### **PRAYER**

In view of the above facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

- a. Stay the effect and operation of Presidential Order Presidential G.S.R. 551(E) (C.O. 272) dated 05.08.2019; and/or
- b. Stay the effect and operation of Presidential Order G.S.R. 562(E) (C.O. 273) dated 06.08.2019; and/or
- c. Stay the effect and operation of The Jammu and Kashmir (Reorganisation) Act of 2019; and/or
- d. Pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case

AND FOR THIS KINDNESS THE PETITIONERS  
ABOVENAMED SHALL AS IN DUTY BOUND EVER PRAY

FILED BY:

ARJUN KRISHNAN  
Advocate for the Petitioners

New Delhi  
Filed on: