

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE SURYA KANT

SERIAL No. 501, COURT NO.1 SECTION PIL-W
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

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DUSHYANT DAVE: May it please Your Lordships. My Lord, may I once again request Your Lordship to revisit *Berubari* for a minute. My Lord, where we had stopped yesterday. That is PDF Volume 13, Page 492, at 508, Para 31. Volume 13, 492 at 508, Para 30.... para 31.

JUSTICE B. R. GAVAI: PDF 508?

DUSHYANT DAVE: Sorry, My Lord.

JUSTICE B. R. GAVAI: PDF 508?

DUSHYANT DAVE: Yes, My Lord.

JUSTICE SURYA KANT: Mr. Dave, PDF number?

DUSHYANT DAVE: 49...Volume 13, Page 492, at 508 para 31, which I read..

CHIEF JUSTICE DY CHANDRACHUD: Yes, you read here.

DUSHYANT DAVE: One line to be re-read again to buttress my point, Your Lordships, may see last ten lines of that para 31, last ten lines, that's, My Lord, very crucial, because that's exactly what has happened. 370 is a clear, My Lord, I would say, reflection of this viewpoint, that, My Lord, 8 justices of this Court have taken.

JUSTICE B. R. GAVAI: Running page...

DUSHYANT DAVE: My Lords have got it?

JUSTICE B. R. GAVAI: One minute... We are also in the same...

JUSTICE SANJIV KHANNA: I know but there was an intern who was helping Justice Kaul here..

JUSTICE B. R. GAVAI: Justice Kaul and me are totally newcomers to this.

1 **DUSHYANT DAVE:** Beware of, My Lord, Chief Justice, My Lord. He doesn't appreciate
2 those of us who are technologically challenged.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Become pros now, my two brothers have become
5 pros.. Surya Kant I had indoctrinated when we sat together for two years, we were together on
6 the...

7

8 **JUSTICE SANJAY KISHAN KAUL:** Learning experience, even yesterday evening while
9 going home.

10

11 **DUSHYANT DAVE:** But what, My Lord, Justice Khanna would remember, Delhi High
12 Court, My Lord started it much earlier. That's why My Lord, most judges from Delhi High
13 Court are extremely pro.

14

15 **JUSTICE SANJIV KHANNA:** We've been used to it, we've been used to it. I think for
16 regular matters, I found it to be extremely helpful, it's very convenient.

17

18 **JUSTICE SANJAY KISHAN KAUL:** I escaped it.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** See, some state governments are very
21 supportive, others you know are... I remember the time of the pandemic, I won't name the
22 High Court, they didn't have money to pay for the licenses for this videos, video platform that
23 we went, so that's so dust cheap. We just withdrew some licenses from the Supreme Court and
24 transferred it to them. Because they were absolutely in a dire state. And at that time there was
25 a lockdown, you know. It was impossible to run the Court without video conferences.

26

27 **DUSHYANT DAVE:** But if Your Lordships can carry this into, My Lord, the lowest of the
28 courts, Mofussil court, My Lord it would be the greatest contribution that Your Lordships....

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Phase 3, we have a huge budget. So we are in the
31 process of doing that, setting up our own cloud software for video conferencing.

32

33 **DUSHYANT DAVE:** And My Lord, Your Lordships there will be at least continuity, since all
34 Your Lordships are here for at least next several years so... Now, My Lord, last ten lines of this
35 paragraph. 'This power' it may be added. The words, 'this power', it may be added. My Lords
36 have it?

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

2

3 **DUSHYANT DAVE:** 'This power', it may be added is' of course, subject to the limitations
4 which the Constitution of the State may either expressly or by necessary implication, impose
5 in that behalf. In other words, the question as to how treaties can be made by a sovereign state
6 in regard to accession of national territory, and how treaties, when made, can be implemented,
7 would be governed by the provisions in the Constitution of the country. Stated broadly, the
8 treaty making power, would have to be exercised in the manner contemplated by the
9 Constitution, and subject to the limitations imposed by it. Whether the treaty made can be
10 implemented by ordinary legislation or by Constitutional amendment, will naturally depend
11 on provisions of the Constitution itself. Now, My Lord, in my respectful submission, the treaty
12 in question here between the erstwhile ruler and, My Lord, the Governor General, which
13 ultimately... My Lord, that has now been transfixed into Article 370. So, My Lord, 370 is an
14 extraordinarily unusual provision. It's never My Lord... I mean, it's something which is so
15 beautiful, that, My Lord, the Constitutional framers felt that how do we give, My Lord, a kind
16 of respect, kind of acceptability, kind of validity to this Letter of Accession? So, they, my Lord
17 devised, as I said yesterday, My Lord, it was absolute brilliant statesmanship on their part, to
18 bring that into Constitution, to assure people of Jammu and Kashmir that we mean what we
19 say; we are not going to do away with this. So, My Lord, that's why this is very important. That
20 treaty will have to be interpreted in the light of 370. It's now, My Lord, virtually transposed
21 into Article 370. Now, My Lord, in the light of this discussion, please see at Page... Para...
22 "therefore our conclusion is"... Para 44, My Lord. Page 515, Para 44, just first sentence. And
23 this becomes even more important now. "Therefore, our conclusion is..." and My Lord, in my
24 respectful submission, My Lord, know it's a view which is inescapable, and it binds Your
25 Lordships, since this is a judgment of a bench of eight learned judges. "Therefore, our
26 conclusion is that it would not be competent to Parliament to make a law relatable to Article 3
27 of the Constitution for the purpose of implementing the agreement. It is considered by learned
28 Attorney General, that this conclusion must inevitably mean, that law necessary to implement
29 the agreement has to be passed under 368". Now, concession follows the conclusion. So, My
30 Lord, it can't be said that it is on a concession. The conclusion of Your Lordships is very
31 categorical, that legislative power is not possible, only a constituent power can be exercised in
32 respect of this. And that constituent power is under 368. So, My Lord, in my respectful
33 submission, far from President exercising the powers... and I will show My Lord, why
34 President had become *functus officio*. But, My Lord even assuming that, My Lord, 370(3)
35 survives, which it doesn't, in my respectful submission, even then, the power could only be
36 exercised under the constituent power; no other way. Now, My Lord, please... yes... My Lord,
37 this is a little important, because Your Lordships rightly, My Lord, raised the issue as to the

1 definition of Union Territories in Article 3. My Lord, originally, it was not there. It was brought
2 subsequently, by, I think, the 17th Amendment to the Constitution. But Your Lordships said,
3 “States do not include territories”. Kindly see that. Page 516, Para 47. “It would not be out of
4 place to mention one more point before we formulate our opinion on questions referred to us.
5 We have already noticed, that under the proviso to Article 3 of the Constitution, it is prescribed
6 that where proposal contained in bill affects the area, boundaries or name of any of the states,
7 the bill has to be referred by the President to the legislature of that state for its use. Therefore,
8 within such period it is prescribed, it has been heard before us... so and so”.

9
10 Then My Lord... no, I'm sorry. I'm sorry. I missed that page. It's earlier page. Page... "It is
11 significant that Article 3... it is significant that Article 3" page 513, My Lord, my apologies.
12 Sincere apologies. Page 513, Para 40. My sincere apologies. "It is significant that Article 3, in
13 terms does not refer to the Union Territories and so, whether or not they are intruded in the
14 last Clause of Article 3(a), there is no doubt they are outside a purview of Article 3(b), (c), (d),
15 and (e). In other words, even increase or diminution in the areas of the Union Territories is
16 contemplated or alienation of their boundaries or names is proposed, it cannot be affected by
17 law relatable to Article 3. This position would be of considerable assistance in interpreting
18 Article 3(c). So, My Lord, Parliament, then amended and, 18th, 18th Amendment. That's the
19 joy of having somebody like, My Lord, Gopal sitting next to us. I must, My Lord, confess to
20 Your Lordships, that I have sufficiently been instructed, briefed and educated by Mr. Prashant
21 Bhushan in this matter over several sessions My Lord, because he is appearing with me, and
22 so, My Lord, it is something which I must, My Lord, say that it is... Now, My Lord, please turn
23 back to that para that I was reading, Para 47, at 516 and Your Lordships will find, in the middle
24 somewhere "on the other hand", which is at 10th line from the top, "on the other hand", page
25 516, para. 47, in the middle, somewhere or 10th line from the top. "On the other hand, it is
26 clear, that if the law in regard to implementation of the Agreement is to be passed under Article
27 368, it has to satisfy, the requirements prescribed by the said Article. The Bill has to be passed
28 in each House by a majority of the total membership of the House, and by a majority of not
29 less than two thirds of the House present and voting. That is to say, it should obtain
30 concurrence of a substantial section of the House, which may normally mean the consent of
31 the major parties of the House, and that is, a safeguard provided by the Article in matters of
32 this kind. Please see the language. My Lord, this is the protection, Your Lordships have
33 extended and I beseech Your Lordships to extend this further. I beseech Your Lordships to
34 extend this further. That, this is how...You can't My Lord resort to, some kind of executive
35 power, authorized President to do this, My Lord, do away with everything that Article 3
36 provides, in the garb of My Lord, 356 powers. It makes complete mockery of constitutional
37 safeguards. Because Your Lordship knows what majorities can do. We have seen, My Lord,

1 what happened in 1975. So, My Lords, this is the check and that's why, constitutionalism, Your
2 Lordships, My Lord duty toward the Constitution, to My Lord to ensure that it is upheld, by
3 the Executive and Parliament in letter and spirit. If they don't do it in letter and spirit, this
4 Court will strike it down and must. So My Lords, these words, My Lord I... now, see answers,
5 My Lord, to the reference which was said by the Hon'ble President. We would accordingly...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Probably *Berubari* was decided at the time
8 when, explanation 1 and explanation 2 were not on the Constitutional.

9

10 **DUSHYANT DAVE:** It came as a consequence, Your Lordships...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** They came as a consequence of *Berubari*...

13

14 **DUSHYANT DAVE:** Correct.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** to take into account what the Court held that the
17 State would not include a Union Territory.

18

19 **DUSHYANT DAVE:** Correct.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** So, now really, that issue will not survive...

22

23 **DUSHYANT DAVE:** No.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Because the whole basis was that State will not
26 include the Union Territory, and therefore you couldn't see that territory and exercise the
27 lawmaking power under Article 3, you have to amend the Constitution.

28

29 **DUSHYANT DAVE:** That's... that's... what I... There are two submissions on this. One, that
30 treaty to be interpreted in the light of what Constitution provides, in respect of that treaty. And
31 two, that if you want to now touch that treaty, you cannot do it by a legislative act. You have to
32 do it in exercise of a constituent power. As I said, My Lord, Constitution is durable. My Lord,
33 if it serves the need of the hour on that day, doesn't mean that, My Lord, that need must be
34 wished away because you have a majority.

35

36 **JUSTICE SANJIV KHANNA:** Just...

37

1 **DUSHYANT DAVE:** My Lord, in my respectful submission, the argument that, My Lord,
2 Government is advancing before Your Lordships, does not bear out from plain reading of the
3 Constitutional provision. Now see, My Lord, Chapter 21, the title, 'Temporary, Transitional
4 and Special Provisions.' Now My Lord, I accept that 370 is temporary because it's titled
5 temporary.

6
7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

8
9 **DUSHYANT DAVE:** But it is temporary from the perspective of J&K, not temporary from
10 the perspective of the Indian dominion or Indian Republic, the choice was left to the
11 Constituent Assembly and therefore the people of J&K to decide whether you want to continue
12 with the status or you want to be away from India. That was the choice. And I will show that
13 from Mr. Ayyangar's, Gopalaswami Ayyangar's, My Lord, very express statement before the
14 Constituent Assembly. So, My Lord he was chairing the committee, which drafted Article 370,
15 there were eight members in it. And they did it because of the extraordinary situation. They
16 realized that we are losing J&K out of our hands. Now, you persuade, My Lord, citizens of a
17 state, a country, at that time an independent state, to accede to you, they agree to accession on
18 clear understanding

19
20 **JUSTICE B. R. GAVAI:** Persuasion by...

21
22 **DUSHYANT DAVE:** Sorry?

23
24 **JUSTICE B. R. GAVAI:** It was the Raja who... Hari Singh who requested the Government
25 of India that...

26
27 **DUSHYANT DAVE:** I agree. No question about it.

28
29 **JUSTICE B. R. GAVAI:** No, you're saying that...

30
31 **DUSHYANT DAVE:** But the conditions, historical conditions, can't be lost sight of, Your
32 Lordships are right. Raja requested but in that letter, he expressly asked for this protection. In
33 that letter, he expressly asked for this protection. The Governor General agreed to that. And
34 that is why the Constituent Assembly debated.

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36 **JUSTICE BR GAVAI:** That's what Mr. Sibal argued that after 1954, this 370 has become
37 permanent.

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DUSHYANT DAVE: Yes.

JUSTICE BR GAVAI: [UNCLEAR] the Constitution.

DUSHYANT DAVE: Now, just see My Lord. Just see, My Lord, 370. 370 is, My Lord, what? First and foremost, 370 is, My Lord... that Article 370(1)(c) is most important, that's first. The provisions of Article 1 and of this article shall apply in relation to that state. Meaning thereby, all other articles will not apply. That's an emphatic statement in the Constitution. Article 370(1)(c). We have to begin journey of 370 with that. Then, My Lord, they go forward and say, in Article (b) power of Parliament... sorry, in Article (b)(2)... article... just a second. In Article... My Lord, after that, in (d), “such other provisions of this Constitution shall apply in relation to that state, subject to such exceptions and modifications as the President may, by order, specify”. So My Lord, only Article 1 and Article 370 were expressly applied, all other articles were to be applied by the President, subject to this, My Lord, exercise of power under (d), and read with the proviso. “Provided, no such order which relates to matters specified in Instrument of Accession, shall be issued accepting consultation”. So, if it is part of Instrument of Accession, in consultation. If it is outside the Instrument of Accession, concurrence of the State Government. Now, State Government here, must be understood in the context of democracy. It cannot be understood in the context of 356 and Governor exercising, My Lord, omnipotent powers. That's why, it is, My Lord, very important for Your Lordships to read this in letter and spirit. So, My Lord, the constitutional provisions are now added by 1(c) and 1(d). Legislative powers are added by 370(1)(a). (1)(a), and specifically, (b). “The power of Parliament to make laws shall be limited”, please see the words, “shall be limited”. Mandatory. “... to those matters in Union List and the Concurrent List, which in consultation with Government of State, are declared by President to correspond to matter specified in Instrument of Accession. Governing accession of state to the dominion of India as matters with respect to which dominion legislature may make laws for that” And two, “Such other matters in the State List, as with the concurrence of Government of State, President may, by order, specify”. Now, My Lord, why is it temporary? Please see Article... Sub-Article 2. Please see Sub-Article 2. “If concurrence of Government of State referred to in Para 2 of Sub-Clause B”, that is, My Lord, legislative power, “...of Clause 1, or in the second proviso to Sub-Clause D of that Clause”, that's constitutional provisions, “...be given before Constituent Assembly for the purpose of framing Constitution is convened, it shall be placed before such assembly for such decision as it may take thereon.” Why? Because, My Lord, democracy. You could only do it if the Constituent Assembly approved it. It was a temporary provision. So, they knew Constituent Assembly is being now convened, and soon it may mean... In the Meanwhile, My

1 Lord, President may exercise powers in consultation with the State Government under (1)(b)
2 or My Lord, (1)(c) or (1)(d). They said, yes, they can. But you place them before Constituent
3 Assembly for a *post facto* approval. So, My Lord, it was never intended to be permanent; it is
4 a temporary provision. And, My Lord, the entire burden, or entire onus, or entire
5 responsibility, or entire power, decision to make the applicability, was left to the Constituent
6 Assembly. This can't be wished away. This, My Lord, is the Constitutional provision. President
7 can't exercise powers like this and say 370 is now *otiose*, or it stands repealed, or it stands
8 withdrawn. Now, in that context, please see Article 3, My Lord, Sub-Article 3.
9 "Notwithstanding anything in the foregoing provisions of this Article, the President may, by
10 public notification declare, that this Article shall cease to be operative." So, My Lord, he can
11 either say it will be cease to be operative, or he can continue, or shall be operative, which means
12 shall be continued, only with such exceptions and modifications, and from such date as he may
13 specify.

14

15 So, My Lord, the power is both for President to continue or President to discontinue, My Lords.
16 If he wants to continue, he can continue in same fashion or with such exceptions and
17 modifications. But, for President to do so, prior consent of the Constituent Assembly is a must,
18 provided that the recommendation of Constituent Assembly of the State referred to in Clause
19 2, shall be necessary before President issues such a notification. So Constituent Assembly will
20 send a notification to the President for a resolution and on that President alone can act. You
21 can't My Lord rewrite this, it is, it is not capable of any other understanding. It was therefore,
22 an exercise which was limited by.... therefore an exercise, which brought a temporary
23 provision, but temporary in terms of the objects. Temporary in terms of the actions to be taken,
24 not by effluxion of time. But time becomes important, because the life of Constituent Assembly
25 was only till 1957. Now, My Lord, Constituent Assembly, as Your Lordships have been told,
26 My Lord, went into it, in Kashmir, they said, we want to be part of India. We want Constitution
27 of India to apply to us. We want Article 370 to continue. President accepted that, and he issued,
28 My Lords C. O. in 1954, end of the matter. Where does he then have power to re-exercise that
29 My Lord? It will be travesty of justice. If, My Lord, it is, now today contended by Government
30 of India responsibly before this Court, that no, it has happened but now Governor can send in,
31 and he can act on it. What, that will be, My Lord, virtually, My Lord, destroying this very
32 express provision. And I respectfully submit that, it is impossible to, My Lord, to accede to that
33 interpretation. It was a one-time exercise. It was not, My Lord, intended to be exercised again
34 and again. Even Constituent Assembly was not given power to do it again and again. Supposing
35 they passed a resolution later saying, now we don't want to get out of India and 370 should not
36 apply to us. Was it permissible? In my respectful submission, no. So, Your Lordships, will have
37 to look at it either way. That's why the word temporary, is very meaningful as the heading of

1 the Article. So I respectfully submit, that, My Lord, this Article has lived its life, has achieved
2 its purpose. Now, My Lord, 370(1) survives, because My Lord tomorrow if, Constitution is
3 amended and new Article is inserted, which My Lord, we would like to apply to Jammu and
4 Kashmir also, President then sends, seeks Government's view and then exchanges the Article.
5 So, to that limited extent, perhaps this Article 370(1) may be necessary, but 370(3) is very clear
6 that applicability of Constitution of India per se was only in terms of Article 370(3). And once
7 they decide that, then My Lord it is untouchable, it cannot be revisited. President becomes
8 *functus officio*, in 1954, so far as 370(3) is concerned. And Your Lordships, have expressly
9 accepted this position. My Lord, in **Prem Nath** and **Sampat Kumar** both, Your Lordships
10 had accepted this interpretation. I'll make it, My Lord, good to Your Lordships. Expressly,
11 Your Lordships, have said that. And that is My Lord, the view. Now, just turn to, My Lord, view
12 of Gopalaswami Ayyangar, My Lords. As, Your Lordship, would recall, My Lord, Gopalaswami
13 Ayyangar was, My Lord, the *Diwan* or Prime Minister of Jammu and Kashmir for many years.
14 My Lord, he was later Defence Minister in post-independent India, and one of the most
15 respected Indians at that point of time. My Lord, he was heading this. Now just see his, My
16 Lord, page, PDF page... Volume 8, PDF page 1175.

17

18 **JUSTICE SANJAY KISHAN KAUL:** Document.. Document 5?

19

20 **JUSTICE B. R. GAVAI:** Document 5.

21

22 **DUSHYANT DAVE:** Documents Volume 8.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dave, if Article 370 works itself out and
25 achieves its purpose once the Constituent Assembly for the State of Jammu and Kashmir has
26 completed its task, then where is the occasion thereafter to issue Constitutional Orders post
27 1957?

28

29 **DUSHYANT DAVE:** My Lord, I... My Lord that's for 370(1) to extend from time to time any
30 amendments because there were many provisions of Constitution which may not have been
31 made applicable, or many laws which may not have been applicable.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** **But if** you see the proviso to (d), (d) refers to
34 other provisions of the Constitution, which will apply subject to such modifications. Then
35 matter which are referable to the IOA require only consultation.

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37 **DUSHYANT DAVE:** Yes.

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CHIEF JUSTICE DY CHANDRACHUD: All other provisions of the Constitution require the..

DUSHYANT DAVE: Concurrence.

CHIEF JUSTICE DY CHANDRACHUD: ... Require the concurrence, that is the second proviso. Then Sub-Article 2, Clause 2 says, 'If the concurrence has been given before the Constituent Assembly has given its opinion, then it has to be placed before the Constituent Assembly for its opinion and for its concurrence. So, your whole argument is that Article 370 has now worked itself out, once the Constituent Assembly completed its task. But that would be belied at the least by constitutional practice, because even after 1957 there were orders which were issued, Constitutional Orders progressively modifying the provisions of the constitutional relation to the State of Jammu and Kashmir. Which means that really speaking, Article 370 had continued to operate even thereafter. Therefore, it would not be correct to postulate, but Article 370 achieves its life, and what is a temporary provision really assumes the State of permanence in the Indian Constitutional fabric.

DUSHYANT DAVE: My Lord, may I respectfully submit...

CHIEF JUSTICE DY CHANDRACHUD: Because then there is no question of us, or of any Constitutional Orders being issued, progressively from 1954 onwards, or 1958 thereafter..

DUSHYANT DAVE: It refers to those decisions which were taken prior to its, My Lord, Constitution. So, to that limited extent Constituent Assembly's approval was sought for. But, My Lord subsequently, once the Constituent Assembly, My Lord, goes, whatever my respectful submission...

CHIEF JUSTICE DY CHANDRACHUD: But then there is no power to alter the Constitution at all. If your argument is right, then once the Constituent Assembly in 1956, '57 takes its decision. There is no power to change any provision of the constitutional relation to the State of Jammu and Kashmir.

DUSHYANT DAVE: No, I respectfully submit.

CHIEF JUSTICE DY CHANDRACHUD: Which was contrary to what everyone accepted that...

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2 **DUSHYANT DAVE:** 370(3) is only in respect of continuation of, My Lord, 370 or not. Now,
3 My Lord, they agree, Constituent Assembly agrees, once it agrees that it has to be continued,
4 then it becomes some kind of a permanent decision. Please read... permit me to re-read that
5 My Lord... 370(3). 'Notwithstanding anything in the foregoing provisions of this article, the
6 President made by public notification declare that this article shall cease to be operative or
7 shall be operative only with such exceptions or modifications from such date as he may specify,
8 provided that recommendation of Constituent Assembly of State in Clause D shall be necessary
9 before President issue such a notification.' So My Lord, idea is that you had to decide as a
10 Constituent Assembly whether you want this relationship to continue or not. So, My Lord, they
11 took that decision.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** No. What I was trying to refer to is this, Clause
14 2 of Article 370 refers to a decision. It uses the expression 'decision'. The proviso to Clause 3
15 uses the expression 'recommendation' but the commonality between Clause 2 of Article 370
16 and the proviso to 370(3), is some decision or action on the part of the Constituent Assembly.

17

18 **DUSHYANT DAVE:** My Lord...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Just give me a minute, give me a minute. Both
21 require some action on the part of the Constituent Assembly. Clause 2 requires a decision and
22 the proviso to Clause 3 requires the recommendation. Now, according to you, once the
23 Constituent Assembly completed its task in 1957, there was no question thereafter of invoking
24 the proviso to Clause 3, because then it's worked itself out, and the substantive part of Clause
25 3, and Article 370 becomes a permanent feature of the Constitution. That's the submission.
26 It's a submission worthy of consideration, absolutely. We have to deal with the submission.
27 I'm just trying to explore that submission.

28

29 **DUSHYANT DAVE:** Yes, My Lord.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** There is one internal inconsistency in accepting
32 that submission, because if that submission is right, qua the proviso to Clause 3, then the
33 consequence would be, that once the Constituent Assembly completed its task in 1957, there
34 could be no amendment to the Constitution at all under Clause 2 of Article 370. Which is...
35 one second. Which is belied not merely by Constitutional practice, but the acceptance by both,
36 the State of Jammu and Kashmir and the Government of India, that amendments were being
37 made to the Constitution even after 1957, and until the disputed Amendment of 2019.

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DUSHYANT DAVE: Just see Sub-Article 2.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DUSHYANT DAVE: “If the concurrence of Government of State, referred to in Para 2 of Sub-Clause B of Clause 1, or second proviso to Sub-Clause D of that clause, be given before the Constituent Assembly is convened...” It's purely limited.

CHIEF JUSTICE DY CHANDRACHUD: It shall be placed before the Constituent...

DUSHYANT DAVE: Before. So, My Lord, this is temporary within temporary. It is in respect of a situation where, My Lord, the Constitution... Now, a state has just come in, India has now become a Republic, a Constituent Assembly is going to be convened soon, and if some decisions are taken to protect them, that government may do anything it wants to, State Government. It may give its concurrence and its consultation. But we should be very clear whether people want it. So they said, “If you have done it before, then place it before the Constituent...”

CHIEF JUSTICE DY CHANDRACHUD: But then, would the power of the State Government, to grant its concurrence under the second proviso to Clause D, continue to operate once the Constituent Assembly completed its task in 1957?

DUSHYANT DAVE: My Lord, what has happened is, that government also has said in their affidavit, and I'll...

CHIEF JUSTICE DY CHANDRACHUD: Or, would that power be exhausted once a Constituent...

DUSHYANT DAVE: All provisions of the Constitution... They have applied all provisions of Constitution by 1954. So really speaking, there is nothing left to be done. It is fully in operation now.

CHIEF JUSTICE DY CHANDRACHUD: Exactly.

DUSHYANT DAVE: 370 is fully in operation.

1 **CHIEF JUSTICE DY CHANDRACHUD:** But then that is exactly...

2

3 **DUSHYANT DAVE:** We are talking about...

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** You are right, absolutely, logically. But then, how
6 do you explain the fact that there were subsequent amendments to the Constitution by the
7 constituent orders?

8

9 **DUSHYANT DAVE:** My Lord...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Because, the provisos to Clause D, refer to State
12 Government. Clause 2 refers to the Constituent Assembly. And Clause 2 says, if the consent
13 of the government was taken before the Constituent Assembly was formed, you have to place
14 it before the Constituent Assembly.

15

16 **DUSHYANT DAVE:** My Lord, a wrong practice cannot, My Lord, result in...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** We're talking of a practice over what?

19

20 **DUSHYANT DAVE:** But...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Over, 46 + 18, 64 years.

23

24 **DUSHYANT DAVE:** 64 years. After 64 years, you can repeal it. My Lord, with great respect
25 the same argument, if it is carried to a logical end, it means that 370(3) can't be repealed, and
26 you continue with the practice. It's nobody's case. It's not...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** That's completely [UNCLEAR] But otherwise,
29 you will have to say...

30

31 **DUSHYANT DAVE:** My Lord it is not petitioner's case...

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** You will have to say, that...

34

35 **DUSHYANT DAVE:** That no longer amendments of Constitution can apply. That's not
36 petitioner's case. Question is, what is it that was supposed to have been agreed, a promise.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** If the power under the proviso to Clause 3 has
2 exhausted itself, then equally, the power under the two provisos to Clause D have also
3 exhausted itself. In which case, how do we explain the exercise of that power for 64 years?
4

5 **DUSHYANT DAVE:** My Lord, I'm looking at 370(3) independently of 370(1). 370(2) has no
6 application now. It lived its purpose, because it, by its language, it says that if any decision
7 was... consultation or concurrence was given before we came into existence, you please come
8 back to us, and our decision will be final. That's ended now. So, 370(2) is dead. That's how
9 they wanted it, Constitutional framers.
10

11 **JUSTICE B. R. GAVAI:** 370(1) survives?
12

13 **DUSHYANT DAVE:** ... life to it. Likewise...
14

15 **JUSTICE B. R. GAVAI:** Mr. Dave...
16

17 **DUSHYANT DAVE:** 370(3) was also given in a limited sense, and My Lord we can't give
18 now life to it. 370(1), My Lord would survive for the purpose of continuing. Your Lordships
19 are right. I'm not for a moment suggesting conceding on that position. But, if it has continued
20 as a practice, there is nothing wrong about continuing that practice. That means that Article
21 370 is alive to the extent of Sub-Article 1, not difficulty about it. Question is, can you repeal it?
22 Can you withdraw it? Do you have power under 3?
23

24 **CHIEF JUSTICE DY CHANDRACHUD:** It is 370(1), continues. It will be very difficult to
25 say that 370(3) ceases to exist. The modality for exercise of the power under 370(3), is a
26 different issue, which both Mr. Sibal and Mr. Subramaniam and Dr. Dhavan have addressed
27 themselves too, but it would be... because there has to be a logical consistency between how
28 you interpret Clause 2, and its impact on Clause 1, and the proviso to Clause 3, it has to be in
29 tandem.
30

31 **DUSHYANT DAVE:** My Lord...
32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Either everything remains together or everything
34 perishes together.
35

36 **DUSHYANT DAVE:** Then let everything perish together.
37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But if it did, perish, what about the fact that it
2 applied from 1958 to 19, 2018?

3

4 **DUSHYANT DAVE:** Power, My Lord...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** There is no power to any of the C.O.s.

7

8 **DUSHYANT DAVE:** What is our, our submission? My submission is, that if you wanted to
9 do it, you do it by Constitutional Amendment. You have no power. This is a relationship which
10 has been continued for a long time since before 1947, and 370(1) therefore continues, Your
11 Lordships are right, that time and again Government of India, President, has exercised powers
12 and applied various provisions of laws and Constitution from time to time. That's how they
13 wanted it. That's how they wanted it. But My Lords, it's one thing to continue 370(1) and it's
14 another to repeal. 370(3), that's the difficulty. Nobody is not saying that Presidential Order
15 extending Constitution are wrong or Presidential Order applying various laws are wrong.
16 People of Jammu and Kashmir want Constitution of India. They want the laws to be applied.
17 So My Lord, that position there is nothing wrong about it. But if you, My Lord repeal it, then,
18 My Lord, that limited power of the state to say, that certain laws should be applied in certain
19 manner, My Lord that special status. That..

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Got the point. We'll move on.

22

23 **DUSHYANT DAVE:** Now just see, My Lord..

24

25 **JUSTICE SANJIV KHANNA:** Just one minute...

26

27 **DUSHYANT DAVE:** Now, please see My Lord, what Your Lordships are saying, is answered
28 in note 370(1)(d) itself. What My Lord Chief Justice is rightly putting, 'The power of
29 Parliament to make laws for the said State shall be limited, to those matters in Union this
30 concurrent list, which in consultation with Government of State, are declared by President to
31 correspond to matters to so and so, as the matters with respect to which dominion may make
32 law.' So that's futuristic, may make law for the State. So any law that is made in future can be
33 applied by the President under 370(1)(b). Then such other matters in the said list as with
34 concurrence of government of State resident may by order specify. So this is futuristic,
35 futuristic exercise of power by the President from time to time. Likewise in (d). 'Such are the
36 provisions of this Constitution shall apply in relation to that State, subject to such exceptions
37 and modifications as President may, by order specify.' So power of President is not a surviving

1 power to be exercised from time to time. That is why the words notwithstanding anything
2 contained in the Constitution are important, in the opening of the article. Now just turn to Mr.
3 Ayyangar's statement. Please turn to PDF, Volume...

4

5 **JUSTICE B. R. GAVAI:** Mr. Dave, we are under the second proviso...

6

7 **DUSHYANT DAVE:** Yes, My Lord.

8

9 **JUSTICE B. R. GAVAI:** ... To (d). All the provisions of the Constitution could not have been
10 made applicable with the concurrence of the Government.

11

12 **DUSHYANT DAVE:** Yes, My Lord.

13

14 **JUSTICE B. R. GAVAI:** Is it not possible that if there is a concurrence of the government,
15 under (d), the entire provisions of the constitution could be made applicable to Jammu and
16 Kashmir?

17

18 **DUSHYANT DAVE:** This could have been. Except three. Except 370, can't be.

19

20 **JUSTICE B. R. GAVAI:** Except 370.

21

22 **DUSHYANT DAVE:** Yes, 370(3) is something which is left to the will of the people. There is
23 no difficulty. Government says it is..

24

25 **JUSTIE B. R. GAVAI:** If everything under the Constitution can be made applicable by
26 exercising the powers under (d).

27

28 **DUSHYANT DAVE:** Lord, it needs consultation and concurrence.

29

30 **JUSTIE B. R. GAVAI:** That is what if, with the concurrence, the question that is being put..

31

32 **DUSHYANT DAVE:** No difficulty. It can be, undoubtedly. But the power of removing Article
33 370 is disappearing.

34

35 **JUSTIE B. R. GAVAI:** Is a different power.

36

1 **DUSHYANT DAVE:** That's an independent one and Government, Union in this Affidavit
2 has stated that all provisions of Articles are constitutional been made applicable to Jammu
3 and Kashmir, and they have said that there is no difficulty on that. It has worked very well.
4 They say so. There is no doubt that 370 has worked beautifully for last, since 1947, this
5 relationship. There has been no difficulty. It's not Government of India's case that there were
6 impediments in, My Lord, running the administration of the State for any reason. Except
7 national security on some violence, they have not given any other reason also. This has
8 worked. It must continue to work. Now, why it should continue to work? Please see, Dr.
9 Ayyangar's statement. PDF Volume 8, page 1175. The words, 'Again, the Government of India
10 is...'Last para. My Lords have got it?

11

12 **JUSTICE B. R. GAVAI:** Again the Government of India?

13

14 **DUSHYANT DAVE:** Yes. Again the government.. My Lord, Justice Kaul has got?

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Just one minute.

17

18 **DUSHYANT DAVE:** My Lord, telling the learned law clerk that they are so lucky that they
19 got opportunity to work with Your Lordships. When we started practice, each one of us, we
20 didn't have that facility. We all learned on our own.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** We are equally fortunate to have their assistance.
23 They are very talented.

24

25 **JUSTICE SANJAY KISHAN KAUL:** The quality of assistance they give, especially in
26 matters of this nature, it's a herculean task just to marshal the records and they assisted
27 tremendously in this.

28

29 **DUSHYANT DAVE:** No. In fact, I had to work hard to get my intern in court today, I wrote
30 out a very personal letter to the assistant registrar and said please for God's sake allow them
31 to come in because their assistance is amazing and their experience, My Lord, the memories
32 they carry back home, are unbelievable. This generation of, My Lord, students are outstanding,
33 these lawyers! They are far more better than my generation was. Again, "The Government of
34 India have committed themselves to the people of Kashmir on certain respects. They have
35 committed themselves to the position, that an opportunity would be given to the people of the
36 state to decide for themselves whether they will remain with Republic or wish to go out of it.
37 We also committed to ascertaining this will of the people by means of a plebiscite, provided

1 peaceful and normal conditions were restored, and impartiality of plebiscite would be
2 guaranteed. We have also agreed that will of the people through Instrument of Constituent
3 Assembly will determine the Constitution of the State, as well as sphere of Union jurisdiction
4 over the state". Now kindly turnover and please come to, My Lord, page... the last clause, three
5 pages later. The last clause refers to... In fact, right from top, then we'll come to Clause 2. 1178.
6 Then we come to Clause 2.

7

8 **JUSTICE SANJIV KHANNA:** Mr. Dave, the portion you have read, is part of the
9 Constituent Assembly debates relating to the Indian Constitution.

10

11 **DUSHYANT DAVE:** Yes. Part of the Constituent Assembly debates on 17th of October 1949.

12

13 **JUSTICE SANJIV KHANNA:** Correct.

14

15 **DUSHYANT DAVE:** However, 1178, my Lords may turn to...

16

17 **JUSTICE SANJIV KHANNA:** 1-1?

18

19 **DUSHYANT DAVE:** 7-8. Then we come to Clause 2. "You will remember"... then we come
20 to Clause 2. "You will remember, that several of these clauses provide for the concurrence of
21 Government of Jammu and Kashmir State. Now these relate particularly to matters which are
22 not mentioned in Instrument of Accession, and it is one of our commitments to people of
23 Government of Kashmir, that no such additions would be made, except with the consent of the
24 Constituent Assembly, which may be called in the state for the purpose of framing its
25 Constitution. In other words, what we are committed to, is that these additions are matters for
26 determination of Constituent Assembly of the State". Then, My Lord, one paragraph later. The
27 last clause refers to what may happen later on. Now see this, My Lord. " We have said Article
28 211(a), which is 238, will not apply to J&K, but that cannot be a permanent feature of the
29 Constitution of the State, and hope it will not be so. So, the provision is made, that when the
30 Constituent Assembly of the State has met and taken its decision, both on Constitution for the
31 State and on the range of federal jurisdiction over the state, President may, on
32 recommendation of the Constituent Assembly, issue an order, that this Article 306(a), which
33 is 370, shall either cease to be operative, or shall be operative, only subject to such exceptions
34 and modifications as may be specified by him. But before he issues any order of that kind,
35 recommendation of Constituent Assembly will be a condition precedent." That explains the
36 whole of this article. Now see next paragraph. "The effect of this article is, that the Jammu and
37 Kashmir State, which is now a part of India, will continue to be a part of India". My Lord, the

1 bogey today in the country are a wrong narrative that Jammu and Kashmir is not part of India
2 because of 370. That's not so. That Jawaharlal Nehru also refuted when K.M. Shah said that,
3 Yes, yes, plebiscite. He said, "Nothing doing. It's part and parcel of India. It's integral part of
4 India". Unit of federal, and the Union Legislature will get jurisdiction to enact laws on matters
5 specified, either in Instrument of Accession, or by later addition, with concurrence of
6 Government of State, and steps have to be taken for purpose of convening a Constituent
7 Assembly into due course, which will go into matters I have referred. When it has come to a
8 decision on the matters it will make a recommendation to President, who will either abrogate
9 306(a) or direct that it shall apply with such modification, exceptions or make recommend.
10 That sir, is briefly description and effect of this article. I hope the House will carry it". And
11 House carried it. Today's House has no moral or Constitutional authority to undo this, just
12 because it has a majority. For the people of Jammu and Kashmir, this was the essential feature
13 of the Constitution and we said, why forget this? We could bring Jammu and Kashmir into our
14 fold. In fact, My Lord, during this Assembly debate, Maulana Hasan said, you are
15 discriminating in favour of Jammu and Kashmir. Because Baroda Maharaja, and I come from
16 Baroda, I didn't know this story at all, but it is mentioned here, Baroda Maharaja also didn't
17 want to join the Union. I didn't know that. And he was physically brought from England, and
18 forced to sign. So Maulana Hasan says, in this debate that you have forced Baroda Maharaja
19 to sign it. He didn't want to sign it.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Who, Sayajirao?

22

23 **DUSHYANT DAVE:** Sayaji Rao. I was shocked to read it, because, My Lords, Sayajirao, is
24 perhaps the greatest of the rulers of 20th century. I don't know whether your Lordships knows
25 or not, but the man was absolutely unbelievable. I have been telling family to have a biopic on
26 it, because he was the one who sent Dr. Ambedkar, for education. He was the one, My Lord,
27 who always took guidance from Maharishi Aurobindo, stayed in Baroda for many years and
28 My Lord some of the greatest people. Girl child education he made compulsory in 1920s. Girl
29 child education, free and compulsory. And I was telling Dr. Dhavan in the morning, that I saw,
30 My Lord, a law against water pollution, which was drafted in 1920s. So, My Lord the man had
31 a vision, which was the University of the Baroda, if Your Lordships have seen it. So beautifully
32 designed on Oxford-Cambridge lines. So, My Lord, and the Maharaja will not take a penny
33 more, than what was decided for him by his diwan, at beginning of the year, that you have to
34 only spend this much for your personal expense. He won't touch a penny after that. Now, My
35 Lord, he therefore didn't want to. Now just see my learned friend wants me to read, My Lord
36 at page 1177, perhaps or 1178. Now it is not case... which page? 1177, last para.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** In fact you know, 1178, see that one para which
2 says, now, you will recall.

3

4 **DUSHYANT DAVE:** Yes, that in some of the causes of this article we have provided
5 concurrence of governments of State, Governments of State feel that in view of commitments
6 already entered into between state and centre, they cannot be regarded as final authorities for
7 giving this concurrence, though they are prepared to give it in interim period. But if they do
8 give this concurrence, this clause provides that concurrence should be placed before
9 Constituent Assembly, when it meets, because it was My Lord, a transitional governments.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore, the concurrence of the
12 Government also, in terms of the first proviso to Clause D, was till the Constituent Assembly
13 was convened and took a decision under Clause 2. So even Mr. Ayyangar, construed it in a way,
14 that this concurrence was only up to that point when the Constituent Assembly would come
15 into being.

16

17 **DUSHYANT DAVE:** No, My Lord, that may perhaps...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That's what he says, that they will give that in the
20 interim periods till the Constituent Assembly is formed, after which that power has exhausted
21 itself.

22

23 **DUSHYANT DAVE:** In the context of Clause 2. Just see in the context of one.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So in which case really speaking, there's no
26 question of concurrence by the state government after 1957.

27

28 **DUSHYANT DAVE:** No, no, no.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** But yet we operated that provision.

31

32 **DUSHYANT DAVE:** Please see that on C and D at Page 1177. "Clauses C and D, refer..." Your
33 Lordships, see "Clauses C and D refer to provisions of Constitution", My Lords have it?

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

36

1 **DUSHYANT DAVE:** "Clauses C and D refer to the provisions of the Constitution other than
2 matters listed in List 1 and 3. These various provisions have been divided in certain categories.
3 First, according to this [UNCLEAR] is Article 1, of the Constitution will automatically apply.
4 As you know, it describes territory of India and includes amongst territories all states
5 mentioned in Part 3, J&K is one of the States mentioned in Part 3 with regard to other
6 provisions of the Constitution, these will apply to Jammu and Kashmir State with such
7 exceptions and modification as may be decided on, when President issues order to that effect,
8 that order can be issued in regard to subjects mentioned in Instrument of Accession, only after
9 consultation of Government of State, in other matter matters concurrence of that government
10 has to be taken. What, Your Lordships read was in Part Two, because the government was an
11 interim government. So, My Lord, whether that government was rightly giving was being
12 rightly, giving advice or concurring. So, they said, let people decide, to that limited extent. Now
13 My Lord, next paragraph, now it is not the case, nor it is the intention of members of Kashmir
14 Government whom I took opportunity of consulting before this draft was finalized. It is not
15 their intention that other provisions of Constitution are not to apply their particular point of
16 view is that these provisions should apply only in cases where they can suitably apply only
17 subjects with modifications and exceptions, as particular conditions of J&K State may require.
18 I wish to say no more about particular point at the present. So, that is how, My Lord, he looked
19 at it. That is how he defined it, there is no other interpretation possible. This is the author and
20 one of the most respected, My Lord eminent citizens of this country. My Lord, you... you.. on
21 5th of August, President issues a proclamation, then it is sent to Rajya Sabha, Rajya Sabha
22 sends a recommendation without, My Lord, on the same day. Then Rajya Sabha approves
23 Reorganization Bill on the same day. Next day it goes to Lok Sabha, on the same day, it is
24 approved. My Lord, these Constituent Assembly debates took place over several years. These
25 are the men and women who are most brilliant that have ever been born in this country. We
26 owe a permanent gratitude to them. And if we were to interpret Constitution as today's
27 governments tell us, we will be doing great disservice to these men and women. Please don't
28 do that, My Lord. They were much wiser than anybody in our generations. They knew what
29 India's problems were. As Dr. Dhavan, My Lord, was at pains to point out, they knew about
30 the diversity of this country. They felt the pain of every part of this country. And that pain they
31 brought in, My Lord, in various provisions, to give, recognize this. It's not in.. the Article, My
32 Lord, is not just a letter, it's the feelings of people of Jammu and Kashmir.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** What next, Mr. Dave now?

35

1 **DUSHYANT DAVE:** Yes, now, My Lord kindly come to in this context, the two judgments
2 which I respectfully submit are sparely, My Lord, supports the view that I have.. My Lord,
3 kindly turn to PDF Volume 1. 1 isn't it? At page 8. *Prem Nath Kaul*. On October 25, 1947?
4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 1, Page 7, Case Law compilation.
6

7 **DUSHYANT DAVE:** Para ten. Your Lordships may turn to Para 10. Your Lordships have got
8 it?

9 'On October 25, 1947, Maharaja signed an Instrument of Accession with India, which had then
10 become an independent Dominion. By first Clause of Instrument, the Maharaja declared that
11 he had acceded to Dominion of India with intent. That Governor General of India, Dominion
12 Legislature and Federal Court and any other Dominion authority established for purpose of
13 Dominion shall by virtue of Instrument of Accession subject to the terms thereof for the
14 purposes only of Dominion, exercised in relation to State of Jammu and Kashmir, such
15 functions as may be vested in them by or under Government of India Act so and so.' We may
16 usefully refer to some of the other Clauses of Instrument. Then Lordships may omit all that
17 and please kindly.. Thus last sentence of that para, 'Thus, by the Instrument of Accession,
18 Maharaja took the very important step of recognizing the fact that his state was a part of
19 Dominion of India.' So this is very important, My Lord. The repeal does not subserve any
20 purpose, Jammu and Kashmir is integral part of India. Now kindly turn to My Lord... please
21 turn to paragraph, there is one more argument, Page 287. PDF page 50, para 26. No. Where is
22 para? Page 16? Para 26.
23

24 There is one more. No just before that. My Lord, just before the paragraph 26, please see last
25 sentence of Para 25. "We must, therefore, reject the argument, that the execution of
26 Instrument of Accession..." of para. 26, last sentence. I'm sorry. The last part of para 26. "We
27 must, therefore, reject the argument, that the execution of Instrument of Accession affected in
28 any manner, the legislative, executive, and judicial powers in regard to Government of State
29 of which, then vested in ruler of the State." So, for all purposes, Your Lordship's Court
30 recognized, that My Lord, he was this State who wielded all the powers, and his Instrument of
31 Accession didn't take away those powers, although he became part of India. Now see, My Lord,
32 next paragraph. "There is one more argument which has been heard before us, on the question
33 of Maharaja Hari Singh's powers. It said that Maharaja issued proclamation on March 5, 1948,
34 replacing emergency administration by popular interim government headed by Sheikh
35 Abdullah, constituting Council of Ministers who have to function as Cabinet, and act on
36 principle of joint responsibility. He virtually introduced a popular democratic government in
37 state, surrendered his sovereign rights and became Constitutional Monarch. There is no

1 substance in this argument. The proclamation merely shows under pressure of public opinion,
2 and as a result of difficult and delicate problem raised [UNCLEAR], the Maharaja, very wisely,
3 chose to entrust actual administration government to charge of popular Cabinet”. Then
4 Lordships may omit all that, and please kindly come to, My Lord, page... My Lord, since, "Mr.
5 Chatterjee has relied"... para 32, page 18. “Since Mr. Chatterjee has strongly relied on
6 application of Article 370 of the Constitution to the State in support of his argument, that
7 Yuvraj had ceased to hold plenary legislative powers, it's necessary to examine provisions of
8 this article and their effect”. My Lord, these two judgments are complete answer to what has
9 happened. And My Lord, these judgments bind Your Lordships. There is no reason to differ
10 from this view. “This article was intended to make temporal provisions with respect to State
11 of Jammu and Kashmir then... so and so”. Now, My Lord, please see after the article. “Clause
12 (1)(b) of this article deals with legislative power of Parliament to make laws for the state, and
13 it prescribes limitations in that behalf”. Limitations in that behalf. Under Para 1, Sub-Clause
14 B, Clause 1, “Parliament has power to make laws for state in respect of matters in Union List
15 and Concurrent List, which President, in consultation with Government of State, declares to
16 correspond to matters specified in Instrument of Accession. Whereas, in regard to other
17 matters in the said list, Parliament may by, under Para 2, have power to legislate for the state
18 after such others matters have been specified by his order by President, with the concurrence
19 of the Government of the State. It is significant that Para 1 refers to consultation with
20 Government of State, while Para 2 requires concurrence. Having thus provided for
21 consultation with, and concurrence of Government of State, the explanation shows that
22 ‘Government of State’ means in this...” what it means in this context. “It means, according to
23 appellant, not the Maharaja, acting in his... himself, in his own discretion, but person who is
24 recognized as Maharaja by President, acting on advice of Council of Ministers for this... it is
25 said on this explanation, that appellant has placed great reliance. Sub-clauses (c), (d) and (1)
26 of article, provide respectively, provisions of Article 1, and the present Article shall apply in
27 relation to the state, and that the other provisions of the Constitution shall apply in relation to
28 it, subject to exceptions and modifications specified by Presidential Orders. These provisions
29 are, likewise, made subject to consultation with, or concurrence of Government of State,
30 respectively. Having provided for legislative power of Parliament, and for application of
31 Articles of Constitution to the State, Article 370(2) prescribed that if concurrence of
32 Government of State, required by relevant clauses has been given before Constituent Assembly
33 of Jammu and Kashmir has been convened, such concurrence shall be placed before such
34 assembly for such decision it may take. This clause shows...” This, My Lord, is what Your
35 Lordships are rightly worried about. “This Clause shows that Constitutional makers attach
36 great importance to the final decision of the Constituent Assembly, and continuance of
37 exercise of powers, conferred on the Parliament and President by very relevant temporary

1 provisions of 370(1) is made conditional on the final approval by State Constituent Assembly
2 in State matters. So My Lords, 370(1) continues with that. Once My Lord, it continues then
3 370(3) becomes *otiose*. Clause 3, authorizes President, to declare public notifications that, this
4 article shall cease to be operative or shall be operative only with specified exceptions or
5 modification. But this power can be exercised by President, only if Constituent Assembly of
6 State makes recommendations in that behalf. Thus, proviso to Clause 3 also emphasizes
7 importance, which was attached to final decision of Constituent Assembly in regard to relevant
8 matters covered by 370. Now, My Lord, please turn to next para on the same page, on the said
9 construction. Para 38, para 38, but My Lord, please omit first 10 lines. Or 5 lines. The
10 Constitution makers were obviously anxious. My Lords have that? Para. 38, fourth or fifth line.
11 The Constitutional makers were obviously anxious that the said relationship should be finally
12 determined by the Constituent Assembly of the State itself, not by Indian Parliament, State
13 itself. And that is the main basis for purport of the temporary provisions made by the present
14 article, and so the effect of its provisions must be confined to the subject matter. It would be,
15 it would not be permissible or legitimate to hold that by implication, this Article sought to
16 impose limitations on plenary legislative powers of Maharaja. These powers had been
17 recognized, specifically provided by the Constitution Act of the State. It was not and could not
18 have been within contemplation or competence of constitutional makers to impinge even
19 indirectly on the said power. So My Lord, from Maharaja they got transferred to Constituent
20 Assembly, those powers. So they say, that you can't impinge on those powers. It would be
21 recalled that by Instrument of Accession, these powers have been expressly recognized and
22 preserved, and neither subsequent proclamation by Yuvraj Karan Singh, adopting as far as
23 applicable the proposed Constitution nor Constitutional Order subsequently issued by
24 President, purported to impose any limitation, on said legislative powers of the ruler. Please
25 see this. This decisions My Lord, I have completely answered long back, what form of
26 Government the State should adopt, was a matter which had to be and naturally left to be
27 decided by Constituent Assembly of the State, until the Constituent Assembly reached its
28 decision in that behalf. Now see these words, My Lord "until the Constitution Assembly
29 reached its decision in that behalf, the constitutional relations relationship between the State
30 and India continued to be governed basically by Instrument of Accession. It would therefore,
31 be unreasonable to assume that, application of 370 could have affected or was intended to
32 affect plenary powers of Maharaja in matter of governance. In our opinion appellants
33 contention based on this article is therefore, rejected." Now My Lords, please turn to this para,
34 because this is a little important. It is difficult to see how these article purports. Para 40. Para
35 40, but My Lords after 12 lines, the word starting with the 'constitutional position'. 10-12 lines.
36 PDF 21.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** The issue is whether the Yuvraj could have really
2 issued...

3

4 **DUSHYANT DAVE:** Turn to *Sampath Prakash* now.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** *Sampath Prakash*.

7

8 **DUSHYANT DAVE:** Same Volume. It starts at page 27 at 30, 27 at 30. On the earlier page
9 at 29, but at 30, please see the answer. "Learned Counsellors in this background, Article 370
10 of the Constitution could only have been intended to remain effective until Constitution of the
11 State was framed."

12

13 **JUSTICE SANJAY KISHAN KAUL:** You are reading paragraph?

14

15 **DUSHYANT DAVE:** Page 30, para? Para 4.

16

17 **JUSTICE SANJAY KISHAN KAUL:** Just the paragraph above para 5?

18

19 **DUSHYANT DAVE:** Yes. "Learned Counsellors that this background Article 370 of the
20 Constitution could only have been intended to remain effective until Constitution of the State
21 was framed and the will of the people of J&K had been expressed. And thereafter this article
22 must be held to have become ineffective. So that modifications made by President in the
23 exercise of powers under this Article, subsequent to enforcement of Constitution of State
24 would be without any authority of law." Now, please see the answer to that, next paragraph.
25 'We are not impressed by either of these two arguments advanced by Mr. Rama Murthy. So far
26 as historical background is concerned, Attorney General, appearing on behalf of Government,
27 also relied to us that provisions of Article 370 should be held to be continuing in force.' Please
28 see that, My Lord. Mr. Daftari. 'Should be held to be continuing in force because the situation
29 that existed when this article was incorporated had not materially altered, and purpose of
30 introducing this article was to empower President to exercise discretion in applying Indian
31 Constitution. There is considerable force in this submission. Legislative history of this Article
32 cannot in this circumstances be of any assistance, that this article became ineffective after
33 Constituent Assembly of the State had framed the Constitution.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Completely against you, Mr Dave.

36

37 **DUSHYANT DAVE:** Please see that. There are other, much stronger reasons for holding.

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CHIEF JUSTICE DY CHANDRACHUD: Even para 5, which says, “Should be held to be continuing in force.”

DUSHYANT DAVE: Yes.

CHIEF JUSTICE DY CHANDRACHUD: And then 6...

JUSTICE SANJIV KHANNA: 7 in fact. 6 and 7.

CHIEF JUSTICE DY CHANDRACHUD: 6 says that the second submission, based on (2) of Article 370 does not find support, even from the language of that Clause, which only refers to the concurrence given by the Government of the State before the Constituent Assembly... and makes no mention at all of the completion of the work of the Constituent Assembly.

DUSHYANT DAVE: ' ...does not find support even from language of that clause, which only refers to concurrence given by government before the Constituent Assembly was...' That's what I'm submitting. That's a very limited... It's a temporary provision within a temporary provision.

CHIEF JUSTICE DY CHANDRACHUD: But, this seems to give the, seems to hold, that the article, in its entirety, would continue to govern even after the Constituent Assembly had completed its task.

DUSHYANT DAVE: No. Not as a whole.

JUSTICE SANJAY KISHAN KAUL: Read 7, para 7.

DUSHYANT DAVE: Let me read it, My Lord. Your Lordships may allow me to complete.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DUSHYANT DAVE: “There are, however, much stronger reasons for holding, that provisions of this article continued in force and remain effective even after Constituent Assembly of State had passed Constitution. The most important provision in this connection is contained in Clause 3 of Article, which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modification, and from such state as

1 President, may by public notification, provided recommendation of Constituent Assembly of
2 State, referred to in Clause 2 shall be necessary before President issues. This Clause clearly
3 envisages that article will continue to be operative, and can cease to be operative only on the
4 recommendation of Constituent Assembly of the State, President makes a notification
5 direction to that effect. In fact, no such recommendation was made by Constituent Assembly
6 of the State, nor was order made by President declaring article shall cease to be operative. On
7 the contrary..." That's important... "It appears that Constituent Assembly of the State made a
8 recommendation, that article should be operative with one modification to be incorporated in
9 the explanation to Clause 1 of the article. This modification in the article was notified by the
10 President, by Ministry of Law Order dated for 15th November '52, and laid down that from
11 17th November, article was to be operated with substitution of new explanation for old
12 explanation. This makes it very clear that Constituent Assembly of the State did not desire that
13 this article should cease to be operative, and in fact, expressed its agreement to the continued
14 operation of this article, by making a recommendation it should be operative with modification
15 only." My Lord, it can't be.. You can't now resort to 370(3) to repeal it. Constituent Assembly
16 has accepted it's a one-time exercise, My Lord. President has accepted, acted upon it.

17

18 **JUSTICE SANJAY KISHAN KAUL:** It is not repealed Mr...

19

20 **DUSHYANT DAVE:** No, it becomes inoperative.

21

22 **JUSTICE SANJAY KISHAN KAUL:** So, from time to time.... this is what I said earlier.
23 From time to time, C.O.s have been issued...

24

25 **DUSHYANT DAVE:** No, we are not on 370(1). I am on 370, Sub-Article 3.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Even the present exercise, other argument being
28 open, it is not removed, it has applied the other provision. As it exists, it exists in the statute
29 of the Constitution.

30

31 **DUSHYANT DAVE:** No, My Lord, they have repealed it. They have deleted it. They have
32 exercised 370(3) to delete it.

33

34 **JUSTICE SANJAY KISHAN KAUL:** All provisions...

35

36 **DUSHYANT DAVE:** I'll just tell Your Lordships.

37

1 **JUSTICE SANJAY KISHAN KAUL:** Now, as it stands is, all provisions of this Constitution,
2 amended from time to time, have been applied.

3

4 **DUSHYANT DAVE:** My Lord, they have abrogated 370, and applied all the provisions of the
5 Constitution. Both they have done. That was not permissible. Now see further, My Lord.

6

7 **JUSTICE SANJIV KHANNA:** Mr. Dave, we can just go a little earlier, paragraph 4.

8

9 **DUSHYANT DAVE:** Yes.

10

11 **JUSTICE SANJIV KHANNA:** First argument and the second argument, that will clarify the
12 situation. It's at page 29, 28 rather. The first argument was that...

13

14 **DUSHYANT DAVE:** Yes. The first argument was that this article contained temporary
15 provision which ceased to be effective after Constituent Assembly convened for purpose of
16 framing Constitution of J&K, had completed his task by framing Constitution. Reliance was
17 based on historical background in 370 included so and so... Then Your Lordships may omit.
18 The answer is, My Lord...

19

20 **JUSTICE SANJIV KHANNA:** And then it goes also...

21

22 [NO AUDIO]

23

24 **JUSTICE SANJIV KHANNA:** As you have done, and in this background, then it stated that
25 background of Article 370 could have been intended to remain effective till the Constitution of
26 the State was framed and the people of Jammu and Kashmir had been expressed and
27 thereafter must be ceased to have become ineffective, so that modifications made by the
28 President.....

29

30 **DUSHYANT DAVE:** Without authority. Now see the answer. [NO AUDIO] I'm grateful to
31 Your Lordships. Your Lordships, said no, but we are not on that. It's not our contention that
32 370(1), doesn't apply or President can't exercise powers under 370, Sub-Article 1. As, My Lord,
33 recorded at page, My Lord... PDF Page 31, Para 7. Para 7. That's the answer. That it was, My
34 Lord, left to be a Constituent Assembly. Otherwise, it makes mockery of the provision. If now
35 somebody else My Lord, complete stranger, went to decide. The Governor will make a
36 recommendation, or the President will make a recommendation, or Parliament will resolve.
37 Here what they have done is that Parliament resolved, that's an unusual procedure. It's neither

1 a Constituent Power nor a Legislative Power that Parliament exercised on 5th and 6th of
2 August 2019. Parliament resolves that President may issue an order under 370(3) abrogating
3 it. It's an extraordinary, My Lord, I must say Legislative Act, I mean Parliamentary Act. It's
4 neither Legislative nor Constituent. It's not a Constituent Power.... advised that because State
5 is under President's Rule, Parliament therefore is Constituent Assembly or Legislative
6 Assembly, and therefore this must be, could be done. But My Lord, it can't be because that has
7 come to an end. Speaking for Federal Court Chief Justice Kania, said this in 1949 FCR, My
8 Lord, *Jatindra Nath Gupta vs Bihar*, Your Lordship are aware of that judgment. 'As a
9 general rule, and unless it contains some special provision to the contrary after a Temporary
10 Statute has expired, no proceedings can be taken upon it as it ceases to have any further effect.'
11 370(3), is that. 1949, FCR, 595. It's at, Volume 30, Page 18. I'm not going to trouble reading it,
12 but this is the state and this has been recognized subsequently. Even General Clauses Act
13 doesn't apply Your Lordships to temporary statues and Article 367, expressly begins with a
14 non-obstante Clause subject to the contrary. Article 367 begins with a
15 non-obstante Clause says subject to the contrary, unless context otherwise requires. Now, My
16 Lord 370 therefore, context is completely different.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Does apply. Section 21 will apply... what you said.

19

20 **DUSHYANT DAVE:** I am looking to the statute, My Lord, and making submission because
21 Federal Court judgment was not granted. I'm sure you will get opportunity.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** No. This judgment says that the General Clauses
24 Act will apply.

25

26 **DUSHYANT DAVE:** Yes. Yes. I've seen that, My Lord. I have seen that. I have marked that
27 portion also, but My Lord my respectful submission, is that here, because of the context of
28 370(3), I respectfully submitted in respect of Sub-Article 3, there is no question that it should
29 apply. Now My Lord, one judgment that I would like to place, before Your Lordships for
30 consideration is My Lord... So, My Lord this is my second argument that My Lord, 370 Sub-
31 Article 3 stood exhausted, and therefore, President neither could exercise powers, nor could
32 Parliament recommend to the President to exercise that power. Now My Lord, just to take,
33 look at the Counter Affidavit which has been filed on behalf of Union of India. My Lord,
34 Common Counter on all it says, Lord, it's a counter, which is for all comprehensive counter,
35 they call it. PDF 5, Common Counter.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** This will be in the paper book, right?

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DUSHYANT DAVE: Yes, My Lord.

COURT MASTER: 501.7.

CHIEF JUSTICE DY CHANDRACHUD: Oh, 501.7.

DUSHYANT DAVE: Thank you, Mr. Court Master.

COURT MASTER: Page 2990... 501.7

DUSHYANT DAVE: Justice Surya Kant has? Mr. Court Master kindly...

JUSTICE SURYA KANT: Page? PDF?

COURT MASTER: 2990.

DUSHYANT DAVE: 2990.

CHIEF JUSTICE DY CHANDRACHUD: Which is the internal page? Mr. Dave?

DUSHYANT DAVE: Your Lordships may kindly turn to page 13. Do Your Lordships have Page 13?

CHIEF JUSTICE DY CHANDRACHUD: It will be 3104?

DUSHYANT DAVE: Sub para 7...7 or 8, what is it? 8. As has been explained in greater detail...

CHIEF JUSTICE DY CHANDRACHUD: One second, just one second, give me one second.

DUSHYANT DAVE: [NO AUDIO] Mr. Mehta.

CHIEF JUSTICE DY CHANDRACHUD: 3005.

JUSTICE B. R. GAVAI: At page 13.

1 **JUSTICE SANJAY KISHAN KAUL:** Page is 3005.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** PDF 3005.

4

5 **DUSHYANT DAVE:** 'As has been explained in greater detail in later paragraphs of this
6 affidavit, it has been observed, it was observed over years, existing regime under Article 370
7 and exemptions, modifications carried out to the provisions of Constitution of India by
8 Presidential Orders, issued under 370(1)(d), where impeding rather than enabling facilitating
9 full integration of erstwhile State of Jammu and Kashmir with rest of the country which was
10 neither in national interest nor in interest of State of Jammu and Kashmir. How impeding?
11 Somebody makes a statement from Home Ministry. I'm giving no details as to how it has
12 impeded. Law and Order problems certainly exists but it is not because of applicability or
13 otherwise of the Constitution. Now please turn over, My Lord. Kindly turn to paragraph,
14 straight away to paragraph, My Lord page 18... Page 18. Part of para 8, My Lord, (v). Your
15 Lordships have that? Page 20, perhaps PDF page 20.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dave, are you inviting the court to review the
18 wisdom of the decision of the government, on the abrogation of 370?

19

20 **DUSHYANT DAVE:** Yes, My Lord.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** So you're now, you're saying that judicial review
23 should reassess the basis of the government's decision that it is not in the national interest to
24 continue with Article 370.

25

26 **DUSHYANT DAVE:** When Chief Justice Chandrachud said in '88, that My Lord, this theory
27 that was developed in United States Supreme Court, that political decisions, Court shouldn't
28 go into. That has now, My Lord... that was given... and in *Poudyal*, Your Lordships expressly
29 rejected that argument.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** But judicial review would be confined to a
32 constitutional violation. Constitutional violation, certainly, it's open to, amenable to judicial
33 review.

34

35 **DUSHYANT DAVE:** My Lord, I would respectfully submit that even subject...

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** There's no doubt that if there's a constitutional
2 violation, this court has a jurisdiction to review. Of course, that's undoubted.

3

4 **DUSHYANT DAVE:** Let me put it this way. President is undoubtedly exercising powers
5 under 370, purportedly. In *Shamsher Singh* Your Lordships have said, that President can
6 only exercise Presidential power in constitutional sense. No other sense. Not personal.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** But the wisdom underlying the decision to
9 abrogate...

10

11 **DUSHYANT DAVE:** My Lord, there is no question of wisdom. President can only look at
12 370. President has to be advised by his advisors, that 370(3) does not exist today.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Then, we are back, therefore, to the
15 Constitutional argument. Constitutional argument, of course, judicial review is available, and
16 we are addressing ourselves. There is no doubt about it.

17

18 **DUSHYANT DAVE:** I am on fraud on Constitution, Your Lordships are right.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Fraud on the Constitution.

21

22 **DUSHYANT DAVE:** I am on fraud on Constitution, that President is today exercising a
23 power without any material whatsoever, without any justification whatsoever, and to wish it
24 away by simply saying that it was impeding. My Lord, surely, this Court is not going to accept
25 that kind of very cavalier affidavit on part of Union of India. The argument was this, that these
26 are political questions, don't go into it. Your Lordships had nothing... we will go into them.
27 And now, after *Bommai*, Your Lordships have expanded the horizon. Your Lordships have
28 gone, My Lord, to an extent... what I... Now, just see, My Lord, two more things in this affidavit.
29 Kindly turn to, My Lord, paragraph 15. It's a bundle of contradiction, their affidavit.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Paragraph 15?

32

33 **DUSHYANT DAVE:** Yes, My Lord.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** What PDF page would that be?

36

37 **DUSHYANT DAVE:** PDF 25... Thank you Mr. Court Master

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CHIEF JUSTICE DY CHANDRACHUD: 3015.

DUSHYANT DAVE: “I state and submit that Constituent Assembly of erstwhile State of Jammu and Kashmir, did not in any manner, deviate”. Please see that, My Lord. “Did not, in any manner, deviate from provisions of Constitution of India, which would be applicable to erstwhile State of Jammu and Kashmir. The Constitution of J&K adopted by this Constituent Assembly included Section 3, which unequivocally stated, State of Jammu and Kashmir is, and shall be, an integral part of Union of India. Additionally, Section 5 stated executive and legislative power of state extends to all matters, except those with respect to which Parliament has power to make laws for state under provisions of the Constitution of India”. There can be no doubt...

CHIEF JUSTICE DY CHANDRACHUD: Mr. Dave, do we really need to labour on the Counter? We have to... we have interpret the Constitutional provision as it stands. How is this relevant?

DUSHYANT DAVE; Your Lordships are right, I bow down. I’m submitting that there are no reasons available in Presidential exercise, nor are they given in, My Lord, Counter. It's bereft of any reasons. The whole entire exercise. That's my respectful submission.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

DUSHYANT DAVE: Now, see last sentence. “There can be no doubt, therefore, Jammu and Kashmir became integral part of India, and Constituent Assembly, an elected body had also given its imprimatur to the provisions of Constitution of India”. Now, My Lords, please see, in this regard two decisions. My Lord, kindly turn to the judgment of, My Lord [NO AUDIO] My Lord, on fraud. Just see, My Lord, one paragraph of this judgment.

JUSTICE SANJAY KISHAN KAUL: Now, what are you referring?

DUSHYANT DAVE: My Lord, this is the Constitution Bench judgment in *Mudaliar* on fraud on the Constitution. Just see, My Lord this interpretation. And then I'll take to the next...

CHIEF JUSTICE DY CHANDRACHUD: Where will we get it, Mr. Dave?

DUSHYANT DAVE: Volume 28, Case Law, Volume 28. Page 8. 15. 8 at 15.

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CHIEF JUSTICE DY CHANDRACHUD: Volume 28, Case Law compilation.

DUSHYANT DAVE: PDF Page 19. I'm sorry this leads us to the consideration....

CHIEF JUSTICE DY CHANDRACHUD: *Mudaliar* is at page... its internal page 7, right?

JUSTICE SURYA KANT: Para 16.

DUSHYANT DAVE: At Page 19.

CHIEF JUSTICE DY CHANDRACHUD : At what Para?

JUSTICE SURYA KANT: Para 16.

DUSHYANT DAVE: Para 1-6. 'These leads us to the consideration of the question of scope of doctrine of fraud on power. In *Gajpati Narayan*, Mukherjee. Justice Mukherjee as he then explained, the doctrine. It may be made clear that outside doctrine of colourable legislation does not involve any question of bona fide or malafide. The old doctrine resolves into a question of competency of a particular legislation. If Legislature is competent to pass law motives which impended are irrelevant. On the other hand, it Legislature lacks competency, question of motive does not arise whether a Statute is constitutional or not that's always the question of power. Learned Judge describes how Legislature may transgress the limit.' Now, this is important. 'Such transgression may be patent, manifest or direct, but it may also be disguised, overt or indirect. And it is to these later class of cases that expression colourable legislation has been applied in certain judicial pronouncements.' Now My Lord, In *D. C. Wadhwa*, Your Lordships go further. And that is that page... Parliamentary Recommendation, My Lord, in my respectful respect suffers from complete colourable exercise of Parliamentary Powers. It was neither exercising constituent power under 368, nor any legislative power. Resolutions are passed by Parliament on many issues, sometimes not even to honour some individuals, or to say some other things, or to recognize great events in the country. So, Parliament here passes resolution and says, Mr. President, you kindly do this. That, My Lord, respectful submission is a pure act outside Parliamentary Power and they did it only because the assembly was dissolved purporting to act as assembly of J&K. That we are now, since the assembly is dissolved, therefore, President has the powers and Parliament has powers under 356. Volume 19, My Lord. Page 118, just one para. One para. My Lord, Para 7, PDF page 131.

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CHIEF JUSTICE DY CHANDRACHUD: Which judgment is this?

DUSHYANT DAVE: My Lord, this is *DC Wadhwa*.

CHIEF JUSTICE DY CHANDRACHUD: One second. PDF Page?

DUSHYANT DAVE: Of Volume 19, 1-9, 118 at 131.

CHIEF JUSTICE DY CHANDRACHUD: No, No. That's some other judgment .

JUSTICE SANJIV KHANNA: That's *State of Tamil Nadu*.

CHIEF JUSTICE DY CHANDRACHUD: *State of Tamil Nadu versus Padmavati Ammal*.

JUSTICE SURYA KANT: Volume 19.

JUSTICE SANJIV KHANNA: 19.

JUSTICE SURYA KANT: PDF, I think 131. You are referring *DC Wadhwa*?

DUSHYANT DAVE: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: No, we have some other judgment, *Padmavati Ammal*.

JUSTICE SANJAY KISHAN KAUL: Volume 19, what is the PDF Page number?

CHIEF JUSTICE DY CHANDRACHUD: Oh, oh, yes, it's 118. Actually, it's immediately after that it's 118, 118.

CHIEF JUSTICE DY CHANDRACHUD: Page 118 at 131.

DUSHYANT DAVE: 131, para 7. I will not trouble Your Lordships reading that. The emergency power of the Governor was in the context of ordinances. But just above where

1 Justice Mukherjee's dictum in *Gajapati Narayan* is cited, just above that. Four lines above
2 that.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** At page 133.

5

6 **DUSHYANT DAVE:** 133. 'It is settled law...' My Lord, this is what I placed for Your
7 Lordship's kind consideration.

8 'It is settled law that a constitutional authority cannot do indirectly what it is not permitted to
9 directly. If there is a constitutional provision inhibiting the constitutional authority from doing
10 an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That
11 would clearly be a fraud on the Constitutional provision.'

12 This is precisely what was pointed out by Justice Mukherjee and that's my respectful
13 submission, that My Lord... and, My Lord, [UNCLEAR] is also considered. Now, My Lord, last
14 judgement that I placed for Your Lordship is the UP Assembly Case, Volume 30, PDF Page 73.
15 Volume 30, PDF 73 at 92.

16

17 **JUSTICE SANJAY KISHAN KAUL:** Volume?

18

19 **DUSHYANT DAVE:** Para 38. Volume 30, My Lord, Volume 30. My Lord, this is the Special
20 reference.

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22 **JUSTICE SURYA KANT:** PDF?

23

24 **DUSHYANT DAVE:** PDF 30. Sorry. PDF 73, Volume 30, PDF 73 at 92, para 38.

25

26 **JUSTICE SANJIV KHANNA:** What's the name of the case?

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** It is that three powers, privileges and immunities
29 of state, UP case.

30

31 **JUSTICE SANJAY KISHAN KAUL:** What page are you referring to Mr. Dave?

32

33 **DUSHYANT DAVE:** My Lord, at para 38, 92.

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35 **JUSTICE SANJIV KHANNA:** 92.

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37 **DUSHYANT DAVE:** Page 92, para 38.

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JUSTICE SANJAY KISHAN KAUL: In dealing with this question?

DUSHYANT DAVE: Yes, My Lord, grateful. All Your Lordships have that? My Lord, Justice Khanna?

JUSTICE SANJIV KHANNA: Just give me a minute. Paragraph number?

DUSHYANT DAVE: 38.

JUSTICE SANJIV KHANNA: 38, okay.

DUSHYANT DAVE: 'In dealing with this question, it's necessary to bear in mind one fundamental feature of Federal Constitution. In England, Parliament is sovereign and in words of Dicey, the three distinguishing features of the principle of parliamentary sovereignty are that Parliament has right to make or unmake any law whatever, that no person or body is recognized by law of England is having a right to override or set aside legislation of Parliament. And that right of power of Parliament extends to every part of Queen's dominion. On the other hand, essential characteristic of federalism is distribution of limited executive, legislative, and judicial authority among bodies which are coordinate with and independent of each other. Supremacy of Constitution is a fundamental to existence of a federal State, in order to prevent either the legislature of Federal Units or those of the Member States from destroying or impairing that delicate balance of power...' That's precisely what has happened, destroyed the delicate balance of power....which satisfies the particular requirements of States, which are desirous of Union, but not prepared to merge their individuality in unity.' My Lord, you can't rewrite history and a Constitutional history can certainly be never rewritten. That's why it's durability. 'This supremacy of Constitution is protected by the authority of an independent judicial body.' Your Lordships, 'Independent judicial body to act as interpreter of a scheme of distribution of powers. Nor is any change possible in the Constitution by the ordinary process of Federal or State legislation.' Ordinary process, 370, President issues, Parliament pass resolution.

CHIEF JUSTICE DY CHANDRACHUD: Yes, Mr. Dave.

DUSHYANT DAVE: Thus, the dominant characteristic of British Constitution cannot be claimed by a federal Constitution like ours. Then, My Lord, next para. 'Our legislature, have undoubtedly, plenary powers. But these powers are controlled by basic concepts of the written

1 Constitution itself, and can be exercised within legislative fields allotted to their jurisdiction
2 by three Lists under the Seventh Schedule. But beyond the Lists, legislatures cannot travel.
3 They can, no doubt, exercise their plenary legislative authority and discharge their legislative
4 functions by virtue of powers conferred on them by relevant provisions of the Constitution,
5 but the basis of power is Constitution itself.”

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr Dave, we have read that. Thank you.
8 Which is the next judgment?

9

10 **DUSHYANT DAVE:** My Lord, one sentence in paragraph 40, last sentence, PDF page 93.
11 “Therefore, there can be no doubt, that the sovereignty which can be claimed by Parliament in
12 England, cannot be claimed by any legislature in India in the literal, absolute sense”.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

15

16 **DUSHYANT DAVE:** So, My Lord, whichever way one looks at it...Your Lordships may look
17 at the *UP Assembly* case, or Your Lordships may look at *Shamsher Singh’s* case If My
18 Lord, the exercise of power by the Constitution or by the Parliament has to be done under the
19 Constitution itself and in the Constitutional sense, then in my respectful submission,
20 Constitutional sense or Constitutional provisions prohibited... prohibited both the President
21 and Parliament from touching Article 370, Sub-Article 3, in any manner, to abrogate it. There
22 is no power to abrogate 370 under 370(3), because as I respectfully submitted, that, My Lord,
23 it has lived its purpose, its object, and, therefore, it no longer is available for exercise. In any
24 case, the exercise suffers from a fraud on the Constitution, because it has been done completely
25 contrary to Constitutional provisions. And, My Lord, the principle of federalism, principle of
26 democracy, which *Bommai* has so beautifully escribed, because ultimately... That's why, My
27 Lord, Constitutional framers were very conscious, let the people of Jammu & Kashmir decide
28 how they want their relationship. They decided, for all times to come. It was not My Lord, the...
29 It was not a temporary exercise by Constituent Assembly. That's why I said, it would be
30 travesty of justice that Constituent or Legislative Assembly of Jammu and Kashmir, were now
31 to be given authority to say, that no Constitution of India will not apply to us. That power also,
32 for them, stands exhausted. So, My Lord, those are my respectful submissions. Therefore, I
33 respectfully submit... My Lord, there is one aspect, which I must tell you. My Lord, in my
34 written submissions I have quoted from the 2019 manifesto of the Bhartiya Janta Party. In
35 that, My Lord, they expressly said that we will work towards abrogating Article 370. My Lord,
36 in my respectful submission, this Court has already said in the 2013 judgment, that these
37 manifestos can't be contrary to Constitutional scheme, one, and directed EC to issue

1 guidelines. 2015, EC issued guidelines, and told all political parties that your manifestos must
2 be within the Constitutional scheme and spirit. Now, My Lord, today, because you have
3 majority in Parliament, you have done not for any purpose. So, My Lord, this argument of
4 impeding, etc. is not relevant at all. It doesn't exist. The only reason you have done it, because
5 you told people of India to vote for you, because I will go and abrogate Article 370. That My
6 Lord, shows that the power has been exercised for colourable considerations. The actual
7 exercise is, My Lord, fraud, with clearly... My Lord, I would say, irrelevant considerations,
8 which cannot apply to broad Constitutional exercise. The President is not a rubber stamp. He
9 had to seal this. Yes, you have the majority in Parliament, but majority doesn't speak, My Lord.
10 It's not a Constituent power. You didn't want to go, therefore, to the majority of both Houses
11 of Parliament. You didn't want to do that. You didn't want to go to legislature, because you are
12 now taking away out of five Lok Sabha members and four Rajya Sabha members. Once you
13 divide territory, those members, their representation is gone. If the representation is gone by
14 virtue of Article 368 (1), you are supposed to go to all... many state legislatures and take their
15 approval, because they are also concerned. 368 is very beautifully worded. There are so many
16 safeguards in it.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, thank you, Mr Dave.

19

20 **DUSHYANT DAVE:** So those are my respectful submission. Deeply obliged, your Lordships.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you now, thank you, Mr. Dave. Who will
23 argue now?

24

25 **DUSHYANT DAVE:** It's been a privilege. Grateful.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Dvivedi will argue now? Oh, Mr. Naphade
28 will argue.

29

30 **SHEKHAR NAPHADE:** There are few aspects which I would like to highlight. The burden
31 of my song is very simple beneath the apparent constitutionality lies the [UNCLEAR]. Now
32 how do I demonstrate that. So in the first place, it has been argued extensively that the effect
33 of Constitutional Order 272 is Amendment of Article 370, Clause 3 this has been extensively
34 argued. This has been done via the root of Article 367. Now 19(1)(b). Sorry, 370(1)(d)
35 empowers, the President to apply the provisions of the Constitution to Jammu and Kashmir.
36 Now with such exceptions and modification. These are the words used. Now the question that
37 arises is whether this power to modify, whether there are any implied limitations on this

1 power. This is the first, my submission. Now take for example, while applying the Indian
2 Constitution to Jammu and Kashmir the modification says Article 21 will not apply. Article 14
3 will not apply. Will it or will it not trouble your conscience? So therefore, my first submission
4 is that there are implied limitations on this power to modify. And what are those limitations
5 we'll examine. So what have they done? Instead of Constituent Assembly it is replaced by
6 Legislative Assembly, whether this is permissible, whether it falls within the ambit of the term
7 modification or it goes far beyond that. So, if Your Lordships, look at the Constitutional Order,
8 272 it adds the word. In the Constitution of India, as its originally stands there is no such
9 definition. So it's an addition. I am prepared to assume for the time being that modification
10 can take in its, within its compass, even addition. But the question is that you are replacing a
11 fundamental concept. The core concept of Constituent Assembly by another legal concern
12 known as Legislative Assembly. The fundamental difference between these two concepts is
13 well known. Now therefore Your Lordship, will see that a Legislative Assembly is the product,
14 is a creature of Constituent Assembly. Now, therefore, in my respectful submission, this
15 exercise is not permissible. Now take another example which is to be found in the judgment of
16 Justice Khanna in *Kesavananda Bharathi*. I will invite Your Lordships attention. His
17 Lordship had raised the question that suppose the Parliament in exercise of its Constituent
18 Power says that the existing Parliament will continue for 50 years, will it or will it not be a
19 mockery? Kindly see that paragraph ..

20

21 **SHEKHAR NAPHADE:** In the Judgment of Justice Khanna, Your Lordship will get it in
22 PDF Page... So the PDF page is 7426.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Which volume?

25

26 **SHEKHAR NAPHADE:** Volume 15, the PDF page is 7426, so sorry, I stand corrected, 527,
27 571.

28

29 **JUSTICE SANJIV KHANNA:** Volume 15?

30

31 **SHEKHAR NAPHADE:** 571.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 15.

34

35 **SHEKHAR NAPHADE:** And the paragraph is 1423. Kindly see what His Lordship says.

36

37 **JUSTICE B. R. GAVAI:** It's at page?

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SHEKHAR NAPHADE: Page 1423. Sorry. Paragraph 1423 , PDF page 571. I get confused between PDF page and the page that I have.

JUSTICE SANJAY KISHAN KAUL: Paragraph?

SHEKHAR NAPHADE: Paragraph 1423, sir. So this is how that Para runs, 'Apart from the fact that the best guarantee against the abuse of power of amendment.' Part 3 of the Constitution. 'There is other aspect to the matter. Even if Part 3 may be left intact, a mockery of the entire parliamentary system can be made by amending Articles 85 and 172, which are not in Part 3, and according to which the life of the Lok Sabha and the Vidhan Sabha of the State unless soon resolved, would be five years. And by providing that the life of existing Lok Sabha and Vidhan Sabha shall be 50 years. This would be a flagrant abuse of the power of amendment. And I refuse to believe, etc.' Now, this is precisely the situation. The second Judgment on which, of course this is the only observation met in the Judgment. I'm not saying that this constitutes the ratio, but it is something which Your Lordship will bear in mind. Now kindly see the second judgment on which I place Your Lordships. That is [UNCLEAR] case.

CHIEF JUSTICE DY CHANDRACHUD: [UNCLEAR]

SHEKHAR NAPHADE: [UNCLEAR] case and it is there in Volume 25 and the PDF page starts at page 524 and I invite Your Lordship's attention to page 546. On that page, section 7.

JUSTICE SANJIV KHANNA: Which is the PDF number?

SHEKHAR NAPHADE: 546. On that page, Your Lordship will find Section 7 has been quoted.

CHIEF JUSTICE DY CHANDRACHUD: Para?

JUSTICE SANJAY KISHAN KAUL: Could you please repeat the page?

SHEKHAR NAPHADE: 546.

JUSTICE SANJAY KISHAN KAUL: 524 I have, 546 now.

SHEKHAR NAPHADE: At para 41, My Lord.

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JUSTICE SANJIV KHANNA: Which is the volume, sorry?

SHEKHAR NAPHADE: Volume 25. So kindly see where, Their Lordships have quoted the section in para 41, 'The provincial Government may by notifications in the Official Gazette extend with such restrictions and modifications... to the province of Delhi or any part thereof, any enactment which is involved in any part of the British India, at the date of such notification.' Now we are concerned with the word modification. Now this has been construed by, this is a seven bench judgment and if Your Lordships come to first Justice Chief Justice Kania's observations on this. Your Lordship will come to Page 726 of the PDF... So para 354... "The power to modify an act in its extension by the order of the subordinate authority, has also come in considerable discussion. Originally, when the power was conferred on the subordinate authority to apply existing legislation to specified areas, it was given only to apply the whole or a portion thereof. That power was further expanded by giving a power to restrict its application also. In the next stage, however, it was given to modify, so as to adapt the same, to the local conditions. It is obvious, that till this stage, the clear intention was, that the delegate on whom the power was conferred, was only left with a discretion to apply what was considered suitable as a whole or in part, and to make adaptations, which became necessary because of the local conditions. Nothing more. Only in the recent years, since some acts, power of modification is given without any words on limitations on that power. The learned Attorney General contended that the word 'modify', according to the Oxford Dictionary means - to limit, restrain, to assuage, to make less severe, rigorous, or decisive, to tone down. It is also given the meaning - to make partial changes to alter without radical transformation." Sir this is important. "He therefore contended, that if the donee of the power exceeded the limits of the power of modification beyond the sense, that would be exceeding the limits of the power, and to that extent the exercise of the power may be declared invalid. He claimed that no longer the power under the term 'modification'. On the other hand... so and so words exercises, the word 'modify' has been defined as meaning vary, extend or enlarge, limit or restrict. It has been held that modification implies an alteration. It may narrow or enlarge the provisions of the former act. It has been pointed out, that under the powers conferred by the Delhi Laws Act, the Central Government has extended the application of the Bombay Debtors' Relief Act to Delhi. The Bombay Act limits its application to poor agriculturists whose agricultural income is less than so and so. Under the power of modification conferred on it by the Delhi Laws Act, the Central Government has removed this limit on the income, with the result that the principles, policy and machinery to give relief to the poor peasants or agriculturists with an income of less than Rs. 500, is made applicable in Delhi to big landlords, even with an

1 income of 20 lakhs. This shows how the word 'modification' is understood and applied by the
2 Central Government and acquiesced in by the Indian Legislature”.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we have seen that. Yes.

5

6 **SHEKHAR NAPHADE:** Now this is the classic example, and this is precisely what has
7 happened. There is a qualitative difference, conceptual difference between the Constituent
8 Assembly and the Legislative Assembly. So, the same thing has been repeated. I'll just give to
9 Your Lordships the paragraph numbers, that is, Justice Mahajan - paragraph 414, PDF page
10 is 760. Justice Vivian Bose - para 316, PDF page 698. Justice Fazl Ali – para 46, PDF page 553,
11 and Justice Mukherjee - para 155, PDF page 613. So, Your Lordships have laid down, that there
12 are implied limitations on the power to modify. And the one classic example I gave was,
13 suppose they say no Article 21 in Jammu and Kashmir. Whether such modification can be
14 sustained? Now, this judgment was cited in *Puranlal Lakhanpal*, and I want to show to
15 Your Lordship what the judgment says. So kindly come to the judgment in *Puranlal's* case.
16 Your Lordship will find it in Volume 1, PDF page 24-26. Judgment was delivered by Your
17 Lordships Justice Wanchoo, fortunately there is only one judgment so that we understand the
18 ratio.

19

20 **JUSTICE SANJIV KHANNA:** Volume 1?

21

22 **SHEKHAR NAPHADE:** We are grappling to find out what is the ratio of *Kesavananda*
23 case.

24

25 **JUSTICE SANJIV KHANNA:** Page Number?

26

27 **SHEKHAR NAPHADE:** Sorry the, Page is, PDF Page is 25. The Judgment begins at Page
28 24 and it is in Volume 1. Now kindly see My Lord, Article 81 was modified. Now this is the
29 modification 'Article 81 shall apply to subject to the modification that the representatives of
30 the State in the House of the people shall be appointed by the President on the
31 recommendations of the Legislature of the State.' So instead of a Direct Election the Indirect
32 Election that the Legislature of the State shall recommend the names of persons who are to be
33 appointed as Members of the Parliament to represent J&K. Now this was impugned on the
34 ground that the modification crosses the legitimate limits. Now in paragraph 3, Your
35 Lordships, have said on Page 25. PDF page 25. This is what the Paragraph 3 says. And
36 according to me this is the ratio. 'Before we consider what the word modification means in the
37 context of Article 370(1), let us see what the President has actually done in the matter of

1 modification of Article 81. The modification prescribes that the 6 seats in the House of the
2 People from State of Jammu & Kashmir would be filled by nomination by the President on the
3 recommendation of the Legislature of the State. Now in form seats will be filled by nomination
4 by the President. But in reality what the modification provides is indirect election in place of
5 direct election to these seats in the House of the People. The modification lays down that the
6 President will nominate members to these 6 seats on the recommendation of the Legislature
7 of the State. The President must therefore nominate only those who have been recommended
8 by the Legislature of the State, which is elected on Adult Suffrage. Now, the only way the
9 Legislature can make a recommendation for this purpose is by voting. Therefore, in effect the
10 modification made by the President is that the 6 seats through the House of the People from
11 the State of Jammu and Kashmir will be filled by indirect election and not by direct election.
12 The element of election still remains in the matter of filling those seats. Though it has been
13 made indirect. In these circumstances, it may not be possible to say that there are there has
14 been a radical alteration. Now this proposition itself may be debatable, but the point is that in
15 paragraph 3 Your Lordships have said that there is no radical alteration. Now in Paragraph 4,
16 then Their Lordship say, but assuming that the introduction of the entire List selection by this
17 [UNCLEAR] is a radical alteration and that is permissible. Now, how do I deal with this para
18 4? So, my submission is that two issues arose before the Court. First, whether it's a radical
19 alteration and second, assuming it's a radical alteration, whether it is within the ambit of
20 370(1)(d). Now the second issue did arise for the Court consideration. But in my respectful
21 submission, the determination of this issue is an obiter and not ratio. What is the difference
22 between a ratio and an obiter. A ratio is that proposition which the court has to decide has to
23 lay down so that the case is finally disposed of.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** So according to you once the Court has held that
26 this was not a radical modification. The question is whether a radical modification is
27 permissible really didn't arise?

28

29 **SHEKHAR NAPHADE:** And for this purpose I rely upon a judgment of the Bombay High
30 Court. Unfortunately, it was not there in the... but we have circulated, I'm.. so I am told and I
31 just want to show to Your Lordships how Chief Justice Chagla, deals with this concept of ratio
32 and obiter.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** On the second aspect, what was the quote? Just,
35 let's see that.

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37 **SHEKHAR NAPHADE:** The second?

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CHIEF JUSTICE DY CHANDRACHUD: The obiter. Let's see the obiter.

SHEKHAR NAPHADE: The paragraph four is an obiter according to me.

CHIEF JUSTICE DY CHANDRACHUD: Let's read that.

SHEKHAR NAPHADE: Yes. All right. I'll read that. 'But even assuming that the introduction of the indirect election by the...

CHIEF JUSTICE DY CHANDRACHUD: Yes, Mr. Naphade.

SHEKHAR NAPHADE: Your Lordships want me to read paragraph 4...

CHIEF JUSTICE DY CHANDRACHUD: Just a few lines from that para. And then, you can move on to the next.

SHEKHAR NAPHADE: There's something which I want to bring to Your Lordships notice. This, if Your Lordship, sees the first para of the judgment where it refers to the Presidential Order of 1954, in the very first para of the judgment. Now, Article 81 was amended, was modified with the concurrence of the state government. So, there was a democratic element in that. Now in this context, kindly see para 4. Some of the observations in Para 4 as I said, are too wide and if they are accepted in toto, the entire Constitution of India can never be applied to Jammu and Kashmir. That is, if taken to its logical conclusion. But even assuming that the introduction of indirect election by this modification is a radical alteration of the provisions of Article [UNCLEAR], the question still remains whether such a modification is justified by the word modification used in Article 370(1). We are here, dealing with the provision of a Constitution which cannot be interpreted in any narrow or pedantic sense. So I paused here for a minute. Their Lordships are now comparing Delhi Laws case and this provision in the Constitution. Now my humble submission is that as far as Delhi Laws is concerned, it is ordinary statute. Therefore, there can be a more flexibility.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SHEKHAR NAPHADE: But when you are dealing with a Constitutional document, the limitations should be on a higher scale. This point is missed out. Kindly see further. The

1 question that came for consideration in the Delhi laws case was with respect to the power
2 delegate, delegation.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Naphade, I think we've got your point.
5 That you have to have some implied limitations. And therefore, these observations in para 4
6 are of a very broad amplitude.

7

8 **SHEKHAR NAPHADE:** Your Lordship, see para 4...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** We'll have to hear the other side. You made your
11 point. We'll hear the other side on this.

12

13 **SHEKHAR NAPHADE:** Completely wipe out.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** All right. What is the next point Mr. Naphade?

16

17 **SHEKHAR NAPHADE:** So, my next point is, which I will indicate at the end because I have
18 to deal with Article 3 and 4, as briefly as possible. But my next point is what happens to the
19 Constitution of Jammu and Kashmir. That's a thorny question. So if I recapitulate the facts
20 which have been extensively set out in *Prem Nath Kaul* case, and which has been cited
21 before Your Lordships..

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** What is the submission on this aspect?

24

25 **SHEKHAR NAPHADE:** The submission, which I want to make is this, so it traces out... the
26 judgment traces out how the sovereignty came to be vested in the Yuvraj, right from 1925 to
27 1951... '49, and thereafter two important developments. Yuvraj accepts the Constitution of
28 India but that is in the light of Clause 8 of the Treaty of Accession. Clause 8 recognizes that
29 barring a few items, the sovereignty of the Maharaja remains. Now this sovereignty, which is
30 recognized by the Accession Treaty, where and when does it evaporate? That's the question.
31 Because as a result of this Constitutional Order and the Reorganization Act, the result is the
32 Jammu and Kashmir Constitution comes to an end. Now let me elaborate this point first.

33

34 **JUSTICE SANJIV KHANNA:** But that's... that's postulated. And over the passage of time,
35 period of time, what was left as pointed out by Dr. Dhavan was only limited. Very very limited.

36

1 **SHEKHAR NAPHADE:** Several provisions came to be applied, no difficulty. But the core
2 of the J&K Constitution has remained intact till 8, which I'll indicate to Your Lordships.
3 Therefore, Your Lordships will see that it is in 1951 that Yuvraj convened the Constituent
4 Assembly. To frame the Constitution. What is the authority by which he could do so? His
5 authority to convene a Constituent Assembly has not been questioned anywhere. So therefore,
6 J&K Constitution is [UNCLEAR], is a constitutional document. That's the only conclusion
7 possible. Now my submission is going to be that no matter how widely you interpret the power
8 under 370(1)(d), the core of the J&K Constitution must remain. And what is that core? So
9 kindly come to J&K Constitution, that is in Volume 2. So in the first place the State ..

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Can you itemize the core? Can you just sort of
12 summarize what should be the core?

13

14 **SHEKHAR NAPHADE:** The core I'm indicating that is part 5, and Part 6 of the J&K
15 Constitution.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** That is the Executive?

18

19 **SHEKHAR NAPHADE:** That is part 5 is Executive, and part 6 is the Legislature.

20

21 **JUSTICE SANJAY KISHAN KAUL:** Additional document Volume 2.

22

23 **SHEKHAR NAPHADE:** Sir, when the Constitution was ushered in ...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Which is one more provision? Part 5 is the...

26

27 **SHEKHAR NAPHADE:** Is the Executive is the Executive. Governor, Council of ministers...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Part 6 is a Legislature. And what else?

30

31 **SHEKHAR NAPHADE:** And the Legislature..

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** These two?

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35 **SHEKHAR NAPHADE:** And kindly see..

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37 **CHIEF JUSTICE DY CHANDRACHUD:** You said one more...

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SHEKHAR NAPHADE: Section 3 and 4. Sections 3.

JUSTICE B. R. GAVAI: Document compilation.

JUSTICE SANJAY KISHAN KAUL: Document volume.

SHEKHAR NAPHADE: And 5. That is part 2.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SHEKHAR NAPHADE: Now, the State of Jammu and Kashmir has its origin also in this, its continuation. It originally existed. There's a long history which has been set out in *Prem Nath Kaul's* case, right up to Independence 1947 Act. Treaty of Accession et cetera. Now kindly see the territory, Section 4. The territory, the PDF page is... 18. 'The territory of the State shall comprise all territories which on the 15th day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State .' Now this is a territorial integrity of the state. Now, there is no provision in the Constitution of India by which the J&K Constitution can be abrogated. There is no express provision. The only question is, whether through the route of 370(1)(d), this can be achieved? Now this depends upon the question, because Article 370 itself recognizes the Constituent Assembly. And the concept of Constituent Assembly is that it is a sovereign body. Now there can be a Constitution within a Constitution. That is something which Your Lordships have recognized. I'll just indicate to Your Lordships. That Your Lordships will find in the judgment of *Kesavananda Bharati* . Para 2072, I'll just indicate, PDF page 790, 91.

JUSTICE SANJAY KISHAN KAUL: Volume?

SHEKHAR NAPHADE: Volume 15, Sir.

CHIEF JUSTICE DY CHANDRACHUD: We'll look at it. Just give us a page. Page 7-0...?

SHEKHAR NAPHADE: 790.

CHIEF JUSTICE DY CHANDRACHUD: It says that there can be a Constitution within a...

1 **SHEKHAR NAPHADE:** That's what...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Whose judgment is that?

4

5 **SHEKHAR NAPHADE:** Justice Chandrachud. Now therefore, Your Lordships see the
6 existence of...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

9

10 **SHEKHAR NAPHADE:** 'Thus, the true ground of division by virtue of which the nature of
11 the Constitution is whether it is flexible or rigid, that depends upon whether the process of
12 Constitutional law making is or is not identical with the process of ordinary law making. A
13 typical instance of flexible Constitution is that of United Kingdom. The Constitution of the
14 former Kingdom of Italy was also flexible, so flexible indeed, that Mussolini was able to
15 profoundly violate the spirit of the Constitution without having to denounce it. The
16 Constitution of the United States is rigid, as it cannot be amended without the special
17 machinery being set in motion for this purpose. In short, we may say that the Constitution,
18 which cannot be bent without being broken, is a rigid Constitution. The Indian Constitution,
19 considered as a whole, is a controlled or a rigid Constitution, because broadly, none of the
20 articles of the Constitution can be amended otherwise than by special procedures prescribes
21 the Article 360. Certain provisions therefore, like Article 4 read with Articles 2 and 3, Article
22 169 para 7 of the 5th Schedule and para 21 of the 6 Schedule confirm power to amend the
23 provisions of the Constitution by ordinary lawmaking process but these Amendments are
24 expressly accepted by the respective provisions from the purview of Article 268. Schedules 5
25 and 6 of the Constitution are in fact Constitution within a Constitution. So, therefore the
26 existence of J&K Constitution is recognized by the Constitution of India. How do I show that?
27 Kindly turn to Article 370.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** That you need not labour because according to
30 you the Constituent Assembly itself.

31

32 **SHEKHAR NAPHADE:** Now the question, therefore, is that if the Jammu and Kashmir
33 Constituent Assembly was convened by a sovereign authority that sovereignty merges into the
34 sovereignty of the Constituent Assembly and it ultimately gets transferred to the Constitution
35 of Jammu and Kashmir. Now, therefore you have two sets of documents. Article 370(1)(d), if
36 it is deployed in such a manner that it results in the complete abrogation of J&K Constitution
37 is something which is in my respectful submission not contemplated.

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CHIEF JUSTICE DY CHANDRACHUD: All right, what is the next point, Mr. Naphade?

SHEKHAR NAPHADE: So my next point is, now originally there were two routes. One was 370(3) itself after 1957 that route is closed.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SHEKHAR NAPHADE: Then we take reports to Article 368. So in para 7 of the judgement in *Sampat Prakash*...

CHIEF JUSTICE DY CHANDRACHUD: Para?

SHEKHAR NAPHADE: Para 7 in *Sampat Prakash* it was relied upon by Mr. Dave. I don't wish to therefore repeat that.

CHIEF JUSTICE DY CHANDRACHUD: Para 7 of *Sampath Prakash*. What is the submission on that?

SHEKHAR NAPHADE: Justice Dave... Mr. Dave said that Your Lordships in this judgment have recognized that Article 370(3) is still in force. This is much after 1957. Now that route is obviously closed. But *Sampat Prakash* goes a step forward and says that even with reference to 368, you can't do it. Para 13. Para 13 of *Sampat Prakash* I've showed to Your Lordship. That Your Lordship will get... PDF... Volume 1 PDF 33. Now, this in my respectful submission is no longer good law. In view of what the 11 judgments in *Kesavananda Bharati* say? Every judgment is *Kesavananda Bharati* says that every part of the Constitution can be amended. Of course some judgments take a view subject to the rider that basic structure can't be touched but there is not a single judgment in *Kesavananda Bharati* which carves out an exception and therefore, in my respectful submission, the only route, which was constitutionally permissible is through 68.

JUSTICE B. R. GAVAI: That's what Mr. Dave also argued.

SHEKHAR NAPHADE: Yes, that's what. So therefore to that extent para 13 of *Sampat Prakash* is not a good law, but para 7 remains. So my next. So therefore, the question of what do we do with J & K Constitution? The Core provisions as I said, Part 5, and Part 6, the Executive and the Legislature of J&K are created by J&K Constitution. Now, by reference to

1 Articles 3 and 4...by taking the reference to Articles 3 and 4, these constitutional provisions
2 contained J&K cannot be done away with. So, two submissions in this regard. The framers of
3 the Constitution were aware of the fact that the Constituent Assembly for J&K is in the offing,
4 clearly reflected in Article 370. Now therefore the question is that does it not contemplate
5 when it says that provisions this Article 370, special status, provisions of the Indian
6 Constitution can't be applied unless you follow a certain procedure.... does it not contemplate
7 clearly that the Constitution of India as framed by the Constituent Assembly, recognizes the
8 existence of J&K Constitution? And therefore, doing away with that can only be through a
9 constitutional process. Now, therefore, Your Lordship will see that this is a limitation... the
10 existence of J&K Constitution is a limitation, both on the power of the President under Article
11 370(1)(d). Also, the Parliament's power under Article 3 and 4. So, Part 6 of the Indian
12 Constitution has never been applied to the Jammu and Kashmir, except a few provisions here
13 and there. But the core... the Executive and the Legislature, those provisions contained in the
14 Indian Constitution have never been applied to J&K. In the Judgment in ***NCT of Delhi***
15 ***versus Union of India***

16

17 [NO AUDIO]

18

19 **SHEKHAR NAPHADE:** So, this is the four characteristics which Your Lordships have
20 [UNCLEAR]. In paragraphs 292... 291, 292, 296, 298, and 305. So kindly see what Your
21 Lordships have said. 'The framers of the Constitution were aware of the challenges which the
22 instituted democracy would face.' It is addressed to the Constituent Assembly, but kindly come
23 My Lord to the, straightaway to 305. This is the discussion which I don't wish to trouble you.
24 PDF page 160. 'There are four abiding principles which are essential to understanding the
25 content of the Constitution. The first is that as a political document, the Constitution is an
26 expression of the sovereignty.' This is satisfied by J&K Constitution. Because the Constituent
27 Assembly was convinced by the Maharaja Yuvraj because of Clause 8 of the Accession. Second.
28 The second is that the Constitution seeks to achieve its vision of a political and social ordering
29 on the basis of democracy. A democratic form of government recognizes that the sovereignty
30 resides within the people. Popular sovereignty can exist when democracy is meaningful. This
31 is also satisfied. The third principle is, that the Constitution adopts a republican form of
32 government, in which the powers of sovereignty are vested in the people and are exercised
33 directly or through their elected representative. This is also satisfied. The fourth, which is not
34 the least in importance in the secular ideology of the Constitution, or it is on the foundation of
35 secular order that freedom, liberty and dignity and equality to every citizen. Now, if these are
36 the four characteristics of a Constitution, then my respectful submission, J&K Constitution
37 satisfies it. Now, when we talk of sovereignty, it does not necessarily contemplate external

1 sovereignty. I accept that the concept of sovereignty vis-a-vis J&K is not external sovereignty.
2 Because defence, foreign affairs, et cetera, the subjects were already accepted in the Accession
3 Treaty. I'm not, therefore saying, suggesting for a moment that this sovereignty is absolute in
4 the sense in which that concept is understood in international law. I wonder whether, given
5 the current scenario under the international law, is there anything called absolute sovereignty.
6 Because there are so many conventions by which the state bind themselves. And Your
7 Lordships have recognized, that Your Lordships Courts can enforce the international
8 conventions, though India may not have ratified them. So therefore, the absolute sovereignty
9 concept, which was some 200 years ago, is no longer exists even in international law. But, the
10 fact remains that concept of sovereignty has some content and that content with regard to
11 Jammu and Kashmir, is that their internal affairs be conducted at least in accordance with
12 part 5 and part 6 of the J&K Constitution. 370(1)(d) can make only marginal inroads. Anything
13 beyond that, which results in the Constitution of J&K evaporating, you can never have
14 contemplated. Now in the alternative, even if we accept the concept of internal sovereignty,
15 with respect to other states, keep aside Jammu and Kashmir, because people get obsessed with
16 the concept of special status. Forget the special status also for the time being. But Your
17 Lordships in *Bommai* have quoted with approval a passage from [UNCLEAR] book which
18 talks of internal sovereignty. Your Lordships may have a look at that para, that is para 97. It is
19 PDF...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Volume?

22

23 **SHEKHAR NAPHADE:** Volume 2.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Page?

26

27 **SHEKHAR NAPHADE:** Page 113.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Para?

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31 **SHEKHAR NAPHADE:** Para 97 sir. There [UNCLEAR] has been extensively quoted
32 therefore, every State in this country has internal sovereignty.

33

34 **JUSTICE SANJIV KHANNA:** Para?

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36 **SHEKHAR NAPHADE:** Para 97, PDF page 113. Where [UNCLEAR] has been quoted
37 extensively. I don't wish to read that entire portion but kindly see sub-para (b) on page, PDF

1 page, next page Your Lordship 114. The parliament's power to alter the boundaries of States
2 without their consents is a breach of federal principle and Sub-para (d) 'External sovereignty
3 is not relevant to the federal nature of a Constitution, but such sovereignty must belong to the
4 country as a whole but the division of internal sovereignty by distribution of legislative power
5 is an essential feature of federalism and our Constitution possesses that feature.' Now if this is
6 so with regard to the other States, much greater weight must be applied to J&K Constitution.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr.

9

10 **SHEKHAR NAPHADE:** So in *Santosh Gupta's* case 2017 to SSC which Your Lordship
11 will find in Volume 1 pdf page 136.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** What are you citing it for?

14

15 **SHEKHAR NAPHADE:** This is because this judgment says that J&K Sovereignty has come
16 to an end. Probably the Union of India wants to rely upon that judgement. That is how it has
17 come in the... So I wish to point out to Your Lordship that what was the issue in this matter?
18 The issue was whether the provisions of the SARFAESI Act applied to J&K or not? There are
19 also constitutional challenge which was upheld by the High Court and the High Court referred
20 to in the judgment several times the sovereignty of the J&K and also said that this does not fall
21 within the List 1. Now this judgment takes a view if Your Lordships look at paragraph 43 and
22 44 at PDF pages 133, that SARFAESI Act calls principally within the provisions of... within the
23 ambit of Entry 45 and Entry 95, List 1. That's the finding in paras 43 and 44. Now having come
24 to this conclusion that since it falls in Entry 45 and 95 of the list one, the question whether
25 J&K Constitution had sovereignty or not does not survive our consideration. Therefore, this is
26 an obiter, applying the test which Chief Justice Chagla applied in that Bombay judgment which
27 incidentally I forgot to refer. It is there in Volume 29.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Read it as it is.

30

31 **SHEKHAR NAPHADE:** I'll just read out. So page 5 of that... this is what Your Lordship...
32 'but the question still remains as to what is an obiter dictum given expression to by the
33 Supreme Court, which is binding upon the Courts in India. An obiter dictum is an expression
34 of opinion or point which is not necessary for the decision of a case. This very definition draws
35 a clear distinction between a point which is necessary for the determination of a case and a
36 point which is not necessary for the determination of the case. But in both cases, points must
37 arise for the determination of the Court. Two questions may arise before the Court for

1 determination. The Court may determine both, although only one of them may be necessary
2 for the ultimate decision of the case. The question which was not necessary for the
3 determination of the case would be the 'ratio decidendi'; the opinion of the Tribunal on the
4 question, which was not necessary to decide would be only an obiter dictum.'

5 I don't think that this view can be found fault with. So therefore in para 47, in **Santosh**
6 **Gupta's** case, His Lordship says that sovereignty has come to an end. In the first place, this
7 is clearly contrary to in **Prem Nath Kaul's** case which has been cited by Mr. Dhavan. I just
8 want to show to Your Lordships only one observation from **Prem Nath Kaul's** case that Your
9 Lordships will find.. that is para 16 of that judgment. What is the PDF page? 12. Second line
10 from the top. 'We have no doubt that the Yuvraj was perfectly competent to issue the
11 proclamation of 20th April 1951, under which the Constituent Assembly ultimately came to be
12 elected and convened. If the Constituent Assembly was properly constituted and it decided
13 not to pay any compensation to the landlord. So it is difficult to understand how the validity
14 of these decisions can effectively be challenged.'

15 So, Your Lordships have specifically recognized the power to convene the Constituent
16 Assembly. That's an act of sovereignty. So there is one more para. I'm sorry, I read para 42,
17 not para 16. I stand corrected. So, therefore, in my respectful submission, the observations in
18 para 47 in **Santosh Gupta's** case to the effect that the sovereignty has come to an end, is
19 clearly contrary to **Prem Nath Kaul's** case. In any case it's an obiter. In any case, there is
20 not much of discussion in that judgement on this issue. And it's a judgment of only... Bench of
21 2 learned judges. So my next point is, Article 356 much has been said by Mr. Dave and others,
22 but there is one aspect which I want to bring to... highlight. It may be an overlap, but there is
23 one particular aspect which I want to emphasize. What is the effect of the Presidential
24 Proclamation? So kindly turn to Article 355. What is the purpose of 346...356?

25
26 There is breakdown of the machinery. Accepted. The affairs of the State cannot be carried on
27 in accordance with the Constitution. Accepted. But does that justify, doing something which
28 is unconstitutional? So in the first place, the J&K Assembly was dissolved in November 2018.
29 And the Governor assumed the powers. He assumed the powers under the J&K Constitution.
30 And not... the 356 proclamation came in December 2018. This Presidential proclamation
31 under 356 is clearly without jurisdiction, clearly without jurisdiction. The reason is that the
32 Governor has already dissolved the Assembly, the Governor has assumed all the powers of the
33 state. Now, certainly the Governor, assuming the powers can't be a breakdown of the state
34 machinery. It could be absurd to suggest that and therefore, President has to intervene under
35 356. It's a jurisdictional issue. And 356 has been invoked for a collateral purpose. And that
36 collateral purpose is apparent on the face of the report. You suspend the two provisos to Article
37 3. The first proviso which applies to all the states, that you can't alter the boundaries, change

1 the name of the state, et cetera, without first, giving an opportunity to the state concerned to
2 express its views through its Legislative Assembly, you suspend that. Second proviso which
3 applies to J&K, without the consent of the Legislative Assembly of J&K. Now, I cannot
4 understand if there is breakdown of the machinery, what is the necessity? What is the rational
5 nexus to suspending these provisos? There is an implied limitation on this power. Can you
6 suspend the entire Constitution because the President has issued proclamation under 356?
7 Once you accept that there are implied limitations, the suspension of any part of the
8 Constitution as a result of Presidential proclamation under 356 must have a rational nexus to
9 the objective that is to be achieved. And the objective that is to be achieved is Article 355.
10 Kindly see Article 355. 'The duty of the Centre.
11 'It shall be the duty of the Union to protect every state against external aggression and internal
12 disturbance, and to ensure that the Government of every state is carried on in accordance with
13 the provisions of this Constitution.' Now read Article 355, 356, 357 conjointly. And the only
14 result is that the state as a constitutional entity must survive. Now, what is the purpose of
15 suspending the proviso? Ultimate design is abolishing the state of J&K, contrary to the
16 mandate of 355. Therefore, Your Lordships will see the J&K Reorganization Act is born, is
17 conceived in an unconstitutionality, patent. Now let me test even the wording. I have shown
18 to Your Lordship the context but kindly see what 357 says... sorry 356 see. Make such
19 incidental and consequential provisions as appeared to the President necessary or desirable in
20 giving effect to the objects of the proclamation. Now suspension of those provisos. What is the
21 nexus? In the entire affidavit of the Union, I don't find any light being thrown on this aspect
22 of the matter. Then kindly see 357. 357(1)(b) 'For Parliament, or for the President or other
23 authority in whom such power to make laws is vested under Sub-Clause A, to make laws
24 conferring power and imposing duties or authorizing the conferring of powers and the
25 imposition of duties upon the Union or officers and authority .' Now this is a power to make
26 law. Dave, Dr. Dhavan, everybody has argued that 356 is a temporary thing... that the power
27 or the function that the State Assembly performs under the provisos to Article 3, are not power
28 of making law. Article 357, 356 they refer to the State Legislature's power to make law which
29 is taken over by the Parliament or by President by issuance of ordinance. But this is not that
30 power. The power under proviso is not lawmaking power at all. And this is recognized by
31 judgment in *Kesavananda Bharati's* case. Again I have to refer to Justice Khanna's
32 observation and that is para. 1351 which Volume 15. PDF 542. So this is with reference to
33 proviso to Article 368, but the logic would equally apply to proviso to 3. Article 3.... my
34 submission.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** And your argument is that 357 (1)(A) provides
37 for Parliament to confer the President the power of the Legislature of the State to make laws.

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SHEKHAR NAPHADE: Make laws.

CHIEF JUSTICE DY CHANDRACHUD: And that function which you discharge under the proviso to Article 3 is not the power to make laws.

SHEKHAR NAPHADE: Is not for making laws. It's not law making power.

CHIEF JUSTICE DY CHANDRACHUD: You made the point. What's the next?

SHEKHAR NAPHADE: Therefore, it can't get... the President can't take over that power.

CHIEF JUSTICE DY CHANDRACHUD: Just give us....

SHEKHAR NAPHADE: 1351.

CHIEF JUSTICE DY CHANDRACHUD: Para... Volume?

SHEKHAR NAPHADE: 1351. 'Article 248 read with Entry 97, List 1, contemplates legislative process. If the amendment of the Constitution where such a legislative process, the provisions regarding ratification by the Legislature of States....

CHIEF JUSTICE DY CHANDRACHUD: What is the PDF page? PDF page?

SHEKHAR NAPHADE: 542.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

SHEKHAR NAPHADE: 'Article 248 read with Entry 97, List 1 contemplates legislative process. If the amendment of the Constitution where such a legislative process, the provisions regarding ratification by the Legislatures of not less than one-half of the States in respect of certain amendment, the Constitution would be meaningless because there is no question of ratification of a legislation made by the Parliament in exercise of the powers conferred by Article 248 read with Entry 97, List 1. It is noteworthy that ratification is by means of a resolution by the State Legislature. The passing of a resolution can plainly be not considered to be a legislative process for making a law. The State Government also do not come into the picture for the purpose of ratification etc.'

1 So therefore, Your Lordship sees is that everything that the Legislature does is not necessarily
2 law making process. So therefore, the powers under the proviso could have never been taken.
3 So therefore, Article 356 proclamation suspending those two provisos, which has no nexus
4 whatsoever to the object to be achieved under 356. Clearly collateral. So now I come to
5 interpretation of Article 3 and 4. So the reference I made to Article 355, but some passage from
6 **Bommai**, I have shown to Your Lordships... Para... PDF Page 155.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Of?

9

10 **SHEKHAR NAPHADE:** Of Volume 2. Now kindly see what that Para says. This is with
11 reference to Article 355, on which I press reliance that the purpose of 356 is to restore the
12 state. Para. 160. The crux of the question....

13

14 **JUSTICE SANJAY KISHAN KAUL:** Just one second. Which page are you reading?

15

16 **SHEKHAR NAPHADE:** The PDF page... 155.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Which judgment is this?

19

20 **SHEKHAR NAPHADE:** *Bommai*.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 2, para 168.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Para 160. I think, judgment of *K. Ramaswamy*.

25

26 **SHEKHAR NAPHADE:** 'The crux of the question is wills of the President's power under
27 Article 356.' 'This has a direct bearing. It finds its birth from a family of emergency provisions
28 in Part 18 of the Constitution. Article 355 imposes duty on the Union to protect states against
29 external aggression and internal disturbance, and to ensure that the Government of every state
30 is carried on in accordance with the provisions of the Constitution. As a corollary, when the
31 Government of the State is not being [UNCLEAR] out in accordance with the provisions of the
32 Constitution, a constitutional duty and responsibility is put on the Union to set it right.' So
33 therefore, if the machinery has broken down, to set it right means, to see that the state's
34 normalcy is restored. So therefore, Article 356 cannot be read in isolation. The purpose of 356
35 is to restore, under Article 355, that's the purpose for which... Now another reason to say, the
36 same thing is said by Justice Jeevan Reddy at paragraph 272 and Justice Sawant at para 56,
37 57. I did not read those paras, I'm just giving to you with para numbers. So the sum and

1 substance of *Bommai* is this, that restore the state to normalcy, because that's a duty cast
2 upon you under Article 355. Now there is one more reason to say that the exercise of power
3 under 356 is for collateral purpose. Because ultimately what they want to achieve, get away,
4 with, do away with Jammu and Kashmir state. That, I point, I already made. I have also said
5 no jurisdiction because the Governor has already assumed the powers after the Assembly was
6 dissolved. There is one more reason, which is to be found in judgement of this court in *KN*
7 *Rajgopal versus Karunanidhi*, 1972, Volume 4, SCC, page 733, PDF page 68, 69.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Of which volume?

10

11 **SHEKHAR NAPHADE:** So, PDF page 68, 69 Volume 19. It's a one page judgement. But has
12 seminal contents.

13

14 **JUSTICE SURYA KANT:** Volume?

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** 19.

17

18 **SHEKHAR NAPHADE:** Paragraph, there is only one page judgement. It is Volume 19. PDF
19 page 68, 69. So, this is what Your Lordships have said. 'We have just delivered a judgement in
20 [UNCLEAR]. A similar question arises in this appeal. But with respect to the Chief Minister
21 and the Minister of the State of Tamil Nadu, the relevant articles are worded similarly. The
22 only difference is that the Governor is not elected, but is appointed by the President under
23 Article 155 of the Constitution and under Article 356 of the Constitution makes a provision in
24 case of failure of Constituent Assembly of the state. But when an Assembly is dissolved, there
25 is no failure of the constitutional machinery within Article 356, Article 164, which provides
26 that the Council of Ministers shall be collectively responsible to Legislative Assembly of the
27 state has to be [INAUDIBLE] Article [UNCLEAR]

28 In other words, what Your Lordships have said is that once the Assembly is dissolved., there
29 is no question of machinery having failed ,and therefore consequently, there can't be a 356
30 exercise. So in this context, I invite Your Lordship's attention to judgement in *Gujarat*
31 *Assembly* case. Now, if Your Lordships have a look at Article 356, there is no provision which
32 says that what is the upper limit. How long you can do away without an elected Government?
33 This question came up before Your Lordship in *Gujarat Assembly case*. And Your
34 Lordship has said six months. That judgment is in Volume 19 PDF page...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 19, page?

37

1 **SHEKHAR NAPHADE:** I am just seeing. 283. So, kindly come to paragraph 79 on PDF
2 page...The PDF Page 283 para 79. 'However, we are of the view that the employment of the
3 words and expiration occurring in Section 14 and 15 of the Representation of Peoples Act,
4 respectively, show that the Election Commission is required to take steps for holding elections
5 immediately on expiration of the term of the assembly or a dissolution, although no period has
6 been provided for. Yet there is another indication in Section 14 and 15 of the Representation
7 of Peoples Act that the election process can be set in motion by issuing a notification prior to
8 the expiry of six months of the normal term of the House of the People or the Legislative
9 Assembly. Clause 1 of Article 172 provides that while promulgation of emergencies is in the
10 operation, Parliament may by law extend the duration of the Legislative assembly by not
11 exceeding one year at a time, and this period shall not, in any case extend beyond a period of
12 six months after the promulgation has ceased to operate. Further, under Article 123
13 [UNCLEAR] the life of an ordinance promulgated either by the President, or by the Governor
14 as the case may be is six months and repeated promulgation of ordinance after six months has
15 been welcomed by this Court. Again under Article 109, 110, 111 and all of those articles for the
16 State Assembly Money bill has to be passed by the House of the people or by the legislative...
17 so the period of six months has been the read by Your Lordships. Then there is one more para
18 in the same judgment. This was of Justice Khare and there is para 147 in the Judgment of
19 Justice Prasad. PDF page 316. So this is the ratio. Para 147 almost, His Lordship has echoed
20 what Justice Khare has written in the 79, which I read. Now I come to Article 3 and 4. Now
21 kindly see the marginal reading. 'Formation of new States and alteration of areas, boundaries,
22 or names of the existing States.' This is a clue. Of course, there is a debate whether marginal
23 reading can be seen or not but fortunately for us this issue is no longer [UNCLEAR] as a
24 Constitution bench judgment of this court in *Bengal Immunity versus State of Bihar*
25 1955 page 603, year 1955?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** What will be the PDF page and volume?

28

29 **SHEKHAR NAPHADE:** PDF Volume 13, and page is... PDF page is 144. And I take straight
30 away, Your Lordship to para 25.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** It can indicate the general drift of the provision,
33 but it cannot be used to supply on the actual statute.

34

35 **SHEKHAR NAPHADE:** That's correct.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** That the actual...

1

2 **SHEKHAR NAPHADE:** I'm not saying. If there is some ambiguity and there is in my
3 respectful submission. According to me, there is not even ambiguity. There is a conscious
4 omission in Article 3 as regards power to abolish a State. Conscious omission. So, why do I say
5 there is a conscious omission? Not only from the marginal reading but also look at the text.
6 'Form a new State by separation of territory from any State or by uniting two or more States
7 or parts of the State, or by uniting the territory to a part of a new State.' Minute details. What
8 that power is... then it further says, 'Increase the area of any State, diminish the area of any
9 State, alter the boundaries of any State, alter the name of any State.' Details are given. What is
10 the extent of that power. There is no ambiguity at all. There is not even a whisper about
11 abolishing the state. And this has to be seen in the light of Article 1, 'India, that is Bharat shall
12 be a Union of States.' 2 also, 'The Parliament may, by law admit into Union or establish new
13 States on such terms and conditions as it thinks fit.' So Article 1, 'India that is, Bharat is a
14 Union of States.' Article 2, Admission of New States, Article 3 gives details of the power that
15 the Parliament has. Now, therefore, there is a conscious omission to abolish a state. My second
16 point...

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18 **CHIEF JUSTICE DY CHANDRACHUD:** What happens when you unite two states?

19

20 **SHEKHAR NAPHADE:** But the point is this, Your Lordship will see that's a territory...what
21 is the idea behind the state... that people in a given territory should have a State Government.
22 Two-tier democracy at the State level and that is how the constitutional scheme is. Some
23 powers are given to the States. They have their own Government. So this concept of a state is
24 inbuilt in a democratic structure that this Constitution has built. In other words, the existence
25 of States is a part of the basic structure and J&K can't be an exception to it. Then why not
26 tomorrow abolish Bengal? By what parameter? That according to me, there is a conscious
27 omission. So Article 1, 2, 3 have to be read together. Now, there is one more reason. This
28 alteration of boundaries, changing the name of the state, uniting two states, one state being
29 divided into number of states, this does not amount to an amendment of the Constitution.
30 True. So all the more reason why this power must be narrowly construed. According to me, no
31 two interpretations are possible. There is a conscious omission to abolish a state, because India
32 is the Union of States. I link it with 355 and 356. Article 3 has to be read with 355. If there is
33 breakdown of machinery, restore the normalcy. But you can't abolish the state. And since it
34 does not amount to a constitutional amendment, it must be strictly narrowly construed. And
35 this interpretation, in my respectful submission, would advance the concept of democracy and
36 concept of federalism.

37

1 [NO AUDIO]

2 **SHEKHAR NAPHADE:**of my argument. Now forget everything. What is the impact on
3 the constitutional structure where everything has been turned upside down? First what is the
4 impact? Ladakh under the reorganization, has no representative in the Rajya Sabha. People of
5 Ladakh, therefore, do not count as far as Rajya Sabha is concerned. So much for democracy.
6 Now look at Lok Sabha all existing force... sorry Rajya Sabha, all existing forces in Rajya Sabah
7 go to J&K, Ladakh is left out. Consequently, people of Ladakh have nothing to do with working
8 of Rajya Sabha, including the election of the Deputy Chairman under Article 89 and 90.
9 Second, look at Lok Sabha, under Article 81(c), all Union Territories in the country can
10 maximum have 20 seats, in that you have the J&K. But look at the discrimination under Article
11 81 Clause 2, as far as other States are concerned the number of seats that they have depends
12 upon their population and the Constitution further mandates that this ratio between the
13 population and the seats for all the States shall be same as far as practicable. So in state of
14 Jammu and Kashmir irrespective of its population, it has no proportionate representation in
15 the Lok Sabha. Discrimination. Article 14. Now, if you create some more Union Territories that
16 limit of 20 will have to be crossed. Today it is 19, including the 5. That's all right but look,
17 working out seats for other States is a different formula. How can this be done? Other
18 disastrous consequences. Look at the election of the President. Come to Article 54 and 55. For
19 electing the President the Electorate consists of members of Parliament, both Rajya Sabha,
20 Lok Sabha and also the legislative members of Respective States. Now J&K is not a State
21 therefore, there is no MLA for the purpose of President's election. Now to the exclusion of such
22 a big area, no say in the election of the President, if not by direct at least by an indirect method
23 but I must hasten to add that the Reorganization Act says that J&K will have the same rights
24 as Pondicherry. And Pondicherry under Article 54 and 53 there... but this will require a
25 constitutional amendment. You can't do it by law like this. Other disastrous consequence is,
26 Article 279(a) representation in the GST Council. People of Jammu-Kashmir-Ladakh have no
27 say as far as that Council is concerned. Appointment of High Court Judges. As far as other
28 States are concerned, the Governor is one of the person to be consulted and Governor means
29 aid and advice. So, that also goes away. There are several such provisions in the Constitution
30 which are impacted. Therefore, by a very small act, which apparently looks constitutional, that
31 is Constitutional Order 272. The whole constitutional structure is demolished, substantially
32 restructured vis-a-vis J&K. Sir, I'm grateful that..

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Naphade.

35

36 **SHEKHAR NAPHADE:** I exceeded my time.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** No. Mr. Naphade. Thank you very much.

2

3 **SHEKHAR NAPHADE:** And both Mr Dave and everybody has argued that consultation
4 contemplated must be effective. That is why elected... that point has been extensively argued.
5 I'm sorry that I exceeded my..

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Thank You, Mr. Naphade.

8

9 **SHEKHAR NAPHADE:** I thought [UNCLEAR] perhaps I was justified. I'm grateful My
10 Lord.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Somebody's time will have to get deducted.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Ultimately whether it's 20 over, 50 over there.
15 The time is allocated to everyone between whatever is available.

16

17 **JUSTICE SANJAY KISHAN KAUL:** How much somebody can bat will depend on the total
18 number of hours?

19

20 **DINESH DWIVEDI:** Since Your Lordships have used the word 'bat'. It reminds me of my
21 position at this point of time is like that of an night watchman.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** You know, you are just after tea actually, so you
24 have a whole session you can resume.

25

26 **DINESH DWIVEDI:** Which is a very delicate job.. Night watchman, no? He has to sustain
27 the flagging interest also. My Lord, I have submissions on two issues only. One was what the
28 Mr. Naphade was advocating just now regarding demolishing of a State into Union territory.
29 And the only thing I wish to add on what he said was, if Your Lordship would just have a look
30 at 246(4)

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Which matter are you appearing, Mr Dwivedi?

33

34 **DINESH DWIVEDI:** First matter My Lord. We filed a petition, but we were told to file an
35 intervention application, and then an order was passed on that that we will be heard like any
36 other petitioner, therefore...

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** So you are here for an intervener?

2

3 **DINESH DWIVEDI:** Yes.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Which? Just give us the reference so that we
6 can... just for the sake of the record, we need to complete the record.

7

8 **DINESH DWIVEDI:** It is Writ Petition number. It is I.A. number 145852.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** I.A. number? Sorry. Can you come again, please?

11

12 **DINESH DWIVEDI:** I.A. No. 145852/53 of 2019. This is in Writ Petition (Civil) No. 1013 of
13 2019.

14

15 [NO AUDIO]

16

17 So I've given my written submissions also. 2019 *Radha Kumar Vs. Union of India*.
18 There's a part of the submission, which is there I was waiting for 15-20 minutes. My name is
19 there in the list after Mr. .. just to what he said because rest he has already said I won't be
20 wasting lots of time on ...

21

22 [NO AUDIO]

23

24 The second point is not the major point which Your Lordships are faced, with whether Article
25 370 survives and remains to be an effective source of power post 1957. After the enactment of
26 the Constitution and dissolution of the constituent Assembly that is the question which
27 primarily concerns us hence here what I say is Lord Lordships are going to perhaps decide
28 whether 370 survives as a source of R post 57 or it ceases to be a source of power after 57. I
29 think with respect note that the latter point that it does not survive has not been argued by
30 anyone up till now because most of my friends on this side are of the view that one survives
31 and rest. Caesars. What I am submitting is none of the parts of 370 survive. That's the
32 difference I'll answer that, Lord, I'll answer that one shall lordships decide on this major issue
33 then the further question that arises is would Your Lordship be deciding on the basis of past
34 practice of continuing use of 270 only Your Lordship would have a looked into the text of 370
35 and the context and then decide whether the power is there or not, because if the power is not
36 there, then merely because past practice is there would not justify the exercise, would not fast
37 practice, but the cues have been issued. Is there a challenge raised to all the CEOs of let's put

1 it take that question supposing I have not challenged the earlier CEOs yes, I am challenging
2 these cos, which are there before lodges under Challenge. Now one of the grounds for
3 challenges that because 370 power is no longer there post 1957 and therefore, these two orders
4 cannot be passed. Now, if you lordship accept my argument, then whatever be the consequence
5 on the other issues. It hardly matters. Why do I say so? Is this there's a reason for it for
6 instance. It's a case of the ***Keshwanand Bharati case*** Your Lordships, for the first time
7 initiated the doctrine of basic structure, which cannot be amended of the Constitution now
8 Your Lordships did not decide the verity of the past amendments but the fact is when Your
9 Lordship prospectively overruled the impugned [UNCLEAR] Amendments that were in
10 question then what Your Lordships implied that even though this may reflect on the past
11 amendments.

12

13 **DINESH DWIVEDI:** Yet in order to save those amendments, we are prospectively over the
14 entire doctrine of prospective inevitably implies that the past practice, whether right or wrong,
15 it will continue to operate and will not be affected by the judgement. But it accepts the fact that
16 if the declaration is made of invalidity of the impugned amendments, then that may have a
17 consequence, and therefore Your Lordships prospectively overrule it. So implicit in this
18 prospective overruling is the invalidity of those, supposed invalidity and therefore Lordships
19 try to save it. Now, another way of looking at it is, look at it this way. Supposing Lordships
20 accept my viewpoint. Accept my viewpoint on the basis of the text and the context and Your
21 Lordships come to the conclusion that, yes, there is a case for this, that the power is not
22 available, and therefore the impugned C.Os are invalid. Now, in order to prevent the effect
23 from traversing on to the earlier ones, Your Lordship would pass whatever reliefs Your
24 Lordships can mould under 142. Your Lordships would do that. But that doesn't mean that on
25 the basis of this past, continued exercise of power, Your Lordships would ignore the text and
26 the context. If the text and the context, as per my submission, inevitably show that yes, the
27 power could not have survived beyond 57. Then perhaps, My Lord, there is a case to look into
28 it.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Now, Mr. Dwivedi, should we start with
31 the first point? Because first you have to add on to what has been argued by Mr... So maybe
32 just... because we are at about 3:35. So you can maybe in five or ten minutes, conclude the first
33 point.

34

35 **DINESH DWIVEDI:** What I wanted to add was apart from what my friend had said.
36 Additionally, if Your Lordship would just have a look at 246(4), Your Lordships have had a
37 look at it at several occasions, but then my friend perhaps omitted to see it. 246(4). 'Parliament

1 has power to make laws with respect to any of the matter for any of the Territory of India,
2 which is Union territory not included in a State notwithstanding that such matter is a matter
3 enumerated in the State List.' Now that's the inevitable consequence of when you break down
4 the State into a Union Territory, then Parliament is the sole Legislature. Now, when
5 Parliament becomes a sole Legislature My Lord then inevitably, My Lord, the State comes out
6 of the federal structure. Because Your Lordships had said that Article 1 and my friends have
7 read some part of it and My Lord I can read some part of it too. My Lord, Article 1 says India
8 is an Union of State and refers to Schedule 1. Your Lordships just have Schedule 1 for a
9 moment. Now, Schedule 1, specifies the States in Article 1 and 4. First Schedule. It specifies
10 the states and Kashmir is there at Item 15 and then My Lord, it goes on to have Item 2. Your
11 Lordship would have 28 States, then Item 2 Union Territories. These are not specified as
12 States. Though they are part of Territory of India, as per Article 1, yet when it comes to federal
13 structure My Lord Union Territories are not part of that federal structure. This is My Lord...
14 that decisions I have referred to in my judgment as a decision to that effect, My Lord that
15 Article 1, does not contemplate Union Territory constituting part of federal structure, and for
16 obvious reason My Lord. If Your Lordship would recall the definition of federal structure in
17 our Constitution given by Dr. Ambedkar, he said there has to be a dual polity. And that is how
18 he, My Lord, declined the entire objections to the Constitution of India has been unitary and
19 not being federal. Your Lordship...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Now there's a nuance on that for following the
22 NCT judgment.

23

24 **DINESH DWIVEDI:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** We have placed Delhi in a different...

27

28 **DINESH DWIVEDI:** And I was coming to that only. My Lord it goes further what Your
29 Lordships have said goes further. What it says is they dual polity contemplates that citizen of
30 every state is entitled to be governed by the laws made by two different legislators. That's a
31 concept of dual polity. Where for local issues, the right is for the local to get himself governed
32 by the local legislature on local issues and so far as the My Lord the national issues are, bigger
33 issues are concerned, Parliament. That right gets defeated, and therefore the dual polity gets
34 lost as per Your Lordship's judgment. States are not appendages, as Your Lordship said, not
35 satellites of the Union. They are their own plenary self-created under the Constitution, not the
36 Parliament. So, this results in the demolition of the entire dual polity and therefore destruction
37 of the federal structure. And no one can say that the Jammu and Kashmir did not satisfy the

1 requirement of federal structure. Our federal structure is not defined. There's an interesting
2 aspect which I wanted to bring to Your Lordships notice in this regard. My Lord, all throughout
3 we have been hearing about the federal character and so on so but that's not truly federal as
4 the American system in our Constitution, but in each of these judgments which say so, what
5 Your Lordship would see is they omit to notice the Constitution of Jammu and Kashmir and
6 when we come to Constitution of Jammu and Kashmir, it goes one step ahead of any other
7 Constitution. And that is this. It is the Constitution of Jammu and Kashmir in our federal
8 structure, which lays down the parliamentary jurisdiction.

9 It lays down the parliamentary jurisdiction under the commitment given by the framers of the
10 Constitution and the dominion of India. It lays down the tone and tenor of the state and the
11 Union relations finally. That's what the framers have said. And then have a look at Section 5,
12 because if you don't accept this fact, My Lord, then Section 5 becomes, which is the according
13 to me, the soul and heart of the J&K Constitution. That gets absolutely demolished. That's the
14 basic structure of the J&K Constitution. And Section 5 says the power of State would be not on
15 any subject which is given to the Parliament. Parliament has been given enumerated powers.
16 That is, Entry 1 to 96 and not 97 and Article 248. So which means residuary entry is not there.
17 Rest of the Entries 1 to 96 are there with Parliament under the constitution of J&K. The
18 Concurrent List and the State List are with the State except to the extent My Lord, that
19 correspond to the Instrument of Accession. Now can you look at this, My Lord? Here is a case
20 where the State is going to decide what is the jurisdiction of Parliament and what is the Centre-
21 State relations, scope of that. So that's the extent to which the autonomy was given to J&K.
22 Guaranteed autonomy. And to borrow Dr. Rajeev Dhavan's phrase My Lord, it is
23 democratization of power in India in the shape of autonomy. He referred to various provisions
24 where there are various levels of autonomy was given. Now here is the case where the level of
25 autonomy is stupendously raised. But nevertheless it is part of Federal structure we can't deny,
26 because Article 1 and the Schedule say so. But by reducing that State into a Union territory,
27 what we are doing is we are bringing it under 246(4), where the people of the State, both the
28 states, both the union territories now will have only one Legislature, both for local and the
29 national issues. Their rights to be governed under a dual polity goes for a toss. And that is how
30 we'll have to see Section 3... Article 3...

31 I am sorry. **Berubari** gives a clear indication. I'll show that Passage, but that is how we have
32 to see it. The power is limited. We can't... the amendments that have come is only for a specific
33 object and the object amendment in the...by adding the explanations to Article 3. They have
34 come for a specific object of overruling the **Berubari** case to the extent it says that union
35 territory is not governed by it, so to that extent they overruled. But the remaining part of
36 **Berubari** judgment, which says that States cannot be... they don't have a territorial integrity,
37 the word used. But then there can be addition to the State, there can be subtractions from the

1 State by giving it to another State. That way what you are conferring is the dual polity.
2 Whenever you change the territory of the State you are retaining the dual polity of the citizens.
3 Because from this State, they go to another State, where the dual polity continues but then by
4 demolishing it, what we are doing is reducing and demolishing the dual polity into a unitary
5 system under 246(4). That is what I wanted to add to my friends'. And I have in my written
6 submission, My Lord, given the host of cases My Lordships have said, this federal structure
7 cannot be disturbed. This is my written submissions, My Lord. And this is, I would request
8 Your Lordships to see page 44 and 45 in that regard. This is at page, as my friend corrects me,
9 I've given the internal page, PDF page.

10

11 **PETITIONER'S COUNSEL:** In the written submission, My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** What is the PDF page?

14

15 **PETITIONER'S COUNSEL:** 394.

16

17 **DINESH DWIVEDI:** The internal page is 44 and 45. So therefore I submit with respect that
18 this Article 1 completely excludes Union Territories, and therefore, once you reduce the state
19 into a Union Territory, you deprive me of my right to be governed by two legislatures. That's
20 the crux of the dual... Internal page 44 at page 437 of the PDF.

21

22 **JUSTICE SANJIVE KHANNA:** 437?

23

24 **DINESH DWIVEDI:** And I'm only referring to page 44 to 46, and I have referred to a host
25 of judgements, which Your Lordships are clearly aware of. But basically, referring to two last
26 judgements, if Your Lordships could see, at page 46, internal Page 46. Two last judgements,
27 of which the Chief Justice was a part. 2017 12 SCC 1. This is *Jindal* and then 2018, Volume 8,
28 SCC 501, I have given the paragraphs too.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** 2018?

31

32 **DINESH DWIVEDI:** 2018 Volume 8, SCC 501 and I have given the paragraphs also in the
33 PDF.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

36

37 **DINESH DWIVEDI:** And then there is another page, 46 and 47, internal page.

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CHIEF JUSTICE DY CHANDRACHUD: Yes.

DINESH DWIVEDI: That is what I wish to add. My Lord, before I proceed there were two issues which were rankling Your Lordships' mind, from the very beginning, first day. One was, in fact two, from Your Lordships. And one from My Lord Justice Khanna. Your Lordship had an issue with regard to sovereignty and the observation was that once you accede to the Dominion of India, you surrender all your sovereignty. Lots of things have been already informed to Your Lordships, that, Instrument of Accession would not amount to surrender unless there is a merger agreement, which says that you merge your sovereignty, as happened in the case of other states, which I will show. The other states had, not only not acceded before 15 August '47, they had signed as a precondition, laid by the Dominion of India, that they will sign the standstill agreement also, which covers the matters of local concern. And after that, they acceded to the Union of India. Thereafter, when they, further when they merged with the adjoining states, there are adjoining provinces, provinces automatically merged, provinces under the Government of India Act. They automatically merged. Indian states merged primarily with the provinces or they formed their own federation. Then they were directly administered states also. They all signed the merger agreements with the dominion of India, conceding all their powers of legislation. And that is why Your Lordship would see, Article 238 was incorporated. Article 238 , expressly applied part 6 and 7 and of course, consequently, part 11, which is 245, 246, 254 and so on and so, to all the other Indian States. But when it came to Jammu and Kashmir, Lordship would notice, have noticed, that in 370 Clause 1, 238 is excluded. This is despite the fact, My Lord, what is important is this, is despite the fact that Kashmir was placed as a Part B state in the Schedule at that point of time when the Constitution was enacted.

CHIEF JUSTICE DY CHANDRACHUD: Mr Dwivedi, roughly how long would you take? Because you are starting the new point..

DINESH DWIVEDI: Not more than an hour, I will try to.

CHIEF JUSTICE DY CHANDRACHUD: Could we... because we would like to conclude the submissions on this side on Tuesday. Frankly I will tell you now we've got so much information from you. We'd like to put it to the other side and get response...

DINESH DWIVEDI: My situation is not like...my Friends are on different issue and I am on an entirely different issue.

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CHIEF JUSTICE DY CHANDRACHUD: If you could really put it down into about half an hour or so that we can push through on Tuesday and after Mr. Dwivedi who will be arguing? Mr. Singh about half an hour or less? You've prepared your recent submissions? Your written submissions are there right? So, what we will do on Tuesday. Frankly I have not seen your submissions, over the weekend we will look at your written submissions so that then your time is then... because we would have then... we would be completely ready with your background. Cut it down to half an hour Mr. Singh. Otherwise, we'll not finish this side now.

JUSTICE SANJAY KISHAN KAUL: Mr. C. U. Singh see Gopal Sankaranarayanan has been sitting all this time. Therefore we must now decide who is speaking and how long they are speaking. The [UNCLEAR] time will apply on Tuesday certainly. therefore it should not be that one person takes an extra time and other people don't get a chance to speak. This is the problem.

CHIEF JUSTICE DY CHANDRACHUD: So therefore half an hour.

JUSTICE KAUL: Certainly, it'll end on Tuesday.

CHIEF JUSTICE DY CHANDRACHUD: and half an hour for Mr. Dwivedi, half an hour... and after Mr Chander Singh who will argue? Mr Gopal Sankaranarayanan

P. C. SEN: My Lord, my name has been there after Mr. Singh.

CHIEF JUSTICE DY CHANDRACHUD: So what we do is Mr. Dinesh Dwivedi, Mr. C U Singh. Mr. Gopal Sankaranarayanan and Dr. Menaka... 1 second... we're making... laying down a time schedule. The four of you between yourself please ration the time so we complete your submissions by lunch on Tuesday. And then we'll give a little another half an hour or 45 minutes to everybody.

DINESH DWIVEDI: My lord it will be of great help by reducing my time. If Your Lordships go through....

CHIEF JUSTICE DY CHANDRACHUD: I think what we'll do is...

DINESH DWIVEDI: Then Your Lordship can put the direct question to...

1 **CHIEF JUSTICE DY CHANDRACHUD:** Right. What we will do is, we'll go through the
2 written submissions of Mr. Dwivedi and Mr. C U Singh and possibly Dr. Guruswamy and Mr.
3 Sankaranarayanan, any particular aspect of your submissions that you would like us to focus
4 on, because now we'll be covering things which are left out by the others.

5

6 **GOPAL SANKARANARAYANAN:** If I can just make one small submission, if Your
7 Lordships have noticed everybody on this side there's hardly been any repetition or overlap,
8 despite the amount of time that's been taken and the reason I'll explain why, on day one, I told
9 Your Lordships the number of pages that were involved. Your Lordships have been shown only
10 I think about 10 or 5%, less than 5% of the documents involved and the rest of it, I'm sorry,
11 I'm afraid Your Lordship may have to go through. What we are doing, personally, I'll tell you
12 what I'm doing. I am putting down what I would like Your Lordships to read on your own
13 because it's going to take way too much time for me perhaps to take Your Lordships through
14 it. There are, in fact, large swaths of material that needs to be shown but we don't have the
15 time...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Can I suggest one thing.

18

19 **GOPAL SANKARANARAYANAN:** Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Without giving us like a million pages. If you can
22 say by tomorrow afternoon, give to the Court Master on a piece of paper, what are the specific
23 aspects you would like us to read from your submissions as Mr. Dwivedi has given us, just
24 highlight that I'll circulate it to all my four colleagues. So that then we know exactly what is
25 the area we are focusing on. So we'll be also ready over the weekend. We have those two days
26 apart from the Monday reading. We'll focus on that. So, we'll get through with the submission
27 so that that will curtail ultimately the time which all of you are... so, we proceed on the basis
28 then that Mr. Dwivedi, Mr. Chander Singh, Mr. Gopal Sankaranarayanan and Dr. Menaka will
29 conclude.

30

31 **SANJAY PARIKH:** After that probably my turn was there... then I think

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. You tell us what is the sequence now?

34

35 **SANJAY PARIKH:** I'll take half an hour....

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37 **CHIEF JUSTICE DY CHANDRACHUD:** No it can't...

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JUSTICE SANJAY KISHAN KAUL: The sequence can be... that is why I said Mr. Gopal Sankaranarayanan can put down. You have so many minutes in Tuesday, how much minutes will each of you take. So that it should not be that anybody is left out by the end of the time.

CHIEF JUSTICE DY CHANDRACHUD: So Mr. Sankaranarayanan, what you can do is..

GOPAL SANKARANARAYANAN: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: We are concluding this side completely on Tuesday. Please sit with whoever is in the court. You give us on Tuesday morning the sequence and allocation of time. So that we strictly stick to the time and we can conclude on Tuesday.

GOPAL SANKARANARAYANAN: May I suggest that if I go last, if I'm the one doing that because I don't want there to be any allegation that I favoured....

CHIEF JUSTICE DY CHANDRACHUD: No. No. Not at all. I don't think anybody will do that. You've been there sitting there and you've been making notes and assisting everyone. But now when your turn comes, but give us that on Tuesday morning upfront so that... in fact, if you can ideally give it to us tomorrow morning. Give it to our... Mr. Sanjay, our Court Master. I'll circulate it to all my colleagues. So we know Tuesday morning. And we'll keep to that order, the sequence and the time. So that everybody feels that they have...

PETITIONER'S COUNSEL: <UNCLEAR>

CHIEF JUSTICE DY CHANDRACHUD: Of course. No difficulty. Absolutely no. No difficulty at all.

GOPAL SANKARANARAYANAN: If possible, I'll mention the issue.

CHIEF JUSTICE DY CHANDRACHUD: You can even mention the interveners, who are the interveners. Between the interveners....

IRFAN HAFIZ LONE: [UNCLEAR]

1 **CHIEF JUSTICE DY CHANDRACHUD:** No difficulty, no difficulty. You can just right now
2 sit with Mr. Sankaranarayanan for 5 minutes after we rise. So that he can just prepare the
3 blueprint for us. One thing. This is a little bit of self-restraint.

4

5 **IRFAN HAFIZ LONE:** [INAUDIBLE]

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** We'll give ten minutes. But ten minutes provided
8 you saying something which is different from what somebody has argued. Then don't cover
9 the same territory. We had that. We still have it. But now we are towards almost the concluding
10 stages of the arguments so thought... now everybody, each one of the counsel following, knows
11 this is the time stipulated and so that we conclude on Tuesday. Otherwise what will happen is
12 that last 2 or 3 counsels will have very little time left. That should not happen. We like to ration
13 out time for everybody, including the interveners. Mr. Sankaranarayanan, just do that and
14 kindly give it to Sanjay by tomorrow morning. So he will have it. Thank you. Thank you.

15

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END OF DAY'S PROCEEDINGS