

**IN THE SUPREME COURT OF INDIA**

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 1162 OF 2018

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

**IN THE MATTER OF:**

ASHWINI KUMAR UPADHYAY

...PETITIONER

VERSES

UNION OF INDIA & ANOTHER

...RESPONDENTS

PAPER BOOK

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**ADVOCATE FOR PETITIONER: R.D.UPADHYAY**

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## PERFORMA FOR FIRST LISTING

**Section: PIL**

The case pertains to (Please tick / check the correct box):

- Central Act: The Constitution of India
- Section: Articles 14, 15, 16, 19, 21 & 370
- Central Rule: N/A
- Rule No: N/A
- State Act: N/A
- Section: N/A
- State Rule: N/A
- Rule No: N/A
- Impugned Interim Order: N/A
- Impugned Final Order / Decree: N/A
- High Court: N/A
- Name of Judges: N/A
- Tribunal / Authority Name : N/A

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1. Nature of Matter: Civil

2. (a) Petitioner / Appellant : [REDACTED]

(b) Email ID: [REDACTED]

(c) Phone No: [REDACTED],

3. (a) Respondent: Union of India and another

(b) Email ID: N/A

(c) Phone No: N/A

4. (a) Main Category: 08 PIL Matters

(b) Sub Category: 0812, Others

5. Not to be listed before: N/A



## **SYNOPSIS**

By way of instant petition under Article 32 of the Constitution of India, Petitioner is challenging validity of proviso of the Article 370(3) of the Constitution of India and Articles 6, 7, 8 and 144 of the Constitution of Jammu & Kashmir for being arbitrary and contrary to the fundamental rights - equality before Law, equal protection of law, equal opportunity in public employment, right to establish educational institution, right to trade /business, right to own property, right to know etc. guaranteed under Articles 14, 15, 16, 19 and 21 of the Constitution of India.

The maximum life span of proviso of the Article 370(3) was only till the existence of Constituent Assembly. It can be clarified from perusal of the Constituent Assembly debates and the Article 370(3) itself. Hence, as on today, it is illegal and unconstitutional.

The Constitution of Jammu & Kashmir is invalid mainly for the reason that the same has not yet got the assent of the Hon'ble President, which is mandatory as per provisions of the Constitution of India.

From the perusal of Article 370 as a whole i.e., Clauses 1, 2 and 3, it becomes clear that the said provision was valid only till constituent Assembly, ratified the instrument of accession and/or in alternative till framing the Constitution of Jammu & Kashmir, inconformity with / in consonance with Indian Constitution, with approval of the President. The Constituent Assembly was not in operation on the day of coming into force of the Indian Constitution i.e. 26.01.1950. Therefore, Article 370 deems to be lapsed in 1954, when it ratified accession or maximum in 1957, when Constituent Assembly of Jammu & Kashmir dissolved. It is also pertinent to mention that as per provision of Article 370 read with

Schedule I of the Constitution and even as per provision of the Constitution of Jammu & Kashmir, the State of J&K, is integral part of Union of India. This Hon'ble Court has held that Constitution of India is Supreme and India is a sovereign Country not the State of J&K.

It is pertinent to mention that interpretation of Constitution must be purposive to achieve the object sought. It is needless to reiterate that from the perusal of heading / title of Article 370 itself, it is amply clear that the said provision is temporary / interim arrangement only. So, this Hon'ble Court can declare the said provision manifestly arbitrary.

It is further submitted that even the Hon'ble President cannot declare the Article 370 operative, because it can be done only with the consent of the Constituent Assembly. It is pertinent to mention that "temporary Provisions means a provision made for short prescribed period or in absence of prescribed period, the same exist/continue till happening of certain event / finishing of some known job, which is bound to happen in near future. So, in present case, harmonious and purposive interpretation of Article 370 may satisfy the requirements to achieve avowed object, would be to keep the same temporary not to make the same perpetual / permanent. The question arises are: **(i)**

Whether Article 370 of the Constitution of India is a temporary provision, lapsed automatically with the dissolution of Constituent Assembly of J & K, which was dissolved on 26.01.1957 mainly in view of Constituent Assembly debate and Article 370 (3) itself? **(ii)**

Whether the Article 370 can be made permanent / perpetual even after dissolution of the Constituent Assembly as has been done impliedly in Sampat Kumar Case? [(1969) 2 SCR 365]

**(iii)** Whether the second proviso of clause 3 of Article 370 of the Constitution of India lapsed with the dissolution of the Constituent Assembly which was dissolved / lapsed in 1957 even assuming that the whole Article 370 didn't lapse?

**(iv)** Whether even assuming that the second proviso of clause 3 of the Article 370 of the Constitution still exists, even then, the same can be said mandatory in character/nature, in absence of Constituent Assembly of Jammu & Kashmir which was dissolved in 1957, or the same has been restricted/limited to optional/directory in nature only? **(v)**

Whether the Constitution of Jammu & Kashmir, which came into force/ in operation on 26.01.1957, several provisions of which are completely inconsistent with / against the provisions of the Constitution of India, are constitutionally valid, especially in view of the facts that the said Constitution of Jammu & Kashmir has never been ratified by the President nor has been ratified by the Parliament nor satisfies the requirement of Article 1, Preamble of the Constitution, which can't be eroded/even remotely, as, is clear from perusal of Article 370 itself.

**(vi)** Whether the Government of India has rightly delegated the matter related to citizenship etc. to the State Government especially in view of the provisions of Article 1, 11, 246 and Seventh Schedule of the Constitution of India and its Preamble, by agreement entered on 24.07.1952? Whether the Central Government has such power?

**(vii)** Whether even after ratifying the J & K accession unconditionally in 1954, itself by the Constituent Assembly, the same could further proceed to frame separate Constitution?



Petitioner is not questioning / challenging the agreement / instrument of accession dated 26.10.1947, signed by the Ruler of Jammu & Kashmir and Union nor any order passed by the Hon'ble President under Article 370. Therefore, Article 363 is not applicable in this matter.

It is also pertinent to mention that the Constitution of Jammu & Kashmir was adopted on 26.01.1957, much after coming the Constitution of India in force. Therefore, the Article 372 is also not applicable in the present matter. Furthermore, the instrument of accession dated 26.10.1947 does not talk, even remotely about Constituent Assembly or about separate Constitution of J & K.

Therefore, this Hon'ble Court may graciously be pleased to issue a writ, order or direction including a writ of mandamus to declare that proviso of Article 370(3) lapsed with the dissolution of J & K Constituent Assembly, dissolved on 26.01.1957 and has been restricted to directory.

It is also prayed to issue a order or direction or writ mandamus to declare that (a) the Constitution of J & K dated 26.01.1957 is void, inoperative, illegal and ultra-vires of the Constitution of India or (b) such provisions of J & K Constitution like Article 6, 7, 8, 144, etc., of the same, which are inconsistent with/in derogation of Indian constitution void, inoperative, illegal and ultra-vires of the Constitution of India.

#### **LIST OF DATE**

20.09.2018: Proviso of Article 370(3) of the Constitution of India and Articles 6, 7, 8 and 144 of the Constitution of J&K is arbitrary and void for being violative of Articles 14, 15,16,19,21 and Preamble of the Constitution of India. Hence, this writ petition in larger public interest.

**IN THE SUPREME COURT OF INDIA**  
**CIVIL ORIGINAL JURISDICTION**  
**WRIT PETITION (CIVIL) NO 1162 OF 2018**  
**(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)**

**IN THE MATTER OF:**

Ashwini Kumar Upadhyay

██  
██  
██  
██

...Petitioner

Versus

1. Union of India  
Through the Secretary,  
Ministry of Home Affairs,  
North Block, New Delhi-110001,

2. The State of Jammu and Kashmir,  
Through the Chief Secretary,  
Civil Secretariat, Srinagar,  
Jammu & Kashmir-190001,

.....Respondents

PIL UNDER ARTICLE 32 SEEKING A DECLARATION THAT PROVISIO OF THE ARTICLE 370(3) HAS BEEN LAPSED WITH THE DISSOLUTION OF J&K CONSTITUENT ASSEMBLY ON 26.1.1957 AND HAS BEEN RESTRICTED TO BEING DIRECTORY ONLY AND CANNOT BE TREATED AS MANDATORY FOR THE EXERCISE OF POWERS OF THE PRESIDENT.

To,  
THE HON'BLE CHIEF JUSTICE OF INDIA  
AND LORDSHIP'S COMPANION JUSTICES  
OF THE HON'BLE SUPREME COURT OF INDIA  
THE HUMBLE PETITION OF ABOVE-NAMED PETITIONER  
THE MOST RESPECTFULLY SHOWETH AS UNDER:

1. The Petitioner is filing this writ petition as a PIL under Article 32 of the Constitution of India seeking a writ, order or direction or a writ in the nature of mandamus to declare that the Article 370 is arbitrary and contrary to Articles 14, 15, 16, 19, 21 and basic structure of the Constitution of India. Hence, the said provision may be declared as void and inoperative. It is further prayed before this Hon'ble Court that in

exercise of the wide powers possessed by this Hon'ble Court, it may be declared that the proviso to Article 370(3) of the Constitution of India has been rendered infructuous and that the same is inoperative inasmuch as it virtually erodes the wide powers of the President of India to effect 'exceptions and modifications' to the said Article in its application to the State of Jammu and Kashmir.

- 2.** The Petitioner has not filed any other same or similar writ petition either in this Hon'ble Court or in any other High Court seeking same or similar directions as prayed in the instant writ petition.
- 3.** Petitioner's full name is Ashwini Kumar Upadhyay. Residence at: G-284, Govindpuram, Ghaziabad-201013, U.P. Ph No: 08800278866, Email: aku.adv@gmail.com, PAN: AAVPU7330G, AADHAAR: 659982174779. Annual Income is Rs. 3 Lakh. Petitioner is an Advocate, practices in this Hon'ble Court and a social-political activist, contributing his best to the development of socially-economically downtrodden Indian citizens.
- 4.** The facts constituting cause of action accrued on 26.1.1957 and every subsequent date, when proviso of the Article 370(3) lapsed due to the dissolution of the J&K Constituent Assembly and has been restricted to being directory only but it is still being used for restricting the power of the President of India.
- 5.** The injury caused to the public is very large because proviso of the Article 370(3) is arbitrary and contrary to Articles 14, 15, 16, 19 and 21 and Preamble of the Constitution of India.
- 6.** It is respectfully submitted that the Petitioner has no personal interest, individual gain, private motive or oblique reasons in filing this writ petition. It is not guided for gain of any other individual person,

institution or body. There is no motive other than larger public interest and interest of justice. Further, it is disclosed that there is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus with the issues involved in this writ petition. The Petition is totally bona-fide and in larger public interest.

7. There is no alternate efficacious remedy available in terms of the prayers sought in this writ petition and thus, there is no requirement to approach any government authority for the reliefs sought herein.
8. It is most respectfully submitted that the continued existence of Article 370 of the Constitution of India, given the typical historical setting in which the same was formulated, coupled with subsequent developments over the years since, violates the structural sanctity of this Constitution and is in effect a fraud played on the *suprema lex*. Part XXI of the Constitution of India was specifically designed in a manner to facilitate the transition of a fledgling democracy with federal constituents into a true 'Union of States', with a centric bias, that is to say that the federal structure of the Constitution tilts strongly towards the Central Legislature and the Central Government. (Refer. *State of West Bengal v. Union of India*, AIR 1963 SC 1241, (1964) 1 SCR 371)
9. Certain special features of Article 370 of the Constitution of India are immediately discernable which posit the said Article in a unique position which was carefully balanced to ensure that the supremacy of the Constitution of India is never undermined, even as though certain provisions were sought to be made which may have temporarily come in conflict with the remainder of the instrument. **First**, Article 370 is one of those handful of constitutional provisions which begins with a non-

obstante clause to the entire Constitution; **secondly**, the said provision was included in a special Part which was then titled ‘Temporary and Transitional Provisions’; **thirdly**, the marginal note to Article 370 clearly spells out the intent of the constituent assembly to formulate this Article only as “Temporary provisions with respect to the State of Jammu and Kashmir”; **fourthly**, and significantly the provision had envisioned a sunset clause and condition for it to be rendered as a ‘temporary provision’; and **fifthly**, the sunset clause/condition for the provision as incorporated in Article 370(3) also significantly begins with a non-obstante clause to the remainder of the Article. What is significant in the structure of Article 370(3) is that its opening words with a non-obstante clause causes that provision to be governing over even the other clauses of Article 370.

- 10.** The continuing and purportedly perennial existence of Article 370 along with a separate Constitution for the State of Jammu and Kashmir is rendered anomalous also in light of the fact that practically the entirety of the Constitution of India (as it stood on 20-06-1964), with certain modifications and amendments, has been extended to the State by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954, as had been amended from time to time, with the concurrence of the Government of the State of Jammu and Kashmir. (Refer *State Bank of India v. Santosh Gupta*, (2017) 2 SCC 538, para 22)
- 11.** In light of the above, the following submissions are made without prejudice to each other, which this Hon’ble Court may consider in adjudicating the prayers sought in the present Petition:

**THE STRUCTURAL SANCTITY OF THE CONSTITUTION OF INDIA AND  
THE PROVISO TO THE ARTICLE 370(3):**

- 12.** It is most respectfully submitted that it is beyond any pale of doubt that at the time of its drafting, the intent behind incorporating a special provision for the State of Jammu and Kashmir was necessitated in light of the then prevailing social and political conditions, and more relevantly the Instrument of Accession as entered into between the Union of India and the then Ruler of the State. Clause 7 of the said Instrument of Accession dated 26.10.1947, pertinently read as follows: *“7. Nothing in this Instrument shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Governments of India under any such future Constitution.”* Therefore, it was imperative to find a legal solution for the true integration of the State and its people with the Union of India. Chronologically, after the execution of the Instrument of Accession, the next subsequent event in the course of the chequered relationship between the State and the Union of India, came to be the adoption of the Constitution of India along with Article 370. Pertinently at the time of adoption of the Constitution of India, there existed no Constituent Assembly for the State of Jammu and Kashmir which was only to be set up more than a year later by a Proclamation which also indicated that the Constituent Assembly was to be on the basis of adult franchise.
- 13.** It is in this background it had become important to entrench the applicability of the Constitution of India to the State of Jammu and Kashmir, through Article 370, since its application was not a direct

sequitur of the Instrument of Accession. The exercise of Presidential powers in the manner provided in Article 370 was thus the available route through which the centrality of the Constitution of India could be preserved. It is in pursuance of this that various Constitution Orders (C.O.) came to be promulgated from time to time, of which, the final one being C.O. 48 (as amended from time to time) vide which practically the entirety of the Constitution of India (as it stood on 20-06-1964), with certain modifications and amendments, has been extended to the J&K.

- 14.** As matters stood thus, *de hors* the Petitioner's humble submission that the above has thus rendered a Special Constitution for the State of Jammu and Kashmir redundant and expendable, a curious anomaly has arisen which potentially shakes the foundational principle of Article 370 being a 'temporary provision'. The smooth extension of the Constitution of India to all its federal units being the intent of the framers of the Constitution behind enacting this particular Article, which per necessity is a temporary and transitional mandate, the provision was thus provided with a sunset clause/condition in Article 370(3). Thereby the President of India was empowered to *inter alia* declare the particular provision i.e., Article 370 to cease to be operative. However, the said power was hedged by the proviso to the Article, where under, the President could exercise the said power granted in the principle provision of Article 370(3) only upon a recommendation to that effect by the Constituent Assembly of the State of Jammu and Kashmir.
- 15.** Crucially, Article 370 commences with a non-obstante clause, thereby paving the path to make wide ranging modifications (plausibly also in derogation of provisions of the Constitution of India) in the provisions of

the Constitution in its application to the State of Jammu and Kashmir. Further, Article 370(3) commences with a second non-obstante clause which is a rider on everything that may be provided under the other provisions of Article 370 itself. Therefore, a cumulative reading of the two non-obstante clauses leads to the inescapable conclusion that Article 370(3) would be governing in the scenario of a conflict between an exercise of powers by the President under that clause, as posited against the Presidential powers under the remaining provisions of Article 370 of the Constitution of India.

- 16.** The careful positioning and phrasing of Article 370 with its deployment of twin non-obstante clauses, therefore amplifies the full extent of the powers of the President of India, in connection with the application of the Constitution of India including the provision of Article 370 to the State of Jammu and Kashmir, geared towards the gradual and appropriate integration of the erstwhile kingdom of Jammu and Kashmir with the Union of India. This cherished objective of softly handling the process of integration of the State shall be dealt a death blow in the circumstance it is to be caused that the special provision of Article 370 shall continue in perpetuity, which in any case was never the intention of the framers of the Constitution as is plainly evident from the structure, positioning and phraseology of the Article in question.
- 17.** A further structural sequitur of Article 370 of the Constitution of India is that the said provision was never intended to outlive the duration and life of a constituent assembly which may be framed for the State of Jammu and Kashmir. The above is borne by the fact and the specific wording of the proviso to Article 370(3). While the proviso hedges the exercise of



power by the President of India with regard to Article 370, it specifies that the presidential power under clause (3) could only be used upon a “recommendation of the Constituent Assembly of the State referred to in clause (2)”. Referring back to clause (2) of Article 370 it is clear that the Constituent Assembly of the State mentioned in the proviso to clause (3) is one which is for the purpose of the ‘framing the Constitution of the State’. Therefore, once such a Constitution has been framed, a constituent assembly within the meaning of proviso to clause (3) cannot be further instituted for any other purpose.

- 18.** It is humbly submitted that although an amending body (a legislature whether of the Union or a State) is reposed with constituent powers to effect an amendment to a Constitution, a constituent assembly, which has the primary power to frame a constitution cannot be reconvened after the dissolution of the body which possesses the said primary power. The power to amend a constitution under the procedure provided in any such instrument is only a derivative power and no constituent assembly is required for the same. Therefore, a rigid constitution (like the Constitution of India – with its inherent mechanism of amendment) does not envisage a circumstance of reconvening of a constituent assembly once its mandate is fulfilled. Further, that the Constituent Assembly of the State of Jammu and Kashmir has been dissolved, there is no other such constituent assembly which can be even convened because of the phraseology of Clause (2) and proviso to Clause (3) read cumulatively. The Constituent Assembly envisaged under the proviso to Clause (3) is only one which is ‘for the purpose of framing the Constitution of the

State', which now once framed, there is no foreseeable circumstance in which the same can be reconstituted for any purpose whatsoever.

**19.** The direct effect of the above is that through this backhanded sleight, an attempt is sought to be made to evergreen the provision of Article 370, which is anomalous for the following reasons:

(a). It curtails the wide powers of the President of India to exercise her powers under Clause (3) of Article 370;

(b). The proviso is thus made to govern the principle provision, that is to say, it creates the anomalous circumstance whereby, by rendering the proviso otiose, the substantive power under the main clause i.e., Article 370(3) has been put in cold storage in perpetuity; and

(c). Eternal perpetuation of a provision through a sleight, when the said provision was *ex facie* intended to be temporary is a massive fraud on the Constitution of India. (refer *D.C. Wadhwa v. Union of India*, AIR 1987 SC 579)

**20.** Each of the above mentioned grounds shakes the structural sanctity of the Constitution of India, in connection with the relationship that the Centre shares with the constituent States of the Union. That having done away with Article 238 of the Constitution of India, there is no discernable rationale *sans* any other textual indication in the Constitution itself for having different categories of the States within the Union. Of course, it is admitted, that the decision to exercise the powers under Clause (3) to Article 370 shall rest upon the executive wisdom which in turn shall be predicated on social and political necessities, the power however, must remain reposed with the President and the same cannot be denuded through the medium of the proviso to that provision.

**21.** It is most respectfully submitted that in its present form, Part XXI of the Constitution of India contains three types of provisions, (i) temporary ones – e.g., Articles 369, 370 and 373; (ii) transitional ones – e.g., Articles 369, 372, 373, 374, 375, 376, 377, 378 and 392; and (iii) special ones – e.g., Articles 371, 371A-J and 378A. It is noteworthy, that the Part as was adopted in 1950 only contained temporary and transitional provisions. It is in this matrix, the legislative history of the provision elucidates that Article 370, as originally promulgated was only a temporary provision and was never meant to be an everlasting and eternal special provision. It cannot be countenanced that while multiple amendments have been effected to the Part by the Parliament, the provision of Article 370 has been retained without material alteration and therefore, there cannot be an implicit interpretation that Article 370 has now converted itself into a ‘Special Provision’. The provision itself with its nuances and the history of Constitutional Orders issued under it, undermines any such interpretation and the same necessarily has to be eschewed.

**FRAUD ON THE CONSTITUTION OF INDIA:**

**22.** It is most respectfully submitted that the constitutional structure is so envisioned that all its provisions are intended to play in a symphony of the individual notes that independent provisions strike. When a limb of the government in exercising its powers, seeks to use any provision in a manner which is designed to circumvent constitutional safeguards and when it seeks to operate the constitution in a manner, which is contrary to and in direct collision of the original course, the same has to be regarded as a fraud on Constitution of India.

- 23.** That it is a truism in law that what cannot be done directly may not be attained indirectly either. The evergreen-ing of the provision of Article 370, contrary to the explicit intent of the original Constitution and that too without bringing about any amendment to the provision itself, is a massive subterfuge of the sanctity of constitutional structure.
- 24.** A direct correlation may be drawn to the twin cases of *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 and that in *DC Wadhwa v. State of Bihar*, (supra.) wherein it has been held that “*an edifice of rights and obligations cannot be built in a constitutional order on acts which amount to a fraud on power. This will be destructive of the rule of law*”. What is possibly the most crucial is that, as in those cases, in the present as well, constitutional silences are sought to be utilized in a manner to further narrow political gains, quite contrary to the intent manifest in the text. In the present matter, while the constitutional text clearly envisaged a power in the President to cause a cessation of the provision of Article 370 (of course, upon the recommendation of the Constituent Assembly of the State), its continuance in perpetuity, denuding the President of her powers, by rendering otiose the proviso to Clause (3) of Article 370 is a colourable exercise of power and is a gross abuse of the process and amounts to a fraud on the Constitution of India.
- 25.** What is crucial in the instant matter is that the Constitution had envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision

applied; but subsequent changes in situation might justify the rescinding of those modifications or exceptions. Such power of the President extended through the non-obstante clause to Article 370(3) to the entirety of that Article. However, present manner of short circuiting the amplitude of the President's powers under the said clause of Article 370 is illegal and cannot be countenanced by this Hon'ble Court.

### **CURTAILING THE AMPLITUDE OF POWERS OF THE PRESIDENT:**

- 26.** It is respectfully submitted that under the provisions of the Constitution of India, the power of the President i.e., the Executive powers are widely bestowed. In fact, our judicial precedents have repeatedly clarified that it is impossible to frame an exhaustive definition of what executive function means and implies. In fact in ***Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225***, this Hon'ble Court had opined that "*executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away*". In fact it shall be instructive to refer to Halsbury's Vol. 7, 3rd Edn., to highlight the plenitude of the powers available to the Executive which are sought to be exercised through its fountainhead i.e., the President of India: "*In the performance of these functions, public authorities are bound to issue orders which are not far removed from legislation and to make decisions affecting the personal and proprietary rights of individuals which, while not strictly judicial, are quasi-judicial in character. Discretionary action of both these types must now be considered normal on the part of the executive. [...]* In view of the complexity of modern government and the congestion of parliamentary business, it is probably necessary that executive should exercise powers of subordinate legislation. From the above, it can be

crystallized that the extent of the executive power cannot be easily curtailed and that any grant of power ought to be interpreted broadly to take within its sweep the widest extent of subjects. In the performance of its functions, the Executive, this Hon'ble Court has held that, public officials are bound to issue orders, which are not far removed from legislation, and to make decisions affecting the personal and proprietary rights of individuals, which, while not strictly judicial, are quasi-judicial in character. That discretionary action of both types must now, therefore, to be considered normal on the part of the Executive. (***Amritlal v. F.N. Rana, (1964) 5 SCR 294***)

- 27.** The above demonstrates the breadth of the power, which is wielded by the Executive, and therefore, the President of India. Any artificial curtailment of the same shall amount to an arbitrary restriction, which cannot be countenanced by this Hon'ble Court. In the context of Article 370, therefore, it is demonstrable that the Constitution makers in its wisdom had reposed the responsibility of working the nuances of integrating the State of Jammu and Kashmir into the Union of India vide the powers, which are expressly granted to the President.
- 28.** Therefore, an abridgement of the powers of the President under the principal clause of Article 370(3) is a direct affront to the amplitude of powers of President / Executive as available under the Constitution of India. The backhanded sleight of denuding powers of the President by causing the proviso to clause (3) of Article 370 be rendered inoperable is therefore, anathema to constitutional scheme of distribution of powers and also does not advance the purpose of incorporating special provisions for transitioning the nation to its true independence.

## **MANIFEST ARBITRARINESS:**

- 29.** The continuance of two parallel constitutions one for the State and one for the Union, reeks of a weird dichotomy inasmuch as narrated above most of the provisions of the Constitution of India has already been extended to the State of Jammu and Kashmir vide C.O. 48 as amended till date. To further exacerbate the complexity of the situation the Union of India had entered into an agreement, popularly referred to as the Delhi Agreement of 1952, which sought to settle certain issues between the Union and the State of Jammu and Kashmir through an ad-hoc mechanism. However, what is noteworthy is that the Delhi Agreement, 1952, does not find any mention in the Constitution of India or the Constitution Orders passed by the President of India under the powers of Article 370 of the Constitution. Therefore, this particular instrument i.e., Delhi Agreement 1952 is an entirely extra-constitutional and does not inspire any confidence in terms of legal matrix of the relationship between the State of Jammu and Kashmir and the Union of India.
- 30.** Furthermore, it is respectfully submitted that certain clauses of the Delhi Agreement 1952 are not in consonance with the Instrument of Accession or the Constitution of India and therefore, must be declared to be unconstitutional being ultra vires the Constitution of India.
- 31.** The injury caused to the public because Article 370 is arbitrary and contrary to the fundamental rights viz. equality before the Law, equal protection of law, equal opportunity in public employment, right to form association, right to establish educational institution, right to trade /business, right to own property, right to know etc. guaranteed under Articles 14, 15, 16, 19 and 21 of the Constitution of India.

- 32.** The maximum life span of Article 370 of the Constitution was only till the existence of Constituent Assembly. It can be clarified from perusal of the Constituent Assembly debates and Article 370 clause (3) itself. Hence, as on today, it is illegal and unconstitutional.
- 33.** The Constitution of Jammu & Kashmir is invalid mainly for the reason that the same has not yet got the assent of the Hon'ble President, which is mandatory as per provisions of the Constitution of India.
- 34.** The PIL is related to interpretation of Article 370 of the Constitution of India, which is a temporary provision, with respect to the State of Jammu & Kashmir, Article 1, 6, 7, 8, 11, 14, 53, Article 246, read with List I of Seventh Schedule etc. of the Constitution of India.
- 35.** From the perusal of Article 370 as a whole i.e., Clauses 1, 2 and 3, it becomes clear that the said provision was valid only till constituent Assembly, ratified the instrument of accession and/or in alternative till framing the Constitution of Jammu & Kashmir, inconformity with / in consonance with Indian Constitution, with approval of the President. The Constituent Assembly was not in operation on the day of coming into force of the Indian Constitution i.e. 26.01.1950. So, Article 370 deems to be lapsed in 1954, when it ratified accession or maximum in 1957, when Constituent Assembly of Jammu & Kashmir dissolved.
- 36.** It is also pertinent to mention that as per provision of Article 370(3) read with Schedule I of the Constitution of India and even as per provision of the Constitution of Jammu & Kashmir, the State of Jammu & Kashmir, is integral part of Union of India. This Hon'ble Court has held that Constitution of India is Supreme and India is a sovereign Country not the State of Jammu & Kashmir.



**37.** It is pertinent to mention that interpretation of Constitution must be purposive to achieve the object sought. It is needless to reiterate that from the perusal of heading / title of Article 370 itself, it is amply clear that the said provision is temporary / interim arrangement only. So, this Hon'ble Court can declare the said provision manifestly arbitrary.

**38.** It is further submitted that even the Hon'ble President cannot declare the Article 370 operative, because it can be done only with the consent of the Constituent Assembly. It is pertinent to mention that "temporary Provisions means a provision made for short prescribed period or in absence of prescribed period, the same exist/continue till happening of certain event / finishing of some known job, which is bound to happen in near future. So, in present case, harmonious and purposive interpretation of Article 370 may satisfy the requirements to achieve avowed object, would be to keep the same temporary not to make the same perpetual / permanent. The question arises are:

**(i)** Whether

Article 370 of the Constitution of India is a temporary provision, lapsed automatically with the dissolution of Constituent Assembly of J & K, which was dissolved on 26.01.1957 mainly in view of Constituent Assembly debate and Article 370 (3) itself?

**(ii)**

Whether the Article 370 can be made permanent / perpetual even after dissolution of the Constituent Assembly as has been done impliedly in Sampat Kumar Case? [(1969) 2 SCR 365]

**(iii)**

Whether the second proviso of clause 3 of Article 370 of the Constitution of India lapsed with the dissolution of the Constituent Assembly which was dissolved / lapsed in 1957 even assuming that the whole Article 370 didn't lapse?

**(iv)** Whether

even assuming that the second proviso of clause 3 of the Article 370 of the Constitution still exists, even then, the same can be said mandatory in character/nature, in absence of Constituent Assembly of Jammu & Kashmir which was dissolved in 1957, or the same has been restricted/limited to optional/directory in nature only? **(v)**

Whether the Constitution of Jammu & Kashmir, which came into force/ in operation on 26.01.1957, several provisions of which are completely inconsistent with / against the provisions of the Constitution of India, are constitutionally valid, especially in view of the facts that the said Constitution of Jammu & Kashmir has never been ratified by the President nor has been ratified by the Parliament nor satisfies the requirement of Article 1, Preamble of the Constitution, which can't be eroded/even remotely, as, is clear from perusal of Article 370 itself.

**(vi)** Whether the Government of India has rightly delegated the matter related to citizenship etc. to the State Government especially in view of the provisions of Article 1, 11, 246 and Seventh Schedule of the Constitution of India and its Preamble, by agreement entered on 24.07.1952? Whether the Central Government has such power?

**(vii)** Whether even after ratifying the J & K accession unconditionally in 1954, itself by the Constituent Assembly, the same could further proceed to frame separate Constitution?

**39.** It is necessary to mention / clarify that petitioner is not questioning / challenging the agreement / instrument of accession dated 26.10.1947, signed by the Ruler of Jammu & Kashmir and Union of India nor any order passed by the Hon'ble President under Article 370. Therefore, Article 363 is not applicable in the present matter.

- 40.** It is also pertinent to mention that the Constitution of Jammu & Kashmir was adopted on 26.01.1957, much after coming the Constitution of India in force. Therefore, the Article 372 is also not applicable in the present matter. Furthermore, the instrument of accession dated 26.10.1947 does not talk, even remotely about Constituent Assembly or about separate Constitution of J & K.
- 41.** Therefore, this Hon'ble Court may graciously be pleased to issue a writ, order or direction including a writ of mandamus to declare that proviso of Article 370(3) lapsed with the dissolution of J & K Constituent Assembly, dissolved on 26.01.1957 and/has been restricted to directory only / not mandatory.
- 42.** It is also prayed to issue a order or direction or writ mandamus to declare that (a) the Constitution of J & K dated 26.01.1957 is void, inoperative, illegal and ultra-vires of the Constitution of India or (b) such provisions of J & K Constitution like Article 144, 6, 7, 8 etc., of the same, which are inconsistent with/in derogation of Indian constitution void, inoperative, illegal and ultra-vires of the Constitution of India.
- 43.** It is also respectfully prayed to declare all such provisions of "Delhi Agreement - 1952" viz. clause II etc. which are inconsistent with/in derogation of the provisions of the Constitution of India, void, illegal inoperative, unconstitutional and quash the same.
- 44.** It is necessary to state that due to vote bank politics, the successive Central Governments did nothing to repeal Article 370 or proviso of the Article 370(3) and the Constitution of J& K. Hence, this Hon'ble Court is the only hope of Citizens of India to secure their fundamental rights and supremacy of the Constitution of India.

## **PRAYER**

Keeping in view the above stated facts and circumstances, it is the most respectfully prayed that this Hon'ble Court may be pleased to issue a writ, order or direction or writ in the nature of mandamus to:

**(a)** declare that proviso of Article 370(3) of the Constitution of India lapsed with the dissolution of J & K Constituent Assembly on 26.01.1957 and has been restricted to being directory only and cannot be treated as mandatory for exercise of powers of the President of India;

**(b)** declare that the Constitution of Jammu & Kashmir is against supremacy of the Constitution of India and contrary to dictum of "*One Nation One Constitution One National Anthem and One National Flag*";

**(c)** declare that the Constitution of Jammu & Kashmir is arbitrary, unconstitutional and void for being violative of Articles 14, 15, 16, 19, 21, the Preamble and Basic Structure of the Constitution of India;

**(d)** in the alternative to Prayer (c), declare Articles 6, 7, 8 and 144 of the Constitution of Jammu & Kashmir, arbitrary, unconstitutional and void for being violative of Articles 14, 15, 16, 19, 21, the Preamble and Basic Structure of the Constitution of India;

**(e)** pass such other order or direction as this Hon'ble Court may deem fit in the facts and circumstances of the case and to secure fundamental rights of the Citizens of India, particularly guaranteed under Articles 14, 15, 16, 19 and 21 of the Constitution of India; and

**f)** allow the cost of this writ petition to petitioner.

**NEW DELHI**

**(R.D.UPADHYAY)**

**20.09.2018**

**ADVOCATE FOR PETITIONER**

**IN THE SUPREME COURT OF INDIA**  
CIVIL ORIGINAL JURISDICTION  
WRIT PETITION (CIVIL) NO ..... OF 2018

**IN THE MATTER OF:**

Ashwini Kumar Upadhyay ...Petitioner  
Verses  
Union of India & another ...Respondents

**AFFIDAVIT**

I, Ashwini Kumar Upadhyay aged 44 years, son of Sh. Suresh Upadhyay, Office at: 15, New Lawyers Chambers, Supreme Court, New Delhi-110001, Residence at: G-284, Govindpuram, Ghaziabad-201013, at present at New Delhi, do hereby solemnly affirm and declare as under:

1. I am the sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.
2. I have read and understood contents of accompanying synopsis and list of dates pages (B- E) writ petition paras (1- 43) pages (1- 19) and total pages (1- 24) which are true and correct to my knowledge and belief.
3. Annexure has not been filed with the writ petition.
4. I have not filed any other petition either in this Hon'ble Court or in any other Court seeking same or similar directions as prayed in this petition.
5. I have no personal interests, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body. The only motive is public interest.
6. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with issue involved in this petition.
7. There is no requirement to move concerned government authority for relief sought in this petition. There is no other remedy available except approaching this Hon'ble Court.
8. I have gone through the Article 32 and the Supreme Court Rules and do hereby affirm that the present petition is in conformity thereof.
9. I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data or material, which was available; and which was relevant for this Hon'ble Court to entertain the present petition.
10. I've not concealed any data/material/information in this petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this petition or not and/or whether to grant any relief or not.
11. The averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this Affidavit is false or fabricated, nor has anything material been concealed there from.

(Ashwini Kumar Upadhyay)  
DEPONENT

**VERIFICATION**

I, the Deponent do hereby verify that the contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from.

I hereby solemnly affirm and declare it today i.e. the 20<sup>th</sup> day of September 2018 at New Delhi.

(Ashwini Kumar Upadhyay)  
DEPONENT

**APPENDIX**

## ARTICLE 370 IN THE CONSTITUTION OF INDIA

370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,

(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to-

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

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

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the 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:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause ( 1 ) or in the second proviso to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

## ARTICLE 6 OF THE CONSTITUTION OF JAMMU & KASHMIR

6. Permanent residents:- (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954-

(a) he was a State Subject of Class I or of Class II ; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as in State Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty seventh June, 1932.

#### **ARTICLE 7 OF THE CONSTITUTION OF JAMMU & KASHMIR**

7. Construction of references to State Subjects in existing laws:-Unless the context otherwise requires, all references in any existing law to hereditary State Subjects or to State Subject of Class I or of Class II or of Class III shall be construed as references to permanent residents of the State.

#### **ARTICLE 8 OF THE CONSTITUTION OF JAMMU & KASHMIR**

8. Legislature to define permanent residents:-Nothing in the foregoing provisions of this part shall derogate from the power of the State Legislature to make any law defining the classes of persons who are, or shall be, permanent residents of the State.

#### **ARTICLE 144 OF THE CONSTITUTION OF JAMMU & KASHMIR**

144. Flag of the State.-The Flag of the State shall be rectangular in shape and red in colour with three equidistant white vertical strips of equal width next to the staff and a white plough in the middle with handle facing the strips. The ratio of the length of the Flag to its width shall be 3:2.

#### **ARTICLE 147 OF THE CONSTITUTION OF JAMMU & KASHMIR**

147. Amendment of the Constitution.-An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly and when the Bill is passed in each House by a majority of not less than two thirds of the total membership of that House, it shall be presented to the Sadar-i-Riyasat for his assent and, upon such assent being given, to, the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that a Bill providing for the abolition of the Legislative Council may be introduced in the Legislative Assembly and passed by it by a majority of the total membership of Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting:

Provided further that no Bill or amendment seeking to make any change in-

(a) this section; or

(b) the provisions of sections 3 and 5 ; or

(c) the provisions of the Constitution of India as applicable, in relation to State, shall be introduced or moved in either House of the Legislature.

#### **ARTICLE 14 IN THE CONSTITUTION OF INDIA**

14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

### **ARTICLE 15 IN THE CONSTITUTION OF INDIA**

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

[\(1\)](#) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

[\(2\)](#) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

[\(a\)](#) access to shops, public restaurants, hotels and palaces of public entertainment; or

[\(b\)](#) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

[\(3\)](#) Nothing in this article shall prevent the State from making any special provision for women and children

[\(4\)](#) Nothing in this article or in clause ( 2 ) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

### **ARTICLE 16 IN THE CONSTITUTION OF INDIA**

16. Equality of opportunity in matters of public employment

[\(1\)](#) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

[\(2\)](#) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

[\(3\)](#) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment

[\(4\)](#) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State

[\(5\)](#) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination

### **ARTICLE 19 IN THE CONSTITUTION OF INDIA**

19. Protection of certain rights regarding freedom of speech etc

[\(1\)](#) All citizens shall have the right

[\(a\)](#) to freedom of speech and expression;

[\(b\)](#) to assemble peaceably and without arms;

[\(c\)](#) to form associations or unions;

[\(d\)](#) to move freely throughout the territory of India;

[\(e\)](#) to reside and settle in any part of the territory of India; and

[\(f\)](#) omitted

[\(g\)](#) to practise any profession, or to carry on any occupation, trade or business

[\(2\)](#) Nothing in sub clause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with



foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

[\(3\)](#) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

[\(4\)](#) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

[\(5\)](#) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

[\(6\)](#) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

[\(i\)](#) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

[\(ii\)](#) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

#### **ARTICLE 21 IN THE CONSTITUTION OF INDIA**

21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

#### **PREAMBLE THE CONSTITUTION OF INDIA**

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this Twenty-Six day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

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