

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Pronounced on: 11.04.2017

+ W.P.(C) 9300/2015

KUMARI VIJAYALAKSHMI JHA Petitioner

Through Mr.Anil Kumar Jha WITH
Mr.Binay K.Das, Mr.Narsing Narain Rai and
Ms.Jyoti Kumri, Advs.

Versus

UNION OF INDIA & ANR Respondent

Through Mr.Sanjay Jain, ASG with
Mr.Amit Mahajan, CGSCand Mr.Nitya
Sharma, Advs.for UOI/R-1
Mr.D.C.Raina, Advocate General with
Mr.G.M.Kawoosa, Mr.S.Fernandes and
Ms.Astha Sharma, Advs. for R-2

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present Public Interest Litigation is filed under Article 226 of the Constitution of India seeking a writ and appropriate declaration to declare Article 370 of the Constitution of India a temporary provision which has lapsed with the dissolution of the Jammu and Kashmir Constituent Assembly on 26.01.1957/06.02.1954. A Writ is also sought to declare that the Constitution of Jammu and Kashmir is void, inoperative and ultra vires the Constitution.

2. Relevant brief facts as stated in the petition are that on 26.10.1947 the Maharaja of Jammu and Kashmir Shri Hari Singh signed the “Instrument of Accession” integrating the State of Jammu and Kashmir to the Indian Union including Tibet. It is further stated that Article 370 of the Constitution gives a special status to the State of Jammu and Kashmir as a temporary measure. On 27.10.1950 a resolution was passed for convening the constituent assembly for the State of J & K. Pursuant to elections the constituent assembly was formed and on 17.11.1956 Jammu and Kashmir Constitution was adopted by the state constituent assembly. On 26.1.1957 the Constituent assembly is said to have been dissolved. It is further stated that a perusal of Article 370 of the Constitution would show that it ceased to remain operative with the dissolution of the constituent assembly of Jammu and Kashmir.

3. The petitioner is said to have earlier filed a writ petition before the Supreme Court being W.P.(C)510/2014. On 11.7.2014 the writ petition was dismissed in limine. The petitioner thereafter moved an interim application in the writ petition for recall of the order of dismissal dated 11.7.2014. The IA was listed before the Supreme Court on 7.9.2015 whereupon hearing of the matter the Supreme Court granted liberty to the petitioner to move the High Court under Article 226 of the Constitution of India.

4. We have heard learned counsel for the parties. The petitioner has also filed his written submissions. What has been stressed before us by the petitioner is that the present writ petition is restricted to the constitutional interpretation of Article 370 of the Constitution of India. It is urged that the said article is a temporary provision which lapsed in

1954/57. It is further stated that a perusal of the Constituent assembly debate would show that the maximum life of Article 370 was prescribed up to the existence/continuance of Jammu and Kashmir Constituent Assembly. Hence, it is stressed that the said Article 370 has ceased to exist.

5. Learned counsel appearing for respondent No.2 has submitted that a similar PIL seeking somewhat identical relief had been filed before the Supreme Court being *Writ Petition (Civil) No.489/2015 titled Bonded Purushottam Yadav vs. Union of India and others*. It is urged that the said writ petition was dismissed on 30.10.2015. Hence, it is urged that on the same analogy the present writ petition filed by the petitioner is also liable to be dismissed.

6. Article 370 of the Constitution of India reads as follows:-

“Article 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 Maharaja's 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.”

7. In our opinion, the pleas raised by the petitioner stand fully rebutted by the Supreme Court in a recent judgment in *State Bank of*

India vs. Santosh Gupta and Another, (2017) 2 SCC 538. The Supreme Court in paragraphs 14 and 15 held as follows:-

“14. The first thing that is noticed in Article 370 is that the marginal note states that it is a temporary provision with respect to the State of Jammu & Kashmir. However, unlike Article 369, which is also a temporary provision limited in point of time to five years from the commencement of this Constitution, no such limit is to be found in Article 370. Despite the fact that it is, therefore, stated to be temporary in nature, sub-clause (3) of Article 370 makes it clear that this Article shall cease to be operative only from such date as the President may by public notification declare. And this cannot be done under the proviso to Article 370 (3) unless there is a recommendation of the Constituent Assembly of the State so to do.

15. This takes us to an interesting judgment of this Court, namely, *Sampat Prakash v. the State of Jammu & Kashmir, (1969) 2 SCR 365*. In this case, a writ petition under Article 32 was filed challenging the detention of the petitioner, in which it was contended that Article 370 contained only temporary provisions which cease to be effective after the Constituent Assembly of the State had completed its work by framing a Constitution for the State. The detention of the petitioner was continued without making a reference to the Advisory Board inasmuch as Article 35(c) of the Constitution had given protection to any law relating to preventive detention in Jammu & Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution initially for a period of five years, which was then extended to ten years and fifteen years. These extensions were the subject matter of challenge, and it was sought to be contended that the power of the President, depending on the concurrence of the Government of the State of Jammu & Kashmir, must be exercised under Article 370 before dissolution of the Constituent Assembly of the State, and that such power must

be held to cease to exist after dissolution of the Constituent Assembly. This argument was repelled by the Constitution Bench by giving three reasons. First and foremost, it was stated that the reason for the Article was that it was necessary to empower the President of India to exercise his discretion from time to time in applying the Indian Constitution. This being so, Article 370 would necessarily have to be invoked every time the President, with the State's concurrence, feels it necessary that amendments to the Constitution of India be made applicable to Jammu & Kashmir, given the special proviso to Article 368 which applies only to the State of Jammu & Kashmir. Further, it was also held that the Article will cease to operate under sub-clause (3) only when a recommendation is made by the Constituent Assembly of the State to that effect. It was found that in fact the Constituent Assembly of the State had made a recommendation that the Article should be operative with one modification to be incorporated in the explanation to clause (1) of the Article, namely, that the Maharaja of Jammu & Kashmir be substituted by the expression "Sadar-I Riyasat of Jammu & Kashmir". Also, it is important to note that Article 370 (2) does not in any manner state that the said Article shall cease on the completion of the work of the Constituent Assembly or its dissolution. Having regard to all these factors, this Court clearly held that though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in sub-clause (3) of the said Article takes place. It was further held by the Sampat Prakash judgment that Section 21 of the General Clauses Act, 1897 was also applicable so that the power under this Article can be used from time to time to meet with varying circumstances."

8. Hence, as per the judgment of the Supreme Court, though as per marginal note Article 370 is a temporary provision, it will, however, continue to remain in force until the specified event in clause 370 of the

Article takes place. It also noted that the said Article remains in current usage. In view of the said authoritative pronouncement it is clear that the submission of the petitioner has no merits.

9. There is also merit in the submissions of learned counsel for respondent No.2. In Writ Petition 489/2015 titled *Bondada Purushottam Yadav vs. Union of India and others (supra)* the petitioner therein had also sought a writ of mandamus to remove the Temporary Provisions being Article 370 from the Constitution of India apart from other ancillary reliefs. It had also sought quashing of the Separate Constitution (application to the State of Jammu and Kashmir) order 1950 and Constitution (application to the Jammu and Kashmir) Order 1954. The said writ petition was dismissed in limini by the Supreme Court by its order dated 30.10.2015 again rejecting the contentions that are raised by the petitioner herein.

10. In view of the said legal position as settled by the Supreme Court, in our opinion, nothing survives for adjudication in the present writ petition. Same is without merits and is dismissed.

**(JAYANT NATH)
JUDGE**

CHIEF JUSTICE

APRIL 11, 2017/n