

## KASHMIR

Jammu and Kashmir, a state in India, located in the northern part of Indian Subcontinent and is part of the larger region of Kashmir. It has been the subject of dispute between India, Pakistan and China since 1947. Jammu and Kashmir enjoyed special status under Article 370 of the constitution of India. According to the text of the article 370, it is a temporary provision and that it will cease to be operative if the president issues a public notification to that effect. But, prior to that, a recommendation in this regard is very necessary from the Constituent Assembly of Jammu and Kashmir. Because of article 370, the state of Jammu and Kashmir had its own constitution, and all the laws passed by the Parliament will not be applicable to the state, unless the state government gives its concurrence. The President is empowered to decide what provisions of the constitution of India would be applicable to the state of Jammu and Kashmir and what are the exceptions but that too, only with the concurrence of the state government. The article 35A which does not even appear in the text of the constitution of India and only figures in the Jammu and Kashmir's Constitution, protected the special laws, such as bar on outsiders buying property and women marrying non-kashmiris losing their property rights of the state. In short, article 370 and 35A gave special powers and special status to the state of Jammu and Kashmir. The Supreme Court of India has said at various points that, the article 370 of the constitution which confers special status on Jammu and Kashmir and limits the central government's power to make laws for the state, has acquired permanent status through years of existence, making its abrogation impossible. But on 5<sup>th</sup> August, 2019, the article 370 was abrogated by the government of India.

On 5<sup>th</sup> August, 2019, President Ram Nath Kovind issued a presidential order under Article 370 (1) of the Constitution of India. This clause enables the President to specify the matters which are applicable to the state of Jammu and Kashmir. As it can be issued only with the Jammu and Kashmir government's concurrence, the notification uses the words "with the concurrence of the Government of the State of Jammu and Kashmir". But at that time the state legislative assembly of Jammu and Kashmir was not in session and hence the Governor can and was administering the state. This presumably means the Governor, who is now administering the State under President's Rule, has given his concurrence on behalf of the State government. The Order passed on 5<sup>th</sup> August, 2019, supersedes the 1954 Order. This effectively means that all the provisions that formed the basis of a separate "Constitution" for Jammu and Kashmir stand abrogated. (Venkataramanan, 2019) The Order declares that all

the provisions of the Constitution of India, shall also apply uniformly across the India including the Jammu and Kashmir. But in order to scrap the article 370 completely, there were some measures which were required to be taken and therefore, a few clauses were added to Article 367 of the Constitution.

Article 367 contains “Interpretations”. They contain guidance on how to read or interpret some provisions. The new clauses say, when applicable to Jammu and Kashmir, all references to the ‘Sadar-i-Riyasat’, acting on the aid and advice of the Council of Ministers, will be construed as references to the Governor of Jammu and Kashmir. All references to the State government shall mean “the Governor”.

And most importantly, the reference to the “Constituent Assembly” in a proviso to Article 370 (3) has been amended to read “Legislative Assembly of the State”. This is the proviso that says the President can declare that Article 370 is no more operative only on the recommendation of the Constituent Assembly. As there is no Constituent Assembly in existence now, there is no body to “recommend” the demise of Article 370. Therefore, the State Assembly has to play that role. The issuance of the Presidential Order did set the stage for the abrogation of Article 370. Here, the government made use of the fact that Jammu and Kashmir is under President’s Rule. Under the Proclamation issued under Article 356 of the Constitution, by which the President takes over the administration of a State, Parliament usually performs the legislative functions of the State Assembly. For instance, when a State is under Central rule, the budget allocations for that State are voted in Parliament in the absence of the Assembly. The Union Home Minister introduced two statutory resolutions, one, to recommend that the President issue a notification rendering Article 370 inoperative, and two, to accept the Jammu and Kashmir Reorganisation Bill. The passage of the former resolution enabled the President to declare that Article 370 has ceased to operate. The Bill envisaged converting Jammu and Kashmir into a Union Territory with a legislature, and carve out Ladakh region as another Union Territory, but without a legislature. The reorganisation took place on 31 October 2019.

### **Supreme Court Judgement (2016)**

In the case, Statebank of India vs Santosh Gupta and Anr. Where the issue was that, Whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) in its application to the state of Jammu and Kashmir would be held to be within the legislative competence of the Parliament? This appeal was filed against the decision of Jammu and Kashmir High Court which held that provisions

of SARFAESI are not applicable to the state of J&K because it's outside the legislative competence of Parliament, as they are in conflict with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. Another question which has been raised by various scholars is that what does the word 'Modification' in the Article 370 (1) mean and include. After reading the judgement, in my opinion this question has been fairly addressed. The judges are of the opinion that that when the Constitution used the word "modification" in Art. 370(1) the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir.

Having held that the provisions of SARFAESI cannot be applied to the State of Jammu & Kashmir, the judges found it contradictory in terms to state that SARFAESI can be availed of by banks which originate from the State of Jammu & Kashmir for securing monies which are due to them and which have been advanced to borrowers who are not the residents of the State of Jammu & Kashmir. The Hon'ble Judges therefore set aside the judgment of the High Court. As a result, notices issued by banks in terms of Section 13 and other coercive methods taken under the said Section are valid and can be proceeded with further. The appeals were accordingly allowed with no order as to costs.

The Supreme Court on Thursday told the Jammu and Kashmir administration that it will have to respond to each and every question raised on the restrictions imposed in the erstwhile state after the abrogation of Article 370.

A bench headed by Justice NV Ramana told Solicitor General Tushar Mehta, appearing for the administration, that petitioners challenging the restrictions have argued in detail and he will have to answer all questions.

Mr. Mehta you have to answer each and every question raised by the petitioners who have argued in detail. Your counter affidavit does not help us to come to any conclusion. Don't give the impression that you are not giving enough attention to the case," said the bench, comprising Justices R Subhash Reddy and BR Gavai.

Mehta said most of the averments made by the petitioners on restrictions are "incorrect" and he will respond to each and every aspect when he argues in court.

The solicitor general said he has a status report with him but he has not filed it in the court as

the situation in Jammu and Kashmir is changing every single day and would like to show to the court the exact status at the time of his submission.

### **LATEST HAPPENINGS IN KASHMIR:**

Hundreds of marchers protesting against the Indian decision to revoke Article 370 camped out night in the Pakistan-administered Kashmir town of Chinari, about 10km (six miles) from the LoC, after Pakistani police stopped them from crossing the de facto border into Indian-administered Kashmir.

The House Foreign Affairs Committee has urged India to lift restrictions on Kashmir as it impacts their daily lives. "India's communication blackout in Kashmir is having a devastating impact on the lives and welfare of everyday Kashmiris," the tweet said. "It's time for India to lift these restrictions and afford Kashmiris the same rights and privileges as any other Indian citizen."

Hundreds of people arrested in the Kashmir lockdown have been held without trial by the Indian authorities and moved to jails far from home. At least 300 have been arrested under the Public Safety Act (PSA), which allows for detentions of up to two years without trial. Most have been sent to jails across the northern state of Uttar Pradesh. Indian officials say the policy of transporting detainees, which started last year but has snowballed since August, is required to cut off the rebels from their networks. The transportations are often conducted without warning, and families say they are allowed little contact with detainees once they find them. Proving innocence is difficult even for those with resources given the communications situation in Kashmir and the number of cases.

Sanjay Dhar, the registrar general of the Jammu and Kashmir High Court, said two judges in Kashmir's main city of Srinagar were handling around 300 appeals against PSA detentions filed since August 5.

Most mobile phone connections in Indian-administered Kashmir will be restored, the Indian government has said, after more than two months. Indian government spokesman Rohit Kansal said the decision was taken after a review of events in the disputed Himalayan region. "All post-paid mobile phones irrespective of the telecom service provider will stand restored and be functional from noon on October 14," he told a news conference, adding that the

measure would apply to all districts of Indian-administered Kashmir.

***Questions to be pondered upon-***

- 1 What is the entire Kashmir issue in the first place?
- 2 Why the Kashmir is important for India?
- 3 What was the procedure followed by the government for the abrogation of article 370 and 35a?
- 4 Was the procedure followed by the government, constitutional?
- 5 What is the reason for the restrictions imposed by the government on freedom of press and movement in Kashmir?
- 6 What is the opinion of Kashmiris on this action of the government?
- 7 How is the SC judgement of 2016 in SBI vs Santosh Gupta relevant to the abrogation of 370 and 35a?
- 8 Whether article 370 and 35a were in derogation of the fundamental right under article Part III of the Indian Constitution?