

Ashok Kumar and Others Vs. State of JandK and Others

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Court : Jammu and Kashmir

Decided On : Oct-09-2015

Judge : Hasnain Massodi & Janak Raj Kotwal

Appeal No. : SWP Nos. 1290 of 2014, 2777 of 2013, 1694 of 2006, 131-E of 2004, 1006 of 2005, 1639 of 2003, 1497 of 2004, 1854 of 2004, 1619 of 2006, 213 of 2001, 1583 of 2014, 1271 of 2014, 1816 of 2000, 2096 of 2014 & MP Nos. 1685 of 2014, 4089 of 2013, 4023 of 2010, 2119 of 2006, 1114 of 2005, 1746 of 2003, 1942 of 2004, 2010 of 2006, 254 of 2001, 2093 of 2014, 1655 of 2014, 2822 of 2014

Appellant : Ashok Kumar and Others

Respondent : State of JandK and Others

Judgement :

Massodi, J.

1. Controversy raised in writ petitions on hand stands crystallised by learned Single Judge as under:

Whether in light of the Apex Court judgment in Indra Sawhney v. Union of India, 1992 Suppl (III) SCC 217 which prohibits reservation in matters of promotion, provisions of the Jammu and Kashmir Reservation Act, 2004 and the rules framed thereunder can be enforced in the absence of the applicability of Art. 16 (4A) of the

Constitution of India to the State of JandK.

2. Dispute, as bare look on the issue identified would reveal, relates to right of Reserved Category Government servants, to accelerated promotion provided under Section 6, JandK Reservation Act, 2004 read with Rule 9 and 34, JandK Reservation Rules, 2005 (for short Reservation Act and Rules). The facts fall in a narrow compass, though issue raised reflects an important question of law. It is pertinent to point out that all these petitions were considered by learned Writ Court. However, at the request of learned Single Judge (Hon ble Mr Justice Dhiraj Singh Thakur), the Hon ble Chief Justice has been pleased to direct listing of batch of petitions before the Division Bench. Request to list writ petitions before larger Bench was made because of importance of question of law arising out of petitions. So much about backdrop against which petitions have been listed before this Bench. Now an overview of background facts.

3. Petitioners in writ petitions SWP nos.1290/2014, 1006/2005, 1694/2006, 1497/2004, 1619/2006, 213/2001, 1816/2000, 2096/2014, 1583/2014, are members of JandK Engineering (Gazetted) Service Hydraulic Wing, JandK Law Officer (Subordinate) Service, JandK Engineering (Gazetted) Service, JandK Animal Husbandry (Gazetted) Service. They are aggrieved with different Government orders, whereby private respondents in writ petitions, though junior to them, have been promoted to next higher level ahead of them under Reservation Act and Rules, and thereby allowed to steal march over them. Petitioners case is that private respondents have been promoted and their seniority fixed ahead of them on the ground that they belong to reserve category within meaning of JandK Reservation Act, 2004 (hereinafter Reservation Act) and JandK Reservation Rules, 2005 (for short Reservation Rules). It is stated that official respondents while promoting private respondents, have pressed into service Section 6 of Reservation Act and Rules 9, 10 and 34 of Reservation Rules, whereunder reserved category government employees are to appear at higher place in roster, and get promotion ahead of their General Category colleagues. The aforementioned provisions of Reservation Act and Reservation Rules, according to petitioners, would not be available to make promotions impugned in writ petitions, in wake of Supreme Court Judgement in Indra Sawhney v. Union of India, 1992

Suppl (III) SCC 210.

4. Petitioners insist that in terms of authoritative judicial pronouncement in aforementioned reported judgment, reservation in case of promotion offends letter and spirit of Articles 14 and 16, Constitution of India and therefore, is not permissible under law. It is urged that Article 16(4A) added by 77th Constitutional Amendment Act, would not legitimise course followed by official respondents inasmuch as amendments made are not applicable to the State of Jammu and Kashmir. Petitioners case is that Constitution (Application to Jammu and Kashmir) Order, 1954, made in exercise of powers conferred by Clause 1 of Article 370 of the Constitution, adds proviso to Clause (2) of Article 368 in its application to the State, providing that no amendment is to have effect in relation to State of Jammu and Kashmir unless applied by a Presidential Order. It is pleaded that as 77th Constitutional Amendment Act, 1995, adding Clause (4A) to Article 16, has not been extended to State of Jammu and Kashmir by Presidential order under Clause (1) of Article 370, clause (4A) of Article 16 would not be applicable to State.

5. It is pleaded that even if Section 6, Reservation Act and Rules 9, 10 and 34, Reservation Rules, are assumed to have protection of Clause (4A), Article 16, Constitution of India, yet provision for reservation does not satisfy requirement of Clause (4A), Article 16, inasmuch as no background study has been made and satisfaction recorded regarding inadequate representation of reserved category in service under the State.

6. Petitioners, on strength of averments made in petitions, seek appropriate writ, declaring Section 6 of Reservation Act and Rules 9 and 34 of Reservation Rules to be ultra vires Articles 16, Constitution of India and in conflict with law laid down by Supreme Court in Indra Sawhney s case and therefore, liable to be quashed. Petitioners further seek quashment of Government order Nos. 151 PW(Hyd) of 2013 dated 3rd June 2013, 92-PW (Hyd) of 2014 dated 3rd March 2014, 95-PW(Hyd) of 2014 dated 4th March 2014; 379-PW (RandB) of 2006 dated 22nd September 2006; 228-PDD of 2002 dated 21st October 2003; 175-PDD of 2002 dated 12th June 2002; 228-PDD of 2001 dated 13th June 2001; 175-PDD of 2004

dated 24th June 2004; 7-PDD of 2002 dated 4th January 2002; 224-PDD of 2004 dated 30th July 2004; 178-PDD of 2001 dated 27th April 2001; 115-ASH of 2000 dated 29th December 2000; 265-HME of 2013 dated 16th April 2013; Corrigendum no.ME-GM-246/2011 dated 25th April 2013 to Government order no.380-HME of 2012 dated 25th May 2012; 619-HME of 2011 dated 25th November 2011; and 43-ASH of 2000 dated 12th June 2000, whereby private respondents in writ petitions have been promoted on stopgap/incharge as well as substantive basis as members of Reserved Category , ahead of petitioners.

7. Petitioners in SWP no.2777/2013 and no.1271/2014 support reservation in promotions. Petitioner in SWP no.2777/2013 is a member of JandK Medical Education (Gazetted) Service. Her case is that official respondents, ignoring Section 6, Reservation Act and Rules 9 and 34, Reservation Rules, have promoted private respondent as Assistant Professor on incharge basis. She seeks quashment of Government order no.39-HME of 2013 dated 16th January 2013, whereby private respondent has been so promoted on the ground that she belongs to Reserved Category (RBA) and therefore, had right to be considered for promotion ahead of private respondent. Petitioner maintains that Section 6, Reservation Act and Rules 9 and 34, Reservation Rules, are Constitutionally valid and benefits available to members of Reserved Category in tune with Article 16, Constitution of India.

8. Petitioners in SWP no.1271/2014 are also members of JandK Medical Education (Gazetted) Service. They like petitioner in SWP no.2777/2013 support reservation in promotion and seek quashment of proposal whereby private respondents are recommended for promotion/regularisation as Assistant Professors (Medicine) in Medical Education department.

9. Respondents resist writ petition on the ground that Section 6, Reservation Act and Rules 9 and 34, Reservation Rules, are protected under Clause (4A), Article 16, Constitution of India, and therefore, Government orders impugned in writ petitions are valid and beyond challenge. It is pleaded that law laid down in Indra Sawhney s case stands neutralised by 77th Constitutional Amendment Act, 1995, effective from 17th June 1995. According to respondents, Clause (4A), Article 16,

leaves room for reservation in matters of promotion with consequential seniority to any class or classes of posts in service under the State in favour of Scheduled Caste and Scheduled Tribes, which in the opinion of State are not adequately represented in the service under the State. Any provision for such reservation, it is insisted, is protected against challenge under Article 16 of the Constitution mandating equality in the matters of public employment. It is pointed out that challenge to Clause (4A) Article 16, Constitution of India, did not succeed and was rejected by Supreme Court in *M. Nagaraj and others v. Union of India and others* (2006 (8) SCC 212). It is denied that reservation in the matters of promotions contemplated under Section 6, Reservation Act and Rules 9 and 34, Reservation Rules, is excessive. Reservation, according to respondents, is restricted to 22% of total promotional vacancies and therefore, cannot be struck down on the ground of excessive reservation. It is next pleaded that as reservation in promotions is only up to Deputy Secretary Level, it is not to impact promotion to higher posts and dampen and discourage merit and efficiency. Respondents deny that there has been, no background study before providing for reservation in the matters of promotions under Reservation Act and Reservation Rules.

10. Private respondents in all writ petitions toe the line followed by official respondents. The stand taken in opposition to writ petitions SWP no.2777/2013 and no.1271/2014 is that positions meant for a particular reserved category have been de-reserved due to non-availability of officers from category, to which promotional slot was due and therefore, private respondent from general category considered for promotion on incharge basis. Respondents, however, agree that it is constitutionally permissible to follow reservations in the matters of promotions.

11. We have gone through the pleadings and record available on file. We have heard learned counsel for parties at length.

12. Mr P.N.Raina, learned Senior Advocate, advancing arguments in lead case, insists that State of Jammu and Kashmir under the Constitutional Scheme has status and powers, not available to any other State in the Union. Mr Raina argues that Jammu and Kashmir State while acceding to the Union of India did not merge with it but retained its distinct and special status. The State, it is pointed out, has

surrendered some of powers in favour of Union and not vice-versa; that while in case of other States, powers available and exercised are what have been conceded by Union, in case of State of Jammu and Kashmir, powers are retained by State except what has been given by it to the Union. Mr Raina, to buttress his argument, relies on Article 370 of the Constitution. An elaborate reference is also made to Constitution (Application to Jammu and Kashmir) Order, 1954, that, according to learned counsel, lays down foundation of relationship between State and Union, and maps out the areas that the State has conceded to Union and therefore, fall within its realm. It is insisted that in view of express embargo placed on application of amendment to a provision of Constitution, to the State of Jammu and Kashmir by proviso to Clause II, Article 368 of the Constitution, except in accordance with mode and manner laid down therein, Clause (4A) and Clause (4B) to Article 16, would not be applicable to State of Jammu and Kashmir is as much as it is not applied to the State by a Presidential order, under Article 370(1) of the Constitution.

13. Ms. Seema Shekhar, learned Senior Additional Advocate General, does not controvert petitioner's stand. Learned counsel accepts that an amendment to any of the provision of the Constitution already applied to the State, would be applicable only by a Presidential Order with concurrence of or in consultation with the Government of Jammu and Kashmir as the case may be. Mrs. Shekhar admits that Clauses (4A) and (4B) added to Article 16, Constitution of India by 77th Constitutional Amendment Act 1995, are not applicable to the State of Jammu and Kashmir, as these have not been extended to the State through the mechanism laid down in Proviso to Clause 2, Article 368 of the Constitution read with Clause 1, Article 370 of the Constitution. Learned counsel however, disputes petitioners claim that Section 6 Reservation Act has been enacted and Rules 9 and 34 of the Reservation Rules, have been made, without any background study. Learned counsel insists that only after the State Government was satisfied that Reserved Categories on the basis of available data are not adequately represented at different levels in Government employment, that it made a provision for reservation in promotions. Insisting that reservation made would neither discourage, disregard or dampen merit, Ms. Shekhar points out that the reservation under the present legal framework is restricted up to the level of Deputy Secretary or the post with

equivalent grade, whereafter the promotion is made purely on basis of merit and seniority, without any reservation in favour of any of the Reserved Categories.

14. Mr Sethi, learned Senior Advocate appearing for private respondents, per contra, insists that as State of Jammu and Kashmir in terms of Article 1 Constitution of India is part of territory of India, amendments made to Constitution of India from time to time would be ipso facto applicable to State of Jammu and Kashmir. It is argued that, at least, there should be no doubt about automatic application of amendment to a Constitutional provision to the State, that has already been applied to the State. Mr Sethi states that as Article 16 of the Constitution stands already applied to the State by the Constitution (Application to Jammu and Kashmir) Order 1954. Subsequent amendment to Article 16 by adding Clause (4A) in Clause (4B) would be applicable to the State even in absence of a Presidential order under Article 370 of the Constitution.

15. Controversy involved in writ petitions is multi-dimensional. It raises a number of questions, required to be dealt with to settle the controversy.

i) Why was Constituent Assembly convened and separate Constitution framed for the State, when none of the Princely States that acceded to Dominion of India, did go for such exercise.

ii) Why are not all the provisions of Constitution, like other States, applicable to the State and so are the amendments made to the Constitution from time to time.

iii) Whether after accession of the State to Dominion of India and after the State in terms of Article 1 of the Constitution, became part of India and was included in 1st Schedule to the Constitution, amendment to a provisions of the Constitution applied to the State, is to ipso facto apply to the State?

iv) Whether Article 370, being a temporary provision, lost its force once Constitution of the State was framed by its Constituent Assembly and therefore, can no more be used by the President to modify a provision of the Constitution in its application to the State?

v) Whether expressions exceptions and modifications in Sub clause (d) Clause (1) of Article 370 of the Constitution, limit power of the President to minor changes or alterations in the provision of Constitution on their application to the State and not to amend such provision- add to, omit or abrogate such provision? and like questions are intertwined with the controversy and required to be answered for just disposal of the writ petitions on hand. The duty, to deal with the matter in detail and consider all the aspects of controversy, assumes importance because of reference of the matter to a larger Bench.

16. The State of Jammu and Kashmir ("the State" hereinafter) like other 600 and odd princely States , regained its sovereignty on 15th August 1947, on the lapse of British Paramountcy, enactment of Indian Independence Act 1947 and emergence of Dominions of India and Pakistan. This was made clear by Cabinet Mission Memorandum dated May 12, 1946 as regards "States Treaties and Paramountcy" and Statement of Viceroy of May 16, 1946, to the effect that "Paramountcy can neither be retained by the British Government nor transferred to the new Government." The Government of India Act, 1935, earlier envisioned accession of a Princely State to the Dominion. In terms of Section 6 of the Act, such a State was to be deemed to have acceded to the Dominion if the Governor General conveyed his acceptance of Instrument of Accession executed by the Ruler of the State. The Instrument of Accession was to abide by Section 6 of the Act as adopted by Section 9 of the Indian Independence Act, 1947. It is pertinent to point out that Government of India Act, 1935 was adopted and operated after independence till Constitution came into force on Jan. 26, 1950.

17. The Ruler of an Indian Princely State having regained absolute sovereignty on the lapse of Paramountcy and end of its Treaty obligations towards Imperial power, got power to decide future of his State including an option to accede to either of the two Dominions India or Pakistan in accordance with Cabinet Mission Memorandum 1946, Statements of June 3, July 25, 1947 and the Indian Independence Act, 1947. Same was true about the State. The power to accede included a choice to accept the Constitution of the Dominion to which accession was made subject to such conditions as put by the Ruler and accepted by the Dominion.

18. Though almost all the Princely States with few exceptions acceded to either of the Dominions before 15th August 1947, the Ruler of the State did not immediately accede to either of the Dominions. He wanted sometime to take a decision. He entered into a standstill agreement with Dominion of Pakistan. His proposal to enter into a similar agreement with Dominion of India, could not materialise, as Dominion of India desired further discussion on the matter. Developments in the State however did not make such a discussions possible.

19. The Ruler in October, 1947, approached Dominion of India for help to meet the challenge that confronted the State. The Dominion of India had its reservations. It conveyed its inability to deploy troops of Indian Army in absence of a formal accession by the Ruler to the Dominion. The Ruler realising that the help sought may not come unless he decided to accede to Dominion of India signed Instrument of Accession on October 26, 1947. The Governor General of Dominion of India accepted accession of the State to Dominion of India and conveyed acceptance to the Ruler on 27th October 1947. Governor General in the same communication conveyed decision to send troops of Indian Army to the State to help it in defending territory of the State, protecting life and property of people of the State.

20. The immediate object of the accession, unlike other Princely States, therefore, was to make possible and legitimize deployment of troops of Indian Army to the State. This is what we also gather from following statement of Prime Minister of the State in Jammu and Kashmir Constituent Assembly on 5th November 1951;

when the raiders were fast approaching towards Srinagar, we could think of only one way to save the State from total annihilation by asking for the help from a friendly neighbour. .. But the absence in constitutionalities between our State and India made it impossible for her to render us any effective assistance in meeting the aggressor .

21. Though the Instrument of Accession signed by the Ruler of the State was similar to such Instruments signed by Rulers of other Princely States, to the extent it conceded power to Dominion Legislature, the Federal Court and other Dominion Authorities i.e. Defence, External Affairs and Communications, in relation to the

State and such powers and functions vested under Government of India Act 1935 as in force on August 15th 1947, yet the attending circumstances of the signing of Instrument of Accession and its acceptance, sufficiently indicate that contemporaneously with the signing of the Instrument of Accession, a Constitutional framework was conceived where under the State unlike other States that acceded to Dominion of India, was to enjoy a special constitutional status. This is gatherable from following facts and events that took place around and after signing of the accession:-

(i) The text of Instrument of Accession, though, similar to such Instruments signed by other Princely States and cover the same subjects i.e. foreign affairs, defence and communication, yet the paras 4 and 7 of the Instrument of Accession and the Communication whereby Governor General accepted the accession, made it clear that Dominion of India did not treat accession by the State to Dominion of India, in the manner it treated accession made by other Princely States to the Dominion. It was made sufficiently clear that the State was to stand on a different pedestal and to be given distinct and different, status as regards constitutional powers, it was to enjoy after accession. It would be advantageous to reproduce paras 4 and 7 of the Instrument of Accession and the Communication whereby Governor General conveyed to the Ruler acceptance of Accession of State to the Dominion of India.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

7. Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangement with the Government of India under any such future constitution.

The acceptance letter reads:

My Dear Maharaja Sahib,

Your Highness letter dated 26th October 1947, has been delivered to me by Mr. V. P. Menon. In the circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with wishes of the people of the State, it may Government s wish that, as soon as law and order have been restored in Kashmir and its soil is cleared of the invader, the question of state s accession should be settled by a reference to the people.

Meanwhile, in response to your Highness appeal for military aid, action has been taken today to send troops of the India Army to Kashmir, to help your own forces to defend your territory and to protect the lives, property, and honour of your people. My Government and I note with satisfaction that your Highness has decided to invite Sheikh Abdullah to form an interim Government to work with your Prime Minister.

Mountbatten of Burma

(Governor -General of India)

(ii) That the Dominion of India and the State at the time Instrument of Accession was signed by Ruler and accepted by Dominion of India had decided to work out a Constitutional framework, whereunder the State was to retain sovereignty to a limited extent, is also reinforced by the fact that while the Constituent Assemblies/Rulers/Raj Parmukas of all the Princely States, that acceded to Dominion of India, in November 1949 (before November 26th 1949 the date Constitution was adopted) decided to accept the Constitution and consented to application of Constitution in its entirety to their States, such a decision was not taken by the Ruler of the State. It was thereby made sufficiently clear that the Dominion of India had decided to treat the State differently, and not at par with other States.

(iii) The Ruler a few months after signing of the Instrument of Accession, in the Declaration of 5th March, 1948 announced his resolve to constitute a National

Assembly to frame Constitution for the State.

(iv) The State did not adopt Government of India Act, 1935 or the Constitution for the intervening period till Constituent Assembly was convened, Constitution framed and adopted, but decided to adopt and abide by Jammu and Kashmir Constitution Act, Svt. 1986 (1939 A.D.).

(v) The fact that the parties had agreed on a Constitution relationship different from one applicable to other acceding Princely States, was evident when Draft Clause 306(A) (corresponding to Article 370) was introduced in the Constituent Assembly of India. Shri N. Gopal Swami Ayanger, while introducing the Draft Clause identified following amongst eight special circumstances that persuaded the Framers to incorporate the Draft Clause in the Constitution.

8) that the Will of the people expressed through the instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of the Union jurisdiction over the State.

Shri Ayanger explaining the scope of Article 370 in the Constituent Assembly on October 17th 1949 stated;

"You will remember that several of these clauses provide for the concurrence of the Government of Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and the Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution..."

He further remarked:

"The Government of State feels that in view of the commitments already entered into between the State and the Centre, they cannot be regarded as final authorities for the giving of this concurrence, though they are prepared to give it in the interim periods but if they do give this concurrence... concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decisions it likes on those matters."

The Draft Clause 306 was adopted by Constituent Assembly as Article 370 without any changes and without much discussion.

22. Article 370, of the Constitution reflects constitutional relationship between State and Dominion of India. It reads as under:

370. (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.

23. The Constitutional framework worked out by Dominion of India and the State reflected in Article 370 has its roots in paras 4 and 7 of Instrument of Accession. It in the first place, provided for convening of a Constituent Assembly to frame Constitution of the State. Reference, in this regard, may be made to Clause (2) and proviso to Clause (3) of Article 370. The Head of the State issued a proclamation on May 1st 1951 for convening the Constituent Assembly for the State, to decide the future of the State. The object of the Constituent Assembly as stated by Mr. Ayanger, was to determine the Constitution of the State as well as sphere of Union jurisdiction over the State . The Constituent Assembly was also to take a final call on the application of laws made by the Parliament to the State in consultation with or with the concurrence of the State Government. The Constituent Assembly commenced its proceeding on 31st October, 1951. The

Constitution was adopted on November 17th 1956 and the members put their signatures on the Constitution on November 19th 1956. The Resolution to dissolve the Constituent Assembly was passed on November 17th 1956 and the Assembly dissolved on January 25th 1957. The Constitution of Jammu and Kashmir came into force on January 26th 1957. The State unlike other States of the Union, therefore, has its own Constitution with Preamble reflecting core constitutional values, Directive Principles of State Policy, mapping out its constitutional goals, the extent of its executive and legislative powers and its relationship with Union of India etc. etc.

24. The other facet of the Constitutional arrangements agreed upon, related to special status of the State, allowing it to exercise powers on the subjects that in case of other States were within exclusive domain of the Union Government, and restricting power of the Union Government to legislate on such subjects, by making it, subject to consultation or concurrence of the State Government within the meaning of paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d), Article 370. In terms of Article 370 Parliament's legislative power over the State is primarily confined to three subjects mentioned in the Instruments of accession i.e. Defence, Foreign Affairs and Communications. The President, however, has power to extend to the State other provisions of the Constitution as also other laws, that relate to the subjects specified in the Instrument of Accession. While extending such provisions and laws, the exercise of the power involves consultation with the State Government. In such matters, only consultation is required as the State is taken to have accepted the Instrument of Accession, therefore, dispensing with the requirement of concurrence. The President has even power to extend other provisions of the Constitution or other laws not related to subjects enumerated in the Instrument of Accession to the State provided the State Government gives concurrence to extension of such Constitutional provisions, application of laws. In other words, laws on subjects included in the Union List and Concurrent List may be extended in consultation with State Government while laws on other subjects are to be extended to the State only with concurrence of the State Government.

25. Article 370 of the Constitution embodies conceptual framework of relationship between Union of India and State and lays down broad features of special status granted to the State. It, as already pointed out, at the same time confers power on the President to deal with the areas otherwise within domain of the State, subject to consultation or concurrence with the State. Article 370 is the only provisions of the Constitution that applies to the State, on its own. The only other provision applied to the State by the Constitution itself, is Article 1 made applicable by sub clause (c) clause (1) Article 370. The Constituent Assembly in terms of proviso to Clause (3) Article 370 is conferred power to recommend to the President that Article 370 be declared to cease to be operative or operate only with the exceptions and modifications mentioned in the recommendation, if any so made. It is only on such recommendations that the President in terms of Clause (3) Article 370 of the Constitution may, by public notification, declare that Article 370 shall cease to be operative or shall be operative only with such exceptions and modifications and from such date, specified in the notification. The Constituent Assembly did not make such a recommendation before its dissolution on January 25th, 1957. Resultantly, Article 370, notwithstanding its title showing it a "temporary provision" is a permanent provision of the Constitution. It cannot be abrogated, repealed or even amended as mechanism provided under Clause (3) of Article 370 is no more available. Further more, Article 368 cannot be pressed into service in this regard, inasmuch as it does not control Article 370 - a self contained provision of the Constitution.

26. To have a good idea about extent of special status or autonomy enjoyed by the State, we have to go through Constitutional (Application to Jammu and Kashmir) orders issued by the President, applying Constitutional provisions and other laws to the State. Such orders widen the powers of the Union Government in matters related to the State with correspondence decrease in powers of the State Government.

President of India, in exercise of powers under Article 370 (1) (d), has issued Constitutional (Application to Jammu and Kashmir) orders from time to time applying various Constitutional provisions to the State with exceptions and modifications. First such Order was made on January 26th 1950. Second schedule

to the Order specified Constitutional provisions applied to the State, in addition to Articles 1 and 370 of the Constitution. This was followed by Constitutional (Application to Jammu and Kashmir) Order, 1954. The Order applied various Constitutional provisions with modifications, detailed therein, to the State. The Order did not only modify text of Constitutional provisions applied to the State but in case of some of such provisions, deleted part of text, added to the text, or added provisos to existing Constitutional Orders. It even added new Article like Article 35A to the Constitution in its application to the State.

27. The State as on date, continues to enjoy autonomy in areas covered by the provisions of Constitution not extended to the State. Most of the provisions of the Constitution applied to the State are extended with exceptions and modifications to maintain and preserve special status granted to the State. To suit autonomy granted to the State, provisions like Article 35A and proviso to Article 253 and proviso to Clause 2 Article 368 have been added to the provisions of Constitution, as applied to the State. The Article 35A gives protection to existing laws in force in the State and to any law enacted after 1954 by the State legislature, defining the classes of persons treated as permanent residents of the State, conferring on permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects employment in the State Government, acquisition of immovable property in the State, settlement in the State or right to scholarship and other aids granted by the State. Proviso to Article 253 even guarantees a say or role to the Government of the State in decision affecting the disposition of the State. In terms of Proviso to Clause (2), Article 368 no amendment made to the Constitution is to have effect in relation to the State, unless applied by the order of the President under Clause (1) of Article 370.

28. Focus of present discussion is on Article 368 as applied to the State. Article 368 gives power to Parliament to amend the Constitution and lays down procedure for making such amendment. The Constitution (Application to Jammu and Kashmir) Order, 1954, applied Article 368 to the State, adding following proviso:

Provided further that no such amendment shall have effect in relation to State of Jammu and Kashmir unless applied by the order of the President under Clause (1)

Article 370 .

The net effect of Proviso is that any amendment to the Constitution of India shall not be applicable to the State unless it is made applicable by Presidential order, in exercise of powers under Article 370 Sub Clause (d) Clause (1) of the Constitution.

29. Having regard to the controversy raised, it is necessary to find out true ambit and scope of expression exceptions and modifications , used by Framers in sub clause (d) Clause (1), Article 370 of the Constitution. What is nature of power given to the President. Would expression exceptions and modification include power to amend Constitutional provision, as it applies to State of Jammu and Kashmir are questions that call for an answer. Hon ble Supreme Court had an occasion in *Puranlal Lakhanpal s versus President of India and others* (AIR 1961 SC 1519) AIR 1961 SC 1519 and *Sampat Prakash versus The State of JandK* and another (AIR 1970 SC 1118) to consider the matter.

30. In *Puranlal Lakhanpal s case* (supra), petitioner questioned constitutionality of Constitution (Application to Jammu and Kashmir) Order, 1954, to the extent it applied Article 81 of the Constitution to the State with modification, providing for appointment of representatives of State in the House of People by the President on recommendations of State Legislature. Petitioner s case was that representatives of the State in the House of People in terms of Article 81 of Constitution are to be elected by people and Constitution (Application to Jammu and Kashmir) Order, 1954, by providing for appointment of representative of State by President while applying Article 81 to the State, made a radical alteration in Article 81, as applied to the State. Supreme Court, emphasising importance of Article 370, observed:

Article 370 clearly recognises the special position of the State of Jammu and Kashmir and that is why the President is given the power to apply the provisions of the Constitution to that State subject to such exceptions and modifications as the President may by order specify. The President thus has power to say by order that certain provisions of the Constitution will be excepted from application to the State of Jammu and Kashmir and on such order being made those provisions would not

apply to that State. Besides this power of making exceptions by which certain provisions of the Constitution were not to apply to that State the President is also given the power to apply the provisions of the Constitution with such modifications as he thinks fit to make.

The Court, repelling the argument that expression exception and modification would not include amendment or alteration and alteration made in Article 81 in application to the State, amounted to amendment and therefore not permissible, held:

.in the present case we have to find out the meaning of the word "modification" used in Art. 370 (1) in the context of the Constitution. As we have said already the object behind enacting Art. 370(1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If, therefore, the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us 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. In the Oxford English Dictionary (Vol. VI) the word "modify" means inter alia "to make partial changes in; to change (as object) in respect of some of its qualities; to alter or vary without radical transformation." Similarly the word "modification" means "the action of making changes in an object without altering its essential nature or character; the state of being thus changed; partial

alteration." Stress is being placed on the meaning "to alter or vary without radical transformation" on behalf of the petitioner; but that is not the only meaning of the word "modify" or "modification". The word "modify" also means "to make partial changes in" and "modification" means "partial alteration". If, therefore, the President changed the method of direct election to indirect election he was in essence making a partial change or partial alteration in Art. 81 and, therefore, the modification made in the present case would be even within the dictionary meaning of that word. But, in law, the word "modify" has even a wider meaning. In "Words and Phrases" by Roland Burrows, the primary meaning of the word "modify" is given as "to limit" or "restrict" but it also means "to vary" and may even mean to "extend" or "enlarge." Thus in law the word "modify" may just mean "vary", i.e., amend; and when Art. 370(1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify it means that he may vary (i.e., amend) the provisions the Constitution in its application to the State of Jammu and Kashmir. We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Art. 370 (1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Art. 370(1) only to such modifications as do not make any "radical transformation." We are therefore of opinion that the President had the power to make the modification which he did in Art. 81 of the Constitution.

31. In Sampat Prakash (supra) case petitioner a trade union leader, threw challenge to Constitution (Application to Jammu and Kashmir) Order, 1954, to the extent it added clause (C) to Article 35, of the Constitution of India, as applicable to the State. The added Clause protected preventive detention law made by the State Legislature from any challenge, on the ground that such law offended any of provisions of Part III, Constitution, for a period of five years (increased to ten years in the year 1959 by Presidential Order of 1959 and to 15 years by the Order of 1964). Petitioner's case was that Article 370 was temporary provision and ceased to be in force from the date Constitution of Jammu and Kashmir framed by its Constituent Assembly came into force on 26th January 1957. It was urged that as Presidential Order, extending any provision of the Constitution to the State of Jammu and Kashmir, was to get concurrence of Constituent Assembly, the power

ceased to be available after dissolution of Constituent Assembly. It was next contended that power conferred to the President under Sub clause (d) of clause (1), Article 370 of the Constitution, was for purposes of applying provisions of Constitution to State of Jammu and Kashmir and not for purposes of making amendments in the Constitution, as applied to the State. It was argued that once a provision of the Constitution was applied to the State, there was no scope thereafter for any exceptions or modifications as such power is to be exercised at the initial application of the provision to the State. Petitioner disputed reliance on Section 21, General Clauses Act as a tool to interpret Constitutional provision on the ground that Section 21 could be pressed into service only while interpreting an Act, Rule or Byelaws and not Constitutional provision. It was pleaded that in any case, power to make exceptions and modifications is limited in scope and restricted to minor alterations and not power to abrogate an Article of the Constitution, applied to the State.

32. Supreme Court rejected all contentions raised by petitioner as regards status of Article 370, i.e whether Article being temporary provision, ceased to have any force once Constitution for Jammu and Kashmir was framed by its Constituent Assembly, observing:

5. We are not impressed by either of these two arguments advanced by Mr. Ramamurthy. So far the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Article 370 should be held to be continuing in force because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. The legislative history of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State.

Supreme Court proceeded to hold:-

7. There are, however, much stronger reasons for holding that the provisions of this article continued in force and remained effective even after the Constituent Assembly of the state had passed the Constitution of the State. The most important provision in this connection is that contained in Clause (3) of the article which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date, as the President may specify by public notification, 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. This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In fact, no such recommendation was made by the Constituent Assembly of the State, nor was any Order made by the President declaring that the article shall cease to be operative. On the contrary, it appears that the Constituent Assembly of the State made a recommendation that the article should be operative with one modification to be incorporated in the Explanation to Clause (1) of the article. This modification in the article was notified by the President by Ministry of Law Order No. C. O. 44 dated 15th November, 1952, and laid down that, from the 17th November, 1952, the article was to be operative with substitution of the new Explanation for the old Explanation as it existed at that time. This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only.

8. Further reference may also be made to the proviso added to Article 368 of the Constitution in its application to the State of Jammu and Kashmir, under which an amendment to the Constitution made in accordance with Article 368 is to have no effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Cl. (1) of Article 370. The proviso, thus, clearly requires that the powers of the President under Article 370 must be exercised from time to time in order to bring into effect in Jammu and Kashmir amendments made by Parliament in the Constitution in accordance with Article 368. In view of these provisions, it must be held that Article 370 of the Constitution has never ceased to be operative

and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article.

33. Rejecting argument that President's power under Article 370(1) would not cover any modification in the Constitution as applied and that Section 21, General Clauses Act, was not to be relied upon to imply such power, the Court held:

10. The argument, in our opinion, proceeds on an entirely incorrect basis. Under Article 370 (1) (d), the power of the President is expressed by laying down that provisions of the Constitution, other than article 1 and article 370 which, under Article 370 (1) (c), became applicable when the Constitution came into force, shall apply in relation to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify. What the President is required to do is to specify the provisions of the Constitution which are to apply to the State of Jammu and Kashmir and, when making such specification, he is also empowered to specify exceptions and modifications to those provisions. As soon as the President makes such specification, the provisions become applicable to the State with the specified exceptions and modifications. The specification by the President has to be in consultation with the Government of the State if those provisions relate to matters in the Union List and the Concurrent List specified in the Instrument of Accession governing the accession of the State to the Dominion of India as matters with respect to which the Dominion Legislature may make laws for that State. The specification in respect of all other provisions of the Constitution under sub-clause (d) of Cl. (1) of Article 370 has to be with the concurrence of the State Government. Any specification made after such consultation or concurrence has the effect that the provisions of the Constitution specified with the exceptions and modifications become applicable to the State of Jammu and Kashmir. It cannot be held that the nature of the power contained in this provision is such that Section 21 of the General Clauses Act must be held to be totally inapplicable.

11. In this connection, it may be noted that Article 367 of the Constitution lays down that, unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for

the interpretation of an Act of the Legislature of the Dominion of India. This provision made by the Constitution itself in Article 367, thus, specifically applied the provisions of the General Clauses Act to the interpretation of all the articles of the Constitution which include Article 370. Section 21 of the General Clauses Act is as follows:

"Where by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued." This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or Regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this Section is fully applicable to all the provisions of the Constitution. As an example, under Art. 77 (3), the President, and, under Article 166 (3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules. The submission that Section 21 of the General Clauses Act cannot be held to be applicable for interpretation of the Constitution must, therefore, be rejected. It appears to us that there is nothing in Article 370 which would exclude the applicability of this Section when interpreting the power granted by that article.

12. The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu and Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was 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 the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Article 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.

34. Supreme Court not impressed by argument that after Article 368, providing for amendment to the Constitution was made applicable to the State, Article 370 to the said extent has lost relevance inasmuch as specific provision for amendment to the Constitution applied to State, observed:

13. The next point urged was that Article 368 of the Constitution having been applied to Jammu and Kashmir with a proviso added to it, there now exists a provision relating to amendment of the Constitution as applied to Jammu and Kashmir under this article and, consequently, while such special provision for this purpose exists, we should interpret Article 370 as being no longer applicable for amending or modifying the provisions of the Constitution applied to that State. This argument, in our opinion, is based on a wrong premise. Article 368 has been applied to Jammu and Kashmir primarily with the object that amendments made by the Parliament in the Constitution of India as applicable in the whole of the country should also take effect in the State of Jammu and Kashmir. The proviso, when applying this article, serves the purpose that those amendments made should be made applicable to the State of Jammu and Kashmir only with the

concurrence of the State Government and, after such concurrence is available these amendments should take effect when an order is made under Article 370 of the Constitution. Thus, Article 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir, but is for the purpose of carrying the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu and Kashmir. Even, in this process, the powers of the President under Article 370 have to be exercised and, consequently, it cannot be held that the applicability of this article would necessarily curtail the power of the President under Article 370.

35. The plea that power of making exceptions and modification to provisions of the Constitution, as applied to the State, should, at least, be limited to making minor alterations and not cover power to amend or abrogate an Article of the Constitution, also did not find favour with the Court. In this regard Supreme Court placed reliance on law laid down in *Puranlal Lakhanpal s case* (supra). The Court observing that law laid down in *Puranlal Lakhanpal s case* was binding on it, held:

14. It was also urged that the power of making modifications and exceptions in the orders made under Article 370 (1) (d) should at least be limited to making minor alterations and should not cover the power to practically abrogate an article of the Constitution applied in that State. That submission is clearly without force. The challenge to the validity of Article 35 (c) introduced in the Constitution as applied to Jammu and Kashmir on this ground was repelled by this Court in *P. L. Lakhanpal v. State of Jammu and Kashmir*, (1955) 2 SCR 1101 = (AIR 1956 SC 197). Subsequently, the scope of the powers of making exceptions and modifications was examined in greater details by this Court in *Puranlal Lakhanpal v. President of India*, (1962) 2 SCR 688 at p. 692 = (AIR 1961 SC 1519 at p. 1521). Dealing with the scope of the word "modification" as used in Article 370 (1), the Court held:-

"But, in the present case, we have to find out the meaning of the word "modification" used in Article 370 (1) in the context of the Constitution. As we have said already, the object behind enacting Article 370 (1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution

to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If, therefore, the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Article 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."

Proceeding further, and after discussing the meaning of the word "modify", the Court held:

"Thus, in law, the word "modify" may just mean "vary" i. e., amend; and when Article 370 (1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify, it means that he may vary (i. e., amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir. We are, therefore, of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word "modification" used in Article 370 (1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Article 370 (1) only to such modifications as do not make any "radical transformation".

This decision being binding on us, it is not possible to accept the submission urged by counsel.

36. From above discussion, it emerges that the State of Jammu and Kashmir while acceding to Dominion of India, retained limited sovereignty and did not merge with

Dominion of India, like other Princely States that signed Instrument of Accession with Dominion of India. The State continues to enjoy special status to the extent of limited sovereignty retained by the State. The limited sovereignty or special status stands guaranteed under Article 370 of the Constitution only provision of the Constitution that applied to the State ex-proprio vigore or on its own. The only other Constitutional provision made applicable by Article 370 of the Constitution to the State is Article 1. No other provision of the Constitution as provided under Article 370 (1), would be applicable to the State except, by Presidential order in consultation with the State in case the provision is akin to subjects delineated in Instrument of Accession and with concurrence of the State, in case it does not fall within ambit of Instrument of Accession. It follows that Article 370 though titled as "Temporary Provision" and included in Part XXI titled "Temporary, Transitional and Special Provisions" has assumed place of permanence in the Constitution. It is beyond amendment, repeal or abrogation, inasmuch as Constituent Assembly of the State before its dissolution did not recommend its amendment or repeal. It is also clear that the President under Article 370(1) is conferred with power to extend any provision of the Constitution to the State with such exceptions and modifications as the President may deem fit subject to consultation or concurrence with the State Government and that such power would include one to amend or alter the provision to be applied, delete or omit part of it, or make additions to the Provisions proposed to be applied to the State. Such power would extend even in case of provisions of the Constitution already applied. In the circumstances, additions made to the existing Constitutional provisions through various Constitutional (Application to Jammu and Kashmir) orders on their application to the State like Proviso to Clause (2) Article 368, fall within four corners of Article 370(1).

37. The President, therefore, has while adding proviso to Clause (2) Article 368, in effect, provided that amendment to any Constitutional provision, though earlier applied to the State, would not apply to the State except by an order issued in accordance with mechanism devised under Article 370, acted within his powers under Article 370(1). Resultantly amendment to Article 16, of the Constitution, made by 77th Amendment Act adding clause (4A) to it, is not applicable to the State, inasmuch as, the amendment has not been applied to the State by

President as provided under Clause (1) Article 370 read with proviso to Clause (2) Article 368. Addition of Proviso to Article 3, Proviso to Article 7 Clause 7 to Article 19, Clause 5 to Article 22, Clause (c) Article 35, Article 35(A), Clause 1A Article 133, Clause 1A Article 220, Proviso to Article 253, Clause (2) Article 256, Clause (6) Article 352, Second Proviso Clause (4) Article 356, Clause (4) Article 367, Proviso Clause (2) Article 368, Clause (4) Article 368 and such additions made after 1954, substitution of Clause (5) Article 31, Sub Clause (a) of Clause (2) Article 31 A, Clause (2) and (3) Article 81, Article 248, entry 97 VII the Schedule, entry 1, 12, 13 Concurrent List. 30,42 and other substitution, to provisions of the Constitution on their application to State, are in tune with powers conferred under Article 370 (1) read with Article 368 of the Constitution and therefore validly made in exercise of such Constitutional power.

38. So viewed constitutionality of Section 6 of Reservation Act and Rules 9 and 34 of Reservation Rules, is to be tested on touchstone of Clauses (1) to (4) of Article 16 and not Clause (4A) Article 16 of the Constitution. Having said so, let us now give closer look to core issue raised in writ petitions on hand.

39. Article 16 mirrors principle of equality before law and equal protection of laws guaranteed under Article 14 of the Constitution. It is an extension of principle of equality with focus on matters of public employment. The Articles, as held by Apex Court in State of Kerala versus N.M.Thomas (1976 (2) SCC 310) is only a part of comprehensive scheme to ensure equality in all spheres. It is an instance of application of larger concept of equality under law, guaranteed under Article 14 and 15 of the Constitution. It has both positive and negative aspects. Positive aspect is to guarantee equality of opportunity in matters relating to employment to any office under the State. Negative aspect or dimension is to prohibit discrimination in such matters on the ground only of religion, race, caste, sex, descent, place of birth, residence or any of them.

40. Article 16, in its scope, is not confined to employment as the expression is used in common parlance. In other words right guaranteed under Article is not restricted to initial stage of appointment to government service or public office. It brings within its sweep all matters that are related to employment. Apex Court in

Govt. Branch Press versus D.B. Belliappa (1979 (1) SCC 477), while commenting upon ambit and scope of Article 16 has held that expression matters relating to employment used in Article 16(1) is not confined to initial matters at or prior to act of employment, but comprehends all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment. Therefore, matters as regards salary, increment, leave gratuity, pension, age of superannuation, promotion and even suspension, discharge, removal or termination of employment come within spread and sweep of the right guaranteed under Article 16. It follows that in all such matters right of equality of opportunity and protection against discrimination to a citizen, are to be respected and adhered to.

41. Though Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and prohibits discrimination, on grounds, only of religion, race, caste, sex, descent, place of birth, residence or any of them, yet it does not forbid classification. Article 14, guaranteeing equality before the law and equal protection of laws, permits classification and so does Article 16 of the Constitution. Classification to be permissible must be reasonable based on intelligible differentia having a close nexus with object sought to be achieved. We need to be reminded that equality of opportunity in employment would mean equality between equals or within a class and not equality between unequals or different classes. In N.M.Thomas s case (supra) it has been emphasised that Article 16 (1) does not bar reasonable classification of employees or reasonable tests for their selection. It was held that discrimination is essence of classification and equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the Constitutional guarantee. Those who are equals and similarly circumstanced, are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore to be based on objective criteria which distinguish persons grouped together from those left out of group. The distinguishing features must bear a just and rational relation to the object intended to be achieved.

42. In writ petitions on hand, petitioners are aggrieved of denial of opportunity in the matter of their promotion to the next level and discrimination on the grounds not permissible under law. It is important to note that right to be considered for promotion as laid down in Union of India and another versus Hemraj Singh Chauhan (AIR 2010 SC 1682) is an integral part of fundamental right to equality of opportunity in matters relating to employment or appointment to any office under the State.

43. It is not denied by respondents that petitioners are senior to private respondents and on the basis of their seniority, had a right to be considered for promotion ahead of private respondents their juniors in the cadre. Official respondents justify promotion of private respondents, their placement in seniority list over petitioners and resultantly their promotion ahead of petitioners on the ground that private respondents belong to Reserved Category within meaning of Reservation Act and in terms of Section 6 of Reservation Act and Rules 9, 10 and 34 of Reservation Rules, have right to get roster position at prescribed slots above petitioners. Official respondents, in effect, have divided petitioners and private respondents in two groups. First comprising of General Category candidates and second group of Reserved Category candidates, i.e. SC, ST, RBA, ALC, etcetera. The question arises as to whether such classification is reasonable classification based on intelligible differentia and having close nexus with object sought to be achieved or it offends Constitutional guarantee embodied in Article 16 of the Constitution.

44. Clause (4) Article 16 leaves room for a provision, providing reservation in appointments or posts, in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services of the State. Clause (4) Article 16 is not an exception to Clause (1), Article 16 but illustrative of classification permissible under Clause (1) Article 16, that as already pointed out has inherent in it, provision for reasonable classification. Clause (4) of Article 16, gives an instance where classification may be made. Clauses (1), (4) or Article 16, therefore, as held by the Supreme Court, operate in the same field and are to be harmoniously read. While Clause (1) Article 16 has implicit in, scope for reasonable classification for individuals, Clause (4) Article 16 speaks of classes. In

terms of Clause (4) of Article 16, the State is required to identify a backward class and thereafter examine whether the entire class is not adequately represented or find out the segment of such class not adequately represented in services of State.

45. The provision for classification or reservation whether inherent in Clause (1), Article 16 or expressly provided under Clause (4), Article 16 is only enabling in character and does not obligate or cast a duty on the State to resort to such classification. The object of both Clause (1) and Clause (4), Article 16 is to attain equality of opportunity in employment under Government. The affirmative action program envisaged under Article 16 is aimed at providing a level play field to all the citizens and while doing so to lift the disadvantaged segment, so as to avoid competition amongst unequals.

46. The reasonable classification contemplated under Clause (1), Article 16, and reservation provided under Clause (4), Article 16 as laid down in *Indra Sawhney and ors. Versus Union of India*, 1992 Supp (3) SCC 210 is restricted to initial appointment/direct recruitment. The Supreme Court in *Indra Sawhney's case* (supra) while recording disagreement with law laid down in *General Manager, S. Railway v. Rangachari*, 1962 (2) SCR 586 held:-

827. we find it difficult to agree with the view in *Rangachari* that Article 16(4) contemplates or permits reservation in promotions as well. it is true that the expression "appointment" takes in appointment by transfer. It may also be that Article 16 (4) contemplates not merely quantitative but also qualitative support to backward class of citizens. But this question has not be answered on a reading of Article 16(4) alone but on combined reading of Article 16 (4) and Article 335. In *Rangachan* this fact was acknowledged but explained away on a basis which with great respect to the learned Judges who constituted the majority-- does not appear to be acceptable. The propositions emerging from the majority opinion in *Rangachan* have been set out in para 823. Under propositions (d) (as set out in para 823), the majority does say that

"[i]n providing for the reservation of appointments or posgts under Article 16(4), the State has to take into consideration the claims of the members of the backward classes, consistently with the maintenance of the efficiency of administration. It

must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairments of efficiency," (SCR p. 606)

but then it explains it away by saying

"but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts." (SCR p. 606)

828. We see no justification to multiply 'the risk, which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to the backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream-- vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence or 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-tracking would necessarily result in leap-frogging and the deleterious effects of 'leap-frogging' need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birth-mark", as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of

administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judge, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly one referred to reservation in promotions, it does not appear to have been within their contemplation.

829. It is true that Rangachari has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are not convinced that the majority opinion of Rangachari to the extent it holds, that Article 16 (4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from"

47. The Apex Court declaring reservation in case of promotions impermissible, however, made the law laid down, as regards reservation in promotions, prospective and allowed the rules if any, in force, to remain in place for a period of five years from the date of judgment, so that the rules are suitably amended to exclude promotions from reservations otherwise permissible under such rules. The Court observed:

"859....."

(7) Article 16 (4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall be operative only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that whatever reservations are already provided in the matter of promotion be it Central Services or State Services, or for that matter services under any Corporation,

authority or body falling under the definition of State in Article 12 such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16 (4). If any authority class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. (Ahmadi, J expresses no opinion on this question upholding the preliminary objection of Union of India). It would not be impermissible for the state to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

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(8) Reservation of appointments or posts under Article 16 (4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

48. Section 6, Reservation Act provides for reservation in promotions. It reads:-

6. Reservation in promotions:

Except as otherwise provided in the Act, available vacancies to the extent as may be notified by the Government from time to time, shall be reserved in any service, class, category or grade carrying a pay scale the maximum of which does not

exceed the pay scale of the post of Deputy Secretary to Government, for promotion from amongst the persons belonging to the Scheduled Castes, Scheduled Tribes and other socially and educationally backward classes:

Provided that total percentage of reservation shall not exceed 25% of the available vacancies:

Provided further that the Government shall exclude the services and posts, which on account of their nature and skill are such as call for highest level of intelligence, skill and excellence, from the operation of the Act.

49. Section 23 of the Act confers power on the Government to make rules to give effect to the provisions of the Act. The Government in exercise of the power has framed Jammu and Kashmir Reservation Rules, 2005. Rule 9 and 10 provide for reservation in promotions and methodology to make it operational. Rule 9 prescribes inter-se ratio of different reserved categories in promotions. Rule 9 may be noticed:

9. Reservation in Promotion

The available vacancies to the extent specified hereinafter shall be reserved in any service, class, category or grade carrying a pay scale the maximum of which does not exceed the pay scale of the post of Deputy Secretary to Government, for promotion from amongst the persons belonging to the Scheduled Castes, Scheduled Tribes and other socially and educationally backward classes:-

(i) Scheduled Castes (SC) 4%

(ii) Scheduled Tribes (ST) 5%

(iii) Socially and Educationally

Backward Classes:

(a) Resident of Backward Area (RBA) 10%

(b) Actual Line of Control 2%

(c) Weak and Under Privileged Classes 1%

(Social Castes)

Rule 10 prescribes Roster for Promotions . The Roster is intended to give effect to the reservations provided under Section 6 of the Reservation Act read with Rule 9 of Reservation of Rules. In terms of Roster candidates belonging to reserved categories identified under the Act are to be placed at prescribed places in the Roster of 100 vacancies, irrespective of their merit in the selection process.

To illustrate, a candidate from Reserved Backward Area appointed to a service with highest merit in his Category, is to be placed at S. No. 4, a candidate from Scheduled Caste at S. No. 6, a candidate from Social Caste at S. No. 10, a candidate from Schedule Tribe at S. No. 12, a candidate from Backward Area at S. No. 14 and a candidate from Actual Line of Control at S. No. 20 in the Roster, irrespective of overall merit position and place in the select list vis-a-vis General Category candidates. Resultantly, candidate from Backward Area placed at S. No. 4 in the Roster of 100 vacancies though less meritorious as against the candidate at S. No. 5 in the Roster, is to be considered for promotion ahead of candidate at S. No. 5. Same is true about the candidates belonging to Scheduled Caste, Social Caste, Scheduled Tribe, ALC and other reserved category candidates.

50. Rule 34 extends the reservation in promotions contemplated under Section 6 of the Reservation Act and Rule 9 of Reservation Rules, to promotions made on adhoc basis. Section 6 of Reservation Act together with the Rules 9, 10 and 34 of Reservation Rules, therefore, embody a scheme for reservation in promotions.

51. The reservation Scheme, in view of law laid down in Indra Sawhney s case (supra), offends Article 16 of Constitution of India. The Scheme, is violative of mandate and spirit of fundamental right to equality of opportunity in matters of public employment, guaranteed under Article 16 of the Constitution.

52. The Parliament to undo fallout of law laid down in Indra Sawhney s case (supra) added Clause (4A) by Constitution 77th Amendment Act, 2000 (A) to Article 16 of the Constitution. The added Clause reads as under:-

(4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotions, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]

The Parliament conscious that Article 16 does not permit reservation in the matter of promotion, by adding Clause 4(A) left scope for law providing for such reservation with consequential seniority to any class or classes of posts in the service of State in favour of Scheduled Castes and Scheduled Tribes, that in the opinion of the State, are not adequately represented in the services of the State.

53. The Constitution 81st Amendment Act, 2000 went a step further. The amendment by adding Clause (4B) to Article 16 made it permissible for the State to carry forward unfilled reserved category vacancies of an year, treat vacancies carried forward as a separate class of vacancies to be filled in succeeding years. In the event, the vacancies are carried forward these are not to be added up to the vacancies for reserved categories available in succeeding year or years, for determining ceiling of 50% reservations of total number of vacancies of that year. Clause (4B) of Article 16, obviously is intended to obviate the 50% ceiling on reservation laid down in Indra Sawhney s case (supra).

54. Protective umbrella under Clause (4A), Article 16 to law/rules/regulations, providing for reservation in promotion, is not available to Section 6 of Jammu and Kashmir Reservation Act and Rules 9, 10 and 34 of Reservation Rules. The reason being that amendment to Article 16, adding Clause (4A) has not been applied to the State. It may be stated at the cost of repetition, that the amendment was to be applied by Presidential order issued, in accordance with procedure laid down in proviso to Clause (2) Article 368 read with Clause (1) of Article 370 of the Constitution. Clause (4A) of Article 16 of the Constitution being not applicable to the State, constitutionality of Section 6 of Reservation Act and Rules 9, 10 and 34 of Reservation Rules is to be tested on the touchstone of unamended Article 16. Law laid down in M. Nagraj's case (supra) having regard to dynamics of present controversy, is not to change complexion of the matter. Clause (1) of Article 16 as

already stated though permitting reasonable classification in the matters relating to employment or appointment to any office under the State, does not permit reservation in the matter of promotions. Same is true about Clause (4), Article 16 that provides for reservation subject to conditions laid down therein. Section 6 of Reservation Act and Rules 9, 10 and 34 of Reservation Rules against above backdrop are, violative of Article 16 of the Constitution and therefore unconstitutional.

55. Let us now examine whether reservation provided under Section 6 Reservation Act and Rules 9, 10 and 34 Reservation Rules, even if assumed to be permissible under Article 16, satisfy the criteria laid down therein. Article 16 of the Constitution as earlier stated permits reservation and reasonable classification of individuals and classes. The affirmative action programme conceived under either of the Clauses i.e Clause (1) or Clause (4), has to satisfy test of "reasonableness". To satisfy the test, a class or individual on the basis of objective and verifiable criteria can be treated apart and given preferential treatment so that it/he does not lag behind because of disability suffered and denied the benefit available to the other classes not a victim of inequality and disadvantage. Reservation is in the nature of a plan to remove inequality and disadvantage and achieve the aim of equality amongst classes by giving a push up to disadvantaged so that they have access to the employment avenues, otherwise inaccessible to them. In other words, classification is to be based on objective and verifiable criteria and such criteria to segregate a class must have close nexus with the objects sought to be achieved.

56. The Supreme Court in Indra Sawhney s case (supra) held that a class to be set apart for reservation in public employment should not only be backward but must be inadequately represented in the services under the State. It further held that a backward class cannot be determined, exclusively with reference to economic criteria, though it may be considered as a basis alongwith or in addition to social backwardness. In any case economic criteria by itself, according to the Supreme Court, can neither be basis for classification under Clause (1) nor for reservation under Clause (4) of Article 16 of the Constitution. The Court observed:-

798. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of Clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words "in the opinion of the State". This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in *Barium Chemicals v. Company Law Board*, which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive.

The Court proceeded to observe:-

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(3)

(b) Neither the Constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. If can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be down with reference to castes among, and along with, other groups, classes and sections of people. One

can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes.

57. It follows that while the Court may not assume role of an appellate authority to look into and examine sufficiency of the material/data collected by the State to justify reservation, there nonetheless must be material available to indicate that such exercise was undertaken. In the present case, respondents have not produced any material to indicate that any exercise was ever undertaken by them to identify the classes inadequately represented in the services of Government employment or for that matter to identify section of the society as a backward class, so as to warrant reservation in promotions. Reservation made in terms of Section 6 of Reservation Act and Rules 9, 10 and 34 of the Reservation Rules is invidious and unconstitutional on this ground as well. The argument that as reservation in promotions in terms of Section 6 Reservation Act read with Rules 9, 10 and 34 Reservation Rules is restricted to the level of Deputy Secretary or equivalent grade, and therefore would not tell upon efficiency in administrative machinery deserves to be allowed, is not to save the Reservation Scheme envisaged under aforesaid provisions, when it is held ultra vires Article 16 of the Constitution.

58. For the reasons discussed, the writ petitions SWP Nos. 1290/2014, 1006/2005, 1694/2006, 1497/2004, 1619/2006, 213/2001, 1816/2000, 2096/2014 and 1583/2014, 1854/2004 and 131-E/2004 are allowed. Section 6 Jammu and Kashmir Reservation Act 2004, and Rules 9, 10 and 34 Jammu and Kashmir Reservation Rules 2005 are held to be ultra-vires Article 16 Constitution of India and accordingly struck down. Government order Nos. 151 PW(Hyd) of 2013 dated

3rd June 2013, 92-PW (Hyd) of 2014 dated 3rd March 2014, 95-PW(Hyd) of 2014 dated 4th March 2014; 379-PW (RandB) of 2006 dated 22nd September 2006; 228-PDD of 2002 dated 21st October 2003; 175-PDD of 2002 dated 12th June 2002; 228-PDD of 2001 dated 13th June 2001; 175-PDD of 2004 dated 24th June 2004; 7-PDD of 2002 dated 4th January 2002; 224-PDD of 2004 dated 30th July 2004; 178-PDD of 2001 dated 27th April 2001; 115-ASH of 2000 dated 29th December 2000; 265-HME of 2013 dated 16th April 2013; Corrigendum no.ME-GM-246/2011 dated 25th April 2013 to Government order no.380-HME of 2012 dated 25th May 2012; 619-HME of 2011 dated 25th November 2011; and 43-ASH of 2000 dated 12th June 2000, 338-PDD of 2004 dated 29.10.2004 and 315-PDD of 2004 dated 18.10.2004, impugned in the writ petition are set aside. The writ petition SWP No. 1271/2014 is dismissed.

MP No. 2/2015

59. SWP No. 2777/2013 is dismissed as withdrawn alongwith connected MP(s). MP No. 2/2015 is disposed of accordingly.

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