

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

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SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS**

Writ Petition (Civil) No.1099/2019

In re: Article 370 of the Constitution

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RESPONDENT'S COUNSEL: With My Lord's permission. An emergency situation My Lord. I am....

CHIEF JUSTICE DY CHANDRACHUD: Circulate an email, I'll attend to it.

RESPONDENT'S COUNSEL: Grateful My Lord.

CHIEF JUSTICE DY CHANDRACHUD:submissions also.

KAPIL SIBAL: Yes, My Lord. I just sent some...

CHIEF JUSTICE DY CHANDRACHUD: But, Mr. Sibal, we have to freeze submissions at some point, because it creates such a problem for us when we have to start putting things together for the judgment.

KAPIL SIBAL: I understand that, My Lord. What happened in our conversations and the dialogue the other day, My Lords, I just wanted to clarify some issues. That's why. Otherwise My Lords I...

JUSTICE SANJAY KISHAN KAUL: Sibal, the problem has been, in the last Constitution Bench also I found, thousands of pages were dumped almost on the last second day. It becomes impossible to formulate our.... We have to formulate a judgment. If we don't know where a person is starting, where a person is going, how will it....

KAPIL SIBAL: No, I'm not saying no, My Lords. The problem is, sometimes when the formulations happen at the beginning of a hearing, as the hearing proceeds My Lords, there are nuances that need to be addressed. That's all My Lords, not for any other reason. I appreciate what My Lord is saying. I'm sorry for that.and the supplementary submissions My Lord, if Your Lordships be kind enough to turn to that? I invite My Lord's attention to page 70. I've sent it.

RESPONDENT'S COUNSEL: Send again.

KAPIL SIBAL: I'm sorry. Lordship has it?

1 **CHIEF JUSTICE DY CHANDRACHUD:** ... Mr. Sibal?

2

3 **KAIL SIBAL:** My Lords, it is combined with the earlier submissions.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** So these are now the updated submissions?

6

7 **KAPIL SIBAL:** That's right.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** So, we don't look at the earlier submissions?

10

11 **KAPIL SIBAL:** There is no other. It's a running page now, My Lords.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Our concern is this, if we allow these
14 submissions, each one of the other counsels, on your side and on the other side, will do this,
15 give us. So, at the end of it, we will have about 15 or 16 additional submissions. And I can just
16 tell you, we were just discussing, and this is not a secret. When it comes to writing a
17 judgment....for instance, we are in the midst of now seeing, which way to... what to decide in
18 the same sex marriage equality, which was argued. With the additional submissions,
19 submissions in rejoinder, surrejoinder, when you actually sit down to open a matter for
20 judgment, it becomes just impossible to... for so many to...

21

22 **KAPIL SIBAL:** No doubt about it.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Mr. Sibal, we had clearly put it down, that we will not
25 accept submissions beyond a particular date. It will be violation of Article 14 if we permit you
26 to do it and not permit the others to do it.

27

28 **KAPIL SIBAL:** Alright My Lords. I'll make oral submissions on that.

29

30 **JUSTICE SANJAY KISHAN KAUL:** See we've marked those submissions. See, the
31 problem is we've also marked those submissions which were made earlier.

32

33 **KAPIL SIBAL:** I appreciate.

34

35 **JUSTICE SANJAY KISHAN KAUL:** Now consolidation. Let us go by that submission,
36 which was earlier made.

37

1 **KAPIL SIBAL:** Your Lordships....

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** But most of them would be an elaboration of
4 what you have argued you can tell us orally <UNCLEAR>

5

6 **JUSTICE SANJAY KISHAN KAUL:** We have been taking notes where we have put
7 questions. We have come up with some answers. We have also been taking notes.

8

9 **KAPIL SIBAL:** Let me, My Lords not waste Your Lordship's time on it. I'm telling Your
10 Lordships, what has happened? Number one, My Lords, there are some speeches made in the
11 J&K Constituent Assembly, which were not part of the original. So I wanted to just cite those
12 My Lords. That's part of it.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** No. But even those now have to be part of the
15 document compilation just frozen, with so much of research by 20 lawyers I am sure nobody
16 would have missed those.

17

18 **KAPIL SIBAL:** It is there, it is there My Lords. It's there. It's in the document.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** But then refer to it in the documents. No
21 difficulty.

22

23 **JUSTICE SANJAY KISHAN KAUL:** Sibal what we got is frozen as when we began the
24 hearing.

25

26 **KAPIL SIBAL:** Very well.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Documents you can show us certainly. No
29 difficulty.

30

31 **KAPIL SIBAL:** Doesn't matter. I'll show the document.

32

33 **JUSTICE SANJAY KISHAN KAUL:** Whatever they are.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** Whatever documents on the record refer to that.

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37 **JUSTICE SANJAY KISHAN KAUL:** We have no problem.

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CHIEF JUSTICE DY CHANDRACHUD: We will see those. Somebody would have filed them.

KAPIL SIBAL: Yes, yes. We filed them My Lords. Volume 8 My Lords. Volume 7. PDF page 102. Volume 7 My Lords. PDF page 101. This is Sheikh Abdullah's speech, My Lords, which is a part of the document. I just wanted to...

CHIEF JUSTICE DY CHANDRACHUD: Volume 7, page 136. That's Volume 7, page 1.

KAPIL SIBAL: Volume 7, yes. But the relevant part of Sheikh Abdullah's speech is at page 101. PDF 101.

JUSTICE SANJAY KISHAN KAUL: 101?

KAPIL SIBAL: Yes. In the submissions, I have just put those paragraphs so that it doesn't waste time. But anyways, My Lords, I'll refer to that. It's not in addition to anything.

JUSTICE SANJIV KHANNA: That's 1460?

KAPIL SIBAL: 1460. That's absolutely right.

CHIEF JUSTICE DY CHANDRACHUD: What is the date of the speech of Sheikh Abdullah?

KAPIL SIBAL: I'll just give that to Your Lordship.

CHIEF JUSTICE DY CHANDRACHUD: This is in the Constituent Assembly. The J&K Constituent Assembly.

KAPIL SIBAL: Yes. 5th November 1951. I'm not adding anything new My Lords. I just... because I didn't want Your Lordships' time to be wasted. So I only pointed those paragraphs. There's nothing new in these submissions. That's all. If I...

CHIEF JUSTICE DY CHANDRACHUD: The agony of this change.... The agony of this change....

1 **KAPIL SIBAL:** Yes. 'The agony of this changeover became all the more intense as a result of
2 the position in which the Indian States were left under the Indian Independence Act of the
3 British Parliament. The paramountcy of British Crown against which the Princes had been
4 learning lapsed' - leaning, it should be -'lapsed, and it was made clear that it would not be
5 transferred to either of the succeeding dominions. There were three alternative courses open
6 to them. They could accede to either of the two dominions or remain independent. This gave
7 the Prince himself the option to decide the fate of their States. Following the announcement
8 of Mountbatten planned on June 3, some of the Indian States acceded to Pakistan, and some
9 to India by means of Instruments of Accession executed through their princes. There were also
10 some who entered into standstill agreements with either or both pending finalization of their
11 decisions. The betrayal of the interests of the state's people had been expected following the
12 rejections of the memorandum of the National Conference and we in Kashmir, decided to place
13 the issue before the people themselves. This is how our well-known 'Quit Kashmir Agitation'
14 began. The National Conference once led the people through a great struggle and once again
15 the ruler tried to curb it this time with unprecedented severity. But when the whole people is
16 one, and the move...and they move...and the move it is not possible to repress them, and they
17 do not stop until they rest freedom and justice for themselves from the unwilling hands of
18 those above them. The crucial date of India and Pakistan independence, therefore, came when
19 I and my colleagues were still behind prison bars. The whole subcontinent was in a state of
20 high tension and disturbance. If at that time the head of the state of Jammu & Kashmir had
21 even the slightest sense of realism or a proper awareness of the danger lurking in the situation,
22 he would have immediately taken the people into confidence. By associating their
23 representatives with administration, I am sure many of the complications that... complications
24 it should be... that arose later, could have been avoided. Instead of that, the Maharaja
25 government entered into a 'standstill agreement', with Pakistan, and this was accepted without
26 question by that dominion. Now the next is important, 'a similar arrangement was suggested
27 to India also, but it is noteworthy that the Government of India insisted that it could not
28 consider any agreement entered into by the Government of the State valid, until it had
29 approval of the people's representatives. While the leaders consistently refused to recognize
30 the vital issue of accession without first securing the approval of its people, the Muslim League
31 in Pakistan government supported the claims of the rulers to speak for their state. The late Mr.
32 Jinnah took the position that after lapse of paramountcy, the Princes were completely
33 independent and then they could themselves determine what relations they should have with
34 the two dominions. Throughout the struggle
35 that the people of Kashmir waged, against autocracy, we should never forget, that the Muslim
36 League leadership had completely dissociated itself from them, and that during the upsurge
37 in 1946, their local party organs had assisted the administration to suppress the movement.

1 At this crucial time, when Pakistan was under the cover of secrecy, perfecting its own plans,
2 and the dawn of the Muslim League, official organ in Karachi was appearing to the Maharaja,
3 to a court to accede to Pakistan on the grounds, that he would have great freedom there in
4 India. It was at this stage, taking advantage of the isolation of the Kashmiris from the rest of
5 the world, that Pakistan imposed an economic blockade upon us, with a view to starving us to
6 submission. Attempts were made even to excite communal hatred, to disrupt our peaceful civic
7 life. Even in the face of such provocations, the National Conference, I'm proud to say, took an
8 objective and democratic stand. Instead, immediately, on my release from imprisonment, I
9 clarified the issue of a mass meeting in Srinagar. The first and fundamental issue before us
10 was the establishment of a 'popular government'. Our objective might be summarized,
11 'freedom first', then alone could free people decide the future associations through accession.
12 I also made it clear that the National Conference would consider this issue without prejudice
13 to political friends.' So leave that around My Lords. Then, My Lords kindly come to the
14 paragraph, 'The overwhelming pressure of this invasion, brought about a total collapse of the
15 armed forces of the State, as well as its administrative machinery, leaving the completely
16 defenceless people at the mercy of invaders. It was not an ordinary type of invasion, in as
17 much, as no canons or warfare were observed. The tribes, tribesmen who attacked the state in
18 thousands, killed, burnt, looted, and destroyed whatever came in their way. And this
19 savagery... And in this savagery, no section of the people could es
20 cape. Even the nuns and nurses of the Catholic missions were killed or brutally maltreated. As
21 these raiders advanced towards Srinagar, the last vestige of authority, which lay in the person
22 of the Maharaja, suddenly disappeared from the capital. This created a strange vacuum, and
23 would have certainly led the occupation of the whole state by Pakistan troops and tribesmen,
24 if at this supreme hour of crisis, the entire people of Kashmir had not risen, like the solid
25 barrier against the aggressor. They halted this on-rush, but could not stop it entirely, as the
26 defendants had not enough experienced training." This is the background on the basis of which
27 the accession took place. Then My Lords kindly come to this paragraph. "When the raiders...
28 1463... were last approaching Srinagar, we could think of only one way to save the state from
29 total annihilation, by asking for help from a friendly neighbour. The representative of the
30 National Conference therefore, flew to Delhi to seek help from the Government of India, but
31 the absence of any constitutionality between our State of India, made it impossible for her to
32 render us any effective assistance in meeting the aggressor. As I said earlier, India had refused
33 to sign a standstill agreement with the state from the ground from the ground that he could
34 not accept it... accept such an agreement until it had the approval of the people. But now, since
35 the people's represented themselves sought an alliance, Government of India showed
36 readiness to accept it legally. The Instrument of Accession had to be signed by the ruler of the
37 state; this the Maharaja did. While accepting that accession, the Government of India said,

1 that she wished that as soon as law and order has been restored in Kashmir and our soil cleared
 2 of invader, the question of the state's succession should be settled by deference of the people.
 3 Actuated by sincere desire to avoid bloodshed and further conflicts, the Government of India
 4 approached the Security Council in 1948 with a plan against Pakistan. The request was simple.
 5 The contention of India was, that Pakistan was responsible for the invasion of Kashmir, and
 6 was continuing to help the raiders who had been employed as mercenaries. And it was further
 7 said, that legally bound as India was, to clear the Jammu and Kashmir state of raiders, might
 8 be constrained to pursue the invaders to their basis in Pakistan, which might lead to still bigger
 9 conflagration. India therefore, wanted the Security Council to dispose of the case as quickly as
 10 possible in the interest of justice". That's how the question of plebiscite, My Lords, came before
 11 the Security Council. Then My Lords, paragraph... this is the essential background which you
 12 must fully take into account. Now I shall indicate some of the considerations, which should be
 13 kept in view. When you, the honourable members of the August Assembly, shoulder the grave
 14 responsibility of giving a considered opinion on this issue of accession, which is ex, not only
 15 the present generation of our people, but generations yet to come. My Lords, now skip the
 16 following paragraphs, and then come to My Lords... the real character. My Lords, kindly come
 17 to paragraph, 'As a realist', My Lords, that paragraph. "As a realist, I'm conscious that nothing
 18 is all black or all white, that there are many facts to each of the propositions before us. I shall
 19 first speak on the merits and demerits of the state's accession to India. In the final analysis, I
 20 understand it, it is the kinship of ideals which determines the strength of ties between two
 21 states. The National Congress is consistently supported the cause of the state's people's
 22 freedom. The autocratic rule of princes has been away with and representative government
 23 have been entrusted with the administration. Steps towards democratization have been taken.
 24 And, these have raised the people's standard of living, brought about much needed social
 25 reconstruction, and above all, built up their very independence of spirit. Naturally, if we accede
 26 to India, there is no danger of a revival of feudalism and autocracy. Moreover, during the last
 27 four years, the Government of India, has never tried to interfere in our internal economy. The
 28 experience has strengthened our confidence in them as a democratic state. The real character
 29 of a state is revealed in its Constitution. The Indian Constitution, as set before as a country.
 30 The goal of secret democracy..." My Lords, we may leave that, leave that out. Then leave the
 31 other things out. Then PDF 562. Why is the state...

32

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

34

35 **KAPIL SIBAL:** It's on 11th August 1952, soon after the Delhi Agreement in July 1952. And,
 36 My Lords, in PDF 562, at 1921, he then explains why the provision is temporary. Here, I would
 37 like to point out.... My Lords have that paragraph?

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JUSTICE SANJAY KISHAN KAUL: Page?

KAPIL SIBAL: Page 1921, PDF 562.

CHIEF JUSTICE DY CHANDRACHUD: After that actually we were reading at 1... it goes on to about 1466, where he specifically speaks about the importance of the affiliation with India and accession to India, because he speaks in terms of, you know... first he speaks about the Indian Constitution.

KAPIL SIBAL: That's correct.

CHIEF JUSTICE DY CHANDRACHUD: Second, it's very important from a historical perspective. Sheikh Abdullah refers to the land reforms which were taking place post the First Amendment and the other amendments which took place to the Constitution. He says Pakistan, on the other hand, is a feudal State.

KAPIL SIBAL: That's correct.

CHIEF JUSTICE DY CHANDRACHUD: And therefore, our interest would not be protected in a feudal Pakistan as compared to an India where land reforms were taking place. Then he refers to the fact that India has of course the access to the seas and therefore, a better as an economic powerhouse for us to carry on trade through the auspices of India. And this really continues until PDF page 107.

KAPIL SIBAL: I didn't want to refer to it because, one - It would take too long. Two - My Lords, it's in the background. But we are dealing with a temporary provision.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: That's why I didn't refer to it. But all that is very important. The reason is simple. Ultimately, what did J&K do? The people of J&K gave to themselves the Constitution, just as the people of India gave to ourselves this Constitution. So central to all this is the will of the people and therefore, you'll have to compare it to the...

CHIEF JUSTICE DY CHANDRACHUD: Very interestingly you see how Sheikh Abdullah puts it. He says, "The most powerful argument which can be advanced in a favour is that

1 Pakistan is a Muslim state, and a big majority of our people being Muslim the State must
 2 accede to Pakistan." But then he says, "This claim of being a Muslim state is of course, only a
 3 camouflage which is a screen to dupe the common man, so that he may not see clearly that
 4 Pakistan is a feudal State in which a clique is trying by these methods to maintain itself in a
 5 power.

6

7 **KAPIL SIBAL:** Absolutely. Your Lordship is right. The point I'm making My Lords,
 8 ultimately what's the essence in this matter that Your Lordships are hearing. The will of the
 9 people of a State, qua the executive act of the Union of India, which decimates the will of the
 10 people. That's the issue before you. That's what Your Lordship... because all the three... all the
 11 three acts of the Union of India are executive acts. 356 deletes the proviso of Article 3. That's
 12 an executive act.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, look at the foresight of the speaker. He
 15 says, "These days, economic interest and a community of political ideals more appropriately
 16 influenced the policies of State."

17

18 **KAPIL SIBAL:** Absolutely. Absolutely.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** He had this vision in 1951 when he was speaking
 21 about the economic interest, which is what the world is talking about today.

22

23 **KAPIL SIBAL:** Absolutely.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** In a globalized world.

26

27 **KAPIL SIBAL:** And in that situation, the ruler had no choice. Absolutely no choice. So My
 28 Lords, the point I was making is that we are now dealing with three executive acts. One, the
 29 356. Two, change of interpretation in the definition of Constituent Assembly under 367(1) and
 30 the abrogation. These are all executive acts. The will of the people is not considered at all.
 31 That's the question. Can you delete provisions of the Constitution by an executive act? Can you
 32 decimate the Constitution by an executive act? Can you change the Constitution by an
 33 executive act? We're not talking about legislation here. We're not talking about parliamentary
 34 legislation. That comes after these executive acts, My Lords, are implemented. That's the
 35 question... you can't change the Constitution of India as applicable to Jammu and Kashmir by
 36 deleting Article 3, the proviso to Article 3. You can't do that through an executive act. You can't

1 change the definition My Lords, of the Legislative.... of the Constituent Assembly as Legislative
2 Assembly through an executive act. Just then I'll come straight away to the issue 1921.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** 1921?

5

6 **KAPIL SIBAL:** Yes. PDF, My Lords 562.

7

8 **JUSTICE SANJAY KISHAN KAUL:** Which volume is this, Mr Sibal?

9

10 **KAPIL SIBAL:** Same volume. Same volume.

11

12 **JUSTICE SANJAY KISHAN KAUL:** Volume 7?

13

14 **KAPIL SIBAL:** Yes. Same. Same speech My Lords. Comes a little later. Same speaker, comes
15 a little later My Lords, 11th August is the speech.

16

17 **JUSTICE B.R. GAVAI:** PDF page 562?

18

19 **KAPIL SIBAL:** 562. PDF 562. Sentence starting, My Lords, paragraph starting My Lords,
20 'here I would like to point out'. My Lords have that?

21

22 **JUSTICE SANJAY KISHAN KAUL:** There seems to be some problem.

23

24 **KAPIL SIBAL:** That's correct, that's correct, that's correct. If all My Lords have it, I'll read it
25 My Lord. 'Here I would like to point out that the fact that Article 370 has been mentioned as a
26 temporary provision, the Constitution does not mean, that it is capable of being abrogated,
27 modified, or replaced, unilaterally.' Kindly mark the words, 'unilaterally', which is exactly what
28 has happened. 'In actual effect, the temporary nature of this article arises merely from the fact
29 that the power to finalize the constitutional relationship between the State and the Union of
30 India has been specifically vested in the Jammu and Kashmir Constituent Assembly.' That's
31 how, My Lords Parliament understood it in 370, that's how the State understood it. It follows
32 that. 'whatever modifications, amendments, or exceptions that may become necessary, either
33 to Article 370, or any other article in the Constitution of India, in their application to Jammu
34 and Kashmir, are subject to decisions, of this sovereign body. Since a good deal of confused
35 thinking and uninformed criticism, is indulging us in the interest of.. I would like to point out
36 here, that the Constitution has confined the scope and jurisdiction of the Union powers, to the
37 terms of the Instrument of Accession with the proviso, that they may be extended to such other

1 matters also, as the President may by order specify with the concurrence of the Jammu and
2 Kashmir Constituent Assembly. The special problems facing the State, were thus taken into
3 account and under the Constitution, the relationship approximated to the subsist.... to that
4 subsisting under the Instrument of Accession. The Constitution of the Indian Union, therefore
5 clearly envisaged, the convening of a Constituent Assembly, for the State of Jammu and
6 Kashmir, which would be finally competent to determine the ultimate position of the State in
7 respect of the sphere of its accession, which would be incorporated as in the shape of
8 permanent provisions of the Constitution. This briefly, is the position which the Constitution
9 of India has accorded to our State. I would like to make it clear, that any suggestions of altering
10 arbitrarily the basis of our relationship with India, would not only constitute a breach of the
11 spirit and letter of the Constitution, but it may invite serious consequences for a harmonious
12 association of our State with India. The formula evolved with the agreement of the two
13 governments remains as valid, to date, as it was when the Constitution was framed and reasons
14 advanced to have this basis changed seem completely devoid of [UNCLEAR]. In arriving this
15 arrangement, the main consideration before our government was to secure a position for the
16 State, which would be consistent with the requirements of maximum autonomy to the local
17 organs of State power, which are the ultimate source of authority in the State, while
18 discharging obligations as a unit of the Federation.

19

20 Then My Lords, kindly come, PDF 648. This is Mir Qasim's statement, on 10th November
21 1952. And this is exactly what I have been submitting before Your Lordships from day one. A
22 unilateral executive decision cannot term... change the terms of a relationship, which are
23 constitutionally embedded in Article 370. My Lords PDF 648, page 2007. This speech was
24 given by Mir Qasim, on 10th of November, 1952. In the statement of the Sheikh, My Lords,
25 that discussion on his statement continues. My Lords, in the middle of that paragraph,
26 starting, it is said that the accession of Kashmir with India should be, as far the statement is
27 concerned, there can be no denying the fact that it should not be a dynamic... dynamic, in the
28 sense that we give up our principles. On the contrary, accession should help us in achieving
29 ideals and preserving our autonomy, except of course, in the objects we handed over to India.
30 Our assembly is competent to make laws and decide the issues, if any, since we are enjoying
31 complete autonomy. We can even frame and amend our Constitution. In this collection, we
32 have application... 'connection' it should be... the Application Order of 1950 of the Indian
33 Constitution. According to this order, all these powers do not vest in the state. Now the next is
34 important. We want to develop Kashmir according to the programme of New Kashmir. Some
35 people say that it is just possible, that in future, Kashmir may also become a part of India, like
36 any other state, and get merged with it. In that case, our eternal economy will be reduced to
37 naught, and residual powers would be snatched from us. In this connection, I will submit, that

1 the thinking of such people is morbid. These are the vested interests which create such
 2 misunderstandings. The representatives of the Government of India have not kept any time
 3 limit for these residuary powers. This is important. That's why, My Lords, 370 talks about
 4 Instrument of Accession and the items, and items in the concurrent list, but doesn't talk of list
 5 2, which is the residuary powers of the state. Therefore, there should be no room for such
 6 doubts. We have acceded to India with a definite objective, and I am sure, the objective will be
 7 achieved. Some interested persons are creating misgivings as regards the autonomy and say
 8 that Kashmir has been granted autonomy simply to benefit its Muslim population, but this is
 9 a baseless allegation. If the people from outside are not given the right of acquiring property
 10 in this state and getting recruited to state services, then it was not the Muslims of this place
 11 alone would get benefited, but all communities will also get benefited. Then, My Lords, kindly
 12 come to... My Lords, the social system which would be set up according to the program in New
 13 Kashmir, will provide equal opportunities of development to all citizens of the state, whether
 14 the Kashmiris, Ladakhis or Dogras. Now My Lords, let's skip the rest. PDF page 694, now, My
 15 Lords.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Formulate. Now that we have seen the speeches,
 18 we'd like to formulate the principle which...

19

20 **KAPIL SIBAL:** The principle is, My Lords, that an executive act of the Union of India cannot
 21 alter unilaterally. Unilaterally... provisions of the Constitution of India, as applicable to the
 22 State of Jammu and Kashmir. That's the central...

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Cannot alter unilaterally, the provisions of the
 25 Constitution...

26

27 **KAPIL SIBAL:** ...of India, as applicable to the Jammu and Kashmir, including getting rid of
 28 the special status given, acceded to by the Union... by the Government of India, and by
 29 Parliament in enacting 370 of the Constitution. That's the submission.

30

31 **JUSTICE SANJAY KISHAN KAUL:** You're saying, this is an executive act?

32

33 **KAPIL SIBAL:** I'll say 356 is executive, 367, definition is executive. These are all executive
 34 acts. Parliament came into the picture when the changes had already been done through
 35 executive acts. We're challenging that.

36

1 **JUSTICE SANJAY KISHAN KAUL:** As you argued, the process was wrong, whatever was
2 done.

3

4 **KAPIL SIBAL:** Yes.

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6 **JUSTICE SANJAY KISHAN KAUL:** But this is... the Parliament did it.

7

8 **KAPIL SIBAL:** No, Parliament according approval to the executive acts which unilaterally
9 changed the Constitution as it was applicable to the State of Jammu and Kashmir. That's the
10 central question that Your Lordships will have to decide. Could Parliament... could the Union
11 of India have done it?

12

13 **JUSTICE B.R. GAVAI:** Is it your case that the Parliament could have done it?

14

15 **KAPIL SIBAL:** No, not at all. My Lords, let me... that also I will answer. My Lords, kindly see
16 ultimately this was a political decision taken in the context of the situation then prevailing.
17 Right? And the complete abrogation of Article 370 must also be a political decision. My Lords,
18 Your Lordships will remember Brexit, what happened? In Brexit what happened? There was
19 no constitutional provision say seeking a referendum. But when you want to sever a
20 relationship which has been entered into, you must ultimately seek the opinion of the people
21 because people are central to this decision, not the Union of India. It goes counter to the very
22 grain of Article 370.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** But Mr Sibal in a Constitutional democracy,
25 seeking the opinion of the people has to be through established institutions,

26

27 **KAPIL SIBAL:** Agree.

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Right? So long as a democracy exists as it does
30 in terms of a Constitutional democracy, any recourse to the will of the people has to be
31 expressed and sought in terms of established institutions.

32

33 **KAPIL SIBAL:** I agree. Either I should do it...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** You cannot envisage therefore a situation like
36 Brexit, a Brexit type referendum. That's a political decision which was taken by the then
37 Government. But within a Constitution like ours, there is no question of a referendum.

1

2 **KAPIL SIBAL:** But My Lords, this is political decision that they have taken by unilaterally
3 through an executive order changing definitions. This is not some Constitutional decision.
4 That's what Your Lordships...supposing Your Lordships were to say that they can change the
5 definition or Your Lordships were to say that...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But therefore, the ultimate question is whether
8 the Constitution does or does not entrust that authority.

9

10 **KAPIL SIBAL:** That's correct. That's all that I'm asking My Lords. I'm not asking for anything
11 more.

12

13 **JUSTICE SANJAY KISHAN KAUL:** Which in turn depends on whether 370 is construed,
14 as you say, a permanent feature irrespective of the terminology used, because that is in the
15 context of the changes till the Constituent Assembly was there, or is it something which is
16 capable of being....

17

18 **KAPIL SIBAL:** My Lords let me... That's a much higher level to which.... I'm not in fact
19 arguing that today. My Lords, whether it is permanent or it is temporary, let's forget about it.
20 The central question is, can the Union of India in this manner determine and terminate that
21 relationship that is constitutionally recognized in Article 370.

22

23 **JUSTICE SANJAY KISHAN KAUL:** We understand.

24

25 **KAPIL SIBAL:** It may not be permanent. That's either... it may be permanent. It may not be.
26 You may change it. You may...

27

28 **JUSTICE SANJAY KISHAN KAUL:** I said in the context that you... that was the argument
29 earlier. So we have come to the next argument, which is the manner in which it is done is
30 flawed according to you.

31

32 **KAPIL SIBAL:** Absolutely. Absolutely. It's a flawed on the Constitution itself, according to
33 me. It is politically motivated. It is a political act. These executive orders are political acts.
34 They're not constitutional acts. That's my submission. And My Lords is whether it is a
35 permanent feature or a temporary feature is really at the moment not an issue. The reason why
36 it's not an issue is maybe there is a constitutional way of doing this. I'm not addressing that.

1 Nor have they resorted to that constitutional methodology. If they resort to it, it will be tested
2 in a court.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** And on the process. You said last time that first,
5 the Section 92, power was vested the Governor, independent of the Council of Ministers.

6

7 **KAPIL SIBAL:** 36, 38.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** Right. Step 2, the Legislative Assembly is
10 dissolved by the Governor under Section 53 without aid and advice. Three, the proclamation
11 is issued under Article 356. You said that the object of the proclamation on the 356 to
12 eventually restore democracy.

13

14 **KAPIL SIBAL:** That's right.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** And not the decimation of democracy. And then
17 finally, we saw the amendment of Article 3, in the presidential notification.

18

19 **KAPIL SIBAL:** That's right. That's also an executive act.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** All these four steps, according to you were
22 constitutionally flawed. There was no provision for these four steps because you've essentially
23 taken away the powers of the State Assembly and exercised them under the garb of 356. That's
24 the submission.

25

26 **KAPIL SIBAL:** That's right. I'm deeply obliged to Your Lordship. My Lords, I just want to
27 read one other...

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** Only last thing I wanted to ask you. You've made
30 your point on the process which was followed, they will have to answer it. On the proviso to
31 Clause 3 of 370, is there something ultimately that happened in the Constituent Assembly,
32 which sheds light on which way the Constituent Assembly was inclined to go? Because, we are
33 reading individual speeches. What happens thereafter at the end of this process in 1957?

34

35 **KAPIL SIBAL:** My Lords, Constitution was adopted in 1957 by the Legislature of Jammu and
36 Kashmir. Between 1951 and 1957, they could have determined or terminated the essence of
37 Article 370, abrogated it, themselves, and said, we don't want, there's no need for this

1 Constitution, we want to be a State, a part of India, like any other State. That is why 370, Sub-
2 Article 3, referred to the decision of the Constituent Assembly. That decision could have been
3 taken. But My Lord asked me the question, well, now that there is no Constituent Assembly,
4 how will this happen? If it were deemed to be a temporary provision. That's what my Lord put
5 to me.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** So your argument would be really, I mean if you
8 are.... if I can put it that way, that the proceedings in the Constituent Assembly of the State of
9 Jammu and Kashmir would indicate, a reaffirmation of the arrangement under Article 370 as
10 a long term arrangement..

11

12 **KAPIL SIBAL:** That's right.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** So that (a) the three options that Sheikh
15 Abdullah spoke about, namely, either of joining Pakistan, acceding to India, or remaining
16 independent. They gave up the first and the third option. They decided that the ultimate
17 decision was to stay within the dominion of India, but subject to the safeguards of 370 and
18 therefore according to you 370 assumes a permanent character, irrespective of the nature of
19 the provision, which is envisaged in the Indian Constitution.

20

21 **KAPIL SIBAL:** And that's what Sheikh Abdullah said in his speech that look, this relation...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** That still begs one question..

24

25 **KAPIL SIBAL:** Yeah.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** ..as to whether it was enough that the Jammu
28 and Kashmir Constituent Assembly proceeded on that basis. Could 370, which was envisaged
29 to be a temporary provision, be converted into a permanent provision, merely by the
30 proceedings of the J&K Assembly or was there some further act required from the Indian
31 Constitution, either in the form of a Constitutional Amendment, by virtue of which 370 would
32 cease to have a temporary character but have a permanent character, in implementation of the
33 wishes of the Jammu and Kashmir Constituent Assembly?

34

35 **KAPIL SIBAL:** My Lords, Government of India never expressed a contrary opinion,
36 throughout.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But didn't it have to take place through a process
2 of amending the Indian Constitution itself...

3

4 **KAPIL SIBAL:** No.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:**to convert the character of 370?

7

8 **KAPIL SIBAL:** Alright. Now, Your Lordships are again going back on the issue of temporary
9 nature. That temporary nature is not part of the Article 370. It's not part of...it's not a part of
10 370 My Lords. In fact, Muzaffar Baig says, we didn't even know about it. That's why I want to
11 read Muzaffar...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, there are two ways that we could really
14 lead into this discussion. One, that though placed in Part 21, Article 370 was never intended
15 to be a temporary provision. That's one. That's one layer of reasoning, which is what you are
16 advancing. Two, that though it was temporary, the reason why it was placed in a temporary
17 provision of the Constitution was, pending the decision of the Constituent Assembly of Jammu
18 and Kashmir, and therefore it was given the character of a temporary provision. Because the
19 views of the Constituent Assembly of J&K was still to be elicited.

20

21 **KAPIL SIBAL:** Right.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Third, the... that's the second argument. We
24 accept that for the purpose of hypothesis. The difficulty of course, which we have to face is this:
25 assuming that that was why it was placed as a temporary provision, because the views of the
26 J&K Constituent Assembly was still to be elicited. And we also take your point, that the J&K
27 Constituent Assembly decided to accede to India and reaffirm the accession to India, subject
28 to the safeguards of Article 370. Is that sufficient itself, sufficient in itself, to convert 370 into
29 an unamendable or untouchable provision?

30

31 **KAPIL SIBAL:** Let me assume, My Lords that it is....

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Or was something more required by a
34 parliamentary intervention in India, post-independence, to convert that which was essentially
35 temporary into a permanent provision?

36

1 **KAPIL SIBAL:** Let's assume My Lords, that it is amendable, for the sake of argument. Then
 2 My Lords, how is it to be amended? The Constitution must provide a solution no My Lords?
 3 I'll assume My Lords for the moment that it is amendable. Then how does the Constitution...
 4 the Constitution of India must provide a solution for that.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Once we concede Mr. Sibal that... concede in the
 7 sense...for the purpose of the...we're not putting anything in your mouth...not at all...don't
 8 misunderstand that. Once we accept the fact that 370 is subject to the amending power under
 9 368, when equally 370 provides for a modality through which 370 itself would come to an
 10 end...

11

12 **KAPIL SIBAL:** Let's see 370 then My Lords. Let's see what modality is. That modality can't
 13 be to convert a Legislative Assembly into a Constituent Assembly by definition, through an
 14 Executive Act under 367(1). Then, My Lords, we have to find the modality within the
 15 Constitution, not outside it. Not vested in an executive part of the Union. That cannot be. So,
 16 if Your Lordship puts to me, and rightly, that something more had to be done under the
 17 Constitution of India, we'd like to know what is that something more?

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But 370(3), it says, specifies the conditions in
 20 which the abrogation can take place.

21

22 **KAPIL SIBAL:** Which is, the Constituent Assembly must... It must be on the
 23 recommendation of the Constituent Assembly, so it gives the solution. That is in line with the
 24 federated nature of this provision. This is complete federation, My Lords. We are quasi federal
 25 qua other states. But, these are purely federal qua Jammu and Kashmir, because the residuary
 26 power vests, My Lords, in the state. So, if you say My Lords at C-70, Sub-Article 3 provides
 27 that solution, that is provided, certainly, but upon the recommendation of the Constituent
 28 Assembly.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** And therefore, according to you, the power is
 31 completely lost once the J&K Constituent Assembly comes to an end.

32

33 **KAPIL SIBAL:** Let me even not go that far. I'll assume that there is some power available. It
 34 may be 368. Let's say, it's hypothetical. We're not concerned with it.

35

36 **JUSTICE SANJIV KHANNA:** No, Mr. Sibal, when you argue, then we'll have to take one.
 37 360 is power to amend the Constitution, that's certainly there. Now, when we look at 370,

1 Clause 3, now, the issue would be whether 368 power is still available to amend the
2 Constitution?

3

4 **KAPIL SIBAL:** Your Lordships is not concerned with it in this matter.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** No, it is. It is very crucial. Because, once we
7 accept the fact that Parliament, as a sovereign lawmaking body, has the power to amend
8 everything, including 368... sorry, including 370, then any amendment of 370 may be subject
9 to criticism on the ground of morality, but not power.

10

11 **KAPIL SIBAL:** No, but it's not a natural...

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Maybe it's a political argument, but it's not an
14 argument of constitutional power.

15

16 **KAPIL SIBAL:** This is not actioned under 368. Your Lordships are not going to
17 hypothetically say this is an action under 368, when 360 has not been invoked.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** But then likewise, the exercise of power under
20 370(3), can it not be then criticized? It is a question of criticizing it as a political criticism. But,
21 is it an argument of the absence of power?

22

23 **KAPIL SIBAL:** Where is that in 370, that power?

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** The court is concerned with either the existence
26 or the absence of power, right?

27

28 **KAPIL SIBAL:** Not that I should ask Your Lordships, where is that power in 370, that says
29 that 368 that you can do it under 360?

30

31 **JUSTICE SANJIV KHANNA:** No, 368 is the power to amend the Constitution.

32

33 **KAPIL SIBAL:** My Lords, we are not... are we concerned with that here? I'm sorry, My Lords,
34 you require two-thirds. You were present...

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** But there are independent avenues. You have the
37 power to amend, you have the power within 370 to abrogate.

1

2 **KAPIL SIBAL:** But My Lords, in that independent... have you must conform to the
3 provisions of the Constitution? And independent avenue dehors the provisions of the
4 Constitution, is no avenue at all.

5

6 **JUSTICE SANJIV KHANNA:** Mr Sibal, for the time being, if we ignore proviso to Clause
7 3. In fact, Clause 3 itself, independent of the proviso, gives the power to the President itself to
8 abrogate 370. If we forget about the proviso.

9

10 **KAPIL SIBAL:** I'm sorry to say that. My Lord, I'm really sorry. Where is the proviso?

11

12 **JUSTICE SANJIV KHANNA:** Just read it once again. Just read it once again.

13

14 **KAPIL SIBAL:** You can't exercise that power without the proviso.

15

16 **JUSTICE SANJIV KHANNA:** No, proviso is something different. We're examining the
17 proviso independently. But independent of the proviso...

18

19 **KAPIL SIBAL:** Clause 370 comes into play on the recommendation of the Constituent
20 Assembly. Your Lordships is putting it the other way around. It comes on the recommendation
21 of the Constituent Assembly, that the President will exercise power, not the other way around.
22 That's why I said, you can't even initiate a bill, Your Lordships will remember that. You can't
23 even initiate a bill, forget about anything else.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Another problem is that, then we would be
26 redrafting the substantive part of Clause 3, to postulate, that the power under the substantive
27 provision of Clause 3 can be exercised, so long as the Constituent Assembly of J&K is in
28 existence. In which case, will a proviso not swallow up the main provision?

29

30 **KAPIL SIBAL:** But that's what it says, that unless that recommendation is there, you can't
31 exercise your power. President can't exercise power under 370, Sub-Article 3. It says so. My
32 Lords, you'll have to interpret it on its plain terms, My Lords. And, Your Lordships have said
33 it not once, but several times over. And it's a provision which, in essence, is a provision of
34 federalism. The heart of federalism is this, My Lord. Yes, it's of course, it's a precondition,
35 there's no doubt about it. I mean, whatever sophistry may happen, can't happen in this way,
36 My Lords. And My Lords, 373 power has been exercised by the Constituent Assembly saying

1 - no recommendation. And I'll come to Your Lordship's a Judgment of *Sampat Prakash* My
2 Lords, which actually deals with this issue. So let's be clear My Lords.

3

4 **JUSTICE B. R. GAVAI:** Where does the Constituent Assembly specifically says that it
5 doesn't.... that a the Sub-Article 3 will not apply to the... it only says that... it only exercises
6 three choices. First, as to whether it should accede to the Pakistan or to India, or to remain
7 independent. Out of three, decided that it will accede to India. But where does it specifically
8 say that it recommends that Sub-Article 3 will not be <UNCLEAR> available.

9

10 **KAPIL SIBAL:** Let me My Lords....let me just...let's go back. Let's go back My Lords to 1950,
11 26th of January. Right? There was no Constituent Assembly. In fact, there was no decision.
12 Originally, it was a National Assembly. There was no decision to convert it through adult
13 suffrage into a Constituent Assembly. So Parliament, forget about the Government...
14 Parliament, incorporated in 370 the provision for a Constituent Assembly. I asked My Lords
15 this question - why? Why did Parliament do that? Parliament did not...parliament... there was
16 no Constituent Assembly in place. There was only a National Assembly. This must have
17 happened in collaboration with Jammu and Kashmir. Must have happened My Lords. That's
18 why the term Constituent Assembly was included in 370 Sub -Article 3. Now, when they said
19 in the proviso that it's on the recommendation, there was no Constituent Assembly. So it had
20 to be a temporary provision. It couldn't be a permanent provision. And the preamble of the
21 Constituent Assembly says to further define the relationship between Jammu and Kashmir
22 and India. So it was temporary because there was nothing in place. It was not temporary
23 because this provision had to go. No. And therefore, My Lords, that relationship was to be
24 decided by the Jammu and Kashmir Constituent Assembly, which had to affirm all laws that
25 had been passed. Even the laws could not be passed till such time <UNCLEAR> confirmed
26 during this period by the Constituent Assembly. So the Constituent Assembly actually was
27 exercising a dual role at that point in time. And the Government of India in 1950, Parliament
28 recognized that it is the Constituent Assembly on the recommendation of which 370 will be
29 abrogated. There would have been no Constitution of Jammu and Kashmir, let's put it that
30 way. There would be no Constitution of Jammu and Kashmir My Lords, if 370 had been
31 abrogated, it would be yet another State of India.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, you've made your point now. I think,
34 basically as we see that your argument is in three layers. We looked at the background, the
35 history. We look at 370 in the background, the Constitutional history, the other history, which
36 we saw pre-independence. We interpret 370 therefore in the context of that history. And then
37 we've gone to the modalities, which we followed for abrogation, which you have said was

1 unconstitutional. Now after having explored this terrain, which is the next.... how do we now
2 progress?

3

4 **KAPIL SIBAL:** Now we come back to the list of dates My Lords.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

7

8 **KAPIL SIBAL:** My Lords, may I with your...? Two minutes I'll take. There is a speech by
9 Muzaffar.... M. A. Baig. Afzal Baig. Just it will take only....

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** Give us the page and the gist of it you can tell us.

12

13 **KAPIL SIBAL:** 694. PDF 694. It's on the temporariness of the Article. That's why I just...
14 that's the last person My Lords... You need not go through it. It refers to the temporary nature
15 of the Article.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** It would be in the same vein as Mir Qasim's
18 speech at 648.

19

20 **KAPIL SIBAL:** And My Lords kindly note this, he was a representative of Jammu and
21 Kashmir in India's Constituent Assembly. There were three members total. He was one of
22 them. So he was part of the Constituent Assembly of India as well.

23 "I said that a good deal of criticism, was levelled in both houses of Parliament of India and in
24 the outside press in regard to the tension of 370, that it is a temporary article in the special
25 position of Kashmir *ipso facto* is of temporary nature. This raised doubts and suspicions not
26 only in the minds of the people of the State, but also in the minds of our colleagues sitting in
27 this House, about our relationship with India and Kashmir, had peculiar position in 1947 that
28 it has now. That peculiar position is a permanent character of the state. It would be unfair to
29 say that this position is a temporary nature. Statements have been made that in due course of
30 time, 370 will cease to exist and Kashmir is bound to become a Part B state. Expressions like
31 these have in fact given rise to amendments proposed by honourable members to the
32 statements of the Leader of the House. Some of these amendments are critical and some are
33 unfriendly." And then he goes on to say that, 'we did not even know that there was a note, a
34 marginal note in this regard. This has just come up suddenly. We didn't know that there was
35 a marginal.... nobody told us there'd be a marginal note. Anyway, My Lords, that's all that he
36 says. I just wanted to invite My Lord's attention. So, in my supplementary submissions only,
37 I've My Lords, set out these passages, nothing more than that. And last, so long as it is not

1 completed, Article 370 will remain there. And when it reaches completion, we shall give to
2 Paul, what's Paul's and what gives to Peter, what's Peter's. This is the centre, that this centre
3 will have the acceded subject and the rest will remain here. 370 will have to be accordingly
4 altered. It would not mean that Kashmir State will cease to have its special position. Amending
5 370 may be necessary at the time, when we finalize our Constitution, but even then, legally,
6 Constitution, as it cannot, in any way rob Kashmir, of its special privileges and position given
7 to it by common Agreement. 370 is therefore temporary, till we complete our Constitution.
8 There, that's the spirit with which it should be incorporated in the Constitutional [UNCLEAR].
9 This is the point My Lords. Anyway, My Lords, so that's.... I've done with this. So, now kindly
10 come back to the list of dates. Yes we were at serial 71, in written submissions compilation,
11 Volume 2, PDF 53.

12

13 **JUSTICE SANJAY KISHAN KAUL:** It begins with serial number 72.

14

15 **KAPIL SIBAL:** Yes. Serial number 72. Let's read 71. 3rd of August.

16

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

18

19 **KAPIL SIBAL:** The governor of the state of Jammu and Kashmir...

20

21 **JUSTICE SURYA KANT:** PDF Mr Sibal, PDF?

22

23 **KAPIL SIBAL:** PDF My Lord..7...8...53, page 53 also. I'm sorry. Justice Kaul, My Lord has
24 it?

25

26 **JUSTICE SANJAY KISHAN KAUL:** Yes. That's why I said serial number 72, 5th August...

27

28 **KAPIL SIBAL:** 71 My Lords. I just want to read 71 also. 'The Governor of the State of Jammu
29 and Kashmir, gave a press statement on the night of 3rd of August, that he was not aware of
30 any proposal to amend 370 or Article 35(a) and that all security arrangements and
31 reinforcements in the state were being made pursuant to intelligence inputs, forecasting a
32 major terror incident. On the 5th of August at 11:00 am, on August 5, the President issued the
33 impugned order, titled 'The Constitution Application to Jammu and Kashmir Order 9, 2019.'
34 This is CO 272. My Lords, let's, therefore mark. It's an Executive Act. The said order, issued
35 under Article 371, with a purported concurrence of the Government of the State of Jammu and
36 Kashmir inserted Article 367(4) of the Constitution of India.' So that's what CO 272 did. 'In
37 particular, the newly inserted Article 367(4)(c) stated that references in the Constitution to the

1 Government of the State of Jammu and Kashmir would be construed as including references
2 to the Governor of Jammu and Kashmir.' Further 367(4)(d) amended Sub-Clause (3) of Article
3 370, by replacing the expression, 'Constituent Assembly' of the state with the 'Legislative
4 Assembly' of the State. Executive Act. Now My Lords, let's come and look at that. It's in Volume
5 3, PDF page 101. That's right.

6

7 **JUSTICE SANJIV KHANNA:** Volume 3 of what?

8

9 **KAPIL SIBAL:** Of documents My Lord.

10

11 **JUSTICE SANJIV KHANNA:** Documents?

12

13 **KAPIL SIBAL:** Yes.

14

15 **JUSTICE SANJAY KISHAN KAUL:** Page 101?

16

17 **KAPIL SIBAL:** 101 My Lords. Running page 494. Now kindly note, My Lords, at this point
18 in time, 356 was in operation.

19

20 **JUSTICE SURYA KANT:** Volume, Mr. Sibal? Volume?

21

22 **KAPIL SIBAL:** Volume 3. Documents Volume 3, PDF page 101. Note, My Lords, that at this
23 time, 356 was in operation.

24

25 **JUSTICE SANJAY KISHAN KAUL:** This is the 5th August 2019 notification?

26

27 **KAPIL SIBAL:** That's right. In exercise of the powers conferred by Clause 1 of 370 of the
28 Constitution, the President, with the concurrence of the Government of the State of Jammu
29 and Kashmir, could never be done. Because, other than 92, 36 and 38, Governor could only
30 act on the aid and advice of the Council of Ministers. That's the Jammu Kashmir Constitution.
31 The Governor could not represent the state. So, the very inception of this executive order is
32 constitutionally flawed. In exercise of the powers conferred by Clause 1 of 370, the President,
33 with the concurrence of the Government of State of Jammu and Kashmir, is placed to make
34 the following order. This order may be called the Constitution Application to Jammu and
35 Kashmir Order of 2019. It shall come into force at once, and shall thereupon supersede the
36 Constitution Application to Jammu and Kashmir Order 1954, because all amendments
37 thereafter to the '54 Order, My Lord, as amended from time to time. All the provisions of the

1 Constitution, as amended from time to time, shall apply in relation to the State of Jammu and
 2 Kashmir, and the exceptions and modifications, subject to which they shall so apply, shall be
 3 as follows. So, My Lords, to Article 367 shall be added the following Clause 4. For the purposes
 4 of this Constitution, as it applies in relation to the State of Jammu and Kashmir, reference to
 5 this Constitution, or to the provision thereof, shall be construed as reference to the
 6 Constitution or the provisions thereof, as applicable or as applied in relation to the state.
 7 Reference to the person for the time being recognized by the President on the recommendation
 8 of the Legislative Assembly of the State of *Sadr-e-Riyasat* of Jammu and Kashmir, acting on
 9 the advice of Council of Minister of the state for the time being in office, shall be construed as
 10 references to the Governor of Jammu and Kashmir. And, references to the Government of the
 11 State shall be construed as including references to the Governor of Jammu and Kashmir,
 12 acting on the advice of the Council of Ministers. How can that be? There is no Council of
 13 Ministers. So, you create a constitutional myth, and assume in the absence of Council of
 14 Ministers, that there is a Council of Ministers. And then, you pass a Presidential Order that,
 15 even in the absence of Council of Ministers, the Governor is acting on the aid and advice of the
 16 Council of Ministers. What kind of exercise of executive power there is... is this? This is a
 17 mockery. Which is why I've been saying, it's only a political act, it's not a constitutional act.
 18 You wanted to do something, you did it.

19
 20 D is even more serious. I don't think in any constitutional democracy in the world, this has
 21 happened My Lords. In the famous *Miller* Case in the UK, My Lords, Boris Johnson tried to
 22 bypass Parliament and requested the Queen to prorogue the House. The House was
 23 prorogued. Immediately My Lords matter came to the Supreme Court. All the Justices of the
 24 Court sat. Now, Your Lordship knows this is the executive power of the Government. They can
 25 prorogue the House. But all came to a unanimous decision - you cannot even prorogue the
 26 House like this. You cannot exercise executive power to bypass Parliament. You bypassed
 27 discussion in Parliament. That's not the way constitutional democracies work. And this is
 28 much worse. You assume something that doesn't exist. You give powers to the Governor, which
 29 he does not have. You assume to yourself under 360... 350 all the powers of the State
 30 Legislature. You are Parliament. So you therefore invoke the powers of the State Legislature
 31 as and Parliament, and you pass an executive order. What kind of... what kind of exercise of
 32 law is that or constitutional law? And then D - 'In the proviso to Clause 3 of Article 370 of this
 33 Constitution, the expression Constituent Assembly of the State referred to in Clause 2 shall
 34 read the Legislative Assembly of the State.' What power does the President have to pass such
 35 an order, My Lords? We're not dealing here with exercise of constitutional power. We're
 36 dealing with exercise of executive power.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Just assist us, from their perspective, why was
2 the amendment to 367 necessary at all? Why was this crucial? I mean, we are seeing now the
3 modalities which they have put into place, for their constitutional design of ultimately
4 abrogating 370. Why was this amendment to 367 necessary?

5

6 **KAPIL SIBAL:** Because My Lords, they themselves gave the power of the Legislative
7 Assembly which they were exercising in 356, as a Constituent Assembly and recommended.
8 My Lords, they were *ad idem* my interpretation. They were as *ad idem* with my
9 interpretation...that you needed the recommendation of the Constituent Assembly. So how do
10 you reach there?

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** They constituted the Legislative Assembly as a
13 Constituent Assembly?

14

15 **KAPIL SIBAL:** Yes. And My Lords, what they do is, they don't interpret it. They say in proviso
16 3 of 370, the expression Constituent Assembly of the State referred to in Clause 3 shall read as
17 Legislative Assembly. So they have amended Article 370 of the Constitution.

18

19 **JUSTICE SANJIV KHANNA:** Actually 367 amendment was really not required because
20 you are exercising power under Clause 1 to say Article....

21

22 **KAPIL SIBAL:** No, no, it was required because you needed the recommendation of the
23 Constituent Assembly.

24

25 **JUSTICE SANJIV KHANNA:** That's something separate. But in 367, introducing Clause
26 4, in terms of the notification dated 5th August 2019...

27

28 **KAPIL SIBAL:** You required it because My Lords they changed the definition of Constituent
29 Assembly in 370 as Legislative Assembly. This is why they could exercise power under 356.
30 Please appreciate.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** But suppose for a moment that they have not
33 gone through this exercise of amending 367, alright, or introducing 367(4), and suppose we
34 are operating purely within the fold of 356...

35

36 **KAPIL SIBAL:** Yes.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright? We are challenged with a 356
2 notification, is a different issue.

3

4 **KAPIL SIBAL:** Yes.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Now, just testing it as an exercise of power under
7 356. Once the proclamation takes place under 356, two consequences follow. One, the
8 President assumes to herself, all the powers of the state, the executive powers of the state
9 vested in the President. Two... except the Legislature, the powers of the State Legislature. Two,
10 the powers of State Legislature are then subsumed in Parliament. The Government of India,
11 does not in its executive capacity, exercise the powers of the State Legislature. Parliament has
12 to exercise the powers. So once the proclamation under 356 was issued, two consequences
13 would follow. All the powers which were vested in the Executive of Jammu and Kashmir, were
14 transferred to the President. All the powers of the State Legislature, were vested in Parliament
15

16 **KAPIL SIBAL:** Right.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Now. If that was so, then if 370(3) is capable of
19 the interpretation, just as a hypothesis, that it's a power to be exercised by the President to
20 abrogate, they abrogate point number 2, "Any power which were to be exercised by the State
21 Legislature, would have to be exercised by Parliament". So, they had to go to Parliament to
22 get a resolution passed. Why was 367 necessary for the design, for the Constitutional design
23 to achieve this at all?

24

25 **KAPIL SIBAL:** My Lord, I'll tell you. 356 power cannot be exercised by the President and
26 Parliament in this fashion, independent of 367. It cannot be done.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Why?

29

30 **KAPIL SIBAL:** Because, you are only acting as the Legislature. You don't have any powers
31 independent of the Legislature under 356. That's *Bommai* has held that. You have no such
32 powers. And the Executive is only dealing with administration, it can't amend the Constitution
33 under 356. Therefore, they'd had to do this, there was no choice. I'll show My Lords *Bommai*.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. But assuming for a moment that we sort of...
36 suppose, we disregard the 367 Amendment.

37

1 **KAPIL SIBAL:** Even if you do, then you can't exercise it under 356 at all. My Lords, it will be
2 a dead letter. It will be inchoate. Because, you can't amend constitutional provisions, My
3 Lords, through 356. You can only exercise the power of the State. Parliament can do it.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. Therefore, if that part of the
6 notification which amends 367, is kept aside for a moment, then what is the consequence?

7

8 **KAPIL SIBAL:** The consequence is, that 356 power cannot be exercised in the same fashion,
9 which is the same result.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** No. See, 356 power is the power of the State
12 Legislature and the State Executive, which has now been vested in the President and in
13 Parliament, respectively. You may be right for a moment, subject to hearing them, that look,
14 how can you exercise the power to amend the Constitution by taking recourse to 356? Fair
15 enough. We got that point, and we'll hear them on that. But, assume that we disregard this
16 whole process of what took place under 367... either disregard it, or hold that it was
17 constitutionally impermissible. Even so, does it affect?

18

19 **KAPIL SIBAL:** That's a separate issue, My Lords, I'll address Your Lordships on that. At the
20 moment, I'm on this Executive Order. I'll come to 356, I'll come to the other issues later My
21 Lords. Because ultimately, what you then do is, Parliament is exercising power as a legislature
22 and Parliament is exercising powers under 356 as well. Correct, My Lords? And as a legislature
23 of the state, let's assume, the state had to convert itself into a Constituent Assembly in terms
24 of 373.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** I think what they believed was, they proceeded
27 on a particular hypothesis, that consultation with the Constituent Assembly is necessary.

28

29 **KAPIL SIBAL:** That's right.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** So therefore, they said that, alright, we're now
32 going to replace the word 'Constituent Assembly' by the word 'Legislative Assembly', which
33 they sought to achieve by amending the Constitution.

34

35 **KAPIL SIBAL:** No. It's the recommendation of the Constituent, it is not just converting it.
36 You can't.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** The first step was to amend the Constitution.

2

3 **KAPIL SIBAL:** Yeah. You recommend it to yourself, because you have a political objective to
4 recommend it, and My Lords, you take the decision yourself.

5

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

7

8 **KAPIL SIBAL:** These are very problematic, My Lords. And, see the consequences of this.
9 That means, through an executive order, you can change any provision of the Constitution,
10 because you have majority? But, this majoritarian culture cannot destroy the edifice of what
11 our forefathers gave us.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So your argument therefore is that you cannot
14 exercise the power in the 356 to amend the Constitution.

15

16 **KAPIL SIBAL:** Exactly.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That point you've made clear.

19

20 **KAPIL SIBAL:** And they cannot possibly justify it unless there is some new jurisprudence
21 that comes to light, that they can do what they like as long as they have the majority. As it is
22 My Lords, now one of your esteemed colleagues has said, My Lords, that in fact, basic structure
23 theory is also doubtful. Maybe...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, when you refer to a colleague you have
26 to refer to a sitting colleague. Once we cease to be judges, they are opinions, not binding
27 dictats.

28

29 **KAPIL SIBAL:** That's true. Of course, it's not binding My Lords. But I'm surprised.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** On 11 November 19...

32

33 **TUSHAR MEHTA:** Parliament doesn't discuss what goes on in the court.

34

35 **KAPIL SIBAL:** No, no I am not discussing anything.

36

37 **TUSHA RMEHTA:** <UNCLEAR> Court should not discuss what goes on in the Parliament.

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KAPIL SIBAL: No, I'm not discussing. This is a public...

TUSHAR MEHTA: <UNCLEAR> it's a freedom of view, freedom of expression.

KAPIL SIBAL: No. No, I know. My Lords, I assume he has the freedom of expression. What's... to say what he likes. I don't dispute that. I'm just saying My Lords. Of course. Of course. Absolutely. We're starting a debate on that because of this majoritarian culture again. I said that... I said that 356 was already in place.

TUSHAR MEHTA: Mr. Sibal is responding to the parliamentary debate here because possibly he was not there in the Parliament yesterday.

KAPIL SIBAL: That is true. That is absolutely true.

TUSHAR MEHTA: It was that place where he could have My Lord, expressed his views on basic structure.

KAPIL SIBAL: Not my view. My view is clear because my view is the court's view. I can't go beyond that. I am an officer of the court. In court I have that constitutional view. Outside may have a different view. Anyway, that's neither here nor there. It's just an aside My Lords. There must be some element of humour and mirth in court as well My Lords. Not... everything can't be this serious. Therefore, see the consequences of this. And My Lords, then it is obviously clear that the Government of India and Parliament recognized that the Legislative Assembly was the Legislative Assembly and could not be the Constituent Assembly which is my interpretation. Therefore, it became necessary. Because they also knew that the Legislative Assembly can't be the Constituent Assembly. That's precisely what I've been arguing. And it says, 'Shall read'. This is an interpretation clause. Please appreciate. 367 is an interpretation clause. It's not a clause to substitute definitions. If you look at 367, the heading is interpretation. It's not substitution. You can't substitute definitions. You can only interpret. So it's outside of 367 itself apart from many other things that I've pointed out.

CHIEF JUSTICE DY CHANDRACHUD: See, what they have done is...

CHIEF JUSTICE DY CHANDRACHUD: So, we saw this notification. Then what happened thereafter? We got your submission on this.

1 **KAPIL SIBAL:** My Lords, I just wanted to mention this to Your Lordship, that once they said
2 the Legislative Assembly could be the Constituent Assembly.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, no.

5

6 **KAPIL SIBAL:** Legislative Assembly is a successor to the Constituent Assembly.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** No, we were saying, what amendment they
9 made. We didn't make a postulation that the Legislative Assembly could be the Constituent
10 Assembly.

11

12 **KAPIL SIBAL:** Your Lordship said that there is a consequence, now that there is no
13 Constituent Assembly, why can't the Legislative Assembly be...?

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** No, no, no, no.

16

17 **KAPIL SIBAL:** Anyway, I was mistaken. I'm sorry My Lords.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** That can never be...

20

21 **KAPIL SIBAL:** Anyway, let's move on My Lords, let's move on. Now, My Lords, I want to
22 show Your Lordships the original 367.

23

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

25

26 **KAPIL SIBAL:** Original 367. That's in Volume 1, PDF page 194, My Lords.

27

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

29

30 **KAPIL SIBAL:** PDF 194, Volume 1. That's the original 367 before the amendment, as
31 applicable to Jammu and Kashmir.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** What page, Mr. Sibal?

34

35 **KAPIL SIBAL:** 194 My Lords. Starts at 193. 367 says interpretation, but the Clause 4 is at
36 194.

37

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

2

3 **KAPIL SIBAL:** If I may read. For the purposes of this Constitution... My Lord Justice Kaul
4 has it?

5

6 **JUSTICE SANJAY KISHAN KAUL:** Yes.

7

8 **KAPIL SIBAL:** For the purposes of this Constitution, as it applies in relation to the State of
9 Jammu and Kashmir, reference to this Constitution or to the provisions thereof, shall be
10 construed as reference to the Constitution or the provisions thereof, as applied in relation to
11 the said... no problem. Then, references to the person, for the time being recognized by the
12 President on the recommendation of the Legislative Assembly of the state, as the *Sadr-e-*
13 *Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the state
14 for the time being in office, shall be construed as references to the Governor of Jammu and
15 Kashmir. And then My Lords, references be, reference to the Government of the said state,
16 shall be construed as including references to the Governor of Jammu and Kashmir acting on
17 the advice of the Council Ministers. So, mark that. That was changed. No, no... provided that...
18 provided that in respect of any period, to the 10th day of April, 1965, such references shall be
19 construed, including references to the *Sadr-e-Riyasat* acting on the advice of the Council of
20 Minister. My Lords, originally, the *Sadr-e-Riyasat*, till 1965, had to be appointed on the
21 recommendation of the Assembly. A name would be sent, and they would agree. In '65 a
22 change was made in terms of which, the President could directly appoint the Governor. That
23 change happened in 1965 in the Constitution of Jammu and Kashmir. So, like any other state.
24 So slowly, slowly, in any case, My Lords, there was a slow, but sure obliteration of the kind of
25 autonomy that Jammu and Kashmir enjoy. All laws were applicable, including TADA, POTA,
26 UAPA, all laws are applicable there, except for land laws and personal laws. Most laws of India
27 are applicable there at that point... at this point of time, in any case. So, there was actually no
28 need for any of this, except with the objective of sending a political message, that we have done
29 away with 370. That's why all this was done. Now that's my submission.

30

31 **TUSHAR MEHTA:** After 2019 exercise, approximately 1,200 laws are now applicable. All
32 beneficial legislations which are available to other citizens, now are available to Jammu and
33 Kashmir also. Prevention of Corruption Act was not applicable, Right to Education was not...

34

35 **KAPIL SIBAL:** There was, there was. My learned friend is not right.

36

37 **TUSHAR MEHTA:** They weren't laws. We have the list. We'll....

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KAPIL SIBAL: Let's not go into that. Let's not go into that. Prevention of Corruption Law was applicable.

CHIEF JUSTICE DY CHANDRACHUD: You are right Mr. Dwivedi. That's not a Constitutional point.

TUSHAR MEHTA: <UNCLEAR> Political optics. All laws were applicable <UNCLEAR>

KAPIL SIBAL: Just to set the record, right, the Jammu and Kashmir Prevention of Corruption Act SAMVAT 2006 applicable. Because they were named differently. Anyway, let's leave that. Let's not get into this. Then references to... then D, My Lords. 'References to the permanent residents of the said State shall be construed as meaning persons who before the commencement of the Constitution application to Jammu Kashmir order were recognized as State subjects under the laws enforced or were recognized by any law made by the Legislative State as permanent resident. Reference to the Governor shall include references to the Governor of Jammu and Kashmir provided that in respect of any period prior to 10th May... April 1965, such references shall be construed as references to the person recognized by the President as the *Sadr-e-Riyasat* of Jammu Kashmir, and as including references to any person recognized by the President as being competent to exercise the power of the Government.'

CHIEF JUSTICE DY CHANDRACHUD: Actually they say in this notification of 5th of August 2019, that they are adding Clause 4 to Article 367.

KAPIL SIBAL: That's right.

CHIEF JUSTICE DY CHANDRACHUD: But it appears that Clause 4 already existed in Article 367. So it was really a matter of substitution and not an addition. That's a <UNCLEAR> but it's a substitution really.

KAPIL SIBAL: Correct. But Clause D is an addition, where the Constituent Assembly, it must be read as....

CHIEF JUSTICE DY CHANDRACHUD: C remains the same right? C remains the same.

KAPIL SIBAL: D is different entirely.

1 **CHIEF JUSTICE DY CHANDRACHUD:** D is different. You are right.

2

3 **KAPIL SIBAL:** And My Lords, 2 also is also different. 'All provisions of the Constitution
4 amended from time to time shall apply in relation with Jammu and Kashmir. And the
5 exemptions and modifications subject to which they shall apply, shall be as follows.' All
6 provisions of the Constitution...

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** And old Clause D goes. The references to a
9 permanent residents of the state... that goes.

10

11 **KAPIL SIBAL:** That goes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Because that D is now substituted by the
14 Legislative Assembly being treated as a Constituent Assembly.

15

16 **KAPIL SIBAL:** That's correct. That's correct. That's what...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, there are two different stands
19 operating here. One stand arises out of the exercise of the power under 356. Under 356, you
20 have no power to amend the Constitution. If you exercise the power under 356 in relation to
21 any other state in India, you can't amend the Constitution. 370 is a provision exclusively in
22 operation in relation to Jammu and Kashmir at the relevant time.

23

24 **KAPIL SIBAL:** Correct.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** So the power which they were exercising was the
27 power under Clause D of Sub-Section 1 of Clause 1 of Article 370.

28

29 **KAPIL SIBAL:** Correct. Absolutely right. But unfortunately, My Lord they couldn't do that
30 because Clause 1 dealt with Instrument of Accession, subject related to Instrument of
31 Accession, and then concurrent list Issues.

32

33 **JUSTICE SANJIV KHANNA:** No. The Clause D is wider.

34

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

36

37 **JUSTICE SANJIV KHANNA:** You are referring to Clause A. You are referring to Clause D.

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KAPIL SIBAL: Yes. I'm reading on Clause A also.

CHIEF JUSTICE DY CHANDRACHUD: D requires the concurrence of that Government.

KAPIL SIBAL: That's correct.

CHIEF JUSTICE DY CHANDRACHUD: That is a J&K Government.

KAPIL SIBAL: That is, Government means Government Council of Ministers. Government is not... under the....

CHIEF JUSTICE DY CHANDRACHUD: But tell us what happens when there is a 356 in operation in the State of J&K?

KAPIL SIBAL: Let's put it this way My Lords, how does 356 in normal circumstances happen? My Lords, the Governor sends a report. The report is that the provisions of the Constitution cannot be carried on this particular state.

CHIEF JUSTICE DY CHANDRACHUD: Right.

KAPIL SIBAL: The Government of India under 356 takes over.

CHIEF JUSTICE DY CHANDRACHUD: Right.

KAPIL SIBAL: Now at that time the Assembly is in suspended animation That's the normal way that it is done. You keep the Assembly in suspended animation. You exercise your powers. Ultimately, the intent is to restore democracy. Therefore My Lords towards the end of it, when you know that elections should be held and you want restoration of democracy, you dissolve the Assembly, and then you hold the election.

JUSTICE SANJIV KHANNA: Mr. Sibal, the question put was slightly different. Come to 370 Clause D. 'Such are the provisions of the Constitution shall apply in relation to the State's subject to exceptions and modifications that the President made by an order specify.' Now, as far as this is concerned therefore the amendment was made to Clause 4 to Section 367 which is the interpretation clause. Now, the proviso says no... 'provided further that no such order which relates to matters other than those specified in the last proviso, preceding proviso, shall

1 be, shall be issued, except with the concurrence of the Government. The concurrence of the
2 Government is the explanation, but...

3

4 **KAPIL SIBAL:** Concurrent list subjects.

5

6 **JUSTICE SANJIV KHANNA:** No, concurrence of the government is the...

7

8 **KAPIL SIBAL:** Both, the Constitution of India as well as the concurrent list.

9

10 **JUSTICE SANJIV KHANNA:** Let's assume Council of... aid and advice of the Council of
11 Ministers for the time being in office. Now when we turn to 356, now 356 applies, 356 applies.

12

13 **KAPIL SIBAL:** Of course. Of course.

14

15 **JUSTICE SANJIV KHANNA:** Now if we turn to 356, then we have to go into what is the
16 power, if 356 provision has been invoked, who'll exercise the power of the Council of Ministers
17 under the terms of Article 371. So now the issue would be whether the Governor could have
18 exercised that power or not?

19

20 **KAPIL SIBAL:** No, My Lords, but at the moment I've not reached 356 My Lords. May I make
21 my submissions when I reach it My Lords.

22

23 **JUSTICE SANJIV KHANNA:** Okay.

24

25 **KAPIL SIBAL:** We've delved into another territory..

26

27 **JUSTICE SANJIV KHANNA:** No, we are not on [UNCLEAR] of 356. We are on the
28 question of power....

29

30 **KAPIL SIBAL:** My Lord, I'll be dealing with the power of 356 My Lords, when we come to
31 356. What happens is that ultimately My Lords, my trend of thought will be...because I have
32 a..

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** We'll just formulate it and leave it at that, that
35 once, upon the proclamation under 356, all the powers of the Government of the State, are
36 vested in the President.

37

1 **KAPIL SIBAL:** Administrative powers..

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** ..all the...yes, then can the President, in the
4 exercise of the second proviso to Clause B of Article 371...

5

6 **KAPIL SIBAL:** Amend the constitution..

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** No, not amend the Constitution. Exercise the
9 power to grant a concurrence.

10

11 **KAPIL SIBAL:** My Lords, concurrence qua what? Qua which subject? Please appreciate.
12 Either the applicability of the Constitution, right? With modifications and exceptions or My
13 Lords, applicability of listing in the concurrent list. That's all. That's all that there is. It can't
14 be more than that.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Then the President has the power to issue an
17 adaptation order?

18

19 **KAPIL SIBAL:** Yes.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Under clause, under the second proviso to Clause
22 D, the President can issue an adaptation order.

23

24 **KAPIL SIBAL:** Correct.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** When you have a regular Government and a
27 Legislative Assembly in place, you require the concurrence of the Government.

28

29 **KAPIL SIBAL:** Correct.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Right? Now, when the power of Government has
32 been vested in the President under 356, it cannot be that the power of the President to issue
33 an order of adaptation is taken away.

34

35 **KAPIL SIBAL:** Correct.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** Now who will exercise that power... that power
2 of concurrence?

3

4 **KAPIL SIBAL:** ... the President. It can't be contrary to Clause D of 373(d). It can't be that My
5 Lords.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** But 370...No, Mr. Sibal, 370(d) says that no such
8 order which relates to a matter other than referred to in the last preceding clause shall be
9 issued, except with the concurrence of that Government. Now 'that Government' means the
10 State Government.

11

12 **JUSTICE SANJIV KHANNA:** It means Council of Ministers..

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Haan, Council of Ministers. Now, what happens
15 when a 356 notification is issued? In which case, will we say that that power cannot be
16 exercised at all by the President.

17

18 **KAPIL SIBAL:** Mr Lords, I'm going to.... I'll answer that. Then My Lords, kindly read My
19 Lords (C) and (D). 'Such of the other provisions of the Constitution, that is excluding Article 1
20 and 370.'

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, under (D), the President has the power
23 to issue adaptations of the Constitution, which are all these orders that we are now seeing.

24

25 **KAPIL SIBAL:** Other provisions of the Constitution. it says, (D) says that My Lord. Each of
26 the other, excluding 1 and excluding 370. This is an amendment of 370 itself. How can the
27 President exercise that power under (D)?

28

29 **CHIEF JUSTICE DY CHANDRACHUD:** No, we are now looking at the exercise of the
30 power to substitute 367.

31

32 **KAPIL SIBAL:** Yes. But that effectively is the amendment of the Constitution to 370.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, the President has the power to amend
35 the Constitution or create exceptions, by taking recourse to the power under Clause D, the
36 second proviso. The President has an unquestioned power to do it.

37

1 **KAPIL SIBAL:** Yes

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** When there is a government in existence, it is
4 conditioned by the requirement of concurrence. Now what happens when the government has
5 been superseded under 356? I'm just using superseded in a loose expression. If the
6 government has ceased to exist by the exercise of the power under 356, the entirety of the
7 power of the government is now vested in the President.

8

9 **KAPIL SIBAL:** But, even the government cannot change Article 1, 370 My Lords. Jammu
10 and Kashmir Legislative Assembly can't change.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** You are right. Absolutely. Therefore...

13

14 **KAPIL SIBAL:** The executive can't go beyond that.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** You are right. Therefore the government, the
17 government also has no power to amend 370 by itself.

18

19 **KAPIL SIBAL:** You can't change the scheme of 370, forget about amendment.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** But 370 itself postulates that it can be abrogated.

22

23 **KAPIL SIBAL:** 370, to say that it can postulate to efface Article 3, then I have no answer, My
24 Lord. Then I have no answer.

25

26 **JUSTICE SANJIV KHANNA:** Mr. Sibal, the question is slightly different. The question is
27 slightly different. Now, under Clause D to Section 371, the President, by an order, can make
28 modifications to the provisions of the Constitution as they apply to that state?

29

30 **KAPIL SIBAL:** My Lords, please, please, please, I'm sorry to interrupt Your Lordships, but
31 read the first part. "Such of the other provisions of this..."

32

33 **JUSTICE SANJIV KHANNA:** Correct. I am coming to that.

34

35 **KAPIL SIBAL:** So, the modifications can only be on...

36

1 **JUSTICE SANJIV KHANNA:** We've understood that. For the time being, just leave that
2 argument apart, because one way to interpret Clause C to Article 371, is that it is only saying 1
3 and 370 will certainly apply to the state of Jammu and Kashmir. D, refers to such of the
4 provisions of the Constitution shall apply in relation to the state, subject to such exceptions
5 and modifications as the President may, by an order, specify. For the time being, we're
6 referring to 367, because the power under 367... because 367(4), which was applicable even at
7 the time in 2019? There was Clause 4 of Article 367, which was certainly applicable at the time,
8 even in 2019?

9

10 **KAPIL SIBAL:** Yes, yes.

11

12 **JUSTICE SANJIV KHANNA:** Now, in order to make modification to that Clause, when 356
13 in invoked, what will be the procedure?

14

15 **KAPIL SIBAL:** But, that's an interpretation clause, that's not a clause to amend the
16 Constitution. I mean I don't understand My Lords. Obviously, I've got something wrong in my
17 understanding of the plain reading of the sections. My Lords. Obviously, I'm completely
18 wrong. But with greatest respect, that's an interpretation clause.

19

20 **JUSTICE SANJIV KHANNA:** Interpretation clause cannot be amended?

21

22 **KAPIL SIBAL:** No. By interpretation of clause you can't amend 370. That's the power. With
23 great respect, My Lords. You can't substitute the Legislative Assembly, Constituent Legislative
24 Assembly. What has that got to do with interpretation? What you can't do directly, you can't
25 do indirectly, My Lords. And where does the President get that power, when it says, "Such of
26 the other provisions of the Constitution shall apply in relation to the state, subject to such
27 extent"? That means qua other provisions of the Constitution, you can have exceptions and
28 modifications, not exceptions and modification qua 370. So, I will not amend 370, but I will
29 amend 367 to amend 370. My Lords, with great respect...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** In your argument on that as well, 367(4)...

32

33 **KAPIL SIBAL:** I have lot of problems.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** One second. 367(4) was brought in for the first
36 time, not with the Constitution, but in 1954, right? So, when 367(4) is brought in, if your
37 argument is right, then the original insertion of 367(4) is also invalid.

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KAPIL SIBAL: No. That is the interpretation. My Lords, Justice Damru... that's a case directly on point, where Your Lordships have said, Governor was always known to be the Governor, *Sadr-e-Riyasat* was only the name. The argument was, *Sadr-e-Riyasat*, prior to 1965, had to be elected.

CHIEF JUSTICE DY CHANDRACHUD: Right.

KAPIL SIBAL: ... I will answer that straight away. Had to be elected. But, in fact, now, the Governor was directly appointed by the President, right? He didn't have to be elected. So merely, because there's a change of nomenclature, but if you change the substance of 370, considerations would be entirely different.

CHIEF JUSTICE DY CHANDRACHUD: Yes, that's also...

KAPIL SIBAL: That's held by Your Lordships. So, let's not... there was no fundamental alteration there, My Lords. Here, there is a fundamental alteration. What you can't do directly, Your Lordships are now saying, let's look at 367. It is hard to find an alleyway to reach a logical conclusion. One can try very hard My Lords, I get lost in my... when I go to my... It gets lost in alleyways, My Lords.

JUSTICE SANJIV KHANNA: Let's put it very simply. When Article 356 is in operation, how will you effectuate Clause 4 to Article 370, Clause 1, according to you?

KAPIL SIBAL: I will, My Lords. Please let me reach that stage. I've tried to answer all your questions so far, My Lords. I'll answer that also.

CHIEF JUSTICE DY CHANDRACHUD: So, now we have seen that notification for 5th of August, and the original Article 367.

KAPIL SIBAL: 370, please remember. It says, "Notwithstanding, anything in this Constitution", at the beginning. And then it says, "Notwithstanding, anything in the foregoing provisions". 356 doesn't begin with that, with a non obstante clause. It's important to know that even 373 says 'Notwithstanding the above provisions'. So it's notwithstanding of notwithstanding. So then how do you exercise that power in any other way? 366 has to be subject to 370. Doesn't say, notwithstanding any provision of the Constitution, I can do what I like. Then you go back to My Lords what we tried to get rid of in 1950. But that's why I said

1 now.... This is now Volume 2 of written submissions and PDF page 53. I was at item serial
2 number 73.

3

4 **JUSTICE SANJIV KHANNA:** Volume 2 written submissions?

5

6 **KAPIL SIBAL:** 73 My Lords. 5th of August. PDF page 53. The second paragraph. 'It's 70
7 members of the House raised objection.'

8

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

10

11 **JUSTICE SURYA KANT:** PDF Mr. Sibal?

12

13 **KAPIL SIBAL:** 53, My Lords. 53. 'Members of the House' - My Lords have that? - 'raised
14 objections that the bill had not been circulated. And if and when the bill is circulated, time be
15 allot for reading and understanding the bills and that only after the bill had been introduced
16 was a supplementary list of bills was circulated in the House. The Statutory Resolutions Re
17 Jammu and Kashmir Reorganization bill 2019 provided that the President of India had
18 referred the Jammu and Kashmir Reorganization bill 2019 to this House under the proviso to
19 Article 3 of the Constitution of India.' Just My Lords, pause here for a minute. Now, if you look
20 at Article 3, Your Lordships will find the Constitution... And as Constitution of India as
21 applicable to the State of Jammu and Kashmir. This is document Volume 1, PDF page 66. This
22 is important My Lords, because remember this is the 5th of August. The bill is passed on the
23 6th of August but introduced on the 5th of August. So if you go to the Article (3) of the
24 Constitution as applicable, you will find, that the second proviso says, provided further.... My
25 Lords have that?

26

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

28

29 **KAPIL SIBAL:** Provided further that no bill....

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, just one second. Volume 1....

32

33 **KAPIL SIBAL:** This is PDF 66 Volume, documents Volume 1. It says that provided further,
34 that no bill providing for increasing or diminishing the area of the State of Jammu and
35 Kashmir, or altering the name of boundary of that State shall be introduced in Parliament
36 without the consent of the Legislature of that State. So there is no Legislature. I mean, there is
37 no Legislative Assembly. Governor has dissolved on the 21st of November, the Assembly. You

1 have to introduce the bill only with the consent, concurrence of the Legislature. You
2 introduced the bill, contrary to the Article, because he says this is suspended, nothing exists.
3 So by this time it is dissolved. How do you do that? Every executive act, is constitutionally
4 flawed, impermissible. It's a violation of the fundamentals of Constitutional Law.

5

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

7

8 **KAPIL SIBAL:** First proviso says, they provided that no bill for the purpose shall be
9 introduced in neither house of Parliament, except on the recommendation of the President
10 and unless where the proposal contains, the bill affects the area boundaries name states, the
11 bill has been referred by the President to the Legislature for expressing its views thereon. So
12 the first proviso dealt with another States like Telangana when they were created, it had to go
13 to the Legislature for expression of views. Government of India may not, Parliament may not
14 agree with those views. That's, of course, the power of Parliament, given by the Constitution
15 itself. So they introduced a bill without the legislative consent. I'll come to the reorganization
16 bill later, but I just wanted to mention because we are on the list of dates, that this itself could
17 not have been done. Now, My Lords, kindly come back to my Volume 2, written submissions.
18 ...was not the legislature.

19

20 **JUSTICE SANJIV KHANNA:** Governor's consent was taken?

21

22 **KAPIL SIBAL:** Had to be My Lord. Not that we know, but yeah, it was not. That's right...no,
23 I'm sorry My Lords. Yes, yes. The proviso, and then they gave consent themselves. Took their
24 own views. My Lords, they had to take the views of the legislature, they removed the proviso
25 and took their own views. And on the basis of that....Yes, yes.

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Give us the sequence. You told us last time, I
28 think, 19th December 2018, which was the documents compilation Volume 3, page 92, when
29 the proclamation under 356 was issued, they suspended the provision of the State
30 Constitution, and proviso to Article 3 was also suspended.

31

32 **KAPIL SIBAL:** That's right.

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** That's step one.

35

36 **KAPIL SIBAL:** That's step one.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Then, thereafter...

2

3 **KAPIL SIBAL:** President's rule was extended from time to time.

4

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

6

7 **KAPIL SIBAL:** On 3rd July, it was extended thereafter, and on 5th August, this happened.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** 5th of August, '19?

10

11 **KAPIL SIBAL:** '19. So, originally, My Lords, 19th of June. Just to get two, three facts right,
12 19th of June, BJP withdrew support. 20th of June, Governor exercised the powers to keep the
13 assembly in animated suspension. 20th, the very next day, he didn't explore the possibility of
14 a government being formed. Now, he had to, necessarily under the Jammu Kashmir
15 Constitution, hold elections within six months. When, My Lords, there were some attempts
16 made in December to form a government... November, to form a government between the
17 National Conference as well as PDP, immediately on 19th December... 21st November, he
18 dissolved the Assembly. The six months were not yet over.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** What is the date of that?

21

22 **KAPIL SIBAL:** On 21st of November.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** 21st of November, 2018?

25

26 **KAPIL SIBAL:** '18. He dissolved the Assembly.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Can you just ask one of your juniors to give us
29 the page reference.

30

31 **KAPIL SIBAL:** Page reference.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Because last time, some or the other we didn't...

34

35 **KAPIL SIBAL:** I'll do that. In a second My Lord. My colleagues are adept at that. Volume 3,
36 PDF page 89.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 3...

2

3 **KAPIL SIBAL:** ... PDF page 89. November 21, 2018 order, where what he says is, by virtue
4 of powers vested upon me in terms of proclamation so and so... 20th June 2018, issued under
5 sub-section 1 of 92, and in exercise of powers conferred upon me by Clause B of subsection 2
6 of 53 of the Constitution, I hereby dissolve the Assembly.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Then comes 19th December '18, proclamation
9 under 356.

10

11 **KAPIL SIBAL:** That's right.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And he suspends... the President's suspends the
14 proviso to Article 3.

15

16 **KAPIL SIBAL:** Correct.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That's the next step.

19

20 **KAPIL SIBAL:** Page 92. PDF page 92.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. Document compilation 3, we got that.

23

24 **KAPIL SIBAL:** Then, it's extended till 3rd of July, that's at page 95. PDF page 95.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Extension till?

27

28 **KAPIL SIBAL:** For six months, My Lords, from 3rd of July. And, in between 5th of August
29 this happens, between the six-month period. 5th of August he introduces it, My Lords. First,
30 on 5th of August is the Amendment Order, My Lords.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, we saw the amendment order.

33

34 **KAPIL SIBAL:** And then, My Lords, he introduces this. Now, I'm going to not deal with the
35 reorganization bit at the moment, My Lords, we come therefore... skip the date and come to
36 C.O. 273, serial number 77. Now we have seen C.O. 272, which I showed Your Lordships, which

1 is under challenge. That's, the executive power as exercised by them, which substitutes, My
2 Lords, 367. That is, C.O. 272. Now, it's C.O. 273.

3

4 **JUSTICE SANJAY KISHAN KAUL:** We are in the list of dates?

5

6 **KAPIL SIBAL:** List of dates, Volume 2, written submissions, written compilation, and serial
7 77. I've skipped the ones in between.

8

9 **JUSTICE SANJAY KISHAN KAUL:** Okay.

10

11 **KAPIL SIBAL:** All My Lords have it? The President issued C.O. 273, which is also impugned,
12 it's also an executive order... in exercise of power under 370, Sub-Article 3 of the Constitution
13 as amended by C.O. 272, declared that Article 370 would cease to apply with effect from 6th
14 of August 2019. So again through an Executive Order, they passed an order saying this
15 particular Article would cease to apply. These are not legislative acts. My Lords, this is in
16 Volume 3, page... PDF page 103. Documents Volume 3. Yeah. Declaration. It's a declaration,
17 not an order My Lords.

18

19 **JUSTICE SANJAY KISHAN KAUL:** Declaration under Article 370.

20

21 **KAPIL SIBAL:** Under Article 370 Sub-Article 3. Which power... I mean what power does the
22 President have to make such a declaration? Under which provision of the Constitution? 'In
23 exercise' - My Lords have that? This is PDF page 103, document Volume 3. Justice Surya Kant?

24

25 **JUSTICE SURYA KANT:** It's reproduced in the PDF also.

26

27 **KAPIL SIBAL:** Okay. Okay. Sometimes easier. 'In exercise of the powers conferred by Clause
28 3 of Article 370 read with Clause 1 of Article 370 of the Constitution of India, the President, on
29 the recommendation of Parliament....' Now My Lords see this. So Parliament that is acting
30 under 356 becomes the Legislative Assembly recommends to itself exercising the powers
31 under 370 as a Constituent Assembly and then says that 370 ceases to exist. So you My Lords,
32 therefore assume all the powers of the State Legislature, of Parliament, of the Constituent
33 Assembly and give consent to yourself. Recommend to yourself and accept the
34 recommendation yourself. So amazing exercise of Constitutional legerdemain. Therefore, he
35 says, My Lord, that - 'All clauses of the said Article 370 shall cease to operate the operative
36 except the following which shall read as under, namely - all provisions of this Constitution, as
37 amended from time to time, without any modifications or exceptions, shall apply to the State

1 of Jammu and Kashmir notwithstanding anything contrary contained in Article 152 or 308, or
2 any other article of this Constitution, or any other provision of the Constitution of Jammu and
3 Kashmir, or any law, document, judgment, ordinance, order, by-law, rule, regulation,
4 notification, custom or usage having the force of law in the territory of India, or any other
5 instrument, treaty or agreement as envisaged under Article 363 or otherwise.' Go back My
6 Lords to the list of dates.

7

8 There is a very serious thing that's happened in Gurgaon My Lords, where there is a call along
9 with policemen to say that - If you employ these people in these shops you will all be *gaddars*.
10 My Lords, this is creating... We have filed an emergency petition. Your Lordships may take a
11 look at it at lunch time. That's all.

12

13

<<<LUNCH BREAK>>>

14

15 **KAPIL SIBAL:** I just want My Lords to look at documents Volume 3, PDF page 104.
16 Documents Volume 3, PDF 104.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That is, the acceptance by Parliament? Every
19 organizer...

20

21 **KAPIL SIBAL:** It moves the resolution My Lords. Amit Shah moves the resolution. It is
22 important to read it.

23

24 **JUSTICE SANJAY KISHAN KAUL:** Supplementary list of business.

25

26 **KAPIL SIBAL:** Yes. Says that the President of India has referred the Jammu and Kashmir
27 Re-organization Bill to this House under the proviso to Article 3, of the Constitution for its
28 views, for its views as this House is vested with the power of the State Legislature of Jammu
29 and Kashmir, as per the proclamation of the President of India dated 19th December 2018.
30 This House resolves to express the view to accept the Jammu and Kashmir re-organization
31 bill. Then My Lords the speech, to the statutory resolution and what he says when he moves
32 it. That's at page PDF 105, that this House recommends. So that's the understanding
33 throughout. This House recommends the following public notification to be issued by the
34 President. An exercise of the powers conferred by Clause 3 of 370, read with Clause 1 of 370.
35 The President, on the recommendation of Parliament is pleased to declare that the 5th, as from
36 5th August, all clauses of the said Article 370 shall cease to be operated except Clause 1 thereof,
37 which shall read as under that all the provisions of this Constitution is amended from time to

1 time, without any modifications and exceptions shall apply to the State of Jammu and
 2 Kashmir, notwithstanding anything contrary contained in 152 or 308, or any other Article this
 3 Constitution, any other provision of the constitution of Jammu and Kashmir or any law or
 4 documents, judgments etc. The President has referred the Jammu and Kashmir re-
 5 organization bill to this House, under the proviso to Article 3 for its views.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** And then the Presidential notification is served.

8

9 **KAPIL SIBAL:** Correct. Just one other thing and then if Your Lordships kindly come back to
 10 the... first C.O. 202. Just for a minute My Lords.

11

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

13

14 **KAPIL SIBAL:** Yes, 101. PDF 101.

15

16 **JUSTICE SANJAY KISHAN KAUL:** Is this document one or...

17

18 **KAPIL SIBAL:** PDF 101, same document. Volume 3, same one just above this. So, it's not
 19 just My Lords, the substitution of definitions, it's much more than that. I just wanted to point
 20 that out. That in exercise of the powers conferred by Clause 1 of 370, the President with the
 21 concurrence of the State of Jammu and Kashmir, is pleased to make the following Order. He
 22 makes that Order and that it shall come into force at once and shall thereupon supersede the
 23 Constitution application to Jammu and Kashmir Order 1954 as amended. So it's not just 367.
 24 And then all the provisions of the Constitution as amended from time to time, shall apply to
 25 the State of Jammu and Kashmir, and the exceptions and modifications subject to which there
 26 shall so apply shall be as follows. So My Lords, they supersede the 54 Order, apply all the
 27 provisions of the Constitution and then the C 367. So it's not just the interpretation clause.
 28 That's all I wanted to point out. Now My Lords, kindly come back to the list of dates, so that
 29 we can..., that is written submissions compilation Volume 2 and we were at 77. My Lords we've
 30 already read 77 in the sense that I have read it from the Amit Shah's, from the Home Minister's
 31 the introduction. And then My Lords, 78 is 9th of August 2019. In exercise of the powers under
 32 Section 2(a) of the Jammu Kashmir Re-organization Act, on receiving the assent of the
 33 President, the Respondents from the Ministry of Home Affairs issued a notification for the
 34 provisions of the Act to come into force with effect from 31-10. Then, of course, the writ
 35 petition is... sorry.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** And then the petition, and then...

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KAPIL SIBAL: And then My Lords, 31st of October, pursuant to the notification SO to...

CHIEF JUSTICE DY CHANDRACHUD: Bifurcation to Ladakh, and...

KAPIL SIBAL: Yes, yes, that's what happened. So that's all My Lords, the facts are concerned. Now, My Lords kindly, just, so therefore, we are dealing with three issues. 356 power. C.O. 202. C.O. 203. 273. Now, just My Lords, keep three principles in mind, which are going to be my key submissions. It's my submission to Your Lordships, that when interpreting all these Executive Orders and the Constitution, three principles must be kept in mind.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: The first is, that the clear language of these provisions, in its structural and historical context. The clear language of these provisions in its structural and historical context, ought to be given effect. And, it is our contention that the language of the provisions is clear, unambiguous, and on its own terms must be given effect. You can't find ambiguity where none exists. So, that's the first principle. Second, if there is a textual ambiguity, the Court should not be adrift in a sea of pragmatism. And the Court must interpret that...

JUSTICE BR GAVAI: If there is structural ambiguity?

KAPIL SIBAL: If there is any textual ambiguity, or the possibility of trying to find another possible interpretation, let's put it that way.

CHIEF JUSTICE DY CHANDRACHUD: The Court should not be adrift in a sea of...

KAPIL SIBAL: Adrift in a sea of pragmatism.

CHIEF JUSTICE DY CHANDRACHUD: And?

KAPIL SIBAL: And My Lords, the interpretation that is more consistent with our Constitutional values. An interpretation that is more consistent with our Constitutional values namely, Representative Democracy and Federalism. Representative Democracy, Federalism and Constitutional morality should be preferred.

JUSTICE SANJAY KISHAN KAUL: Could you repeat that again, Mr. Sibal?

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KAPIL SIBAL: My Lords, if there are, if...

JUSTICE SANJAY KISHAN KAUL: The second part.

KAPIL SIBAL: My Lords, if there's a textual ambiguity, or a possible alternative interpretation, by stretching your mind a bit, then My Lords, we must interpret those provisions, we're not adrift in a sea of pragmatism. We must interpret those petitions, provisions consistent with Constitutional values, Federalism, Representative Democracy and Constitutional morality.

CHIEF JUSTICE DY CHANDRACHUD: That's the second?

KAPIL SIBAL: That's the second.

CHIEF JUSTICE DY CHANDRACHUD: And the third?

KAPIL SIBAL: That will ensure the smooth and harmonious functioning, working of the Constitution.

JUSTICE SANJIV KHANNA: Written submissions which you have given.

KAPIL SIBAL: No, I'm just My Lords, putting it My Lords. And the third is that, any power vested, by or under the Constitution is in essence a limited power. There is no unlimited power My Lords, vested in any institution under the provisions of the Constitution. It's a limited power. It is limited at the time, at the point of time when it is exercised. It is limited at the point in time when it is exercised and limited by core constitutional principles of value, both in terms of time and core constitutional principles and values, since no power is absolute.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: And therefore must be exercised in accordance with the provisions. My Lord. This is my fundamental premise on the basis of which Your Lordships, I beseech will try and interpret the Constitution in the manner that I have suggested.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

1 **KAPIL SIBAL:** So My Lords, if you look at it from these, from the standpoint of these
2 principles, and you apply them to Article 3, Article 356 and Article 37(1)(d), 371(d). Apply
3 these to these three articles, this is the exercise of executive power.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** 3, 356?

6

7 **KAPIL SIBAL:** 371(d) My Lords. The answers according to me are evident. Why? I will just
8 presently say. The power under 371(d) does not extend to abrogating 370 by applying those
9 three principles. The power under 356, My Lords, does not extend to making non-restorative
10 permanent alterations, non-restorative permanent alterations to the state's constitutional
11 status. That's on My Lords, 370... 356. And the power under Article 3 does not extend to
12 effacing the character of a state into a Union Territory. The power under Section 3, Article 3
13 does not extend to effacing the character of a state into a Union Territory. So therefore it is the
14 interaction.

15

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

17

18 **KAPIL SIBAL:** Interactive dimensions. The interaction of the values of constitutional, of
19 constitutional values and federalism, separation of powers and democracy itself, there are at
20 play. That's with greatest respect how My Lords, Your Lordships are kind enough, My Lords.
21 And therefore My Lords, the question that arises is- "is there a limit to the emergency power,
22 or is it unlimited?" That's what they are trying to do in using 356. To change the whole
23 structure. So is it unlimited? Can emergency be passed to make use, to make permanent
24 constitutional changes? Is it an unlimited power? Can it be used to make permanent
25 constitutional changes? Permanent and irreversible. And can the constituent power be
26 equated with ordinary powers? Effacing the source of their authority. Constituent power is a
27 separate genus of power. Can it be equated with ordinary legislative power? It can't. And can
28 Constitutional change, last of all, happen without consultation with the people, despite...
29 consultations with the people of Jammu and Kashmir, despite an express provision in that
30 regard? And last of all, can a state be downgraded to a Union Territory by the Union on its own
31 whim and fancy without consultation with the people affected? Those are the constitutional
32 parameters that I respectfully state should apply when dealing with this momentous change
33 that was brought about by exercise of majoritarian executive power. Now My Lords, I will take
34 Your Lordship with some of these decisions. First of all, My Lord, 356. Let me straight away
35 come to 356. We'll come to **Bommai**. Volume 2, Case Law compilation, Volume 2, at PDF
36 page 120. 113, sorry My Lords. 113. 113, sorry. PDF page 113, paragraph 96. Volume 2.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Justice Jeevan Reddy's judgement or... Justice
2 Sawant.

3

4 **KAPIL SIBAL:** Justice Sawant. Now My Lords the para 96. My Lords have that?

5

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

7

8 **KAPIL SIBAL:** It will be an inexcusable error.

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** 113.

11

12 **KAPIL SIBAL:** 113, running page 267, Volume 2. May I read My Lords.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** Para 96?

15

16 **KAPIL SIBAL:** 96. It is inexcusable...It will be an inexcusable error to examine the provisions
17 of Article 356 from a pure legalistic angle and interpret their meaning only through
18 jurisdictional technicalities. The Constitutional...Constitution is essentially a political
19 document, and provision such as 356 have a potentiality to unsettle and subvert the entire
20 constitutional scheme. The exercise of powers vested under such provision needs therefore to
21 be circumscribed to maintain the fundamental constitutional balance lest the Constitution is
22 defaced and destroyed. This can be achieved even without bending, much less breaking the
23 normal rules of interpretation. If the interpretation is alive to the other equally important
24 provisions of the Constitution, and it's bearing on them, democracy and federalism are the
25 essential features of our Constitution and are part of its basic structure. Any interpretation
26 that we may place on Article 356 must therefore help to preserve not to subvert their value.
27 The power vested *de jure* in the President, but *de facto* in the Council of Ministers under 356
28 has all the latent capacity to emasculate the two basic features of the Constitution, and hence
29 it is necessary to scrutinize the material on the basis of which the advice is given, and the
30 President forms his satisfaction more closely in circumspect. This can be done by the Courts
31 while confining themselves to the acknowledged parameters of the judicial review, as
32 discussed above, illegality, irrationality, and malafide. Such scrutiny of the materials will also
33 be within the judicially discoverable and manageable standards. So that's the first My Lords
34 paragraph. Then 106, PDF 119. Thus, I'm sorry. Thus, the federal principle, social pluralism
35 and pluralistic democracy, which forms the basic structure of our Constitution, demands that
36 the judicial review of the proclamation under 356 is not only an imperative necessity, but a
37 stringent duty and the exercise of power under the set provisions is confined strictly for the

1 purpose and to the circumstances mentioned therein and none else. That's very important.
 2 The purpose of 356 is to restore democracy. That is why this, this is very important. So, you
 3 must interpret whatever the actions of the Government are in the context of that purpose
 4 under 356. It also requires that the material on the basis of which the power is exercised is
 5 scrutinized circumspectly. In this connection, we may refer to Dr. Ambedkar, what he had to
 6 say in reply to the apprehensions expressed by other honourable members of the Constituent
 7 Assembly, In this context, which also brings out the concerns weighing in the mind of
 8 honourable members. In regard to the general debate which has taken place, in which it has
 9 been suggested that these articles are liable to be abused. And you say that I do not altogether
 10 deny that there's a possibility of these articles being abused or employed for political purposes.
 11 So this is not something that I am saying on my own, My Lords. This was envisaged. But that
 12 objection applies to every part of the Constitution, which gives power to the centre to override
 13 the provinces. In fact, I share the sentiments expressed by my honourable friend, Mr. Gupte
 14 yesterday, that the proper thing we ought to expect is that such articles will never be called
 15 into operation and that they would remain a dead letter. If at all, they are brought into
 16 operation, I hope the President, who is endowed with these powers, will take proper
 17 precautions before actually suspending the administration of province. I hope the first thing
 18 that he will do, would be to issue a mere warning to a province that has erred, that things were
 19 not happening in the way in which they were intended to happen in the Constitution. If that
 20 warning fails, the second thing for him to do will be to order an election, allowing the people
 21 of the province to settle matters by themselves. It is only when these two remedies fail, that he
 22 would resort to this Article. It is only in those circumstances, he would resort to this Article. I
 23 do not think we could then say that these Articles were imported in vain, or that the President
 24 had acted wantonly. Time and again, in the history of this country, 356 has been misused by
 25 all [UNCLEAR]. That was never the intent. And now, in this, in changing the structure of this
 26 Constitution as applicable to Jammu and Kashmir, it has crossed all limits. See what happens.
 27 20th of June, My Lords. 19th of June, support withdrawn. 20th of June, Governors. Governor
 28 says and suspended animation. 20th of November, an attempt is made, My Lords, there is
 29 some ambiguity in that, to form a government. 21st November, dissolution. Can't be done
 30 without the aid and advice. Then, My Lords, after 21st November, 19th December. Then 356.
 31 Then 3rd of July extended, then 5th of August.

32

33 Where are the steps for the restoration of democracy? Where are those steps? In fact, the steps
 34 are just to the contrary. The reverse of it. Destruction of democracy. People are not taken into
 35 account. Their views are not taken into account. You arrogate to yourself the powers of the
 36 State. You arrogate to yourself the powers of the Legislature. Parliament becomes a
 37 spokesperson of the people of Jammu and Kashmir. And you express the wishes of the Jammu

1 and Kashmir Assembly through Parliament, when the Constitution requires you to take the
2 views of the state, of the Legislature, of the people of Jammu and Kashmir, who gave to
3 themselves the Constitution of Jammu and Kashmir. Everything that is done under 356 is
4 contrary to the basic principles of both federalism and democracy and to the principle of
5 constitutional morality.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Yes Mr. Sibal.

8

9 **KAPIL SIBAL:** Then 108, My Lords. The further, equally important question that arises in
10 this context is whether the President, when he issues a proclamation under 356 would be
11 justified in removing the Government in power or dissolving the Legislative Assembly, and
12 thus in exercising all the powers mentioned in Sub Clauses A, B, and C of Clause 1 of Article
13 356, whatever the nature of the situation or degree of the failure of the constitutional
14 machinery. A strong contention was raised that situations of the failure of the constitutional
15 machinery may be varied in nature and extent, and hence, measures to remedy the situation
16 may differ both in kind and degree. It would be a disproportionate and unreasonable exercise
17 of power if the removal of Government or dissolution of Assembly is ordered when, what the
18 situation required was, for example, only assumption of some functions or powers of the State,
19 Government of the State, or of anybody or authority in the State under 356(1)(a). This is not
20 the only power that you can exercise under 356. There are incremental steps to be taken. This
21 is not a guillotine provision. And it's temporary to say the least. So unless Your Lordships come
22 down heavily that 356 is not meant for this purpose. The excessive use of power also amounts
23 to illegal, irrational and malafide. So Your Lordships will have to determine is, was this not an
24 excessive use of power? And per se it would be illegal, malafide and irrational. Hence, it is
25 urged, that the Doctrine of Proportionality is relevant in this context and has to be applied in
26 such circumstances. To appreciate, My Lords, that's why I said, in normal circumstances,
27 dissolution would never happen. First, the Assembly would be suspended, be in suspended
28 animation. Attempts would be made to form a Government. In the meantime, you exercise
29 President's rule. When you realize that it's just not possible at all, it's then at that stage that
30 you dissolve the Assembly and order elections. Now you've dissolved the Assembly. When did
31 you dissolve it? On 21 November 2018. And we are where? In August 2023. Was that meant to
32 be, My Lords, under 356? Hence it is urged that the Doctrine of Proportionality is relevant. To
33 appreciate the discussion on the point, it is necessary to realize that the removal of
34 Government and the dissolution of the Assembly are effected by the President, if he exercises
35 powers of the Governor, under 164-174, respectively, under Subclause A of Article 356, though
36 that is neither necessary nor obligatory while issuing the proclamation. In other words, the

1 removal of the Ministry of the dissolution of the Legislative Assembly is not an automatic
2 consequence of the issuance of the proclamation.

3

4 The exercise of the powers under clause and sub-clause is (a), (b), and (c) of 356 may also co-
5 exist with the mere suspension of the political executive and the legislature of the state. Sub-
6 Clause (c) of Article 356 makes it clear. It speaks of incidental and consequential provisions to
7 give effect to the object of the emergency, of the proclamation including suspension in whole
8 or in part of the operation of any provision of the Constitution relating to anybody or authority
9 in the State. It has to be noted that unlike Sub-Clause (a), it does not exclude the legislature of
10 the State. Sub-Clause (b), only speaks of exercise or power of the legislature of the State by or
11 under the authority of Parliament. What is further, the assumption of only some of the
12 functions of the Government, and the powers of the Governor or of anybody or authority in
13 the State other than the legislature of the State under Sub-Clause (a), is also conceivable with
14 the retention of the other functions and powers with the Government of the State and the
15 Governor or anybody or authority in the State. The language of (a), is very clear on the subject.
16 It must be remembered in this connection that where, there is a bicameral legislature, the
17 Upper House, the Legislative Assembly cannot be dissolved. Yet under Sub-Clause (b), of 356
18 (1), it's powers are exercisable by or under the authority of Parliament. The word used there is
19 legislature, not Legislative Assembly. Legislature includes both Lower and Upper House.
20 Legislative Assembly and the Legislative Council. It is also to be noted that when the powers
21 of the legislature of the State are declared to be exercisable by or under the authority of
22 Parliament under 356(1)(b), it is competent for Parliament under 357 to confer on the
23 President the power of such legislature to make laws, and to authorize the President to
24 delegate the powers so conferred to any authority to be so specified, to be specified by him.
25 The authority so chosen may be by the Union or officers and authorities. Legally therefore, it
26 is permissible under 356, firstly, only to suspend the political executive, or anybody or
27 authority in the State, and also the legislature, and not to remove or dissolve them. Secondly,
28 it is also permissible for the President to assume only some of the functions of political
29 executive or of anybody or authority of the State other than the legislature while neither
30 suspending nor removing them. The fact that some of these exercises have not been resorted
31 to in practice so far does not militate against the legal position which emerges from the clear
32 language of 356. In this connection you may refer to Dr. Ambedkar had to say on the subject
33 of Constituents Assembly. The relevant extract from his speech is reproduced in para, which
34 I've already read. Hence, it is possible for the President. Therefore, My Lords, we need
35 not...this really...

36

37 And then sorry, My Lords, the last paragraph.

1 'However whether in a particular situation, the extent of powers used is proper and justifiable
2 is a question which would remain debatable and beyond judicially, discoverable and
3 manageable standards unless the exercise of the excessive power is so palpably irrational, or
4 malafide as to invite judicial intervention. In fact, once the issuance of the proclamation is held
5 and valid, the scrutiny of the kind and degree of power under this proclamation falls in a
6 narrow compass. I'll just pause here. My Lords on the 21st of November, the Governor had no
7 power to dissolve Parliament. He could only do it under the...on the aid and advice of the
8 Council of Ministers. So see what they did. They knew that the Councils of Ministers would
9 never advise the Governor to dissolve. So he dissolved it on his own. If you dissolve it on your
10 own, what are you left with? Only the Governor. And then the Governor, My Lords, did what
11 he did. You imposed 356 and then you take over the powers. And My Lords, ultimately you are
12 the delegate. 356 delegates the powers of the legislature to you. You're not an omnipresent,
13 omnipotent authority to do what you like. You are the delegating. You have been delegated the
14 powers of the legislature. What the primary institution cannot do, the delegate cannot do. So
15 therefore, 356 was an extraordinary provision, allowing a progressive pathway for restoration.
16 So My Lords, that's it. I'm done with this. Then....

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal then you can perhaps give us the
19 paragraphs. You can read them if they are in the same drift. Just give us the paragraphs so that
20 we can use them later.

21

22 **KAPIL SIBAL:** I will give you the paragraphs. Volume two whereas therefore, there's Justice
23 Jeevan Reddy.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Which para?

26

27 **KAPIL SIBAL:** 268 and para 289.

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29 **CHIEF JUSTICE DY CHANDRACHUD:** Paras 268...

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31 **KAPIL SIBAL:** 268, 289, PDF 225. 268, 289 para, PDF 225.

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33 **CHIEF JUSTICE DY CHANDRACHUD:** Right.

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35 **KAPIL SIBAL:** Then My Lords, Justice Ahmadi, PDF 69.

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37 **CHIEF JUSTICE DY CHANDRACHUD:** PDF?

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KAPIL SIBAL: PDF 69. Paragraphs 14, 16 and 23. Right? The rest I've dealt. This is what...yes. Yes, the rest I have... So, this My Lords completes the...

CHIEF JUSTICE DY CHANDRACHUD: What is the next judgment now?

KAPIL SIBAL: My Lords, yes. There's a speech of just, of Ambedkar on Constitutional morality, which I just want to mention. That is November 1948. Compilation Volume 8. I will just do that. Document Compilation Volume 8, PDF 3. No, sorry 15. Sorry. Right.

CHIEF JUSTICE DY CHANDRACHUD: I think I cited it in the first Delhi Judgment. The *NCT Judgment*, 2018. Document Compilation 8, page?

KAPIL SIBAL: Page My Lords 15. PDF 15, running page 2876 at the bottom, My Lords. Yes, it's also quoted My Lords, in the Delhi matter. So, My Lords, it's all right. We can move forward. So, My Lords, this is now, I've done with 356. We'll give Your Lordships the pages of the Delhi Judgment also?

CHIEF JUSTICE DY CHANDRACHUD: Yes, you can just give that.

KAPIL SIBAL: Paragraph 280...

CHIEF JUSTICE DY CHANDRACHUD: Where is the Delhi Judgment? *NCT*?

KAPIL SIBAL: Yeah, I will just give Your Lordships the citation. Volume 5.

CHIEF JUSTICE DY CHANDRACHUD: Case Law right?

KAPIL SIBAL: Case Law Compilation, Volume 5. PDF 2, where it starts.

CHIEF JUSTICE DY CHANDRACHUD: At?

KAPIL SIBAL: At paragraphs 284, 303. 284, 303. PDF pages 146 and 159. So, PDF 146, 159, paragraph 284, 303. Right? So, that's the Delhi Judgment. Then My Lords, I want to cite to Your Lordships *Miller's* judgment. That's important. I'll just give you three paragraphs of *Miller's* . Just show where it is... Volume 6, Volume 6, PDF 384. Sorry, sorry, my mistake. I

1 am sorry My Lords, it's my mistake. Sorry. Volume 5. It is not 6. PDF 308, Volume 5. And I
2 just, I just.... three paragraphs of that judgment that I would...

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4 **CHIEF JUSTICE DY CHANDRACHUD:** Volume 5...

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6 **JUSTICE SANJIV KHANNA:** Volume 5, page number?

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8 **KAPIL SIBAL:** It's PDF page 30... it's PDF page 323, of Volume 5, straight to the paragraph
9 that I'm reading.

10

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

12

13 **KAPIL SIBAL:** 323, para 41. This is the case where My Lords, the Queen was advised to
14 prorogue Parliament. And 11 Justices came down heavily. Unanimous judgment. You can't just
15 shut away discussion in Parliament. This is an extraordinary My Lords, interpretation showing
16 that look, you can't just show your back to the Constitutional authority, which has to deal with
17 these issues. I mean in our Constitution, the right to prorogue is also given to the Government.
18 But, but, but of course, this principle is not really applied often. Now see, 41. Two fundamental
19 principles. If all Your Lordships have it, I'll read it. PDF 323.

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21 **JUSTICE SANJIV KHANNA:** Page 23?

22

23 **KAPIL SIBAL:** 323 My Lords. Running page 1446 at the bottom. I'm just waiting for Justice
24 Kaul. Two fundamental principles of our Constitutional law are relevant to the present case.
25 The first is the principle of Parliamentary Sovereignty that laws enacted by the Crown in
26 Parliament are the supreme form of law in our legal system with which everyone, including
27 the Government, must comply. However, the effect which the courts have given to
28 Parliamentary Sovereignty is not confined to recognizing the status of the legislation enacted
29 by the Crown in Parliament as a highest form of law. Time and again in a series of cases since
30 the 17th century, courts have protected Parliamentary Sovereignty from threats posed to it by
31 the use of prerogative powers. And in doing so, have demonstrated that prerogative powers
32 are limited by the principles of Parliamentary Sovereignty. In the context of Jammu and
33 Kashmir, you use your prerogative power to erase the role of the Legislature completely. To
34 erase the opinion of the people of Jammu and Kashmir completely. To silence them through
35 your own acts of majoritarian rule, which is a political act according to me. To give only a few
36 examples, in the case of proclamations, the Court protected Parliamentary Sovereignty
37 directly by holding that prerogative powers could not be used to alter the law of the land. Three

1 centuries later, in the case of *Attorney-General vs De Keyser's Royal Hotel [1920]*
2 **AC 508**, the Court prevented the Government of the day from seeking it by indirect means to
3 bypass Parliament in circumventing a statute through the use of prerogative exactly what
4 happened, in fact, much more, circumventing the Constitution.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Sibal, in a similar discussion, we find in a
7 Seven Judge Bench judgement in *Krishna Kumar Singh*.

8

9 **KAPIL SIBAL:** Yes.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** On the power to enact, to promulgate ordinances
12 and...

13

14 **KAPIL SIBAL:** Your Lordships have said, in that judgement.

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Though the power is limited by duration and
17 time, can you bring about irreversible changes by the exercise of the ordinance making power,
18 and we said you can't do that.

19

20 **KAPIL SIBAL:** I've relied on that. Absolutely. If it were an act of Parliament, right, My Lords,
21 the situation may well be different. But then you would have to attack the Legislation itself, if
22 at all it is permissible. But you're doing something through your prerogative power and making
23 structural changes in an embedded constitutional structure recognized by Parliament then in
24 1950. That's the problem in the case. So three centuries later, the courts will....

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Mr Sibal, we'll look at this, there's no difficulty.
27 We'll look at this. Para 42, the first sentence of para 42.

28

29 **KAPIL SIBAL:** This is 41 and then there are...

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** 42 the first sentence is important.

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33 **KAPIL SIBAL:** 42 and 50.

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35 **CHIEF JUSTICE DY CHANDRACHUD:** And 50?

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37 **KAPIL SIBAL:** 50. Five-zero.

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CHIEF JUSTICE DY CHANDRACHUD: At page?

KAPIL SIBAL: Which is PDF page 326.

CHIEF JUSTICE DY CHANDRACHUD: Actually para 50 is the...

KAPIL SIBAL: So My Lord, just 50 is important. It's a very small paragraph. I'll just read it. At PDF page 326. It says, "for the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way, that a decision to prorogue Parliament or to advise the Monarch to prorogue Parliament will be unlawful, if the prorogation has the effect of frustrating or preventing without reasonable justification, the ability of Parliament to carry out its constitutional functions as a Legislature and as a body responsible for the supervision of the executive. In such a situation, the court will intervene, if the effect is sufficiently serious to justify since the exceptional courts. Anyway, so that's I am done with. *Krishna Kumar* I'll give the citation only My Lords, because it's Your Lordship's judgment.

CHIEF JUSTICE DY CHANDRACHUD: Is it part of the compilation?

KAPIL SIBAL: It's Volume 21 My Lords. Yes, it starts at PDF 2, in that volume. Volume 21. And the relevant part, PDF page 82, paragraph 101.

CHIEF JUSTICE DY CHANDRACHUD: Para 101?

KAPIL SIBAL: Para 101 and 103. Re-promulgation in the present case as well, as 103. And that's PDF 83. PDF 83, so that's *Krishna Kumar* for your Lordships. So that's we're done with this. So this topic now we're done with. Now let's come to My Lords.... My Lords, that itself, I've said that, 356 is only for temporary emergency legislation. Anyway so, now we come to My Lords, the judgments because several of the judgments in J&K have interpreted these provisions so I just want to bring...

CHIEF JUSTICE DY CHANDRACHUD: Yes.

KAPIL SIBAL: You know, up to speed. Compilation Volume 1.

CHIEF JUSTICE DY CHANDRACHUD: These are judgments on Article 370 itself?

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KAPIL SIBAL: That's correct. That's correct. Yes, this one.

CHIEF JUSTICE DY CHANDRACHUD: Which is the first judgment?

KAPIL SIBAL: I'll just give you. Just give me a minute. PDF page 2, My Lords.

CHIEF JUSTICE DY CHANDRACHUD: Which Volume?

KAPIL SIBAL: This is Volume 1, of the judgments My Lords. This is *Lakhanpal versus State of Jammu and Kashmir*. First matter. I intend to finish today, My Lords so that...

CHIEF JUSTICE DY CHANDRACHUD: Thank You, Mr. Sibal, for keeping to time.

KAPIL SIBAL: Your Lordships have been very kind.

CHIEF JUSTICE DY CHANDRACHUD: I was going to tell you at 2 o' clock when we assembled, but sometimes as a judge, we don't have the heart to do it.

KAPIL SIBAL: No, no I am very much...

CHIEF JUSTICE DY CHANDRACHUD: I am sure you would ...

KAPIL SIBAL: I've already sort of tested your patience more than....

CHIEF JUSTICE DY CHANDRACHUD: No, no. Not at all. Which...

KAPIL SIBAL: My Lords this page, first paragraph.

CHIEF JUSTICE DY CHANDRACHUD: Which page?

KAPIL SIBAL: Page 1, My Lords. PDF page 2. This is a Constitution Bench judgment. *Lakhanpal versus State of Jammu and Kashmir*. I won't deal with the re-organization, My Lords, the other Senior Counsel will deal with it. But I'll broadly tell Your Lordships what the submission is. Then they can deal with it more elaborately. The application of a writ of *habeas corpus* is directed against the State of Jammu and Kashmir, which has by its order dated 04-10-1955, directed the detention of the petitioner under Section 3, of the Jammu and

1 Kashmir's Preventive Detention Act, hereinafter referred to as the Act. Originally the sole
2 Respondent impleaded for the State of Jammu and Kashmir after the Rule 'nisi' was issued to
3 the Respondent. The Union of India intervened because the petitioner had challenged the
4 validity of the Constitutional Application of Jammu and Kashmir Order 1954. Those are the
5 facts and the order is set out as PDF 4. PDF 4. Yes, I'm just reading the Order. That's the order,
6 whereas the Government are satisfied that Lakhanpal, Chairman, so and so, there's a view to
7 preventing him from acting in a manner prejudicial. It's necessary to make the order, and
8 therefore they make the order. Then kindly come to paragraph 4. This order was to remain in
9 force My Lords for 5 years but it was extended. It's not contended that you can't extend this
10 order. That's how the matter came up. So Your Lordships will find in paragraph 4, 'Act
11 impugned in this case, provided that it shall remain in force for a period of five years.' Relevant
12 portion is that so, let's skip that My Lords. Then kindly come to paragraph 6, in the quoted
13 portion. My Lords in paragraph 6, PDF 6.

14

15 No law with respect to preventive detention made by the Legislature of the State whether
16 before or after the commencement of the constitutional application to Jammu Kashmir Order
17 1954 shall be void on the ground that it is inconsistent when any of the provisions of this part
18 with any such law shall to the extent of such inconsistency, cease to have effect on the
19 expiration of five years from the commencement of the Order, except as respect things run or
20 envisaged to be done. The effect of the modification in 35 is that such of the provisions of the
21 Act are as consistent with Part 3 of the Constitution shall be valid until the expiration of 5 years
22 from the commencement. This is an exception which has been engrafted on the Constitution
23 in respect of fundamental rights relating to personal liberty for a period of five years. The act
24 itself has a limited life of 5 years, thus exception aforesaid, is co-extensive with the life of the
25 act itself. Hence, so long as the Act continues in force in its present form, the provisions of
26 Articles 21 and 22, insofar as they are inconsistent with the Act and out of the way of the
27 Respondent, and the petitioner cannot take advantage of those provisions. Therefore, there is
28 no question of the provisions of Section 8 of the Act being unconstitutional by reason of their
29 being inconsistent with 21 and 22. Then paragraph 8, My Lord, he realized, the petitioner
30 realizing the difficulty My Lords. We are having the difficulty in the petitioner's way in view of
31 the provisions of Clause C, added to Article 35. The Learned Counsel for the petitioner faintly
32 suggested that Clause C of 35, added by the Presidential Order was itself bad as so the
33 argument further than that provision was in excess of the past conferred by the President, to
34 on the President by 370. No attempt was made on behalf of the petitioner to show how the
35 order promulgated by the President was in excess of the powers of 370. It was not contended
36 that the article did not authorize the President to promulgate the order. What was suggested
37 was a promulgating, the order which the President was authorized to make under 370 had

1 exceeded his powers. This argument was ultimately rejected. So the detention was upheld.
 2 Then My Lords the next judgment is ***Prem Nath Kaul***. This relates to land and My Lords
 3 paragraph.... this is also a Constitution Bench judgement. That is My Lords PDF 8. The suit
 4 was filed by the appellant in a representation.....

5

6 **CHIEF JUSTICE DY CHANDRACHUD: *Lakhanpal*** nothing really turns much I think.

7

8 **KAPIL SIBAL:** No, nothing much. That's right. That's right. But then those provisions were
 9 extended My Lords from time to time. This particular issue came up My Lords kindly see this
 10 is important page 8. PDF page 9.

11

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

13

14 **KAPIL SIBAL:** Paragraph 6 and 7. What happened was My Lord, in dealing with this appeal,
 15 it is necessary to relate some detail the events that took place in Kashmir and the constitutional
 16 changes which followed. Then in order to appreciate fully the background, a clear
 17 understanding of this background will therefore deal with the appellant's case in this proper
 18 perspective. In 25, Hari Singh succeeded Pratap Singh as a ruler. It appeared that for some
 19 time prior to 34 there was public agitation in Kashmir for establishment of responsible
 20 government. Presumably as a sequel to the said agitation Hari Singh issued Regulation 1 of 91.
 21 The regulation began with the statement of policy that it has a declared intention of the
 22 Maharaja to provide for the association of its subjects in the matter of legislation and the
 23 administration of the State, and that it was in pursuance of the said intention that the
 24 regulation was being promulgated. Regulations consisted of 46 sections which dealt with the
 25 legislative, executive and judicial powers of the Maharaja, referred to the subjects which had
 26 to be reserved for the operation of regulation based provision for the Constitution of the
 27 Legislative Estate, confers authority on the Council to make rules for specified purposes. It is
 28 relevant to refer to only two sections of this regulation. Section 3 provides that all powers
 29 legislative, executive, and judicial in relation to the State and its Government are hereby
 30 declared to be and to have been always inherent and possessed and retained by His Highness
 31 the Maharaja of Jammu and Kashmir and nothing contained in the regulation shall affect or
 32 deem to affect the right or the prerogative of His Highness to make it past regulations.... These
 33 Regulations... passing of these regulations was challenged and ultimately the court held. But
 34 this power is retained by the Maharaja, so therefore you can't really challenge them. Despite
 35 the fact that, My Lords we are in the year 1959, so those powers continued and ultimately My
 36 Lords, the Court upheld them. My Lords, kindly see paragraph 12 at PDF 10. Meanwhile, the
 37 invasion of the state had created tremendous popular fervour and patriotic feelings in resisting

1 the act of aggression and this popular feeling inevitably tended to exercise pressure on the
2 Maharaja for introducing responsible and popular government. Maharaja tried to pacify the
3 popular demand by issuing a proclamation on March 8, 1948. By this proclamation, the State,
4 he stated that, in accordance with the traditions of his dynasty, yet from time to time provided
5 for increasing association of his people with the administration of the state with the object of
6 realizing the goal of full responsible government at as early a stage as possible. And he added
7 that he had noted with gratification and pride the progress made so far and the legitimate
8 desire of his people, for the immediate establishment of fully democratic constitution based
9 on adult franchise with a hereditary ruler from his dynasty, from his dynasty as the
10 constitutional head of an executive, responsible to the legislature. Remember, by this time the
11 1957 Constitution of Jammu and Kashmir had come into play. So the argument was, how do
12 you expect this Maharaja to continue with the power, when we have a Constitution of our own?
13 So, therefore, this power and this proclamation issued by him is bad. It's in that context, that
14 the judgment is rendered. It appears that before this proclamation was issued, the Maharaja
15 had already appointed Sheikh Muhammad Abdullah, who was then the popular leader of the
16 people and the head of the emergency administration. By the proclamation, the Maharaja
17 replaced the emergency administration by popular interim government. It provided for his
18 powers, duties and functions pending the formation of fully democratic government. Clause 1
19 of proclamation provides for the composition of the Ministry, Your Lordships may leave that.
20 Straightaway come to para 23.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Which paragraph?

23

24 **KAPIL SIBAL:** PDF page 14, paragraph 23. This was the contention of the... in the suit which
25 ultimately came to the Supreme Court. The validity of the act is impeached mainly on the
26 ground that Yuvraj Karan Singh had no authority to promulgate the said act. It is this
27 argument which has been urged before us by Mr. Chatterjee in different and alternative forms,
28 needs careful examination. The first attack against the competence of Yuvraj proceeds on the
29 assumption at the time when the Maharaja Hari Singh conveyed his powers to Yuvraj by his
30 proclamation at 49, he was himself no more than a Constitutional Monarch, and as such, he
31 could convey to Yuvraj Karan Singh no higher powers. Let us first deal with this argument.
32 Prior to the passing of the Independence Act, the sovereignty of Maharaja Hari Singh over the
33 State of Jammu Kashmir was subject to such limitations, as were constitutionally imposed on
34 it by the paramountcy of the British Crown, and by the treaties and agreements entered into
35 between the rulers of the State and the British Government. It cannot be disputed that so far
36 as the internal administration and governance of the State were concerned, Maharaja Hari
37 Singh, like his predecessors, was an absolute monarch, and that all the powers, legislative,

1 executive and judicial in relation to his State and its governance inherently vested in him. The
2 position has been emphatically brought out by Section 3 of the regulation. Though by this
3 regulation, Hari Singh gave effect to his intention to provide the association of his subjects in
4 the matter of legislation and administration. By Section 3, he fully preserved to himself all the
5 existing legislative, executive, and judicial powers. Section 3, not only preserves the said
6 powers, but expressly provides that nothing contained in the regulations shall affect or deem
7 to have affected the right and prerogative of His Highness. My Lords, Your Lordships may
8 leave this now. And then it is, however, urged that the constitutional position substantially
9 altered by the subsequent Constitutional Act of 1996. While we are unable to accept this
10 argument, 4 and 5 of this act in terms continue to preserve the powers, legislative, executive
11 and judicial as well as the right and prerogative of His highness, just as Section 3 of the
12 Regulation of 1991. So, My Lords they uphold it even though there is a Praja Sabha at that
13 time. They said the Maharaja's powers are intact. Of course the situation is completely
14 changed now. You no longer have the Maharaja. So, now all the powers are with the legislature.
15 So, in a sense, this is a pre-1957 situation which preserve the power of the Maharaja till My
16 Lords the Maharaja had to give up his powers. So let's not... let's quickly now.... Now kindly
17 see 34. Just one minute, My Lords. 34, PDF 19. Having provided for the legislative power of
18 Parliament and for the application of the Articles of the Constitution. Article 370, Clause 2
19 prescribes that if the concurrence of the Government of the State required by the relevant
20 subclauses of Clause 1, has been given before the Constituent Assembly of Kashmir has been
21 convened, such concurrence shall be placed before such Assembly for such decision as it may
22 take thereon. This is what I was saying in the morning as well. Even in respect of laws passed
23 My Lords, the concurrence of the Constituent Assembly was necessary. This clause shows that
24 the Constitution makers attach great importance to the final decision of the Constituent
25 Assembly. And the continuance of the exercise of powers conferred on Parliament and the
26 President by the relevant temporary provisions of 371 is made conditional on the final approval
27 by the said Constituent Assembly in such matters. Clause 3 authorizes the President to declare
28 by public notification that this Article shall cease to be operated or shall be operative only with
29 specified exceptions and modifications. While this power can be exercised by the President
30 only if the Constituent Assembly of the State makes recommendations in that behalf. This is
31 also a Constitution Bench judgment.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Which para is this, Mr. Sibal?

34

35 **KAPIL SIBAL:** This is para 35.

36

37 **JUSTICE SANJIV KHANNA:** What's the year of the judgment?

1
2 **KAPIL SIBAL:** 1959. Sorry, give the year please. '59, '59. After the Constitution of Jammu
3 and Kashmir [UNCLEAR]. And this is a Constitutional Bench, My Lord. 'Clause 3 authorizes
4 the President to declare, by public notification that this Article shall cease to be operative or
5 shall be operative only, with specified exceptions or modification. But this power can be
6 exercised by the President only if the Constituent Assembly of the State makes
7 recommendations on that behalf. Thus, the proviso to Clause 3 also emphasizes the
8 importance which was attached to the final decision of the Constituent Assembly of Kashmir
9 in regard to the relevant matters covered by 370.' This is how this Court also understood it.
10 The appellant contends that the scheme of this Article clearly shows that the person who would
11 be recognized by the President as the Maharaja of Jammu and Kashmir was treated as no more
12 than a constitutional ruler of the state. In regard to matters covered by this Article, he could
13 not function or decide by himself and his own discretion. The Constitution contemplated by
14 this Article, had to be with the Maharaja acting on the advice of the Council of Ministers and
15 the concurrence prescribed by it had to be similarly obtained and given. And that brings out
16 the limitations of the powers of the Maharaja. It is also were to the final decision in these
17 matters has been deliberately left to the Constituent Assembly, which was going to be
18 convened for the framing of the Constitution of the State and that again emphasizes the
19 limitations imposed. This argument assumes that under Article 370, Sub-Article (1), it is the
20 person recognized by the President or the Maharaja, who has to act on the advice of the Council
21 of Ministers in relation to matters covered by 370. But it is possible to take the view that the
22 said clause really indicates that in recognizing any person as the Maharaja of the State, the
23 President has to act on the advice of the Council of Ministers for the time being in office under
24 the Maharaja's proclamation dated 5th March 1948. If that be the true construction of the
25 explanation, then the argument that before the Maharaja is consulted or his concurrence is
26 obtained, he must act on the advice of the Ministers would not be valid. We would, however,
27 like to deal with the argument, even on the assumption that the construction put by the
28 appellant, the explanation is right, and then they deal with it. On the said construction, the
29 questions which falls for consideration is, do the provisions of 370 affect the plenary powers
30 of the Maharaja in the matter of governance of the State? 'The effect of the application of the
31 present Article has to be judged in the light of its objects and it's terms considered in the
32 context of special features of the constitutional relationship between State and India. The
33 Constitution makers were obviously anxious that the said relationship should be finally
34 determined by the Constituent Assembly of the State itself.' Mark these words, please. 'That it
35 is the main basis and purpose of the temporary provisions made by the present Article. And
36 so the effect of its provisions must be confined to its subject matter. It would not be permissible
37 or legitimate to hold that by implication, the Article sought to impose limitations on the

1 plenary legislative powers of the Maharaja. These powers had been recognized and specifically
2 provided by the Constitution Act of the State itself, and it was not and could not have been
3 within the contemplation or competence of the Constitution makers to impinge even indirectly
4 on the said powers. It could be recalled that the Instrument of Accession those powers have
5 been expressly recognized and preserved, and neither the subsequent proclamation issued by
6 Yuvraj adopting as far as it was applicable, the proposed Constitution of India, nor the
7 Constitution Order, subsequently issued by the President, purported to impose any limitations
8 of the said legislative power. What form of government the state would adopt was a matter
9 which had to be and naturally was left to be decided by the Constituent Assembly of the State.
10 Until the Constituent Assembly reached its decision on that behalf, the Constitutional
11 relationship between the State of India continued state in India continued to be governed
12 basically by the Instrument of Accession. It would therefore be unreasonable to assume that
13 in the application of 370 could have affected or was intended to affect the plenary power. So
14 this is how this Court... Constitution Bench of this court interpreted 370. And then My Lords,
15 they referred to 245, 254 and say that those provisions were not applicable anyway. Then it
16 says it is difficult to see how this article supports the appellant's contention. In fact, it is not
17 easy to appreciate what the application of this article to the state meant. As we've already
18 pointed out, the application of the specified articles to the State was not intended to affect and
19 constitutionally could not have affected the form of government prevailing in the state and the
20 plenary legislative powers of the Maharaja. And that My Lords all this was, the rest is... So that
21 gives you an indication as to what how a Constitutional Bench of this court looked at 370 and
22 in the context of the Constituent Assembly, leaving it to the Constituent Assembly to decide
23 upon the relationship between the State and the Union of India at that point in time. The next
24 is My Lords **Lakhanpal** of [UNCLEAR] this is not necessary. This is the second Lakhanpal
25 My Lords, where My Lords the detention... Again, he challenges detention. And the
26 detention... The law and detention was extended to 15 years, and therefore, that detention was
27 also upheld. So we'll skip My Lord, the second Lakhanpal. Yes. sorry. The second one **Sampat**
28 **Prakash** detention. This is a case My Lords where members were sent by at the instance of
29 the legislative... legislature to the...to Parliament on a recommendation on the Legislature,
30 which was a special provision in 81 of the Jammu Kashmir's Constitution, and said that, look,
31 there can be no direct election. It has to be three of them. Part of a few of them have to be at
32 the instance of the Legislature on the recommendation of the legislature. Really speaking the
33 core issue is..... My Lords this was a case of detention. Again a case of detention. And kindly
34 come to paragraph and the Law of Detention was extended from time to time till it was for 15
35 years at a stretch and that detention order was challenged. But My Lords see that PDF 29
36 paragraph starting the first argument. Continuation of paragraph 4 My Lords, at PDF 28. He

1 challenged his detention order and the first argument he made was the following. PDF 20. My
2 Lord has that?

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** They say that the power of the President to make
5 modifications is of the widest amplitude?

6

7 **KAPIL SIBAL:** That's *Lakhanpal*.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** That's *Lakhanpal*, yeah.

10

11 **KAPIL SIBAL:** *Lakhanpal 2* right?

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And the power to make a modification includes
14 the power to make an amendment to the Constitution?

15

16 **KAPIL SIBAL:** Yes, yes. And that is also with the concurrence My Lords,. It is not without
17 concurrence. That's not without concurrence.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, that's right,. That concurrence is not an
20 issue there.

21

22 **KAPIL SIBAL:** I am just saying My Lords, it's not in the absence of concurrence.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Obviously.

25

26 **JUSTICE SANJIV KHANNA:** But 368 is therefore not really applicable as well, because
27 you are not amending the main Constitution?

28

29 **KAPIL SIBAL:** That's right. That's right. Absolutely right. Now doubt about it. Now My
30 Lords, in this *Sampat Prakash*, PDF 29 and I am inviting My Lords to paragraph 4 at PDF
31 28, at 29. The PDF 29, the first argument. The first argument, My Lord, has that? The first
32 argument was that, this article contained temporary provisions which ceased to be affected
33 after the Constituent Assembly convened for the purpose of framing the Constitution of
34 Jammu and Kashmir. Had completed its task by framing the Constitution of that State.
35 Reliance was placed on the historical background in which Article 370 was included in the
36 Constitution to urge that the powers under the Article were intended to be conferred only for
37 the limited period under the Constitution of the State was framed, and that the President could

1 not resort to them after the Constituent Assembly was completed, had completed its work by
2 framing the Constitution of the State. The background of the legislative history to which
3 reference was made, was brought to our notice by Learned Council by drawing attention to the
4 speech of Gopaldaswami Ayyangar, which Your Lordships read, when he moved in the
5 Constituent Assembly, Clause 306(a) of the bill which now corresponds to 370. It was stated
6 by him, the conditions, I will leave that out My Lords. Then para, further down My Lords, after
7 those seven items. Learned counsel urged that in this background, 370 of the Constitution
8 could only have been intended to remain effective until the Constitution of the State was
9 framed, and the will of the people of Jammu and Kashmir had expressed. And thereafter, this
10 article must be held to have become ineffective so that the modifications made by the President
11 in exercise of the powers under this Article, subsequent to the enforcement of the Constitution
12 of the State would be without any authority of law. The Constitution of the State came into
13 force on 26 January '56, and therefore the two orders 59 and 64 passed by the President in
14 perpetrated exercise of power under 370 were void. It was also urged that the provisions of
15 Clause 2 of Article 370 support this view. It would also urge that the, support this view because
16 it directs that if the concurrence of the Government of the State is given under paragraph 2 of
17 sub para, Subclause D of Clause 1, or under the second proviso to Subclause D of that clause
18 before the Constituent Assembly for the purpose of framing the Constitution of the State is
19 convened, that concurrence had to be placed before such Assembly for such decision as it may
20 take thereon. From this, it was sought to be inferred that the power of the President, depending
21 on the concurrence of the government of the State, must be exercised before the dissolution of
22 the Constituent Assembly of the State so that the concurrence could be placed for its decision,
23 and that power must be held to cease to exist after the dissolution of the Assembly. We are not
24 impressed with either of these two arguments advanced by Ramamurthi. So far as the
25 historical background is concerned, the Attorney General, appearing on behalf of government,
26 relied on it to urge, that the provisions of 370 should be held to be, continuing in force. This is
27 important "continuing in force" because the situation that existed when this Article was
28 incorporated in the Constitution had not materially altered, and the purpose of introducing
29 this article was to empower the President to exercise its discretion in applying the Indian
30 Constitution while that situation remained unchanged. There is considerable force in this
31 submission. The legislative history of this Article cannot in these circumstances be of any
32 assistance, but holding that the Article became ineffective after the Constituent Assembly of
33 the State that were to frame the Constitution.

34

35 And then My Lords, ultimately para 7 is important. 'There are, however, much stronger
36 reasons for holding, to the provisions of this Article continued in force and remain effective
37 even after the Constituent Assembly of the State passed the Constitution of the State. The most

1 important provision in this connection...' Kindly note that, 'is contained in Clause 3 of the
 2 Article,' which lays down that, 'this article shall cease to be operative or shall be operative only
 3 with such exceptions and modifications, and from such date as the President may specify, by
 4 public notification provided that the recommendation of the Constituent Assembly of the State
 5 referred to in Clause 2, shall be necessary before the President issues a notification.' My Lords
 6 that's what I was trying to tell, My Lord Justice Khanna. 'Before', this is a Constitutional Bench
 7 judgment. This clause clearly envisages that the Article will continue to be operative and cease
 8 to be operative only if, on the recommendation of the Constituent Assembly. President may
 9 make a direction to that effect. In fact, no such recommendation was made by the Constituent
 10 Assembly of the State, nor was any order made by the President declaring that the Article shall
 11 cease to be operative. On the contrary, it appears that the Constituent Assembly of the State
 12 made a recommendation that the Article should be operative with one modification to be
 13 incorporated in the explanation of Clause 1 of this Article. This modification in the Article was
 14 notified by the President of the Ministry of Law C.O. 44, dated 15th of November '52, and laid
 15 down that the 17th November '52, the Article was to be operative with substitution of the new
 16 explanation for the old explanation as it existed at that time. This makes it clear that the
 17 Constituent Assembly of the State did not desire this Article should cease to be operative and
 18 in fact expressed it's agreement to the continued operation of this Article for making his
 19 recommendations and should preserve...

20

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

22

23 **KAPIL SIBAL:** The next submission made for challenging the validity of the orders or
 24 modifications made in 59 and 64 was, that Sub-Clause (d) of Clause 1, of 370, the power that
 25 is conferred on the President is for the purpose of applying the provisions of the Constitution
 26 of Jammu and Kashmir, and not for the purpose of making amendments in the Constitution
 27 as applied to that State. The interpretation sought to be placed was that, at the time of applying
 28 any provision of the Constitution of the State of Jammu and Kashmir, the President is
 29 competent to make modification exceptions therein. But once any provision of the
 30 Constitution has been applied, the power under 370 would not cover any modification in the
 31 Constitution as applied. Reliance was thus placed on the nature of the power conferred on the
 32 President to urge, that the President could not from time to time amend any of the provisions
 33 of the Constitution as applied to the State of Jammu and Kashmir. It was further urged that
 34 the Presidential Power under 370 should not be interpreted as applying Section 21 of the
 35 General Clauses Act because the constitutional power cannot be equated with the power
 36 conferred by the Act.

1 My Lords the Court ultimately relied on 21. The argument and our opinion proceeds on an
 2 entirely incorrect basis. Under 371 (d), the power of the President is expressed by laying down
 3 the provisions of the Constitution other than Article 1, of 370, which under 371(c) became
 4 applicable when the Constitution came into force. Shall apply in relation to the State of Jammu
 5 Kashmir, subject to the exceptions and modifications of the President may order specify. What
 6 the President is required to do is to specify the provisions of the Constitution which are to
 7 apply to the State of Jammu Kashmir, and when making such specification he is also
 8 empowered to specify exceptions and modifications to those provisions. As soon as the
 9 President makes such a specification provisions become applicable to the State, with a
 10 specified exception for modification. The specification by the President has to be in
 11 consultation with the Government of the State if those provisions relate to matters in the union
 12 list and the concurrent list specified in the Instrument of Accession governing the accession of
 13 the State of the dominion of India as matters with respect to which dominion Legislature will
 14 make law. Specification with respect to all other provisions that is, Sub-Clause(d) Clause 1 of
 15 370 has to be with the concurrence of the State Government. Any specification made after such
 16 consultation or concurrence has the effect of the provisions of the Constitution specified with
 17 exceptions and modifications become equivalent to the State of Jammu and Kashmir cannot
 18 be said held at the nature of the power contained in this provision is [UNCLEAR] Section 21
 19 must be held to be totally inapplicable.

20

21 That's it My Lords as far as... No para 14 sorry. It was also urged... para 14, PDF My Lord 33.
 22 It was also urged as a power of making modifications and exceptions in the orders made by
 23 Article 371(d) should at least be limited to making minor observations, not cover the part of
 24 practically abrogate an article of the Constitution applied. That submission is clearly without
 25 force. Challenge to the validity of 35(c) introduced in the Constitution as applied to Jammu
 26 Kashmir of this grant was withheld by the court in **Lakhanpal**. Subsequently, the scope of
 27 the powers making exceptions and modification was examined. So My Lord, as long as the
 28 exceptions or modifications are made with consultation or concurrence, depending on the
 29 Instrument of Accession or the concurrent list matters, My Lord, there's no issue at all, the
 30 President could do it. But beyond that My lords... My Lords now therefore now this is the case
 31 that the other side is relying upon that's 367. This is the important case that is PDF 36 same
 32 volume. **Maqbool Damnoo**, it's a 32 petition. Again a detention matter. After this I'll touch
 33 it for 5-10 minutes on the Re-organization Act and the rest others can do. My Lords Mr. Garg,
 34 this is again a detention matter, who appeared on behalf of the petitioner raised the following
 35 points, paragraph 6, at page 40. Very inspirational lawyer Mr. Garg was. He would be sitting
 36 at the back of this court and pretend to be sleeping. When he would suddenly wake up, he
 37 would suddenly wake everybody up including himself and he will tell the court that they were

1 wrong or they were right. An amazing personality and wedded to the cause of... at least in
2 matters of preventive detention, and always appearing for the weak and for the marginalized.
3 Always. We owe him a lot. Mr. Garg who appeared on behalf of the petitioner, raised the
4 following points before us. The Jammu Kashmir preventive detention herein referred to as the
5 Amending Act was invalid as it was ascended to by the *Sadr-e-Riyasat*not invalid as was
6 not ascended to by the *Sadr-e-Riyasat*. It was ascended to by the Governor, but he said the
7 *Sadr-e-Riyasat* was directly elected. The Governor was not directly elected, so therefore this
8 is completely unconstitutional because he did not give his assent to it. The proviso inserted by
9 4(2) of Section 8 is bad because it suffers from excessive delegation. There has been no
10 violation of Article 21. 22. At any rate, the proviso is bad because it conflicts with Section 103
11 of the Constitution. Detention order is bad because the detaining authority has not applied its
12 mind and the Order of Detention is bad if it is not served or executed in accordance with law.
13 In support of his contention, Learned Counsel urged the 370 was the only authority which is
14 recognized as the government of the State of Jammu Kashmir is the *Sadr-e-Riyasat*. 370
15 contemplate that *Sadr-e-Riyasat* would be the head of the State of Jammu Kashmir and
16 Jammu Kashmir's assembly had no power to abolish the office of *Sadr-e-Riyasat*. He further
17 urged that Section 147 of the Constitution, which I've read to Your Lordship, also contemplates
18 that the *Sadr-e-Riyasat* shall exist and be the head of state. He urged that the only possible
19 way of getting rid of the *Sadr-e-Riyasat* would be to amend the Constitution of India, as
20 applied to Jammu and Kashmir. Learned Attorney General who appeared on behalf of the
21 Government. Mr. Chagla, who appeared for the State, contended that the Constitution of
22 Jammu Kashmir, which had received the assent of the *Sadr-e-Riyasat*, validly amended the
23 Constitution of Jammu Kashmir and validly provided for appointment of a Governor in place
24 of *Sadr-e-Riyasat*. And therefore, the Governor was competent to give assent to the Jammu
25 Kashmir Preventive Detention. That was this limited issue. That the *Sadr-e-Riyasat* was
26 directly elected, Governor was appointed. The *Sadr-e-Riyasat* never gave its consent.
27 Therefore, this detention law where the Governor gave consent is bad.

28
29 Then straight away 13 My Lords. Paragraph 13 at PDF 42. On January 26, 1950, the
30 Constitution Application Jammu Kashmir Order, 1950 was made by the President. On April
31 20, 1951, the Maharaja of Jammu Kashmir issued a proclamation, in pursuance of which the
32 Constituent Assembly of Jammu Kashmir was convened on November 5, '51. On June 10, 1952,
33 the basic principles of the Committee of Jammu Kashmir Constituent Assembly submitted an
34 interim report. Then para 14. The Constituent Assembly by a resolution adopted these
35 recommendations. The following part of the resolution is relevant. Now, therefore, in
36 pursuance of the resolution dated 12 June '52, and having considered the report of the Drafting
37 Committee, this Assembly resolved that the head of the State, shall be the person recognized

1 by the President of Union, on the recommendations of the Legislative Assembly. Later on My
 2 Lords, it was directly appointed. The Head of State shall be the person... he shall hold office
 3 during the pleasure of the President. He may, by writing under his hand addressed to the
 4 President, resign his office. Subject to the foregoing provisions, the head of State and hold
 5 office for the term of five years from the date he enters upon his office. And then, My Lords
 6 provided that he shall not withstanding the expiration of his term, continues to hold office
 7 until his successor enters. There's the recommendation of the Legislative Assembly of the
 8 State, in respect of recognition of Head of State shall be made by election. Then My Lords,
 9 November 16, 1952. The explanation was My Lords, in a way it was amended by a
 10 recommendation of the Constituent Assembly. Just mark that. In exercise of the powers
 11 conferred by this article, the President, on the recommendation of the Constituent Assembly
 12 of the State, declared that, as from 17th day of November, the said 370 shall be operative with
 13 the modification that for the explanation in Clause 1 thereof, the following explanation is
 14 substituted. For the purpose of this article the Government of the State means, the person for
 15 the time being recognized by the President, on the recognition of the... on the
 16 recommendation of the Legislative Assembly of the State as the *Sadr-e-Riyasat* of Jammu and
 17 Kashmir, acting on the advice of the Council of Ministers. So, when this argument was raised,
 18 the court ultimately came to the conclusion that in essence, this *Sadr-e-Riyasat* is a Governor,
 19 so there is no substantial change.

20

21 Then go directly to 19 My Lords, PDF, page 44. I am trying to hasten the pace so that... On
 22 November 1756, Jammu and Kashmir's Constitution was adopted. Some sections came into
 23 force on the day of the... and remaining sections came into force in '57. Then My Lords, few
 24 lines thereafter on November 24, '65. This is important. The President, in exercise of the
 25 powers by Clause 1 of Article 370 with the concurrence of the government of Jammu and
 26 Kashmir made the Constitution Application to Jammu Kashmir's Second Amendment Order
 27 1965 for Sub-Clause B of Clause 4 of 367. Your Lordships sees that? The following clauses were
 28 inserted. References to the person for the time being enforced, recognized by the President
 29 from the Recommendation of Legislative Assembly as the *Sadr-e-Riyasat* acting on the advice
 30 of the Council of Minister of the State for the time being in office, shall be construed as
 31 references to the Governor of Jammu and Kashmir, and references to the Government of the
 32 said State shall be construed as including references to the Governor of Jammu and Kashmir,
 33 acting on the advice of the Council of Ministers. Then in paragraph 21, according to the
 34 Attorney General this is a mere definition inserted for the purpose of the Article in accordance
 35 with the constitutional conditions prevailing at that time. What are the constitutional
 36 conditions My Lords? Every State had a Governor. He was not directly elected. And
 37 Constitution of Jammu Kashmir itself stood amended in 1965 and the head of the State was to

1 be the Governor. So, according to the Attorney General, this is a mere definition inserted for
2 the purpose of the Article in accordance to the constitutional conditions prevailing at the time.
3 According to Mr. Garg, this is the kingpin of the whole relationship between the Union of India
4 and the State of Jammu and Kashmir. According to him, neither the Jammu and Kashmir
5 Assembly nor the President were competent to impair the functioning of the *Sadr-e-Riyasat*.
6 Insofar as the Constitution of Jammu and Kashmir 6th Amendment Act 1965 replaced the
7 *Sadr-e-Riyasat* by the Governor is his *ultra vires*. According to him, either there has to be an
8 amendment to the Constitution of India under 368 and 373 or a fresh Constituent Assembly
9 had to be convened to amend the explanation. He said that if the text of the Constitution is
10 explicit. Effect must be given to it. And it is not the duty of the courts to improve upon the
11 Constitution because the Constitution makers had not anticipated it. So, My Lords the Court
12 rejects that argument. And then My Lords at page 24, this para 24, is the heart of the matter.
13 The learned counsel, relying on ***Sampat Prakash***, contended that the only way of modifying
14 370 is specified in Article 370, Sub-Article 3, itself. He said that this was expressly laid down
15 by this court in a decision referred to. We are not concerned with the question whether Article
16 373 can now be utilized to amend the provisions of 371 or 2, and therefore we do not express
17 any opinion on that point. We are now not concerned with an amendment to Article 370, Sub-
18 Clause 1. We are concerned with the situation where the explanation ceased to operate. It had
19 to be... It has ceased to operate because there is no longer a *Sadr-e-Riyasat* in Jammu and
20 Kashmir. Now My Lords next is important. 'If the definition contained in the explanation
21 cannot apply to the words Government of the State, since the meaning of Article 367(4), as
22 amended, will have to be given to it. It is this meaning, if this meaning is given, it is quite clear
23 that the Governor is competent to give the concurrent stipulated in Article 370.' And then My
24 Lords kindly come straight away to para 29.

25

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

27

28 **KAPIL SIBAL:** PDF page 47. I My Lords, your ...PDF page 47. If we had regarded this as an
29 amendment to Article 370 Clause 1, then we would have to consider whether the amendatory
30 powers had been validly exercised or not. But as we have said, we're not concerned with that
31 question.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Which para is this?.

34

35 **KAPIL SIBAL:** This is 29.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** 29.

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KAPIL SIBAL: Yes. So, clearly My Lords *Damnoo* is not for a proposition that you can amend 370 in this process by virtue of 367(4). That's what the Union has tried to apply that *Damnoo* has already decided this issue. Now I am finished with the judgments also. Now I'm left with the last which I'll finish by 4 o' clock, 15 more minutes.

CHIEF JUSTICE DY CHANDRACHUD: That's the re-organization.

KAPIL SIBAL: That's the Re-organization Act. Now My Lords, let's go to the...First of all...So, Jammu and Kashmir...Constitution of India as applicable to Jammu and Kashmir, Article 3. This is My Lords at document Volume 2. Sorry 1, not 2. PDF page 65, Article 3 My Lords. So, I've shown Your Lordships the proviso already in Article 3, My Lords, that no bill shall be introduced in Parliament without the consent of the Legislature of the State. And I've shown to Your Lordships the August 5, the bill was introduced. Now see the Constitution of India, along with this Article 3 of the Constitution. I'll just make a brief argument so that My Lords then others can...

CHIEF JUSTICE DY CHANDRACHUD: Article 3, right?

KAPIL SIBAL: Constitution of India Article 3. Formation of new States and alteration of areas, boundaries or names of the existing States. Parliament may by law... My Lords have that? May by law form a new State by separation of territory from any State. So if you have a large State, you can form a new State by separation of territory of a new State, or by uniting two or more States. So you can form a new State by uniting two or more States or parts of States or by uniting any territory to a part of any State. That's the way you form States My Lords, or you bifurcate states, increase the area of any State, diminish the area of any state, alter the boundaries of any State, alter the name of any State. Provided that no bill for the purpose shall be introduced to either House of Parliament, except on the recommendation of the President, and unless with a proposal contained in the bill affects the area, boundaries, or name of any of the States. The bill has been referred to by the President of the Legislature of that State for expressing its views thereon. Within such period as may be specified in the reference or within such period as the President may allow, the period so specified or allowed has expired. Explanation- this is important. In this Article in Clause A to E, State includes a Union Territory, but in the proviso State does not include a Union Territory. The power.... then explanation two. The power conferred on Parliament by Clause A includes the power to form a new State or Union Territory by uniting a part of any State or Union Territory to any other State or Union Territory. Now My Lords if you're going to read in explanation one, State

1 includes an Union Territory. Let's go back to My Lords definition now. let's see how it fits in.
2 So now you say, form a new Union Territory. Let's read the word instead of State as Union
3 Territory. If you My Lords substitute the word Union Territory wherever the word State is
4 used, this article will make no sense and I will read it in that fashion. Form a new Union
5 territory by separation of territory from any Union Territory.

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7 **CHIEF JUSTICE DY CHANDRACHUD:** No. That could be by separation of territory from
8 any State.

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10 **KAPIL SIBAL:** That's correct. So therefore you can't read therefore only in the first part, you
11 read Union Territory. That's my submission. In other words, form an Union Territory by
12 separation of territory from any State. You can do that or by uniting two or more States, you
13 can have a Union Territory or parts of States. You can have a Union Territory or by uniting any
14 territory to a part of any State. How can you create an Union Territory for Jammu and Kashmir
15 under this Article? You can't do it. You can carve out a Union Territory. You can't create a
16 Union Territory under Article 3 and convert it into a State into a Union Territory. That's
17 contrary to all principles of representative form of government. It doesn't allow
18 extinguishment of a State completely. Can you say that tomorrow Madhya Pradesh would be
19 a Union Territory or Bihar would be a Union Territory. You can do to one, you can do it to all.
20 You can have a presidential form of government. Create all States. Convert all States into
21 Union Territory. By what stretch of imagination can you...?

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** What about textually?

24

25 **KAPIL SIBAL:** I'm sorry?

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Textually. The other argument is a first, but you
28 can't do it because you said representative democracy. But textually can you not do it?

29

30 **KAPIL SIBAL:** No. Because I'm saying you have formed Union Territory by separation of a
31 territory from a State. From any State or by uniting two or more States or parts of a State. This
32 is not that exercise at all. You have created two Union Territories from a State. Where is that
33 power?

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35 My Lords, there are multiple categories. What they have done doesn't fall in any of these
36 categories. You can carve out a Union Territory. If you have two or more States come together,
37 you can carve out a Union Territory. If a part of a state you can carve out a Union Territory.

1 But you can't create two Union Territories in a State. How is that possible? Apart from what
 2 My Lord said, representative form of government. You can't My Lords. You are not going back
 3 My Lords, moving away from a representative form of government. This is not a reverse. That
 4 was possible. My Lords, you could have kept Ladakh, My Lords as a Union Territory. I am
 5 sorry. I am sorry. I won't go into it my colleagues will, which tells you as to how the Union
 6 thought as to how Union Territories are to be created. In 1953, way back there is a State
 7 Reorganization Commission. My Lords my learned friend will refer to it I don't want to My
 8 Lord do that. But essentially, there are two aspects to this. The text of the Constitution doesn't
 9 allow you to do that. And the Fundamentals of Constitutional Democracy don't allow you to
 10 do that. You can't go back in time, move from representative...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** My judgment in *NCT 2* traces the history of how
 13 we had the part A, part B, part C state. How then after the 7th Amendment you replaced the
 14 part B and part C States, and the Union Territories were created.

15

16 **KAPIL SIBAL:** And *NCT* Judgment deals with asymmetric federalism. It's a case of
 17 asymmetric federalism. Of course now they have done something else with that Your
 18 Lordships will hear now. Otherwise, My Lords, this power can be exercised at any time. My
 19 Lord, where is the voice of the people of Jammu and Kashmir? Where is the voice of
 20 representative democracy? 5 years have passed. Have you heard My Lords any representative
 21 form of Government? Can you convert a whole State My Lords? This way the whole, all of India
 22 can be converted. This power is given. And My Lords, the proviso said you have to take the
 23 consent. You do away with that through an executive act. You don't even take their views. You
 24 become the legislature yourself. So where do we stand, My Lords? We stand at a situation
 25 where My Lords, though the Constitution is a political document, its provisions can't be
 26 manipulated and manoeuvred for political ends. It cannot be. That's not how you interpret a
 27 Constitution. It is a political document but you cannot politically misuse it and manoeuvre it
 28 and manipulate it, which is what has been done. That can't be done. And even when there is a
 29 clash of arms, the law is never silent. The law is not concerned with that. The court is never
 30 silent. And when the.... whenever the court has been silent, the consequences have been
 31 disastrous. It's time for Your Lordships... and My Lords what is a Constitution? A Constitution
 32 is a set of values, values on the basis of which people will represent themselves, and their voice
 33 will be heard. If you, through such executive acts, silence the voice of the people, what is left
 34 of democracy? All that I can say to Your Lordships, is that this is a historic moment. Historic
 35 not for the present, but for the future of India. And I hope this court is not silent. Thank you.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you very much. Mr Sibal.

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TUSHAR MEHTA: Only one thing.

CHIEF JUSTICE DY CHANDRACHUD: Who will follow now?

TUSHAR MEHTA: Just this occurred My Lord on the Union Territory part. Your Lordship would also examine after the court is over.

CHIEF JUSTICE DY CHANDRACHUD: Yes.

TUSHAR MEHTA: What was read was the provisions of Article 3 as applicable to Jammu and Kashmir then. Thereafter the entire Constitution is applied before the re-organization took place.

KAPIL SIBAL: That's what we are challenging.

TUSHAR MEHTA: Please read, as applicable to entire...

KAPIL SIBAL: I read both.

TUSHAR MEHTA: Your Lordship would get the answer.

KAPIL SIBAL: I read both. Both applicable as well as the present Consti.....My learned friend is wrong. I read both. I was reading the Constitution Article 3.

TUSHAR MEHTA: Explanation was not read.

KAPIL SIBAL: What are you saying? I don't know. Obviously you didn't even hear what I said. So therefore he was silent while I was arguing My Lords.

TUSHAR MEHTA: I can't interrupt him.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Zafar Shah will be arguing now?

GOPAL SUBRAMANIAM: No, I beg to appear My Lord, after Mr. Sibal.

1 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Mr. Subramanium, which area would
2 you be covering broadly?

3

4 **GOPAL SUBRAMANIUM:** My Lord, I will be covering some parts of the unfinished if I may
5 say so, portions of Mr. Sibal largely. I wouldn't take very long. Your Lordships may be assured
6 of that. But there are some points which need to be cemented, particularly with reference to
7 the decision of the Constituent Assembly of Jammu and Kashmir itself.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** So we begin tomorrow morning. Mr.
10 Subramanium, can we request you to compete by lunch tomorrow?

11

12 **GOPAL SUBRAMANIUM:** I think My Lord, that's a very fair suggestion.

13

14 **JUSTICE SANJAY KISHAN KAUL:** After that who will be the next person in line?

15

16 **RESPONDENT'S COUNSEL:** [UNCLEAR]

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** Yes certainly. Then we'll hear... So Mr.
19 Subramanium will take through to lunch tomorrow and then you can.... How long would you
20 take roughly?

21

22 **RESPONDENT'S COUNSEL:** [INAUDIBLE]

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END OF DAY'S PROCEEDINGS