REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 1099 OF 2019

DR. SHAH FAESAL AND ORS. **...PETITIONER(S)**

VERSUS

UNION OF INDIA AND ANR. **...RESPONDENT(S)**

And

WRIT PETITION (CIVIL) NO. 1013 OF 2019

WRIT PETITION (CIVIL) NO. 722 OF 2014

WRIT PETITION (CIVIL) NO. 871 OF 2015

WRIT PETITION (CIVIL) NO. 396 OF 2017

SLP (CIVIL) NO. 19618 OF 2017

WRIT PETITION (CIVIL) NO. 756 OF 2017

WRIT PETITION (CIVIL) NO. 398 OF 2018

WRIT PETITION (CIVIL) NO. 924 OF 2018

WRIT PETITION (CIVIL) NO. 1092 OF 2018

WRIT PETITION (CIVIL) NO. 1162 OF 2018

WRIT PETITION (CIVIL) NO. 1082 OF 2019

WRIT PETITION (CIVIL) NO. 1048 OF 2019

WRIT PETITION (CIVIL) NO. 1068 OF 2019

WRIT PETITION (CIVIL) NO. 1037 OF 2019

WRIT PETITION (CIVIL) NO. 1062 OF 2019

WRIT PETITION (CIVIL) NO. 1070 OF 2019

WRIT PETITION (CIVIL) NO. 1104 OF 2019

WRIT PETITION (CIVIL) NO. 1165 OF 2019

WRIT PETITION (CIVIL) NO. 1210 OF 2019

WRIT PETITION (CIVIL) NO. 1222 OF 2019

WRIT PETITION (CIVIL) NO. 1268 OF 2019

WRIT PETITION (CIVIL) NO. 1368 OF 2019

ORDER

1. These cases pertain to the constitutional challenge before this Court as regards to two Constitution Orders issued by the President of India in exercise of his powers under Article 370 of the Constitution of India.

2. At the outset, learned senior counsel appearing for one of the Petitioners in W.P. (C) No. 1013/19 and Petitioner in W.P. (C) 1368/19 raised the contention that the present matter needs to be referred to a larger Bench as there were contrary opinions by two different Constitution Benches on the interpretation of Article 370 of the Constitution. This order is confined to the limited preliminary issue of whether the matter

should be referred to a larger Bench. We have ***not*** considered any issue on the merits of the dispute.

3. A brief introduction to the issue to set the context for this order is that after the late Maharaja of Kashmir had entered into a treaty of accession with the Indian State, Article 370 was incorporated into the Indian Constitution, which states as follows:

> **370. Temporary provisions with respect to the State of Jammu and Kashmir**
>
> **(1)** Notwithstanding anything in this Constitution,—
>
> (a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;
>
> (b) the power of Parliament to make laws for the said State shall be limited to—
>
> (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
>
> (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation [1950 wording]: For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

Explanation [1952 wording]: For the purposes of this article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat (now Governor) of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.

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

(d) Such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second

> provision to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.
>
> **(3)** Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

Since India's independence, this Article has remained in the Constitution and has been invoked as and when required.

4. On 20.12.2018, President's Rule was imposed in exercise of powers under Article 356 of the Constitution of India in the State of Jammu and Kashmir, which was subsequently extended on 03.7.2019.

5. On August 5, 2019, two Constitution Orders were issued by the President in exercise of his power under Article 370, being C.O. Nos. 272 and 273, which are extracted below:

C.O. 272 of 2019

MINISTRY OF LAW AND JUSTICE
(Legislative Department) NOTIFICATION

New Delhi, the 5th August, 2019

G.S.R .551(E).— the following Order made by the President is published for general information:-

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 2019
C.O. 272

In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is pleased to make the following Order:—

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019.

(2) It shall come into force at once, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time to time.

2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:—

To article 367, there shall be added the following clause, namely:—

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the

provisions thereof as applied in relation to the said State;

(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers;

and

(d) in proviso to clause (3) of article 370 of this Constitution, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State"."

C.O. 273 of 2019

MINISTRY OF LAW AND JUSTICE
(Legislative Department) NOTIFICATION
New Delhi, the 6th August, 2019

G.S.R. 562(E).— The following Declaration made by the President is notified for general information:—

DECLARATION UNDER ARTICLE 370(3) OF THE CONSTITUTION

C.O. 273

In exercise of the powers conferred by clause (3) of article 370 read with clause (1) of

> article 370 of the Constitution of India, the President, on the recommendation of Parliament, is pleased to declare that, as from the 6th August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely:—
> "370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise."

6. These Constitution Orders made the Constitution of India applicable to the State of Jammu and Kashmir in its entirety, like other States in India.

7. Challenging the constitutionality of the aforesaid orders, Mr. Raju Ramachandran, learned senior counsel, has argued on the validity of the same. However, as mentioned above, Mr. Dinesh Dwivedi and Mr. Sanjay Parikh, learned senior counsel, sought a reference to a larger Bench. Therefore, this Court is

required to hear the issue of reference as a preliminary question.

Contentions

8. Learned senior advocate Mr. Dinesh Dwivedi, after placing reliance upon the Constituent Assembly debates and interpreting the language of Article 370, submitted that Article 370 was a transitory provision, which provided for an interim arrangement between the State of Jammu and Kashmir and the Union of India. It was the Constituent Assembly of Jammu and Kashmir which took a final decision on the form of Government the State of Jammu and Kashmir should adopt. The counsel argued that this Court, in the case of ***Prem Nath Kaul v. State of Jammu and Kashmir***, AIR 1959 SC 749, after considering the various issues, held that Article 370 was temporary in nature, but the subsequent judgment of ***Sampat Prakash v. State of Jammu and Kashmir***, AIR 1970 SC 1118 reversed the aforesaid position, recognizing Article 370 as a permanent provision giving perennial power to the President to regulate the relationship between the Union and the State. Learned senior counsel contended that this conflict needs

reconsideration by a larger Bench.

9. Learned senior advocate Mr. Sanjay Parikh submitted that after the framing of the Constitution of Jammu and Kashmir, the first judgment rendered by this Court was by a Bench of five-judges in ***Prem Nath Kaul*** (supra). This Court, after widely discussing the historical background and objective behind the introduction of Article 370, held that the constitutional relationship between the State of Jammu and Kashmir and the Union of India should be finally decided by the Constituent Assembly of the State and, therefore, the same has to be treated as a temporary provision.

10. The learned senior counsel further submitted that, the subsequent cases of ***Sampat Prakash*** (supra) and ***Mohd. Maqbool Damnoo v. State of Jammu and Kashmir***, (1972) 1 SCC 536, have not considered the earlier judgment of ***Prem Nath Kaul*** (supra). On the contrary, this Court in ***Sampat Prakash*** (supra) held that neither the Constituent Assembly nor the President ever made any declaration that Article 370 has ceased to be operative. Moreover, this Court in the aforesaid case further held that in the light of the proviso to

Article 368, the President under Article 370 is required to exercise his powers from time to time in order to bring into effect constitutional amendments in the State of Jammu and Kashmir, under Article 368. Therefore, by virtue of the aforesaid mechanism, it cannot be said that Article 370 was temporary.

11. Furthermore, in the case of ***Mohd. Maqbool Damnoo*** (supra), this Court, while interpreting Article 370, ignored the interpretation rendered in ***Prem Nath Kaul*** (supra). The aforesaid case also did not decide as to whether Article 370 can continue after the Constitution of Jammu and Kashmir was enacted. The learned senior counsel finally submitted that concurrence under Article 370(1)(d) was subject to ratification by the Constituent Assembly and therefore, upon the dissolution of the Constituent Assembly, this power cannot be exercised.

12. Learned senior advocate, Mr. Zafar Shah, representing the Jammu and Kashmir High Court Bar Association on the necessity of reference submitted that while there is no direct conflict between the aforesaid two five-judge Bench decisions of ***Prem Nath Kaul*** (supra) and ***Sampat Prakash*** (supra)

however if it is held that ***Prem Nath Kaul*** (supra) declared that Article 370 as temporary, then there exists a conflict with the subsequent holding of ***Sampat Prakash*** (supra)***.***

13. The learned Attorney General submitted that the challenge on the ground of an inconsistency between the decisions in ***Prem Nath Kaul*** (supra) and ***Sampat Prakash*** (supra) is not sustainable. The judgments must be read in their context. The earlier decision of ***Prem Nath Kaul*** (supra) was regarding legislative capacity of the Yuvaraj and the Court never intended on deciding upon the nature of Article 370. However, this Court for the first time in the case of ***Sampat Prakash*** (supra) dealt with the issue of continuance of powers under Article 370 after the dissolution of the Constituent Assembly of the State. In order to substantiate his contentions, he relied upon the subsequent decision of ***State Bank of India v. Santosh Gupta***, (2017) 2 SCC 538 wherein this Court, after placing reliance upon the earlier decisions, concluded that the Constitution of Jammu and Kashmir is subordinate to that of the Constitution of India.

14. The learned Solicitor General supported the arguments rendered by the learned Attorney General and submitted that a co-ordinate Bench cannot refer the matter to a larger Bench on minor inconsistencies. Rather, the decisions rendered by an earlier co-ordinate Bench are always binding on the subsequent Benches of equal strength. However, if the subsequent Bench expresses doubt on the correctness of the earlier decision rendered by a Bench of equal strength, the same has to be referred to a larger Bench.

15. Learned senior advocate, Dr. Rajeev Dhavan, appearing for the Petitioner in W.P. (C) No. 1165 of 2019, while opposing the reference, submitted that it is not legally tenable to argue that ***Sampat Prakash*** (supra) is *per incuriam* as it has not considered the earlier decision of ***Prem Nath Kaul*** (supra) as the decisions should be studied in their context and hence have limited application. Moreover, the present case deals with various other issues which have not been considered by the previous Bench. The submissions made by Dr. Rajeev Dhavan, learned senior counsel were supported by learned senior advocates C.U. Singh, Shekhar Naphade and Gopal

Sankaranarayanan, who submitted that the alleged conflict in the aforesaid judgments do not mandate reference.

16. Based on the submissions of the learned senior counsel, the following questions of law which can be formulated herein are as follows.

i. When can a matter be referred to a larger Bench?
ii. Whether there is a requirement to refer the present matter to a larger Bench in view of the alleged contradictory views of this Court in ***Prem Nath Kaul*** case(*supra*) and ***Sampat Prakash*** case (*supra*)?
iii. Whether ***Sampat Prakash*** case (*supra*) is *per incuriam* for not taking into consideration the decision of the Court in ***Prem Nath Kaul*** case (*supra*)?

17. This Court's jurisprudence has shown that usually the Courts do not overrule the established precedents unless there is a social, constitutional or economic change mandating such a development. The numbers themselves speak of restraint and the value this Court attaches to the doctrine of precedent. This Court regards the use of precedent as indispensable bedrock upon which this Court renders justice. The use of such precedents, to some extent, creates certainty upon which individuals can rely and conduct their affairs. It also creates a basis for the development of the rule of law. As the Chief Justice of the Supreme Court of the United States, John

Roberts observed during his Senate confirmation hearing, "*It is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and even-handedness*."[1]

18. Doctrine of precedents and *stare decisis* are the core values of our legal system. They form the tools which further the goal of certainty, stability and continuity in our legal system. Arguably, judges owe a duty to the concept of certainty of law, therefore they often justify their holdings by relying upon the established tenets of law.

19. When a decision is rendered by this Court, it acquires a reliance interest and the society organizes itself based on the present legal order. When substantial judicial time and resources are spent on references, the same should not be made in a casual or cavalier manner. It is only when a proposition is contradicted by a subsequent judgment by a Bench of same strength, or it is shown that the proposition laid down has become unworkable or contrary to a well-established principle, that a reference will be made to a larger Bench. In this context, a five-Judge Bench of this Court in ***Chandra***

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1 Congressional Record—Senate, Vol. 156, Pt. 7, 10018 (June 7, 2010)

Prakash v. State of U.P., (2002) 4 SCC 234, after considering series of earlier ruling reiterated that:

> "*22.* … The doctrine of binding precedent is of utmost importance in the administration of our judicial system. **It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court.**"
>
> (*emphasis supplied*)

20. At the extreme end of this doctrine, we have the example of the House of Lords, wherein until 1966 it never overruled its decisions but only distinguished them. It was said that an erroneous decision of the House of Lords could be set right only by an Act of Parliament (*refer* ***Street Tramways v. London County Council,*** [1898] A.C. 375 and ***Radcliffe v. Ribbel Motor Service Ltd.***, [1939] A.C. 215).

21. It is only after 1966, due to pressure and the prevailing socio-economic structure that the House of Lords finally decided to exercise the power of overruling. From then on, there has been a continuous evolution of guidelines which have modified the

basis as to when the House of Lords could overrule its earlier decisions.

22. It may be necessary to quote the opinion of Chief Justice Griffith of the High Court of Australia in the ***Ex Parte Brisbane Tramways Co. Ltd. (No. 1)***, [1914] 18 C.L.R 54:

> *"In my opinion, it is impossible to maintain as an abstract proposition that Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion, that some or all of the members of the later Court might arrive at a different conclusion if the matter was res integra. Otherwise there would be great danger of want of continuity in the interpretation of law."*

In the same case, Barton, J. observed as follows:

> *" ....I would say that I never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in the judicial decision. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review... But*

> *the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong and its continuance is injurious to the public interest*".

23. This brings us to the question, as to whether a ruling of a co-ordinate Bench binds subsequent co-ordinate Benches. It is now a settled principle of law that the decisions rendered by a coordinate Bench is binding on the subsequent Benches of equal or lesser strength. The aforesaid view is reinforced in the ***National Insurance Company Limited v. Pranay Sethi***, (2017) 16 SCC 680 wherein this Court held that:

> **59.1.** The two-Judge Bench in *Santosh Devi* [*Santosh Devi* v. *National Insurance Co. Ltd.*, (2012) 6 SCC 421 7] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been Stated in *Sarla Verma* [*Sarla Verma* v. *DTC*, (2009) 6 SCC 121] , a judgment by a coordinate Bench. **It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.**
>
> (*emphasis supplied*)

24. The impact of non-consideration of an earlier precedent by a coordinate Bench is succinctly delineated by *Salmond*[2] in his book in the following manner:

> …A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. **Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law.** In the meantime the matter remains at large, and the law uncertain.
>
> (*emphasis supplied*)

25. In this line, further enquiry requires us to examine, to what extent does a ruling of co-ordinate Bench bind the subsequent Bench. A judgment of this Court can be distinguished into two parts: *ratio decidendi* and the *obiter dictum.* The ratio is the basic essence of the judgment, and the

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2*Salmond on Jurisprudence* (P.J. Fitzgerald ed., 12th edn., 1966), p. 147.

same must be understood in the context of the relevant facts of the case. The principle difference between the ratio of a case, and the obiter, has been elucidated by a three-Judge Bench decision of this Court in ***Union of India v. Dhanwanti Devi***, (1996) 6 SCC 44 wherein this Court held that:

> **9.** ...It is not everything said by a Judge while giving judgment that constitutes a precedent. **The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*.** ... **A decision is only an authority for what it actually decides.** ....The concrete decision alone is binding between the parties to it, but it is the abstract *ratio decidendi*, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding**. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution**.
>
> (*emphasis supplied*)

26. The aforesaid principle has been concisely stated by Lord Halsbury in ***Quinn* v. *Leathem***, 1901 AC 495 (HL) in the aforesaid terms:

> … that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that **a case is only an authority for what it actually decides**…
>
> (*emphasis supplied*)

27. Having discussed the aspect of the doctrine of precedent, we need to consider another ground on which the reference is sought, *i.e.*, the relevance of non-consideration of the earlier decision of a co-ordinate Bench. In the case at hand, one of the main submissions adopted by those who are seeking reference is that, the case of ***Sampat Prakash*** (supra) did not consider the earlier ruling in the case of ***Prem Nath Kaul*** (supra)**.**

28. The rule of *per incuriam* has been developed as an exception to the doctrine of judicial precedent. Literally, it means a judgment passed in ignorance of a relevant statute or any other binding authority [see ***Young v. Bristol Aeroplane Co. Ltd.***, 1944 KB 718 (CA)]. The aforesaid rule is well elucidated in *Halsbury's Laws of England* in the following manner[3]:

33rd edn., Vol. 22, para 1687, pp. 799-800.

> **1687**. … the court is not bound to follow a decision of its own if given per incuriam. **A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords.** In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords.
>
> (*emphasis supplied*)

29. In this context of the precedential value of a judgment rendered *per incuriam*, the opinion of Justice Venkatachaliah, in the seven-judge Bench decision of ***A.R. Antulay v. R.S. Nayak***, (1988) 2 SCC 602 assumes great relevance:

> **183.** But the point is that the circumstance that a decision is reached **per incuriam, merely serves to denude the decision of its precedent value**. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. **When a previous decision is so overruled it does not happen — nor has the overruling Bench any jurisdiction so to do — that the finality of the operative order, inter partes, in the previous decision is overturned. In this context the word**

> **'decision' means only the reason for the previous order and not the operative order in the previous decision, binding inter partes.** ...Can such a decision be characterised as one reached per incuriam? Indeed, Ranganath Misra, J. says this on the point: (para 105)
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> > "Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench."
>
> (*emphasis supplied*)

30. The counsel arguing against the reference have asserted that the rule of *per incuriam* is limited in its application and is contextual in nature. They further contend that there needs to be specific contrary observations which were laid without considering the relevant decisions on the point, in which case alone the principle of *per incuriam* applies.

31. Therefore, the pertinent question before us is regarding the application of the rule of *per incuriam*. This Court while deciding the ***Pranay Sethi*** case (supra), referred to an earlier decision rendered by a two-judge Bench in ***Sundeep Kumar***

Bafna* v. *State of Maharashtra, (2014) 16 SCC 623, wherein this Court emphasized upon the relevance and the applicability of the aforesaid rule:

> **19.** It cannot be overemphasized that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the *per incuriam* rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the court. **A decision or judgment can also be *per incuriam* if it is not possible to reconcile its *ratio* with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta*.**
>
> (*emphasis supplied*)

32. The view that the subsequent decision shall be declared *per incuriam* only if there exists a conflict in the *ratio decidendi* of the pertinent judgments was also taken by a five-Judge Bench decision of this Court in ***Punjab Land Development and***

Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, Chandigarh, (1990) 3 SCC 682:

> **43.** As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to "declare the law" on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. **The problem of judgment *per incuriam* when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together.**
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> (*emphasis supplied*)

33. In order to analyze the contention of the Petitioners that the judgments in question were *per incuriam*, we need to understand the context, ratios of the concerned cases and the interpretation of Article 370. Once we have noted the evolution of Article 370, we would be able to appreciate the context of the cases which are sought to be portrayed as being contradictory.

34. Under the draft Constitution, Article 370 of the Constitution was draft Article 306A, which was introduced in the Constituent Assembly on 17.10.1947, by N. Gopalaswami Ayyangar, who stated as under:

N. Gopalaswami Ayyangar

> Sir, this matter, the matter of this particular motion, relates to the Jammu and Kashmir State. The House is fully aware of the fact that the State has acceded to the Dominion of India. The history of this accession is also well know. The accession took place on the 26th October, 1947. Since then, the State has had a chequered history. Conditions are not yet normal in the State. **The meaning of this accession is that at present that State is a unit of a federal State, namely, the Dominion of India. This Dominion is getting transformed into a Republic, which will be inaugurated on the 26th January, 1950. The Jammu and Kashmir State, therefore, has to become a unit of the new Republic of India**.
>
> …
>
> The last clause refers to what may happen later on. We have said article 211A will not apply to the Jammu and Kashmir State. But that cannot be a permanent feature of the Constitution of the State, and hope it will not be. **So the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent**

Assembly issue an order that this article 306A shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issues any order of that kind the recommendation of the Constituent Assembly will be a condition precedent. That explains the whole of this article.

The effect of this article is that the Jammu and Kashmir State which is now a part of India will continue to be a part of India, will be a unit of the future Federal Republic of India and the Union Legislature will get jurisdiction to enact laws on matters specified either in the Instrument of Accession or by later addition with the concurrence of the Government of the State. And steps have to be taken for the purpose of convening a Constituent Assembly in due course which will go into the matters I have already referred to. **When it has come to a decision on the different matters it will make a recommendation to the President who will either abrogate article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend**. That, Sir, is briefly a description of the effect of this article, and I hope the House will carry it.

(*emphasis supplied*)

35. In line with the above observations, Constitution Order 44 was promulgated under Article 370(3) of the Constitution, modifying Article 370 of the Constitution by amending the Explanation in Clause 1 of Article 370 in the following terms:

> "Explanation.—For the purposes of this Article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being on office"

36. Further, the President in exercise of the power conferred upon him by clause (1) of Article 370 of the Constitution, with the concurrence of the Government of the State of Jammu and Kashmir, issued the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965, which further brought about change through amendment to Article 367 as applicable to the State of Jammu and Kashmir. The aforesaid amendment can be observed as under:

> "(*aa*) references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time

being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(*b*) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers:

Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his Council of Ministers."

The aforesaid amendment Order of 1965 was upheld in the ***Mohd. Maqbool Damnoo*** case (supra).

37. After alluding to the Constituent Assembly Debates and developments subsequent to the coming of the Constitution, we need to look at the cases indicated by the counsel, which according to them have interpreted the aforesaid provision in a contradictory manner.

38. The first case which needs to be looked at is the ***Prem Nath Kaul*** case *(supra)* which dealt with the validity of the Jammu and Kashmir Big Landed Estate (Abolition) Act, 2007 (17 of 2007 smvt.). The main contention on which the Act was impugned was that the Yuvaraj did not have the constitutional authority to promulgate the said Act. One of the arguments

canvassed by the Petitioner in that case related to the effect of Article 370 of the Constitution of India on the powers of the Yuvaraj. The Constitution Bench, in deciding that it would be unreasonable to hold that Article 370 could have affected, or was intended to affect, the plenary powers of the Maharaja, made certain observations relating to Article 370 of the Constitution, which the counsel before us arguing for a reference have relied upon. The observations of the Constitution Bench in the ***Prem Nath Kaul*** case *(supra)* regarding Article 370 therefore merit reproduction in their entirety:

> **32.** Since Mr Chatterjee has strongly relied on the application of Article 370 of the Constitution to the State in support of his argument that the Yuvaraj had ceased to hold the plenary legislative powers, it is necessary to examine the provisions of this article and their effect. This article was intended to make temporary provisions with respect to the State of Jammu & Kashmir. It reads thus:
>
> **xxx**
>
> Clause (1)(*b*) of this Article deals with the legislative power of Parliament to make laws for the State; and it prescribes limitation in

that behalf. Under para (1) of sub-clause (*b*) of clause (1) Parliament has power to make laws for the State in respect of matters in the Union List and the Concurrent List which the President in consultation with the Government of the State declares to correspond to matters specified in the Instrument of Accession; whereas in regard to other matters in the said Lists Parliament may, under para (*ii*), have power to legislate for the State after such other matters have been specified by his order by the President with the concurrence of the Government of the State. It is significant that para (*i*) refers to consultation with the Government of the State while para (*ii*) requires its concurrence. Having thus provided for consultation with, and the concurrence of, the Government of the State, the explanation shows what the Government of the State means in this context. It means according to the appellant, not the Maharaja acting by himself in his own discretion, but the person who is recognised as the Maharaja by the President acting on the advice of the Council of Ministers for the time being in office. It is on this explanation that the appellant has placed considerable reliance.

33. Sub-clauses (*c*) and (*d*) of clause (1) of the Article provide respectively that the provisions of Article 1 and of the present article shall apply in relation to the State; and that the other provisions of the Constitution shall apply in relation to it subject to exceptions and modifications specified by the Presidential order. These provisions are likewise made subject to consultation with, or concurrence of, the Government of the State respectively.

34. Having provided for the legislative power of Parliament and for the application of the articles of the Constitution of the State, Article 370 clause (2) prescribes that if the concurrence of the Government of the State required by the relevant sub-clauses of clause (1) has been given before the Constituent Assembly of Kashmir has been convened, such concurrence shall be placed before such Assembly for such decision as it may take thereon. **This clause show that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on Parliament and the President by the relevant temporary provisions of Article 370(1) is made conditional on the final approval by the said Constituent Assembly in the said matters**.

35. Clause (3) authorises the President to declare by public notification that this article shall cease to be operative or shall be operative only with specified exceptions or modifications; but this power can be exercised by the President only if the Constituent Assembly of the State makes recommendation in that behalf. **Thus the proviso to clause (3) also emphasises the importance which was attached to the final decision of the Constituent Assembly of Kashmir in regard to the relevant matters covered by Article 370**.

(*emphasis supplied*)

39. Learned senior counsel, Mr. Dinesh Dwivedi and Mr. Sanjay Parikh, have given much importance to the above observations of the Court, and have submitted that the implication of the above Statements, in line with the observations made in the Constituent Assembly Debates, is that the exercise of power under Article 370 of the Constitution of India was contingent on the existence of the Constituent Assembly of the State of Jammu and Kashmir, as the Constituent Assembly had the "final decision" on the matters pertaining to Article 370. Therefore, according to the learned senior counsel, when the Constituent Assembly of the State was dissolved subsequent to the drafting and adoption of the Constitution of Jammu and Kashmir, the application of Article 370 automatically came to an end, with no further recourse to the same being possible, even without any declaration to that effect being made under Article 370(3) of the Constitution.

40. On this interpretation of the decision in the ***Prem Nath Kaul*** case (supra), the learned senior counsel submit that there exists a conflict with the dicta of another Constitution Bench of this Court in the ***Sampat Prakash*** case *(supra)*. In the

Sampat Prakash case (supra), this Court was seized of a matter pertaining to the detention of the petitioner in that case under the Jammu and Kashmir Preventive Detention Act 13 of 1964. The main point canvassed before the Constitution Bench was whether the continuation of Article 35(c) of the Constitution (as applicable to the State of Jammu and Kashmir), which gave protection to any law relating to preventive detention in Jammu and Kashmir, through successive Constitution Orders passed in exercise of the powers of the President under Article 370 of the Constitution, in 1959 and 1964, was valid. The Court held that the Constitution Orders were validly passed in exercise of the power under Article 370 of the Constitution, which continued beyond the date of dissolution of the Constituent Assembly. In this regard, this Court held as follows:

> **5.** We are not impressed by either of these two arguments advanced by Mr Ramamurthy. So far as the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Article 370 should be held to be continuing in force, because the situation that existed when this article was

incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. **The legislative history of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State.**

6. The second submission based on clause (2) of Article 370 does not find support even from the language of that clause which only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened, and makes no mention at all of the completion of the work of the Constituent Assembly or its dissolution.

7. There are, however, **much stronger reasons for holding that the provisions of this article continued in force and remained effective even after the Constituent Assembly of the State had passed the Constitution of the State**. The most important provision in this connection is that contained in clause (3) of the article which lays down that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as the President may specify by public notification, provided that the recommendation of the Constituent

> Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification. This clause clearly envisages that the article will continue to be operative and can cease to be operative only if, on the recommendation of the Constituent Assembly of the State, the President makes a direction to that effect. In fact, no such recommendation was made by the Constituent Assembly of the State, nor was any order made by the President declaring that the article shall cease to be operative. On the contrary, it appears that the Constituent Assembly of the State made a recommendation that the article should be operative with one modification to be incorporated in the Explanation to clause (1) of the article. This modification in the article was notified by the President by Ministry of Law Order CO 44 dated 15th November, 1952, and laid down that, from 17th November, 1952, the article was to be operative with substitution of the new Explanation for the old Explanation as it existed at that time. This makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only.
>
> (*emphasis supplied*)

41. The learned senior counsel urge that these two judgments by Constitution Benches of this Court are in direct conflict with one another, and as such, the present petitions require to be

referred to a larger Bench. However, we are not in agreement with this submission of the learned senior counsel.

42. *First*, it is worth highlighting that judgments cannot be interpreted in a vacuum, separate from their facts and context. Observations made in a judgment cannot be selectively picked in order to give them a particular meaning. The Court in the ***Prem Nath Kaul*** case (supra) had to determine the legislative competence of the Yuvaraj, in passing a particular enactment. The enactment was passed during the *interregnum* period, before the formulation of the Constitution of State of Jammu and Kashmir, but after coming into force of the Constitution of India. The observations made by the Constitution Bench in this case, regarding the importance given to the decision of the Constituent Assembly of the State of Jammu and Kashmir needs to be read in the light of these facts.

43. *Second*, the framework of Article 370(2) of the Indian Constitution was such that any decision taken by the State Government, which was not an elected body but the Maharaja of the State acting on the advice of the Council of Ministers which was in office by virtue of the Maharaja's proclamation dated March 5, 1948, prior to the sitting of the Constituent

Assembly of the State, would have to be placed before the Constituent Assembly, for its decision as provided under Article 370(2) of the Constitution. The rationale for the same is clear, as the task of the Constituent Assembly was to further clarify the scope and ambit of the constitutional relationship between the Union of India and the State of Jammu and Kashmir, on which the State Government as defined under Article 370 might have already taken some decisions, before the convening of the Constituent Assembly, which the Constituent Assembly in its wisdom, might ultimately not agree with. Hence, the Court in the case of ***Prem Nath Kaul*** (supra) indicated that the Constituent Assembly's decision under Article 370(2) was final. This finality has to be read as being limited to those decisions taken by the State Government under Article 370 prior to the convening of the Constituent Assembly of the State, in line with the language of Article 370(2).

44. *Third*, the Constitution Bench in the ***Prem Nath Kaul*** case (*supra*) did not discuss the continuation or cessation of the operation of Article 370 of the Constitution after the dissolution of the Constituent Assembly of the State. This was not an issue

in question before the Court, unlike in the ***Sampat Prakash*** case (supra) where the contention was specifically made before, and refuted by, the Court. This Court sees no reason to read into the ***Prem Nath Kaul*** case (supra) an interpretation which results in it being in conflict with the subsequent judgments of this Court, particularly when an ordinary reading of the judgment does not result in such an interpretation.

45. Thus, this Court is of the opinion that there is no conflict between the judgments in the ***Prem Nath Kaul*** case (supra) and the ***Sampat Prakash*** case (supra). The plea of the counsel to refer the present matter to a larger Bench on this ground is therefore rejected.

46. An additional ground canvassed by the learned senior counsel is that the judgment of the Court in the ***Prem Nath Kaul*** case (supra) was not considered by the Court in its subsequent decision in ***Sampat Prakash*** case (supra), which is therefore *per incuriam*. At the cost of repetition, we note that the rule of *per incuriam* being an exception to the doctrine of precedents is only applicable to the ratio of the judgment. The same having an impact on the stability of the legal precedents must be applied sparingly, when there is an irreconcilable conflict

between the opinions of two co-ordinate Benches. However, as indicated above there are no contrary observations made in the ***Sampat Prakash*** case (supra) to that of ***Prem Nath Kaul*** (supra), accordingly, the case of ***Sampat Prakash*** (supra) is not *per incuriam*.

47. In light of the aforesaid discussion, we do not see any reason to refer these petitions to a larger Bench on the questions considered.

.....J.
(N.V. RAMANA)

.....J.
(SANJAY KISHAN KAUL)

.....J.
(R. SUBHASH REDDY)

.....J.
(B. R. GAVAI)

.....J.
(SURYA KANT)

NEW DELHI;
MARCH 02, 2020