REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 12237-12238 OF 2016
[ARISING OUT OF SLP (CIVIL) NOS.30884-30885 OF 2015]

STATE BANK OF INDIA … APPELLANT

VERSUS

SANTOSH GUPTA AND ANR. ETC. ...RESPONDENTS

WITH

CIVIL APPEAL NOS. 12240-12246 OF 2016
[ARISING OUT OF SLP (CIVIL) NOS.30810-30815 & 30817 OF 2015]
[SLP (CIVIL) NOS.30810-30817 OF 2015]

STATE BANK OF INDIA AND ORS. …APPELLANTS

VERSUS

ZAFFAR ULLAH NEHRU AND ANR. ETC. …RESPONDENTS

J U D G M E N T

R.F. Nariman, J.

Leave granted.

1. The Constitution of India is a mosaic drawn from the experience of nations worldwide. The federal structure of this Constitution is largely reflected in Part XI which is largely drawn from the Government of India Act, 1935. The State of Jammu & Kashmir is a part of this federal structure. Due to historical reasons, it is a State which is accorded special treatment within the framework of the Constitution of India. This case is all about the State of Jammu & Kashmir vis`-a-vis` the Union of India, in so far as legislative relations between the two are concerned.

2. The present appeals arise out of a judgment dated 16.7.2015 passed by the High Court of Jammu & Kashmir at Jammu, in which it has been held that various key provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI") were outside the legislative competence of Parliament, as they would collide with Section 140 of the Transfer of Property Act of Jammu & Kashmir, 1920. The said Act has been held to be inapplicable to banks such as the State Bank of India which are all India banks.

3. Before going into the merits of the case, it is important to note that SARFAESI is an enactment which *inter alia* entitles banks to enforce their security interest outside the court's process by moving under Section 13 thereof to take possession of secured assets of the borrower and sell them outside the court process. Sections 13 (1) and (4) and 17 are key provisions of SARFAESI relevant for the present case and are set out herein as follows:

> **"Section 13. Enforcement of security interest.**
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> (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.
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> (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
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> PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:
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> PROVIDED FURTHER that where the management of whole of the business or part of the business is severable,

the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt. (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor; (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

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Section 17. Right to appeal.

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement

of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to anyone or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery

Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder."

4. Section 34 declares that a Civil Court shall not have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal under the Act is empowered to determine, and Section 35 is a general non-obstante clause declaring that this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

5. The bone of contention in the present appeals is whether SARFAESI in its application to the State of Jammu & Kashmir would be held to be within the legislative competence of Parliament. To

decide this question, we have heard wide ranging arguments from the learned Attorney General Shri Mukul Rohtagi and Shri Rakesh Dwivedi, learned Senior Advocate, on behalf of the Appellants. They have referred in detail to the provisions of Article 370 of the Constitution of India, read with Section 5 of the Jammu & Kashmir Constitution, 1956. It is their submission that the Instrument of Accession of Jammu and Kashmir, 1947 itself makes it clear that List I of the 7th Schedule of the Government of India Act, 1935 would apply, and that the various Constitution Application to J & K Orders issued from time to time under Article 370 makes it clear that Article 246 (1) read with Entry 45 and 95 List I would clothe Parliament with power to enact SARFAESI. In fact, according to them, even the impugned judgment of the High Court concedes this. According to them, once Entry 45 List I has no other competing Entry, inasmuch as List II of the 7th Schedule to the Constitution of India has not been extended to the State of Jammu & Kashmir, and Entry 11A dealing with Administration of Justice contained in List III of the 7th Schedule to the Constitution of India does not apply to Jammu & Kashmir, and Entry 6 List III dealing with transfer of property also does not apply, it is their case that Entry 45 List I is to be read in its full plenitude and is

not cut down by the provisions of any other Entry. If it is found that the entire SARFAESI is in fact enacted under Entry 45 read with 95 of List I, it would be clear that no other enquiry is necessary, as the Act in pith and substance would be referable to these two entries. This being the case, the State's legislative power comes in only if none of the entries of List I or III are attracted. To refer to Entry 11A and to Entry 6, and further to state that Section 140 of the Transfer of Property Act of Jammu & Kashmir would render the key provisions of SARFAESI without legislative competence, is wholly incorrect. They referred to a number of judgments to show that recovery of loans is as much part of the business of banking as the giving of loans, and that therefore the entire 2002 Act would fall within Entry 45 read with Entry 95 List I. According to them, therefore, the impugned judgment is wrong on several fundamentals and needs to be set aside. They referred to and relied upon a number of other judgments which we will deal with in the course of this judgment.

6. Shri Vijay Hansaria, learned senior advocate, appearing on behalf of the private respondent, has argued that since both the Constitution of India and the Constitution of Jammu & Kashmir are expressions of the sovereign will of the people, they have equal

status and none is subordinate to the other. His basic argument to meet the contentions of the appellants is that the SARFAESI Act, in pith and substance, relates to "transfer of property" and not "banking" and would, therefore, be outside the competence of Parliament and exclusively within the competence of the State Legislature. He further argued that the power of Parliament is expressly "limited" under Article 370(1)(b) of the Constitution of India whereas under the Constitution of Jammu & Kashmir, the State Legislature has plenary powers over all matters, except those where the Parliament has power to make laws. He also argued that the subjects mentioned in the State List of the 7th Schedule under the Constitution of India were frozen and can never be delegated or conferred on Parliament so long as Article 370 remains and therefore any transference of a State List subject to the Concurrent List later cannot apply to the State of Jammu & Kashmir. He also argued that it is not enough under Article 370 to confer power on Parliament by a Presidential Order, but that every time Parliament enacts a law under such power, before such law can operate in the State of Jammu & Kashmir, the State Government's concurrence must be obtained. This was stated to be also for the reason that an amendment made to the Constitution of

India will not apply unless the State concurs in applying it to the State of Jammu & Kashmir, in which case only a Presidential Order applying such amendment would take effect. Further, according to him, Section 140 of the Jammu & Kashmir Transfer of Property Act is in direct conflict with Section 13 of SARFAESI Act and the Transfer of Property Act must prevail. He further argued that Section 17A and 18B of the SARFAESI Act, being Sections relatable to administration of justice, which is purely a State subject, would also be *ultra vires* Parliament. He relied upon Article 35A and supported the impugned judgment on this score, and further stated that the various judgments cited on behalf of the appellants were distinguishable as the fact situation in the present case was completely different from the situation in those judgments.

7. Shri Sunil Fernandes, learned Standing Counsel for the State of Jammu & Kashmir, referred to Article 370 and the Constitution of Jammu & Kashmir in some detail and cited judgments of this Court dealing with the same. He also pointed out local statutory laws which prohibit transfer of land belonging to State residents to non State residents. His submission was that though the SARFAESI Act was enacted by Parliament by virtue of Entry 45 List I, yet Section 13(4)

alone incidentally encroaches upon the property rights of permanent residents of the State of Jammu & Kashmir and must be read down so that it will not be permissible under this Section to sell property belonging to a permanent resident of the State to a person who is not a permanent resident of the State. It was his further submission that the proviso added to Rule 8(5) of the SARFAESI Rules must be read along with Section 13(4) of the SARFAESI Act and if so read, the State of Jammu & Kashmir would have no objection to the SARFAESI Act applying to the State of Jammu & Kashmir.

8. As Article 1 of the Constitution of India states, India is a Union of States. In an illuminating judgment, namely, **State of West Bengal** v. **Union of India**, 1964 (1) SCR 371, Chief Justice Sinha, in the majority judgment, has held that India is quasi-federal with a strong tilt to the Centre. In so holding, the learned Judge referred to four indicia of a real federation, as follows:-

> "(a) A truly federal form of Government envisages a compact or agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining the residue of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of

the Union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement: Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union.

(b) Supremacy of the Constitution which cannot be altered except by the component units. Our Constitution is undoubtedly supreme but it is liable to be altered by the Union Parliament alone and the units have no power to alter it.

(c) Distribution of powers between the Union and the regional units each in its sphere coordinate and independent of the other. The basis of such distribution of power is that in matters of national importance in which a uniform policy is desirable in the interest of the units, authority is entrusted to the Union, and matters of local concern remain with the State.

(d) Supreme authority of the Courts to interpret the Constitution and to invalidate action violative of the Constitution. A federal Constitution, by its very nature, consists of checks and balances and must contain provisions for resolving conflicts between the executive and legislative authority of the Union and the regional units." [at pages 396 - 397]

9. It was found that so far as States other than the State of Jammu & Kashmir are concerned, indicia (a) and (b) were absent whereas indicia (c) and (d) were present, and this coupled with a reading of various other Articles of the Constitution led a Constitution Bench of this Court to decide that the federal structure of the Constitution tilts strongly towards the Central Legislature and Central Government.

10. Insofar as the State of Jammu & Kashmir is concerned, it is clear that indicia (b) is absent. Insofar as the other indicia are concerned, the State does have its own separate Constitution by which it is governed in all matters, except those surrendered to the Union of India. Amendments that are made in the Constitution of India are made to apply to the State of Jammu & Kashmir only if the President, with the concurrence of the State Government, applies such amendments to the State of Jammu & Kashmir. The distribution of powers between the Union and the State of Jammu & Kashmir reflects that matters of national importance, in which a uniform policy is desirable, is retained with the Union of India, and matters of local concern remain with the State of Jammu & Kashmir. And, even though the Jammu & Kashmir Constitution sets up the District Courts and the High Court in the State, yet, the supreme authority of courts to interpret the Constitution of India and to invalidate action violative of the Constitution is found to be fully present. Appeals from the High Court of Jammu & Kashmir lie to the Supreme Court of India, and shorn of a few minor modifications, Articles 124 to 147 all apply to the State of Jammu & Kashmir, with Articles 135 and 139 being omitted. The effect of omitting Articles 135 and 139 has a very small impact, in

that Article 135 only deals with jurisdiction and powers of the Federal Court to be exercised by the Supreme Court, and Article 139 deals with Parliament's power to confer on the Supreme Court the power to issue directions, orders, and writs for purposes other than those mentioned in Article 32 (2). We may also add that permanent residents of the State of Jammu & Kashmir are citizens of India, and that there is no dual citizenship as is contemplated by some other federal Constitutions in other parts of the world. All this leads us to conclude that even qua the State of Jammu & Kashmir, the quasi federal structure of the Constitution of India continues, but with the aforesaid differences. It is therefore difficult to accept the argument of Shri Hansaria that the Constitution of India and that of Jammu & Kashmir have equal status. Article 1 of the Constitution of India and Section 3 of the Jammu & Kashmir Constitution make it clear that India shall be a Union of States, and that the State of Jammu & Kashmir is and shall be an integral part of the Union of India.

11. It is interesting to note that the State of Jammu & Kashmir, though a state within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning because of certain events that took place at the time that the

erstwhile Ruler of Jammu & Kashmir acceded to the Indian Union. These events have been set out in detail in **Prem Nath Kaul v. State of Jammu & Kashmir**, (1959) Supp. 2 SCR 270, to which we will refer in some detail. The State of Jammu & Kashmir is dealt with by a special provision, namely, Article 370. At this juncture, it is necessary to set out this Article which reads as follows:-

> **Article 370. Temporary provisions with respect to the State of Jammu and Kashmir.**
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> (1) Notwithstanding anything in this Constitution,
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> (a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;
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> (b) the power of Parliament to make laws for the said State shall be limited to
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> (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
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> (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.
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> *Explanation*.- For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the

Maharaja's Proclamation dated the fifth day of March, 1948 ;

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

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

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

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

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub clause (b) of clause (1) or in the second proviso to sub clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

12. The first thing that is noticed in Article 370 is that the marginal note states that it is a temporary provision with respect to the State of Jammu & Kashmir. However, unlike Article 369, which is also a temporary provision limited in point of time to five years from the commencement of this Constitution, no such limit is to be found in Article 370. Despite the fact that it is, therefore, stated to be temporary in nature, sub-clause (3) of Article 370 makes it clear that this Article shall cease to be operative only from such date as the President may by public notification declare. And this cannot be done under the proviso to Article 370 (3) unless there is a recommendation of the Constituent Assembly of the State so to do. This takes us to an interesting judgment of this Court, namely, **Sampat Prakash v. the State of Jammu & Kashmir,** (1969) 2 SCR 365. In this case, a writ petition under Article 32 was filed challenging the detention of the petitioner, in which it was contended that Article 370 contained only temporary provisions which cease to be effective after the Constituent Assembly of the State had completed its work by framing a Constitution for the State. The detention of the petitioner was continued without making a reference to the Advisory Board inasmuch as Article 35(c) of the Constitution had given protection to

any law relating to preventive detention in Jammu & Kashmir against invalidity on the ground of infringement of any of the fundamental rights guaranteed by Part III of the Constitution initially for a period of five years, which was then extended to ten years and fifteen years. These extensions were the subject matter of challenge, and it was sought to be contended that the power of the President, depending on the concurrence of the Government of the State of Jammu & Kashmir, must be exercised under Article 370 before dissolution of the Constituent Assembly of the State, and that such power must be held to cease to exist after dissolution of the Constituent Assembly. This argument was repelled by the Constitution Bench by giving three reasons. First and foremost, it was stated that the reason for the Article was that it was necessary to empower the President of India to exercise his discretion from time to time in applying the Indian Constitution. This being so, Article 370 would necessarily have to be invoked every time the President, with the State's concurrence, feels it necessary that amendments to the Constitution of India be made applicable to Jammu & Kashmir, given the special proviso to Article 368 which applies only to the State of Jammu & Kashmir. Further, it was also held that the Article will cease to operate under sub-clause

(3) only when a recommendation is made by the Constituent Assembly of the State to that effect. It was found that in fact the Constituent Assembly of the State had made a recommendation that the Article should be operative with one modification to be incorporated in the explanation to clause (1) of the Article, namely, that the Maharaja of Jammu & Kashmir be substituted by the expression "Sadar-I Riyasat of Jammu & Kashmir". Also, it is important to note that Article 370 (2) does not in any manner state that the said Article shall cease on the completion of the work of the Constituent Assembly or its dissolution. Having regard to all these factors, this Court clearly held that though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in sub-clause (3) of the said Article takes place. It was further held by the **Sampat Prakash** judgment that Section 21 of the General Clauses Act, 1897 was also applicable so that the power under this Article can be used from time to time to meet with varying circumstances.

13. Article 370 begins with a non obstante clause stating that notwithstanding anything contained in the Constitution, first and foremost, under sub-clause (1)(a) the provisions of Article 238 shall

not apply in relation to the State of Jammu & Kashmir. Article 238 has since been repealed and is not of any importance today. It only referred to the application of the provisions of Part VI to States in Part B of the 1st Schedule. Since the scheme of Article 370 was different, the said Article was stated not to apply. But more importantly, the power of Parliament to make laws for the said State shall be limited, in sub-clause (b)(i), to the matters in the Union List and the Concurrent List of the 7th Schedule to the Constitution of India, which in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession. If other matters contained in the said Constitution outside the Instrument of Accession in the said Lists are to be extended, then they can be extended only with the concurrence of the State. The difference between consultation and concurrence was highlighted in **Prem Nath Kaul**'s case, supra. At this stage, it is necessary to refer to this case in some detail as it goes into the legislative history of Article 370, and the Presidential Orders made under the said Article. We are not directly concerned here with the Jammu & Kashmir Big Landed Estates (Abolition) Act, 1950, whose validity was challenged in the said judgment. The judgment goes into great detail as to how

the Instrument of Accession to the Union of India was made by Maharaja Hari Singh. What is of importance is to note that after the reins of power were handed over to his son Yuvraj Karan Singh by a proclamation dated 20.6.1949, Yuvraj Karan Singh, by a proclamation dated 25.11.1949, stated that the Constitution of India, which was yet to be promulgated, would apply to the State of Jammu & Kashmir. Also, by a proclamation dated 20.4.1951, a Constituent Assembly was to be set up on the basis of adult franchise in order that this Assembly give to the State its own Constitution. The judgment then goes on to refer to the Jammu & Kashmir Presidential Order of 1950 and its amendments, which was then supplanted by the 1954 Order. It then goes on to state that, whereas sub-clause (1) (b) (i) of 370 requires only consultation with the Government of the State, sub-clause (ii) requires concurrence, which scheme applies under sub-clause (d) of the said Article in relation to the extension or modification of other provisions of the Indian Constitution as well. Under sub-clause (d), other provisions of the Constitution may, by Presidential Order, be held to apply to the State of Jammu & Kashmir. If matters specified in the Instrument of Accession are to be applied, then there is only consultation with the Government of the State, and

if not, there must be concurrence. The scheme of Article 370(1), therefore, is clear. Since the Instrument of Accession is an agreement between the erstwhile Ruler of Jammu & Kashmir and the Union of India, it must be respected, in which case if a matter is already provided for in it, it would become applicable straightaway without more, and only consultation with the Government of the State is necessary in order to work out the modalities of the extension of the provisions of the Government of India Act corresponding to the Constitution of India referred to in it. However, when it comes to applying the provisions of the Constitution of India which are not so reflected in the Instrument of Accession, they cannot be so applied without the concurrence of the Government of the State, meaning thereby that they can only be applied if the State Government accepts that they ought to be so applied. Under Article 370(2), the concurrence of the Government of the State, given before the Constituent Assembly is convened, can only be given effect to if ratified by the Constituent Assembly. This legislative scheme therefore illustrates that the State of Jammu & Kashmir is to be dealt with separately owing to the special conditions that existed at the time of the Instrument of Accession.

14. Under sub-clause (1)(d) of Article 370, other provisions of the Indian Constitution shall apply in relation to the State of Jammu & Kashmir subject to such exceptions and modifications as the President may by order specify. In **Puranlal Lakhanpal v. President of India**, (1962) 1 SCR 688, this Court held that "modification" in sub-clause (d) is a very wide expression which includes amendment by way of change. This Court held:

> "The question that came for consideration in In re: Delhi Laws Act case(') was with respect to the power of delegation to a subordinate authority in making subordinate legislation. It was in that context that the observations were made that the intention of the law there under consideration when it used the word "modification" was that the Central Government would extend certain laws to Part C States without any radical alteration in them. But in the present case we have to find out the meaning of the word "modification" used in Art. 370(1) in the context of the Constitution. As we have said already the object behind enacting Art. 370(1) was to recognise the special position of the State of Jammu and Kashmir and to provide for that special position by giving power to the President to apply the provisions of the Constitution to that State with such exceptions and modifications as the President might by order specify. We have already pointed out that the power to make exceptions implies that the President can provide that a particular provision of the Constitution would not apply to that State. If therefore the power is given to the President to efface in effect any provision of the Constitution altogether in its application to the State of Jammu and Kashmir, it seems that when he is also given the power to make modifications that power should be considered in its widest possible amplitude. If he could efface a particular

provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Art. 370(1) the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir. In the Oxford English Dictionary (Vol. VI) the word 'modify" means inter alia "to make partial changes in; to change (as object) in respect of some of its qualities; to alter or vary without radical transformation". Similarly the word "modification" means "the action of making changes in an object without altering its essential nature or character; the state of being thus changed; partial alteration". Stress is being placed on the meaning "to alter or vary without radical transformation" on behalf of the petitioner; but that is not the only meaning of the words "modify" or "modification". The word "modify" also means "to make partial changes in" and "modification" means "partial alteration". If therefore the President changed the method of direct election to indirect election he was in essence making a partial change or partial alteration in Art. 81 and therefore the modification made in the present case would be even within the dictionary meaning of that word. But, in law, the word "modify" has even a wider meaning. In "Words and Phrases" by Roland Burrows, the primary meaning of the word "modify" is given as "to limit" or "restrict" but it also means ""to vary" and may even mean to "extend" or "enlarge". Thus in law the word "modify" may just mean "vary", i.e., amend; and when Art. 370(1) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify it means that he may vary (i.e., amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir. We are therefore of opinion that in the context of the Constitution we must give the widest effect

> to the meaning of the word 'modification" used in Art. 370(1) and in that sense it includes an amendment. There is no reason to limit the word "modifications" as used in Art. 370(1) only to such modifications as do not make any "radical transformation".” [pages 692 – 693]

15. It has been argued that Parliamentary legislation would also need the concurrence of the State Government before it can apply to the State of Jammu & Kashmir under Article 370. This is a complete misreading of Article 370 which makes it clear that once a matter in either the Union List or the Concurrent List is specified by a Presidential Order, no further concurrence is needed. Indeed, the argument is that a Constitutional amendment does not *ipso facto* apply to the State of Jammu & Kashmir under the proviso to Article 368 as applicable in the said State unless there is concurrence of the State Government and therefore, logically, it must follow that Parliamentary legislation would also require concurrence of the State Government before it can be said to apply in the State of Jammu & Kashmir. We fail to understand or appreciate such an argument. A constitutional amendment is different in quality from an ordinary law and, as has been held by us, it is clear that the language of Article

368 proviso and the language of Article 370 are different and have to be applied according to their terms.

16. The Instrument of Accession of Jammu & Kashmir State is dated 26.10.1947, and states, in paragraphs 1, 3, 8, and 9, the following:

> "1. I hereby declare that I accede to the Dominion of India with the intent that the Governor General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of Jammu & Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947, (which Act as so in force is hereafter referred to as "the Act').
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> 3. I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State.
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> 8. Nothing in this Instrument affects the continuance of my Sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.
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> 9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be

construed as including a reference to my heirs and successors."

The Schedule which is referred to in clause 3 refers to defence, external affairs, communications and certain ancillary matters.

17. At this stage, it is necessary to see which of the provisions of the Constitution of India have in fact been applied by Article 370 to the State of Jammu & Kashmir. First and foremost, in sub-clause (1) (c) of Article 370, the provisions of Article 1 and Article 370 itself are said to apply by virtue of this sub-clause straightaway. In order to find out what other provisions of the Constitution have been extended to the State of Jammu & Kashmir, we have necessarily to go to the Presidential Order of 1950. This Order, which is called the Constitution Application to Jammu & Kashmir Order, 1950, began rather warily by extending a few Entries in List I of Schedule 7 and applying only certain clauses and Articles of the Constitution. Since this Order and its amendments are of historical importance only, it is not necessary to refer to them in any detail, as it is the Constitution Application to Jammu & Kashmir Order, 1954, that superseded the 1950 Order, and went on to apply various provisions of the Constitution of India to the State of Jammu & Kashmir that we are

concerned with. Insofar as this case is concerned, it is important to note that, in Part XI, in Article 246, it was stated that the words, brackets, and figures “notwithstanding anything contained in clauses 2 and 3” occurring in clause 1, and clauses 2, 3, and 4 shall be omitted. Article 254 was also, by sub-clause (f) of paragraph 6, extended with certain modifications and omissions. The 7th schedule Union List was extended containing most of the Entries therein except what was expressly omitted by clause 22. Interestingly enough, Entry 45 and 95 with which we are directly concerned were applied for the first time by this Order, and have continued to apply to the State since. Significantly, the State List and the Concurrent List of the 7th Schedule were omitted by the original 1954 Order.

18. This order has been amended repeatedly by a number of subsequent orders, and the Order with which we are directly concerned is the 1954 Order as amended from time to time. This Order adopts all the provisions of the Constitution of India as in force on the 20th June, 1964, together with certain amendments and modifications. The argument that Article 370(1)(b) ‘limits’ the power of Parliament is answered by the fact that the entire Constitution of India, as it exists in 1964, has been made applicable by Presidential

order to the State of Jammu & Kashmir, availing both Articles 370(1) (b) and (d) for this purpose. And the expression 'limited to' does not occur in Article 370(1)(d),under which it is open to adopt the entire Constitution of India subject to exceptions and modifications, as has been noted above. The opening paragraphs of this Order read as follows:-

> "In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of the 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, 1954.
>
> (2) It shall come into force on the fourteenth day of May, 1954, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.
>
> 2. The provisions of the Constitution as in force on the 20th day of June, 1964 and as amended by the Constitution (Nineteenth Amendment) Act, 1966, the Constitution (Twenty-first Amendment) Act, 1967, Section 5 of the Constitution (Twenty-third Amendment) Act, 1969, the Constitution (Twenty-fourth Amendment) Act, 1971, section 2 of the Constitution (Twenty-fifth Amendment) Act, 1971, the Constitution (Twenty-sixth Amendment) Act, 1971, the Constitution (Thirtieth Amendment) Act, 1972, section 2 of the Constitution (Thirty-first Amendment) Act, 1973, section 2 of the Constitution (Thirty-third Amendment) Act, 1974, sections 2, 5, 6 and 7 of the Constitution (Thirty-eighth Amendment) Act, 1975, the Constitution (Thirty-ninth Amendment) Act, 1975, the Constitution (Fortieth Amendment) Act, 1976, sections 2,

3 and 6 of the Constitution (Fifty-second Amendment) Act, 1985 and the Constitution (Sixty-first Amendment) Act, 1988 which, in addition to article 1 and article 370, 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:-"

By this Order, in Part XI of the Constitution of India, in Article 246 for the words, brackets, and figures "clauses (2) and (3)" occurring in clause (1), the word, brackets and figure "clause (2)" shall be substituted, and the words, brackets and figure "Notwithstanding anything in clause (3)," occurring in clause (2), and the whole of clauses (3) and (4) shall be omitted. This being the case, it is clear that Article 246 as applicable to the State of Jammu & Kashmir would read thus:-

"246. Subject matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clause (2), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the 7th Schedule (in this Constitution referred to as the Union List)

(2) Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the 7th Schedule (in this Constitution referred to as the Concurrent List)"

19. Equally, Article 248 and Entry 97 List I have been modified so that Parliament has the residuary power to make laws only with respect to three subjects – (1) the prevention of activities involving terrorist acts, (2) the prevention of activities directed towards questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of any part of the territory of India, and (3) taxes on three specified subjects. Significantly, clause (f), which contained Article 254 in a modified form, was omitted by C.O. No.66, by which it has become clear that after 1963, Article 254 in its current form in the Constitution of India will apply to the State of Jammu & Kashmir. Equally, in the 7th Schedule Union List, the omission of Entries has now come down to only four i.e. Entries 8, 9, 34, and 79, with a few other Entries being modified or substituted. Significantly, Entries 45 and 95 of List I continue to apply to the State of Jammu & Kashmir. The State List continues to be omitted altogether, and from 1963 onwards, the Concurrent List applies to the State of Jammu & Kashmir with a number of Entries being omitted. What is of importance for the decision of this case is that Entry 6 dealing with the transfer of property and Entry 11A of the Concurrent List do not apply to the State of Jammu & Kashmir. Entry 6 does not apply

because it has not been extended to the State, and Entry 11A does not apply because the 42nd Amendment to the Constitution of India, which introduced Entry 11A into the Concurrent List, is itself not applicable.

20. At this stage, it is important to refer to the Constitution of Jammu & Kashmir, 1956. This Constitution came into effect on 17.11.1956. Section 2(1)(a), and Sections 3, 4, and 5 read as follows:-

> **"2. Definitions**:-
>
> (1) In this Constitution, unless the context otherwise requires- (a) "Constitution of India" means the Constitution of India as applicable in relation to this State;
>
> **3. Relationship of the State with the Union of India**:-The State of Jammu and Kashmir is and shall be an integral part of the Union of India.
>
> **4. Territory of the State**:-The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.
>
> **5. Extent of executive and legislative power of the State**:- The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."

21. What is important to note in this Constitution, which was drafted by a Constituent Assembly elected on the basis of adult franchise, is that the State of Jammu & Kashmir is stated to be an integral part of the Union of India, and that the executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under Article 370 of the Constitution of India. A combined reading, therefore, of Article 370 of the Constitution of India, the 1954 Presidential Order as amended from time to time, and the Constitution of Jammu & Kashmir, 1956 would lead to the following position insofar as the legislative competence of the Parliament of India vis-à-vis the State of Jammu & Kashmir is concerned:

1. All entries specified by the 1954 Order contained in List I of the 7th Schedule to the Constitution of India would clothe Parliament with exclusive jurisdiction to make laws in relation to the subject matters set out in those entries.
2. Equally, under the residuary power contained in Entry 97 List I read with Article 248, the specified subject matters set out would indicate that the residuary power of Parliament to enact exclusive laws relating

to the aforesaid subject matters would extend only to the aforesaid subject matters and no further.

3. Parliament would have concurrent power with the State of Jammu & Kashmir with respect to the entries that are specified in the Presidential Order of 1954 under List III of the 7th Schedule of the Constitution of India. This would mean that all the decisions of this Court on principles of repugnancy applicable to Article 254 would apply in full force to laws made which are relatable to these subject matters.

4. Every other subject matter which is not expressly referred to in either List I or List III of the 7th Schedule of the Constitution of India, as applicable in the State of Jammu & Kashmir, is within the legislative competence of the State Legislature of Jammu & Kashmir.

22. An argument was made by learned counsel on behalf of the respondents that the subjects mentioned in the State List of the 7th Schedule to the Constitution of India as originally adopted were frozen and can never be delegated or conferred on the Parliament so long as Article 370 remains, since under Article 370(1)(b), the President could declare that the Parliament shall have power to make laws for the State of Jammu & Kashmir only on the fields of legislation mentioned in the Union List and the Concurrent List. We

are afraid that this submission is also without force for the reason that Article 368 proviso, as applicable to the State of Jammu & Kashmir, expressly allows any Constitutional amendment to the Constitution of India to be applied with the concurrence of the State of Jammu & Kashmir. This would include within its ken, an amendment which either adds to or subtracts from the State List and confers upon Parliament, either exclusively under List I or concurrently under List III, a subject matter hitherto in the State List. This has been so held in **Sampat Prakash's case** (supra). Also, in **Puranlal Lakhanpal's case** (supra), the expression "modifications" occurring in Article 370(1)(d) has been construed not only to mean "to limit or restrict" but even "to extend or enlarge." Thus, the word "modification" must be given the widest meaning and would include all amendments which either limit or restrict or extend or enlarge the provisions of the Constitution of India. For this reason also it is clear that nothing can ever be frozen so long as the drill of Article 370 is followed.

23. Given this legislative scenario, we have now to examine SARFAESI in its applicability to the State of Jammu & Kashmir. Entries 45 and 95 of List I of the 7th Schedule of the Constitution of India read as follows:-

"45. Banking.

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction."

24. The first significant thing to note is that recovery of debts by banks has been held to fall within Entry 45 List I. Thus, in **Union of India v. Delhi High Court Bar Association**, (2002) 4 SCC 275, it has been held:

> "The Delhi High Court and the Guwahati High Court have held that the source of the power of Parliament to enact a law relating to the establishment of the Debts Recovery Tribunal is Entry 11-A of List III which pertains to "*administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts*". In our opinion, Entry 45 of List I would cover the types of legislation now enacted. Entry 45 of List I relates to "banking". Banking operations would, *inter alia*, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered. The Tribunals have been set up in regard to the debts due to the banks. The special machinery of a Tribunal which has been constituted as per the preamble of the Act, "*for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto*" would squarely fall within

the ambit of Entry 45 of List I. As none of the items in the lists are to be read in a narrow or restricted sense, the term "banking" in Entry 45 would mean legislation regarding all aspects of banking including ancillary or subsidiary matters relating to banking. Setting up of an adjudicatory body like the Banking Tribunal relating to transactions in which banks and financial institutions are concerned would clearly fall under Entry 45 of List I giving Parliament specific power to legislate in relation thereto." [para 14]

25. When it came to SARFAESI itself, this Court has held in **Central Bank of India v. State of Kerala**, (2009) 4 SCC 94:

> **"**Undisputedly, the DRT Act and the Securitisation Act have been enacted by Parliament under Entry 45 in List I in the 7th Schedule whereas the Bombay and Kerala Acts have been enacted by the State Legislatures concerned under Entry 54 in List II in the 7th Schedule. To put it differently, two sets of legislations have been enacted with reference to entries in different lists in the 7th Schedule. Therefore, Article 254 cannot be invoked per se for striking down State legislations on the ground that the same are in conflict with the Central legislations. That apart, as will be seen hereafter, there is no ostensible overlapping between two sets of legislations. Therefore, even if the observations contained in *Kesoram Industries case* [(2004) 10 SCC 201] are treated as law declared under Article 141 of the Constitution, the State legislations cannot be struck down on the ground that the same are in conflict with Central legislations." [para 36]

26. In a recent judgment, namely, **UCO Bank & Anr. V. Dipak Debbarma & Ors**., [Civil Appeal No. 11247 of 2016 and Civil Appeal

No. 11250 of 2016] delivered by this Court on 25th November, 2016, this Court has held:

> "18. The Act of 2002 is relatable to the Entry of banking which is included in List I of the 7th Schedule. Sale of mortgaged property by a bank is an inseparable and integral part of the business of banking. The object of the State Act , as already noted, is an attempt to consolidate the land revenue law in the State and also to provide measures of agrarian reforms. The field of encroachment made by the State legislature is in the area of banking. So long there did not exist any parallel Central Act dealing with sale of secured assets and referable to Entry 45 of List I, the State Act, including Section 187, operated validly. However, the moment Parliament stepped in by enacting such a law traceable to Entry 45 and dealing exclusively with activities relating to sale of secured assets, the State law, to the extent that it is inconsistent with the Act of 2002, must give way. The dominant legislation being the Parliamentary legislation, the provisions of the Tripura Act of 1960, pro tanto, (Section 187) would be invalid. It is the provisions of the Act of 2002, which do not contain any embargo on the category of persons to whom mortgaged property can be sold by the bank for realisation of its dues that will prevail over the provisions contained in Section 187 of the Tripura Act of 1960."

27. In this case, a Tripura Land Reform law, which was made under Entries 18 and 45 of List II, was pitted against SARFAESI which is made under Entry 45 List I. Despite the fact that the Tripura Act received the protection of Article 31B read with Ninth Schedule, it was held that the Tripura Act, Section 187 of which put a legislative

embargo on the sale of mortgaged properties by a bank to any person who is not a member of Scheduled Tribe, was held to give way to the Parliamentary enactment SARFAESI made under Entry 45 List I. Though this judgment does not apply on all fours to the present case, it clearly establishes that SARFAESI is relatable to Entry 45 List I and that any enactment made under the State List would have to give way to SARFAESI by virtue of the application of Article 246 of the Constitution of India.

28. **R.C. Cooper v. Union of India,** (1970) 1 SCC 248, has also in paragraph 36, stated that the subject matter 'banking' in Entry 45 List I must be construed so as to comprehend within its scope all matters that are incidental to such subject matter. It was held:

> "The legislative entry in List I of the 7th Schedule is "Banking" and not "Banker" or "Banks". To include within the connotation of the expression "Banking" in Entry 45, List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in re-writing the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. The field of "banking" cannot be

> extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II." [para 36]

29. A judgment of the Privy Council reported in **Attorney-General for Canada** v. **Attorney-General for the Province of Quebec**, 1947 Appeal Cases 33, also throws some light on what is the correct meaning to be given to the expression "banking". A Quebec Statute deemed as vacant property, without an owner, (which will now belong to His Majesty) all deposits or credits in credit institutions and other establishments which received funds or securities on deposit where for 30 years or more such deposits or credits are not the subject of any operation or claim by the persons entitled thereto. In an appeal from the Court of King's Bench of the Province of Quebec, the Bank of Montreal argued that the State Act was beyond the powers of the Quebec legislature as "banking" was one of the subjects allotted exclusively to the Parliament of Canada. Lord Porter, in an illuminating judgment, posed the question and answered it thus:-

> "Is then, the repayment of deposits to depositors or their successors in title under the law as existing a part of the business of banking or necessarily incidental thereto, or is it concerned primarily with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the

sums deposited to the depositors or their successors as defined above is an essential part of the business of banking."

In this view of the matter, the Privy Council further held:

"In their view, a Provincial legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking." (At pages 44 and 46)

30. What is of significance to note is that since List II is not operative in the State of Jammu & Kashmir, there is no competing Entry in the said List and this would lead therefore to the conclusion that Entries 45 and 95 of List I must be given a wide meaning. Indeed, in a converse situation, this Court, in **Union of India v. H.S. Dhillon**, 1972(2) SCR 33, had this to say:

"It was also said that if this was the intention of the Constitution makers they need not have formulated List I at all. This is the point which was taken by Sardar Hukam Singh and others in the debates referred to above and was answered by Dr. Ambedkar. But apart from what has been stated by Dr. Ambedkar in his speech extracted above there is some merit and legal effect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and II. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that as it

> may, we have the three lists and a residuary power and therefore it seems to us that in this context if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises." (At page 67)

31. At this juncture, it is important to advert to **State of Jammu & Kashmir** v. **M.S. Farooqui**, (1972) 1 SCC 872. This judgment dealt with the interplay between the Jammu & Kashmir Government Servants Prevention of Corruption (Commission) Act, 1962 as against the All India Services (Discipline and Appeal) Rules, 1955. In para 7 of the judgment it was noticed that Parliament could legislate by virtue of Entry 70 List I on All India Services, and Rules made under Article 309 of the Constitution are referable to this Entry. This being the case, the question that this Court had to answer was as to whether the appellant, who was a member of the Indian Police Service, which is an All India Service, in the Jammu & Kashmir cadre, was liable to be governed by the All India Services Rules or by the Jammu & Kashmir Act. After dealing in some detail with judgments of this Court on legislative competence, this Court concluded:-

> "From the perusal of the provisions of the two statutory laws, namely, the All India Services (Discipline and Appeal) Rules, 1955, and the Jammu and Kashmir

government servants' Prevention of Corruption (Commission) Act, 1962, it is impossible to escape from the conclusion that the two cannot go together. The impugned Act provides for additional punishments not provided in the Discipline and Appeal Rules. It also provides for suspension and infliction of some punishments. It seems to us that insofar as the Commission Act deals with the infliction of disciplinary punishments it is repugnant to the Discipline and Appeal Rules. Parliament has occupied the field and given clear indication that this was the only manner in which any disciplinary action should be taken against the members of the All India Services. Insofar as the Commission Act deals with a preliminary enquiry for the purposes of enabling any prosecution to be launched it may be within the legislative competence of the Jammu and Kashmir State and not repugnant to the provisions of the Discipline and Appeal Rules. But as the provisions dealing with investigation for possible criminal prosecution are inextricably intertwined with the provisions dealing with infliction of disciplinary punishment the whole Act must be read down so as to leave the members of the All India Service outside its purview.

We accordingly hold that the provisions of the Commission Act do not apply to the members of the All India Services. Accordingly we dismiss the appeal. As the respondent was not represented there would be no order as to costs. We thank Mr. G.L. Sanghi for assisting us as amicus curiae." [paras 47 – 48]

32. Applying the doctrine of pith and substance to SARFAESI, it is clear that in pith and substance the entire Act is referable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, *inter alia* through facilitating

securitization and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, SARFAESI does not deal with "transfer of property". In fact, in so far as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of SARFAESI, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear

that SARFAESI, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject matter "transfer of property". At this juncture it is necessary to point out that insofar as the State of Jammu & Kashmir is concerned, Sections 17A and Section 18B of SARFAESI, which apply to the State of Jammu & Kashmir, substituted 'District Judge' and the 'High Court' for the 'Debts Recovery Tribunal' and the 'Appellate Tribunal' respectively. These provisions read as under:-

> **"Section 17-A. Making of application to Court of District Judge in certain cases.** In the case of a borrower residing in the State of Jammu and Kashmir, the application under Section 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.
>
> Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons shall not entitle the person (including borrower) to make an application to the Court of District Judge under this section.
>
> **Section 18-B. Appeal to High Court in certain cases.**
>
> Any borrower residing in the State of Jammu and Kashmir and aggrieved by any order made by the Court of District Judge under Section 17-A may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge:

> Provided that no appeal shall be preferred unless the borrower has deposited, with the Jammu and Kashmir High Court, fifty per cent of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less:
>
> Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of the debt referred to in the first proviso."

33. It would be clear that these provisions are referable to Entry 45 as being ancillary to banking, and expressly to Entry 95 List I inasmuch as the jurisdiction and power of courts is laid down for the special subject of recovery of debts due to banks by these provisions.

34. In **State of Maharashtra v. Narottamdas Jethabai**, (1950) 1 SCR 51, this Court upheld the Bombay City Civil Courts Act, and in so doing, referred specifically to the following Entries in the legislative lists of the Government of India Act, 1935.

> Entry 53, List I:
> "Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List …."
>
> Entries 1 and 2, List II:
> "1. . . . the administration of justice; constitution and organisation of all courts except the Federal Court …."

"2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List …."

Entry 15, List III:
"Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this List."

35. Justices Fazal Ali, Mahajan, and Mukherjea held that 'Administration of Justice' contained in Entry 1 of List 2 of the Government of India Act, 7th Schedule, would include jurisdiction and power of courts generally, but that Entry 53 of List 1 would refer to special powers referable to a particular entry in the Union List as opposed to the general power contained in Entry 1 List 2. It was held, therefore, that but for an express provision like Entry 53 List 1, Parliament may not have been able to confer special jurisdiction on courts in regard to matters set out in legislative List 1. Two learned Judges, namely, Patanjali Sastri and Das, JJ. also upheld the Bombay Act, but on the basis that the expression "Administration of Justice" would be cut down by the expression "jurisdiction and power of all courts", and would not therefore include within its ken jurisdiction and power of courts.

36. Similarly in **Jamshed N. Guzdar v. State of Maharashtra,** (2005) 2 SCC 591, this Court upheld the constitutional validity of the

Bombay City Civil Court and the Bombay Courts of Small Causes (Enhancement of Pecuniary Jurisdiction and Amendment) Act, 1986 by holding in paragraph 53 as follows:

> "Thus, on and after 3-1-1977 the situation appears to be as under:
>
> (*a*) Parliament alone has the competence to legislate with respect to Entry 78 of List I to "constitute and organise" the High Court.
>
> (*b*) Both Parliament and the State Legislature can invest such a High Court with general jurisdiction by enacting an appropriate legislation referable to "administration of justice" under Entry 11-A of List III.
>
> (*c*) Parliament may under Entry 95 of List I invest the High Court with jurisdiction and powers with respect to any of the matters enumerated in List I.
>
> (*d*) The State Legislature may invest the High Court with the jurisdiction and powers with respect to any of the matters enumerated in List II.
>
> (*e*) Both Parliament and the State Legislature may by appropriate legislation referable to Entry 46 of List III invest the High Court with jurisdiction and powers with respect to any of the matters enumerated in List III." [para 53]

37. It is thus clear on a reading of these judgments that SARFAESI as a whole would be referable to Entries 45 and 95 of List I. We must remember the admonition given by this Court in **A.S. Krishna and others v. State of Madras,** 1957 SCR 399, that it is not correct to

first dissect an Act into various parts and then refer those parts to different Entries in the legislative Lists. It is clear therefore that the entire Act, including Sections 17A and 18B, would in pith and substance be referable to Entries 45 and 95 of List I, and that therefore the Act as a whole would necessarily operate in the State of Jammu & Kashmir.

38. The judgment of the High Court is wholly incorrect in referring to Entry 11A of the Concurrent List. First and foremost, as has been noted by us above, the Entry is not extended to the State of Jammu & Kashmir. From this, the counsel for the respondents sought to contend that Parliament would, therefore, have no power under the Concurrent List to legislate on the subject matter "Administration of Justice". Under Section 5 of the Jammu & Kashmir Constitution, we have seen that "Administration of Justice" would come into play only when Entries 45 and 95 of List 1 are not attracted. Even if this were not so, we have seen in the two judgments cited hereinabove, the expression "administration of justice" is general and must give way to the special laws that are enacted under Entry 95 List I when coupled with another Entry in the same List – in this case Entry 45 List I. The

relevant part of Section 140 of the Jammu & Kashmir Transfer of Property Act, on which great reliance has been placed by learned counsel for the respondents, provides:-

> "140. Exemptions of certain instruments from restriction imposed on transfer of immovable property.
>
> Nothing contained in Irshad dated 29th Maghar, 1943, or any law, rule order, notification, regulation, hidyat, ailan, circular, robkar, yadasht, irshad, State Council resolution or any other instrument having the force of law prohibiting or restricting the transfer of immovable property in favour of a person who is not a permanent resident of the State shall apply to-
>
> (h) a simple mortgage of immovable property executed or created in favour of a public financial institution, l as specified in section 4-A of the Companies Act, 1956, a Scheduled bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and the Trustees for the holders of debentures to secure the loans, guarantees, issue of debentures or other form of financial assistance provided for developmental projects in the State of Jammu and Kashmir Like Baghliar Project of Jammu and Kashmir State Power Development Corporation Limited. Provided that in any suit based on such mortgage, the mortgaged property shall be sold or transferred only to a permanent resident of the State or any financial institution or corporation managed and owned by the Government of India;

39. At this juncture, it is necessary to refer to Rule 8(5) proviso of the Security Interest (Enforcement) Rules, 2002, which states as follows:-

> "Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State."

40. This Rule makes it amply clear that Section 140 of the Transfer of Property Act of Jammu & Kashmir will be respected in auction sales that take place within the State. This being the case, it is clear that there is no collision or repugnancy with any of the provisions of SARFAESI, and therefore it is clear that the High Court is absolutely wrong in finding that as Section 140 of the Transfer of Property Act will be infracted, SARFAESI cannot be held to apply to the State of Jammu & Kashmir. Rule 8 has been noticed but brushed aside by the aforesaid judgment. The High court judgment begins from the wrong end and therefore reaches the wrong conclusion. It states that in terms of Section 5 of the Constitution of Jammu & Kashmir, the State has absolute sovereign power to legislate in respect of laws touching the rights of its permanent residents qua their immovable properties. The State legislature having enacted Section 140 of the Jammu & Kashmir Transfer of Property Act, therefore, having clearly stated that the State's subjects/citizens are by virtue of the said provision protected, SARFAESI cannot intrude and disturb such

protection. The whole approach is erroneous. As has been stated hereinabove, Entries 45 and 95 of List I clothe Parliament with exclusive power to make laws with respect to banking, and the entirety of SARFAESI can be said to be referable to Entry 45 and 95 of List I, 7th Schedule to the Constitution of India. This being the case, Section 5 of the Jammu & Kashmir Constitution will only operate in areas in which Parliament has no power to make laws for the State Thus, it is clear that anything that comes in the way of SARFAESI by way of a Jammu & Kashmir law must necessarily give way to the said law by virtue of Article 246 of the Constitution of India as extended to the State of Jammu & Kashmir, read with Section 5 of the Constitution of Jammu & Kashmir. This being the case, it is clear that Sections 13(1) and (4) cannot be held to be beyond the legislative competence of Parliament as has wrongly been held by the High Court.

41. It is rather disturbing to note that various parts of the judgment speak of the absolute sovereign power of the State of Jammu & Kashmir. It is necessary to reiterate that Section 3 of the Constitution of Jammu & Kashmir, which was framed by a Constituent Assembly elected on the basis of universal adult franchise, makes a ringing

declaration that the State of Jammu & Kashmir is and shall be an integral part of the Union of India. And this provision is beyond the pale of amendment. Section 147 of the Jammu & Kashmir Constitution states:-

> "147. **Amendment of the Constitution.** - An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly and when the Bill is passed in each House by a majority of not less than two-thirds of the total membership of the House, it shall be presented to the Sadar-i-Riyasat for his assent and, upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that a Bill providing for the abolition of the Legislative Council may be introduced in the Legislative Assembly and passed by it majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting:
>
> Provided further that no Bill or amendment seeking to make any change in:
>
> (a) this section;
>
> (b) the provisions of the sections 3 and 5; or
>
> (c) the provisions of the Constitution of India as applicable in relation to the State;
>
> shall be introduced or moved in either House of the Legislature."

42. It is also significant in this context to refer to the Preamble to the Constitution of Jammu & Kashmir, 1957 and compare it to that of the Constitution of India, 1950.

The Preamble of the Constitution of Jammu and Kashmir reads as follows:

> "WE, THE PEOPLE OF THE STATE OF JAMMU AND KASHMIR, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves-
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among us all;
>
> FRATERNITY assuring dignity of the individual and the unity of the nation;
>
> IN OUR CONSTITUENT ASSEMBLY this seventeenth day of November, 1956, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

It is to be noted that the opening paragraph of the Constitution of India, namely “WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens…” has been wholly omitted in the Constitution of Jammu & Kashmir. There is no reference to sovereignty. Neither is there any

use of the expression “citizen” while referring to its people. The people of Jammu & Kashmir for whom special rights are provided in the Constitution are referred to as “permanent residents” under Part III of the Constitution of Jammu & Kashmir. Above all, the Constitution of Jammu & Kashmir has been made to further define the existing relationship of the State with the Union of India as an integral part thereof.

43. It is thus clear that the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India. It is therefore wholly incorrect to describe it as being sovereign in the sense of its residents constituting a separate and distinct class in themselves. The residents of Jammu & Kashmir, we need to remind the High Court, are first and foremost citizens of India. Indeed, this is recognized by Section 6 of the Jammu & Kashmir Constitution which states:

> “6. Permanent residents:-(1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954-
>
> (a) he was a State Subject of Class I or of Class II ; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as in State Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty 7th June, 1932."

They are governed first by the Constitution of India and also by the Constitution of Jammu & Kashmir. This is made clear by Section 10 of the Jammu & Kashmir Constitution which states:

"10. Rights of the permanent residents:- The permanent, residents of the State shall have all the rights guaranteed to them under the Constitution of India."

We have been constrained to observe this because in at least three places the High Court has gone out of its way to refer to a sovereignty which does not exist.

44. Again it is wholly incorrect to refer to Entry 11A of List 3 and to state that since it is not extended to the State of Jammu & Kashmir, Parliament would have no legislative competence to enact Sections 17A and 18B of SARFAESI. There are at least three errors in this conclusion. First and foremost, it is not possible to dissect the provisions of SARFAESI and attach them to different Entries under different Lists. As has been held by us, the whole of SARFAESI is referable to Entry 45 and 95 of List I. Secondly, what has been missed by the impugned judgment is that Entry 95 List I is a source of legislative power for Parliament for conferring power and jurisdiction on the District Court and the High Court respectively in respect of matters contained in SARFAESI. And third, the subject "Administration of Justice" is only general and can be referred to only if Entry 95 List I read with Entry 45 List I are not attracted. We are afraid that despite the judgment in **Narottamdas Jethabai** and **Jamshed Guzdar's case** (supra)**,** the High Court, even though it refers to **Narottamdas Jethabai,** has completely missed this crucial aspect. Most importantly, even if it is found that Section 140 of the Jammu & Kashmir Transfer of Property Act entitles only certain

persons to purchase properties in the State of Jammu & Kashmir, yet, as has been held hereinabove, Rule 8(5) proviso which recognizes this provision, has been brushed aside. In any case an attempt has first to be made to harmonise Section 140 of the Jammu & Kashmir Transfer of Property Act with SARFAESI, and if such harmonization is impossible, it is clear that by virtue of Article 246 read with Section 5 of the Jammu & Kashmir Constitution, Section 140 of the Jammu & Kashmir Transfer of Property Act has to give way to SARFAESI, and not the other way around.

45. Reliance has also been placed on Article 35A of the Constitution as it applies to the State of Jammu & Kashmir. The said Article reads as follows:

> "35A. *Saving of laws with respect to permanent residents and their rights*- Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,-
>
> (a) Defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
>
> (b) Conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects-

(i) employment under the State Government;
(ii) acquisition of immovable property in the State;
(iii) settlement in the State; or
(iv) right to scholarships and such other forms of aid as the State Government may provide,

Shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part."

46. We fail to understand how Article 35A carries the matter any further. This Article only states that the conferring on permanent residents of Jammu & Kashmir special rights and privileges regarding the acquisition of immovable property in the State cannot be challenged on the ground that it is inconsistent with the fundamental rights chapter of the Indian Constitution. The conferring of such rights and privileges as mentioned in Section 140 of the Jammu & Kashmir Transfer of Property Act is not the subject matter of challenge on the ground that it violates any fundamental right of the Constitution of India. Furthermore, in view of Rule 8(5) proviso, such rights are expressly preserved.

47. We find that the High Court judgment ultimately states:

"It is held that the Union Parliament does not have legislative competence to make laws contained in section 13, section 17(A), section 18(B) section 34, 35 and section 36, so far as they relate to the State of J&K;

> It is further held that in view of the aforesaid declaration, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot be enforced in the State of J&K;
>
> It is further held that the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 can be availed of by the banks, which originate from the State of J&K for securing the monies which are due to them and which have been advanced to the borrowers, who are not State subjects and residents of the State of J&K and who are non State subjects/ non citizens of the State of J&K and residents of any other State of India excepting the State of J&K."

Having held that the provisions of SARFAESI cannot be applied to the State of Jammu & Kashmir, it is a contradiction in terms to state that SARFAESI can be availed of by banks which originate from the State of Jammu & Kashmir for securing monies which are due to them and which have been advanced to borrowers who are not the residents of the State of Jammu & Kashmir.

48. We therefore set aside the judgment of the High Court. As a result, notices issued by banks in terms of Section 13 and other coercive methods taken under the said Section are valid and can be proceeded with further. The appeals are accordingly allowed with no order as to costs.

…….J.
(Kurian Joseph)

…….J.
(R.F. Nariman)

New Delhi;
December 16, 2016.