

(2015) 12 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1012 Of 2015, CMP No. 01 Of 2015,
Others Writ Petition (OWP) No. 1811 Of 2013 and CMP No. 2464/2014

Abdul Qayoom Khan

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 18-12-2015

Acts Referred:

Citation : (2015) 12 J&K CK 0001

Hon'ble Judges : Hasnain Massodi, J.

Bench : Single Bench

Advocate : B.A. Dar, Additional Advocate General, for the Respondent

Final Decision : Disposed Off

Judgement

Hasnain Massodi, J.—Flag is not a mere piece of cloth of a shape, design and colour. It reflects pain and agony suffered by people to

realise the dream of freedom. It's every strand is soaked in the blood of martyrs, tears of thousand who join their funeral procession and all those

left behind without a source of sustenance. The wails of millions crushed under wheels of oppression, run through weft and warp of the Flag. Flag

also depicts hope for a better future and resolve of masses to build a new polity based on values and ideals close to their heart. It is symbol of unity

amongst different sections of population. It binds people and blends past with future.

2. Flag is in use with different shapes, colours and designs to serve different purposes, from 3rd millennium B.C. Initially used as a general tool of

signalling and identification, it served as a heraldic device in middle ages. The upswing in sea trade brought out importance of flag. Its use on ships

was made compulsory to indicate their nationality. With the advent of time, flag assumed the status of a symbol of national aspirations and dreams

and to mirror past, present and future. Netherlands was probably the first country to have a flag in ninth century A.D. with the features of a

National Flag followed by Denmark that adopted national flag in fifteenth century (1478 AD). Such is the importance of Flag that nations around

globe on attaining freedom have all along entrusted duty to decide on the flag, not to a statutory body or even legislature, but to the Constituent

Assembly, convened to frame the Constitution. The decision on Flag is treated, as important a task, as deciding on fundamentals of the

Constitution.

3. This explains why the decision on National Flag was left to Constituent Assembly of India. The Constituent Assembly realizing importance of

National Flag, constituted an ad-hoc committee headed by Dr. Rajinder Prasad, with Abdul Kalam Azad, K.M. Panikar, Sarojni Naidu, C.

Rajagopalachari, K.M. Munshi and Dr. B.R. Ambedkar as its members, to design Flag for free India. The committee made its recommendations,

after thorough discussion and the Constituent Assembly adopted tri-colour as National Flag on 22nd July 1947. Constituent Assembly of Jammu

& Kashmir State like Constituent Assembly of India also took upon itself important task to decide on the State Flag and after threadbare

discussion passed resolution moved by Leader of the House in this regard on 7th June 1952 and adopted the State Flag. The decision taken finds

place in Section 144, Constitution of Jammu and Kashmir.

4. The Parliament enacted the Emblem and Names (Prevention of Improper Use) Act, 1950, and Prevention of Insult to National Honour Act,

1971. Both Acts are aimed at preventing dishonour to the National Flag. The Central Government also notified Flag Code of India, which though

without Statutory flavour, is nonetheless to be abided by to show respect to the National Flag. Both the Acts are extended to State of Jammu and

Kashmir. The State Legislature followed same course and enacted J&K Prevention of Insult to State Honours Act, 1979. The Act, like Central

Acts, is aimed at maintaining sanctity of and preventing insult to the Flag of the State. It declares ""bringing into contempt"" Flag of the State, whether

by words either spoken or written or acts, an offence punishable with

imprisonment or with fine.

5. Petitioner aggrieved that the State Flag was not being hoisted on the buildings housing offices of Constitutional authorities and on the official cars

used by such authorities in compliance of Executive instructions, filed writ petition, being OWP No. 1811/2013. His grievance was that failure to

hoist the Flag amounted to contempt of the 'Flag of the State' and breach of law, and intervention was warranted to ensure that honour and sanctity

of the State Flag was maintained. He was also aggrieved that State Government was not celebrating the day, the Constituent Assembly of State

adopted State Constitution. He on strength of averments made in petition, sought following relief:

i) by writ of mandamus, commanding all Constitutional Authorities, which are created and function under the Constitution of Jammu and Kashmir,

to use the Flag of the State in all their official Cars, Offices, Buildings wherever the offices of Constitutional Authorities are located;

ii) by writ of mandamus, commanding all Constitutional Authorities to celebrate Republic Day of the State of Jammu and Kashmir when it adopted

the Constitution of the State/Constitution becoming enforceable with dignity and honour demonstrating the sanctity of the State Flag.

6. It appears that State Government, during pendency of writ petition, issued a Circular being Circular No. 13-GAD of 2015 dated 12th March

2015. The Circular, in effect, redressed grievances voiced in writ petition (OWP No. 1811/2013). It reads:--

Circular No. 13-GAD of 2015

Dated : 12. 03. 2015

As per the Constitution of Jammu and Kashmir and the Delhi Agreement of 1952 and keeping in view the historical background, the State Flag has

the same sanctity and position as the Union Flag has under the Indian Constitution and other statutory provisions. Therefore, this sanctity and

position has to be maintained at all costs. It's non-hoisting along with the Union Flag amounts to insult to the Flag as per the provisions of the

Jammu and Kashmir Prevention of Insult to State Honors Act 1979.

All the Constitutional Authorities are enjoined upon to maintain the sanctity of the State Flag, at all costs, as is being done in respect of the Union

Flag. The Flag shall always be hoisted jointly on the buildings housing

Constitutional Institutions and shall be used on the official cars of

Constitutional Authorities. Any deviation in this regard shall amount to insult to the Jammu and Kashmir Prevention of Insult to State Honors Act, 1979.

7. The Circular was endorsed to Private Secretaries to all Constitutional authorities and other key Government officials to ensure that the Flag of

the State (State Flag for short) was given respect envisioned under Section 144, Constitution of Jammu and Kashmir read with Section 2, J&K

Prevention of Insult to State Honours Act, 1979. This was sufficient to end controversy. However, Commissioner/Secretary to Government,

General Administration Department, a day after aforementioned Circular, issued Circular No. 14-GAD of 2015 dated 13th March 2015

withdrawing circular No. 13-GAD of 2015 dated 12th March 2015. It reads:

Circular No. 14-GAD of 2015

Dated 13.3.2015

The Circular No. 13-GAD of 2015, dated 12.03.2015 issued under endorsement No. GAD(L)F-51/2014, dated 12.03.2015, is hereby withdrawn.

Sd/-

(M.A. Bukhari) IAS,

Commissioner/Secretary to Government

General Administration Department

NO:GAD(L)F-51/2014

Dated: 13.03.2015.

8. Petitioner aggrieved with Circular No. 14-GAD of 2015 dated 13th March 2015 has filed another writ petition, being OWP No. 1012/2015.

Petitioner insists that Circular No. 14-GAD of 2015 dated 13th March 2015 is violative of Section 144, Constitution of Jammu and Kashmir,

inasmuch as the Circular, in essence, permits non-hoisting of the Flag of the State and frees Constitutional authorities of duty to maintain sanctity of

the Flag. He, on grounds urged in petition, seeks quashment of Circular No. 14-GAD of 2015 dated 13th March 2015 and also enforcement and

implementation of Circular No. 13-GAD of 2015 dated 12th March 2015.

9. Respondents, in their reply, admit almost all averments made in petition. It is admitted that the State Flag is required to be hoisted by all

Constitutional authorities on official buildings and on official vehicles. Respondents go a step further to insist that every citizen is bound to respect

and maintain sanctity of the State Flag as mandated under Section 144, Constitution of Jammu and Kashmir read with J&K Prevention of Insult to

State Honours Act, 1979. It would be advantageous to reproduce paragraph 01 of counter affidavit filed by respondents in response to writ

petition:

(1)[As] per the State Constitution, the State Flag has the same sanctity and position as the Union Flag and in, view of

historical reasons, the State Flag is being honoured and respected in the State by all the constitutional authorities by hoisting the same on official

buildings and flying it on the officials vehicles. It is obligatory on every citizen as well as on every Constitutional Authority to maintain the sanctity of,

and respect, the State Flag in terms of the Constitutional provisions and the Jammu and Kashmir prevention of Insult to State Honour Act, 1979.

There is a stated position under Section 144 of the State Constitution about the State Flag and thus no further action needs to be taken as that

would be laboring the obvious. Accordingly, there is no need to issue any executive instructions/circular/Government order impressing upon the

Constitutional Authorities to honour it when the fact of the matter is that everybody is expected to know the legal position on the issue as ignorance

of law is no excuse. Anybody who contravenes or goes against the stated constitutional position with regard to the hoisting of the State Flag shall

invite action under the Jammu and Kashmir Prevention of Insult to State Honour Act, 1979, which makes the offence punishable. As regards the

celebration of 17th November as Republic Day of the State, it is submitted that it is not obligatory for the State to celebrate Republic day as there

is no Constitutional provision or any statute which makes it obligatory upon the State to celebrate 17th November as the Republic Day of the

State. Filing of CMP is a matter of record. Rest of the averments are denied.

10. Respondents maintain that as position as regards sanctity of the State Flag is stated in Section 144, Constitution of Jammu and Kashmir,

issuance of Circular No. 13-GAD of 2015 dated 12th March 2015 was

unwarranted and was, therefore, withdrawn. It is pleaded that authorities of the State are not required to be reminded of their duty to respect the State Flag.

11. Petitioner in his rejoinder affidavit assails the stand taken in counter affidavit as ""loaded with malice"". Respondents, according to petitioner, have failed to disclose reasons for issuance of Circular No. 13-GAD of 2015 dated 12th March 2015 and its subsequent withdrawal vide Circular No. 14-Gad of 2015 dated 13th March 2015. It is insisted that Circular No. 13-GAD of 2015 dated 12th March 2015, would presuppose a duty cast on the people at large and Constitutional authorities in particular to maintain sanctity of the State Flag. Constitutional authorities, it is contended, are to maintain sanctity by hoisting the State Flag on official buildings and official cars used by them.

12. I have gone through pleadings and heard learned counsel for parties.

13. Flag, as stated above, is symbol of struggle to achieve goals of freedom movement as also of values that form edifice of polity proposed to be created. It connects past with present and future. Flag while reminding us of struggle made by the people and their sacrifices also makes us aware of our aspirations. Hon'ble Supreme Court in Union of India (UOI) Vs. Naveen Jindal and Another, , in the context of right of every citizen to fly the National Flag as part of freedom of speech and expression guaranteed under article 19(1)(a), Constitution of India observed:

8. A National Flag"" as pointed by Lt. Cdr. K.V. Singh in his book 'Our National Flag' is the most solemn symbol of a country. Be it a Head of the State, King or peasant, salutes it. A piece of cloth called the National Flag stands for the whole nation, its honour and glory. When it goes up the flag mast, ""the heart of a true citizen is filled with pride."" In his foreword to this very book, Mr. R. Venkataraman, former President of India, referred to the struggle for independence and said as under :

Our flag, therefore, is both a benediction and beckoning. It contains the blessings of all those great souls who brought us to freedom. But it also beckons us to fulfill their vision of a just and united India. As we confront crucial challenges to our security, our unity and integrity, we cannot but heed to the call of this flag to rededicate ourselves to the establishment of that peaceful and just order wherein all Indians irrespective of creed,

caste or sex will fulfil themselves.

9.

10.

11. As said by Pandit Jawahar Lal Nehru, the flag is, "a flag of freedom not for ourselves, but a symbol of freedom to all people who may seek it.

(See Constituent Assembly Debates, 22nd July 1947, p. 766) It was not to be the flag of the rich or wealthy, but it is to be the Flag of the

depressed, oppressed and submerged classes all over the country. (See the views of Shri V.I. Muniswami Pillai, in Constituent Assembly Debates,

22nd July 1947, p.771). This flag was to be the flag of the Nation, not the flag of any particular community, but the Flag of all Indians. As declared

by Shri Frank Anthony, "while this is a symbol of our past, it inspires us for the future. This flag flies today as the flag of the nation, and it should be

the duty and privilege of every Indian not only to cherish and live under it, but if necessary, to die for it." (See Constituent Assembly Debates, 22nd

July 1947, p. 780)

12. The significance of the National Flag was aptly portrayed by Pandit Govind Malaviya who said, "The importance of a National Flag does not

depend on its colour, its bands or its other parts. The flag as a whole, is important and other things-the colours etc, that it contains- are immaterial.

The flag may be of a piece of white cloth or of any other insignificant material but when it is accepted as a National Flag, it becomes the emblem of

national self-respect. It becomes an expression of the sense of freedom of a nation.

13.

14. National Flags are intended to project the identity of the country they represent and foster national spirit. Their distinctive designs and colours

embody each nation's particular character and proclaim the country's separate existence. Thus it is veritably common to all nations that a national

flag has a great amount of significance. In order that the respect and dignity of the flag be fostered and maintained, several countries have laid down

rules relating to the use, display, etc. of the flag, along with rules to provide against the burning, mutilation and destruction of the flag. At this stage

we would like to deal with the question as to how flying of national flag is understood by other countries. The question at hand relates to how many

countries allow the free use of the national flag by the citizens. In stark contrast to the role the flag has played in the freedom struggles, in several

countries, the usage of the flag has become a virtual sole prerogative of the government.

14. State of Jammu and Kashmir is only State in the Union that has its own Flag adopted by its Constituent Assembly, and provided in its

Constitution. The State Flag is one of the attributes of Constitutional autonomy or limited or residual sovereignty - by whatever name we call it,

enjoyed by the State of Jammu and Kashmir. The present discussion on plea raised is therefore, embedded in discourse on extent and scope of the

autonomy or limited sovereignty available to the State.

15. It may be recalled that the State of Jammu & Kashmir in terms of Constitutional framework agreed upon, convened Constituent Assembly to

frame its Constitution. In Ashok Kumar and others Versus State (SWP No. 1290/2014, MP No. 1685/2014 c/w SWP No. 2777/2013, MP No.

4089/2013 (dated 9th October 2015) Division Bench of this Court while tracing background of autonomy enjoyed by the State and its contours,

observed:

23. The Constitutional framework worked out by Dominion of India and the State reflected in Article 370 has its roots in paras 4 and 7 of

Instrument of Accession. It in the first place, provided for convening of a Constituent Assembly to frame Constitution of the State. Reference, in

this regard, may be made to Clause (2) and proviso to Clause (3) of Article 370. The Head of the State issued a proclamation on May 1st 1951

for convening the Constituent Assembly for the State, to decide the future of the State. The object of the Constituent Assembly as stated by Mr.

Ayanger, was to determine ""the Constitution of the State as well as sphere of Union jurisdiction over the State"". The Constituent Assembly was

also to take a final call on the application of laws made by the Parliament to the State in consultation with or with the concurrence of the State

Government. The Constituent Assembly commenced its proceeding on 31st October, 1951. The Constitution was adopted on November 17th

1956 and the members put their signatures on the Constitution on November 19th 1956. The Resolution to dissolve the Constituent Assembly was

passed on November 17th 1956 and the Assembly dissolved on January 25th

1957. The Constitution of Jammu and Kashmir came into force on January 26th 1957. The State unlike other States of the Union, therefore, has its own Constitution with Preamble reflecting core constitutional values, Directive Principles of State Policy, mapping out its constitutional goals, the extent of its executive and legislative powers and its relationship with Union of India etc. etc.

24. The other facet of the Constitutional arrangements agreed upon, related to special status of the State, allowing it to exercise powers on the subjects that in case of other States were within exclusive domain of the Union Government, and restricting power of the Union Government to legislate on such subjects, by making it, subject to consultation or concurrence of the State Government within the meaning of paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d), Article 370. In terms of Article 370 Parliament's legislative power over the State is primarily confined to three subjects mentioned in the Instruments of accession i.e. Defence, Foreign Affairs and Communications. The President, however, has power to extend to the State other provisions of the Constitution as also other laws, that relate to the subjects specified in the Instrument of Accession. While extending such provisions and laws, the exercise of the power involves consultation with the State Government.

In such matters, only "consultation" is required as the State is taken to have accepted the Instrument of Accession, therefore, dispensing with the requirement of concurrence. The President has even power to extend other provisions of the Constitution or other laws not related to subjects enumerated in the Instrument of Accession to the State provided the State Government gives concurrence to extension of such Constitutional provisions, application of laws. In other words, laws on subjects included in the Union List and Concurrent List may be extended in consultation with State Government while laws on other subjects are to be extended to the State only with concurrence of the State Government.

16. It was further observed:

25. Article 370 of the Constitution embodies conceptual framework of relationship between Union of India and State and lays down broad features of special status granted to the State. It, as already pointed out, at the same time confers power on the President to deal with the areas

otherwise within domain of the State, subject to consultation or concurrence with the State. Article 370 is the only provisions of the Constitution

that applies to the State, on its own. The only other provision applied to the State by the Constitution itself, is Article 1 made applicable by sub

clause (c) clause (1) Article 370. The Constituent Assembly in terms of proviso to Clause (3) Article 370 is conferred power to recommend to the

President that Article 370 be declared to cease to be operative or operate only with the exceptions and modifications mentioned in the

recommendation, if any so made. It is only on such recommendations that the President in terms of Clause (3) Article 370 of the Constitution may,

by public notification, declare that Article 370 shall cease to be operative or shall be operative only with such exceptions and modifications and

from such date, specified in the notification. The Constituent Assembly did not make such a recommendation before its dissolution on January

25th, 1957. Resultantly, Article 370, notwithstanding its title showing it a ""temporary provision"" is a permanent provision of the Constitution. It

cannot be abrogated, repealed or even amended as mechanism provided under Clause (3) of Article 370 is no more available. Further more,

Article 368 cannot be pressed into service in this regard, inasmuch as it does not control Article 370 - a self contained provision of the

Constitution.

17. Article 370, Constitution of India, cannot be abrogated, repealed or even amended, not only because mechanism provided under Clause (3)

Article 370 is no more available, but also because Constituent Assembly is presumed to have taken informed decision, not to recommend

modification or change in the Article and to allow it to remain in the same form even after Constitution of the State came into force on 26th January

1957. The expression ""temporary"" or ""transitional"" is used only to indicate that Constituent Assembly envisioned by Article 370 was to take a final

decision as regards Constitutional relationship between the State and the Union. Two important aspects of the Constitutional autonomy i.e., nature

of ""consultation"" and ""concurrence"" contemplated under Article 370 and change in extent of autonomy, also need to be examined, in the present

context.

18. It hardly needs any emphasis that Article 370, reflects solemn pledge made

by people of country through duly elected Constituent Assembly to people of Jammu and Kashmir that the powers of the Union would be restricted to subjects mentioned in the Instrument of Accession and such constitutional provisions, as are extended by the President in "consultation" with or "concurrence" of Government of Jammu and Kashmir and that the State shall have autonomy as regards all other matters. It is to be appreciated that with extension of the constitutional provision or law to the State, there is corresponding decrease in the sphere of autonomy of the State. By giving consent to extension of a constitutional provision or law, the people of State concede or surrender part of the autonomy covered by extended constitutional provision or law. As "consultation" or concurrence" is to affect autonomy of the State, it is consent of people of State conveyed through their duly elected Government that is contemplated under Article 370, Constitution of India. "Consultation" or "concurrence", therefore, cannot be that of Governor when the State is placed under Governor's Rule under Section 92, Constitution of Jammu and Kashmir, or Presidential rule under Article 356, Constitution of India. President of India cannot have "consultation" with Governor or seek his "concurrence" while extending Constitutional provision to the State or applying a law to the State, as the Governor having been appointed by President in terms of Section 27, Constitution of Jammu and Kashmir, it would not be "consultation" or "concurrence", contemplated under Article 370 Constitution of India. The Governor may be taken as "Government for exercise of executive power during such rule, but not for "consultation" and "concurrence" required under Article 370 of the Constitution. This would amount to having consultation with or seeking concurrence of oneself and not representatives of people affected by the decision.

19. Other aspect of Constitutional autonomy, enjoyed by the State under Constitutional framework reflected in Constitution of Jammu and Kashmir and Article 370, Constitution of India, relates to change or modification in extent of autonomy by an amendment to the Constitution of Jammu and Kashmir. Constituent Assembly of the State met on 31st October 1951. The Assembly on 5th November 1951 constituted Basic Principles Committee headed by Leader of the House (Prime Minister) and comprising of 17 members to make its recommendations as regards

basic features of proposed Constitution, to Drafting Committee. The Committee after discussions and deliberations recommended amongst others

secular socialist character of the polity, democracy, elected Head of the State as basic framework of the proposed Constitution. Constitution was

drafted and thereafter adopted having due regard to recommendations made by Basic Principles Committee. The essence of recommendations

made by Basic Principles Committee and reflected in Constitution of Jammu & Kashmir, was to preserve and maintain autonomy of the State.

20. Constitution of a country, as stated by Hans Kelson, noted jurist and philosopher in his treatise, ""Pure Theory of Law"" is Grundnorm or

fundamental law of the State. All norms are to conform to the basic or fundamental norm. A norm or law in conflict with Grundnorm or

fundamental law, is void. The Constitution itself has fundamental features that cannot be modified or changed as any such modification or change is

to damage and destroy the fabric of Constitution. While legislature is given power to suitably amend the Constitution or fundamental law, to keep

pace with changing circumstances and meet new challenges, the power does not extend to amendment of 'Basic Structure' of the Constitution. An

amendment to any of the Constitutional provisions that changes ""Basic Structure"" of the Constitution, is void like a law that offends the

Constitution.

21. Basic Structure doctrine, laid down by Constitutional Bench of Hon'ble Supreme Court in His Holiness Kesavananda Bharati Sripadagalvaru

Vs. State of Kerala, provides that power of amendment cannot be exercised so as to damage or destroy essential elements or ""basic structure"" of

the Constitution, whatever these expressions may comprehend. The theory of basic structure is woven out of conspectus of Constitution and

amending power is subjected to it, because changing Basic Structure is a ""constituent power"" available to Constituent Assembly and not constituent

or legislative power available to Legislature. The principle was reiterated or discussed in Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and

Another, ; Minerva Mills Limited v. Union of India (AIR 1980 SC 1798); Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and

Others, ; State of Karnataka Vs. Union of India (UOI) and Another, ; High Court of Judicature at Bombay through its Registrar Vs. Shirish

Kumar Rangrao Patil and another, ; and recently in Supreme Court Advocates on Record versus Union of India (2015) AIR SCW 5457. It is

neither possible nor proper to make an exhaustive list of features that constitute ""Basic Structure"" of a Constitution. It has been held that for

determining what part or feature of Constitution is its ""Basic Structure"", one has perforce to examine in each case, place of particular feature in the

Constitutional scheme, its object and purpose and consequence of its amendment on the integrity of the Constitution. Supremacy of the

Constitution, democracy, independence of judiciary, rule of law, socialist, secular foundation of polity are amongst the Constitutional features that

have been held to constitute ""basic Structure"" of the Constitution and therefore not amendable in exercise of amending power provided under the

Constitution.

22. 'Basic structure doctrine' would be applicable wherever spread and sweep of amending power conferred under Constitution on legislature to

amend it, is under discussion. Both the Constitution of India and Constitution of Jammu and Kashmir have come into being through same process

and have same origin. In both cases a duly elected Constituent Assembly was convened or convoked with the specific task of framing Constitution

for the country and for the State respectively. What is true about Constitution of India as regards, ""Basic Framework of the Constitution"" is true

about Constitution of Jammu and Kashmir.

23. 'Constituent power' is to be distinguished from legislative power. State legislature does not have ""Constituent power"". Section 147, State

Constitution does not make mention of ""Constituent power"", though expression is used in Art 368 Constitution of India. Even if state legislature is

said to have ""Constituent Power"" such ""Constituent Power"" is different from the ""Constituent power"" of the Constituent Assembly. It is to be

appreciated that at the time Constitution is framed, ""Constituent Power"" is unfettered and without any limits. Constituent Assembly in exercise of its

Constituent power is free to frame a Constitution with framework as agreed upon by it. But once Constitution is framed, the ""constituent power"" is

limited by ""Basic Structure"" of the Constitution and cannot be exercised to change ""Basic structure"" of the Constitution. Amending ""Basic

Framework"" of the Constitution is therefore beyond amending power of the

State Legislature.

24. Constitutional autonomy guaranteed to the State is ""Basic Structure"" of State Constitution and beyond amending power available to the State

Legislature under Section 147 of the Constitution. One of important facets of autonomy enjoyed by the State and therefore ""Basic Structure"" of the

State Constitution as recommended by Basic principles committee, was ""elected Head of State"". Section 26 of Constitution provided that Head of

the State (Sadri Riyasat) shall be elected in the manner, provided under Section 27. The Head of the State as provided under Section 27, of the

Constitution, was to be elected by people of the State through their representatives in State Legislatures. The Constitution of Jammu & Kashmir

(Sixth Amendment) Act 1965 amended the State Constitution and replaced ""Sadri Reyasat"" by Governor. In terms of aforesaid amendment

Governor is appointed by the President and is to be Head of the State. The office of Head of the State in wake of amendment ceases to be

elective"". The sixth amendment therefore did not merely change the nomenclature but the eligibility, mode and method of appointment of Head of

the State. The ""elective"" status of Head of the State was an important attribute of Constitutional autonomy enjoyed by the State, a part of ""Basic

Framework"" of the State Constitution and therefore not within the amending power of the State legislature. It is questionable whether Constitution

of Jammu & Kashmir (sixth Amendment) Act, 1965, to the extent it amended Section 26 and 27 of Constitution of Jammu and Kashmir and all

connected provisions of the Constitution, satisfies the ""Basic Structure"" doctrine and falls within the ambit of power under section 147 of the State

Constitution. In absence of challenge to Jammu & Kashmir Constitution (sixth Amendment) Act 1965, it would be appropriate to leave it to State

Legislature to consider the matter and take measures as required to uphold the Constitution. The Legislature is equally under a constitutional

obligation to uphold the Constitution and rectify an error, wherever necessary. A Jurist has said that ""to perpetuate an error is no heroism and to

rectify it is compulsion of conscience"". Be that as it may ""Constitutional autonomy"" of the State provided under Constitution of Jammu & Kashmir,

is ""Basic Structure"" of the Constitution and beyond amending power of State Legislature under section 147, Constitution of Jammu & Kashmir.

25. After a brief over view of the extent of the Constitutional autonomy, also called as limited or residual sovereignty, rendered necessary because

of questions raised in the present petition, let us again shift focus to the State Flag and grievance voiced by petitioner. Constituent Assembly of

India, as already stated, on 23rd June 1947 set up an ad-hoc committee to select Flag for Independent India. Pandit Jawahar Lal Nehru moved

proposal to adopt the Flag, recommended by committee on 22nd July 1947. The resolution was approved unanimously. The Flag served as

National Flag of Dominion of India between 22nd of July 1947 and 15th August 1947 and from 15th August 1947 is National Flag of free India.

26. The sentiments expressed in the Constituent Assembly of India were echoed in the Constituent Assembly of the Jammu & Kashmir. The leader

of house (Prime Minister) on 7th June 1952 while moving resolution for adoption of ""Flag"" of Jammu and Kashmir State, stated:

While framing the Constitution of the country, the question of Flag is of great importance. As a rule every nation of the world has its aspirations,

ambitions, desires, aims and objects. The symbol of all the desires and aspirations of a country is its flag. When the old system, which has trampled

upon the hopes of this country is dying and the resplendent sun of freedom is rising in the horizon, it is necessary that a symbol for the country

should be adopted which should represent the hopes and desires of people.

The mover of resolution and participants in debate highlighted features of the Flag and sentiments these represented. Three parallel strips on Flag

were said to represent three regions of the State, its colour to reflect ideals of secularism and the plough respect for peasants and workers. One of

the participants said ""the Flag is to be protected with the same intensity of zeal and alertness, we protect our face"".

27. The State Flag proposed by leader of the House, was adopted on Saturday, the 7th June 1952. The question of separate Flag adopted by the

Constituent Assembly on 7th June 1952, came up for discussion between a delegation headed by a senior Minister in the State Government and

representatives of the Government of India. There was no disagreement between parties as regards adoption of the ""Flag of the State"" by

Constituent Assembly. Statement in this regard was made by the leader of House in Constituent Assembly on 11th August 1952. He said:

We agreed that in view of the clarifications issued by me.....it was obvious that the new State Flag was in no sense rival of the National flag. But

for historical and other reasons connected with the freedom struggle in the State, the need for continuance of this Flag was recognized. The Union

Flag to which we continue our allegiance as part of the Union will occupy the supremely distinctive place in the State.

The decision taken by Constituent Assembly on 7th June 1952 got reflected in Section 144, Constitution of Jammu and Kashmir. It reads as

under:

144. Flag of the State.--The Flag of the State shall be rectangular in shape and red in colour with three equidistant white vertical strips of equal

width next to the staff and a white plough in the middle with handle facing the strips.

28. State Legislature as a follow up, enacted J&K Prevention of Insult to State Flag Act, 1979. The Act, as stated by the parties, in their

pleadings, is intended to prevent disrespect to State Flag and makes it an offence to ""bring into contempt"" the State Flag. Section 2 of the Act is

illustrative in character and would include any omission or commission that may involve ""bringing into contempt"" the State Flag. It also prescribed

punishment for any of the acts mentioned therein. It is pertinent to point out that while Constitution of India does not have specific provision,

providing for National Flag, except Article 51A (a) of the Constitution that includes duty to respect National Flag amongst fundamental duties of

every citizen of India, the Constitution of Jammu and Kashmir has a specific provision - Section 144 that provides for State Flag. Once Section

144, Constitution of Jammu and Kashmir provides for ""Flag of the State"", it by implication casts duty on Constitutional authorities and other State

functionaries, representing different wings of the State, to show respect to the State Flag it deserves, as a symbol of the State. In case of State of

Jammu and Kashmir because of a specific Constitutional provision, even an omission may amount to disrespect to the State Flag. Such omission

would include failure to hoist the Flag by persons and at places required, to maintain sanctity of the Flag. Section 144 of the State Constitution is to

be read with various Constitutional provisions whereunder Constitutional authorities, i.e. Governor, Chief Minister, Ministers, Judges of the High

Court, are required to subscribe to the oath to uphold the Constitution. The oath obviously would, as well, include upholding Section 144 of the State Constitution.

29. The State Government alive to Constitutional mandate issued Circular No. 13-GAD of 2015 dated 12th March 2015, impressing upon all

Constitutional authorities to maintain the sanctity of the State Flag, at all costs, as is being done in respect of the Union Flag; that the Flag shall

always be hoisted on the buildings housing Constitutional Institutions and shall be used on the official cars of Constitutional Authorities; and that any

deviation in this regard shall amount to insult to the Flag within meaning of Jammu and Kashmir Prevention of Insult to State Honours Act, 1979. It

may be recalled that respondents in their counter affidavit do not dispute that Constitutional authorities are to maintain sanctity of State Flag and

respect the State Flag in terms of the Constitutional provisions and the Jammu and Kashmir Prevention of Insult to State Honour Act, 1979; that

there is a stated position under Section 144 of the State Constitution about the State Flag and non-hoisting of the Flag by Constitutional authorities

would amount to insult to the Flag.

30. The respondents, however, contend that said mandate or duty is clear and explicit in Section 144 of the State Constitution, and all concerned

were not to be reminded of their duty to respect the State Flag. They justify withdrawal of Circular No. 13-GAD of 2015 dated 12th March 2015

on said ground alone. The justification sought to be offered is far from convincing. Respondents were to realise that once it was found necessary to

enjoin upon all Constitutional authorities to respect the State Flag in the manner set out in circular No. 13-GAD of 2015 dated 12th December

2015, reminding them that they by not respecting the Flag in the manner indicated in the circular, may attract penal consequences under J&K

Prevention of Insult to State Honours Act, 1979, it was not open to respondents to withdraw circular by one line order without indicating reasons

for such withdrawal. It is a matter of common sense that once a person in terms of a written circular is required to act in a particular manner as

acting in the manner directed would be necessary to carry out mandate of law, the net effect of withdrawing such circular would be declaring that

the person need not act in the manner he was required to act in obedience to

Constitution and law.

31. Respondents by issuing Circular No. 13-GAD of 2015 dated 12th March 2015, enjoining upon all Constitutional authorities and thereafter

withdrawing it by a one line circular, have in effect conveyed the message that Constitutional authorities may not adhere to whatever was required

in terms of Circular No. 13-GAD of 2015 dated 12th March 2015. Circular No. 14-GAD of 2015 dated 13th March 2015 does not give any

reason for withdrawal of earlier circular, i.e. to hoist the Flag on the buildings housing Constitutional Institutions and on official cars of

Constitutional Authorities. The reason given in counter affidavit, is nothing except an afterthought and post facto justification for Circular No. 14-

GAD of 2015 dated 13th March 2015. True that Circular No. 13-GAD of 2015 dated 12th March 2015 may not have Statutory flavour, yet

circular having been passed to carry out mandate of Section 144, Constitution of Jammu and Kashmir, it could not have been withdrawn

conveying a message that Constitutional mandate was not required to be adhered to and sanctity of the State Flag maintained. Petitioner, as a

citizen of India and state subject, has right to seek enforcement of Constitutional mandate, The Jammu & Kashmir prevention of Insult to State

Honour Act, 1979 read with Circular No. 13-GAD of 2015 dated 12th March 2015. However, decision to celebrate the day when Constitution

was adopted is a matter that falls within domain of the State Government. It is for the State Government to decide whether the day is to be

celebrated or the manner in which it is to be celebrated. There is no provision under Constitution or law requiring the respondents to celebrate the

event. Relief sought in this regard, therefore would not be warranted.

32. For reasons discussed, Writ petition No. 1012/2015 is allowed and Circular No. 14-GAD of 2015 dated 13th March 2015 set-aside.

Resultantly circular No. 13-GAD of 2015 dated 12th March 2015 gets restored. Respondents and all Constitutional Authorities shall adhere to

and abide by mandate and spirit of Section 144, Constitution of Jammu and Kashmir, J&K Prevention of Insult to State Honour Act, 1979 and

Circular No. 13-GAD of 2015 dated 12th March 2015. Such adherence obviously is to include hoisting of State Flag on the buildings housing

offices of Constitutional Authorities and on vehicles used by such Authorities.

Writ petition No. 1811/2013 is also disposed of in terms of above direction.

33. Disposed of.