**CASE ANALYSIS OF STATE BANK OF INDIA VS. SANTOSH GUPTA**

 **“Though the State of Jammu and Kashmir enjoys a special a status it is not a state with absolute sovereignty. The Constitution of Jammu and Kashmir will always be subordinate to that of the Indian Constitution” AIR 2017 SC 25.**

 **SUBMITTED BY**

 **AMRUSHA SENGUPTA**

 **INTERN (BATCH 1)**

 **3RD YEAR**

 **ADAMAS UNIVERSITY KOLKATA**

 **Contact No- 7980150853/ 9831177403**

 **Email id- sengupta.amrusha@gmail.com**

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 **BRIEF FACTS OF THE CASE**

Many Permanent Residents of the State of Jammu and Kashmir had mortgaged their property to the State Bank of India, and took loan from the bank. After sometime the people who took loan from the bank failed to repay the loan, even after several warnings given by the bank they defaulted in the payment of the loan. After this the Bank filed a suit against the defaulters by invoking the SARFAESI (The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest) Act 2002 against the defaulters. The Bank invoked Section 13 of the SARFAESI Act, 2002 which allows the creditors to recover the money by selling the property of the debtors when there is a default. The residents of Kashmir on the other hand claimed that the bank cannot sell their property as properties in the State of Jammu and Kashmir cannot be transferred to a non resident and this is protected by Section 140 of the Transfers of Property Act, 1977 for the state of Jammu and Kashmir.

When the High Court of Jammu and Kashmir was hearing the case it held that there is a collusion between Section 13 of the SARFAESI Act, 2002 and Section 140 of the Jammu and Kashmir Transfers of Property Act, 1977 and the interest of kashmiri residents should be protected as the State of Jammu and Kashmir enjoys a Special Status under Article 370 of the Constitution of India. The High Court ruled in favor of the Kashmiri residents and an appeal has been made by the Bank before the Supreme Court and now the case of **State Bank of India vs.** **Santosh Gupta[[1]](#footnote-1)** is now pending before the Honorable Supreme Court.

 **ISSUES RAISED**

1. Can the SARFAESI Act (2002) be made applicable to the State of Jammu and Kashmir?
2. Can Parliament make laws for the State of Jammu and Kashmir as it has acquired a special status under the Indian Constitution?
3. Can Kashmir be regarded as a state which has absolute sovereignty?

 **ARGUMENTS ON BEHALF OF THE APPELLANT**

1. The learned counsel appearing on behalf of the appellant referred to the Constitution (Application to Jammu and Kashmir) Order, 1950 which states that though Kashmir has acquired a special statues by virtue of Article 370 of the Indian Constitution the Parliament has the exclusive power to make laws for the state of Jammu and Kashmir for those subjects which are listed at the Union list (List I) of the Seventh Schedule of the Indian Constitution.
2. The Appellant also argued that even the Constitution of Jammu and Kashmir, 1956 has an expressed provision under Section 3 which states that Jammu and Kashmir shall be an integral part of India. Section 5 of the Constitution of Kashmir also states that parliament can make laws relating to the matters which are specified in the Union List and Banking (Entry 45) is a part of the Union List, therefore the SARFAESI Act, 2002 should be made applicable.
3. The Appellant have argued to invoke to Doctrine of Pith and Substance as there had been collusion between the two laws i.e. Section 140 of the Jammu and Kashmir Transfers of Property Act, 1977 and Section 13 of the SARFAESI Act, 2002. Moreover it has been stated by the appellants that Article 35 A of the Indian Constitution is not of importance with regard to this case as Article 35 A restricts non kashmiri residents to buy property in Kashmir but in this case the transfer of property is on default of nonpayment and by selling the property bank will recover its loan it is not transferred for any other purpose. The Appellant referred to the judgment of State of West Bengal vs. Union of India[[2]](#footnote-2) , it was held in this case that India is a quasi federal state with a strong tilt towards the centre
4. The Appellant also argued that though the state of Jammu and Kashmir enjoys a special status the Constitution of Jammu and Kashmir shall always be subordinate to the Indian Constitution.

 **ARGUMENTS ON BEHALF OF RESPONDENT**

1. The learned counsel appearing on behalf of the respondent argued that Both the Constitution of India and of Jammu and Kashmir of sovereign and none one can be treated subordinate to each other they acquire the equal status.
2. The Doctrine of Pith and Substance cannot be made applicable because in this particular case, the transfer of property is in question and laws related to transfer of property is outside the scope of the parliament.
3. He argued that it is not enough under Article 370 of the Indian Constitution to confer power on parliament by a presidential order, every time the parliament enacts a law and to make it applicable in the state of Kashmir the concurrence of the State Government is required. Therefore to make the SARFAESI Act, 2002 applicable state government’s concurrence is required. Section 140 of the Kashmir Transfer of Property Act is in direct conflict with Section 13 of the SARFAESI Act, (2002) therefore the interest of the Kashmiri residents must be protected.
4. The respondent also relied on Article 35 A of the Indian Constitution which defines permanent residents for the State of Jammu and Kashmir and it also restricts the non Kashmiri people or companies to buy land. It argued that even the Indian Constitution protects the property rights of Kashmiri residents and this should be protected.

 **DOCTRINE OF PITH AND SUBSTANCE**

The Doctrine of Pith and Substance is a doctrine which is used when there is a conflict between two laws. Both the Parliament and State Legislature should be within the domain which has been assigned to by the Indian Constitution. A law made by one if encroaches the law made by the other that law becomes invalid. If the subject matter falls within the State List (list II) of the Seventh Schedule of the Indian Constitution then the State has the exclusive power to make laws. But if it falls within the Union List (List I) and Concurrent List (List III) of the Seventh Schedule in Indian Constitution then the parliament will be in a dominant position.

 In the Case of State Bank of India vs. Santosh Gupta, The SARFAESI Act (2002) was in conflict with the Transfers of Property Act, 1977 for the State of Jammu and Kashmir. Though the subject matters of both the Acts are different in this particular case a transfer of property was involved, however the transfer of debtor’s property was only to recover the loan and it was not a normal transfer by sale gift by means of which the bank will enjoy the property. Banking is a subject matter of Union List and even the Constitution of Jammu and Kashmir read with the Presidential Order, 1950 has stated that parliament has power to make laws regarding the subject matters which are a part of the Union List.

In the Case of Union of India vs. H.S Dhillon[[3]](#footnote-3), the question which was involved was that can the Centre impose wealth tax on assets which are a part of agricultural land, and agricultural land is a subject matter of the State List. The Supreme Court held that if a particular matter is not a part of the Union List then parliament has the exclusive power to deal with but if it is a matter of state list then state legislature shall the exclusive power

 **JUDGEMENT**

The Honorable Supreme Court held that there is no dual citizenship in India like in many other countries and the permanent residents of Jammu and Kashmir are citizens of India moreover Section 3 of the Constitution of Jammu and Kashmir makes it clear that Jammu and Kashmir will be an integral part of India. It also stated that Constitution of India and Constitution of Jammu and Kashmir do not have the equal status.

The Supreme Court held that no concurrence of State Government as stated under Article 370 of the Indian Constitution is required if the parliament makes law regarding the subject matters laid down in the Union List. It referred to the Judgment of Prem Nath Kaul vs. State of Jammu and Kashmir[[4]](#footnote-4) which held that Article 370 of the Indian Constitution is temporary in nature, with reference to this Supreme Court stated that a temporary provision will not come in the way of parliament when it makes law on matters which are a part of the Union List.

The Supreme Court held that Banking ( Entry 45) is a subject matter of the Union List and the purpose of the SARFAESI Act,2002 in respect of this case is to recover the debt from the property the bank will not enjoy the property for its own benefit. Therefore SARFAESI Act, 2002 is not to be said in pith and substance nor is it in repugnancy with Section 140 of the Jammu and Kashmir Transfers of Property Act. As Banking is a part of the Union list SARFAESI Act, 2002 will be applicable in the State of Jammu and Kashmir. Thus anything which comes in the way of the SARFAESI Act, 2002 will have to give away by virtue of Article 246 of the Indian Constitution and this can be extended to the State of Jammu and Kashmir.

The Supreme Court totally disagreed with the High Court of Jammu and Kashmir which stated that Kashmir is an absolute sovereign State. It referred to Section 3 of the Constitution of Jammu and Kashmir which states that Kashmir is an integral part of India. Further it made it very clear that the preamble of the Jammu and Kashmir Constitution has no reference to sovereignty .The Constitution of Jammu and Kashmir will always be subordinate to the Constitution of India.

The Supreme Court allowed the appeal and held that SARFAESI Act, 2002 shall be applicable in Jammu and Kashmir.

 **CRITICAL EVALUATION OF THE JUDGEMENT**

The Decision of the Honorable Supreme Court is totally valid and the reasons which have been specified by the Court are also reasonable. Though the Indian Constitution by virtue of Article 370 has given a special status to Kashmir but at this very point this special status was misused by the residents of Kashmir. The Kashmiri residents had mortgaged their property to the State Bank of India and in lieu of that property the bank had given them loan , the immovable property was a security to the bank and now when they defaulted in paying the loan the bank had to recover the debt by selling the property but the defaulters were not even agreeing to transfer their property to the bank as under Section 140 of the Transfers of property Act for the state of Jammu and Kashmir was protecting the defaulters as it restricted the transfer of property to non kashmiri residents . Due to Section 140 of the Transfers of Property Act, 1977 the bank was suffering a great loss the bank wanted those properties to recover the loan they did not want to enjoy the property or use the property for their personal benefit. Moreover the respondents also tried to misinterpret Article 35 A of the Indian Constitution which states that non Kashmiri residents cannot buy property in the state of Jammu and Kashmir however it did not state that in case of default in paying the loan a property cannot be taken by the bank to recover the loan. In this particular case the people of Kashmir tried to misuse their special status. Every law is made for the welfare of people but in this the respondents were misusing their special laws and intended to escape their liability to pay the money back to the bank. The Supreme Court prevented the misuse of law and made the SARFAESI Act, 2002 applicable in the State of Jammu and Kashmir.

 **PROBLEMS FACED BY BANKS TO RECOVER LOANS**

The Banks face problems in recovering the loans from the debtors and some of the problems which the banks face are discussed below.

1. The first and one of the major problems is that if someone has mortgaged their property and in lieu of that they have taken loan, when the debtor is at default the banks face a lot of problems in gaining the pocession of the property. In most cases the debtors do not agree to part with their properties as a result of which the banks have no option but to file cases on them to recover their loan.
2. The cases which are filed by the bans take a lot of time and the banks while defending itself before the court of law the banks need to hire an advocate and the fees charged by them also has to be paid by the bank which is an extra expenditure on the part of the banks.
3. The banks usually specify a time limit within which the debtor has to pay the amount, until the time is over the banks in between do not check on the debtors as to how much they are earning or what are their expenditure, whether he will be able to pay the loan or not. After providing a loan the banks usually do not check on the financial status of the debtor, they rely on the documents which were provided by the debtor at the time of taking the loan. As the banks do not maintain a check the debtors induce themselves into fraudulent activities and there are times when the claim to become insolvent in order to escape the liability of repaying the loan.

 **SOME PROBLEMS FACED BY THE DEBTORS**

It is not always the banks that face problems the debtors too face certain problems some of them are discussed below.

1. One of the problems which the debtor faces is that the property which will be sold by the bank is for the recovery of their loan as a result of which they sometimes do not consider the market value of the property rather they are only concerned about their loan amount and the fixing of price is also done according to that.
2. If the property is sold at a price greater than the loan amount then they return the excess to the debtor, however the money which has been returned is not a complete replacement of the property. Sometimes the money is so less that the debtors can neither start a business nor they can buy any property.

1. Another challenge which the debtors face when their property is attached due to nonpayment of bank loan is that their CIBIL score is affected. A CIBIL score is a record of scores which a person secures by paying their loan. The Banks or any other financial institution before proving a loan to any individual always check the CIBIL Score as it also records the past credit history. Due to this attachment the CIBIL score is also affected and as result of this the probability for them to get any loan in future decreases.

 **SUGGESTIONS**

Certain suggestions are discussed below which the banks should follow in order to reduce the inconvenience caused to them.

1. The banks usually give a time limit to the debtors within which they have to repay the loan, within that time period the banks usually do not track the income or expenditure of the debtor, they do not keep a track of debtors business if he has any, as to whether it is running in loss or having profits. In my opinion the banks should constantly monitor and keep a record. If the Banks keep a track and maintain records of the financial condition of the debtor then it will be easier for them when the time for repaying the loan comes. The Banks can show the records to the debtor if he refuses to pay money or he lies to the bank regarding his financial incapability of paying the loan. By keeping the records the probability of any unfair means on both the parts of the creditor and debtor reduces.
2. The Banks should also consider extending the time for repayment of loan if there is urgency. Obtaining the property and selling the property should be the last option for the bank and it should be specially made for them those who have means to pay the loan but they are not doing so just to escape their liability. Even if the Court passes any decree favouring the bank stating that the bank should now take the pocession of the property, in my opinion the bank should give the debtors a last opportunity of at least two to three months so that the debtors can pay the loan. Even after this if the debtors do not pay the loan then the bank can sell the property. But the debtors should be given a fair amount of time to repay the loan if the reason for non payment of the loan after the time limit is over is reasonable.
3. The banks usually auction the property and the bank should see to the matter that the property is sold at the market price, in this case the banks should fix the bidding price by taking in consideration the fact that if the sale is done at a greater price than the amount of loan then it will be easier for the debtor as the excess amount of money will go to the debtor, even though the money will not be a total replacement of the house but that money will be important to him, as something is better than nothing.
4. In my opinion the cases related to debt recovery must be dealt by The Debt Recovery Tribunal at the very first stage instead of approaching to the High Courts or District Courts, though they too have the jurisdiction to try the cases but for expeditious remedy it should go to the debt tribunal as this tribunal deals with cases of similar kind every day. If at very first the case is dealt by them the case will be disposed off faster as they only deal with this kind. If then also people are aggrieved there is always a provision of appeal.

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 **BRIEF ABOUT AUTHOR**

Amrusha Sengupta is a 3rd Year BA.LL.B (H) student from Adamas University. Her are of interests are Criminal Law, Corporate Law and International Law. She has participated in National Moot Court Completions and Intra College debates as well. She has published papers on various legal issues in many online law portals. She also has an interest is Legal Research currently she is a part of the Legal Research Team at Adamas University and she has also worked on a Research Project on “International Courts and Tribunals” at the Indian Society for Legal Research.

1. State Bank of India vs. Santosh Gupta, AIR 2017 SC 25 [↑](#footnote-ref-1)
2. State of West Bengal vs. Union of India, AIR 1963 SC 1241 [↑](#footnote-ref-2)
3. Union of India vs. H.S Dhillon, AIR 1972 SC 1061 [↑](#footnote-ref-3)
4. Prem Nath Kaul vs. State of Jammu and Kashmir, AIR 1959 SC 749 [↑](#footnote-ref-4)