



F.R.
M.

IN THE HIGH COURT OF SIKKIM AT GANGTOK
(WRIT JURISDICTION)

Writ Petition (C) No. 38 of 2007

Smt. Shraddha,
Wife of Shri Dhiraj Subedi
Resident of West Pendam,
Sakhu, East Sikkim.

...Petitioner

-Versus-

1. State of Sikkim,
Through the Chief Secretary,
Government of Sikkim,
Gangtok.
2. The High Court of Sikkim,
Through the Registrar General,
High Court of Sikkim,
Gangtok, East Sikkim.
3. State of Sikkim
Through the Secretary,
Department of Personnel,
Government of Sikkim,
Gangtok, East Sikkim.
4. State of Sikkim,
Through the Secretary,
Department of Law,
Government of Sikkim,
Gangtok, East Sikkim.

...Respondents.

For the petitioner:

Mr. B. Sharma, Sr. Advocate with Mr.
J.K. Kharka, Advocate.

For the respondents:

Mr. J.B. Pradhan, Additional Advocate
General, Sikkim with Mr. Karma
Thinlay, Government Advocate and Mr.
S.K. Chettri, Assistant Government
Advocate for Respondents No. 1, 3
and 4.

M.



Mr. A.K. Upadhyaya, Senior Advocate
with Mr. Ashim Chhetri and Mr. D.
Tewari, Advocates for Respondent
No. 2.

***Date of Hearing : 25.08.2009, 15.09.2009 and
24.11.2009***

Date of Judgment : 24.11.2009

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE**

JUDGMENT AND ORDER (ORAL)

Saikia, CJ

Heard Mr. B. Sharma, learned Senior Counsel assisted by Mr. J.K. Kharka, learned Counsel for the petitioner. Also heard Mr. J.B. Pradhan, learned Additional Advocate General, Sikkim with Mr. S.K. Chettri, learned State Counsel representing official respondents as well as Mr. A.K. Upadhyaya, learned Senior Counsel assisted by Mr. D. Tewari, learned Counsel appearing on behalf of respondent No. 2/High Court of Sikkim.

2. The two fundamental questions which have been agitated in this writ petition filed by the petitioner under Article 226 of the Constitution of India are as to (i) whether the reasons and grounds put forward by the State Government/respondents in expressing its



inability to accept the recommendation of the Full Court of the High Court of Sikkim (hereinafter referred to as 'High Court') for the appointment of one Judicial Officer under Sikkim Judicial Service (for short, 'SJS') are correct, reasonable, justified and tenable in law; and (ii) whether the concurrence given by the Hon'ble the then Chief Justice of the High Court alone instead of the High Court with the views of the State Government/respondents not to accept the recommendation of the Full Court of the High Court, is permissible under the law.

3. In order to resolve the issues raised herein, it would be appropriate to underline the relevant facts of the case in brief as revealed from a close perusal of the pleadings exchanged by and between the parties, being placed on record.

4. The High Court through its Registrar General published an advertisement on 14.09.2006 in a local English Daily Newspaper "Sikkim Express" inviting applications to fill up one post of Civil Judge-cum-Judicial Magistrate (1st Class) in the cadre of SJS in the (Grade III) so as to reach the Office of the Registrar General not later than 26.09.2006 by 4.00 PM. The advertisement is extracted hereunder:

" EMPLOYMENT NOTICE

Applications are invited to fill up one post of Civil Judge-cum-Judicial Magistrate (1st Class) in the cadre of Sikkim Judicial Service in the (Grade III) scale of pay

A.



of Rs.9000-250-10750-300-13150-350-14550 from candidates who are citizens of India; not more than 35 years of age as on 26.09.2006 and a holder of a degree in law granted by a University established by law in India.

2. Recruitment shall be made on the basis of a competitive written examination followed up by Viva Voce test, if found suitable for the same, to be held by the High Court.

3.(i) The written examination shall consist of:-

Paper-I. Procedural Law

- (a) Code of Civil Procedure,
- (b) Code of Criminal Procedure,
- (c) Indian Evidence Act and
- (d) Limitation Act.

Paper-II. Substantive Law

- (a) Hindu Law
- (b) Indian Contract Act
- (c) Sale of Goods Act
- (d) Partnership Act
- (e) Specific Relief Act
- (f) Transfer of Property Act
- (g) General Clauses Act and
- (h) Indian Penal Code.

Note: Each paper shall be of two and half hours duration and shall carry 200 marks each.

(ii) **Viva-voce:** This will carry 100 marks.

(A) Only those candidates shall be called for Viva-voce who shall obtain the highest marks in aggregate of both the papers in the written examination upto the extent of five times of the number of posts as specified in the advertisement inviting applications.

(B) Selection of candidates shall be made on the basis of the aggregate marks obtained in the written examination and Viva-voce.

3.(i) No person who has more than one wife living and no female candidate who is married to a person, who already has a wife living, shall be eligible for



appointment to the service unless the Governor, for special reasons, exempts such persons from the operation of the rule.

4. Application furnishing all the particulars of eligibility accompanied by attested copies of the following testimonials and three passport size photographs should be sent by 'Registered post acknowledgment due' so as to reach the undersigned not later than September 26, 2006 by 4.00 P.M.

- (i) Educational Qualifications,
- (ii) Enrolment certificate under the Advocates Act, 1961
- (iii) Certificate of Experience at the Bar,
- (iv) Certificate of Date of Birth,

5. Applications which are not accompanied by the relevant documents shall be rejected.

6. The candidates found eligible on preliminary scrutiny shall be called for written examination by the High Court.

7. No TA/DA will be paid for appearing in the examination and for the Viva-voce.

8. The Registry of the High Court of Sikkim reserves the right to accept or reject any application with or without any reason.

***VERY IMPORTANT NOTE:-**

Candidates are required to note that the High Court has proposed to the State Government the amendment of Rules for inclusion of Local Laws in Paper I and Constitutional Laws of India in Paper II. If the proposed amendments made in the regard are accepted by the State Government and notified in the mean time, then the above subjects will also be included in the written examinations the duration of which shall be three hours instead of 2 ½ hours.

Local Laws: -

- (a) Property Law,
- (b) Registration Law,
- (c) House Rent & Eviction Laws,
- (d) Land Law,
- (e) Court Fee & Stamp Laws,
- (f) Adoption Law,



- (g) Civil Courts Act,
- (h) Municipal Law,
- (i) Interpretation and General Clauses Act,
- (j) Notification on Issuance of Certificate of Identification,
- (k) Debt Law and
- (l) Rural Indebtedness Act.

Substantive Law:-

- (a) Constitutional Laws of India.

Meenakshi M Rai
Registrar General (O)
High Court of Sikkim
at Gangtok "

5. The petitioner, a Master Degree holder in Law (LL.M), being eligible for appointment to the said post, responding to the above quoted advertisement took the written test as well as the viva voce test along with other candidates.

6. The High Court in terms of the Sikkim Judicial Service Rules, 1975, as amended upto date (for short, 'the Service Rules') on the basis of the written test and viva-voce conducted for such purpose prepared on 16.12.2006 a Select List of six candidates mentioning its validity for one year including the petitioner in order of merit. Since the petitioner had been placed in first position, her name was recommended by the Full Court to the State Government for appointment as Civil Judge-cum-Judicial Magistrate of SJS.



7. The Select List dated 16.12.2006 along with the informations regarding total marks obtained by all the six candidates including the petitioner, as put on record, is reproduced hereinbelow:

“ HIGH COURT OF SIKKIM
GANGTOK

NOTICE

As directed, I notify the following informations regarding the total marks obtained by the following candidates in the Written Examinations and in the interview held by the Full Court today:-

Sl No.	Name	Roll No.	Paper I Total Marks 200. Marks obtained	Paper II Total Marks 200. Marks obtained	Vava Voce Total Marks 100 Marks obtained	Total
1.	Shri Ajay Kumar Shrivastava	38	106	93	43	242
2.	Miss Yousa Lachenpa	37	81	97	42	220
3.	Smt. Shraddha	19	84	89	72	245
4.	Miss Pema Lahmu	15	89	82	40	211
5.	Shri Dhiraj Subedi	04	89	79	41	209
6.	Miss Kessang Diki Bhutia	07	97	70	45	212

[2] The following Select List [valid for one year] has been prepared by the Full Court: -

1. Smt. Shraddha
2. Shri Ajay Kumar Srivastava
3. Miss Yousa Lachenpa
4. Miss Kessang Diki Bhutia.

[3] The Full Court has recommended the name of Smt. Shraddha to the State Government for her appointment as Civil Judge Cum Judicial Magistrate of the Sikkim Judicial Service.

By order.

Sd/-
(Harish Kumar Sharma)
Registrar General In-Charge
16-12-2006 ”

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8. However, the respondents did not take any action to appoint the petitioner to the post so advertised by the High Court. Accordingly, the petitioner approached the competent authority under the Right to Information Act, 2005 (for short, 'the Act') seeking certain informations as regards her appointment. In response to the application, the concerned officer under the Act informed the petitioner on 25.06.2007 that the informations sought for by her could not be provided in terms of section 8(1)(e) of the Act. Thereafter, the petitioner issued a Legal Notice dated 14.11.2007 to the respondents requesting the competent authority to issue appointment order within 15 days.

9. Situated thus, since no action was taken within the period specified in the notice by the official respondents, the petitioner has initiated this writ proceeding by filing the instant writ petition on 07.12.2007 just couple of days ahead of the expiry of the Select List dated 16.12.2007 within a period of one year.

10. Later on, the petitioner has sought for amendment of the writ petition for incorporation of certain informations which has been permitted by this Court and accordingly an amended writ petition has been filed.

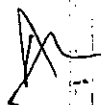
11. In the amended writ petition, the petitioner has prayed for following reliefs:

"Under the facts and circumstances it is most humbly prayed that the Hon'ble Court may be pleased enough to issue;

RELIEFS

1. Writ, order or direction to the Respondent No. 1, 3 and 4 to act on the recommendation of the Hon'ble the High Court and to appoint the petitioner in the post of Civil Judge-cum-Judicial Magistrate.
2. Writ, order or direction in the nature of Mandamus directing the Respondent No. 1, 3 and 4 and/or each of the respondents to act as per the recommendation of the Hon'ble High Court.
3. Writ, order or direction to the Respondent No. 1, 3 and 4 and/or each of the respondents to keep the recommendation of the Hon'ble High Court valid till the petitioner is appointed in the post of Civil Judge-cum-Judicial Magistrate.
4. Writ, order or direction to the Respondent No. 1, 3 and 4 and/or each of the respondents restraining them from making any advertisement for the post for which the petitioner is entitled to be appointed.
5. Writ, order or direction to the Respondent No. 1, 3 and 4 and/or each of the respondents to furnish all files pertaining to the appointment to the post of Civil Judge-cum-Judicial Magistrate from the date when the post was advertised till date.
6. Writ, order or direction to the Respondent No. 1, 3 and 4 and/or each of the respondents to affect appointment to the petitioner from appropriate date as Your Lordship may deem fit and proper.
- 6-A.** Writ, order or direction to the Respondent No. 2 to withdraw the Annexure P-12 and stay of entire follow up action by virtue of Annexure P-12.
7. Any other relief or reliefs for which the petitioner is entitled to."

12. After the recommendation was being forwarded by the High Court, the Respondent No. 3 responding to the High Court's recommendation, by seeking certain information regarding the





number of cases filed during the preceding one year in the Court of Civil Judge-cum-Judicial Magistrate, North District at Mangan, made a communication dated 19.04.2007 (Annexure R-3 appended to the amended additional counter affidavit filed by the State respondents through one Joint Secretary to the Government of Sikkim, Department of Personnel, Administrative Reforms & Training, etc.) quoting the subject "Direct recruitment of one post in the cadre of Sikkim Judicial Service" to the High Court Registry. The communication dated 19.04.2007 runs as under: -

"GOVERNMENT OF SIKKIM
DEPTT. OF PERSONNEL, ADM. REFORMS, TRAINING,
PUBLIC GRIEVANCES, CAREER OPTIONS &
EMPLOYMENT, SKILL DEVELOPMENT AND CHIEF
MINISTER'S SELF EMPLOYMENT SCHEME
GANGTOK-737101

No. 858/G/DOP

Dated: 19.04.2007

To,

The Registrar General,
High Court of Sikkim,
Gangtok.

Subject: **Direct recruitment of one post in the
cadre of Sikkim Judicial Service**

Sir,

With reference to your letter No. V(13) Confdl/HCS/6683 dated 16.12.2006, I am directed to request you to kindly arrange to send the information on the number of cases filed during the preceding one year in the Court of Civil Judge-cum-Judicial Magistrate, North District at Mangan.

Yours faithfully,

Sd/-



JOINT SECRETARY TO THE GOVT. OF SIKKIM
DEPTT. OF PERSONNEL, ADM. REFORMS, TRAINING,
PUBLIC GRIEVANCES, CAREER OPTIONS &
EMPLOYMENT, SKILL DEVELOPMENT AND CHIEF
MINISTER'S SELF EMPLOYMENT SCHEME"

13. In reply to such communication, the Registry vide its communication dated 04.09.2007 informed that the number of civil cases filed during the preceding year 2006-2007 in the Court of Civil Judge (North) is nil. The said communication dated 04.09.2007 reads as under:

"HIGH COURT OF SIKKIM
GANGTOK

Ref. No. 4(15)Confdl/HCS/2277

Date: 4/9/07

To,

The Joint Secretary-I,
Department of Personnel, Adm. Reforms,
Government of Sikkim,
Gangtok-737 101.

Ref: Your letter No. 3923/G/DOP dated 01.09.2007.

Sir,

With reference to your above cited letter, I am directed to inform you that the number of Civil cases filed during the preceding year 2006-2007 in the Court of Civil Judge (North) is nil.

Yours faithfully,

Sd/-

(Rudra Bhutia)
OFFICER ON SPECIAL DUTY
(CONFIDENTIAL)"

A..



14. Nonetheless, in the meantime, no action has been taken by the Government as regards appointment of the petitioner in terms of the recommendation of the High Court. The records also do not disclose the rejection of the recommendation made by the High Court.

15. On the other hand, it transpires from the records that the State Government through its Joint Secretary wrote to the High Court again on 21.12.2007, immediately after the initiation of this present writ proceeding, seeking information on the number of civil suits filed during the period of January, 2007 to December, 2007 in the Courts of Civil Judge-cum-Judicial Magistrate, West District, South District and East District.

16. On 28.1.2008, the Joint Secretary issued a reminder to this Court requesting for making the information sought earlier available at the earliest as the matter was of an urgent nature and of utmost importance.

17. In reply to the above communication, the High Court Registry informed the Government vide letter bearing No. 4(15) Confdl/HCS/4783/HCS dated 05.02.2008 that there were total 32 cases pending in all Courts of Civil Judge in the State showing the break up as 17 cases in the Court of Civil Judge-cum-Judicial Magistrate, East at Gangtok, 15 cases in the Court of Civil Judge, South at



Namchi and no pendency in the Courts of Civil Judge at Gyalshing, West and at Mangan, North. The following is the extract of the communication dated 05.02.2008: -

“HIGH COURT OF SIKKIM
GANGTOK

No. 4(15)Confdl/HCS/4873/HCS
Date: 5/02/08

To,

The Joint Secretary,
Department of Personnel, Adm. Reforms,
Government of Sikkim,
Gangtok-737 101.

Ref: Your letter No. 4904/G/DOP dated 21.12.2007.

Sir,

With reference to your above cited letter, I am directed to inform you that the number of Civil cases filed during the period of January, 2007 to December, 2007 in the Court of Civil Judge-cum-Judicial Magistrate East District, West District, North District and South District are as follows:

Civil Judge-cum-Judicial Magistrate (East) at Gangtok	17
Civil Judge-cum-Judicial Magistrate (West) at Gyalshing	00
Civil Judge-cum-Judicial Magistrate (North) at Mangan	00
Civil Judge-cum-Judicial Magistrate (South) at Namchi	<u>15</u>
Total :	32

Yours faithfully,

Sd/-

5.2.08

(Tshering Dolkar)

ADDL. REG.(I&E)-CUM-P.P.S. TO
THE HON'BLE CHIEF JUSTICE."

A.



18. Surprisingly, it is only after a lapse of nearly one and half years from the date of publication of Select List 16.12.2006 that the State Government/respondent has again sent a communication vide letter dated 06.03.2008 issued under the signature of the Commissioner-cum-Secretary, Department of Personnel, Administrative Reforms and Training addressed to the Registrar General, High Court whereby referring to Section 3 of Sikkim Civil Court Act, 1978 (for short, 'Civil Act') it is informed that since no civil cases are filed and are pending either in the Court of the Civil Judge-cum-Judicial Magistrate (West) or in the Court of Civil Judge-cum-Judicial Magistrate (North), and the requirement of the filling up of the post of Civil Judge-cum-Judicial Magistrate being non-existent, the State Government is unable to consider and accept the recommendation made by the High Court for the filling up the post of Civil Judge. It is also requested that the High Court may take the entire matter in its proper prospective in keeping with the principle accepted by the Hon'ble Supreme Court of India and accept the position as elaborated and concur with the view of the State Government.

19. The communication dated 06.03.2008 is quoted hereunder:

"GOVERNMENT OF SIKKIM
DEPTT. OF PERSONNEL, ADM. REFORMS, TRG.
PUBLIC GRIEVANCES, CAREER OPTIONS &
EMPLOYMENT, SKILL DEVELOPMENT AND
CHIEF MINISTER'S SELF EMPLOYMENT SCHEME
GANGTOK.

No. 9129/G/DOP.

DATED: 6/03/2008

To,

The Registrar General,
High Court of Sikkim,
Gangtok.

Sub: Direct recruitment of one post in the cadre of
Sikkim Judicial Service.

Madam,

Please refer to your letter No. V(13)Confdl./HCS/6683 dated 16.12.2007. In this regard I am directed to inform you that the recommendation made by the High Court of Sikkim for filling up of the post in the cadre of Sikkim Judicial Service was duly examined and considered by the State Government. While examining the matter it has been found that: -

1. The Supreme Court has exempted the State from the requirement of filling up of any vacant post in the judiciary due to peculiar condition in the State i.e. limited cadre of Judiciary and low pendency of cases (in Civil appeal no.1867 of 2006 order dated 4.1.07).
2. The Hon'ble High Court of Sikkim too has in its earlier decision concurred with the view of the Supreme Court in view of limited cadre and low pendency of cases vide its letter no.7351/HCS dated 11.01.07.
3. The basic requirement of provisions of Section 3 of Sikkim Civil Court Act, 1978 being non-existent the State Government has no option but to express its views that the recommendation of the High Court could not meet the legal requirement and as such the State Government is unable to consider it. As per the provisions of Section 3 of

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Sikkim Civil Court Act, 1978 it is provided that the post of Civil Judge-cum-Judicial Magistrate shall not be filled up unless at least 30 civil suits have been filed within the preceding one year in respect of places where there is no Court of Chief Judicial Magistrate and the post of Civil Judge-cum-Judicial Magistrate is lying vacant at such places. Since, as per the letter of the High Court vide no. 4(15)Confdl./HCS/4873/HCS dated 5.2.008 it has been clearly indicated that no Civil cases have been filed either in the Court of Civil Judge-cum-Judicial Magistrate, West or in the case of Civil Judge-cum-Judicial Magistrate, North it has therefore been found that requirement for filling up the post being non-existent, the State Government is unable to consider it and accept the recommendation made by the High Court of Sikkim for the filling up the post of Civil Judge. This is also in keeping with the principle accepted by the Hon'ble Supreme Court of India in its order referred above.

It is accordingly requested that Hon'ble High Court of Sikkim will take the entire matter in its proper prospective and accept the position as elaborated herein above and also concur with the view of the State Government.

Yours Sincerely,

Sd/-

(N. Tshering)

Commissioner-cum-Secretary DOP

20. Significantly in response to the said communication dated 06.03.2008, the Registrar General of this Court on 10.03.2008 has informed the State Government that the Hon'ble Chief Justice of the High Court is pleased to accept the stand of the State Government on the subject mentioned above, which is quoted as below:



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REGISTRAR GENERAL
HIGH COURT OF SIKKIM
GANGTOK

Ref. No.V(13)Confdl./HCS/5848
Date 10/03/2008

To,

Shri N. Tshering,
Commissioner-cum-Secretary,
Department of Personnel & Admin. Reforms,
Government of Sikkim,
Gangtok.

Sub: Direct recruitment of one post in the cadre of
Sikkim Judicial Service.

Ref.: Your letter No.9129/G/DOP, dated 6.3.2008.

Sir,

With reference to the above cited letter, I am directed to inform you that Hon'ble the Chief Justice has been pleased to accept the stand of the State Government on the above mentioned subject.

Yours faithfully,
Sd/-
10/3/08
(Meenakshi M. Rai)
REGISTRAR GENERAL”

21. On 28.03.2008, again the Government referring to its earlier letter dated 06.03.2008, has written to the Registrar General of the High Court stating that the communication dated 06.03.2008 does contain certain incorrect informations made inadvertently therein with reference to the provisions of Section 3 of the Civil Act, which



had already been amended and expressing sincere regret a request has been made to treat the said letter as withdrawn and deleted. The communication has clearly stated that the State Government has duly examined the matter regarding filling up the post in the cadre of Sikkim Judicial Service and as such keeping in view the order dated 04.01.2007 passed by the Supreme Court in Civil Appeal No. 1867 of 2006 exempting the State of Sikkim from the requirement of filling up of any post in the judiciary due to peculiar condition in the State i.e. limited cadre of Judiciary and low pendency of cases, and also the fact that no cases have been filed either in the Court of Civil Judge-cum-Judicial Magistrate, West or North, the State Government is of the view that the requirement of the filling of the post as recommended by the High Court of Sikkim does not exist. Accordingly once again a request, although on an another pretext, has been made to the High Court to take the entire matter in the proper perspective and accept the position as elaborated therein and accordingly to concur with the views of the State Government.

22. For the sake of convenience, the communication dated 28.03.2008 may be extracted as under:

“ DEPARTMENT OF PERSONNEL A.R. & TRAINING,
PUBLIC GRIEVANCES, CAREER OPTIONS,
EMPLOYMENT SKILL DEVELOPMENT AND CHIEF
MINISTER'S SELF EMPLOYMENT SCHEME



No. 1888/G/DOP

DATED: 28.3.2008

To,
The Registrar General,
High Court of Sikkim,
Gangtok.

Sub: Direct recruitment of one post in the cadre of
Sikkim Judicial Service.

Reference letter No. 9129/G/DOP dated 6.03.2008.

Madam,

Please refer to your letter No. V(13)Confdl./HCS/6683 dated 16.12.2007 and the reply given vide our letter cited under reference above, I am directed to draw your kind attention that in the said letter vide No. 9129/G/DOP dated 6.3.2008 at serial No. 3 reference were made to the provisions of section 3 of the Sikkim Civil Court Act, 1978 which were made due to inadvertence for which we express our sincere regret and the reference to the said provision of the law which has already been amended may kindly be treated as withdrawn and deleted.

However, on the issue of the recommendation made by the High Court of Sikkim for filling up of the post in the cadre of Sikkim Judicial Service, the matter was duly examined by the State Government. While examining the matter it has been found that:-

1. The Hon'ble Supreme Court has exempted the State of Sikkim from the requirement of filling up of any vacant post in the judiciary due to peculiar condition in the State i.e. limited cadre of Judiciary and low pendency of cases (in Civil appeal no. 1867 of 2006 order dated 4.1.07).
2. The Hon'ble High Court of Sikkim too has in its earlier decision concurred with the view of the Hon'ble Supreme Court in view of limited cadre and low pendency of cases as communicated vide its letter no. 7351/HCS dated 11.01.07.

3. Further, as per the letter of the Hon'ble High Court of Sikkim vide no. 4(15)Confdl/HCS/4873/HCS dated 5.2.08 it has been clearly indicated that no Civil cases have been filed either in the Court of Civil Judge-cum-Judicial Magistrate, West or in the Court of Civil Judge-cum-Judicial Magistrate, North. It has therefore been found that since no civil cases have been filed in either of the two Courts, the requirement for filling up the post does not exist. Therefore, the State Government is of the view that against such back drop it may not be necessary to fill up the post and therefore the recommendation made by the High Court of Sikkim for the filling up the post was examined and found that the requirement for filling up of the post does not exist. This is also in keeping with the principle accepted by the Hon'ble Supreme Court of India in its order referred above and in conformity with the principle accepted by the Hon'ble High Court of Sikkim as communicated in its earlier decision referred above.

The inconvenience caused by the inadvertent error is sincerely regretted.

It is accordingly requested that Hon'ble High Court of Sikkim will take the entire matter in its proper perspective and accept the position as elaborated herein above and also concur with the views of the State Government.

Yours sincerely,

Sd/-

(N. Tshering)

Commissioner-cum-Secretary DOP "

23. Against this communication dated 28.03.2008, the Registrar General of this Court by communication dated 09.04.2008 conveyed the concurrence of the Hon'ble the then Chief Justice of





the High Court with the views of the State Government under the subject mentioned above which speaks as below:

“

REGISTRAR GENERAL
HIGH COURT OF SIKKIM
GANGTOK

Ref. No. V(13)Confdl/HCS/197
Date 09.04.2008

To,

Shri N. Tshering,
Commissioner-cum-Secretary,
Department of Personnel, Admin. & Reforms,
Government of Sikkim,
Gangtok.

Sub: Direct recruitment of one post in the cadre of
Sikkim Judicial Service.

Ref: Your letter No. 1888/Gen/DOP dated 28.3.2008.

Sir,

With reference to the above cited letter, I am directed to convey the concurrence of Hon'ble the Chief Justice of this High Court with the views of the State Government on the above mentioned subject.

Yours faithfully,

Sd/-
(Meenakshi M. Rai)
REGISTRAR GENERAL ”

24. In the backdrop of the above fact situation, the entire matter now rests on the determination of the two questions as already recorded hereinabove.



25. It is the admitted position that the Full Court initially recommended the name of the petitioner for her appointment, but the Government was not willing to accept such recommendation for the reasons reflected in the Government's communications dated 06.03.2008 and 28.03.2008 as already referred to above.

26. The stand of the State Government against the acceptance of the recommendation for the appointment of the petitioner is primarily reflected in the amended additional affidavit filed on behalf of the State Government on 29.11.2008. It would manifestly show that the Government has taken a decision not to appoint any officer due to non-pendency of any cases in the North District of Sikkim. The relevant portion of paragraph 26 of the said affidavit may be noticed which states as under: -

"26.

.....
.....

It is submitted that justification given by the answering respondent here-in-above for not filling up the post of Civil Judge-cum-Judicial Magistrate applies for both the North and West Districts as the said decision was taken based on a letter No. 4(15)/Confdl/HCS/4873 dated 5/2/2008 received from the Additional Registrar (I&E)-cum-P.P.S to the Hon'ble Chief Justice which clearly shows the number of civil cases pending during the preceding one year at Mangan and Gyalshing were nil. After a consultative process, the High Court has accepted the contention of the State Government that there was no justification in filling up the post of Civil Judge-cum-Judicial Magistrate at North and West Sikkim. Since the High Court has already accepted the contention of the State Government the matter has acquired finality and stands settled.

AS



In any case the selection process for which the petitioner had taken part was exclusively meant for the post of Civil Judge-cum-Judicial Magistrate for North Sikkim notwithstanding the fact that filling up on the post was not found to be justified in view of the pending position by virtue of which the impugned decision was taken. No right accrues in favour of the petitioner even if a vacancy of the post arises for another district. Even in that case for the reasons already stated it was deemed not necessary to fill up the post, a decision was taken on the strength of the rules relevant for the purpose by the authorities competent to take such decision."

27. Amazingly, from a close perusal of the advertisement so floated as quoted above, it transpires that there is no whisper to the effect that the post is basically meant for North Sikkim. What appears to us is that the advertisement/employment notice so published on 14.09.2006 in "Sikkim Express" clearly, specifically and candidly mentioned that "Applications are invited to fill up one post of Civil Judge-cum-Judicial Magistrate (1st Class) in the cadre of Sikkim Judicial Service in the (Grade III) in the scale of" and no mention has been made about any specific place for which the advertisement is made or where the appointee is to be posted on appointment. It is, therefore, seen that the reason or grounds put forward for not approving the Full Court's recommendation, is not good and weighty reason and the same is palpably unreasonable, unjustified and not founded on administrative fairness.

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28. It would also clear from the scrutiny of records that the recommendation conveyed to the State Government vide letter dated 16.12.2006 was a decision of the Full Court which normally takes a decision for appointment of judicial officers under SJS. However, it is seen that the concurrence to the views expressed by the State Government in the matter in question, was given by the then Chief Justice alone and not by the Full Court.

29. Mr. Sharma, learned senior counsel appearing for the petitioner, harping on the point as regards the power of Hon'ble the Chief Justice to give concurrence to the views of the Government, has drawn our attention to Rules 231, 232 and 234 of the Sikkim High Court (Practice and Procedure) Rules, 1991, (for short, 'the Rules') which read as under:

"231. Matters which shall be disposed of at a Judges meeting:- Notwithstanding anything contained in the preceding Rules, the following matters shall invariably be taken up and disposed of at a meeting of the Hon'ble Judges: -

- (i) All matters involving questions of principle and policy;
- (ii) All cases relating to amendments to be made to existing laws or to the statutory rules of the Court;
- (iii) All matters concerning the High Court as such or all the Honourable Judges;
- (iv) All matters on which the opinion of all the Hon'ble Judges is invited by the Government;
- (v) The suspension of Judges of the subordinate judiciary;
- (vi) The promotion of Judges of the subordinate judiciary;



- (vii) Recommendation for the grant of pensions to the Judges of the Subordinate Judiciary where it is proposed to recommend that the full pension earned be not allowed;
- (viii) Annual Confidential remarks on the work of the Judges of the Subordinate Judiciary;
- (ix) All matters relating to entitlement of the sitting and retired Judges including the sitting and retired Chief Justices;
- (x) Audit objections;
- (xi) Any other matter which may be referred by the Honourable the Chief Justice to a meeting of the Honourable Judges.

232. Referring a matter to Judges meeting: - The Honourable Judge placed in charge of any branch of the executive or administrative business of the Court may refer any matter relating to that branch to a meeting of the Hon'ble Judges.

233.

234. Quoram of Judges meeting:- At all meetings of Honourable Judges, two Judges shall form a quorum if the actual strength of the High Court consists of two or more Judges. In case the actual strength at any time consists of only the Chief Justice or Acting Justice, he alone shall constitute the quoram."

30. On the basis of the above Rules, it is the submission of Mr. Sharma, the learned senior counsel, that once a decision has been taken by a Full Court, any deletion, modification or cancellation of such decision must be made by the subsequent Full Court which only has the power to take such action. However, the same did not exactly happen in the instant case. Indeed, it was the Full Court alone which ought to have taken a decision regarding concurrence with the view expressed by the State Government in such matter and not Hon'ble the then Chief Justice alone.

h.

31. We have meticulously scrutinized the entire records placed before us including the concurrence given by the then Hon'ble the then Chief Justice of the High Court to the views of the State Government as the issue in question.

32. Before delving upon the basic issue as already referred to above, it would be necessary and appropriate to have a look at the relevant provisions of the Service Rules.

33. The Rules 3, 4 and 5 of Service Rules would be relevant for such purpose and the same are quoted as under:

"3. For the purpose of recruitment of the Service, there shall be a Selection Committee consisting of the following:

- (i) Appointment to the post of Civil Judge-cum-Judicial Magistrate (Grade-III) shall be made by the Governor on the basis of the selection made by the High Court in accordance with these Rules.
- (ii) Promotion to the posts of Civil Judge-cum-Judicial Magistrate (Grade-II); Civil Judge-cum-Judicial Magistrate (Grade-I), Chief Judicial Magistrate-cum-Civil Judge (Grade-III), Chief Judicial Magistrate-cum-Civil Judge (Grade-II), Chief Judicial Magistrate-cum-Civil Judge (Grade-I) shall be made by the High Court.

4. A candidate shall be eligible to be recruited if he is:

- (a) a citizen of India.
- (b) Not more than 35 years of age as on the last date fixed for receipt of applications.
- (c) The holder of a degree in law granted by a University established by law in India.
- (d) able to communicate in Nepali or any other languages of the State.

5. Recruitment to the post of Civil Judge-cum-Judicial Magistrate (Grade III) shall be made on the





basis of a competitive examination to be held by the High Court at such intervals as the High Court may determine. The date on which and the place at which the examination is to be held, shall be fixed by the High Court.

(a) The competitive examination shall consist of:-

(i) Written examination

Paper-I Procedural Law – Code of Civil Procedure,
 Code of Criminal Procedure, Local Laws,
 Indian Evidence Act and Limitation Act.

Local Laws.

(A) Property Laws.

- (1) Notice dated 2nd January 1897 relating to transfer of land by Bhutias and Lepchas.
- (2) Revenue Order No. 1 dated 17th May, 1917
 - (a) Notice No.660/G dated 21st May, 1931
 - (b) Notice No.669/G dated 21st May, 1931
- (3) Sikkim Darbar Gazette Vol. XVIII No. 11 dated 21st April, 1969 Right of a woman to purchase or sell land after her marriage vis-à-vis Revenue Order No. 1 of 1917.
- (4) O.O. No. 105/L.R. dated 25th February, 1961.

(B) Registration Laws.

- (1) Notification No.385/G dated 11th April, 1928 (Regarding Registration of Documents)
- (2) Notification No. 2947/G dated 22nd November, 1946 (Regarding Registration of Documents)
- (3) Sikkim State Rules Registration of Documents 1930.

(C) House Rent & Eviction Laws.

- (1) Notification No. 6326-600/H&W-B dated 14.04.1949 Regulating and Letting and Sub-letting of Premises etc. (Health & Works Deptt.)
- (2) Gangtok Rent Control & Eviction Act 1 of 1956 dated 31st May, 1956.
- (3) The Sikkim Public Premises (Eviction of Unauthorized Occupants and Rent Recovery) Act, 1980.
- (4) The Sikkim Public Premises (Eviction of Unauthorized Occupants and Rent Recovery) Rules, 1980.

(D) Land Laws.

- (1) The Sikkim Cultivators Protection Act, 1985.
- (2) The Sikkim Land (Requisition & Acquisition) Act, 1977 (1 of 1978)

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(3) Notification No. 1209/L&F dated 25th May, 1950 (Regarding formulation of Substantive Law for Land in Sikkim)

(4) The Sikkim Regulation of Transfer of Land Act, 2005.

(E) Court Fee & Stamp Laws

(1) Sikkim Court Fees & Stamp on Documents Rules dated 30.03.1928 (Amended schedule).

(2) Sikkim Court Fees (Exemption and Miscellaneous Provision) Act, 1983.

(F) Adoption Laws

(1) Notification No. 2341-4/G dated 17th June, 1930 (Regarding Adoption of Heir)

(G) Civil Courts Act

(1) Sikkim Civil Courts Act, 1978.

(H) Municipal Laws

(1) Sikkim Shops and Commercial Establishment Act, 1983.

(2) Sikkim Allotment of House Sites and Construction of Buildings (Regulation and Control) Act, 1985.

(I) Interpretation and General Clauses Act

(1) Sikkim Interpretation and General Clauses Act, 1978.

(J) Other Local Laws

(1) The Sikkim Anti Drugs Act, 2006.

(2) The Sikkim State Legislator's Appointment to Different Authorities Act, 2006.

(3) The Sikkim State Public Services Act, 2006.

(K) Notification and Issuance of Certificate of Identification.

(1) Notification No. 66/Home/95 dated 2nd November, 1995.

(L) Rural Indebtedness Act.

(1) Sikkim Rural Indebtedness Act, 1966 dated 23.9.1966, Notification No. 845/II dated 20.08.1968 issued under the Sikkim Rural Indebtedness Act, 1966.

(M) Language Test.

Nepali or any Languages of the State.

Paper-II Substantive Law – Hindu Law, Indian Contract Act, Sale of Goods Act, Partnership Act, Specific Relief Act, General Clauses Act, Transfer of Property Act, Indian Penal Code and Constitutional Law of India.

Note: Each paper shall be three hours duration and shall carry 200 marks each.

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(ii) Viva Voce:

It will carry 100 marks.

(b) Only such number of candidates shall be called for viva-voce as shall obtain the highest number of marks in aggregate of both the papers in the written examination up to the extent of five times of the number of posts as specified in the advertisement inviting applications.

(c) Selection of candidates shall be made on the basis of the aggregate marks obtained in the written examination and viva voce.

(d) The list prepared on the basis of the selection made shall be operative for one year and shall be effective for the filling of the vacancies then existing and those arising within a period of one year."

34. Article 234 of the Constitution of India would also be relevant for ready reference. It provides for recruitment of persons other than district judges to the judicial service which contemplates as under:

"234. Recruitment of persons other than district judges to the judicial service.- Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

35. A fair reading of those provisions above referred to would explicitly go to indicate that the appointment of the Civil Judge-cum-Judicial Magistrate (Grade-III) under SJS shall be made by the Governor of the State on the basis of competitive examination held

A.



by the High Court. Such process is duly indicative of the consultation process as indicated in Article 234 of the Constitution of India. In the instant case, in terms of the Service Rules, one post of Civil Judge-cum-Judicial Magistrate was advertised and competitive examination both written examination and viva voce were conducted and the petitioner was selected in order of merit and placed in Sl. No. 1 and the Full Court recommended her name for appointment in terms of Rule 3 (1). Thereafter, it is for the State Government to appoint her in the respective post. However, the State Government has expressed its inability to accept the recommendation basically showing the reason that since there is no pendency of cases in the Court of Civil Judge, North at Mangan, there is no necessity for such appointment, although, a close inspection of the advertisement as already indicated above did not mention that the post was specifically advertised for North Sikkim at Mangan. Apparently, ex-facie, the advertisement belies the stand taken by the State Government and as such the reason for not accepting the recommendation, in our firm opinion, deserves no approval.

36. Coming to the question of concurrence given by the then Chief Justice of the High Court alone to the view expressed by the State Government regarding its inability to accept the recommendation sent by the Full Court, it is seen that Rule 231 of



the Rules referred to by Mr. Sharma, in our considered view, basically indicates that all the important matters including the matters of Full Court and any variation from earlier decision of the Full Court must be adopted, resolved or nullified by a subsequent Full Court. Such an interpretation of the Rule, in our view, would be in line with the meaning assigned to the 'High Court' under Article 216 of the Constitution of India. As per the interpretation placed on Article 216 of the Constitution of India, the High Court means the entire body of Judges appointed to the High Court. As such the High Court consists of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. We are supported to take this view by the decision of the Apex Court in *State of Uttar Pradesh vs. Batuk Deo Pati Tripathi and Another* reported in (1978) 2 SCC 102 wherein in paragraph 10 it has been clarified that the High Court under Article 216 means the entire body of judges appointed who together constitute the High Court. The relevant portion of paragraph 10 runs as under:

"10.
..... Since Article 216 provides that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint, Article 235 has to be construed to mean that the control over District Courts and courts subordinate thereto is vested in the entire body of Judges who together constitute the High Court and not in the Chief Justice as representing the High Court or an Administrative Judge or a smaller body of Judges acting as an Administrative Committee."



37. On the basis of the constitutional and legal position as indicated above and also bearing in mind the spirit reflected in Rule 231 of the Rules, we are of the view that the competent authority to concur with the views of the State Government in the matter is and must have been the Full Court and not the Chief Justice alone. Thus, it follows that if the initial recommendation was made by the Full Court, the concurrence ought to have been rendered by the Full Court. In other words, the concurrence ought to have been given by the Full Court i.e. the Chief Justice and other Pusine Judges which constitute the quorum/strength of the High Court and not by the Chief Justice alone. It is pertinent to mention here that on the relevant period i.e. during the months of March, April and May, 2008 during which the concurrence was given by the then Chief Justice, the High Court was having the strength of two judges including the Chief Justice. It appears that the Chief Justice alone, not being authorized, ought not to have exercised such power of concurrence without referring the matter to the Full Court.

38. In view of what has been discussed, observed and stated above and even otherwise given the facts and circumstances of the case, we have no hesitation to hold that the concurrence to the views expressed by the State Government having been given by the Chief Justice alone and not by the Full Court is not the

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concurrence given by the High Court and the same lacks legal permissibility. In view of the same, it can be well opined that the Government has to act in terms of Rule 3 (1) of the Service Rules to appoint the petitioner on the basis of the selection made by the High Court which was done in accordance with the Rules.

39. We are thus of the considered view that the petitioner has made out a case for issue of a direction for consideration of her appointment pursuant to the recommendation given by the High Court.

40. Accordingly, we hereby direct the respondents to consider the case of the petitioner in terms of the recommendation made by the Full Court and also in compliance of the Service Rules.

41. Be it made clear that the entire process as directed above shall be undertaken and completed within a period of three months from today.

42. In the result, this writ petition stands allowed with the directions and observations as indicated above. However, considering the facts and circumstances of the case there shall be no order as to costs.

Judge

Chief Justice