



**THE HIGH COURT OF SIKKIM : GANGTOK**

(Civil Extraordinary Jurisdiction)

DATED : 20<sup>th</sup> April, 2023

**DIVISION BENCH : THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE  
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

**WP(PIL) No.10 of 2018**

**Petitioners** : Sikkim Gorkha Jagaran Sangh and Others

***versus***

**Respondents** : Union of India and Others

Writ Petition under Article 226 of the Constitution of India

**Appearance**

Mr. Manoj Goel, Senior Advocate with Mr. Naman Kamboj and Ms. Anusha Basnet, Advocates for the petitioners.

Mr. Karma Thinlay, Central Government Counsel for Respondent Nos.1 and 2.

Mr. Vivek Kohli, Advocate General with Ms. Y. W. Rinchen, Government Advocate (as they were, at the time of hearing) and Ms. Pema Bhutia, Assistant Government Advocate for Respondent No.3.

Mr. T. R. Barfungpa, Advocate with Ms. Tshering Laki, Advocate for Respondent No.4.

None present for Respondent No.5.

**J U D G M E N T**

Meenakshi Madan Rai, J.

**1.** In this Public Interest Litigation the Petitioners *inter alia* seek the following reliefs;

- "a. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to the respondents for the enforcement of various Constitutional and/or legal rights of the petitioners and/or enforcement of various Constitutional and legal duties and obligations of the respondents; and
- b. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to direct the respondents to take all the requisite steps to consider to reserve seats in the



Sikkim Legislative Assembly for different section (sic) of the people of Sikkim including the Sikkimese Gorkhas in terms of Article 371F(f); and

- c. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to direct the respondents to take all the requisite steps to consider to provide beneficial treatment to different sections of the people of Sikkim including the Sikkimese Gorkhas as provided under Article 371F(g); and
- d. issue a writ, order or direction including a writ in the nature of Certiorari or any other appropriate writ, order or direction thereby directing the respondents to take all the requisite steps to consider to remove the name of the Bhutia, except Sherpa, given in the Constitution (Sikkim) Scheduled Tribes Order, 1978; or alternatively issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction thereby directing the respondents to take all the requisite steps to consider to exclude the creamy layer of the Bhutia and others included in the Constitution (Sikkim) Scheduled Tribes Order, 1978; and
- e. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to direct the respondents to take all the requisite steps to consider to withdraw/ discontinue excessive reservation of seats in the Sikkim State Legislative Assembly in favour of Bhutias under Article 371F(f) and/or Article 332 and/or Article 342 of the Constitution read with R.P. Act, the same provisions being only 'transitional' and having become spent force; and
- f. issue a writ, order or direction including a writ in the nature of Certiorari or any other appropriate writ, order or direction thereby striking down/declaring that the provisions of Sections 7(1A)(a) of 1950 Act and 5A(1)(a), 5A(2)(a) of 1951 Act, so far they relate to Bhutias, except Sherpa, being essentially transitional



in nature, now cease to have any valid effect in law as well as in fact; and

- g. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to the respondents to consider and take all the requisite steps to increase the total number of seats in the Sikkim Legislative Assembly from the present 32 to 60 under Article 170 or to such other appropriate numbers as may be found necessary and for reservation of Assembly seats in proportion to various sections of the people of Sikkim; and
- h. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to the respondents to consider and to take all the requisite steps to reserve the seats in the Sikkim Legislative Assembly for Schedule Tribes of Limboo and Tamangs under Article 332 and/or Article 371F(f) of the Constitution; and
- i. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to the respondents to take all the requisite steps to consider and provide reservation of Assembly seats to the eligible Scheduled Tribes strictly in proportion to their respective population; and
- j. issue a writ, order or direction including a writ in the nature of mandamus or any other appropriate writ, order or direction to the respondents to take all the requisite steps to consider and reserve seats in the Sikkim Legislative Assembly for Gorkha community strictly in proportion to their population; and
- k. grant all or any of the foregoing prayers either cumulatively or alternatively.
- l. issue any appropriate order or direction thereby granting any other relief that the petitioners may be found entitled to; and



- m. issue any other appropriate writ, order or direction as this Court may deem fit and proper in the circumstances of this case.”

**2.** Respondent 3 filed objection to the Petition, wherein it is averred that in view of the reliefs sought, the Writ Petition is not maintainable for the reason that prayers (b), (f), (e), (i) and (j) as reflected hereinabove, were considered by a Constitution Bench of the Hon’ble Supreme Court in **R. C. Poudyal vs. Union of India and Others**<sup>1</sup>. That, prayer (c) invoking Article 371F(g) besides being vague is a matter in the discretion of His Excellency the Governor. That, prayer (d) is contrary to the provisions of Article 342 of the Constitution of India which provides that any exclusion or inclusion in the Presidential Order can be only by way of Legislation by the Union Parliament. The prayer to exclude the creamy layer of Bhutias and others included in the Constitution (Sikkim) Scheduled Tribes Order, 1978, is not applicable to Scheduled Castes/Scheduled Tribes as laid down in **Indra Sawhney and Others vs. Union of India and Others**<sup>2</sup> and also **Ashoka Kumar Thakur vs. Union of India and Others**<sup>3</sup>. That, prayer (g) is a subject-matter falling within the exclusive legislative competence of the Parliament. Prayers (a), (k), (l) and (m) are in general terms and if the other reliefs are not maintainable, as submitted, these prayers may also be dealt with accordingly. That, in prayer (h), the Supreme Court has issued directions in the case of **Harry Ram Pradha (sic) and Others vs. State of Sikkim and Others**<sup>4</sup> which is being pursued by the State Government, hence the Petition be dismissed.

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<sup>1</sup> 1994 Supp (1) SCC 324

<sup>2</sup> 1992 Supp (3) SCC 217

<sup>3</sup> (2008) 6 SCC 1

<sup>4</sup> Writ Petition (Civil) No.90 of 2006 decided on 04-01-2016



**3.** Respondent Nos.1 and 2 in their joint preliminary objection while seeking deletion of the name of Respondent No.1 from the array of Respondents as no reliefs were claimed from the said official, akin to Respondent No.3 averred that prayers (g) and (h) herein have been dealt with by the Hon'ble Supreme Court in **Harry Ram Pradha** (*supra*) and is under consideration of the Respondent No.2 Ministry.

**4.** Although Respondent No.4 entered appearance in the matter no objection was filed. Respondent No.5 was duly served with notice but was not represented in the matter.

**5.** Petitioner No.6, one Kishan Chettri responding to the question of maintainability raised by Respondent No.3 contended *inter alia* that none of the questions of law raised in the instant Writ petition were raised in **R. C. Poudyal** (*supra*) and the preliminary objection of the Respondent Nos.1 and 2 is liable to be dismissed being bereft of merit.

**6.** Relevantly, it may be mentioned that I.A. No.10 of 2022 filed on 16-02-2022 was an application for placing on record *inter alia* a copy of authorization letter empowering one Balbir Tamang, President of Sikkim Gorkha Jagaran Sangh, for appearing before this Court in connection with the instant PIL being WP(PIL) No.10 of 2018. Vide Order dated 07-12-2021, this Court had ordered the Petitioners to place on record a copy of the resolution of the Board of Trustees of the said Trust, reflecting such empowerment as pleaded in the Writ Petition. I.A. No.11 of 2022 was filed on 19-03-2022 whereby an application for placing of complete Trust Deed was filed along with a copy of the Trust Deed, which was taken on record by the Court but the resolution of



authorization referred to above was not filed. There is no document to indicate that Respondent No.6 was at any point of time authorized by the Petitioners to file any petition/response on their behalf. This circumstance is being flagged in view of the response filed by the Respondent No.6 to the question of maintainability raised by the Respondents and the averment of Balbir Tamang referred to above, that he has been specifically empowered to appear in this matter by the Petitioners.

**7(i).** Having considered the rival verbal contentions of Learned Counsel for the parties on the maintainability of the Writ Petition and having perused the pleadings and all appended documents it is imperative to refer to the Constitution Bench Judgment of the Hon'ble Supreme Court in ***R. C. Poudyal*** (*supra*). The prayers in the said Writ Petition are extracted herewith for convenient reference;

"a. Issue an appropriate, Writ, Order or direction declaring the Provisions of the Representation of People (Amendment) Act 1980, No.8 of 1980 as unconstitutional and illegal.

a. (i) Issue an appropriate writ, order or direction declaring Article 371F(f) of the Constitution (thirty sixth) Amendment Act, 1975 as unconstitutional.

a. (ii) Issue an appropriate writ, directions or order declaring that the Constitution and continuance of the present Legislative Assembly of Sikkim is illegal and unconstitutional.

a. (iii) Issue an appropriate writ, order or direction restraining respondents No.1 to 3 from holding, in future, the election to the Legislative Assembly of Sikkim in accordance with the impugned Act.

(b) Pass such other orders which this Hon'ble Court deem fit and proper in the interest of Justice."



(ii) The majority Judgment was delivered in the said matter by Venkatachaliah, Verma and Reddy, JJ. At Paragraph 85, the points for determination therein were enumerated as follows;

**"85.** On the contentions urged in support of the petitions, the points that fall for consideration, are the following :

- (a) Whether the questions raised in the petitions pertaining as they do to the terms and conditions of accession of new territory are governed by rules of public international law and are non-justiciable on the 'political questions doctrine'?
- (b) Whether clause (f) of Article 371-F of the Constitution of India, introduced by the Constitution (Thirty-sixth Amendment) Act, 1975 is violative of the basic features of democracy?
- (c) Whether Section 7(1-A) and Section 25-A of the Representation of the People Act, 1950 [as inserted by Election Laws (Extension to Sikkim) Act, 1976 and Representation of the People (Amendment) Act, 1980 respectively] and Section 5-A(2) of the Representation of the People Act, 1951 [as inserted by the Representation of the People (Amendment) Act, 1980] providing for reservation of 12 seats, out of 32 seats in the Sikkim Legislative Assembly in favour of Bhutias-Lepchas, are unconstitutional as violative of the basic features of democracy and republicanism under the Indian Constitution?
- (d) Whether the aforesaid provisions and the reservations made thereunder are violative of Articles 14, 170(2) and 332 of the Constitution? Whether they violate 'one person one vote' rule? Or are these differences justified in the historical background of Sikkim and are incidental to the political events culminating in the cession of Sikkim?
- (e) Whether the reservation of 12 seats out of 32 seats reserved for Bhutias-Lepchas is ultra vires clause (f) of Article 371-F in that while that provision enabled the protection of the rights and interests of different sections of population of Sikkim and for the number of seats in the Legislative Assembly which may be filled by the candidates belonging to such sections, the impugned provisions provide for one section alone, namely, the Bhutias-Lepchas.



- (f) Whether, at all events, in view of the Constitution (Sikkim) Scheduled Tribes Order, 1978, declaring Bhutias and Lepchas as a Scheduled Tribe, the extent of reservation of seats is disproportionate and violative of Article 332(3) of the Constitution which requires that the number of seats to be reserved shall bear as nearly as may be, the same proportion to the total number of the seats in the Assembly as the population of the Scheduled Tribe in the State bears to the total population of the State.
- (g) Whether the reservation of one seat for Sangha to be elected by an Electoral College of Lamaic monasteries is based purely on religious distinctions and is, therefore, unconstitutional as violative of Articles 15(1) and 325 of the Constitution and as violative of the principle of secularism?"

(iii) With regard to point (a) *supra* the majority while elaborating its ultimate reasoning in Paragraphs 101 to 105 of the Judgment concluded at Paragraph 105; "*Contention (a) requires to be and is rejected.*" At Paragraph 104, it was observed thus;

"**104.** Even if clause (f) of Article 371-F is valid, if the terms and conditions stipulated in a law made under Article 2 read with clause (f) of Article 371-F go beyond the constitutionally permissible latitudes, that law can be questioned as to its validity. The contention that the vires of the provisions and effects of such a law are non-justiciable cannot be accepted."

(iv) Points (b), (c) and (d) were taken up next for consideration. The arguments and reasonings for these points are elucidated in Paragraphs 106 to 131. At Paragraphs 128, 129 and 131, it was concluded as follows;

"**128.** From 1975 and onwards, when the impugned provisions came to be enacted, Sikkim has been emerging from a political society and monarchical system into the mainstream of a democratic way of life and an industrial civilisation. The process and pace of this political transformation is necessarily reliant on its institutions of the past. Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise





merely embodies political hopes and ideals. The provisions of clause (f) of Article 371-F and the consequent changes in the electoral laws were intended to recognise and accommodate the pace of the growth of the political institutions of Sikkim and to make the transition gradual and peaceful and to prevent dominance of one section of the population over another on the basis of ethnic loyalties and identities. These adjustments and accommodations reflect *political expediencies* for the maintenance of social equilibrium. The political and social maturity and economic development might in course of time enable the people of Sikkim to transcend and submerge the ethnic apprehensions and imbalances and might in future — one hopes sooner — usher in a more egalitarian dispensation. Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in character.

**129.** It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the constitutional muster. But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify inequality and special treatment. ....

.....  
**131.** We are of the view that the impugned provisions have been found in the wisdom of Parliament necessary in the admission of strategic border-State into the Union. The departures are not such as to negate fundamental principles of democracy. We accordingly hold and answer contentions (b), (c) and (d) also against the petitioners.”

(v) For points (e) and (f) the discussions obtained at Paragraphs 132 to 135 wherein at Paragraphs 133, 134 and 135 it was held as follows;

“**133.** Shri Jain contended that Bhutias and Lepchas had been declared as Scheduled Tribes under the Constitution (Sikkim Scheduled Tribes) Order, 1978 and that the extent of the reservation in their favour would necessarily be governed by the provisions of Article 332(3) of the Constitution which requires that the number of seats to be reserved shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Tribes in the State bears to the total population of the State. But, in our opinion, clause (f) of Article 371-F is intended to enable, a departure from Article 332(3). This is the



clear operational effect of the non-obstante clause with which Article 371-F opens.

**134.** Shri Jain pointed out with the help of certain demographic statistics that the degree of reservation of 38 per cent in the present case for a population of 20 per cent is disproportionate. This again has to be viewed in the historical development and the rules of apportionment of political power that obtained between the different groups prior to the merger of the territory in India. A parity had been maintained all through.

**135.** We are of the opinion that the provisions in the particular situation and the permissible latitudes, cannot be said to be unconstitutional."

**(vi)** On point (g), discussions were detailed from Paragraphs 136 to 138 of the Judgment and at Paragraph 137 it was held that;

**"137.** The Sangha, the Buddha and the Dharma are the three fundamental postulates and symbols of Buddhism. In that sense they are religious institutions. However, the literature on the history of development of the political institutions of Sikkim adverted to earlier, tend to show that the Sangha had played an important role in the political and social life of the Sikkimese people. It had made its own contribution to the Sikkimese culture and political development. There is material to sustain the conclusion that the 'Sangha' had for long associated itself closely with the political developments of Sikkim and was interwoven with the social and political life of its people. In view of this historical association, the provisions in the matter of reservation of a seat for the Sangha recognises the social and political role of the institution more than its purely religious identity. In the historical setting of Sikkim and its social and political evolution the provision has to be construed really as not invoking the impermissible idea of a separate electorate either. Indeed, the provision bears comparison to Article 333 providing for representation for the Anglo-Indian community. So far as the provision for the Sangha is concerned, it is to be looked at as enabling a nomination but the choice of the nominee being left to the 'Sangha' itself. We are conscious that a separate electorate for a religious denomination would be obnoxious to the fundamental principles of our secular Constitution. If a provision is made purely on the basis of religious considerations for election of a member of that religious group on the basis of a separate electorate, that would, indeed, be wholly unconstitutional. But in the case of Sangha, it is not merely a religious institution. It has been historically a political and social institution in Sikkim and the provisions in regard to the seat reserved admit of being construed as a nomination and the Sangha itself being assigned the task of and enabled



to indicate the choice of its nominee. The provision can be sustained on this construction. Contention (g) is answered accordingly.

**138.** For the foregoing reasons, all the petitions are dismissed without any order as to costs."

**8.** In light of the discussions and decisions extracted above, it is apposite to now consider the prayers raised by the Petitioners in the instant Writ Petition. Prayer (a) in the instant Writ Petition is nebulous and unfathomable as it fails to specify which constitutional and legal rights of the Petitioners and various constitutional and legal duties of the Respondents are sought to be enforced. Insofar as the other prayers enumerated by the Petitioner are concerned, points (b), (c) and (d) in **R. C. Poudyal** (*supra*) answers the reliefs sought for in prayers (b), (d), (e), (f) and (j) of the instant Writ Petition. The remaining relief sought for in prayer (d) of the instant Petition seeking exclusion of the creamy layer of Bhutia and others included in the Constitution (Sikkim) Scheduled Tribes Order, 1978 cannot be considered by this Court in light of the pronouncement of the Hon'ble Supreme Court in **Indra Sawhney** (*supra*) and **Ashoka Kumar Thakur** (*supra*). In **Ashoka Kumar Thakur** (*supra*) the Supreme Court observed that;

**"186.** Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to the Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the purpose of reservation, the principles of "creamy layer" are not applicable for Scheduled Castes and Scheduled Tribes."

Discussions in points (e) and (f) of **R. C. Poudyal** (*supra*) are directly related to prayers (c) and (i) of the reliefs sought in the Writ Petition herein. Hence, these prayers are determined by the



ratio in **R. C. Poudyal** (*supra*). As submitted by Learned Counsel for the Respondent Nos.1 and 2, prayers (g) and (h) of the instant Writ Petition have been dealt with by the Hon'ble Supreme Court in **Harry Ram Pradha** (*supra*) and the matter is under consideration of the Respondent No.2 Ministry.

**9.** In terms of Article 141 of the Constitution of India, the Judgments of the Supreme Court are the law of the land and binding on all Courts and Tribunals. In this context, reference is made to **Namit Sharma vs. Union of India**<sup>5</sup> and **M/s. East India Commercial Co. Ltd., Calcutta and Another vs. Collector of Customs, Calcutta**<sup>6</sup>.

**10.** This Court is indeed aware that the Hon'ble Supreme Court has observed at Paragraph 128 of the ratio in **R. C. Poudyal** (*supra*) that "*Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in character*" and the Petitioners in prayers (e) and (f) have sought for a direction that excessive seats in the Sikkim Legislative Assembly in favour of Bhutias be withdrawn, the provisions being transitional. However, the "transitional phase" is to be considered and determined by the Hon'ble Supreme Court in view of its observation *supra*.

**11.** Consequently, this Court cannot delve into matters duly considered and determined by the Hon'ble Supreme Court as discussed above.

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<sup>5</sup> (2013) 1 SCC 745

<sup>6</sup> AIR 1962 SC 1983



12.

The Writ Petition stands disposed of accordingly.
13.

No order as to costs.

( Meenakshi Madan Rai )  
Judge

( Biswanath Somadder )  
Chief Justice