

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 20th February, 2020

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.66 of 2016

Petitioners : Yogen Ghatani and Others

versus

Respondents : State of Sikkim and Others

Application under Article 226
of the Constitution of India

Appearance

Mr. Sudesh Joshi, Advocate, for the Petitioners.

Mr. Vivek Kohli, Advocate General with Mr. Thinlay Dorjee Bhutia, Government Advocate, for the Respondents.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Petitioners No.1 to 15 are the grandchildren of Government Servants to the Government of Sikkim prior to 31.12.1969. The Petitioners No.16 to 21 are the children of Government Servants to the Government of Sikkim on or before 31.12.1969. The Petitioners are aggrieved by the state action, by which an insertion was made in Notification No.66/Home/95, dated 22.11.1995 (for brevity, "Notification of 1995"), in Item No.5 therein, qualifying the issuance of Certificate of Identification (for short, "COI"), to persons whose father/husband has or had been in the Sikkim Government Service on or before 31.12.1969, *"for the purpose of employment only"*, by superseding Memorandum No.5(92)5/

GEN/EST., dated 09.04.1981 (for short, "Memorandum of 1981") . They also assail Item No.5 appearing in Notification No.57/Home/96, dated 27.09.1996 (for short, "Notification of 1996"), which further qualified the sentence *supra* by insertion of the words "*and for no other purpose*" causing the sentence to read as follows;

*"..... Certificate of Identification
obtained by such persons shall be for the purpose
of employment only **and for no other purpose**"*

Their grievance further extends to letter bearing No. GOS/Home-II/94/14(Part)/2687, dated 02.06.2006 (for short, "Letter dated 02.06.2006"), issued by the Respondent No.2, to the effect that Item No.5 of the Notification of 1995 does not entitle the third generation, i.e., the grandchildren of persons who were initially issued COI on the basis of Government employment before 31.12.1969, to obtain COI. Insertion of Item No.4A by Notification No.119/Home/2010, dated 26.10.2010 (for short, "Notification of 2010"), below Item No.4 of the Notification of 1995, is also impugned. The insertion it is averred is discriminatory, inasmuch as descendants of persons falling under Item Nos.1 to 4 of the Notification would always be eligible for obtaining COIs to the exclusion of persons in Item No.5. That, the Petitioners by such exclusion are being treated as "*non-locals*" in Sikkim, whereas, they have always considered themselves as '*locals*' and '*Sikkimese*'. That, the discrimination strikes at the Petitioners' right to live with dignity in their own land besides subjecting them to an identity crisis, hence the reliefs claimed.

2. The facts may be briefly traversed to comprehend the dispute with clarity. By the Constitution (Thirty-Sixth) Amendment Act, 1975, on 26.04.1975 (Appointed day), Sikkim became a State in the Indian Union. Article 371F was inserted in the Constitution of India (for short "Constitution") as a special provision for the State of Sikkim. Clause (I) of Article 371F *inter alia* provides that the President may extend any law to the State or repeal any law existing in the State, within two years from the appointed day. Prior to Sikkim joining the Indian Union, the Monarch (Chogyal) of the erstwhile Kingdom of Sikkim promulgated the Sikkim Subjects Regulation, 1961 (for brevity "Regulation of 1961") enumerating criteria for persons to become Sikkim Subjects *inter alia* by virtue of birth in Sikkim immediately preceding the Regulation and by ordinarily being a resident of Sikkim for not less than fifteen years prior to the Regulation of 1961. In addition to the above, under Regulation 8(iii)(a), a person could become a naturalized Subject if he was in the service of the Government of Sikkim for a period of not less than ten years immediately preceding the date of his application, and under Regulation 8(iii)(b) if he had rendered meritorious service to the State and Certificate thereof was granted to him. The Sikkim Government Establishment Rules, 1974 (hereinafter, "Establishment Rules, 1974") also came to be promulgated by the Chogyal to govern recruitment and conditions of service for persons appointed in Government service then. Under these Rules preference was given to Sikkim Subjects for recruitment in Government service. Only in the

absence of requisite qualified 'Sikkimese' personnel appointments were offered to non-Sikkimese. Post merger the Establishment Rules, 1974 came to be adopted by the State of Sikkim under Article 309 of the Constitution. The validity of those Rules were upheld by the Hon'ble Supreme Court in the ratification of ***State of Sikkim vs. Surendra Prasad Sharma and Others***¹.

3. Thereafter, vide the Extraordinary Gazette No.41, dated 16.05.1975, of the Home Department "The Adaptation of Sikkim Laws (Number 1) Order, 1975" (for short, "Adaptation Laws, 1975") was published for general information, whereby, the Regulation of 1961 stood repealed from the appointed day. The Home Department, Government of Sikkim, vide Notification No.995/H/75, dated Gangtok 21.06.1975, re-published Notifications of the Government of India, Ministry of Home Affairs, bearing various numbers, dated 16.05.1975, for general information. It was notified therein *inter alia* that the Citizenship Act, 1955 (57 of 1955) was extended and enforced in the State of Sikkim w.e.f. 16.05.1975. Vide an Order called "The Sikkim (Citizenship) Order, 1975" of 16.05.1975 every person who immediately before 26.04.1975 (Appointed day) was a Sikkim Subject under the Regulation of 1961, was deemed to have become a citizen of India on that day.

4. On 25.09.1976, the Respondent No.3 issued a Memorandum bearing No.5(92)229/GEN/Est. (for short,

¹ (1994) 5 SCC 282

"Memorandum of 1976"), requiring persons seeking employment to inform whether their parents' name had been recorded in the relevant Government Register on or before 15.05.1975. In continuation of this Memorandum, Notification bearing No.285(GEN)/EST., dated 28.01.1980 (for short, "Notification of 1980") was issued by the Respondent No.3 notifying that Domicile/Residential Certificate issued by sources other than the District Collector would not be accepted as valid. Vide the Memorandum of 1981 District Collectors were authorized to issue Certificates to persons in the following categories, to enable them to "*apply for employment*" in the State;

- "1. A person whose name is found recorded in the Old Sikkim Subject Register prior to 1975.
2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that name of his/her father/husband/paternal grandfather/brother from same father has been recorded in the Old Sikkim Subject Register.
3. A person who has agricultural land in the rural areas and has been ordinarily residing in the State of Sikkim.
4. A person whose father/husband had been in the service of the State Government on or before 31st December, 1969."

5(a). It is the Petitioners' case that the Memorandum of 1981 (*supra*) placed the persons at Item No.4 (*supra*) at par with persons belonging to Items No.1, 2 and 3 (*supra*) by embodying the spirit of the Regulation of 1961. That, infact rights conferred upon such Government servants by the Regulation of 1961 stood at a higher pedestal than even those born in the territory of Sikkim, as the requirement for the latter

was their birth in Sikkim before the commencement of the Regulation of 1961 and for others the requirement was residence in Sikkim for a period of fifteen years preceding the Regulation of 1961. No such fetters were imposed for Government servants, the only eligibility criteria being of Government service for a period of ten years even after the commencement of the Regulation of 1961. That, at the time of promulgation of the Regulation of 1961, due to dearth of educated Sikkimese, educated non-Sikkimese took up Government service, with the legitimate expectation of becoming Sikkim Subjects on completion of ten years service and the circumstance of merger was unforeseen. That, although the Memorandum of 1981 was issued basically for the purposes of employment it was accepted for myriad purposes, such as sale and purchase of land in Sikkim, obtaining relevant caste, tribe and class certificate sans discrimination amongst the four categories.

(b) That, on an application moved in the Lok Sabha in 1988, an amendment to the Sikkim (Citizenship) Order 1975 was made being the Sikkim Citizenship (Amendment) Order, 1989 [for short, "Amendment Order of 1989"]. A proviso came to be inserted in Paragraph 2 of the Sikkim (Citizenship) Order of 1975, vide which, any person whose name was eligible to be entered in the register under the Regulation of 1961 but was left out due to genuine omission were deemed to have become Citizen of India on that day, i.e., 26.04.1975, if so determined by the Central Government. A Committee was constituted accordingly on 03.04.1989 by the Central Government for this

purpose. Item No.(d) of the Annexure to the Amendment Order of 1989 therein included amongst others, the criteria of persons in regular government service in Sikkim before 26.04.1975 to be considered for grant of Indian Citizenship, provided that the appointment had not been made under the “*exception clause*” pertaining to non-Subjects. His natural descendants were also eligible for Citizenship. It is averred that this criteria was adopted in the spirit of the provision in Regulation 8(iii)(a) of the Regulation of 1961. That, although the cut-off date was taken as 31.12.1969 in the Memorandum of 1981 without any justification but that is not the subject of challenge in the instant Writ Petition. Pursuant thereto, vide the Government of India Orders dated 07.08.1990 and 08.04.1991 a total number of 73,431 persons were granted Indian Citizenship. Thus, a new category of persons other than the categories included in Item No.1 to Item No.4 of Memorandum of 1981 were eligible for enumeration as locals.

(c) By an executive order, Notification of 1995 was issued in supersession of all previous Memoranda and Notifications. The earlier Item No.4 was renumbered as Item No.5. The new Item 4 included persons granted Citizenship as detailed *supra*. Item No.5 (viz., previously 4) witnessed an arbitrary insertion of the second sentence which provided that “*Certificate obtained by such persons shall be **for the purpose of employment only***”, thereby restricting the utility of the COI of the Petitioners. No such restrictions came to be in place for Items No.1 to 4 of the Notification of 1995. On 27.09.1996, Notification

of 1996 was brought out substituting the contents of the previous Item No.5 by imposing a further restriction to the effect that Certificate for Item No.5 shall be for the purpose of employment only and "**for no other purpose**". That, the treatment of persons obtaining COIs under Item No.5 *vis-à-vis* those belonging to the categories in Item Nos.1 to 4 is arbitrary, discriminatory and in violation of Articles 14 and 21 of the Constitution. Compounding this situation was the interpretation of the District Collectors based on a letter issued by the Respondent No.2 dated 02.06.2006, interpreting Item No.5 of the Notification of 1995 to mean that the third generation of COI holders based on Government service before 31.12.1969 were not eligible to obtain COI under the said Notification. No such interpretation however was made for the third generation or subsequent generations of persons belonging to the other items in the Notification of 1995. That although the aforesaid Memoranda and Notifications are not based on any statutory, legislative enactments or codified laws and are policy decisions of the Government of Sikkim, such decisions cannot be bereft of rationality.

(d) In the year 2006, another Notification bearing No.04/Home/2006, dated 25.01.2006, authorized the District Collectors to issue COI only to the direct descendants of the COI holders and all the other cases were to be referred to the Head Office. This was followed by a Notification of 2010 which vide Clause (2), inserted Item No.4A after Item No.4 and before Item No.5, to the Notification of 1995 to read as follows;

“(2) After item 4 the following shall be inserted, namely:

4A. A person whose father/husband is/was eligible for grant of the Certificate of Identification under any of the categories listed under items 1 to 4 above,”

This perpetuated the issuance of COIs to categories in Item Nos. 1 to 4 but excluded Item No.5. That, the classification in the Notifications are motivated and wholly arbitrary, discriminatory, unreasonable and unjustified violating Article 14 of the Constitution. The classification is also violative of Article 15 of the Constitution as it does not fall within any of the exemptions envisaged therein. That, even Regulation 6 of the Regulation of 1961 provides that children of a Sikkim Subject father would be Sikkim Subjects. That, on account of the impugned Notifications the Petitioners have become stateless in their own State.

(e) The Petitioners therefore seek a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, direction or order, quashing and setting aside and striking down the second sentence to Item No.5 appearing in Notification of 1995 vide which the words *“for the purpose of employment”* were inserted. Quashing and setting aside Item No.5 appearing in Notification of 1996 (Annexure P-13), which substituted Item No.5 of Notification of 1995, which inserted the words *“for no other purpose”*. Quashing and setting aside Letter dated 02.06.2006 (Annexure P-14), issued by the Respondent No.2, denying issuance of COI to the third generation, i.e., the children of the persons who were issued COIs on the basis of

employment of their father in the Government of Sikkim before 31.12.1969. Quashing and setting aside Item No.4A to Notification of 1995 below Item No.4 and above Item No.5, inserted by Notification of 2010 (Annexure P-16). That, the Respondents be prohibited by issuance of appropriate writ to give effect to the Letter dated 02.06.2006 (*supra*) and Notification of 2010. An appropriate writ be issued declaring that the COIs obtained by the persons on the basis of such persons' father being in the service of Government of Sikkim is not restricted for the purpose of employment alone but for all purposes. An appropriate writ declaring that descendants of persons who have obtained COI on the basis of service of their father being in Government service prior to 31.12.1969, falling under Item No.5 of the Notification of 1995, are entitled to obtain COI.

6(a). The State-Respondents by filing a joint return while admitting the historical facts and averments of the Petitioners based on records, denied and disputed the allegations of arbitrariness and the averment of the Petitioners that they were ever placed at par with persons at Item Nos.1 to 3 of the Memorandum of 1981. That, under the Memorandum of 1981 a one time concession had been conferred to persons categorized in Item No.4, despite them not being '*Sikkimese*' or '*locals*' and ineligible for Government service in terms of Rule 4(4) of the Establishment Rules, 1974. That, the concession was not envisaged to be in perpetuity and such concession could not be deemed as a right or as one extending to future generations.

Neither does it entitle them to identify themselves as 'Sikkimese', who are infact a different category as their names having been registered in the Sikkim Subject Register. They sought to clarify that Clause (k) of Article 371F of the Constitution provides that all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force until amended or repealed by a competent legislature or other competent authority. Consequently, the Establishment Rules, 1974 which governs the appointment and service conditions of Government employees is a valid and protected law being a pre merger Rule, the constitutional validity of which has been upheld by the Supreme Court in **Surendra Prasad Sharma** (*supra*). Rule 4(4) of the said Rules provides *inter alia* that 'non-Sikkimese' nationals may be appointed only when suitably qualified and experienced 'Sikkimese' nationals are not available. That, replacement of such appointees by suitable 'Sikkimese' candidates may be made as and when available.

(b) After the merger of Sikkim and repeal of the Regulation of 1961, in order to identify the Sikkim Subjects the Memorandum dated 25.09.1976 was issued, to enable appointment of 'Sikkimese' in the Government sector as per safeguards provided in the Establishment Rules, 1974. Notification of 1995 was specific that COI for category in Item No.5 was limited to the purposes of employment. Moreover, the Finance Act, 2006 introduced Clause 26AAA in Section 10 of the Income Tax Act, 1961 and the said amendment also defined

'Sikkimese' as a distinct class. That, in order to consider whether the third generation of the State Government employees who have been issued COI based on their service in the State Government on or before 31.12.1969 were eligible for COI, a High Level Committee was constituted by the State Government under the Chairmanship of the Chief Secretary which observed that, the grandchildren of those persons who were in Sikkim Government service on or before 31.12.1969 are not entitled to COIs. Besides, persons seeking Citizenship even under Regulation 8 of the Regulation of 1961 were required to take oath of allegiance and renounce their former nationality neither is it the Petitioners' case that their parents had been conferred with Sikkimese Citizenship by the then Maharaja of Sikkim in exercise of powers under Regulation 8(iii) of the Regulation of 1961. Thus, in view of the provisions contained in Regulation of 1961 the claim of the Petitioners' are misconceived and misplaced. The issue was also examined by the Law Commission of Sikkim. The Hon'ble Chairman, Law Commission of Sikkim *inter alia* opined that "*special privilege conferred in Clause 5 of the above notification should not be extended any further to the grandchildren of the former employees mentioned therein*".

(c) It is denied that the Memorandum of 1981 was for other purposes besides employment in the Government of Sikkim, as purchase and sale of land and other government benefits and entitlements are governed by their respective Acts and Rules. The Respondents deny that Item (d) of the Annexure dated 03.04.1989 was issued in terms of or in consideration of

the provisions contained in Regulation 8(iii)(a) of the Regulation of 1961. That, granting of Indian Citizenship to 73,431 persons were those who had been genuinely excluded and it was not an exercise in granting Citizenship to those persons who were in Sikkim Government employment at the time of merger. It is denied that the impugned Notifications are violative of Articles 14 and 21 of the Constitution and discriminatory and not based on valid classification. That, Regulation 12 of the Regulation of 1961 prescribes the maintenance of the Register of Sikkim Subjects also known as the Sikkim Subject Register or Government Register and the name of those who are granted citizenship under various provisions were recorded in the said Sikkim Subject Register. That, the Petition for the aforesaid reasons deserves a dismissal.

7. While reiterating the facts as made out in the Writ Petition, in Rejoinder the Petitioners added that the High Level Committee ignored the particular distinctness of the appointments made by the then Chogyal on or before 31.12.1969 and that they were continuously residing in Sikkim prior to the merger and treated as '*Sikkimese*'. Besides, the Committee's opinion is influenced by non-consideration of the entire context in which the COIs were issued by the State. The opinion of Hon'ble Justice Bhaskar Bhattacharya the Chairman, Law Commission of Sikkim is devoid of examination of the Memorandum of 1981, the provisions relating to Regulation 8(iii) of the Regulation of 1961 and the opinion given by his predecessor in Office, Hon'ble Justice R.K. Patra dated

05.03.2012. That, Hon'ble Justice R.K. Patra after examining the matter had *inter alia* sought clarification from the authority on the point as to how a son whose father is having a COI could not be considered for issuance of a COI irrespective of whether he is of third or fourth generation. It is thus prayed that the reliefs be granted.

8. Advancing his arguments for the Petitioners, learned Counsel stated that insertion of the impugned sentence in Item No.5 of the Notification of 1995 and in Item No.5 of Notification of 1996 are violative of the provisions of Articles 14 and 21 of the Constitution and fails to satisfy the tests laid down by the Hon'ble Supreme Court under Article 14 of the Constitution. That, the classification is required to be reasonable and must have a nexus with the object sought to be achieved, however in the present case the classification is motivated and is wholly arbitrary, discriminatory, unreasonable and unjustified. That, in fact the Regulation of 1961 had placed all '*Sikkimese*' at par with each other, however the assailed Notifications have treated '*Sikkimese*' differently by denying benefits that accrue to the Petitioners. That, Article 15 of the Constitution under Clause (4) provides for special provisions to be made for the advancement of any socially and educationally backward classes of citizens and for the Scheduled Castes and Scheduled Tribes, however these exceptions are not applicable in the present circumstances. By denying issuance of COI to the grandchildren of persons employed before 31.12.1969, their rights of sale and purchase of land and other government benefits are being denied and is

socially divisive. While reiterating the facts as averred in the Petition, it was contended that the Memorandum of 1981 placed the Petitioners at par with persons belonging to other categories.

9. Adverting to the constitution of the Committee in 1989 by the Government of India, it was contended that a bare perusal of the Guidelines to the Committee clearly indicates that a person holding a regular Government job before 26.04.1975 and his natural descendants were found to be eligible to have their names included in the Register maintained under the Regulation of 1961, thereby making such person's eligibility at par with persons under Items (a), (b), (c) and (e) of the Guidelines. By the same logic it would imply that the Petitioners were also eligible for inclusion as Sikkim Subjects. That, interpreting the provisions of the Notification of 1995 to mean that the children of those who have obtained COIs on the basis of the employment of their father in Government service prior to 31.12.1969 would not be entitled to obtain COI would lead to absurdity and such interpretation would be unacceptable. That, even Regulation 6 of the Regulation of 1961 provides that children of a Sikkim Subject father would also be a Sikkim Subject. That, the insertion of Item No.4A is an effort to overcome the grammatical difficulties created by Notification of 1995 for children of those persons belonging to Items No.1 to 4 but excludes children of persons belonging to Item No.5 without any reasoning. Infact, agricultural land was not even a criteria for issuance of Sikkim Subject Certificate but was subsequently inserted by way of Memorandum of 1981. Contending that the

interpretation made by the Notifications of 1995, 1996 and 2010 (*supra*), leads to absurdity, he relied on ***H.S. Vankani and Others*** vs. ***State of Gujarat and Others***², ***Afcons Infrastructure Limited and Another*** vs. ***Cherian Varkey Construction Company Private Limited and Others***³ and ***Sarah Mathew*** vs. ***Institute of Cardio Vascular Disease and Others***⁴. It was next urged that the Government cannot make policy decisions which are illegal. Towards this submission, reliance was placed on ***State of Madhya Pradesh and Others*** vs. ***Mala Banerjee***⁵ and ***Delhi Development Authority and Another*** vs. ***Joint Action Committee, Allottee of SFS Flats and Others***⁶. That, the ratio in ***R.K. Garg*** vs. ***Union of India and Others***⁷ lays down that classification cannot be arbitrary. Further, in ***D.S. Nakara and Others*** vs. ***Union of India***⁸ the Courts have been vested with powers to widen the scope of the petitions by reading down the provisions. That, the interpretation of Notification of 1995 is untenable as fetters were created by such interpretation only for the third generation of persons belonging to Item No.5 of the Notification and not for the third or subsequent generation of persons belonging to Items No.1 to 4 of the said Notification. No explanation emerges as to why the third generation of persons belonging to Item No.5 alone have been denied COIs and not others. That, policy decisions cannot be arbitrary and there is no justification as to why the son or daughter of a father who is a

² (2010) 4 SCC 301

³ (2010) 8 SCC 24

⁴ (2014) 2 SCC 62

⁵ (2015) 7 SCC 698

⁶ (2008) 2 SCC 372

⁷ (1981) 4 SCC 675

⁸ (1983) 1 SCC 305

COI holder could not be considered for grant of COI whether he is of a third generation or fourth generation. That, in view of the averments in the Writ Petition and the foregoing arguments the prayers be granted.

10. Learned Advocate General repudiating the stand of Learned Counsel for the Petitioners contended that Article 14 of the Constitution is not applicable in the instant case. That, only those persons whose parents' names had been recorded in the Sikkim Subject Register on or before 15.05.1975 qualified as 'Sikkimese' or 'locals'. That, as per the Regulation of 1961 persons were naturalized as subjects on giving up of their Indian Citizenship and taking an oath of allegiance to the King. The forefathers of the Petitioners did not give up their Indian Citizenship neither did they claim allegiance to the then Kingdom and its Monarch and continued to be Indian Citizens, thus becoming ineligible for subjecthood. That, the letter dated 02.06.2006 by the Additional Secretary/Home to the District Collector, East District, Gangtok (Annexure-P14) unequivocally states the position that the grandchildren of persons who were issued with the COI being in regular Government service prior to 31.12.1969 were not entitled to obtain COI. Relying on the decision in **State of Haryana and Others vs. Mahabir Vegetable Oils Private Limited**⁹ it was contended that there is no law which can force the hand of the Government to extend benefits to the Petitioners. That, the Notification of 26.10.2010 extends the

⁹ (2011) 3 SCC 778

issuance of COI to the father but does not perpetuate it. The Learned Advocate General urged that Rule 4(4) of the Establishment Rules, 1974 is protected under Clause (k) of Article 371F of the Constitution whereby employment is reserved only for the '*Sikkimese*' or the locals. To safeguard the spirit of this provision, the Notifications have been issued by the Government of Sikkim from time to time and in 1981 the Government categorized various groups so as to enable them to take up employment in the State. By way of concession and as a one time measure this was offered also to persons whose father/husband had been in the service of the State on or before 31.12.1969. The Memorandum of 1981 also clearly stipulated that it was only for the purpose of employment. Thus, this concession was extended only to the wife or children of those persons who had been in Government service on or before 31.12.1969 and not to their children or other future generations. Later, by issuance of the Notification of 1995, the Government decided to issue Certificate of Identification. Vide the Notification, a concession was extended or continued to those persons whose father/husband had been in Sikkim Government service on or before 31.12.1969 on account of the State having newly merged into the Indian Union. A clarification ensued therein that COI would be only for the purpose of employment, thus manifesting the interpretation of the State Government to give the concession or benefit of COI to such category of persons despite them being non-locals. It was next contended that the grant of such concession does not however entitle them to claim

the status of being a Sikkim Subject or a '*Sikkimese*' which is a distinct class as law grants certain rights and privileges to the Sikkim Subjects. Consequently, the District Collectors vide Notification of 2006 have been authorized to issue COI only to the direct descendants of such persons, this distinction is reinforced by the amendment in the Finance Act, 2006 recognising '*Sikkimese*' as a distinct class. Drawing the attention of this Court to the ratio in ***Surendra Prasad Sharma (supra)***, it was contended that the Hon'ble Supreme Court has upheld the constitutional validity of the Establishment Rules, 1974. That, the High Level Committee constituted on 03.03.2014 concluded that the benefits to category in Item No.5 of Notification of 1995 as amended in 1996, was admissible only to the son/daughter and the wife of a person who was in the Sikkim Government service on or before 31.12.1969 and permanently lived in Sikkim after retirement and that too for the purpose of employment only and for no other purpose. That, the grandchildren of such persons are not entitled to COIs (Annexure R-5) and the Chairman, Law Commission of Sikkim Hon'ble Justice Bhaskar Bhattacharjee was also of the same view. That, the Memorandum of 1981 was not issued in terms of Regulation 8(iii) of the Regulation of 1961 neither was the Memorandum of 1981 for any other purpose besides employment contrary to the stand of the Petitioners. That, even under Clause 8 of the Regulation of 1961 persons who had been granted '*Sikkimese*' citizenship were required to enter their names in the Sikkim Subject Register hence in the absence of such entry the claims

of the Petitioners are misconceived. That, considering the historical background of Sikkim, the third generation of persons falling under category in Item No.4 of the Memorandum of 1981 and category in Item No.5 of the Notification of 1995 are not entitled to be treated in the same distinct class as Sikkim Subjects in terms of Article 371F of the Constitution and only one generation following was to be granted COI. Such non-entitlement is neither discriminatory nor arbitrary. It was clarified that before the appointed day there were many persons including citizens of India residing in the State for the purposes of employment or business. Such persons did not opt for 'Sikkimese' citizenship and continued to remain Indian citizens, hence after the merger it is only Sikkim Subjects or 'Sikkimese' nationals who were granted Indian citizenship. The other category of persons who are Indian Citizens were not required to be granted Indian citizenship afresh as they were already citizens of India even prior to the appointed day. That, at this belated stage the Petitioners cannot take the plea that under the Regulation of 1961 they are also entitled to 'Sikkimese' Citizenship. The Petitioners are thus not entitled to any of the reliefs sought for in the Writ Petition, which deserves a dismissal.

11. The rival submissions put forth by Learned Counsel were heard at length. I have carefully perused and considered the pleadings, the entire documents appended, as well as the Judgments cited at the Bar.

12. The questions that fall for consideration before this Court are –

- (i) Whether the impugned insertions in Notification No.66/Home/95, dated 22.11.1995 in Item No.5 qualifying the use of Certificate of Identification to persons in that category "*for the purpose of employment only*" and the insertion in Notification No.57/Home/96, dated 27.09.1996, substituting the provisions of Item No.5 and further qualifying the utility of the COI of that category by insertion of the words "*for no other purpose*" and the Letter dated 02-06-2006 and Notification of 2010 are violative of Articles 14 and 21 of the Constitution;
- (ii) Whether the Petitioners No.1 to 15 being grandchildren of persons who were Government Servants in the Government of Sikkim on or before 31.12.1969 are entitled to obtain Certificate of Identification and as a corollary whether children of Petitioners No.16 to 21 are entitled to the same as also their subsequent generations; and
- (iii) Whether such COI is to be limited to the purposes of employment only for persons in Item No.5 of the Notification of 1995 as amended by Notification of 1996.

13. A brief discussion on the relevant provisions of the Regulation of 1961 would lend assistance in delineating the issues raised in the Petition. In the erstwhile Kingdom of Sikkim, under Sikkim Subjects Regulation 1961, certain persons domiciled in the territory at the commencement of the Regulation and others contingent upon certain caveats, could be Sikkim Subjects. The relevant portions are extracted hereinbelow;

"3. Certain persons domiciled in Sikkim Territory at the commencement of the Regulation to be Sikkim subjects -

1. Every person who has his domicile in the territory of Sikkim immediately before the commencement of this Regulation shall be a Sikkim subject if he:
 - (a) Was born in the territory of Sikkim and is resident therein, or
 - (b) Has been ordinarily resident in the territory of Sikkim period not less than fifteen years immediately preceding such commencement; provided that in the said period of fifteen years any absence from the said territory on account of service under the Government of India shall be disregarded; or

5. Sikkim Subject by Descent:

Every person born after the commencement of this Regulation shall be a Sikkim Subject if at-the time of his birth his father is a Sikkim subject under this Regulation, whether or not the birth takes place in the territory of Sikkim.

8. Naturalised subjects:

(i)

(ii)

(iii) The Government to the-Chogyal shall also have the power to naturalise a person upon application made therefore in the manner prescribed by the rules, provided that the Government of the Chogyal are satisfied that;

- (a) He has been in the service of the Government of Sikkim for a period of not less than ten years immediately preceding the date of his application, or

(b) He has rendered meritorious service to the state; and the person to whom such a certificate is granted shall, on taking oath of allegiance, and upon his name being entered in the Register of Subjects, be a naturalized Sikkim subject from the date on which the certificate was granted;"

14. A bare perusal of these provisions reveal that once the contingencies in Regulation 8 were fulfilled persons applying for Sikkim Subjecthood would be granted the same. The Regulations do not envisage any differential benefit or treatment

to any category once they are Sikkim Subjects, whether by birth, descent or naturalisation. The Sikkim Subjects Regulation, 1961 stood repealed by the Adaptation Laws, 1975, which defines *"Existing Law"* as *any law in force immediately before the Appointed day in the whole or any part of the territories comprised in the State of Sikkim. "Law includes any enactment, Proclamation, Regulation, Rule, Notification or other instrument having, immediately before the Appointed day, the force of Law in the whole or any part of the territories now comprised in the State of Sikkim."* Hence, the Establishment Rules, 1974, being covered by the ambit of the above definitions is a protected law in terms of Article 371F(k) of the Constitution.

15. Rule 4(4) of the Establishment Rules, 1974, provides as follows;

"4. Establishment : General principles.-

.....

(4) Appointment.- (A) Appointment to service under the Government shall be by one or both the method indicated below;-

(a) Direct recruitment;

(b) Promotion from one grade to another.

(B) Direct recruitment shall include appointment on contract and appointment on deputation:

Provided these two types of appointment shall be made having due regard to the exact nature of specific duties and responsibilities and the qualification required for the post, and further provided that (i) **Non-Sikkimese nationals may be appointed only when suitably qualified and experienced Sikkimese nationals are not available**, and (ii) **replacement of such appointees by suitable Sikkimese candidates may be made as and when available.**

....." [emphasis supplied]

As pointed out by the Respondents, the constitutional validity of Rule 4(4) of the Establishment Rules, 1974 has been

upheld by the Supreme Court in ***Surendra Prasad Sharma*** (*supra*). It is evident that under the Regulation of 1961 there was no cut-off year for submission of application by any person to become a Sikkim Subject by naturalization. In this context, it cannot but be noticed that the records furnished before this Court do not provide for reasons as to why the Government has specified that 31.12.1969 would be the relevant year for issuance of Certificates to Item No.4 of the Memorandum of 1981 and Item No.5 of the Notification of 1995 partially modified in 1996. Be that as it may, this date is not assailed in the instant Petition and therefore further discussions on this aspect stand truncated here.

16. Post merger, Memorandum bearing No.5(92)229/GEN/Est. came to be issued on 25.09.1976 which reads as follows;

"OFFICE OF THE SECRETARY
ESTABLISHMENT DEPARTMENT
GOVERNMENT OF SIKKIM

Memorandum No.5(92)229/GEN/Est.
Dated Gangtok, the September 25th 1976.

In order to ascertain the residential qualification of candidates who claim to be **Locals** on the view of seeking employment, **it has been decided that the candidates should be able to maintain whether their parents name have been recorded on or before 15.5.1975 in the relevant Government Register.**

Sd/-T.Chhopel
Secretary
Establishment Department

1. Secretary/Head of Department.
2. Additional Secretary, Home Department.
3. District Office East/West/North/South.
4. File and
5. Guard File

[Emphasis supplied]"

As per this Notification, locals who sought employment (impliedly Government employment) were to establish entry of

their parents' name in the Sikkim Subject Register on or before 15.05.1975. This is a day before the date on which the Citizenship Act, 1955 (57 of 1955) came into force in the State of Sikkim, i.e., on 16.05.1975, vide Notification in the Extraordinary Gazette No.995/H/75, dated Gangtok 21.06.1975.

17. Notification bearing No.285 (GEN)/EST. dated 28.01.1980 was issued in continuation of the Notification of 1976 *supra* and provided that **Domicile/Residential Certificate** issued by sources other than the District Collector, shall not be accepted as valid. It is worthwhile noticing that the Notification of 1976 made no mention of a "*Certificate*". The Notification of 1980 came to provide for "*Domicile/Residential Certificate*" but carved out no distinction between the two.

18. In 1981 for the first time the Government of Sikkim categorised persons into four different groups to enable them to obtain Certificates, issued by the District Collectors, for the "**purposes of employment**" in the State, vide Memorandum bearing No.5(92)5/GEN/EST, dated 09.04.1981. This Memorandum provides as follows;

"GOVERNMENT OF SIKKIM
ESTABLISHMENT DEPARTMENT

NO.5(92)5/GEN/EST Dated Gangtok the 9.4.81

MEMORANDUM

In modification of this Department Notification No:5(92)229/GEN/EST dated: 25.9.76 and Notification No:285/Gen/EST dated:28.1.1980 **the Governor has been pleased to authorize the District Collectors within their respective districts to issue certificates to persons identifying them in the following groups to enable them to apply for employment in the State.**

1. A person whose name is found recorded in the Old Sikkim Subject Register prior to 1975.

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2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that name of his/her father/husband/paternal grandfather/ brother from same father has been recorded in the Old Sikkim Subject Register.
3. A person who has agricultural land in the rural areas and has been ordinarily residing in the State of Sikkim.
4. A person whose father/husband had been in the service of the State Government on or before 31st December, 1969.

Sd/-
L.T. Tonyot
Joint Secretary to Govt. of Sikkim
Establishment Department
[emphasis supplied]”

Apart from '*locals*' as mentioned in the Memorandum of 1976 and categorized at Item Nos.1 and 2 of the Memorandum of 1981, Item No.3 saw the inclusion of persons who had agricultural land in rural areas and ordinarily residing in Sikkim as being eligible to apply for and obtain **Domicile/Residential Certificate** for employment in the State. For this category there was no requirement of proving lineage or ancestry in Sikkim. Item No.4 included persons whose father/husband had been in the service of the State Government on or before 31.12.1969 and they too were found to be eligible to apply for employment in the State. Thus, all four categories in the Memorandum were eligible to apply for and obtain Certificates, to enable them to apply for employment in the State. As apparent, all four categories have been placed at par by this Memorandum for the said purpose, viz., employment.

19. Thereafter, vide Notification No.56(9)H/88-89/35 (Annexure P8) dated 03.04.1989, the Sikkim (Citizenship) Order, 1975 was amended by the Sikkim (Citizenship)

Amendment Order, 1989 and the following proviso was inserted in Paragraph 2;

“Provided that any person whose name was eligible to be entered in the register maintained under the said regulation but was not so entered because of any genuine omission shall also be deemed to have become a citizen of India on that day if so determined by the Central Government”.

A Committee comprising of Central and State Government Officers was constituted by the Central Government vide Notification No.56(9)/H88-89/36, dated 03.04.1989, for the aforestated object. The Notification bore an Annexure being “Annexure to M.H.A. ORDER NO.26030/69/88-IC.I dated 20.3.89. GUIDELINES” which reads as follows;

- “a. Natural descendants of a person whose names is in the Sikkim Subject Register.
- b. Person having recorded ownership or tenancy rights on agricultural land or of rural property within Sikkim before 26th April, 1975, and his natural descendants.
- c. Persons, whose name is included in the earliest available voters-list prior to the 26th April, 1975, and his natural descendants.
- d. Person holding a regular government job before 26th April, 1975 provided that the appointment has not been a made (sic) under the 'exception' clause pertaining to non-subjects; and his natural descendants.**
- e. Holder of trade license outside notified bazaar areas prior to 26th April, 1975 and his natural descendants.
- f. He must not have entered the territory of Sikkim on the basis of work-permit.
- g. He must not have acquired citizenship of any other country.
- h. He must not be holding the status of refugee on the basis of a registration certificate issued by the competent authority.

(The criteria laid down from (a) to (e) singly or collectively are by themselves not be taken as conclusive evidence for granting citizenship, but would have to be scrutinized in the light of those at (f), (g) & (h). **[Emphasis supplied]”**

The contention of the Petitioners is that the guidelines *supra* prescribed the category in 'd' for inclusion as Sikkim

Subjects, hence by the same logic all other persons who were Government employees then but not Sikkim Subjects were also eligible to be considered as '*Sikkimese*'. In this context, it may be clarified that the forefathers of the Petitioners were admittedly Indian Citizens, hence this exercise was not relevant for them, as they were not left out persons. The exercise was only for the conferment of citizenship to persons for the aforesaid reason, although evidently the guidelines at 'd' was prompted by Regulation 8 of the Regulation of 1961. The State-Respondents could not enlighten this Court as to what the "*exception clause*" as mentioned in Item 'd' pertained to.

20. Consequent thereto, the Central Government vide its Order No.26030/36/90-I.C.I. of the Ministry of Home Affairs dated 07.08.1980, republished in the Sikkim Government Gazette Extraordinary vide Notification No.56(9)Home/88-89/108, dated 16.08.1990, provided Citizenship to 40,083 persons w.e.f. 26.04.1975. This was followed by a second Order bearing No.26030/36/90-I.C.I., dated 08.04.1991, of the Central Government, republished in the Sikkim Government Gazette Extraordinary vide Notification No.56(9)Home/88/7, dated 15.04.1991, the Central Government conferred Citizenship on an additional number of 33,348 persons. A total of 73,431 persons who were found to have been left out due to genuine omissions and conferred Indian Citizenship.

21. On 22.11.1995 the State Government then issued the Memorandum which reads as follows;

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"GOVERNMENT OF SIKKIM
HOME DEPARTMENT

No.66/Home/95. Dated:22nd November, 1995.

N O T I F I C A T I O N

In supersession of the Memorandum No.5 (92) 229/GEN/EST, dated 25th September 1976, Notification No. 285/GEN/EST, dated 28th January, 1980, Memorandum No5 (92) 5/GEN/EST, dated 9th April, 1981 and Circular No. 339/HS/87, dated 17th March, 1987, **the State Government is hereby pleased to authorize the District Collectors, Sub-Divisional Officers and Revenue Officers within their respective jurisdiction to issue Certificate of Identification to the persons falling in the different categories as indicated below** on the recommendations Of (sic) the Gram Panchayat and being duly satisfied with such recommendation:-

1. A person whose name is found recorded in the Old Sikkim Subject Register or
2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that the name of his/her father/husband/paternal grandfather/brother from the same father has been recorded in the Old Sikkim Subject Register or
3. A person who has or had agricultural land in rural areas and has been ordinarily residing in the State of Sikkim or
4. A person who is holder of Indian Citizenship Certificate issued by the District Collector, Government of Sikkim under the Sikkim (Citizenship) Order, 1975 as amended vide the Sikkim (Citizenship) Amendment order, 1989 or
5. **A person whose father/husband has/had been in Sikkim Government Service on or before 31.12.1969. Certificate or Identification (sic) obtained by such persons shall be for the purpose of employment only.**

.....
By order and in the name of the Governor,

K.A.VARADAN
CHIEF SECRETARY
(F.No. 103/90-91/L.R.)

[emphasis supplied]"

22. Vide this Notification it is evident that the Certificates earlier called **"Domicile/Residential Certificates"** by the Notification of 1980 was given the nomenclature of **"Certificate of Identification"** (COI, for short) and the **"left out"** persons who

were included by the Orders *supra*, as Indian Citizens, were inserted in Item No.4 as persons eligible to receive COI. The previous Item No.4 was now renumbered as Item No.5 and it was specified therein that the COI obtained by persons at Item No.5 shall be **"for the purposes of employment only"**. It is pertinent to notice that in contrast to the Notification of 1976 which provides that *"In order to ascertain residential qualification of candidates who claim to be **Locals** on the view of seeking employment"* and Memorandum of 1981 which provided that Certificates will be issued to persons as categorized therein to enable them to *"apply for employment"*, no specific mention of *"employment"* is made in the introduction to the Notification of 1995 as the purpose for obtaining COI. The word *'employment'* only finds mention in Item No.5, by way of qualifying the use of COI for that category for the *"purpose of employment only"*. Hence, there appears to be substance in the submissions of the Petitioners that the utility of the COI is not confined to employment but is for myriad purposes within the State.

23. The Notification of 1995 came to be modified by the Notification of September, 1996, extracted hereunder;

**"GOVERNMENT OF SIKKIM
HOME DEPARTMENT**

No. 57/Home/96 Dated: 27th September, 1996

NOTIFICATION

In partial modification of Notification No. 66/Home/95 dated 22nd November, 1995, the State Government hereby makes the following amendments with immediate effect:-

- In the said Notification for the words, "Sub-Divisional Officers and Revenue Officers" wherever they occur, the words

"Additional District Collectors" shall be substituted.

- For item 5, the following shall be substituted, namely:

"5. A person whose father/husband has/had been in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after his retirement. Certificate of Identification obtained by such persons shall **be for the purpose of employment only and for no other purpose**"

By order and in the name of the Governor.

CHIEF SECRETARY
(F.NO. 103/90-91/L.R.)
[Emphasis supplied]"

The sentence added in Item No.5 (*supra*) further qualified the sentence of the Notification of 1995 to confine the utility of COIs obtained by persons at Item No.5 to be for the purpose of employment "*and for no other purpose*". Although the Notification of 1981 was confined to Certificates for employment it treated persons in the categories alike but in the Notification of 1995 which superseded the Memorandum of 1981 no reasons emanated as to why the utility of the COI has to be limited to employment for category in Item No.5.

24. The Home Department vide Notification bearing No. 04/Home/2006, dated 25.01.2006, partially modified Notification of 1995 as amended in 1996 and authorized the District Collectors to issue COI only to "*direct descendants*" of Sikkim Subject Certificate/COI holders appearing in the present updated list. That "*all other*" requests for issuance of COI was to be forwarded to the Head Office for consideration after completing field verification as usual.

25. Following the above actions, the Additional Secretary, Home Department, Government of Sikkim in a

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communication to the District Collector, East District at Gangtok while referring to the Office letter of the said Official, bearing No.861/DCE, dated 10.05.2006, would clarify as follows;

**"HOME DEPARTMENT
GOVERNMENT OF SIKKIM**

No:Gos/Home-II/94/14(Part)/2687 Dated:02/06/2006

To,

The District Collector,
East District,
Gangtok.

Sir,

Kindly refer to your office letter No.861/DCE dated 10/05/2006 seeking clarification as to whether the Certificate of Identification can be issued to the grand children of the persons who were issued with the Certificate of Identification being in regular Government service prior to 31/12/1969.

I am directed to convey that the third generation is not covered for issue of COI under Notification No.66/Home/1995 dated 22/11/1995 and No.57/Home/1996 dated 27/09/1996. Therefore, the present practice may continue.

Yours faithfully,

Sd/-

(D.P. SHARMA)

ADDITIONAL SECRETARY/HOME

[emphasis supplied]"

26. Another Notification bearing No.119/Home/ 2010, dated 26.10.2010, partially modified the Notification of 1995 dated 22.11.1995, as amended in 1996. The relevant portion is extracted below;

**"GOVERNMENT OF SIKKIM
HOME DEPARTMENT
GANGTOK**

No. 119/Home/2010

Dated: 26/10/2010

NOTIFICATION

In partial modification of Notification No. 66/Home/95 dated 22nd November, 1995 as amended vide Notification No. 57/Home/96 dated 27th September, 1996 the State Government hereby makes the following amendments with immediate effect:

(1)

- (2) After item 4 the following shall be inserted, namely:

"4A. A person whose father/husband is/was eligible for grant of the **Certificate of Identification** under any of the categories listed under items 1 to 4 above, or"

- (3) After item 5 the following shall be inserted, namely:

"Provided that no such Certificate shall be issued or deemed to have been validly issued for further issue of COI:-

- (a) On the basis of relationship of father unless the applicant is or at the relevant time was the natural legal descendant of such person.
 - (b) On the basis of relationship of husband unless the applicant has established beyond all reasonable doubt that she is or at the relevant time was a citizen of India.
 - (c) On the basis of relationship of paternal grandfather/brother from the same father unless the applicant has established beyond all reasonable doubt that he/she is or at the relevant time was a citizen of India and has/had been a resident of the State."
- (4)"

BY ORDER AND IN THE NAME OF THE GOVERNOR.

TT Dorji, IAS

Chief Secretary

File No.Home/Confdl./158/1994/2/Part

[emphasis supplied]"

The insertion of 4A *supra* as canvassed by the Petitioners perpetuated the eligibility of Item Nos.1 to 4 but excluded Item No.5.

27. While carefully walking through the report of the High Level Committee referred to by the parties, Annexure R-5, comprising of the Chief Secretary, Director General of Police, Principal Secretary, Law Department, Principal Secretary, Home Department, Secretary, Department of Personnel, Administrative Reforms and Training, Secretary, Land Revenue and Disaster Management Department, it appears at Paragraph 6 of the

Report that the Committee had examined all the relevant Circulars, Memoranda, Notifications and related documents and arrived at conclusions as detailed in Paragraph 6(a) to 6(d). For convenience, Paragraph 6(c) and 6(d) are extracted hereinbelow;

- "6.
- (c) Persons granted COIs under categories 1 to 4 would be classified as 'locals' and entitled to various other rights and privileges. Persons claiming under category 5 have been given a particular benefit on the basis of their father or husband having served the Sikkim government on or before 31.12.1969 and have permanently settled in Sikkim after retirement. The Notification No.66/Home/95 dated 22nd November, 1995 has created a distinct category under category 5 which says "A person whose father/husband has /had been in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after retirement.". It clearly restricts the eligibility to a person whose father/husband has / had been in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after his retirement and that the Certificate of Identification obtained by such persons shall be for the purpose of employment only for no other purpose. Therefore, from a plain and simple reading of the words of the Notification No.66/Home/95 dated 22nd November 1995 as amended, there is no ambiguity at all and it is very clearly evident that only the son/daughter (natural legal descendant) and the wife of a person who was in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after retirement is entitled to get a Certificate of Identification under category 5 of the said notification for the purpose of employment only and for no other purpose. There is nothing in the official records to suggest or give any indication that the State Government had any intention whatsoever at any point of time to extend the benefit of category 5 to the grandchildren or further generations of those who were in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after retirement.

- (d) The Committee has thoroughly examined all relevant Memoranda, Notifications and other documents and has come to the conclusion that the benefits under category 5 of Notification No 66/Home/95 dated 22nd November, 1995 as amended are admissible only to the son/daughter (natural legal descendant) and the wife of a person who was in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after retirement and that too for the purpose of employment only and for no other purpose. The grandchildren of those persons who were in Sikkim Government Service on or before 31.12.1969 are not entitled for Certificates of Identifications.
[emphasis supplied]”

Evidently, the Committee has looked into the relevant Memoranda, Notifications and the contents *prima facie* and from a “plain and simple” reading of the Notifications arrived at their decision. They have however failed to examine the reasons for inclusion of Item No.4 in the Memorandum of 1981 and their continued inclusion in the Notification of 1995 at Item No.5 and Notification of 1996 both of which proceeded to limit the utility of their COI to employment only, while no such restrictions were introduced for other categories, although in Memorandum of 1981 they were all placed on the same footing, limited as the purpose was to employment. No reasons have been given for the conclusions arrived by the Committee at Paragraph 6(d) of their Report. They appear to have *per se* examined the documents but their consideration was bereft of examination of any relevant File or notings of the various Government Departments and the reason for the policy decision of the Government pertaining to the Memorandum of 1981 and its supersession by the Notification of 1995.

28. Annexure P20 (collectively) an application submitted by one Motiyas Rai, S/o Shri Meshak Rai, pertaining to issue of Certificate may relevantly be examined. The note of the Under Secretary – I (C)/Home after receiving the application reads as follows;

“.....

This is regarding representation submitted by Motiyash Rai of West Sikkim for grant of Certificate of Identification to the Chief Minister vide his application placed below at Fag- (sic) A.

Here the following points are submitted for consideration:

1. Motiyash Rai is the son of Shri Meshak Rai of Tinzerbong Block, West Sikkim who is in possession of Certificate of Identification (COI) issued to him on the basis of his father's COI under provision laid by Sl. No.5 of the Notification No.66/Home/95 Dated 22nd November, 1995 placed at Flag B below, read with the amendment notified vide Notification No.57/Home/96, Dated 27th September, 1996 which provides that COI may be issued to "A person whose father/husband has/had been in Sikkim Government Service on or before 31.12.1969 and permanently settled in Sikkim after retirement. COI obtained by such persons shall be for the purpose of employment only and for no other purpose."

His father was the second generation to be issued COI under the said provision.

2. In this connection a letter written by the then Additional Secretary, Home to the District Collector, East may be perused at Flag- C which clearly mentions that the third generation is not covered for issue of COI under Notification No.66/Home/95, Dated 22nd November, 1995. Which means Shri Motiyash Rai, who is the third generation in this case is also not covered.

3. The Notification No.66/Home/95 Dated 22nd November, 1995 was again amended vide Notification No.119/Home/ 2010, Dated 26.10.2010 placed below at Flag D which vide sl. No.3 (c) provides that "On the basis of relationship of paternal grandfather/ brother from same father unless the applicant has established beyond all reasonable doubt that he/ she is or at the relevant time was a citizen of India and has/had been a resident of State."

This has included the third generation; however it is not clear whether it is application for the category 5 of the Notification No.66/Home/95

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Dated 22nd November, 1995 as it spells that : "COI obtained by such persons shall be for the purpose of employment only and **for no other purpose.**"

.....

4. The application was also examined by the Law Department vide notes at Nsp 8 ante/-, whereby they have stated that "While going through the above clause, it may perhaps be impliedly inferred that third generation may be covered under category-5 of the Notification No.66/Home/95 Dated 22nd November, 1995". If this is the case, Motiyash Rai's application may be considered, but it will also entitle all the other such third generation who may approach the office of the District Collector for issue of COI on the basis of their grandfather's COI issued under clause 5 of Notification No.66/Home/95 Dated 22nd November, 1995.

Submitted for perusal of higher authorities and further appropriate action, please.

....."

The matter was placed before the Additional Secretary (C)/Home who has recorded as follows;

".....

2. The question for consideration here is whether 3rd generation of a person whom COI has been issued under clause 5 of the Notification referred to above are eligible for issue of COI similar to that of his father. It is clarified that COI under the said clause is issued to those who were in the regular service of the State Government prior to 31st December, 1969.

3. In this connection it is apprised that clause 5 provides for grant of COI to a person whose father/husband has/had been in Sikkim Government service on or before 31.12.1969 and permanently settled in Sikkim after his retirement. The point to be understood here is that this clause does not make mention of paternal grandfather or the brother from the same father etc. as in clause 2 of the above Notification.

4. This notification was partially amended vide Notification NO.119/Home/2010 dated 26.10.2010 whereby a proviso was inserted after clause 5 to make the first notification more specific and clear (clause 3 of the said notification may be seen at flag 'c'). Sub-clause (c) of the clause 3 of notification (flag 'c' below) also speaks of relationship of paternal grandfather/brother from the same father etc.

5. Therefore, the provision of the proviso of notification (flag 'c') is not applicable to person who

are eligible for grant of COI under clause 5, as the said clause speaks of father and husband only and not the paternal grandfather or the brother from the same father.

6. In the light of the above interpretation the 3rd generation of a person whom COI has been issued under clause 5 is not entitle for further issue of COI.

However, Law Department may kindly see and advice, please.

..... [emphasis supplied]"

It thus emerges that varying opinions of Officers of various Departments interpreted the provisions of the Notification of 1995 and Notification of 2010 as reflected hereinabove, with the Home Department being opposed to the issuance of COI to the third generation while the Law Department was of the opinion that *"it may perhaps be impliedly inferred that third generation may be covered under category-5 of the Notification No.66/Home/95 Dated 22nd November, 1995"*. The differing opinions compounded the conundrum whereby it was deemed essential to seek the views of the Hon'ble Chairman, Law Commission, Sikkim.

29. Hon'ble Justice R. K. Patra, the then Chairman, Law Commission opined *inter alia* as follows on 05.03.2012;

".....

However, a policy decision cannot be arbitrary and must have a rational basis. The point that needs to be clarified by the authority is on the point as to how a son whose father is having a C.O.I. could not be considered for issue of C.O.I. irrespective of whether he is of third or fourth generation. If the rule has been designed to put a stop to such issue of C.O.I. reasons in support of it must be indicated. The requirement of law is that there must be reasonable nexus between the object sought to be achieved and the device or methodology adopted. In other words it must be reasonable and not arbitrary.

The authority may clarify the above point. Based on the clarification if it so warrants the

existing provisions may require to be suitably modified.

For further examination, the query (sic) made above be answered.

..... [emphasis supplied]"

30. No information was forthcoming to the query made by the Chairman, Law Commission instead the File meandered in its path to the Office of the then Learned Advocate General, who required the Additional Chief Secretary, Home Department to provide all Notifications along with the relevant File to enable him to determine the object and intention of the impugned amendment. This request too met the fate of stonewalling inasmuch as the Under Secretary to the Department informed the Additional Chief Secretary that the File in which the matter was dealt with in 1995, being F. No.103/90-91/L.R., of the Land Revenue and Disaster Management was untraceable in the Department. The failure or reluctance of the Government to furnish the File undoubtedly leads to an adverse inference. Following this development, Hon'ble Justice Bhaskar Bhattacharjee gave an opinion divergent to that of his predecessor in Office Hon'ble Justice Patra. Strong reliance was placed by the State Government on the opinion rendered by Hon'ble Shri Justice Bhaskar Bhattacharjee, Chairman, Law Commission of Sikkim. However, on careful perusal of his opinion which was reproduced in the Counter-Affidavit of the State-Respondents, it contains no reference or specifics as to why he was of the opinion that the third generation of COI holder based on Government service should not be issued COI. He opined as follows;

"In order to appreciate the above question, it will be profitable to refer to the above clause 5 which is quoted below:

5. A person whose father/husband has/had been in Government Service on or before 31.12.1969 and permanently settled in Sikkim after his/her retirement.

On a plain reading of the above clause manifestly expresses the intention of the State to give a special type benefit of COI only for seeking employment in Sikkim Government Service even though a person does not come within the clause 1 to 4 of the said notification after taking into consideration the fact that the applicant's father/husband rendered service to Sikkim Government on or before 31/12/1969 and after his/her retirement has permanently settled in Sikkim.

In the opinion of this Commission, such special benefit of right to apply for employment in the Sikkim Government Service notwithstanding the fact that such person is not otherwise entitled to have COI should not be extended from generation to generation. Thus, this Commission is of the view that the special privilege conferred in Clause 5 of the above notification should not be extended any further to the grandchildren of the former employees mentioned herein.

Let the above view of this Commission be immediately be communicated to the State Government."

It is evident that here too a "plain reading" of the Clauses was resorted to but with due respect he has not taken into consideration the Memorandum of 1981 and the subsequent impugned insertion made in Item No.5 of the Notification of 1995, and Notification of 1996. No details of reasons unfolded as to why he differed from the opinion of Hon'ble Justice Patra or whether the reasons for prescribing limitations vide the impugned sentences of the Notifications of 1995 and 1996 were furnished for his perusal.

31. From the entirety of facts and circumstances *supra* and the discussions hereinabove, although it is submitted by the

State-Respondents that insertion of the category in Item No.4 of the Memorandum of 1981 and Item No.5 of the Notification of 1995 was not prompted by the provisions of the Regulation of 1961, silence resounds on the reasons for such insertion. No documents, File notings revealing the reasons for the policy of the State Government or any other evidence was forthcoming for the perusal and consideration of this Court. Indubitably after the merger of Sikkim, the Regulation of 1961 came to be repealed, despite this circumstance the category in Item No.4 was inserted in the Memorandum of 1981. In other words, post merger there was indeed no requirement to include the category but the State-Respondents in its wisdom did include them. Once they have been so included it is indicative of an implied acceptance of the Petitioners by the Respondent as '*Sikkimese*' and thereby a legitimate expectation on the part of the Petitioners to be treated as such. The State-Respondents' contention that it was a one time concession to that category is unfathomable, since Rule 4(4) of the Establishment Rules, 1974 already provides for employment to outsiders if competent candidates were not available amongst the '*Sikkimese*'. It is not the Petitioners' case that the Chogyal had granted them Citizenship nonetheless it was only their legitimate expectation based on the Regulations of 1961 of becoming '*Sikkimese*', a promise writ large in the Regulations, the circumstance of merger being unforeseen. Post merger therefore, it was incumbent upon the State Government to have addressed the specific case of the non-Sikkimese Government servants and their status, instead as already stated

they were included in the Memorandum of 1981, devoid of any caveat, which led to an assurance and affirmation of their status as 'Sikkimese'. The Memorandum of 1981 is the result of a Government policy which nowhere elucidates that a one time concession was extended to the category in Item No.4 of 1981 thereby preparing them for the eventuality of the Notifications of 1995, 1996 and 2010. The Notification of 1995 being in supersession of the Memorandum of 1981 effectively replaced its contents and was a bolt from the blue for the Petitioners who, I am of the considered opinion, cannot now be short changed by insertion of qualifying sentences. It was the argument of the State-Respondents that in any event the Memorandum of 1981 was only for employment. True that, but when the superseding Notification was issued no reason emanates for placing Item No.5 differently from other categories by limiting the use of their COI to employment while no such restrictions emerge for other categories. The argument of Learned Advocate General that only those persons whose parent's names were recorded on or before 15.05.1975 were 'Sikkimese', stands belied by the introduction of the category in Item No.3 in the Memorandum of 1981 for whom neither birth or descent, is mentioned as a criteria, neither did any cut-off date exist, the only requirement being possession of agricultural land.

32. The Supreme Court in ***Kailash Chand Sharma vs. State of Rajasthan and Others***¹⁰ expounded that a policy decision should be free from the ills of arbitrariness and conform to the well-

¹⁰ (2002) 6 SCC 562

settled norms both positive and negative underlying Articles 14 and 16 of the Constitution which together with Article 15 of the Constitution form part of the constitutional code of equality. From the above stated ratio it concludes that a policy decision is not beyond the pale of judicial review if the policy decision is taken arbitrarily and fails to satisfy the test of reasonableness. Concomitant to this principle is the doctrine of legitimate expectation which is an aspect of Article 14 of the Constitution in dealing with Citizens in a non-arbitrary matter. In ***Manuelsons Hotels Private Limited vs. State of Kerala and Others***¹¹ the Supreme Court held that where an exemption from payment of property tax was promised by the Government and a consequent amendment was made in the Statute enabling the Government to issue an exemption Notification but no such exemption was granted, non-issuance of the exemption notice is arbitrary and contrary to the principle of estoppels.

33. Equality before the law as provided in Article 14 of the Constitution is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. The State has the obligation to take necessary steps so that every individual is given equal respect and concern which he is entitled to as a human being [***Amita*** vs. ***Union of India and Another***¹²]. The requirement thus is of a nexus between the basis of classification and the object of the legislation eschewing irrationality. There

¹¹ (2016) 6 SCC 766

¹² (2005) 13 SCC 721

cannot be undisclosed and unknown reasons for subjecting individuals to hostile and discriminatory policy. Although good faith and knowledge of existing conditions are presumed to be reasons for State action, it cannot be cloaked with some undisclosed reasons for discrimination. I hasten to add that the guarantee of equal protection of law and equality does not prohibit the State from creating classification but such classification is to be founded on intelligible differentia and a rational relation to the object sought to be achieved. The onus for this is upon the Respondent, which unfortunately they have failed to discharge. This Court is conscious and aware that policy decisions of the Government are to be tread upon warily and with circumspection but a policy decision which is subversive of the doctrine of equality cannot sustain. This observation stands augmented by the ratio in ***Kailash Chand Sharma*** (*supra*).

34. We may now consider the ratio relied on by Learned Advocate General in ***Mahabir Vegetable Oils Private Limited*** (*supra*). While buttressing his submissions with the above ratio Learned Advocate General canvassed that the beneficiary of a concession has no legally enforceable rights. It may be remarked here that the Supreme Court in the said ratiocination has explicated at Paragraph 29 as follows;

"29. Furthermore, in the fact of the instant case, it cannot be said that the respondent had altered its position relying on the promise inasmuch **as even before steps were taken by the respondent for laying the solvent extraction plant, the petitioner had made its intention clear through its notice dated 3-1-1996 that it was likely to amend the law/Rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file**

objections and suggestions thereto. Amendments in the terms of the said draft Rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and whereunder the solvent extraction plant was included therein."

[emphasis supplied]

35. It thus emerges that affected persons in the ratiocination above were sounded about the intention of the Respondents therein and thereby the claim of prejudice was a nullity. In the instant case no notice of intention by the Government to supersede the Memorandum of 1981 and thereafter to insert the qualifying sentences in the Notification of 1995, Notification of 1996, interpretation vide Letter dated 02-06-2006 and Notification of 2010, was ever made to the Petitioners or their predecessors. Article 14 of the Constitution requires the Rule of *audi alteram partem*, a facet of natural justice to be adhered to and is the antithesis of arbitrariness. The maxim mandates that no person shall be condemned unheard which unfortunately has been given a go-by by the State-Respondents.

36. In *Smt. Indira Nehru Gandhi vs. Shri Raj Narain*¹³ the Supreme Court observed as follows;

"564. Indeed, there are judicial dicta to the effect that God Himself considered Himself bound by those elementary principles of justice whose love was planted in man by Him. In *Cooper v. Wandsworth Board of Works* [(1863) 4 CB (NS) 180] Byles, J. observed:

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adams' (says God), 'where art thou? Has thou not

¹³ 1975 (Supp.) SCC 1

Yogen Ghatani and Others vs. State of Sikkim and Others

eaten of the tree whereof I commanded thee that thou shouldst not eat?’ And the same question was put to Eve also.”

In ***E. P. Royappa vs. State of Tamil Nadu and Another***¹⁴ for the first time a new dimension to Article 14 of the Constitution was pointed out. The Supreme Court while doing so held as follows;

“85. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., “a way of life”, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed, cabined and confined” within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.”

This view was reiterated in the ratio of ***Maneka Gandhi vs. Union of India***¹⁵ and ***R. D. Shetty vs. International Airport Authority of India***¹⁶.

37. In ***Ajay Hasia and Others vs. Khalid Mujib Sehravardi and Others***¹⁷ the Supreme Court held as follows;

“16.

..... It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary,

¹⁴ (1974) 4 SCC 3

¹⁵ (1978) 1 SCC 248

¹⁶ (1979) 3 SCC 489

¹⁷ (1981) 1 SCC 722

must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

38. The Government turned a Nelsons eye to the requirement of Article 14 of the Constitution when arbitrarily inserting the assailed sentences sans rationale. The casualness with which a File of importance being F. No.103/90-91/L.R. of the Land Revenue and Disaster Management which could have thrown light on the policy decisions and the changes envisaged has been dealt with by the Government department with astounding callousness. If, as urged, the Memorandum of 1981 extended a one time concession, the records do not bear out reasons for extension of such magnanimity nor does the arbitrary stand in Notification of 1995, Notification of 1996 and Notification of 2010 stand the test of equity, justice and fair play. A belated realization by the State Government of unintended altruism to the persons by inclusion in Item No.4 of the Memorandum of 1981, and in Notification of 1995 cannot be a ground for the qualifying the use of the COI by subsequent Notifications, bereft of specific reasons. Indeed the inclusions of

Item No.4 and Item No.5 in 1981 and 1995 respectively appears to have been made rather late in the day, viz., years after the appointed day. Nevertheless, can they now cease to be locals by sleight of an interpretation of a Government servant or for that matter the High Level Committee who have failed to shed light on the grounds for the Government policy either way. The State Government is entitled to amend or rescind a policy decision in public interest but what the public interest is cannot be shrouded in mystery.

39. In conclusion, in consideration of the facts and circumstances and documents on record and the gamut of discussions hereinabove, the questions raised *supra* stand answered.

40. In conclusion, it is it is observed and ordered as follows;

- (i) The insertion of the sentence "*Certificate of Identification obtained by such persons shall be for the purpose of employment only*" appearing in Notification No.66/Home/95, dated 22.11.1995, and insertion of the sentence "*Certificate of Identification obtained by such persons shall be for the purpose of employment only and for no other purpose*" appearing in Notification No.57/Home/96, dated 27.09.1996, which substituted Item No.5 of the Notification No.66/Home/95, dated 22.11.1995, being irrational is violative of Article 14 of the Constitution of India and deserve to be and are hereby quashed.
- (ii)(a) Letter bearing No.GOS/Home-II/94/14(Part)/2687, dated 02.06.2006, issued by the Respondent No.2,

to the effect that, Item No.5 of Notification No.66/Home/95, dated 22.11.1995 does not entitle the third generation, i.e., the children of the persons who were issued Certificate of Identification on the basis of employment of their father in the Government of Sikkim before 31.12.1969 to obtain COIs, is unconstitutional, abridging the fundamental rights of the Petitioners guaranteed under Articles 14 and 21 of the Constitution of India and is accordingly quashed.

- (b) The State-Respondents, their agents and servants are prohibited from giving effect to letter bearing No. GOS/Home-II/94/14(Part)/2687, dated 02.06.2006.
- (iii) Insertion of Item No.4A to Notification No.66/Home/95, dated 22.11.1995, below Item No. 4 and above Item No.5 by Notification No.119/Home/ 2010, dated 26.10.2010 which reads;

"4A. A person whose father/husband is/was eligible for grant of the Certificate of Identification under any of the categories listed under items 1 to 4 above, or"

is *ultra vires* Article 14 of the Constitution of India to the extent that it excludes Item No.5 from the same benefits as extended to categories in Item Nos. 1 to 4 of the Notification. This being unreasonable and unconstitutional deserves to be and is accordingly quashed and set aside.

- (iv) That, descendants of persons who have obtained COI on the basis of their father being Government servants in the Government of Sikkim prior to 31.12.1969, falling under Item No.5 of the Notification No.66/Home/95, dated 22.11.1995 and substituted Item No.5 of Notification of 1996 are entitled to obtain COI. This also includes the third generation and their subsequent generations.

(v) The COI obtained by such persons shall have the same utility and benefits as it does for categories listed in Item Nos.1 to 4 of the Notification No.66/Home/95, dated 22.11.1995, and the Notification No.119/Home/2010, dated 26.10.2010, sans discrimination on any count.

41. The State-Respondents shall take necessary steps in accordance with the aforestated observations.

42. The Writ Petition stands disposed of accordingly.

43. No order as to costs.

(Meenakshi Madan Rai)
Judge
20-02-2020

Approved for reporting : **Yes**