

(2015) 10 SIK CK 0005
In the Sikkim High Court
Case No : Writ Petition (C) No. 49 of 2015

Kunga Nima Lepcha and Others

APPELLANT

Vs

State of Sikkim and Others

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Constitution of India, 1950 — Article 172, 317(1)

Citation : (2015) 10 SIK CK 0005

Hon'ble Judges : Sonam Phintso Wangdi and Meenakshi Madan Rai, JJ.

Bench : Division Bench

Advocate : Aarohe Bhalla and Ashok Subba, Advocates, for the Appellant; A. Mariarputham, Advocate General, J.B. Pradhan, Addl. Advocate General, S.K. Chettri and Pollin Rai, Asstt. Govt. Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Sonam Phintso Wangdi, J.—Petitioners No. 1 and 2, who are members of the Sikkim Legislative Assembly and Petitioner No. 3 a social worker, have preferred this writ petition to question the legality of the Warrant dated 07.05.2015 issued by the Governor of Sikkim and the Notification dated 08.05.2015 bearing No. 20/Home/2015, issued by the Home Department, Government of Sikkim, appointing Hon"ble Mr. Justice Kalyan Jyoti Sengupta as the Chairperson of the Sikkim Lokayukta. The appointment is challenged on the ground that it is against the very rule of fair play in a democratic set up and violation of statutory provisions of the Sikkim Lokayukta Act, 2014 (hereinafter referred to as the Act).

2. As per the Petitioners, the appointment is liable to be struck down as the entire exercise in making the appointment is bad on the legal proposition of malice in law. It is first contended that under Section 4(1)(d), it is a mandatory requirement for the Leader of Opposition in the Legislative Assembly to be a member of the Selection Committee and in the event of there being no Leader of Opposition, then it is the senior most member of the Legislative Assembly who shall be a member of the Section Committee. In the circumstance where

admittedly, there was no designated Leader of Opposition in the Sikkim Legislative Assembly, the Chief Secretary of the State was statutorily bound to inform the senior most member of the Legislative Assembly of the Meeting of the Selection Committee that was being convened.

3. It is stated that since Mr. Prem Singh Tamang, the MLA representing Upper Burtuk Assembly Constituency, being the senior most member of the Legislative Assembly, having been elected as MLA for the 5th term, ought to have been consulted in making the recommendations for appointment of the Chairperson. That if age was the criterion for determining who the senior most member of the Legislative Assembly was, then it was the Petitioner No. 1, being 67 years of age, who ought to have been consulted. Thus, as per the Petitioners, the senior most member of the Legislative Assembly having not been consulted, the recommendation of the Respondent No. 3 by the Committee for appointment as the Chairperson of Sikkim Lokayukta suffered from the lack of relevant materials and comments which the senior most member would have offered for consideration.

4. It is stated that in reply to an application under the Right to Information Act, 2005, submitted by the Petitioner No. 3, it had been informed that the criterion to determine the seniority of a member under Section 4(1)(d) is not defined in the Act, but as per the past practice it is determined in terms of age. It is averred that it was not the age but the number of terms a member of the Legislative Assembly is elected that was the factor for determining "Senior most member of the Assembly" as, such a member by virtue of his experience, would be adept at active and meaningful deliberations in the process of making recommendation, which, as per the Petitioners, was essential when the recommendation was for the sensitive post of Chairperson of the Lokayukta. Thus, it is the case of the Petitioners that the selection process had not been carried out in the letter and spirit of the Act, but was rather in violation of it.

5. Next, it is contended that as per their information, cases against the Chief Minister of the State and the Speaker of the Legislative Assembly are pending inquiry in the office of the Lokayukta. Propriety, therefore, demanded their recusal from the Selection Committee in order to ensure fair play and transparency. It was next contended that Shri Dorjee Dazom Bhutia, Respondent No. 4, the incumbent Minister, Energy & Power and Labour Department, Government of Sikkim, who had attended the Meeting of the Selection Committee as its member, was neither the senior most member of the Legislative Assembly considering the number of terms he was elected to the Assembly as compared to Mr. Prem Singh Tamang, MLA, Upper Burtuk Constituency, nor was he the oldest in terms of age being 63 years old in the year 2014 as compared to the Petitioner No. 1, MLA, 23 Syari Constituency, who was 66 years of age in the year 2014 when the 8th Vidhan Sabha Elections to the Sikkim Legislative Assembly was held. It is also averred that Respondent No. 4 could not have been a member of the Selection Committee as there was no provision in the Act which

provided for an incumbent cabinet minister other than the Chief Minister to be a member of the Selection Committee.

6. It is thus stated that the Selection Committee was not validly constituted as the provision of the Act was not adhered to. As per the Petitioners, the writ petition has been filed assailing only the legality of the appointment of the Chairperson of Sikkim Lokayukta and not the merit of the person appointed. This has been re-emphasized when it has been specifically pleaded that it was made abundantly clear that challenge to the appointment of the Chairperson of Sikkim Lokayukta is not on the ground of ineligibility or the merit of the person appointed but, only on the ground of legality and violation of statutory provisions.

7. On 21.08.2015, this Court issued notices only upon Respondents No. 1 and 2 and refrained from doing so upon the Respondents No. 3 and 4, as at that stage necessity to do so was not felt. Since the questions raised in the writ petition were purely of law, it was listed for hearing on 14.09.2015, granting liberty to the Respondents No. 1 and 2 to file a response, if it was so advised. In the affidavit thus filed on behalf of State-Respondents No. 1 and 2, facts as regards the constitution of the Selection Committee were not disputed except on the legal propositions placed on behalf of the Petitioners.

8. It was contended that since the Chief Minister is the Chairperson of the Selection Committee under clause (a) of sub-section (1) of Section 4, and the Speaker a member by designation under clause (c) of that provision, their presence in the Selection Committee was mandatory by express legislative sanction and directive. In such a case, the doctrine of necessity would be attracted and that there is no provision in the Act for substituting them by any other person in their place. It is also averred that since the Chairperson of the Lokayukta, as per the Act, is one who has been a former Chief Justice of the High Court and whose function is of quasi-judicial nature, he would require to look into the allegations against all those functionaries set out in the Act and not specifically against the Chief Minister or the Speaker. The contention that the Chief Minister and the Speaker should not have participated in the Meeting of the Selection Committee has been repelled as being misconceived. That there was no infirmity in the selection on account the Chief Minister and Speaker participating in the selection process in their official capacities due to the doctrine of necessity.

9. On the question of violation of Section 4(1)(d), it is contended that while under Section 4 (3) of the Act the recommendation of the Selection Committee as per the Act would be valid if made just by a simple majority, in the case at hand it was a unanimous recommendation. Thus, it was urged that even if the member under Section 4(1)(d) was excluded, still there would be a majority in support of the recommendation and by that, in any case, the unanimity in the recommendation does not get whittled down. Further, even if the member under Section 4(1)(d) is considered as being absent in the Meeting of the Selection Committee, still the required majority in support of the recommendation would exist in view of Section 4 (2) which provides that absence of a member would

not invalidate any selection, and as per Section 4 (3), only a simple majority is required. Thus, the irregularity alleged by the Petitioners did not materially affect the recommendation, particularly, having regard to the fact that the Petitioners are not questioning the eligibility or merit of the person recommended.

10. As regards the reply dated 13.06.2015 to the query under RTI Act, it is stated that the past practice, as referred to therein, was found to be incorrect as per the records. No criterion has been laid down for determining "senior most member of the Legislative Assembly" in the Act or the Rules framed thereunder. It is stated that the Chief Minister is the Leader of the House and is, therefore, the senior most member and that, the member who is considered as the number two in the cabinet of ministers is regarded as the senior most member in the house after the Chief Minister. Since Mr. Dorjee Dazom Bhutia, Respondent No. 4, is presently number two in the cabinet and ranks next to the Chief Minister in terms of protocol etc., he is regarded as the senior most member of the House after the Chief Minister. It is emphasized that earlier also the same criteria had been adopted in the absence of a Leader of Opposition. That the seniority of a member of Legislative Assembly has been considered in the context of the existing Assembly having regard to the legal position that each Legislative Assembly is a new one, the previous ones having ceased to exist after the end of its term.

11. Placing his arguments, Mr. Aaroahi Bhalla, learned counsel appearing on behalf of the Petitioners, on the first aspect of the constitution of the Selection Committee as being in gross violation of the Act, submitted that Section 4(1)(d) of the Act was not complied with as neither the Leader of Opposition nor the senior most member of the Legislative Assembly had been inducted as a member. It was urged that even if it was accepted that the Leader of Opposition was not in existence, it was expected that the senior most member of the Legislative Assembly would be inducted, in which case it was Mr. Prem Singh Tamang, MLA of Upper Burtuk Constituency, having been elected to the Assembly for five terms. That if the criterion was not on the number of times a member of the Assembly was elected, then, as per the learned counsel, it ought to have been the age, in which case it was Mr. Kunga Nima Lepcha, Petitioner No. 1, who was 67 years of age, who fulfilled the criterion. Thus induction of Mr. Dorjee Dazom Bhutia, who was 63 years of age as a member under Section 4 (d) was in violation of this norm.

12. The next contention which Mr. Bhalla urged strongly was that the Chief Minister and Mr. K.N. Rai, the present Speaker of the Legislative Assembly, were not ideal persons to be inducted as members of the Selection Committee, since the Lokayukta was required to enquire into charges of corruption against them. Mr. Bhalla would urge that the Chairperson of the Lokayukta is an exalted position, a post requiring to be filled by a person of unquestionable integrity and high ethical standard. The Chairperson of the Lokayukta being selected by persons who themselves were going to be inquired into, would cast serious

doubts on the fairness of the proceedings of the inquiry by the Lokayukta due to a reasonable apprehension of bias which had become real due to their presence in the Selection Committee thereby vitiating the entire selection process. It was submitted that non-compliance of Section 4(1)(d) is not just a procedural violation but a material one as it effects the very substratum of the appointment being a mandatory provision to be complied with before recommending a person for the post of Chairperson. In support of his contentions, Mr. Bhalla referred to the following decisions: -

"(i) State of Gujarat and Another Vs. Hon"ble Mr. Justice R.A. Mehta (Retd.) and Others, ;

(ii) Mr. Justice Chandrashekaraiah (Retd.) Vs. Janekere C. Krishna and Others etc., ;

(iii) Rajesh Awasthi Vs. Nand Lal Jaiswal and Others, ;

(iv) Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, ; and

(v) A.K. Kraipak and Others Vs. Union of India (UOI) and Others, ."

13. Repelling the contentions placed on behalf of the Petitioners, Mr. A. Mariarputham, learned Advocate General, appearing for the State-Respondents No. 1 and 2, submitted that there was no violation of the provisions of the Lokayukta Act in constituting the Selection Committee under Section 4 of Sikkim Lokayukta Act, 2014. It was submitted that there being no designated Leader of Opposition in the House, the senior most member of the Legislative Assembly as provided under Section 4(1)(d) had to be inducted as a member of the Selection Committee.

14. Since the Sikkim Lokayukta Act, 2014 and the Rules framed thereunder do not lay down any criterion to determine "senior most member of the Legislative Assembly", it was the protocol position amongst the members in the present Assembly that was adopted. It was thus the number two in the cabinet who was nominated as he ordinarily would officiate as the Chief Minister and also function as the leader of the House in the absence of Chief Minister. Mr. Dorjee Dazom Bhutia, Respondent No. 4, who is regarded as number two in the cabinet and is ranked next to the Chief Minister in terms of protocol is, therefore, regarded as the senior most member of the House and accordingly inducted as a member.

15. He would further argue that in view of Section 4 (2) of the Act whereunder it is provided that no appointment of a Chairperson or a member shall be invalid merely by reason of absence of any member in the Selection Committee and, that Section 4 (3) provides that the selection shall be by majority of the members present in the Meeting for selection, then even if the member under Section 4(1)(d) is excluded, there would still be a majority in support of the recommendation, as would appear from the minutes of the Meeting forming part of Annexure P-2, that shows that the selection was on the basis of unanimous

recommendation. Thus, as per learned Advocate General, the irregularity does not materially affect the recommendation.

16. It is submitted that in the absence of any criterion laid down for determining "senior most member of the Legislative Assembly", the ones suggested on behalf of the Petitioners and the one adopted by the State-respondents would be the possible criteria. Thus, the criterion adopted by the State-respondents, which is based upon protocol as the determining factor, could not be assailed but was rather acceptable. Reliance placed on behalf of the Petitioners upon the reply dated 13.06.2015, Annexure P-2, to the application under RTI Act, 2005, to the effect that the senior most member of the Legislative Assembly was determined in terms of age as per the past practices, was misplaced as the reply was incorrect as per the records. The only practice adopted in the past was the protocol position of the member of the Legislative Assembly that was followed even in respect of the Selection Committee constituted for recommendation of the previous Chairperson and members of the Lokayukta. In any case, it is the specific case of the Petitioners that age cannot be the relevant factor but rather the number of terms a member is elected to the Assembly. Thus, as there were several possible interpretations on the determination of the term "senior most member of the Legislative Assembly", the one adopted by the State-respondents cannot be said to be in conflict with Section 4(1)(d) being not in violation of that provision. Learned Advocate General fairly submitted that the provision indeed required a clarity which he would invite this Court to give.

17. On the contention placed by Mr. Bhalla as regards likelihood of bias on the part of the Lokayukta recommended by the Selection Committee, it was submitted by the learned Advocate General that since it has been specifically pleaded on behalf of Petitioners that they were not questioning the eligibility or merit of the person recommended to be the Chairperson of the Lokayukta, the apprehension of the Petitioners was misplaced and only rhetorical.

18. Repelling the contention on the plea that the Chief Minister and Mr. K.N. Rai, the present Speaker of the Legislative Assembly, ought to have recused from the Meeting of the Selection Committee, it was contended that their participation were by designation and was mandatory by the express legislative sanction and directive. In such a case, the doctrine of necessity was attracted and also for the reason that there is no provision for substituting them by other persons. Moreover, as per learned Advocate General, the Lokayukta in the discharge of its function is required to look into allegations against various functionaries as laid down in the Act and is not limited specifically against the Chief Minister or the Speaker. Thus, as per him, there is no infirmity in the recommendation of the Selection Committee on account of participation of the Chief Minister and the Speaker in the selection process in their official capacities. It was then submitted that when such serious allegations are being leveled against them, the Chief Minister and, Mr. K.N. Rai, the present Speaker of the Legislative Assembly, ought to have been impleaded as parties which, they have not. It is urged that

the specific pleading on this score contained in paragraph 6 of the affidavit filed on behalf of the State-respondents, having not been traversed by a rejoinder, are deemed to have been accepted by the Petitioners.

19. The learned Advocate General emphasized that there being no quorum of the Selection Committee prescribed in the Act, therefore, even in the absence of the Chief Minister, the present Speaker of the Legislative Assembly and Mr. Dorjee Dazom Bhutia, the other two members, i.e., the Chief Justice and the eminent person from the State nominated by the Governor, would form the quorum to constitute a valid Meeting. Further, since the recommendation of the Selection Committee for the Chairperson was a unanimous one, the decision taken in the Meeting could not be held to be invalid. On this, learned Advocate General relied upon the decisions of *Ishwar Chandra Vs. Satyanarain Sinha and Others*, .

20. On the doctrine of necessity, reference was made to the cases of Reference under Article 317 (1) of the Constitution of India, *In Re : (2009) 1 SCC 337 ; State of U.P. Vs. Sheo Shanker Lal Srivastava and Others*, ; *Badrinath Vs. Government of Tamil Nadu and Others*, ; *Tata Cellular Vs. Union of India*, ; *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, and *J. Mohapatra and Co. and Another Vs. State of Orissa and Another*, .

21. Relying upon *Kihoto Hollohan Vs. Zachillhu and Others*, , it was submitted that the challenge to the presence of the Speaker in the Meeting of the Selection Committee on the ground of likelihood of political bias was unsound as the Speakers hold a pivotal position in the scheme of Parliamentary democracy and are considered as guardians of the rights and privileges of the House. It was then contended that under the Act, an inescapable duty was cast upon the State to appoint the Lokayukta.

22. Summing up his submissions, the learned Advocate General submitted that the writ petition is solely based upon a reply given in response to an application under RTI Act, whereby it had been stated that to determine the senior most member of the Assembly age was the factor that was adopted as a criterion as per the past practices. This, as per him, had been wrongly communicated and, in any case it is the Petitioners' own case that age cannot be the criterion and that, there exist an ambiguity as no criteria have been laid down in the Act to determine "senior most member of the Legislative Assembly", which, as per him, would require clarity. The specific pleading that the present criterion adopted by the State being as per established procedure having not been traversed, is deemed to be accepted. There is no allegation on the suitability or merit of the person recommended by the Selection Committee for appointment as Chairperson of the Lokayukta. There is no specific allegation of mala fide against any person or that anyone had acted in a mala fide manner. The Chief Minister as the Chairperson and the Speaker of the Legislative Assembly as one of the members of the Selection Committee, are statutory requirements and, even otherwise, their presence in the Committee is saved by the doctrine of necessity. If the contention of the Petitioners is to be accepted, then the very system would

become unworkable.

23. Mr. Aaroahi Bhalla, learned counsel for the Petitioners, in his reply would submit that there is no ambiguity in Section 4(1)(d) of the Act. As per him, apart from the definition of Chairperson and members of the Lokayukta under Sections 3(4)(a) and (f) and 2(1)(a) and (h) in respect of the Lokayukta, Chairperson and member of the Selection Committee provided under Section 4 of the Act have not been defined. Therefore, it was his submission that by necessary implication the Chairperson can be a member but a member cannot be a Chairperson and under such circumstance, the doctrine of necessity would not be attracted. He would also refer to *Ashok Kumar Yadav and others v. State of Haryana* (supra) on his contention of bias and the need of the Chief Minister and the Speaker of the Legislative Assembly to recuse themselves as members of the Selection Committee.

24. The questions that arise for consideration in this case are -

"(i) As to whether there was non-compliance of Section 4(1)(d) of the Sikkim Lokayukta Act, 2014 resulting in the Meeting of the Selection Committee and recommendation being rendered non est; and

(ii) Whether the recommendation of the Selection Committee forwarding the name of Respondent No. 3 for appointment as the Chairperson of the Sikkim Lokayukta stands vitiated on account of the presence of Chief Minister as Chairman and the Speaker of the Legislative Assembly as one of the members of the Selection Committee."

25. Taking up the first question, it is admitted position that Respondent No. 4, Mr. Dorjee Dazom Bhutia, a Member of Legislative Assembly, was inducted as "the senior most member of the Legislative Assembly" in the absence of the Leader of Opposition in the Legislative Assembly.

26. The Petitioners' contention is that the criterion for determining "senior most member of the Legislative Assembly" ought either to have been the number of terms for which a member had been elected or the oldest in terms of age of a member of Legislative Assembly. It is a conceded position of both the sides that criterion for determining "senior most member of Legislative Assembly" has not been defined in the Act. In this circumstance, in our considered opinion, it is all the three criteria i.e., two urged on behalf of the Petitioners, and one adopted by the State-Respondents, would be legitimate and acceptable criteria. Under this circumstance, since the State-Respondents have adopted the criterion of protocol position of a Member of the House, we do not find any reason as to why that should not be accepted since it is found not to be in violation of Section 4(1)(d) of the Act. We are rather impressed by the submission of learned Advocate General that the seniority of a member of the Legislative Assembly is to be considered in the context of an existing Assembly. Under Article 172 of the Constitution of India, the duration of every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for

its first meeting and on expiration of such period it shall operate as a dissolution of the Assembly. In other words, there is no continuity of the Legislative Assembly.

27. In *Amarinder Singh Vs. Special Committee, Punjab Vidhan Sabha and Others*, the Hon'ble Supreme Court held as under:

"73. Coming to judicial observations, the effects of dissolution of a House were discussed by this Court in *Gujarat Assembly Election case* (Special Reference No. 1 of 2002, Ref. by President, . V.N. Khare, J. (as His Lordship then was) had made the following observations:

"40. Dissolution ends the life of the legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself has ceased to exist. Dissolution of Legislative Assembly ends the representative capacity of legislators and terminates the responsibility of the Cabinet to the Members of the Lok Sabha or the Legislative Assembly, as the case may be."

74. Furthermore, Passayat, J. had explained: (*Gujarat Assembly Election Case*)-

"135. Dissolution brings a legislative body to an end. It essentially terminates the life of such body and is followed by constitution of a new body (a Legislative Assembly or a House of the People, as the case may be). Prorogation on the other hand relates to termination of a session and thus precludes another session, unless it coincides with the end of the legislative term. The basic difference is that prorogation unlike dissolution does not affect a legislative body's life which may continue from session to session, until brought to an end by dissolution. Dissolution draws the final curtain upon the House. Once the House is dissolved it becomes irrevocable. There is no power to recall the order of dissolution and/or revive the previous House. Consequently effect of dissolution is absolute and irrevocable. It has been described by some learned authors that dissolution "passes a sponge over the parliamentary slate". The effect of dissolution is in essence termination of current business of the legislative body, its sittings and sessions. There is a cessation of chain of sessions, sittings for a dissolved legislative body and there cannot be any next session or its first sitting. With the election of a legislative body a new chapter comes into operation. Till that is done, the sine qua non of responsible government i.e. accountability is nonexistent. Consequently, the time stipulation is nonexistent. Any other interpretation would render use of the word "its" in relation to "last sitting in one session" and "first sitting in the next session" without significance."

28. The term of Legislative Assembly being limited to five years with the consequence at the end of its terms lucidly stated in the *Gujarat Assembly Election Case*, referred to above, in our view, it would be illogical to fix the number of terms a member of Legislative Assembly is elected as there can be no guarantee that the member would contest in every election. Thus we find the

criterion adopted by the State-Respondents to be more reasonable and rational in determining "senior most member of the Legislative Assembly".

29. Alternatively, even if we assume that the induction of Respondent No. 4, Mr. Dorjee Dazom Bhutia, was not considered to be the senior most member of the Legislative Assembly, the proceedings of the Meeting still cannot be said to have been rendered a nullity. It at best may have the consequence of his presence in the Meeting being completely discarded. In this situation, had the opinion of Respondent No. 4 been the determining factor in deciding the majority opinion, perhaps the entire proceeding would have been rendered indecisive due to the resultant tie. However, in the present case, undeniably the recommendation was a unanimous one, and it would not have made any difference if the opinion of the Respondent No. 4 was discarded due to his assumed disqualification. Under sub-section (2) of Section 4 of the Sikkim Lokayukta Act, no appointment of a Chairperson or a Member shall be invalid merely by reason of absence of any Member in the Selection Committee. In *Union of India (UOI) and Others Vs. Somasundaram Viswanath and Others*, , the Hon"ble Supreme Court while dealing with a similar situation arising out of an Office Memorandum prescribing constitution of Departmental Promotion Committee, it was held that the proceedings of the Departmental Promotion Committee cannot be said to have been vitiated solely because one of the members of the Committee was not present.

30. Mr. Aarohi Bhalla, learned counsel for the Petitioners, of course submitted that the provision of Section 4(1)(d) of the Act was mandatory non-compliance of which would render the recommendation of the Selection Committee a nullity and, therefore, an order of quo-warranto would have been in order to quash the entire proceedings of the Selection Committee. We are, however, unable to be convinced by this. In the first instance, we have already held that criterion for inducting Respondent No. 4 as the member cannot be held as being bad and secondly, it is trite that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." This proposition propounded by Tindal, C.J., has been re-emphasized in paragraph 71 in the case of *Justice Chandrashekariah (Retd.) v. Janekere C. Krishna* (supra) referred to by Mr. Bhalla. Thus, when the statute clearly spells out that no appointment of a Chairperson or a member shall be invalid merely by reason of absence of any member in the Selection Committee, no interpretation otherwise would be permissible.

31. Again sub-section (3) of Section 4 of the Sikkim Lokayukta Act provides that the Selection Committee shall select the names of the Chairperson and members of the Lokayukta by majority of the members present in the Meeting for selection. Thus, even going by this provision, having regard to the fact that the selection of the name of Respondent No. 3 was by a unanimous decision, the

absence of Respondent No. 4 or non-consideration of his opinion, would have no difference to the recommendation.

32. For these reasons, we reject the contention on the first question raised on behalf of the Petitioners.

33. Coming to the next contention as regards presence of the Chief Minister as Chairperson and the Speaker as a Member in the Selection Committee and the desirability of their recusal urged on behalf of the Petitioners, we have carefully considered the submission of Mr. Bhalla, which was rather strenuously urged. We have no hesitation in accepting that the position of the Chairperson of the Lokayukta is an exalted one and the person holding that position ought to be of highest integrity maintaining unquestionable ethical standards as, under the Act, he has to perform quasi-judicial function that are of investigative in nature. But the question here is concededly not as to whether the Respondent No. 3 did not fulfill these qualities but, as to whether the proceedings of the Selection Committee was properly held and whether the presence of the Chief Minister as the Chairman and the Speaker of the Legislative Assembly as one of the Members was appropriate or not.

34. On behalf of the Petitioners it has been urged that since the Lokayukta was to enquire into allegations of corruption against the Chief Minister and the Speaker, they ought to have recused themselves from the Committee as their presence would vitiate the entire proceedings of the Meeting due to likelihood of bias which would tantamount to them of being judge of their own cause. Relying upon *Ashok Kumar Yadav and Others v. State of Haryana and Others* (supra), it was submitted by Mr. Bhalla that since personal reasons of the Chief Minister and the Speaker were involved, likelihood of their bias on account of proprietary interest was a distinct possibility which, therefore, necessitated their recusal. Reliance was also placed upon the well known decision in *A.K. Kraipak v. Union of India* (supra) in support of this contention.

35. The well settled proposition of law as regards bias cannot be disputed. The two decisions, which were rendered in the context of Selection Committees constituted under the service rules have to be considered in the facts of those cases and would not be applicable on the ones before us. In the facts and circumstance as obtaining in the present case, we find exceptions that have been carved out as would appear from what follows.

36. "Doctrine of necessity" is a well accepted principle and is applicable in a circumstance where "An adjudicator, who is subject to disqualification on the ground of bias or interest in the matter which he has to decide, may be required to adjudicate if there is no other person who is competent or authorized to adjudicate or if a quorum cannot be formed without him or if no other competent tribunal can be constituted" as held in *J. Mohapatra and Co. v. State of Orissa* (supra). It has also been held that "In such cases the principle of natural justice would have to give way to necessity for otherwise there would be no means of

deciding the matter and the machinery of justice or administration would break down".

37. In *People's Union for Civil Liberties Vs. Union of India (UOI) and Another*, Hon'ble Supreme Court while dealing with the provision for appointment of Chairperson, National Human Rights Commission under the Protection Human Rights Act, 1993, under Section 4 which is somewhat similar to Section 4 of the Sikkim Lokayukta Act, 2014, held as under : -

"15. A perusal of the Act does not show that there is any quorum fixed for the selection nor does it provide for any meeting nor has any particular procedure been provided for. Under the Act, consultation by circulation is not impermissible. In such a situation, if one out of six did not respond, it would not vitiate the opinion of the other five members. On the contrary Sub-section (2) of Section 4 specifically says that no appointment of a Chairperson or a member shall be invalid merely by reason of any vacancy in the Committee. In the instant case the Prime Minister, the Speaker of the House of the People, Minister in charge of the Ministry of Home Affairs in the Government of India, Leader of Opposition in the House of the People and Deputy Chairman of the Council of States having agreed on the appointment of the second respondent, we find no statutory error in the appointment of the second respondent."

38. In *Badrinath v. Government of Tamil Nadu (supra)*, while dealing with the "doctrine of necessity" in the context of a Screening Committee for promotion to super-time scale under a Government Order, held as under: -

"78. We shall next deal with the doctrine of "necessity" raised by learned Senior Counsel for Respondents 1, 3 and 4, Shri Vaidyanathan. It was argued that under GO No. 793 Public (Special A) Department dated 10-3-1976, the Screening Committee for promotion to super-time scale was to consider of (i) the Chief Secretary to Government, (ii) the First Member, Board of Revenue, and (iii) the Second Secretary to the Government and that, therefore, the doctrine of "necessity" applies.

79. It may be noticed that where a statute or a statutory rule constitutes a designated authority to take administrative or quasi-judicial decisions and where the person concerned is disqualified to take a decision on the principle of likelihood of bias, then the law (in certain circumstances explained below) makes an exception in the situation and the said person is entitled to take a decision notwithstanding his disqualification for otherwise no decision can be taken by anybody on the issue and public interest will suffer."

39. In *State of U.P v. Sheo Shanker Lal Srivastava and Others (supra)*, where allegation of bias was levelled against the Lokayukta, as he was a witness in a proceeding against the officer, it has been held as follows: -

"13. It is true that the principle of natural justice is based on two pillars: (i) nobody shall be condemned without hearing; and (ii) nobody shall be a judge in

his own cause.

14. It is, however, well known that the principles of natural justice can be excluded by a statute. They can also be waived.

15. In a case where doctrine of necessity is applicable compliance with the principles of natural justice would be excluded.

16. Referring to the doctrine of necessity, Sir William Wade in his Administrative Law stated:

"But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity; for otherwise there is no means of deciding and the machinery of justice or administration will break down."

It was further stated:

"In administrative cases the same exigency may arise. Where the statute empowers a particular minister or official to act, he will usually be the one and only person who can do so. There is then no way of escaping the responsibility, even if he is personally interested. Transfer of responsibility is, indeed, a recognized type of ultra vires. In one case it was unsuccessfully argued that the only minister competent to confirm a compulsory purchase order for land for an airport had disqualified himself by showing bias and that the local authority could only apply for a local Act of Parliament."

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19. In the aforementioned situation, the Lok Ayukta had no other option but to proceed with the inquiry. Despite the fact that he was the disciplinary authority himself, as well as a witness, he had no other option but to inquire into the charges against the appellant."

40. In the present case, there is no doubt of the fact that the Selection Committee constituted for recommending the Chairperson and members of the Sikkim Lokayukta is under a statutory provision. Even if the Chief Minister or the Speaker is subject to disqualification on the ground of bias or interest as has been alleged, they are statutorily required to be present in the Selection Committee, as there are no other persons authorized to take their places and, therefore, no other competent Selection Committee can be constituted under the Act.

41. Mr. Bhalla would no doubt argue that the principle of "doctrine of necessity" would apply only in cases of constitutional bodies but, we are unable to be persuaded by this, in view of the decisions of the Hon'ble Supreme Court cited earlier which clearly shows that it applies to other bodies also. In our opinion, it is too pedantic to interpret the proposition in such a manner.

42. Considering the question at another angle, it may eminently be noted that under clause (b) of sub-section (1) of Section 4 of the Act, the Chief Justice of the High Court is also a member of the Selection Committee. The very presence of the Chief Justice, in our view, ought to be sufficient to allay the fear and apprehension of bias expressed by the Petitioners as he would ensure fairness in the proceedings of the Selection Committee.

43. For these reasons, we do not find any merit in the writ petition and accordingly hold that the Petitioners have failed to make out any case for this Court to interfere with the proceedings of the Selection Committee by which the Respondent No. 3 had been recommended for appointment as the Chairperson of the Sikkim Lokayukta.

44. In any case, we find that the contentions raised on behalf of the Petitioners are merely technical as it is their stated and specifically pleaded case that they are not questioning the merit and eligibility of the Respondent No. 3. In our considered view nothing turns on the objection to the constitution of the Selection Committee, as exclusion of the principle of natural justice is inherent in Section 4 of the Act. In any case, the earlier stated case of the Petitioners would tantamount to waiver on the part of the Petitioners as laid down in Sheo Shanker Lal Srivastava and Others (supra).

45. In the result, the writ petition is dismissed. No order as to costs.

46. Before parting it is deemed appropriate to observe that the second part of Section 4(1)(d) does appear to be quite vague and evidently having the possibility of several interpretations. In our view, there is a need to give clarity to the provision by laying down a criterion for determining the term "senior most member of the Legislative Assembly" occurring in the provision to overcome the present ambiguity. Although, the learned Advocate General called upon us to give the clarity, in our considered opinion, it would not be within our domain to do so as it lies in the field of legislation. We, therefore, hope and expect that the State Government will introduce a suitable amendment to the Act inserting either an explanation to make Section 4(1)(d) or such other provision laying down a criterion for determining "senior most member of the Legislative Assembly".