

(2017) 08 SIK CK 0004

In the Sikkim High Court

Case No : 04 of 2016

Pahalman Subba & ors. Vs The State of Sikkim & ors.

Date of Decision : 25-08-2017

Acts Referred:

Constitution of India, Article 246, Article 192, Article 164(1A) - Subject-matter of laws made by Parliament and by the Legislatures of States - Decision on questions as to disqualifications of members - Other provisions as to Ministers

Citation : (2017) 08 SIK CK 0004

Hon'ble Judges : Meenakshi Madan Rai

Bench : Single Bench

Advocate : O.P. Bhandari, A. Mariarputham, Karma Thinlay, Santosh Kr. Chettri, D.K. Siwakoti, Jorgay Namka, Tashi D. Sherpa, Panila Theengh, N. Rai, Tamanna Chhetri, Malati Sharma, Suraj Chhetri

Judgement

1. W.P. (PIL) No. 04 of 2016 (hereinafter referred to as "the first petition") is filed by public spirited persons, in the nature of Public Interest Litigation, questioning the legality and constitutionality of the Sikkim State Legislators' Appointment to Different Authorities Act, 2006 (hereinafter referred to as "the Act of 2006"), Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 (hereinafter referred to as "the impugned Act") and further extension of status of Cabinet Minister and the Minister of State with facilities and privileges to the Chief Whip. Subsequently, the provision of Section 3A(bb) of the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006, by way of amendment of the petition, was also challenged. The petitioners have further prayed for quashment of consequential notifications and also a declaration disqualifying the sixth to nineteenth respondents from being members of the Sikkim Legislative Assembly, on the ground of holding office of profit.

2. W.P. (C) No. 63 of 2016 (hereinafter referred to as "the second petition") was filed by Sikkim Krantikari Morcha, a political outfit, seeking reliefs on similar terms, questioning the validity of various statutory provisions, as stated

hereinabove, during the currency of the first petition.

3. Both the writ petitions involve a common question of law, and as such are being considered jointly and disposed of by this common order.

4. The High Court, on preliminary examination, framed the following questions of law in the first petition on 29th August 2016: - "(i) whether the Parliamentary Secretaries appointed under provisions of the Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 (for short "the Act of 2010"), are holding office of profit;

(ii) if the answer of the first question is affirmative, whether they have incurred disqualification as Legislature under provisions of Article 191(a) of the Constitution of India;

(iii) whether the Act of 2010 providing for appointment of Parliamentary Secretary is violative of the provisions of Article 102 read with Article 191 of the Constitution of India and Section 9 of the Representation of the People Act, 1951; and

(iv) Whether "Explanation" to the provisions of Article 102 with Article 191 of the Constitution of India may be expanded by the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006."

5. In the meantime, the Supreme Court examined an identical issue in *Bimolangshu Roy (Dead) through LRs vs. State of Assam and Another* 2017 SCC online SC 813, on 26th July 2017, wherein the question involved was the constitutional validity of Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2004 (hereinafter referred to as "the Assam Act") and held as under: - "54. Thus, it can be seen from the scheme of Article 194 that it does not expressly authorize the State Legislature to create offices such as the one in question. On the other hand, Article 178 speaks about the offices of Speaker and Deputy Speaker. Article 179 deals with the vacation of those offices or resignations of incumbents of those offices whereas Article 182 and 183 deal with the Chairman and Deputy Chairman of the Legislative Council wherever the Council exists. In our opinion, the most crucial article in this Chapter is Article 187 which makes stipulations even with reference to the secretarial staff of the Legislature. On the face of such elaborate and explicit constitutional arrangement with respect to the Legislature and the various offices connected with the legislature and matters incidental to them to read the authority to create new offices by legislation would be a wholly irrational way of construing the scope of Article 194(3) and Entry 39 of List II. Such a construction would be enabling the legislature to make a law which has no rational connection with the subject matter of the entry. "The powers, privileges and immunities" contemplated by Article 194(3) and Entry 39 are those of the legislators qua legislators. 55. For the above-mentioned reasons, we are of the opinion that the Legislature of Assam lacks the competence to make the impugned Act. In view of the above conclusion, we do not see it necessary to

examine the various other issues identified by us earlier in this judgment. The Writ Petition is allowed. The impugned Act is declared unconstitutional."

6. Resultantly, it was held that the State Legislature is not competent to make an Act for appointment of Parliamentary Secretaries circumventing the mandate ordained under Article 164 (1A) of the Constitution.

7. At the outset, Mr. O.P. Bhandari, learned counsel appearing for the petitioners in the first petition and Mr. Raghavendra Kumar, learned counsel appearing for the petitioners in the second petition submit that the petitioners be permitted to confine their challenge to the constitutional validity of the Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 only in these petitions, seeking further permission to withdraw the challenge to the provisions of other Acts, with liberty to question the same in a different writ petition, at an appropriate stage.

8. Mr. A. Mariarputham, learned Advocate General, Mr. N. Rai, learned Senior Counsel, Mr. Jorgay Namka and Mr. D.K. Siwakoti, Learned counsel appearing for the respondents have no objection, accordingly, the petitioners were permitted to withdraw the challenge on the issue of constitutional validity of the Sikkim State Legislators" Appointment to Different Authorities Act, 2006, extension of status of Cabinet Minister and the Minister of State with facilities and privileges to the Chief Whip, and the provision of Section 3A(bb) of the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006 and also the consequential notifications, reserving liberty to the petitioners to agitate the same, if so advised, afresh in accordance with law.

9. Mr. O.P. Bhandari, learned counsel appearing for the petitioners in the first petition would contend that the State Legislature by an enactment of the impugned Act has overreached the Parliament to defeat the mandate as enshrined in Article 164 (1A) of the Constitution. It is further contended that the Parliamentary Secretaries are not only granted the salary and perks of a Minister, but also assigned departments to discharge the duties and functions of Ministers, as is evident from the notifications dated 28th May 2014 (Annexure P-5), 30th November 2015 (Annexure P-10) appointing the 7th to 17th respondents as Parliamentary Secretaries and other consequential notifications, dated 30th November 2015 (Annexure P-8) and 30th April 2016 (Annexure P-11).

10. Referring to the judicial pronouncement made by the Supreme Court in *Bimolangshu Roy (Dead)*¹, Mr. Bhandari would contend that the validity of the appointment of Parliamentary Secretaries stand settled on declaration of law by the Supreme Court holding that the State Legislature lack competence to make such an enactment for appointment of Parliamentary Secretaries to assist the Ministers to discharge the duties and responsibilities of a member of the Cabinet, thus, the impugned Act deserves to be quashed.

11. Mr. Bhandari would further contend that the 7th to 17th respondents in the first petition, who were appointed as Parliamentary Secretaries have become

disqualified even to continue as Members of Legislative Assembly on the ground of holding the office of profit, which is proscribed under Article 191 of the Constitution of India and as such the direction to the same effect be passed.

12. Mr. Raghavendra Kumar, learned counsel appearing for the petitioners in second petition adopts the argument put forth by Mr. Bhandari and submits that the impugned Act deserves to be quashed with an order to quash the consequential notifications granting status, salary, allowance and perks to the said respondents.

13. Mr. A. Mariarputham, learned Advocate General appearing for the State-respondents, in all fairness, submitted that the law in respect of legality and validity of the enactment and also appointment of Parliamentary Secretaries stands settled by the judicial pronouncement of the Supreme Court and as such the State-respondents have nothing much to argue on the issue. The other respondents have also not contested the issue.

14. On consideration and examination of the submissions put forth by the learned counsel as well as on perusal of the pleadings and documents appended thereto, it is explicit that the question of law as to whether the State Legislature has legislative competence to make an Act, which authorize the Chief Minister to appointment Parliamentary Secretaries and further assigning the duties and responsibilities to assist the Cabinet Ministers is well settled in *Bimolangshu Roy (Dead)*¹.

15. Article 141 of the Constitution of India mandates that the law declared by Supreme Court is binding on all courts. The observation made by the Supreme Court in various cases affirm the proposition that ratio decidendi of a judgment which constitutes a binding precedent, as the same enunciated on points arising or raised in the case directly has a precedential value. As such, the ratio decidendi laid down by the Supreme Court in *Bimolangshu Roy (Dead)*¹ is binding on this Court.

16. The Supreme Court in *Union of India and others vs. Kantilal Hematram Pandya* (1995) 3 SCC 17, held as under: - "6. The approach of the Tribunal is patently objectionable and does not commend to us. It attempted to circumvent the law laid down by this Court on untenable reasons by stating that "we are required to consider the case on merits" without in fact so considering. The law laid down by this Court is binding on all courts and tribunals. Indeed, the law as declared by this court has to be applied to the facts of a given case and not applied mechanically but we find that in the present case the facts were so eloquent that no scope was available with the Tribunal to get over the opinion expressed by this Court in *Harnam Singh* case [(1993) 2 SCC 162] and on the facts as established on the record the Tribunal had no option but to refuse relief to the respondent."

17. The State Legislature enacted the impugned Act, namely, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous

Provisions) Act, 2010 and received the assent of the Governor on 16th September 2010, thereafter, the impugned Act was published in the Sikkim Extraordinary Government Gazette dated 27th September 2010. Section 2 (c) of the Act defines "Parliamentary Secretary" as under: "2(c) "Parliamentary Secretary" means a Political functionary as may be appointed by the Chief Minister for one or more departments and to assist the Minister concerned of such department or departments in effective disposal of the government business, pertaining thereto, or as may be decided by the Chief Minister."

Section 3 empowers the Chief Minister to appoint Parliamentary Secretaries and assign to each of them such duties and functions as he may deem fit and proper. Section 4 contemplates granting of rank and status of a Minister of State to the Parliamentary Secretary and also confers power to discharge such functions and duties as assigned by the Chief Minister.

Section 5 is in the same term. Section 6 provides for administration of oath by the Chief Minister. Section 7 provides for grant of salary and allowances as are admissible to a Minister of State. Section 8 provides that a Parliamentary Secretary shall not draw salary and allowances as a Member of the Sikkim Legislative Assembly, while drawing salary and allowances for the office as Parliamentary Secretary. Section 10 provides that all other conditions of service of a Parliamentary Secretary shall be governed by the Sikkim Ministers, Speaker, Deputy Speaker and Members of Sikkim Legislative Assembly (Salaries and Allowances) Act, 1977. Except administration of oath, duties, functions, salaries and allowances are at par with the State Ministers.

18. The issue as to whether appointment of the Parliamentary Secretaries infringes the provisions of Article 164 (1A) of the Constitution, came up for consideration before various High Courts.

19. A Division Bench of the High Court of Punjab & Haryana in Jagmohan Singh Bhatti vs. Union of India & Others, etc. (2016) 184 PLR 110, on an identical issue, held as under: - "In the light of the above, it is quite evident that :-

(a) The Governor of the State or the legislature has no competence or legislative sanction to frame rules regulating the conditions of appointment and services of Chief Parliamentary Secretaries and Parliamentary Secretaries for their functioning within the House of the State Assembly. Such posts are not part of regular services of the State under the executive forming part of the bodies involved in the governance of the State;

(b) The services under the State are entirely different from services within the Assembly House. Rules for governing the services under the State or its executive can be made in exercise of powers conferred by the proviso to Article 309 of the Constitution as also under the authority conferred by Entry 41 of List-II of the Seventh Schedule of the Constitution, i.e. the State List, which provides for: "State Public Services; State Public Service Commission". These evidently relate to executive services under the State.

However, in case a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason for the fact that he holds the office of Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries.

(c) The provisions of Article 162 of the Constitution relate to the extent of executive power of the State and that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. The power sought to be derived by the officials respondents is in the context of Article 309 of the Constitution. The 2006 Rules have been framed by the State in exercise of the powers of Article 162 of the Constitution relate to services under the State of the executive and not that of the legislature.

(d) The appointments of Chief Parliamentary Secretaries are contrary to the Constitutional intent of limiting the number of Ministers or the size of the Cabinet. The appointments as made, therefore, are in fact a roundabout way of bypassing the Constitutional mandate of the provisions of Article 164 (1A) of the Constitution and, therefore, have to be invalidated.

For the foregoing reasons, both the writ petitions are allowed and the appointment of the private respondents in both the petitions and their continuing as Chief Parliamentary Secretaries are set aside, invalidated and quashed. There shall, however, be no order as to costs."

20. In *Vishak Bhattacharya vs. The State of West Bengal & Ors.* W.P. 7326 (W) of 2013 and W.P. 8321 (W) of 2013 , the constitutionality of the West Bengal Parliamentary Secretaries (Appointment, Salaries, Allowance and Miscellaneous Provision) Act of 2012 came up for consideration in the High Court at Calcutta, the Division Bench held the enactment as unconstitutional.

21. In the case before us, the learned Advocate General and other learned counsel appearing for the parties have emphatically not contested the issued in the light of the judicial pronouncement of the Supreme Court on the issue in *Bimolangshu Roy (Dead)*¹. The Supreme Court examining the provisions of the Assam Act, held as under: "21. However, the more accurate legal position is expounded in *Union of India & Others v. Shah Goverdhan L. Kabra Teachers' College*, (2002) 8 SCC 228 at para 6:

"In view of the rival submissions at the Bar, the question that arises for consideration is whether the impugned legislation can be held to be a law dealing with coordinated development of education system within Entry 66 of List I of the Seventh Schedule or it is a law dealing with the service conditions of an

employee under the State Government. The power to legislate is engrafted under Article 246 of the Constitution and the various entries for the three lists of the Seventh Schedule are the "fields of legislation".

The different entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislatures. They neither impose any restrictions on the legislative power nor prescribe any duty for exercise of the legislative power in any particular manner. It has been a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any list it would not be reasonable to import any limitation therein. The rule of widest construction, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject-matter of an entry. When the vires of enactment is challenged, the court primarily presumes the constitutionality of the statute by putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude and the substance of the legislation will have to be looked into. The court sometimes is dutybound to guard against extending the meaning of the words beyond their reasonable connotation in anxiety to preserve the power of the legislature.

22. The jurisprudential basis for the "rule of widest construction" is the hallowed belief that a Constitution is drafted with an eye on future providing a continuing framework for exercise of governmental power. Therefore, it must be elastic enough to meet new social, political and historical realities often unimagined by the framers of the Constitution.

23. Chief Justice Marshall's celebrated statement in *McCulloch v. Maryland*, 17 US 316 (1819) that "... we must never forget that it is a constitution we are expounding" is the starting point. It was a statement made in the context of the interpretation of Article I of the US Constitution which declares the authority of "the Congress" to perform various functions enumerated in sub-sections (1) to (17) of Section 8 and under sub-Section (18) "to make all laws necessary and proper to carrying into execution of the powers vested in the Congress by the preceding 17 sub-sections."

It is further held as under: -

"28. The authority to make law flows not only from an express grant of power by the Constitution to a legislative body but also by virtue of implications flowing from the context of the Constitution is well settled by the various decisions of the Supreme Court of America in the context of American Constitution. A principle which is too well settled in all the jurisdictions where a written Constitution exists. The US Supreme Court also recognised that the Congress would have the authority to legislate with reference to certain matters because of the fact that such authority is inherent in the nature of the sovereignty. The doctrine of inherent powers was propounded by Justice Sutherland in the context of the role

of the American Government in handling foreign affairs and the limitations thereon. [United States v. Curtiss - Wright Export Corp., 299 U.S. 304, 81 L. Ed. 255]

29. In substance, the power to make the legislation flows from various sources: (1) express text of the Constitution; (2) by implication from the scheme of the Constitution; and (3) as an incident of sovereignty."

22. Indisputably, the source of authority to make legislation emanates from Article 246 of the Constitution in respect of all the matters enumerated in each of the three lists contained in Seventh Schedule.

23. The Supreme Court in several cases have clearly and repeatedly held that the entries in the various lists of the Seventh Schedule are not sources of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate. It is apposite to refer to observations made by the Supreme Court in various cases.

24. In *Harakchand Ratanchand Bantia and others vs. Union of India and others* 1969 (2) SCC 166, a Constitution Bench of the Supreme Court held as under: "8. Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate Legislatures by Article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate Legislatures can operate. It is well established that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction."

25. In *Union of India vs. Shri Harbhajan Singh Dhillon* 1971 (2) SCC 779, the Supreme Court held as under: "22. It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field."

26. Subsequently, in *Synthetic and Chemicals Ltd. and others vs. State of U.P. and others* (1990) 1 SCC 109, again a Constitution Bench observed as under: "67. It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty

of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws."

27. It is a trite law that the true nature and character of legislation is determined to which Entry it belongs, in its pith and substance. The Supreme Court in *Southern Pharmaceuticals and Chemicals, Trichur and others v. State of Kerala and others* (1981) 4 SCC 391 observed as under: - "13. In determining whether an enactment is a legislation "with respect to" a given power, what is relevant is not the consequences of the enactment on the subject-matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject-matter in question."

28. Gleaning through various entries in List-II of the Seventh Schedule (State List), it is luculent that the creation of post of Parliamentary Secretary is seemingly referable to Entries 37, 39 and 40 of the List-II. On critical examination, it is evidently plain and clear that the Entries setting out the field of legislation therein do not contemplate creation of posts of Parliamentary Secretaries. The post of Parliamentary Secretaries are clothed with the insignia of Ministers with their duties and functions, which is subject to the limitation prescribed under Article 164 (1A) of the Constitution of India. In case of Sikkim, the maximum number of Council of Ministers cannot exceed twelve.

29. Article 164(1A) was incorporated in the Constitution by the Constitution (Ninety-first Amendment) Act, 2003 with effect from 01st January 2004 restricting the number of Ministers in the Council of Ministers, which reads as under : "(1A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent. of the total number of members of the Legislative Assembly of that State:

Provided that the number of Ministers, including the Chief Minister in a State shall not be less than twelve:

Provided further that where the total number of Ministers including the Chief Minister in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent. or the number specified in the first proviso, as the case may be, then the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date (7th January, 2004) as the President may by public notification appoint."

30. Article 164 (1) provides for the appointment of the Ministers by the Governor

on the advice of the Chief Minister. In the case on hand, the Parliamentary Secretaries were appointed as Ministers of State and became a part of Council of Ministers without there being any appointment by the Governor, as required.

31. The Rules of Procedure and Conduct of Business in Lok Sabha while defining the term "Minister" states that it means a Member of the Council of Ministers and includes a member of the Cabinet Minister of State or Deputy Minister or a "Parliamentary Secretary". Likewise, Rule 2 of the Rules of Procedure and Conduct of Business in the Sikkim Legislative Assembly defines "Minister" means a member of the Council of Ministers, a Minister of State or a Deputy Minister and "Member" means a Member of the Sikkim Legislative Assembly. Examining the provisions of the impugned Act as well as subsequent notifications to give effect thereto, it is apparent that the Parliamentary Secretaries are privy to official information, all of them having access to official files, official documents in the course of decision making process by the Council of Ministers, and discharge the duties and functions assigned to the Ministers. As aforesaid, the Parliamentary Secretaries, partaking character of Ministers is manifestly impermissible in the light of mandate enshrined under Article 164(1A) of the Constitution and is unconstitutional. The appointment of Parliamentary Secretaries under the impugned Act is a pretence to circumvent the provisions of constitutional provision, as incorporated in the Constitution of India by Ninetyfirst amendment. Moreover, the Supreme Court has held in *Bimolangshu Roy (Dead)*¹ that the State Legislature lacks the competence to appoint Parliamentary Secretaries. In such view of the matter, without examining further in detail, which is not contended by either parties, we are of the considered view that the issue of the constitutionality of the impugned Act is squarely covered by the judicial pronouncement made by the Supreme Court in *Bimolangshu Roy (Dead)*¹.

32. Accordingly, the impugned Act and other consequential notifications deserve to be quashed. The Parliamentary Secretaries, so appointed under the Act shall cease to function as Parliamentary Secretaries and shall also cease to draw and avail salaries, allowances, perks, etc. as admissible under the Act forthwith.

33. A feeble attempt is made by the learned counsel appearing for the petitioners to submit that on account of quashing of aforesaid impugned Act, the respondents, who are Members of the Legislative Assembly, be declared as disqualified to continue as members. Article 192 of the Constitution mandates that the question as to the disqualification of a Member shall be referred to the decision of the Governor and the decision shall be final. In such view of the matter, we are not inclined to pass any order on the issue.

34. As a sequel, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 and consequential notifications are declared as unconstitutional and, accordingly, quashed.

35. In view of the aforesaid backdrop, we are not inclined to examine the other

issues, which are not necessary at this stage, for the fact that the petitioners have withdrawn the challenge in the instant petition

36. The petitions are allowed. No order as to costs.