THE
SIKKIM LAW REPORTS

JANUARY AND FEBRUARY - 2020

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SUBJECT INDEX

relied) – The requirement thus is of a nexus between the basis of classification and the object of the legislation eschewing irrationality – There 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 – 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 – 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.

Yogen Ghatani and Others* v. *State of Sikkim and Others ***85-B***

Constitution of India – Article 226 – 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 – Hereby quashed.

Yogen Ghatani and Others* v. *State of Sikkim and Others ***85-D***

Constitution of India – Article 226 – 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 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 – Quashed and set aside.

Yogen Ghatani and Others* v. *State of Sikkim and Others ***85-F***

Constitution of India – Article 226 – Letter bearing No. GOS/Home-II/94/14(Part)/2687 dated 02.06.2006 issued by 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 Articles14 and 21 of the Constitution of India and is accordingly quashed.

Yogen Ghatani and Others* v. *State of Sikkim and Others ***85-E***

Constitution of India – Article 226 – Public Notice dated 19.07.2016 issued by Respondent No. 2 prohibited Universities/Institutions from conducting examinations for their Open and Distance Learning Programmes outside their territorial jurisdiction including setting up of Examination Centres – Petitioner University began offering distance education programs with permission from the Respondent No. 2 from 2001, and was subsequently granted recognition by the Distance Education Council, Indira Gandhi National Open University in October, 2009 – The University Grants Commission (Open and Distance Learning) Regulations, 2017 incorporated and codified the restrictions made out in the Public Notice vide Regulation 13(7) which limits the location of Examination Centres to venues within the territorial limits of the State where the University has been incorporated – Whether the impugned Public Notice and the communications dated 07.10.2016 and 01.11.2016, and Regulation 13(7) is violative of Articles 14, 19(1)(g) and 21 of the Constitution?

Held: Referring the decision of this High Court in WP (C) No. 4 of 2013 – Observed that territorial jurisdiction for offering programmes through distance mode would be governed by the latest UGC Notifications which prevailed over all previous Notifications, Circulars and as per the UGC Notification, the State Universities (Private and Government funded) could offer programmes only within the State. The Study Centre of the Petitioner University was to be confined to the State of its incorporation – On consideration of order dated 29.12.2012 and the recommendations of MadhavaMenon Committee Report, it is clear that Study Centres are to conduct term end examinations. The Report recommends that examinations should be held at Study Centres or any other Centre identified by the University having necessary facilities and support environments and emphasizes that under no condition was a study centre to be located beyond the territorial jurisdiction of the State – It cannot be said that the Public Notice and communications impugned herein are either capricious or unreasonable – Impugned Notification also do not infringe on the Petitioner's right under Article 19(1)(g) or 21.

Sikkim Manipal University* v. *Union of India and Others ***1-A***

Code of Criminal Procedure, 1973 – S. 482 – F.I.R lodged by the first

Petitioner against the second Petitioner that on 04.04.2019, when she along with other supporters of the SDF party had assembled at Raley, East Sikkim, to receive their candidate for a meeting, the second Petitioner came on a motor bike and used abusive language besides pushing her by touching her body – F.I.R No. 24/2019 under S. 354/509, I.P.C came to be registered in Singtam Police Station, East Sikkim – Charge-sheet filed before Learned Chief Judicial Magistrate, East Sikkim at Gangtok and registered as G.R. Case No. 108 of 2019 – Charge framed under Ss. 354/ 506, I.P.C to which he pleaded "not guilty". Before Prosecution evidence could be led in the matter, both parties reached an amicable compromise – First Petitioner submitted that she has entered into the compromise with the second Petitioner of her own freewill and without any duress from any quarter – Held: Pursuing the prosecution will serve no purpose as in all likelihood there will be no evidence to establish the prosecution case – Proceedings quashed.

Nilu Thapa and Another* v. *State of Sikkim ***131-A***

Motor Accidents Claim – Calculation of the quantum of the loss of income of the deceased assailed by the Appellant – Held: Income of the deceased ought to have been calculated as 242/- per day instead of 320/- in terms of Notification No. 11/DL dated 15.09.2017 of the Department of Labour, Government of Sikkim considering that the accident took place on 20.04.2016 and the said Notification came to be issued subsequently and thus cannot be applied retrospectively – 40% of the established income of the deceased aged about 35 years and self-employed added towards future prospects in terms of *PranaySethi* – Respondent No. 1 entitled to spousal consortium and Respondent No. 2 to 4 entitled to parental compensation (*Magma General Insurance Co. Ltd.* and *Rajesh and Others* relied).

***Branch Manager, United India Insurance Co. Ltd.* v.**
Bishnu Maya Mukhia and Others ***138-A***

Motor Accidents Claim – Multiplier to be Adopted– Age of the deceased and not that of the claimants is the criteria for consideration for adoption of multiplier – Age of the deceased should be the basis for applying the multiplier (*Sarla Verma* and *Pranay Sethi* discussed).

***Branch Manager, National Insurance Co. Ltd.* v.**
Chezing Bhutia and Others ***50-A***

Motor Accidents Claim – Rash and Negligent Driving – Proof of – There were five occupants in the vehicle including the driver of whom three

passed away in the accident. Apart from the driver, one surviving passenger not examined – Held: Barring exceptional cases, it is always not possible for the claimant to know what precisely led to the accident, hence the application of the maxim *res ipsa loquitur*, which is but a rule of evidence. The reason being that there are certain incidents which do not occur unless there is negligence.

***Branch Manager, National Insurance Co. Ltd.* v.**
Chezing Bhutia and Others ***50-B***

Probation of Offenders Act, 1958 – Ss. 4 and 12 – Code of Criminal Procedure, 1973 – S. 482 – Indian Penal Code, 1860 – S. 354 – In the first instance it may be pointed out that the Respondent was convicted of the offence under S. 354A, IPC for sexual harassment – No ground made to establish good character of the offender – Respondent used criminal force upon the victim which by no stretch of imagination can it be stated to be decent behaviour – Teacher should be more like a "*loco parentis*" and that is the duty, responsibility and charge expected of a teacher. Here the victim, a student was subjected to unwelcome sexual advances of the Respondent – Provisions of S. 354, IPC enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with intention or knowledge that the woman's modesty will be outraged, he is to be punished – Offences of sexual harassment to a woman is not to be taken lightly. Such offences are heinous in nature and have to be dealt with sternly (*Ajay Tiwari* and *Ajahar Ali* discussed).

State of Sikkim* v. *Sashidar Sharma ***81-A***

Sikkim State General Notification No. 385/G dated 11th April 1928 – Necessity of Registration of Partition Deed – Legality of an unregistered document (partition deed) – The Sikkim State General Notification No. 385/G makes it clear that it is not only title deeds that are to be compulsorily registered but any "important document". The said Notification while indicating that other important documents will not be considered valid unless they are duly registered does not define what are "important documents" – In the absence of definition of the term, we may seek guidance from the provisions of S. 17 of the Registration Act, 1908 which enumerates documents which are compulsorily to be registered – Taking assistance from this provision, it emerges with clarity that Exhibit 11 being a partition deed would necessarily have to be registered.

Kiran Limboo* v. *Kussang Limboo and Another ***56-A***

SLR (2020) SIKKIM 1

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 65 of 2016

Sikkim Manipal University ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner: Mr. Gopal Subramaniam and Mr. Nikhil Nayyar, Senior Advocates with Mr. T.R. Barfungpa, Mr. Pawan Bhushan, Mr. Dhananjay Baijal and Mr. Ugang Lepcha, Advocates.

For Respondent No.1: Mr. Karma Thinlay, Central Government Counsel.

For Respondent No.2: Mr. A. Mariarputham, Senior Advocate with Mr. Thinlay Dorjee Bhutia, Advocate.

For Respondent No.3: Dr. Doma T. Bhutia, Additional Advocate General with Mr. Thupden Youngda, Government Advocate and Ms. Pollin Rai, Assistant Government Advocate.

Date of decision: 3rd January 2020

A. Constitution of India – Article 226 – Public Notice dated 19.07.2016 issued by Respondent No. 2 prohibited Universities/Institutions from conducting examinations for their Open and Distance Learning Programmes outside their territorial jurisdiction including setting up of Examination Centres – Petitioner University began offering distance education programs with permission from the Respondent No. 2 from 2001, and was subsequently granted recognition by the Distance Education Council, Indira Gandhi National Open University in October, 2009 – The

University Grants Commission (Open and Distance Learning) Regulations, 2017 incorporated and codified the restrictions made out in the Public Notice vide Regulation 13(7) which limits the location of Examination Centres to venues within the territorial limits of the State where the University has been incorporated – Whether the impugned Public Notice and the communications dated 07.10.2016 and 01.11.2016, and Regulation 13(7) is violative of Articles 14, 19(1)(g) and 21 of the Constitution?

Held: Referring the decision of this High Court in WP (C) No. 4 of 2013 – Observed that territorial jurisdiction for offering programmes through distance mode would be governed by the latest UGC Notifications which prevailed over all previous Notifications, Circulars and as per the UGC Notification, the State Universities (Private and Government funded) could offer programmes only within the State. The Study Centre of the Petitioner University was to be confined to the State of its incorporation – On consideration of order dated 29.12.2012 and the recommendations of Madhava Menon Committee Report, it is clear that Study Centres are to conduct term end examinations. The Report recommends that examinations should be held at Study Centres or any other Centre identified by the University having necessary facilities and support environments and emphasizes that under no condition was a study centre to be located beyond the territorial jurisdiction of the State – It cannot be said that the Public Notice and communications impugned herein are either capricious or unreasonable – Impugned Notification also do not infringe on the Petitioner's right under Article 19(1)(g) or 21.

(Paras 2, 16, 18, 24 and 31)

Petition dismissed.

Chronology of cases cited:

1. Prof. Yashpal and Another v. State of Chhattisgarh and Others, (2005) 5 SCC 420.
2. University of Mysore and Another v. C.D. Govinda Rao and Another, (1964) 4 SCR 575.
3. Transport Corporation of India v. Employees' State Insurance Corpn. and Another, (2000) 1 SCC 332.

4. State of Bihar and Others v. Smt. Charusila Dasi and Others, (1959) Supp (2) SCR 601.
5. P. Suseela and Others v. University Grants Commission and Others, (2015) 8 SCC 129.
6. State of Bombay v. F.N. Balsara, 1951 SCR 682.
7. D.S. Nakarav v. Union of India, (1983) 1 SCC 305.
8. Navtej Singh Johar v.Union of India, (2018) 10 SCC 1.
9. Shayara Bano v. Union of India, (2017) 9 SCC 1.
10. State of Tamil Nadu v. P. Krishnamurthy, (2006) 4 SCC 517.
11. Khoday Distilleries v. State of Karnataka and Others, (1996) 10 SCC 304.
12. Sharma Transport v. State of A.P, (2002) 2 SCC 188.
13. Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703.
14. Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353.
15. U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479.
16. State Trading Corporation v. Commercial Tax Officer, AIR 1963 SC 1811.
17. Telco v. State of Bihar, AIR 1965 SC 40.
18. Kurmanchal Institute of Degree and Diploma and Others v. Chancellor, M.J.P. Rohilkhand University and Others, (2007) 6 SCC 35.
19. Avishek Goenka v. Union of India and Another, 2012 (8) SCC 441.
20. N. Vasundara v. State of Mysore and Another, (1971) 2 SCC 22.
21. Saurabh Chaudri and Others v. Union of India and Others, (2003) 11 SCC 146.
22. Namit Sharma v. Union of India, (2013) 1 SCC 745.
23. Annamalai University represented by Registrar v. Secretary to the Government, Information and Tourism Department and Others, (2009) 4 SCC 590.

24. University of Mysore v. Govindrao, AIR 1965 SC 491.

25. UGC v. Neha Anil Bobde, (2013) 1 SCC 519

26. Census Commissioner and Others v. R. Krishnamurthy, 2015 (2) SCC 796.

27. Narmada Bachao Andolan v. Union of India and Others, (2000) 10 SCC 664.

28. Rai University v. State of Chhattisgarh and Others, (2005) 7 SCC 330.

29. Kalyani Mathivaran v. K.V. Jeyaraj and Others, AIR 2015 SC 1875.

JUDGMENT

Meenakshi Madan Rai, J

1. This Writ Petition pivots around the *vires* of the impugned Public Notice dated 19.07.2016, issued by the Respondent No.2, *inter alia* prohibiting Universities/Institutions from conducting examinations for their Open and Distance Learning Programmes outside the territorial jurisdiction of the University's location, followed by communications dated 07.10.2016 and 01.11.2016 reiterating the aforestated prohibition including setting up of Examination Centres. Claiming that the Notices are *ultra vires* the powers of the Respondent No.2 under the parent Statute and have no force of law besides being violative of Articles 14, 19(1)(g) and 21 of the Constitution of India, the Petitioner University seeks the following reliefs;

> **"***a) Issue a Writ of Certiorari, or any other appropriate Writ, Order or Direction to declare and quash the Public Notice dated 19.07.2016 as violative of Articles 14, 19(1)(g) and 21 of the Constitution;*
>
> *b) Issue a Writ of Certiorari, or any appropriate Writ, Order or Direction to quash the communications dated 7.10.2016 and 01.11.2016 issued pursuant to Public Notice dated 19.07.2016 to the extent that they seek to prohibit examination centres/conduct*

examination outside the State where the University is situated; [sic]

[b1] Issue a Writ of Declaration, or any other appropriate Writ, Order or Direction to declare and quash the requirement to establish 'Examination Centres' within territorial jurisdiction of the Petitioner University as provided under sub-clause (7) of Regulation 13 of the UGC (Open and Distance Learning) Regulations, 2017 as unconstitutional and violative of Articles 14, 19(1)(g) and 21 of the Constitution; [sic]

[b2] Issue a Writ of Declaration, or any other appropriate Writ, Order or Direction to declare and quash the applicability of Policy on Territorial Jurisdiction of Universities provided as under sub-clause (ii) of Regulation 3(1) read with Annexure IV of the UGC (Open and Distance Learning) Regulations, 2017 with reference to establishment of Examination Centres as under sub-clause (7) of Regulation 13 of the UGC (Open and Distance Learning) Regulations, 2017 as unconstitutional and violative of Articles 14, 19(1)(g) and 21 of the Constitution;

c) pass any such other order or direction as this Honble Court may deem fit in the facts and circumstances of the case;"

2. The Petitioner University was established in 1995 by an Act of the State legislature of Sikkim. The Petitioner's case is that their University began offering distance education programs with permission from the Respondent No.2 from the year 2001, and was subsequently granted

recognition by the Distance Education Council ("DEC"), Indira Gandhi National Open University ("IGNOU") in October, 2009. That, the University Grants Commission (Open and Distance Learning) Regulations, 2017 ("2017 ODL Regulations") in exercise of powers conferred under Section 26 of the University Grants Commission Act, 1956 ("UGC Act, 1956") has incorporated and codified the restrictions spelt out in the Public Notice and communications *supra* vide Regulation 13 of the 2017 ODL Regulations which have assumed a statutory character from 23.06.2017. The Policy of the Respondent No.2 pertaining to territorial jurisdiction was challenged by the Petitioner University in Writ Petition No.4 of 2013 and by its decision dated 26.06.2015 a Division Bench of this Court upheld the said Policy. By a Judgment dated 29.06.2015 in WP(C) No.08 of 2015 this Court while reiterating the Judgment dated 26.06.2015, protected certain categories of the Petitioner students who had pursued the distance education program. Pursuant to the decision of this Court in WP(C) No.04 of 2013, the Petitioner University closed down its Study Centres that were operating outside the State of Sikkim duly informing the Respondent No.2, but no undertaking was sought in relation to conducting of examinations within the State of Sikkim only and previously no such bar was contemplated by the Respondent No.2 or the DEC (IGNOU), thus allowing examinations at multiple venues for the convenience of out station students. The regulatory bodies permitted Universities to organize counselling and conduct examinations where there was reasonable concentration of students, hence there is no reason why now such students should be put to inconvenience by travelling to the Headquarters of the Petitioner University only for the purpose of examinations, which militates against the very nature of distance education, besides imposing constraints on the University to arrange logistics. Following approval granted by the Respondent No.2 for certain specified programs for the academic years 2016-17 and 2017-18, the Petitioner University has admitted about 1,21,000 students. Regulation 13(7) of the 2017 ODL Regulations limits the location of Examination Centres to venues within the territorial limits of the State where the University has been incorporated. That, the examinations are conducted at various locations including Colleges and Universities across the country for the term end examinations, the venues are temporary in nature, varying on a yearly basis, contingent upon the need and convenience of the enrolled students. The Petitioner University thereupon set out a brief summary of the Regulations of distance education program and the Policy on territorial jurisdiction adopted from time to time dividing it into four phases and

averring that the DEC at different points adopted varying policies on territorial jurisdiction. That, in Phase III, the DEC as per its 35th meeting held on 10.03.2010 determined that the territorial jurisdiction of State University would be as per their parent Statute, but in its 40th meeting dated 08.06.2012 it took the view that a State University could not have Study Centres located outside its geographical limits, as opposed to Examination Centres or venues, being motivated by the concern that there was franchising of Study Centres across the country which would function as independent units. In Phase IV in August, 2010, a high level Committee was appointed by the Central Government under the chairmanship of Prof. (Dr.) N. R. Madhava Menon for suggesting measures to regulate standards of education being imparted through distance mode. The Committee found that franchising of Study Centres needed to be addressed and recommended setting up of a dedicated statutory body for regulation of distance education but did not advise that Study Centres ought not to be permitted outside the limits of the State. That, in the interim such regulation could be taken over by the Respondent No.2. Pursuant to the Committee Report, on 29.12.2012, the Respondent No.1 issued a policy direction to the Respondent No.2 to frame regulations for the purposes of distance education and indicated that the Report of the Madhava Menon Committee may be adopted. The Respondent No.2 after assuming regulatory control issued Public Notices dated 24.06.2013 and 27.06.2013, prohibiting Study Centres outside the State as also communication dated 23.08.2013 to the Vice Chancellors of Universities stating the Policy on territorial jurisdiction of Study Centres. A communication in August, 2014 also referred amongst others to examinations being operated by the University and that it could not be conducted independently by the Study Centre. That, the position pertaining to Study Centres is now settled by the decision of this Court in WP(C) No.04 of 2013, dated 26.06.2015, but the scope of that Policy is now sought to be enlarged by the Respondent No.2 to include conduct of examinations out of the State. The Petitioner University preferred a fresh application on 10.08.2015 before the Respondent No.2 seeking continuation of recognition for offering ODL programs for the academic year 2015-16 which was accordingly granted, but the Petitioner University was to comply with mandatory terms and conditions set out therein, which are being duly complied. The recognition accorded to the Petitioner University for the academic year 2017-18 on 21.03.2017, reiterated the terms and conditions as set out for the academic year 2016-17, by letter dated 21.03.2016. However the letter did not make any reference to territorial restrictions for

Examination Centres. That, the Respondent No.3 vide its letter dated 13.05.2016 directed the Petitioner University to confirm their adherence to guidelines issued by the Respondent No.2 on territorial restrictions, franchisees and Study Centres outside the jurisdiction of Sikkim without extending the restrictions to Examination Centres. The Petitioner in its reply affirmed the same.

3. That, the territorial jurisdiction policy set out in the public notice of 27.06.2013 applies to study centres, while conduct of examinations at hired venues outside the State by the Petitioner University does not dilute the standards of education. Pursuant to the Public Notice dated 19.07.2016, a complaint lodged by one Mr. Dibyendhu Pradhan, dated 25.07.2016, was forwarded to the Petitioner University for comments, by the Respondent No.2, which contained the allegation that the Petitioner University continued to run Examination Centres outside the State of Sikkim and sought cancellation of the recognition granted for the academic year 2016-17. Vide communication dated 18.08.2016, a confirmation was sought pertaining to closure of all its Centres outside its territorial jurisdiction which was responded to by the Petitioner University on 29.08.2016, affirming the same. A further letter dated 06.10.2016 of the Respondent No.2 directed the Petitioner University not to conduct online examinations till formulation of UGC Guidelines. The Respondent No.2 issued impugned communication dated 07.10.2016 reiterating the requirement of strict adherence to territorial jurisdiction policy including setting up of Examination Centres. This was followed by communication dated 01.11.2016 stating that, some Universities were found to be operating in violation of the directions of the Respondent No.2 pertaining to territorial jurisdiction on Study Centres and conduct of examinations. The Petitioner University then came across news reports suggesting that Respondent No.1 has issued directions to the Respondent No.2 to register First Information Reports against errant State and private Universities flouting norms on territorial restrictions, purportedly issued in exercise extraordinary powers of the Respondent No.2 under Section 20 of the UGC Act, 1956. That, it is unclear whether the purported direction extends to Examination Centres as well. If it has been issued under Section 20 of the UGC Act, 1956 it clearly contradicts the earlier directions dated 29.12.2012 issued under the same provision. The Petitioner University approached the Respondent No.2 and the Ministry of Human Resource Development, vide letter dated 19.01.2017, requesting them to reconsider the impugned restrictions imposed on examination venues to which no

response was received from either. On 23.06.2017, the Respondent No.2 published the ODL Regulations in the official Gazette and brought it into force with immediate effect. Vide Notification dated 29.06.2017, the Respondent No.2 exempted all Universities holding valid recognition prior to 23.06.2017 and allowed them to continue their ODL programs for the academic year 2017-18. On 17.07.2017 another Public Notice was issued by the Respondent No.2 stating that the 2017 ODL Regulations would be operationalised from the year 2018-19, consequently the requirement to apply afresh for continuation of recognition under the ODL Regulations would commence from 2018-19. The Petitioner submitted its application seeking approval for the academic year 2018-19 on 17.10.2017 as per the ODL Regulations besides being in the process of obtaining accreditation from the National Assessment and Accreditation Council ("NAAC"). That, the Respondent No.2 failed to ensure wide consultation or give prior notice to universities and students before finalization of the ODL Regulations although it covers a wide array of activities on distance education. That, presently the Petitioner is concerned with Regulations 2(a) [*sic*], 3(1)(ii), 13(7) read with Annexures III and IV of the 2017 ODL Regulations affecting Examination Centres. Regulation 2(g) and Regulation 2(k) maintain a distinction between "Examination Centres" and "Learner Support Centres", respectively, wherein the activities of the examination centre are restricted to conduct of examinations. That, the definition of 'study centre' as provided in the UGC (Establishment of and Maintenance of Private Universities) Regulations, 2003 ("2003 UGC Regulations") and 'learner support centre' in the 2017 ODL Regulations are more or less identical. That, Regulation 3(1)(ii) requires the Universities to adhere to the policy of territorial jurisdiction as a necessary pre-condition for grant of recognition, being a verbatim reproduction of Public Notices dated 24.06.2013, 27.06.2013 and 23.08.2013. That, the Respondent No.2 vide its Public Notice dated 18.07.2017 published and sought feedback on the draft UGC (Online Education) Regulations, 2017 which incorporated the recommendations of the Madhava Menon Committee Report and allowed the conduct of examinations through technologically supervised mode or at campuses of Universities through internet, resulting in dichotomy on territorial policy between the 2017 ODL Regulations and draft UGC (Online Education) Regulations, 2017. The Respondent No.2 is revisiting the 2017 ODL Regulations to resolve the issues flagged *inter alia* by the Petitioner University, who has also reminded the Honble Minister to re-examine the issue on Examination Centres but the provisions remain unattended, despite

amendments on two occasions. That, the bar on the conduct of examinations outside the State of Sikkim is arbitrary, irrational, unreasonable, discriminatory and plainly opposed to the very concept of distance education and the objective of reaching out to students in remote areas, hence, the prayers in the Writ Petition.

By an additional affidavit dated 15.02.2017 the Petitioner sought to file additional documents being a copy of the University Undertaking, dated 15.02.2017 and copy of the information supplied by the UGC on information sought under the RTI Act. The Petitioner University vide the first document stated that no study centres will be established outside the State and all examinations centres may notwithstanding be located in various parts of the country provided that they remain under the direct supervision and oversight of the University. The information under the RTI Act which dated 12.04.2016 states on the query of the applicant that as per public notice of the Respondent No.2 dated 27.06.2013 there are no restrictions on "Examination Centres" outside the State.

4. Respondents No.1 and 3 had no Counter Affidavit to file.

5. Disputing the averments put forth by the Petitioner, the Respondent No.2 in its Counter Affidavit stated that the challenge to the Notice dated 19.07.2016 on grounds that it is violative of Article 14 of the Constitution of India (for short, the "Constitution") is misconceived and without merit as no exceptions have been made in it in favour of any State. That, the impugned Notice, dated 19.07.2016, neither infringes nor violates the protection to life and personal liberty, besides, Article 21 of the Constitution is not applicable to an artificial person like a University. The Notification does not violate Article 19(1)(g) of the Constitution as it does not interfere with the right of the Petitioner to run an educational institution or activities related to it within the State of Sikkim and to claim violation of the right is wholly misconceived. That, no right accrues to the Petitioner under the provision to operate outside the State of Sikkim by virtue of it having been incorporated as a University by a legislation of the State of Sikkim. That, this stands concluded by the Judgment of the Hon'ble Supreme Court in ***Prof. Yashpal and Another*** vs. ***State of Chhattisgarh and Others***[1] as well as by the Judgment of this Court in WP(C) No.4 of 2013 dated

[1] (2005) 5 SCC 420

26.06.2015. That, the prohibition of Study Centres outside the territorial limits necessarily implies and includes any Centre for conducting examinations as evident from the fact that the Study Centres were undertaking activities such as processing admission of candidates, conducting classes and holding examinations. The Examination Regulations of the Petitioner University which deals with Examiners provides that Learning Centres are required to generate a list of external examiners from among the institutions near the Learning Centres affiliated to the local University and internal examiners possessing the required qualification and to send the details for University approval. That, in Regulation 2.3 of the Examination Regulations of the Directorate of Distance Education, it has been provided that the Learning Centres must conduct the examinations as per the Rules and Guidelines issued by the University. Further, Regulation 2.4 provides that Learning Centres or its faculty will not be paid any remuneration since conduct of examinations is the responsibility of the Learning Centres. That, Regulation 2.6 provides that Learning Centres must provide the relevant/ necessary facilities for the proper conduct of the examinations. When Study Centres outside the territorial limits of the State have been prohibited and upheld by the Hon'ble Supreme Court, it is not open to the Petitioner to establish Centres for one aspect of the activities i.e. conducting examinations. The distinction sought to be made between "Study Centres" and "Examination Centres" is without merit and deserves to be rejected. That, the Madhava Menon Committee took into consideration the activities that may be carried out in such Centres which included the conduct of term end examinations and held that examinations can be held at the premises of the University within the State or at such Study Centres which have been established by the University within the State for the purposes of imparting distance education. That, the policy directives dated 29.12.2012 also emphatically prohibits Centres, by whatever name, outside the territorial limits of the State. That, the Notice dated 19.07.2016 is clarificatory in nature and not a fresh prohibition, besides, there is no legal or other infirmity in the same and is binding on the Petitioner University. That, the Respondent No.2 in its 520th meeting held on 14.12.2016 decided that the UGC norms of territorial jurisdiction should be applicable for all academic activities including examinations for distance education. The confinement to the territorial limits was contained in the Notice dated 19.07.2016 and also of 24.06.2013 and 27.06.2013 and accepted by the Petitioner University who cannot now plead that it was not in existence when permission was granted and admissions made. In a communication addressed to all

Secretaries of Education Department of States dated 28.04.2016, the Respondent No.2 reiterated the decision which was brought to the notice of the Petitioner University, vide letter dated 13.05.2016 of the Principal Secretary to the Government of Sikkim, Human Resource Development Department. The Petitioner University responded confirming compliance. On 25.07.2016, the Respondent No.1 brought to the attention of the Chairman, UGC violation of territorial limits by different Universities, including the Petitioner University and that the University had not indicated its jurisdiction for admissions to the proposed courses. There can be no plea that only those directives which were in existence when permission was granted i.e. 21.03.2016 are only applicable. The Respondent No.2 by virtue of powers given to it under Section 12 of the UGC Act is entitled to lay down policies and issue directives from time to time which is binding on the Universities. Further, no right accrues to the students that examinations should be conducted near their home or at places of their choice. The alleged hardship of the students is also without merit. That, the University is required to indicate in its website and prospectus its territorial limits and jurisdiction so that students taking admissions are aware of this but has not complied within this request. That, in ***University of Mysore and Another*** vs. ***C.D. Govinda Rao and Another***[2] the Hon'ble Supreme Court held that it would normally be wise and safe for the courts to leave the decisions of academic matters to experts familiar with the problems they face. It was averred that distance education cannot be viewed differently from conventional form of education as the former is a supplementary to the latter and no legal infirmity arises in requiring a State established University to confine its educational activities within the territorial limits of the State. That, the challenge to the constitutional validity of the 2017 ODL Regulations is wholly misconceived and without any merit. That, this Court in WP(C) No.04 of 2013 *inter alia* upheld the policy of the UGC on territorial jurisdiction holding that the provisions of any enactment made by the State legislature concerning higher education which is in conflict with UGC Regulations would be *ultra vires.* Hence, even if the Act by which the State University was incorporated permits Study Centres/Examination Centres outside the State, it will be *ultra vires* and ineffective as the UGC Act enacted by the Parliament under Entry 66 of List-I of the Seventh Schedule of the Constitution empowers the UGC to maintain minimum standards of education in the country. That, the Respondent No.2 is a statutory authority

[2] (1964) 4 SCR 575

and is competent and empowered to regulate all aspects of ODL education. That, merely granting of approval for certain programs for the academic years 2016-17 and 2017-18 cannot be construed as permitting the Petitioner to have Examination Centres outside the territorial limitations of the State. No permission has been given to have Examination Centres outside the State in respect of students admitted in the academic years 2016-17 and 2017-18. The Vice Chancellors were requested to ensure that no Off Campus Centres/Study Centres or franchisee is opened by the Universities outside the territorial jurisdiction of the State pursuant to the Judgment of the Hon'ble Supreme Court in ***Prof. Yashpal*** *(supra)* and the State Governments were to amend the Acts in conformity with the Judgment. Another Notification was issued by the Director, DEC on 31.01.2012 informing that territorial jurisdiction in case of private institutions will be as decided by the Joint Committee which has decided that the territorial jurisdiction for the institutions (both private and Government funded) shall be the Headquarters and in no case outside the State. The word „operate in Public Notice dated 27.06.2013 encompasses all aspects/ procedures relating to educational institutions and includes the holding of examinations and the award of the Degrees. That, sanctity of examinations cannot be maintained in commercial venues and locations which are being hired by the Petitioner University for the said purpose. Besides, the Petitioner University has not given particulars of the number of Examination Centres being operated and how direct supervision is being exercised by the Petitioner University officials in so many Centres as they are limited in number. The Petitioner University has to abide by the entirety of the 2017 ODL Regulations in regard to its ODL education and while they may be in the process of obtaining accreditation from the NAAC, it does not entitle them to set up Examination Centres outside the State. That, there is no conflict between the 2003 UGC Regulations and the 2017 ODL Regulations as averred by the Petitioner University and the specific restriction in the 2017 ODL Regulations will apply and operate after being brought into force. That, the facilities to be provided in the Examination Centres are not to be confused with location of Examination Centres. It is denied that Regulation 13(7) read with Regulation 3(ii) are violative of Article 19(1)(g) of the Constitution. While referring to the additional Affidavit dated 15.02.2017 of the Petitioner University, it was submitted that based on the undertaking therein the Petitioner University cannot seek to override the policy directives of the UGC and the Government of India and seek to hold examinations outside the territorial limits of the State. While referring to a

reply under the RTI dated 12.04.2016 it is stated that it is incorrect and not based on a correct understanding of the earlier Public Notice of the Respondent No.2 dated 27.06.2013. In any event, the said reply has no relevance or effect after the formal Public Notice dated 19.07.2016. That, the submissions in the Writ Petition do not merit consideration by this Court and hence be dismissed.

6. The Petitioner filed Rejoinder to the Counter Affidavit of the Respondent No.2 reiterating in sum and substance its stand as given in the Writ Petition. The averments in the Rejoinder also sought to emphasise the rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution.

7. Advancing arguments for the Petitioner Learned Senior Counsel submitted that the adjudication in the present case requires this Court to assess and determine the *lis* that was actually determined and adjudicated in the previous round of litigation. That, in the previous dispute before this Court being WP(C) No.4 of 2013, the matter concerned "Study Centres" alone and the submissions made therein pertained to territorial policy as it applied to Study Centres which was for the prevention of commercialization of education, franchising etc. The only reason advanced by the Respondent No.2 for restricting examinations to territorial limits was that as the territorial policy applied to Study Centres it would necessarily apply to every aspect or activity being conducted by the erstwhile Study Centres. That, since some examinations could be conducted at Study Centres, the territorial policy would necessarily be seen as interdicting examinations outside the State even though this has not been stated in the territorial policy and has nothing to do with the purport, intent and objective underlying the framing of that policy. That, the Examination Centres were separate and distinct from Study Centres even prior to the Judgment of this Court in WP(C) No.04 of 2013 dated 26.06.2015 and only matters such as internal assessment and some aspects of practicals were being conducted at study centres. The end of term examinations continue to be conducted at venues near the places where students are located and are temporarily arranged for the purpose of writing the examinations. In the event the Regulations are upheld by this Court, the relief ought to be moulded in a manner to protect the interests of students enrolled in distance education programs with certain expectations. That, the examination restriction for students who sought admission prior in time to the said Regulations restrictions as to *situs* may not be enforced, provided that all safeguards and standards in Regulation 13(7) are complied with.

8. It was next contended that the Madhava Menon Committee Report did not advocate for any territorial restrictions nor did it believe that the location of an Examination Centre would in any way violate the territorial jurisdiction of the University or its parent Statute. That, examinations conducted by the Petitioner University is computer based and the answer scripts directly transferred from the concerned Centre to the University Headquarters in Gangtok enabling a fully secure examination process and allowing students to write examinations from convenient venues. The Regulations made by Respondent No.2 under Section 26 of the UGC Act, 1956 pursuant to acceptance of the Madhava Menon Report and direction of the Ministry of Human Resource Development must conform to the directions issued under Section 20 of the Act and in any event its powers thereof are constrained by the need to obtain either the prior or subsequent approval of the Central Government. Contending that the steps taken by the Respondent No.2 are manifestly arbitrary, it was submitted that the impugned restrictions are beyond the scope of the policy decision dated 29.12.2012 and entirely contrary to the very essence of distance education, which is to expand access to higher education besides having no rational basis. That, evaluation of students enrolled in DEC comprises of formative as well as summative aspects, and the formative portion of its assessment was being held in the erstwhile Study Centres. The summative end term examinations are held in independent test centres and are not linked to the Study Centres which have since been closed down. That, the examinations are conducted in centres approved by the Respondent No.2 and is computer based using local area network. Relying on the observation of the Hon'ble Supreme Court in ***Transport Corporation of India*** vs. ***Employees' State Insurance Corpn. and Another***[3] it was submitted that the Petitioner University satisfies the test of functional integrity. That, in ***State of Bihar and Others*** vs. ***Smt. Charusila Dasi and Others***[4] it was clarified that a State law cannot be bad on account of extra territoriality. That, regulatory regimes preceding the 2017 ODL Regulations did not impose any territoriality restrictions on the conduct of any examination *per se.* The DEC/IGNOU in its 40th meeting resolved to limit the jurisdiction of State Universities to the boundaries of their respective States and not beyond, it is in this context that the Madhava Menon Committee Report was commissioned which recommended that examinations should be held at

[3] (2000) 1 SCC 332
[4] (1959) Supp (2) SCR 601

Study Centres or any Centre identified by the University having necessary facilities and support environments.

9. That, on 27.06.2013, the Respondent No.1 vide a Notification for the first time spelt out the territorial policy and it was reiterated that the 2003 UGC Regulations will apply insofar as setting up of Study Centres or Off Campus Centres. The Respondent No.2 issued express clarifications in RTI queries stating no restrictions existed on the holding of examinations outside the territoriality of the State where the University is located. That, the Respondent No.2 wrote letters to the State Governments including the State of Sikkim asking them to seek confirmation from Universities operating within their States on their adherence to the applicable UGC guidelines, the letter did not suggest prohibition on holding of examinations beyond the States territoriality. Thereafter the impugned Notice dated 19.07.2016 came to be issued followed by the communications dated 07.10.2016 and 01.11.2016 which emphasized the prohibition *supra* besides directing the Petitioner University to upload information regarding its Examination Centres. Relying on the decision of ***P. Suseela and Others*** vs. ***University Grants Commission and Others***[5] it was contended by the Petitioner University that the scheme of the UGC Act makes it wholly clear that the power to determine and take policy decisions is squarely within the ambit of the Central Government which has powers under Section 20(1) to direct the Respondent No.2 to discharge its functions in terms of a policy that relates to national purpose. That, the Hon'ble Supreme Court in the ratio *supra* has *inter alia* held that the Central Government is empowered to direct the Respondent No.2 to modify a regulation if it fails to fall in line with the policy framework. Thus, Respondent No.2 has no authority to issue Notifications and Public Notices which whittle away the ability of the Petitioner University to conduct examinations outside the State of Sikkim, the impugned Notifications being non-statutory are *ultra vires* passed without legislative backing.

10. The approval letter of the Respondent No.2 granting permission to the University for the academic year 2017-18 stated that the territorial jurisdiction in respect of University for offering programs through distance mode will be as per the policy of UGC on territorial jurisdiction and opening of Off campuses/Centres/Study Centres as mentioned in the UGC

[5] (2015) 8 SCC 129

Notification dated 27.06.2013. As the approval was traced to the Notification dated 27.06.2013 the approval of the Petitioner University for the year 2017-18 was not subject to any restriction on the territoriality of Examination Centres. Since the Respondent No.2 did not refer to its subsequent Notifications in the approval *supra* it cannot now impose conditions that were waived. The territorial restriction on Examination Centres in Regulation 13(7) of the ODL Regulations is mutually inconsistent with the entire scheme of the 2017 ODL Regulations which emphasises continuous evaluation of students, which would necessarily have to happen at the home of the students situated in their home States. The 2017 ODL Regulations puts an obligation upon the Petitioner University to upload on its website the feedback mechanism for the design delivery and development of continuous evaluation of learner performance and has to form an integral part of the design of the program. That, Regulation 13(6) of the 2017 ODL Regulations mandates that the weightage for the term end examination should not be less than 70%. In these circumstances, the Respondent No.2 s assertion that the Petitioner University can conduct 30% of the evaluation in terms of Regulation 13(2) through home assignments and response sheets while simultaneously debarring the University from holding term end examination of 70% component in secure centres, in terms of Regulations 13(7)(i) to 13(7)(v), is manifestly arbitrary. Hence, Regulation 13(7) which provides for establishment of Examination Centre within the territorial jurisdiction of the Higher Educational Institutions, being arbitrary sans intelligible differentia is required to be severed to ensure that the scheme of distance education is not made redundant. That, the doctrine of severability mandates that when a part of a provision is not inextricably bound with the part declared invalid, then only the part that is declared invalid is required to be excised. On this aspect, submissions were augmented with reliance on ***State of Bombay*** vs. ***F. N. Balsara***[6]. Reference was also made to the ratio in ***D. S. Nakarav*** vs. ***Union of India***[7]. That, the 2017 ODL Regulations contemplate two different academic activities and purposes for Examination Centres and Learner Support Centres hence, the contention of the Respondent No.2 that Examination Centres include Study Centres is incorrect. In fact, the 2017 ODL Regulations provide for Minimum Standards to be Maintained at Examination Centres and contemplates that the Centres are to be situated in States or Cities depending on the proportion of the Student enrolment. The administrative, technical and

[6] 1951 SCR 682
[7] (1983) 1 SCC 305

logistical challenges of holding examinations for almost 50,000 students in the State of Sikkim has been recognized by the Government of Sikkim which has made a representation to the Respondent No.2 in this context. That, the insistence on holding examinations within the State of incorporation discriminates against the economically weaker students who would be required to expend on travel arrangements and board, as also working professionals who may not always get leave. That, the Hon'ble Supreme Court has held that internal contradictions in a legislation would be evidence of manifest arbitrariness. Reliance on this count was placed in ***Navtej Singh Johar*** vs. ***Union of India***[8]. That, in ***Shayara Bano*** vs. ***Union of India***[9] the Honble Supreme Court observed that manifest arbitrariness of a provision of law can also be a ground for declaring a law as unconstitutional. That, the Hon'ble Supreme Court in ***State of Tamil Nadu*** vs. ***P. Krishnamurthy***[10] laid down the parameters of judicial review of subordinate legislation. That, in ***Khoday Distilleries*** vs. ***State of Karnataka & Ors.***[11] the Hon'ble Supreme Court has laid down the parameters of judicial review of subordinate legislation on account of it being manifestly arbitrary and the same are now well settled. Reference on this count was also made to the ratio in ***Sharma Transport*** vs. ***State of A.P.***[12] and ***Cellular Operators Association of India*** vs. ***TRAI***[13]. That, the Notice dated 19.07.2016 and communications dated 07.10.2016 and 01.11.2016 were issued without any study or application of mind and were wholly unreasoned. The subsequent 2017 ODL Regulations were also drafted without any intelligent care and deliberation. That the Notifications and Regulations framed by the Respondent No.2 are not at all proportionate to the object sought to be achieved, for which the submissions were buttressed with the ratio in ***Modern Dental College and Research Centre*** vs. ***State of Madhya Pradesh***[14]. Besides, the Respondent No.2 has by asking the Petitioner University not to hold examinations outside the State of Sikkim after the issuance of the Notifications and thereafter the promulgation of the 2017 ODL Regulations, overstepped the express decision of this Court in WP(C) No.08 of 2015 dated 29.06.2015 where the Court had expressly protected the Degrees of all students who had been

[8] (2018) 10 SCC 1
[9] (2017) 9 SCC 1
[10] (2006) 4 SCC 517
[11] (1996) 10 SCC 304
[12] (2002) 2 SCC 188
[13] (2016) 7 SCC 703
[14] (2016) 7 SCC 353

admitted prior to the final Judgment in WP(C) No.04 of 2013. That, should this Court be of the opinion that the Regulations of the Respondent No.2 are valid, the reliefs may be moulded to protect the existing students with permission to the Petitioner University as a onetime measure to hold examinations in 10-12 State capitals and the NCR Region. To this end, reliance was placed on ***U.P. State Brassware Corporation Ltd.*** vs. ***Uday Narain Pandey***[15]. Hence, in view of the said submissions, the Writ Petition be allowed.

11. Learned Senior Counsel for the Respondent No.2 refuting the arguments contended that other issues argued by learned Senior Counsel for the Petitioner University besides the prayers in the Writ Petition cannot be considered. That, there is no challenge to the powers of the Respondent No.2 to frame the Regulations but only the validity of the 2017 ODL Regulations. It is contended that Article 19(1)(g) of the Constitution is available only to a citizen and not to an Institution as held in ***State Trading Corporation*** vs. ***Commercial Tax Officer***[16]. That, this Judgment was followed and reiterated in ***Telco*** vs. ***State of Bihar***[17]. Similarly, Article 21 of the Constitution does not apply to an artificial or juristic person like a University and while Article 21A deals with right to education of children up to the age of 14 hence, inapplicable to the instant matters. It was next contended that the assailed Public Notices and Regulations are consistent with the constitutional provisions and the limitations contained therein as also the provisions of the UGC Act, 1956, Prof. Madhava Menon Committee Report, Presidential Directive dated 29.12.2012 issued under Section 20 of the UGC Act 1956 and the Judgment of this Court in WP(C) No.04 of 2013 dated 26.06.2015. That, the Petitioner University has been established for improving education activities in the State, therefore the requirement for the University to conduct examinations within the State consistent with Article 245 of the Constitution. On this count reliance was placed on ***Kurmanchal Institute of Degree and Diploma and Others*** vs. ***Chancellor, M.J.P. Rohilkhand University and Others***[18]. Reference was also made to Section 12 of the UGC Act, 1956 as also Section 20, Section 26 and Section 28 of the Act and it was canvassed that not only was the prior approval of the Government of India taken before notifying

[15] (2006) 1 SCC 479
[16] AIR 1963 SC 1811
[17] AIR 1965 SC 40
[18] (2007) 6 SCC 35

the Regulations in question, it was also laid before both Houses of the Parliament and no modifications made to Regulation 13(7) by the Parliament. The Madhava Menon Committee Report observed that the Study Centres are to be identified within the State and for the purposes of the Report such a Centre is a place where a number of activities were/are carried on, one of them being the conduct of term end examinations. That, while testing the validity of the Regulations, it has to be borne in mind that the 2017 ODL Regulations is to regulate distance education in all conventional Universities which should be encouraged and should endeavour to provide distance education. Peculiar aspects relating to a single University is not to be the deciding factor or the test as laid down by the Hon'ble Supreme Court in ***Avishek Goenka*** vs. ***Union of India and Another***[19]. That, the Directives of the Government of India as contained in the Order dated 29.12.2012 has been found to be a Directive under Section 20 of the UGC Act and binding on all parties including State Government Universities and includes keeping in view the territorial restrictions. Paragraph 9 of the Madhava Menon Committee Report provides that Study Centres for ODL programs are to be located within territorial limits of the State and not beyond. It prohibits establishing Centres outside the State for imparting instructions and also for holding examinations, malpractices in such Centres being a relevant factor. That, the Petitioner University was holding examinations in Study Centres at the relevant time. The provisions of the Examination Regulations of the Directorate of Distance Education of the Petitioner University have not been denied by the Petitioner but has been sought to be explained away as limited to certain subjects. It was next contended that the Policy Directive of the Government of India dated 29.12.2012 has not been challenged. The only challenge is to the steps taken by the Respondent No.2 to implement the Policy laid down in the said directive, hence in the absence of any challenge to the Policy, implementation of the same is not open to challenge and for this reason alone, the Writ Petition deserves to be dismissed.

12. That, prior to the impugned Notifications and Regulations as early as 23.08.2013, the Respondent No.2 had sent a communication to the Vice Chancellors of all the Universities that the State established Universities should operate only within the territorial limits of the State. That, the plea of the Petitioner University is that holding examinations within the State will

[19] 2012 (8) SCC 441

cause hardship to the students is not substantiated by any student claims. There cannot be hardship on the part of the University if it follows the Regulations and Acts in accordance with Article 245 of the Constitution. In any event, hardship cannot be a test for deciding the validity of a statutory provision for which reliance was placed on ***N. Vasundara*** vs. ***State of Mysore and Another***[20] and ***Saurabh Chaudri and Others*** vs. ***Union of India and Others***[21]. That, the Judgment of ***N. Vasundara*** *(supra)* was affirmed in ***Avishek Goenka*** *(supra)* and ***Namit Sharma*** vs. ***Union of India***[22].

13. That, the Division Bench Judgment of this Court in WP(C) No.04 of 2013 dated 26.06.2015 in categorical terms held that a State established University could not carry out any activity outside the territorial limits of the State in view of the Policy decision of the Central Government and the Notification and Orders following thereafter. In the light of this decision, it was contended that the word 'operations' encompasses all activities including holding of any examination. The Judgment was not appealed against by the Petitioner University thus attaining finality, hence the plea of the Petitioner University that the Division Bench Judgment of this Court dealt with Study Centres only and not with Examination Centres is incorrect and misconceived. The expression Study Centre in the Judgment is to be understood as it was projected at that point of time where among other things, examinations were also being conducted. The Public Notices under challenge are subsequent to the Division Bench Judgment of this Court in WP(C) No.04 of 2013 dated 26.06.2015 and are consistent with and following the same and therefore protected and not open to challenge. The only difference between education in the regular mode and distance mode is the manner in which students are taught, not that examination is to be held at the place of the choice of the student or a place of their convenience. The Hon'ble Supreme Court in ***Annamalai University represented by Registrar*** vs. ***Secretary to the Government, Information and Tourism Department and Others***[23] held that the distinction between a formal system and an informal system is in the mode and manner in which education is imparted. That, the Government of Sikkim vide its letter dated 13.05.2016 instructed the Petitioner University that it should not operate

[20] (1971) 2 SCC 22
[21] (2003) 11 SCC 146
[22] (2013) 1 SCC 745
[23] (2009) 4 SCC 590

outside the territorial limits of the State in any manner. Vide its response dated 25.05.2016, the Petitioner University informed that the University is compliant with the guidelines of the Respondent No.2 on Open and Distance Learning Programs. There is nothing unreasonable or arbitrary in requiring a University to hold examinations within the territorial limits of the State of its incorporation and is consistent with the constitutional scheme. That, the Hon'ble Supreme Court has laid down that in education matters, ordinarily the Courts would not interfere with policy decisions of academic bodies, this argument was augmented by the ratio in ***University of Mysore*** vs. ***Govindrao***[24], ***UGC*** vs. ***Neha Anil Bobde***[25], ***Census Commissioner & Ors.*** vs. ***R. Krishnamurthy***[26] and ***Narmada Bachao Andolan*** vs. ***Union of India and Others***[27]. That, the plea that the final Regulation is different from the draft Regulations, is without merit as the draft Regulations is for circulation and discussions and what is relevant is the final Regulation which is notified. The plea that the Petitioner University wrote to the Respondent No.2 that it was holding examinations outside the territorial limits but did not receive any reply and by inaction this lapse has been condoned, is without any merit. This plea was rejected in the Division Bench Judgment.

14. That, the issues relating to examinations held outside the territorial limits after the impugned notifications and the 2017 ODL Regulations without any order or permission from this Court are not the subject matter of the present Writ Petition although arguments are advanced on this count by the Petitioner University. The validity of the impugned Notifications and Regulations are only to be considered by this Court, hence on the grounds mentioned hereinabove, the Writ Petition be dismissed.

15. I have heard the rival submissions put forth by the learned Counsel at length, carefully perused the pleadings, documents and citations made at the Bar.

16. The question that falls for determination is;

> *Whether the impugned Public Notice dated 19.07.2016 and the communications dated*

[24] AIR 1965 SC 491
[25] (2013) 1 SCC 519
[26] 2015 (2) SCC 796
[27] (2000) 10 SCC 664

07.10.2016 and 01.11.2016 to the extent that they seek to prohibit Examination Centres/conduct examinations outside the State where the University is situated is violative of Article 14, Article 19(1)(g) and Article 21 of the Constitution and whether the requirement under Regulation 13(7) of the University Grants Commission (Open and Distance Learning) Regulations, 2017, pertaining to establishment of "Examination Centre" within the territorial jurisdiction of the concerned institution also violates of the same provisions of the Constitution?

17. While proceeding to determine the question *supra* it is apposite to refer to the Division Bench Judgment of this Court in WP(C) No.04 of 2013 dated 26.06.2015. The Petitioner University while challenging the decision of the IGNOU (Respondent No.1 therein) at its 40th Meeting, dated 08.06.2012, by which it was decided that State University could not have Study Centres outside the geographical limits of the State, even if the State legislation permitted it to do so, had in the Writ Petition sought the following reliefs;

> **"***(a)* issue an appropriate writ, order or direction directing Respondent No.1 to expeditiously dispose of the Petitioners application for continuation of recognition dated 10-07-2012;
>
> (b) issue an appropriate writ, order or direction quashing the decision taken by the Respondent No.1 at its 40th meeting on 08-06-2002 by which it was decided that a State University could not have Study Centres outside the geographical limits of the State, even if the State Legislation permitted it to do so;
>
> (bb) issue an appropriate writ, order or direction quashing the communication dated 28-06-2013 issued by the Respondent No.3; and
>
> (bbb) issue an appropriate writ, order or direction quashing the Public Notice dated 27-06-2013

(sic) insofar as it prejudicially affects the Petitioner from continuing to conduct its DEP through the existing Study Centres.**"**

The Court framed four questions to consider the issues raised in the Writ Petition;

> ***"(a)*** Does the UGC have supervening position upon the IGNOU, DEC and the Universities, both Private and Government funded, created under the State Acts?
>
> **(b)** Can it be said that Regulations 2003 was never applied after it was framed and that UGC Regulation, 1985 continued to be in force?
>
> **(c)** Would the letters issued to the Petitioner-University by the IGNOU and DEC in contravention to letter dated 29-12-2012, Annexure P29, of the Ministry of Human Resource Development, Respondent No.2, amount to abandonment of Regulations 2003?
>
> **(d) Can it, therefore, be said that it was permissible for the Universities of all categories to run DEP outside the territorial limits of the State?"**
>
> [emphasis supplied]

18. While considering "(d)" *supra*, reference was made by the Court to the ratiocination in ***Prof. Yashpal and Another*** *(supra)*, ***Rai University*** vs. ***State of Chhattisgarh and Others***[28], ***Kurmanchal Institute of Degree and Diploma*** *(supra)*, ***Annamalai University represented by Registrar*** *(supra)* and ***Kalyani Mathivaran*** vs. ***K. V. Jeyaraj and Others***[29]. Reference was also made to letters dated 15.10.2009 (issued by the Respondent No.1 (IGNOU), 09.09.2009 and 17.09.2009 [in WP(C) No.4 of 2013]. Admittedly, the letter dated 15.10.2009 of the Respondent No.1 therein, (IGNOU), conveyed that the territorial jurisdiction for offering

[28] (2005) 7 SCC 330
[29] AIR 2015 SC 1875

programmes through distance mode would be governed by the latest UGC Notifications which prevailed over all previous Notifications, Circulars and as per the UGC Notification, the State Universities (Private and Government funded) could offer programmes only within the State and in any case not outside the State. The Court while arriving at the finding that the Study Centre of the Petitioner University was to be confined to the State of its incorporation held as follows;

> ***"15(i)**. However, we are unable to accept these contentions as it does not appear to be correct in view of the subsequent letter dated 15-10-2009, Annexure P17, issued by the Respondent No.1 as also the preceding letters of the IGNOU dated 09-09-2009, Annexure P16 and 17-09-2009, Annexure P16A, as would appear from Clauses 6 and 7 of the conditions of the recognition mentioned therein which provided as follows:-*
>
> > *"6. Regarding territorial jurisdiction for offering programmes through distance mode the latest UGC notifications will prevail over all previous notifications and circulars. As per the UGC notification, State Universities (both private as well as Govt. funded) can offer programmes only within the State and Deemed Universities from the Headquarters and in no case outside the state. However, Deemed Universities may seek the permission to open off campus centres in other states and offer distance education programmes through the approved off campuses only after approval of UGC and DEC. Central Universities will also adhere to the UGC norms. <u>The territorial jurisdiction for the</u>*

institutions (both private as well as Govt. funded) shall be the Headquarters, and in no case outside the State.

7. The Distance Education Council prohibits franchising of Study Centres. Thus, your University will not franchise any Study Centre."

(ii) *This was followed by another letter of the Respondent No.1 dated 06-11-2009, Annexure P18, issued in continuation of the letter dated 15-10-2009, Annexure P17, which re-emphasised the terms and conditions conveyed earlier as would appear from the following:-*

"……

The terms & conditions which have been communicated to you vide our letter no. F.No.DEC/Recog/2009/3947 dated 15/10/ 2009 will remain in force and subject to the compliance of the same.

……."

(iii) *Quite evidently these letters, apart from emphasising on the pre-eminence of the latest UGC Notifications over all previous Notifications and Circulars, in no uncertain terms conveyed the jurisdiction of the Universities, be it Private or Government funded or Deemed Universities or Private Universities, being confined within the territory of the State.*

……

18(i) *It was no doubt contended that, at the time of seeking approval, the Petitioner-University had given a clear disclosure of each Study Centre, its locations and other details and, on that basis the DEC and UGC had granted the approvals*

*and, therefore, it was not now open for the UGC to take a different position, especially since it has adopted and applied the DEC Guidelines which were the very norm that were applicable at the time the approvals were granted. We are, however, not convinced by this argument. As held by the Honble Supreme Court in Annamalai University (supra), only because no action was taken by UGC on such disclosure, it would not mean that the illegality had been cured or the Regulations abandoned.***"**

[emphasis supplied]

It was also observed that "*the DEC for the first time imposed restrictions on the territorial jurisdiction of the Petitioner-University as would appear from paragraph 6 of letter dated 15-10-2009"*. While considering the Order dated 29.12.2012 the Court held as follows;

"19(i). *……..……*

(ii) *The Order dated 29-12-2012, Annexure P29, obviously does not appear merely to be an Executive Order of the Central Government as the Petitioner-University would want us to believe. To the contrary, we find that it has been passed in exercise of its powers under Sub-Section (1) of Section 20 of UGC Act, 1956 and the AICTE Act, 1987 thereby giving it a statutory character. The Order undoubtedly reflects the policy adopted by the Central Government in respect of the programmes/courses in the ODL Mode and made it a requirement to get such courses recognised by the UGC, AICTE and DEC and other regulatory bodies of the conventional mode of education in those areas of study.*

(iii) *Incidents of significance preceding the aforesaid Order were % (a) the recommendations of the Madhava Menon Committee was accepted*

under actionable Point 9 of which it was proposed that the Study Centres for ODL programmes were to be located within the statutory territorial jurisdiction of the relevant Acts/Statutes governing the Institution irrespective of whether a State Act mentions territorial jurisdiction beyond its State limits; ……..... (c) Even in the letter dated 15-10-2009, Annexure P17, of the Respondent No.1 to the Petitioner-University, it is found to have categorically mentioned that regarding territorial jurisdiction for offering programmes through Distance Education Mode the latest UGC Notifications will prevail over all previous Notifications and Circulars which was again found to have been repeated in the Notification of the Respondent No.1 dated 29-03-2010, Annexure P20. What followed thereafter was in the culmination of the Order dated 29-12-2012, Annexure P29, setting out the policy of the Central Government.

(iv) *We are of the considered opinion that since it has been held that the UGC Act being an Act of Parliament passed under Entry 66 List I of the Seventh Schedule to the Constitution of India, it will prevail over the Open University Act and all other Universities and, that as the function of the UGC is all-pervasive in respect of matters provided, inter alia, under Sections 12A, 22 and 26, the Order of the Central Government dated 29-12-2012 assumes a statutory character. Similarly, the Regulations framed under Section 26 of the UGC Act being Subordinate Legislations would also become part of the Act and, therefore, binding.*

……..

22. ……..

> ***(iii)*** *The validity of Regulations 2003 has been upheld in* ***Prof. Yashpal case (supra)*** *and, therefore, there can be no doubt that the Universities offering DEP would mandatorily require to follow the same. Even if it is accepted that the Petitioner-University had earlier been granted recognition for its ODL programmes without following Regulations 2003 or other Notifications of the UGC, the situation now stands altered in view of the policy decision of the Central Government and the Notifications and Orders following thereafter under which it is mandatory for the ODL programmes of the Universities to be recognised by the UGC, AICTE and IGNOU and, that these Universities shall be subject to its operations within geographical territorial limits of the State under the Statute of which the Universities are created. ……"*
>
> **[emphasis supplied]**

It was concluded as follows;

> ***"29.*** *For the aforesaid reasons, we hold that the Order of the Central Government dated 29-12-2012, Annexure P29, is valid and binding upon all Universities in the country, be it State or Private or Central Universities,* ***being a policy decision of the Government. Notifications/Orders issued consequential thereto and also preceding those to the same effect or consistent*** *therewith, are also held to be valid and binding.*
>
> ***(i)*** *Consequently, all prayers except prayer (a) alluded to above shall stand rejected.*
>
> *……."*
>
> **[emphasis supplied]**

19. Following the above Judgment, Student Petitioners in WP(C) No.08 of 2015 approached the Court as the degrees issued by the Petitioner

University was not recognised by the Governments of Denmark and Australia where they intended to pursue higher studies. The Single Bench of this Court observed that **"**……. *factual and legal aspects of this case are the very ones involved in WP(C) No.04 of 2013, in the matter of Sikkim Manipal University vs. Indira Gandhi National Open University and Others,* …….**"** The Petitioners had undergone the courses during the period when the DEP of the Respondent No.4 University was being run under valid recognition of the UGC and the DEC. The case of the Petitioners, it was observed, would be fully covered by the decision in WP(C) No.4 of 2013. It was further observed in WP(C) No.08 of 2015 as follows;

> ***"7.*** As regards the status and legal position of the UGC, it was held that UGC Act, 1956, under which it has been created, has a supervening influence over all other Legislations on the subject of education for maintenance of minimum standards in the country and indisputably governs Open University also. Thus, the resolution adopted in the 40th Meeting of the DEC dated 08-06-2012, Annexure P34, to confine the territorial jurisdiction of the Private Universities within the geographical limits of the States of its locations, having been taken as a consequence of a policy decision of the Government of India, it cannot be held to be unauthorised and invalid. The policy decision ultimately crystallised in the form of Order dated 29- 12-2012, Annexure R4. This Order having been issued by the Ministry of Human Resource Development, Department of Higher Education, Government of India, Respondent No.1, in exercise of its powers under Sub-Section (1) of Section 20 of the UGC Act, 1956, assumes a statutory character and would be considered as part of the main Statute, i.e., UGC Act, 1956, and binding upon all Universities irrespective of whether the other Statutes including the ones under State Legislations provide otherwise. This is so far as the questions of law are concerned.
>
> ***8.*** …….....……

"24(i) *……...……*

(ii) *…….....……*

25(i) *…….....……*

(ii) *By order dated 13-04-2015 of this Court in CM Appl No. 33 of 2015 had further confirmed the aforesaid two orders, the relevant portion of which is as follows:-*

> ***"6.*** *At this stage, Mr. Misra submits that by making an observation of de-recognition of the degrees of the intervenors, their job prospects are being jeopardized and they are being deprived of prosecuting their further studies, therefore, some protection may be granted to them.*
>
> ***7.*** *There is no occasion for this Court to deliberate on this point in an application field for permission to intervene in the main writ petition. However, it is observed that by interim order dated 22.02.2013 passed in W.P. (C) No.04/2013, it has clearly been held by this Court that during the pendency of the Writ Petition, the operation of the condition "but not beyond the boundary of their respective States", which clearly relates to the territorial jurisdiction of the Petitioner University, contained in the Minutes of 40th Meeting of the Distance Education Council of Indira Gandhi National Open University held on 08.06.2012, and any consequential direction in this regard shall remain stayed and the same order by a subsequent order dated 07.11.2013 has also been held to be binding on all the parties including the University Grants Commission (UGC). We*

are of the view that the earlier two interim orders would make the situation very clear and it is expected that all the parties concerned, including the UGC, would implement the said orders in their letter and spirit.

.....

10. *It is relevant to note that there are 3 (three) categories of students who stand thus protected. They are (i) those who had commenced and completed their DEP anytime prior to the academic session 2011-12; (ii) those who had commenced with their DEP prior to the academic session 2011-12 but, completed after that; and (iii) those who were admitted to the DEP any day after the interim order of this Court dated 22-02-2013 passed during the proceedings of Sikkim Manipal University (supra) by which operation of the condition* ***"but not beyond the boundary of their respective States"*** *stipulated in the decision of the DEC in its 40th Meeting dated 08-06-2012, Annexure P34, was stayed and the Respondent No.4-University was permitted to continue to act in accordance with the communication dated 15-10-2009, Annexure P27, subject to compliance of the terms thereof. The case of the Petitioners would certainly fall within the purview of the judgment in Sikkim Manipal University (supra) extracted above.*

11. *Apart from the above, the interim order of stay dated 22-02-2013 that was directed to be continued by a subsequent order dated 07-11-2013, was later confirmed by order dated 13-04-2015 in CM Appl No.33 of 2015 arising out of WP(C) No.04 of 2013 in Sikkim Manipal University (supra). Therefore, as a natural corollary and by necessary implication, the*

> *degrees in respect of the students, who were admitted to the DEP of the Respondent No.4-University after the order of stay, one of whom appears to be the Petitioner No.4, shall also be protected.*
>
> ***12.*** *The information conveyed in letter dated 11- 05-2011, Annexure P32, issued by the Respondent No.1 to the Royal Danish Embassy, being in conflict with the decision of the DEC, firstly, in ratifying the decision of its Chairman granting recognition to the DEP of the Respondent No.4-University for the academic years 2009-10 to 2011-12 and, secondly, its own grant of recognition, be it provisional or regular, for the preceding years, would be rendered a nullity, non est and, therefore, unenforceable and is accordingly, ordered so.***"**
>
> ……..
>
> ***14.*** *It is needless to state that this order would also apply to all the students who are similarly placed as the Petitioners although they are not before us.***"**
>
> **[emphasis supplied]**

20. It is now apposite to refer to the contents of the impugned Notification and communications. The Public Notice dated 19.07.2016 bearing F.No.12-9/2016(DEB-III) reads as follows;

> **"**It has come to the notice of the UGC that some Institutions/Universities/Institutions Deemed to be Universities are conducting examinations for their Open and Distance Learning (ODL) programmes outside the State of their location or beyond their territorial jurisdiction, which is wholly illegal. The Policy of the UGC with regard to territorial jurisdiction and off-campuses/ study centres has been clearly articulated in its Public Notice dated

> 27.06.2013, which is also available on the UGC website at www.ugc.ac.in.
>
> All the Institutions are hereby directed to follow the UGC policy on ODL norms and territorial jurisdiction which are applicable for all academic activities including setting up of examination centres for distance education.
>
> The students and parents are requested to ascertain the territorial jurisdiction of the institution before seeking admission in the same and refrain from studying in these institutions which violate the norms of the University Grants Commission.
>
> ……."

This Public Notice is self-explanatory. This Notification as pointed out by Learned Senior Counsel for the Respondent No.2 is infact a clarificatory Notification pertaining to the conducting of examinations by Universities for their Open and Distance Learning Programmes outside the State of their location or beyond their territorial jurisdiction. It was elucidated therein that such acts were wholly illegal. The Public Notice also explained that the Institutions were to follow the UGC Policy on ODL norms and territorial jurisdiction including setting up of Examination Centres for Distance Education. The Public Notice dated 27.06.2013 mentioned in the said notice *supra* pertains to Courses/Study Centres/Off Campuses and Territorial Jurisdiction of Universities. This Public Notice requires *inter alia* that a University established or incorporated by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the State of its location. Learned Senior Counsel for the Petitioner University argued that in Paragraph 2(b) of the Public Notice which provides that, a University established or incorporated by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the State of its location, is to be read with *Clause A – UGC Regulations on Private Universities* of the same Notice and is concerned only with permission to open Off Campus Centres/Off Shore Campuses and Study Centre after five years of its coming into existence subject to fulfillment of necessary conditions laid down by the Respondent No.2 and does not pertain to establishment of Examination Centres. The attention of this Court

had been drawn to the information sought under the RTI Act by one Maninder Singh Aujla from the Respondent No.2 and the response of the Respondent No.2 to the said person dated 12.04.2016 where it specified that there is no restriction on Examination Centres outside the State. On this count, we may notice that in WP(C) No.8 of 2015, the Judgment of the Court at paragraph 6 notes that *"Public Notice dated 27-06-2013, Annexure P39, impugned in the present case, was also assailed in the said Writ Petition."* and the fate of this Notice was sealed in Paragraph 29 of the said Judgment which lays down that;

> ***"29.*** For the aforesaid reasons, we hold that the Order of the Central Government dated 29-12-2012, Annexure P29, is valid and binding upon all Universities in the country, be it State or **Private or Central Universities, being a policy decision of the Government. Notifications/Orders issued consequential thereto and also preceding those to the same effect or consistent therewith, are also held to be valid and binding.**
>
> ……."
>
> **[emphasis supplied]**

Thus, no further discussions need emanate with regard to the Notification dated 27.06.2013 the observation *supra* having obtained finality.

21. The assailed communication dated 07.10.2016 is a letter issued by the Respondent No.2 to the Registrar, MATS University, Raipur, Chhattisgarh. The details required to be furnished on the websites of the Universities offering ODL programs *inter alia* included list of Study Centres and list of Examination Centres. The last Paragraph of the Public Notice reiterates **"**…… *Territorial Jurisdiction in respect of all activities has to be followed strictly. This also includes setting up of examination centres. UGC has already issued a Public Notice on 19.07.2016, which may be accessed at UGC website www.ugc.ac.in.***"**. Needless to add that at no point of time the Petitioner University has deemed it necessary despite direction to furnish the list of Examination Centres before the Respondent No.2 nor has it been admitted that it indicated the territorial limits of its operations on its website.

22. The impugned communication dated 01.11.2016 is addressed by the Respondent No.2 to the Petitioner University reiterating the contents of the letter dated 19.07.2016. It was emphasized therein that the Respondent No.2 vide its letter dated 06.10.2016 has also clarified that no University/ Institution is allowed to conduct Online Examination until such time that the UGC Guidelines are formulated and are mandatory. The Public Notice at Paragraph 4 reads as follows;

> **"**4. However, it has come to the notice of UGC that some institutions are offering programmes in violation of the policy of UGC and erstwhile DEC on territorial jurisdiction. Some Institutions are still operating beyond their territorial jurisdiction in terms of opening of Study Centres, conducting examinations outside the territorial jurisdiction and conducting 'Online Examination' as well as giving misleading advertisements in newspapers and other public media including their respective websites. The same is not permissible by UGC as per its norms.
>
> Therefore, all the Institutions are hereby strictly instructed that there should not be any Study Centre/ Examination Centre beyond its territorial jurisdiction, apart from adhering to the norms of not conducting 'Online Examination'. Franchising of ODL academic programmes is violation of UGC norms, and all ODL institutions need to have strict compliance of the same.
>
> All ODL institutions are also directed to notify their territorial jurisdiction as per UGC norms on the main page of their official website along with a clear public notice that they do not possess a study centre/ examination centre beyond their jurisdiction and do not possess Study Centre in franchisee mode even within the territorial jurisdiction. On similar lines, Universities are instructed to include this information also in the prospectus/forms/ other documents issued to all stakeholders and students for distance education from time to time.**"**

It may be pertinently be noticed here that these impugned Notifications/communications are issued consequential to the order of the Central Government dated 29.12.2012 and would therefore, in my considered, opinion meet the same fate as the Notification dated 27.06.2013 in view of the conclusion of this Court in WP(C) No.04 of 2013.

23. The UGC Regulations 1985 pertains to Minimum Standards of Instruction for the Grant of the First Degree through Non-Formal/Distance Education and is dated 25.11.1985. Admittedly, no restrictions were mandated on territoriality in the said Regulations. The UGC (Establishment of and Maintenance of Private Universities) Regulations, 2003 encompasses all Degrees, Diplomas and Certificates offered under formal, non-formal or distance education mode by the private Universities. Regulation 2.4 defines "Study Centres". Regulation 3.1 provides that each private University shall be established by a separate State Act and shall conform to the relevant provisions of the UGC Act, 1956, as amended from time to time. It may relevantly be pointed out that this Court in WP(C) No.4 of 2013 has unequivocally declared that the Petitioner University has been established by the Manipal Pai Foundation, a registered Trust thereby falling squarely within the meaning of a private University in Clause 2.1 of the 2003 UGC Regulations. In Para 17(iii) it was held as follows;

> ***"(iii)*** *The validity of Regulations 2003 having been upheld by the Honble Supreme Court in* ***Prof. Yashpal case (supra)*** *and, Regulations framed under Clauses (e), (f), (g) and (h) of Sub-Section (1) of Section 26 of the UGC Act, 1956, held to be binding on all Universities in* ***Annamalai University (supra)****, there can be no doubt of its applicability on the Petitioner University. Of course, Mr. Gopal Subramaniam, would argue that the Petitioner-University cannot be treated as „Private University considering its structure where the Chancellor is the Governor of the State and the Governing Council represented substantially State Government nominees but, in our opinion, such features or the fact that it had been recognised under Section 2(f) of the UGC*

*Act, would not confer upon the Petitioner-University, the legal statutes of a 'State University'. We are rather convinced that the Petitioner-University is a 'Private University' as will be revealed from what will follow hereafter.***"**

Regulation 26(1)(e), (f), (g) and (h) of the UGC Act, 1956 referred to *supra* read as follows;

> **"**26. (1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder–
>
> …….
>
> (e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction;
>
> (f) defining the minimum standards of instruction for the grant of any degree by any University;
>
> (g) regulating the maintenance of standards and the co-ordination of work or facilities in Universities.
>
> (h) regulating the establishment of institutions referred to in clause (ccc) of section 12 and other matters relating to such institutions;
>
> …….**"**

Regulation 3.3 of the 2003 UGC Regulations provides as follows;

> **"3.3.** A private university established under a State Act shall operate ordinarily within the boundary of the State concerned. However, after the development

> of main campus, in exceptional circumstances, the university may be permitted to open off-campus centres, off-shore campuses and study centres after five years of its coming into existence, ……."

24. On the anvil of these Regulations, the Madhava Menon Committee Report may briefly be perused. Reference in this context is made to the Guidelines on DEC Minimum Requirements for Recognition of ODL Institutions (Handbook 2009) at Page 7 of the Report, DEC Requirements, which *inter alia* provides that DEIs (Distance Education Institutions) that are part of the dual (offering education through regular mode and OLD mode) institutions that can be Central Universities, State Universities, Deemed to be Universities, Institutions of National Importance or any other institutions of higher learning recognized by Central/State Governments. The Petitioner University thus stands encompassed in the definition of DEI. 4.2.2 of the Report deals with Organizational Structure of the DEIs which requires that the activities of the DEIs can be classified on the pattern of Open Universities system such as academic activities and administrative activities. In "administrative activities" it is elucidated as follows;

> "**4.2.2 of the Report deals with Organizational Structure of the DEIs :**
>
> ……
>
> **Administrative Activities**: These include the following:-
>
> - Registration of students
> - Administration and Management of Finances
> - Management of Study Centres /Student Counseling
> - **Examination related activities**
> - Declaration of results and award of certificates/ degrees"
>
> **[emphasis supplied]**

The Organizational Structure described hereinabove is necessarily to be read with "Learner Support Services" described at "4.7" of the Report which provides *inter alia* as follows;

"• Organized learner support through Study Centres established and maintained by University/ Institution at existing recognized educational institutions having the required infrastructure and programme requirement

• Study Centres to provide both academic and administrative support services, such as dissemination of information, academic counseling (for both theory and practical courses), vocational guidance, hands-on experience, multimedia support, library services, evaluation of assignments, feedback, guidance of project work, organization of seminars, field trips, **conduct of term end exams, monitoring, etc.**

• Study Centres to be identified within the state or outside as per the jurisdiction of the University

• Study Centres to maintain records pertaining to:

- Academic Counsellors and Staff
- Students Registered
- Counselling Sessions
- Assignments Received, Evaluated and Returned
- Student Queries
- Administration and Finance
- Student feedback about the course, delivery, counselor/teacher, facilities, environments, etc."

[emphasis supplied]

In the light of the above recommendations it is clear that the administrative activities and examination related activities described as "administrative support" in "4.7" extracted *supra* would thereby include examinations to be held at the Study Centres. In WP(C) No.4 of 2013, it has already been decided that the Order dated 29.12.2012 is not merely an executive Order of the Central Government but has been issued in exercise

of the powers of the Central Government under Sub-Section (1) of Section 20 of the UGC Act, 1956 and the AICTE Act, 1987 thereby giving it a statutory character. Paragraph 9 of the report reads as hereunder;

> **"**9. Study centers for ODL programmes to be located within the statutory territorial jurisdiction of the relevant Act/statute governing the institution**. In case a state Act mentions territorial jurisdiction beyond its State limits, the same will be limited to the territorial jurisdiction of the State in which it is located and under no condition will study centers be located beyond it."**
>
> [emphasis supplied]

The point on territorial jurisdiction having been laid down so succinctly *supra* it requires no further elaboration, thus the argument of the Petitioner University that the Madhava Menon Committee did not recommend any confinement to territorial jurisdiction is belied by the Paragraph 9. On consideration of both the Order dated 29.12.2012 and the recommendations of the Madhava Menon Committee Report, it is clear that Study Centres are to conduct the term end examinations. The Report also recommends that examinations should be held at Study Centres or any other Centre identified by the University having necessary facilities and support environments and emphasizes that under no condition was a study centre to be located beyond the territorial jurisdiction of the State. The requirements in the Examination Centres as per the 2017 Regulations are as follows;

> "**Annexure III**
>
> **Minimum Standards to be Maintained at Examination Centres**
>
> 1. The examination centre must be centrally located in the city, with good connectivity from railway station or bus stand, for the convenience of the students.
>
> 2. The number of examination centres in a city or State must be proportionate to the student enrollment from the region.

3. Building and grounds of the examination centre must be clean and in good condition.

4. The examination centre must have an examination hall with adequate seating capacity and basic amenities.

5. Fire extinguishers must be in working order, locations well marked and easily accessible. Emergency exits must be clearly identified and clear of obstructions.

6. The examination centre must provide adequate lighting, ventilation and comfortable seating. Safety and security of the examination centre must be ensured.

7. Restrooms must be located in the same building as the examination centre, and restrooms must be clean, supplied with necessary items, and in working order.

8. Provision of drinking water must be made for learners.

9. Adequate parking must be available near the examination centre.

10. Facilities for Persons with Disabilities should be available.**"**

The requirements do not at any point envisage location of the examination centre beyond the territorial jurisdiction of the State. The Public Notice dated 24.06.2013 reiterates that a University established or incorporated by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the State of its location. In the Public Notice dated 27.06.2013, this provision is reiterated and as already stated has already been discussed in the Judgment in WP(C) Nos.04 of 2013 and 08 of 2015. The communication by the Respondent No.2 dated 23.08.2013 to Vice Chancellors/Directors, Directorate SOUs/DEIs/DDEs bearing F.No.DEB/ QMC/2013 also states that **"***ii) a University established or incorporated*

*by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the state of its location.***"** Besides, the said letter also *inter alia* specifies that;

> **"4.** Therefore, all Universities/Institutions are hereby requested to offer only those programmes which are approved by UGC/erstwhile DEC and follow the policy of UGC on territorial jurisdiction, Study centres, and non-franchising of Study centres for offering programmes through distance mode. **The activities at the Study centre such as admission, examination, conduct of Personal Conduct Programmes (PCPs) etc should be operated by the concerned University.** Study centres can not conduct examinations on their own nor can they award degree/diploma etc. No sub-letting of study centres should be allowed and any such centre opened by any University/Institution would be in violation of the UGC policy.**"**
>
> **[emphasis supplied]**

In the face of such clarity with regard to the activities of the Study Centre it is indeed startling that the Petitioner University remains in a state of conundrum. An Affidavit submitted by the Petitioner University to the Respondent No.2 dated 01.04.2016 declares on oath that the territorial jurisdiction in respect of University for offering programs through distance mode will be as per the Policy of UGC on territorial jurisdiction and opening of Off Campuses/Centres/Study Centres as mentioned in the UGC Notification No.F.27-1/2012 (CPP-II), dated 27.06.2013. This provision is necessarily to be read in the context of inclusion of conduct of examinations. As the Petitioner University has sworn on Affidavit that the territorial jurisdiction is being complied with, the question of Examination Centres being allowed outside the territorial jurisdiction in the wake of the clarity in the correspondence dated 23.08.2013 cannot be countenanced. Besides, in its communication dated 21.03.2017, the Respondent No.2 while considering **"**Continuation of recognition to Sikkim Manipal University, Gangtok Sikkim for offering programmes through Open & Distance Learning (ODL) mode for academic year 2017-18,**"** had specified that the territorial jurisdiction in

respect of University for offering programs through distance mode will be as per the Policy of UGC on territorial jurisdiction and opening Off Campuses/ Centres/Study Centres as mentioned in the UGC Notification No.F.27-1/2012 (CPP-II), dated 27.06.2013, a copy of which was also posted on the UGC website. The State Principal Secretary, Human Resource Development Department, Government of Sikkim had also brought to the notice of the Vice Chancellor of the Petitioner University vide its letter dated 13.05.2016 that under no circumstances, any Education Centre of the Petitioner should be operating beyond the territorial jurisdiction of the State of Sikkim in any manner and it was also to be ensured that no other Campus Centre/Study Centre/Affiliating College and Centres operating through franchise is opened outside the territorial jurisdiction of the State of Sikkim. A communication in confirmation was sent by the Petitioner University on 25.05.2016. It is clear that the communications with regard to prohibiting holding of examinations outside the State did not emerge suddenly in the year 2016 but the Respondent No.2 has been consistently stating it from 2010.

25. Besides all of the above, the averments of the Respondents No.2 in its Counter-Affidavit dated 08.05.2019 has drawn attention to the examination Regulations of the Directorate of Distance Education of the Petitioner University which reads as follows;

> **"**VIII. ……In Regulations 2.2 dealing with Examiners, it has been provided that "learning centres are required to generate a list of external examiners from among the institutions near to LC(within a radious of 15 kms) affiliated to local university and internal examiners possessing the required qualification and send the details for university approval". In Regulation 2.3 dealing with conduct of examination, it has been provided that "final semester internship examination is a university examination. The learning centres must conduct this examination as per the rules and guidelines issued in this regard by the university". In Regulation 2.4 dealing with remuneration, it was provided as under:

"2.4 REMUNERATION

The honorarium payable to the external examiners must be borne by the learning centres which will be reimbursed by them after the receipt of marks, original cash vouchers signed by the receiver (Form I) and other required details.

The learning Centre or its faculty will not be paid any remuneration since conduct of these examinations is the responsibility of the LC"

"2.6 ACTION BY THE LC

The learning centre must provide the relevant/necessary facilities for the proper conduct of the examinations"

……..**"**

[emphasis supplied]

These Regulations were not disputed by the Petitioner University save to the extent that the Regulations were in vogue prior to the Judgment of this Court dated 26.06.2015 and is no longer relevant. I find that such declaration of irrelevance cannot wish away the contents thereof which at Regulations 2.4 and 2.6 indicate that the Petitioner University was conducting the examinations in the Learning Centres and therefore well-aware that when the Notifications confining territorial jurisdiction were issued they ought to have confined all activities of the Study Centres/Learning Centres to the jurisdiction of the State. The insistence of the Petitioner University that prohibition on Examination Centres was being introduced for the first time on 27.06.2013 appears to be incorrect in view of the fact that it was well within the knowledge of the Petitioner University prior in time as can be deducted from their own Regulations that the Learning Centers conducted the examinations.

26. The Petitioner had also contended that the Madhava Menon Committee Report stated that there had to be provision for despatch of sealed scripts immediately to Headquarters, indicating that Study Centres were

envisaged as being outside the territorial limits appears to be based on assumptions favourable to itself but belied by the Report itself.

27. The argument that the Respondent No.2 has not been able to advance any reason why restricting examinations to the limits of the State is necessary to maintain standards is also answered by the Judgment of this Court in WP(C) No.4 of 2013 besides which in ***Modern Dental College and Research Centre*** *(supra)* the Hon'ble Supreme Court would observe *inter alia* as follows;

> **"69.** Apart from the material placed before the High Court, our attention has also been drawn to a recent report of the Parliamentary Committee to which we will refer in later part of this judgment. The Report notes the dismal picture of exploitation in making admissions by charging huge capitation fee and compromising merit. This may not apply to all institutions but if the legislature which represents the people has come out with a legislation to curb the menace which is generally prevalent, it cannot be held that there is no need for any regulatory measure. "*An enactment is an organism in its environment*" *[Justice Frankfurter, "A Symposium of Statutory Construction: Forward", (1950) 3 Vand L Rev 365, 367]*. It is rightly said that the law is not an Eden of concepts but rather an everyday life of needs, interests and the values that a given society seeks to realise in a given time. The law is a tool which is intended to provide solutions for the problems of human being in a society.**"**
>
> **[emphasis supplied]**

If the concerned authority is of the view that regulatory measures are imperative then legislation cannot be questioned because of inconvenience. The question of moulding the reliefs to protect the interests of students enrolled in distance education programs on a certain basis and with a certain expectation cuts no ice in the light of the foregoing discussions. Nevertheless, the protection granted by the Judgment in WP(C) No.08 of 2015 to the Petitioners therein and those similarly situated stands maintained and unchanged.

28. While tracing the history pertaining to examinations it may relevantly be noted that the UGC Regulations of 1985 dated 25.11.1985 lays down under "3. Programme of Study" as follows;

> **"3.** ***Programme of Study:***
>
> …….....……
>
> 2. The University shall set up study centres (outside the headquarters) in areas where there is a reasonable concentration of students. Each study centre shall have adequate library facilities (text books, reference materials and lessons and supporting materials). They shall also have qualified part time instruction/ counselling staff to advise and assist the students in the studies and remove individual difficulties.
>
> ……**"**

However, so far as examination is concerned it was laid down at "4" that **"**The University shall adopt the guidelines issued by the University Grants Commission from time to time in regard to the conduct of examinations.**"** Thus, even the Regulations of 1985 specify that the University is bound by the guidelines issued by the Respondent No.2 so far as conduct of examinations is concerned. When the Regulations of 1985 were in vogue admittedly the Study Centres were mandated to be in areas outside the Headquarters. Consequently there was no bar on conduct of examinations even at such Centres. In 1991, the Distance Education Council was constituted as an authority under the IGNOU. Even at that time, there was no territorial restrictions. The UGC (Establishment of and Maintenance of Private Universities) Regulations, 2003 however envisaged that Study Centres could be established outside the State provided permission was taken of the State where the Centre was to be located and that of the UGC as well Regulations 3.3 and 3.3.1. The said Regulations required the private Universities which had started functioning before commencement of the 2003 UGC Regulations, to ensure adherence with the said Regulations in which at "2.4" a "Study Centre" and its meaning was prescribed.

It is evident that the 2003 UGC Regulations were silent on the

manner in which examinations were to be conducted. In February, 2004 vide a Public Notice, the DEC (IGNOU) sought applications for recognition/ approval of the distance education programs. The DEC in its 35th Meeting held on 10.03.2010 held that territorial jurisdiction of State Universities would be as per their parent Statutes but in its 40th Meeting dated 08.06.2012 took the view that a State University could not have Study Centres outside the geographical limits of the State. Pertinently, it may be stated that in WP(C) No.4 of 2013, the Judgment has taken all these matters into consideration and arrived at its finding *supra*. Hence, the submissions of the Petitioner University that regulatory bodies permitted conduct of examinations outside the territorial jurisdiction is to be considered on the anvil of the Regulations governing the relevant period.

29. The additional affidavit of the Petitioner dated 15.02.2017 unequivocally states that the Petitioner had relied upon and filed a copy of the University Undertaking dated 15.02.2017. However, on perusal of the said University Undertaking although the date is "15.02.2017" it does not reflect as to who the communication was addressed to and therefore merits no consideration. So far as the information in the RTI is concerned it has been explained by the Respondent No.2 that it was incorrectly furnished and was not based on a correct understanding of the earlier Public Notice of the Respondent No.2 dated 27.06.2013. Although the Respondent No.2 ought to be circumspect in issuing such letters however it is clear that the Public Notice, dated 27.06.2013, places restrictions on Study Centres and Study Centres as already discussed includes Examination Centres. An argument was advanced by Learned Senior Counsel for the Petitioner that Clause 2.4 of the Regulations of 2003 described Study Centre while Regulations 2017 at 2(k) described Learning Support Centre and that both required that the Centre had to be established and maintained. That, Examination Centres on the contrary are temporary and neither established nor maintained by the Petitioner University but are temporarily hired. Consequently, the question of Study Centre including the examination centre did not arise in the absence of any definition in the Regulations of 2003. Having considered this argument it may be stated that conversely in the absence of definition of Examination Centre in the 2003 Regulations it is to be understood that the Study Centres would be conducting the examination as apparent from the Regulations of the University itself and subsequently bolstered by the Madhava Menon Committee Report.

30. The argument that Draft Regulations incorporate recommendations of the Madhava Menon Committee report to conduct examinations through technologically supervised mode or at campuses of Universities through internet, resulting in dichotomy of territorial policy in the ODL Regulations 2017 and the Draft Regulations of 2017, appear in the least to be incongruous since Draft Regulations cannot be said to have attained finality. It may also be noted that the ODL Regulations of 2017 have been passed by both Houses of Parliament. The contention that restriction on examination venues is not traceable to any Regulations or delegated powers finds its answer in the Judgment of this Court in WP(C) No.04 of 2013 and the discussions pertaining to Study Centres and Examination Centres that have emanated herein. In any event if the Petitioner University was of the opinion that an ambiguity arose due to absence of specific definition on examination centre it was incumbent upon them to have sought clarifications instead of putting enrolled students in jeopardy. It may be reiterated here that the Division Bench of this Court has concluded that the DEC for the first time imposed restrictions on the territorial jurisdiction of the Universities from 15.10.2009 which was repeated in the Notification of the IGNOU dated 29.03.2010 which culminated in the Order dated 29.12.2012.

31. In the light of the foregoing discussions, it cannot be said that the Public Notice and communications impugned herein are either capricious or unreasonable. The Respondent No.2 is clothed with powers to regulate Distance Education. The impugned Notification also do not infringe on the Petitioners right under Article 19(1)(g) or Article 21 of the Constitution. That apart which what stares us in the face is that the students who are said to be enrolled in the Distance Education Programme of the Petitioner University have at no point of time objected to the impugned Notifications or communications neither have they sought impleadment as intervenors in the instant Writ Petition.

32. Consequently, in consideration of the discussions hereinabove, the Writ Petition stands dismissed and disposed of.

33. No order as to costs.

SLR (2020) SIKKIM 50

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

MAC App. No. 08 of 2019

Branch Manager,
National Insurance Company Limited ….. APPELLANT

Versus

Chezing Bhutia and Others ….. RESPONDENTS

For the Appellant: Ms. Kesang Choden Tamang, Advocate.

For Respondent 1 & 3: Mr. N. Rai, Senior Advocate with
Mr. Nima Tshering Sherpa, Advocate.

For Respondent No.4: Mr. K. B. Chettri, Advocate.

With

C. O. No. 02 of 2019

Chezing Bhutia and Others ….. APPELLANTS

Versus

Branch Manager,
National Insurance Company Limited ….. RESPONDENT
and Another

For the Appellants: Mr. N. Rai, Senior Advocate with
Mr. Nima Tshering Sherpa, Advocate.

For Respondent No.1: Ms. Kesang Choden Tamang, Advocate.

For Respondent No.2: Mr. K. B. Chettri, Advocate.

Date of decision: 18th February 2020

A. Motor Accidents Claim – Multiplier to be Adopted – Age of the deceased and not that of the claimants is the criteria for consideration for adoption of multiplier – Age of the deceased should be the basis for applying the multiplier (*Sarla Verma* and *Pranay Sethi* discussed).

(Para 5)

B. Motor Accidents Claim – Rash and Negligent Driving – Proof of –There were five occupants in the vehicle including the driver of whom three passed away in the accident. Apart from the driver, one surviving passenger not examined – Held: Barring exceptional cases, it is always not possible for the claimant to know what precisely led to the accident, hence the application of the maxim *res ipsa loquitur*, which is but a rule of evidence. The reason being that there are certain incidents which do not occur unless there is negligence.

(Para 6)

Appeal dismissed. Cross Objection allowed.

Chronology of cases cited:

1. National Insurance Company Limited v. Pranay Sethi and Others, 0(2017) 16 SCC 680.
2. Sarla Verma (Smt) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.

JUDGMENT (ORAL)

Meenakshi Madan Rai, J

1. The Appeal assails the Judgment of the Motor Accident Claims Tribunal, East Sikkim, at Gangtok (for short, "Learned Claims Tribunal"), dated 29-03-2019, in MACT Case No.70 of 2017. The first ground raised is that the Learned Claims Tribunal adopted the multiplier of '18' for calculating loss of income of the deceased which allegedly resulted in a mis-calculation of the amount awarded which was placed at Rs.27,99,376/- (Rupees twenty seven lakhs, ninety nine thousand, three hundred and seventy six) only. That, infact the multiplier adopted ought to have been '11' and not '18' bearing in mind the age of the Claimants-Respondents No.1 to 3. The age of the deceased instead was erroneously considered by the

Learned Claims Tribunal. The second ground for assailing the Judgment was that despite the Claimants not having established rash and negligent driving the Learned Claims Tribunal took into consideration the prayer of the Claimants and granted compensation.

2. In the Cross-Objection filed by the Appellant in the Cross-Objection No.02 of 2019 (Respondents No.1 to 3 in MAC App. No.08 of 2019) the grievance is that the Learned Claims Tribunal failed to calculate and include "future prospects" of the deceased in the compensation granted in terms of the Judgment of the Hon'ble Supreme Court in the ratio of ***National Insurance Company Limited*** vs. ***Pranay Sethi and Others***[1]. No objection on this count was raised by Learned Counsel for the Respondent No.1 (Appellant in MAC App No.08 of 2019).

3. The undisputed facts are that the deceased along with four other Indian Reserve Battalion (hereinafter, IRB) personnel were travelling in vehicle bearing registration No.SK 01 P 8693 from IRB Camp at Pipaley, West Sikkim to Rorathang, East Sikkim, on 11-08-2017. The vehicle met with an accident near the Sikkim Distilleries, Rangpo, East Sikkim, resulting in the death of the deceased, son of Respondents No.1 and 2 and brother of Respondent No.3 (MAC App No.8 of 2019). The age of the deceased being 22 years at the time of the accident is not disputed.

4. Learned Counsel for the parties have been heard at length. Their submissions duly considered and pleadings perused.

5. In the light of the decision in ***Sarla Verma (Smt) and Others*** vs. ***Delhi Transport Corporation and Another***[2], it is evident that the multiplier to be adopted is indeed '18' and not '11', as the age of the deceased and not that of the Claimants is the criteria for consideration for adoption of multiplier. In ***Pranay Sethi*** (*supra*) it has clearly been spelt out by the Hon'ble Supreme Court that the age of the deceased should be the basis for applying the multiplier. Hence, the objection raised by the Appellant, on this count has no legs to stand.

6. So far as rash and negligent driving is concerned, it is admitted that there were five occupants in the vehicle including the driver of whom three

[1] (2017) 16 SCC 680
[2] (2009) 6 SCC 121

passed away in the unfortunate accident. Apart from the driver, it was contended that one remaining person was not examined. It would be apposite to remark here that barring exceptional cases, it is always not possible for the Claimant to know what precisely led to the accident, hence the application of the maxim *res ipsa loquitur*, which is but a rule of evidence. The reason being that there are certain incidents which do not occur unless there is negligence. In consideration of the facts placed before this Court the negligence on the part of the driver obviously cannot be ruled out. Hence, I find no merit in the second ground raised in the Appeal.

7. Addressing the question in the Cross-Objection, viz., the Learned Claims Tribunal had failed to consider the future prospects of the victim. In this context, in ***Pranay Sethi*** (*supra*) the Supreme Court while discussing future prospects held as hereunder extracted;

> **"59.** In view of the aforesaid analysis, we proceed to record our conclusions:
>
> ……...…….
>
> **59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made.** The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> …….....……
>
> **59.7.** The age of the deceased should be the basis for applying the multiplier.
>
> **59.8.** Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years.
>
> **[emphasis supplied]"**

Since the deceased had a permanent job being an employee in the Indian Reserve Battalion posted in Pipaley Camp, West Sikkim, future prospects are thus due to him. Nevertheless, as he was a bachelor there can be no computation for "loss of consortium" as calculated by the Learned Claims Tribunal which is however replaced by "Loss of Filial Compensation".

8. In view of the aforestated discussions, the quantum of compensation calculated by the Learned Claims Tribunal stands re-calculated and modified as follows;

Annual income of the deceased (Rs.25,272- x 12)		Rs. 3,03,264.00
Add 50% of Rs.3,03,264/- as Future Prospects	**(+)**	Rs. 1,51,632.00
		Rs. 4,54,896.00
Less 50% of Rs.4,54,896/- [as the victim was a bachelor, in consideration of the expenses which he would have incurred towards maintaining himself had he been alive]	**(-)**	Rs. 2,27,448.00
Net yearly income		Rs. 2,27,448.00
Multiplier to be adopted **'18' (Rs.2,27,448/- x 18)** [The age of the deceased at the time of death was 22 and the relevant multiplier as per Judgment of *Sarla Verma (supra) is* '18']		Rs. 40,94,064.00
Funeral Expenses [in terms of the Judgment of *Pranay Sethi (supra)*]	**(+)**	Rs. 15,000.00
Loss of Estate [in terms of the Judgment of *Pranay Sethi (supra)*]	**(+)**	Rs. 15,000.00
Loss of Filial Consortium **(Rs.40,000/- x 3)** [in terms of the Judgment of *Magma General Insurance Co. Ltd.* vs. *Nanu Ram and Others : (2018) 18 SCC 130*]	**(+)**	Rs. 1,20,000.00
	Total =	**Rs. 42,44,064.00**

(Rupees forty-two lakhs, forty-four thousand and sixty-four) only.

9. The Appellant-Insurance Company shall pay the compensation computed *supra*. The Claimants-Respondents shall be entitled to simple

interest @ 10% per annum on the above amount with effect from the date of filing of the Claim Petition before the Learned Claims Tribunal, i.e., 14-09-2017, until its full realisation.

10. The Appellant-Insurance Company is directed to pay the awarded amount to the Claimants-Respondents within one month from today, failing which the Appellant-Insurance Company shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition, till realisation, duly deducting the amounts, if any, already paid by the Appellant-Insurance Company to the Claimants-Respondents.

11. Appeal dismissed. Cross Objection allowed. Both stand disposed of accordingly.

12. No order as to costs.

13. Copy of this Judgment be sent to the Learned Claims Tribunal for information.

SLR (2020) SIKKIM 56

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

RFA No. 04 of 2017

Kiran Limboo ….. APPELLANT

Versus

Kussang Limboo and Another ….. RESPONDENTS

For the Appellant: Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Ms. Malati Sharma and Mr. Gulshan Lama, Advocates.

For the Respondents: Mr. A.K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha, Advocate.

Date of decision: 18th February 2020

A. Sikkim State General Notification No. 385/G dated 11th April 1928 – Necessity of Registration of Partition Deed – Legality of an unregistered document (partition deed) – The Sikkim State General Notification No. 385/G makes it clear that it is not only title deeds that are to be compulsorily registered but any "important document". The said Notification while indicating that other important documents will not be considered valid unless they are duly registered does not define what are "important documents" – In the absence of definition of the term, we may seek guidance from the provisions of S. 17 of the Registration Act, 1908 which enumerates documents which are compulsorily to be registered – Taking assistance from this provision, it emerges with clarity that Exhibit 11 being a partition deed would necessarily have to be registered.

(Paras 20 and 21)

Appeal allowed.

Chronology of cases cited:

1. Karma Doma Gyatso *alias* Babila Kazi v. Mrs. Kesang Choden and Others, AIR 2009 Sikkim 6.
2. Bishnu Kumar Rai v. Minor Mahendra Bir Lama and Others, AIR 2005 Sikkim 33,
3. Union of India and Others v. Vasavi Cooperative Housing Society Ltd. and Others, (2014) 2 SCC 269.
4. B. L. Sreedhar and Others v. K. M. Munireddy (Dead) and Others, (2003) 2 SCC 355.
5. Karam Kapahi and Others v. M/s. Lal Chand Public Charitable Trust and Another, AIR 2010 SC 2077.
6. Parvinder Singh v. Renu Gautam and Others, (2004) 4 SCC 794.
7. Thulasidhara and Another v. Narayanappa and Others, (2019) 6 SCC 409.

JUDGMENT

Meenakshi Madan Rai, J

1. This Appeal assails the Judgment and Decree dated 08.06.2017 in Title Suit No. 06 of 2014 *(Shri Kussang Limboo and Another v. Shri Kiran Limboo)* vide which the Suit of the Respondents/Plaintiffs was decreed.

2. The Appellant was the Defendant before the learned trial Court and the Respondents No.1 and 2, brothers, were Plaintiffs No.1 and 2 respectively. The parties shall be referred to in their order of appearance before the learned trial Court.

3. Before embarking on the merits of the matter, a brief narration of the facts is imperative. The Plaintiffs claimed to be owners of 'Schedule A' property being land bearing plot No.534, *Khatiyan* No.593, measuring .1300 hectares, under Hee Block, Gyalshing, West Sikkim with 'Schedule B' property, a house measuring 18 feet x 12 feet, standing on a portion of the said land. Consequent upon the demise of the Plaintiffs parents in 2006,

and on Plaintiff No.1 attaining the age of majority on 25.07.2014, the suit property was mutated in his name. The Plaintiffs sought eviction of the Defendant from the suit property alleging that his possession over it was illegal and that the property was required for their own use. That, a previous Suit being Title Suit No.07 of 2012 filed by the Plaintiffs against the Defendant on a different cause of action before the learned trial Court had been withdrawn and the instant Suit filed. The Plaintiffs sought the following reliefs;

> *"9. …..*
>
> *a) A decree declaring that the Plaintiffs are jointly the absolute owners of the suit property.*
>
> *b) A decree declaring the possession of the Defendant over the Suit property as illegal.*
>
> *c) A decree for recovery of the suit property from the possession of the Defendant.*
>
> *d) For any other relief/reliefs to which the plaintiff may be found entitled to either in law or in equity."*

4. Contesting the Suit of the Plaintiffs, the Defendant averred *inter alia* that he was the progeny of his father, late Buddhi Raj Limboo and his second wife Jasmaya Limboo. His father had three other sons from his previous wife, *viz.* Durga Singh Limboo (since deceased), Dhan Raj Limboo and Buddhi Lall Limboo. The Plaintiffs being the sons of late Durga Singh Limboo are his nephews. From the year 2004 till 2008, the Defendant was living in the Plaintiffs house. In 2008, Dhan Raj Limboo and Buddhi Lall Limboo gave him 'Schedule B' property vide document dated 20.12.2008, *"Bandabast Patra"* (Exhibit A) in the presence of witnesses as his share in the ancestral property. He also paid a sum of Rs.60,000/- (Rupees sixty thousand) only, to Buddhi Lall Limboo as expenses incurred by his brothers on repairing the wooden house standing on 'Schedule B' property. Vide another *"Bandabast Patra"* dated 14.11.2010 (Exhibit B), his brothers Dhan Raj Limboo and Buddhi Raj Limboo allowed him to construct a house in the courtyard in front of the 'Schedule B' property. Pursuant to such construction he along with his mother resided therein, his father having

passed away in 2013. Subsequent thereto, the Plaintiffs in collision with their uncles Dhan Raj Limboo and Buddhi Lall Limboo filed a false Suit (Title Suit No.07 of 2012), against the Defendant and his late father also impleading Dhan Raj Limboo and Buddhi Lall Limboo as Defendants, to evict the Defendant from the suit land but was withdrawn on 19.06.2014. Thereafter, the Plaintiff No.1 surreptitiously caused the entire plot No.534 to be recorded in his name. On learning of such change in the records after receiving a Legal Notice he has filed the Counter Claim.

5. In his Counter Claim, the Defendant reiterated that he is in possession of an area measuring 25 feet x 45 feet in plot No.534, under *Khatiyan* No.593, Hee Block, Gyalshing, West Sikkim and sought the following reliefs;

> *"1. A declaration that the Defendant is the owner in possession of the suit property of this Counter Claim.*
>
> *2. Or in the alternatively* (sic) *a declaration that the Defendant is entitled to hold the possession of the suit property of this Counter Claim as his share in the properties left behind by late Buddhi Raj Limboo.*
>
> *3. A declaration that the recording of Plot No.534 in the name of Plaintiff No.1 is illegal and liable to be cancelled.*
>
> *4. In consequence to relief 3 above, a direction directing the office of the LR & DM, Gyalshing, West Sikkim to make necessary corrections in the Records of Right by inserting the name of the Defendant in respect of the suit property of this Counter Claim and direction directing the said office to cancel and rectify the Khatiyan Parcha of the Plaintiff No.1 and to issue a Khatiyan Parcha to the Defendant in respect of the suit property of this Counter Claim.*

5. A declaration confirming the possession of the Defendant over the suit property of this Counter Claim.

6. An injunction restraining the Plaintiffs from interfering with the right, title and possession of the Defendant over the suit property of this Counter Claim.

7. Cost of the Counter Claim.

8. Any other reliefs to which the Defendant is found entitled to."

6. Responding to the Counter Claim, the Plaintiffs in their Written Statement disputed the claims and denied the paternity of the Defendant, alleging that he was alien to their family. That, on the strength of a false/ forged document, he had obtained a Certificate of Identification (for short "COI") which on 26.07.2012 was cancelled by the Additional District Collector, West, besides which the Defendant also obtained a false birth record, thus, the claims of the Defendant are devoid of merit.

7. The learned trial Court settled the following Issues for determination;

'1. Whether the plaintiffs are the absolute owner of the suit property as mentioned in the plaint?

2. Whether the plaintiff No.1 surreptitiously and behind the back of the defendant cause (sic) *the entire plot No.534 to be recorded in his name or same was recorded by following due process of law?*

3. Whether the possession of the defendant over the suit property mentioned in the plaint is illegal and is liable to be evicted from the said suit land?

4. Whether in and around the year 2008, Shri Dhan Raj Limboo and Shri Buddhi Lal Limboo had given the Schedule B property to the

defendant under a written document 20.12.2008 and the same is forged and sham transaction?

5. Whether the defendant is also one of the sons of Late Buddhi Raj Limboo and is entitled to a share in the property left behind by Late Buddhi Raj Limboo?

6. Whether the defendant is entitled to retain the suit property as mentioned in the counter claim as his share in the properties left behind by Late Buddhi Raj Limboo?

7. Whether the defendant is entitled to have the suit property as mentioned in the counter claim to be mutated in his name after making necessary correction in the records of right?

8. Relief(s).'

8. The Plaintiff No.1 (PW1) filed his Evidence-on-Affidavit and that of his three witnesses being Buddhi Lall Limboo (PW2), Dilip Kumar Rai (PW3) and Padam Lall Limboo (PW4). The Defendant filed his Evidence-on-Affidavit and that of his witnesses Sudesh Kumar Subba (DW1) and Ran Bahadur Subba (DW2).

9. Issue No.5 was taken up first for discussion and the learned trial Court on consideration of the evidence on record reached the finding that the Defendant had failed to satisfactorily prove that he is one of the sons of late Buddhi Raj Limboo and was consequently not entitled to a share of the property of late Buddhi Raj Limboo. In Issue No.4, the learned trial Court concluded that the Suit Property was the ancestral property of the Plaintiffs and no person had any right to transfer the property in favour of a third party. That, Exhibit A and Exhibit B executed by PW2 and Dhan Lall Limboo with regard to plot No.534, although not forged, were void, invalid and unauthorized, and decided the Issue in favour of the Plaintiffs. Issues No.1 and 2 were taken up together and it was observed that the Plaintiffs were the absolute owners of the Suit Property, both Issues thus came to be decided in favour of the Plaintiffs. In Issue No.3, the learned trial Court observed that the possession of the Defendant over the Suit Property was

on account of the unauthorized actions of Dhan Raj Limboo and Buddhi Lall Limboo, who, although not the absolute owners of the Suit Property had alienated it in favour of the Defendant. The Issue went in favour of the Plaintiffs. Issue No.6 was also decided in favour of the Plaintiffs in view of the decision in the preceding Issues. Issues No.7 and 8 were taken up next wherein it was held that the Defendant was not entitled to the reliefs claimed in his Counter Claim, while the Plaintiffs were entitled to the reliefs claimed at paragraph 9(a), (b) and (c) of the Plaint, (extracted *supra)*. The Suit was thus decreed in favour of the Plaintiffs.

10. Emphasizing that Exhibit 11, the alleged Partition Deed of 1988, allegedly executed by late Thabgo Limboo, grandfather of the Defendant Kiran Limboo, Durga Singh Limboo, Dhan Raj Limboo and Buddhi Lall Limboo and great grandfather of the Plaintiffs, was a document fabricated for the purposes of this case, learned Senior Counsel for the Defendant canvassed that this is evident from the fact that no physical partition took place thereafter and no steps were taken towards registration of their alleged respective shares. This was the position even when the Defendant and his father returned to Sikkim in 2004. Assuming that Exhibit 11 was indeed executed no reasons for exclusion of Buddhi Raj Limboo was revealed therein although the Plaintiff No.1 in his evidence did not deny that Buddhi Raj Limboo was the son of Thabgo Limboo. In fact he admitted that the Defendant was also one of the sons of Buddhi Raj Limboo but from his second wife, thereby admitting his lineage. Vide Exhibit A and Exhibit B Buddhi Lall Limboo and Dhan Raj Limboo have unequivocally accepted that the Defendant was their half brother, being the son of their father through his second wife. The Plaintiffs also failed to establish as to whether the property was the self acquired property of Thabgo Limboo or whether it was ancestral as no document to establish transfer of the property to Thabgo Limboo was furnished by the Plaintiffs. That, in fact mere recording of name in *Khatiyan* does not transfer title. To augment this submission strength was drawn from ***Karma Doma Gyatso alias Babila Kazi v. Mrs. Kesang Choden & Ors.***[1] and ***Bishnu Kumar Rai v. Minor Mahendra Bir Lama and Ors.***[2] as also ***Union of India and Others v. Vasavi Cooperative Housing Society Limited and Others***[3]. That, while

[1] AIR 2009 Sikkim 6
[2] AIR 2005 Sikkim 33
[3] (2014) 2 SCC 269

decreeing the Suit of the Plaintiffs the learned trial Court contemplated on the weaknesses of the Defendants case, when in fact the relief ought to have been granted on the strength of the Plaintiffs case, which was non-existent. That, in fact Buddhi Lall Limboo PW2 is the architect of this case who however had in the earlier Title Suit No.07 of 2012 in his Written Statement (Exhibit C) admitted the execution of documents *viz.* Exhibit A and Exhibit B as also in cross-examination and is therefore estopped from denying their existence and transfer of the suit property to the Defendant. On this count, reliance was placed on ***B.L. Sreedhar and Others v. K.M. Munireddy (Dead) and Others***[4]. Reliance was also placed on ***Karam Kapahi & Ors. v. M/s. Lal Chand Public Charitable Trust & Anr.***[5] in which it was held that estoppel cannot be elected, in other words, a party cannot approbate and reprobate. That, in the Suit *(supra)* the Plaintiffs had impleaded the father of the Defendant, Buddhi Raj Limboo, his uncles Buddhi Lall Limboo, Dhan Raj Limboo and the Defendant (Kiran Limboo) as Defendants, and sought a declaration that the property was ancestral for the Plaintiffs and Defendants Buddhi Lall Limboo and Dhan Raj Limboo but not for the Defendant, whose possession was alleged to be illegal and therefore he was liable to be evicted. That, for reasons best known to the Plaintiffs, they withdrew the Suit (Title Suit No.07 of 2012) which was allowed vide order dated 19.06.2014, till which time the suit property continued to remain recorded in the name of Thabgo Limboo. That, plot No.534 came to be registered in the name of the Plaintiff No.1 only in the year 2014 after the withdrawal of the Title Suit No.07 of 2012. In the surreptitious race to register the Suit Property in the Plaintiff No.1s name which was accomplished on 21.08.2014, in order to outwit and evict the Defendant, the name of Sukman Limboo the brother of Plaintiff No.1 was excluded in the *Khatiyan Parcha,* although he is also the son of Durga Singh Limboo and thereby an equal shareholder. That although the Plaintiffs witnesses seek to deny the parentage of the Defendant by pointing to cancellation of his COI, however they concealed the fact that the cancellation was only on account of the School Certificate furnished by the Defendant of a School in which he had not studied. There is no finding by the concerned authority that the Defendant is not the son of Buddhi Raj Limboo. He is thus entitled to apply for and obtain a COI on the basis of

[4] (2003) 2 SCC 355
[5] AIR 2010 SC 2077

his parentage. The finding of the learned trial Court that he cannot hold properties herein is therefore an erroneous finding. That, the Defendant lived with his father Buddhi Raj Limboo on the suit property till his demise in 2013 without questions or objections from any quarter which came to be raised only after his fathers death despite Exhibit A and Exhibit B having been executed prior to his death. That, Exhibit A and Exhibit B are not required to be registered in view of the fact that the property was still standing in the name of Thabgo Limboo. Hence, the impugned Judgment and Decree be set aside and reliefs prayed for in the Counter Claim be granted.

11. Resisting the arguments of the Defendant, learned Senior Counsel for the Plaintiffs contended that late Thabgo Limboo the original holder of the disputed property vide Exhibit 11, *"Banda Patra,"* dated 12.03.1988, partitioned his landed properties amongst his sons and grandsons. The properties described in „Schedule A fell in the share of late Durga Singh Limboo, father of the Plaintiffs, which the Plaintiffs inherited on his demise and are jointly and absolutely possessing. That, as the Plaintiff No.1 was the elder of the two brothers, the Suit Property was recorded in his name on his attaining majority, as such neither Buddhi Lall Limboo nor Dhan Raj Limboo could have alienated it to the Defendant on the Plaintiffs behalf either through Exhibit A, *"Bandabast Patra"* dated 20.12.2008 or Exhibit B, *"Bandabast Patra"* dated 14.11.2010. Besides, both documents are unregistered which is a requisite when transfer of immovable properties is intended. The Defendant has failed to establish by documentary evidence that he is the legitimate son of late Buddhi Raj Limboo or that the Suit Property was left to him by his father, who admittedly was neither the owner of the Suit Property nor did he lay his claim to it during his lifetime. That, the COI obtained by him was cancelled on account of him furnishing a false document claiming that he had studied in the Government Senior Secondary School, Hee Yangthang, West Sikkim, and the cancellation remaining unchallenged has thereby attained finality. Had he been the son of late Buddhi Raj Limboo he could have easily obtained the COI through his parentage but no such effort was made during his fathers lifetime. That, the property being the self acquired property of Thabgo Limboo no share was allotted for late Buddhi Raj Limboo who was unheard of for about forty years. Padam Lall Limboo the only surviving son of late Thabgo Limboo was neither made a party nor were the legal heirs of late Bhim Lall Limboo, the second son of late Thabgo Limboo, made parties,

without their impleadment he cannot stake claim to the suit property. That, the evidence on record also fails to establish the claims of the Defendant, hence the Appeal be dismissed.

12. The submissions of learned Counsel for the parties were heard at length and anxiously considered. The evidence and documents on record, the impugned Judgment and the citations placed at the Bar have been carefully perused.

13. The question that falls for consideration of this Court is whether the Defendant (Appellant) is the son of Buddhi Raj Limboo and whether he is entitled to the suit property?

14. Exhibit 11 is purportedly a Partition Deed executed by late Thabgo Limboo dated 12.03.1988 in the presence of four attesting witnesses. The document details property partitioned amongst his sons Bhim Lall Limboo (since deceased) and Padam Lall Limboo and his grandsons Buddhi Lall Limboo (PW2), Durga Singh Limboo and Dhan Raj Limboo. This document makes no provision for his son Buddhi Raj Limboo although it is not denied that Buddhi Raj Limboo is also one of his sons. The averments made in the Plaint makes no mention of Exhibit 11. It is not the Plaintiffs case that the suit property fell in the share of their father by virtue of Exhibit 11, in fact the Plaintiff No.1 appears to be oblivious of the existence of Exhibit 11 until much later. The Plaintiff No.1 merely states that on having attained majority the suit land came to be recorded in his name. In his Evidence-on-Affidavit filed on 01.07.2015 and affirmed on 25.08.2015 he does not advert to Exhibit 11. According to him the Suit property mentioned in Schedules A and B of his Plaint are ancestral properties which were inherited by him from his great grandfather. He admits to having filed a previous Suit in 2012 and withdrawn it in the month of June, 2014 (Exhibit 5). The Title Suit under discussion being Title Suit No.06 of 2014 was registered on 09.12.2014 and Exhibit 11 was sought to be filed by the Plaintiffs on 08.07.2016 much after closure of his evidence on 25.08.2015. The grounds put forth by the Plaintiffs in their petition under Order VII Rule 14(3) read with Section 151 of the Code of Civil Procedure, 1908, before the learned trial Court for non-filing of Exhibit 11 earlier was his lack of knowledge and its possession being with Buddhi Lall Limboo who had only recently handed

over the documents to them. The Plaintiff No.1 on learning of Exhibit 11 did not seek to amend the pleadings. Although the Defendant objected to the Plaintiffs petition, the learned trial Court despite absence of averments in the pleadings allowed it concluding that the documents are important for proper adjudication of the matter and would not prejudice the Defendant as he would get an opportunity to crossexamine the witnesses. His cross-examination revealed that his uncles PW2 and Dhan Raj Limboo had acknowledged the Defendant as their brother. The relevant portion of his crossexamination is as follows;

> "……***It is true that according to the document dated 20.12.2008 my uncles, Shri Buddhi Lall Limboo (Khamdhak) and Dhan Raj Limboo had acknowledged that the defendant was their youngest brother through the second wife of their father and accordingly the defendant was given the land along with the house mentioned in Schedule-B of the plaint. It is true that the said document also reveals that the defendant was to pay Rs.60,000/- to my uncle, Shri Buddhi***
> ***Lall Limboo as compensation of the cost of building the wooden structure standing on the said land.*** *It is true that the execution of document dated 20.12.2008 (supra) by my uncle Shri, Buddhi Lall Limboo had been told to me by him before I filed Title Suit No. 7/2012 (supra). It is true that he had even told me then that he had given the suit property mentioned in Schedule-B of the present plaint to the defendant under the said document. ……***It is true that our ancestral properties has not been mutated in the respective names of my uncles, Shri Buddhi Lall Limboo and Shri Dhan Raj Limboo.** ..... ***It is true that the suit properties involved in this suit and Title Suit No.7/2012 (supra) are the same i.e. Schedule-B property. It is true that I applied for mutation of plot no.534 immediately***

after withdrawing Title Suit No.7/2012. *It is true that while applying for mutation I did not intimate to the concerned office that the defendant also claimed to be one of the sons of my grandfather and was also claiming a share in the ancestral properties including plot no.534.* ***It is true that the intended mutation of plot no.534 was not brought to the notice of the defendant by the concerned office. It is true that because of this the defendant did not get an opportunity to object to such mutation of plot no.534 in my name. It is true that the defendant was brought to our house by my grandfather Late Buddha Raj Limboo along with him when he returned from Nepal after the residing there*** (sic) ***a number of years. It is true that my grandfather Late Buddha Raj Limboo had then told all of us including my uncles that the defendant was his son born through his second wife. ..... It is true that after the defendant received the suit property mentioned in Schedule-B of my plaint in the year 2008, he started living there along with his mother and my grandfather Late Buddha Raj Limboo. My grandfather Late Buddha Raj Gurung*** (sic) ***expired in and around the year 2013. It is true that till the time of his death my grandfather was living with the defendant in the house mentioned in Schedule-B of my plaint. It is true that his funeral was also conducted from the house of the defendant.*** *It is true that neither me nor my uncles or any of our relatives objected to the fact that the funeral of my grandfather was conducted from the house of the defendant on the ground that the defendant was not related to us or my grandfather. It is not a fact that we did not object to this because the defendant was also*

the son of my grandfather. ***It is true that the defendant had also performed the death rites of my grandfather along with my other uncles.*** *.....* ***It is true that the defendant had performed all the pious rituals during the death of my grandfather Late Buddha Raj Limboo as his son.*** *.....* ***I have a sister named Binita. It is true that after the death of my father I was taken by my uncle, Shri Buddhi Lall Limboo under his wings. It is also true that my another uncle, Shri Dhan Raj Limboo took my another sister namely Manita and the plaintiff No.2 to stay with him after the death of our father. It is true that the defendant took my sister Binita to stay with him after the death of our father.*** *..... It is true that my uncle Shri Buddhi Lall Limboo has been financing me to file and pursue the present suit as well as Title Suit No.7/2012 (supra).* ..... ***It is true that though I had personal knowledge of the existence of two Bandabast Patras dated 20.12.2008 and 14.11.2010 by which the defendant had been given portions of plot No.534 as his share by my uncles I did not bring to the notice to the Registrar while seeking mutation of Plot No.534 in my name.*** *.....* ***It is true that under this document my uncles have given additional land to the defendant acknowledging him as their brother and that the defendant could even cause the registration of such land which was under his possession in his name.*** *It is true that both my uncles had personally acknowledged to me of them executing this document dated 14.11.2010. .....”*

(emphasis supplied)

Hence, from this evidence it is apparent that the Plaintiff No.1 had the knowledge that the Defendant is his uncle being the son of Buddhi Raj

Limboo but conversely in the same breath insists that the Defendant does not belong to Sikkim. It may be reiterated here that the Plaintiff No.1 makes no mention whatsoever of the *"Banda Patra"* Exhibit 11 or his knowledge thereto of it at any point of time during the recording of his evidence. Even the Legal Notice, Exhibit 2, issued by the Plaintiff No.1 to the Defendant is devoid of reference to Exhibit 11. In contrast he is aware of the execution of Exhibit A and Exhibit B as revealed in his evidence.

15. PW 2 Buddhi Lall Limboo, the witness of the Plaintiffs while identifying Exhibit 11 as the Partition Deed executed by Thabgo Limboo deposed that no share of Buddhi Raj Limboo was held as he had been missing from the house for more than twenty nine years. He admitted his ignorance as to whether the property in Exhibit 11 was the self acquired or ancestral property of Thabgo Limboo. On the one hand however he admits that vide Exhibit C, his Written Statement in Title Suit No.07 of 2012, he had acknowledged executing the *"Bandabast Patra"* Exhibit A and that the contents of Exhibit C are correct. On the other hand, he states that he does not have knowledge of Exhibit A the *"Bandabast Patra"* dated 20.12.2008. Under crossexamination, he deposed that Exhibit 11 mentions reasons for non-allotment of share to his father Buddhi Raj Limboo. However, when confronted with Exhibit 11, he admitted that the document does not "give any reasons" for such non-allotment. He also testified that he had not admitted in Title Suit No.07 of 2012, in Exhibit C, that the lands mentioned in Exhibit 12 are the ancestral property of all sons and grandsons of late Thabgo Limboo and unpartitioned. Contrarily when confronted with Exhibit C, he admitted that on reading the contents of paragraphs 8 and 9 he had admitted therein that the lands were unpartitioned. The scribe of Exhibit 11 was not disclosed by this witness despite his assertion of personal presence when the document was prepared. He denied the suggestion that the attesting witnesses did not sign on Exhibit 11 in his presence. According to him, they transferred the lands in the year 2014 but again admitted that in Exhibit C he had stated that the lands had not yet been partitioned, while denying that Exhibit 11 was a false or fabricated document.

16. The evidence reveals inherent contradictions in that of PW1 and PW2. As per PW1, his grandfather Buddhi Raj Limboo brought the Defendant along with him when he returned from Nepal, to their home i.e.

home of Durga Singh Limboo. PW2 Buddhi Lall Limboo however had a tangential narration stating that the Defendant had approached him for accommodation and requested him to let him in his house as he was in search of a job and in return he assured to give tuitions to his children. PW2 does not state why the Defendant approached him for accommodation or disclose the actual identity of the Defendant and he denies that the Defendant was the son of Buddhi Raj Limboo and his second wife Jasmaya Limboo, therefore his half brother. His evidence is also contrary to the evidence of Plaintiff No.1 with regard to Exhibit A and Exhibit B since the Plaintiff No.1 under oath would have the Court believe that the Defendant entered into possession of 'Schedule B' property having purchased the land from PW2 vide Exhibit A and that the execution of the said document was told to him by PW2 before he filed Title Suit No.7/2012, which was subsequently withdrawn. That, PW2 told him that he had given the suit property mentioned in 'Schedule B' of the Plaint to the Defendant vide Exhibit B. As per PW1, he had personal knowledge of the existence of the two "*Bandabast Patras*" Exhibit A and Exhibit B. According to him, both his uncles had personally acknowledged to him of having executed the subsequent document dated 14.11.2010 as well. However, PW2 when confronted with the "*Bandabast Patras*" Exhibit A and Exhibit B denied knowledge either of preparation or execution of the two documents. In the same breath he admitted that in Exhibit C he had acknowledged executing the "*Bandabast Patra*" dated 20.12.2008 in favour of the Defendant. He claims that Exhibit 11 was in his safe keeping but failed to enlighten the Court as to why he kept the document with him despite knowledge of the filing of Title Suit No.07 of 2012. The vacillating evidence of this witness and the statements made in contradiction to the evidence of the Plaintiff No.1 himself renders this witness and his evidence unreliable.

17. Plaintiffs' witness PW 3 Dilip Kumar Rai deposed that he is a family friend of the Plaintiffs but in cross-examination claimed to be their relation. According to this witness, Buddhi Raj Limboo returned to the village in the year 2004. He admitted the possibility of Buddhi Raj Limboo having married Jasmaya Limboo during his absence from the village. He could not say whether the Defendant was or was not the son of Buddhi Raj Limboo although he denied that the Defendant and Buddhi Raj Limboo came back to the village "together" in the year 2004. He admitted that Exhibit 3, the

certified copy of the order of the Additional District Magistrate (West) did not indicate that the COI of the Defendant was cancelled on account of a finding that the Defendant was not the son of Buddhi Raj Limboo. He further admitted that Exhibit 4/A, the attested copy regarding verification of Birth Certificate of the Defendant, issued by the Principal of the concerned Government Senior Secondary School does not say that the Defendant is not the son of Buddhi Raj Limboo. Pertinently it may be noticed that the Principal who issued Exhibit 4/A was not produced by the Plaintiffs as a witness. PW3 has given no evidence with regard to either the Partition Deed Exhibit 11 or Exhibit A and Exhibit B.

18. Plaintiffs' witness No.4 Padam Lall Limboo is the third son of late Thabgo Limboo and the grand uncle of the Plaintiffs hence he claimed to be conversant with the facts and circumstances of the case. Exhibit 11 according to him, was scribed by one Jas Bahadur Subba, a co-villager. Pausing here for a moment it is relevant to notice that PW2 Buddhi Lall Limboo is unaware of the scribe and although PW4 names the scribe, he was not produced before the Court as a witness. The witness is unaware as to whether the scheduled property was acquired by his father or was ancestral, suffice it to say that no document of the Plaintiffs sheds light on this aspect including Exhibit 11 or Exhibit 12 *Khatiyan Parcha* in the name of Thabgo Limboo. According to him, their respective shares of the partitioned property was mutated in their names sometime in the year 2013-14. However, if we are to revert to the evidence of Plaintiff No.1 he has stated categorically that the ancestral properties have not been mutated in the respective names of his uncles Buddhi Lall Limboo and Dhan Raj Limboo. PW4 shed no light on Exhibit A and Exhibit B.

19. The Defendant, to substantiate his claims relied on Exhibit A, "*Bandabast Patra"* dated 20.12.2008 and Exhibit B, "*Bandabast Patra"* dated 14.11.2010. He has denied having submitted a letter to the Principal of the Government Senior Secondary School, Hee Yangthang, West Sikkim being Exhibit 4/B. Relevantly, it may be noted that although the Plaintiff No.1 furnished Exhibit 4/B as a copy of the said letter written by the Defendant to the Principal, Government Senior Secondary School, Hee Yangthang, West Sikkim but the document remained unproved. His deposition was that Exhibit 11 is not binding upon him being a fabricated

document besides which his father was not given a share. His possession over the suit property consequent upon the execution of Exhibit A and Exhibit B by PW2 and Dhan Raj Limboo has not been decimated in cross-examination. The Defendants witness Sudesh Kumar Subba (DW2) served as the Panchayat Secretary of 22 Hee Gram Panchayat from the year 2007 to 2012 and although an effort was made to demolish this aspect, the fact was supported by the evidence of Plaintiff No.1 himself, according to whom Sudesh Kumar Subba was the Panchayat Secretary during 2008 and 2010. DW2 testified that PW2, Dhan Raj Subba and the Defendant had approached him as they had agreed to draw up an agreement amongst themselves. Accordingly on 20.12.2008 he prepared Exhibit A. He failed to recall the contents of Exhibit A but the fact that he prepared both the documents Exhibit A and Exhibit B remained uncontroverted. According to him, he had then read over the contents of Exhibit A and Exhibit B to both PW2 Buddhi Lall Subba and Dhan Raj Subba on which they signed. DW3 Ran Bahadur Subba witness to the execution of Exhibit B while substantiating the foregoing evidence, identified it as the document prepared by Sudesh Kumar Subba DW2, the contents of which were read over to the three brothers being Buddhi Lall Limboo, Dhan Raj Limboo and the Defendant, whereupon all of them affixed their signatures in his presence and of their own free will and consent. He denied the suggestion that the signatures of Dhan Raj Limboo and Buddhi Lall Limboo which were affixed in his presence were forged signatures. He shed no light on Exhibit 11. He was unaware of the possession of a COI by the Defendants father but asserted that the Defendants COI was cancelled by the authority. No grounds for such cancellation were detailed.

20. The legality of Exhibit 11, the alleged Partition Deed is now to be examined. Admittedly, this is an unregistered document. The Sikkim State General Notification No.385/G provides as follows;

"SIKKIM STATE
GENERAL DEPARTMENT
Notification No. 385/G;

All Kazis, Thikadars and Managers of Estates.

In continuation of the previous rules on the subject,

His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under:-

"**Any document such as mortgage and sale deeds, and other important documents and deeds, etc. will not be considered valid unless they are duly registered**.

The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.

Exception:- Handnotes duly stamped shall be exempt from registration penalty".

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Gyaltsen Kazi
Gangtok General Secretary to
The 11th April, 1928 H.H. the Maharaja of Sikkim."

(emphasis supplied)

Thus the Notification *supra* makes it clear that it is not only Title Deeds that are to be compulsorily registered but any "important document." The said Notification while indicating that other important documents will not be considered valid unless they are duly registered does not define what are "important documents." The term "important documents" is indeed a relative term. Consequently in the absence of definition of the term, we may seek guidance from the provisions of Section 17 of the Registration Act, 1908, which enumerates documents which are compulsorily to be registered and at Section 17(1)(b) it is detailed as follows;

> "**17. Documents of which registration is compulsory**.-(1)
> …
> (a)…
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
> …"

21. Taking assistance from this provision it emerges with clarity that Exhibit 11 being a Partition Deed would necessarily have to be registered, as also Exhibit A and Exhibit B. Undoubtedly a partition, as held by the learned trial Court, can be verbal and has legal validity but of course when contested or controverted before a Court of law the difficulty of proof arises. A Partition Deed is essentially executed to divide property amongst family members so that each person entitled to a share is allotted the same. It is clear that Exhibit 11 was sought to be filed before the Court by the Plaintiffs only on 08.07.2016 almost one and a half years subsequent to the filing of the instant Suit, being Title Suit No.06 of 2014. Exhibit 11 "*Banda Patra*" dated 12.03.1988 is alleged to be the document vide which the properties described therein including the plot number in dispute i.e. 534 was partitioned by Thabgo Limboo. The attesting witnesses to the documents allegedly were one Ganga Ram Limboo, Jas Bahadur Subba, Man Dhoj Limboo and Mangla Dhoj Limboo. The reason for calling an attesting witness is that he is witness to the execution of the document and would vouch for its truth. However none of these attesting witnesses were produced by the Plaintiffs to prove execution of the document contrary to the provisions of Sections 67 and 68 of the Indian Evidence Act, 1872 (for short the "Evidence Act"). It emanates from the evidence of PW2 Buddhi Lall Subba that Ganga Ram Limboo one of the witnesses to the execution of Exhibit 11 has passed away but he failed to recount the position with regard to the other attesting witnesses. According to PW4 Padam Lall Limboo, the document was scribed by J.B. Subba. The name of one Jas Bahadur Subba appears as a witness on Exhibit 11. Even assuming that

Jas Bahadur Subba or J.B. Subba the alleged scribe of the document are different persons, neither were called by the Plaintiffs to establish the contents of Exhibit 11. In other words, none of the attesting witnesses to Exhibit 11 or its scribe were called by the Plaintiffs to prove execution and contents of the document as required by law nor their fate discussed prompting this Court to draw an adverse inference under illustration (g) of Section 114 of the Evidence Act. It is admitted by PW2 Buddhi Lall Subba that Exhibit 11 was given to him for safe keeping by his grandfather Thabgo Limboo. It is also admitted by him that he had filed Exhibit C, his Written Statement in Title Suit No.07 of 2012 in the Court of the learned District Judge, (South and West) Sikkim at Namchi but even in the said Civil Suit, he failed to furnish Exhibit 11 to establish partition. Admittedly, that Civil Suit was withdrawn and the instant Civil Suit being Title Suit No.06 of 2014 filed at which time also Exhibit 11 continued to be in his possession but Buddhi Lall Limboo chose to keep Exhibit 11 under wraps and not to disclose its existence or contents to the Plaintiffs who were evidently unaware of it. PW4 Padam Lall Subba claimed to be present when Exhibit 11 was prepared and stated that a share for his elder brother Buddhi Raj Limboo was also set aside when the document was prepared but retracted the statement by deposing that as the whereabouts of Buddhi Raj Limboo was not known, his share was not set aside. From the evidence on record Exhibit 11 appears to have sprouted rather belatedly and with startling suddenness in the matter and the circumstances surrounding its production renders it a suspicious document, fit for exclusion from consideration. There are no independent witnesses to its execution to vouch for its contents besides PW2 Buddhi Lall Limboo an interested witness. Although it is now established law that merely because a witness is interested his evidence cannot be brushed aside, however evidence of such a witness must be cogent, consistent and reliable. The evidence of PW 2 when gauged on these principles is palpably unreliable, vexed as it is with contradictions as already discussed *supra*. Exhibit 11 therefore suffers from the defect of being an unregistered document, its contents unproved, compounded by the failure of the Plaintiffs and their witnesses to establish the whereabouts of the attesting witnesses to prove execution or contents of the document. The circumstances surrounding the emergence of Exhibit 11 into the Suit rather belatedly and for the reasons *supra*, the document is rendered suspicious

and fit for exclusion from consideration. So far as its applicability to the Defendant is concerned, we may refer to ***Parvinder Singh v. Renu Gautam and Others***[6] wherein it was held that the rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. Nevertheless, a stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. At the same time it is worth mentioning that the learned trial Court took into consideration Exhibit 11 in its entirety despite absence of proof of its execution. This document is clearly an afterthought and prepared for the purposes of this case as already stated and lends no support or credence to the Plaintiffs Suit. Even if its non-registration is factored out based on the consideration that it is an alleged family settlement, it still suffers from the defects enumerated above and thus requires no consideration.

22. On the other hand, the execution of Exhibit A and Exhibit B has been established by the Defendant, DW2 Sudesh Kumar Subba and also obtained support from the evidence of the Plaintiff No.1 himself as also PW2 Buddhi Lall Limboo who has admitted that he had acknowledged executing Exhibit A in favour of the Defendant in Exhibit C. Although Exhibit A and Exhibit B may suffer from the same defect of non-registration, however the contents thereof have been proved as also admitted by the evidence of PW1 and PW2 themselves fulfilling the requirements of Section 58 of the Evidence Act. In this context, reference is made to ***Thulasidhara & Another v. Narayanappa & Others***[7] wherein it was held thus;

> "**9.4.** …The High Court has refused to look into the said document and/or consider document dated 23-4-1971 (Ext. D-4) solely on the ground that it requires registration and therefore as it is unregistered, the same cannot be looked into. However, as observed by this Court in *Kale* [*Kale* v. *Director of Consolidation*, (1976) 3 SCC 119] that such a family settlement, though not registered,

[6] (2004) 4 SCC 794
[7] (2019) 6 SCC 409

would operate as a complete estoppel against the parties to such a family settlement. ……

9.5. As held by this Court in *Subraya M.N.* [*Subraya M.N.* v. *Vittala M.N.*, (2016) 8 SCC 705 : (2016) 4 SCC (Civ) 163] **even without registration a written document of family settlement/family arrangement can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. In the present case, as observed hereinabove, even the plaintiff has also categorically admitted that the oral partition had taken place on 23-4-1971 and he also admitted that 3 to 4 panchayat people were also present**. However, according to him, the same was not reduced in writing. Therefore, even accepting the case of the plaintiff that there was an oral partition on 23-4-1971, the document, Ext. D-4 dated 23-4-1971, to which he is also the signatory and all other family members are signatory, can be said to be a list of properties partitioned. Everybody got right/share as per the oral partition/partition. Therefore, the same even can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. Therefore, in the facts and circumstances of the case, the High Court has committed a grave/manifest error in not looking into and/or not considering the document Ext. D-4 dated 23-4-1971.

……"

(emphasis supplied)

The circumstances pertaining to Exhibit A and Exhibit B are similar to the circumstances discussed in the ratio *supra* and thereby sets to rest the legal position of Exhibit A and Exhibit B. The documents are found to be genuine and executed by PW2 and Dhan Raj Subba.

23. So far as the question of cancellation of the COI of the Defendant is concerned, the reason for cancellation as given in Exhibit 3 is "False Birth Record." The order is indeed cryptic. The cancellation order does not deny the Defendants paternity. The evidence of the Plaintiff No.1, no less, establishes that Buddhi Raj Limboo had on his arrival to Sikkim brought along with him his second wife and the Defendant and informed his family that the Defendant was his son from his second marriage. This has not been demolished under cross-examination. DW2 Sudesh Kumar Subba the Panchayat Secretary serving the Government would have to be given his due considering that on oath he has deposed the fact of execution of Exhibit A and Exhibit B supported by the evidence of DW3. Admittedly from 2004 Buddhi Raj Limboo came to Sikkim and continued to live with the Defendant till his death in 2013. It is rather incongruous that Exhibit 11 was never mentioned to Buddhi Raj Limboo by his three sons till his demise and it was only in 2014, the property of Plaintiff No.1 came to be recorded hurriedly in his name on 21.08.2014 (Exhibit 1) after the first Title Suit was withdrawn. The registration was evidently carried out with a view to strengthen the Plaintiffs case. The funeral and death rites of deceased Buddhi Raj Limboo was completed by the Defendant without any objection from his uncles Buddhi Lall Limboo and Dhan Raj Limboo indicating an acceptance of the Defendant as the son of Buddhi Raj Limboo. In any event, at no stage when Buddhi Raj Limboo was alive did Buddhi Lall Limboo and Dhan Raj Limboo or for that matter the Plaintiffs ever question the identity or lineage of the Defendant. The entire decision of the learned trial Court pivots around the failure of the Defendant to establish his possession of any Certificate of Identification. The learned trial Court held that the Defendant failed to produce any other document to show how he would be entitled to hold landed property in the State of Sikkim and that his witnesses and the witnesses of the Plaintiffs have stated that they have no idea where he was born and brought up. In this context, it is alarming that the learned trial Court has completely disregarded the evidence of the Plaintiff No.1 himself to the effect that Buddhi Raj Limboo had told them that the Defendant was his son. The learned trial Court also failed to consider the admission that the deceased Buddhi Raj Limboo continued to live with the Defendant with no questions asked. The learned trial Court has not considered the utterly suspicious circumstances of Exhibit 11, its belated entry in the matter and absence of attesting witnesses or its scribe. The

contents of Exhibit A and Exhibit B reveal acceptance of the Defendant as the younger brother of Buddhi Lall Limboo and Dhan Raj Limboo by themselves. The contents of the documents have to be read and interpreted in its entirety and not piecemeal depending on its suitability to the Plaintiffs and PW2. The Defendant, according to the learned trial Court, did not challenge the records of the suit property in the name of the Plaintiff No.1, however it would be worthwhile noticing that the Plaintiff No.1 himself has admitted that the Defendant was ignorant of the transfer and had no opportunity to object to it. It may also relevantly be noted that the sister of the Plaintiffs Binita Limboo was being taken care of by the Defendant after the death of their father, while Bhim Lall Limboo took the Plaintiff No.1 under his care and Dhan Raj Limboo took the Plaintiffs' other sister Manita and the Plaintiff No.2. Had the Defendant not been the uncle of Binita Limboo and a blood relation the responsibility would neither have been shared nor befallen on him. The learned trial Court was rather concerned about the whereabouts of the Defendant prior to 2004 although the Plaintiff No.1 has admitted that Buddhi Raj Limboo was out of the State and returned home in 2004 along with the Defendant and his mother Jasmaya Limboo. According to the learned trial Court, the Defendant did not offer to name the School or Schools attended by him. In my considered opinion, this is not even relevant to the Issues at hand besides which in cross-examination the Plaintiffs did not seek to extract any such answers from him. So far as his Certificate of Identification is concerned, unless the entire facts with regard to furnishing false records are placed before any trial Court and what the false records contained and comprised of, the Courts cannot jump to assumptions and conclusions. The property was never transferred from the name of late Thabgo Limboo to his sons but suspiciously only plot No.534 came to be recorded in the name of the Plaintiff No.1 which therefore reeks of foul play. The argument of learned Senior Counsel for the Plaintiffs that the order of the authority cancelling the COI has attained finality holds no water since the paternity of the Defendant and rights accruing consequently cannot be denied.

24. In the end result on consideration of the evidence on record and the discussions that have emanated hereinabove it concludes that the Defendant (Appellant) is the grandson of late Thabgo Limboo being the son of late Buddhi Raj Limboo through his second wife. Exhibit 11 is evidently a

document propelled by avarice and warrants no consideration by this Court for reasons already discussed. The property of late Thabgo Limboo remained unmutated in the name of any person except for plot No.534 in the name of the Plaintiff No.1 (Respondent No.1.). The Defendant nevertheless claims only a portion of land of which he is in possession measuring 25 feet x 45 feet, in plot No.593 vide Exhibit A, *"Bandabast Patra"* dated 20.12.2008 and Exhibit B, *"Bandabast Patra"* dated 14.11.2010, the land being butted and bounded as described in the Counter Claim. For the aforestated reasons it is found that the Defendant is in possession of the land *supra*, he is entitled to take steps to register it in his name. The recording of the said property in the name of the Plaintiff No.1 is consequently liable to be cancelled.

25. The Appeal is accordingly allowed.

26. The Judgment and Decree of the learned Trial Court is set aside.

27. Parties shall bear their own costs.

28. Records of the learned Trial Court be remitted forthwith.

SLR (2020) SIKKIM 81

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

IA No.10 of 2019 and I.A. No.12 of 2019
arising out of Crl. A. No.04 of 2016

State of Sikkim **….. APPELLANT**

Versus

Sashidhar Sharma **….. RESPONDENT**

For the Appellant: Dr. Doma T. Bhutia, Public Prosecutor with Mr. Sujan Sunwar, Mr. Hissey Gyaltsen and Ms. Mukun Dolma Tamang, Assistant Public Prosecutors.

For the Respondent: Mr. B. Sharma, Senior Advocate with Ms. Gita Bista, Advocate.

Date of decision: 19th February 2020

A. Probation of Offenders Act, 1958 – Ss. 4 and 12 – Code of Criminal Procedure, 1973 – S. 482 – Indian Penal Code, 1860 – S. 354 – In the first instance it may be pointed out that the Respondent was convicted of the offence under S. 354A, IPC for sexual harassment – No ground made to establish good character of the offender – Respondent used criminal force upon the victim which by no stretch of imagination can it be stated to be decent behaviour – Teacher should be more like a "*loco parentis*" and that is the duty, responsibility and charge expected of a teacher. Here the victim, a student was subjected to unwelcome sexual advances of the Respondent – Provisions of S. 354, IPC enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with intention or knowledge that the woman's modesty will be outraged, he is to be punished – Offences of sexual harassment to a woman is not to be taken lightly. Such offences

are heinous in nature and have to be dealt with sternly (*Ajay Tiwari* and *Ajahar Ali* discussed).

(Paras 4 and 6)

Applications rejected.

Chronology of cases cited:

1. Soney Lal Pasi v. State of U.P., Criminal Revision No. 2820 of 2003 of the Allahabad High Court.
2. Mukesh @ Munno Mansukhbhai Handa v. State of Gujarat, Criminal Appeal No. 1245 of 2016 of the Gujarat High Court.
3. State of Rajasthan v. Shyam Lal, Criminal appeal No. 49 of 2017 of the Rajasthan High Court.
4. Ajahar Ali v. State of West Bengal, (2013) 10 SCC 31.
5. Ajay Tiwari v. University of Delhi and Others, WP(C) No.1288 of 2012 of the Delhi High Court.
6. State of Rajasthan v. Sri Chand, (2015) 11 SCC 229.

ORDER (ORAL)

The Order of the Court was delivered by ***Meenakshi Madan Rai, J***

1. By filing these applications being I.A. No.10 of 2019 and I.A. No.12 of 2019, the Applicant/Respondent-Accused (hereinafter, the Respondent) prays that he be released on probation under Sections 4 and 12 of the Probation of Offenders Act, 1958 read with Section 482 of the Code of Criminal Procedure, 1973. It is submitted by Learned Senior Counsel that the Respondent is of good character and good conduct. Besides, he is aged about 60 years and retired as the Headmaster of a Government Primary School. During his service he was felicitated by the Sikkim Teachers Association in the year 2007 and received two commendation Certificates from the Government of Sikkim and the Limboo Cultural society respectively. These documents adequately establish the good antecedents of the Respondent. He is also suffering from various ailments and considering that the penalty is imposed under Section 354A of the Indian Penal Code, 1860 (hereinafter, IPC), he be released on probation. That, the Respondent has infact already undergone imprisonment of

approximately one year and five months during the trial. Learned Senior Counsel for the Respondent fortifies his submissions with the ratio in ***Soney Lal Pasi*** vs. ***State of U.P.***[1], ***Mukesh @ Munno Mansukhbhai Handa*** vs. ***State of Gujarat***[2] and ***State of Rajasthan*** vs. ***Shyam Lal***[3] where the accused person in each of the cases *supra* were released on probation having been convicted under Section 354 of the IPC. It was urged that as the conviction handed out to the Respondent herein is also under Section 354A of the IPC and is by and large an extension of the offence under Section 354 of the IPC. Hence, the same consideration be meted out to him.

2. Objecting to the prayer of the Respondent, the Learned Public Prosecutor submits that the Respondent has made no grounds to establish that he satisfies the ingredients of Section 4 of the Probation of Offenders Act inasmuch as the character of the offender has already been established by the conviction handed out to him in the Judgment of this Court dated 30-09-2019 in Crl.A. No.04 of 2016. Placing reliance on the decision of ***Ajahar Ali*** vs. ***State of West Bengal***[4] it was contended that the offence committed therein was one under Section 354 of the IPC, the Supreme Court held that it was a heinous crime and the modesty of the woman has to be strongly guarded and refused to grant the relief under Section 4 of the Probation of Offenders Act. Reliance was also placed on the decision of the Hon'ble Delhi High Court in ***Ajay Tiwari*** vs. ***University of Delhi and Others***[5].

3. We have heard at length and considered the rival submissions of Learned Counsel for the parties.

4. In the first instance it may be pointed out that the Respondent was convicted of the offence under Section 354A of the IPC for sexual harassment of the victim. He was sentenced for a term of three years with fine of Rs.25,000/- (Rupees twenty five thousand) only, with default clause of imprisonment. From the submissions of Learned Senior Counsel for the Respondent it is clear that no grounds were made by him to establish the good character of the offender or that consideration ought to be taken of the nature of the offence. It is clear that the Respondent had used criminal

[1] Criminal Revision No.2820 of 2003 of the Allahabad High Court
[2] Criminal Appeal No.1245 of 2016 of the Gujarat High Court
[3] Criminal appeal No.49 of 2017 of the Rajasthan High Court
[4] (2013) 10 SCC 31
[5] WP(C) No.1288 of 2012 of the Delhi High Court

force upon the victim which by no stretch of the imagination can it be stated to be decent behaviour. As pointed out by Learned Public Prosecutor in the decision of ***Ajay Tiwari*** (*supra*) it has been held that the teacher should be more like a "*loco parentis*" and that is the duty, responsibility and charge expected of a teacher. Here the victim a student was subjected to unwelcome sexual advances of the Respondent her teacher. The documents relied on by the Respondent are of no assistance to him. In ***Ajahar Ali*** (*supra*) the Supreme Court had held that provisions of Section 354 of the IPC have been enacted to safeguard public morality and decent behaviour. Therefore, if any person uses criminal force upon any woman with the intention or knowledge that the woman's modesty will be outraged he is to be punished. In ***State of Rajasthan*** vs. ***Sri Chand***[6] it was held as under:

> **"12.** In the present case the accused is not a minor, rather he has committed an offence against a minor girl who is helpless. Further, it is clear from the evidence on record that he ran away only when the prosecutrix screamed and PW 3 came to the place of incident, which goes on to show that the accused could have had worse intentions. The offence is heinous in nature and there is no reason for granting benefit of probation in this case. The trial court has not given any special consideration to the character of the accused apart from the fact that this was the first conviction of the accused. We find this is far from sufficient to grant probation in an offence like outraging the modesty of a woman.**"**

It is clear that offences of sexual harassment to a woman is not to be taken lightly. Such offences are heinous in nature and have to be dealt with sternly.

5. In view of the entirety of the facts and circumstances placed before us and considering the conviction handed out to the Respondent, we are not inclined to consider the prayer of the Respondent which accordingly stands rejected.

6. IA Nos. 10 of 2019 and 12 of 2019 stand disposed of accordingly.

[6] (2015) 11 SCC 229

SLR (2020) SIKKIM 85

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 66 of 2016

Yogen Ghatani and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. Sudesh Joshi, Advocate.

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

Date of decision: 20th February 2020

A. Constitution of India – Article 14 – 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 (*Kailash Chand Sharma* v. *State of Rajasthan* relied).

(Para 32)

B. Constitution of India – Article 14 and 15 – 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* v. *Union of India* relied) – The requirement thus is of a nexus between the basis of classification and the object of the legislation eschewing irrationality – There 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 – 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 – 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.

(Para 33)

C. Constitution of India – Article 14 – *Audi Alteram Partem* – 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.

(Para 35)

D. Constitution of India – Article 226 – 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 – Hereby quashed.

(Para 40(i))

E. Constitution of India – Article 226 – Letter bearing No. GOS/Home-II/94/14(Part)/2687 dated 02.06.2006 issued by 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 Articles14 and 21 of the Constitution of India and is accordingly quashed.

(Para 40(ii a))

F. Constitution of India – Article 226 – 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 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 – Quashed and set aside.

(Para 40(iii))

D. Constitution of India – Article 226 – 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 entitled to obtain COI – Includes third generation and their subsequent generations – 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.

(Para 40 (iv) (v))

Petition allowed.

Chronology of cases cited:

1. State of Sikkim v. Surendra Prasad Sharma and Others, (1994) 5 SCC 282.
2. H.S. Vankani and Others v. State of Gujarat and Others, (2010) 4 SCC 301.
3. Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Company Private Limited and Others, (2010) 8 SCC 24.
4. Sarah Mathew v. Institute of Cardio Vascular Disease and Others, (2014) 2 SCC 62.

5. State of Madhya Pradesh and Others v. Mala Banerjee, (2015) 7 SCC 698.

6. Delhi Development Authority and Another v. Joint Action Committee, Allottee of SFS Flats and Others, (2008) 2 SCC 372.

7. R.K. Garg v. Union of India and Others, (1981) 4 SCC 675.

8. D.S. Nakara and Others v. Union of India, (1983) 1 SCC 305.

9. State of Haryana and Others v. Mahabir Vegetable Oils Private Limited, (2011) 3 SCC 778.

10. Kailash Chand Sharma v. State of Rajasthan and Others, (2002) 6 SCC 562.

11. Manuelsons Hotels Private Limited v. State of Kerala and Others, (2016) 6 SCC 766.

12. Amita v. Union of India and Another, (2005) 13 SCC 721.

13. Smt. Indira Nehru Gandhi v. Shri Raj Narain, 1975 (Supp.) SCC 1.

14. E.P. Royappa v. State of Tamil Nadu and Another, (1974) 4 SCC 3.

15. Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

16. R.D. Shetty v. International Airport Authority of India, (1979) 3 SCC 489.

17. Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others, (1981) 1 SCC 722.

JUDGMENT

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 (l) 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 Honble Supreme Court in the ratiocination 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 I) 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, **"**Memorandum of 1976**"**), requiring persons seeking employment to inform whether their parents name had been recorded in the relevant Government Register on or before

[1] (1994) 5 SCC 282

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 aforestated 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 validty 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 Honble 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 aforestated 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 Committees opinion is influenced by non-consideration of the entire context in which the COIs were issued by the State. The opinion of Honble 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, Honble Justice R.K. Patra dated 05.03.2012. That, Honble 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 Honble 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 persons 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 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

[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

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 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

[9] (2011) 3 SCC 778

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 Honble 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 Honble 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.

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 aforestated 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;

> **"**GOVERNMENT OF SIKKIM
> HOME DEPARTMENT
>
> No.66/Home/95. Dated: 22nd November, 1995.
>
> NOTIFICATION
>
> 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 Indentification *(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 sentenced 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 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 fathers 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 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

> Rais 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 grandfathers 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. Honble 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 querry (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 Honble Justice Patra. Strong reliance was placed by the State Government on the opinion rendered by Honble 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 applicants 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 Honble 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 parents 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-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 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

[10] (2002) 6 SCC 562
[11] (2016) 6 SCC 766
[12] (2005) 13 SCC 721

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 exposited 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 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

[13] 1975 (Supp.) SCC 1
[14] (1974) 4 SCC 3

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, 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

[15] (1978) 1 SCC 248
[16] (1979) 3 SCC 489
[17] (1981) 1 SCC 722

> 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.

SLR (2020) SIKKIM 131

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. M.C. No. 10 of 2019

Nilu Thapa and Another ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Mr. S.S. Hamal with Ms. Priyanka Chhetri and Mr. Subham Pradhan, Advocates.

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor with Mr. Sujan Sunwar, Mr. Hissey Gyaltsen and Ms. Mukun Dolma Tamang, Asst. Public Prosecutors.

Date of decision: 20th February 2020

A. Code of Criminal Procedure, 1973 – S. 482 – F.I.R lodged by the first Petitioner against the second Petitioner that on 04.04.2019, when she along with other supporters of the SDF party had assembled at Raley, East Sikkim, to receive their candidate for a meeting, the second Petitioner came on a motor bike and used abusive language besides pushing her by touching her body – F.I.R No. 24/2019 under S. 354/509, I.P.C came to be registered in Singtam Police Station, East Sikkim – Charge-sheet filed before Learned Chief Judicial Magistrate, East Sikkim at Gangtok and registered as G.R. Case No. 108 of 2019 – Charge framed under Ss. 354/ 506, I.P.C to which he pleaded "not guilty". Before Prosecution evidence could be led in the matter, both parties reached an amicable compromise – First Petitioner submitted that she has entered into the compromise with the second Petitioner of her own freewill and without any duress from any quarter – Held: Pursuing the prosecution will serve no purpose as in all likelihood there will be no evidence to establish the prosecution case – Proceedings quashed.

(Paras 7, 8, 9 and 10)

Petition allowed.

Chronology of cases cited:

1. B. S. Joshi and Others v. State of Haryana and Another, (2003) 4 SCC 675.
2. State of Karnataka v. L. Muniswamy and Others, (1977) 2 SCC 699.
3. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 303.
4. Narinder Singh and Others v. State of Punjab and Another, (2014) 6 SCC 466.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. By filing the instant Petition the Petitioners herein seek quashing of the FIR No.24/2019, dated 04-04-2019, of Singtam Police Station, under Sections 354/509 of the Indian Penal Code, 1860 (hereinafter, IPC) filed by the Complainant (Petitioner No.1) against the Accused (Petitioner No.2.) and the consequential proceedings in General Register Case No.108 of 2019 (*State of Sikkim* vs. *Ganesh Bhattarai*) pending before the Court of the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok, under Sections 354/506 of the IPC.

2. Heard Learned Counsel for the parties.

3. It is submitted by Learned Counsel for the Petitioners that both Petitioners have now compromised the matter amicably and Petitioner No.1 in the said circumstance does not seek to pursue prosecution. However, the offence vide which the second Petitioner is booked is under Section 354 of the IPC which is non-compoundable. Learned Counsel prays that the powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.) are not fettered by the provisions of Section 320 of the Cr.P.C.. Accordingly, the FIR and consequently, the General Register Case No.108 of 2019 : *State of Sikkim* vs. *Ganesh Bhattarai*, before the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok, be quashed.

4. Learned Public Prosecutor submits that in view of the Compromise Deed entered into between the disputing parties she has no objection to the prayer of the Petitioners.

5. Considered submissions.

6. In ***B. S. Joshi and Others*** vs. ***State of Haryana and Another***[1] the Supreme Court while examining the powers of the High Court under Section 482 of the Cr.P.C. held that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or Complaint and Section 320 of the Cr.P.C. does not limit or affect the powers under Section 482 of the Cr.P.C. In ***State of Karnataka*** vs. ***L. Muniswamy and Others***[2] the Supreme Court while considering the scope of inherent power of quashing under Section 482 of the Cr.P.C. held that in the exercise of this wholesome power, the High Court is entitled to quash proceedings if it comes to the conclusion that the ends of justice so require. It was observed that in a criminal case the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The Supreme Court further observed that the compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. In ***Gian Singh*** vs. ***State of Punjab and Another***[3] the Supreme Court recognized the need of amicable resolution of disputes and held as under;

> **61.** The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent

[1] (2003) 4 SCC 675
[2] (1977) 2 SCC 699
[3] (2012) 10 SCC 303

power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (*i*) to secure the ends of justice, or (*ii*) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not

quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.**"**

This was also reiterated in the ratiocination of ***Narinder Singh and Others*** vs. ***State of Punjab and Another***[4] wherein it was held as under:

> **"29.** In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> **29.1.** Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

[4] (2014) 6 SCC 466

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(*i*) ends of justice, or

(*ii*) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.**"**

7. On the anvil of the ratiocination hereinabove, we may appositely look at the facts of the instant case. On 04-04-2019 an FIR was lodged by the first Petitioner against the second Petitioner to the effect that on the same day when she along with other supporters of the SDF party had assembled at Raley, East Sikkim, to receive their candidate for a meeting, the second Petitioner of Lower Samdong came on a motor bike and used abusive language besides pushing the Complainant by touching her body. The matter came to be registered at Singtam Police Station, East Sikkim

being FIR bearing No.24/2019, dated 04-04-2019, under Section 354/509 of the IPC. On filing of the Charge-Sheet before the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok, it was registered as General Register Case No.108 of 2019. Charge was framed against the Accused under Sections 354/506 of the IPC to which he pleaded "*not guilty*". Before Prosecution evidence could be led in the matter, both parties reached an amicable compromise vide document "Annexure P/4".

8. Both the Petitioners are in the Court. It is submitted by the first Petitioner that she has entered into the compromise with the second Petitioner of her own freewill and without any duress from any quarter.

9. In the said circumstances, it is but obvious that pursuing the prosecution will serve no purpose as in all likelihood there will be no evidence to establish the Prosecution case.

10. Accordingly, FIR bearing No.24/2019, dated 04-04-2019, of the Singtam Police Station, East Sikkim, stands quashed as also General Register Case No.108 of 2019 before the Court of the Learned Chief Judicial Magistrate, East Sikkim, at Gangtok.

11. Crl.M.C. No.10 of 2019 stands disposed of.

12. Copy of this Order be forwarded to the Learned Trial Court for information.

SLR (2020) SIKKIM 138

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

MAC App. No. 01 of 2019

Branch Manager,
United India Insurance Co. Ltd. ….. APPELLANT

Versus

Bishnu Maya Mukhia and Others ….. RESPONDENTS

For the Appellant: Mr. Pema Ongchu Bhutia, Advocate.

For Respondent No. 1 – 4: Ms. Tashi Doma Bhutia and
Ms. Pritima Sunam, Advocates.

For Respondent No. 5: None.

For Respondent No. 6: None.

Date of decision: 28th February 2020

A. Motor Accidents Claim – Calculation of the quantum of the loss of income of the deceased assailed by the Appellant – Held: Income of the deceased ought to have been calculated as 242/- per day instead of 320/- in terms of Notification No. 11/DL dated 15.09.2017 of the Department of Labour, Government of Sikkim considering that the accident took place on 20.04.2016 and the said Notification came to be issued subsequently and thus cannot be applied retrospectively – 40% of the established income of the deceased aged about 35 years and self-employed added towards future prospects in terms of *Pranay Sethi* – Respondent No. 1 entitled to spousal consortium and Respondent No. 2 to 4 entitled to parental compensation (*Magma General Insurance Co. Ltd.* and *Rajesh and Others* relied).

(Paras 3, 7, 9 and 10)

Appeal partially allowed.

Chronological list of cases cited:

1. National Insurance Company Limited v. Pranay Sethi and Others, AIR 2017 SC 5157.
2. Magma General Insurance Co. Ltd. v. Nanu Ram and Others, MANU/SC/1012/2018.
3. Raj Rani and Others v. Oriental Insurance Co. Ltd. and Others (2009) 13 SCC 654.
4. Rajesh and Others v. Rajbir Singh and Others, (2013) 9 SCC 54.
5. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.

JUDGMENT (ORAL)

Meenakshi Madan Rai, J

1. The instant Appeal assails the Judgment of the learned Motor Accident Claims Tribunal, West Sikkim at Gyalshing in MACT Case No.06 of 2018 *(Smt. Bishnu Maya Mukhia and Others v. Shri Bikram Tamang and Others)*, dated 30.10.2018, on two counts *viz.* the income of the deceased which has been calculated by the learned Tribunal as Rs.320/- (Rupees three hundred and twenty) only, per day, instead of Rs.242/- (Rupees two hundred and forty two) only, per day, as the amount that the deceased was allegedly earning at the time of the accident. Inclusion of Rs.2,00,000/- (Rupees two lakhs) only, in the compensation granted on account of "loss of love and affection" is also impugned.

2. The facts in the case are not in dispute and therefore are not being reiterated herein, suffice it to state that the vehicle in which the deceased, the husband of the Respondent No.1 and father of Respondents No.2 to 4, was travelling met with an accident on 20.04.2016 at "Tafel Bhir," Rinchenpong, West Sikkim wherein he succumbed to his injuries at the place of accident. The learned Tribunal after considering the entire evidence on record granted compensation of Rs.15,23,800/- (Rupees fifteen lakhs, twenty three thousand and eight hundred) only, to the Respondents No.1 to 4.

3. Assailing the quantum calculated on the loss of income of the deceased learned Counsel for the Appellant submitted that the income of the

deceased ought to have been computed by the learned Tribunal as Rs.242/- (Rupees two hundred and forty two) only, per day, instead of Rs.320/- (Rupees three hundred and twenty) only, per day. That, prior to the accident which took place on 20.04.2016, the Government rates for semi-skilled workers was Rs.242/- (Rupees two hundred and forty two) only, per day. Vide Notification bearing No.11/DL dated 15.09.2017 issued by the Labour Department, Government of Sikkim, Gangtok the daily wages for semi-skilled workers was raised to Rs.320/- (Rupees three hundred and twenty) only, per day. The accident having occurred on 20.04.2016, the daily wage of the deceased ought not to have been calculated on the revised rates reflected *supra*.

4. Learned Counsel for the Respondents No.1 to 4 did not seriously contest the contention of learned Counsel for the Appellant pertaining to loss of income of the deceased or inclusion of loss of love and affection in the quantum of the Award. However, it is submitted that no computation towards Future Prospects on grounds that the deceased was self-employed has been taken into consideration by the learned Tribunal as ruled in the decision of ***National Insurance Company Limited vs. Pranay Sethi & Ors.***[1]. Learned Counsel also submits that loss of Parental consortium in terms of ***Magma General Insurance Co. Ltd. vs. Nanu Ram and Ors.***[2] has not been calculated by the learned Tribunal.

5. In rebuttal, learned Counsel for the Appellant urged that the issue of Future Prospects and Parental consortium have not been raised by a Cross Objection by the Respondents No.1 to 4 and cannot be agitated before this Court without written averments.

6. I have heard and considered the rival submissions of learned Counsel for the parties. I have also perused the impugned Judgment including the documents and evidence on record.

7. The income of the deceased ought to have been calculated as Rs.242/- (Rupees two hundred and forty two) only, per day, instead of Rs.320/- (Rupees three hundred and twenty) only, in terms of Notification bearing No.11/DL dated 15.09.2017 of the Department of Labour, Government of Sikkim considering that the accident took place on

[1] AIR 2017 SC 5157
[2] MANU/SC/1012/2018

20.04.2016 and the said Notification came to be issued subsequently and thus cannot be applied retrospectively.

8. While addressing the issue flagged by learned Counsel for the Respondents No.1 to 4 that Future Prospects and Parental consortium was not granted by the learned Tribunal, although it has vehemently been objected to by learned Counsel for the Appellant, in ***Raj Rani and Ors. vs. Oriental Insurance Co. Ltd. and Ors.***[3], it was held as follows;

> "**13**. …… It is not necessary in a proceeding under the Motor Vehicles Act to go by any rules of pleadings or evidence. Section 168 of the Act speaks about grant of just compensation. The Courts duty being to award just compensation, it will try to arrive at the said finding irrespective of the fact as to whether any plea in that behalf was raised by the claimant or not."

This observation soundly quells the aforementioned argument raised by learned Counsel for the Appellant.

9. So far as the question of Future Prospects is concerned in ***Pranay Sethi*** *(supra)* the Hon'ble Supreme Court held as under;

> **"61.** ...
>
> **(iii)** While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> **(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years**. An

addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

(Emphasis supplied)

On the touchstone of the ratio *supra* it is evident that an addition of 40% of the established income of the deceased, aged about 35 years and self-employed should be added towards future prospects.

10. On the question of "consortium" the Hon'ble Supreme Court in ***Magma General Insurance Co. Ltd.*** *(supra)* while allowing consortium not only to the spouse but also to the children and parents of the deceased held as follows;

"8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.

In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.

The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

Spousal consortium is generally defined as rights pertaining to the relationship of a husbandwife which allows compensation to the surviving spouse for loss of "company, society,

co-operation, affection, and aid of the other in every conjugal relation."

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

……

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in *Pranay Sethi* (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs.40,000 each for loss of Filial Consortium."

……."

(Emphasis supplied)

In ***Rajesh and Ors. v. Rajbir Singh and Ors.4*** the Hon'ble Supreme Court held as follows;

"*20*. … In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of

> companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. ……"

Hence, on the anvil of the aforestated ratio in ***Magma General Insurance Co. Ltd.*** *(supra)* and ***Rajesh and Ors.*** *(supra)* the Respondent No.1 is entitled to Spousal consortium and Respondents No.2 to 4 are entitled to Parental compensation to the sum as reflected in the ratio of ***Magma General Insurance Co. Ltd.*** *(supra)*.

11. The deceased was approximately 35 years of age at the time of the accident therefore the Multiplier of "16" was rightly adopted by the learned trial Court in consonance with the decision in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[5]. In my considered opinion, there is no requirement for computing loss of love and affection in the Award. The Litigation Costs awarded by the learned Tribunal are not contested by the Appellant and is accordingly allowed.

12. Consequently, in light of the aforesaid facts and circumstances, the Judgment of the learned trial Court stands modified to the extent below;

Annual Income of the deceased	Rs.87,120.00

[4] (2013) 9 SCC 54
[5](2009) 6 SCC 121

(Rs.242/-x30x12)	
Add 40% of Rs.87,120/- as future prospects	Rs.34,848.00
Yearly income of the deceased	Rs.1,21,968.00
Less 1/3rd of	Rs.1,21,968.00
	Rs.40,656.00
[deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	
Net yearly income	Rs.81,312.00
Multiplier of **'16**' adopted in terms of ***Sarla Verma's case*** (Rs.81,312 x 16)	Rs.13,00,992.00
Add Loss of **Spousal consortium** [payable to Respondent No.1]	Rs.40,000.00
Add Loss of **Parental consortium** [Rs.40,000/- each, payable to Respondents No. 2 to 4, respectively]	Rs.1,20,000.00
Add Funeral expenses	Rs.15,000.00
Add Loss of estate	Rs.15,000.00
Add Litigation costs	Rs.25,000.00
Total	**Rs.15,15,992.00**

(Rupees fifteen lakhs, fifteen thousand, nine hundred and ninety two) only.

13. The Respondents No.1 to 4 shall be entitled to simple interest @ 9% per annum on the above amount instead of 10% granted by the learned Tribunal, with effect from the date of filing of the Claim Petition before the learned Tribunal till full realisation.

14. The awarded amount shall be paid to the Respondents No.1 to 4 within one month from today by the Appellant, failing which, the Appellant shall pay simple interest @ 12% from the date of filing of the Claim Petition

till realisation, duly deducting the amounts, if any, already paid by it to the Respondents No.1 to 4.

15. The awarded amount of compensation shall be divided amongst the Claimant-Respondent No.1 being the spouse of the deceased and Claimants-Respondents No.2 to 4 being his minor children.

(i) From the amount awarded, Claimant-Respondent No.1, spouse of the deceased is entitled to 40%, along with interest as specified above.

(ii) 60% of the total amount awarded shall be divided equally amongst the Claimants-Respondents No.2 to 4, of which 50% of the share of each child shall be kept in individual Fixed Deposit in a Nationalised Bank, until the child attains the age of majority. The remaining 50% of each of the minor's share shall be expended on their education.

16. Appeal allowed to the extent above.

17. MAC App. No.01 of 2019 stands disposed of accordingly.

18. No order as to costs.

19. Copy of this Judgment be sent to the learned Tribunal for information.

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GANGTOK
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