

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 30th JULY, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.60 of 2015

Petitioner : Mr. Phigu Tshering Bhutia,
S/o Late Dozi Tshering Bhutia,
Aged about 41 years,
R/o Simick Lingzey,
East Sikkim.

versus

Respondents : 1. The State of Sikkim
through the Chief Secretary,
Government of Sikkim,
Gangtok, East Sikkim.

2. The State Election Commissioner,
Amdo Golai, Tadong,
Gangtok,
East Sikkim.

3. The Special Secretary,
Urban Development and Housing Department,
Government of Sikkim,
Gangtok, East Sikkim.

Petition under Article 226
of the Constitution of India

Appearance

Mr. Chewang Norbu Bhutia, Advocate for the Petitioner.

Mr. J. B. Pradhan, Additional Advocate General with Mr. Karma Thinlay, Senior Government Advocate, Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates, for the State-Respondents.

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

J U D G M E N T

Meenakshi Madan Rai, J.

1. By filing this Writ Petition under Article 226 of the Constitution of India, the Petitioner seeks a direction from this Court to the Respondents to provide reservation of seats for the Bhutia-Lepcha (for short "B-L"), as an independent Community and Limboo-Tamang (for short "L-T") as Scheduled Tribes, in the Municipal Elections (held on 09-10-2015) to the Municipal Corporation/Municipal Councils and Nagar Panchayats in the State.

2. The Petitioner's case is that in the previous Municipal Elections held in 2010, seats had been reserved for the B-L as an independent Community and for the L-T as Scheduled Tribes. Vide the assailed Notifications bearing Nos. M(63)/GOS/UD&HD/MUN/2015/23 and M(63)/GOS/UD&HD/MUN/2015/24 both dated 01-09-2015, the reservations so made were withdrawn for the Sikkim Municipal Elections of 2015. The Petitioner also assails two Notifications dated 09-09-2015 vide which details of process of nomination and date for election respectively were fixed as "09-10-2015" for all Wards of the Municipal Corporation/Municipal Councils/Nagar Panchayats in the State. The Petitioner avers that the main inhabitants, i.e., the only ethnic Communities of Sikkim as per its history, are the Lepchas, the Bhutias and the Nepalese. Tracing the history of Sikkim from 1947 when Sikkim was a British

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Protectorate and thereafter a Protectorate of India under the Treaty of 1950, reference was made to the Royal Proclamation of 28-12-1952 and the provisions for reservation of seats for the B-L and the Sikkimese Nepali. That the State Council set up, in 1952 provided for twelve elected Members of which six were to be from the B-L Community and the other six, from the Sikkimese Nepalese. By the State Council and Executive Council Proclamation, 1953, dated 23-03-1953, a State Council of eighteen Members, consisting of twelve elected Members, five nominated Members and a President to be appointed by the Maharaja was constituted. The twelve elected Members were to comprise of the B-L and Sikkimese Nepalese. In 1958, the strength of the Council was increased to twenty, where the parity between B-L and the Sikkimese Nepalese was maintained. By the Representation of Sikkim Subjects Regulation, 1966, dated 21-12-1966, promulgated by the then Chogyal, the State Council was to consist of Territorial Constituencies of which seven comprised of B-L and seven were for Sikkimese Nepalese, apart from one seat for the Sangha, one seat for the Scheduled Castes, one for Tsong, one General seat and six to be nominated by the Chogyal.

3. Reference was also made to the Tripartite Agreement of 08-05-1973 which envisaged the rights of the people of Sikkim to Elections on the basis of adult suffrage. It also contemplated the setting up of a Legislative Assembly in Sikkim to be reconstituted by election every four years. Clause (5) of the Tripartite Agreement

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

envisaged that the system of elections shall be so organised as to make the Assembly adequately representative of the various sections of the population. The size and composition of the Assembly and of the Executive Council was to be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquired a dominating position due mainly to its ethnic origin, duly protecting the rights of the B-L, Sikkimese Nepali, Tsong and Scheduled Caste. Under The Representation of Sikkim Subjects Act, 1974 the reservation of seats under this dispensation, *inter alia*, was that the Assembly was to constitute of thirty two elected Members of which sixteen Constituencies were reserved for Sikkimese of B-L origin from which one was to be for Sangha. The remaining sixteen Constituencies were to be reserved for the Sikkimese Nepali including one for Tsongs and another for the Scheduled Castes. The Sikkim Assembly was elected and constituted and passed the Government of Sikkim Act, 1974. By the Constitution (35th Amendment) Act, 1974, by inserting Article 2A of the Constitution of India, Sikkim was given the status of an Associate State. The Petitioner also averred to the abolishment of the Institution of Chogyal of Sikkim by the Assembly in 1975 pursuant to which the Constitution (36th Amendment) Act, 1975, came to be passed, giving Statehood to Sikkim, duly repealing Article 2A of the Constitution. Article 371F introduced by the 36th Constitutional Amendment with effect from 26-04-1975 envisaged certain special conditions for the

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

admission of Sikkim as a new State in the Union of India of which the Petitioner draws emphasis to Article 371F(f) of the Constitution which provides as under;

“(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the Assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim;”

4. It was further averred that the Election Laws (Extension to Sikkim) Act, 1976, sought to extend, with certain provisions, The Representation of the People Act, 1950 (for short “1950 Act”) and The Representation of the People Act, 1951 (for short “1951 Act”), to Sikkim. Section 25A of the 1950 Act provides for conditions of registration as elector in Sangha Constituencies, in Sikkim. By the Representation of the People (Amendment) Ordinance, 1979, amendments were introduced to the above two Acts to enable fresh elections to the Sikkim Assembly on certain basis considered appropriate to and in conformity with the historical evolution of Sikkim’s political institutions. The Ordinance was later replaced by The Representation of the People (Amendment) Act, 1980, by which Sub-Section (1A) was inserted in Section 7 of the Representation of the People Act, 1950, which provided for seats in the Legislative Assembly to the various Communities of Sikkim and the Sangha.

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

5. In 1982, vide in a Writ Petition transferred to the Hon'ble Apex Court from this Court being ***R. C. Poudyal vs. Union of India and Others***¹ the Petitioner assailed the constitutionality of the provisions for reservation of seats in favour of B-L and the Sangha. The Hon'ble Apex Court formulated certain points for discussion in the matter as extracted below;

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

¹. 1994 Supp (1) SCC 324

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

provision enabled the protection of the rights and interests of different sections of population of Sikkim and for the number of seats in the Legislative Assembly which may be filled by the candidates belonging to such sections, the impugned provisions provide for one section alone, namely, the Bhutias-Lepchas.

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

The Hon'ble Apex Court *supra* while deciding the aforesaid points held as under;

- (i) the questions raised in the petitions pertaining to the terms and conditions of accession of new State are justiciable.
- (ii) Clause (f) of Article 371-F of the Constitution of India, is not violative of the basic features of democracy.
- (iii) That impugned provisions providing for reservation of 12 seats, out of 32 seats in the Sikkim Legislative Assembly in favour of Bhutias Lepchas, are neither unconstitutional as violative of the basic features of democracy and republicanism under the Indian Constitution nor are they violative of Article 14, 170(2) and 332 of the Constitution. The impugned provisions are also not ultra vires of clause (f) of Article 371-F.

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

- (iv) The extent of reservation of seats is not violative of Article 332(3) of the Constitution.
- (v) The reservation of one seat for Sangha to be elected by an Electoral College of Lamaic monasteries is not based purely on religious distinctions and is, therefore, not unconstitutional as violative of Article 15(1) and 325 of the Constitution.

Thus, the Hon'ble Apex Court specifically held that reservation of seats in favour of the B-L independently is not unconstitutional.

6. That, in the year 2007, the Sikkim Municipalities Act, 2007, was enacted which provided for Municipal Governance in the State of Sikkim and for the first time in 2010, elections were held in the Municipal Corporation, Municipal Councils and Nagar Panchayats in the State. In exercise of powers conferred by Section 15 of the Sikkim Municipalities Act, 2007, the State Election Commission reserved seven seats separately for the B-L and four seats for the L-T Communities in consonance with the Judgment of the Hon'ble Apex Court in **R. C. Poudyal's**¹ case (*supra*). The reservation of the seats for L-T Communities was extended in view of the fact that the said Communities were notified as a Scheduled Tribes under Articles 243D, 243T and 332 of the Constitution of India in 2003. Vide the assailed Notifications dated 01-09-2015, no such separate provisions have been made for the B-L Community in a departure from its earlier Notification dated 10-03-2010. That, in 2015 election, the total number of seats have increased to fifty-three as against forty-seven in the 2010 elections. That, in view of the aforesaid facts and

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

circumstances and the legal position with respect to Article 371F of the Constitution in the Judgment of the Hon'ble Supreme Court in **R. C. Poudyal's**¹ case (*supra*) a direction be issued to the Respondents to make provision for reservation of seats for the B-L Community independently and for the L-T Community as Scheduled Tribes for the Municipal Elections.

7. The Respondents No.1 and 3 filed a joint Counter-Affidavit while the Respondent No.2 filed a separate Counter-Affidavit. Denying and disputing the claims of the Petitioner, the Respondents No.1 and 3 submitted that Part IXA of the Constitution deals with the Municipalities, while the Constitution (74th Amendment) Act, 1992, introduced Articles 243P to 243ZG. That Article 243T provides for reservation of seats in every Municipality and provides as follows;

"243T. Reservation of seats.-(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the Scheduled Castes in the Municipal area or of the Scheduled Tribes in the Municipal area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Municipality.

....."

The same Article also provides for reservation of women belonging to the Scheduled Castes and Scheduled Tribes, etc. That Article 243ZG of the Constitution debars the Courts from interfering in electoral matters and provides as follows;

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

"243ZG. Bar to interference by courts in electoral matters.—Notwithstanding anything in this Constitution,—

- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZF shall not be called in question in any court;
- (b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

It is averred that in view of the provisions contained in Article 243T, as per the Constitutional Scheme for the Municipalities the reservation of seats are provided only to Scheduled Castes and Scheduled Tribes. Further, Clause (6) of Article 243T also empowers the Legislature of the State to make provisions for reservation of seats in any Municipality or Offices of Chairpersons in the Municipality in favour of Backward Class of citizens. Besides this provision, there are no other provisions in the Constitution providing reservation in the Municipality on the basis of Community.

8. That, Section 15 of the Sikkim Municipalities Act, 2007, which was published in the Sikkim Government Gazette No.193 on 09-05-2007 provides that the State Government may by Notification reserve seats for the Scheduled Castes, Scheduled Tribes, the Backward Class citizen and most Most Backward Class citizen in every Municipality. Thus, considering the Constitutional Scheme, providing for reservation of seats in the Municipalities, Notification dated 01-09-2015 was issued under Section 15 of the Sikkim

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Municipalities Act, 2007, and published in Sikkim Government Gazette bearing no.330 dated 01-09-2015, notifying the reservation of seats in the Municipal Corporation, Municipal Councils and Nagar Panchayats within the State of Sikkim for Sikkim Municipal Elections, 2015. Out of fifty-three Municipal Wards and seats, fifteen seats have been reserved for Scheduled Tribes and six seats for the Scheduled Castes, eleven for OBC (Central List) and nine for OBC (State List) respectively. That the B-L have been declared as Scheduled Tribes by The Constitution (Sikkim), Scheduled Tribes Order, 1978 and in the year 2003, L-T were also declared as Scheduled Tribes, hence, the B-L are eligible to contest from the seats reserved for the Scheduled Tribes. That Article 371F provides for special provisions with respect to the State of Sikkim of which Clauses (d), (f) and (m) have been extracted by the Respondents No.1 and 3. It is vehemently denied that in the year 2007 seats were reserved separately for Bhutia, Lepcha, Limboo and Tamang Communities as per the Judgment rendered in **R. C. Poudyal's**¹ case (*supra*). That, in view of the aforesaid facts and circumstances, the Writ Petition is not maintainable in Law as well as on facts and is liable to be dismissed.

9. The Respondent No.2 placed reliance on Section 15(1) of the Sikkim Municipalities Act, 2007 and also relied on the Counter-Affidavit of the Respondents No.1 and 3 submitting that the said Respondents had set out in detail the Constitutional Scheme

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

providing reservation of seats in the Municipalities vide Notifications dated 01-09-2015.

10. Learned Counsel for the Petitioner and Respondent Nos. 1 and 3, apart from their verbal submissions also submitted their Written Arguments.

11. The Petitioner reiterated the facts set out in the Writ Petition and drew the attention of this Court to the provisions of Article 371F of the Constitution and emphasised that the Article begins with a *non obstante* Clause. That in view of the language used in the special provision it is evident that Article 371F shall have an overriding effect over Article 243T and Article 243ZG. That, it is a settled legal position that in case of conflict between two provisions under the same Statute the special provision having a *non obstante* Clause shall prevail over the other provision.

12. Inviting the attention of this Court to the decision in **R. C. Poudyal's**¹ case (*supra*) it was held that the Hon'ble Apex Court upheld the validity of Article 371F(f) inspite of "The Constitution (Sikkim) Scheduled Tribes Order, 1978", declaring the B-L as a Scheduled Tribe and held that the extent of reservation extended to said Communities is not violative of Article 332 of the Constitution. That, though Article 243ZG also has a *non obstante* Clause, conflict in such cases is resolved by considering the purpose and policy underlying the enactment and the language used and Article 371F

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

being a later provision shall prevail over the earlier one, i.e., Article 243ZG. Besides, which, it is also relevant to consider whether any of the two provisions can be described as a special one, in which case the special provision shall prevail over the general provision. That, Article 226 confers extraordinary jurisdiction to the High Court and the bar contemplated under Article 243ZG is subject to judicial review under Article 226. That, when the action of the Election Commission affects the purity and probity of the election, cutting to the very root of the democratic process a petition under Article 226 is maintainable. It is urged that Article 371F(f) shall have an overriding effect over Article 243T, 243ZG of the Constitution and Section 15 of the Sikkim Municipalities Act, 2007.

13. The State-Respondents for their part also reiterated the facts set out in their Counter-Affidavits. Attention of this Court was once again invited to the provisions of Article 243 of the Constitution which bars interference by the Courts in electoral matters, while also referring to the Order of this Court in I.A. No.01 of 2015 dated 06-10-2015 in the instant Writ Petition, whereby the prayer seeking stay of the two Notifications dated 01-09-2015 was rejected by this Court. It was contended that Rule 121 of the Sikkim Municipalities (Conduct of Election) Rules, 2007, provides that no election shall be called in question except by an Election Petition in accordance with the provisions of this part. Considering the above provisions in the Constitution as well as the Sikkim Municipalities (Conduct of

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Election) Rules, 2007, the prayer for quashing the Notifications dated 01-09-2015 is liable to be rejected. That, Article 243T provides for reservations of seats for Scheduled Caste and Scheduled Tribes and makes no provision for any specific community within the criteria.

14. The Respondents also took the assistance of the decision in ***Mani Subrat Jain and Others vs. State of Haryana and Others***² by which a three Judge Bench of the Hon'ble Apex Court held that no one can seek a *mandamus* without a legal right, that there must be a judicially enforceable right as well as a legally protected right before one suffering a legal grievance can ask for a *mandamus*. Moreover, Clause (f) to Article 371F enables the Parliament to provide for reservation of seats in the Legislative Assembly of the State of Sikkim for various sections of the population in order to protect their rights and interests. The said Article is not applicable in the facts and circumstances of the present case which is governed by Article 243T of the Constitution.

15. That, with regard to the Judgment of ***R. C. Poudyal's***¹ case (*supra*) the Petitioner therein, had challenged the provisions of Sub-Section (1A) of Section 7 of the Representation of People Act, 1950 and Sub-Section (2) of Section 5A of the Representation of People Act, 1951 vide which separate reservations were provided in the Legislative Assembly in Sikkim for the B-L Communities and the

^{2.} (1977) 1 SCC 486

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Sangha relying on Clause (f) of Article 371F of the Constitution. However, in the present case, no such reservation has been provided under Article 243T of the Constitution. That the law laid down in **R. C. Poudyal's**¹ case (*supra*) is altogether different as the Parliament had exercised their power and amended the provisions of the Representation of People Act to provide for reservation for the B-L Community and the Sangha. That, the Petitioner although not entitled to any reliefs in the Writ Petition, however, it is always open for him to challenge the election by filing an Election Petition as provided by Rule 122 of the Sikkim Municipalities (Conduct of Election) rules, 2007. Hence, the Writ Petition be dismissed.

16. The contentions of Learned Counsel were heard at length by me and given due consideration.

17. The pith and substance that can be culled out from the submissions and arguments of Learned Counsel for the Petitioner is that in view of the Judgment of the Hon'ble Apex Court in **R. C. Poudyal's**¹ case (*supra*), *inter alia*, upholding the reservation of twelve seats out of thirty two seats in the Legislative Assembly in favour of B-L as neither unconstitutional or violative of the basic features of democracy, the same interpretation be carried over to the Municipal Elections, thereby granting separate reservation to the Bhutia and Lepchas, while providing separate reservation for the L-T as Scheduled Tribes.

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

18. Article 371F of the Constitution was inserted by the Constitution (36th Amendment) Act, 1975, providing for special provision with respect to the State of Sikkim. The Article consists of sixteen clauses and commences with a *non obstante* clause, i.e., “Notwithstanding anything in the Constitution”. The nature of operation and scope of a *non obstante* clause was explained in ***Vishin N. Khanchandani and Another*** vs. ***Vidya Lachmandas Khanchandani and Another***³ as follows;

“11. There is no doubt that by non obstante clause the Legislature devices means which are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. The phrase is equivalent to showing that the Act shall be no impediment to measure intended. To attract the applicability of the phrase, the whole of the section, the scheme of the Act and the objects and reasons for which such an enactment is made has to be kept in mind.”

19. In ***Aswini Kumar Ghose and Another*** vs. ***Arabinda Bose and Another***⁴ it was held that “the enacting part of a statute must where it is clear be taken to control the *non obstante* clause, where both cannot be read harmoniously. In ***South India Corporation (P) Ltd.*** vs. ***Secretary, Board of Revenue, Trivandrum and Another***⁵ the Apex Court observed as follows;

“(19) The phrase “notwithstanding anything in this Constitution” is equivalent to saying that in spite of other articles of the Constitution, or that other articles shall not be an impediment to the operation of Art. 278.”

3. AIR 2000 SC 2747 4. AIR 1952 SC 369 5. AIR 1964 SC 207

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Thus, in the event of a conflict of any of the clauses of Article 371F with the provisions of any other Article of the Constitution the former will prevail, regardless of the contents of the other provisions. What follows indubitably, therefore, is that the vires of the clauses of Article 371F cannot be challenged. The above discussion is warranted to consider the question as to whether Article 371F being a special provision for the State of Sikkim will have an overriding effect on Article 243T and Article 243ZG.

20. Reverting to the relevant history, by The Constitution (Sikkim) Scheduled Tribes Order, 1978, the B-L Community were deemed to be Scheduled Tribes in relation to the State of Sikkim. By insertion of Clause (1A) in Section 7 of the Act of 1950, the total number of seats to be reserved for the B-L in the Legislative Assembly of the State of Sikkim was laid down. For better appreciation of the matter the Section is quoted hereinbelow;

"7. Total number of seats in Legislative Assemblies and assembly constituencies.—.....

.....
 (1A) Notwithstanding anything contained in sub-section (1), the total number of seats in the Legislative Assembly of the State of Sikkim, to be constituted at any time after the commencement of the Representation of the People (Amendment) Act, 1980 (8 of 1980), to be filled by persons chosen by direct election from assembly constituencies shall be thirty-two, of which—

- (a) twelve seats shall be reserved for Sikkimese of Bhutia-Lepcha origin;
- (b) two seats shall be reserved for the Scheduled Castes of that State; and
- (c) one seat shall be reserved for the Sanghas referred to in section 25A

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Explanation.—In this sub-section “Bhutia” includes Chumbipa, Dophapa, Dukpa, Kagatey, Sherpa, Tibetan, Tromopa and Yolmo.”

By insertion of Section 5A in the Act of 1951, the qualifications for membership of Legislative Assembly of Sikkim was detailed. The Section reads as follows;

“5A. Qualifications for membership of Legislative Assembly of Sikkim.—(1)Notwithstanding anything contained in section 5, a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State duly constituted under the Constitution) unless—
”

Section 5A(a) lays down that, in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, he is a person either of Bhutia or Lepcha origin and is an elector for any Assembly constituency in the State other than the constituency reserved for the Sanghas. Therefore, the above legal provisions being self-explanatory and need no further elucidation.

21. In *R. C. Poudyal’s*¹ case (*supra*) it was, *inter alia*, argued with the help of certain demographic statistics that the degree of reservation of seats of 38 per cent for a population of B-L of 20/25 per cent (Paragraphs 134 and 178) was disproportionate. As per the majority Judgment authored by Venkatachaliah, J., it was, *inter alia*, held at Paragraphs 133, 134 and 135 that –

“133. But, in our opinion, Clause (f) of Article 371-F is intended to enable, a departure from Article 332(2).

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

134. This again has to be viewed in the historical development and the rules of apportionment of political power that obtained between the different groups prior to the merger of the territory in India. A parity had been maintained all through.

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

As per the Judgment *supra* of Agarwal, J. (partly dissenting) at Paragraph 179, *inter alia*, held as follows;

"179. The reservation of seats for Bhutias and Lepchas is necessary because they constitute a minority and in the absence of reservation they may not have any representation in the **Legislative Assembly**.

180. The second contention relating to the extent of the reservation of seats for Bhutias and Lepchas is based on the provisions of Article 332(3) of the Constitution. Clause (3) of Article 332 postulates that the number of seats reserved for Scheduled Castes or Scheduled Tribes in the Legislative Assembly of the State shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes or the Scheduled Tribes in the State bears to the total population of the State. The said provision has, however, to be considered in the light of Clause (f) of Article 371-F which provides:

"(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim."

181. The non-obstante clause in Article 371-F enables Parliament to make a departure from the ratio contemplated by Article 332(3) within the limitation which is inherent in the power conferred by Article 371-F, i.e., not to alter any of the basic features of the Constitution." [emphasis supplied]

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

Thus, the Apex Court held that the reservation for the B-L Community in the Legislative Assembly was not violative of Article 14 of the Constitution in view of the peculiar circumstances as discussed *supra*. The Judgment discusses the disproportionate reservation of seats for the B-L Community over and above the provisions of Article 332(3) of the Constitution in the Legislative Assembly of the State and why a departure from Article 332 is justiciable in the circumstances that existed. Therefore, the *non obstante* clause of Article 371F(f) had an overriding effect over Article 332 of the Constitution for reservation of seats in the Legislative Assembly.

22. At this juncture, it would be appropriate to discuss what a Municipality is.

“While Panchayats are the institutions of local self-Government in rural areas called ‘villages’ as specified in the notifications issued by the Governor of a State, the Municipalities (Part IX-A) are the institutions of self-Government in the urban area, called a ‘Metropolitan Area’ as specified in the Governor’s notification issued under Art.243P.

A Municipality may be constituted for a ‘municipal area’, which is a part of a ‘metropolitan area’ as specified by the Governor. In specifying an area to be a municipal area, the Governor shall take into consideration its size, the municipal services provided or proposed to be provided by an industrial establishment in that area.

Such areas, again, will be divided, having regard to their populations, the revenue generated for local administration, the percentage of employment in non-agricultural activities and the like,—into three categories *viz.*—(a) a ‘transitional area’, *i.e.*, an area in transition from a rural to an urban area; (b) ‘a smaller urban area’ and (c) ‘a larger urban area’.

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

For the three categories aforesaid, the municipal institution shall be called—

- (a) A 'Nagar Panchayat' for a transitional area;
- (b) A Municipal Council for a smaller urban area; and
- (c) A 'Municipal corporation' for a larger urban area [Art.243Q].

As in the case of the Panchayats, similar provisions are made, for election to a Municipality [Art.243R], reservation of seats for Scheduled Castes and Tribes and their women [Art.243T]; Finance Commission [Art.243Y]; State Election Commission [Art.243ZA].

....."

[See Shorter Constitution of India, Dr. Durga Das Basu, Fourteenth Edition 2009, Volume 2, Page 1640]

The above extract clears the air as to the position of the Municipality. Thus, Municipality by no stretch of any interpretation can be brought into the ambit of a Legislative Assembly.

23. Article 371F(f) clearly lays down that the Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim, make provision for the number of seats in the **Legislative Assembly** of the State of Sikkim. This provision obviously relates to reservation of seats in the Legislative Assembly and does not envision reservation in the Municipal Elections. The decision in **R. C. Poudyal's**¹ case (*supra*) was also confined to reservation in the Legislative Assembly and did not venture into the field of reservation in local administrative bodies. When no express provision exists in Article 371F for reservation in the Municipal Bodies, it is axiomatic that the question of *non obstante* clause of Article 371F having an overriding effect on Article 243T of

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

the Constitution pertaining to reservation of seats in the Municipal Elections, does not arise. Thus, I am of the considered opinion that the question of having separate reservations for the B-L Community in the Municipal Elections over and above what has been enshrined in Article 243T of the Constitution is not tenable. Apart from the above observations, I find no documents have been placed on record to substantiate the submission of the Petitioner that the reservation of seats in the 2010 Municipal Elections were in terms of the Judgment in ***R. C. Poudyal's***¹ case (*supra*).

24. It may also be relevant to point out here that the Statute is an edict of the Legislature and the conventional way of interpreting or construing a Statute is to seek the intention of its maker. The Courts cannot read beyond what the Statute speaks.

25. So far as the question of bar to interference by Courts in electoral matters as provided under Article 243ZG of the Constitution, while referring to the Order of this Court in I.A. No.01 of 2015, this Court while considering the application of grant of interim stay of two Notifications *supra* both dated 01-09-2015 opined that, these Notifications had been issued in exercise of powers conferred by Section 15 of the Sikkim Municipalities Act, 2007 (5 of 2007) declaring reservation of seats in Municipalities. The Notification No.13/SEC/2015 dated 09-09-2015 vide which the schedule of election had been notified was also considered, according to which polling was to take

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

place on 09-10-2015. Refusing to stay the Notification, it was Ordered that if the effect and operation of the above two Notifications of 01-09-2015 are stayed, the consequence of that would be staying the forthcoming election of 09-10-2015. Reference was made to Article 243ZG(b) which provides that no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. Relying on the decision of the ***Election Commission of India Through Secretary vs. Ashok Kumar and Others***⁶, the application as already stated was rejected.

26. In the same vein, the Hon'ble Apex Court while holding that the High Court ought not to interfere in matters pertaining to Elections held in ***Boddula Krishnaiah and Another vs. State Election Commissioner, A.P. and Others***⁷ observed as follows;

"9. The same principle was laid down in *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman* [(1985) 4 SCC 689 : 1985 Supp (1) SCR 493]. In this case where the election process was set in motion the High Court granted ad interim injunction of the further proceedings of the election to the State Legislature. A Constitution Bench of this Court had held thus: (SCC pp.708-09, para 30)

"The High Court acted within its jurisdiction in entertaining the writ petition and in issuing a rule nisi upon it, since the petition questioned the vires of the laws of election. But, with respect, it was not justified in passing the interim orders dated February 12 and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982. Firstly, the High Court had no material before it to warrant the passing of those orders. The allegations in the writ petition are of a vague and general nature, on the basis of which no relief could be granted. Secondly, though the High Court did not lack

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its power under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or given directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution. That limitation ought to be observed irrespective of the fact whether the preparation and publication of electoral rolls are a part of the process of 'election' within the meaning of Article 329(b) of the Constitution."

At p. 497 it was further held that: (SCR Headnote p.497)

"Even assuming, that the preparation and publication of electoral rolls are not a part of the process of 'election' within the meaning of Article 329(b), the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the election to the Legislative Assembly stood the risk of being postponed indefinitely."

10. The same principle was reiterated when the election to the Gram Panchayat was sought to be stalled in *State of U. P. v. Pradhan, Sangh Kshetra Samiti* [1995 Supp (2) SCC 305] . The Court observed thus: (SCC pp. 331-32, para 45)

"What is more objectionable in the approach of the High is that although Clause (a) of Article 243-O of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a

6. (2000) 8 SCC 216

7. (1996) 3 SCC 416

Shri Phigu Tshering Bhutia vs. State of Sikkim and Others

decision of this Court in *Meghraj Kothari v. Delimitation Commission* [(1967) 1 SCR 400]. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law.”

27. Bearing in mind the decisions hereinabove, no further discussions are required on this count. As there is a specific bar to interference by Courts in electoral matters, I would not be inclined to wade into forbidden waters.

28. For the aforesaid reasons, the Writ Petition fails and is accordingly dismissed.

29. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Judge
 30-07-2016

Approved for reporting : **Yes**

Internet : **Yes**