HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

W.P. (C) No. 20 of 2015

1. Shri Kunga Nima Lepcha
   Son of late C.B. Lepcha,
   Resident of at Upper Tathangchen,
   Post Office Raj Bhawan,
   Police Station, Gangtok,
   East Sikkim, Sikkim.

2. Sonam Lama
   S/o late Sh. Chung Tshering Bhutia,
   R/o Sang Bazar,
   East Sikkim, Sikkim.

3. Prem Singh Tamang
   S/o Sh. Kaloo Singh Tamang
   R/o Lumsey Busty, 5th Mile
   P.O. Tadong, East Sikkim, Sikkim.

4. Taraman Rai,
   S/o Late Hangjit Rai,
   R/o Ranipool, Marchak,
   East Sikkim.

5. Sonam Wangdi Bhutia,
   S/o Late Sharki Bhutia,
   R/o Hotel Rendezvous,
   Gangtok, East Sikkim.

6. Lalit Sharma
   S/o Late Indra Prasad Sharma,
   R/o Tarku, South Sikkim.

7. Labzong Bhutia
   S/o Late Akhey Tshering Bhutia
   R/o Hospital Road
   P.O. Ravangla, South Sikkim.

8. Dawa Lepcha
S/o Sh. Lhazang Lepcha
R/o Lingdong
P.O. Sankalang, Dzongu,
North Sikkim.

9. Pawan Kumar Gurung
S/o Late D.B. Gurung
R/o Nam Nang, Gangtok,
East Sikkim.

10. Kamal Neopaney
S/o Pravakar Neopaney,
R/o Lower Sichey, Gangtok,
East Sikkim.

… Petitioners.

Versus

1. The State of Sikkim,
Through the Chief Secretary
Having his office at
Tashiling, Gangtok,
Gangtok, East Sikkim.

2. Union of India,
Ministry of Home,
Through Secretary,
North Block,
New Delhi-110001.

3. The Director
Central Bureau of Investigation (CBI)
Having its office at CGO Complex,
Lodhi Road, New Delhi -

4. Jt. Director
Central Bureau of Investigation,
Government of India
Nizam Palace, 2nd MSO Building,
15th Floor, 234/4, A J C Bose Road,
Kolkata-700 020.

5. Department of Personnel & Training
Ministry of Personnel, Public Grievance
& Pension,
Through its Secretary
Union of India
North Block, New Delhi.

… Respondents.

Writ Petition under Article 226 of the Constitution of India.

Appearance:

Mr. Arvind Kumar Gupta, Mr. Kausik Chatterjee and Mr. Ashok Subba, Advocates for the Petitioners.

Mr. A. Mariarputham, Advocate General, Mr. J.B. Pradhan, Addl. Advocate General with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Asstt. Govt. Advocates for Respondent No. 1.

Mr. Karma Thinlay, Central Govt. Advocate with Mr. D.K. Siwakoti, Advocate for Respondent No. 2.

None for Respondents No. 3, 4 and 5.

J U D G M E N T
(06.10.2017)

Satish K. Agnihotri, CJ

Questioning the validity and constitutionality of provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as "DSPE Act"), as being ultra vires and violative of Article 14 of the Constitution of India, the instant petition is filed. The petitioners have also sought quashment of the notification No. 70/HOME/2010 dated 21st July

2010 (Annexure P-10) whereby and whereunder the general consent granted earlier was withdrawn prescribing that the prior consent in respect of public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim in offences referred thereto, is required for the investigation of any such offence by the Delhi Special Police Establishment (hereinafter referred to as "DSPE"). The petitioners are stated to be the residents of Sikkim and some petitioners are people's representative and Members of Legislative Assembly. During currency of the petition, the original petitioners 2, 3, 4 and 6 have sought withdrawal from the petition, which was accorded by the order dated 02nd June 2017.

2. The relevant facts, as projected by the petitioners, are that after accession of the Kingdom of Sikkim as State of Sikkim to the republic of India in 1975, the State of Sikkim by notification dated 20th October 1976 accorded general consent, as required under Section 6 of DSPE Act to DSPE for the investigation of offences punishable, as referred thereto, of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and also under the Prevention of Corruption Act, 1947. On 10th July

1979 (Annexure P-2), some more offences were included under grant of consent to DSPE for investigation. Subsequently, on 24th December 1983, 28th June 1984, 10th December 1984, more offences were brought under schedule of consent granted to DSPE. Subsequently, vide notification dated 07th January 1987, the State Government withdrew the schedule of consents granted earlier under Section 6 of DSPE Act. This notification came to be challenged in *Kazi Lhendup Dorji v. Central Bureau of Investigation* in Writ Petition (C) No. 313 of 1993[1]. It is averred that the Supreme Court quashed the notification dated 07th January 1987.

3. Consequent thereupon, a notification dated 2nd July 1994 was issued by the Government of Sikkim, wherein it was clarified that consent given by the State Government under Section 6 of DSPE Act for investigation of offences by DSPE stood revived with effect from 7th January 1987, as per the schedule of consents given earlier in letters dated 20th October 1976, 10th July 1979, 24th December 1983, 28th June 1984 and 10th December 1984. Offences under the Prevention of Corruption Act, 1988 were further added vide notification dated 2nd July 1994.

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[1] (1994) Supp 2 SCC 116

4. It appears that the first petitioner along with others filed a writ petition by way of public interest litigation under Article 32 of the Constitution of India in the Supreme Court, being *Kunga Nima Lepcha & others v. State of Sikkim &* others (Writ Petition (Civil) No. 353 of 2006), seeking a direction to the Central Bureau of Investigation (CBI) against the founder President of the Sikkim Democratic Front (SDF), who have been the Chief Minister of the Government of Sikkim since 12th December 1994. The Supreme Court, while rejecting the prayer of the petitioners vide order dated 25th March 2010[2], observed that it was open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action.

5. General consent accorded to DSPE earlier came to be withdrawn vide notification dated 21st July 2010, which is sought to be impugned in the instant petition. It appears that Justice R.K. Patra Commission was appointed to look into the allegations made by the petitioners. In the meantime, Sikkim Lokayukta Act, 2014 was notified by the State of Sikkim on 27th February 2014. Accordingly, all the allegations made in the petition were transferred to the Lokayukta and the same is under examination.

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[2] (2010) 4 SCC 513

6. Mr. Arvind Kumar Gupta, learned counsel appearing for the petitioners would contend that the impugned notification dated 21st July 2010 issued in exercise of Section 6 of DSPE Act does not serve any public purpose as it was with sole motive to protect the corrupt persons. Mr. Gupta would further contend that on conjoint reading of Sections 5 and 6 of DSPE Act, there is no contemplation of classification of offences on the basis of offender. Thus, the issuance of notification is colourable exercise, which is illegal, perverse, arbitrary and mala fide. It is further urged that there was no reason to withdraw the notification all of a sudden, when the charges of corruption leveled against the public functionaries came to light. There is no rational and reasonableness in issuance of the said notification and by virtue of this notification, two separate classes have been carved out by the State of Sikkim, one is for the offence committed by Central Government servants and another is by the State Government servants. This distinction and discrimination is unreasonable, perverse and improper, as it defeats the object and purpose of the enactment. It is also contended that the Lokayukta has no power to examine the validity of the impugned notification. It is also canvassed that after establishment of Lokayukta on 27th February 2014, how the report dated 05th March of Justice Patra Commission was

submitted, when according to the State Government, Justice Patra Commission ceased to exist on creation of Lokayukta establishment on 27th February 2014. This confusion indicates that the respondents are avoiding and scuttling the issue to protect themselves. There is no provision under Section 6 of DSPE Act, empowering the State Government to withdraw the consent already given. Issuance of the notification is bad for the ground the allegations are against Council of Ministers. The State Government has no power to withdraw the consent, even under the provisions of Section 21 of the General Clauses Act, 1897 (hereinafter referred to as "the Act of 1897") as the Act of 1897 is not applicable to DSPE Act, which is a piece of conditional legislation and the exercise made under Section 6 is not reversible. To bolster up the aforestated contention, Mr. Gupta refers to and relies on the observations made by the Supreme Court in *Bangalore Medical Trust v. B.S. Muddappa and others*[3], *Maharashtra Land Development Corporation and others v. State of Maharashtra and another*[4], and *Subramanian Swamy v. Director, Central Bureau of Investigation and another*[5].

7. In oppugnation, Mr. A. Mariarputham, learned Advocate General appearing for the first respondent, would

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3 (1991) 4 SCC 54
4 (2011) 15 SCC 616
5 (2014) 8 SCC 682

contend that DSPE Act is a preconstitution legislation. Drawing a reference from Entry 39 of the Federal Legislative List of the Seventh Schedule to the Government of India Act, 1935, it is submitted that under Entry 80 of List-I (Union List) of the Seventh Schedule to the Constitution of India, Parliament is competent to frame Section 6 of the DSPE Act, which is legal within the frame work of the Constitutional Scheme. In support, he refers to a decision in *The Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal and others*[6], wherein it was observed that the investigation by the CBI could be extended to any State only with the consent of the State. It is further contended that Sections 5 and 6 have to be read and understood together. In the event, Section 6 is held to be ultra vires, Section 5 cannot be operative and be also held as invalid.

8. "Police" is a State subject and the investigation of allegation of corruption can be done by the local police also. It is further urged that after establishment of Lokayukta, in pursuance of Section 63 of the Lokpal and Lokayukta Act, 2013, the allegation of corruption has to be investigated by the Lokayukta and not by the CBI.

9. It is further submitted that the State Government is fully competent to withdraw the consent, as is done in the

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[6] 1970 (1) SCC 633

present case, vide impugned notification dated 21st July 2010. The impugned notification has been accepted by the Central Government, as is evident from the notification dated 13th April 2011, which is not the subject matter of challenge under this petition.

10. Responding to the plea of unreasonable classification, Mr. Mariarputham would submit that the Central Government employees and State Government employees form two separate classes and as such classification is valid. It is also contended that reliance of the petitioners in *Subramaniyam Swamy's* case[5] is misplaced as there was sub classification among the Central Government employees, giving a preferential treatment to some employees holding the rank of Joint Secretary and above. The Supreme Court held that the classification was unreasonable.

11. Referring to the observation made by the Supreme Court in *M.P. Special Police Establishment v. State of M.P. and others*[7], on the question of mala fide, Mr. Mariarputham would submit that the allegation of mala fide is also misplaced as there cannot be an allegation of mala fide against the Council of Ministers as a body.

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7 (2004) 8 SCC 788

12. Mr. Mariarputham would further submit that the first petitioner has withdrawn his writ petition being Writ Petition (Civil) No. 328 of 2011[8], on 08th August 2011, wherein liberty was reserved to challenge the order by which the State Government declined to give the consent to the CBI for investigation. The petitioner failed to challenge the decision of the State Government dated 09th February 2011, whereby the State Government declined to give consent. The impugned notification was the subject matter of one more petition in W.P. (C) No. 16 of 2012[9], alleging mala fide in issuance of impugned notification. The Supreme Court disposed of the writ petition on 26th August 2014 observing that it was for Lokayukta to deal with the allegations and declined the relief. The petitioner moved the Supreme Court again in a writ petition, which was withdrawn on 18th December 2014 ex-parte without referring the earlier order passed by the Supreme Court on the issue.

13. On the issue of alternative prayer, learned Advocate General would contend that in Writ Petition No. 16 of 2012[9], the relief sought for was to quash the impugned notification and also a direction to the Governor to accord sanction for prosecution

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[8] Kunga Nima Lepcha v. State of Sikkim and others

[9] Delay Namgyal Barfungpa and another v. State of Sikkim and others

and direction to the CBI to register a case and prosecute the second respondent therein. The said writ petition was disposed of on having come to know that the Lokayukta consisting a retired Chief Justice of High Court, a Judicial Member and an Administrative Member has been constituted and as such the Lokayukta was requested to deal with the allegations, declining other reliefs. As such, this Court may not sit over the Judgment of the Supreme Court. Thus, this petition deserves to be dismissed.

14. Supporting the contention put forth by the first respondent, Mr. Karma Thinlay, learned Central Government Counsel appearing for the second respondent (Union of India), submits that the impugned notification is valid in accordance with law and it has duly been accepted by the Union of India by notification dated 13th April 2011 to that effect.

15. The 3rd and 4th respondents (CBI) have categorically stated in their affidavit dated 14th November 2015 that the members of DSPE are not authorized to exercise power and jurisdiction under Section 6 of DSPE Act, in absence of the consent granted by the concerned State. Section 6 is framed in view of the legislative field reserved for Parliament under Entry

80 of List-I and the State Government is competent to exercise power of consent and as such the Section 6 of DSPE Act is neither unconstitutional not invalid or illegal. The State Government is fully empowered to withdraw its consent. The CBI, on receipt of a complaint by the first petitioner in May 2010 processed the complaint and made a request to the State Government on 12th October 2010 to grant sanction/approval for conducting investigation under Section 6 of DSPE Act, as the general consent was withdrawn vide impugned notification dated 21st July 2010, which was declined by the State Government vide letter dated 09th February 2011. Thus, no further investigation was conducted. The provisions of the Act are in accordance with the constitution and law, warranting no interference.

16. I have given anxious consideration to the submissions put forth by the learned counsel appearing for the parties, examined the pleadings and documents appended thereto.

17. DSPE Act, 1946 was enacted to constitute a special police force, to be called the Delhi Special Police Establishment for the investigation, in any Union Territory, of offences notified under Section 3. Section 3 deals with the offences to be investigated by special police establishment. Section 5

prescribes for extension of powers and jurisdiction of special police establishment to other areas, which reads as under: -

> "Extension of powers and jurisdiction of special police establishment to other areas.—
>
> (1) The Central Government may by order extend to any area (including Railway areas), 1[in 2[a State, not being a Union territory]] the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under section 3.
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> (2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject of any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police force.
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> (3) where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

18. Section 6, which was inserted with effect from 6th March 1952, provides for consent of the State Government to exercise powers and jurisdiction, reads as under: -

> "6. Consent of State Government to exercise of powers and jurisdiction.— Nothing contained in section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union territory or railway area, without the consent of the Government of that State."

19. Constitutionality of Section 6, wherein the State Government has power to grant consent for investigation of offence by DSPE is assailed in this petition. Article 245 of the Constitution of India empowers Parliament and the Legislature of the States to make laws. Parliament is competent to make laws for the whole or any part of the territory of India. Article 246 of the Constitution contemplates that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.

20. Entry 80 of the Union List in the Seventh Schedule provides for extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, with the consent of the Government of that State. Entry 80 of List I – Union List reads as under: -

> "80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State."

21. Entry 2, List II-State List, deals with 'police', as the subject matter of the State. The DSPE is a police force belonging to any State from its inception within the meaning of Entry 80 of Union List of the Seventh Schedule, corresponding to Entry 39 of the federal legislative list of Seventh Schedule to the Government of India Act, 1935. The issue came up for consideration in *Management of the Advance Insurance Co. Ltd. v. Shri Gurudasmal, Supdt. of Police and others*[10] before a Division Bench of the Delhi High Court, wherein it was held that DSPE is a Central Government Police Force. The Delhi High Court held as under: -

> "14. …… We have already stated that the Delhi Special Police Establishment was a Central Government Police Force. It, however, belonged to Delhi inasmuch as it was constituted and functioned in Delhi. In respect of its political or governmental character, it was under the control of the Central Government. In respect of its constitution and functioning, it was located in Delhi. Therefore, the words "for the State of Delhi" or "for the Chief Commissioner's

[10] AIR 1969 Delhi 330

> Province of Delhi" which existed in the Act prior to the amendment of 1952 had never meant that the Delhi Special Police Establishment was a police force of the State of Delhi or of the Chief Commissioner's Province of Delhi in the sense that it was under the control of the Chief Commissioner of the Part C State of Delhi or of the Chief Commissioner's Province of Delhi. Therefore, the substitution of the words "in Delhi" for the words "for the State of Delhi" did not in any way change the constitution and the functioning or the nature of the Delhi Special Police Establishment. They remained the same."

22. It is a trite law that the entries in the various lists of the Seventh Schedule are not source of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate. It is apposite to refer to observations made by the Supreme Court in various cases.

23. In *Harakchand Ratanchand Banthia and others vs. Union of India and others*[11], a Constitution Bench of the Supreme Court held as under:

> "8. Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate Legislatures by Article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate Legislatures can operate. It is well-established that the widest amplitude should be given to the language of the entries. But some of the entries in the

[11] 1969 (2) SCC 166

> different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about a harmonious construction. ……"

24. In *Union of India vs. Shri Harbhajan Singh Dhillon*[12], the Supreme Court held as under:

> "22. It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field. ……"

25. Subsequently, in *Synthetics and Chemicals Ltd. and others vs. State of U.P. and others*[13], again a Constitution Bench observed as under:

> "67. …… It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any

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12 1971 (2) SCC 779
13 (1990) 1 SCC 109

> limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. ……"

26. The true nature and character of legislation is determined to which Entry it belongs, in its pith and substance. The Supreme Court in *Southern Pharmaceuticals and Chemicals, Trichur and others v. State of Kerala and others*[14] observed as under: -

> "13. In determining whether an enactment is a legislation "with respect to" a given power, what is relevant is not the consequences of the enactment on the subject-matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject-matter in question. ……"

27. A Constitution Bench of the Supreme Court examining the scope and jurisdiction of DSPE in *The Management of Advance Insurance Co. Ltd.*[6] , held as under:

> "12. This entry speaks of a "police force belonging to any State" and not of a police force belonging to the Union Territory. The adaptation of the Delhi Special Police Establishment Act by the Adaptation of Laws (No. 3) Order, 1956 by substituting "Union Territories" in place of "Part C States", it is said, cut the Act adrift from the entry under which the power could alone be exercised. This power is limited in extent, it is argued,

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14 *(1981) 4 SCC 391*

and cannot be used except as specifically conferred and it applies to a police force belonging to a State and not Union Territory. In reply the provisions of the General Clauses Act, as adapted by Adaptation Order (No. 1) were brought to our notice. Section 3(58) of the General Clauses Act was adapted to read:

> "State—
>
> (*a*) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and
>
> (*b*) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."

Previously the definition read:

> "State shall mean a Part A State, a Part B State or a Part C State."

This definition furnishes a complete answer to the difficulty which is raised since Entry 80 must be read so as to include Union Territory. Therefore members of a police force belonging to the Union Territory can have their powers and jurisdiction extended to another State provided the Government of that State consents. ……"

(emphasis supplied)

28. Again in *A.C. Sharma v. Delhi Administration*[15] the extension of power under DSPE Act was examined, wherein the Supreme Court held as under: -

> "13. ……
>
> Section 3 which empowers the Central Government to specify the offences to be investigated by the DSPE. has already been

[15] (1973) 1 SCC 726

set out. The notification dated November *6,* 1956, referred to earlier specifies numerous offences under various enactments including a large number of ordinary offences under IPC clauses (*a*) to (*j*) of this notification take within their fold offences under a number of statutes specified therein. Clause (*k*) extends the sweep of this notification by including in its scope attempts, abatements and conspiracies in relation to or in connection with offences mentioned in clauses (*a*) to (*h*) and also any other offence committed in the course of those transactions arising out of the same facts. It may also be stated that after 1956 in a number of further notifications the list of the offences specified under Section 3 has increased manifold. We consider it unnecessary to refer to them in detail. According to Section 4 the superintendence of DSPE vests in the Central Government and Section 5 empowers the Central Government to extend to any area in a State not being a Union Territory the powers and jurisdiction of members of this establishment for the investigation of any offences or classes of offences specified under Section 3. Subject to the orders of the Central Government the members of such Establishment exercising such extended powers and jurisdiction are to be deemed to be members of the Police force of that area for the purpose of powers, functions, privileges and liabilities. But the power and jurisdiction of a member of DSPE in such State is to be exercised only with the consent of the Government of the State concerned. The scheme of this Act does not either expressly or by necessary implication divest the regular police authorities of their jurisdiction, powers and competence to investigate into offences under any other competent law. As a general rule, it would require clear and express language to effectively exclude as a matter of law the power of investigation of all the offences mentioned in this notification from the

> jurisdiction and competence of the regular police authorities conferred on them by CrPC and other laws and to vest this power exclusively in the DSPE. The DSPE Act seems to be only permissive or empowering, intended merely to enable the DSPE also to investigate into the offences specified as contemplated by Section 3 without imparting any other law empowering the regular police authorities to investigate offences."

29. Section 6 of DSPE Act is constitutional and valid, as Parliament is competent to enact such a provision as stated under Entry 80 of List I-Union List, prescribing power to grant consent for the concerned State Government, to enable a member of DSPE to exercise powers and jurisdiction in any area in the State. Under the legislative scheme, Parliament has no competence to extend power and jurisdiction of DSPE to any other State without consent of the concerned State.

30. The next issue is as to whether the impugned notification dated 21st July 2010 is illegal or invalid. Indisputably, the State Government has granted consent to the extension of powers and jurisdiction to a member of DSPE in the whole of State for investigation of offences punishable under different provisions of the Penal Code, referred thereto, vide letter dated 20th October 1976, which was further extended to the offences provided under letter dated 10th July 1979 and further by order dated 24th December 1983, consent was

accorded for investigation of offences punishable under Section 22, 23 and 25 of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976). Vide order dated 28th June 1984, further offences punishable under Section 4 and 5 of the Anti-Hijacking Act, 1982 (65 of 1982) was brought within the schedule of consent granted by the State Government. Again by order dated 10th December 1984, some more offences were included in the schedule.

31. All the consent granted earlier for investigation of various offences as provided therein was withdrawn vide notification dated 07th January 1987, which came to be assailed in the Supreme Court in Writ Petition (Civil) No. 313 of 1993[1]. The Supreme Court upheld the power of the State to withdraw the consent by notification dated 07th January 1987, clarifying that the notification would operate only prospectively and the same would not apply to the cases wherein consent was available prior thereto. Thereafter, the consent granted earlier vide various letters and orders were revived vide notification dated 2nd July 1994. The first petitioner along with others moved the Supreme Court under Article 32 of the Constitution of India in Writ Petition (Civil) No. 353 of 2006[2] seeking a direction to the CBI to investigate the allegations leveled against the founder President of Sikkim Democratic Front (SDF) who has been the serving Chief Minister of the State of Sikkim since 12th December

1994. The Supreme Court while dismissing the writ petition vide order dated 25th March 2010, observed that the petitioner may approach the investigating agency directly with the incriminating materials before approaching the Court.

32. On the heels of, the impugned notification came to be issued on 21st July 2010, which reads as under:

" SIKKIM
GOVERNMENT GAZETTE
EXTRA ORDINARY
PUBLISHED BY AUTHORITY

GANGTOK WEDNESDAY 21TH JULY 2010 No.355

GOVERNMENT OF SIKKIM
HOME DEPARTMENT
GANGTOK

No. 70/HOME/2010 Date: 21.07.2010

NOTIFICATION

In order to have uniformity with the other States in the matter of investigation of cases by the members of the Delhi Special Police Establishment, the Governor of Sikkim, in exercise of the powers, conferred by Section 6 of the Delhi Special Police Establishment Act, 1946 (Act No. 25 of 1946), and in supersession of all previous notifications on the subject, is pleased to accord his consent to all members of the Delhi Special Police Establishment to exercise powers and jurisdiction under the said Act in the whole of the State of Sikkim in respect of the investigation of the following:

(a) Offences committed by public servants employed in connection with the affairs of the Government of India and persons employed in connection with the affairs of any local authority subject to the control of the Government of India

or any corporation, company or bank owned or controlled by the Government of India: -

(i) punishable under Sections 120B, 124-A, 166, 167, 168, 169, 171E, 171F, 182, 193, 196, 197, 198, 199, 200, 201, 204, 211, 218, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 263-A, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 403, 406, 407, 408, 409, 411, 412, 413, 414, 417, 418, 419, 420, 465, 466, 467, 468, 471, 472, 473, 474, 475, 476, 477-A, 489-A, 489-B, 489-C, 489-D, 489-E, 500, 501, 502 and 505 of the Indian Penal Code, 1860 (Act No. 45 of 1860);

(ii) punishable under the Prevention of Corruption Act 1947 (Act No. 2 of 1947) and the Prevention of Corruption Act, 1988 (Act No. 49 of 1988);

(iii) attempts, abetments and conspiracies in relation to, or in connection with, the offences mentioned in clauses (i) and (ii) above.

(b) Offences punishable under the Central Acts specified in the Annexure appended thereto.

Provided that where public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim are concerned in offences referred to in items (a) (i) to (iii) and (b) above, the prior consent of the State Government shall be obtained for the investigation of any such offence by the Delhi Special Police Establishment.

By order of the Governor of Sikkim.

Sd/-
(TT Dorji), IAS

Chief Secretary
F. No. GOS/Home-II/84/18

(C.M. Sharma)
Addl. Secretary (C),
Home department ”

33. Needless to state that on receipt of the complaint from the first petitioner, a request was made to the State Government for grant of consent to initiate formal investigation into the matters on 12th October 2010 (Annexure P-11) which was declined on 04th November 2010 (Annexure P-12). One more request was made on 20th December 2010 by the CBI. The State Government again declined to give consent on the ground that Justice R.K. Patra Commission has been appointed vide notification dated 07th January 2011 to examine the allegations and as such it was not necessary to give consent. It has come on record that feeling aggrieved, the first petitioner again preferred a writ petition being Writ Petition (Civil) No. 328 of 2011[8], in the Supreme Court, which was dismissed as withdrawn reserving the liberty to the petitioner to file another petition to challenge the order of the Government of Sikkim whereby the consent was declined. It is pertinent to state here that no petition to assail the order of the State Government to decline consent was filed. In the meantime, one Delay Namgyal Barfungpa with Pema D. Bhutia preferred writ petition, being Writ

Petition (Civil) No. 16 of 2012[9] against the State and the present Chief Minister of Sikkim in the Supreme Court, assailing the legality and validity of the instant impugned notification dated 21st July 2010. Further seeking a direction to the Governor of the State of Sikkim to accord necessary sanction and in alternative issue a direction to the CBI to register a regular case and prosecute the second respondent therein. The relevant clause in the petition reads as under:

> "a) Issue an appropriate writ order or direction quashing the notification dated 21-7-2010 issued by the State of Sikkim so far as it mandates prior consent of the State Government against the public servant employed with the affairs of the State Government in respect of offences under Prevention of Corruption Act, 1988;
>
> b) Call for the records and quash by a writ in the nature of certiorari or any other appropriate writ order or direction, the undisclosed decision of the Government of Sikkim referring prior consent for investigation to the request of the CBI contained in letter dated 12-10-2010 (i.e. Annexure P-6);
>
> c) Issue an order or direction to the Governor of the State of Sikkim in the nature of mandamus to accord necessary sanction for the prosecution of the respondent No. 2;
>
> d) In the alternative issue an order or direction in the nature of Mandamus directing the respondents No. 4 and 5 to register regular cases and prosecute the respondent No. 2 and others as mentioned in the CBI report forwarded vide letter dated 12-10-2010;
>
> e) Grant such other relief/reliefs and pass such other order/orders as this Hon'ble court

> may deem fit and proper in the circumstances of the case."

34. The Supreme Court disposed of the writ petition recording that since the Lokayukta for Sikkim has been established, the papers in possession of the Justice Patra Commission against the second respondent therein was transmitted to the Lokayukta, it was not necessary to consider the prayer made in the writ petition. The Lokayukta was requested to complete the inquiry as early as possible.

35. It is apposite to state that such allegations are pending consideration before the Lokayukta, which is headed by retired Chief Justice of a High Court. In such a situation, whether it is proper for this Court to examine the validity of impugned notification which was the subject matter before the Supreme Court in Writ Petition (Civil) No. 16 of 2012[9] and the Supreme Court declined to examine the same, on account of the fact that the allegations made against the second respondent and others were pending examination by Lokayukta. Subsequently, the petitioner herein filed one more petition, being Writ Petition (Civil) No. 1036 of 2014[16], which was withdrawn ex-parte with liberty to approach the High Court.

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[16] Shri Kunga Nima Lepcha & others v. The State of Sikkim & others

36. Learned Advocate General has categorically pointed out that subsequent petition being Writ Petition (Civil) No. 1036[16] of 2014 was withdrawn without disclosing that the earlier challenge before the Supreme Court was rejected as not being necessary in view of the pendency of the allegations before the Lokayukta. On perusal of the writ petition, it appears that it was stated in the writ petition that the earlier writ petition, filed for the same relief, was not considered, however, it is not clear as to whether it was brought into the notice of the Hon'ble Supreme Court or not, when petition was withdrawn, ex-parte.

37. The Act of 1897 is applicable to all enactments in all situations unless there is anything repugnant in the subject or context. DSPE Act does not exclude applicability of the Act of 1897 in any context. Competence of the State Government to accord consent or withdraw the same cannot be doubted. Section 21 of the Act of 1897 is in the following terms:

> "**21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.**- Where, by any Central Act or Regulations a power to issue notifications orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

38. Under Section 21 of the Act of 1897, the authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. The Supreme Court, examining the ambit and scope of Section 21 of the Act of 1897, in *Rasid Javed v. State of Uttar Pradesh*[17], held as under:-

> "55. The aforesaid provision came up for consideration before the Constitution Bench of this Court in *Kamla Prasad Khetan* v. *Union of India* [AIR 1957 SC 676] way back in 1957. The majority opinion stated: (AIR p. 685, para 19)
>
> > "*19*. … It is to be remembered that Section 21 of the General Clauses Act embodies a rule of construction, and that rule must have reference to the context and subject-matter of the particular statute to which it is being applied;"
>
> 56. It seems to be fairly settled that under Section 21 of the General Clauses Act, an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in the like manner. ……"

39. Further, it was reiterated in *Shree Sidhbali Steels Ltd. v. State of Uttar Pradesh*[18], as under: -

> "38. Section 21 is based on the principle that power to create includes the power to destroy and also the power to alter what is created. Section 21, amongst other things, specifically

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17 (2010) 7 SCC 781

18 (2011) 3 SCC 193

> deals with power to add to, amend, vary or rescind the notifications. The power to rescind a notification is inherent in the power to issue the notification without any limitations or conditions. Section 21 embodies a rule of construction. The nature and extent of its application must be governed by the relevant statute which confers the power to issue the notification, etc. However, there is no manner of doubt that the exercise of power to make subordinate legislation includes the power to rescind the same. This is made clear by Section 21. On that analogy an administrative decision is revocable while a judicial decision is not revocable except in special circumstances. Exercise of power of a subordinate legislation will be prospective and cannot be retrospective unless the statute authorises such an exercise expressly or by necessary implication.
>
> 39. The principle laid down in Section 21 is of general application. The power to rescind mentioned in Section 21 is without limitations or conditions. It is not a power so limited as to be exercised only once. The power can be exercised from time to time having regard to the exigency of time. When by a Central Act power is given to the State Government to give some relief by way of concession and/or rebate to newly-established industrial units by a notification, the same can be curtailed and/or withdrawn by issuing another notification under the same provision and such exercise of power cannot be faulted on the ground of promissory estoppel."

40. In the light of the aforestated well-settled principles of law, I have no hesitation to hold that the State Government has power to give consent under the valid provision of law and also to withdraw the same. Withdrawal of consent to initiate an

investigation is not final and it may be granted in any specific offence in future at any point of time or can be withdrawn. In the case on hand, request for consent was made after the State Government had withdrawn the general consent given vide earlier notifications. The impugned notification is valid and proper and was exercised within the full competence of the State Government.

41. The petitioners have further raised the issue of mala fide against the Council of Ministers chaired by the Chief Minister, who has approved the issuance of impugned notification. It is a trite law that mala fide cannot be attributed to an institution, the members of Council of Ministers without impleading them by name and person. In the case on hand, mala fide is attributed without setting out details and without impleading any one in the case, as party. Thus, the allegation of mala fide cannot be countenanced.

42. In *M.P. Special Police Establishment v. State of M.P. and others*[19], the Supreme Court held as under: -

> "25. On the same analogy in the absence of any material brought on record, it may not be possible to hold that the action on the part of the Council of Ministers was actuated by any malice. So far as plea of malice is concerned, the same must be attributed personally against the person concerned and not

[19] (2004) 8 SCC 788

> collectively. Even in such a case the persons against whom malice on fact is alleged must be impleaded as parties."

43. In *State of M.P. and others v. Nandlal Jaiswal and others*[20], the Supreme Court held as under:

> "39. ..... It is true that in the writ petitions the petitioners used words such as 'mala fide', 'corruption' and 'corrupt practice' but the use of such words is not enough. What is necessary is to give gull particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. ....."

44. Again in *State of Bihar and another v. P.P. Sharma, IAS and another*[21], the Supreme Court observed as under:

> "55. It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise, it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. ....."

45. In *J.N. Banavalikar vs. Municipal Corporation of Delhi and another*[22], the Supreme Court held as under:

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20 (1986) 4 SCC 566
21 1992 Supp (1) SCC 222
22 1995 Supp (4) SCC 89

> "21. …… Further, in the absence of impleadment of the junior doctor who is alleged to have been favoured by the course of action leading to removal of the appellant and the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. 'malice in fact' should not be countenanced by the court. ……"

46. In *Federation of Railway Officers Association and others v. Union of India*[23], the Supreme Court observed as under:

> "20. …… Allegations regarding mala fides cannot be vaguely made and it must be specific and clear. It this context, the Minister concerned who is stated to be involved in the formation of the new zone at Hajipur is not made a party who can meet the allegations."

47. An alternative relief to issue an order or direction to the 3rd and 4th respondents (CBI) to register an FIR regular case and prosecute the persons indicted in report dated 12th October 2010, was sought to be made subsequently by amendment application dated 30th May 2017. In view of the order dated 08th August 2011 rendered in Writ Petition (Civil) No. 328 of 2011[8] by the Supreme Court, wherein specific prayer was made for a direction to the CBI in the same nature as sought for herein, it is not proper to consider and grant alternative prayer at this stage, when in pursuance of Section 63 of the Lokpal and Lokayuktas Act, 2013, the Sikkim Lokayukta Act, 2014 has been notified on 27th February 2014. The Lokayukta, comprising

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[23] (2003) 4 SCC 289

of a Chairperson, a retired Chief Justice of a High Court and two Members, have been properly constituted. Further, the allegations, as referred in the report dated 12th October 2010 is under examination by the Lokayukta, as observed by the Supreme Court in its order rendered in Writ Petition (Civil) No. 328 of 2011[8]. The Sikkim Lokayukta Act provides for constitution of an Inquiry Wing as well as Prosecution Wing, fully competent to inquire into the allegations and initiate prosecution, if necessary.

48. In *Bangalore Medical Trust*[3] cited by Mr. Gupta, interpretation of Section 19 of the Bangalore Development Authority Act, 1976 was involved, wherein power was exercised in absence of jurisdiction, the Supreme Court observed that the authority exercising discretion must not appear to be impervious to legislative directions. In the case on hand, the power was exercised well within the competence, permissible under enactment i.e. DSPE Act. Thus, the ratio is not applicable to the facts involved in the case on hand.

49. In *Maharashtra Land Development Corporation* case[4], referred by Mr. Gupta, it was again a case wherein it was held that in the light of the legislative scheme, the disputed lands will vest with the respondent State as a private forest. The claim of

the Corporation was denied, the Supreme Court observed that the purpose of the statute and the intention of the legislature in enacting the same must be of paramount consideration while interpreting its provisions. The facts are distinguishable and the ratio laid down therein is not applicable to the facts of this case.

50. In *Subramanian Swamy's* case[5], the issue was as to whether the Central Government is competent to discriminate the employees on the basis of rank held by the officers for whom, sanction was required. Section 6-A of DSPE Act provides for prior approval of the Central Government, where such allegation relates to the employees of the Central Government of the level of Joint Secretary and above, the Supreme Court held as under:-

> "99. In view of our foregoing discussion, we hold that Section 6-A(1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to: (a) the employees of the Central Government of the level of Joint Secretary and above, and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26(c) of Act 45 of 2003 to that extent is also declared invalid."

declaring the provision as invalid.

51. In the case on hand, there is no such classification between the employees of different cadre, as consent is required for extension of power and jurisdiction of DSPE in case of all the Sikkim Government employees or other public servants employed in connection with the affairs of the Government of Sikkim and persons employed in connection with the affairs of any authority subject to the control of the Government of Sikkim or any corporation, company or bank owned or controlled by the Government of Sikkim. Thus, the ratio laid down by the Supreme Court in the case is not applicable to the facts of this case.

52. The local police as well as members of DSPE have concurrent jurisdiction to investigate an offence, but in case of members of DSPE, prior consent of the State Government is necessary.

53. For the reasons and analysis made hereinabove, the petition is bereft of merit and deserves dismissal.

54. As a sequel, the writ petition is dismissed. Costs made easy.

Chief Justice
06.10.2017

Approved for Reporting : Yes/~~No~~.
jk Internet : Yes/~~No~~.