REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 59 OF 2013

Association of Old Settlers of Sikkim and Ors. …Appellant(s)

Versus

Union of India and Anr. …Respondent(s)

WITH

WRIT PETITION (C) NO. 1283 OF 2021

Rapden Lepcha and Ors. …Appellant(s)

Versus

Union of India and Anr. …Respondent(s)

J U D G M E N T

M.R. SHAH, J.

1. By way of this writ petition under Article 32 of the Constitution of India, the respective writ petitioners – Association of Old Settlers of Sikkim and Others have prayed for an appropriate writ, direction or order

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striking down Section 10(26AAA) of the Income Tax Act, 1961 (hereinafter referred to as the "Act, 1961"), more particularly, the definition of "Sikkimese" in Section 10 (26AAA) to the extent it excludes Indians who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975. The petitioners have also prayed for an appropriate writ, order or direction striking down the Proviso to Section 10(26AAA) of the Act, 1961, insofar as it excludes from the exempted category, "Sikkimese women" who marries a non-Sikkimese after 01.04.2008.

2. Section 10(26AAA), the vires of which is under challenge reads as under:-

> "[(26AAA) in case of an individual, being a Sikkimese, any income which accrues or arises to him-
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> (a) from any source in the State of Sikkim; or
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> (b) by way of dividend or interest on securities:
>
> Provided that nothing contained in this clause shall apply to a Sikkimese woman who, on or after the 1st day of April, 2008, marries an individual who is not a Sikkimese.
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> Explanation.- For the purposes of this clause, "Sikkimese" shall mean-
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> (i) an individual, whose name is recorded in the register maintained under the Sikkim Subjects Regulation, 1961 read with the Sikkim Subject

Rules, 1961 (hereinafter referred to as the "Register of Sikkim Subjects"), immediately before the 26th day of April, 1975; or

(ii) an individual, whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No.26030/36/90-I.C.I., dated the 7th August, 1990 and Order of even number dated the 8th April, 1991; or

(iii) any other individual, whose name does not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individual's father or husband or paternal grand-father or brother from the same father has been recorded in that register;"

3. It is the case on behalf of the respective writ petitioners that by excluding the Indians from the definition of Sikkimese, the exemption granted under Section 10(26AAA) of the Act 1961, is not available to the Indian Settlers resulting in discrimination. There is no valid ground for discriminating against this section of the residents of Sikkim alone. Therefore, it is the case on behalf of the writ petitioners that exclusion of Indians who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 and consequently not granting the exemption granted under Section 10(26AAA) of the Act, 1961 to the class of Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 is arbitrary, discriminatory and the differentia do not have a rational nexus to the object sought to be achieved by the Statute

in question. It is also the case on behalf of the writ petitioners in Writ Petition No. 59 of 2013 that Proviso to Section 10(26AAA), insofar as it excludes from the exempted category, “Sikkimese women” who marries a non-Sikkimese after 01.04.2008, is discriminatory and violative of Articles 14, 15 and 21 of the Constitution of India as the exclusion is based on gender.

4. Before dealing with and/or considering the rival submissions, history of Kingdom of Sikkim and the chronology of dates and events, which led to enactment of Section 10(26AAA) of the Act, 1961, is required to be referred to and considered, which are as under:-

4.1 The Kingdom of Sikkim came into existence in 1642. It was ruled as an independent Kingdom for 333 years till its merger with the Union of India in 1975. Originally the Kingdom of Sikkim held a large territory ranging from parts of present-day Bhutan, Bihar, West Bengal, Nepal and Bangladesh. In the 18th and 19th Century, a lot of territory was ceded to the British Empire in various conflicts. The Imperial British Government took over the control of the erstwhile Kingdom of Sikkim in the year 1888. However, there were conflicts with China.

4.2 In 1890, a Convention was signed between Great Britain and China to settle the boundaries of Sikkim and Tibet. The British control

over Sikkim was recognized by China in the year 1890. Following British taking control of Sikkim, British Indian Subjects were allowed to hold Government employment in Sikkim.

4.3 In supersession of all earlier treaties, a fresh treaty was entered into between the British Government and the King of Sikkim in the year 1861. Under this treaty, the territory of Sikkim was restored to the King of Sikkim under certain conditions. These conditions included Article 8 under which the Government of Sikkim was to abolish all restrictions on travelers and monopolies in trade between the British territories and Sikkim. Under the said treaty, British subjects were permitted to trade, reside and travel through Sikkim. Many Indians came to reside in Sikkim over the years. Except for the fact that they could not hold lands in rural areas, the Indians and other foreigners who settled in Sikkim were treated equally with the original inhabitants of Sikkim.

4.4 The Sikkim Income Tax Manual, 1948 was promulgated by the Ruler of Sikkim (the Chogyal) in the year 1948. Under the said Manual, all persons engaged in business were subjected to tax irrespective of their origin. The India-Sikkim Peace Treaty was entered into on 05.12.1950 and under this Treaty Sikkim was to be the protectorate of India as per Article VII of the said treaty. It appears that in order to check the influx of foreigners into Sikkim, the Ruler of Sikkim (the

Chogyal) promulgated the Sikkim Subject Regulations, 1961 on 03.07.1961. Under the said Regulations: (a) the persons falling under Clause 3 of the Regulations were to be entered as a “Sikkim Subject” in the Register; and (b) Persons who were citizens of another country were not to be registered as a “Sikkim Subject” unless he relinquishes the citizenship of the other country. The term 'Sikkim Subject' was defined as a person who was born in the territory of Sikkim and was resident therein and similarly situated persons, but however with a caveat that "a person shall not be a “Sikkim Subject” under this section, unless he makes a declaration that he is not a citizen of any other country at the time of inclusion of his name in the register of “Sikkim Subjects". Because of this caveat, an Indian citizen whose ancestors had settled down in Sikkim for generations, had to give up his citizenship of India, for the purpose of converting himself into a “Sikkim Subject”.

4.5 It appears that some of the families/persons like the members of the petitioners’ Association, even though their forefather and they were residents of Sikkim for years together, did not surrender their citizenship of India and, therefore, their names were not registered as “Sikkim Subject” in the register maintained under the Sikkim Subjects Regulations, 1961.

4.6 By way of the Constitution 36th Amendment Act 1975, Sikkim was made a full-fledged State of India and was included in Entry 22 of Schedule I to the Constitution of India. Article 371-F was also inserted in the Constitution under which it was, inter alia, open to the President or the Parliament to extend any law to the State of Sikkim, or repeal any existing law of Sikkim.

4.7 On 21.06.1975, the Home Department issued a notification stating that "all Sikkim Subjects (under the Sikkim Subjects Regulations, 1961) before 26.04.1975 were to be deemed Indian citizens". Therefore, this effaced the distinction between the persons of Indian origin residing in Sikkim (without giving up Indian Citizenship) and others who had taken up Sikkimese Citizenship.

4.8 Since a large number of eligible persons had been left out of the Sikkim Subject Register and were consequently denied Indian citizenship, Government of Sikkim issued a Memorandum that for the purposes of seeking employment, those claiming to be "Locals" should be able to show whether their parents' names are maintained on or before 15.05.1975 in the relevant Government Register. In the year 1980, notification was issued that domicile/ residential certificate issued by sources, other than District Collector, shall not be accepted as valid.

4.9 In the year 1988, a petition was moved in the Lok Sabha by a few MLAs of Sikkim stating that at the time of merger of Sikkim with India, only those people whose names were registered in the Sikkim Subject Register in 1961 were made Indian Citizens, but there were many other stateless persons who were present in Sikkim between the period 1946 and 1975 who were otherwise by the reason of their residence, domicile and allegiance, "Sikkimese", and they should also be made Indians. The Government of India conceded to this demand and an exercise was carried out to grant Indian Citizenship to those so-called stateless people who were deemed to have been genuinely omitted.

4.10 In the year 1989, the Sikkim Citizenship (Amendment) Order 1989 was notified wherein a proviso was created to deem such cases of genuine omission as citizens of India. It appears that the principal beneficiaries of the said Amendment were those who had migrated to Sikkim post 1946 and were therefore not even eligible for being on the Sikkim Subject Register.

4.11 That thereafter the Government of India formed a Committee consisting of its officers and officers of the Sikkim Government and certain guidelines were made to decide who the persons were, who were omitted by mistake from being entered into the “Sikkim Subjects Register”. However, these guidelines, did not apply to persons of Indian

origin as they were already Indian citizens, but only to those "non-Sikkimese Subjects" who were to be made Indian citizens.

4.12 Subsequently, vide Government of India's Order dated 07.08.1990 and 08.04.1991, a total of 73,431 were granted Indian Citizenship on the basis that it was found that these persons were eligible to have been included in the "Sikkim Subjects Register".

4.13 That in the year 1989 and w.e.f. 26.07.1989, the Indian Income Tax Act, 1961 was extended to Sikkim by the Finance Act, 1989. Under the said amendment, any law corresponding to the Income Tax Act, 1961, which was in force in the State of Sikkim stood repealed.

4.14 That the State of Sikkim filed a Suit before this Court challenging the extension of the Income Tax Act, 1961 to the State of Sikkim, however, the same came to be withdrawn subsequently.

4.15 In the year 1985, the Government of India, vide an amendment to the Income Tax Act, 1961 in the Finance Act, 1994, proposed an exemption from Income Tax to the Schedule Tribes in Sikkim as was being done in regard to other states. The same was opposed by the lone M.P. of Sikkim.

4.16 Thereafter, the Government of India and the Government of Sikkim formed a joint committee consisting of the members from the Central Government and Government of Sikkim to resolve the differences for implementation of the Income Tax Act, 1961 in Sikkim. It appears that while discussing the matters relating to implementation of the Income Tax Act, 1961 to the State of Sikkim, the committee representing the State Government of Sikkim insisted on exemption for persons holding the Sikkim Subjects Certificate and their descendants and were made Indian Citizens vide the Sikkim Citizenship Amendment Order, 1989. It appears that these two categories essentially consisted of the Bhutia Lepchas, Sherpas and the Nepalis who constituted together about 94.6% of the total population. Discussions were held for four long years to secure exemptions to Sikkim Subjects Certificate holders and the people made citizens of India vide the Government of India orders dated 07.08.1990 and 08.04.1991 and their descendants.

4.17 That in the year 2008, the Government of India, gave in to the demands of the State of Sikkim, and passed an amendment to the Income Tax Act, by the Finance Act, 2008, wherein Clause 26AAA was introduced in Section 10 of the Income Tax Act, and the persons of Indian origin in Sikkim were treated differently from the Sikkim subjects and persons who had become citizens of India by the Sikkim Citizenship

Amendment Order 1989. Clause 26AAA to Section 10 of the Income Tax Act, 1961 granted an exemption to "Sikkimese" people. However, the Explanation to Clause 26AAA defined the term "Sikkimese" as follows:

> "For the purposes of this Clause, "Sikkimese" shall mean:-
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> (i) an individual, whose name is recorded in the register maintained under the Sikkim Subjects Regulations, 1961 read with the Sikkim Subject Rules, 1961 (hereinafter referred to as the "Register of Sikkim Subjects", immediately before the 26th day of April, 1975; or
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> (ii) an individual, whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No. 26030/36/90 - I.C.I. dated the 7th August, 1990 and Order of even number dated the 8th April, 1991; or
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> (iii) any other individual, whose name does not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that register;"

4.18 It appears that in view of Section 10(26AAA) of the Income Tax Act, 1961, effectively 94% of the residents of Sikkim are exempted from payment of Income Tax under the Income Tax Act, 1961. However, 5% of the residents of Sikkim of which about 1% are the people like the petitioners, who, as such are also the bona fide settlers of Sikkim, are being singled out from exemption from payment of income tax on the

sole ground that they are not recorded in the register under the Sikkim Subjects Regulation 1961. It appears that approximately 500 such families are affected by the definition of the "Sikkimese".

4.19 It appears that various representations were made against such a discriminatory treatment by the Petitioners to the Government of Sikkim as well as the Union Finance Minister time and again. In the year 2009, the Government of Sikkim appointed a Committee to look into the grievances of the petitioners' Association. The Committee made certain recommendations, which shall be dealt with hereinbelow.

4.20 As observed hereinabove, as per Proviso to Section 10(26AAA) "a Sikkimese women who marries a non-Sikkimese after 01.04.2008" is excluded for getting the benefit of exemption under Section 10(26AAA).

5. Feeling aggrieved and dissatisfied with the definition of "Sikkimese" in Section 10(26AAA) to the extent it excludes Indians (having Indian citizenship), who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 and thereby not granting the benefit of exemption under Section 10(26AAA) of the Income Tax Act to such Indians and being aggrieved by the Proviso to Section 10(26AAA), insofar as, it excludes from the exempted category "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008", the present writ

petitioners have prayed to strike down Section 10(26AAA) to the extent it excludes Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 and insofar as it excludes from the exempted category “a Sikkimese woman, who marries a non-Sikkimese after 01.4.2008, being arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

6. Shri K.V. Viswanathan, learned Senior Advocate has appeared on behalf of the writ petitioners in Writ Petition (C) No. 59 of 2013. Ms. Pooja Dhar, learned counsel has appeared on behalf of the writ petitioners in Writ Petition (C) No.1283 of 2021. We have heard the learned counsel appearing on behalf of the intervenors in I.A. No. 153446 of 2018 filed in Writ Petition (C) No. 59 of 2013. Shri N. Venkataraman, learned ASG has appeared on behalf of the Revenue – Union of India and Shri Vivek Kohli, learned Advocate General has appeared on behalf of the State of Sikkim.

7. Learned counsel appearing for the respective writ petitioners/intervenors have challenged the *vires* of Section 10(26AAA) of the Income Tax Act to the extent it excludes Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 and more particularly, the definition of “Sikkimese” in Section 10(26AAA) of the Income Tax Act and Proviso to Section 10(26AAA) of the Income

Tax Act, insofar as, it excludes from the exempted category “a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008”, mainly on the following grounds and making the following submissions:-

(i) That the definition of “Sikkimese” in Section 10(26AAA) of the Income Tax Act to the extent it excludes Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 is discriminatory, arbitrary and unfair and it violates the fundamental rights of those Indians, who have settled in Sikkim prior to 26.04.1975 under Articles 14 and 15 of the Constitution of India;

(ii) In the definition of “Sikkimese”, the old Indian settlers of Sikkim have been excluded from the purview of the definition of "Sikkimese" and therefore are not entitled to exemption from Income Tax. It is submitted that the exemption which has been granted to 'Sikkimese" people residing in Sikkim essentially exempts 95% of the residents of Sikkim while taxing only a handful of persons including the 1% / 2% old Indian settlers;

(iii) The exclusion of the old Indian settlers from the definition of 'Sikkimese' in Clause 10(26AAA) of the Income Tax Act is clearly violative of Article 14 of the Constitution of India and

does not satisfy any of the tests laid down by this Hon'ble Court under Article 14;

(iv) It is submitted that as consistently held by this Hon'ble Court that in order to be held valid any legislation under Article 14, the classification should be reasonable and must have a nexus with the object sought to be achieved;

(v) It is contended that by way of the amendment, one single class of persons, namely, the citizens of India, are sought to be treated differently for the purpose of taxation;

(vi) It is urged that to exclude the old Indian settlers from the exemption under Section 10(26AAA) has no nexus with the object sought to be achieved to grant the exemption to the residents of Sikkim;

(vii) It is submitted that there is no reasonable classification between the residents/origins of Sikkim whose names were registered as “Sikkim Subjects” under the Sikkim Subjects Regulations, 1961 and those Indian old Sikkim settlers, whose names could not be registered as “Sikkim Subjects” as their forefathers did not surrender the Indian citizenship;

(viii) It is further submitted that after the Sikkim became part of the Union of India, all the residents of Sikkim have become the citizens of India. Therefore, being citizen of India, settled in Sikkim, all are to be treated at par. It is contended that therefore, there is no reasonable justification and/or classification to exclude those Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 solely on the ground that their names were not registered as "Sikkim Subjects" due to non-surrender of Indian citizenship at the relevant time;

(ix) It is submitted that as such, the object and purpose of Section 10(26AAA) is to grant exemption from payment of tax under the Income Tax Act to the locals/residents of Sikkim and that is the object sought to be achieved by providing exemption under Section 10(26AAA) of the Income Tax Act. It is submitted that therefore, there shall not be any further classification between the locals/residents of Sikkim, whose names have been registered as "Sikkim Subjects" in the Register maintained under the Sikkim Subjects Regulations, 1961 and those whose names could not be

and/or were not registered as “Sikkim Subjects” due to non-surrender of their Indian citizenship;

(x) It is submitted that as such all the residents of Sikkim, who have settled in Sikkim prior to the merger of Sikkim with India are all to be treated at par as they are all similarly situated and therefore the classification into different groups though similarly situated is discriminatory and violative of Article 14 of the Constitution of India. It is submitted that the classification into groups should be based on identifiable criteria, which sets apart one group from the other. It is submitted that the second condition which has to be satisfied is that such a classification of a separate and identifiable group should bear a reasonable nexus with the object and purpose sought to be achieved by that law. That in the present case, none of the above two conditions are satisfied and therefore, the classification between the two groups similarly situated would be arbitrary and hit by Article 14 of the Constitution. In support of above submission that classification between the two groups similarly situated would be arbitrary and hit by Article 14 of the Constitution, Shri Vishwanathan, learned Senior Advocate, has heavily

relied upon the decisions of this Court in the case of **D.S. Nakara Vs. Union of India, (1983) 1 SCC 305** (paras 9 to 15). He has also relied upon the observations made by this Court in paragraph 4 of the decision of this Court in the case of **State of Rajasthan Vs. Manohar Singhji, 1954 SCR 996 : AIR 1954 SC 297.**

7.1 Shri Vishwanathan, learned Senior Advocate appearing on behalf of the petitioner has further submitted that Court can remove discrimination and put the petitioners in the same class so as to do away with discrimination. It is submitted that in the present case, in order to remove the arbitrary discrimination against Indian settlers in Sikkim, the definition of "Sikkimese" in Section 10(26AAA) ought to be read to include Indians, who had settled there as on 26.04.1975. Therefore, it is prayed to treat the word "means" in the definition of "Sikkimese" as an inclusive one and include Indian settlers within this fold. Reliance is placed on the decision of this Court in the case of **Vishundas Hundumal Vs. State of M.P., (1981) 2 SCC 410.**

7.2 Learned counsel appearing on behalf of the intervenors has, in addition, also relied upon the Parliamentary Report of the Parliament of India (Rajya Sabha Committee) in the 145th Report dated 06.08.2013 recommending that the ambit of Section 10 (26AAA) of the Income Tax

Act, 1961, which exempted "Sikkimese Subjects" from payment of Income Tax should also be extended to all the Indian citizens and their descendants, who have been residing in Sikkim prior to 26.04.1975.

8. Now, so far as challenge to the Proviso to Section 10(26AAA), insofar as it excludes from the exempted category "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008" is concerned, it is vehemently submitted by Shri K.V. Vishwanathan, learned Senior Advocate that the same is discriminatory and based on gender inequality, which is wholly violative of Articles 14, 15 and 21 of the Constitution of India. It is submitted that there is no exclusion of a male Sikkim, who marries a non-Sikkimese person from the exemption granted under clause (26AAA) of Section 10 of the Income Tax Act.

8.1 It is submitted that a woman is not a chattel and has an identity of her own, and the mere factum of being married ought not to take away that identity. Reliance is placed upon the decisions of this Court in the case of **Anuj Garg & Ors. Vs. Hotel Association of India & Ors. (2008) 3 SCC 1** (paras 21, 22, 25, 26) and **G. Sekar Vs. Geetha & Ors. (2009) 6 SCC 99** (paras 52, 54), in support to the prayer to strike down and/or hold the Proviso to Section 10(26AAA) of the Income Tax Act is discriminatory and violative of Articles 14 and 21 of the Constitution of India.

9. Shri N. Venkataraman, learned ASG has tried to justify the classification by submitting that a conscious decision has been taken by the legislature/Parliament to grant the benefit of exemption to only those "Sikkim Subjects", whose names have been registered in the Register maintained under the Sikkim Subjects Regulations, 1961. It is submitted that therefore the same may not be interfered with. However, he is not in a position to justify the classification and satisfy the Court how such a classification will achieve the object and purpose of granting exemption under Section 10(26AAA) of the Income Tax Act. He is not in a position to explain and/or satisfy the Court any reasonable differentia and/or justification to exclude the Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 from the purview of Section 10(26AAA) of the Income Tax Act. He is also not in a position to satisfy the distinguishing features and/or the intelligible differentia, which distinguishes the persons, who are left out of the group namely, the Old Indian Settlers, who have settled in Sikkim prior to the merger of Sikkim with India and with that of the "Sikkim Subjects" registered under the Sikkim Subjects Regulations, 1961.

9.1 Shri Venkataraman, learned ASG is also not in a position to justify the Proviso to Section 10(26AAA) insofar as it excludes from the

exempted category, “a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008”.

10. Shri Vivek Kohli, learned Advocate General appearing on behalf of the State of Sikkim has as such supported the objections.

10.1 It is submitted on behalf of the State that the State has no objection if the Proviso to Section 10(26AAA) depriving the right of a “Sikkimese woman” to exemption from payment of Income Tax under Section 10(26AAA) upon her marriage to a non-Sikkimese after 01.04.2008 is struck down and/or is done away with so as to treat them equally in the matter of income tax exemption.

10.2 Now, so far as, the right of the old Indian settlers to pray for the exemption under Section 10(26AAA) of the Income Tax Act is concerned, it is submitted on behalf of the State that the benefit of Section 10(26AAA) has to be extended to all Indian citizens domiciled in the State of Sikkim irrespective of the fact whether their names have been registered as “Sikkim Subjects” in the “Sikkim Subjects Register” maintained under the Sikkim Subjects Regulations, 1961 or not.

11. Heard the learned counsel for the respective parties at length.

12. The challenge in the present petitions under Article 32 of the Constitution of India is :-

(i) The definition of "Sikkimese" in Section 10(26AAA) to the extent it excludes the Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975; and

(ii) Proviso to Section 10(26AAA) insofar as it excludes from the exempted category "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008"

13. Now, so far as the first issue is concerned, as per the definition of "Sikkimese" only those individuals, whose names are recorded in the register maintained under the Sikkim Subjects Regulation, 1961 immediately before 26.04.1975 or whose names are recorded in the Register of "Sikkim Subjects" by virtue of Government of India's Orders dated 07.08.1990 and 08.04.1991 or any other individual whose name does not appear in the Register of "Sikkim Subjects", but it is established beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that register, are considered to be eligible as "Sikkimese" for the purpose of exemption under Section 10(26AAA) of the Income Tax Act. Meaning thereby, all those Sikkimese/Old Indian Settlers in Sikkim, who might have settled in Sikkim prior to 26.04.1975 but whose names are

not registered as “Sikkim Subjects” in the register maintained under the Sikkim Subjects Regulations, 1961 are not entitled to the exemption available under Section 10(26AAA) of the Income Tax Act. At this stage, it is required to be noted that total 95% of the population of Sikkim are getting the benefit of Section 10(26AAA) of the Income Tax Act and only 5% are left out and out of which only 1% are the persons like the Old Indian Settlers, who have settled in Sikkim prior to the merger with India on 26.04.1975, but their names could not be registered as “Sikkim Subjects” like the petitioners.

13.1 It is to be noted that as such the purpose of Section 10(26AAA) is to grant exemption to the residents of Sikkim from payment of income tax under the Income Tax Act. Therefore, all such Indians/citizens, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 are to be treated at par and they form the same group/class and are entitled to the exemption under Section 10(26AAA) of the Income Tax Act. As such, there is no difference and/or distinction between those “Sikkim Subjects”, whose names are recorded in the register maintained under the Sikkim Subjects Regulations, 1961 and those Indians, who have settled in Sikkim prior to the merger of Sikkim, but whose names were not recorded as “Sikkim Subjects” in the register maintained under the Sikkim Subjects Regulations, 1961. All are “Sikkimese”. Merely because at the relevant time and when the Sikkim

Subjects Regulations, 1961 was enacted, the Indians settled in Sikkim did not surrender their Indian citizenship or their fathers/forefathers' names were not entered into the register maintained under the Sikkim Subjects Regulations, 1961, by itself, it cannot be said that they cease to be the "Sikkimese". All of them are similarly situated with those "Sikkimese" / "Sikkim Subjects", who all have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975. As observed above, the object and purpose of Section 10(26AAA) is to grant benefit of exemption from payment of income tax under the Income Tax Act to the residents of Sikkim. Therefore, there is no nexus sought to be achieved in excluding the Indians, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 but their names are not recorded as "Sikkim Subjects". The Union of India has failed to satisfy any reasonable classification and/or nexus to exclude such class of Indians, who, in fact, have settled in Sikkim prior to 26.04.1975. Therefore, exclusion of old Indian settlers, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 from the definition of "Sikkimese" in Section 10(26AAA) is arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

13.2 As observed and held by this Court in the case of **D.S. Nakara (supra)** Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation, which classification must

satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. In the present case, the exclusion of old Indian settlers, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 from the definition of "Sikkimese" in Section 10(26AAA) does not fulfill the aforesaid two conditions.

13.3 As observed and held by this Court in the case of **Manohar Singhji (supra),** Article 14 declares that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". It is observed that such an obvious discrimination can be supported only on the ground that it was based upon a reasonable classification. A proper classification must always bear a reasonable and just relation to the things in respect of which it is proposed. Judged by those criteria, it seems to us that the discrimination is based on no classification at all and is manifestly baseless, unreasonable and arbitrary.

13.4 In the present case, as observed hereinabove, the exclusion has no nexus with the object and purpose of enacting Section 10(26AAA) of the Income Tax Act to be achieved. No reasonable intelligible differentia

has been shown and therefore, the same can be termed as arbitrary. As observed and held by this Court in the case of **Shayara Bano Vs. Union of India, (2017) 9 SCC 1**, in India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. Therefore, any provision, which is arbitrary, discriminatory and violative of Article 14 of the Constitution of India and any classification which is violative of Article 14 of the Constitution of India can be struck down.

14. In view of the above and for the reasons stated above, we are of the firm opinion that Section 10(26AAA) to the extent it excludes the Old Indian settlers, who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975, but whose names are not recorded as "Sikkim Subjects", from the definition of "Sikkimese" is ultra vires, being arbitrary, discriminatory and violative of Article 14 of the Constitution of India. The definition of "Sikkimese" in Section 10(26AAA) of the Income Tax Act shall also include all Indians, who have permanently settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 irrespective of the fact that whether their names have been recorded in the register maintained under the Sikkim Subjects Regulations, 1961 or not. Therefore, it is held that the "Sikkimese" like the petitioners, who are old Indian settlers and who have settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975 shall also be entitled to the exemption under Section 10(26AAA) of the Income Tax Act, 1961.

15. Now, so far as the challenge to the Proviso to Section 10(26AAA) insofar as it excludes from the exempted category, “a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008” is concerned, there is no justification shown and/or demonstrated to exclude “a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008” from the exempted category. Apart from the above, the same is clearly hit by Articles 14, 15 and 21 of the Constitution of India. The discrimination is based on gender, which is wholly violative of Articles 14, 15 and 21 of the Constitution of India. It is to be noted that there is no disqualification for a Sikkim man, who marries a non-Sikkimese after 01.04.2008. As rightly submitted, a woman is not a chattel and has an identity of her own, and the mere factum of being married ought not to take away that identity. In the case of **G. Sekar (supra)**, it is observed and held that the exclusion of women from inheritance on the ground of gender was a clear violation of the constitutional prohibition against unfair discrimination. It is observed and held that in terms of Articles 14 and 15 of the Constitution of India, the female heirs, subject to the statutory rule operating in that field, are required to be treated equally to the male heirs. Gender equality is recognised by the world community in general in the human rights regime.

15.1 Even otherwise, there is no justification shown to exclude "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008". A Sikkimese woman, who has married a non-Sikkimese prior to 01.04.2008 is entitled to the benefit of exemption provided under Section 10(26AAA). There is no justification shown to fix the cut off date of 01.04.2008. There is no rational nexus to the object sought to be achieved by excluding "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008" and to include "a Sikkimese woman, who has married a non-Sikkimese before 01.04.2008". Therefore, to deny the benefit of exemption under Section 10(26AAA) of the Income Tax Act to "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008" is arbitrary, discriminatory and violative of Article 14 of the Constitution of India. Therefore, also, the Proviso to Section 10(26AAA) insofar as it excludes from the exempted category "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008" has to be struck down.

16. Therefore, Proviso to Section 10(26AAA) inasmuch as it excludes from the provision of exemption a Sikkimese woman merely because she marries a non-Sikkimese after 01.04.2008 is totally discriminatory and violative of Articles 14, 15 and 21 of the Constitution of India, which requires to be struck down.

17. In view of the above and for the reasons stated above, both these petitions succeed. The exclusion of Old Indian settlers, who have permanently settled in Sikkim prior to merger of Sikkim with India on 26.04.1975 from the definition of "Sikkimese" in Section 10(26AAA) is hereby held to be ultra vires to Article 14 of the Constitution of India and is hereby struck down. It is held that all Indians/old Indian settlers, who have permanently settled in Sikkim prior to the merger of Sikkim with India on 26.04.1975, irrespective of whether his/her name is recorded in the register maintained under the Sikkim Subjects Regulations, 1961 read with Sikkim Subject Rules, 1961 or not, are entitled to the exemption under Section 10(26AAA) of the Income Tax Act.

17.1 Proviso to Section 10(26AAA) insofar as it excludes from the exempted category, "a Sikkimese woman, who marries a non-Sikkimese after 01.04.2008" is hereby struck down being ultra vires to Articles 14, 15 and 21 of the Constitution of India.

Both these writ petitions are accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

…….J.
[M.R. SHAH]

NEW DELHI;
JANUARY 13, 2023.

…….J.
[B.V. NAGARATHNA]

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 59 OF 2013

ASSOCIATION OF OLD SETTLERS OF SIKKIM & ORS **.....PETITIONER(S)**

VERSUS

UNION OF INDIA & ANR. **.... RESPONDENT (S)**

With

WRIT PETITION (C) NO. 1283 OF 2021

J U D G M E N T

NAGARATHNA J.

I have perused the judgment and order proposed by His Lordship M.R. Shah J. as well as the conclusions reached by him. However, I would like to render my separate opinion on the issues raised in these writ petitions revolving around the definition of "Sikkimese" appended as an Explanation to Section 10 (26AAA) of the Income Tax Act, 1961 (hereinafter referred to as 'I.T. Act, 1961') as well as on the *vires* of the proviso concerning Sikkimese women assailed in these writ petitions.

2. His Lordship M.R. Shah, J. has opined as follows:

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(i) That Section 10 (26AAA) to the extent that it excludes old Indian settlers from the benefit of exemption from payment of income tax i.e. those who have settled in Sikkim prior to merger of Sikkim with India on 26th April, 1975 but whose names are not recorded as "Sikkim Subjects" from the definition of Sikkimese is *ultra vires* as, being arbitrary, discriminatory and violative of Article 14 of the Constitution of India. Hence, petitioners herein and similarly situated persons who are old Indian settlers who have settled in Sikkim prior to the merger of Sikkim with India on 26th April, 1975 shall also be entitled to the exemption under Section 10 (26AAA) of the I.T. Act, 1961.

In my view, persons such as the petitioners and similarly situated persons are not entitled to the exemption under the Explanation as it now stands. In the circumstances, in order to remove the discrimination, certain observations have been made and directions have been issued by me to the Union of India on the basis of reasons assigned during the course of my judgment. If those directions are complied with, the discrimination would be removed.

(ii) I agree with the conclusion reached by M.R. Shah, J. to the effect that the proviso in Section 10 (26AAA) of the I.T. Act, 1961 is arbitrary, discriminatory and violative of Articles 14 and

15 of the Constitution of India. I have assigned additional reasons and dealt with the said aspect of the matter in greater detail through the course of my judgment and order.

Background facts:

3. Writ Petition (C) No.1283 of 2021 has been filed by the petitioners under Article 32 of the Constitution of India, assailing the validity of the proviso to Section 10 (26AAA) and Explanation thereto introduced to the I.T. Act, 1961 through the Finance Act, 2008 by which Sikkimese (people from Sikkim State) are purportedly exempted from payment of income tax. They have further sought a direction to the respondents to extend the exemption granted under Section 10 (26AAA) of I.T. Act, 1961 to persons such as the petitioners herein. The petitioners have sought a declaration that they are also entitled to exemption from payment of income tax under Section 10 (26AAA) of the I.T. Act, 1961. In other words, they have sought a direction to extend the benefit of the said provision to the petitioners herein. Another direction that is sought against respondent No. 2 is to furnish a list of applicants who have submitted applications seeking income tax exemption pursuant to the Public Notice dated 22nd September, 2018.

Similar prayers have been sought by the petitioners in W.P. (C) No. 59 of 2013 which is the earlier of the two writ petitions.

4. It is the case of the petitioners that they were ordinarily resident in the former Kingdom of Sikkim prior to its merger with India and they have an ethnic identity in Sikkim. Now, they are citizens of India. The persons ordinarily resident in the former Kingdom of Sikkim comprised of:

(a) a major population of 'Sikkimese Nationals'/'Sikkim Subjects' recognized as 'Persons of Sikkimese origin'; and

(b) a minor population of 'British Indian Subjects' of Undivided India/'Indian Nationals' of Independent India recognized as 'Persons of Indian origin' ordinarily residing in the former Kingdom of Sikkim for the purpose of trade, commerce and Government employment/s under the 'Sikkim Darbar '.

5. The ordinarily resident 'Sikkimese Nationals/Subjects' or 'Persons of Sikkimese origin' of the former Kingdom of Sikkim comprised of persons recognized as having the following ethnicity:

(i) ***'Sikkimese Bhutia'*** - meaning persons who could be from among the native 'Bhutia' and the 'Chumbipa', 'Dopthapa', 'Dukpa', 'Kagatey', 'Sherpa', 'Tibetan', 'Tromopa', 'Yolmo' Communities which got recognised and notified as the Scheduled Tribes by 'The Constitution (Sikkim) Scheduled Tribes Order 1978'

(ii) ***'Sikkimese Lepcha'*** - meaning persons who could be from the aboriginal Lepcha Community which got recognised and notified as the Scheduled Tribes by 'The Constitution (Sikkim) Scheduled Tribes Order, 1978'.

(iii) ***'Sikkimese Nepali'*** - meaning persons who could be from among the Castes or Classes that included the following:

(a) the 'Damai', 'Kami'/'Lahar', 'Majhi', and 'Sarki' Communities which got recognised as the Scheduled Castes by the Constitution (Sikkim) Scheduled Castes Order, 1978;

(b) the 'Limbu' and 'Tamang' Communities (earlier notified under 'Central List of Other Backward Classes ' in the year 1995) which got recognised and notified as the Scheduled Tribes in the year 2003 by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 2002;

(c) the Communities which got recognised and notified for inclusion in the 'Central List of Other Backwards Classes' in the year 1995, namely, 'Bhujel', 'Gurung', 'Manger', 'Kirat Rai', 'Sunuwar', and in the year 1999 namely 'Sanyasi', and in the year 2000 namely 'Jogi'; and

(d) the 'Bahun', 'Chettri' and 'Newar' Communities which got recognized and notified in the 'State List of Other Backward Classes of Sikkim in the year 2014.

6. According to the petitioners, the history regarding ordinarily resident 'British Indian Subjects' and the 'Indian Nationals' engaged in trade, commerce and Government employment in the former Kingdom of Sikkim is pluralistic. They comprised of diverse ethnic, religious and socio-cultural backgrounds from across the territories of Undivided British India and later Independent India. The residents of Sikkim are the inhabitants of Sikkim who were permanent residents prior to the year 1975.

7. In the year 1975, the former Kingdom of Sikkim became a part of India and became known as the State of Sikkim. Till then i.e., 26th April, 1975 (which is the 'appointed day' of its merger and incorporation with India), the Kingdom of Sikkim was ruled through a lineage of hereditary rulers of Namgyal Dynasty known as the 'Chogyal'.

8. The history of the period prior to the merger of Sikkim with India as averred in the writ petitions could be encapsulated as under:

(a) During the period from 1890 till 1950, the Government of the erstwhile Kingdom of Sikkim and its posts and services were

subjected to various situations and conditions which have been described by the petitioners and is referred to hereunder:

> "(i) During the period from 1890 to 1918, the Imperial British Government exercised direct and exclusive control over the external affairs as well as the internal affairs of the Kingdom of Sikkim. At that time the British Indian Subjects were allowed to hold Office and Employment to the posts and services of the Government Establishment of the erstwhile Kingdom of Sikkim.
>
> (ii) In 1918, the then King of Sikkim Chogyal Tashi Namgyal was given back his authority over the internal affairs of Kingdom of Sikkim; where-after he got empowered with absolute powers over all legislative, judicial and executive functions of his Kingdom; while the external affairs continued to remain under the Government of Imperial British India. From 1918 onwards, the Kingdom of Sikkim had continued to allow the British Indian Subjects to hold Office and Employment in the posts and services of the Government Establishment of the Kingdom of Sikkim i.e. 'Sikkim Darbar'. Such government employees were referred to as 'Darbar' Employees of British Indian origin.
>
> (iii) At the time immediately before India's Independence from British Paramountcy, there was a popular demand from the people of Kingdom of Sikkim for a democratic setup and its accession to the Indian Union. During that time, a popular vote for Sikkim to join India had failed; hence the Kingdom of Sikkim did not accede to the Indian Union then.
>
> (iv) When India became independent in 1947, on the cessation of British Paramountcy from India, the Dominion of India inherited the rights and liabilities of the British Crown vis-à-vis the Indian States as on that date. The Kingdom of

Sikkim not being exactly like other Indian States did not accede to the Union of India but had signed a standstill agreement for continuation of its previous relationship pending a fresh agreement with India. In the years preceding the proclamation of Republic of India (i.e. before 26th January 1950), it was agreed that the Kingdom of Sikkim was a Special Protectorate State of Indian Union, having its own separate territory.

(v) From 1947 onwards, the Kingdom of Sikkim had continued to allow the British Indian Subjects as well as Indian Nationals to hold Office and employment in the posts and services of the Government Establishment of the Kingdom of Sikkim, i.e. 'Sikkim Darbar'. Such persons of Indian origin serving/appointed in the posts and services of Government Establishment of the Kingdom of Sikkim were referred to as 'Darbar' Employees of British Indian origins and 'Darbar' Employees of Indian Nationality."

In view of the above historical developments, persons of Indian origin belonging to diverse ethnic, religious and socio-cultural backgrounds from across the territories of Undivided British India and later Independent India, resided in Sikkim for the purpose of their employment in various posts and services or for trade and business.

(b) On 5th December, 1950, the Indo-Sikkim Peace Treaty was entered into and under this Treaty, Sikkim was to be a protectorate of India. However, Sikkim still enjoyed autonomy in its internal administration. It is pertinent to note that Article VII of this Treaty

allowed the subjects of Sikkim as well as Indian citizens, free movement in each other's territories. Under the said Treaty, Indians in Sikkim were subject to Sikkimese law and the Sikkimese in India were subject to Indian Laws. Indian citizens in Sikkim had reciprocal rights to hold government employment and buy immovable properties once settled in Sikkim and were to be treated equally with Sikkimese in all matters.

(c) The Chogyal promulgated the Sikkim Subjects Regulation in 1961 (hereinafter called "1961 Regulation" for the sake of convenience). This Regulation had extraordinary provisions by which a 'National of another State' ordinarily residing in the erstwhile Kingdom of Sikkim then, could acquire a Naturalised Sikkim Subject/Citizenship status. Regulations 8(3), 8(4) of the 1961 Regulation provide for the power of the government of the erstwhile Chogyal of the Kingdom of Sikkim to naturalise a person upon an application being made in this regard. However, in order to be qualified for naturalization, the applicant/person must be employed in the Posts or Services of the Government Establishment of the Kingdom of Sikkim and must fulfil the following parameters:

(i) must have been in the service of the Government of the erstwhile Kingdom of Sikkim for a period not less than ten

years immediately preceding the date of his application, or

(ii) must have rendered meritorious service to the erstwhile Kingdom of Sikkim. The Government of the Chogyal may as provided for under Regulation 8(4) also naturalise the wife and minor children of a person who is granted a Certificate of Naturalisation, if an application is made in this regard. It is however, to be noted that, in order for a Certificate of Naturalisation to be granted under the aforesaid clauses, the following conditions must be fulfilled: (i) renouncing their Nationality and (ii) changing their allegiance to the erstwhile Kingdom of Sikkim. The result of this pre-condition was that an eligible male British Indian Subject or male Indian National and his wife and minor children had to give up their Indian Nationality (of which country Sikkim was a protectorate since 1950), for the purpose of converting themselves into Naturalized Sikkim Subjects. Although, these Regulations were promulgated, according to the petitioners no differential treatment was meted out to the Indians as their rights were protected under the Indo-Sikkim Treaty of 1950.

(d) In 1965, the Chogyal of Sikkim notified the Sikkim Work Permit Rules, 1965, by which all foreigners required a Work Permit to

enter, work and stay in Sikkim. Significantly, the term "Foreigner" under the Sikkim Work Permit Rules, 1965, was defined as meaning a “foreigner not being Indian national". Persons of Indian origin were therefore not considered as foreigners in Sikkim and were not required to obtain a work permit irrespective of the fact that they were not Sikkim Subjects. Many of the Indians were also on the voters list of Sikkim.

(e) In 1973, an agreement was entered into between India, the Chogyal and the political parties of Sikkim for the establishment of a democratic Government in Sikkim. In pursuance of the same, India was to assist in the conduct of free and fair elections in Sikkim.

(f) Thereafter, on 26th April, 1975, by way of the Constitution Thirty-sixth Amendment Act, 1975, Sikkim became a State in India and was included in Entry 22 of Schedule I to the Constitution of India.

(g) Article 371-F was also inserted into the Constitution of India under which it was, *inter alia,* open to the President of India (within two years from the date of the Amendment) or the Parliament to extend any law to the State of Sikkim, or repeal any existing law of Sikkim.

9. Subsequent to the merger of Sikkim as a State of the India, the following developments relevant to these cases could be traced as under:

(a) By way of a statutory order, the Citizenship Act, 1955 was extended to the State of Sikkim. On 21st June, 1975, the Home Department of Government of India issued a notification titled "Sikkim (Citizenship) Order 1975" stating that 'all Sikkim Subjects under the 1961 Regulation before 26th April, 1975 were to be deemed Indian citizens'. Therefore, this effaced the distinction between persons of Indian origin residing in Sikkim (without giving up Indian Citizenship) and others who had earlier taken up Sikkimese Citizenship by entry of their names in the Sikkim Subjects Register. According to the petitioners, as on 26th April, 1975, there was no distinction between Sikkim subjects and persons of Indian origin and other settlers in Sikkim, all of them being treated as citizens of India. However, those whose names did not figure in the Sikkim Subjects Register were left out of consideration.

(b) In view of the fact that a large number of eligible persons had been left out of the Sikkim Subjects Register and were consequently denied Indian citizenship, on 25th September, 1976 the Government of Sikkim issued a Memorandum that for the purposes of seeking employment, those claiming to be locals should be able to show whether their parents' names were maintained on or before 15th May, 1975 in the relevant Government Register.

(c) Further, under Article 371-F, an Adaptation of Sikkim Laws Order was promulgated wherein, the 1961 Regulation, was repealed w.e.f. 26th April, 1975 by the Order issued on 13th September, 1975.

(d) On 9th April, 1981, the Government of Sikkim issued a Memorandum to the effect that:

" ... the Governor has been pleased to authorize District Collectors within respective district to issue Certificate to person identifying them in the following groups to enable them to apply for employment in the State-

1. A person whose name is found in the Old Sikkim Subject Register prior to 1975.

2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that the name of his/her father/husband/paternal grandfather /brother from the same father has been recorded in the Old Sikkim Subject Register, or

3, A person who has or had agricultural land in rural areas and has been ordinarily residing in the State of Sikkim or

4. A person whose father/husband has/had been in Sikkim Government service on or before 31.12.1969."

(e) In the year 1988, a petition was moved in the Lok Sabha by a few Members of Legislative Assembly of Sikkim stating that at the time of merger of Sikkim with India, only those people whose names were registered in the Sikkim Subjects Register were made Indian Citizens in terms of Sikkim (Citizenship) Order 1975, but there were many other persons who were present in Sikkim between the period 1946 and 1975 who were otherwise by reason of their residence, domiciled in Sikkim and by allegiance "Sikkimese" and they should also be made Indian citizens. The Government of India conceded to this demand and an exercise was carried out to grant Indian Citizenship

to the so-called 'stateless' people whose names were deemed to have been genuinely omitted. For this purpose, the Sikkim Citizenship (Amendment) Order, 1989, was notified on 3rd April, 1989, wherein a proviso was inserted to deem such cases of genuine omission as citizens of India. The relevant clause in the amendment order reads as follows:

> "Provided that any person whose name was eligible to be entered in the register maintained under the said regulation but was not entered because of any genuine omission shall also be deemed to have become a citizen of India on that day if so determined by the Central Government."

(f) On the same date i.e., 3rd April, 1989, the Ministry of Home Affairs, Government of India, constituted a committee comprising of officials of the Government of India and Government of Sikkim, to look into cases of genuine omission in terms of the Sikkim Citizenship (Amendment) Order, 1989. Certain Guidelines were prescribed to decide the persons who were left out due to genuine omission from being entered into the Sikkim Subjects Register. It is averred that in terms of "clauses d, f, g and h" of the prescribed Guidelines, persons such as the

petitioners were entitled to acquire Indian Citizenship in terms of Sikkim Citizenship (Amendment) Order, 1989, by virtue of their fathers' Government employment in 'Sikkim Darbar' prior to the commencement of the 'exception' clause introduced w.e.f., 1st April, 1974, by the Sikkim Government Establishment Rules, 1974.

(g) Subsequently, *vide* Government of India orders dated 7th August, 1990 and 08th April, 1991, a total of 73,431 persons were granted Indian Citizenship on the basis that it was found that these persons were eligible to have been included in the Sikkim Subjects Register. Most of these 73,431 persons included citizens of India and were persons who had permanently settled in Sikkim between 1946 and 1975.

It is averred that applications in the prescribed format for inclusion in the Citizenship list in terms of the Sikkim Citizenship (Amendment) Order, 1989, were submitted by the family members of petitioners in W.P. (C) No.1283 of 2021, which was duly acknowledged by the concerned District Collector. However, their names neither appeared in the approved list forwarded by the

Ministry of Home Affairs, Government of India nor in the rejected list.

10. The legal and factual developments prior to the introduction of the I.T. Act, 1961, in Sikkim could be encapsulated as under as the controversy in these cases arises under the said Act:

(a) In 1948, the Sikkim Income Tax Manual, 1948 (SITM) was promulgated by the Ruler of Sikkim (the Chogyal). Under the SITM, all persons engaged in business were subjected to tax irrespective of their origin. Therefore, there was no difference made out between the original inhabitants of Sikkim, namely, the Bhutia-Lepchas and the persons of foreign origin settled in Sikkim like the Nepalis or persons of Indian origin who had settled down in Sikkim generations back. It is averred that under the SITM, Income Tax was paid by all without any discrimination on the ground of place of birth, race or ethnicity.

(b) In the year 1989, the I.T. Act, 1961 was extended to Sikkim by the Finance Act, 1989. Under the said Amendment, any law corresponding to the I.T. Act, 1961 which was in force in the State of Sikkim stood repealed. Of course, since Parliament had no competence

to levy a tax on agricultural income, the repeal of the SITM, 1948, would affect only the law insofar as it applied to taxes on income and would not affect its operation with respect to agricultural income.

(c) However, in spite of the fact that the I.T. Act, 1961, stood extended to Sikkim and the corresponding law stood repealed, *pro tanto*, all residents, including the petitioners, continued to pay income tax under the SITM, along with the other Indian citizens in Sikkim irrespective of whether their names had been registered in the Sikkim State Subjects Register or not.

(d) It is noted that the extension of the I.T. Act, 1961, to Sikkim was not implemented in reality due to severe opposition from the State of Sikkim. Thereafter, the Government of India, *vide* an amendment to I.T. Act, 1961 by the Finance Act, 1994, proposed an exemption from income tax to the Scheduled Tribes in Sikkim as was being done in regard to other states. However, this was also opposed by the lone member of Sikkim in the Lok Sabha, since granting exemption only to the tribals would mean antagonizing a large extent of non-tribal population who form the bulk of the voters, due to which the said

amendment was withdrawn.

(e) On 19th July, 2004, the Government of India and Government of State of Sikkim, in an attempt to resolve the differences *vis-à-vis* implementation of I.T. Act, 1961 in Sikkim, formed a Joint Committee consisting of the members from the Central Government and Government of Sikkim. The State of Sikkim representing to the Committee repeatedly insisted on an exemption for persons holding the Sikkim Subjects Certificate (SSC) and their descendants who were made Indian Citizens *vide* the 1989 Sikkim Citizenship (Amendment) Order, from payment of income tax. This category essentially consisted of about 94.6% of the total population. Discussions were held for four years to secure exemptions to SSC holders and the people who were made citizens of India and their descendants *vide* the Government of India orders dated 07th August, 1990 and 08th April, 1991. The contention of the Government of Sikkim was that SSC holders and those who became Indian citizens in 1990-1991 vide the Sikkim Citizenship (Amendment) Order, 1989, should be exempted. The Voters' List of 2004 for the State of Sikkim had the following demographic composition:

Bhutia-Lepcha (STs)	:	20.64%
Nepalis	:	69.71%
(Including the original Sikkim Subjects)		
Sherpa	:	4.31%
Others	:	5.34%

(Old Settlers of Indian Origin: 1.50% and New Settlers including those of Indian Origin 3.84% = 5.34%)

(f) In the year 2008, Government of India passed an amendment to the I.T. Act, 1961 by virtue of the Finance Act, 2008, wherein clause (26AAA) was introduced under Section 10 of the I.T. Act, 1961. Clause (26AAA) to Section 10 of the I.T. Act 1961 granted an exemption to Sikkimese people. Thereafter, on 16th June, 2008, the Government of Sikkim issued a Circular stating that the SITM should not be acted upon.

Grievance of the petitioners:

11. According to the petitioners in W.P.(C) No. 1283 of 2021, they have settled in Sikkim and their fathers were in Government service on and prior to 31st December, 1969. Therefore, they have come under the fourth category of the Memorandum issued by Government of Sikkim on 09th April, 1981. The petitioners have been issued the Certificate of Identification (akin to domicile or residential certificate)

by the Sikkim Government. On account of Certificate of Identification being issued to them, the petitioners are part of the local population of Sikkim and are at par with those persons whose names are found in the old Sikkim Subjects Register. Thus, they have all along been treated as part of the local population of Sikkim but the petitioners, who are also settled in Sikkim and who have been issued Certificates of Identification are excluded from the benefit of Section 10 (26AAA) of the I.T. Act, 1961, and are being assessed to income tax whereas the object of the aforesaid provision is to exempt the category of persons mentioned therein from the payment of income tax. According to these petitioners, the said provision in effect exempts 94% of the residents of Sikkim while taxing the remaining 5% of which about 1% are the people such as petitioners who are *bona fide* settlers in Sikkim and are entitled to be treated at par with other categories. It is the grievance of the petitioners that they have been singled out for the purpose of imposition of income tax on the sole ground that their names are not recorded in the Register under the 1961 Regulation. According to these petitioners, they have Certificates of Identification and they are as much Sikkimese as those categories of persons mentioned in Section 10 (26AAA) of I.T. Act, 1961 who have been given the benefit of non-payment of income tax under the said Act.

12. It is also averred that the persons who were granted Indian citizenship by way of the Sikkim Citizenship (Amendment) Order of 1989, were those persons whose names in point of fact were never included in the Sikkim Subjects Register but were given the benefit of Indian citizenship.

13. In the context of the above grievance, various representations were made by various persons for being granted exemption from payment of income tax. Taking note of these representations, the Union Government appointed a committee. On 16th October, 2009, the Committee communicated a decision that it had come to the conclusion that there was no provision in the I.T. Act, 1961, for grant of exemptions to the individuals not included in the Register of Sikkim Subjects. The Committee therefore recommended that the said individuals should approach legal experts/Chartered Accountants to look into the lacunae in the I.T. Act, 1961, for the possible inclusion of their names so that the Government of Sikkim could take up the issue with the Government of India.

14. According to the petitioners, on 21st September, 2010, Government of Sikkim issued a Cabinet Memorandum wherein it was admitted that Certificate of Identification (COI) was issued in view of the still valid pre-merger laws on the subject, as it enjoyed constitutional protection under Article 371-F. The persons such as the

petitioners herein by virtue of being COI holders are covered under Rule 4(4) of Sikkim Government Establishment Rules, 1974, for employment under the State Government and its Public Sector Units (PSUs) which has provisions of employment for locals only.

15. According to the petitioners, due to the injustice being meted out to the persons excluded from exemption from payment of income tax, even though they were clearly permanent residents of Sikkim, the matter was debated in the Sikkim State Assembly. On 24th March, 2011, a Cabinet Memorandum was issued stating that the Government of Sikkim felt that it was appropriate to pass a Resolution in the ensuing session of the Assembly in favour of the left-out categories of persons (including persons such as the petitioners in W.P. (C) No. 1283 of 2021, whose fathers were in Sikkim Government Service before 31st December, 1969 and who are continuously residing in the State of Sikkim) for income tax exemption by Government of India. The Resolution was accordingly passed on 26th March, 2011.

16. Thereafter, Writ Petition (Civil) No 59 of 2013 was filed before this Court and this Court was pleased to issue notice on 11th February, 2013, and granted interim relief to persons such as the petitioners herein in respect of recovery proceedings at the instance of the Income Tax Department as also *qua* deposit of TDS.

17. In August 2013, the Rajya Sabha published its 145th Report of the Committee on the Petition, praying for protection of interest of *bona fide* Indian nationals living in Sikkim prior to its merger with India in the year 1975. In its deliberations, the Committee clearly found that old Indian settlers of Sikkim are to be treated at par with Sikkimese and should have been included in the said definition. It was recommended that exemption be granted to such persons as well.

18. On 4th April, 2018, an order was passed by this Court directing the petitioners in Writ Petition No. 59 of 2013 to place on record a list of persons who were claiming benefit of Section 10 (26AAA) of I.T. Act, 1961, and the State of Sikkim was further directed to verify the claims and cooperate with the Central Government so that such claims could be considered by the Central Government in accordance with law.

19. Following this order, the State Government approved two other categories of persons to be included for exemption from payment of income tax, including the petitioners' category i.e., those having COI on the basis of their fathers' being in Government of Sikkim service on or before 31st December, 1969 and who are permanently settled and residing in Sikkim along with persons who had been issued COI on the basis of landed property in rural areas of Sikkim. A Public Notice bearing No. Home/Confdl/111/2013/09part/5992 dated 22nd September, 2018 was issued by the State Government with a directive

to the above two categories to furnish details in the prescribed format to the competent authority. It is averred that the persons such as the petitioners in W.P.(C) No. 1283 of 2021 in accordance to the Public Notice dated 22nd September, 2018, have submitted all relevant documents before the competent authority.

20. It is contended that the petitioners are being subjected to continued discrimination and are being assessed to income tax, even though they are also eligible for the exemption under Section 10 (26AAA) of the I.T. Act, 1961. That, in spite of various representations which have been made, the completely discriminatory and arbitrary amendments made to the I.T. Act, 1961 have still not been done away with. In fact, further recovery notices for recovery of tax have been sent to some of the persons who are members of petitioner No.1 Association in W.P. (C) No. 59 of 2013. Therefore, in the above circumstances, being aggrieved by the amendment by which clause (26AAA) to Section 10 of the I.T. Act, 1961 was introduced, the petitioner has invoked Article 32 of the Constitution of India by averring that the provision is violative of their fundamental rights.

Section 10 (26AAA) of Income Tax Act, 1961:

21. Section 10 of the I.T. Act, 1961, speaks about incomes not included in total income i.e., the incomes mentioned under the clauses of Section 10 of the said Act shall not be included in

computing the total income of any person. Clause (26AAA) of Section 10 states that in case of an individual, being a Sikkimese, any income, which accrues or arises to him (a) from any source in the State of Sikkim; or (b) by way of dividend or interest on securities, shall not be income falling within total income of any person. The proviso, however, states that nothing contained in this clause shall apply to a Sikkimese woman who, on or after 1st April, 2008, marries an individual who is not a Sikkimese. The Explanation defines a Sikkimese as under:

1. An individual, whose name is recorded in the register maintained under the Sikkim Subjects Regulation, 1961 read with Sikkim Subject Rules, 1961 (hereinafter referred to as the "Register of Sikkim Subjects"), immediately before the 26th April, 1975; or

2. An individual, whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No. 26030/36/90 – I.C.I., dated the 7th August, 1990 and Order of even number dated the 8th April, 1991; or

3. Any other individual, whose name does not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that register;

The relevant provision of Section 10 (26AAA) of I.T. Act, 1961, is extracted as under:

> "(26AAA) in case of an individual, being a Sikkimese, any income which accrues or arises to him—
>
> (a) from any source in the State of Sikkim; or
>
> (b) by way of dividend or interest on securities:
>
> Provided that nothing contained in this clause shall apply to a Sikkimese woman who, on or after the 1st day of April, 2008, marries an individual who is not a Sikkimese.
>
> Explanation. —For the purposes of this clause, "Sikkimese" shall mean—
>
> (i) an individual, whose name is recorded in the register maintained under the Sikkim Subjects Regulation, 1961 read with the Sikkim Subject Rules, 1961 (hereinafter referred to as the "Register of Sikkim Subjects"), immediately before the 26th day of April, 1975; or
>
> (ii) an individual, whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No. 26030/36/90-I.C.I., dated the 7th August, 1990 and Order of even number dated the 8th April, 1991; or
>
> (iii) any other individual, whose name does not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that register;"

Submissions:

22. We have heard Sri K.V. Viswanathan, learned senior counsel appearing on behalf of the writ petitioners in Writ Petition (C) No. 59 of 2013, Ms. Pooja Dhar, learned counsel appearing for the writ petitioners in Writ Petition (C) 1283 of 2021, Sri N. Venkataraman,

learned Additional Solicitor General appearing for the Department of Revenue, Union of India, Sri Vivek Kohli, learned Advocate General for the State of Sikkim, and perused the material on record.

Submissions of the Writ Petitioners:

23. Learned senior counsel and learned counsel appearing on behalf of the writ petitioners at the outset submitted that Section 10(26AAA) of the I.T. Act, 1961 is *ultra vires* the Constitution of India, insofar as it excludes from the definition of 'Sikkimese,' migrants/settlers of Indian origin who had settled in Sikkim much prior to the coming into effect the 1961 Regulation, on the sole ground that such migrants/settlers had not been registered as 'Sikkim Subjects' under the 1961 Regulation. Further, the proviso to Section 10(26AAA) of the I.T. Act, 1961 is unconstitutional and violative of Articles 14 and 15 of the Constitution of India because it excludes from the exempted category, a Sikkimese woman who married a non-Sikkimese after 1st April, 2008.

24. As regards the first leg of challenge in the instant Writ Petitions, i.e., challenge to the *vires* of the definition of 'Sikkimese' under Section 10(26AAA) of the I.T. Act, 1961, it was contended that old settlers/migrants, who had settled in Sikkim much prior to the coming into effect of the 1961 Regulation had been excluded from the definition of 'Sikkimese' and consequently rendered ineligible to claim

the benefit of Section 10(26AAA) of the I.T. Act, 1961, on the sole ground that their names could not be registered as Sikkim Subjects as their forefathers did not surrender their Indian citizenship.

25. It was further contended that migrants from other Countries/erstwhile Kingdoms such as Nepalese migrants, who had migrated to and settled in Sikkim at the same time or even after migrants/settlers of Indian origin, had been admitted to the benefits of Section 10(26AAA) of the I.T. Act, 1961, while arbitrarily excluding settlers of Indian origin such as the petitioners herein. That the object sought to be achieved by the exemption provision contained in Section 10(26AAA) of the I.T. Act, 1961 was to grant exemption to the residents of Sikkim as per the definition of Sikkimese which is in the form of an Explanation to the provision. Therefore, the discriminatory classification of Sikkim Subjects *vis-à-vis* old Sikkim settlers, who had not been registered as Sikkim Subjects, whereby the former category of persons was admitted to the benefits of the exemption while excluding the latter, had no nexus with the object of the exemption provision.

26. It was next submitted that classification into groups or categories ought to be based on an intelligible differentia which set one group apart from the other. In this regard, it was stated that Sikkim, having merged with India on 26th April, 1975, all residents and

subjects of Sikkim, had thereafter become Indian citizens. Therefore, there was no justifiable reason to treat Indian settlers of Sikkim differently from Sikkim Subjects who had all subsequently become Indian citizens. That following the merger of Sikkim with India, and Indian citizenship having been conferred on Sikkim Subjects, the basis for classification had been eroded. That migrants/settlers who had earlier not been registered as Sikkim Subjects, as well as Sikkim Subjects were uniformly considered as Indian residents of Sikkim, after 26th April, 1975, and therefore, both such categories were to be admitted to the benefits of income tax exemption under Section 10(26AAA) of the I.T. Act, 1961. The fact that migrants/settlers had earlier not been registered as Sikkim Subjects on the ground that they failed to surrender their Indian citizenship at the relevant time, would have no relevance after the merger of Sikkim with the India, since such migrants as well as Sikkim Subjects had been placed in the same class of Indian residents of Sikkim, after the merger.

27. It was urged that the rules to the effect that provisions of legislation ought to reflect the object sought to be achieved and that any classification into groups or categories ought to be based on an intelligible differentia, would apply equally to tax legislations, as they apply in any other area of law, *vide* ***S.K. Dutta vs. Lawrence Singh Ingty, A.I.R. 1968 SC 658***.

28. Sri K.V. Viswanathan, learned Senior Counsel, further submitted that the Explanation to Section 10(26AAA) of the I.T. Act, 1961 begins with the phrase, "'Sikkimese' shall mean," and thereafter lists three categories of persons who shall be considered to be 'Sikkimese' for the purposes of the Act. That the term used in the Explanation is 'mean.' Therefore, the definition would have to be treated as inclusive, but not exhaustive of the scope of the term 'Sikkimese.' In this regard, reliance was placed on ***Southern Electricity Supply Co. of Orissa Ltd. vs. Sri Seetaram Rice Mill, (2012) 2 SCC 108***.

29. It was averred that an Explanation to a provision should not be such as would operate as an exception or a proviso *vide* ***Aphali Pharmaceuticals Ltd. vs. State of Maharashtra, (1989) 4 SCC 378***. That the Explanation to Section 10(26AAA) of the I.T. Act, 1961, in effect, acts as an exception to Section 10(26AAA) of the I.T. Act, 1961 by excluding from the scope of the provision migrants/settlers of Indian origin who had settled in Sikkim much prior to the coming into effect of the 1961 Regulation.

30. It was submitted that in the present case, in order to remove the arbitrary discrimination against Indian settlers in Sikkim, the definition of the term 'Sikkimese' should be read to include Indians who had settled there as on 26th April, 1975. That this Court, in order

to remedy the discrimination against the writ petitioners, ought to put the Indian settlers in Sikkim in the same class as Sikkim Subjects, for the purposes of all matters which would affect the rights, benefits and privileges of such class of persons.

31. As regards the second prong of the challenge, which is to the *vires* of the proviso to Section 10(26AAA) of the I.T. Act, 1961, which excludes from the exempted category, a Sikkimese woman who marries a non-Sikkimese after 1st April, 2008, it was contended by learned senior counsel and learned counsel appearing for the writ petitioners that the proviso is violative of Articles 14 and 15 of the Constitution of India. In this regard, it was further contended that a woman, on the mere factum of being married would not lose her identity as a 'Sikkimese.' That gender-based discrimination is *ex-facie* evident in the proviso, more so, because there is no provision for disqualification of a Sikkimese man from claiming exemption under the Act, on marrying a non-Sikkimese woman after 1st April, 2008.

32. It was submitted that the said proviso could not be traced to any consideration other than that of gender alone and therefore, the same ought to be declared as discriminatory against women. Reliance was placed on ***Anuj Garg and Ors. vs. Hotel Association of India and Ors., (2008) 3 SCC 1*** and ***G. Sekar vs. Geetha, (2009) 6 SCC 99*** to contend that exclusion from the benefits of a provision, on the ground

of gender alone, would be liable to be struck down as being violative of Article 14 of the Constitution of India.

33. With the aforesaid averments, it was prayed that the definition of the term 'Sikkimese' as provided for in the Explanation to Section 10(26AAA) of the I.T. Act, 1961, should be read to include Indians who had settled there as on 26th April, 1975 and that the proviso to Section 10(26AAA) of the I.T. Act, 1961 which excludes from the exempted category, a Sikkimese woman who marries a non-Sikkimese after 1st April, 2008, should be struck down as being unconstitutional.

Submissions of the Respondents:

34. *Per contra*, Sri N. Venkataraman, learned Additional Solicitor General appearing for the Department of Revenue contended that the impugned provision is based on a reasonable classification of Sikkim Subjects, as a group, different from migrants/settlers of Indian origin. That such classification was founded on considerations which were designed to maintain peace and harmony within the Sikkimese society, and therefore prayed that the same may not be interfered with.

35. It was submitted that Sikkim merged with India, as the 22nd State of the Union on 26th April, 1965 and consequently, Article 371-F was introduced in the Constitution of India by way of the Constitution

(Thirty-sixth Amendment Act) 1975. That subsequently, by virtue of a Notification dated 23rd February, 1989 issued by the Department of Revenue, Ministry of Finance, the I.T. Act, 1961 was extended to the State of Sikkim with effect from assessment year 1989-1990. That after the extension of the Act to the state of Sikkim, the Government of Sikkim continued to vacillate on extending co-operation for smooth implementation of the central direct tax laws in the state and constantly sought extensions for the implementation, on various grounds. In order to resolve the continuing *impasse*, the then Union Minister for Finance, in June 2004 constituted a committee having representation from the Government of Sikkim as well as the Central Government. During the course of deliberations of the said Committee, the then Chief Secretary, Government of Sikkim identified that Sikkimese society was based on a classification of those Indians of Sikkimese origin who voted in the referendum of 1975, and others who were residents of the erstwhile Kingdom of Sikkim, but had not voted in the referendum as they were not registered 'Sikkim Subjects.' Accordingly, it was resolved that such classification would be maintained for the purposes of determining income tax liability as any other classification would fracture Sikkimese society and lead to unrest and agitations within the society. With the aforesaid background, it was urged that the distinction between Sikkim

Subjects and other residents of Sikkim, including migrants/settlers of Indian origin, was based on a reasonable classification.

36. It was emphasized that this Court had recognized on previous occasions that Sikkim Subjects formed a group which was distinct from other residents of Sikkim.

37. It was next contended that exemption from payment of income tax could not be granted to the entire population of Sikkim simply because they are domiciled in the State. Therefore, exemption was granted in favour of Sikkim Subjects and such other persons as specified under the Explanation to Section 10(26AAA) of the I.T. Act, 1961, having due regard to tangible social and historical differences between various categories of residents of Sikkim.

38. Those migrants/settlers of Indian origin, who may have been residing in Sikkim prior to the coming into effect of the 1961 Regulation, chose not to get themselves registered as Sikkim Subjects by relinquishing their Indian citizenship. This was a considered choice made by the said class of persons. Having waived their privileges on account of non-registration as Sikkim Subjects, migrants/settlers of Indian origin cannot at this juncture claim to be treated at par with Sikkim Subjects.

39. Insofar as the validity of the proviso to Section 10(26AAA) of the I.T. Act, 1961 is concerned, it was submitted that the same is not discriminatory against women or violative of Articles 14 and 15 of the Constitution. That the disqualification placed on Sikkimese women marrying non-Sikkimese men after 1st April, 2008, was based on the customary laws of Sikkim which provide that descent shall be through a woman's father and any privileges vested by virtue of such descent would continue until such woman is married. That the peculiar customary laws of a society could not be ignored while framing laws to bind such society.

40. With the aforesaid averments, it was prayed that the instant writ petitions be dismissed as being devoid of merit.

41. On behalf of the State of Sikkim, learned counsel, Sri Vivek Kohli has fairly submitted that the State Government does not have any objection to the prayer of the writ petitioners herein to extend the income tax exemption to married women of Sikkimese origin, who, after 1st April, 2008 married a non-Sikkimese man. It was also submitted that the benefit of the tax exemption may be extended to all Indian citizens domiciled in Sikkim irrespective of the fact as to whether their names are registered as 'Sikkim Subjects' in the 'Sikkim Subjects Register' maintained under the 1961 Regulation.

42. There is a two-pronged challenge to clause (26AAA) of Section 10 of the I.T. Act, 1961. Firstly, the proviso restricting a Sikkimese woman who marries after the 1st April, 2008, a non-Sikkimese, is excluded from the benefit under that provision. Secondly, the definition of 'Sikkimese' is also assailed in these writ petitions. The same shall be discussed *in seriatim*.

***Challenge to the Proviso to Section 10 (26AAA) of I.T. Act, 1961*:**

43. The proviso to Section 10(26AAA) of the I.T. Act, 1961 has been assailed. The proviso reads as under:

> "Provided that nothing contained in this clause shall apply to a Sikkimese woman who, on or after 1st day of April, 2008, marries an individual who is not a Sikkimese"

44. The proviso is challenged on the ground that it excludes Sikkimese women on the basis that they have married an individual who is not a Sikkimese after 1st April, 2008. In this context, the following aspects can be discerned:

i) *Firstly*, it is the contention of the petitioners that Sikkimese women have been subjected to discrimination which is not valid in law, particularly, having regard to Articles 14 and 15 of the Constitution of India. The contention is that there is a discrimination against

Sikkimese women while there is no such discrimination as far as Sikkimese men are concerned, in the sense that if a Sikkimese woman marries an individual who is not a Sikkimese, she is excluded from the benefit of the clause but if a Sikkimese man marries an individual who is not a Sikkimese, such an exclusion does not apply.

ii) *Secondly*, it is only Sikkimese women who have married on or after 1st April, 2008 who are excluded from the benefit of the said provision but if any Sikkimese woman was married to a non-Sikkimese prior to 1st April, 2008, there is no such exclusion from the benefit granted under the provision.

iii) *Thirdly*, it is contended that marriage cannot be a basis for a classification between a man and a woman so as to make it discriminatory against a woman. A Sikkimese woman cannot be discriminated against *vis-à-vis* a Sikkimese man who marries a non-Sikkimese.

iv) *Fourthly*, it is the case of the petitioners that an arbitrary cut-off date of 1st April, 2008 has been inserted in the provision thereby, resulting in discrimination between those Sikkimese women who married a non-Sikkimese prior to the said date and those Sikkimese women who are married after the said date. That those Sikkimese women who married a non-Sikkimese prior to the said date are included in the beneficial clause of Section 10 (26AAA), but those who

married subsequent to that date are denied the benefit.

v) Another contention is that the definition of the expression "Sikkimese" itself is assailed and therefore, any Sikkimese woman who marries a person who does not fall within the scope of the definition of "Sikkimese", does not have the benefit of the said provision.

45. Primarily, it was contended that there cannot be any discrimination on the basis of marriage against Sikkimese women with reference to an arbitrary date i.e., 1st April, 2008. According to the petitioners, the proviso creates an artificial classification and a discrimination between married women and unmarried women and that marriage cannot be a basis of classification between Sikkimese women themselves. Further, the said classification has no nexus to the object sought to be achieved inasmuch as when all persons who are coming within the scope and ambit of the expression "Sikkimese" as given in the Explanation to the said provision, are given the benefit of exemption from payment of income tax under the I.T. Act, 1961, there cannot be an exclusion of only Sikkimese women, who are married subsequent to 1st April, 2008, to a non-Sikkimese.

46. The thrust of the submissions of the learned Senior Counsel for the petitioners is that there is a discrimination against Sikkimese women who have got married to a non-Sikkimese, that too, only those

women who have married on or after 1st April, 2008. It is contended that proviso is arbitrary for two reasons: firstly, because it is discriminatory against Sikkimese women who have married non-Sikkimese men and secondly, only those Sikkimese women who were married on or after 1st April, 2008, do not have the benefit of the provision.

47. On analysing the impugned proviso, it is noted that the benefit of the provision does not apply (i) to a Sikkimese woman, (ii) who is married to an individual who is not a Sikkimese, and (iii) the marriage having taken place on or after 1st April, 2008. Thus, what emerges is that marriage of a Sikkimese woman is made the basis of classification. Thus, in other words, there is discrimination in the following ways:

i) between Sikkimese women who as opposed to Sikkimese men.

ii) between Sikkimese women who are married as opposed to those who are not married, and

iii) between Sikkimese women who are married to a Sikkimese as opposed to those who are married to a non-Sikkimese, and

iv) between Sikkimese women who have married a non-Sikkimese on or after 1st April, 2008, who are not entitled to the benefit of the provision as opposed to those Sikkimese women who are married

to a non-Sikkimese prior to the aforesaid date, who are entitled to the said provision.

48. It is further observed that Section 10 (26AAA) was inserted to the I.T. Act, 1961 by the Finance Act, 2008 w.e.f. 1st April, 1990. The proviso although inserted in the year 2008 has a retrospective effect from 1st April, 1990 i.e., the date on which I.T. Act, 1961 was introduced in Sikkim. Prior to 1990, SITM, 1948, was applicable to Sikkim. This would imply that there was no such discrimination between 1st April, 1990 and 1st April, 2008 for a period of eighteen years. Thus, those Sikkimese women who had the benefit of the exemption have been deprived by the same w.e.f., 1st April, 2008. The retrospectivity of the proviso takes away a vested benefit extended to such category of women covered under the proviso w.e.f., 1st April, 1990 without there being a rationale for the same.

49. Further, it is necessary to analyse the basis of classification in terms of the categories of persons enunciated under Regulation (3) of the 1961 Regulation as under:

(i) If a woman is the wife of a person who has his domicile in the territory of Sikkim immediately before the commencement of the 1961 Regulation, such a person shall be a Sikkim Subject if he:

a) was born in the territory of Sikkim and is resident therein, or

b) has been ordinarily resident in the territory of Sikkim for a period of not less than fifteen years immediately preceding the commencement of the Regulation.

(ii) The wife of the person having domiciled in Sikkim shall be deemed to have domiciled in Sikkim for the purpose of Regulation (3) [*vide* clause (2) of Explanation to Regulation (3)].

(iii) Under Regulation (6), a woman of a foreign nationality who is married to a Sikkim Subject after the commencement of 1961 Regulation shall ordinarily be eligible to be registered as a Sikkim Subject, on making an application to the Government of the Chogyal in the manner provided by the Rules under the 1961 Regulation, and after renouncing her former nationality and on taking an oath of allegiance.

(iv) Clause (b) of Regulation (7) states that any Sikkimese woman who marries a person who is not a Sikkim Subject shall cease to be a Sikkim Subject.

50. Thus, under the 1961 Regulation, as far as women are concerned, marriage has been the basis of acquiring the status of having a domicile in Sikkim and being a Sikkim Subject or losing domicile or status as a Sikkim Subject which aspect shall be

discussed while considering the challenge to the proviso to Section 10 (26AAA) of the I.T. Act, 1961.

51. In my view, marriage of a Sikkimese woman is also the basis for discrimination against her whereas there is no such discrimination *vis-à-vis* a Sikkimese man marrying a Sikkimese or a non-Sikkimese woman on or after 1st April, 2008. Article 14 of the Constitution states that, State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15 (1) of the Constitution states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. In fact, Article 15(3) empathetically states that nothing in Article 15 shall prevent the State from making any special provision for women and children but in the instant case, according to petitioners, instead of the proviso being in favour of Sikkimese women, it is antithetical to Articles 14 and 15 (1) and (2) of the Constitution of India as it is discriminatory against Sikkimese women who have married a non-Sikkimese, that too, after 1st April, 2008.

52. This discussion has also to be viewed in light of the Explanation to Section 10 (26AAA) of the I.T. Act, 1961. The Explanation states that, the term 'Sikkimese' shall mean, an individual whose name is recorded in the Register of Sikkim Subjects immediately before 26th April, 1975, or an individual whose name is included in the said

Register by virtue of the Government of India Orders dated 07th August, 1990 and 08th April, 1991, or also an individual whose name does not appear in the said Register but, it is established beyond doubt that name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that Register. The expression "an individual" in clauses (1) to (3) of the Explanation cannot refer to only a Sikkimese man and exclude a Sikkimese woman. Any other interpretation would mean that a Sikkimese woman has no identity of her own even if she is covered under the Explanation to be a Sikkimese and therefore is entitled to the benefit of the provision. It would also mean that a Sikkimese woman covered under the Explanation would be excluded from the benefit of the provision if she is covered under the proviso. In other words, the Explanation which is in the nature of a definition so as to give benefit to all Sikkimese individuals cannot be restricted in its applicability only to Sikkimese men (who are individuals covered under the Explanation), but exclude female Sikkimese individuals of a particular category on account of the proviso, which is inherently discriminatory. This would also imply that the expression "individual" in the Explanation would exclude Sikkimese women. In my view, the proviso cannot be construed to be an exception to the Explanation which is in the nature of a definition clause as it would be inherently discriminatory to do so.

53. Thus, when a benefit is being given to a Sikkimese individual which would include all genders under the provision, by way of the Explanation being added, which is in the nature of a definition, the proviso cannot exclude a certain category of married Sikkimese women from the said Explanation and thereby, deprive them of the said benefit of exemption from payment of income tax on the basis of to whom they are married to. When the Explanation refers to an "individual", it includes both Sikkimese men and women, in fact, all genders; it cannot have a restrictive or myopic reference to only Sikkimese men and exclude those Sikkimese women covered under the proviso. A proviso cannot over arch a provision. But in the instant case, the proviso is overriding the provision as well as the Explanation in respect of those categories of married Sikkimese women referred to in the proviso which is impermissible. Thus, the proviso is inherently arbitrary and discriminatory against a particular category of Sikkimese women. In other words, the Explanation to Section 10 (26AAA) of the I.T. Act, 1961 includes both Sikkimese men as well as women. Such being the interpretation, in my view, the proviso is antithetical to the Explanation and the Section as well.

54. The normal function of a proviso is to except something out of the provision or to qualify something enacted therein which, but for the proviso, would be within the purview of the provision. As a general

rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In other words, a proviso qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main provision. Further, a proviso cannot be construed as nullifying the provision or as taking away completely a right conferred by the enactment. If it does so and is discriminatory then it falls foul of the equality clauses of the Constitution of India.

55. It is reiterated that the expression "an individual" in the Explanation to Section 10 (26AAA) of the I.T. Act, 1961, must include all genders including Sikkimese women. There cannot be a discrimination only on the ground of sex and race. Hence, all Sikkimese women are entitled to the benefit of Section 10 (26AAA) of the I.T. Act, 1961, as per the Explanation thereto irrespective of whether they marry a Sikkimese or a non-Sikkimese.

56. Further, pursuant to the merger of Sikkim with India by virtue of which, Sikkim has become one of the States of India and all Sikkim Subjects and all Sikkimese domiciled in the territory of Sikkim have become Indian citizens, there cannot be a discrimination *vis-à-vis* Sikkimese women marrying a non-Sikkimese individual, whether an

Indian citizen or a foreigner, that too, on or after 1st April, 2008. Such discrimination, is therefore, in violation of the guarantee of equality provided under Articles 14 and 15 of the Constitution of India as it is on the basis of sex and race. Hence, the proviso to clause (26AAA) of Section 10 of the I.T. Act, 1961, is a stark example of an unconstitutional sex-based discrimination and is liable to be struck down.

57. In this context, the judicial dicta and decisions of this Court could be noted as under:

a) In ***Air India vs. Nergesh Meerza, AIR 1981 SC 1829,*** the question was, whether, a four-year bar on marriage immediately on obtaining employment in Air India, applicable only to women employees, could be retained as a reasonable provision. This Court held the same to be a sound and salutary provision on the ground that it would "improve the health of the employee" and "she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal.....". The said judgment was delivered in the year 1981 but with the passage of time and owing to the worldwide movement towards gender justice and elimination of all discrimination against women, acquiring momentum, I am of the

considered view that a ban on marriage in respect of a female employee immediately for a period of four years on her being appointed by the employer is also discriminatory. Hence, this aspect of gender discrimination would require a reconsideration and course correction. This is because choice of marriage as well as exercising an option as to when to marry is a Fundamental Right under Article 21 of the Constitution of India.

However, in the very same case, this Court found the termination of service of a woman employee on her first pregnancy to be shocking as it was an open insult to "Indian womanhood" and hence, the said action was extremely detestable and abhorrent to the notions of a civilised society and therefore, violative of Article 14 of the Constitution. In fact, this Court observed that the rule could be amended so that termination of the services of an employee on her third pregnancy could be permitted which aspect also, in my view, calls for reconsideration in the absence of any qualifying parameters.

b) In ***Air India Cabin Crew Assn. vs. Yeshaswinee Merchant and others, AIR 2004 SC 187***, this Court set aside a decision of the Bombay High Court and upheld the early retirement of women employees, namely, Air

> Hostesses in Air India which was then a Public Sector Undertaking. Justifying its decision, this Court observed that, "there cannot be any cut and dried formula for fixing the age of retirement" and this "would always depend on a proper assessment of the relevant factors and may conceivably vary from case to case".

58. With due respect, I find that the aforesaid two judgments have an underlying emphasis on the physique and physical appearance of women related to their marriage, consequent pregnancy and ageing which cannot be the rationale or basis for making policy decisions or regulations as they are discriminatory on the basis of sex and thus, unconstitutional.

59. As opposed to the aforesaid decisions, it is necessary to also cite the following decisions of this Court:

i) The decision of this Court in ***C.B. Muthamma Vs Union of India AIR 1979 SC 1868*** is highly instructive in this regard. The petitioner therein was an officer in the Indian Foreign Service. She filed a writ petition before this Court claiming denial of promotion on the ground of hostile discrimination, as she was a woman. She also brought to the notice of this court, the following two rules, challenging the same as being violative of the right to equality:

1. Rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 which required a woman member in foreign service to obtain permission of the Government in writing before her marriage and to resign if the Government is satisfied that her family and domestic commitments are likely to come in the way of due and efficient discharge of her duties.

2. Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, which prohibited a married woman to be appointed in Foreign Service as of right.

Although during the pendency of the writ petition, Rule 18(4) was deleted, and an affidavit was filed by the Respondent-State that Rule 8(2) was also in the process of being repealed, this Court made the following observations as regards disabilities based on marriage:

> "5. Discrimination against women, in traumatic transparency, is found in this rule. **If a woman member shall obtain the permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member.** In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species.
>
> **6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a**

> **hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom.** Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable.
>
> 7. We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter-affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinise or strike down these rules."
>
> **(Emphasis by me)**

This Court struck down the afore-mentioned provisions as unconstitutional and also impressed upon the Central Government, the need to overhaul all Service Rules and remove the stain of sex discrimination.

(ii) ***Mackinnon Mackenzie and Co. Ltd. vs. Audrey D'costa and Another, AIR 1987 SC 1281,*** is a judgment of this Court upholding the decision of the Bombay High Court wherein it was ordered that, all women stenographers were entitled to equal remuneration for work of the same or similar nature as a male stenographer.

(iii) In ***Githa Hariharan vs. Reserve Bank of India, (1999) 2 SCC 228,*** this Court was faced with the interpretation of Section 6(a) of Hindu Minority and Guardianship Act, 1956 and Section 19(b) of Guardian and Wards Act, 1890. The validity of the aforesaid Sections was assailed as being violative of the equality clause of the Constitution, inasmuch as under the said provisions the mother of a minor child is relegated to an inferior position on the ground of sex alone since her right as a natural guardian of the minor, is made cognizable only 'after' the death of the father. This Court by relying upon the Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") and the Beijing Declaration, 1995, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women, observed that gender equality is one of the basic principles of our Constitution and in the event the word 'after' is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the

constitutional mandate and would lead to a differentiation between a man and a woman.

This Court therefore held that the father, by reason of being conferred a dominant personality, cannot be ascribed to have a preferential right over the mother, in the matter of guardianship, since both fall within the same category and the word 'after' shall have to be interpreted in terms of the constitutional safeguards and guarantee given to gender equality so as to give a proper and effective meaning to the words use.

(iv) In ***Anuj Garg & Ors. vs. Hotel Association of India & Ors. (2008) 3 SCC 1,*** this Court upheld the right of women to have equal treatment in employment in the hospitality sector. In the said case, the constitutional validity of Section 30 of the Punjab Excise Act, 1914, which prohibited employment of "any man under the age of 25 years" or "any woman" in any part of the premises in which liquor or any intoxicating drug was consumed by the public, was challenged. This Court observed that, when the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life by virtue of Articles 14 and 15 of the Constitution. The Court was of the view that:

> **"26.** When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criterion. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criterion in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriage, pilots et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They are now widely accepted both in police as also army services."

In the said case, this court relied upon the judgment of the South African Constitutional Court in ***Bhe and Ors. vs. The Magistrate, Khayelisha and Ors. (2004) 18 BHRC 52 : (2005) 1 BCLR 1 (CC),*** wherein the South African Constitutional Court had declared the Black Administration Act, 1927 (South Africa) and the Regulations of the Administration and Distribution of the Estates of Deceased Blacks (South Africa) as *ultra vires*. It was held by the majority that the rule of male primogeniture as it applied in customary law to the inheritance of property was inconsistent with its Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. The South African Constitutional Court further observed that, the rules of succession in customary law had not been given the space to adapt and to keep pace with changing

societal conditions and values, instead, they had over time become increasingly out of step with the real values and circumstances of the societies they were meant to serve. Thus, the official rules of customary law of succession were no longer universally observed. The South African Constitutional Court, therefore, held that, the exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination.

(v) In ***G. Sekar vs. Geetha & Ors. (2009) 6 SCC 99*** this Court observed that, in terms of Articles 14 and 15 of the Constitution of India, the female heirs, subject to the statutory rule operating in that field, are required to be treated equally to the male heirs. This Court further observed that, gender equality is recognized by the world community in general in the human rights regime.

(vi) In this context, it would be useful to refer to the following observations made by Altamas Kabir, C.J. in his supplemental opinion in ***State of Maharashtra vs. Indian Hotel and Restaurants Association, (2013) 8 SCC 519:***

> "**147.** Women worldwide are becoming more and more assertive of their rights and want to be free to make their own choices, which is not an entirely uncommon or unreasonable approach. But it is necessary to work towards a change in mindset of people in general not only by way of laws and other forms of regulations,

> but also by way of providing suitable amenities for those who want to get out of this trap and to either improve their existing conditions or to begin a new life altogether. Whichever way one looks at it, the matter requires the serious attention of the State and its authorities, if the dignity of women, as a whole, and respect for them, is to be restored."

(vii) Recently in ***Secretary, Ministry of Defence vs. Babita Puniya and others, (2020) 7 SCC 469,*** a struggle for equality of opportunity for women seeking Permanent Commissions (PCs) in the Indian Army succeeded after a decade and more spent in litigation in which women engaged in Short Service Commissions (SSCs) in the Army sought parity with their male counterparts in obtaining PCs. In the said case, this Court speaking through Dr. D. Y. Chandrachud, J. (as His Lordship then was) observed as under:

> "85.....An absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner. In this sense, even at its bare minimum, the right to equality is a right to rationality. Where the State, and in this case the Army as an instrumentality of the State, differentiates between women and men, the burden falls squarely on the Army to justify such differentiation with reason. An absolute prohibition of women SSC officers to obtain anything but staff appointments evidently does not fulfil the purpose of granting PCs as a means of career advancement in the Army. Whether a particular candidate should or should not be granted a criteria or command

> assignment is a matter for the competent authority to consider having regard to all the exigencies of service, performance and organisational requirements. In the present case the Army has provided no justification in discharging its burden as to why women across the board should not be considered for any criteria or command appointments. Command assignments are not automatic for men SSC officers who are granted PC and would not be automatic for women either. The absolute exclusion of women from all others except staff assignments is indefensible. If the Army has cogent reasons for excluding women from a particular criteria or command appointment, it may provide them to the relevant authorities and if necessary, to future courts. However, such a justification must take place on a case-to-case basis, in light of the requirements and exigencies of a particular appointment. The blanket non-consideration of women for criteria or command appointments absent an individuated justification by the Army cannot be sustained in law."

60. The fight for non-discrimination based on considerations of gender has assumed centre stage in the United States of America as well. The Fourteenth Amendment to the U.S. Constitution provides that no State shall deny to any person within its jurisdiction, equal protection of the laws. This clause has evolved a body of judicial doctrine which is comprised, *inter-alia,* in the numerous rulings issued by the United States Supreme Court, that have advanced women's rights. A few of such landmark decisions may be referred to as under:

(a) In ***Reed vs. Reed, 404 U.S. 71, 92 S. Ct. 251 (1971),*** the question before the Supreme Court of the United States was, whether, a statute, namely, the Idaho Probate Code that

included a gender-based provision, preferring males over females to administer an estate, violated the Equal Protection clause of the Fourteenth Amendment of the Constitution. In a unanimous decision, the Court held that the Idaho Probate Code's dissimilar treatment of men and women was unconstitutional and was violative of the Equal Protection clause of the Fourteenth Amendment. The Court observed that, *"to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection clause of the Fourteenth Amendment…The choice in this context may not lawfully be mandated solely on the basis of sex."*

(b) In ***Weinberger vs. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225 (1975),*** the issue was with regard to the Social Security Act which provided survivor's benefits based on the earnings of a deceased husband and father both to his widow and the couple's minor children in her care. However, the benefits based on the earnings of a covered deceased wife and mother were granted only to the minor children and not to the widower. In the said case, the question before the Supreme Court of the United States was whether the gender-based

distinction in Social Security Benefits violated the Due Process Clause of the Fifth Amendment.

In a unanimous decision, the Court held that the purpose of the social security benefits for the surviving spouse and children is to enable the surviving spouse to properly care for the children, regardless of the gender of the parent. The Court observed that, gender-based discrimination regarding these benefits was illogical and counter-productive by excluding a widower.

It was further observed that the Constitution of United States forbade a gender-based differentiation that resulted in less protection for the families of female workers who were required to pay Social Security taxes than was accorded to the families of male workers. The statute's gender-based distinction was based on an archaic and overbroad generalization about the contributions to family support made by male and female workers. The Court therefore held that such an irrational classification violated the right to equal protection secured by the Fifth Amendment, which prohibited discrimination that was so unjustifiable as to be violative of due process. Thus, in the aforesaid case, the right of a widower was established while at the same time emphasising that discrimination on the basis of gender violated the equality clause which provides a guarantee against such discrimination.

(c) The question in ***Duren vs. Missouri, 439 U.S. 357, 99 S. Ct. 664 (1979)*** was whether the Jackson County's practice of automatically exempting women from jury service upon request violated the rights as guaranteed by the Sixth and Fourteenth Amendments. The Court held that the State statute's exemption of women from jury service on request violated the defendant's rights as guaranteed by the Sixth and Fourteenth Amendments in failing to ensure that jurors in criminal cases be drawn from a fair cross section of the community, since it was sufficiently established by the defendant that women, as a group, were distinct from men. The Court further observed that, there existed no significant state interest to justify exemption of women from jury service.

(d) In ***Hishon vs. King & Spalding, 467 U.S. 69, 104 S. Ct. 2229 (1984)*** the controversy was whether King & Spalding, the law firm where Hishon was employed, violated Title VII of the Civil Rights Act of 1964 (for short, "CR Act, 1964") by unfairly discriminating against Hishon on the basis of her sex by denying her admission to the partnership of the firm. In a unanimous decision, the Court held that Title VII of the CR Act, 1964 made it illegal for an employer to discriminate against any employee on the basis of her sex. The Court

observed that, the promise of equal consideration for partnership that went along with Hishon's employment was contractual in nature and subject to the regulations of Title VII of the CR Act, 1964. The Court further observed that by preventing Hishon from obtaining partnership because of her sex, the firm had discriminated against her and had breached the "terms, conditions or privileges of employment". It was therefore held that the firm acted in direct violation of Title VII of the CR Act, 1964.

(e) Another question before the Supreme Court in ***United States vs. Virginia, 518 U.S. 515 (1996)*** was whether the practice undertaken by the Virginia Military Institute (VMI) of offering education only to men and not women constituted a denial of equal protection under the Fourteenth Amendment of the United States Constitution. In a 7:1 decision, the Court held that VMI's male-only admissions policy was unconstitutional. Justice Ruth Bader Ginsburg was of the view that Virginia failed to show "an exceedingly persuasive justification" for VMI's gender-biased admissions policy. The Court observed that the notion that admitting women would downgrade VMI's stature and destroy the school's adversity

system, was hardly proved. The Court therefore observed that, it violated the Fourteen Amendment's equal protection clause.

61. In the case under consideration as per the Notification dated 16th May, 1975 on the enforcement of Citizenship Act, 1955, and Citizenship Rules, 1956 to the State of Sikkim on its merger with India and as per the Sikkim (Citizenship) Order, 1975, every person who immediately before 26th April, 1975, was a Sikkim Subject as per the 1961 Regulation was deemed to have become a citizen of India on that day. Thus, an individual had a domicile in the territory of Sikkim immediately before the commencement of the 1961 Regulation, if he/she was:

a) born in the territory of Sikkim and was resident therein; or

b) had been ordinarily residing in the territory of Sikkim for a period of not less than fifteen years immediately preceding the commencement of the 1961 Regulation.

62. Such an individual automatically became a citizen of India and his/her name may have also been entered in the Register of Sikkim Subjects immediately before 26th April, 1975. This is also clear from the Government Order dated 7th August, 1990 which was notified by the Government of Sikkim to the effect that every person who immediately before 26th April, 1975, was a Sikkim Subject under 1961

Regulation, shall be deemed to have become a citizen of India on that day. In fact, where there were genuine omissions, a direction was issued to enter all such eligible persons who had been omitted in the said Register. To the same effect is the Government Order issued by the Government of India dated 8th April, 1991 which was notified by the Government of Sikkim on the same date.

63. Therefore, on a conspectus consideration of the 1961 Regulation in light of the Government Orders passed subsequent to the merger of Sikkim with India by which Sikkim became a State in India and by which the Sikkim Subjects domiciled in Sikkim had their names included in the Register of Sikkim Subjects, the proviso should not have discriminated against Sikkimese women in the manner analysed above, only because a Sikkimese woman who, though, may have had her name registered in the Register of Sikkim Subjects, married a non-Sikkimese, that too, only on or after, 1st April, 2008, would be excluded from the exemption clause. Such a category of women cannot be deprived of the benefit of the provision under Section 10 (26AAA) of the I.T. Act, 1961.

64. In fact, in my view, the proviso runs counter to the Explanation and is thus manifestly arbitrary. This is because the Explanation intends to give the benefit of Section 10 (26AAA) of the I.T. Act, 1961 to all Sikkimese who are defined under the said Explanation as those

'individuals' whose names have been recorded and registered in the Register of Sikkim Subjects immediately before 26th April, 1975 or included pursuant to the Government of India Order No. 26030/36/90/I.C.I. dated 7th August, 1990 and Order of even number dated 8th April, 1991, or those persons whose names do not appear in the Register of Sikkim Subjects but it has been established that the name of such individual's father or husband or paternal grandfather or brother from the same father had been recorded in that Register. Hence, the benefit of the Explanation must be extended to all Sikkimese women, irrespective of whether they have married a Sikkimese or a non-Sikkimese after the 1st April, 2008.

65. Thus, in view of the aforesaid discussion, the proviso to Clause (26AAA) of Section 10 of the I.T. Act, 1961 is struck down as being in violation of Articles 14 and 15 of the Constitution of India.

Challenge to the Explanation:

66. For the purpose of Section 10 (26AAA) of the I.T. Act, 1961, the meaning of 'Sikkimese' is of significance inasmuch as it is only a 'Sikkimese' who is entitled to the benefit under the said Act. The same is under challenge in these petitions. There are three categories of persons included within the expression 'Sikkimese' given in the Explanation to the aforesaid provision namely: -

A) an individual, whose name is recorded in the register maintained under the Sikkim Subjects Regulation, 1961 read with the Sikkim Subject Rules, 1961 (Register of Sikkim Subjects), immediately before 26th April, 1975; or

B) an individual, whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No. 26030/36/90 - I.C.I., dated 7th August 1990 and Order of even number dated 8th April, 1991; or

C) any other individual, whose name does not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in that register;

67. Therefore, it is necessary to analyse each of the aforesaid Regulations, Rules, Government of India Orders for the purpose of this case as a challenge is made by the petitioners to the definition of 'Sikkimese' in the Explanation to Section 10 (26AAA) of the I.T. Act, 1961 in respect of the three categories of individuals entitled to the benefit.

68. The **first category of individuals** are those individuals whose names are registered in the Register maintained under the Sikkim

Subjects Regulation, 1961 read with the Sikkim Subject Rules, 1961 ("1961 Regulation" and "1961 Rules" respectively):

68.1. An individual whose name is recorded in the Register of Sikkim Subjects immediately before 26th April, 1975 is a Sikkimese. The same is as per the 1961 Regulation read with 1961 Rules. On a perusal of the 1961 Regulation, which was enacted during the period of the Chogyal in Sikkim, it is noted that Regulation (3) is relevant insofar as these petitioners are concerned. Regulation (3) reads as under: -

> "3. Certain persons domiciled in Sikkim Territory at the commencement of the Regulation to be Sikkim Subjects:
>
> (1) Every person who has his domicile in the territory of Sikkim immediately before the commencement of this Regulation shall be a Sikkim Subject if he-
>
> (a) was born in the territory of Sikkim and is resident therein, or
>
> (b) has been ordinarily resident in the territory of Sikkim for a period of not less than fifteen years immediately preceding such commencement:
>
> Provided that in counting the said period of fifteen years any absence from the said territory on account of service under the Government of India shall be disregarded; or

(c) is the wife or minor child of a person mentioned in clause(a) or clause (b):

Provided that a person shall not be a Sikkim Subject under this Section unless he makes a declaration to the effect that he is not a citizen of any other country at the time of inclusion of his name in the register of Sikkim Subjects to be maintained under this Regulation:

Provided further that in the case of a minor or a person of unsound mind, such declaration may be made by his guardian.

Explanation: No person shall ·be deemed to have his domicile in the territory of Sikkim unless ...

(1) he is a person who has made Sikkim his permanent home and has severed his connections with the country of his origin such as by parting with his property in that country or acquiring immovable property in Sikkim.

Provided that a person shall not be deemed to have a permanent home in Sikkim if he indicates an intention of returning to his country of origin, by keeping a live interest therein even though he might have parted with his property in his country of origin and the mere parting of such property will not be regarded as proof of a person's having acquired a permanent home in Sikkim.

(2) The wife and minor children of a person having his domicile in Sikkim shall be deemed to have domicile in Sikkim for the purpose of this Section.

(3) In any case of doubt as to whether a person has domicile within the territory of Sikkim

> under this Section, the matter shall be decided by The Chogyal with the assistance of a Board consisting of persons to be appointed in accordance with the rules made under this Regulation."

68.2. What is pertinent in the said Regulation is that, the following three categories of persons are stated to have domicile in the territory of Sikkim immediately before the commencement of the 1961 Regulation: -

> (a) a person born in the territory of Sikkim and is resident therein, or
>
> (b) has been ordinarily resident in the territory of Sikkim for a period of not less than fifteen years immediately preceding such commencement, or
>
> (c) is the wife or the minor child of a person mentioned in clause (a) or clause (b) above.

68.3. The proviso to Regulation (3) states that a person shall not be a Sikkim Subject under Regulation (3) *"unless he makes a declaration to the effect that he is not a citizen of any other country at the time of inclusion of his name in the Register of Sikkim Subjects to be maintained under the said Regulation."* The said proviso, must now be interpreted in light of the fact that the Kingdom of Sikkim has merged with India with effect

from 26th April, 1975 and is an Indian State. When considered in the context of the aforesaid significant fact, the proviso to Regulation (3) would have to be interpreted to mean that an individual who had not made a declaration to the effect that he was not a citizen of any other country at the time of inclusion of his name in the Register of Sikkim Subjects, as he was originally a subject of British India or any of the princely states of India or any other A, B or C state as understood under the Constitution of India, had ordinarily been resident in the territory of Sikkim for business, employment or any such other purposes, is now entitled to be registered in the Register of Sikkim Subjects. This is because Sikkim has now merged with India and has become one of the States of India. Also, persons domiciled in the erstwhile Kingdom of Sikkim i.e., prior to 26th April, 1975, the day Sikkim Kingdom merged with India would now become citizens of India. Therefore, the expression "he is not a citizen of any other country" in the proviso to Regulation (3), after the inclusion of the territory of Sikkim as a part of the Indian territory, must now be read, to exclude a citizen of India ordinarily resident in Sikkim as on 26th April, 1975. This would imply that if an individual from British India or any other part of India after its Independence was domiciled in Sikkim prior to 26th April, 1975 and has become a citizen of India by virtue of

Part II of the Constitution and the Citizenship Act, 1955, enacted by the Parliament and Orders made thereunder, pursuant to the merger of Sikkim Kingdom with India, such individual ought to now be included in the Register of Sikkim Subjects if not included till date.

68.4. Similarly, the expression "any other country" in Regulation (4) of the 1961 Regulation must be read to mean "any other country other than India". By such an interpretation, a person domiciled in the territory of Sikkim and who has acquired the citizenship of India may, on an application made to the authority prescribed by the 1961 Rules be registered as a Sikkim Subject, if he is a person whose ancestors were deemed to be Sikkim Subjects.

68.5. That in order to check the influx of foreigners into Sikkim, the Chogyal, in 1961, had promulgated the 1961 Regulation. Under the said Regulation:

a) Persons falling under Regulation (3) of the 1961 Regulation were to be entered as 'Sikkim Subjects' in the Register; and

b) Persons who were citizens of another country were not to be registered as 'Sikkim Subjects' unless they relinquished the citizenship of the other country.

However, after the merger of Sikkim Kingdom with India, the expression “any other country” would not include India as all residents of Sikkim, whether a Sikkim Subject or not are now Indian citizens. But the term 'Sikkim Subject' was defined as a person who was born in the territory of Sikkim and was resident therein and all similarly situated persons, but however, with a caveat that a person shall not be a Sikkim Subject under the 1961 Regulation, unless he made a declaration that he was not a citizen of any other country at the time of inclusion of his name in the Register of Sikkim Subjects. The result of this caveat was that an Indian citizen whose ancestors had settled down in Sikkim for generations, had to give up his citizenship of India (of which country Sikkim was a protectorate since 1950), for the purpose of registering himself as a Sikkim Subject. However, though these Regulations were promulgated, no differential treatment was meted out to the Indians as their rights were protected under the Indo-Sikkim Treaty of 1950.

68.6. Thus, although, as per the 1961 Regulation read with the 1961 Rules, the name of the individual had to be registered before 26th April, 1975 in the Register of Sikkim Subjects, in view of the interpretation now given to the proviso to Regulation (3) and particularly, to the expression ‘in any other country’, as also

found in Regulation (4) of the 1961 Regulation, a future cut-off date may have to be indicated by the Union of India by means of a circular or in any other manner for the purpose of enabling the registration of individuals in the Register of Sikkim Subjects who are Indian citizens, domiciled in the territory of Sikkim on or before 26th April, 1975. This is permissible because Government Order dated 7th August, 1990, would indicate that every person who immediately before 26th April, 1975 was a Sikkim Subject under the 1961 Regulation shall be deemed to have become a citizen of India on that day. The object and purpose of the issuance of the Government Order was to ensure that those persons who were eligible to be entered in the Register of Sikkim Subjects but were not so entered because of a genuine omission were enabled to get themselves registered and are accordingly deemed to have become citizens of India with effect from 26th April, 1975 in terms of the Sikkim (Citizenship) Order, 1975._

68.7. The Sikkim (Citizenship) Order, 1975, as amended by the Sikkim (Citizenship) Amendment Order, 1989, issued by the Government of India would clearly indicate that any person who was a Sikkim Subject under the 1961 Regulation shall be deemed to have become a citizen of India. Conversely, all

citizens of India having a domicile in Sikkim on or before 26th April, 1975 must be enabled to register their names in the Register of Sikkim Subjects in order to avail the benefit of exemption under clause (26AAA) of Section 10 of the I.T. Act, 1961. This would imply that the 1961 Regulation is being extended up to 26th April, 1975 for the purpose of Explanation to Section 10 (26AAA) of the I.T. Act, 1961 so as to save it from being rendered discriminatory insofar as the petitioners herein and similarly situated individuals are concerned.

68.8. Further, under the Sikkim Work Permit Rules, 1965 every 'foreigner' entering Sikkim was required to obtain a work permit from the Chief Secretary or any other officer authorised by him before he could take up or continue any employment for gain within the State of Sikkim. However, under the aforesaid Rules, the definition of 'foreigner' included all foreigners except a citizen of India. Therefore, Indian citizens or Indian nationals who became domiciled in Sikkim and were employed in Sikkim did not require a work permit. In view of the aforesaid Rules, it can be inferred that any Indian citizen who entered Sikkim for the purpose of employment prior to 26th April, 1975 was treated on par with Sikkimese and not as a foreigner. It is plausible that because of the concession given under Work Permit Rules

of 1965, Indian citizens or nationals did not get themselves registered under the Register of Sikkim Subjects at the relevant point of time.

68.9. It is contended that only a small percentage of settlers of Indian origin in Sikkim have not been registered under the Register of Sikkim Subjects and as a result they are not provided the benefit of exemption under the Explanation to clause (26AAA) of Section 10 of the I.T. Act, 1961. In the circumstances, the respondent-Union of India must consider ways and means in which such persons could also receive the benefit of exemption from payment of income tax if they were domiciled in Sikkim on or before 26th April, 1975 by amending the Explanation to Section 10 (26AAA) of the I.T. Act, 1961 or by issuing a circular enabling such individuals being given the opportunity to register themselves in the said Register.

68.10. Further, the Government of India has enabled the registration of all such persons who were omitted from the Register of Sikkim Subjects under the 1961 Regulation read with the 1961 Rules. The Government of India Order dated 7th August, 1990 also has a deeming fiction inasmuch as all subjects registered under the Register of Sikkim Subjects have become citizens of India as on 26th April, 1975.

68.11. The rationale for extending the registration of persons who were omitted from the Register of Sikkim Subjects under the 1961 Regulation *vide* Government of India Orders dated 07th August, 1990 and 08th April, 1991 is in recognition of the fact that individuals who were domiciled in Sikkim, for various reasons could not be registered under the Register of Sikkim Subjects. If the criterion of domicile has been the basis for registration of persons in the Register under the 1961 Regulations, then by the very same basis, individuals such as the petitioners and all similarly situated persons domiciled in Sikkim on or before 26th April, 1975 which is the day on which Sikkim merged with India must be given the benefit of the exemption even if their names are presently not registered in the Register of Sikkim Subjects in order to remove the vice of discrimination *vis-a-vis* such individuals.

68.12. Hence, persons such as the petitioners and other similarly situated persons who have not been registered under the Register of Sikkim Subjects can now seek registration in view of the aforesaid discussion as registration under the said Register is the basis for extending the exemption under Section 10 (26AAA) of the I.T. Act, 1961. Hence, directions have been

issued so as to include persons such as the petitioners and other similarly situated persons.

69. The **second category of individuals** are individuals whose names have been registered in the Register of Sikkim Subjects by virtue of the Government of India Order No.26030/36/90 – I.C.I. dated 7th August, 1990 and Order of even number dated the 8th April, 1991 and notification issued by the Department of Home, Government of Sikkim dated 16th August, 1990 publishing the Government of India Order dated 7th August, 1990:

69.1. As per the Notification dated 21st June, 1975, issued by the Home Department, Government of Sikkim, it was declared that 16th May, 1975 was the date on which the Citizenship Act, 1955, shall come into force in the State of Sikkim and the Citizenship Rules, 1956, were also enforced from the aforesaid date. In fact, in exercise of the powers conferred under Section 7 of the Citizenship Act, 1955, the Government of India promulgated the Sikkim (Citizenship) Order, 1975. As per clause (2) of the aforesaid order:

> "Every person who immediately, before the 26th day of April, 1975, was the Sikkim Subject under the Sikkim Subjects Regulation, 1961 shall deem to have become a citizen of India on that day".

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Further, in exercise of the powers conferred by Section 7 of the Citizenship Act, 1955, the Government of India amended the Sikkim Citizenship Order, 1975, by virtue of the Sikkim Citizenship (Amendment) Order, 1989, whereby a proviso was added to paragraph 2 of the Sikkim (Citizenship) Order, 1975, which reads as follows:

> "Provided that any person whose name was eligible to be entered in the register maintained under the said regulation but was not so entered because of any genuine omission shall also be deemed to have become a citizen of India on that day if so determined by the Central Government".

69.2. As per the Notification issued by the Government of India Order No.26030/69/88-I.C.I. dated 20th March, 1989, a Committee for the purpose of consideration of the cases of genuine omissions in terms of the Sikkim Citizenship (Amendment) Order, 1989, was formed on 20th March, 1989. Further, by this Order, Guidelines were issued as criteria for considering the names of individuals who had been omitted to be registered in the Sikkim Subjects. The said criteria read as under: -

> "ANNEXURE TO M.H.A. ORDER N0.26030/ 69/88-I.C.I DATED 20.03.1989 GUIDELINES
>
> a. Natural descendants of a person whose names is in the Sikkim Subject Register.

b. Person having recorded ownership or tenancy rights on agricultural land or of rural property within Sikkim before 26th April, 1975, and his natural descendants.

c. Persons whose name is included in the earliest available voters-list prior to the 26th April, 1975, and his natural descendants.

d. Person holding a regular government job before 26th April, 1975 provided that the appointment has not been made under the 'exception' clause pertaining to non-subjects; and his natural descendants.

e. Holder of trade license outside notified bazaar areas prior to 26th April, 1975 and his natural descendants.

f. He must not have entered the territory of Sikkim on the basis of work-permit.

g. He must not have acquired citizenship of any other country.

h. He must not be holding the status of refugee on the basis of a registration certificate issued by the competent authority.

(The criteria laid down from (a) to (e) singly or collectively are by themselves not be taken as conclusive evidence for granting citizenship, but would have to be scrutinized in the light of those at (f), (g) & (h).”

69.3. Further, the Government of India issued Notification *vide* Order No.26030/36/90-I.C.I. dated 8th April, 1991 and the said Order states that there were a large number of persons who were

eligible to be entered in the Register as Sikkim Subjects immediately before 26th April, 1975, as per the 1961 Regulation, were not so entered because of genuine omissions. The said cases of genuine omissions were reviewed and it was recommended that the names of 73,431 persons were considered eligible for being included in the Register of Sikkim Subjects. The Ministry of Home Affairs, Government of India after consideration of the cases found that 33,348 persons were eligible to be registered under the Register of Sikkim Subjects and were deemed to have become citizens of India with effect from 26th April, 1975, in terms of the Sikkim (Citizenship) Order, 1975.

69.4. By virtue of the aforesaid Government Orders dated 7th August, 1990 and 8th April, 1991 it is clear that persons who were entitled to be registered in the Register of Sikkim Subjects immediately before 26th April, 1975 but were not registered because of genuine omissions, are to be registered in the said Register by virtue of the said Government Orders as citizens of India and entitled to the benefit of the exemption.

Thus, all individuals who were registered in the Register of Sikkim Subjects became citizens of India by virtue of the aforesaid Government of India's orders. Therefore, it was a

necessary concomitant that to become a citizen of India, an individual must have been/be registered in the Register of Sikkim Subjects. Further registration under the said Register enables such individuals to have the benefit of exemption from payment of income tax. But individuals such as the petitioners and all similarly situated individuals as of now are not entitled to the benefit of exemption as their names are not registered in the said Register.

69.5. Further, even under the Sikkim Work Permit Rules, 1965, an Indian national was not considered to be a foreigner in Sikkim. Thus, all Indian nationals who have become domiciled in Sikkim till 26th April, 1975 must be given the benefit of the exemption clause under the I.T. Act, 1961. This is in order to eliminate the disparity amongst the individuals who are all now citizens of India settled/domiciled in Sikkim prior to 26th April, 1975. Therefore, directions have been issued in this regard so as to save the Explanation from the vice of being *ultra vires* under Articles 14 and 15 of the Constitution of India.

70. The **third category of individuals** are those, whose names do not appear in the Register of Sikkim Subjects, but it is established beyond doubt that the name of such individuals' father or husband or

paternal grandfather or brother from the same father has been recorded in that register.

70.1. As far as these categories of individuals are concerned, there is a necessity to prove beyond doubt that the name of such individual's father or husband or paternal grandfather or brother from the same father has been recorded in the Register. In such a case, even if an individual's name does not appear in the Register of Sikkim Subjects, for the purpose of clause (26AAA) of Section 10 of the I.T. Act, 1961, a Sikkimese is entitled to the benefit of the said provision of the said Act. This is on the basis of the concept of domicile of the ancestors or close relations of the individual. Therefore, such category of individuals are also included to avail the benefit of the exemption clause.

71. On an analysis of the Explanation, it would emerge that the Register of Sikkim Subjects is the basis for granting an exemption from payment of income tax under the I.T. Act, 1961 to a Sikkimese. Therefore, the Government of India has extended opportunities for the names of individuals to be recorded in the Register of Sikkim Subjects even after the merger of Sikkim as a State with India on 26th April, 1975, by issuance of Government Orders dated 7th August, 1990 and 8th April, 1991. Further, names of individuals which do not appear in

the Register of Sikkim Subjects but it is established beyond doubt that the names of such individual's father or husband or paternal grandfather or brother from the same father have been recorded in that Register, could also be included in the said Register. Hence, even as of now, if any individual's name is not entered in the Register, such individual's name could be entered into the Register by virtue of clause (iii) of the Explanation to Section 10 (26AAA) of the I.T. Act, 1961. The object of providing clause (iii) of the Explanation, which is in the nature of an omnibus clause, is to extend the benefit of the exemption under Section 10 (26AAA) of the I.T. Act, 1961 to all Sikkimese as per the conditions mentioned therein by providing individuals whose names do not appear in the Register, an opportunity of getting their names registered in the said Register so as to avail the benefit of exemption from payment of income tax as per the aforesaid provision.

72. Thus, the object is to provide the exemption from payment of income tax only to those Sikkimese who were domiciled in Sikkim having regard to the 1961 Regulation or by virtue of the Government Orders dated 7th August, 1990 or 8th April, 1991 issued by the Government of India which are again based on the 1961 Regulation. Therefore, under clause (iii) of the Explanation, an opportunity would have to be provided to individuals who fall within the scope and ambit

of the said clause of the I.T. Act, 1961, to get their names registered if not yet registered.

73. However, in my view, the Explanation restricts the exemption only to those Sikkimese individuals who fall within the three clauses of the Explanation, as the object and purpose of the exemption is only to exempt the settlers in Sikkim or persons domiciled in Sikkim in terms of the 1961 Regulation or the Government Orders referred to above. Even though the 1961 Regulation has been repealed, nevertheless, the Register of Sikkim Subjects which is maintained under the said Regulation, which had acquired a sanctity, has been the basis for grant of an exemption and particularly in the form of clause (iii) of the Explanation to Section 10(26AAA) of the I.T. Act, 1961. This would imply that all those individuals who fall outside the scope and ambit of the Explanation would not be granted the exemption. Then, the questions of discrimination against persons such as the petitioners and others similarly situated would arise.

74. Individuals having become citizens of India and were domiciled in Sikkim as on 26th April, 1975 are also entitled to the benefit of registration and exemption. Thus, in my view, all individuals domiciled in Sikkim till 26th April, 1975 and who have since become citizens of India are entitled to exemption from payment of income tax as per Section 10 (26AAA) of the I.T. Act, 1961.

75. The rationale being, Sikkim merged with India and became a State within India in the year 1975 and a special status was given to it by virtue of Article 371-F of the Constitution of India. This does not mean that all persons domiciled in Sikkim who have been treated as citizens of India are entitled to the exemption. Only such individuals are entitled to the exemption who fall within the three clauses of the Explanation. Hence, the Explanation must be construed strictly as it is in the nature of a definition of the expression "Sikkimese" for the purpose of granting an exemption from payment of income tax under the I.T. Act, 1961. However, the exemption must be extended to incorporate all such individuals who have been domiciled in Sikkim as on 26th April, 1975 and who have since then become citizens of India. This would mean that all other citizens of India who do not fall within the ambit of the Explanation as interpreted above and who have been domiciled in Sikkim State subsequent to 26th April, 1975 would not have the benefit of exemption under Section 10 (26AAA) of the I.T. Act, 1961.

76. In view of the above interpretation, in my view, the Explanation has to be saved from being in violation of Articles 14 or 15 of the Constitution of India as there is rationale in the three clauses of the Explanation which is a reasonable classification which has a nexus to the object sought to be achieved, which is to grant of exemption from

payment of income tax only to those individuals who would qualify as 'Sikkimese' in terms of the Explanation to clause (26AAA) of Section 10 of the I.T. Act, 1961. Thus, any individual not falling within the said clause would not be entitled to the said exemption. This would however be discriminatory insofar as those settlers in Sikkim are concerned who have been domiciled in Sikkim subsequent to promulgation of 1961 Regulation and till 26th April, 1975 when Sikkim merged with India. Such individuals are old settlers who have become citizens of India from 26th April, 1975 but who were domiciled in Sikkim prior to the said date. In my view, they are also entitled to the exemption under Section 10 (26AAA). Hence, directions in that regard have to be issued to fill the Legislative vacuum and amendment to the Explanation is necessary. However, those individuals who have been domiciled in Sikkim subsequent to 26th April, 1975 shall not be entitled to the benefit of exemption from payment of income tax.

77. This Court has on previous occasions, sought to enforce rights of citizens even in areas of legislative vacuum. [For instance, in ***Vishaka and Ors. vs. State of Rajasthan, A.I.R. 1997 SC 3011***]. To this end, Article 142 of the Constitution of India has been invoked and the law so declared in order to fill the vacuum has been treated as law declared by this Court under Article 141 until a proper legislation is made.

Hence, it has to be directed that till such amendment is made to the down the Explanation to Section 10(26AAA) of the I.T. Act, 1961, all individuals domiciled in Sikkim up to 26th April, 1975 shall be entitled to the exemption under the said provision from the current financial year i.e., 1st April, 2022 onwards. This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26th April, 1975 and to save the Explanation from being rendered unconstitutional *vis-à-vis* such individuals who form a small percentage of Sikkimese and who are also entitled to such an exemption. Such as approach is being adopted rather than striking down the Explanation to Section 10(26AAA) of the I.T. Act, 1961 which would have the effect of withdrawing the benefit of exemption even from those categories of persons who are presently eligible for the same.

78. Hence, until the amendment is made, the following clause shall be read as a part of the Explanation to Section 10(26AAA) of the I.T. Act, 1961, possibly as sub-clause (iv) thereof:

> "(iv) any other individual, whose name does not appear in the Register of Sikkim Subjects but it is established that such individual was domiciled in Sikkim on or before 26th April, 1975."

This provision would extend the benefit of exemption to those individuals, domiciled in Sikkim on the day it merged with India, i.e., 26th April, 1975.

79. In the result, the writ petitions are disposed of in the following terms:

i) That the benefit of income-tax exemption presently is restricted only to those Sikkimese who fall within the three clauses of the Explanation to Section 10(26AAA) of the I.T. Act, 1961, or those persons domiciled in Sikkim, or are Sikkimese as covered under the 1961 Regulation.

ii) In terms of the Sikkim (Citizenship) Order, 1975 as amended by the Sikkim (Citizenship) Amendment Order, 1989, issued by the Government of India any person who was a Sikkim Subject under the 1961 Regulation was to be deemed to be a citizen of India w.e.f. 26th April, 1975. Conversely, it is held that all citizens of India, having a domicile in Sikkim on the day it merged with India i.e. 26th April, 1975 must be covered under the Explanation in order to avail the benefit of the exemption under Section 10(26AAA) of the I.T. Act, 1961.

iii) The Union of India shall make an amendment to Explanation to Section 10 (26AAA) of I.T. Act, 1961, so as to suitably include a

clause to extend the exemption from payment of income tax to all Indian citizens domiciled in Sikkim on or before 26th April, 1975. The reason for such a direction is to save the explanation from unconstitutionality and to ensure parity in the facts and circumstances of the case.

iv) Till such amendment is made by the Parliament to the Explanation to Section 10 (26AAA) of I.T. Act, 1961, any individual whose name does not appear in the Register of Sikkim Subjects but it is established that such individual was domiciled in Sikkim on or before 26th April, 1975, shall be entitled to the benefit of exemption.

This direction is being issued in exercise of powers under Article 142 of the Constitution so as to eliminate discrimination and disparity in respect of the aforesaid category of Sikkimese, who subsequently have become citizens of India w.e.f. 26th April, 1975 and to save the Explanation from being rendered unconstitutional *vis-à-vis* such individuals who form a small percentage of Sikkimese.

v) Proviso to Section 10 (26AAA), insofar as it excludes from the exempted category, ***"a Sikkimese woman who marries a non-Sikkimese man after 1st April, 2008" is hereby struck down as being ultra vires Articles 14, 15 and 21 of the Constitution of India."***

Parties to bear their respective costs.

.....J.
[B.V. Nagarathna]

New Delhi;
13 JANUARY, 2023.