

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No.2507 of 2023 & CWPIl No.19 of 2023

Reserved on: 31st May, 2024

Date of Decision: 13th November, 2024

1. CWP No. 2507 of 2023

Satpal Singh Satti & others ...Petitioners

Versus

State of Himachal Pradesh & othersRespondents

2. CWPIL No. 19 of 2023

Kalpana DeviPetitioner

Versus

State of Himachal Pradesh & othersRespondents

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

The Hon'ble Mr. Justice Bipin Chander Negi, Judge.

Whether approved for reporting? Yes

CWP No. 2507 of 2023

For the Petitioners : Mr. Maninder Singh & Mr.Ankush Dass Sood, Senior Advocates along with M/s Vir Bahadur Verma, Ankit Dhiman, Prabhas Bajaj, Ragasanan Mohan, Gaurav Chaudhary, Tarun Mehta, Mukul Sharma, Ms. Prajwal Busta, Advocates for the petitioners.

For the respondents : Mr. Dushyant Dave, Senior Advocate (through Video Conferencing) with Mr.Navlesh Verma, Additional Advocate General for respondents No.1& 3-State.

Mr.Ashwani Chawla, Advocate, for respondent No.2.

Respondent No.4 stands deleted vide order dated 20.12.2023.

Mr. Deven Khanna, Advocate, for respondent No.5.

Mr. Ajay Sharma, Sr. Advocate with Mr.Atharv Sharma, Advocate, for respondent

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No.6-Mohan Lal Brakta.

Mr. P.P. Chauhan, Advocate (through Video Conferencing) Ms. Shikha Rajta and Mr.Sahil Verma, Advocates, for respondent No.8-Ashish Butail.

Mr. Virender Singh Chauhan, Sr. Advocate with M/s Vikram Thakur, Arsh Chauhan, Ms. Bhanvi Negi and Mr.Vanshaj Azad, Advocates, for respondents No.7 and 9.

Mr. Neeraj Gupta, Sr. Advocate with M/s Pranjal Munjal and Vedhant Ranta, Advocates, for respondent No.10.

CWPIL No. 19 of 2023

For the Petitioners:

M/s Sanjay Kumar & Mr. Rakesh Kumar Sharma, Advocates.

For the Respondents:

Mr. Vivek Krishan Tankha, Senior Advocate (Through Video Conferencing) along with M/s Nalvesh Verma, and Puneet Rajta, Additional Advocates General and Mr. Vipul Tiwari, Advocate, for respondents No.1 and 2.

Respondent No.3 stands deleted vide order dated 19.5.2023.

Mr. Deven Khanna, Advocate, for respondent No.4.

Mr. Ajay Sharma, Sr. Advocate with Mr.Atharv Sharma, Advocate for respondent No.5.

Mr. V.S. Chauhan, Sr. Advocate with Mr.Vikram Thakur, Arsh Chauhan, Ms.Bhanvi Negi and Mr.Vanshaj Azad, Advocates, for respondents No.6 and 8.

Mr. P.P. Chauhan, Advocate (through Video Conferencing) with Ms.Shikha Rajta and Mr.Sahil Verma, Advocates, for respondent No.7.

Mr. Neeraj Gupta, Sr. Advocate with M/s Pranjal Munjal and Vedhant Ranta, Advocates, for respondent No.9.

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Bipin Chander Negi, Judge

Since in these petitions the issue to be adjudicated is common, hence these petitions are being taken together for adjudication. The sole question for consideration in the present petitions is the Legislative competence of the Legislature of Himachal Pradesh to make the impugned Act i.e The Himachal Pradesh Parliamentary Secretaries (Appointment, Salaries, Allowances, Powers, Privileges and Amenities) Act, 2006 (Act No. 1 of 2007) (hereinafter for purpose of brevity referred to as the Act), which received the assent of the Governor on the 23rd January, 2007 and was published in Hindi and English in the Rajpatra, Himachal Pradesh (Extraordinary), dated 24th January, 2007, (pp. 9895-9904).

2 By virtue of the impugned Act an office of a Parliamentary Secretary for a Member of the Himachal Pradesh Legislative Assembly in the State of Himachal Pradesh has been created.

3. In CWP No 2507 of 2013, petitioners are the Members of Legislative Assembly of Himachal Pradesh, who belong to the Bhartiya Janta Party. Respondent No.1 is the State of Himachal Pradesh, which has been sued through the

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Chief Secretary to the Government of Himachal Pradesh. Respondent No.2 is the Secretary to the Governor, Himachal Pradesh. Respondent No.3 is the Principal Secretary Finance to the Government of Himachal Pradesh. Respondent No.4 was arrayed as party on account of having been appointed as a Deputy Chief Minister in the State of Himachal Pradesh. His appointment as Deputy Chief Minister had been assailed in the present petition. Other than the aforesaid respondents No.5 to 10, who are also the Members of the Legislative Assembly of Himachal Pradesh, have been arrayed as parties to the lis on account of having been appointed as Chief Parliamentary Secretaries under the impugned Act.

4. During pendency of the petition, (CWP No. 2507 of 2013), challenge laid to the appointment of respondent No.4 as Deputy Chief Minister was not pressed and consequently, respondent No.4 was deleted from the array of parties vide order dated 20.12.2023 .

5. In CWPIl No. 19 of 2023, petitioner is an Advocate stationed at Delhi, who originally belongs to District Mandi of Himachal Pradesh. Respondents No.1 and 2 are representing the State of Himachal Pradesh. Hon'ble the Chief Minister was arrayed as respondent No.3. Vide order dated

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19.05.2023 Hon'ble the Chief Minister stands deleted from the array of respondents. Respondents No.4 to 9 are the Members of Legislative Assembly of Himachal Pradesh, who have been arrayed as parties to the lis on account of having been appointed as Chief Parliamentary Secretaries under the impugned Act, 2006.

6. Respondents No.5 to 10 in CWP No.2507 of 2023 and respondents No.4 to 9 in CWPII No.19 of 2023 are one and the same persons. They belong to the Indian National Congress Party.

7. Prior to 1-1-2004 i.e before the passing of the (Ninety-First Amendment) Bill, 2003, Article 164 of the Constitution read as follows;

“164. Other provisions as to Ministers.—(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:

Provided that in the States of [Chhattisgarh, Jharkhand]*, Madhya Pradesh and [Odisha]**, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.

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(*1. Substituted by the Constitution (Ninety-fourth Amendment) Act, 2006, Section 2, for “Bihar” (w.e.f.12-6-2006). **2.Substituted by Act 15 of 2011, Section 4, for “Orissa” (w.e.f. 1.11.2011, vide G.S.R. 791(E), dated 1st November, 2011).”

8. On 1-1-2004 the Constitution (Ninety-First Amendment) Bill, 2003 was passed by both the Houses of Parliament. This Bill after the assent of the President became an Act with modifications made to Articles 75 and 164 of the Constitution. This Act inter alia provides under Article 164(1-A) that the size of the Council of Ministers in the State should not exceed 15% of the total strength of the Assembly. Relevant extract whereof is being reproduced herein below:

“164.....

(1-A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent of the total number of members of the Legislative Assembly of that State:

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

Provided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003

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exceeds the said fifteen per cent or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date* as the President may by public notification appoint.”

9. Subsequent to the incorporation of Article 164(1-A) in the Constitution of India, the Assam assembly promulgated the Assam Parliamentary Secretaries (Appointment, Salaries and Miscellaneous Provisions) Act 2004 (in short ‘Assam Act’) on 03-11-2004. By virtue of the said Act, an office of a Parliamentary Secretary was created for a member of the Assam Legislative Assembly in the State of Assam.

10 In *Bimolangshu Roy v. State of Assam, (2018) 14 SCC 408*, the validity of the Assam Act 2004 came up for consideration. The crucial provisions of the Assam Act considered by the Apex Court while delivering the judgement, were the following:

“Definition:

Section 2(c) of the Act which defined “Parliamentary Secretary” as follows:

“2. (c) “Parliamentary Secretary” means a member of the Assam Legislative Assembly appointed as the

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Parliamentary Secretary under this Act by the Chief Minister.”

Section 3: Appointment of Parliamentary Secretary

The Chief Minister, may, having regard to the circumstances and the need of the situation, at any time appoint such number of Parliamentary Secretaries and assign to each of them such duties and functions as he may deem fit and proper.

Section 4: Rank, status, powers and functions of Parliamentary Secretary

A Parliamentary Secretary shall be of the rank and status of a Minister of State and shall exercise such powers, discharge such functions and perform such duties as may be assigned to him by the Chief Minister by way of a notification published in the Official Gazette.....

7. Salary and allowances of Parliamentary Secretary

A Parliamentary Secretary shall be entitled to such salary and allowance as are admissible to a Minister of State under the Assam Ministers, Ministers of State and Deputy Ministers Salaries and Allowances Act, 1958.”

11. Before applying judgment in *Bimolangshu Roy's case* to the case, at hand, one must ascertain the true principle laid down in the decisions by the Apex Court. In this respect reference to *CIT v. Sun Engineering Works (P) Ltd., (1992) 4 SCC 363, at page 386* would be appropriate. Relevant extract whereof is being reproduced herein below:

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“39.....A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In *Madhav Rao Scindia v. Union of India* 1971(1) SCC 85 this Court cautioned:

“It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.”

12. The observations made in *Bimolangshu Roy's case* cannot be read in isolation and divorced from the context in which the same were made. In this respect reference to *Sukhwant Singh v. State of Punjab, (1995) 3 SCC 367 : 1995 SCC (Cri) 524, at page 376* would be appropriate. Relevant extract whereof is being reproduced hereinbelow :

“The observations from a judgment of this Court cannot be read in isolation and divorced from the context in which the same were made and it is improper for any court to take out a sentence from the judgment of this Court, divorced from the context in which it was given, and treat such an isolated

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sentence as the complete enunciation of law by this Court.

Such observations, or simply what was done in a given case, without laying down the law cannot be read as a ratio of the judgment and certainly not as a precedent. (*Common Cause v. Union of India, (2004) 5 SCC 222, at page 223*)”

13. The sole question which was considered in *Bimolangshu Roy's case* by the Apex Court was the Legislative competence of the Assam Assembly to create an office of a Parliamentary Secretary for a member of the Assam Legislative Assembly in the State of Assam .

14. In *Bimolangshu Roy's case* after taking into consideration, (a) Rule/Doctrine of widest construction of Constitutional Provisions to meet new social, political and historical realities unimagined by the Framers of the Constitution; (b) flow of power to make Legislation from various sources i.e. (i) express text of the Constitution; (ii) by implication from the Scheme of Constitution; and (iii) as an incident of sovereignty; (c) adoption of a detailed written Constitution by India whereby the authority of Federal Government and also the components of Federation States including the Local Bodies has been regulated and structured; (d) examining the Scheme of the entire

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Constitution including the entries contained in three list of 7th Schedule (e) Constituent Assembly debates and (f) relevant case law related to and referred to in this regard, the Apex Court was of the firm opinion that the Legislature of Assam lacked the competence to make the impugned Assam Act i.e create an office of a Parliamentary Secretary for a member of the Assam Legislative Assembly in the State of Assam .

15. The implications of the aforesaid authoritative pronouncement being;

(a) When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. (*R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 : AIR 1957 SC 628*).

(i) The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. (*Indira Bai v. Nand Kishore, (1990) 4 SCC 668, at page 672*)

(ii) When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res-judicata. (*Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1, at page 44*)

(b) It is a well-settled principle that a judgment of the Supreme Court cannot be collaterally challenged

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on the ground that certain points had not been considered.

(c) Besides the aforesaid it is also well settled that a judgment of the apex Court is binding on all and it is not open to contend that the full facts had not been placed before the Court.

(d) Moreover an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. (*Omprakash Verma v. State of A.P., (2010) 13 SCC 158*).

(e) The language used by the apex court is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. It is only a larger Bench of the Supreme Court which can whittle down, wish away or be unbound by the ratio thereof because of the imperatives of Article 141. (*Fuzlunbi v. K. Khader Vali, (1980) 4 SCC 125 : 1980 SCC (Cri) 916, at page 129*).

(f) Normally the ratio of the case shall be deduced from the facts involved in the case and the particular provision of law which the Court has interpreted and the decision shall be read with reference to and in the context of particular statutory provisions involved in the matter. (*ICICI Bank v. Municipal Corpn. of Greater Bombay, (2005) 6 SCC 404, at page 412*).

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16. After the passing of the (Ninety-First Amendment) Bill, 2003, Article 164(1-A) was incorporated in the Constitution of India. By virtue of Article 164(1-A) an embargo was placed on the size of the Cabinet (Political Executive) in a Legislative Assembly. Subsequent thereto, the impugned Act 2006 in the State of Himachal Pradesh received the assent of the Governor on the 23rd January, 2007 and was published in Hindi and English in the Rajpatra, Himachal Pradesh (Extraordinary), dated 24th January, 2007, (pp. 9895-9904).

17. The substance of the Act is material and not merely the form or outward appearance. The form in which the law is clothed would not save it from condemnation. Therefore the enquiry has to be qua the true nature and character of the challenged Legislation. For the purpose of this investigation the Court can certainly examine the effect of the legislation and take into consideration its object, purpose or design. (*Sri Sri Sri K.C. Gajapati Narayan Deo v. State of Orissa, 1954 SCR 1 : AIR 1953 SC 375*)

18. Other than the aforesaid *In Om Prakash Agarwal v. Vishan Dayal Rajpoot, (2019) 14 SCC 526*: the Apex Court specified the purpose for which Statement of Objects and

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Reasons of an Act can be looked into. Relevant portion whereof is being reproduced hereinbelow:

“51. A three-Judge Bench of this Court in *S.S. Bola v. B.D. Sardana*, has held that the Statement of Objects and Reasons of the statute can be looked into only as extrinsic aid to find out the legislative intent only when the meaning of statute by its ordinary language is obscure and ambiguous. In para 176, following was laid down: (SCC p. 651)

“176. ... But it is a cardinal rule of interpretation that the Statement of Objects and Reasons of a statute is to be looked into as an extrinsic aid to find out the legislative intent only when the meaning of the statute by its ordinary language is obscure or ambiguous. But if the words used in a statute are clear and unambiguous then the statute itself declares the intention of the legislature and in such a case it would not be permissible for a court to interpret the statute by examining the Statement of Objects and Reasons for the statute in question.”

52. In *Subhash Ramkumar Bind v. State of Maharashtra*, this Court again laid down that the Statement of Objects and Reasons can be looked into for limited purpose of ascertaining condition prevailing at the time which prompted or actuated

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the proposal of bill to introduce the same and the extent of existing evil of the society. Further, in *Bhaiji v. SDO*, this Court again reiterated the following principles of statutory interpretation in para 11:

“11. Reference to the Statement of Objects and Reasons is permissible for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy.

The weight of judicial authority leans in favour of the view that the Statement of Objects and Reasons cannot be utilised for the purpose of restricting and controlling the plain meaning of the language employed by the legislature in drafting a statute and excluding from its operation such transactions which it plainly covers. (See *Principles of Statutory Interpretation* by Justice G.P. Singh, 8th Edn., 2001, pp. 206-09.)”

19 Statement of Objects and Reasons of a Bill/Act can be looked into for limited purpose of ascertaining conditions prevailing at the time which prompted or actuated the proposal of bill to introduce the same.

20. The statement of Objects and Reasons of impugned Act have been published in the Rajpatra, Himachal

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Pradesh (Extra-ordinary), dated 27th December 2006, (pp. 9225 and 9231). The same are being reproduced here-in-below:

“STATEMENT OF OBJECTS AND REASONS

At present there is no statutory provision for appointment of the Chief Parliamentary Secretaries or the Parliamentary Secretaries and earlier their appointments were made on conventions. The object behind the appointment of the Chief Parliamentary Secretaries and the Parliamentary Secretaries is to strengthen Parliamentary affairs and make the system more efficient and effective and to serve the twin purpose of lightening the over burden of Ministers and also to afford opportunity to youth members to share higher responsibilities in future. As such, it has been decided to bring a legislation which may provide for appointment, salaries, allowances, powers, privileges and amenities of the Parliamentary Secretaries in the State of Himachal Pradesh.”

21. Hence the object of promulgating the Act in the State of Himachal Pradesh includes two-fold purposes (a) lightening the over burden of Ministers and (b) to afford an opportunity to youth members to share higher responsibilities in future. The same reflects the true nature and character of the challenged Legislation.

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22. As per the Preamble it is an Act to provide for the Appointment, Salaries, Allowances, Powers, Privileges and Amenities etc. of the Parliamentary Secretaries in the State of Himachal Pradesh. The Preamble to the Act is put in with a purpose. It clearly sets out the context and purpose of the said enactment. It is an aid to the interpretation of its provisions. Due regard and deference has to be given to the fundamental nature and importance of the legislative process.

23. The Legislature cannot violate the mandatory constitutional prohibitions by employing an indirect method. If there is a constitutional provision inhibiting the Constitutional Authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision. (*D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378, at page 393*). Transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. (*Sri Sri Sri K.C. Gajapati*

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Narayan Deo v. State of Orissa, 1954 SCR 1 : AIR 1953 SC 375).

24. The relevant extract of the impugned Act is being reproduced hereinafter;

“2. Definitions:- In this Act, unless the context otherwise requires-

- (a) “Chief Minister” means the Chief Minister of Himachal Pradesh;
- (b) ‘member’ means a member of the Legislative Assembly of Himachal Pradesh;
- (c) “notification” means a notification published under proper authority in the Official Gazette;
- (d) “Parliamentary Secretary” means a member of the Legislative Assembly of Himachal Pradesh appointed as the Parliamentary Secretary or the Chief Parliamentary Secretary under Section 3 of this Act;
- (e) “prescribed” means prescribed by rules made under this Act; and
- (f) “specified” means specified by notification published in Official Gazette.

3. Appointment:- The Chief Minister may appoint such number of the Parliamentary Secretaries, and assign to each of them such duties and functions, as he may deems fit.

4. Powers and functions:- (1) A Parliamentary Secretary shall exercise such powers, discharge such functions and perform such duties as may be specified by the Chief Minister.

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(2) A Parliamentary Secretary shall not have the powers to approve the action proposed by a Secretary or any other subordinate functionary of the Government, except recording his note in the form of proposal on the file for the consideration of the Minister-in-Charge.

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6. Oath of office and secrecy:- Before a Parliamentary Secretary enters upon his office, the Chief Minister shall administer to him oath of office and secrecy in the following manner:-

“I, _____, do swear in the name of God that I will not directly or indirectly communicate or reveal to any person or person any matter which shall be brought under my consideration or shall become known to me as a Parliamentary Secretary for the State except as may be required for the due discharge of my duties as such Parliamentary Secretary.”

7. Salaries and Allowances- A Chief Parliamentary Secretary shall be entitled to the salary of Rs.65,000/- per month, while a Parliamentary Secretary shall be entitled to a salary of Rs.60,000/- per month. In addition, the Parliamentary Secretary shall be entitled to compensatory allowance and other perquisites as are admissible to the members.

8. Residence- (1) A Parliamentary Secretary shall be provided with furnished house, the maintenance charges of which shall be borne by the State Government or in lieu of such house, shall be paid an allowance at the following rates, namely-

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| (a) a Chief Parliamentary Secretary | Rupees three thousand per mensem; and |
| (b) a Parliamentary Secretary | Rupees two thousand and five hundred per mensem; |

(2) The State Government may allow a Parliamentary Secretary to continue in occupation of the house provided to him for a period not exceeding fifteen days from the date of his ceasing to be a Parliamentary Secretary.

(3) A Parliamentary Secretary shall be liable to pay license fee at the rate of Rs.1500/- per month in respect of the furnished house allotted to him and the same shall be recoverable monthly from his salary.

Explanation:- A Parliamentary Secretary shall not become personally liable for any payment in case the standard rent of the house allotted to him for residence exceeds the amount specified in sub-section (1).

9. Conveyance allowance- A Parliamentary Secretary shall be entitled to the use of a car, the expenses on the maintenance and propulsion of which shall be borne by the State Government or in lieu thereof to a conveyance allowance at the rate of rupees three hundred per mensem.

10. Parliamentary Secretary not to draw salary or allowances as member- No Parliamentary Secretary, in receipt of the salary or allowances under this Act, shall be entitled to receive any sum by way of salary or allowances as member."

25. The appointment of a "Chief Parliamentary Secretary" or a "Parliamentary Secretary" is done by the

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Chief Minister by virtue of Section 3 of the impugned Act. In terms of Section 6 of the Act an Oath of office and secrecy is administered to a “Chief Parliamentary Secretary” or a “Parliamentary Secretary”. Salaries, allowances and other perquisites, to which a “Chief Parliamentary Secretary” or “Parliamentary Secretary” shall be entitled, are also detailed in the Act.

26. Most relevant to the present controversy are the Powers, functions assigned to a “Chief Parliamentary Secretary” or “Parliamentary Secretary” under the Act as provided under Section 4 of the impugned Act. It provides that “Chief Parliamentary Secretary” or “Parliamentary Secretary”

(a) discharge such functions;

(b) perform such duties; as may be specified by the Chief Minister;

(c) record their note in the form of proposal on the file for the consideration of the Minister-In-Charge.

27. The Oath of office and secrecy administered to a “Chief Parliamentary Secretary” or a “Parliamentary Secretary” debars them from communicating or revealing to any person or persons any matter which has been brought under their consideration or has become known to them in

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their capacity as such except as may be required for the due discharge of their duties as such “Chief Parliamentary Secretary” or a “Parliamentary Secretary”.

28. It has been categorically provided that they shall not have the powers to approve the action proposed by a Secretary or any other subordinate functionary of the Government. However, on being appointed as “Chief Parliamentary Secretary” or a “Parliamentary Secretary” they have access to the office of the Political Executive. It is therefore that they are administered an oath of secrecy. In their capacity as “Chief Parliamentary Secretary” or a “Parliamentary Secretary” they perform functions ancillary /incidental to the office of a Cabinet Minister. Even though their role at best is recommendatory, they are actively associated with the performance of constitutional or statutory, sovereign functions of the Political Executive.

29. Conspicuous by absence is a provision in the Act whereby a “Chief Parliamentary Secretary” or a “Parliamentary Secretary” has been given the rank and status of a Minister (Political Executive). For the reasons stated hereinbelow it is inconsequential.

(a)The word “rank” according to its ordinary sense means grade or status. *Mahalinga Thambiran*

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Swamigal and ThambiranSwamigal, (1974) 1 SCC 150, at page 162 :

(b)The fundamental difference between “rank”/ “status” and “capacity” is that the former is a legal state of being while the latter is a legal power of doing. Capacity is an incident of rank/status.

30. As informed, Member of Legislative Assembly in Himachal Pradesh is entitled for salary of Rs.55,000/- per month, whereas Chief Parliamentary Secretary and Parliamentary Secretary are entitled for salary of Rs.65,000/- and 60,000/- per month respectively. Minister of State, Cabinet Minister and Chief Minister are entitled for salary of Rs.78,000/-, 80,000/- and Rs.95,000/- respectively.

31 A Parliamentary Secretary as well as Minister is entitled for furnished house, maintenance charges qua which shall be borne by the State Government or in lieu of such house, Chief Parliamentary Secretary and Parliamentary Secretary are entitled for residence allowance at the rate of Rs.2500/- and 3000/- per month respectively, whereas Deputy Minister, Minister of State, Cabinet Minister are entitled for residence allowance at the rate of Rs.2500/-, 3000/- and 3500/- per month respectively.

32. Each Minister and Parliamentary Secretary shall be entitled to use of a car, the expenses on maintenance

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and propulsion of which shall be borne by the State Government or in lieu thereof, Parliamentary Secretary is entitled for conveyance allowance at the rate of Rs.300/- per month, whereas Deputy Minister and Minister are entitled for conveyance allowance at the rate of Rs.300 and Rs.500 per month respectively.

33. In Himachal Pradesh though there exists no express and explicit provision in the impugned Act, conferring rank and status of Minister upon the Parliamentary Secretary. However, hidden status provided to such office is unveiled from the 'Object' of enactment of impugned Act and on account of the provisions of the impugned Act whereby access to files and the power to record Notes in the Form of Proposal on the files for consideration of Minister incharge(Section 4(2), Oath of Office and Secrecy (Section 6), as well as perks and facilities like salaries and allowances (Section 7), residence (Section 8), conveyance allowance (Section 9) akin to salary, perks and facilities extended to a Minister in terms of Sections 3, 5 and 6 of the Salaries and Allowances of Ministers (Himachal Pradesh) Act 2000, have been provided to the Parliamentary Secretary.

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34 Unlike Member of Legislative Assembly but like Parliamentary Secretary has access to official files to participate in decision making process in the Government. The Chief Minister has also allotted the Departments to Chief Parliamentary Secretary(ies) and they have been attached with the Cabinet Ministers like Deputy/Junior Ministers.

35. It is also an admitted fact that before passing of interim order dated 3.1.2024 by this Court in present matters, Chief Parliamentary Secretaries had been permitted to fly the National Flag and display the Emblem "Ashoka Chakra" on their vehicles and to use the Government Seal/Emblem. In fact, they were being allowed to enjoy rank and status of Minister.

36. Evidently, the distinction attempted to be portrayed between Chief Parliamentary Secretary/Parliamentary Secretary and Minister is artificial.

37. Eloquent persuasive arguments made by the learned Senior counsels on behalf of the respondents to trace a source of power for enacting the impugned legislation, either in the Constitution or in Convention by referring to and touching the historical aspect of the post, appointment of the Parliamentary Secretaries in the

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Common Wealth Countries including India, Study Report on Parliamentary Secretary 1997 published by Ministry of Parliamentary Affairs, Union of India along with opinion of the first Prime Minister Shri Jawahar Lal Nehru dated 25.07.1951 published by the Prime Minister's Secretariat appended with the said Report as Annexure-II; endeavour to protect the Legislation based on various principles of law including inherent power of State/Legislature to legislate, presumption of validity of the legislation, Legislature representing the will of the people, Liberal interpretation, limited power of judicial review, no breach of civil liberty, fundamental rights or violation of Constitutional provisions, purpose of Legislation with the object and aim of good governance; Administration necessity, Policy Decision, exigency of circumstances; Rule/Doctrine of widest interpretation, narrow interpretation in Assam and Manipur cases by the Apex Court; and also absence of provisions in the impugned Act conferring rank and status upon the Chief Parliamentary Secretaries/Parliamentary Secretaries of Ministers/Cabinet Ministers; attempts to distinguish *Bimolangshu Roy's case* and case law referred and related thereto, are of no consequence when pitted against judicial

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discipline required to be maintained by this court in view of the well set parameters discussed supra qua implications of a judgment of the Apex Court.

38. In light of the aforesaid we are of the considered view that the case at hand is squarely covered by the law declared by the Apex Court in *Bimolangshu Roy's case*. The office created by the impugned Act for a Member of the Himachal Pradesh Legislative Assembly in the State of Himachal Pradesh is also beyond the legislative competence of the State legislature.

39. By virtue of the impugned Act the transgression of the mandatory Constitutional prohibition and mandatory Constitutional Limitation contained in Article 164(1-A) of the Constitution of India is patent as the office created by the impugned Act, in fact, performs functions ancillary to and incidental to those of the Political Executive. In fact what is prohibited and limited directly by Article 164(1-A) of the Constitution of India has been sought to be done indirectly by the State Legislature.

40. The very declaration by a Court that a statute is unconstitutional obliterates the statute entirely as it had never been passed and after such declaration, it is nonest

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for all purposes. (*See: State of Manipur vs. Surjakumar Okram and others's case, 2022 SCC Online SC 130*)

41. According to the respondents, the petitioners should be denied equitable relief under Article 226 of the Constitution as the petitioners have not come with clean hands. They have suppressed and concealed material facts from the Court(*Prestige Lights Ltd. v. SBI, (2007) 8 SCC 449, at page 460*; other than the aforesaid the present petition was not a bona fide action in as much as the petitioners having accepted the position of law and earlier have taken the benefit of the same, therefore could not have recourse to the legal proceedings; the delay in approaching the Court also remained unexplained. (*Shish Ram v. State of Haryana, (2000) 6 SCC 84, at page 88*).

42. The aforesaid contention needs to be rejected for the following reasons. The limitation on the powers of the Legislature may be of two kinds : It may be with reference to the subject-matter on which they could legislate, as, for

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example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution. When a legislature, whose authority is subject to limitations aforesaid, enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. (*R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 : AIR 1957 SC 628*)

43. The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. (*Indira Bai v. Nand Kishore, (1990) 4 SCC 668, at page 672*)

44. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res judicata. (*Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1, at page 44*)

45. Other than the aforesaid reliance has been placed by the respondents on the Apex Court judgement *Nain Sukh Das 1953 SCR 1184* to substantiate their contention that the

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present petition is not maintainable at the behest of the petitioners who, it is alleged, were appointees under the impugned Legislation and being Legislators never got the same repealed . Therein the Apex Court was concerned with a case where the election of the Municipal Member was sought to be set aside on the ground of alleged violation of Article 15(1) of the Constitution. In that case it was held that the petitioners therein never asserted their rights by taking appropriate proceedings to get the bar under Article 15(1) removed, and in that situation, the Apex Court did not exercise its jurisdiction under Article 32 of the Constitution (SCR pp. 1187-88).(*Ashok Lanka v. Rishi Dixit, (2005) 5 SCC 598, at page 629*). Even otherwise, when one or some of the petitioners were appointed under the impugned Legislation, at that point of time law qua legislative competence of the State Legislature to promulgate the Act in question had not been laid down by the Apex Court.

46. While it is true that the Court is required to examine whether a litigation is really in public interest or to advance some other interest in the garb of public interest, at the same time, a public interest litigation cannot be thrown out only because the petitioner belongs to a rival political

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party. Persons with political affiliations are, as much entitled to file a public interest litigation as any other person. Whether the litigation is bona fide or not is a different issue which has to be examined by the Court on a case-to-case basis, having regard to the nature of the complaint before it. (*State of W.B. v. Dipak Mishra, (2022) 13 SCC 250, at page 252*).

47. In view of the above discussion, impugned H.P. Parliamentary Secretaries (Appointment, Salaries, Allowances, Powers, Privileges & Amenities) Act, 2006 is quashed as being beyond the legislative competence of the State Legislature.

48 Consequently, all subsequent actions, including the appointment of respondents No.5 to 10 in CWP No.2507 of 2023, who are also respondents No.4 to 9 in CWPII No.19 of 2023, are held and declared to be illegal ,unconstitutional, void ab-initio and accordingly are set aside.

49. Since the impugned Act is void *ab initio* therefore respondents No.5 to 10 in CWP No.2507 of 2023 (respondents No.4 to 9 in CWPII No.19 of 2023) are usurpers of public office right from their inception and thus,

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their continuance in the office, based on their illegal and unconstitutional appointment, is completely impermissible in law. Accordingly, from now onwards, they shall cease to be holder of the office(s) of Chief Parliamentary Secretaries with all the consequences.

50. Accordingly, protection granted to such appointment to the office of Chief Parliamentary Secretary/ or Parliamentary Secretary as per Section 3 with Clause (d) of Himachal Pradesh Legislative Assembly Members (Removal of Disqualifications) Act, 1971 is also declared illegal and unconstitutional and thus, claim of such protection under above referred Section 3(d) is inconsequential. Natural consequences and legal implications whereof shall follow forthwith in accordance with law.

51. Learned Additional Advocate General appearing for the State and counsel appearing for the other respondents, are directed to convey/transmit the information of passing of this judgment, which is available on Website of the High Court, forthwith to enable the Chief Secretary and all concerned for its immediate implementation. Chief Secretary to the Government of Himachal Pradesh, as well

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as all other concerned shall ensure implementation of this judgment in letter and spirit forthwith.

Petitions are allowed in aforesaid terms, along with pending application(s), if any.

**(Vivek Singh Thakur)
Judge.**

13th November, 2024_(ms)

**(Bipin Chander Negi)
Judge**