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SUBJECT INDEX

in the manner provided under Order XVIII. The plaintiff has a right to begin unless the defence admits the facts. On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove – In the present case, admittedly, the Petitioner as the plaintiff has not filed his evidence on affidavit and is yet to lead his evidence. It is thus clear that although the date of first hearing was set on 11.11.2013 when the issues were framed and thus the trial is deemed to have commenced then, the trial had not effectively commenced as the petitioner was yet to file his affidavit in evidence. In such circumstances, it is also quite evident that no prejudice would occasion the respondent if the proposed amendment which have been found necessary for the purpose of determining the real questions in controversy between the petitioner and the respondent, is allowed. The respondent would have full opportunity of meeting the case of the petitioner as amended. It is also clear that in spite of due diligence the petitioner could not have incorporated the proposed amendment in the plaint as all of it transpired after the filing of the plaint – The trial having not effectively commenced, a liberal approach is required while considering the application for amendment. Mere delay cannot be ground for refusing a prayer for amendment.

Subash Gupta v. Shri Yadap Nepal ***424-C***

Code of Civil Procedure, 1908 – Order XXII Rule 4 – Substitution of legal representative of the defendant – The plaintiff in its application, after stating the fact that the deceased proforma defendant 6 was survived by two sons and his wife, had chosen to implead only one son as legal heir. On this, the application cannot be rejected as held by the Supreme Court in *Re: Gema Coutinho Rodrigues (Smt.)* that when an application is made to bring one of the heirs on record, the trial Court ought to direct the plaintiff to bring other legal heirs of the deceased on record without rejecting the application.

M/s. Himalyan Distilleries Ltd v. Smt.Urmila Pradhan & others ***458-A***

Code of Civil Procedure, 1908 – Order XXIII Rule 1(3) – Withdrawal of suit– Difference between 'cause of action' and 'subject matter' explained – The petitioner in its application under Order XXIII Rule 1(3) seeking withdrawal of the suit has specifically mentioned to file fresh suit on the same 'cause of action' and the learned trial Judge acceded to the request of the petitioner and granted the same – The petitioner has not sought permission to withdraw the suit on the same 'subject matter' – The learned trial Judge has rightly confined the liberty to the same cause of action as pleaded by the petitioner/ plaintiff.

M/s. Himalyan Distilleries Ltd v. Smt. Urmila Pradhan & others ***458-B***

Code of Civil Procedure, 1908 – Order XXIII Rule 4 – Abatement of suit – It is well settled principles of law that under Order XXII Rule 4 CPC read with Article 120 of the Limitation Act, 1963 the suit stand abated without there being any order on completion of 90 days. Further, the application may be made for setting aside the abatement within 60 days from the expiry of 90th day – However, there is no quarrel on the issue that the Court is competent to condone the delay in the event sufficient reasons are shows for not making the application within the limitation period of 60 days for setting aside the abatement – On invocation of doctrine of abatement, the most effective party is the plaintiff and plaintiff's family and estate. The principle of abatement is involved to ensure administration of justice as expeditiously and cheaply as possible. The abatement merely pauses the proceedings until the problem is remedied in the pending dispute – In the case on hand, wherein the application was filed belatedly and the two legal heirs have also filed caveats in the pending suit, there is no reason to reject the application on the ground that the limitation period was not followed strictly. The liberal trend be read and considerable leeway be accorded to the proceeding to set aside the abatement and as such strict compliance of the rules of procedure may not be required in the facts of the case to advance justice – As a sequel, the order to the extent of dismissing the application to bring legal heirs of the deceased proforma defendant 6 is quashed and abatement vis-à-vis deceased proforma defendant 6 is set aside. The other conditions are upheld.

M/s. Himalyan Distilleries Ltd v. Smt. Urmila Pradhan & others 458-C

Code of Criminal Procedure, 1973 – S. 31 – Sentence in cases of conviction of several offences at one trial – The Special Judge while sentencing must keep in mind the provisions of S. 31 which provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provision of S. 71 of the I.P.C, sentence him for such offences, the several punishments prescribed thereof which such Court is competent to inflict. It is desirable that the Special Court should record what punishment it awards for each of the two distinct offences. If this is not done complications would necessarily arise at the appellate stage. Proper course of action would have been to pass a separate sentence for each offence – The question in such situations as to what interpretation should be given to such a composite sentence was persuasively answered by a Division Bench of the Allahabad High Court in re: *Murlidhar Dalmia* v. *State* – No failure of justice would have occasioned the convict for the irregularity in passing a composite sentence by the Special Judge in view of S. 465 of Cr.P.C.

Deo Kumar Rai v. State of Sikkim 361-E

Code of Criminal Procedure, 1973 – S. 31 – For the offence under S. 376(2)(i) and (n) of the I.P.C, a single charge has been framed, whereas it is evident that the said offences are individual offences, inasmuch as S. 376(2)(i) is for commission of rape on a woman when she is under 16 years of age, while the offence under S. 376(2)(n) is commission of rape repeatedly on the same woman – Further, the penalty for the offence under S. 376(2)(i) and S. 376(2)(n) of the I.P.C ought to have been separately awarded, but no attention has been bestowed on this detail. Considering that the Learned Trial Court has granted a composite sentence under S. 376(2)(i) and (n) of the I.P.C, conclusion thereof would be that the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done.

Robin Gurung v. State of Sikkim ***477-F***

Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging the F.I.R – This Court has examined the evidence of Ms. R and Ms. S and come to the conclusion that the same are not only truthful and reliable but their evidences alone could be the basis of conviction. In such circumstances, as held by the Apex Court, it is important to deal with it with all sensitivity that is needed in such cases taking stock of the realities of life. The assault amounts to aggravated sexual assault under the POCSO Act, 2012. The victims are children aged 6 and 11 years. The incident relates to a rural area of West Sikkim. The families of both Ms. R and Ms. S come from lower income strata of society. The convict was a relative of Ms. R and a co-villager of Ms. S. Consciousness, alertness and consequences of procedural laws would definitely not be considerations for such witnesses who are bound to make exaggerations, and sometimes embellish the evidence. When such heinous offences are committed on minor children it may perhaps also be expected that the family members may be confused, ill advised and may not understand the nuances of not reporting the crime on time.

Deo Kumar Rai v. State of Sikkim ***361-C***

Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging of the F.I.R – The F.I.R, Exhibit 5 has been lodged on 30-09-2015, alleging therein that, the victim had been raped by the appellant on 29-08-2015. As per P.W.12, the I.O., his investigation revealed that the minor victim had been raped on two occasions at Lambutar jungle, but it was only on 28-09-2015 that she revealed the matter to her guardians. The evidence of P.W.12 must necessarily be read with the evidence of P.W.3, the witness who lodged Exhibit 5. He has, in close conformity with the evidence of P.W.12, stated that he came to learn of the incident on 30-09-2015. Along with his evidence, it would also be apposite to look into the evidence of

P.W.1, the victim, who has stated that the first incident occurred on 29-08-2015 following which a threat held out by the appellant of dire consequences, she did not divulge the incident to any person. The second incident occurred in the month of September 2015. Evidently, the victim look ill in School on 28-09-2015, as already discussed. The evidence of P.W.10 indicates that the victim was examined by her on 01-10-2015 having been brought with allegedly history of sexual intercourse on "29-08-2015 and 28-09-2015". If P.W.9 had not been sensitive to the condition of P.W.1 and acted with promptness the incident would evidently have gone unreported. Pursuant thereto, P.W.1 informed P.W.5, who for her part, narrated the incident to P.W.3. Admittedly, P.W.3 on learning about the incident, called the appellant, presumably to make an effort at settlement and on the appellant's failure to present himself before them, lodged Exhibit 5 on 30-09-2015. Considering the gamut of the facts and circumstances the offence involved and the background of the victim and her relatives, who are villagers, we are of the considered opinion that the delay has been sufficiently explained.

Robin Gurung v. State of Sikkim ***477-D***

Code of Criminal Procedure, 1973 – S. 164 – The defence had ample opportunity to use the previous statement of Ms. R taken under S. 164 to contradict her – S. 145 of the Indian Evidence Act, 1872 permits cross-examination as to previous statement in writing – However, the defence did not do so. At the Appellate stage, the convict cannot be permitted to take advantage of such discrepancies, even if it is existed, when the defence failed to contradict Ms. R in the manner provided under law. It must be remembered that evidence given in the Court under oath has great sanctity, which is why it is called substantive evidence – A statement under S. 164 can be used for both corroboration and contradiction. The object of recording a statement under S. 164 is to deter the witness from changing a stand by denying the contents of her previously recorded statement and to tide over immunity from prosecution by the witness – Any former statement of a witness is admissible under S. 157 of the Indian Evidence Act, 1872 – Thus the discrepancies pointed out cannot come to the rescue of the convict at the Appellate stage.

Deo Kumar Rai v. State of Sikkim ***361-B***

Code of Criminal Procedure, 1973 – S. 354 – While conducting a trial of different offences allegedly committed against two victims, the Special Judge must clearly and cogently specify the offences of which, and the Sections of the POCSO Act, 2012 under which, the accused is convicted and punishment to which he is sentenced – The Special Judge, while writing the operative part of the judgment seem to have lost sight of the law and the fact that the Special Court was in fact

conducting a trial of two separate and distinct offences committed on two victims. This is a requirement under the provision of S. 354 – The Learned Special Judge while conducting a trial of two offences committed against two victims must keep conscious of the fact that the Special Court is required to render justice to two victims – Each of the offences defined in sub-section (a) to (u) of S. 9 of the POCSO Act, 2012 are distinct and different offences having different ingredients. Thus, the convict was liable to be punished separately for the offence committed on Ms. R under S. 9 (n) and on Ms. S under S. 9 (m).

Deo Kumar Rai v. State of Sikkim ***361-D***

Code of Criminal Procedure, 1973 – S. 357 – S. 357 A – Compensation– In exercise of the powers conferred by Section 357 A, the Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013 came into force in Sikkim on 24.06.2013. The said Scheme was amended vide Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013 and the maximum limit of compensation was enhanced under particular heads of loss or injury. On 25.11.2016 Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2016 was notified in the Sikkim Government Gazette making it applicable from 18.11.2016. The said amendment of 2016 further enhances the maximum limit of compensation on various heads of loss or injury.

Deo Kumar Rai v. State of Sikkim ***361-G***

Code of Criminal Procedure, 1973 – S. 378 (3) – Leave to Appeal – The provision for seeking Leave to Appeal is to ensure that no frivolous Appeal are filed against orders of acquittal as a matter of course – Careful and meticulous consideration of the relevant material and evidence on record, we find that arguable points have been raised by the Appellant which are not trivial – The material furnished before us requires deeper scrutiny and consideration.

State of Sikkim v. Mr. Gyurmee Wangchuk Wazalingpa ***355-A***

Code of Criminal Procedure, 1973 – S. 482 – Extraordinary powers of High Court under S. 482 to quash FIR/ Criminal proceeding involving non-compoundable offence in view of compromise arrived at between parties I.P.C is not compoundable under S. 320 Cr.P.C. Rash and negligent driving on a public way, if proved, is an offence which does affect the society – The allegation put to trial is one of rash and negligent act simplicitor and not a case of driving in an inebriated condition. This Court notices that the allegation in the final report is that the accused/petitioner No.1 stayed back after the accident, loaded the Scooty in his vehicle with the help of the locals and produced it at the Police Station. There is no allegation that the accused/petitioner No.1 tried to escape after the accident

– The examination of prosecution witnesses is yet to commence. The main witnesses in the pending criminal proceeding would be the parties to the deed of compromise and the declaration. The accused/petitioner No.1 is a resident of Bhutan and perhaps not a frequent driver in the roads of Sikkim. It is noticed that during the proceedings before this Court the accused/petitioner No.1 was personally present in various dates which is a clear indication that the accused/petitioner No.1 has due regard to the majesty of the Indian Laws – S. 279, I.P.C is not a heinous offence. All dispute and differences being settled amicably and to the complete satisfaction of the victim/petitioner No.3, the continuation of the Criminal proceeding would be an exercise in futility and in such circumstances the possibility of conviction would be remote and bleak. The benevolence of the victim/petitioner No.3 to forgive the accused/petitioner No. 1 who is said to have injured him must also not be lost sight of. It is also noticed that if the trial is to continue the accused/ petitioner No. 1 who has shown a great amount of right thinking, reflected in his conduct, post the accident, would be put to unnecessary judicial process. Therefore, not quashing the Criminal proceeding despite full and complete settlement and compromise would not be in the interest of real, complete and substantial justice.
Thinlay Dorjee and Others v. State of Sikkim ***334-A***

Indian Evidence Act, 1872 – S. 134 – It is settled law that conviction can be founded on the testimony of the prosecutrix alone, unless there are compelling reasons for seeking corroboration. It is equally well settled that the evidence of prosecutrix is more reliable than that of an injured witness – The evidence produced reflects that besides Ms. R and Ms. S, and the convict there was no one else when the alleged offences were committed on Ms. R and Ms. S on two different occasions – Minor discrepancies are bound to occur when the other witnesses who merely heard what was told to them narrate about the incident. It is significant to note that the evidence of Ms. R and Ms. S, although both of tender age, are cogent and unblemished in spite of being subjected to cross examination by the defence.
Deo Kumar Rai v. State of Sikkim ***361-A***

Indian Penal Code, 1860 – S. 375 clause sixth – Assuming on the basis of the evidence of P.W.1 and P.W.7, that P.W.1 was in an affair with the appellant and assuming that the sexual act was consensual, her consent cannot absolve the adult appellant of the criminal nature of his act, since the consent of a minor is not a valid consent.
Robin Gurung v. State of Sikkim ***478-A***

Limitation Act, 1963 – S. 5 – Allows condonation of delay, if "sufficient cause" is shown by the party, who fails to perform the act within the prescribed period –

"Sufficient cause" has to be established to indicate the reasons which prevented the party from taking necessary steps within the period of limitation prescribed. If the party fails to show "sufficient cause", then the Court will not be in a position to condone the delay – The delay has been sufficiently explained by the State-Appellant by placing the sequence of events that occurred which resulted in the delay. There is no gross inaction, negligence, deliberate inaction or lack of *bona fides* on the part of the Appellant.

State of Sikkim v. Mr.Gyurmee Wangchuk Wazalingpa ***327-A***

Protection of Children from Sexual Offences Act, 2012 – S. 5(l) – Statement of the prosecutrix that the accused forcibly took off her clothes and had intercourse with her, despite her refusal cannot be overlooked. P.W.10 may not have detected injuries on her body, but it is now settled by a catena of judicial pronouncements that every victim of rape is not expected to have injuries on her body, as evidence of the offence perpetrated on her.

Robin Gurung v. State of Sikkim ***477-B***

Protection of Children from Sexual Offences Act, 2012 – S. 30 – Presumption of culpable mental state – It is now well-settled law that corroboration of the victim in such matters is not required if the evidence of the victim is consistent and inspires confidence – The evidence of the victim being consistent and cogent about the occurrence of the incident of rape on two occasions inspires confidence and requires no corroboration.

Robin Gurung v. State of Sikkim ***477-E***

Protection of Children from Sexual Offences Act, 2012 – S. 33 (7) – Identity of the child – POCSO Act, 2012 is a special Act for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest of well being of the children – It is only appropriate and expected that the said Special Court would be aware of the provisions and the purpose of enacting the POCSO Act before proceeding to divulge the name and address of the victim and her kith and kin – Has to be circumspect and knowledgeable about the required provision of law to prevent any *faux pas* and apply the Law stringently giving paramount importance to the safety and privacy of the victim.

Robin Gurung v. State of Sikkim ***477-G***

Protection of Children from Sexual Offences Act, 2012 – S. 33 (7) – Identity of the child – It is seen that the Investigating Officer while preparing the charge-sheet; the Learned Judicial Magistrate while recording the statement of Ms. R and

Ms. S under S. 164 of Cr.P.C. and the Special Judge while recoding the deposition of Ms. R and Ms. S were not conscious that the identity of the child cannot be compromised and that the identity of the child is not only the name of the child but the whole identity of the child, the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. It is urged that the guidelines laid down by this Court in *Rabin Burman* v. *State of Sikkim, 2017 SCC OnLineSikk 143* be followed to ensure strict compliance of the law with regard to non-disclosure of the identity of the child with the sensitivity the situation commands.

Deo Kumar Rai v. State of Sikkim ***361-I***

Protection of Children from Sexual Offences Act, 2012 – S. 33 (8) – Protection of Children from Sexual Offences Rules, 2012 – Rule 7 – Compensation – Many a times due to the peculiar facts of the case, a Trial Judge may be faced with the situation where it is found that in addition to the punishment, compensation must be directed to be paid. In such situations the Trial Court is not helpless. S. 33 (8) read with Rule 7 was made precisely for the said purpose. The Special Judge has the power and therefore must also exercise it, in appropriate cases, to direct payment of compensation as per the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. The aforesaid provisions are victim centric. It is meant for the purpose of rehabilitation of the victim who has suffered loss or injury as a result of the crime and who require rehabilitation. The Special Court is required to consider whether there is a need for directing payment of compensation by firstly making adequate inquiry and thereafter giving reasons. The quantum of compensation must be as prescribed under the provisions of the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date – While making the recommendation by the Court and while deciding the quantum of compensation payable under the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date the ethos of S. 33(8) of the POCSO Act 2012, Rule 7 of the POCSO Rules 2012 and S. 357(A) of the Cr.P.C, which have direct roots in the concept of victimology must always be in its mind.

Deo Kumar Rai v. State of Sikkim ***361-F***

Protection of Children from Sexual Offences Act, 2012 – S. 34(2) – Determination of age – The date of birth of the victim therein is recorded as "05-10-2002", while the date of registration of the birth, as per the document, evidently took place only on 19-05-2011. The Birth Certificate, Exhibit 3, was issued on 02-06-2011. Firstly, no irregularity can be culled out on this count, as the victim and herfamily belong to a rural area, hence, ignorance of immediate

registration of birth would be a mitigating factor. Besides, the incident took place in the months of August and September 2015, whereas Exhibit 3, the Certificate, was issued in the year 2011 – Thus, the document having been prepared *ante litem motam*, it cannot be said that it was manufactured for the purposes of the instant case.

Robin Gurung v. State of Sikkim ***477-C***

Protection of Children from Sexual Offences Rules, 2012 – Rule 7 – In terms of S. 33 (8) of the POCSO Act, 2012 read with the POCSO Rules, 2012 and S. 357 A (3) of Cr.P.C, the Special Judge was required to come to a conclusion whether the compensation awarded under S. 357 of Cr.P.C. is adequate or not for the rehabilitation of Ms. R and Ms. S. The considerations are cogently enumerated in Rule 7 of the POCSO Rules, 2012. In the facts of the present case, the type of abuse, gravity of the offence and the severity of the mental and physical harm suffered by the victims would be relevant. The fact that the aggravated sexual assault on Ms. R and Ms. S were isolated incidents would also be a relevant factor. Equally important would be the financial condition of Ms. R and Ms. S which as per the evidence available was definitely not good. The shock of such heinous sexual assault by Ms. R's own uncle on Ms. R and by a person known to Ms. S on her would also be a relevant consideration. The Special Court is required to ask itself as to what is required to rehabilitate the victim who has suffered both mentally and physically to get over that trauma. The Special Judge did not do so. Under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 as amended till date for sexual assault (excluding rape) an amount of 50,000/- (Rupees Fifty Thousand) is prescribed as the maximum limit of compensation. As such the Sikkim State Legal Services Authority is directed to pay Ms. R and Ms. S just compensation of 45,000/- (Rupees Forty-Five Thousand) each from the Victim Compensation Fund provided by the State Government to it – As required under Rule 7 (5), the State Government shall pay the compensation within 30 days of the receipt of this judgment.

Deo Kumar Rai v. State of Sikkim ***361-H***

Sikkim Government Service Rules, 1974 – Rule 5 (13) – Officiating appointment – The appointee is to perform the duties of a vacant post without holding a lien in the service – Length of service of appointment on promotion made on ad-hoc or temporary basis, or on officiation in accordance with law against the substantive vacancies, may be counted for the purpose of seniority from the date of initial appointment – In the case at hand, all the appointments were made in excess of their quota, not in accordance with Rules, subject to conditions enshrined in the order stating that the appointees shall not claim seniority

or regular promotion on the said basis. The petitioners are not entitled to the benefit of period of officiation on the post of ACF before their appointment on permanent basis, on recommendation of the Sikkim Public Service Commission, as required under the Rules as well as under the conditions of the appointment of officiating basis. The petition is bereft of merits.

Samdup Tshering Bhutia and Others v. State of Sikkim and Others

405-C

Sikkim State Forest Service (Recruitment) Rules, 1976 – Rule 4 (2) – Method of Recruitment to the Service– Vacancies of a cadre to be filled up by competitive examination in accordance with clause (a) and by selection from among persons holding the post of Range Officers as per clause (b) in 50 : 50 ratio. Proviso to sub-rule (2) further provides that the number of persons, recruited under clause (b) shall not at any time exceed 50% of the total strength of the Service – Out of total 87 cadre strength, 43 or 44 posts were to be filled up by promotion. When the petitioners were promoted on officiating basis to the post of ACF vide order dated 12th February 2010 and 5th August 2010, there were already 56 promotee ACFs working in the cadre. Thus, the appointment of the petitioners was in excess of the requisite limit, as prescribed under the Rules – The subsequent regularization or absorption of the petitioners on permanent cadre was done by the Government after relaxation in the rules exercising power under Rule 4 (3) – The appointment of the petitioners as ACF on officiating basis was not in accordance with the law i.e. the Recruitment Rules, as it was clearly indicated in the appointment order itself, and as such their claim to seniority from initial date of officiating appointment merits rejection.

Samdup Tshering Bhutia and Others v. State of Sikkim and Others

405-B

Sikkim State Forest Service (Recruitment) Rules, 1976 – Rule 18 (A) – A direct recruit is entitled to seniority from the date of initial appointment, on completion of probation within the prescribed time i.e. two years. In the case on hand, all the direct recruits (4th to 22nd Respondents) have completed their probation in two years time and as such they became members of the Sikkim Forest Service from the initial date of appointment – Sikkim State Services (Regulation of Seniority) Rules, 1980 is applicable to the members of Sikkim Forest Service as prescribed under Rule 18 (A) of the Recruitment Rules.

Samdup Tshering Bhutia and Others v. State of Sikkim and Others

405-A

SLR (2017) SIKKIM 327

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

I.A. No. 01 of 2017 in
Crl. L.P. No. 02 of 2017

State of Sikkim ….. APPELLANT

Versus

Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others ….. RESPONDENTS

For the Appellant :	Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S.K. Chettri, Asstt. Public Prosecutor.
For Respondents No. 1 and 2 :	Mr. Ajay Rathi, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri, Advocates.
For Respondents 3 and 5 :	Mr. J.K. Kharka, Advocate.
For Respondent No. 4:	Mr. Tashi Norbu Basi, Advocate.
For Respondents 6 and 7:	Ms. Tashi Doma Sherpa, Advocate.

Date of decision: 1st September 2017

A. Limitation Act, 1963 – S. 5 – Allows condonation of delay, if "sufficient cause" is shown by the party, who fails to perform the act within the prescribed period – "Sufficient cause" has to be established to indicate the reasons which prevented the party from taking necessary steps within the period of limitation prescribed. If the party fails to show "sufficient cause", then the Court will not be in a position to condone the delay – The delay has been sufficiently explained by the State-Appellant by placing the sequence of events that occurred which resulted in the delay. There is no gross inaction, negligence, deliberate inaction or lack of *bona fides* on the part of the Appellant. (Paras 9 and 11)

Petition allowed.

Chronological list of cases cited:

1. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.

2. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

3. Pundlik Jalam Patil (Dead) by Lrs. v. Executive Engineer, Jalgaon Medium Project and Another, (2008) 17 SCC 448.

4. H. Dohil Constructions Company Private Limited v. Nahar Exports Limited and Another, (2015) 1 SCC 680.

5. State of Jharkhand through SP, CBI vs. Lalu Prasad @ Lalu Prasad Yadav, 2017 (6) Scale 21.

ORDER

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

1. The State-Appellant has filed the instant Application under Section 5 of Limitation Act, 1963 (for short "the Act"), seeking condonation of 158 (one hundred and fifty-eight) days in filing Leave to Appeal.

2. On the date fixed for hearing the instant matter, Learned Additional Public Prosecutor sought some time to file a better Affidavit, which was allowed vide Order of this Court dated 31-07-2017 and consequently filed. Learned Additional Public Prosecutor while seeking condonation of delay has put forth the chronology of events leading to the delay, being,

(i) That, the impugned Judgment and Order of acquittal was passed by the Learned Sessions Judge, Special Division – II, at Gangtok, East Sikkim, in Sessions Trial Case No.09 of 2015, in the matter of **State of Sikkim vs. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others**, acquitting the Respondents herein.

(ii) On an Application made for a certified copy of the impugned Judgment on the same day, the copy was furnished on 03-08-2016, hence, the Appeal was to be filed by 31-10-2016.

(iii) The File was received in the Office of the Advocate General on 27-01-2017, marked to the Senior Government Advocate, by Learned Additional Advocate General, on the same day, for preparation of the Appeal.

(iv) 28-01-2017 being a Government holiday and 29-01-2017, a Sunday, no steps were taken, following which, Senior Government proceeded to Delhi and returned only on 12-02-2017.

(v) Thereupon, the file was marked to Assistant Government Advocate on 13-02-2017 for taking necessary steps, who on 25-02-2017, placed the draft before the Additional Public Prosecutor.

(vi) Due to the intervening Government holidays on 26-02-2017 and 27-02-2017, the draft was sent to the CrimeBranch, Sikkim Police, on 06-03-2017, for clarification and after its return on 08-03-2017, the matter was discussed with the Law Officer on 09-03-2017 and 11-03-2017, receiving final settlement on 28-03-2017. On 29-03-2017 the draft was sent to the Additional Public Prosecutor for filing the Appeal, which took 3 (three) days, for preparation and the same was finally filed on 03-04-2017.

(vii) The grounds furnished herein are bona fide and hence, the Petition be allowed.

3. His submissions were buttressed by placing reliance on **Basawaraj and Another vs. Special Land Acquisition Officer**[1] and **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others**[2] .

[1] (2013) 14 SCC 81
[2] (2013) 12 SCC 649

4. Learned Counsel for the Respondents No.1 and 2, on his part, vehemently opposing the Petition for delay and contended that the State Government cannot be given any extra leverage for the delay, as it has been held by the Hon'ble Supreme Court in **Pundlik Jalam Patil (Dead) by Lrs. vs. Executive Engineer, Jalgaon Medium Project and Another**[3], that the Court helps those who are vigilant and "do not slumber over their rights". That, stale claims ought not to be allowed to be pursued as public interest is of paramount consideration. Reliance was also placed on the decision of **H. Dohil Constructions Company Private Limited vs. Nahar Exports Limited and Another**[4]**,** where the Hon'ble Supreme Court, while dealing with a delay of 1727 (one thousand, seven hundred and twenty-seven) days reiterated maxim vigilantibus non dormientibus jura subveniunt (law assists those who are vigilant and not those who sleep over their rights) and observed that, the same maxim were applicable to the said case and the Petition was dismissed lacking bonafides.

5. That, in the instant matter, the delay has not been explained inasmuch as, merely because, the Counsel goes out of station, it would not imply that the matter cannot be continued. The Petition lacks in bona fides and the grounds merit no consideration. Attention of this Court was drawn to **Esha Bhattacharjee**[2], wherein the Hon'ble Supreme Court, in Paragraph 15, observed as hereinunder;

> **"15.** In this context, we may refer with profit to the authority in Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn. [(2010) 5 SCC 459], where a two-Judge Bench of this Court has observed that: (SCC p.465, para 14)
>
> > "14. …. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time."

[3] (2008) 17 SCC 448
[4] (2015) 1 SCC 680

> Thereafter, the learned Judges proceeded to state that this Court has justifiably advocated adoption of liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate."

6. That, in **State of Jharkhand through SP, CBI vs. Lalu Prasad @ Lalu Prasad Yadav**[5] the Hon'ble Supreme Court observed that State and Private individuals should not be differentiated in matters of delay. That, merely because, the State has filed the matter belatedly by putting forth the above reasons, which lack bona fides, it is not entitled to the prayer for condonation of delay. Therefore, the Petition be dismissed.

7. The other Respondents had no submissions to made.

8. We have heard Learned Counsel at length, traversed the contents of the Application and given careful consideration to their rival submissions.

9. Section 5 of the Act allows condonation of delay if "sufficient cause" is shown by the party, who fails to perform the act within the prescribed period. However, the condition is that "sufficient cause" has to be established to indicate the reasons which prevented the party from taking necessary steps within the period of limitation prescribed. If the party fails to show "sufficient cause", then the Court will not be in a position to condone the delay.

10. In **Esha Bhattacharjee**[2] relied on by both parties, the Hon'ble Supreme Court while dealing with Section 5 of the Act,inter alia, culled out the principles that ought to be adhered to by the parties, viz.;

> **"21.** .....
>
> **21.1.** (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> **21.2.** (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

[5] 2017 (6) Scale 21

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

.....

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

.....”

11. Bearing in mind the aforesaid principles, while examining the matter at hand, we find that the delay has been sufficiently explained by the State-Appellant by placing the sequence of events that occurred which resulted in the delay. There is no gross inaction, negligence, deliberate inaction or lack of bona fides on the part of the Appellant.

12. The matter deals with the acquittal of the Respondents No.1 to 5 under Sections 302/323/325/506/34 of the Indian Penal Code and Sections 176/34 of the Indian Penal Code regarding Respondents No.6 and 7. It is appropriate to state here that in **Esha Bhattacharjee**[2] the Hon’ble Supreme Court held that the Courts are required to be vigilant so that ultimately there is no real failure of justice

and substantial justice being paramount and pivotal, the technical considerations ought not to be given undue and uncalled for emphasis.

13. In the facts and circumstances, we are inclined to and accordingly, do condone the delay.

14. Petition allowed.

SLR (2017) SIKKIM 334

(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. Misc. Case No. 10 of 2017

Thinlay Dorjee and Others ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners : Mr. A. K. Upadhayaya, Senior Advocate with Ms. Aruna Chhetri and Ms. Hemlata Sharma, Advocates.

For Respondent : Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors.

Date of decision: 1st September 2017

A. Code of Criminal Procedure, 1973 – S. 482 – Extraordinary powers of High Court under S. 482 to quash FIR/ Criminal proceeding involving non-compoundable offence in view of compromise arrived at between parties – S. 279, I.P.C is not compoundable under S. 320 Cr.P.C. Rash and negligent driving on a public way, if proved, is an offence which does affect the society – The allegation put to trial is one of rash and negligent act simplicitor and not a case of driving in an inebriated condition. This Court notices that the allegation in the final report is that the accused/petitioner No.1 stayed back after the accident, loaded the Scooty in his vehicle with the help of the locals and produced it at the Police Station. There is no allegation that the accused/petitioner No.1 tried to escape after the accident – The examination of prosecution witnesses is yet to commence. The main witnesses in the pending criminal proceeding would be the parties to the deed of compromise and the declaration. The accused/petitioner No.1 is a resident of Bhutan and perhaps not a frequent driver in the roads of Sikkim.

It is noticed that during the proceedings before this Court the accused/ petitioner No.1 was personally present in various dates which is a clear indication that the accused/petitioner No.1 has due regard to the majesty of the Indian Laws – S. 279, I.P.C is not a heinous offence. All dispute and differences being settled amicably and to the complete satisfaction of the victim/petitioner No.3, the continuation of the criminal proceeding would be an exercise in futility and in such circumstances the possibility of conviction would be remote and bleak. The benevolence of the victim/ petitioner No.3 to forgive the accused/petitioner No. 1 who is said to have injured him must also not be lost sight of. It is also noticed that if the trial is to continue the accused/petitioner No. 1 who has shown a great amount of right thinking, reflected in his conduct, post the accident, would be put to unnecessary judicial process. Therefore, not quashing the Criminal proceeding despite full and complete settlement and compromise would not be in the interest of real, complete and substantial justice.

(Paras 24, 25 and 26)

Petition allowed.

Chronological list of cases cited:

1. Narinder Singh and Others v. State of Punjab and Another, (2014) 6 SCC 466.
2. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 303.
3. Manoj Subba and Others v. State of Sikkim, Order dated 21.09.2016 in Crl. M.C. No. 19 of 2016.
4. Mohan Singh (Dead) by LRS v. Devi Charan and Others, (1988) 3 SCC 63.
5. Puttaswamy v. State of Karnataka and Another, (2009) 1 SCC 711.
6. Manish Jalan v. State of Karnataka, (2008) 8 SCC 225.

ORDER

Bhaskar Raj Pradhan, J

Crl. Misc. Case No.10 of 2017 has been preferred seeking to invoke the inherent powers of this Court under Section 482 of the Code of Criminal Procedure,

1973 (Cr.P.C.). The petitioners are the accused, the complainant and the victim respectively. The State of Sikkim is the respondent. The petitioners prays that FIR No. 29 of 2016 dated 03.06.2016 and its subsequent proceedings i.e., G.R. Case No. 24 of 2016 (State of Sikkim v. Shri Thinlay Dorjee) be quashed in terms of the deed of compromise dated 11.06.2016 entered between one Krishna Chettri, petitioner No. 2/ complainant and Thinlay Dorjee, petitioner No. 1/accused in the above mentioned Criminal Misc. Case on 29.07.2017. The deed of compromise records:

> "1. That the Party of the Second Part on 03.06.2016, on his way back to Bhutan collided with a Scooty bearing Registration No. WB 74 AF 6438, wherein one Mr. Hari Chhetri, S/o Late B. B. Chhetri (Rider of the said Scooty) and the pillon rider Mr. Ram Bahadur Chhetri, S/o Late H. B. Chhetri got injured. Accordingly the Party of the First Part being the brother of the injured persons lodged a complaint before the Singtam Police Station and on the basis of the same a FIR was registered against the Party of the Second part vide FIR No. 29/2016, dated 03.06.2016, dated 03.06.2016 under Section 279/237/238 of the Indian Penal Code, 1860 read with Section 177/ 184 of the Central Motor Vehicle Act, 1988.
>
> 2. That the Party of the Second Part assisted by the other persons of the locality took the injured persons to the hospital wherein the injured Mr. Hari Chhetri was admitted to Singtam District Hospital and later on referred to Mohapal Nursing Home, Pradhan Nagar, Siliguri, whereas the Pillion Rider Mr. Ram Bahadur Chhetri having suffered simple injuries was returned back after through medical examination, expenses of same was incurred by the party of the Second Part.
>
> 3. That the parties having been agreed to settle their disputes and differences amicably between themselves without recourse to litigation and for that purpose showing their willingness to abandon

their claims met at Singtam, East Sikkim for compromising the matter on 08.06.2016.

4. That it has been settled and compromised by the parties herein that the Party of the Second Part shall pay a lumpsum amount for the damages of the Scooty i.e. Rs.60,000/- (Rupees Sixty Thousand only), compensation to injured No.1 Mr. Hari Chhetri i.e. Rs. 1.00,000/- (Rupees One Lac only) and expenses for medical treatment to the injured No.2. Mr. Ram Bahadur Chhetri i.e. Rs.10,000/- as a full and final settlement to the claims of the party of the First Part.

Therefore, it was settled in a lumpsum amount of Rs.1,70,000/- (One Lac Seventy Thousand only) to be paid by the Party of the Second Part as a full and final settlement to the Complainant (i.e. party of the First Part) in connection to FIR No.29/2016 dated 03.06.2016.

5. That the party of the Second Part has already paid a sum of Rs.50,000/- (Rupees Fifty Thousand only) to the party of the Second Part as an advance to the aforesaid lumpsum amount and receipt of the same has been duly acknowledged by the Party of the First Part in presence of two attesting witnesses.

6. That the Party of the Second Part shall pay the remaining amount of Rs.1,20,000/- (Rupees One Lac Twenty Thousand only) to the Party of the First Part on 11.06.2016 and the Party of the First Part shall acknowledge the receipt of the same as full and final settlement and in future the party of the First Part shall have no claim against the Party of the Second Part.

7. That after execution of this deed of compromise and after receipt of the full and final payment of

the compensation amount, the Party of the First Part has agreed to withdraw the Complaint filed by him on 03.06.2016 followed by FIR No.29/ 2016 dated 03.06.2016 under Section 279/237/ 238 of the Indian Penal Code, 1860 read with Section 177/184 of the Central Motor Vehicle Act, 1988."

2. During the proceedings an application was filed by the petitioners placing on record a declaration of the parties dated 28.07.2017 in respect of the deed of compromise dated 11.06.2016 which was allowed. This application was filed by all the petitioners herein supported by a joint affidavit. Declaration of the parties in respect of the deed of compromise dated 11.06.2016 is signed by Hari Chettri, victim/petitioner No.3, complainant/petitioner No.2 and accused/petitioner No.1. The said declaration records that the total compensation amount of Rs.1,70,000/- (One Lakh Seventy Thousand only) has been paid to the complainant/petitioner No.2 to be paid to the victim/petitioner No.3 on 11.06.2016 as the victim/petitioner No.3 was at that time undergoing treatment. It also declares that it has been agreed between the parties that no future claims shall be made by the victim/petitioner No.3 and the complainant/petitioner No.2 against the accused/petitioner No.1 arising out of the said accident. The declaration also records the acknowledgment of the receipt of the entire compensation amount of Rs.1,70,000/- by the victim/ petitioner No.3.

3. FIR No. 29 of 2016 was registered on 03.06.2016 under Section 279, 237, 238 of the Indian Penal Code, 1860 (IPC) read with Section 177/184 of the Motor Vehicles Act, 1988. The FIR was lodged by complainant/petitioner No. 2 stating that around 4.20 p.m. on 03.06.2016 his sister-in-law, Uma Chettri, telephonically informed him that his brother victim /petitioner No.3 while going from Rangpo to Singtam in a scooty bearing No.WB 74 AF 6438 was hit by a vehicle No. BP-1B4867 and was grievously injured.

4. On the basis of the said FIR the investigation culminated in filing of a final report under Section 173 Cr.P.C. by which the accused /petitioner No. 1 was charge-sheeted under Section 279/338 IPC read with Section 177/181/184 Motor Vehicles Act, 1988.

5. On 22.03.2017 the Learned Chief Judicial Magistrate pronounced a notice of accusation to the accused/ petitioner No.1 under Section 279, 338 IPC and Section 184 of the Motor Vehicles Act, 1988.

6. The accused/petitioner No.1 did not plead guilty to the notice of accusation, pursuant thereto, the case was put to trial and summons issued to the prosecution witnesses. It was at this stage that on 30.05.2017 the present Criminal Misc. Case No. 10 of 2017 was filed before this Court.

7. I have heard Mr. A. K. Upadhayaya, Learned Senior Advocate, appearing for the petitioners as well as Mr. Karma Thinlay Namgyal, Learned Senior Advocate and Additional Public Prosecutor appearing for the State of Sikkim. Mr. A. K. Upadhayaya, would submit that this was a fit case for the exercise of the inherent powers of this Court and relied upon (1). **Narinder Singh & Ors. v. State of Punjab & Anr[1]. (2) Gian Singh v. State of Punjab & Anr[2] . (3) Manoj Subba & Ors v. State of Sikkim[3] (4) Mohan Singh (Dead) by LRS v. Devi Charan & Ors[4].** Mr. Karma Thinlay Namgyal, would submit that in view of the compromise entered between the affected parties and keeping in mind the ratio of the judgment of the Apex Court in re: **Gian Singh v. State of Punjab (supra)** it was a fit case in which this Court should exercise its inherent powers under Section 482 Cr.P.C. to quash the criminal proceeding and the State would not have any objection.

8. The relevant Sections of the IPC provides:-

> **"279.** Rash driving or riding on a public way.- Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."
>
> **"338.** Causing grievous hurt by act endangering life or personal safety of others.-Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."

[1] (2014) 6 SCC 466
[2] (2012) 10 SCC 303
[3] Order dated 21.09.2016 in Crl. M.C. No. 19 of 2016
[4] (1988) 3 SCC 63

9. Section 184 of the Motor Vehicles Act, 1988 provides:-

> **"184. Driving dangerously.**-Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable for the first offence with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, and for any second or subsequent offence if committed within three years of the commission of a previous similar offence with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both."

10. Section 320 of the Cr.P.C. provides which of the offences under the IPC are compoundable and the persons by whom such offences may be compounded.

11. Section 279 of IPC is a non-compoundable offence.

12. Section 338 IPC is an offence which is compoundable by a person to whom hurt is caused. The Petitioner No. 3 being the victim and the person who was hurt can compound it. By the compromise deed read with the declaration of the parties the offence under Section 338 IPC stands compounded. The accused/ petitioner No. 1 would stand acquitted for the offence under Section 338 IPC.

13. Section 200 of the Motor Vehicles Act, 1988 provides:

> **"200.** Composition of certain offences.-(1) Any offence whether committed before or after the commencement of this Act punishable under Section 177, Section 178, Section 179, Section 180, Section 181, Section 182, sub-section (1) or subsection (2) of Section 183, Section 184, Section 186 [Section 189, sub-section (2) of Section 190], Section 191, Section 192, Section 194, Section 196, or Section 198, may either before or after the institution of the prosecution, be compounded by such officers or authorities and for such amount as the

State Government may, by notification in the Official Gazette, specify in this behalf."

14. Section 184 of the Motor Vehicles Act, 1988 is therefore compoundable by such officers or authorities and for such amount as the State Government may by Notification in the Official Gazette.

15. The Government of Sikkim vide Notification No. 1633/MV/S dated 21st Feb. 1995 published in Sikkim Government Gazette No.79 dated 27th April 1995 has specified such officers under Schedule I who are authorised to compound the specific offences as provided under Section 200 of the Motor Vehicles Act, 1988 as well as the amount of fine thereto under Schedule II.

16. Section 200 of the Motor Vehicles Act, 1988 read with vide Notification No. 1633/MV/S dated 21st Feb. 1995 makes it clear that Section 184 of the Motor Vehicles Act, 1988 is compoundable by the Officers as specified in Schedule I of the said Notification on payment of the amount of fine as provided in Schedule II.

17. The petitioner No.1, pursuant to a query raised by this Court on 25.08.2017, has approached the authorised officer in terms of Notification No. 1633/MV/S dated 21st Feb. 1995, paid the amount specified under Schedule II thereof and vide receipt No.776 dated 28.08.2017 an amount of Rs.1,000/- (Rupees one thousand) only has been acknowledged by the compounding officer under Section 184 of the Motor Vehicles Act, 1988. The said receipt has been filed with an application dated 31.08.2017 filed by the Sub Divisional Police Officer, Gangtok. Accordingly the said offence under Section 184 of the Motor Vehicles Act, 1988 also stands compounded. Resultantly, the accused/petitioner No. 1 would stand acquitted for the offence under Section 338 IPC also.

18. The Apex Court in re: **Puttaswamy v. State of Karnataka and Anr.**[5] while examining a case where the appellant therein had been convicted under Section 279 and 304-A IPC for causing death of a small girl due to his rash and negligent driving took note of the settlement between the parties at the admission stage of the appeal before it and held that from the various decisions of the Apex Court it is clear that even if the offence is not compoundable within the scope of Section 320 of the Code of Criminal Procedure the Court may, in view of the compromise arrived at between the parties, reduce the sentence imposed while maintaining the conviction. This was not a case of exercise of inherent powers of the High Court under Section 482 of Cr.P.C.

[5] (2009) 1 SCC 711

19. In re: **Manish Jalan v. State of Karnataka**[6] the Apex Court while examining yet another case of conviction under Section 279 and 304-A IPC and upheld by the High Court, where the appellant therein had dashed against a Kinetic Honda Scooter, being driven by the deceased, who fell down and was run over by the left wheel of the tanker would hold that the offence under Section 279 IPC is not compoundable. Even while holding so the Apex Court would take note of the fact that it was a case of rash and negligent act simpliciter and not a case of driving in an inebriated condition and considering that the mother of the victim had no grievance against the appellant therein a lenient view was taken. The sentence of imprisonment was reduced to the period already undergone and in addition thereto the appellant therein was directed to pay an amount of Rs 1,00,000 to the mother of the deceased by way of compensation. This was also not a case of exercise of inherent powers of the High Court under Section 482 of Cr.P.C.

20. In re: **Narinder Singh & Ors. v. State of Punjab (supra)** the Apex Court while examining the powers under Section 482 of Cr.P.C. for quashing and offence alleged under Section 307 IPC would lay down detailed guidelines for High Courts to form a view under what circumstances it would accept the settlement between the parties and quash the proceedings and when it should refrain from doing so. In paragraph 29 of the said judgment the guidelines would read thus:-

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

[6] (2008) 8 SCC 225

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

(i) ends of justice, or

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

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

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

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

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is

a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the

stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

21. In re: **Gian Singh vs. State of Punjab (supra)** while answering the reference with regard to the inherent power of the High Court under Section 482 Cr.P.C. in quashing Criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 Cr.P.C. the Apex Court would hold:-

"51. Section 320 of the Code articulates public policy with regard to the compounding of offences. It catalogues the offences punishable under IPC which may be compounded by the parties without permission of the court and the composition of certain offences with the permission of the court. The offences punishable under the special statutes are not covered by Section 320. When an offence is compoundable under Section 320, abatement of such offence or an attempt to commit such offence or where the accused is liable under Section 34 or 149 IPC can also be compounded in the same manner. A person who is under 18 years of age or is an idiot or a lunatic is not competent to contract compounding of offence but the same can be done on his behalf with the permission of the court. If a person is otherwise competent to compound an offence is dead, his legal representatives may also compound the offence with the permission of the court.

Where the accused has been committed for trial or he has been convicted and the appeal is pending, composition can only be done with the leave of the court to which he has been committed or with the leave of the appeal court, as the case may be. The Revisional Court is also competent to allow any person to compound any offence who is competent to compound. The consequence of the composition of an offence is acquittal of the accused. Sub-section (9) of Section 320 mandates that no offence shall be compounded except as provided by this section. Obviously, in view thereof the composition of an offence has to be in accord with Section 320 and in no other manner."

"52. The question is with regard to the inherent power of the High Court in quashing the criminal proceedings against an offender who has settled his dispute with the victim of the crime but the crime in which he is allegedly involved is not compoundable under Section 320 of the Code."

"53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, "nothing in this Code" which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e. to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on the High Court; it merely safeguards existing inherent powers possessed by the High Court necessary to prevent abuse of the process of any court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the

grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code."

"54. In different situations, the inherent power may be exercised in different ways to achieve its ultimate objective. Formation of opinion by the High Court before it exercises inherent power under Section 482 on either of the twin objectives, (i) to prevent abuse of the process of any court, or (ii) to secure the ends of justice, is a sine qua non."

"55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection."

"56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided."

"57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment."

"58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants whileworking in that capacity, the settlement

between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

"59.B.S. Joshi [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] , Nikhil Merchant [(2008) 9 SCC 677 : (2008) 3 SCC (Cri) 858] , Manoj Sharma [(2008) 16 SCC 1 : (2010) 4 SCC (Cri) 145] and Shiji [(2011) 10 SCC 705 : (2012) 1 SCC (Cri) 101] do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in B.S. Joshi [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] , Nikhil Merchant [(2008) 9 SCC 677 : (2008) 3 SCC (Cri) 858] , Manoj Sharma [(2008) 16 SCC 1 : (2010) 4 SCC (Cri) 145] and Shiji [(2011) 10 SCC 705 : (2012) 1 SCC (Cri) 101] this Court has compounded the noncompoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under

Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment."

"60. We find no incongruity in the above principle of law and the decisions of this Court in Simrikhia [(1990) 2 SCC 437 : 1990 SCC (Cri) 327] , Dharampal [(1993) 1 SCC 435 : 1993 SCC (Cri) 333 : 1993 Cri LJ 1049] , Arun Shankar Shukla [(1999) 6 SCC 146 : 1999 SCC (Cri) 1076 : AIR 1999 SC 2554] , Ishwar Singh [(2008) 15 SCC 667 : (2009) 3 SCC (Cri) 1153] , Rumi Dhar [(2009) 6 SCC 364 : (2009) 2 SCC (Cri) 1074] and Ashok Sadarangani [(2012) 11 SCC 321] . The principle propounded in Simrikhia [(1990) 2 SCC 437 : 1990 SCC (Cri) 327] that the inherent jurisdiction of the High Court cannot be invoked to override express bar provided in law is by now well settled. In Dharampal [(1993) 1 SCC 435 : 1993 SCC (Cri) 333 : 1993 Cri LJ 1049] the Court observed the same thing that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Similar statement of law is made in Arun Shankar Shukla [(1999) 6 SCC 146 : 1999 SCC (Cri) 1076 : AIR 1999 SC 2554] . In Ishwar Singh [(2008) 15 SCC 667 : (2009) 3 SCC (Cri) 1153] the accused was alleged to have committed an offence punishable under Section 307 IPC and with reference to Section 320 of the Code, it was held that the offence punishable under Section 307 IPC was not compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In Rumi Dhar [(2009) 6 SCC 364 : (2009) 2 SCC (Cri) 1074] although the accused had paid the entire due amount as per the settlement with the bank in the matter of recovery before the Debts Recovery Tribunal, the accused was being proceeded with for the commission of the offences under Sections 120-B/420/467/468/471 IPC along with the bank officers who were being prosecuted under Section 13(2) read with 13(1)(d) of the Prevention of Corruption

Act. The Court refused to quash the charge against the accused by holding that the Court would not quash a case involving a crime against the society when a prima facie case has been made out against the accused for framing the charge. Ashok Sadarangani [(2012) 11 SCC 321] was again a case where the accused persons were charged of having committed the offences under Sections 120-B, 465, 467, 468 and 471 IPC and the allegations were that the accused secured the credit facilities by submitting forged property documents as collaterals and utilised such facilities in a dishonest and fraudulent manner by opening letters of credit in respect of foreign supplies of goods, without actually bringing any goods but inducing the bank to negotiate the letters of credit in favour of foreign suppliers and also by misusing the cash-credit facility. The Court was alive to the reference made in one of the present matters and also the decisions in B.S. Joshi [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] , Nikhil Merchant [(2008) 9 SCC 677 : (2008) 3 SCC (Cri) 858] and Manoj Sharma [(2008) 16 SCC 1 : (2010) 4 SCC (Cri) 145] and it was held that B.S. Joshi [(2003) 4 SCC 675 : 2003 SCC (Cri) 848] and Nikhil Merchant [(2008) 9 SCC 677 : (2008) 3 SCC (Cri) 858] dealt with different factual situation as the dispute involved had overtures of a civil dispute but the case under consideration in Ashok Sadarangani [(2012) 11 SCC 321] was more on the criminal intent than on a civil aspect. The decision in Ashok Sadarangani [(2012) 11 SCC 321] supports the view that the criminal matters involving overtures of a civil dispute stand on a different footing."

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the

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

to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

22. A perusal of the notice of accusations dated 22.03.2017 framed by the Learned Chief Judicial Magistrate makes it evident that the offences under Section 279/338 of the IPC and Section 184 of the Motor Vehicle Act, 1988 pertains to the same occurrence. As per the accusations the accused/petitioner No.1 was driving an SUV vehicle on 03.06.2016 in speed so rash and negligent that it hit the Scooty driven on the road causing grievous hurt to the rider i.e. the victim/petitioner No.3. The deed of compromise dated 11.06.2016 and the declaration dated 28.07.2017 makes it evident that all issues between the offender and the victim have been amicably settled. The offence under Section 279 IPC is not compoundable. The rest of the offences charged against the accused/petitioner No.1 are compoundable and have been compounded.

23. From the recital of the deed of compromise it is clear that the injured victim/petitioner No.3 was immediately evacuated by the accused/petitioner No.1 with the help of other persons to the Singtam District Hospital and admitted there for treatment and care. Later on the victim/petitioner No.3 was referred to Mohapal Nursing Home, Pradhan Nagar, Siliguri. It is also noticed that the accused/petitioner No.1 has borne the medical expenses of the injured victim/petitioner No.3 for an amount of Rs.1,00,000/- (Rupees One Lakh); expenses for the damages to the Scooty for an amount of Rs.60,000/- (Rupees Sixty Thousand) and for the medical expenses of one Ram Bahadur Chhetri, the pillion rider who had suffered simple injury. The dispute and differences between the parties have thus been amicably resolved and a total amount of Rs.1,70,000/- (Rupees One Lakh Seventy Thousand) paid as detailed above and the victim/petitioner No.3 has acknowledged the receipt of the same vide declaration dated 28.07.2017.

24. It is true that Section 279 IPC is not compoundable under Section 320 Cr.P.C. rash and negligent driving on a public way, if proved, is an offence which does affect the Society. However it is noticed that there is no allegation against the accused/petitioner No.1 that at the time of accident he was under the influence of liquor or any other substance impairing his driving skills. The allegation put to trial is one of rash and negligent act simplicitor and not a case of driving in an inebriated

condition. This Court notices that the allegation in the final report is that the accused/petitioner No.1 stayed back after the accident, loaded the Scooty in his vehicle with the help of the locals and produced it at the Police Station. There is no allegation that the accused/petitioner No.1 tried to escape after the accident.

25. The examination of prosecution witnesses is yet to commence. The main witnesses in the pending criminal proceeding would be the parties to the deed of compromise and the declaration. The accused/petitioner No.1 is a resident of Bhutan and perhaps not a frequent driver in the roads of Sikkim. It is noticed that during the proceedings before this Court the accused/petitioner No.1 was personally present in various dates which is a clear indication that the accused/petitioner No.1 has due regard to the majesty of the Indian Laws.

26. Section 279 IPC is not a heinous offence. All dispute and differences being settled amicably and to the complete satisfaction of the victim/petitioner No.3 the continuation of the Criminal proceeding would be an exercise in futility and in such circumstances the possibility of conviction would be remote and bleak. The benevolence of the victim/petitioner No.3 to forgive the accused/petitioner No. 1 who is said to have injured him must also not be lost sight of. It is also noticed that if the trial is to continue the accused/petitioner No. 1 who has shown a great amount of right thinking, reflected in his conduct, post the accident, would be put to unnecessary judicial process. Therefore, not quashing the Criminal proceeding despite full and complete settlement and compromise would not be in the interest of real, complete and substantial justice.

27. This Court in re: **Manoj Subba v. State of Sikkim (supra)** while exercising its inherent powers under Section 482 of Cr.P.C. would quash the FIR registered under Section 279/337/338 of the IPC read with Section 184 and 187 of the Motor Vehicles Act, 1989 and the G.R.Case registered thereafter.

28. In the circumstances, this Court is of the view that this is a fit case to exercise the inherent powers of this Court under Section 482 Cr.P.C. to secure the ends of justice. In exercise of the inherent powers of this Court under Section 482 of the Cr.P.C. the FIR No. 29 of 2016 dated 03.06.2016 and its subsequent proceedings i.e. G.R. Case No. 24 of 2016 (State of Sikkim v. Shri Thinlay Dorjee) is quashed.

29. Copy of this Order may be sent to the Court of the Learned Chief Judicial Magistrate, East Sikkim at Gangtok for compliance.

SLR (2017) SIKKIM 355

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

Crl. L.P. No. 02 of 2017

State of Sikkim ….. APPELLANT

Versus

Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others ….. RESPONDENT

For the Appellant : Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S.K. Chettri and Mrs. Pollin Rai, Asstt. Public Prosecutors.

For Respondents 1 and 2 : Mr. Ajay Rathi, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri, Advocates.

For Respondents 3 and 5: Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan, Advocate.

For Respondent No. 4: Mr. Tashi Norbu Basi, Advocate.

For Respondents 6 and 7: Mr. Jorgay Namkha, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates.

Date of decision: 8th September 2017

A. Code of Criminal Procedure, 1973 – S. 378 (3) – Leave to Appeal – The provision for seeking Leave to Appeal is to ensure that no frivolous Appeal are filed against orders of acquittal as a matter of course – Careful and meticulous consideration of the relevant material and evidence on record, we find that arguable points have been raised by the Appellant which are not trivial – The material furnished before us requires deeper scrutiny and consideration. (Paras 8, 10 and 11)

Petition allowed.

Chronological list of cases cited:

1. Khumbha Ram v. State of Rajasthan and Others, (2016) 15 SCC 613.

2. State of Rajasthan v. Sohan Lal, (2004) 5 SCC 573.

3. State of Rajasthan v. Firoz Khan *alias* Arif Khan, (2016) 12 SCC 734.

ORDER

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

1. The State-Appellant is before this Court, aggrieved by the Judgment and Order of acquittal, dated 29-07-2016, passed by the Learned Sessions Judge, Special Division – II, at Gangtok, East Sikkim, in Sessions Trial Case No.09 of 2015 **(State of Sikkim vs. Gurmey Wangchuk Wazalingpa @ Gyurmee and Others)**, whereby the Respondents No.1 to 5 were acquitted of the offences under Sections 302/323/325/506/34 of the Indian Penal Code (for short "the IPC") and the Respondents No.6 and 7 from the charges under Sections 176/34 of the IPC.

2. The facts summarised for the present purposes are that, on 18-05-2013, the deceased, Rakshit Singh Meena @ Rakshit Meena, along with one Anirban Neogi (P.W.22), went to Café Live & Loud, at Tibet Road, Gangtok, at around 8 p.m. and were later joined by their friends, namely, Aditya Verma (P.W.8), Ambar Chandra (P.W.23), Arindam Parmar (P.W.21) and Divit Vinod (P.W.9), at around 10 p.m. At around 01.30 a.m., on 19-05-2013, the deceased and his friends, all students of Sikkim Manipal Institute of Technology (SMIT), Majitar, Rangpo, East Sikkim, were assaulted by six unknown persons, on the stairs and outside the said Café, who after the assault made good their escape in two vehicles. The injured deceased and his friends returned to their hotel at Arithang, Gangtok. At around 5 a.m., due to the deteriorating condition of the deceased, he was taken to STNM Hospital, Gangtok, and thereafter to Central Referral Hospital, Tadong, where he was declared "brought dead". The Prosecution case is that the Respondents No.1 to 5 herein are the assailants and the indiscriminate assault inflicted by them on the PWs mentioned hereinabove and the deceased, led to the fatality.

3. By filing this Application under Section 378(3) of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C."), the State-Appellant seeks Leave to Appeal against the impugned Judgment. The grounds raised by Learned Additional Public Prosecutor was that the impugned Judgment was passed mainly on the ground that the testimony of the witnesses suffered from substantial infirmities and inconsistencies and were not sufficient to convict the Respondents who were extended the benefit of doubt. On the contrary, the evidence of five witnesses, being P.Ws 8, 9, 21, 22 and 23, relied on by the Prosecution, corroborate each other, with regard to the incident and the assault by the Respondents, which led to the death of Rakshit Singh Meena @ Rakshit Meena, the victim. Walking this Court through the evidence of the said witnesses at length, it was contended that a closer scrutiny of the evidence, so furnished by the Prosecution, would clearly indicate that the Respondents had been identified by the witnesses, emphasis was laid on the evidence of P.W.22. That, although the Learned Trial Court had opined in its Judgment that the place of occurrence was also not specified, however, the witnesses have clearly described the location as well as the time of the offence, which has been consistent. That, the Learned Trial Court had held that the witnesses were unable to throw light on the physical and mental condition of the deceased or for that matter unable to identify the Respondents and failed to describe their physical features of the said accused persons, the Respondents herein. That, such an observation seriously prejudices the Prosecution case. Considering the time of the offence, it suffices that they were able to identify the Respondents as the persons who perpetuated the offence that relevant night. The Learned Trial Court erred in discarding the identification of the accused persons, the Respondents herein. The evidence on record infact forms a complete chain of evidence which leads to the irresistible conclusion that the Respondents were responsible for the offence. The Learned Trial Court thus failed to appreciate the Prosecution evidence in its correct perspective as required by Law and erroneously acquitted the accused persons, hence, there being questions which require consideration by this Court, the Leave to Appeal be granted.

4. Resisting the arguments put forth by Learned Additional Public Prosecutor, Learned Counsel for the Respondents No.1 and 2 would urge that there was no error in the finding of the Learned Trial Court. That, the evidence of the witnesses leads to a clear conclusion that none could identify the accused persons besides the Prosecution case has to stand on its own legs. Hence, in the absence of any specific evidence against the Respondents No.1 and 2 and in the absence of identification or proof of any assault, the Petition be dismissed.

5. Learned Counsel for the Respondents No.3, 4, 5, 6 and 7, had no objection to the Petition, conceding that on the same issue an Appeal being Crl.A. No.30 of 2016 **(Renu Meena vs. State of Sikkim and Others)** has been filed by the mother of the victim and already admitted by this Court, vide Order dated 16-02-2017.

6. We have heard Learned Counsel at length and given anxious consideration to their submissions. We have also perused the pleadings and documents annexed thereto.

7. In order to appreciate the matter at hand, we may extract the relevant Section of the Cr.P.C. Section 378(3) reads as follows;

> **"378. Appeal in case of acquittal.–** ……..
>
> (3) No appeal under sub- section (1) or subsection
>
> (2) shall be entertained except with the leave of the High Court.
>
> ……."

8. The provision for seeking Leave to Appeal is to ensure that no frivolous Appeal are filed against orders of acquittal as a matter of course. The Hon'ble Supreme Court in **Khumbha Ram vs. State of Rajasthan and Others**[1] relying on the decision of **State of Rajasthan vs. Sohan Lal**[2] , held that;

> **"10.** …….....
>
> "3. … The State does not in pursuing or conducting a criminal case or an appeal espouse any right of its own but really vindicates the cause of society at large, to prevent recurrence as well as punish offences and offenders respectively, in order to preserve orderliness in society and avert anarchy, by upholding the rule of law. ……."

9. Further, in **State of Rajasthan vs. Firoz Khan alias Arif Khan**[3] the Hon'ble Supreme Court in an Appeal, filed by the State of Rajasthan, against the final Judgment and Order of the High Court of Rajasthan, in Crl. Leave to Appeal No.227 of 2005, dated 28-10-2005, which had dismissed the Application filed

[1] (2016) 15 SCC 613
[2] (2004) 5 SCC 753
[3] (2016) 12 SCC 734

by the Appellant,i.e., the State of Rajasthan, seeking Leave to file Appeal under Section 378(3) of the Cr.P.C., observed as follows;

> **"10.** The question as to how the application for grant of leave to appeal made under Section 378(3) of the Code should be decided by the High Court and what are the parameters which the High Court should keep in mind remains no more res integra. This issue was examined by this Court in State of Maharashtra v. Sujay Mangesh Poyarekar [(2008) 9 SCC 475]. C.K. Thakker, J. speaking for the Bench held in paras 19, 20, 21 and 24 as under: (SCC pp.482-83)
>
> "19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal 'shall be entertained except with the leave of the High Court'. It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by subsection (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.
>
> 20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.
>
> 21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded

by the trial court could not be said to be "perverse" and, hence, no leave should be granted.

* * *

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate court against an order of acquittal recorded by the trial court. We only state that in such cases, the appellate court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial court should not be disturbed. Where there is application of mind by the appellate court and reasons (may be in brief) in support of such view are recorded, the order of the court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review or reconsideration of evidence, the appellate court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave." "

10. On the principles enunciated hereinabove, while considering the matter at hand, we find that the offence under which the Respondents No.1 to 5 were booked are Sections 302/323/325/506/34 of the IPC and under Sections 176/34 of the IPC against the Respondents No.6 and 7. Needless to add that, the offence under Section 302 of the IPC is a heinous offence, and the life of the young victim herein has been snuffed out.

11. After a careful and meticulous consideration of the relevant material and evidence on record, we find that arguable points have been raised by the Appellant which are not trivial, consequently, the material furnished before us requires deeper scrutiny and consideration.

12. Consequently, the Leave to Appeal is allowed.

13. Crl.L.P. stands disposed of accordingly.

SLR (2017) SIKKIM 361

(Before Hon'ble Justice Mr. Bhaskar Raj Pradhan)

Crl. A. No. 13 of 2016

Deo Kumar Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant : Mr. Zangpo Sherpa, Legal Aid Counsel with Ms. Mon Maya Subba, Advocate.

For Respondent : Mr. S.K Chettri and Mr. D. K. Siwakoti, Assistant Public Prosecutors.

Date of decision: 13th September 2017

A. Indian Evidence Act, 1872 – S. 134 – It is settled law that conviction can be founded on the testimony of the prosecutrix alone, unless there are compelling reasons for seeking corroboration. It is equally well settled that the evidence of prosecutrix is more reliable than that of an injured witness – The evidence produced reflects that besides Ms. R and Ms. S, and the convict there was no one else when the alleged offences were committed on Ms. R and Ms. S on two different occasions – Minor discrepancies are bound to occur when the other witnesses who merely heard what was told to them narrate about the incident. It is significant to note that the evidence of Ms. R and Ms. S, although both of tender age, are cogent and unblemished in spite of being subjected to cross examination by the defence. (Para 34 and 53)

B. Code of Criminal Procedure, 1973 – S. 164 – The defence had ample opportunity to use the previous statement of Ms. R taken under S. 164 to contradict her – S. 145 of the Indian Evidence Act, 1872 permits cross-examination as to previous statement in writing – However, the defence did not do so. At the Appellate stage, the convict cannot be permitted to

take advantage of such discrepancies, even if it is existed, when the defence failed to contradict Ms. R in the manner provided under law. It must be remembered that evidence given in the Court under oath has great sanctity, which is why it is called substantive evidence – A statement under S. 164 can be used for both corroboration and contradiction. The object of recording a statement under S. 164 is to deter the witness from changing a stand by denying the contents of her previously recorded statement and to tide over immunity from prosecution by the witness – Any former statement of a witness is admissible under S. 157 of the Indian Evidence Act, 1872 – Thus the discrepancies pointed out cannot come to the rescue of the convict at the Appellate stage. (Paras 56 and 57)

C. Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging the F.I.R – This Court has examined the evidence of Ms. R and Ms. S and come to the conclusion that the same are not only truthful and reliable but their evidences alone could be the basis of conviction. In such circumstances, as held by the Apex Court, it is important to deal with it with all sensitivity that is needed in such cases taking stock of the realities of life. The assault amounts to aggravated sexual assault under the POCSO Act, 2012. The victims are children aged 6 and 11 years. The incident relates to a rural area of West Sikkim. The families of both Ms. R and Ms. S come from lower income strata of society. The convict was a relative of Ms. R and a co-villager of Ms. S. Consciousness, alertness and consequences of procedural laws would definitely not be considerations for such witnesses who are bound to make exaggerations, and sometimes embellish the evidence. When such heinous offences are committed on minor children it may perhaps also be expected that the family members may be confused, ill advised and may not understand the nuances of not reporting the crime on time. (Para 65)

D. Code of Criminal Procedure, 1973 – S. 354 – While conducting a trial of different offences allegedly committed against two victims, the Special Judge must clearly and cogently specify the offences of which, and the Sections of the POCSO Act, 2012 under which, the accused is convicted and punishment to which he is sentenced – The Special Judge, while writing the operative part of the judgment seem to have lost sight of the law and the fact that the Special Court was in fact conducting a trial of two separate and distinct offences committed on two victims. This is a requirement under the provision of S. 354 – The Learned Special Judge while conducting a

trial of two offences committed against two victims must keep conscious of the fact that the Special Court is required to render justice to two victims – Each of the offences defined in sub-section (a) to (u) of S. 9 of the POCSO Act, 2012 are distinct and different offences having different ingredients. Thus, the convict was liable to be punished separately for the offence committed on Ms. R under S. 9 (n) and on Ms. S under S. 9 (m).

(Paras 73, 74, 75 and 78)

E. Code of Criminal Procedure, 1973 – S. 31 – Sentence in cases of conviction of several offences at one trial – The Special Judge while sentencing must keep in mind the provisions of S. 31 which provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provision of S. 71 of the I.P.C, sentence him for such offences, the several punishments prescribed thereof which such Court is competent to inflict. It is desirable that the Special Court should record what punishment it awards for each of the two distinct offences. As this is not done complications would necessary arise at the appellate stage. Proper course of action would have been to pass a separate sentence for each offence – The question in such situations as to what interpretation should be given to such a composite sentence was persuasively answered by a Division Bench of the Allahabad High Court in re: *Murlidhar Dalmia* v. *State* – No failure of justice would have occasioned the convict for the irregularity in passing a composite sentence by the Special Judge in view of S. 465 of Cr.P.C.

(Paras 76, 79 and 80)

F. Protection of Children from Sexual Offences Act, 2012 – S. 33 (8) – Protection of Children from Sexual Offences Rules, 2012 – Rule 7 – Compensation – Many a times due to the peculiar facts of the case, a Trial Judge may be faced with the situation where it is found that in addition to the punishment, compensation must be directed to be paid. In such situations the Trial Court is not helpless. S. 33 (8) read with Rule 7 was made precisely for the said purpose. The Special Judge has the power and therefore must also exercise it, in appropriate cases, to direct payment of compensation as per the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. The aforesaid provisions are victim centric. It is meant for the purpose of rehabilitation of the victim who has suffered loss or injury as a result of the crime and who require rehabilitation. The Special Court is required to consider whether there is a need for directing

payment of compensation by firstly making adequate inquiry and thereafter giving reasons. The quantum of compensation must be as prescribed under the provisions of the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date – While making the recommendation by the Court and while deciding the quantum of compensation payable under the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date the ethos of S. 33(8) of the POCSO Act 2012, Rule 7 of the POCSO Rules 2012 and S. 357(A) of the Cr.P.C, which have direct roots in the concept of victimology must always be in its mind.

(Paras 85, 86, 91, 92, 93, 94, 95, 96, 97 and 98)

G. Code of Criminal Procedure, 1973 – S. 357 – S. 357 A – Compensation – In exercise of the powers conferred by Section 357 A, the Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2013 came into force in Sikkim on 24.06.2013. The said Scheme was amended vide Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2013 and the maximum limit of compensation was enhanced under particular heads of loss or injury. On 25.11.2016 Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016 was notified in the Sikkim Government Gazette making it applicable from 18.11.2016. The said amendment of 2016 further enhances the maximum limit of compensation on various heads of loss or injury.

(Paras 87, 88, 89)

H. Protection of Children from Sexual Offences Rules, 2012 – Rule 7 – In terms of S. 33 (8) of the POCSO Act, 2012 read with the POCSO Rules, 2012 and S. 357 A (3) of Cr.P.C, the Special Judge was required to come to a conclusion whether the compensation awarded under S. 357 of Cr.P.C. is adequate or not for the rehabilitation of Ms. R and Ms. S. The considerations are cogently enumerated in Rule 7 of the POCSO Rules, 2012. In the facts of the present case, the type of abuse, gravity of the offence and the severity of the mental and physical harm suffered by the victims would be relevant. The fact that the aggravated sexual assault on Ms. R and Ms. S were isolated incidents would also be a relevant factor. Equally important would be the financial condition of Ms. R and Ms. S which as per the evidence available was definitely not good. The shock of such heinous sexual assault by Ms. R's own uncle on Ms. R and by a person known to Ms. S on her would also be a relevant consideration. The Special Court is required to ask itself as to what is required to rehabilitate

the victim who has suffered both mentally and physically to get over that trauma. The Special Judge did not do so. Under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 as amended till date for sexual assault (excluding rape) an amount of 50,000/- (Rupees Fifty Thousand) is prescribed as the maximum limit of compensation. As such the Sikkim State Legal Services Authority is directed to pay Ms. R and Ms. S just compensation of 45,000/- (Rupees Forty-Five Thousand) each from the Victim Compensation Fund provided by the State Government to it – As required under Rule 7 (5), the State Government shall pay the compensation within 30 days of the receipt of this judgment.

(Para 105)

I. Protection of Children from Sexual Offences Act, 2012 – S. 33 (7) – Identity of the child – It is seen that the Investigating Officer while preparing the charge-sheet; the Learned Judicial Magistrate while recording the statement of Ms. R and Ms. S under S. 164 of Cr.P.C. and the Special Judge while recoding the deposition of Ms. R and Ms. S were not conscious that the identity of the child cannot be compromised and that the identity of the child is not only the name of the child but the whole identity of the child, the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. It is urged that the guidelines laid down by this Court in *Rabin Burman* v. *State of Sikkim, 2017 SCC OnLine Sikk 143* be followed to ensure strict compliance of the law with regard to non-disclosure of the identity of the child with the sensitivity the situation commands.

(Para 110)

Appeal dismissed.

Chronological list of cases cited:

1. Mohd Ali *alias* Guddu v. State of U.P., 2015 (7) SCC 272.
2. Govt. of NCT of Delhi v. Mullah Muzib, 2015 SCC OnLine Del 7228.
3. Dharma Rama Bhargare v. State of Maharashtra, (1973) 1 SCC 537.
4. Gurbachan Singh v. Satpal Singh and Others, (1990) 1 SCC 445.
5. State of H.P. v. Asha Ram, (2005) 13 SCC 766.
6. State of Himachal Pradesh v. Suresh Kumar *alias* DC, (2009) 16 SCC 697.

7. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.

8. Swaroop Singh v. State of Madhya Pradesh, (2013) 14 SCC 565.

9. Sanjok Rai v. State of Sikkim, 2017 SCC OnLine Sikk 76.

10. State of Himachal Pradesh v. Sanjay Kumar, (2017) 2 SCC 51.

11. R. Shaji v. State of Kerala, (2013) 14 SCC 266.

12. Shivaji Sahabrao Bobade and Another v. State of Maharashtra, (1973) 2 SCC 793.

13. State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban, (2006) 11 SCC 473.

14. Murlidhar Dalmia v. State, 1952 SCC OnLine All 232 : ILR (1953) 1 All 834 : AIR 1953 All 245.

15. Ankush Shivahi Gaikwad v. State of Maharastra, (2013) 6 SCC 770.

16. State of Madhya Pradesh v. Mehtaab, (2015) 5 SCC 197.

17. Hari Singh v. Sukhbir Singh, (1988) 4 SCC 551.

18. Manohar Singh v. State of Rajasthan and Others, 2015 (89) ACC 266 (SC).

19. Rabin Burman v. State of Sikkim, 2017 SCC OnLine Sikk 143.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Judgment of the Learned Special Court dated 17.09.2015 (the impugned judgment) sentences the convict to undergo simple imprisonment of 5 years and to pay a fine of ₹ 10,000/- (Rupees Ten Thousand) only under Section 9 (m) and 9 (n) and punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012). In default of payment of fine, the convict was directed to further undergo simple imprisonment of 3 (three) months. However, the period of detention already undergone by the convict during investigation and trial was to be set off against this period of imprisonment as provided under Section 428 Cr.P.C. The fine, if recovered, was to be handed

over to the victim as compensation under Section 357 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

2. The convict/appellant herein seeks to assail the impugned judgment passed by the Special Judge. Mr. Zangpo Sherpa, Legal Aid Counsel for the Appellant submits that the Learned Special Judge ought not to have relied upon the testimony of the victims alone when there were certain inconsistencies in the facts. He further submits that the Learned Special Court had erred in not considering the delay in lodging the First Information Report (FIR). He further submits that the prosecution had failed to examine necessary witnesses and the testimonies of those witnesses who had been examined were inconsistent. Mr. Zangpo Sherpa, relies upon **Mohd Ali alias Guddu v. State of U.P.[1] and Govt. of NCT of Delhi v. Mullah Muzib[2]** .

3. The Apex Court in re: **Mohd Ali alias Guddu (supra)** would hold that there can be no iota of doubt that the conviction can be based on sole testimony of prosecutrix, even without corroboration, if it is impeachable and beyond reproach. However, when a Court on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not irreproachable, then there is a requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony and in such cases where such other evidence does not support the story of the prosecutrix it can be discarded.

4. The facts of the case in re: **Mullah Muzib (supra)** is distinguishable as would be seen in the later part of this judgment. **Mullah Muzib (supra)** was a case of material contradiction in the testimonies of the two witnesses, the victim and his uncle, because of which the High Court had held that the evidence produced is not cogent enough to prove that the accused had carnal intercourse with the victim.

5. Mr. S. K. Chettri, Learned Assistant Public Prosecutor for the State would strongly contend that the judgment sought to be assailed was a reasoned one, the testimonies of the two child victims were cogent and reliable, the prosecution had

[1] 2015 (7) SCC 272
[2] 2015 SCC OnLine Del 7228

been able to establish the ingredients of the offences charged and therefore the same needs no interference. Mr. S. K. Chettri, relies upon **Dharma Rama Bhargare v. State of Maharashtra[3] , Gurbachan Singh v. Satpal Singh & Ors[4] ., State of H.P. v. Asha Ram[5] , State of Himachal Pradesh v. Suresh Kumar Alias DC[6] ., Mohd. Imran Khan v. State Government (NCT of Delhi)[7] , Swaroop Singh v. State of Madhya Pradesh[8] and Sanjok Rai v. State of Sikkim[9]** .

FACTUAL MATRIX

6. The relevant facts for the purpose of deciding this appeal is that on 31.12.2014 at 19.00 hrs an FIR was lodged at the Naya Bazar Police Station by P.W.4 alleging commission of rape on two minor children, Ms. R and Ms. S, by the convict. The investigation was conducted by P.W.13. The charge-sheet was filed on 16.02.2015. On 18.03.2015 the Learned Special Judge framed two charges. The first charge related to minor victim Ms. R, aged 11 years. It was alleged that since 2012 to December, 2014 the convict being a relative of Ms. R, committed aggravated sexual assault on her repeatedly, which offence fell under Section 9(l), 9(m) and 9(n) and punishable under Section 10 of the POCSO Act, 2012. The second charge related to the aggravated sexual assault on the other child victim, Ms. S, aged about 6 years. It was alleged that sometime in the year 2014 the said offence was committed by the convict, which offence fell under Section 9(m) and punishable under Section 10 of the POCSO Act, 2012. 13 witnesses were examined by the prosecution.

7. The victim, Ms. R, was examined as P.W.2. Her mother was examined as P.W.1 and her father was examined as P.W.6., Ms R's sister-in-law, who noticed some swelling over the chest of Ms. R, inquired about it and was informed by Ms. R that she was sexually assaulted by her 'dewa' (uncle), was examined as P.W.8.

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[3] (1973) 1 SCC 537.
[4] (1990) 1 SCC 445
[5] (2005) 13 SCC 766
[6] (2009) 16 SCC 697
[7] (2011) 10 SCC 192
[8] (2013) 14 SCC 565
[9] 2017 SCC OnLine Sikk 76.

8. The next victim, Ms. S, was examined as P.W.3. Her father was examined as P.W.5.

9. First informant for both the offences was examined as P.W.4. P.W.7 and P.W.5. are the seizure witnesses of the birth certificates of Ms. R, and Ms. S, vide seizure memos (Exhibit-7 and Exhibit-9).

10. P.W.11 is the Gynaecologist at the STNM Hospital, Gangtok who examined Ms. R and Ms. S, both on 01.01.2015 and proved his reports (Exhibit-13 and Exhibit-12) respectively.

11. P.W.12 was the Station House Officer (SHO) at the relevant time of lodging the first information by P.W.4 alleging that his elder brother, the convict, had committed rape on Ms. R and Ms. S.

12. P.W. 13 was the Investigating Officer who on completion of the investigation laid the charge-sheet before the Court of the Learned Special Judge. Charges were framed on 18.03.2015 and the trial culminated in the conviction of the convict.

EVIDENCE RELATING TO ASSUALT ON Ms. R.

13. Ms. R has deposed that she knows the accused who is her 'Dewa' (uncle). She further states that on 14.11.2014, after attending her school, she went to the place where her mother works at the site. At the site she went to drink water to the house of the convict. When she was drinking the water given by P.W.4, the brother of the convict, P.W.4 left. Thereafter, the convict came from behind and fondled her breasts and threatened her not to tell anyone. Ms. R further states that only after several days, she told about the incident to her sister-in-law, P.W.8. Ms. R identified her signatures on the questionnaire put by the Magistrate (Exhibit-1) and her statement recorded under Section 164 Cr.P.C. (Exhibit-2).

14. In cross examination Ms. R confirmed that on 14.11.2014 P.W.4 and his brother, the convict, where together in their house. Ms. R also admitted that she narrated about the alleged incident to P.W.8 only after few days and she did not tell her mother about the same. Ms. R further admitted that the relation between the convict and her family was not healthy and cordial. Ms. R clearly denied the

suggestion of the defence Counsel that the convict had not come from behind and fondled her breasts and that the convict had not threatened her not to disclose to anyone about the incident. Ms. R could not recollect when her statement was recorded by the Police.

15. P.W.8 deposed that about 4 to 5 months prior to the date of her deposition in Court (i.e. 16.04.2015) she had noticed some swelling over the chest of Ms. R, inquired from her about the same and was told by Ms. R, that she was sexually assaulted by her 'Dewa' (uncle). P.W.8 thereafter informed Ms. R's mother, P.W.1 about the incident. Thereafter, they inquired about the incident from the convict, who replied that P.W.1 had taken some loan from him and taking advantage of that the convict used to sexually assault Ms. R.

16. On cross examination P.W.8 admitted that she had informed P.W.1 about the incident in the month of November, 2014 but does not remember the exact date. P.W.8 denied the suggestion made by the defence that Ms. R had not disclosed about the commission of sexual assault on her by the convict. P.W.8 also denied the suggestion made by the defence that her allegation that the convict had admitted to the crime was a false statement. P.W.8 admitted that P.W.1 was also present with her when the convict confessed about the incident. P.W.8 also admitted that the relation between the convict and P.W.1 was not good and cordial. P.W.8 denied the suggestion made by the defence that it was because of this strained relationship that Ms. R's family had lodged the false complaint against the convict.

17. P.W.1, the mother of Ms. R, recognized the convict as her brother-in-law. On 14.11.2014, P.W.8 told her that the convict had committed rape on Ms. R. P.W.1 requested P.W.8 to inquire about the matter from Ms. R, after which P.W.8 inquired from Ms. R and confirmed that the convict had committed rape on Ms. R. After that P.W.1 inquired about the incident from Ms. R, reported the matter to the village Panchayat and thereafter they reported it to the Police.

18. In cross examination P.W.1 reiterated her statement about P.W.8 informing her that the convict had committed rape on Ms. R. She also admitted, in cross examination, that she had also noticed that the breast of Ms. R was swollen. P.W.1 admitted that they had reported the matter to the Police after seven days of the incident. P.W.1 admitted of having taken a loan of ` 3000/- from the convict prior to the incident and that she had not returned the amount to the convict. P.W.1 denied that the relation between the convict and her was not cordial prior to the incident. All other suggestion made by the defence was denied by P.W.8.

19. P.W.6, the father of Ms. R, also identified the convict as his cousin. P.W.6 deposed that on 31.12.2014 he learnt that convict had committed sexual assault on Ms. R and Ms. S and thereafter they reported the matter before the Panchayat and later to the Police. P.W.6 also deposed that on 31.12.2014 the Police had seized birth certificate of his daughter, Ms. R and identified Exhibit-8 as the birth certificate of Ms. R. P.W. 6 also deposed that on the same day the Police had also seized the birth certificate of Ms. S vide Exhibit-9 and identified the said birth certificate as Exhibit-10.

20. In cross examination, P.W.6 admitted that P.W.1 was his wife. P.W.6 denied the suggestion that his wife had informed about the alleged incident during second or third week of November, 2014. P.W.6 admitted that he did not have any personal knowledge about this case and that what he deposed was on the basis of hearsay. P.W.6 denied the suggestion of the defence that the relation between his family and the convict was not good or cordial prior to the incident. P.W.6 also admitted that the complaint (Exhibit-5) was prepared on instruction given by the Police and it was prepared at a place in West Sikkim. P.W.6 denied the suggestion made by the defence that his wife had not told him that the convict had committed sexual assault on Ms. R and Ms. S.

21. The evidence of Ms. R, was amply corroborated by the evidence of P.W.8 to whom Ms. R narrated about the incident. The evidence of P.W.8 is corroborated by the evidence of P.W.1, the mother of Ms. R to whom P.W.8 narrated what was told to P.W.8 by Ms. R.

22. P.W.4, the first informant and the natural brother of the convict, identified the convict in Court. P.W.4 stated that on 29.12.2014, one lady from his village (not examined), told him that the convict had committed rape on her minor granddaughter, Ms. S and another Ms. R. P.W.4 further deposed that again on 31.12.2014 P.W.1 also told him that P.W.8 had told her that the convict had committed rape on Ms. R and Ms. S and thereafter as per the request made by the 'Panchayat' (not examined), affixed his signature to the FIR (Exhibit-5). P.W.4 identified his signatures in (Exhibit-5) and the formal FIR (Exhibit-6). P.W.4 also identified (Exhibit-6).

23. In cross examination, P.W.4 admitted that the FIR (Exhibit-5) was not scribed by him but by the 'Panchayat' and he did not know the contents thereof. P.W.4 further stated that he had not given any instructions while preparing the FIR. P.W.4 admitted that the signature in the FIR (Exhibit-5) was his and volunteered to say that it was prepared at his house by the 'Panchayat' in the presence of Police. P.W.4 admitted that the Police had visited his house before lodging of the FIR. P.W.4 further admitted that he had no personal knowledge about the case. P.W.4 denied the suggestions of the defence that he had not been told by the grandmother of the victim, and P.W.1 about the alleged incidents. P.W.4 further stated that he could not say whether the relation between the convict and Ms. R's family was cordial or not. P.W.4 stated that he could not say whether Ms. R came to his house for drinking water prior to the incident. P.W.4 further stated that he could not say as to when the alleged incident occurred. P.W.4 admitted that he did not know what the FIR (Exhibit-6) was but admitted that he had signed the same at his residence and identified his signature.

24. P.W.7 and P.W.9 both identified the convict in the Court as their co-villager. They are seizure witnesses. P.W.7 and P.W.9 stated that the Police had seized the birth certificate of Ms. S (Exhibit-8) vide seizure memo (Exhibit-7) and identified their signatures thereon.

25. P.W.11 is the Gynaecologist who examined Ms. R on 01.01.2015 at 6.55 p.m. Ms. R was brought for examination with the alleged history of assault by the convict. Ms. R told P.W.11 that she was molested by the convict on 14.11.2014 by playing/massaging the breast area of Ms. R from the back. Ms. R denied sexual intercourse or penetration to P.W.11. On clinical examination of Ms. R P.W.11 gave a finding that there was no sufficient injury to determine sexual intercourse but fondling of the breast was likely. The cross examination of P.W.11 by the defence yielded no fruitful result in their favour.

EVIDENCE RELATING TO ASSUALT ON Ms. S.

26. Ms. S also identified the convict in Court as a co-villager. She could not remember the date, month and year of the incident. On the relevant day when she was returning from school, alone on reaching the house of the convict, the convict held Ms. S and rubbed himself against her for some time. The convict then told

Ms. S not to tell anyone about the incident and also gave 11/- to her. Ms. S went home and told her mother about it. Ms. S identified her signatures on the questionnaire put by the Magistrate (Exhibit-3) and her statement recorded under Section 164 Cr.P.C. (Exhibit-4).

27. On cross examination Ms. S denied the suggestion of the defence that they were other persons present at the time of the incident. She reiterated that she had narrated about the incident to her mother only. She could not remember when her statement was recorded. All other suggestions made by the defence were denied by Ms. S.

28. P.W.5, the father of Ms. S identified the convict in Court as a co-villager. P.W.5 stated that on 31.12.2014, at around 5 to 6 p.m., his wife telephonically called him to the house of the convict. P.W.5 further stated that when he went to the house of the convict his wife informed him that the convict had committed sexual assault on his minor daughter, Ms. S. He saw that the convict was taken by the Police.

29. In cross examination P.W.5 admitted that he had no personal knowledge about the case and it was based on hearsay. P.W.5 denied all other suggestion made by the defence.

30. P.W.6, as stated earlier, also stated that the Police has seized the birth certificate (Exhibit-10) of Ms. S vide seizure memo (Exhibit-9).

31. P.W.7 and P.W.9 both identified the convict in the Court as their co-villager. They are seizure witnesses. P.W.7 and P.W.9 stated that the Police had seized the birth certificate of Ms. S (Exhibit-10) vide seizure memo (Exhibit-9) and identified their signatures thereon.

32. P.W.11 is the Gynaecologist who examined Ms. S on 01.01.2015 at 7.05 p.m. Ms. S was brought for examination with the alleged history of assault by the convict. Ms. S told P.W.11 that she was sexually assaulted by the convict on her way back from school. According to P.W.11 Ms. S could not recollect the date by her but remembered she was given 11/- by the convict after which he took out his private part and rubbed against her. Ms. S denied penetration. On clinical examination of Ms. S, P.W.11 gave a finding that there was no evidence of penetrative

sexual 12 Crl. Appeal No. 13 of 2016 Deo Kumar Rai v. State of Sikkim intercourse. The cross examination of P.W.11 by the defence yielded no fruitful result in their favour.

33. P.W.12, the SHO of the Police Station, proved the FIR (Exhibit-5), the registration of the case and the endorsement of the same to Sub-Inspector, P.W.13, for investigation.

CONSIDERATION

34. It is settled law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is equally well settled that the evidence of prosecutrix is more reliable than that of an injured witness.

35. The Apex Court would have occasion to examine a case of a father charged for raping his own daughter in which the High Court had reversed the order of conviction passed by the Trial Court in spite of the testimony of the prosecutrix remaining unimpeached after lengthy cross examination. This was also a case in which suggestion was that a false case had been hoisted against the accused at the instance of her mother (who had strained relations with the father and residing separately). in re: **State of H.P. v. Asha Ram (supra)** the Apex Court would hold:-

"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is

found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case".

36. In re: **State of Himachal Pradesh v. Sanjay Kumar**[10] the Apex Court would hold:-

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P. [Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551 : 2004 SCC (Cri) 31]). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

[10] (2017) 2 SCC 51

37. The evidence produced makes it unequivocally clear that at the time of the actual assault, Ms. R and the convict were the only two present. The evidence of Ms. R is truthful and reliable. The defence could not break her in spite of her tender age. The fact that she narrated the incident to P.W.8 is corroborated by P.W.8 and P.W.1.

38. P.W.4, the natural brother of the convict and incidentally the first informant, naturally, in cross examination, stated that he could not say whether Ms. R came to his house for drinking water prior to the incident. P.W.4's hesitation to recollect the fact does not weaken the evidence of Ms. R. More so, when P.W.4, the first informant does not deny his signature on the written FIR (Exhibit5) and the formal FIR (Exhibit-6). It is quite obvious that the hesitation was due to the fact that the convict was, in fact, the real brother of P.W.4.

39. Similarly, the evidence produced with reference to the alleged offence against Ms. S also makes it evident that at the time of the sexual assault on Ms. S by the convict they were the only two present. The deposition of Ms. S is also truthful and reliable.

40. The evidence of Ms. S however stands alone. Although P.W.5, the father of Ms. S, was examined according to him it was his wife who told him about the incident. Mr. Zangpo Sherpa appearing for the convict would argue that the mother of Ms. S not being examined, the Special Court ought to have considered this fact before holding that the evidence of the prosecutrix is unimpeachable. Unfortunately, the mother of Ms. S and the wife of P.W. 5, was not brought to the witness box. The truth of the evidence of P.W.5 of what he heard from the mother of Ms. S cannot be accepted, being hearsay. However, the evidence of Ms. S stood the cross examination of the defence and remained undemolished. The Learned Special Judge has relied upon her testimony. There is no cogent reason for this Court to upset the said finding of the Learned Special Judge.

41. The Learned Special Judge on examination of the evidence held that the evidence of both Ms. R and Ms. S could not be discredited in cross examination. The Learned Special Judge would believe the evidence of P.W.1 the mother of Ms. R. The Learned Special Judge rejected the argument of the defence that the non examination of the mother of Ms. S and the Panchayat had created reasonable doubt on the prosecution case by holding that since there were no eye witnesses

their non examination was of no consequence. This Court finds no necessity to upset the above finding of the Learned Special Court.

42. The relevant provisions of the POCSO Act, 2012 are extracted herein below:-

"9. **Aggravated Sexual Assault.-**

(m) Whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child;....."

.....

is set to commit aggravated sexual assault."

43. The term sexual assault has been defined in Section 7 of the POCSO Act, 2012, which provides:-

"7. Sexual Assault.-Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such persons or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

44. The ingredients of aggravated sexual assault in terms of Section 9(m) of the POCSO Act, 2012 are:

1. Commission of sexual assault,

2. That sexual assault must be on a child below 12 years.

45. The ingredient of sexual assault as defined in Section 7 of the POCSO Act, 2012 are:

1. Sexual intent,

2. Touch of the vagina, penis, anus or breast of the child by the accused or making the child touch the vagina, penis, anus or breast of the accused or any other person or doing any other act with sexual intent which involves physical contact without penetration.

46. The word 'child' has been defined in Section 2(d) of the POCSO Act, 2012 as under:-

> "2(d) "child" means any person below the age of [eighteen] years;"

47. On examination of the evidence, the Learned Special Judge had come to a finding that:-

> "33. On the date of incident the victims were aged about 11 years and 6 years. In Exhibit-8 and Exhibit-10 the Birth Certificate (s) (sic), dates of birth of the victims are 22.09.2004 and 26.12.2008. In fact the defence has not disputed the age of the minor victims."

48. Mr. Zangpo Sherpa, appearing for the convict does not, fairly, contest the finding of the Learned Special Judge regarding the age of Ms. R and Ms. S before this Court also. This Court sees no cogent reason to disturb the finding of the Learned Special Judge regarding the age of Ms. R and Ms. S. relying upon the birth certificates of Ms. S (exhibit-10) issued on 24.02.2009 and Ms. R (exhibit-8) issued on 30.04.2008 by the Government of Sikkim, Office of the Chief Registrar Birth and Death, Department of Health Care, Human Services & Family Welfare Department. P.W.7 and P.W.9 have proved the seizure of the birth certificates of Ms. R vide seizure memo (exhibit-7) and of Ms. S vide seizure memo (exhibit9). P.W.7 is the father of Ms. R. Both the birth certificates are 17 certificate issued by the Government and issued under Section 12/17 of the Registration of Births and Deaths Act, 1969 and Rule 8/13 of the Sikkim Registration of Births and Deaths Rule, 1999 certifying that the information has been taken from the original record of birth which is the register for the particular area and giving details of the date of birth, place of birth, name of mother, name of father, nationality of father and mother, address of the parents at the time of birth,

permanent address, registration number, date of issue and date of registration. Under Section 35 of the Indian Evidence Act, 1872 an entry in any public or other official book, register or record or an electronic record, stating of fact in issue or relevant fact, and made by a public servant in the discharge of official duty, or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact. The said Exhibit-8 and Exhibit-10 are under the signature of the Registrar of Births and Deaths. The said birth certificates are admissible in evidence.

49. Ms. R stated that the convict is 'Dewa' (uncle). P.W.1, mother of Ms. R stated that the convict is her brother-in-law. P.W.6 the father of Ms. R stated that the convict was his cousin. The convict was therefore a relative of Ms. R through blood.

50. Ms. R stated that the convict came from behind, fondled her breast and threatened her not to tell anyone. It is evident that the convict had committed aggravated sexual assault as defined in Sections 9 (m) and 9 (n) of the POCSO Act, 2012. The sexual intent of the convict is clear from the act of fondling Ms. R's breast and threatening her not to tell anyone.

51. Ms. S stated that the convict held her and rubbed himself against her for some time. The convict also told Ms. S not to tell anyone and further gave an amount of ₹ 11/- to her. It is evident that the convict had committed aggravated sexual assault as defined under Section 9 (m) of the POCSO Act, 2012. The sexual intent is clear from the act of the convict of rubbing himself against Ms. S and thereafter telling Ms. S not to tell anyone and further giving an amount of 11/- to her.

52. Mr. Zangpo Sherpa, would argue that there was inconsistency in the version of the Prosecution witnesses.

53. The evidence produced reflects that besides Ms. R and Ms. S and the convict there was no one else when the alleged offences were committed on Ms. R and Ms. S on two different occasions. Thus, minor discrepancies, are bound to occur when the other witnesses who merely heard what was told to them narrate about the incident. It is significant to note that the evidence of Ms. R and Ms. S,

although both of tender age, are cogent and unblemished in spite of being subjected to cross examination by the defence. The minor discrepancies pointed out by Mr. Zangpo Sherpa does not relate to the ingredients of the offences for which the convict is aggrieved.

54. While examining such cases of sexual abuse on minor children it would be vital to keep in mind the observations of the Apex Court in re: **State of H.P. v. Sanjay Kumar (supra)**:-

> "22. We have already narrated the case of the prosecution as well as the testimonies of the prosecutrix, her mother PW 1 and the medical evidence. After going through the evidence of the prosecutrix and her mother, we find that apart from some minor and trivial discrepancies with regard to the period of stomach ache or about the medicine taken from the local doctor/chemist, insofar as material particulars of the incident are concerned, version of both these witnesses is in sync with each other. Here is a case where charge of sexual assault on a girl aged nine years is levelled. More pertinently, this is to be seen in the context that the respondent, who is accused of the crime, is the uncle in relation. Entire matter has to be examined in this perspective taking into consideration the realities of life that prevail in Indian social milieu."

55. Mr. Zangpo Sherpa further sought to point out various discrepancies between the statement of Ms. R under Section 164 Cr.P.C. and her deposition in Court.

56. The defence had ample opportunity to use the said previous statement of Ms. R taken under Section 164 Cr.P.C. to contradict Ms. R. However, the defence did not do so. At the Appellate stage the convict cannot be permitted to take advantage of such discrepancies, even if it is existed, when the defence failed to contradict Ms. R in the manner provided under law. It must be remembered that evidence given in the Court under oath has great sanctity, which is why it is called

substantive evidence. A statement under Section 164 Cr.P.C. can be used for both corroboration and contradiction. The object of recording a statement under section 164 Cr.P.C. is to deter the witness from changing a stand by denying the contents of her previously recorded statement and to tide over immunity from prosecution by the witness under Section 164 Cr.P.C. At the time of recording a statement under Section 164 Cr.P.C. no opportunity is provided to cross examine the witness and as such it cannot be treated as substantive evidence. (See: **R. Shaji v. State of Kerala**[11]).

57. Under Section 145 of the Indian Evidence Act, 1872 a witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Under Section 157 of the Indian Evidence Act, 1872 in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. Thus the discrepancies pointed out by Mr. Zangpo Sherpa cannot come to the rescue of the convict at the Appellate stage.

58. Mr. Zangpo Sherpa would also argue that the evidence of Prosecution witnesses would show that the relation between the convict and P.W.1, the mother of the victim, Ms. R was not good and cordial prior to the incident. The Learned Special Judge has examined this argument and held that: –

> "26. PW-1 is the mother of the victim R. Even if, the relation between PW-1 and accused is not good then also it is not believable that she use the prosecutrix as an instrument to wreak her vengeance against the accused. She being the mother cannot be expected to expose the modesty of her own daughter. I do not think that the mother of the victim will use her minor daughter as an instrument for her enmity with the accused, if any, and jeopardize her life involving in such kind of heinous offence."

[11] (2013) 14 SCC 266

59. This Court is in complete agreement with the reasoning given by the Learned Special Court as quoted above. The observations made by the Apex Court in paragraph 5 of the judgment in re: **State of H.P. v. Sanjay Kumar (supra)** quoted above, on a similar factual narrative, would suffice to reject the contention of Mr. Zangpo Sherpa.

60. Mr. Zangpo Sherpa would also argue that as per Ms. R the date of the alleged incident is 14.11.2014 but the FIR was filed only on 31.12.2014 and as such there is a delay in the FIR which was not considered by the Learned Special Judge. This statement that the contention of delay was not considered by the Learned Special Judge, however, is incorrect. Paragraphs 20 and 21 of the Judgment of the Learned Special Judge deals extensively on the aspect of delay in lodging the FIR and rejects the same.

61. Ms. R stated that the incident was of 14.11.2014 and that she informed P.W.8 after several days. P.W.8 states that after inquiring about the swelling over Ms. R's chest from Ms. R and on being told she was sexually assaulted by her 'Dewa' (uncle) she informed P.W.1, the mother of Ms. R, about what she heard from Ms. R. In cross examination P.W.8 admitted that she had informed P.W.1 about the incident in the month of November, 2014 but does not remember the exact date. There is a contradiction in the statement of P.W.1, on when she was informed by P.W.8 because in her deposition in Court, P.W.1 states that on 14.11.2014 itself she was informed by P.W.8 that convict had committed rape on Ms. R. However, P.W.1 goes on to state that she requested P.W.8 thereafter to inquire about the matter from Ms. R who on inquiry confirmed the same after which P.W.1 inquired about the incident directly from Ms. R, reported the matter to the Village Panchayat and thereafter they reported to the Police. Evidently the evidence is not cogent regarding when and how the information regarding the sexual assault on Ms. R was transmitted till it reached the Police Station.

62. Ms. S does not remember at all the date, month and year of the incident. P.W.5 the father of Ms. S stated that on 31.12.2014 his wife called him to the house of the convict and on reaching there she informed him that the convict had sexually assaulted Ms. S. The fact that P.W.5 received a telephone call from his wife on 31.12.2014 and heard from her after reaching the house of the convict is

admissible in evidence under Section 60 of the Indian Evidence Act, 1872. The FIR was lodged by P.W.4 on 31.12.2014 itself who states that on 21.12.2014 he received information about the incident from one Lady (not examined), grandmother of Ms. S about rape having been committed by the convict on both Ms. S and Ms. R. P.W.4 further goes to state that on 31.12.2014 P.W.1 also told her that P.W.8 told her that the convict had committed rape on Ms. R and Ms. S and thereafter on the request of the Panchayat he affixed his signature on the FIR.

63. However, the evidence of Ms. R and Ms. S on the material aspect of commission of aggravated sexual assault on them does inspire confidence. In such event discrepancies as pointed out above, of other witnesses, who did not have direct knowledge about the aggravated sexual assault on Ms. R and Ms. S, or of P.W.4, the first informant and an interested witness, fades into insignificance when the direct and cogent evidence of Ms. R and Ms. S are available. There are no contradictions on the direct evidences given by Ms. R and Ms. S about the crime and the other witnesses examined by the prosecution.

64. In **State of Himachal Pradesh v. Sanjay Kumar**[12] the Apex Court would examine a delay in lodging an FIR of 3 years on which ground the High Court of Himachal Pradesh had been swayed and over turned the judgment of conviction in a rape case rendered by the Trial Court. The Apex Court in the said Judgment would hold:-

> **"30.** By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are

> not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims."

65. This Court has examined the evidence of Ms. R and Ms. S and come to the conclusion that the same are not only truthful and reliable but their evidences alone could be the basis of conviction. In such circumstances, as held by the Apex Court, it is important to deal with it with all sensitivity that is needed in such cases taking stock of the realities of life. The assault amounts to aggravated sexual assault under the POCSO Act, 2012. The victims are children aged 6 and 11 years. The incident relates to a rural area of West Sikkim. The families of both Ms. R and Ms. S come from lower income strata of Society. The convict was a relative of Mr. R and a co-villager of Ms. S. Consciousness, alertness and consequences of procedural laws would definitely not be considerations for such witnesses who are bound to make exaggerations, and sometimes embellish the evidence. When such heinous offences are committed on minor children it may perhaps also be expected that the family members may be confused, ill advised and may not understand the nuances of not reporting the crime on time. As far back in the year 1973 V. R. Krishna Iyer J, would hold, and very appropriate to the present case, in re: **Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra**[13]:-

> "(8) Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways

[12] (2017) 2 SCC 51

> of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that the variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.....
>
> 11 .....The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed."

SENTENCE

66. The Learned Special Judge was examining two different offences committed by the convict to different victims, Ms. R and Ms. S. However, the Learned Special Judge, in the operative part of the judgment, held as under:-

> "I, therefore, hold that the accused Deo Kumar Rai is guilty under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012. Thus, I do hereby convict the accused Deo Kumar Rai under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012."

67. Vide order on sentence dated 17.09.2015 the Learned Special Judge would sentence the convict in the following manner:-

> "4. After considering the submissions made by Ld. Addl. Special P. P. as well as Ld. Counsel for the convict and considering the facts and circumstances of the case, the ends of justice would meet if the convict Deo Kumar Rai is sentenced to undergo:-

Simple imprisonment of 5 years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012. In default of payment of fine, the convict shall further undergo simple imprisonment of 3 (three) months.

However, the period of detention already undergone by convict during investigation and trial shall be set off against this period of imprisonment as provided under Section 428 Cr.P.C..

5. The fine amount (supra), if recovered shall be handed over to the victims as compensation under Section 357 of the Code of Criminal Procedure, 1973."

68. Section 9 (n) of the POCSO Act, 2012, as quoted above, deals with commission of sexual assault on a child being a relative of the child. Section 9 (m) of the POCSO Act, 2012 however deals with sexual assault on a child below 12 years. Both Ms. R and Ms. S being below 12 years the convict was liable to be convicted and punished under Section 9 (m) of the POCSO Act, 2012 for having committed sexual assault on a child below 12 years.

69. Section 71 IPC provides:-

"71. **Limit of punishment of offence made up of several offences.-**Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

[13] (1973) 2 SCC 793

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

70. In re: **STATE REPRESENTED BY INSPECTOR OF POLICE, PUDUKOTTAI, T.N v. A. PARTHIBAN**[14] , held as under:-

"7. The crucial question is whether the alleged act is an offence and if the answer is in the affirmative, whether it is capable of being construed as offence under one or more provisions. That is the essence of Section 71 IPC, in the backdrop of Section 220 CrPC."

71. Section 71 IPC would thus be attracted. The convict, in so far as it relates to the offence committed on Ms. R, shall not be punished with the punishment of more than one of such offences.

72. Section 9 (n) of the POCSO Act, 2012, as quoted above, however, deals with commission of sexual assault on a child being a relative of the child. The evidence available makes it evident that Ms. R is a relative of the convict. Ms. R stated that the convict is her 'Dewa' (uncle). P.W.8, P.W.1 and P.W.6 also corroborated the said fact. Thus the convict was liable to be convicted and punished under Section 9 (n) of the POCSO Act, 2012, also.

73. While conducting a trial of different offences allegedly committed against two victims the Special Judge must clearly and cogently specify the offences of which, and the Sections of the POCSO Act, 2012 under which, the accused is convicted and punishment to which he is sentenced.

74. The Learned Special Judge, while writing the operative part of the judgment seem to have lost sight of the law and the fact that the Learned Special Judge was in fact conducting a trial of two separate and distinct offences committed on two victims. This is a requirement under the provision of Section 354 Cr.P.C.

75. The Learned Special Judge while conducting a trial of two offences committed against two victims must keep conscious of the fact that the Special Court is required to render justice to two victims.

76. Section 31 of the Cr.P.C. which deals with sentences in cases of conviction of several offences at one trial provides:-

[14] (2006) 11 SCC 473

"31. **Sentence in cases of conviction of several offences at one trial. -**

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

77. Section 10 of the POCSO Act, 2012 provides:-

"10. Punishment for aggravated sexual assault.-Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine."

78. Each of the offences defined in sub-section (a) to (u) of Section 9 of the POCSO Act, 2012 are distinct and different offences having different ingredients.

Thus, the convict was liable to be punished separately for the offence committed on Ms. R under Section 9 (n) and on Ms. S under Section 9 (m). Under Section 10 each of the said offences under Section 9 (m) and 9 (n) of the POCSO Act, 2012 shall be punished with imprisonment of either description for a term which shall not be less than 5 years but which may extent to 7 years, and shall also be liable to fine. Thus the convict was liable for the offence on Ms. S under Section 9 (m) of the POCSO Act, 2012 for a term which shall not be less than 5 years but which may extend to 7 years, and shall also be liable to fine. Similarly, the convict was also liable for the offence on Ms. R under Section 9 (n) of the POCSO Act, 2012 for a term which shall not be less than 5 years but which may extend to 7 years, and shall also be liable to fine.

79. The Learned Special Judge while sentencing must keep in mind the provisions of Section 31 Cr.P.C. which provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provision of Section 71 of the IPC, sentence him for such offences, the several punishments prescribed thereof which such Court is competent to inflict. It is desirable that the Learned Special Court should at least record what punishment it awards for each of the two distinct offences. As this is not done complications would necessary arise at the appellate stage. Proper course of action would have been to pass a separate sentence for each offence. The question in such situations as to what interpretation should be given to such a composite sentence was pursuasively answered by a Division Bench of the Allahabad High Court in re: **Murlidhar Dalmia v. State**[15] in which it would hold:-

> "Such a view does find support from some cases, but we do not agree with the view and are of opinion that such a composite sentence of imprisonment should be taken to mean that identical sentence was awarded for each of the offences of which the accused was convicted and that all such identical sentences for all the offences were ordered to run concurrently. This seems to us to be the most logical interpretation as otherwise the appellate or the revisional court cannot be in a position to determine the specific punishments which the trial court is supposed to have contemplated to award for each offence and whose total was simply mentioned as the sentence awarded to the accused. It can be said that ordinarily courts do make the

[15] 1952 SCC OnLine All 232 : ILR (1953) 1 All 834 : AIR 1953 All 245

separate sentences concurrent and that it is only in special cases that the courts order sentences to run consecutively. Section 35, Code of Criminal Procedure, provides that when a person is convicted at one trial of two or more offences, the court may sentence him for such offences to the several punishments prescribed therefor which such court was competent to inflict and that such punishments, when consisting of imprisonment or transportation, shall commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently. This means that when a court intends to award separate sentences for the various offences to run consecutively it is to express the order in which the sentences for the various offences would run. When the court passes just one sentence for the various offences, it would be too much to suppose that the court had separate sentences for each offence in mind and failed to give expression to its intention about the extent of the sentences and also failed to mention the order in which the sentences for the various offences were to run.

It would be more probable in such a case that the court contemplated the sentences to run concurrently and just expressed the, maximum sentence which the court thought that the accused should undergo for what he had done. No difficulty arises in interpreting one sentence awarded as a sentence for each offence with the direction that the sentences were to run concurrently. A difficulty may arise when the sentence awarded be in excess of the maximum sentence which could have been awarded for any of the offences of which the accused had been convicted, because in that case it would not be proper to hold that the court intended to pass an illegal sentence and did pass an illegal sentence. In such a case it can be held that the sentence passed for such an offence was the maximum fixed under law for that offence and that the court ordered such maximum sentence to run concurrently with the higher sentence passed for other offences. This view agrees with the view expressed by this Court in Sohan Ahir v.

> KingEmperor[(1)], where DANIELS, J., interpreted a sentence of 18 months' rigorous imprisonment under sections 326 and 147, Indian Penal Code as meaning that the Magistrate passed concurrent identical sentences under each section. When the composite sentence consists of or includes fine, the amount of fine should be taken ordinarily to be the total of the fines the trial court intended to impose for various offences and it may be presumed in the absence of any special circumstances that an equal amount of fine was imposed for each offence. It would follow that the acquittal of the accused for some offence must mean corresponding reduction in fine."

80. Section 537 of the old Criminal Procedure Code corresponds to the present Section 465 of Cr.P.C. No failure of justice would have occasioned the convict for the irregularity in passing a composite sentence by the Learned Special Judge.

81. Therefore, so interpreted, while this Court confirms the composite sentences awarded by the Learned Special Judge, it is hoped that the Learned Special Judge while imposing sentence may keep in mind the aforesaid observations.

82. The convict is therefore sentenced for the offence on Ms. S under Section 9 (m) of the POCSO Act, 2012 for a term of 5 years and to pay a fine of ₹ 5,000/- (Rupees five thousand) and further the convict is also sentenced for the offence on Ms. R under Section 9 (n) of the POCSO Act, 2012 for a term of 5 years and to pay a fine of ₹ 5,000/- (Rupees five thousand). The sentences to run concurrently.

83. The Learned Special Judge has directed that the period of detention already under gone by convict during investigation and trial shall be set off against the period of imprisonment as provided under Section 428 Cr.P.C. The said direction is maintained.

84. The Learned Special Judge has also directed that the fine amount, if recovered shall be handed over to the victims as compensation under Section 357 of the Cr.P.C. The same is also maintained.

COMPENSATION

85. Section 33 (8) of the POCSO Act, 2012 provides:-

> "33 (8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."

86. Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules, 2012) provides:-

> "7.**Compensation.**—(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.
>
> (2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.
>
> (3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-sections (2) and (3) of Section 357-A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the

following—

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child become pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357-A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

87. Section 357 of Cr.P.C. provides:-

"357. **Order to pay compensation.-(**1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied

(a) in defraying the expenses properly incurred in the prosecution;

(b)in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying

compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d)when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellant Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

88. Section 357 A of Cr.P.C. provides:-

"357A. Victim compensation scheme. - (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have

suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in subsection (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

89. In exercise of the powers conferred by Section 357 (A) of Cr.P.C. the Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013 came into force in Sikkim on 24.06.2013. The said Scheme was amended vide Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013

and the maximum limit of compensation was enhanced under particular heads of loss or injury. On 25.11.2016 Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2016 was notified in the Sikkim Government Gazette making it applicable from 18.11.2016. The said amendment of 2016 further enhances the maximum limit of compensation on various heads of loss or injury.

90. Section 357 of Cr.P.C. relates to compensation payable by the convict. Section 357 (A) of Cr.P.C. on the other hand deals with Victim Compensation Schemes of State Government's for providing funds for the purpose of compensation to the victim or his dependence who have suffered loss or injury as a result of the crime and who require rehabilitation.

91. Under Section 33 (8) of the POCSO Act, 2012 the Special Court, in appropriate cases in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child. The Learned Special Judge has however, not complied with the mandatory duty of the court to apply its mind to the question of the award or refusal of compensation in a particular case in every criminal case.

92. Under Rule 7 (1) of the POCSO Rules, 2012 the Special Court may, in appropriate cases, on its own or an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the FIR. Such interim compensation paid to the child shall be adjusted against the final compensation, if any. In the present case the Learned Special Judge has not considered payment of compensation, interim or otherwise, as mandated under Section 33 (8) of the POCSO Act, 2012 read with Rule 7 of the POCSO Rules, 2012.

93. Under the provisions of Rule 7 (2) of the POCSO Rules, 2012, the Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

94. Under Rule 7 (3) of the POCSO Rules, 2012, which is an inclusive Rule

and therefore not exhaustive, the relevant factors to be considered while directing compensation have been enumerated for the guidance of the Special Court.

95. Under Rule 7 (4) of the POCSO Rules, 2012, the compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357 A of Cr.P.C. or any other law for the time in force.

96. Under Rule 7 (5) of the POCSO Rules, 2012, the State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

97. Under Rule 7 (6) of the POCSO Rules, 2012 a child or his parent or guardian or any other person in whom the child has trust and confidence may submit an application for seeking relief under any other rules or schemes of the Central Government or State Government.

98. Many a times due to the peculiar facts of the case a Trial Judge may be faced with the situation where it is found that in addition to the punishment, compensation must be directed to be paid. In such situations the Trial Court is not helpless. Section 33 (8) of the POCSO Act, 2012 read with Rule 7 of the POCSO Rules, 2012 was made precisely for the said purpose. The Special Judge has the power and therefore must also exercise it, in appropriate cases, to direct payment of compensation as per the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. The aforesaid provisions are victim centric. It is meant for the purpose of rehabilitation of the victim who has suffered loss or injury as a result of the crime and who require rehabilitation. The Special Court is required to consider whether or not there is a need for directing payment of compensation by firstly making adequate inquiry and thereafter giving reasons. The quantum of compensation must be as prescribed under the provisions of the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. As per the schedule thereto the particulars of loss or injury as well as the maximum limit of compensation is provided. While making the recommendation by the Court and while deciding the quantum of compensation payable under the

Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date the ethos of Section 33(8) of the POCSO Act, 2012, Rule 7 of the POCSO Rules, 2012 and Section 357(A) of Cr.P.C. which have direct roots in the concept of victimology must always be in its mind.

99. In re: **Ankush Shivahi Gaikwad v. State of Maharastra**[16] the Apex Court would hold:-

> **"33.** The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the lawmakers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on Victim Restitution in Criminal Law Process: A Procedural Analysis sums up the historical perspective of the concept of restitution in the following words:
>
> "Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."

[16] (2013) 6 SCC 770

100. In re: **State of Madhya Pradesh v. Mehtaab**[17] the Apex Court would hold:-

> "8. Apart from the sentence and fine/compensation to be paid by the accused, the court has to award compensation by the State under Section 357-A CrPC when the accused is not in a position to pay fair compensation as laid down by this Court in Suresh v. State of Haryana. This Court held:
>
> > "16. We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity or offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

101. In re: **Hari Singh v. Sukhbir Singh**[18], 551 the Apex Court would hold:-

> **"10.** Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the

[17] (2015) 5 SCC 197
[18] (1988) 4 SCC

sentence of fine imposed on accused. In this case, we are not concerned with subsection (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default.

12. Joginder in this case is an unfortunate victim. His power of speech has been permanently impaired. Doctor has certified that he is unable to speak and that is why he has not stepped into the witness box for the prosecution. The lifelong disability of the victim ought not to be bypassed

by the court. He must be made to feel that the court and accused have taken care of him. Any such measure which would give him succour is far better than a sentence by deterrence."

102. In re: **Manohar Singh v. State of Rajasthan & Ors.**[19] the Apex Court would hold:-

"11. Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. The compensation is payable under Sections 357 and 357-A CrPC. While under Section 357 CrPC, financial capacity of the accused has to be kept in mind, Section 357-A CrPC under which compensation comes out of the State funds, has to be invoked to make up the requirement of just compensation."

103. In re: **Ankush Shivahi Gaikwad (supra)** the Apex Court would hold:-

"66. To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 Cr.P.C. would involve a

[19] 2015 (89) ACC 266 (SC)

certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."

104. In the present case aggravated sexual assault on Ms. R and Ms. S has been proved against the convict. The fine imposed by the Learned Special Judge of 10,000/- (Rupees ten thousand) is payable as compensation only on realisation from the convict. It is obviously not adequate, keeping in mind the fact that there are two victims aged 6 and 11 years, who have suffered aggravated sexual assaults.

105. In terms of Section 33 (8) of the POCSO Act, 2012 read with the POCSO Rules, 2012 and Section 357 (A) (3) of Cr.P.C. the Learned Special Judge was required to come to a conclusion whether the compensation awarded under Section 357 of Cr.P.C. is adequate or not for the rehabilitation of Ms. R and Ms. S. The considerations are cogently enumerated in Rule 7 of the POCSO Rule, 2012. In the facts of the present case the type of abuse, gravity of the offence and the severity of the mental and physical harm suffered by the victims would be relevant. The fact that the aggravated sexual assault on Ms. R and Ms. S were isolated incidents would also be a relevant factor. Equally important would be the financial condition of Ms. R and Ms. S which as per the evidence available was definitely not good. The shock of such heinous sexual assault by Ms. R's own uncle on Ms. R and by a person known to Ms. S on Ms. S would also be a relevant consideration. The Special Court is required to ask itself as to what is required to rehabilitate the victim who has suffered both mentally and physically to get over that trauma. The Learned Special Judge did not do so. Under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 as amended till date for sexual assault (excluding rape) an amount of 50,000/- (Rupees fifty thousand) is prescribed as the maximum limit of compensation. As such the Sikkim State Legal Services Authority is directed to pay Ms. R and Ms. S just compensation of 45,000/- (Rupees forty five thousand) each from the Victim Compensation Fund provided by the State Government to it. The said amounts shall be deposited in interest bearing fixed deposits in the accounts of Ms. R and Ms. S payable to

them on their turning 18 years of age. If Ms. R and Ms. S do not have saving accounts for the purpose of opening of fixed deposits as directed, the Sikkim State Legal Services Authority shall assist Ms. R and Ms. S through its panel lawyers to do so. As required under Rule 7 (5) of the POCSO Rules, 2012 the State Government shall pay the compensation within 30 days of the receipt of this judgment.

106. The Appeal against conviction is dismissed. The sentences imposed by the Learned Special Judge's stands explained as above.

107. The convict is in jail. He shall continue there to serve the remaining of the sentences.

108. Copy of this judgment be remitted to the Court of learned Special Judge, East Sikkim at Gangtok, forthwith along with records of the Court for compliance. Copy of this judgment may also be forwarded to the Sikkim State Legal Services Authority for payment of compensation payable to Ms. R and Ms. S and for compliance of other directions.

109. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Counsels for the parties upon compliance of all formalities.

110. It is seen that the Investigating Officer while preparing the charge-sheet; the Learned Judicial Magistrate while recording the statement of Ms. R and Ms. S under Section 164 of Cr.P.C. and the Learned Special Judge while recoding the deposition of Ms. R and Ms. S were not conscious that the identity of the child cannot be compromised and that the identity of the child is not only the name of the child but the whole identity of the child, the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. It is urged that the guidelines laid down by this Court in **Rabin Burman v. State of Sikkim**[20] be followed to ensure strict compliance of the law with regard to non disclosure of the identity of the child with the sensitivity the situation commands.

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[20] 2017 SCC OnLine Sikk 143

SLR (2017) SIKKIM 405

(Before Hon'ble the Chief Justice)

W.P. (C) No. 39 of 2016

Shri Samdup Tshering Bhutia and Others ….. **PETITIONERS**

Versus

State of Sikkim and Others ….. **RESPONDENTS**

For the Petitioners : Mr. B. Sharma, Sr. Advocate with Mr. Bhola N. Sharma and Mr. Sajal Sharma, Advocates.

For Respondent Nos.1-3 : Mr. J.B. Pradhan, Additional Advocate General with Ms. Pollin Rai, Asstt. Govt. Advocate and Ms. Rita Sharma, Advocate.

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

For Respondent Nos. 4-22 : Mr. Jorgay Namka, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates.

Date of decision: 13th September 2017

A. Sikkim State Forest Service (Recruitment) Rules, 1976 – Rule 18 (A) – A direct recruit is entitled to seniority from the date of initial appointment, on completion of probation within the prescribed time i.e. two years. In the case on hand, all the direct recruits (4th to 22nd Respondents) have completed their probation in two years time and as such they became members of the Sikkim Forest Service from the initial date of appointment – Sikkim State Services (Regulation of Seniority) Rules, 1980 is applicable to the members of Sikkim Forest Service as prescribed under Rule 18 (A) of the Recruitment Rules.

(Para 14)

B. Sikkim State Forest Service (Recruitment) Rules, 1976 – Rule 4 (2) – Method of Recruitment to the Service – Vacancies of a cadre to be filled up by competitive examination in accordance with clause (a) and by selection from among persons holding the post of Range Officers as per clause (b) in 50 : 50 ratio. Proviso to sub-rule (2) further provides that the number of persons, recruited under clause (b) shall not at any time exceed 50% of the total strength of the Service – Out of total 87 cadre strength, 43 or 44 posts were to be filled up by promotion. When the petitioners were promoted on officiating basis to the post of ACF vide order dated 12th February 2010 and 5th August 2010, there were already 56 promotee ACFs working in the cadre. Thus, the appointment of the petitioners was in excess of the requisite limit, as prescribed under the Rules – The subsequent regularization or absorption of the petitioners on permanent cadre was done by the Government after relaxation in the rules exercising power under Rule 4 (3) – The appointment of the petitioners as ACF on officiating basis was not in accordance with the law i.e. the Recruitment Rules, as it was clearly indicated in the appointment order itself, and as such their claim to seniority from initial date of officiating appointment merits rejection.

(Paras 15 and 16)

C. Sikkim Government Service Rules, 1974 – Rule 5 (13) – Officiating appointment – The appointee is to perform the duties of a vacant post without holding a lien in the service – Length of service of appointment on promotion made on ad-hoc or temporary basis, or on officiation in accordance with law against the substantive vacancies, may be counted for the purpose of seniority from the date of initial appointment – In the case at hand, all the appointments were made in excess of their quota, not in accordance with Rules, subject to conditions enshrined in the order stating that the appointees shall not claim seniority or regular promotion on the said basis. The petitioners are not entitled to the benefit of period of officiation on the post of ACF before their appointment on permanent basis, on recommendation of the Sikkim Public Service Commission, as required under the Rules as well as under the conditions of the appointment of officiating basis. The petition is bereft of merits.

(Paras 18 and 29)

Petition dismissed.

Chronological list of cases cited:

1. S.B. Patwardhan and Another v. State of Maharashtra and Others, AIR 1977 SC 2051.

2. Pran Krishan Goswami and Others v. State of West Bengal and Others, AIR 1985 SC 1605.

3. G.K. Dudani and Others v. S.D. Sharma and Others, AIR 1986 SC 1455.

4. G.C. Gupta and Others v. N.K. Pandey and Others, (1988) 1 SCC 316.

5. State of W.B. and Others v. Aghore Nath Dey and Others, (1993) 3 SCC 371.

6. B. Amrutha Lakshmi v. State of Andhra Pradesh and Others, AIR 2014 SC 751.

7. Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others, (1990) 2 SCC 715.

8. State of W.B. and Others v. Aghore Nath Dey and Others, 1993) 3 SCC 371.

9. M.P. Palanisamy and Others v. A. Krishnan and Others, (2009) 6 SCC 428.

JUDGMENT

Satish K. Agnihotri, CJ

1. Assailing the correctness of the seniority list published vide, Notification No. 114/G/DOP dated 01st September 2016 (Annexure P-12) (hereinafter referred to as "the impugned notification"), whereunder the petitioners were placed below the 4th respondent to 22nd respondent, the petitioners have come up with this petition.

2. The petitioners seek quashing of the said impugned notification, a direction to place the petitioners above the private respondents, considering their officiation on the post of Assistant Conservator of Forest (hereinafter referred to as "ACF") and also to consider their promotion to the post of Divisional Forest Officer (hereinafter referred to as "DFO") in officiating capacity on permanent basis.

3. The chronological events leading to filing of the instant petition are that the petitioners, initially appointed as Block Officers, were promoted to the post of Range Officers on 19th August 2000 (Annexure P-2). Thereafter, the petitioners were promoted as ACF in an officiating capacity vide, Office Orders No.2633/G/DOP dated 12th February 2010 and No. 466/G/DOP dated 05th August 2010 (Annexure R-16 and Annexure R-17 respectively). Subsequently, the petitioners were promoted on permanent basis on the post of ACF vide Office Order No. 3691/G/DOP dated 19th March 2013 (Annexure R-21). It appears that the official respondents have issued a provisional seniority list vide Memo No. 9021/G/DOP dated 10th July 2014 (Annexure P-14), placing the petitioners down below the direct appointee/ private respondents, which prompted the petitioners to make a representation on 04th August 2014 (Annexure P-10) and also to send a legal notice on 04th April 2016 (Annexure P-11) seeking grant of seniority with effect from the date of officiation and their placement above the direct recruits, who completed their probation on 21 st May 2013. The instant petition is filed on 12th September 2016, resubmitted on 13th September 2016, after a period of two years from the date of issuance of provisional seniority list on 10th July 2014.

4. Mr. B. Sharma, learned Senior Counsel assisted by Mr. Bhola N. Sharma and Mr. Sajal Sharma, learned Advocates, would contend that the petitioners were promoted as ACF on officiating capacity against the existing vacancies and their services continued without interruption till they were confirmed on 19th March 2013, before completion of probation period of private respondents on 21st May 2013. The appointment of the petitioners was in accordance with the Rules against the clear vacancies and, as such, the petitioners are entitled to seniority with effect from the date of their promotion on the post of ACF, on officiation.

5. Mr. Sharma further contended that the private respondents were appointed on probation, which came to end on 21st May 2013. Thus, they become members of service only on completion of probation. In that event, the petitioners were senior, as they were confirmed on the post on 19th March 2013. It is also urged that the Principal Secretary-cum-Principal Chief Conservator of Forest has recommended for protection of seniority of the petitioners vide notings dated 19th December 2013 (Annexure P-7). The Chairman, Law Commission of Sikkim has strongly observed that it is well-settled law that in absence of any rule to the contrary, the continuous service on confirmation cannot be ignored for determining the place in seniority list. Mr. Sharma would lastly submit that in the facts of the case wherein the petitioners were promoted on officiating basis, in accordance with rule, and thereafter confirmed on the post, the petition deserves to be allowed

with a direction to place the petitioners above the private respondents in the seniority list, who were recruited subsequently and to grant subsequent promotion and other consequential benefits.

6. Mr. Sharma, in support of his case relied on **S.B. Patwardhan and another v. State of Maharashtra and others[1] , Pran Krishan Goswami and others v. State of West Bengal and others[2] , G.K. Dudani and others v. S.D. Sharma and others [3] , G.C. Gupta and others v. N.K. Pandey and others[4] , State of W.B. and others v. Aghore Nath Dey and others [5] and B. Amrutha Lakshmi v. State of Andhra Pradesh and others[6]** .

7. Resisting, Mr. J.B. Pradhan, learned Addl. Advocate General assisted by Ms. Pollin Rai, learned Assistant Government Advocate and Ms. Rita Sharma, learned Advocate, would contend that under sub-rule (2) of Rule 4 of the Sikkim State Forest Service (Recruitment) Rules, 1976 (hereinafter referred to as "the Recruitment Rules"), 50% post of ACF is to be filled up by direct recruitment through open competitive examination and 50% by promotion. The total sanctioned strength of ACF on the relevant date was 87. On 06th February 2007, it was proposed to fill up 21 posts of ACF by direct recruitment and as more than 50% of quota was utilized by promotion from the post of Range Officers. As on relevant date, altogether 71 persons were working as ACF from promotion quota. In pursuance thereof, an advertisement for filling up of 21 posts of ACF was published on 07th June 2010. In response thereto, the private respondents participated successfully in competitive examination and were accordingly appointed. The result was declared on 28th March 2011 and a list of selected candidates was sent to the Department of Personnel, Government of Sikkim on 15th April 2011 (Annexure R-1). Out of 21 posts, two posts, namely, MBC and MBC (W) could not be filled up and the same was carried forward due to non-availability of eligible candidates. The appointment orders were issued in the months of May and June 2011. The promotion of the petitioners to the post of ACF on officiation was subject to two conditions, namely,

(i) the officiating capacity shall not confer any right for regular promotion and shall not be counted towards senior; and

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[1] AIR 1977 SC 2051
[2] AIR 1985 SC 1605
[3] AIR 1986 SC 1455
[4] (1988) 1 SCC 316
[5] (1993) 3 SCC 371
[6] AIR 2014 SC 751

(ii) regular promotion shall be made on the recommendation of the Sikkim Public Service Commission,

which was made subsequently leading to regularization of the petitioners. The said conditions were accepted by the petitioners without a demur or protest.

8. The petitioners were appointed as ACF in officiating capacity against the direct recruitment quota, as the appointment against direct recruitment had taken some time. 14 persons were already serving as ACF on substantive capacity and 12 persons were serving as DFO on officiating capacity, continuing to hold their lien in the cadre of ACF. As such, 91 ACFs, including the petitioners, against the cadre strength of 87, were working as ACF.

9. Mr. Pradhan would further contend that in order to accommodate the petitioners, Department of Personnel, issued two notifications dated 31st October 2011 (Annexure R-22) and 12th February 2013 (Annexure R-23), relaxing the method of recruitment after creation of substantive vacancies of ACFs, under promotion quota, the petitioners were confirmed and granted regular promotion.

10. In support, Mr. Pradhan, relies on **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others[7] , State of W.B. and others v. Aghore Nath Dey and others[8] , and M.P. Palanisamy and others v. A. Krishnan and others[9]** .

11. Adopting the arguments advanced by learned Additional Advocate General, Mr. Jorgay Namka, learned counsel appearing for the private respondents/ direct recruits, would submit that the appointment of the petitioners on the post of ACF was purely temporary on officiating basis, in excess of the quota reserved for promotees against direct appointee vacancy. The petitioners were appointed to perform the duties and functions of ACFs, as no officers appointed in accordance with rules were available. The appointment was purely a stop-gap arrangement. It is further contended that the appointment order of the petitioners, appointing them on officiating basis as ACF, clearly indicate that the appointment was not against a regular substantive vacancy. Thus, the petition deserves to be dismissed maintaining the seniority of the private respondents above the petitioners, as private respondents

[7] (1990) 2 SCC 715
[8] (1993) 3 SCC 371

have completed their probation within the prescribed time and as per rules seniority relates back to the date of initial appointment on completion of probation period in time.

12. Having given my anxious consideration to the submissions put forth by the learned counsel appearing for the parties, on examination of the pleadings and documents appended thereto, it is manifest that the petitioners appointment vide orders dated 12th February 2010 (Annexure R-16) and 05th August 2010 (Annexure R-17) was conditional, as clearly stated in the order itself. The petitioners have not protested at any point of time to the conditions, which were duly accepted by them at the time of their appointment on the post of ACF on officiating basis. The orders seeking appointment of officiating basis clearly prescribed that their officiating capacity shall not confer any right for regular promotion and shall not be counted towards seniority. The appointment to the regular promotion was subject to recommendation of the Sikkim Public Service Commission.

13. On examination of the documents produced by the parties, it is proven that as on the relevant date, the sanctioned strength of the cadre of ACF was 87, as enhanced vide Notification dated 18th December 2006 (Annexure R-13). Out of 87 posts, 10 posts were filled up by direct recruits. For filling up of 21 posts of ACF, necessary steps were initiated on 06th February 2007. The advertisement for filling up of 21 posts of ACF was published on 07th June 2010, which culminated into appointment of the 4th to 22nd respondents vide orders dated 21st May 2011 (Annexure R-2), 25th May 2011 (Annexure R-3), 26th May 2011 (Annexures R-4 and R-5) 27th May 2011 (Annexure R6), 31st May 2011 (Annexure R-7) and 01st June 2011 (Annexures R-8 and R-9). Indisputably, all the private respondents (4th to 22nd respondents) have completed their probation in time, on expiry of a period of two years and as such they are entitled to their seniority from the date of their initial appointment, as per Rule 7(A) of the Sikkim Government Establishment Rules, 1974.

14. As contemplated under the provisions of the Sikkim State Services (Regulation of Seniority) Rules, 1980 (hereinafter referred to as "the Seniority Rules, 1980"), which is applicable to the forest service as prescribed under Rule 18 (A) of the Recruitment Rules, it is well established that a direct recruit is entitled

to seniority from the date of initial appointment on completion of probation within the prescribed time i.e. two years. In the case on hand, all the direct recruits, 4th to 22nd respondents, have completed their probation in two years time and as such they became members of the Service from the initial date of appointment.

15. Rule 4 of the Recruitment Rules contemplates "Method of Recruitment to the Service", which reads as under: -

> "4. METHOD OF RECRUITMENT TO THE SERVICE:- (1) Recruitment to the Service after the commencement of these rules shall be by the following methods, namely: -
>
> (a) By the Competitive Examination to be held by the Commission;
>
> (b) By selection from among persons holding the post of Range Officer or any other post or posts declared equivalent thereto by the Government.
>
> (2) The proportion of vacancies to be filled in any year in accordance with clauses (a) and (b) above, shall be 50 : 50 respectively:
>
> Provided that the number of persons, recruited under clause (b) above, shall not at any time exceed 50% of the total strength of the Service.
>
> (3) Notwithstanding anything contained in sub-rule (1), if in the opinion of the Government, the exigencies of the service so require, the Government may, after consultation with the Commission, adopt such method of recruitment to the Service, other than those specified in the said sub-rule, as it may, by Notification in this behalf, prescribe."

Sub-rule (2) of Rule 4 of the Recruitment Rules provides that the vacancies of a cadre to be filled up by the competitive examination in accordance with clause (a)

and by selection from among persons holding the post of Range Officers as per clause (b) in 50 : 50 ratio. Proviso to sub-rule (2) further provides that the number of persons, recruited under clause (b) shall not at any time exceed 50% of the total strength of the Service. It is established in this case that out of total 87 cadre strength, 43 or 44 posts were to be filled up by promotion. When the petitioners were promoted on officiating basis on the post of ACF vide order dated 12th February 2010 and 05th August 2010, there were already 56 promotee ACFs working in the cadre. Thus, the appointment of the petitioners was in excess of the requisite limit, as prescribed under the Rules. In such a situation, whether it can be held that the appointment of the petitioners was in accordance with the rules?

16. The subsequent regularization or absorption of the petitioners on permanent cadre was done by the Government after relaxation in the rules, as evident from the notifications dated 31st October 2011 and 12th February 2013 (Annexures R22 and R-23 respectively), exercising power under sub-rule (3) of Rule 4 of the Recruitment Rules. In such factual matrix, the ineluctable conclusion is that the appointment of the petitioners as ACF on officiating basis was not in accordance with the law i.e. the Recruitment Rules, as it was clearly indicated in the appointment order itself and such their claim to seniority from initial date of officiating appointment merits rejection.

17. Recommendation of the Principal Secretary-cumPrincipal Chief Conservator of Forest, Government of Sikkim for grant of seniority to the petitioners vide his notings dated 19th December 2013 and also the observation made by the Chairman, Law Commission, are not relevant and binding in the facts of the case.

18. The 'officiating appointment' is defined under the Sikkim Government Service Rules, 1974 (hereinafter referred to as "Service Rules of 1974") in clause (13) of Rule 5, as under: -

> "(13) 'Officiating appointment' – A Government Servant is said to be holding an officiating appointment, when he performs the duties of a vacant or newly created temporary post on which no Government Servant holds a lien without completing the minimum number of qualifying years of

service as may have been or as may be prescribed by the Government from time to time."

Bare perusal of the definition clearly provides that the appointment is to perform the duties of a vacant post without holding a lien in the service.

19. In **S.B. Patwardhan**[1] , cited by the learned Senior Counsel appearing for the petitioners, interpretation of the provisions of the Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1960, was involved, wherein the Supreme Court held Rule 8 (iii) as unconstitutional, holding that the valuable right of seniority may not depend upon the mere confirmation.

20. In **Pran Krishan Goswami**[2], referred by learned Senior Counsel for the petitioners, the W.B. Services (Determination of Seniority) Rules, 1981, was under examination, wherein some Sub-Inspectors of Police have been officiating for almost three decades, without examining the fact as to whether there officiation was against the substantive vacancy, the Supreme Court held that the Sub-Inspectors are entitled to benefit of their continuous officiating service as SubInspectors of Police.

21. In **G.K. Dudani and others**[3], again referred by the learned counsel appearing for the petitioners, wherein the Mamlatdars were promoted and appointed to hold ex-cadre posts, it was held that it could not be said not to have been regularly appointed. In such factual background, they were held to be entitled to seniority of their continuous officiation.

22. In **G.C. Gupta and others**[4], it was held that the temporary Assistant Engineers on absorption were entitled to seniority from the date on which their service were regularized i.e. the date from which they became members of the service.

23. Mr. J.B. Pradhan, learned Addl. Advocate General, referring to an observation made by the Supreme Court in **M.P. Palanisamy and others**[9] submit that the petitioners have accepted the conditions of appointment on officiation. Thus, they cannot be permitted to retrace back and take a contrary stand. The

[9] (2009) 6 SCC 428

Supreme Court held as under: -

> "31. The panel is absolutely correct in the light of GOMs No. 1813. The appellants merely raised a lame plea that they did not challenge GOMs No. 1813, as they were expecting themselves to be placed over and above the T.N. PSC-selected candidates. Such could never be the position in the wake of plain language of GOMs No. 1813. This is one of the main reasons why the claim of the appellants has to be rejected. The aspect of conditional regularization, therefore, had to be kept in mind."

24. In **O.P. Garg and others v. State of U.P. and others** [10] , the Supreme Court examined the seniority and promotion of Judicial Officers under the U.P. Higher Judicial Service Rules, 1975 and held as under: -

> "26. We have given our thoughtful consideration to the arguments of the parties. This Court has time and again held that when an incumbent is appointed to a post in accordance with the Service Rules his seniority has to be counted on the basis of continuous length of service and not in reference to the date of confirmation. Even in the present case the promotees have been confirmed long after the availability of permanent vacancies. This Court in S.B. Patwardhan v. State of Maharashtra. : (1977) 3 SCC 399 observed that "confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies". A Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra : (1990) 2 SCC 715 approved Patwardhan case and laid down the following propositions in this respect:

[10] 1991 Supp (2) SCC 51

> "(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
>
> (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.
>
> (C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly."

27. Keeping in view the scheme of the 1975 rules, we are of the view that first proviso to Rule 26(1)(a) of the 1975 Rules which links the seniority with the date of confirmation is on the face of it arbitrary and as such violative of Article 16 of the Constitution of India. Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the sine qua non for claiming benefit of continuous length of service towards seniority. The period of officiation/service which is not against a substantive vacancy (permanent or temporary) cannot be counted towards seniority. While striking down first proviso to Rule 26(1)(a) of the 1975 Rules we hold

that the continuous officiation/service by a promotee shall be counted for determining his seniority only from the date when a substantive vacancy against a permanent or temporary post is made available in his quota under the 1975 rules."

25. In **Keshav Chandra Joshi and others v. Union of India and others**[11] , wherein fixation of seniority of the petitioners, who were promoted during the period from 13th March 1974 to 21st November 1981, as Assistant Conservator of Forest, on ad hoc basis was involved. In 1976, some direct recruits were appointed on probation against substantive vacancies. When the petitioners became due for promotion as Deputy Conservator of Forest, the promotees claimed seniority over the direct recruits. The promotion of the petitioners as ad hoc was in excess of quota and had to be resorted to because of non appointment of direct recruits due to litigation, the Supreme Court observed as under: -

"19. The heart of the controversy lies in the question as to when a person is appointed to a post in the service in a substantive capacity within the meaning of Rule 3(h) read with Rules 5 and 24 of the Rules. Under Rule 5 read with Rule 3(h) a member of the service means a person, be it direct recruit under Rule 5(a) or promotee under Rule 5(b), appointed in a substantive capacity to the service as per the provisions of the rules. In order to become a member of the service he/they must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy. There exists marked distinction between appointment in a substantive capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor. Then only he/they become member/ members of the service. Any other construction would be violation of the Rules.

x x x

[11] 1992 Supp (1) SCC 272

24. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad-hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Article 14 of the Constitution. This Court interpreted that equity is an integral part of Article 14. So every attempt would be made to minimise, as far as possible, inequity. Disparity is inherent

in the system of working out integration of the employees drawn from different sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees.

x x x

34. Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad-hoc basis as a stop-gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority. The Governor shall have to make recruitment by promotion to substantive vacancies in the posts of Asstt. Conservator of Forest, if not already made, in accordance with Rule 5(b) read with Appendix 'B' and Rule 6. Their seniority shall be counted only from the respective dates of appointment to the substantive posts in their quota under Rule 6 as per the rules. The direct recruits having been appointed in accordance with Rule 5(a) read with Appendix 'A', their seniority shall be counted from the date of their discharging the duties of the post of Asstt. Conservator of Forest and the seniority of the direct recruits also shall accordingly be fixed. The inter se seniority of the direct recruits and promotees shall be determined in accordance with Rules 5, 6 and Rule 24 in the light of the law declared in the judgment. All the employee are entitled to all consequential benefits. On account of the pendency of judicial proceedings, if any of the employees became barred be age for consideration for promotion to cadre posts, the appropriate Governments would do well to suitability relax the rules and do justice to the eligible conditions."

26. In **State of W.B. and others vs. Aghore Nath Dey and others**[8] , the Supreme Court clarified the ratio laid down earlier in **Direct Recruit Class II Engineering Officers' Assn.**[7] case:-

> "22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) can not cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.
>
> 23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) can not include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.
>
> 24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the

cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment,

subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

27. In **P.K. Singh vs. Bool Chand Chablani and others**[12], the Supreme Court has clearly held that when ad hoc appointment is made dehors the rules, such appointment does not enure to the benefit of the appointee for the purpose of determining seniority in the cadre.

28. In **Radha Mohan Malakar and others v. Usha Ranjan Bhattacharjee and others** [13] , the Supreme Court observed as under:

"23. In our opinion the principle of the decision in N. K. Chauhan v. State of Gujarat : (1977) 1 SCC 308 can be illustrated by taking a hypothetical example. Suppose in a particular service 50% of the vacancies are to be filled in by promotion and 50% by direct recruitment, and suppose there is a rule that the inter se seniority of direct recruits and promotees is to be fixed according to the rotation of vacancies between direct recruits and promotees in the manner that the first post will go to a promotee, the second to a direct recruit, the third to a promotee, the fourth to a direct recruit, and so on. Even here the ordinary rule that seniority will depend on the length of the continuous officiating service has to be followed unless the quota of

[12] (1998) 5 SCC 726
[13] (2009) 14 SCC 619

direct recruits or of the promotees has been exceeded. It is only if the said quota is exceeded that the appointees have to be pushed down in the seniority, otherwise seniority has to be taken from the date of continuous officiating service.

24. In the present case it is admitted that the quota of direct recruits has not been exceeded. Hence, in our opinion, the seniority of direct recruits (the appellant) has to be taken from the date of their initial appointment and they cannot be pushed down in seniority. The promotees (the respondents herein) were appointed to Grade II of TCS after the appointments of the direct recruits (the appellants). Hence the former have to be treated as junior to the latter. The earlier Division Bench decision of the High Court dated 29.7.1992 has to be understood in the light of the decision of this Court in N.K. Chauhan case (supra)."

29. From the judicial pronouncements made by the Supreme Court in various cases, as aforestated, it is well established that the length of service of appointment on promotion made on ad hoc or temporary basis or on officiation in accordance with law against the substantive vacancies, may be counted for the purpose of seniority from the date of initial appointment. In the case on hand, all the appointments were made in excess of their quota, not in accordance with rules,subject to conditions enshrined in the order, stating that the appointees shall not claim seniority or regular promotion on the said basis. The petitioners are not entitled to the benefit of period of officiation on the post of ACF before their appointment on permanent basis, on recommendation of the Sikkim Public Service Commission, as required under the Rules as well as under the conditions of the appointment of officiating basis. The petition is bereft of merits.

30. Resultantly, the writ petition is dismissed. No order as to costs.

SLR (2017) SIKKIM 424

(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

WP (C) No. 33 of 2016

Shri Subash Gupta ….. **PETITIONER**

Versus

Shri Yadap Nepal ….. **RESPONDENT**

For the Petitioner : Ms. Laxmi Chakraborty and Ms. Manju Rai, Advocates.

For Respondent : Mr. Zangpo Sherpa, Mr. Jushan Lepcha and Ms. Mon Maya Subba, Advocates.

Date of decision: 15th September 2017

A. Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings – On a query raised by this Court, the Learned Counsel appearing for the petitioner submits that the petitioner is yet to file his evidence on affidavit. The application for amendment also pleads that while preparing the evidence on affidavit the need to file the application for amendment was felt. The respondent has not contested the aforesaid facts – A perusal of paragraph 3 and 4 of the application for amendment makes it clear that it was only at the time of preparation of evidence on affidavit of the petitioner and on close scrutiny of the plaint and documents it was felt necessary to incorporate certain developments in the facts during the pendency of the Title Suit – It is quite evident that the subsequent facts are necessary for the purpose of determining the real questions in controversy between the parties. The reliefs sought for under the proposed amendment had already been set out in the un-amended plaint. The necessary factual basis for amendment being already incorporated in the plaint the proposed amendments would also not change the nature of the suit.

(Paras 26, 27 and 28)

B. Code of Civil Procedure, 1908 – Order VI Rule 17 – Is intended for promoting the ends of justice and definitely not for defeating them. As held in re: *Ganesh Trading Co.* even if a party or his Counsel is inefficient in setting out his case initially, the short-coming can certainly be removed generally by appropriate steps taken by a party to meet the ends of justice. Order VI Rule 17 confers jurisdiction on the Court to allow the amendment "at any stage of the proceedings" if the said amendments are necessary for the purpose of determining the real questions in controversy between the parties. This law hasn't changed. Order VI Rule 17 remains identically worded, save the new proviso – The object of the incorporation of the proviso to Order VI Rule 17 by the Civil Procedure Code (Amendment) Act, 2002 is to prevent frivolous application which is filed to delay the trial. The proviso curtails, to some extent, the absolute discretion to allow amendment at any stage. After the incorporation of the proviso, if the application is filed "after commencement of trial" then the party seeking amendment must also show "due diligence".

(Para 29)

C. Code of Civil Procedure, 1908 – Order VI Rule 17 – In the present case the date of first hearing was set on 11.11.2013 when issues were framed under Order XIV Rule 1. After the framing of issues parties are required to present to the Court a list of witnesses and obtain summonses to such persons for their attendance under Order XVI. Hearing of the suit and examination of witnesses are to be done in the manner provided under Order XVIII. The plaintiff has a right to begin unless the defence admits the facts. On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove – In the present case, admittedly, the Petitioner as the plaintiff has not filed his evidence on affidavit and is yet to lead his evidence. It is thus clear that although the date of first hearing was set on 11.11.2013 when the issues were framed and thus the trial is deemed to have commenced then, the trial had not effectively commenced as the petitioner was yet to file his affidavit in evidence. In such circumstances, it is also quite evident that no prejudice would occasion the respondent if the proposed amendment which have been found necessary for the purpose of determining the real questions in controversy between the petitioner and the respondent, is allowed. The respondent would have full opportunity of meeting the case of the petitioner as amended. It is also clear that in spite

of due diligence the petitioner could not have incorporated the proposed amendment in the plaint as all of it transpired after the filing of the plaint – The trial having not effectively commenced, a liberal approach is required while considering the application for amendment. Mere delay cannot be ground for refusing a prayer for amendment.

(Paras 29 and 30)

Petition allowed.

Chronological list of cases cited:

1. Baldev Singh and Others etc. v. Manohar Singh and Another, (2006) 6 SCC 498.
2. Sampath Kumar v. Ayyakannu and Another, (2002) 7 SCC 559.
3. Ganesh Trading Company v. Moji Ram, AIR 1978 SC 484.
4. Ragu Thilak D. John v. S. Rayappan and Others, (2001) 2 SCC 472.
5. Messrs. Trojan & Co. Ltd. v. Rm N. N. Nagappa Chettiar, AIR 1953 SC 235.
6. Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N., 2006 (12) SCC 1.
7. Vidyabai v. Padmalatha, 2009 (2) SCC 409.
8. J Samuel v. Gattu Mahesh, 2012 (2) SCC 300.
9. B. K. N. Pillai v. P. Pillai and Another, JT 1999 (10) SC 61.
10. Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344.
11. Abdul Rehman and Another v. Mohd. Ruldu and Others, (2012) 11 SCC 341.

JUDGMENT

Bhaskar Raj Pradhan, J

1. A Title Suit for declaration, possession, injunction and consequential reliefs was filed by the petitioner herein, as the plaintiff, in the year 2012 claiming his right to tenancy in the four storeyed RCC building situated at Pakyong-Rorathang road,

Pakyong, East Sikkim owned by late Dilli Ram Nepal and presently by his son the sole respondent, Yadap Nepal as the defendant.

Case of the plaintiff/petitioner

2. The case of the petitioner is based on the allegation that the respondent would use his influence with the local police to threaten the petitioner out of the building tenanted. The situation compelled the petitioner to sign on a document/ agreement prepared by the respondent. Subsequently, on 25.11.2005 the petitioner lodge a First Information Report (FIR) against the respondent, the officer-in-charge of the Pakyong P.S and others with the Superintendent of Police who took prompt initiative and directed investigation by the SDPO, which is pending. The respondent's ill intention of evicting the petitioner by any means led to various illegal acts of the respondent. The respondent, without notice transferred the electric connection of the building in the respondent's name from that of his Late father. The respondent also started mass propaganda against the petitioner in social network sites and connived with the officials of the Power and Energy Department of the Government of Sikkim and on 04.04.2012 disconnected the supply of electricity to the building which led to the filing of a pending complaint under Section 499 and 153 A Indian Penal Code, (IPC) for defamation and spreading communal hatred by the petitioner against the respondent. In pursuance of the said illegal purpose of evicting the petitioner, the respondent started a proceeding before the SubDivisional Magistrate under Section 133 Code of Criminal Procedure, 1973 (Cr.P.C.) which led to the passing of the Order by the District Magistrate directing the petitioner to immediately vacate the said building. This order of the District Magistrate had been passed without serving a copy of the complaint or the report obtained from the Assistant Engineer, UD & HD, Government of Sikkim. The petitioner further alleged that the respondent had conspired with his kin against the petitioner to evict him unlawfully and in furtherance of the said plan they had also disconnected the electricity supply and since 04.04.2012 there is in fact no electricity supply in the said building causing huge financial losses. The petitioner sought to rely upon a list of documents which included, inter-alia, the copies of the Section 133 of Cr.P.C. proceedings before the District Magistrate.

Case of the defendant/respondent

3. On 03.07.2012 the respondent filed his written statement contesting the Title Suit. The respondent denied that late Dilli Ram Nepal had inducted the petitioner as a tenant in the entire building of the respondent and further stated that as per the version of the attesting witnesses to the agreement dated 10.11.1998, late Dilli Ram Nepal had only agreed to let out the road level floor measuring 18 x 36. However, it now appears that the petitioner had discreetly entered the words "ground floor to top" in the space which was left blank and meant to be filled up by appropriate English term to describe the sweet meat shop which the executants and the witnesses were not able to appropriately coin. The respondent contested the allegation of the petitioner regarding disconnection of electricity by stating that it was a suo-motto action on the part of the Power Department. The respondent also contested the allegation of the petitioner of falsely and illegally obtaining orders under Section 133 Cr.P.C. from the District Magistrate by stating that the respondent had in fact legally moved the competent Authority and followed the due process of law. The respondent would also rely upon a list of documents which inter alia, contained copy of the line disconnection notice issued by the Power Department, the eviction notice of the District Magistrate under Section 141 of Cr.P.C. and the final order under Section 133 of Cr.P.C. also passed by the District Magistrate dated 21.06.2012.

Subsequent events

4. After the filing of the written statement on 20.07.2012, the learned Session Judge, East Sikkim at Gangtok would set aside the fnal Order dated 21.06.2012 passed by the District Magistrate under Section 133 of Cr.P.C. by holding that the District Magistrate had failed to comply with the mandatory provisions of law and the said Order cannot be sustained. This fact was not brought on record in the Title Suit by the petitioner and obviously not by the respondent too.

5. In the meantime, on a query made by the petitioner under the Right to Information Act, (RTI) 2005 the Power and Energy Department vide its reply dated 09.01.2013 (the learned Counsel of the Petitioner, during the hearing of the present matter on 09.09.2017, orally pointed out the inadvertent typographical error in the proposed amendment where the date of the said reply was inadvertently written as 19.01.2011) would give certain information with regard to the reasons for the alleged disconnection of electricity from the said building. This subsequent development was also not brought on record by the petitioner till 09.06.2015.

Issues framed

6. On 11.11.2013 issues were framed in the said Title Suit. **Application for amendment**

7. On 09.06.2015 an application for amendment of the plaint was filed by the petitioner under Order VI Rule 7 read with Section 151 of the Code of Civil Procedure, 1908 (CPC).

8. In the said application for amendment under Order VI Rule 7 of the CPC the petitioner averred that at the time of preparation of evidence on affidavit of the petitioner on close scrutiny of the plaint and documents, it was discovered that there were certain developments in the facts which transpired during the pendency of the Title Suit and it was felt necessary that those facts were pertinent and required to be incorporated in the plaint. The said facts which the petitioner sought to be incorporated in the plaint, as detailed in the said application for amendment were:-

> **"Proposed amendments prayed for**
>
> I. After paragraph 21 of the plaint, following paragraph may be added as paragraph 21 A
>
> "That on 21.06.2012, the District Magistrate, East Sikkim at Gangtok passed final order in Misc. Crl. Case No. 03/DM/E of 2012, under Section 133 of CrPC against the Plaintiff and in favour of the Defendant and directed the Plaintiff to vacate the questioned building within 30 days from the date of the order. It was also ordered by the District Magistrate that should the Plaintiff fail to do so; authorised Officer-in-Charge, Pakyong Police Station to evict the Plaintiff, if necessary, by using force after expiry of the given period.
>
> The Plaintiff then preferred revision of the impugned order passed by the District Magistrate, East Sikkim in the Court of the Honble Sessions Judge, East and North Sikkim at Gangtok being Criminal Revision Case No. 04 of 2014. The Defendant contested the said Revision Case and after hearing the parties, the Honble Sessions vide order dated: 20.07.2012 thereby set aside

the order dated: 21.06.2012 passed by the District Collector East Sikkim at Gangtok."

II. In paragraph 25, after the words 'financial loss', the following sub paragraphs may be added

[Upon query of plaintiff under Right to Information Act with respect to the electricity connection/disconnection of the suit building from Energy and Power Department, Government of Sikkim. On 19.01.2011, Energy and Power Department responded as under:

(i) The electricity connection registered in the name of Late Dilli Ram Nepal having account no. A/39 of his RCC house situated at Pakyong Bazar has been changed in the name of his son Shri Yadap Nepal w.e.f. November 2011. Shri Yadap Nepal has made the written request for change in name vide application dated: 21.11.2011 stating that the land where the house stands has been registered in his name. He has submitted the Xerox copy of land parcha khatiyan.

(ii) Shri Yadap Nepal failed to pay his electricity arrears/bills. Disconnection notice was served on him on 12.3.2012 with due date for payment on 26.3.2012 which he did not paid. Hence the electricity supply/service to the house of Shri Yadap Nepal, consumer account No. A/39 was disconnected on 07.04.2012.

(iii) The arrears of electricity bills in the house of Shri Yadap Nepal, consumer account no. A/39 is Rs. 10,775/-.

(iv) Enclosed: a) Xerox copy of application dated: 21.11.2011. b) Xerox copy of land parcha khatiyan.

On 12.02.2013, the Plaintiff made an application under Section 151 of the CPC, incorporating above facts thereby praying for reconnection of supply of electricity in the suit building after depositing arrears, which was outstanding due to the ill motive of the Defendant. After hearing the parties, Honble Court was pleased to pass following orders on 14.08.2013.

……..”14. From the facts put forth it is also apparent that the power/electricity connection was not disconnected by the Power Department on account of the condition of the building but the disconnection was made only on account of the arrears of power bills not being paid by the defendant due to the reasons as already indicated above. Hence in the above circumstances, I find that it will not be essential to send a Commission as prayed by Ld. Counsel for the defendant and I also find no reason not to allow the petition of the Plaintiff.

15. It is accordingly ordered that the electricity to the suit building be reconnected by the concerned Department and the Plaintiff be allowed to deposit the outstanding arrears of electricity bills amounting to Rs. 10,775/-.

16. The defendant shall refrain from creating any hindrance in the reconnection of the electricity supply in the Suit building and from the Plaintiff depositing the outstanding arrears.”

It is submitted that despite the above orders of the Honble Court, the Energy and Power Department did not comply the orders of this Honble Court delayed reconnection of the electricity. The Plaintiff then filed another application praying for implementation of the

orders passed on 14.08.2013. Eventually, Energy and Power Department complied the orders of the Honble Court and the Plaintiff was allowed to deposit arrears and supply of electricity was restored in the suit building in the month of October 2013. Since then, the electricity bills of the suit building are delivered by the Energy and Power Department to the Plaintiff and he has been regularly depositing the same.]"

The objection to the proposed amendment

9. The said application was contested by the respondent by filing an objection dated 23.07.2015 on the ground that the issue having been framed on 11.11.2013 the Title Suit had begun on 11.11.2013 and therefore, as per the proviso to Order VI Rule 17 of the CPC, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, no application for amendment shall be allowed after the trial has commenced. It was also contested by the respondent that the pleadings which the petitioner intended to incorporate in the plaint by way of proposed amendment, related to events and matters prior to the settlement of the issues, which could have been easily raised by the petitioner before commencement of trial if the petitioner had been diligent.

Impugned Order

10. The learned Civil Judge, East Sikkim at Gangtok vide impugned Order dated 07.06.2016 rejected the application for amendment filed by the petitioner. The first amendment sought by the petitioner regarding the factum of the order under Section 133 of Cr.P.C. passed by the learned District Magistrate on 21.06.2012 and the subsequent Order of the learned Session Judge, setting aside the Order dated 21.06.2012 passed by the District Magistrate under Section 133 of Cr.P.C. was not allowed to be incorporated on the ground of delay of four years without any cogent reason. It was also observed by the learned Civil Judge that the defendant had filed the copy of the order under Section 133 of Cr.P.C. passed by the learned District Magistrate on 21.06.2012 along with other

documents and had also mentioned the same in paragraph 20 of the written statement and therefore, is an admitted fact. The second amendment regarding the filling of the RTI regarding non-payment of electricity of the said building and the reply thereto from the Power and Energy Department and the order dated 14.08.2013 passed by the learned Civil Judge in a Section 151 CPC application filed by the petitioner was also rejected on the ground of delay and also that the records thereof were already on the case record.

The hearing

11. At the hearing of the present petition preferred under Article 226 and 227 of the Constitution of India Mrs. Laxmi Chakraborty, Learned Counsel for the petitioner would rely upon:- (1) **Baldev Singh & Ors. etc. v. Manohar Singh & Anr.**[1] (2) **Sampath Kumar v. Ayyakannu & Anr.**[2] (3) **Ganesh Trading Company v. Moji Ram**[3] (4) **Ragu Thilak D. John v. S. Rayappan & Ors.**[4] (5) **Messrs. Trojan & Co. Ltd. v. Rm N. N. Nagappa Chettiar**[5] . Mr. Zangpo Sherpa Learned Counsel for the respondent contesting the said Writ Petition would rely upon: (1) **Ajendraprasadji N. Pandey v. Swami Keshavprakeshdasji N.**[6] (2) **Vidyabai v. Padmalatha**[7] (3) **J Samuel v. Gattu Mahesh**[8] . He would submit that the judgment of the Apex Court in re: Baldev Singh (supra) has been distinguished in re: Vidyabai (supra) and thus issues having been framed on 11.11.2013 and due diligence having not been shown by the petitioner the Writ Petition is liable to be dismissed.

The consideration

12. It is interesting to note that the application for amendment beside stating that while preparing the evidence on affidavit and on close scrutiny of plaint and documents, it was discovered that certain developments in the facts during the pendency of the Title Suit was felt necessary to be incorporated in the plaint and that the said amendments are formal in nature and would in no way change the nature and character of the case, did not plead anything else. Similarly, as stated above, the sole objection of the respondent to the amendment was on the ground

[1] (2006) 6 SCC 498
[2] (2002) 7 SCC 559
[3] AIR 1978 SC 484
[4] (2001) 2 SCC 472
[5] AIR 1953 SC 235
[6] 2006 (12) SCC 1
[7] 2009 (2) SCC 409
[8] 2012 (2) SCC 300

that the trial having commenced as issues had been framed on 11.11.2013, the proviso to order VI Rule 17 of the CPC would be attracted and due diligence having not pleaded or proved by the petitioner the application for amendment was required to be necessarily rejected. It was not the case of the respondent that the pleadings sought to be incorporated by insertion of the paragraphs reproduced above in the application for amendment were not necessary for the purpose of determining the real question in controversy between the parties. Interestingly, the impugned order also does not examine the necessity or the lack of it in the proposed amendment for the purpose of determining the real questions in controversy between the parties. The Learned Civil Judge while examining the proposed amendment was also required to be mindful of the well settled law that the decision of a case cannot be based on grounds outside the pleadings of the parties.

13. Order VI Rule 17 as stood prior to the Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 01.07.2002 would read thus:-

> "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

14. The Parliament inserted a proviso to the aforesaid Order VI Rule 17 of the CPC by the Civil Procedure Code (Amendment) Act, 2002, which reads now as under:-

> "Amendment of pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

15. It should be noticed that Order VI Rule 17 of the CPC read as it stood prior to the amendment in 2002 was the same, save the addition of the proviso. Prior to the insertion of the proviso to Order VI Rule 17 of the CPC by the Civil Procedure Code (Amendment) Act, 2002, the Apex Court would examine Order VI Rule 17 of the CPC in re: **Ganesh Trading Co. (supra)** and hold as under:-

> "4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its Counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.
>
> 5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a

good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional Court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.

6. In the case before us, the appellant-plaintiff Ganesh Trading Co., Karnal, had filed a suit "through Shri Jai Parkash", a partner of that firm, based on a promissory note, dated August 25, 1970, for recovery of Rs 68,000. The non-payment of money due under the promissory note was the real basis. The suit was filed on August 24, 1973, just before the expiry of the period of limitation for the claim for payment. The written statement was filed on June 5, 1974, denying the assertions made in the plaint. It was also asserted that the suit was incompetent for want of registration of the firm and was struck by the provisions of Section 69 of the Indian Partnership Act."

16. In re:- **B. K. N. Pillai v. P. Pillai & Anr.**[9] the Apex Court after referring to various judgments of the privy Council as well as the Apex Court on the un-amended Order VI Rule 17 of the CPC would hold:-

"The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and to such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all

[9] JT 1999 (10) SC 61

> circumstances. But it is equally true that the courts while deciding such prayers should not adopt hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled for multiplicity of litigation."

17. In re:- **Ragu Thilak D. John (supra)** the Apex Court would examine a case in which due to subsequent developments, the appellant therein had filed an application under the un-amended Order VI Rule 17 of the CPC in a pending suit which was rejected by the trial court and the revision thereof was also rejected by the High Court. The Apex Court would hold that if the test as pointed out in re:- **B. K. N. Pillai (supra)** quoted above was applied, the amendment sought could not be declined. It was held that the dominant purpose of allowing the amendment is to minimise the litigation. It was further held that the plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case, as is evident from the perusal of averments made in the plaint which was sought to be incorporated by way of amendment. It was also held that in the circumstances of the case the plea of limitation being disputed could be made a subject matter of the issue after allowing the amendment.

18. In a case relating to an application for amendment filed in the year 1999, before the commencement of the trial by a judgment rendered on 13.09.2002, the Apex Court in re: **Sampath Kumar (supra)**, while explaining the mandate of Order VI Rule 17 of CPC would hold :-

> "9. Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing

in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the court on the date on which the application seeking the amendment was filed. (See observations in Siddalingamma v. MamthaShenoy (2001) 8 SCC 561)"

19. In re: **Salem Advocate Bar Association v. Union of India**[10] , the Apex Court would examine the legality of Order VI Rule 17 of the CPC as amended by the Civil Procedure (Amendment) Act, 2012 and hold:-

"Order 6 Rule 17

26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of

[10] (2005) 6 SCC 344

trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

20. The Apex Court in a post amendment case in re: **Baldev Singh and Ors. (Supra)** would examine the legality of a judgment of the High Court affirming an Order rejecting an application for amendment of a written statement passed by the Additional Civil Judge. In the said case a suit had been filed for declaration by the plaintiff/respondent No.1 therein. The defendant/appellant therein entered appearance and filed the written statement. During the pendency of the suit, an application for amendment of the written statement was filed. The Apex Court would thus hold:-

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

21. In re: **Ajendraprasadji N. Pandey (supra)** was a case in which issues had been framed and the plaintiffs had filed their affidavit of examination-in-chief. The amendment application had not pleaded any facts or grounds raised to even remotely contended that despite exercise of due diligence those matters could not be raised. The Apex Court would examine the implication of the amended Order VI Rule 17 of CPC to the said facts and hold :

> "42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.
>
> 43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

Then again:

"54. In our opinion, the facts abovementioned would also go to show that the appellants are lacking in bona fides in filing this special leave petition before this Court. It is also to be noticed that the High Court has recorded relevant points in its elaborate judgment dated 5- 10-2005 and have been dealt with despite the opposition of the contesting respondents that these pleas were not taken in the written statement. Under these circumstances, non-seeking of appropriate amendment at appropriate stage in the manner envisaged by law has disentitled the appellants to any relief. The amendment, in our view, also seeks to introduce a totally new and inconsistent case. [emphasis supplied]

55. We have carefully perused the pleadings and grounds which are raised in the amendment application preferred by the appellants at Ext. 95. No facts are pleaded nor are any grounds raised in the amendment application to even remotely contend that despite exercise of due diligence these matters could not be raised by the appellants. Under these circumstances, the case is covered by proviso to Rule 17 of Order 6 and, therefore, the relief deserves to be denied. The grant of amendment at this belated stage when deposition and evidence of three witnesses is already over as well as the documentary evidence is already tendered, coupled with the fact that the appellants' application at Ext. 64 praying for recasting of the issues having been denied and the said order never having been challenged by the appellants, the grant of the present amendment as sought for at this stage of the proceedings would cause serious prejudice to the contesting respondent-original plaintiffs and hence it is in the interest of justice that the amendment sought for be denied and the petition be dismissed. [emphasis supplied]

56. An argument was advanced by Mr Parasaran that affidavit filed under Order 18 Rule 4 constitutes examination-in-chief. The marginal note of Order 18 Rule

4 reads recording of evidence. The submission is that after the amendments made in 1999 and 2002 filing of an affidavit which is treated as examination-in-chief falls within the amendment (sic ambit) of phrase "recording of evidence".

57. It is submitted that the date of settlement of issues is the date of commencement of trial. (Kailash v. Nanhku [(2005) 4 SCC 480]) Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter-affidavit which proves lack of due diligence on the part of Defendants 1 and 2 (the appellants)."

Then again:

"60. The above averment, in our opinion, does not satisfy the requirement of Order 6 Rule 17 without giving the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence. As held by this Court in Kailash v. Nanhku [(2005) 4 SCC 480] the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

61. We can also usefully refer to the judgment of this Court in Baldev Singh v. Manohar Singh [(2006) 6 SCC 498] for the same proposition. A perusal of the proposed amendment would show that it contains numerous averments. So far as the averments in the proposed amendments are concerned, at p. 12 of the order in para 22, the appellants admit that all the issues raised by way of proposed amendment in the written

statement were taken before this Court in the appeal from order filed by the present defendants in the civil appeal filed before this Court and again in the special leave petition filed subsequently. As rightly pointed out by learned Senior Counsel, any section should not be so interpreted that part of it becomes otiose and meaningless and very often a proviso itself is read as a substantive provision it has to be given full effect."

22. In re: **Vidyabai (supra)**, was a case in which an application for amendment was filed under Order VI Rule 17 of the CPC seeking to amend the written statement in a suit for specific performance of a contract filed by the appellant/ plaintiff therein where issues were framed, affidavits were filed regarding evidence and dates were fixed for cross examination. The application for amendment having been rejected by the Civil Judge and the writ not allowed by the High Court, the Apex Court would examine the proviso to Order VI Rule 17 of the CPC in such facts. The High Court in that case had held that according to Order VI Rule 17 of the CPC, an amendment application can be filed at any stage of the proceeding and filing of an affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. The Apex Court would re-examine the mandate of Order VI Rule 17 of the CPC, the various precedents of the Apex Court regarding the meaning of the terms "trial" and "commence" and hold :-

"10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

"Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the

commencement of the trial.

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

Then again:

"19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.

20. In Salem Advocate Bar Assn. [(2005) 6 SCC 344] this Court has upheld the validity of the said proviso. In any event, the constitutionality of the said provision is not in question before us nor we in this appeal are required to go into the said question.

Furthermore, the judgment of the High Court does not satisfy the test of judicial review. It has not been found that the learned trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the contentions raised before

it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly."

23. In re: **Vidyabai (supra)** the Apex Court would explain that the judgment passed by the Apex Court in re: **Baldev Singh (supra)** in the following words:-

> "16.....it is not an authority for the proposition that the trial would not be deemed to have commenced on the date of first hearing. In that case, as noticed hereinbefore, the documents were yet to be filed and, therefore, it was held that the trial did not commence."

24. In re: **J Samuel (supra)** the Apex Court would examine the effect of seeking an amendment under the amended Order VI Rule 17 of the CPC, on the sole ground that the omission of the specific averment was by "type mistake". This was found to be a clear lack of "due diligence". In such circumstances the Apex Court would hold:-

> *"19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.*
>
> *20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."*

25. The Apex Court would once again be called upon to examine the amended Order VI Rule 17 of the CPC, in a case in which the application for amendment had been rejected by the trial court and the revision thereof was also dismissed by the High Court. In re: **Abdul Rehman & Anr. v. Mohd. Ruldu & Ors.**[11] would hold:-

> *"11. The original provision was deleted by Amendment Act 46 of 1999, however, it has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The above proviso, to some extent, curtails absolute discretion to allow amendment at any stage. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimise the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case. The above principles have been reiterated by this Court in J. Samuel v. Gattu Mahesh [(2012) 2 SCC 300 : (2012) 1 SCC (Civ) 801] and Rameshkumar Agarwal v. Rajmala Exports (P) Ltd. [(2012) 5 SCC 337 : (2012) 3 SCC (Civ) 92] Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment."*

[11] (2012) 11 SCC 341

26. The petitioner as well as the respondent are ad idem that the issues was framed on 11.11.2013. On a query raised by this Court the Learned Counsel appearing for the petitioner submits that the petitioner is yet to file his evidence on affidavit. The application for amendment also pleads that while preparing the evidence on affidavit the need to file the application for amendment was felt. The respondent has not contested the aforesaid facts. The relevant pleading in the application for amendment as to why the petitioner was filing the said application for amendment is found in paragraph 3 and 4 thereof which states:-

> *"3. That at the time of preparation of Evidence-on-affidavit of the plaintiff and on close scrutiny of the plaint and documents, it is discovered that there are certain developments in the facts during the pendency of the instant suit. It is submitted that it is felt necessary that those facts are pertinent and requires to be incorporated in the plaint. Hence this application.*
>
> *4. That the amendment sought for are very much formal in nature and shall in no way change the nature and character of the case."*

27. A perusal of paragraph 3 and 4 of the application for amendment extracted above makes it clear that it was only at the time of preparation of evidence on affidavit of the petitioner and on close scrutiny of the plaint and documents it was felt necessary to incorporate certain developments in the facts during the pendency of the Title Suit.

28. The proposed amendment seeks to incorporate the fact of passing of the Order dated 21.06.2012 by the District Magistrate under Section 133 of Cr.P.C. and the subsequent Order of the Learned Sessions Judge dated 20.07.2013 setting aside the said Order dated 21.06.2012 passed by the District Magistrate and the passing of the order dated 14.08.2013 passed by the learned Civil Judge. The Order dated 21.06.2012 passed by the District Magistrate was passed after the filing of the plaint. It is seen that the proceedings under Section 133 of Cr.P.C. had already been initiated before the filing of the plaint. Necessary pleadings regarding the same have been incorporated in paragraphs 18, 19, 20, 21 and 22 of the plaint and related documents have also been filed in the list of documents filed as item Nos. 10, 11 and 12 thereof by the petitioner. The Order of the Learned Sessions Judge is dated 20.07.2012 and as such this fact was also not available at the time of filing the plaint. The proposed amendment also seeks to incorporate

the factum of the information received from the Energy and Power Department, Government of Sikkim on an application filed by the petitioner under the Right to Information Act, 2005. The said application was filed by the petitioner on 21.12.2012 and the information provided by the Power & Energy Department was on 19.01.2013. These facts were also subsequent to the filing of the plaint on 05.05.2012. The proposed amendment also seeks to incorporate facts relating to the non payment of electricity bills of the building and related facts thereto. The foundation of the said facts is found in paragraph 2 of the plaint in which it is stated that the petitioner had been continuously depositing the electricity bill of the building as per his consumption. Similarly, paragraph 25 of the plaint also avers about the disconnection of the electricity supply by the respondent. It is quite evident that the subsequent facts are necessary for the purpose of determining the real questions in controversy between the parties. The reliefs sought for under the proposed amendment had already been set out in the un-amended plaint. The necessary factual basis for amendment being already incorporated in the plaint the proposed amendments would also not change the nature of the suit.

29. It is well settled that Order VI Rule 17 of CPC is intended for promoting the ends of justice and definitely not for defeating them. As held in re: **Ganesh Trading Co. (supra)** even if a party or his council is inefficient in setting out his case initially the short coming can certainly be removed generally by appropriate steps taken by a party to meet the ends of justice. Order VI Rule 17 of CPC confers jurisdiction on the Court to allow the amendment "at any stage of the proceedings" if the said amendments are necessary for the purpose of determining the real questions in controversy between the parties. This law hasn't changed. Order VI Rule 17 of CPC remains identically worded, save the new proviso. The object of the incorporation of the proviso to Order VI Rule 17 of CPC by the Civil Procedure Code (amendment) Act, 2002 is to prevent frivolous application which is filed to delay the trial. The proviso curtails, to some extent, the absolute discretion to allow amendment at any stage. After the incorporation of the proviso, if the application is filed "after commencement of trial" then the party seeking amendment must also show "due diligence". As held in re: **Vidyabai (supra)** the date of first hearing in the present case was 11.11.2013 when the issues were framed and filing of an affidavit in lieu of examination of chief of the witness would amount to "commencement of proceedings". However, in the present case, admittedly, the evidence on affidavit of the petitioner is yet to be filed.

30. In the present case the date of first hearing was set on 11.11.2013 when issues were framed under Order XIV Rule 1, CPC. After the framing of issues

parties are required to present to the Court a list of witnesses and obtain summonses to such persons for their attendance under Order XVI, CPC. Hearing of the suit and examination of witnesses are to be done in the manner provided under Order XVIII, CPC. The plaintiff has a right to begin unless the defence admits the facts. On the day fixed for hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. In the present case, admittedly, the Petitioner as the plaintiff has not filed his evidence on affidavit and is yet to lead his evidence. It is thus clear that although the date of first hearing was set on 11.11.2013 when the issues were framed and thus the trial is deemed to have commenced then, the trial had not effectively commenced as the petitioner was yet to file his affidavit in evidence. In such circumstances it is also quite evident that no prejudice would occasion the respondent if the proposed amendment which have been found necessary for the purpose of determining the real questions in controversy between the petitioner and the respondent, is allowed. The respondent would have full opportunity of meeting the case of the petitioner as amended. It is also clear that in spite of due diligence the petitioner could not have incorporated the proposed amendment in the plaint as all of it transpired after the filing of the plaint. The facts would, however, reveal that the final Order of the District Magistrate dated 21.06.2012 was set aside by the Order of the Learned Sessions Judge on 20.07.2012. Similarly, the application of the petitioner under the Right to Information Act, 2005 was made on 21.12.2012 and the reply thereto obtained on 19.01.2013. All these events were prior to the issue being framed on 11.11.2013. The trial having not effectively commenced, a liberal approach is required while considering the application for amendment. Mere delay cannot be ground for refusing a prayer for amendment. Mrs. Laxmi Chakraborty, Learned Counsel for the petitioner, fairly concedes that the inadvertent error of not seeking to amend the plaint earlier was due to her and the same may not be allowed to prejudice the petitioner. Due diligence of the petitioner cannot in such circumstances be equated to the due diligence of the Counsel for the petitioner. After all as held by the Apex Court in re: **Rani Kusum (SMT) v. Kanchan Devi (SMT) & Ors.**[12]

> *"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure*

[12] (2005) 6 SCC 705

is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

31. This Court, thus, is of the opinion that the impugned judgment of the Learned Civil Judge dated 07.06.2016 which has failed to even consider whether the proposed amendment was or not necessary for the purpose of determining the real questions in controversy between the parties must be set aside.

32. The Writ Petition is allowed, the impugned judgment of the Learned Civil Judge dated 07.06.2016 is set aside, the proposed amendment vide the application for amendment sought for by the petitioner is also allowed. The typographical error in the date of the reply to RTI application as pointed out by the Learned Counsel for the petitioner and noted above may be allowed to be rectified, if sought for.

33. However, this is a fit case in which cost should be imposed on the petitioner. Accordingly the petitioner shall pay a cost of 2000/- (Rupees two thousand) to the respondent.

SLR (2017) SIKKIM 451

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

W.P. (PIL) No. 04 of 2015

Shri Bishnu Rai and Another ….. PETITIONERS

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioners : Mr. Suman Sengupta, Ms. Prarthana Ghataney and Ms. Ranjeeta Kumari, Advocates.

For Respondents 1 and 2 : Mr. Karma Thinlay, Central Government Counsel.

For Respondents 3 and 5 : Mr. Umesh Gurung, Advocate.

For Respondents 4 : Mr. Nikhil Pillai and Ms. Rachhitta Rai, Advocates.

For Respondents 6 : Mr. J. B. Pradhan, Additional Advocate General with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates.
Mr. Hemant Shukla, Special Public Prosecutor, CBI/ACR/Kolkata.

Date of decision: 19th September 2017

Petition allowed.

ORDER (ORAL)

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

1. Pointing out gross irregularities including financial irregularities and illegalities committed by the Respondents No.3, 4 and 5, the Petitioners had earlier filed a Writ Petition, being WP(PIL) No.18 of 2000, seeking a

direction to the State or the concerned Ministry, to carry out thorough investigation as to the allegations raised. Disposing of the Petition on 23-06-2014, the Division Bench of this High Court ordered as follows;

> "(i) The petitioners will file a representation with all the allegations, which have been alleged in the present writ petition against respondents No. 1 to 3, before respondent No. 4, i.e. Ministry of Human Resource Department, Government of India, New Delhi, with all necessary facts and documents in support of their allegations, within a period of six weeks from today.
>
> (ii) If such a representation is filed by the petitioners, the respondent No. 4 is directed to consider/examine the allegations alleged by the petitioners, to make an enquiry in case there is any necessity and in case the allegations are, prima facie, found to be proved then to initiate appropriate actions/ proceedings against the University, the then Vice Chancellor, the then Registrar (respondents No. 1 to 3) or any other officer, who is found guilty, in accordance with law. The needful will be done by respondent No. 4 within a period of six months from the date of receipt of representation.
>
> (iii) It will be open for the petitioners to approach this Court again in case they feel aggrieved with the action of respondent No. 4.
>
> (iv) In case the petitioners want a personal hearing, then the respondent No. 4 will afford an opportunity of personal hearing to them.
>
> (v) It is needless to mention that in case any action is taken or proceedings are initiated, by respondent No. 4, against respondent No.

1 Sikkim University, respondent No. 2 Prof. Mahendra P. Lama, former Vice Chancellor, Sikkim University, respondent No. 3 Shri Jyotiprakash Tamang, Registrar, Sikkim University or any other Officer, then an opportunity of being heard or to defend themselves will be given to them.

(vi) Parties shall bear their own costs."

2. In compliance thereto, the Petitioner filed a representation dated 28-07-2014 before the Respondent No.2, who on being satisfied prima facie about the allegations, constituted a Fact Finding Committee (for short "FFC") to enquire thereto. A prayer for extension of time to dispose of the representation dated 28-07-2014 was made by the Respondent No.2 before this Court and allowed. Despite such extension, the Report of the Committee was not made available to the Petitioner, giving rise to the instant Writ Petition, seeking disclosure of the Report of the FFC to the Petitioners, by furnishing it before this Court with a prayer to the Court to direct any Law Enforcing Agency to take up legal proceedings against the Respondents No.4, 5 and 6.

3. The Respondents No.3 and 5 filed their respective Counter-Affidavit disputing and denying the allegations levelled as baseless. Respondent No.4 in his Affidavit also resisted the allegations levelled by the Petitioners as false and vexatious and made with the malicious intention of damaging the Respondent's reputation.

4. The Respondent No.2 for their part filed the Report of the FFC, which was placed before this Court in CM Appl. No.258 of 2015 and taken on record on 21-09-2015. It was submitted that the Report of FFC was under active consideration of the Government for further course of action.

5. On 09-07-2016 by filing I.A. No.03 of 2016, the Respondent No.2, informed that, based on the Report of the FFC, the Ministry had issued a Notice to the Respondent No.4 seeking recovery of an amount of Rs.2,20,671/- (Rupees two lakhs, twenty thousand, six hundred and seventy one), only, on account of irregular payment of electricity bill made by the Respondent No.3, purportedly for the second residence of the Respondent

No.4. An Audit Team had also been constituted to complete the process of auditing/examining the allegations of irregularity in submission of Utilization Certificate for the year 2010-11 and irregularity in appointment of a Caretaker for Siliguri Guest House.

6. The Respondent No.2 by filing I.A. No.05 of 2016, on 03-10-2016, informed that after examining the aforesaid issues, Report had been submitted by the Audit Team and was under consideration of the University Grants Commission (UGC). By the same I.A., two letters, i.e., one dated 12-09-2016 addressed to Respondent No.4 by the Deputy Secretary of the Respondent No.2 and another letter dated 13-04-2016 addressed to the Secretary, UGC, by the Deputy Secretary of the Respondent No.2, were also placed on record. The first letter allowed the request of the Respondent No.4 to pay the amount of Rs.2,20,671/- (Rupees two lakhs, twenty thousand, six hundred and seventy one), only, in twenty equal monthly instalments, while the second letter pertained to constitution of a Team, for examining the aforesaid two allegations. So far as the Fact Finding Report (FFR) was concerned, it was canvassed by Respondent No.2 that some allegations were found to be true, some unfounded and in respect of some allegations the matter was to be enquired further.

7. On 03-11-2016, as no response was forthcoming from the Respondent No.2 with regard to proposed action against the concerned Respondents, despite the observations in order dated 14- 10-2016, this Court ordered that an Independent Agency, namely, the Central Bureau of Investigation (CBI), be directed to examine the alleged irregularities in the functioning of the University and appropriate action be taken, as advised, as per Law. Consequently, Notice was issued to the Additional Director, CBI (In-Charge, N/E States), who put in his appearance through Additional Superintendent of Police, Anti-Corruption Branch, CBI, Kolkata, W.B., on 10-11-2016 and was directed to examine the matter and submit a Preliminary Report, within a period of four weeks.

8. In the interim, the Respondent No.3 filed I.A. No.06 of 2016 seeking modification of the Order passed by this Court on 03- 11-2016 and contended that the FFC had examined all allegations levelled against the Respondents No.3, 4 and 5 and found the same to be incorrect, hence, the CBI was not required to further investigate into the matter. This Court observed that no further order is required in this Application at that stage.

9. The CBI thereafter submitted a Preliminary Status Report to the effect that it was examining a large number of financial transactions pertaining to Sikkim University for the financial years 2009-10 and 2010-11 and sought time for detailed enquiry and report. On 19-06-2017, the CBI filed a Report under sealed cover, with copy made over to the Central Government Counsel appearing for Respondents No.1 and 2.

10. Now, the Respondent No.2 has filed an Affidavit on 07- 09-2017 submitting therein that on perusal of the Report of the CBI, it is found that some prima facie evidence existed against the Respondent No.4, towards which, the CBI proposed to register a Regular Case against the Respondent No.4 and some other suspects. In view of the said circumstances, the Respondent No.2 submits that the Affidavit dated 26-10-2016, being I.A. No.11 of 2016, and an application for modification of Orders dated 03-11-2016 and 10-11-2016, being I.A. No.12 of 2016 may be treated as withdrawn. That, the Respondent has no objection to the CBI proceeding on the basis of their findings.

11. In view of the said Affidavit and the aforesaid submissions, we are of the considered opinion that the CBI take necessary steps, without being prejudiced by any of the observations made by this Court. During the process, the CBI shall afford fair and sufficient opportunity to the Respondent No.4 to place his matter, before the Agency, with no reservations.

12. Writ Petition stands disposed of accordingly.

SLR (2017) SIKKIM 456

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

W.P.(C) No. 45 of 2017

Pema Wangyal Bhutia	**…..**	**PETITIONER**
	Versus	
State of Sikkim and Others	**…..**	**RESPONDENTS**

For the Petitioner :	Mr. S.S. Hamal, Advocate with Ms. Priyanka Chhetri and Ms. Sushma Lepcha, Advocates.
For Respondent 1 and 2 :	Mr. J.B. Pradhan, Addl. Advocate General with Mr. S.K. Chettri, Asst. Govt. Advocate.
For Respondent 3 :	Mr. Tashi Rapten Barfungpa, Advocate. Mr. Hemant Rai, Sub-Divisional Magistrate, East District, Gangtok, in person.

Date of decision: 20th September 2017

Petition allowed.

ORDER

Meenakshi Madan Rai, J

1. Pursuant to the Order dated 18.9.2017 of this Court, an Affidavit bearing the same date, has been filed by the Respondent No.2, conceding therein that the jurisdiction vested in him under Section 145 and Section 146 of the Code of Criminal Procedure, 1973, has been exceeded by him in the impugned Order dated 25.7.2017.

2. Learned Counsel for the Petitioner submits that in view of the said admission, the impugned Order dated 25.7.2017, deserves to be set aside.

3. Heard and considered.

4. Consequently, the impugned Order dated 25.7.2017, in Misc. Case No. 03/DM/East of 2017, is hereby set aside.

5. It is pertinent to state here that the Petitioner had also filed I.A. No. 2 of 2017, an Application questioning the legality and validity of an ex parte ad-interim injunction Order dated 8.9.2017, passed by the learned Civil Judge, East Sikkim, Gangtok, in Title Suit No. 15 of 2017 (Karma Sonam Bhutia vs. Pema Wangyal), during the pendency of the instant Writ, which pertains to the same plot of land in dispute between the parties. That, the learned Trial Court despite being seized of the matter issued an ex parte ad-interim injunction Order dated 8.9.2017, in the aforesaid Title Suit which she ought not to have and hence, prayed that the impugned Order be vacated.

6. Learned Counsel for the Respondent No. 3 has filed his response on 19.9.2017, to I.A. No. 2 of 2017, clarifying therein as to why he approached the Court of the learned Civil Judge, when proceedings before the SubDivisional Magistrate, East District at Gangtok, had been stayed by Orders of this Court dated 17.8.2017. He submits that the Respondent had no intention of undermining the dignity, majesty or prestige of this Court.

7. Learned Counsel for the Petitioner is unrelenting on this count submitting that propriety has to be maintained and the aforesaid response merits no consideration.

8. I have considered the submissions.

9. Consequently, the impugned Order dated 8.9.2017, of the learned Civil Judge, East Sikkim, Gangtok, in Title Suit No. 15 of 2017, stands vacated.

10. Admittedly, the Title Suit is now pending between the parties before the Court of the learned Civil Judge, East Sikkim, along with a Petition filed by the Plaintiff (the Respondent herein), under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure, 1908. Both parties may address their grievances before the concerned Trial Court.

11. Writ Petition No. 45 of 2017 stands disposed of, accordingly.

12. Remit a copy each, of this Order, to the Court of learned Civil Judge, East Sikkim, at Gangtok, and the SubDivisional Magistrate, East District, at Gangtok, for information.

SLR (2017) SIKKIM 458
(Hon'ble the Chief Justice)

C.R.P No. 01 of 2017

M/s Himalayan Distilleries Ltd., ….. PETITIONER

Versus

Smt. Urmila Pradhan and Others ….. RESPONDENTS

For the Petitioner :	Mr. Dewashis Baruah, Mr. Biswajit Kumar, Ms. Nirmala Upadhyaya and Mr. Passang Tshering Bhutia, Advocates.
For Respondent 1 and 3 :	Mr. Bhola N. Sharma, Advocate.
For Respondent 2 :	Mr. N. Rai, Sr. Advocate with Ms. Malati Sharma and Mr. Suraj Chhetri, Advocates.
For Respondent 4 and 5:	Mr. Santosh Kumar Chettri, Assistant Government Advocate.
For Respondent 6-8:	Mr. T.B. Thapa, Sr. Advocate with Ms. Pema Yeshey Bhutia, Ms. Yangchen Doma Gyatso, Mr. Tashi Rapten Barfungpa and Ms. Tshering Palmoo Bhutia, Advocates.

Date of decision: 21st September 2017

A. Code of Civil Procedure, 1908 – Order XXII Rule 4 – Substitution of legal representative of the defendant – The plaintiff in its application, after stating the fact that the deceased proforma defendant 6 was survived by two sons and his wife, had chosen to implead only one son as legal heir. On this, the application cannot be rejected as held by the Supreme Court in *Re: Gema Coutinho Rodrigues (Smt.)* that when an application is made to bring one of the heirs on record, the trial Court ought to direct the

plaintiff to bring other legal heirs of the deceased on record without rejecting the application. (Para 15)

B. Code of Civil Procedure, 1908 – Order XXIII Rule 1(3) – Withdrawal of suit – Difference between 'cause of action' and 'subject matter' explained – The petitioner in its application under Order XXIII Rule 1(3) seeking withdrawal of the suit has specifically mentioned to file fresh suit on the same 'cause of action' and the learned trial Judge acceded to the request of the petitioner and granted the same – The petitioner has not sought permission to withdraw the suit on the same 'subject matter' – The learned trial Judge has rightly confined the liberty to the same cause of action as pleaded by the petitioner/ plaintiff.

(Paras 16 and 17)

C. Code of Civil Procedure, 1908 – Order XXII Rule 4 – Abatement of suit – It is well settled principles of law that under Order XXII Rule 4 CPC read with Article 120 of the Limitation Act, 1963 the suit stand abated without there being any order on completion of 90 days. Further, the application may be made for setting aside the abatement within 60 days from the expiry of 90th day – However, there is no quarrel on the issue that the Court is competent to condone the delay in the event sufficient reasons are shows for not making the application within the limitation period of 60 days for setting aside the abatement – On invocation of doctrine of abatement, the most effective party is the plaintiff and plaintiff's family and estate. The principle of abatement is involved to ensure administration of justice as expeditiously and cheaply as possible. The abatement merely pauses the proceedings until the problem is remedied in the pending dispute – In the case on hand, wherein the application was filed belatedly and the two legal heirs have also filed caveats in the pending suit, there is no reason to reject the application on the ground that the limitation period was not followed strictly. The liberal trend be read and considerable leeway be accorded to the proceeding to set aside the abatement and as such strict compliance of the rules of procedure may not be required in the facts of the case to advance justice – As a sequel, the order to the extent of dismissing the application to bring legal heirs of the deceased proforma

defendant 6 is quashed and abatement vis-à-vis deceased proforma defendant 6 is set aside. The other conditions are upheld.

(Paras 19, 20 and 32)

Petition allowed.

Chronological list of cases cited:

1. Gema Coutinho Rodrigues (Smt.) v. Bricio Franciso Pereira and Others, (1993) 2 SCC 620.

2. Sardar Amarjit Singh Kalra (Dead) by LRs. and Others v. Pramod Gupta (Smt.) (Dead) by LRs. and Others, (2003) 3 SCC 272.

3. Mithailal Dalsangar Singh and Others v. Annabai Devram Kini and Others, (2003) 10 SCC 691.

4. K Rudrappa v. Shivappa, (2004) 12 SCC 253.

5. Banwari Lal (Dead) by Legal Representatives and Another v. Balbir Singh, (2016) 1 SCC 607.

6. Sadassiva Rauji Gaitonde and Others v. Jose Joaquim Fonseca, AIR 1976 Goa, Daman & Diu 11.

7. Shyam Ray v. Haramani Dei (deceased by LR) and Others, AIR 1984 67.

8. Salil Dutta v. T.M. and M.C. Private Ltd. (1993) 2 SCC 185.

9. Balwant Singh (Dead) v. Jagdish Singh and Others, (2010) 8 SCC 685.

10. Vallabh Das v. Dr. Madan Lal and Others, (1970) 1 SCC 761.

11. Rangubai Kom Shankar Jagtap v. Suderabai Bhratar Sakharam Jedhe and Others, AIR 1965 SC 1974.

12. Brij Indar Singh v. Kanshi Ram, (1917) LR 44 IA 218, 228.

13. Sital Prasad Saxena (Dead) by LRS. v. Union of India and Others, (1985)1 SCC 163.

14. Bhag Mal alias Ram Bux and Others v. Munshi (Dead) by LRS. and Others, (2007) 11 SCC 285.

JUDGMENT

Satish Kumar Agnihotri, CJ

1. The petitioner herein filed a suit for declaration and other reliefs against the 1st to 5th respondents/defendants and late Bhim Raj Pradhan, father of the 6th and 7th respondents and husband of the 8th respondent, who was impleaded as proforma defendant at Sl. No. 6, on 27th May 2014. Late Bhim Raj Pradhan filed written statement on 02nd September 2014. On 20th January 2015, late Bhim Raj Pradhan died leaving behind his sons, 6th and 7th respondents and wife, the 8th respondent herein.

2. The brief facts as projected by the petitioner are that on 17th March 2015, learned counsel, Ms. Yangchen Doma Gyatso, appearing for the proforma defendant 6 informed the petitioner/ plaintiff and the court about proforma defendant's death on 20th January 2015. As evident from the proceedings dated 17th March 2015, it was averred that the advocate appearing for the plaintiff retired from the suit on personal grounds. The plaintiff and his constituted attorney were informed through the Personal Manager, Mr. M.B. Majhi. The matter was adjourned to 22nd April 2015. On 22nd April 2015, the plaintiff remained absent without having taken any step to bring legal heirs of the deceased proforma defendant 6 on record. The suit was again taken up on 08th May 2015, wherein one Mr. Durga Prasad Luitel, Advocate appeared for the plaintiff and sought adjournment on the ground that he was recently appointed by the plaintiff. The matter was adjourned to 28th May 2015. On 28th May 2015, again time was sought by the counsel for the petitioner/ plaintiff to obtain certain documents from the Land Revenue Department. The suit again appeared in the court on 03rd July 2015, when the advocate appearing for the plaintiff sought for some more time to take necessary steps for substitution of legal heirs of the deceased defendant 6. Accordingly, time was granted and the matter was adjourned to be listed on 03rd September 2015.

3. On 03rd September 2015, an application under the provisions of Order XXII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"), filed by the petitioner/plaintiff was taken on record, wherein it was stated that the deceased Bhim Raj Pradhan was survived by his wife Smt. Bindu Mati Pradhan and two sons namely, Mr. Bhaskar Raj Pradhan and Mr. Alok Raj Pradhan. A prayer was made to implead Mr. Alok Raj Pradhan as proforma defendant 6, in place of the deceased proforma defendant 6, late Bhim Raj Pradhan. Before that Mr. Alok Raj Pradhan and Mr. Bhaskar Raj Pradhan filed two caveats separately on 20th August 2015 (registered as Caveat No. 25 of 2015 and Caveat No. 26 of 2015 respectively) in the pending suit. On 03rd September 2015, two advocates namely, Ms. Pema Yeshey Bhutia and Mr. Hissay Dorjee Bhutia, appeared for the deceased 6 th defendant. Notices were issued on the caveats as well as on the application to bring legal heirs after the death of the deceased defendant 6 on record, returnable on 14th October 2015. On 14th October 2015, both the caveators/legal heirs of the deceased defendant 6 appeared through advocate. Mr. Alok Raj Pradhan filed reply to the application for substitution on 14th October 2015, contesting that the suit stands abated against the deceased proforma defendant 6, as such his name be deleted from the array of the parties.

4. Subsequently, on 29th March 2016, the petitioner/ plaintiff filed an application under Order XXIII Rule 1 (3) read with Section 151 CPC stating that due to inadvertence and oversight, proper relief could not be made in the suit and as such the plaintiff be allowed to withdraw the present suit with liberty to file a fresh on the same cause of action. The legal heirs of the deceased defendant 6 contested the application. The learned District Judge by impugned order dated 27th April 2016 allowed the application of the plaintiff to withdraw the suit and also dismissed the application of the plaintiff to bring legal heirs of the deceased proforma defendant 6 on record, holding that the suit against the proforma defendant stands abated. It was further directed that the plaintiff shall remove/dismantle the temporary structure that has been recently constructed on the suit property, in the following terms: -

> "For the reasons mentioned above and interpreting the meaning of "sufficient grounds" in a liberal manner, the application of the Plaintiff under Order XXIII Rule 1 (3) CPC, 1908 is allowed, in the interest of justice and is accordingly disposed of. However, the same is subject to

the following conditions:

1. The cause of action shall remain the same.

2. The suit against Proforma Defendant No. 6 stands abatement, and

3. The Plaintiff shall remove/ dismantle the temporary structure that has been recently constructed on the suit property.

Since condition number (3) mentioned above, would serve the purpose of Defendant No. 1, 2 and 3 for seeking temporary injunction, the said application is also disposed accordingly.

In terms above, the Plaintiff is permitted to withdraw the present suit and file afresh on the same cause of action.

The Suit No. 06 of 2014 accordingly stands disposed of."

5. Feeling aggrieved by the order holding that the suit against the deceased proforma defendant 6 stood abated and also direction to remove/dismantle the temporary structure that was then constructed on the suit property and further confining the liberty to file a fresh suit on the same cause of action, the instant revision petition is filed.

6. Mr. Dewashis Baruah, learned counsel appearing for the petitioner/ plaintiff would contend that imposition of conditions is patently illegal. It is further contended that the petitioner/ plaintiff was neither properly advised nor given proper legal assistance after the original advocate, appearing for the plaintiff, withdrew from the suit, without consent and information to the plaintiff. Proceedings under Order XXII CPC are not penal in nature but are only a procedure devised to ensure an effective adjudication after affording an opportunity to all the concerned parties. The same ought to have been considered liberally, particularly when the legal heirs of the deceased defendant 6 had filed caveats themselves and participated in the proceedings thereafter. Mr. Baruah would further contend that the application to bring legal heirs of the deceased defendant 6 could not be filed within time due to the fact that the Personal Manager present in the court could not understand the

gravity of the matter. The original advocate, who retired from the suit, did not inform about the death of the proforma defendant 6, even on information given in the court. Some time was taken while engaging a new counsel. In such a process, the delay was neither unreasonable nor intentional. The learned court ought not to have imposed conditions to file a fresh suit on the same cause of action, when new developments have been taken place in the cause of action. It is also urged that while permitting the plaintiff to withdraw the suit with liberty to file a fresh suit, no interim temporary injunction is permissible in law. Not permitting to implead the legal heirs of the deceased defendant 6 in the proposed suit is not just and proper for judicious adjudication of the dispute.

7. Mr. Baruah had emphatically and vehemently contended that the plaintiff had difficulty in getting legal assistance, as no counsel in Sikkim is willing to take up the matter. It is further urged that the petitioner/ plaintiff could engage an advocate only in the first week of May 2015 and accordingly, an adjournment was sought on 08th May 2015 by the advocate. In fact, the petitioner came to know about the death of proforma 6th defendant only on 03rd July 2015, when the Senior Counsel appearing for the 1st, 2nd and 3rd respondents informed the learned trial court and also to the new advocate appearing for the petitioner/ plaintiff. The petitioner/ plaintiff faced a lot of difficulty in engaging a counsel here and a counsel from Siliguri was engaged to represent the petitioner before the learned trial court.

8. Referring to observations made by the Supreme Court in **Gema Coutinho Rodrigues (Smt.) v. Bricio Franciso Pereira and others[1] , Sardar Amarjit Singh Kalra (Dead) by LRs. And others v. Pramod Gupta (Smt.) (Dead) by LRs. And others [2] , Mithailal Dalsangar Singh and others v. Annabai Devram Kini and others[3] , K Rudrappa v. Shivappa [4]** and **Banwari Lal (Dead) by Legal Representatives and another v. Balbir Singh[5]** , Mr. Baruah submits that in the facts of the case, the application for substitution ought to have been allowed with full liberty to the plaintiff to file a fresh suit on the subject matter.

9. In response, Mr. T.B. Thapa, learned Senior Counsel appearing for the 6th to 8th respondents would contend that if an application, on coming to know the death of the proforma defendant 6, is not filed within 90 days, the title suit vis-à-vis proforma defendant 6 stood abated under the provision of Order XXII Rule

[1] (1993) 2 SCC 620
[2] (2003) 3 SCC 272
[3] (2003) 10 SCC 691
[4] (2004) 12 SCC 253
[5] (2016) 1 SCC 607

4 sub-rule (3) CPC read with Article 120 of the Limitation Act, the right enures in favour of the 6th, 7th and 8th respondents. It is further contended that if an application for setting aside the abatement is not filed within 60 days, i.e. on or before 19th June 2015, no application for abatement was maintainable, as prescribed under Article 121 of the Limitation Act. Mr. Thapa would further submit that mere filing of caveat by two sons on 20th August 2015, on expiry of 90+60 days does not amount to participation or acquiescence, the 8 th respondent did not file any caveat and subsequent participation with the sole purpose to protect their interest does not alter the legal bar. It is emphatically urged by Mr. Thapa that no further order or action is necessary after expiry of 90 days, as the suit stands abated vis-à-vis late proforma 6th defendant on expiry of 90 days, i.e. on 20th April 2015. Thereafter, the only remedy available to the petitioner/ plaintiff was to file an application within 60 days from the date of expiry of 90 days for setting aside the abatement, which was not done.

10. In the case on hand, no application was filed within limitation time. The application filed subsequently on 03rd September 2015 did not disclose any sufficient ground, as required, for setting aside the abatement, after condonation of delay, if permissible in the facts of the case. Thus, the revision petition deserves to be dismissed.

11. To bolster his submission, Mr. Thapa referred and relied on **Sadassiva Rauji Gaitonde and others v. Jose Joaquim Fonseca [6] , Shyam Ray v. Haramani Dei (deceased by LR) and others[7] , Salil Dutta v. T.M. and M.C. Private Ltd.[8]** and **Balwant Singh (Dead) v. Jagdish Singh and others[9]** .

12. Mr. N. Rai, learned Senior Counsel and Mr. Bhola N. Sharma, learned counsel appearing for other respondents have not advanced any arguments except that if the application for substitution seeks impleadment of only one of legal heirs, as the case is herein, the application deserves to be rejected at the threshold.

13. On careful examination of the submissions put forth by the learned counsel appearing for the parties, perusal of the pleadings and documents appended thereto, it is manifest that the factual events are not disputed by either party.

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[6] AIR 1976 Goa, Daman & Diu 11
[7] AIR 1984 67
[8] (1993) 2 SCC 185
[9] (2010) 8 SCC 685

14. Indisputably, the application to bring the legal heirs of the deceased proforma defendant 6 could be filed only on 03rd September 2015, but on the day, the two sons of the deceased proforma defendant 6 appeared through caveats, however, the wife was not represented. It is pertinent to state here that two legal heirs, as aforestated, of the deceased proforma defendant filed caveats on 20th August 2015, which were taken along with the application for substitution on 03rd September 2015. It is again not disputable that the death of the deceased proforma defendant 6 took place on 20th January 2015, which was informed to the court on 17th March 2015. However, on 17th March 2015, it is noticed from the proceedings of the court that the advocate appearing for the plaintiff retired from the suit on personal grounds. It is stated by the petitioner herein that the advocate appearing for the plaintiff withdrew from the suit without giving any information and consent. As such, the information of the death of the proforma defendant 6 was not communicated to the plaintiff. The personal manager appearing on the date was not aware of the legal complications and did not inform the plaintiff.

15. In the facts of the case, when it is alleged that the advocates of the Sikkim were not willing to appear for the plaintiff and an advocate was engaged from Siliguri, who had sought certain adjournments on few dates, it cannot be held that the reasons for not filing the application were not sufficient. It is relevant to mention here that the application under Order XXII Rule 4 CPC did not mention the difficulty faced by the plaintiff in engaging a local counsel, except that the counsel appearing for the plaintiff withdrew from the suit for personal reasons but it is pleaded strongly herein. The plaintiff in its application, after stating the fact that the deceased proforma defendant 6 was survived by two sons and his wife, had chosen to implead only one son, Mr. Alok Raj Pradhan, as legal heir. On this, the application cannot be rejected as rightly held by the Supreme Court in Gema Coutinho Rodrigues (Smt.)1 . The Supreme Court in the case held that in the event, an application is made to bring one of the heirs on record, the trial Court ought to direct the plaintiff to bring other legal heirs of the deceased on record without rejecting the application, as under: -

> "5. It appears that the gift deeds were made by deceased brother's brother-in-law in pursuance of power of attorney in his favour. So long as one of the heirs has been brought on record who substantially represented estate of deceased plaintiff, the application could not be dismissed on the ground that the suit has abated or it could not proceed. Trial court should have directed the

> appellant to implead other heirs if any, of the deceased mother who was also a party to the suit by way of defendants. But the application for being brought on record by the appellant could not have been rejected. We, accordingly, set aside the order of the trial court dated March 19, 1979 as well as the order of the High Court dated January 11, 1983 and direct the trial court to bring the appellant on record as legal heir of the deceased plaintiffs and permit the appellant to implead any other heirs as co-defendants."

16. Now coming to the question, as to whether the learned trial court was right in granting liberty to file a fresh suit on the same cause of action, which has been agitated by the petitioner herein. The petitioner in its application under Order XXIII Rule 1 (3) CPC seeking withdrawal of the suit has specifically mentioned to file fresh suit on the same cause of action and the learned trial Judge acceded to the request of the petitioner and granted the same. Needless to state that if a new cause of action arises that could not have been permitted by the learned trial Judge, as no liberty is necessary for assailing the new cause of action, if any. The petitioner has not sought permission to withdraw the suit on the same subject matter.

17. In **Vallabh Das v. Dr. Madan Lal and others**[10], referred by the learned counsel appearing for the petitioner, the Supreme Court has examined the difference between the cause of action and subject matter. In the case therein, the plaintiff sought withdrawal of the suit with liberty to file a fresh in respect of the subject matter of the suit. In the case on hand, the withdrawal of the suit was sought on the same cause of action. It is for the petitioner to take a decision on fresh cause of action. The learned trial Judge has rightly confined the liberty to the same cause of action as pleaded by the petitioner/ plaintiff. The Supreme Court in **Vallabh Das**[10] , held as under: -

> "5. Rule 1, Order XXIII, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the

[10] (1970) 1 SCC 761

same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subjectmatter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression "subject-matter" in Order XXIII, Rule 1, Code of Civil Procedure means the series of acts

> or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entile the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."

18. The third condition which is challenged herein is that the removal/dismantle of the temporary structure that has been recently constructed on the suit property. Before going into the power of the court to put conditions likewise, it is apt to state that both the parties have agreeably submitted that the said temporary structure stand removed and as such it is not necessary to go into the exercise of judicial discretion/power of the trial court at this stage.

19. The issue as to whether the suit stood abated vis-à-vis deceased proforma defendant 6, in the facts of the case, requires consideration. As aforestated, the application was filed on 03rd September 2015 to bring legal heirs of the deceased defendant 6 on record, wherein the petitioner sought for impleadment of one of the legal heirs of the deceased defendant. It is well settled principles of law that under Order XXII Rule 4 CPC read with Article 120 of the Limitation Act, the suit stand abated without there being any order on completion of 90 days. Further, the application may be made for setting aside the abatement within 60 days from the expiry of 90th day, in the case in hand the date expired on 19th June 2015 and the 60th day came to an end on 20th August 2015. However, there is no quarrel on the issue that the court is competent to condone the delay in the event, sufficient reasons are shows for not making the application within the limitation period of 60 days for setting aside the abatement. The reasons shown by the plaintiff in the application does not appear to be sufficient in strict sense, however, in the factum of the case when the two legal heirs have filed caveat, as being were aware of the proceedings pending against the deceased defendant and also keeping in view the statement of the plaintiff that the plaintiff faced difficulty in engaging counsel as no local counsel was willing to accept the case on behalf of the plaintiff, this court is of the considered view that in the interest of justice, it is necessary to consider all the facts while condoning delay in filing the application to bring legal heirs of the deceased defendant on record.

20. On invocation of doctrine of abatement, the most effective party is the plaintiff and plaintiff's family and estate. The principle of abatement is involved to ensure administration of justice as expeditiously and cheaply as possible. The abatement merely pause the proceedings until the problem is remedied in the pending dispute. The Supreme Court in **Rangubai Kom Shankar Jagtap v. Suderabai Bhratar Sakharam Jedhe & others**[11] , referring to the observation made by the Judicial Committee in **Brij Indar Singh v. Kanshi Ram**[12], held that it is the well-settled position that if the legal representatives of a deceased plaintiff or defendant are brought on record in an appeal or revision from an order made in the suit, that would enure for all subsequent stages of the suit.

21. Mr. T.B. Thapa, learned Senior Counsel appearing for the 6th, 7th and 8th respondents, has referred two passages of the decision rendered by the Additional Judicial Commissioner in **Sadassiva Rauji Gaitonde**[6] , wherein it is held that under Order XXII, Rule 4, CPC, the suit as against the deceased defendant abates automatically whether or not an objection is taken by any party. The legal effects of such abatement will follow and a court of law will have to import them without waiting for formal objection by any party. The procedure is binding on all and it cannot be waived expressly or by implication by any of the parties to the suit. After the abatement of the suit, the only course open for the opposite party is to apply under Order XXII, Rule 9 (2), CPC for setting aside the abatement by pleading facts to show that the party was prevented from sufficient cause from continuing the suit.

22. A reference was made by him to an observation of the learned Single Judge of the Orissa High Court in **Shyam Ray**[7] , wherein the learned Judge held as under: -

> "11. By reason of abatement, certain rights and benefits accrue to the surviving defendant and also to the legal representative of the deceased defendant depending on the suit and the reliefs claimed. I can see no reason either in law or equity to deprive the defendant and the legal representative of the rights and advantages so gained by the failure of the plaintiff to substitute by permitting withdrawal of the suit with liberty to file a fresh suit on the same cause of action."

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[11] AIR 1965 SC 1974
[12] (1917) LR 44 IA 218, 228

23. The Supreme Court examining the facets of Order XXII CPC on abatement in **Sital Prasad Saxena (Dead) by LRS. V. Union of India and others**[13], held that "…… what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted as not to make them penal statutes for punishing erring parties". In view of the nature of litigation wherein the legal representatives of the deceased, the plaintiff is sought to be impleaded belatedly.

24. Referring to a decision rendered in **Salil Dutta**[8] , Mr. Thapa contends that a party cannot disown its advocate at any time and seek relief when the advocate is present in the Court when information about the death of 6th respondent was given. The petitioner/plaintiff cannot disown and submit that the petitioner was not aware of the death of the 6th respondent.

25. Mr. Dewashis Baruah, learned counsel appearing for the petitioner, referring a decision in **Mithailal Dalsangar Singh**[3] , while considering the principles of abatement, as contemplated under Order XXII, Rule 3, CPC, the Supreme Court held as under: -

> "8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or

[13] (1985)1 SCC 163

any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

26. Again in **Sardar Amarjit Singh Kalra (Dead) by LRS.**[2] , a Constitution Bench of the Supreme Court, examining the ambit of Order XXII, Rules 2 and 3, CPC, held as under: -

"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not to retard the further progress of the proceedings

and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in the jamabandi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even dehors the cause for the delay in filing the applications keeping in view the serious manner in which it would otherwise jeopardize an effective adjudication on merits, the rights of the other remaining appellants for no fault of theirs. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttled the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of the Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not interdependent upon one or the other of the appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit of those others, who are not before the Court also and not stultify the proceedings as a whole and non-suit the others as well."

27. In **K. Rudrappa**[4] , the Supreme Court commented on the hypertechnical view, while considering application for setting aside the abatement, observed as under: -

> "10. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. The case of the appellant before the District Court was that he was not aware of the pendency of the appeal filed by his father against the order passed by the Tahsildar. The father of the appellant died in June 1994 and the appellant came to know of the pendency of appeal somewhere in September 1994 when he received a communication from the advocate engaged by his father. Immediately, therefore, he contacted the said advocate, informed him regarding the death of his father and made an application. In such circumstances, in our opinion, the learned counsel for the appellant is right in submitting that a hypertechnical view ought not to have been taken by the District Court in rejecting the application inter alia observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. In any case, when separate applications were made, they ought to have been allowed. In our opinion, such technical objections should not come in doing full and complete justice between the parties. In our considered opinion, the High Court ought to have set aside the order passed by the District Court and it ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the appeal on its own merits. By not doing so, even the High Court has also not acted according to law."

28. Yet, again in **Bhag Mal alias Ram Bux and others v. Munshi (Dead) by LRS. And others** [14] , the Supreme Court reiterated the well-settled principles on consideration of application for setting aside the abatement, as under: -

> 26. We need to read the liberal trend on setting aside the abatement and the issue of finality of decision on abatement

[14] (2007) 11 SCC 285

> together. It is to be noted that considerable leeway has been accorded to proceedings to set aside abatement. Thus it follows that only because abatement leads to serious consequences, the emphasis on ample opportunity to set aside abatement has been laid down.

29. Mr. Thapa, referring to the ratio laid down by the Supreme Court in **Balwant Singh (Dead) vs. Jagdish Singh and others**[9] , submits that no liberal approach be adopted while condoning the delay, particularly when an application for setting aside the abatement is made much beyond the limitation period. The Supreme Court, in the facts of the case, observed as under:-

> "32. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.
>
> 33. Furthermore, it is also a well-settled canon of interpretative jurisprudence that the Court should not give such an interpretation to the provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the learned counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law."

Observation of the Supreme Court was made without referring to a decision of the Supreme Court in the Constitution Bench, however, the observation was

made in the facts of the case, which is distinguishable in the facts of the instant case.

30. In Banwari Lal (Dead)[5] , the Supreme Court examined several decisions referred and rendered by the Supreme Court earlier, held as under: -

> "9. Provisions of Order 22 CPC are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. ....."

31. On critical examination of the judicial pronouncements made by the Supreme Court in various cases, it is luculent that the main consideration is advancement of justice that takes the precedence over rule of the procedure. The Supreme Court in Balwant Singh (Dead)9 has laid emphasis on following the procedural aspect strictly in the facts of that case.

32. In the case on hand, wherein the application was filed belatedly and the two legal heirs have also filed caveats in the pending suit, there is no reason to reject the application on the ground that the limitation period was not followed strictly. The liberal trend be read and considerable leeway be accorded to theproceeding to set aside the abatement and as such strict compliance of the rule of procedure may not be required in the facts of the case to advance justice.

33. As a sequel, the order to the extent of dismissing the application to bring legal heirs of the deceased proforma defendant 6 is quashed and abatement vis-à-vis deceased proforma defendant 6 is set aside. The other conditions are upheld.

34. The petition is allowed accordingly. No order as to costs.

SLR (2017) SIKKIM 477

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

Crl. A. 33 of 2016

Robin Gurung ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant : Mrs. Gita Bista, Advocate (Legal Aid Counsel) and Ms. Monika Rai, Advocate.

For Respondent : Mrs. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 22nd September 2017

A. Indian Penal Code, 1860 – S. 375 clause sixth – Assuming on the basis of the evidence of P.W.1 and P.W.7, that P.W.1 was in an affair with the appellant and assuming that the sexual act was consensual, her consent cannot absolve the adult appellant of the criminal nature of his act, since the consent of a minor is not a valid consent.

(Para 16)

B. Protection of Children from Sexual Offences Act, 2012 – S. 5(l) – Statement of the prosecutrix that the accused forcibly took off her clothes and had intercourse with her, despite her refusal cannot be overlooked. P.W.10 may not have detected injuries on her body, but it is now settled by a catena of judicial pronouncements that every victim of rape is not expected to have injuries on her body, as evidence of the offence perpetrated on her. (Para 19)

C. Protection of Children from Sexual Offences Act, 2012 – S. 34(2) – Determination of age – The date of birth of the victim therein is recorded as "05-10-2002", while the date of registration of the birth, as per the

document, evidently took place only on 19-05-2011. The Birth Certificate, Exhibit 3, was issued on 02-06-2011. Firstly, no irregularity can be culled out on this count, as the victim and her family belong to a rural area, hence, ignorance of immediate registration of birth would be a mitigating factor. Besides, the incident took place in the months of August and September 2015, whereas Exhibit 3, the Certificate, was issued in the year 2011 – Thus, the document having been prepared *ante litem motam*, it cannot be said that it was manufactured for the purposes of the instant case.

(Para 21)

D. Code of Criminal Procedure, 1973 – S. 154 – Delay in lodging of the F.I.R – The F.I.R, Exhibit 5 has been lodged on 30-09-2015, alleging therein that, the victim had been raped by the appellant on 29-08-2015. As per P.W.12, the I.O., his investigation revealed that the minor victim had been raped on two occasions at Lambutar jungle, but it was only on 28-09-2015 that she revealed the matter to her guardians. The evidence of P.W.12 must necessarily be read with the evidence of P.W.3, the witness who lodged Exhibit 5. He has, in close conformity with the evidence of P.W.12, stated that he came to learn of the incident on 30-09-2015. Along with his evidence, it would also be apposite to look into the evidence of P.W.1, the victim, who has stated that the first incident occurred on 29-08-2015 following which a threat held out by the appellant of dire consequences, she did not divulge the incident to any person. The second incident occurred in the month of September 2015. Evidently, the victim look ill in School on 28-09-2015, as already discussed. The evidence of P.W.10 indicates that the victim was examined by her on 01-10-2015 having been brought with allegedly history of sexual intercourse on "29-08-2015 and 28-09-2015". If P.W.9 had not been sensitive to the condition of P.W.1 and acted with promptness the incident would evidently have gone unreported. Pursuant thereto, P.W.1 informed P.W.5, who for her part, narrated the incident to P.W.3. Admittedly, P.W.3 on learning about the incident, called the appellant, presumably to make an effort at settlement and on the appellant's failure to present himself before them, lodged Exhibit 5 on 30-09-2015. Considering the gamut of the facts and circumstances the offence involved and the background of the victim and her relatives, who are villagers, we are of the considered opinion that the delay has been sufficiently explained.

(Para 22)

E. Protection of Children from Sexual Offences Act, 2012 – S. 30 – Presumption of culpable mental state – It is now well-settled law that corroboration of the victim in such matters is not required if the evidence of the victim is consistent and inspires confidence – The evidence of the victim being consistent and cogent about the occurrence of the incident of rape on two occasions inspires confidence and requires no corroboration. (Paras 24 and 26)

F. Code of Criminal Procedure, 1973 – S. 31 – For the offence under S. 376(2)(i) and (n) of the I.P.C, a single charge has been framed, whereas it is evident that the said offences are individual offences, inasmuch as S. 376(2)(i) is for commission of rape on a woman when she is under 16 years of age, while the offence under S. 376(2)(n) is commission of rape repeatedly on the same woman – Further, the penalty for the offence under S. 376(2)(i) and S. 376(2)(n) of the I.P.C ought to have been separately awarded, but no attention has been bestowed on this detail. Considering that the Learned Trial Court has granted a composite sentence under S. 376(2)(i) and (n) of the I.P.C, conclusion thereof would be that the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done.

(Para 29)

G. Protection of Children from Sexual Offences Act, 2012 – S. 33 (7) – Identity of the child – POCSO Act, 2012 is a special Act for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest of well being of the children – It is only appropriate and expected that the said Special Court would be aware of the provisions and the purpose of enacting the POCSO Act before proceeding to divulge the name and address of the victim and her kith and kin – Has to be circumspect and knowledgeable about the required provision of law to prevent any *faux pas* and apply the Law stringently giving paramount importance to the safety and privacy of the victim. (Paras 30, 31 and 33)

Appeal dismissed.

Chronological list of cases cited:

1. State of Himachal Pradesh v. Prem Singh, (2009) 1 SCC 420.
2. Satish Kumar Jayanti Lal Dabgar v. State of Gujarat, (2015) 7 SCC 359.
3. Krishan v. State of Haryana, (2014) 13 SCC 574.
4. State of Rajasthan v. N. K. the Accused, (2000) 5 SCC 30.
5. Murugan alias Settu v. State of Tamil Nadu, (2011) 6 SCC 111.
6. Deepak v. State of Haryana, (2015) 4 SCC 762.
7. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.
8. State of Himachal Pradesh v. Suresh Kumar *alias* DC, (2009) 16 SCC 697.
9. Dinesh *alias* Buddha v. State of Rajasthan, (2006) 3 SCC 771.
10. Murlidhar Dalmia v. State, AIR 1953 All 245.
11. Budha Singh Tamang v. State of Sikkim, Crl.A. No.26 of 2015 dated 19-04-2016.
12. Premiya *alias* Prem Prakash v. State of Rajasthan, (2008) 10 SCC 81.
13. Deo Kumar Rai v. State of Sikkim, Crl. Appeal No. 13 of 2016 dated 13-09-2017.

JUDGMENT

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

1. Aggrieved by the Judgment and Order on Sentence, dated 30-09-2016, of the Learned Special Judge (POCSO Act, 2012), South Sikkim, at Namchi, in Sessions Trial (POCSO) Case No.21 of 2015, State of Sikkim vs. Robin Gurung, the instant Appeal has been preferred.

2. Vide the impugned Judgment, the Appellant was convicted of the offences charged with and sentenced as follows;

(i) for the offence under Sections 5(l)/6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000/- (Rupees fifty thousand), only.

(ii) for the offence under Section 376(2)(i) and (n) of the IPC, to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000/- (Rupees fifty thousand), only.

(iii) for the offence dated 29-08-2015, under Section 354B of the IPC,, to undergo simple imprisonment for a period of 4 years and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand), only.

(iv) for the offence dated 01-09-2015, under Section 354B of the IPC, to undergo simple imprisonment for a period of 4 years and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand), only.

All the sentences of fine bore a default stipulation, while the sentences of imprisonment were ordered to run concurrently, duly setting off the period of imprisonment already undergone.

3. The Prosecution case, before the Learned Trial Court was that, P.W.3, uncle of the victim, lodged Exhibit 5, a First Information Report (FIR), before the Jorethang Police Station, South Sikkim, on 30-09-2015, at 2200 hours, informing therein that the victim, P.W.1, had been sexually assaulted by one Robin Gurung, resident of Chisopani, South Sikkim, on 29-08-2015 and the incident was brought to his notice on 30-09-2015, giving rise to Exhibit 5.

4. The FIR was registered as JPS Case FIR No.54/2015, under Section 4 of the POCSO Act, against the said accused and investigation taken up, during the course of which, the victim was medically examined at the Jorethang Public Health Clinic with the consent of her guardian and later her statement recorded under Section 164 of the Code of Criminal Procedure, 1908 (for short "Cr.P.C."). The accused was arrested on 30-09-2015.

5. It transpired that the accused/Appellant (hereinafter "Appellant") aged about 20 years and the victim, a minor aged about 13 years, a student of 5 th standard in a School, in West Sikkim, were in a relationship, for the past nine months. On 28-09- 2015, the victim fell ill in her School complaining of nausea. The School Authorities suspected foul play, but as no revelation was forthcoming from the victim about any untoward incident, she was handed over to her legal guardian for further enquiry, upon which she revealed to P.W.5, that she had been sexually assaulted by the Appellant, in the jungle of Lambutar, Jorethang, on 29-08-2015 and 01-09-2015. Efforts were made by P.W.3 to settle the matter with the Appellant, in vain, which led to the delay in lodging the FIR. Accordingly, on completion of investigation, Charge-sheet was submitted against the Appellant under Section 4 of the POCSO Act.

6. The Learned Trial Court framed Charge against the Appellant under Section 5(l), punishable under Section 6 of the POCSO Act, Section 376(2)(i) and (n) of the IPC and Section 354B of the IPC on two counts, i.e., for the offence on 29-08-2017 and on 01-09-2017.

7. On a plea of "not guilty" by the Appellant, the trial commenced, which concluded with the conviction of the Appellant and the sentence, as detailed hereinabove.

8. Before this Court, it was argued by Learned Counsel for the Appellant that, the investigation and evidence has clearly revealed that both the Appellant and the victim were in a relationship and, therefore, the Appellant cannot be held at ransom for a consensual act. Drawing strength from evidence of P.W.10, the Doctor, who examined the victim, it was urged that the medical examination which was conducted on 01-10-2015, indicated no injuries on the person of the victim or her private parts, besides an old hymeneal tear, which under cross-examination of the witness, was found to be more than a month old. The Doctor had clarified that any hymeneal tear would take about three to four weeks to heal and had deposed that P.W.1 gave a history of sexual assault on 29-08-2015 and 28-09-2015. As the medical examination was conducted on 01-10-2015, a few days after the second assault, any injury ought to be fresh. The Appellant thus could not be held responsible for the injury which was evidently an old one.

9. It was next contended that the Learned Trial Court convicted the Appellant without considering the relevant materials in his favour, inasmuch as the age of the victim is doubtful, as the entries pertaining to P.W.1 in the concerned School Admission Register show that, her Birth Certificate had not been produced during

her admission to School. Besides, the delay in lodging of theFIR, after about a month of the alleged incident remains unexplained. It was also urged that the sole uncorroborated evidence of the victim does not suffice to convict the Appellant, thus, the Prosecution having failed to prove the case beyond a reasonable doubt, the impugned Order of conviction and sentence deserve to be set aside.

10. The contra argument raised by the Prosecution was that the delay in lodging of the FIR has been explained by P.W.3, as he has clearly stated in cross-examination that, he first came to learn about the incident on 30-09-2015, following which, they called the Appellant, presumably to settle the matter. On the Appellants failure to appear before them, the FIR was lodged. Moreover, it is evident that P.W.3 could lodge Exhibit 5 only after he was informed of it by P.W.5. The victim, P.W.1, herself has admitted that subsequent to the sexual assault on her, by the Appellant on 29-08- 2015, she did not disclose the incident to anyone apprehending dire consequences from the Appellant. Later, in the month of September 2015, when he repeated the sexual assault and she became unwell in School, she told the Principal about the matter, which was reported to the Police. That, the evidence of the victim and P.W.3, therefore, suffices to explain the delay in the lodging of the FIR. On this count, reliance was placed on **State of Himachal Pradesh vs. Prem Singh**[1] wherein the Honble Supreme Court has laid down that, the delay in lodging of the FIR in a case of sexual assault, cannot be equated with the case involving other offences, as several factors weigh in the mind of the prosecutrix and her family members before coming to the Police Station to lodge a Complaint. That, in a tradition-bound society prevalent in India, especially in rural areas, it would be quite unsafe to throw out the Prosecution case merely on the ground that there is some delay in lodging the FIR.

11. Countering the argument pertaining to the age of the victim, it was canvassed that no cross-examination was conducted before the Learned Trial Court on this count and cannot be raised now before the Appellate Forum. The fact of sexual assault is established by the evidence of the victim herself, which being consistent, requires no corroboration. That, in view of the aforesaid circumstances, the impugned Judgment and Sentence requires no interference.

12. We have heard in extenso the rival contentions advanced by Learned Counsel for the parties, carefully perused the evidence and documents on record and the impugned Judgment and Order on Sentence.

[1] (2009) 1 SCC 420

13. The question that falls for consideration before this Court is, whether the Appellant had indeed committed the offences as charged or was he erroneously convicted by the Learned Trial Court.

14. It would but be appropriate to first consider the evidence on record. Thus, addressing the first argument of Learned Counsel for the Appellant that no physical injuries persisted on the person of the victim, nor was the allegation of sexual assault borne out by medical evidence, we may carefully analyse the evidence of the victim, P.W.1, a minor, to whom the Learned Trial Court put some questions to gauge her ability to depose before the Court. On being so satisfied, her evidence was recorded. Admitting to a love affair with the Appellant, she went on to state that on 29-08-2015, during the day, he called her over the phone requiring her to meet him in a jungle at Lambutar, where he forcibly took off her clothes and sexually assaulted her by inserting his genital into hers. Thereafter, in the month of September 2015, he repeated the act with her once again at the same place. On the first occasion, she kept the incident under wraps, having been threatened with dire consequences by the Appellant if she spoke of it, while on the second occasion, he threatened to reveal the first incident to everyone, if she failed to meet him at the place of his choice. On her becoming unwell in School, the entire incident unravelled, leading to the lodging of Exhibit 5 and the medical examination. The occurrence of the two incidents of sexual assault remained uncontroverted, despite the grueling cross-examination that the victim was subjected to. The evidence of the victim that she felt nauseous in School, is supported by the evidence of P.W.9, the Principal of the School, where P.W.1 was studying. Following the illness of the victim she was handed over to P.W.5, her grandmother, after the Panchayat, P.W.4 was informed of the illhealth of P.W.1 and who reached the School. This is duly corroborated by P.W.4 himself. P.W.5 in her evidence hassupported the evidence of P.W.9 to the effect that, the victim fell ill on the relevant day in September 2015, and she, i.e., P.W.5, was summoned to the School on this account. The evidence of the aforesaid witnesses establishes the fact that the victim had fallen ill and on enquiry revealed the incidents of sexual assault to P.W.5.

15. At this juncture, we may turn to the evidence of P.W.10, the Doctor, who examined the victim on 01-10-2015, who had been forwarded to her with a history of having been sexually assaulted on 29-08-2015 and 28-09-2015. P.W.10 found no injuries on the person of P.W.1, but found a hymeneal tear probably more than a month old. According to her, any hymeneal tear would take about three to four weeks to heal. It was, on this aspect, that Learned Counsel for the Appellant sought to explain away the involvement of the Appellant as, according to the doctor, the last incident, as per history furnished to her, occurred on 28-09-

2015. That, fresh injuries ought to have been detected on the private part of the victim in view of the date of medical examination, viz.; 01-10-2015, but only an old tear was found. While considering this argument, it is correct that no specific date of the second incident has been indicated, but the Court is in such circumstance to consider the provisions of Section 29 of the POCSO Act, which provides as follows;

> **"29. Presumption as to certain offences. –** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

Therefore, based on the evidence of P.W.1, it cannot be said that the victim was not subjected to sexual assault twice by the Appellant.

16. On perusal of the cross-examination of P.W.10 and on consideration of Exhibit 11, the Medicolegal Examination Report prepared by her, it is evident that she has stated specifically that "Clinical and pathological evidence do not suggest recent forceful or violent penetrative sexual act". Therefore, what can be ruled out if at all, is use of violence, but the fact of commission of the sexual act persists. In this context, assuming on the basis of the evidence of P.W.1 and P.W.7, that P.W.1 was in an affair with the Appellant and assuming that the sexual act was consensual, her consent cannot absolve the adult Appellant of the criminal nature of his act, since the consent of a minor is not a valid consent.

17. In **Satish Kumar Jayanti Lal Dabgar vs. State of Gujarat**[2] the facts under discussion therein was of the rape of a minor below 16 years of age, the Honble Supreme Court, in this context, held, that when the prosecutrix is less than 16 years of age, Clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse immaterial and inconsequential. We may briefly refer to the relevant clause, viz.; sixthly of Section 375 of the IPC;

> **"375. Rape.**—A man is said to commit "rape" if he—
>
> .....
>
> under circumstances falling under any of the seven following descriptions:—
>
> .....

[2] (2015) 7 SCC 359

Sixthly.— With or without her consent, when she is under sixteen years of age.

……."

18. Reverting back, therefore, to the observation of the Hon'ble Supreme Court in **Satish Kumar Jayanti Lal Dabgar**[2] , it was held that;

> **"15.** The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the socalled consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the socalled consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.
>
> **16.** Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012."

This observation is clearly applicable to the circumstances in the case at hand.

19. Besides, her statement that he forcibly took off her clothes and had intercourse with her, despite her refusal cannot be overlooked. P.W.10 may not have detected injuries on her body, but it is now settled by a catena of judicial pronouncements that every victim of rape is not expected to have injuries on her body, as evidence of the offence perpetrated on her.

20. The Honble Supreme Court in **Krishan vs. State of Haryana**[3] has ruled that it is not expected that every rape victim should have injuries on her body to prove her case. In **State of Rajasthan vs. N. K. the Accused**[4] , it held in Paragraph 18 as follows;

> **"18.** …….. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In Sk. Zakir [Sk. Zakir v. State of Bihar, (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh [Balwant Singh v. State of Punjab, (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause

[3] (2014) 13 SCC 574
[4] (2000) 5 SCC 30

> injuries to her body. In Karnel Singh [Karnel Singh v. State of M.P., (1995) 5 SCC 518 : 1995 SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a common-sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished."

The rationale in the above decisions have to be borne in mind and are undoubtedly relevant to the matter in hand.

21. While dealing with the next argument advanced by Learned Counsel for the Appellant, pertaining to the age of the victim, it would be essential to peruse Exhibit 3, the Birth Certificate, of the victim. The date of birth of the victim therein is recorded as "05-10-2002", while the date of registration of the birth, as per the document, evidently took place only on 19-05-2011. The Certificate, Exhibit 3, was issued on 02-06-2011. Firstly, no irregularity can be culled out on this count, as the victim and her family belong to a rural area, hence, ignorance of immediate registration of birth would be a mitigating factor. Besides, the incident took place in the months of August and September 2015, whereas Exhibit 3, the Certificate, was issued in the year 2011. In **Murugan alias Settu vs. State of Tamil Nadu**[5] the Honble Apex Court while discussing the veracity of the Birth Certificate issued by the Municipality, following which the Headmaster had also issued a School Certificate, opined that;

> **"26.** In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3- 1984; registration was made on 5-4-1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity

[5] (2011) 6 SCC 111

> of the said certificate. More so, the school certificate has been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW 15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable."

Thus, the document having been prepared ante litem motam, it cannot be said that it was manufactured for the purposes of the instant case. In any event, the authenticity of this document was not questioned before the Learned Trial Court during the crossexamination of either P.W.1, P.W.3, P.W.5, P.W.9, P.W.14 or for that matter P.W.12, the Investigating Officer (for short "I.O."). The bogey of a fake document cannot be raised now at this stage.

22. Coming to the question of the delay in lodging of the FIR, which according to Learned Counsel for the Appellant, remains unexplained. We may briefly consider Exhibit 5 and the Prosecution evidence led on this count. Exhibit 5 has been lodged on 30-09- 2015, alleging therein that, the victim had been raped by the Appellant on 29-08-2015. As per P.W.12, the I.O., his investigation revealed that the minor victim had been raped on two occasions at Lambutar jungle, but it was only on 28-09-2015 that she revealed the matter to her guardians. The evidence of P.W.12 must necessarily be read with the evidence of P.W.3, the witness who lodged Exhibit 5. He has, in close conformity with the evidence of P.W.12, stated that he came to learn of the incident on 30-09-2015. Along with his evidence, it would also be apposite to look into the evidence of P.W.1, the victim, who has stated that the first incident occurred on 29-08-2015 following which a threat held out by the Appellant of dire consequences, she did not divulge the incident to any person. The second incident occurred in the month of September 2015. Evidently, the victim look ill in School on 28-09- 2015, as already discussed. The evidence of P.W.10 indicates that the victim was examined by her on 01-10-2015 having been brought with allegedly history of sexual intercourse on "29-08-2015 and

28-09-2015". If P.W.9 had not been sensitive to the condition of P.W.1 and acted with promptness the incident would evidently have gone unreported. Pursuant thereto, P.W.1 informed P.W.5, who for her part, narrated the incident to P.W.3. Admittedly, P.W.3 on learning about the incident, called the Appellant, presumably to make an effort at settlement and on the Appellants failure to present himself before them, lodged Exhibit 5 on 30-09-2015. Considering the gamut of the facts and circumstances the offence involved and the background of the victim and her relatives, who are villagers, we are of the considered opinion that the delay has been sufficiently explained.

23. On this count, we may refer beneficially to the observation of the Honble Supreme Court in **Deepak vs. State of Haryana**[6] wherein it was held that;

> **"15.** The courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384)]."

Consequently, on the bedrock of this decision, it is evident that in the matter at hand, P.W.3 has weighed the advantages and dis-advantages of lodging the Complaint, coupled with the belated narration to him of the incident resulting in the delay.

24. The next argument advanced pertained to the conviction of the Appellant being based on the sole uncorroborated evidence of the victim. It is now well-settled Law that corroboration of the victim in such matters is not required if the evidence of the victim is consistent and inspires confidence. In **Mohd. Imran Khan vs. State Government (NCT of Delhi)**[7] the Honble Supreme Court opined as follows;

[6] (2015) 4 SCC 762
[7] (2011) 10 SCC 192

"22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another persons lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

25. In State of **Himachal Pradesh vs. Suresh Kumar alias DC**[8] it was observed as follows;

"20. This Court observed as follows in State of Rajasthan v. Om Prakash [(2002) 5 SCC 745] at p.753: (SCC para 13)

"13. The conviction for offence under Section 376 IPC can be based on the sole

[8] (2009) 16 SCC 697

testimony of a rape victim is a well-settled proposition. In State of Punjab v. Gurmit Singh [(1996) 2 SCC 384], referring to State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550] this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury."

21. "7. In Panchhi v. State of U.P. [(1998) 7 SCC 177], it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others." [as

observed in Mohd. Kalam v. State of Bihar, p.259, para 7]

Relying on the aforesaid decision, in Mohd. Kalam v. State of Bihar [(2008) 7 SCC 257], this Court has observed that the evidence of a child cannot be rejected outrightly and the same must be evaluated with great circumspection. The aforesaid law laid down by this Court is squarely applicable in the facts and circumstances of the present case."

26. In **Dinesh alias Buddha vs. State of Rajasthan** [9] , it was held by the Honble Supreme in Paragraph 11 as follows;

"11. In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. State of Rajasthan [AIR 1952 SC 54] were: (SCR p.386)

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the

[9] (2006) 3 SCC 771

necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge,...".

Therefore, the evidence of P.W.1 being consistent and cogent about the occurrence of the incident of rape on two occasions inspires confidence and requires no corroboration.

27. Besides, Section 30 of the POCSO Act provides that;

> **"30. Presumption of culpable mental state.—**
> (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
>
> Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

The Appellant has not availed of the provision of Section 30 of the POCSO Act, which affords him the opportunity of rebutting the presumption set out in Section 29 of the POCSO Act.

28. In the end result, after careful consideration of the evidence on record and the discussions which have ensued above, we are of the considered opinion that the finding of the Learned Trial Court brooks no interference and we consequently uphold the conviction and sentence meted out to the Appellant.

29. However, it may be remarked here that the charges have been framed rather unhappily with nary a care to detail. For the offence under Section 376(2)(i) and (n) of the IPC, a single charge has been framed, whereas it is evident that the said offences are individual offences, inasmuch as Section 376(2)(i) is for commission

of rape on a woman when she is under 16 years of age, while the offence under Section 376(2)(n) is commission of rape repeatedly on the same woman. That apart, the Learned Trial Court while clubbing the offences committed on 29-08-2017 and 01-09- 2017, stated that the sexual assault had been committed repeatedly on the said two occasions, when infact, the first incident occurred on 29-08-2015, the question of, repeatedly on that date, therefore, does not arise. Further, the penalty for the offence under Section 376(2)(i) and Section 376(2)(n) of the IPC, ought to have been separately awarded, but no attention has been bestowed on this detail. Considering that the Learned Trial Court has granted a composite sentence under Section 376(2)(i) and (n) of the IPC, conclusion thereof would be that the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done. Thus, much was held by the Honble Allahabad High Court in **Murlidhar Dalmia vs. State**[10] and is ostensibly applicable herein. It was further held therein that "We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, ...". Needless to say we garner support from this observation.

30. Before concluding, we deem it absolutely necessary to point out that in **Budha Singh Tamang vs. State of Sikkim**[11] , it was observed by one of us (Rai, J.), that, the Protection of Children from Sexual Offences Act, 2012, is a special Act for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest of well being of the children. In this background, in Chapter VIII of Section 33(7) of the POCSO Act mandates, as follows;

"33. Procedure and powers of Special Court.¯ .....

> (7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:
>
> Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.
>
> Explanation.¯For the purposes of this sub-section, the identity of the child shall include the identity of the childs family, school, relatives, neighbourhood or any other

[10] AIR 1953 All 245
[11] Crl.A. No.26 of 2015 dated 19-04-2016

information by which the identity of the child may be revealed."

It was also observed therein that despite the said provision, the Learned Special Court has not taken any protective measures, as required by Law and has disclosed the name of the victim et al without recording reasons for the necessity of such disclosure.

31. On going through the records of the Judgment impugned herein, the saving grace is that the evidence of the victim was recorded on 04-02-2016 before the pronouncement of **Budha Singh Tamang**[11] , i.e., 19-04-2016. This, however, does not absolve the Learned Trial Court from bearing in mind, the provisions of the Act. It is a Special Court constituted for the purposes of the POCSO Act and it is only appropriate and expected that the said Special Court would be aware of the provisions and the purpose of enacting the POCSO Act before proceeding to divulge the name and address of the victim and her kith and kin. In the same Judgment, this Court has also referred to the decision of **Premiya alias Prem Prakash vs. State of Rajasthan**[12] , where it was held as follows;

"3. We do not propose to mention the name of the victim.

"2. ... Section 228-A IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, the High Court or the lower court, the name of the victim should not be indicated."

[12] (2008) 10 SCC 81

> We have chosen to describe her as "the victim" in the judgment. (See State of Karnataka v. Puttaraja [(2004) 1 SCC 475], at SCC pp. 478-79, para 2 and Dinesh v. State of Rajasthan [(2006) 3 SCC 771]

32. Later in time, this Court in **Deo Kumar Rai vs. State of Sikkim**[13] again, one of us (Pradhan, J.), has observed as follows;

> **"110.** It is seen that the Investigating Officer while preparing the charge-sheet; the Learned Judicial Magistrate while recording the statement of Ms. R and Ms. S under Section 164 of Cr.P.C. and the Learned Special Judge while recoding the deposition of Ms. R and Ms. S were not conscious that the identity of the child cannot be compromised and that the identity of the child is not only the name of the child but the whole identity of the child, the identity of the childs family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. It is urged that the guidelines laid down by this Court in **Rabin Burman v. State of Sikkim** [2017 SCC OnLine Sikk 143] be followed to ensure strict compliance of the law with regard to non disclosure of the identity of the child with the sensitivity the situation commands."

33. The Learned Special Judge (POCSO Act, 2012), has to be circumspect and knowledgeable about the required provision of Law to prevent any faux pas and apply the Law stringently giving paramount importance to the safety and privacy of the victim.

34. That, having been said, the Learned Trial Court has awarded compensation of Rs.1,00,000/- (Rupees one lakh), only, to the victim, in terms of the Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013, which is found to be appropriate.

35. No order as to costs. 13 Crl. Appeal No.

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[13] of 2016 dated 13-09-2017

36. Copy of this Judgment be transmitted to all the Learned Trial Courts in Sikkim for information and compliance by the Learned Special Judges (POCSO Act, 2012).

37. Records of the Learned Trial Court be remitted forthwith.