THE
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SUBJECT INDEX

EIILM University Act, 2006 – S. 47 – S. 47 mandates identification of mismanagement, maladministration, in-discipline, failure in the accomplishment of the objects of the University and economic hardships in the management system of the University – Direction is to be issued to the University to improve the situation before taking a decision to wind up the University – It is prescribed under proviso that no such action be initiated without affording a reasonable opportunity to show cause – Notice is well-understood, it means communication to a person for the purpose of informing something. Show-cause, which is contemplated under proviso, means to show cause a person on stating reasons as to why a particular action may not be taken against him.

Malvika Foundation and Another* v. *Human Resource Department Government of Sikkim and Another ***587-A***

Government of Sikkim Notification No. 385/G dated 11.04.1928 amended by Notification No. 2947/G dated 22.11.1946 – Validation of unregistered documents by payment of penalty upto fifty times the usual registration fee – The effect of failure to register an unregistered document required to be registered may be harsh and it may be equally harsh not to permit the validation of the unregistered document if the Court comes to the conclusion that it ought in its opinion to have been registered. Registration of a document involves the parties to the document on the one hand and on the other the Registering Authority. Payment of registration fee is the revenue of the State. In such circumstances a "no objection" of one private party cannot permit another private party not to pay the required amount of money for validation which is in effect is the penalty for the failure of the said party to register the said unregistered document on payment of the requisite fees – A judicial order must reflect the mind of the Court and the mind of the Court must be drawn to the *lis* before it. The *lis* in the application dated 24.03.2017 under consideration was whether the two unregistered documents were documents which ought in its opinion required to be registered and would be covered by Notification No.385/G dated 11.04.1928 as amended by Notification No. 2947/G dated 22.11.1946 and whether the said unregistered documents ought to have been allowed to be validated and admitted in Court to prove title or other matters contained in the said unregistered documents on payment of penalty up to fifty times the usual registration fee.

Shri Bishnu Lall Sharma and Others* v. *Shri Rabi Lall Sharma and Another ***494-A***

Government of Sikkim Notification No. 385/G dated 11.04.1928 amended by Notification No. 2947/G dated 22.11.1946 – Writ Petition preferred belatedly when the trial was already complete and judgment reserved. This however, cannot be a ground to perpetuate an illegality. Petitioner filed the said two unregistered documents along with his written statement and sought to rely upon them and further the application was filed on 24.03.2017 when the Plaintiff was yet to be examined, much before the written synopsis of argument dated 20.06.2017 was filed by the Respondent No.1. Filling in the lacunae in a case cannot be equated with the fallout of an oversight committed during trial as; to err is human. *Prima facie* the said two unregistered documents seem to pertain to the dispute before the Trial Court. The purpose of trial is always to seek the truth. Probable evidence cannot be resisted on technicalities or even delay in placing the evidence before the Court – It is the cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. ‘

Shri Bishnu Lall Sharma and Others* v. *Shri Rabi Lall Sharma and Another ***494-B***

Indian Evidence Act, 1872 – Evidence of Victim – A deposition of a victim of alleged sexual crime must be given primary consideration. At the same time it is not as if to say that the prosecution does not have to prove his case beyond reasonable doubt. A solitary statement of the victim, if it inspires confidence, is sufficient to record a conviction and no further corroboration is required. A statement of a victim is akin to a statement of an injured witness and her testimony, ordinarily, should receive the same weight.

State of Sikkim* v. *Dawa Tshering Bhutia ***533-A***

Indian Evidence Act, 1872 – Evidence – In every criminal case, it is the prosecution who alleges the criminality and thus it is incumbent upon the prosecution to establish every ingredient of the offence alleged. While examining the evidence produced in the Court must necessarily seek assurance that the facts emanating from the evidence produced cogently proves the offence. Scientific precision cannot be expected of the evidence given by rustic villagers. There are bound to be minor discrepancies.

Santa Maya Rai* v. *State of Sikkim ***503-C***

Indian Evidence Act, 1872 – Evidence in examination-in-chief is not the

entire evidence. The evidence of a witness in cross-examination must also be considered with equal seriousness.
State of Sikkim* v. *Dawa Tshering Bhutia ***533-C***

Indian Evidence Act, 1872 – Presumption of Innocence of the Accused – The law, well settled, is that where two reasonable conclusions can be drawn on the evidence on record, this Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below – The golden thread, as often stated, which runs through the web of administration of justice in criminal cases, must be respected. The possible view on the evidence adduced in the case pointing to the innocence of the Respondent must be adopted – A victim of crime of outraging the modesty of a woman is in the same position as an injured witness and should receive the same weight. However, while doing so the presumption of innocence of the accused must also be borne in mind especially when the accused has been acquitted after a trial. The presumption that a victim would not ordinarily tell a lie is but a presumption and that cannot be any basis for assuming that the statement of such a witness is always correct or without embellishment or exaggeration. Minor inconsistencies in the victim's statement which does not affect the substratum or the core ingredients of the alleged offence may be ignored but major discrepancies which disturb the very foundation of the prosecution must be taken note of. Judicial examination of evidence must be focused to extract the truth thereof. Truth however, does not always come in black and white. Shades of grey sometimes shadow the truth. Sometimes the shades of grey may itself be the truth. A delicate balance needs to be maintained between the judicial perception of the anguish of the victim of such crimes and the presumption of innocence of the accused. An inequitable tilt either way may not render balanced justice – While it is true that in an adversarial system of criminal justice administration, the evidence adduced would inevitably lead to only one party's success, the solitary goal to search the ethereal truth can only give a quietus to the conflict – A victim's evidence, if it inspires confidence, can be the sole basis for convicting an accused without any corroboration. When a Court is however, confronted with the evidence of a victim strewn with exaggerations, embellishments and inconsistencies it must necessarily seek corroboration in material particulars before convicting an accused.
State of Sikkim* v. *Dawa Tshering Bhutia ***533-G***

Indian Evidence Act, 1872 – Recording Evidence of Witnesses –

Factors for Consideration – In criminal cases of this nature in which witnesses unaccustomed to judicial processes speaking in vernacular enters the witness box to depose, it must be kept in mind that these witnesses are susceptible to various attendant circumstances of anxiety, unfamiliarity, awkwardness and newness. It must also be kept in mind that since the language of the Court is English and what is stated by the witness in vernacular is recorded by the Court in English often times the witness do not get an opportunity to even realize if what she/he had stated was correctly put across in the deposition. Distance of time may often lead to minor discrepancies in the narration of facts. A Court while examining and appreciating such evidences must be alive to these factors. It is the duty of the Court to search for the truth. While doing so it is necessary to remove the grain from the chaff.

State of Sikkim* v. *Dawa Tshering Bhutia ***533-B***

Indian Penal Code, 1860 – S. 354 – In order to prove the ingredients of S. 354, IPC no evidence of bruises or marks needs be proved. Hurt is not a necessary ingredient of either assault or criminal force – Bruises or injury if found on the body of the victim immediately after the incidence may corroborate the victim's statement of assault or use of criminal force for outraging her modesty.

State of Sikkim v. Dawa Tshering Bhutia ***533-E***

Indian Penal Code, 1860 – S. 354 – Numerous Discrepancies – The victim's statement at the time of the F.I.R was cryptic. No fault can be attributed to that. An F.I.R need not necessarily be an encyclopaedic account with minute details of every fact that transpired. It is only the first information of commission of a cognizable offence – The mention of the factum of being threatened to be thrown out of her job in the F.I.R, the first contemporaneous complaint regarding the alleged incident, gathers significance. It probabilises the defence version of an altercation between the victim and the Respondent due to which their relationship had become inimical. It also cannot be ruled out that due to this *animus* exaggerated allegation about outraging the modesty of the victim may have been made – There is difference between "started kissing me" and "tried to kiss me" and a victim would surely not forget a crucial fact when she was forced upon, allegedly by the Respondent. Either of the versions may however, constitute the offence of outraging the modesty of a woman. Equally, a victim of such circumstances facing legal proceedings for the first time out of sheer nervousness could have made inconsistent and sometimes self defeating

statements in her deposition. This Court is alive to the fact that while evaluating evidence in a case of outraging the modesty of a woman, no self respecting woman would come forward just to make a humiliating statement against her honour. This Court is also alive to the fact in such cases supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the victim should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. However, the numerous discrepancies in the statements made by the victim under S. 161 and 164 Cr.P.C. and her deposition brought out by the defence in cross-examination makes it extremely difficult to separate the grain from the chaff to arrive at the ethereal truth – The narration of discrepant facts in the statements of the victim being related to the same alleged incident of outraging her modesty sieving the untruth or unacceptable portion of the evidence seems virtually impossible. The said facts are so inseparable that any attempt to separate them would definitely destroy the substratum on which the prosecution version is founded. A judgment of conviction cannot be based on presumption and probabilities.

State of Sikkim v. Dawa Tshering Bhutia ***533-F***

Indian Penal Code, 1860 – S. 489 B – Necessary ingredients – (i) Proof of the currency-note or bank-note being forged or counterfeit, and (ii) The use of the said currency-note or bank-note as genuine knowing or having reason to believe the same to be forged or counterfeit.

Santa Maya Rai* v. *State of Sikkim ***503-A***

Indian Penal Code, 1860 – S. 489 B and S. 489 C – The *modus operandi* of the appellant is absolutely clear from the deposition of the prosecution witnesses. The appellant had counterfeit currency-notes of 500/- denomination in her possession, she had knowledge that the said currency-notes were counterfeit. The appellant intended to use the said counterfeit currency-notes as genuine. The appellant used the said counterfeit currency-notes as genuine at different shops knowing that the said notes were counterfeit. The prosecution has established *mensrea*a vital ingredient of both the offences under S. 489 B and S. 489 C, IPC. All the ingredients of the said offences have been cogently established by the prosecution.

Santa Maya Rai* v. *State of Sikkim ***503-D***

Indian Penal Code, 1860 – S. 489 C – Necessary ingredients – (i) Possession of forged or counterfeit currency-note or bank-note, and (ii)

knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine.
Santa Maya Rai* v. *State of Sikkim ***503-B***

Indian Evidence Act, 1872 – Principles of Law – In an appeal against an order of acquittal, this Court possesses all the powers of an Appellate Court and nothing less than the power a High Court has while hearing an appeal against an order of conviction. This Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding which may be contrary to the findings recorded by the Trial Court if those findings are against the weight of evidence on record and perverse – Before reversing any finding of acquittal, each ground on which the order of acquittal was based must be examined and considered and it is also incumbent upon this Court to record its reasons for not accepting those grounds and subscribing to the view expressed by the Trial Court that the accused is entitled to an acquittal. It is imperative while doing so to keep in mind that the presumption of innocence is still available in favour of the accused that no longer stands as an accused in view of the acquittal which acquittal now fortifies the presumption of innocence – If two views may be possible in a given set of facts marshalled before the Court, the view in favour of an accused must be adopted. While doing all these it is necessary to remember that the Trial Court had the advantage of looking at the demeanour of the witnesses and observing their conduct in the Court especially in the witness box which this Court would not have – The accused is entitled to the benefit of doubt even at this stage. This doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.
State of Sikkim* v. *Dawa Tshering Bhutia ***533-D***

Principles of Natural Justice – Rules of natural justice are not codified cannons, which may be put in a straight jacket. While examining, it is required to be seen whether any prejudice is caused to the party concerned. The alleged prejudice is required to be pleaded specifically – The requirement of natural justice is dependent on the facts and circumstances of the case.
Malvika Foundation and Another* v. *Human Resource Department Government of Sikkim and Another ***587-B***

SLR (2018) SIKKIM 489

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

W.P. (C) No. 07 of 2018

Krishna Lal Timsina ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Ms. Dr. Doma T. Bhutia, Mr. Raghavendra Kumar, Mr. Ratan Gurung and Ms. Preeti Chettri, Advocates.

For the Respondents: Mr. Thinlay Dorjee Bhutia, Govt. Advocate and Mr. S.K. Chettri, Assistant Govt. Advocate.

Date of decision: 1st May 2018

A. Constitution of India – Article 226 – Liberty need not be granted to challenge any action of the State which is not the *lis* before the Court. Liberty is inherent in any wrongful action of the State.

(Para 6)

ORDER (ORAL)

Bhaskar Raj Pradhan, J.

1. A Writ Petition had been filed before this Court on 21.03.2018 and resubmitted on 02.04.2018 after curing the defects pointed out with the following prayers:

> **"***1. Issue Writ, Order or direction in the nature of Mandamus, Certiorari or any other writ, order or direction to the State Respondents No. 2, 3 and 4 to take appropriate decision within a reasonable*

time frame and pass a reasoned order on the Representations of Petitioner i.e. Annexures P-2, P-3 & P-4 respectively and to intimate to the Petitioner about the same.

*2. Any other directions or orders as this Hon'ble Court deem fit and proper may also be kindly issued.***"**

2. On hearing the Learned Counsel for the Petitioner on 04.04.2018 this Court issued notice upon the Respondents. Liberty was also granted to the State-Respondents to take a decision on the representations made by the Petitioner.

3. The Respondents No. 1 and 2 have filed an application seeking to place on record two communications addressed to the Petitioner. Amongst the two communications the letter No. 305/HC,HS&FW dated 23.04.2018 issued to the Petitioner states:-

"HEALTH CARE, HUMAN SERVICES AND FAMILY WELFARE DEPARTMENT GOVERNMENT OF SIKKIM, GANGTOK, SIKKIM.

No:305/HC,HS&FW/ Dated 23.04.2018

To,

Mr. K.L. Timsina,
R/o Yangyang Bazar,
P.S. Ravangla, South Sikkim.

Sir,

The government has considered your representations dated 8/12/2017 w.r.t. Mr. Chandra Jit Adhikari and Mr. Rup Narayan Sangal, regular MPHWs (Male) and Dr. Kanu Priya Rai, Medical Officer In-charge of Yangyang PHC, South Sikkim who is employed on contract under NHM. On

examination of your representation and the nature of allegation made therein and on consideration of the entire facts, the government has found your representations/requests untenable. Accordingly, the government has decided not to grant sanction under section 197 Cr.PC.

Thanking You,

Yours faithfully,

Sd/-
Additional Secretary
HC, HS&FW Department

Copy for information to:-

1. *Shri Santosh Kr. Chettri, Asstt. Advocate-cum-APP, O/o the Advocate General, High Court of Sikkim.***"**

4. The Respondent No.1 and 2 have also sought to place on record another communication addressed to the Petitioner bearing No.330/ HC,HS&FW/2018 dated 26.04.2018 which states as follows:

"HEALTH CARE, HUMAN SERVICES AND FAMILY WELFARE DEPARTMENT GOVERNMENT OF SIKKIM, GANGTOK, SIKKIM.

No.330/HC,HS&FW/2018 *Dated:26.04.2018*

To,

Shri K.L. Timsina,
R/o Yangyang Bazar,

P.S. Ravangla, South Sikkim.

Sub: Seeking permission for sanction under section 197 Cr.P.C.

Sir,

In addition to our earlier letter no.305 dated 23.4.2018 and with reference to your representations dated 8.12.2017 on the afore mentioned subject, I am to convey the following: That with regard to the matter at hand, there is no reasonable material whether you had filed any written complaint, as no such written complaint or FIR is enclosed with the application. Further, there is also no clear indication as to whether you intend to file the complaint/FIR before the concerned Thana or concerned Superintendent of Police or before the concerned Judicial Magistrate as required under the relevant provision of law.

Therefore, mere allegation made in the complaint is not sufficient for grant of sanction under section 197 Cr.PC. In view of above and on examination of your representation and the nature of allegation made therein and on consideration of the entire facts, the govt. has found your request untenable.

Accordingly, the govt. is of the considered view that sanction under section 197 Cr.PC in r/o Dr. Kanu Priya Rai, MO/IC, Yangang PHC, Mr. Chandra Jit Adhikari and Mr. Rup Narayan Sangal, MPHWs (Male) shall not be granted.

Yours faithfully,

Sd/-
Additional Secretary

Copy to:-

1. Shri Santosh Kr. Chettri, Asstt. Advocate-cum-APP,

O/o the Advocate General, High Court of Sikkim."

5. The said application being allowed the afore-quoted two communications are taken on record. On examination of the said communications it is evident that the solitary relief sought for by the Petitioner for a direction to the State-Respondents to take appropriate decision within a reasonable time frame and pass a reasoned order on the representations of the Petitioner and further to intimate the Petitioner about the same has been achieved and the decision by the State-Respondent has been taken and communicated. Nothing further remains in the present Writ Petition. The present Writ Petition is thus disposed off as being infructuous.

6. Ms. (Dr.) Doma Bhutia, Learned Counsel for the Petitioner submits that the statements and allegations made in the two communications of the Respondent No. 1 and 2 quoted above are refuted. Ms. (Dr.) Doma Bhutia, Learned Counsel seeks liberty of this Court to challenge the aforesaid two communications if so, required. Liberty need not be granted to challenge any action of the State which is not the *lis* before the Court in the present action if it is illegal. Liberty is inherent in any wrongful action of the State.

7. No order as to costs.

SLR (2018) SIKKIM 494

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

W.P. (C) No. 32 of 2017

Shri Bishnu Lall Sharma and Others ….. PETITIONERS

Versus

Shri Rabi Lall Sharma and Another ….. RESPONDENTS

For the Petitioners: Mr. Sudesh Joshi and Mr. Sajan Sunwar, Advocates.

For Respondent No.1: Mr. J.K.P. Jaiswal, Legal Aid Counsel and Miss Rajani Rizal, Advocate.

For Respondent No.2: Mr. Karma Thinlay, Senior Government Advocate with Ms. Pollin Rai, Assistant Government Advocate.

Date of decision: 2nd May 2018

A. Government of Sikkim Notification No. 385/G dated 11.04.1928 amended by Notification No. 2947/G dated 22.11.1946 – Validation of unregistered documents by payment of penalty upto fifty times the usual registration fee – The effect of failure to register an unregistered document required to be registered may be harsh and it may be equally harsh not to permit the validation of the unregistered document if the Court comes to the conclusion that it ought in its opinion to have been registered. Registration of a document involves the parties to the document on the one hand and on the other the Registering Authority. Payment of registration fee is the revenue of the State. In such circumstances a "no objection" of one private party cannot permit another private party not to pay the required amount of money for validation which is in effect is the penalty for the failure of the said party to register the said unregistered document on payment of the requisite fees – A judicial order must

reflect the mind of the Court and the mind of the Court must be drawn to the *lis* before it. The *lis* in the application dated 24.03.2017 under consideration was whether the two unregistered documents were documents which ought in its opinion required to be registered and would be covered by Notification No.385/G dated 11.04.1928 as amended by Notification No. 2947/G dated 22.11.1946 and whether the said unregistered documents ought to have been allowed to be validated and admitted in Court to prove title or other matters contained in the said unregistered documents on payment of penalty up to fifty times the usual registration fee.

(Para 15)

B. Government of Sikkim Notification No. 385/G dated 11.04.1928 amended by Notification No. 2947/G dated 22.11.1946 – Writ Petition preferred belatedly when the trial was already complete and judgment reserved. This however, cannot be a ground to perpetuate an illegality. Petitioner filed the said two unregistered documents along with his written statement and sought to rely upon them and further the application was filed on 24.03.2017 when the Plaintiff was yet to be examined, much before the written synopsis of argument dated 20.06.2017 was filed by the Respondent No.1. Filling in the lacunae in a case cannot be equated with the fallout of an oversight committed during trial as; to err is human. *Prima facie* the said two unregistered documents seem to pertain to the dispute before the Trial Court. The purpose of trial is always to seek the truth. Probable evidence cannot be resisted on technicalities or even delay in placing the evidence before the Court – It is the cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue.

(Para 16)

Petition allowed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. Heard Mr. Sudesh Joshi, Learned Counsel for the Petitioners and Mr. J.K.P.Jaiswal, Learned Counsel for the Respondent No.1. The Learned Counsel appearing for the State (Respondent No.2) made no submission.

2. On 29.12.2012 Respondent No. 1 filed a Civil Suit i.e. Title Suit No. 22 of 2014 for declaration, partition, injunction and other reliefs against the Petitioners and the Respondent No. 2 herein. The dispute is between siblings, all sons of Late Pashupati Sharma, arrayed herein as the three Petitioners and the Respondent No.1.

3. The Petitioner No.1 filed his written statement and along with it a list of documents to be relied upon. Amongst the twelve documents sought to be relied upon were two unregistered *"Bandabast Kagaz"* or settlement deeds dated 24.03.1992 and 01.03.2010 (unregistered documents). The originals of the said two unregistered documents were filed on 28.02.2017.

4. Mr. Sudesh Joshi would contend that an application dated 24.03.2017 under the provision of Notification No. 385/G dated 11.04.1928 of the Government of Sikkim praying for permission of the Court to validate the afore-stated two unregistered documents on payment of fifty times (i.e. ₹ 5000/- for each document) was filed. The said application was disposed off by the Learned Civil Judge, East Sikkim at Gangtok (Learned Trial Judge) vide Order dated 05.04.2017.

5. The Learned Trial Judge, disposed off the said application for validation dated 24.03.2017 giving the following reason:

> *"However, since the petition filed by the defendant no.1 only seeks permission to rely and exhibit two documents, and since Ld. Counsel for the plaintiff raises no objection only for exhibition of the same, the application is dismissed."*

6. The Petitioners are aggrieved by the impugned Order dated 05.04.2017 dismissing the application dated 24.03.2017 on the afore-stated ground. Mr. Sudesh Joshi would contend that when Notification No. 385/G dated 11.04.1928 as amended vide Notification No. 2947/G dated 22.11.1946 provided that an unregistered document which ought in the opinion of the Court to have been registered may however be validated and admitted in Court to prove title or other matters contained in the document on payment of a penalty up to fifty times the usual registration fee it must be done in that way only. He would also rely upon and invoke the settled principle that when a law requires you to do a certain thing in a certain way it must be done in that way and in no other.

7. The relevant notifications sought to be relied upon by the Petitioners are reproduced herein below:

"SIKKIM STATE
GENERAL DEPARTMENT
Notification No. 385/G

All Kazis, Thikadars and Managers of Estates.

"*In continuation of the previous rules on the subject, His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under:-*
"any document such as mortgage and sale deeds, and other important documents and deeds, etc. will not be considered valid unless they are duly registered.

The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.

Exception:- Handnotes duly stamped shall be exempt from registration penalty".

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Sd/-
Gangtok *Gyaltsen Kazi*
The 11th April, 1928 *General Secretary to*
H.H. the Maharaja of Sikkim."

"SIKKIM STATE
GENERAL DEPARTMENT
Notification No. 2947/G

Amendment of para 2 of Notification No: 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty upto fifty times the usual registration fee.

Issued by order of H.H. the Maharaja of Sikkim.

Sd/-
T. Tsering
General Secretary to
H.H. The Maharaja of Sikkim.

Gangtok (Offs)
The 22nd Nov.,46

Copy of memo No. 2553/C & F dated the 18th Sept., 1949, from the Dewan, Sikkim State to the Tahasildar, East Sikkim.

A copy of Rule regarding registration of document (1930) is sent herewith.

*The seals of registration fees is one rupee fee every Rs.100/- or fraction thereof on the value of property or properties.***"**

8. The above two notifications are what, along with many others, is commonly referred to in Sikkim as the "old laws" covered by Article 371F (k) of the Constitution of India.

9. Mr. Sudesh Joshi would contend that unless the payment of fifty time the applicable registration fees is paid the two unregistered documents

cannot become admissible evidence and the "no objection" of the Learned Counsel for the Respondent No.1 would be of no consequence in view of the aforesaid notifications.

10. Mr. J.K.P. Jaiswal would however, vehemently submit that the Writ Petition was filed belated and after the Respondent No.1 had filed his written synopsis of argument dated 20.06.2017 at the final hearing of the said Title Suit to fill in the *lacunae* and on this ground alone the present Writ Petition is liable to be dismissed. He would further submit that the two unregistered documents in any case do not fall within the purview of the said two notifications.

11. The facts reveal that the two unregistered documents had been filed and sought to be relied upon along with the written statement filed by the Petitioners in the Title Suit. The original copies of the said two unregistered documents were also filed by the Petitioner No.1 on 24.03.2017. The application dated 24.03.2017 seeking validation of the said two unregistered documents on payment of fifty times the registration fee under the provisions of Notification No. 385/G dated 11.04.1928 was filed. The impugned Order dated 05.04.2017 reflects that when the said application dated 24.03.2017 seeking validation of the said two unregistered documents was filed, the Plaintiff, the Respondent No.1 herein, had as yet not been examined. It also reflects that on the said date i.e. 07.04.2017 the Learned Trial Judge examined the Plaintiff and posted the matter to 07.04.2017 for examination of the Plaintiff's witness. It is not in dispute that on 24.06.2017 when the present Writ Petition was filed the trial of the Title Suit was already complete and the matter was posted for judgment on 30.06.2017. The interim order passed by this Court on 29.06.2017 on the application filed by the Petitioner has deferred the pronouncement of the judgment. In the back drop of the aforesaid facts this Court has been called upon to determine firstly whether the application dated 24.03.2017 seeking validation of the two unregistered documents filed by the Petitioner No.1 could have been dismissed barely on the ground that the Respondent No. 1 had "no objection" only for exhibition of the said two unregistered documents and secondly; whether the delay in approaching this Court by the Petitioners against the impugned Order dated 05.04.2017 after the trial was complete and the matter was posted for final judgment would prejudice the Respondent No.1?

12. A perusal of the unregistered *"Bandabast Kagaz"* i.e. settlement document dated 21.03.1992 *prima-facie* reflects that it is a document purportedly apportioning the landed property of one Pashupati Sharma between his elder son Rabi Lall Sharma and Bishnu Lall Sharma. Both of them apparently are parties to the dispute before the Trial Court. The certified copy of the said unregistered document *prima-facie* reflects that it has also been exhibited. Similarly, a perusal of the unregistered *"Bandabast Kagaz"* i.e. settlement deed dated 01.03.2010 *prima-facie* reflects that it is a settlement arrived at on 01.03.2010 between apparently the same Rabi Lall Sharma, Divya Rupa Sharma and the same Bishu Lall Sharma. A perusal of this unregistered *"Bandabast Kagaz"* or settlement deed further *prima-facie* reveals that it has been agreed that the sons of Late Pashupati Sharma had willingly partitioned the landed properties of Late Pashupati Sharma on 21.03.1992 but had not been able to mutate the same in their respective names. The said document also *prima-facie* reflects that as per the decision of their mother Rabi Lall Sharma, her elder son, in addition to his share was given a further share from the share of Bishnu Lall Sharma. The evidentiary value of the aforesaid two unregistered *"Bandabast Kagaz"* or settlement deeds and the effect of the same on the dispute in the Title Suit are to be necessarily decided by the Learned Trial Judge.

13. The application filed by the Petitioner No.1 dated 24.03.2017 clearly invokes the provision of Notification No. 385/G dated 11.04.1928 and states that the Petitioner No.1 would like to rely and exhibit the said documents in the instant case and for the said purpose is willing to pay fifty times the stamp duty and the registration duty as required under the notification. There is no anomaly on the intent and purport of the said application dated 24.03.2017 as sought to be argued by Mr. J.K.P. Jaiswal.

14. The Trial Court has however, dismissed the application dated 24.03.2017 on the "no objection" from the Respondent No. 1 for exhibiting the same without examining the merits of the application or applying its mind to the effect of Notification No. 385/G dated 11.04.1928 as amended vide Notification No.2947/G dated 22.11.1946 to the said application dated 24.03.2017. Therefore, what in effect the impugned Order dated 05.04.2017 has done is the dismissal of the application dated 24.03.2017 seeking to pay the penalty for the Petitioners failure to register the unregistered documents and validate them on the "no objection" of the Respondent No.1 without a word on the status of the two unregistered

documents and further without a finding on the effect of the Notification No.385/G dated 11.04.1928 as amended by Notification No.2947/G dated 22.11.1946 on the two unregistered documents.

15. The effect of failure to register an unregistered document required to be registered may be harsh and it may be equally harsh not to permit the validation of the unregistered document if the Court comes to the conclusion that it ought in its opinion to have been registered. Registration of a document involves the parties to the document on the one hand and on the other the Registering Authority. Payment of registration fee is the revenue of the State. In such circumstances a "no objection" of one private party cannot permit another private party not to pay the required amount of money for validation which is in effect is the penalty for the failure of the said party to register the said unregistered document on payment of the requisite fees. The same party i.e. the Respondent No.1 vehemently contests the present Writ Petition before this Court in spite of the "no objection" given before the Trial Court which has been clearly recorded in the impugned Order dated 05.04.2017. The Learned Trial Judge has scribed no other reason for dismissal of the application dated 23.04.2017. A judicial order must reflect the mind of the Court and the mind of the Court must be drawn to the *lis* before it. The *lis* in the application dated 24.03.2017 under consideration was whether the two unregistered documents were documents which ought in its opinion required to be registered and would be covered by Notification No.385/G dated 11.04.1928 as amended by Notification No. 2947/G dated 22.11.1946 and whether the said unregistered documents ought to have been allowed to be validated and admitted in Court to prove title or other matters contained in the said unregistered documents on payment of penalty up to fifty times the usual registration fee.

16. In view of the aforesaid this Court is of the view that the application dated 24.03.2017 must necessarily be reconsidered by the Learned Trial Judge. Mr. J.K.P. Jaiswal, for the Respondent No.1 may be right that the Writ Petition has been preferred belatedly when the trial was already complete and judgment reserved. This however, cannot be a ground to perpetuate an illegality. However, his argument that the present Writ Petition has been filed only to fill in the *lacunae* in the Title Suit may not be correct in view of the fact that the Petitioner had filed the said two unregistered documents along with his written statement and sought to rely upon them and further the application was filed on 24.03.2017 when the Plaintiff was

yet to be examined much before the written synopsis of argument dated 20.06.2017 was filed by the Respondent No.1. Filling in the *lacunae* in a case cannot be equated with the fallout of an oversight committed during trial as; to err is human. *Prima facie* the said two unregistered documents seem to pertain to the dispute before the Trial Court. The purpose of trial is always to seek the truth. Probable evidence cannot be resisted on technicalities or even delay in placing the evidence before the Court. It must be remembered that it is the cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. In the present case the Trial Court is yet to render its judgment. The Respondent No. 1 may not be adversely effected if the application dated 24.03.2017 is reconsidered before delivering the judgment. Although the Learned Counsel appearing for the respective parties have made extensive arguments on the two unregistered documents and whether the said two unregistered documents would fall within the purview of Notification No.385/G dated 11.04.1928 as amended by Notification No. 2947/G dated 22.11.1946 this Court would desist from rendering its view on the arguments made and leave it open to the parties to raise all such arguments before the Trial Court to assist it effectively to enable the Learned Trial Judge to come to a correct conclusion.

17. In view of the aforesaid the impugned Order dated 05.04.2017 to the extent it dismisses the application dated 24.03.2017 filed by the Petitioner on the "no objection" from the Respondent No.1 is set aside and the Trial Court is directed to rehear the said application dated 24.03.2017 before pronouncing its judgment in the Title Suit. The Learned Trial Judge is free to decide the further course as per law after considering the application dated 24.03.2017 and deciding the *lis* thereof. It is also made clear that the observations made in this judgment on the aforesaid two unregistered documents have been made solely for the purpose of examining the *lis* before this Court and the Learned Trial Judge shall not be bound by the observations so made herein while examining the merits thereof.

18. The Writ Petition is allowed on the above terms. No order as to costs.

SLR (2018) SIKKIM 503

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

Crl. A. No. 25 of 2016

Santa Maya Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Gita Bista, Legal Aid Counsel.

For the Respondent: Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor.

Date of decision: 10th May 2018

A. Indian Penal Code, 1860 – S. 489 B – Necessary ingredients – (i) Proof of the currency-note or bank-note being forged or counterfeit, and (ii) The use of the said currency-note or bank-note as genuine knowing or having reason to believe the same to be forged or counterfeit.

(Para 19)

B. Indian Penal Code, 1860 – S. 489 C – Necessary ingredients – (i) Possession of forged or counterfeit currency-note or bank-note, and (ii) knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine.

(Para 21)

C. Indian Evidence Act, 1872 – Evidence – In every criminal case, it is the prosecution who alleges the criminality and thus it is incumbent upon the prosecution to establish every ingredient of the offence alleged. While examining the evidence produced in the Court must necessarily seek assurance that the facts emanating from the evidence produced cogently proves the offence. Scientific precision

cannot be expected of the evidence given by rustic villagers. There are bound to be minor discrepancies.

(Para 40)

D. Indian Penal Code, 1860 – S. 489 B and S. 489 C – The *modus operandi* of the appellant is absolutely clear from the deposition of the prosecution witnesses. The appellant had counterfeit currency-notes of ₹ 500/- denomination in her possession, she had knowledge that the said currency-notes were counterfeit. The appellant intended to use the said counterfeit currency-notes as genuine. The appellant used the said counterfeit currency-notes as genuine at different shops knowing that the said notes were counterfeit. The prosecution has established *mens rea* a vital ingredient of both the offences under S. 489 B and S. 489 C, IPC. All the ingredients of the said offences have been cogently established by the prosecution.

(Para 43)

Chronological list of cases cited:

1. Mohd. Farooque Yusuf Chaiwala v. State of Maharashtra, 2011 SCC OnLine Bom. 521.
2. Pannal Lal Gupta v. State of Sikkim, 2009 SCC OnLine Sikk 19.
3. Umashanker v. State of Chhattisgarh, (2001) 9 SCC 642.
4. Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.
5. Kailash Kumar Sanwatia v. State of Bihar and Another, (2003) 7 SCC 399.
6. Devender Kumar Singla v. Baldev Krishan Singla, (2005) 9 SCC 15.
7. Sooguru Subrahmanyam v. State of A.P., (2013) 4 SCC 244.

JUDGMENT

Bhaskar Raj Pradhan, J

1. In the quest for truth there is a delicate balance which is required to be maintained by the Court to examine the criminality of the offender. A criminal mind is a mind of its own. What compels a criminal to commit the

crime is a question for which one still searches for answers. How a criminal commits a criminal act is a matter of investigation that is required to be cogently proved. Direct evidence may not always be available and sometimes the Courts have to examine circumstantial evidences. When a criminal commits a crime against unsuspecting rustic villagers the evidence produced may not be as perfect as we desire it to be. The task of the Court in such circumstances becomes heavier. As the Language of the Court is English and most of the rustic villagers would communicate in vernacular sometimes the correct statement may get lost in translation. The Court is then required to sift minutely through the evidence in search of the truth. Truth alone can render justice.

2. This is an appeal preferred by the Appellant, Santa Maya Rai, wife of Bir Kumar Rai, under Section 374 (2) Code of Criminal Procedure, 1973 (Cr.P.C.) against the judgment of conviction dated 05.08.2016 and order of sentence dated 09.08.2016 passed by the Learned Sessions Judge, East Sikkim at Gangtok (Learned Sessions Judge) in Sessions Trial Case No. 26 of 2014. The Learned Sessions Judge has acquitted Bir Kumar Rai who was Accused No.1 but found cogent evidence against the wife, the Appellant herein, for commission of offence under Section 489B and 489C of the Indian Penal Code, 1860 (IPC).

3. The Prosecution case is that on 23.04.2014 the Appellant along with her husband travelled from Gangtok towards Dikchu in a vehicle bearing registration No. SK-01T/1171. On the way, they stopped at various places and used the counterfeit currency-notes of ₹ 500/- denomination to purchase small items and receive substantial change of genuine currency notes in return. It was alleged that the *modus operandi* of the Appellant and her husband was to make purchases and tender counterfeit currency-notes of ₹ 500/- denomination to the unsuspecting shopkeepers, who in turn returned genuine currency notes as change besides partying with property.

4. Criminal investigation would be initiated on the lodging of the First Information Report (FIR) (Exhibit-1) on 23.05.2014 on the basis of a written complaint from Narad Nepal (P.W.1) stating that a vehicle bearing No. SK 01T-1171 with two persons, the Appellant and B. K. Rai, were trying to cheat the local shopkeepers by giving counterfeit currency-note of ₹ 500/- denomination, buying small items, receiving original currency-notes

as change and trying to flee away. It was also stated in the FIR that Narad Nepal (P.W.1) along with local Panchayat, P. P. Adhikari (P.W.7), followed them to lower Samdong at about 3 p.m., apprehended them and thereafter informed the local Makha police outpost pursuant to which the police nabbed them.

5. On the completion of the investigation two charges would be framed on 05.05.2015 which read as under:

> ***"Firstly*** *- That you on 23.05.2014, between 12.30 to 3.00 pm hrs. at Singtam, East Sikkim, under the jurisdiction of Singtam Police Station, East Sikkim, in common object with co-accused Bir Kumar Rai used counterfeit Indian Currency Notes as genuine, of the denomination of ₹ 500/-, knowing them to be counterfeit and you have thereby committed an offence under Section 489 'B' read with Section 34 of the Indian Penal Code, 1860 and within the cognizance of this Court.*
>
> ***Secondly*** *- That you on the same date, place and time herein above mentioned, in common object with the Co-accused Bir Kumar Rai, was found in possession of the 42 numbers of Counterfeit Indian Currency Notes of the denomination of ₹ 500/- knowing them to be counterfeit notes and intending the same to be used as genuine and you have thereby committed an offence punishable under Section 489 'C' of the Indian Penal Code, 1860 read with Section 34 of the Indian Penal Code, 1860 and within the cognizance of this Court."*

6. Sixteen witnesses would be examined by the prosecution during trial. The defence would not examine any witness. On examination of the Appellant and her husband under Section 313 Cr.P.C the Learned Session Judge would hear the case finally and pronounce the impugned judgement on 05.08.2016 and order on sentence on 09.08.2016 convicting the Appellant and acquitting her husband.

7. The judgment sought to be assailed convicted the Appellant under Section 489B and 489C IPC and sentenced her to undergo rigorous imprisonment for a period of two years and to further pay a fine of ₹ 5000/- each for each of the said offences and in default of payment of the said fine to undergo imprisonment for a further period of six months. The sentences were to run concurrently and the period of imprisonment already undergone by the Appellant during investigation and trial was required to be set off against the sentences. The fine if recovered was directed to be made over to seven prosecution witnesses @ ₹ 1000/- each for their loss and harassment and the remaining amount of the fine was required to be deposited in the State exchequer.

8. The Learned Sessions Judge after a thorough examination of the evidence produced by the prosecution and after a detailed hearing held:

> ***"30****. There is therefore, no reason to doubt that ₹ 500 currency notes (marked M.O.-IA and M.O.-IB) found in the possession of accused No.2 were counterfeit currency notes. The fact that accused persons stopped at numerous shops between Singtam and Samdong, and tendered counterfeit ₹ 500/- currency notes to collect the genuine currency notes from the unsuspecting shopkeepers goes to show the mens rea which she had. It is certain that accused No.2 had the required knowledge and reason to believe that ₹ 500/- currency notes used by her are counterfeit notes."*

9. Heard Ms. Gita Bista, Learned Counsel for the Appellant and Mr. Thinlay Dorjee, Learned Counsel for the State-Respondent. While Ms. Gita Bista would contend that the prosecution has failed to establish the required *mens rea* for the alleged offences, Mr. Thinlay Dorjee would contend that the *modus operandi* of the Appellant in using the currency-notes of ₹ 500/- denomination at every shop and buying articles of small value and getting substantial genuine currency-notes from the shopkeepers as change would itself establish the *mens rea* of the Appellant for the commission of the offences.

10. Ms. Gita Bista would further submit that the prosecution has failed to prove the seizure of the currency-notes of ₹ 500/- denomination and establish that the said currency-notes were used by the Appellant. Ms. Gita Bista would submit that although the prosecution witnesses deposes about purchase of various items by the Appellant using the counterfeit currency-notes of ₹ 500/- denomination the said items allegedly purchased by the Appellant have not been seized and produced before the Trial Court and as such the benefit of doubt must be given to the Appellant. Ms. Gita Bista would further submit that the prosecution has failed to establish how the Appellant came in possession of the counterfeit currency-notes even if it is assumed, without admitting so, that the Appellant was in possession. It is submitted that since no charge was framed under section 489A IPC against the Appellant it is quite evident that there is no evidence on record as to how the said counterfeit currency-notes came into possession of the Appellant.

11. Mr. Thinlay Dorjee Bhutia, on the other hand would submit that the seizures of the 42 numbers of counterfeit currency-notes have been cogently proved by the prosecution. The seizure memo (exhibit-3) vide which 42 number of counterfeit currency-notes of ₹ 500/- denomination each has been proved by seizure witnesses-Narad Nepal (P.W.1) and Manoj Pradhan (P.W.8) and Dhruva Chettri (P.W.14) the Analyst-cum-Assistant Chemical Examiner to the Government of Sikkim at the Regional Forensic Science Laboratory (RFSL), Saramsa, Ranipool, East Sikkim who examined the 51 Indian currency-notes of ₹ 500/- denomination has clearly proved that the said currency-notes which were seized were counterfeit. Mr. Thinlay Dorjee Bhutia would thus submit that the ingredients of Section 489C of IPC for possession of forged or counterfeit currency-notes or bank notes have been proved by the prosecution. Mr. Thinlay Dorjee Bhutia would further submit, in so far as Section 489B IPC is concerned, the evidence produced by the prosecution has unquestionably proved that the Appellant had used the forged or counterfeit currency-notes as genuine knowing or having reason to believe the same to be forged or counterfeit and thus liable for punishment prescribed. He would submit that the evidence of Sachita Nanda Darjee (P.W.10), Ran Maya Rai (P.W.12) and Kailash Chettri (P.W.13) clearly establishes that the Appellant had used the counterfeit currency-notes of ₹ 500/- denomination at different shops at Ralap, purchased small items and duped the shop owners to accept the counterfeit currency-notes of ₹ 500/- denomination and get change of genuine currency-notes in return. Similarly,

he would submit that the evidence of Anu Rana (P.W.3) and Phul Maya Neopaney (P.W.6) would establish and prove a repetition of the same criminal act at Singbel as done at Ralap. Mr. Thinlay Dorjee Bhutia would rely upon the evidence of Tek Nath Sharma (P.W.11) and the evidence of Sujata Pradhan (P.W.4) and Chandrakala Adhikari (P.W.5) to prove similar *modus operandi* at Kokoley and Tumin respectively. He would submit that the evidence of Narad Nepal (P.W.1) and Manoj Pradhan (P.W.8) would establish the seizure of 9 counterfeit currency-notes of ₹ 500/- denomination used as genuine by the Appellant at the aforesaid adjacent villages of Ralap, Singbel, Kokolay and Tumin. Mr. Thinlay Dorjee Bhutia would further submit that the blunt denial of the Appellant to various questions put by the Trial Court without furnishing any explanation to the incriminating material would entitle the Court to draw an inference, including such adverse inference against the Appellant as may be permissible in accordance with law.

12. Narad Nepal (P.W.1) resident of Tumin is the first informant. He is also the witness to the seizure of 42 currency-notes of ₹ 500/- denomination from the Appellant vide seizure memo (exhibit-3) on 23.05.2014 and the seizure of 9 currency-notes of ₹ 500/- denomination at the Singtam police station from Kailash Chettri (P.W.13) on the same date. Narad Nepal (P.W.1) identified the Appellant as the person who had been apprehended from Samdong on 23.05.2014 and from whom 42 counterfeit currency-notes of ₹ 500/- denomination had been seized at the Singtam police station in his presence and in the presence of Manoj Pradhan (P.W.8) the second seizure witness.

13. The deposition of Narad Nepal (P.W.1) from Tumin, Prem Prasad Adhikari (P.W.7), the Panchayat of 44 Tumin Gram Panchayat Unit and Churamani Bhattarai (P.W.2) a resident of Tumin and who works at the Tumin petrol pump corroborate each other in material particulars and proves the facts leading to the arrest of the Appellant and her husband on 23.05.2014 from Samdong the day on which the alleged criminal acts were committed by the Appellant and her husband. They identified the Appellant. The said three prosecution witnesses cogently establishes that on 23.05.2014 on being informed that the Appellant and her husband were using counterfeit currency-notes of ₹ 500/- denomination on unsuspecting shopkeepers were apprehended at Samdong and handed over to the police. They were the ones who followed the Appellant and her husband to

Samdong from where they apprehended the Appellant's husband and the Appellant was apprehended by the villagers.

14. Manoj Pradhan (P.W.8) also identified the Appellant as the person who had been apprehended by the villagers at Samdong where he had gone chasing the Appellant and her husband after Sujata Pradhan (P.W.4) his wife informed him that the Appellant had also duped her by tendering a counterfeit currency-note of ₹ 500/- denomination and purchasing 3 packets of Mimi noodles from their shop and taking away ₹ 470/- as change from her. Manoj Pradhan (P.W.8) also witnessed the Appellant and her husband being taken to the Singtam police station and the search and seizure conducted on the Appellant where the police recovered 42 counterfeit currency-notes of ₹ 500/- denomination from the Appellant for which he along with Narad Nepal (P.W.1) stood as witness. Manoj Pradhan (P.W.8) and Narad Nepal (P.W.1) were also witness to the seizure of 9 currency-notes of ₹ 500/- denomination on 23.05.2014 from Kailash Chettri (P.W.13) when the shopkeepers who had been duped by the Appellant had come to the Singtam police station and deposited the said currency-notes.

15. The seizure memos (exhibit-3 and exhibit-4) both dated 23.05.2014 recorded the serial numbers of the currency-notes which were seized. Narad Nepal (P.W.1) could identify all the 51 currency-notes of 500/- denomination seized vide seizure memo (exhibit-3 and exhibit-4) by going through its serial numbers and comparing it with the serial numbers noted in the said seizure memos.

16. Dhurba Chettri (P.W.14) the Analyst-cum-Assistant Chemical Examiner proved that he had examined all the said 51 currency-notes of ₹ 500/- denomination and found them to be counterfeit vide his opinion (exhibit-6). He has opined that poor quality of paper ink, defective watermarks, defective window security thread, absence of intaglio printing technology, defective micro printing, absence of optically variable ink, absence of scattered fluorescence fibres and absence of criss-cross markings on the said currency-notes of ₹ 500/- denomination as the reasons to come to the conclusion that the said notes were counterfeit.

17. Section 489B of the IPC provides:

> ***"489-B. Using as genuine, forged or counterfeit currency-notes or bank-notes:-*** *Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]."*

18. Section 489B IPC makes the trafficking of forged or counterfeit currency-notes or bank-notes or the use as genuine, any forged or counterfeit currency-notes or bank-notes with the required *mens rea* i.e. criminal intent *(knowing or having reason to believe the same to be forged or counterfeit)* punishable.

19. In the present case the Learned Sessions Judge has found the Appellant guilty of use of the forged or counterfeit currency-notes as genuine knowing or having reason to believe the same to be forged or counterfeit. Thus the necessary ingredients of Section 489B IPC for the use of forged or counterfeit currency-notes or bank-notes are:-

i. Proof of the currency-note or bank-note being forged or counterfeit.

ii. The use of the said currency-note or bank-note as genuine knowing or having reason to believe the same to be forged or counterfeit.

20. Section 489C of the IPC provides:

> ***"489-C. Possession of forged or counterfeit currency-notes or bank-notes****.—Whoever has in his possession any forged or counter-feit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with*

imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

21. Section 489C IPC makes possession of any forged or counterfeit currency-note or bank-note with the *mens rea* i.e. criminal intent *(knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine)* punishable. The necessary ingredients of Section 489C IPC for possession of forged or counterfeit currency-notes or bank-notes are:-

i. Possession of forged or counterfeit currency-note or bank-note.

ii. knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine.

22. Sachita Nanda Darjee (P.W.10) has identified the Appellant in Court which identification is not contested. She is a resident of Ralap, East Sikkim and runs a provision shop. As per her deposition the Appellant came to the shop and purchased ten packets of Mimi noodles and offered a currency-note of ₹ 500/- denomination. Sachita Nanda Darjee (P.W.10) deducted the price of the Mimi noodles and returned ₹ 450/- to the Appellant as change. On realising that the currency-note of ₹ 500/- denomination was counterfeit from information received from other shopkeepers she went to the Makha police outpost first and thereafter to Singtam police station where she handed over the said currency-note of ₹ 500/- denomination. She identified the same currency-note in Court which was tendered by the Appellant to her as she has signed her name on it at the time of handing over the same to the Singtam police station. The evidence of Sachita Nanda Darjee (P.W.10) clearly proves that the Appellant had used the currency-note of ₹ 500/- denomination and duped her at Ralap. The said currency-note of ₹ 500/- denomination identified by her was seized by the police and sent for forensic examination to RFSL which proved that the said currency-note was counterfeit. Dhurba Chettri (P.W.14) the Analyst-cum-Assistant Chemical Examiner has proved that the said currency-note of ₹ 500/- denomination was counterfeit. Thus the prosecution has been able to prove the possession and use of counterfeit currency-notes of ₹ 500/- denomination

by the Appellant. Possession of counterfeit currency-note is an ingredient of Section 489C IPC. Use of counterfeit currency-note is an ingredient of Section 489B IPC. However, it is yet to be seen whether the Appellant had the required *mens rea* and whether the Appellant was aware that the said currency-notes were counterfeit and intended to use them knowing that they were counterfeit. The knowledge that the said currency-notes of ₹ 500/- denomination were counterfeit and the intention to use it as genuine would satisfy the second ingredient of the alleged offences.

23. The evidence of Sachita Nanda Darjee (P.W.10) as discussed above does establish the use of currency-note of ₹ 500/- denomination identified by her as she had signed on it at the time of the seizure. Sachita Nanda Darjee's (P.W.10) deposition cogently proves the use of the said currency-notes of ₹ 500/- denomination by the Appellant which was obviously part of the counterfeit currency-notes in her possession on 23.05.2014. Although Sachita Nanda Darjee (P.W.10) did not state the date of the incident in her deposition, the seizure memo (exhibit-4) dated 23.05.2014 through which the particular currency-note of ₹ 500/- denomination which was tendered by the Appellant to Sachita Nanda Darjee (P.W.10) on the date of the incident was seized clearly establishes that the Appellant had in fact used the said currency-note of ₹ 500/- denomination on 23.05.2014 itself on the same day she was also found in possession of 42 counterfeit currency-notes.

24. In re: ***Mohd. Farooque Yusuf Chaiwala vs. State of Maharashtra***[1] the Bombay High Court would hold:

> ***"28****. Thus, to bring home the charge of offences punishable under Sections 489B and 489C of the IPC the prosecution is required to establish, inter alia, that the accused knew (or had reason to believe) the notes in question to be counterfeit or forged. The prosecution is also required to establish that the accused intended to use the same as genuine. It is true that such knowledge or existence of reason to believe, can be proved by, or can be inferred, only from circumstantial evidence. In this case, the prosecution has not been able to point out the evidence or*

[1] 2011 SCC OnLine Bom. 521

*circumstances showing that each of the Appellants had knowledge that the notes were counterfeit or that each of them wanted to use the same as genuine. If there were any such circumstances appearing in the evidence of the prosecution, such circumstances should have been put to the Appellants during their examination under Section 313 of the Code. No such circumstances were put to any of the Appellants by the trial Court, presumably because the trial Court did not consider this aspect of the matter. In fact, the trial Court also did not put the report received from the India Security Press, Nasik to any of the Appellants in their examination under Section 313 of the Code. Such circumstances, namely viz. evidence showing that the notes in question were counterfeit and the evidence and circumstances suggesting that the accused knew the same should have been put to the Appellants. The Appellants were therefore not given an opportunity to offer any explanation about these aspects, which were held as 'proved' against them, by the trial Court.***"***

25. In re: ***Pannal Lal Gupta vs. State of Sikkim***[2] a Division Bench of this Court would hold:

"21. *In view of the above circumstances, the possibility of the fake currency-notes' having been given, to him by the customers in the course of his business and he being a-layman could not suspect the said currency-notes to be fake cannot be ruled out. It is hardly necessary to observe that mere possession of, forged note is not an offence. The offence is directed against trafficking in fake notes and what is essential is that apart from possessing the fake notes the appellant must know of its, falsity and having known uses them. The appellant must have known or at least must*

[2] 2009 SCC OnLine Sikk 19

have had reason to believe that the notes were counterfeited. It is also the requirement of law that, the possession must be accompanied by intention to use that as genuine. Nothing has been brought on record by way of even collateral circumstances to show that the appellant had intention to use the fake notes as genuine. On the other hand, as already noted above, it cannot be said on the basis of the materials; on record that the appellant knew or had rea,-son to believe that the currency-notes he was dealing with Were" counterfeited and issued such notes as genuine."

26. Ms. Geeta Bista would rely upon the pronouncement of the Supreme Court in re: ***Umashanker v. State of Chhattisgarh***[3] in which it was held:

> ***"7.*** *Sections 489-A to 489-E deal with various economic offences in respect of forged or counterfeit currency notes or banknotes. The object of the legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency notes and banknotes. The currency notes are, in spite of growing accustomedness to the credit card system, still the backbone of the commercial transactions by the multitudes in our country. But these provisions are not meant to punish unwary possessors or users.*
>
> ***8.*** *A perusal of the provisions, extracted above, shows that mens rea of offences under Sections 489-B and 489-C is "knowing or having reason to believe the currency notes or banknotes are forged or counterfeit". Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or banknotes, is not enough to constitute offence under Section 489-*

[3] (2001) 9 SCC 642

*B IPC. So also possessing or even intending to use any forged or counterfeit currency notes or banknotes is not sufficient to make out a case under Section 489-C in the absence of the mens rea, noted above. No material is brought on record by the prosecution to show that the appellant had the requisite mens rea. The High Court, however, completely missed this aspect. The learned trial Judge on the basis of the evidence of PW 2, PW 4 and PW 7 that they were able to make out that the currency note alleged to have been given to PW 4 was fake, "presumed" such a mens rea. On the date of the incident the appellant was said to be an eighteen-year-old student. On the facts of this case the presumption drawn by the trial court is not warranted under Section 4 of the Evidence Act. Further it is also not shown that any specific question with regard to the currency notes being fake or counterfeit was put to the appellant in his examination under Section 313 of the Criminal Procedure Code. On these facts, we have no option but to hold that the charges framed under Sections 489-B and 489-C are not proved. We, therefore, set aside the conviction and sentence passed on the appellant under Sections 489-B and 489-C IPC and acquit him of the said charges (see: M. Mammutti v. State of Karnataka.***"***

27. ***M. Hidayatullah, J.*** in re: ***Ranjit D. Udeshi vs. State of Maharashtra***[4] while dealing with the criminal prosecution under Section 292 IPC against one of the four partners of a firm which owned a book-stall in Bombay and was accused of having been found in possession, for the purpose of sale, copies of an alleged obscene book called *'Lady Chatterley's Lover'*, would hold:

"11*. ..... In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. .....***"**

[4] AIR 1965 SC 881

28. In re: ***Kailash Kumar Sanwatia vs. State of Bihar and Anr.***[5] the Supreme Court would hold:

> ***"9****.....As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime. ....."*

29. In re: ***Devender Kumar Singla vs. Baldev Krishan Singla***[6] the Supreme Court while examining a case of cheating and dishonestly inducing delivery of property would hold:

> ***"8.*** *As was observed by this Court in Shivanarayan Kabra v. State of Madras [AIR 1967 SC 986: 1967 Cri LJ 946] it is not necessary that a false pretence should be made in express words by the accused. It may be inferred from all the circumstances including the conduct of the accused in obtaining the property. In the true nature of things, it is not always possible to prove dishonest intention by any direct evidence. It can be proved by a number of circumstances from which a reasonable inference can be drawn."*

30. In re: ***Sooguru Subrahmanyam v. State of A.P.***[7] referred to by Mr. Thinlay Dorjee Bhutia, the Supreme Court would hold:

> ***"21.*** *Now, we may deal with the submission that the prosecution has not been able to prove any motive for the commission of the crime because the suspicion on the part of the husband has not been established. We have already recorded an affirmative finding on that score. However, we may, in this context, profitably refer to the pronouncement in Nathuni Yadav v. State of Bihar [(1998) 9 SCC 238: 1998 SCC (Cri) 992] wherein a two-Judge Bench has laid down thus: (SCC p. 244, para 17)*

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[5] (2003) 7 SCC 399
[6] (2005) 9 SCC 15
[7] (2013) 4 SCC 244

"17. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in R. v. Palmer [Shorthand Report at p. 308 CCC May 1856] thus:

> *'But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.'*

Though, it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant."

31. In the light of the various pronouncement of the Supreme Court, the Bombay High Court, this Court as well as the compelling thoughts of Lord Chief Justice Champbell in R.v. Palmer on the requirement of establishing *mens rea* before saddling the Appellant with criminal liability under Section

489B and 489C IPC and "motive" it is vital to examine if, as submitted by Mr. Thinlay Dorjee, the Appellant's repeated use of the counterfeit currency-notes itself establishes the criminal intent.

32. Ran Maya Rai (P.W.12) who runs a vegetable shop at Ralap did not identify the Appellant in Court. She does not remember the date and the month but she recollects that in the year 2014 one lady alighted from a blue coloured car driven by a male driver, purchased vegetables from her shop worth ₹ 100/-, tendered ₹ 500/- and was given ₹ 400/- as change by her. On the same day after the said lady left, some vehicles had stopped at Ralap and she heard that some persons were circulating counterfeit-currency notes at Samdong and were told to be careful. Since she had also received currency-note of ₹ 500/- denomination from the lady, she accompanied the other persons similarly duped to Singtam police station where she also deposited the same. There were 4 to 5 other persons who had reached Singtam police station who were all complaining about one lady and one male person coming to their shops in a car and tendering currency-note of ₹ 500/- denomination to purchase some articles from their shop. The deposition of Ran Maya Rai (P.W.12) that sometime in 2014 a lady tendered currency-note of ₹ 500/- denomination to her which she deposited with the Singtam police station along with other shop-keepers is relevant and corroborates the evidence of Sachita Nanda Darjee (P.W.10) about the same.

33. Kailash Chettri's (P.W.13) sister Heema Chettri runs a grocery shop at Ralap. He is the person whose name is recorded as the person from whom the 9 currency-notes of ₹ 500/- denomination were seized in the seizure memo (exhibit-4). Kailash Chettri's (P.W.13) does not recollect the exact date but sometime in May, 2014 some shopkeepers of Ralap were reported to have received forged Indian currency-notes from some lady who had come to Ralap. Heema Chettri and other shopkeepers of Ralap had told him that the said lady had purchased small items such as Mimi noodles worth ₹ 50/- from the shops including that of his sister. He was informed that the said lady had tendered forged Indian currency-notes of ₹ 500/- denomination to purchase small items from the shops. The police from Makha police outpost visited Ralap and told them to bring the forged currency-note of ₹ 500/- denomination received from the said lady to Singtam police station. Accordingly he along with other shopkeepers went to Singtam police station and handed over the said currency-notes received by

the shopkeepers to a police officer who seized the same duly preparing a seizure memo. The currency-note bearing serial number 7NV979471 was handed over by Kailash Chettri (P.W.13) to the police at the time of the seizure. The name '*Kailash Chettri'* found written on the said note was written by him in his own handwriting while handing over the said currency-note to the police on the relevant day. As he did not compare the numbers of the other currency-notes marked MO I B (collectively) he could not say whether those were the same notes that was seized at Singtam police station. However, he could definitely identify the currency-note of ₹ 500/- denomination that was submitted by him at Singtam police station since he had written his name on it. Although, Heema Chettri was not examined the deposition of Kailash Chettri (P.W.13) about what he heard about one lady using forged Indian currency-notes of ₹ 500 denomination/- from her and other shopkeepers of Ralap; the police from Makha police outpost visiting Ralap and telling them to bring the forged currency-notes of ₹ 500/- denomination received from the said lady to Singtam police station; he along with other shopkeepers going to Singtam police station and handing over the said currency-notes received by the shopkeepers to a police officer who seized the same duly preparing the seizure memo has corroborative value to the other evidence produced by the prosecution. MO I B (2) identified and marked by Kailash Chettri's (P.W.13) as the said currency-note of ₹ 500/- denomination is also part of the seizure vide seizure memo (exhibit-4) which is dated 23.05.2014. Therefore, it is certain that the date of the incident narrated by Kailash Chettri's (P.W.13) is also 23.05.2014. The said seizure memo (exhibit-4) records the serial numbers of the 9 counterfeit currency-notes of ₹ 500/- denomination seized from Kailash Chettri (P.W.13). Although there is some discrepancy as pointed out by Ms. Gita Bista on how the seizure of these 9 currency-notes was effected due to the fact that the said seizure memo (exhibit-4) records the name of Kailash Chettri (P.W.13) as the person from whom the 9 currency-notes of ₹ 500/- denomination were seized it is however clarified by Kailash Chettri (P.W.13) that the police from Makha police outpost who visited Ralap told him and other shopkeepers to bring the forged currency-notes of ₹ 500/- denomination tendered by the Appellant to Singtam police station and accordingly he along with other shopkeepers went to Singtam police station and handed over the counterfeit currency-notes received by the shopkeepers to a police officer who duly prepared a seizure memo. The fact that Kailash Chettri (P.W.13) also identified the currency-note of ₹ 500/- denomination bearing serial number 7NV979471 which had been seized by the Singtam police on

23.05.2014 at the Singtam police station in connection with the same case and which currency-note was examined by Dhurba Chettri (P.W.14) Analyst-cum-Assistant Chemical Examiner and found to be counterfeit convincingly proves that the Appellant had used counterfeit currency-notes of ₹ 500/- denomination in her possession to dupe other shopkeepers as well.

34. The deposition of Anu Rana (P.W.3) clearly establishes the identity of the Appellant as the person who came to her ration shop at Singbel on 23.05.2014 at around 12:30 p.m., tendered currency-note of ₹ 500/- denomination, purchased ten packets of Mimi noodles worth ₹ 50/- and took ₹ 450/- from her as change and drove towards Makha. However, she did not identify the said currency-note of ₹ 500/- denomination which according to her she along with other shopkeepers deposited at the Singtam police station.

35. Phul Maya Neopaney (P.W.6) is also a resident of Singbel and owns a vegetable shop. She also identified the Appellant. As per her deposition in May, 2014 at around 12.10 p.m. the Appellant had come to her shop and purchased tomatoes worth ₹ 10/- and cucumber worth ₹ 20/-. The Appellant tendered currency-notes of ₹ 500/- denomination and Phul Maya Neopaney (P.W.6) returned ₹ 470/- to the Appellant. After the Appellant left her shop Phul Maya Neopaney (P.W.6) came to know that the Appellant had used fake currency-notes in other shops as well. When she checked the currency-note of ₹ 500/- denomination tendered to her by the Appellant she found that it was counterfeit too. She also went with other villagers to Singtam police station and handed over the same to the police there and returned home. However, she also did not identify the said currency-note of ₹ 500/- denomination but was absolutely certain that she along with other shopkeepers had deposited the said currency-note at the Singtam police station.

36. Tek Nath Sharma (P.W.11) a resident of Kokolay identified the Appellant in Court. His deposition has proved that on 23.05.2014 the Appellant had come to his shop after alighting from a taxi, purchased three dozen bananas worth ₹ 30/- per dozen and other eatables worth ₹ 10/-, tendered currency-note of ₹ 500/- denomination and was given a sum of ₹ 400/- by him as change. Tek Nath Sharma (P.W.11) also deposed that he had surrendered the said currency-note of ₹ 500/- denomination at the Singtam police station. However, he also did not identify the currency-notes of ₹ 500/- denomination which he had deposited.

37. Chandra Kala Adhikari (P.W.5) is the wife of Prem Prasad Adhikari (P.W.7) the Panchayat who runs a Provision shop at Tumin busty which is also near Singbel. She identified the Appellant in Court as the person she had seen on the date of the incident. She does not remember the exact date but in May, 2014 at around 1 to 2 p.m. the Appellant alighted from the car and came to her shop asked for Mimi noodles, purchased ten packets of Mimi noodles, tendered currency-note of ₹ 500/- denomination and took away ₹ 450/- as change given by her. On being asked by Prem Prasad Adhikari (P.W.7), her husband, whether two persons had visited their shop and tendered currency-note of ₹ 500/- denomination, Chandra Kala Adhikari (P.W.5) confirmed the same after which Prem Prasad Adhikari (P.W.7) took away the said currency-note and went after the Accused persons. However, Prem Prasad Adhikari (P.W.7) did not elucidate further as to what he did with the said currency-note of ₹ 500/- denomination.

38. Sub Inspector (SI) Tshering Doma Bhutia (P.W.16) the Investigating Officer has deposed that the Appellant along with her husband were brought to Singtam police station by the local people and the police of Makha police outpost. This fact has been clearly proved by the prosecution with the evidence of the prosecution witnesses-Narad Nepal (P.W.1) Churamani Bhattarai (P.W.2) Prem Prasad Adhikari (P.W.7) and Manoj Pradhan (P.W.8). The Investigating Officer (P.W. 16) deposed that after the Appellant and her husband were brought to Singtam police station they were arrested by her and later she had seized 9 numbers of suspected fake currency-notes of ₹ 500/- denomination which the Appellant and her husband had tendered to different shopkeepers after purchasing some items from them through seizure memo (exhibit-4).

39. The rough sketch map (exhibit-8) prepared by the Investigating Officer reflects that Ralap, Singbel and Tumin are adjacent villages.

40. Anu Rana (P.W.3) of Singbel, Tek Nath Sharma (P.W.11) of Kokolay and Chandra Kala Adhikari (P.W.5) of Tumin although identified the Appellant as the person who had tendered the currency-notes of ₹ 500/- denomination at their respective shops could not identify the specific currency-notes in Court. Ms. Gita Bista would submit that this was a major discrepancy and therefore, the prosecution had failed to establish the *mens rea*. In every criminal case it is the prosecution who alleges the criminality and thus it is incumbent upon the prosecution to establish every ingredient of

the offence alleged. While examining the evidence produced in the Court must necessarily seek assurance that the facts emanating from the evidence produced cogently proves the offence. Scientific precision cannot be expected of the evidence given by rustic villagers. There are bound to be minor discrepancies. Although some of the prosecution witnesses have not identified the specific currency-notes which were tendered by the Appellant at their respective shops at Singbel, Kokolay and Tumin it is unequivocally certain that the said currency-notes were definitely amongst the 9 currency-notes of ₹ 500/- denomination seized by the Singtam police on the date of the incident i.e. 23.05.2014 after the arrest of the Appellant and her husband when the villagers who had been duped by the Appellant i.e. Sachita Nanda Darjee (P.W.10) of Ralap, Ran Maya Rai (P.W.12) of Ralap, Kailash Chettri (P.W.13) of Ralap, Anu Rana (P.W.3) of Singbel, Phul Maya Neopaney (P.W.6) of Singbel, Tek Nath Sharma (P.W.11) of Kokolay had gone and deposited the currency-notes of ₹ 500/- denomination tendered by the Appellant to the aforesaid prosecution witnesses of different adjacent villages on the same day i.e. 23.05.2014. The fact that each of the said 9 currency-notes of ₹ 500/- denomination were proved to be counterfeit is reassuring since if any one or more of the said 9 currency-notes were found genuine It may have been difficult to trace the particular currency-note to the particular shopkeeper to whom it was tendered. The names of 9 persons with the serial numbers of the currency-notes are recorded in seizure memo (exhibit-4) dated 23.05.2014. The prosecution witnesses named above are also amongst them. The evidence of the Investigating Officer (P.W.16), Kailash Chettri (P.W.13) and the said prosecution witnesses cogently assures this Court with absolute certainty that each of the said currency-notes tendered by the Appellant at various shops were amongst the said 9 currency-notes of ₹ 500/- denomination deposited by the prosecution witnesses named above at the Singtam police station on 23.05.2014. The 9 currency-notes of ₹ 500/- denomination were also sent for forensic examination and found to be counterfeit. The evidence of Dhurba Chettri (P.W.14) Analyst-cum-Assistant Chemical Examiner, along with his opinion (exhibit-6) clearly establishes that the said 9-currency notes of Rs.500/- denomination were counterfeit.

41. The deposition of Narad Nepal (P.W.1), Prem Prasad Adhikari (P.W.7) and Churamani Bhattarai (P.W.2) have proved that the Appellant and her husband were apprehended at Samdong on 23.05.2015 after they had received information that two persons were using counterfeit currency-

notes. The said prosecution witnesses also proved that after apprehending the Appellant and her husband they informed the Makha police outpost pursuant to which police personnel arrived and took them to Singtam police station where Narad Nepal (P.W.1) lodged the FIR and the investigation commenced. Thereafter, on 23.05.2014 itself at the Singtam police station the Appellant was searched and 42 currency-notes of ₹ 500/- denomination were recovered and seized from her. The police also seized 9 currency-notes of ₹ 500/- denomination from one Kailash Chettri (P.W.13). These 9 currency-notes of ₹ 500/- denomination were deposited by the shopkeepers who were duped by the Appellant on 23.05.2014. All the 51 currency-notes of ₹ 500/- denomination seized on 23.05.2014 were found to be counterfeit by Dhruba Chettri, (P.W.14) Analyst-cum-Assistant Chemical Examiner. Manoj Pradhan (P.W.8) identified the Appellant in Court as the person who was apprehended by the villagers on 23.05.2014 at around 1.00 p.m. from Samdong and taken to Singtam police station where he along with Narad Nepal (P.W.1) stood as witness to the seizure of all the 51 currency-notes of ₹ 500/- denomination. Sujata Pradhan (P.W.4) of Tumin, wife of Manoj Pradhan (P.W.8) and who was also duped by the Appellant by tendering currency-note of ₹ 500/- denomination and purchasing ten Mimi noodles and taking ₹ 450/- as change also identified the Appellant in Court. Sachita Nanda Darjee (P.W.10) has not only identified the Appellant as the one who came to her provision shop at Ralap, purchased ten packets of Mimi noodles, tendered currency-note of ₹ 500/- denomination and took back ₹ 450/- as change but also identified the same currency-note of ₹ 500/- denomination tendered by the Appellant. Anu Rana (P.W.3) from Singbel also identified the Appellant as the person who came to her ration shop on 23.05.2014, tendered currency-note of ₹ 500/- denomination purchased ten packets of Mimi noodles and took ₹ 450/- as change from her. Similarly, Phul Maya Neopaney (P.W.6) from Singbel also identified the Appellant as the person who came to her shop sometime in May, 2014, purchased vegetables worth ₹ 30/-, tendered currency-note of ₹ 500/- denomination and took back ₹ 470/- as change. Tek Nath Sharma (P.W.11) of Kokolay identified the Appellant as the person who on 23.05.2014 had come to his shop, purchased three dozen bananas worth 30/- and other eatables worth ₹ 10/-, tendered currency-note of ₹ 500/- denomination and took back ₹ 400/- as change. Chandra Kala Adhikari (P.W.5) of Tumin busty also identified the Appellant as the one who in May, 2014 had come to her shop, purchased ten packets of Mimi noodles, tendered currency-note of ₹ 500/- denomination and took back ₹ 450/- as change.

42. The seizure witnesses Narad Nepal (P.W.1) has identified the Appellant in Court as the same person from whom the police seized 42 currency-notes of ₹ 500/- denomination on 23.05.2014. Narad Nepal (P.W.1), Churamani Bhattarai (P.W.2) and Prem Prasad Adhikari (P.W.7) who followed the Appellant and her husband on 23.05.2014 on being informed about them using counterfeit currency-notes and apprehending them at Samdong have also identified the Appellant as the same person. The shop owners and villagers viz. Anu Rana (P.W.3) and Phul Maya Neopaney (P.W.6) both from Singbel, Sujata Pradhan (P.W.4), Chandra Kala Adhikari (P.W.5) both from Tumin, Sachita Nanda Darjee (P.W.10) from Ralap and Tek Nath Sharma (P.W.11) from Kokolay also identified the Appellant as the one who had duped them by tendering counterfeit currency-note of ₹ 500/- denomination on the date of the incident.

43. The *modus operandi* of the Appellant is absolutely clear from the deposition of the prosecution witnesses. The Appellant had counterfeit currency-notes of ₹ 500/- denomination in her possession, she had knowledge that the said currency-notes were counterfeit. The Appellant intended to use the said counterfeit currency-notes as genuine. The Appellant used the said counterfeit currency-notes as genuine at different shops knowing that the said notes were counterfeit. The prosecution has established *mens rea* a vital ingredient of both the offences under Section 489B and 489C IPC. All the ingredients of the said offences have been cogently established by the prosecution.

44. This Court is thus of the view that that impugned judgment dated 05.08.2016 and order of sentence dated 09.08.2016 call for no interference. The order on sentence dated 09.08.2016 passed by the Learned Sessions Judge stands confirmed. The Appeal is dismissed. The Appellant is on bail. The bail bonds are forfeited. The Appellant shall be arrested and produced before the Sessions Court, East Sikkim at Gangtok to serve out her sentence.

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

SLR (2018) SIKKIM 526
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

W.P. (PIL) No. 06 of 2018

Shri Puran Alley ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. B. Sharma, Senior Advocate with
Mr. Bholanath Sharma, Advocate.

Date of decision: 24th May 2018

A. Constitution of India – Article 226 – Public Interest Litigation – Making wide ranging allegations without any substance is itself an act which cannot be entertained and ought to be discouraged – Roving inquiry merely on the basis of unsubstantiated allegations cannot be permitted to ventilate a presumed grievance of the Petitioner who has failed to demonstrate public interest element or point out a single material to establish even *prima facie* any act of favouritism towards Respondent No. 4.

(Para 4)

B. Constitution of India – Article 226 – Public Interest Litigation – PIL remedy cannot be permitted to be used in the manner sought for – The tender is for setting up of Sikkim State Museum at Gangtok. There is not a single reason cited as to why or how setting up of a museum is not in public interest. It is a policy decision of the Respondent to set up this museum. Such policies are not open to Judicial review except when it violates constitutional or statutory provisions. The executive is tasked with the primary responsibility for formulating Governmental policies and to carry out its execution and the Writ Court cannot interfere unless the policy is opposed to constitutional and statutory provisions or suffers from manifest arbitrariness, unreasonableness or absurdity. Interference by Courts

on mere allegation smelling foul play at every level of administration is unhealthy and bound to make governance impossible – A public spirited individual must not only make such allegations that the act of the Government smacks of arbitrariness, unreasonableness or illegality but must necessarily substantiate the said allegations. Unsubstantiated allegations adversely affect the opposite party and are evidently unfair. There must be a real and genuine public interest involved in the litigation and not only an adventure of a law graduate, who in spite of a professional degree chooses not to practice law and claims to be unemployed youth instead – PIL remedy cannot be resorted to unless it is *bona fide* – The expression 'Public Interest Litigation' means a legal action in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected.

(Para 4)

Petition dismissed in *limine*.

Chronological list of case(s) cited:

1. Peoples Union for Democratic Rights and others v. Union of India and Others, (1982) 3 SCC 235.

ORDER

Order of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. Heard. Mr. Puran Allay, a law graduate but not practicing as an Advocate has preferred the present petition claiming to be an unemployed youth and engaged in doing social work for the upliftment of Sikkim. There are no details of the social works the Petitioner has been doing in the past. The Petitioner claims that after his graduation when he came back to Sikkim in the year 2013 he observed that there was no overall development in the State and the money received from the Center had not been utilized in the proper place for the upliftment of the downtrodden people of Sikkim. There is no further clarification to this broad spectrum allegation. It is his plea that whenever he would visit remote areas he would notice poor people staying in deplorable condition and thus was anxious to find out the exact reason as to why despite the Central Government providing funds the people of Sikkim have not been proportionately uplifted. Besides the allegation there

are no facts pleaded or proof submitted to substantiate the allegations. The Petitioner claims that he started doing research in the matter and came across shortcomings in the functioning of the Governmental machineries. The Petitioner claims that those shortcoming were that the funds were utilized on non productive schemes; there was no proper allocation of funds to such schemes which would directly benefit the downtrodden; the funds were provided for religious matters; funds were not provided for construction of roads, electricity, establishment of specialized hospitals, schools, research work, technical education, medical facilities etc. which are the basic requirements of the people. There is not a single document filed with the Writ Petition to substantiate the statements made about the Petitioner's perceptions of the said shortcomings.

2. It is claimed by the Petitioner that while doing research the Petitioner came across one Notice Inviting Tender (NIT) published in Sikkim Herald, Sikkim Reporter and Dainik Mirmiray. The Petitioner therefore, sought for copy of the "NIT" under the Right to Information Act, 2005 and the Petitioner was furnished with copy of the "NIT" published in Sikkim Herald on 25.05.2017 and 30.05.2017, Sikkim Reporter on 26.05.2017 and Dainik Mirmiray on 26.05.2017. On a perusal of the "NIT", the Petitioner claims he was shocked to notice that the publication of the "NIT" was done in a casual manner. The Petitioner claims that the publication of the tender has not been done in widely circulated papers or National dailies in so far as the Petitioner's knowledge goes but also states in the same breadth that the publication shows that it was published in e-tender. It is the perception of the Petitioner that only a handful of contractors are conversant with computer knowledge. Yet another grievance of the Petitioner is that the tender does not disclose the nature of work, schedule of work, compliance of Sikkim Works Manual, compliance of Sikkim Financial Rules and other related laws and other details. Mr. B. Sharma, Learned Senior Advocate for the Petitioner could not point out any such non-compliance from the records of the case. The Petitioner states that he also received one Addendum dated 02.06.2017 as well as Corrigendum dated 05.07.2017 through the process of the Right to Information Act, 2005. The Petitioner claims that on examining the Invitation for Bids dated 23.05.2017, the Addendum dated 02.06.2017 and Corrigendum dated 05.07.2017 the Petitioner came to learn how public money from the Government exchequer had been embezzled. It is the case of the Petitioner that the aforesaid three documents makes it clear that the entire exercise of the tender process was undertaken

to accommodate Respondent No.4 in order to give him "favouritism". It is alleged that the Respondent No.4 did not even participate in the pre-bid meeting and in spite of that his tender was accepted. It is the case of the Petitioner that there were as many as three participants in the tender bid. The Petitioner has sought to invoke the Public Interest Litigation remedy to ventilate his perceived grievance and sought the following prayers:-

> **"a**. *Issue a writ or direction for cancelling the entire tender process for execution of setting up of Sikkim State Museum, Gangtok, East Sikkim being contract work No.03/E Tender/B.HD/2017 holding entire process of tender are carried out dehors the existing laws of the land.*
>
> ***b)*** *A writ/order or direction for quashing of the entire tender process as the entire tender process is actuated by malafide and due favouritism meted out to respondent No.4.*
>
> ***c)*** *And after hearing the parties:*
>
> *i.* *To kindly quash/cancel the entire Tender process and fund earmarked for this Tender maybe utilised for other project to meet the basic need of the people and in alternative, kindly quash, cancel the entire Tender process, if it is found that Respondent No.4 is not competent to execute the work. And to cancel the whole process of contract if other bidders are not competent to execute the work. If Hon'ble Court find that this project is also in the Public Interest.*
>
> *ii.* *Kindly pass order/orders restraining the Respondent No.2 to issue to Work Order in favour of Respondent No.4.*

iii. Kindly pass any order or orders if found necessary."

3. Mr. B. Sharma would submit that although the Invitation for Bids dated 23.05.2017 required that the contractors who have experience in the construction of museum/artefacts and consider themselves capable to undertake execution of the project could download the details and bidding documents, Annexure-P11 dated 17.06.2016 would show that the contractor who has been given the contract i.e. Respondent No.4 did not have the requisite qualification. We have examined Annexure-P11 which is a letter addressed to the Chief Engineer dated 17.06.2017 written by M/s Adland Publicity Private Ltd. stating therein that M/s Adland Publicity Private Ltd. is an old associate agency of Shri Sonam Topden Bhutia (Class I-A Government Contractor) the Respondent No.4 herein. It is also stated in the said communication that the said M/s Adland Publicity Private Ltd. and the Respondent No.4 have been working as a joint venture since 2008. As an annexure thereto details of various dimensional creative works & designs executed by the said M/s Adland Publicity Private Ltd. were also furnished. Various certificates issued by various authorities have been attached thereto providing information regarding various works undertaken by the said M/s Adland Publicity Private Ltd. The Addendum to the NIT filed by the Petitioner reflect that preference could be given to such agencies having valid agreement with firms/persons who have done museum works at National/State Level. The Corrigendum merely reschedules the dates for bid submission and opening of bids to 28.07.2017 and 01.08.2017 respectively.

4. Mr. B. Sharma, on being asked, could not point out a single document from the records filed by the Petitioner which would reflect that joint venture was not permitted contrary to the Addendum. It is the case of the Petitioner that there were three bidders in the tender process. The two bidders whose bids were rejected are not before the Court or aggrieved. The Writ Petition does not disclose whether the documents filed with it are the entire documents before the Respondents. A perusal of the documents filed by the Petitioner does not disclose any 'favouritism' as alleged. Making wide ranging allegations without any substance is itself an act which cannot be entertained and ought to be discouraged. The Petitioner's allegation that a perusal of the Invitation for Bids, the Addendum and the Corrigendum thereto demonstrate that the Department has left no stone unturned to accommodate Respondent No.4 remains an unsubstantiated but damning

allegation made without any basis or coherence as even a searching examination of those documents it could not substantiate the said allegation. In fact, Mr. B. Sharma could also not point it out to us. There is nothing brought out in the Writ Petition with discloses that Respondent No.4 did not have the necessary prerequisites to qualify in the bid. Roving inquiry merely on the basis of unsubstantiated allegations cannot be permitted to ventilate a presumed grievance of the Petitioner who has failed to demonstrate public interest element or point out a single material to establish even prima facie any act of favouritism towards the Respondent No.4. Public Interest Litigation (PIL) remedy cannot be permitted to be used in the manner sought for. Admittedly the Invitation for bids was dated 23.05.2017 and the date of opening of Tender documents was 01.08.2017. The Writ Petition has been preferred by the Petitioner on 18.05.2018 after nearly a year. There is no indication in the petition as to the present stage of the contract. The Petitioner seeks an order to quash the present tender process and for a direction to utilise the funds earmarked for this project for other projects to meet the basic need of the people. The tender is for setting up of Sikkim State Museum at Gangtok, East Sikkim. There is not a single reason cited as to why or how setting up of a museum is not in public interest. It is a policy decision of the Respondent to set up this museum. Such policies are not open to Judicial review except when it violates constitutional or statutory provisions which grounds are not available before us in the present petition. The executive is tasked with the primary responsibility for formulating Governmental policies and to carry out its execution and the Writ Court cannot interfere unless the policy is opposed to constitutional and statutory provisions or suffers from manifest arbitrariness, unreasonableness or absurdity. Interference by Courts on mere allegation smelling foul play at every level of administration is unhealthy and bound to make governance impossible. A public spirited individual must not only make such allegations that the act of the Government smacks of arbitrariness, unreasonableness or illegality but must necessarily substantiate the said allegations. Unsubstantiated allegations adversely affect the opposite party and are evidently unfair. There must be a real and genuine public interest involved in the litigation and not only an adventure of a law graduate, who in spite of a professional degree chooses not to practice law and claims to be unemployed youth instead. Public Interest Litigation remedy cannot be resorted to unless it is *bonafide*. The Petitioner's evidently irrational perception that setting up of a museum is non-productive cannot invoke the jurisdiction of this Court to go roving into the process of the tender. The

expression 'Public Interest Litigation' means a legal action in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected. The Supreme Court in re: ***Peoples Union for Democratic Rights & others vs. Union of India & Ors.1*** defined 'Public Interest Litigation' and observed:

> ***"****Public Interest Litigation is a cooperative or collaborative effort by the Petitioner, the State or public authority and the Judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.****"***

5. We are afraid we cannot agree with the perception of the Petitioner that setting up of a State museum is not in public interest and that the funds should be diverted for other public purposes.

6. In the circumstances the Writ Petition is dismissed in *limine.*

7. No orders as to costs.

SLR (2018) SIKKIM 533

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

Crl. A. No. 18 of 2017

State of Sikkim ….. PETITIONER

Versus

Dawa Tshering Bhutia ….. RESPONDENT

For the Petitioner: Mr. Karma Thinlay, Additional Public Prosecutor with Ms. Pollin Rai, Assistant Public Prosecutor.

For the Respondent: Mr. K.T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates.

Date of decision: 24th May 2018

A. Indian Evidence Act, 1872 – Evidence of Victim – A deposition of a victim of alleged sexual crime must be given primary consideration. At the same time it is not as if to say that the prosecution does not have to prove his case beyond reasonable doubt. A solitary statement of the victim, if it inspires confidence, is sufficient to record a conviction and no further corroboration is required. A statement of a victim is akin to a statement of an injured witness and her testimony, ordinarily, should receive the same weight. (Para 27)

B. Indian Evidence Act, 1872 – Recording Evidence of Witnesses – Factors for Consideration – In criminal cases of this nature in which witnesses unaccustomed to judicial processes speaking in vernacular enters the witness box to depose, it must be kept in mind that these witnesses are susceptible to various attendant circumstances of anxiety, unfamiliarity, awkwardness and

newness. It must also be kept in mind that since the language of the Court is English and what is stated by the witness in vernacular is recorded by the Court in English often times the witness do not get an opportunity to even realize if what she/he had stated was correctly put across in the deposition. Distance of time may often lead to minor discrepancies in the narration of facts. A Court while examining and appreciating such evidences must be alive to these factors. It is the duty of the Court to search for the truth. While doing so it is necessary to remove the grain from the chaff.

(Para 28)

C. Indian Evidence Act, 1872 – Evidence in examination-in-chief is not the entire evidence. The evidence of a witness in cross-examination must also be considered with equal seriousness.

(Para 35)

D. Indian Evidence Act, 1872 – Principles of Law – In an appeal against an order of acquittal, this Court possesses all the powers of an Appellate Court and nothing less than the power a High Court has while hearing an appeal against an order of conviction. This Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding which may be contrary to the findings recorded by the Trial Court if those findings are against the weight of evidence on record and perverse – Before reversing any finding of acquittal, each ground on which the order of acquittal was based must be examined and considered and it is also incumbent upon this Court to record its reasons for not accepting those grounds and subscribing to the view expressed by the Trial Court that the accused is entitled to an acquittal. It is imperative while doing so to keep in mind that the presumption of innocence is still available in favour of the accused that no longer stands as an accused in view of the acquittal which acquittal now fortifies the presumption of innocence – If two views may be possible in a given set of facts marshalled before the Court, the view in favour of an accused must be adopted. While doing all these it is necessary to remember that the Trial Court had the advantage of looking at the demeanour of the witnesses and observing their conduct in the Court especially in the witness box which this Court would not have – The accused is entitled to the benefit of doubt even at this stage. This doubt should

be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

(Para 46)

E. Indian Penal Code, 1860 – S. 354 – In order to prove the ingredients of S. 354, IPC no evidence of bruises or marks needs be proved. Hurt is not a necessary ingredient of either assault or criminal force – Bruises or injury if found on the body of the victim immediately after the incidence may corroborate the victim's statement of assault or use of criminal force for outraging her modesty.

(Para 47)

F. Indian Penal Code, 1860 – S. 354 – Numerous Discrepancies – The victim's statement at the time of the F.I.R was cryptic. No fault can be attributed to that. An F.I.R need not necessarily be an encyclopaedic account with minute details of every fact that transpired. It is only the first information of commission of a cognizable offence – The mention of the factum of being threatened to be thrown out of her job in the F.I.R, the first contemporaneous complaint regarding the alleged incident, gathers significance. It probabilises the defence version of an altercation between the victim and the Respondent due to which their relationship had become inimical. It also cannot be ruled out that due to this *animus* exaggerated allegation about outraging the modesty of the victim may have been made – There is difference between "started kissing me" and "tried to kiss me" and a victim would surely not forget a crucial fact when she was forced upon, allegedly by the Respondent. Either of the versions may however, constitute the offence of outraging the modesty of a woman. Equally, a victim of such circumstances facing legal proceedings for the first time out of sheer nervousness could have made inconsistent and sometimes self defeating statements in her deposition. This Court is alive to the fact that while evaluating evidence in a case of outraging the modesty of a woman, no self respecting woman would come forward just to make a humiliating statement against her honour. This Court is also alive to the fact in such cases supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the victim should not, unless the

discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. However, the numerous discrepancies in the statements made by the victim under S. 161 and 164 Cr.P.C. and her deposition brought out by the defence in cross-examination makes it extremely difficult to separate the grain from the chaff to arrive at the ethereal truth – The narration of discrepant facts in the statements of the victim being related to the same alleged incident of outraging her modesty sieving the untruth or unacceptable portion of the evidence seems virtually impossible. The said facts are so inseparable that any attempt to separate them would definitely destroy the substratum on which the prosecution version is founded. A judgment of conviction cannot be based on presumption and probabilities.

(Para 59)

G. Indian Evidence Act, 1872 – Presumption of innocence of the accused – The law, well settled, is that where two reasonable conclusions can be drawn on the evidence on record, this Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below – The golden thread, as often stated, which runs through the web of administration of justice in criminal cases, must be respected. The possible view on the evidence adduced in the case pointing to the innocence of the Respondent must be adopted – A victim of crime of outraging the modesty of a woman is in the same position as an injured witness and should receive the same weight. However, while doing so the presumption of innocence of the accused must also be borne in mind especially when the accused has been acquitted after a trial. The presumption that a victim would not ordinarily tell a lie is but a presumption and that cannot be any basis for assuming that the statement of such a witness is always correct or without embellishment or exaggeration. Minor inconsistencies in the victim's statement which does not affect the substratum or the core ingredients of the alleged offence may be ignored but major discrepancies which disturb the very foundation of the prosecution must be taken note of. Judicial examination of evidence must be focused to extract the truth thereof. Truth however, does not always come in black and white. Shades of grey sometimes shadow the

truth. Sometimes the shades of grey may itself be the truth. A delicate balance needs to be maintained between the judicial perception of the anguish of the victim of such crimes and the presumption of innocence of the accused. An inequitable tilt either way may not render balanced justice – While it is true that in an adversarial system of criminal justice administration, the evidence adduced would inevitably lead to only one party's success, the solitary goal to search the ethereal truth can only give a quietus to the conflict – A victim's evidence, if it inspires confidence, can be the sole basis for convicting an accused without any corroboration. When a Court is however, confronted with the evidence of a victim strewn with exaggerations, embellishments and inconsistencies it must necessarily seek corroboration in material particulars before convicting an accused.

(Para 60)

Appeal dismissed.

Chronological list of cases cited:

1. Vidyadharan v. State of Kerala, (2004) 1 SCC 215.
2. Raju Pandurang Mahale v. State of Maharashtra, (2004) 4 SCC 371.
3. Tarkeshwar Sahu v. State of Bihar (Now Jharkhand), (2006) 8 SCC 560.
4. State of U.P. v. Santosh Kumar and Others, (2009) 9 SCC 626.
5. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
6. Ganesh Bhavan Patel v. State of Maharashtra, (1978) 4 SCC 371.
7. Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225.
8. Ajit Savant Majagvai v. State of Karnataka, (1997) 7 SCC 110.
9. Gorle S. Naidu v. State of A.P. and Others, (2003) 12 SCC 449.
10. Rai Sandeep Alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21.

JUDGMENT

Bhaskar Raj Pradhan, J

1. A daunting question emanate for consideration in the present criminal action. It relates to the deposition of an alleged victim whose modesty had been allegedly outraged by the Respondent. A victim' statement, it is said, is akin to the statement of an injured witness and should receive the same weight but what is the quality of evidence required to be given by such a victim to bring home a charge of outraging her modesty and would it require corroboration?

2. A judgment of acquittal dated 28.12.2016 passed by the Learned Judge, Fast Track Court, East & North Sikkim at Gangtok (the Learned Judge) in Sessions Trial (F.T.) Case No. 05 of 2016 is sought to be assailed by the State of Sikkim. The Learned Judge has acquitted the Respondent from the solitary charge of assaulting or using criminal force to the victim-P.W.1 with intent to outrage her modesty punishable under Section 354 of the Indian Penal Code, 1860 (IPC). Leave having been granted on the application of the State, the Appeal is under consideration.

3. The First Information Report (FIR) was lodged on 22.11.2014 at 2050 hours at the Sadar Police Station, Gangtok by the victim wherein she alleged that she was sexually assaulted by the Respondent. The victim stated that the Respondent tried to forcefully kiss her pushing himself towards her and further that he disrobed himself went inside her bed and made sexually provoking actions. The victim also alleged that it was an unlawful act against a working woman and the Respondent has outraged her modesty because of which she was mentally unwell. The victim also complained that when she resisted the Respondent's advances he threatened to throw her out from her job.

4. On the strength of the aforesaid FIR a criminal case would be registered under Section 376/511 IPC and investigation taken up by P.W.13-the Investigating Officer. It is unclear as to how and why criminal case was registered for alleged rape and for attempting to commit offences punishable with imprisonment for life or other punishment on the basis of the allegations made in the said FIR.

5. The Investigating Officer would file charge-sheet No. 42/SHO/SPS/ 16 dated 04.03.2016 under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) also for the offences under Section 376/511 IPC.

6. During the investigation the Chief Judicial Magistrate-P.W.10 would also record a statement of the victim under Section 164 Cr.P.C. on 04.07.2016.

7. Charge would be framed under Section 376/511 IPC on 06.06.2016 and 13 witnesses including the Investigating Officer-P.W.13 would be examined by the prosecution during trial. A perusal of the charge framed by the Learned Judge would however, disclose, quiet evidently, that charge under Section 376/511 IPC had been registered since the victim had alleged that she was *"sexually assaulted"* in the FIR although the victim had clarified in the FIR itself that she was forcefully tried to be kissed.

8. After the trial the Respondent would be examined under Section 313 Cr.P.C. on 13.12.2016 on which date an opportunity to lead defence evidence would be declined.

9. During the hearing before the Learned Judge, the Learned Additional Public Prosecutor would concede that there is no evidence under Section 376/511 IPC but would submit that there were enough materials against the Respondent to establish a case under Section 354 IPC and although no charge had been framed under Section 354 IPC the Learned Judge would go on to examine it since, as submitted by the prosecution, they had been able to prove it.

10. The impugned judgment dated 28.12.2016 would acquit the Respondent for the offence even under Section 354 IPC on the following grounds:

(i) The evidence of P.W.8-the Doctor who examined the victim on 22.11.2014 had opined that there was no forceful sexual act and that there was no injury/bruises on any part of the body suggesting forceful pulling and pushing.

(ii) The evidence of the victim and other witnesses established that there was an altercation between the Respondent and the victim as she was fired from service after being caught smoking in the hotel room. The evidence of P.W.2-the victim's brother and P.W.7 supported the version of the defence regarding the altercation between the Respondent and the victim.

(iii) The evidence of the victim and other prosecution witnesses i.e. P.W.2, P.W.7, P.W.8, P.W.10 and the Investigating Officer-P.W.13 established that the victim gave different versions and tried to improve her case and in fact the prosecution evidence established that the victim had made false allegation against the Respondent.

(iv) The victim's version is difficult to believe. Prosecution failed to produce two employees of the hotel where the alleged incident took place despite giving several opportunities. There is no evidence of the victim raising any alarm or telling P.W.2 and P.W.3 about the incident when they reached the place of occurrence after the alleged incident.

(v) There is no cogent proof about the alleged incident. Conviction can be based on the sole testimony of the prosecutrix without any corroboration provided it lends assurance of her testimony. However, in the case at hand, the testimony of the prosecutrix has been rendered totally unreliable.

11. Section 354 of the IPC reads thus:

> ***"354. Assault or criminal force to woman with intent to outrage her modesty.—****Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

12. The ingredients required to be established to bring an accused within the mischief of Section 354 IPC are:-

(i) Assault or use of criminal force on a woman.

(ii) The said assault or use of criminal force must be intended to outrage or knowing it to be likely that he will thereby outrage her modesty.

13. Mr. Karma Thinley, Additional Public Prosecutor for the Appellant would rely upon the evidence of the victim and submit that the victim's deposition cogently proved all the ingredients of the offence under Section 354 IPC. He would submit that the records reveal that the FIR was filed promptly and that the substance of the accusation exists in the FIR itself as well as the statement of the victim under Section 164 Cr.P.C. The presence of the victim at the hotel on the date of the incident has been proved by the evidence of P.W.2, the victim's brother, his friend P.W.3 and of the victim herself. Mr. Karma Thinlay would submit that the evidence of hostile prosecution witness-P.W.5 would establish that on 24.11.2014 police officer had visited the Hotel and seized the contract of employment of the victim, a photocopy of the voters identity card as well as one passport photograph of the victim in his presence which have been duly exhibited. He would submit that the deposition of the Respondent's wife-P.W.7 would establish that she had gone to Kalimpong and as such was not in the hotel at the time of the alleged incident giving an opportune occasion for the Respondent to indulge in the alleged criminal act. Mr. Karma Thinlay would submit that the deposition of the Learned Chief Judicial Magistrate-P.W.10 would cogently prove the recording of the Section 164 Cr.P.C. statement of the victim. He would further submit that the only ground on which the Learned Judge had acquitted the Respondent regarding the inimical relationship between the victim and the Respondent is negated by the evidence of the victim. She has stated that she had asked the Respondent for her salary in advance for her treatment to which the Respondent had handed over her documents and passport photo and told her that she was no longer required for the job. After that the victim had told the Respondent that she would not leave the job and requested him for permission to visit the doctor which he agreed and had in fact given her an amount of ₹ 500/- for the same. Mr. Karma Thinlay, would thus submit that permission having been granted and an amount of ₹ 500/- having been paid by the Respondent to the victim the

question of them having any inimical relation thereafter would not arise. Mr. Karma Thinlay would rely upon several judgments of the Supreme Court on the ingredients required to be established by the prosecution and would submit that the prosecution has been able to do so.

14. In re: ***Vidyadharan v. State of Kerala***[1] the Supreme Court would hold:

> ***"9.*** *In order to constitute the offence under Section 354 mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. (See State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] .) A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:*
>
> > *(i) that the person assaulted must be a woman;*
> >
> > *(ii) that the accused must have used criminal force on her;*
> >
> > *and*
> >
> > *(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.*
>
> ***10.*** *Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and*

[1] (2004) 1 SCC 215

cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. ……."

[Emphasis supplied]

15. In re: ***Raju Pandurang Mahale v. State of Maharashtra***[2] the Supreme Court would hold:

> ***"11.*** *Coming to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force on a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:*
>
> *(a) That the assault must be on a woman.*
>
> *(b) That the accused must have used criminal force on her.*
>
> *(c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.*
>
> ***12.*** *What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of*

[2] (2004) 4 SCC 371

pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word "modesty" is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word "modesty" in relation to a woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste."

13. *Modesty is defined as the quality of being modest; and in relation to a woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct". It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patteson in R. v. James Lloyd [(1836) 7 C&P 317 : 173 ER 141] :*

In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part.

The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

14. *Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency: a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Edn.), the meaning of the word "modesty" is given as "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions".*

15. *In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a question arose whether a female child of seven-and-a-half months could be said to be possessed of "modesty" which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the "common notions of mankind" referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of "modesty" and the interpretation given to that word by this Court in Major Singh case [AIR 1967 SC 63 : 1967 Cri LJ 1] the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. The above position was noted in Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] . When the above test is applied in the*

*present case, keeping in view the total fact situation, the inevitable conclusion is that the acts of the accused-appellant and the concrete role he consistently played from the beginning proved combination of persons and minds as well and as such amounted to "outraging of her modesty" for it was an affront to the normal sense of feminine decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on the accused-appellant, for the active assistance he rendered and the role played by him, at all times sharing the common intention with A-4 and A-2 as well, till they completed effectively the crime of which the others were also found guilty.***"**

[Emphasis supplied]

16. In re: ***Tarkeshwar Sahu v. State of Bihar (Now Jharkhand)***[3] the Supreme Court reproduced the cases of various Courts indicating circumstances in which the Court convicted the accused under Section 354 IPC as under:

"44*. We deem it appropriate to reproduce the cases of various courts indicating circumstances in which the court convicted the accused under Section 354 IPC.*

45. *In State of Kerala v. Hamsa [(1988) 3 Crimes 161 (Ker)] it was stated as under: (Crimes p. 164, para 5)*

"What the legislature had in mind when it used the word modesty in Sections 354 and 509 of the Penal Code was protection of an attribute which is peculiar to woman as a virtue which attaches to a female on account of her sex. Modesty is the attribute of female sex and she possesses it irrespective of her age. The two offences were created not only in the interest of the woman

[3] (2006) 8 SCC 560

concerned, but in the interest of public morality as well. The question of infringing the modesty of a woman would of course depend upon the customs and habits of the people. Acts which are outrageous to morality would be outrageous to modesty of women. No particular yardstick of universal application can be made for measuring the amplitude of modesty of woman, as it may vary from country to country or society to society."

46. *A well known author Kenny in his book Outlines of Criminal Law [19th Edn., para 146, p. 203] has dealt with the aspect of indecent assault upon a female. The relevant passage reads as under:*

"In England by the Sexual Offences Act, 1956, an indecent assault upon a female (of any age) is made a misdemeanour and on a charge for indecent assault upon a child or young person under the age of sixteen it is no defence that she (or he) consented to the act of indecency."

47. *In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a three-Judge Bench of this Court considered the question—whether modesty of a female child of 7½ months can also be outraged. The majority view was in the affirmative. Bachawat, J. on behalf of majority, opined as under:*

"The offence punishable under Section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define 'modesty'. What then is a woman's modesty?

… the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby, seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

48. *In Kanhu Charan Patra v. State of Orissa [1996 Cri LJ 1151 (Ori)] the Orissa High Court stated as under:*

"The accused entered the house and broke open the door which two girls of growing age had closed from inside and molested them but they could do nothing more as the girls made good their escape. On being prosecuted it was held that the act of the accused was of grave nature and they had committed the same in a

daredevil manner. As such, their conviction under Sections 354/34 was held proper."

49. *The High Court of Delhi in Jai Chand v. State [1996 Cri LJ 2039 (Del)] observed as under:*

"The accused in another case had forcibly laid the prosecutrix on the bed and broken her pyjama's string but made no attempt to undress himself and when the prosecutrix pushed him away, he did not make efforts to grab her again. It was held that it was not an attempt to rape but only outraging of the modesty of a woman and conviction under Section 354 was proper."

50. *In Raja v. State of Rajasthan [1998 Cri LJ 1608 (Raj)] it was stated as under:*

"The accused took the minor to a solitary place but could not commit rape. The conviction of the accused was altered from Sections 376/511 to one under Section 354."

51. *The Court in State of Karnataka v. Khaleel [2004 Cri LJ (NOC) 10 (Kant)] stated as follows: [Cri LJ (NOC) 10]*

The parents reached the sugarcane field when accused was in process of attempting molestation and immediately he ran away from the place. There was no evidence in support of allegation of rape and accused was acquitted of charge under Section 376 but he was held liable for conviction under Sections 354/511 IPC.

52. *The Court in Nuna v. Emperor [15 IC 309 : (1912) 13 Cri LJ 469] stated as follows: (Cri LJ p. 469)*

"The accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her nor did he do anything more to her: [It is held] that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

53. *The Court in Bisheshwar Murmu v. State of Bihar [2004 Cri LJ 326 (Jhar)] stated as under:*

"The evidence showed that the accused caught hold of the hand of the informant/victim and when one of the prosecution witnesses came there hearing alarm of the victim, offence under Sections 376/511 was not made out and conviction was converted into one under Section 354 for outraging the modesty of the victim."

54. *The Court in Keshab Padhan v. State of Orissa [1976 Cutt LR (Cri) 236] stated as under:*

*"The test of outrage of modesty is whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In the instant case, the girl was 15 years of age and in the midnight while she was coming back with her mother the sudden appearance of the petitioner from a lane and dragging her towards that side sufficiently established the ingredients of Section 354.***"**

17. Mr. Karma Thinlay would submit that minor discrepancies in the evidence produced by the prosecution has led the Learned Judge to hold that the victim had made different statements before the police, Magistrate and Trial Court which discrepancies ought not to have detracted her from the material particulars establishing the ingredient of the offence which had remained untarnished. To elucidate what may be considered as minor

discrepancies Mr. Karma Thinlay would rely upon two judgments of the Supreme Court.

18. In re: ***State of U.P. v. Santosh Kumar & Ors.***[4] the Supreme Court would hold:

> ***"24.*** *In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur. But it is the duty of the court to ensure that the truth prevails. If on material particulars, the statements of prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies."*
>
> *[Emphasis supplied]*

19. In re: ***R. Shaji v. State of Kerala***[5] the Supreme Court would hold:

> ***"26.*** *Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case."*
>
> *[Emphasis supplied]*

[4] (2009) 9 SCC 626
[5] (2013) 14 SCC 266

20. Mr. K. T. Bhutia, Learned Senior Advocate for the Respondent on the other hand would vociferously submit and highlight various evidences available to establish the inimical relationship between the victim and the Respondent. He would submit that the factum of the victim having been thrown out of her job just before the alleged incident would throw grave suspicion about the version of the victim regarding the incident. The conflicting versions regarding the same incident by the victim at different points of time has rendered the deposition of the victim unreliable. The victim had flatly denied having any altercation with the Respondent when suggested during her cross-examination. However, her own brother-P.W.2 has falsified the victims version by stating that during the day the victim had in fact come to his room and told him that she was fired from service by the Respondent and that he had also shouted at her while doing so. P.W.2 also stated that the victim had told him about the altercation which she had with the Respondent during the day. Mr. K. T. Bhutia would submit that the admission of the victim's brother-P.W.2 that the victim had a habit of taking alcohol and smoking and further the fact that the victim had told him that she was scolded by the Respondent as he found her smoking in the hotel room probabilises the defence version and renders the victim's evidence unreliable. This fact is also corroborated by the deposition of the Respondent's wife-P.W.7 who also admitted the Respondent having told her about firing the victim for smoking in the room. He would submit that even the Investigating Officer has deposed that P.W.7 had stated about the said fact even at the time of recording her statement under Section 161 Cr.P.C. Mr. K. T. Bhutia would submit that the evidence of a victim must be cogent and consistent. However, in the present case the victim had narrated different versions in the FIR, statements under Section 161 and 164 Cr.P.C. and the deposition regarding material particulars. He would submit that in the FIR the victim is said to have reported that the Respondent had tried to forcefully kiss her pushing himself towards her whereas in the statement under Section 164 Cr.P.C. she had stated that the Respondent had pushed her on the bed and started kissing her on her cheek and neck and once again in her deposition she stated that the Respondent started putting his hands over her body and tried to kiss her on her cheeks. Mr. K. T. Bhutia would submit that a victim of such a heinous offence would have absolutely clear memory about the incident and that there is a huge difference between *"started kissing me"* and *"tried to kiss me"*. He would submit that similarly the entire deposition of the victim is replete with contradictions on various material aspects of the case which renders the victim version completely false. Mr. K. T. Bhutia would also rely upon various

judgments of the Supreme Court on the quality of evidence required of a sterling witness and on the power of the High Court while examining a judgement of acquittal.

21. In re: ***Ganesh Bhavan Patel v. State of Maharashtra***[6] the Supreme Court would hold:

> ***"13.*** *The dictum of the Privy Council in Sheo Swarup v. King-Emperor [AIR 1934 PC 227 : 61 IA 398] , and a bead-roll of decisions of this Court have firmly established the position that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as a rule of prudence, it should — to use the words of Lord Russel of Killowen — "always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." Where two reasonable conclusions can be drawn on the evidence on record, the High Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. In other words, if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and cannot be entirely and effectively dislodged or demolished, the High Court should not disturb the acquittal.***"***
>
> *[Emphasis supplied]*

[6] (1978) 4 SCC 371

22. In re: ***Ramesh Babulal Doshi v. State of Gujarat7*** the Supreme Court would hold:

> ***"7***. *Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above-quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then — and then only — reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."*
>
> *[Emphasis supplied]*

[7] (1996) 9 SCC 225

23. In re: ***Ajit Savant Majagvai v. State of Karnataka***[8] the Supreme Court would summarize the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal thus:

> ***16.*** *This Court has thus explicitly and clearly laid down the principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the trial court. These principles have been set out in innumerable cases and may be reiterated as under:*
>
> *(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.*
>
> *(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.*
>
> *(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.*
>
> *(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.*

[8] (1997) 7 SCC 110

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

*(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.***"**

24. In re: ***Gorle S. Naidu v. State of A.P. & Ors***[9] the Supreme Court would hold:

"13. *Though mere acquittal of a large number of co-accused persons does not per se entitle others to acquittal, the Court has a duty in such cases to separate the grain from the chaff. If after sieving the untruth or unacceptable portion of the evidence residue is sufficient to prove the guilt of the accused, there is no legal bar in convicting a person on the evidence which has been primarily disbelieved vis-à-vis others. But where they are so inseparable that any attempt to separate them would destroy the substratum on which the prosecution version is founded, then the Court would be within its legal limits to discard the evidence in toto. ……..."*

"14. *The respective stands need careful consideration. There is no embargo on the*

[9] (2003) 12 SCC 449

appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v. State of M.P. [(2002) 4 SCC 85 : 2002 SCC (Cri) 736 : (2002) 2 Supreme 567]) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : AIR 1973 SC 2622] , Ramesh Babulal Doshi v. State of Gujarat [(1996) 9 SCC 225 : 1996 SCC (Cri) 972 : (1996) 4 Supreme 167] , Jaswant Singh v. State of Haryana [(2000) 4 SCC 484 : 2000 SCC (Cri) 991 : (2000) 3 Supreme 320] , Raj Kishore

Jha v. State of Bihar [(2003) 11 SCC 519 : 2004 SCC (Cri) 212 : (2003) 7 Supreme 152] , State of Punjab v. Karnail Singh [(2003) 11 SCC 271 : 2004 SCC (Cri) 135 : (2003) 5 Supreme 508] , State of Punjab v. Pohla Singh [(2003) 11 SCC 58 : 2004 SCC (Cri) 276 : (2003) 7 Supreme 17] and Suchand Pal v. Phani Pal [(2003) 11 SCC 527 : 2004 SCC (Cri) 220 : JT (2003) 9 SC 17]" .

[Emphasis supplied]

25. In re: ***Rai Sandeep Alias Deepu v. State (NCT of Delhi)***[10] the Supreme Court would hold:

> ***"22.*** *In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and*

[10] (2012) 8 SCC 21

*every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.***"***

[Emphasis supplied]

26. The FIR has been lodged on the very same day of the alleged incident. The presence of the victim has been established by the prosecution and in fact that is an admitted fact, the Respondent would not deny. It is also certain that the victim had been employed by the Respondent just a few days before the alleged incident. The seizure of the victim's employment contract, voter identity card and passport photo from P.W.7-wife of the Respondent from the hotel also establishes the victim's employment at the hotel by the Respondent. The prosecution alleges that the victim's modesty was outraged by the Respondent on 22.11.2014 after dark.

27. Out of the 13 witnesses examined by the prosecution there is no eye witness to the alleged incident. The deposition of the victim stands alone. The prosecution has examined P.W.5 who is the only witness from the hotel where the alleged incident took place. P.W.5 has the same name which has been used by the victim several times in her statement recorded under Section 164 Cr.P.C. However, it is not established that P.W.5 is the same person referred by the victim. The said P.W.5 was examined as a witness to the seizure of a copy of the contract of employment, photocopy of voter identity card and passport photograph all belonging to the victim from the hotel on 24.11.2014 and nothing further. In such circumstances, it becomes crucial to examine the evidence of the victim minutely. A deposition of a victim of alleged sexual crime must be given primary consideration. At the same time it is not as if to say that the prosecution does not have to prove his case beyond reasonable doubt. A solitary statement of the victim, if it inspires confidence, is sufficient to record a conviction and no further corroboration is required. A statement of a victim is akin to a statement of an injured witness and her testimony, ordinarily, should receive the same weight.

28. In criminal cases of this nature in which witnesses unaccustomed to judicial processes speaking in vernacular enters the witness box to depose, it must be kept in mind that these witnesses are susceptible to various attendant circumstances of anxiety, unfamiliarity, awkwardness and newness. It must also be kept in mind that since the language of the Court is English and what is stated by the witness in vernacular is recorded by the Court in English often times the witness do not get an opportunity to even realize if what she/he had stated was correctly put across in the deposition. Distance of time may often lead to minor discrepancies in the narration of facts. A Court while examining and appreciating such evidences must be alive to these factors. It is the duty of the Court to search for the truth. While doing so it is necessary to remove the grain from the chaff.

29. To appreciate the rival submissions of Mr. Karma Thinlay and Mr. K. T. Bhutia Learned Senior Counsel appearing for the respective parties it is vital to examine the victim's deposition first. A chart reflecting the narration of facts by the victim first before the Learned Chief Judicial Magistrate under Section 164 Cr.P.C. and thereafter in her deposition in her examination-in-chief is being drawn up for comparison as follows:

Area	Event as narrated in Section 164 Cr.P.C. statement	Event as narrated in deposition before Court
Hotel	**"**On 20.11.2014 I was told by Dawa Tshering Bhutia that I should stay in the hotel itself. Accordingly, I started residing in the said hotel. The said Dawa Tshering Bhutia and his wife also resides in the hotel itself.**"**	**"**I do not remember the exact date but in the month of November, 2015 I was informed by one Binod Tamang who used to stay in the same building where I was staying as a tenant, that he would find me an employment as a Receptionist at a hotel located at Deorali, East Sikkim. Accordingly, Binod Tamang took me to the said hotel where we met the accused who told me to submit me one passport size photo and my Voter I.D. card, thereafter the accused told me that I had been selected for the said job as a receptionist. The accused further told me that it would be inconvenient for me to commute from my house to the work place every day therefore he suggested that it would be better if I stayed in the hotel (work place) itself. He further told me that he would accommodate me in Room No.106 of his hotel.**"**
	"On 21.11.2014 the wife of Dawa Tshering Bhutia went to Kalimpong along with one house keeping staff. She also took 5 numbers of blankets along with her for cleaning the same.**"**	**"**The following day I went to the hotel with some of my belonging and joined my duty and started staying in the said hotel. Everything was running smoothly for a few days but after 4-5 days for my joining the duty the wife of the accused (Aiela) went to Kalimpong to give the dirty linen of the hotel to the laundry at Kalimpong and while going she also took along with her one girl who used to stay with them.**"**
	"On 22.11.2014 I asked for the permission from Dawa Tshering Bhutia to visit my home as there were no guests in the hotel. I was told by Dawa Tshering Bhutia that the guest may come at any time and I cannot leave the hotel. Thereafter, I went to my room at Lingding and brought some clothings for my use in the hotel.**"**	**"**At round 8 p.m. of the same day i.e. the day Aiela left for Kalimpong, I took my dinner after attending to the guests of the hotel and retired for the night. The next morning I asked the accused for an advance of my salary as I needed it to avail treatment for skin disease (hand). On hearing this the accused handed me my document and my passport photo and told me that I was no more required and I could leave the job and go. However, I told him that

		I would not leave the job and asked the accused for permission to visit the doctor for an hour and to this the accused agreed and also give me an amount of Rs.500/-. Thereafter I made queries about the availability of the Doctor and came to learn that the Doctor was not available at that time as he had gone out of state and he would return only after a week. Thereafter, I went to my room at Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel.**"**
Hotel	**"**On the relevant day at around 4pm waiter Suraj asked me the permission to leave the hotel for sometime. I let him go.**"**	
		"That day there were no guests in the hotel but even then I attended my duty till 8 p.m. sometime during the evening the cook of the hotel had asked me as to what curry should be prepared for dinner. At around 8 p.m. the accused also came to the reception and asked me what should be prepared for dinner and he himself said that deep fried chicken should be prepared for dinner that night.**"**
Room No.102 (Respondent's room)	**"**At around 6pm, he came back little bit drunk and he was also carrying a bottle of country liquor with him. I was in the hotel room No.102 where Dawa Tshering Bhutia used to stay. He had called me in his room and he was giving instructions to me with regard to the running of a hotel. He told me that I should check all the staff working in the hotel as they might pick up the articles from the hotel. At that time waiter Suraj called us from the counter of the hotel and told us to come down in the counter.**"**	**"**After about half and (sic) hour one boy who was employed in the housekeeping section at the hotel called me through the intercom and told me that the dinner was ready and he asked me to come to the kitchen which is below the reception/counter to have dinner. Thereafter I, the accused person, the small boy employed in housekeeping section and the cook had dinner.**"**

Counter/ kitchen	**"**I came down to the counter and after sometime Dawa Tshering Bhutia also came in the counter. The kitchen of the hotel is adjacent to the restaurant and the counter. I saw that Suraj was in the kitchen. I went to the kitchen and he gave me two packets of nuts (supari) and he also gave the bottle of country liquor to Dawa Tshering Bhutia. Dawa Tshering Bhutia then put the country liquor in four cups and offered us to drink. Suraj refused to take the said country liquor as he was already drunk. Dawa Tshering Bhutia then asked me to drink the same but I did not drink it and I only pretended that I am drinking. Dawa Tshering Bhutia started drinking said country liquor adding some Rum in the same. Thereafter, he went to the room and he also called me in his room.**"**	**"**After the dinner the small boy employed in housekeeping section brought a Pepsi bottle (small) containing "Nigar" (local wine) and the accused told everyone present there that all of us will take the said "Nigar" (Local wine). Then the accused who was already drunk before dinner, poured the "Nigar" for all of us and even for me. When I did not take the "Nigar" that had been served to me the accused insisted that I should drink it but I told him I would have it later in my room and I took the "Nigar" to my room.**"**
Room No.102 (Respondent's room)	**"**I went to his room and found that he was watching T.V. He told me to seat (sic) on the bed but I told him that I am all right and I kept on standing nearby him. He then pulled me by my hand and asked me to seat on the bed. I told him that I am feeling sleepy and I want to go my home. I do not exactly remember the time but it must be around 8pm at the relevant time. Thereafter, he told me that he will give me gold and he will also transfer the above hotel in my name. He told me that I should accompany him in a long drive and	

	should drink beer. He then forced me to drink the country liquor and in the process the liquor also spilled over my body. He also told me that I do not know how to dress and I only wear Kurta. He told me that he will get me modern dresses.**"**	
Restaurant/ reception	**"**Thereafter, as I was little bit scared of him I came down to the restaurant where I saw cook and Suraj. I had my dinner in the restaurant. Thereafter, I went to the reception and filled up the necessary papers which are required to be sent to the police station and handed those papers to Suraj who used to take the same to Thana. I also gave Suraj a red colour jug for cleaning the same in which I wanted to take some water in my room.**"**	
Restaurant/ reception	**"**When I came out from the kitchen I found Dawa Tshering Bhutia in the restaurant with keys in his hand. He then asked me to reach a bottle of bisleri water and a cup of Rum in his room i.e., room No. 102. He also told me to stay there in the said room. After reaching the water and Rum I came to the reception of the hotel and locked the same. Thereafter, Dawa Tshering Bhutia came to the reception and forcefully pulled by my hand to his room. Room No.102 is in the same floor and it is near to the reception.**"**	**"**After this I went and checked all the rooms of the hotel to ensure whether it was properly locked and safe. After locking the rooms I went to the reception area and was keeping the keys of the hotel rooms out there when the accused also came there and he suddenly caught hold of my hand and told me that he had something to tell me and also told me to go to his room for chatting. I denied to go to his room but he forcefully took me to his room.**"**

Room No. 102	**"**Once I was taken inside his room he forced me to drink the cup of rum which I refused but he pushed me on the bed and he started kissing me on my cheek and neck. He also snatched my cell phone and he started physically abusing me. I then pushed him and after taking my cell phone I ran towards the reception where the keys of room was kept. I took the keys and ran towards my room.**"**	**"**In the room the accused took out a bottle of beer and glasses and offered it to me but I refused and kept it on the table. At the said time my mobile phone rang but the accused did not allow me to attend the call and told me that there was no need to attend the call while we were chatting. Saying this the accused switched off my mobile. Then the accused started putting his hands over my body and also tried to kiss me on my cheeks and during this process the beer that the accused had kept on the table also spilled all over my clothes. I was very frightened but I somehow managed to take my mobile from the table and hurriedly fled away from the room and went towards my room.**"**
Room No. 106 (Victim's room)	**"**When I was unlocking the door of my room (room No. 106) Dawa Tshering Bhutia came and he pushed me inside the room and locked the door. I put the master key on the switch. The moment I put the key the lights in the room switched on and the T.V. of the room was also switched on. The said Dawa Tshering Bhutia then increased the volume of T.V. and started removing his clothes of the upper part of his body. He then laid himself on my bed in the room and started forcing me to sleep with him. I was scared and was standing near the bed. He also put a quilt over him. He then came out of the bed and started removing his pant. At that time I ran towards the toilet of the room and locked the door from inside. I send a SMS to my brother asking him to	

	come soon in the hotel as the owner of the hotel is misbehaving with me. I also called my brother Saroj Rai many times but he did not pick up the phone. Dawa Tshering Bhutia was outside the door and was knocking continuously. After sometime, my brother called me back and I asked him to come to hotel Neema Ghang. After about 15 minutes my brothers one of his friend and his driver came to the hotel. I did not see as to who open the main door of the hotel but when I heard the noise of people who were entering inside the hotel I also came out of the toilet and ran towards my brother.**"**	**"**When I was opening the door of my room with the room keys, the accused also reached there and entered my room after pushing me. In my room the accused told me that we should spend the entire night talking to each other. Then he switched on the T.V. and selected a news channel. After which he took off his half jacket, climbed on my bed, covered himself with the blanket on the bed. Then after this the accused pulled me next to him and asked me to sit with him. I did not agree to sit with him but instead went inside the bathroom of my room and locked myself inside the bathroom and from there I called my brother Saroj Rai from my mobile phone but he did not receive my call. Therefore, I sent a message to my brother saying that the accused was insisting to stay with me in my room. This message was received by a friend of my brother who saw the message and informed my brother about it. On hearing this my brother called me back but out of fear that the accused would hear me I had opened the water tap in the bathroom and spoke to my brother standing near the tap. But my brother could not hear me as I was whispering over the phone and because of the sound of the tap water. Therefore, I again sent another message telling him to come as soon as possible. After sending the message I did not go to my room but stayed inside the bathroom only. After about 10-15 minutes I heard the voice of my brother shouting, he was banging on the door of the hotel asking them to open up. Then the accused went and opened the door and after sometime my brother came and I came out of the bathroom and went to my brother and told him about the incident. There is a single entrance to the floor where my room and the room of the accused was located and on the said day only myself and the accused were in the said floor.**"**

Sadar P.S.	**"**Thereafter, my brother and his friends brought Dawa Tshering Bhutia to Sadar P.S. I also accompanied them to Sadar P.S. In the Sadar P.S. wrote FIR which I signed and filed in the Sadar P.S. After I lodged FIR I was forwarded to STNM Hospital by the police for medical examination.**"**	**"**My brother's friend and a driver had also come to the hotel at the said time. Thereafter, we took the accused to Sadar P.S. where I lodged an FIR against him.**"**

30. A perusal of the statements of the victim as narrated to the Learned Chief Judicial Magistrate under Section 164 Cr.P.C. and to the Court in her deposition reflects that the victim's statements are in great detail.

31. The victim in her statement recorded under Section 164 Cr.P.C. would narrate what had transpired in room No.102 when she went there on being called by the Respondent and proceeded to his room. When the victim reached the room he was watching T.V. He asked her to sit on the bed. She declined saying she is sleepy and she wanted to go home. The Respondent would tell her that he would give her gold and also transfer the hotel in her name. He would also tell her that she should accompany him for long drives and drink beer. He would then force her to drink country liquor and the liquor would spill over her body. The Respondent would tell her that she did not know how to dress and that she wore only kurtas. He would tell her that he would get her modern dresses. All these facts were not narrated by the victim while deposing later in the Court. The deposition in Court is the substantial evidence of the victim. The cook and one Suraj who were mentioned by the victim in her statement have not been examined to corroborate the victim.

32. The reading of the two statements of the victim also reflects that she had stated certain facts which transpired at the restaurant and the reception area of the hotel on the relevant day. In her statement recorded under Section 164 Cr.P.C. the victim would state that after reaching the water and rum to the Respondent's room she came to the reception of the hotel when the Respondent after coming there forcefully pulled her hand to his room. In her deposition in Court the victim would state that after locking the rooms she went to the reception area and while she was keeping the keys of the

hotel rooms the Respondent came and suddenly caught hold of her hand and told her that he had something to tell her and to go to his room for chatting and when she resisted he forcefully took her to his room. There were discrepancies on the details of what transpired at the relevant time. These discrepancies have been brought out by the defence with the cross-examination of prosecution witnesses. However, the victim is consistent that the Respondent had pulled her hand forcefully and taken her to his room No. 102 in both the statements.

33. The victim would again narrate about what transpired in the Respondent's room No. 102 thereafter in both the statements. In her statement recorded under Section 164 Cr.P.C. she would state that once she was taken inside his room the Respondent forced her to drink a cup of rum which she declined but he pushed her on the bed and started kissing her on her cheek and neck. The victim would also state that the Respondent snatched her cell phone and started physically abusing her after which she ran towards the reception took the keys of her room and ran towards it. In the victim's deposition in Court she would however, state that in the room the Respondent took out a bottle of beer and glasses and offered it to her but she refused and kept it on the table. She would also state that her mobile phone rang at that time but the Respondent did not allow her to attend the call and told her there was no need to attend the call while they were chatting and switched off the phone which fact was not stated by her in her statement recorded under Section 164 Cr.P.C. She would also state that thereafter the Respondent started putting his hand over her body and also tried to kiss her on her cheeks and during this process the beer that the Respondent had kept on the table spilled all over her clothes. She would state that she was frightened but somehow managed to take her mobile from the table and hurriedly fled away from the room and went towards her room. The deposition of the victim would again have discrepancies. It is seen that in the statement recorded under Section 164 Cr.P.C the victim had stated that the Respondent had pushed her on the bed and started kissing her on her cheek and neck. However, in her deposition she would state that the Respondent started putting his hand over her body and also tried to kiss her on her cheeks and during this process the beer that the Respondent had kept on the table spilled all over her clothes. The facts as deposed by the victim not having been stated in such great detail while giving her statement under Section 164 Cr.P.C. would be brought out by the defence in cross-examination and during arguments to

submit that these discrepancies would make the deposition doubtful. There are discrepancies in the two statements. If one were to ignore the discrepancies regarding the victim's statements i.e. about the Respondent *"started kissing me"* and *"tried to kiss me"* as well as other related details of the specific incident one may still find ingredients of the offence in the residue of the victim's deposition.

34. The victim would also narrate what transpired thereafter in her room No. 106 when she ran away from the Respondent's room No. 102. In her statement recorded under Section 164 Cr.P.C. she would state that when she was unlocking the door the Respondent came and pushed her inside the room and locked the door. At that time she put the master key on the switch and immediately the lights as well as the T.V. in the room was switched on. The Respondent increased the volume of the T.V. and started removing his clothes from the upper part of his body and thereafter laid himself on the victim's bed and started forcing her to sleep with him. She was scared and standing near the bed. He put a quilt over himself. Thereafter he came out of the bed and started removing his pant. At that time she ran towards the toilet of her room and locked the door from inside. She sent a "SMS" to her brother asking him to come soon to the hotel as the Respondent was misbehaving. She tried to call her brother several times but he did not pick up the phone. Respondent was outside the door and knocking continuously. After sometime her brother called her back and she asked him to come to the hotel. 15 minutes thereafter the victim's brother came with a friend and a driver to the hotel. She did not see as to who opened the main door but she heard the noise of the people who were entering inside the hotel. She also came out of the toilet and ran towards her brother. The victim would relate about the same facts in her deposition but with a variation. She would state that when she opened the door of her room the Respondent also reached there and entered the room after pushing her. In the room the Respondent would tell her that they should spend the entire night talking to each other then he switch on the T.V. and select a news channel. After that the Respondent would take off his half jacket, climb on her bed and cover himself with the blanket the Respondent would thereafter pull her next to him and ask him to sit with him. The victim would not agree and would instead go to the bathroom and lock herself inside the bathroom and from there call her brother from her mobile but he would not receive the call. Thereafter, she would send a message to her brother telling him that the Respondent was insisting on staying with her in her room. The

victim would state that this message was received by a friend of her brother who informed him about it. Her brother thereafter called her back but due to fear that the accused would hear her she opened the water tap in the bathroom and spoke to her brother standing near the water tap. The victim's brother could not hear as she was whispering over the phone and because of the sound of the tap water. She would send yet another message telling her brother to come as soon as possible. Thereafter, she would continue to stay inside the bathroom. After 10-15 minutes she would hear the voice of her brother shouting and banging on the door of the hotel asking them to open up. The Respondent would go and open the door. After sometime her brother would come and she would also get out of the bathroom and go to her brother and tell him about the incident. The facts relating to what transpired in room No.106 on the relevant day have substantial variances in the two statements.

35. The narration of the facts in the examination-in-chief of the victim as to what transpired on that day after the Respondent forcefully took the victim to his room from the reception and thereafter again in the victim's room when she ran away from the Respondent to her room does indicate the existence of both the ingredients of the offence under Section 354 IPC. However, the evidence in examination-in-chief is not the entire evidence. The evidence of a witness in cross-examination must also be considered with equal seriousness.

36. Criminal force has also been defined in Section 350 IPC:

> ***"350. Criminal force.-*** *has been defined in Section 350 IPC. "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is set to use criminal force to that other."*

37. Assault has also been defined in Section 351 IPC:

> ***"351. Assault.—****Whoever makes any gesture, or any preparation intending or knowing*

it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault."

38. However, during the victim's cross-examination the defence has highlighted various discrepancies between the statement made by the victim while giving her statement to the police; while giving her statement under Section 164 Cr.P.C. to the Learned Chief Judicial Magistrate and while deposing before Court which this Court shall now examine.

39. In the victim's cross-examination she would admit that:

(i) She did not know the name of the hotel where she was employed by the Respondent.

(ii) She did not know who the actual owner of the hotel was or whether he lived with his family on the top floor.

(iii) She had stated before the police and the Magistrate that she was appointed as a Manager and not as a receptionist.

(iv) At the time of appointment she was told that she cannot ask for leave often and she agreed not to demand pay in advance.

(v) When she asked for leave and advance payment the Respondent lost his temper.

(vi) Although she denied having any altercation with the Respondent she admitted that the Respondent returned all her documents i.e. passport photo, contract of employment and copy of voters I.D. card and told her to leave and not to come back.

(vii) She went to her room at Lingding and met her brother-P.W.2 and his friends present in their room.

(viii) She had not stated to the police or Magistrate that the Respondent was already drunk before dinner and that he had poured "*nigar*" for all of them including her.

(ix) At the time of recording her statement by the police and the Magistrate she had not stated important things regarding the incident due to nervousness and fear.

(x) She knew the difference between rum and beer.

(xi) On the same night when she had lodged the FIR she was also sent for medical examination but she did not disclose the fact of the beer being spilled over her clothes to the police or to the Doctor on duty who examined her.

(xii) There were no latches on the door of the bathroom from inside and that the door of the bathroom is fitted with round shaped lock. To lock the door one has to push the middle button in the round shape clock and that the bathroom's door can be easily opened with the key from the outside.

(xiii) In her statement recorded by the Magistrate she had stated that she had put the master key on the switch and the moment she put the key the light in the room as well as the T.V. switched on.

(xiv) She had stated to the police and Magistrate that the Respondent was outside the door and knocking continuously.

(xv) She had not stated that she had made a hue and cry for help while giving a statement to the Magistrate or to the police.

(xvi) At the relevant time the waiter and the cook were present at the hotel and that she did not try to take help from them.

(xvii) The area where the hotel is located is a crowded place next to the motor stand.

(xviii) The taxi stand and the road near the hotel are always crowded and vehicles are parked next to the hotel building.

40. The Learned Chief Judicial Magistrate-P.W.10 would also be cross-examined regarding the statement of the victim recorded by him under Section 164 Cr.P.C. P.W.10 who would admit that the victim had not made the following statements when she narrated her story to him about:-

(i) The Respondent coming to the reception area of the hotel and suddenly catching hold of her hand and telling her to go to his room for chatting when the victim had gone to the reception area after locking the rooms.

(ii) The Respondent taking out a bottle of beer and glasses and offering it to her and the victim refusing and keeping it on the table.

(iii) The Respondent not allowing the victim to attend to the incoming call on her mobile and switching off her mobile.

(iv) The Respondent putting his hand over her body and trying to kiss her on her cheek and during the process beer spilling over her clothes.

(v) The victim being frightened but somehow managing to take her mobile from the table and hurriedly fleeing away from the room and going towards her room.

(vi) The Respondent telling her that they should spend the entire night talking to each other.

(vii) The Respondent having switched on the T.V. and selected a news channel.

(viii) The Respondent taking off his jacket, climbing on her bed and covering himself with a blanket on the bed.

(ix) The Respondent pulling her close and asking her to sit down.

(x) The victim sending a message to her brother-P.W.2 stating that the Respondent was insisting to stay with her in her room.

(xi) The message sent by the victim to her brother-P.W.2 having been received by his friend who informed him.

(xii) The brother-P.W.2 calling her but out of fear she opening the water tap to talk to him and speaking to her brother-P.W.2.

(xiii) The brother-P.W.2 not being able to hear her as she would whisper over the phone and because of the sound of the water tap.

(xiv) The victim again sending another message to her brother-P.W.2 and telling him to come as soon as possible.

41. The Investigating Officer-P.W.13 was finally cross-examined. In her deposition the Investigating Officer-P.W.13 admitted the following:

(i) No message was sent to the brother's friend by the victim.

(ii) She had not checked the call records with timings of the mobile of the victim.

(iii) During investigation she found that the hotel belongs to a lady but she did not try to meet her.

(iv) She had recorded the statement of P.W.4 who did not state that he had received a call from the victim's brother-P.W.2.

(v) She had recorded the statement of P.W.7-wife of the Respondent and in her statement she had stated that on 22.11.2014 when she called up her husband, she was told that the newly appointed staff (alleged victim) was fired from service by the Respondent as she was not found fit for the job.

(vi) She had recorded the statement of the victim but the victim had not stated to her that on arrival of her brother-P.W.2 and his friend she had complained to them or disclosed to them as to what the Respondent had done to her.

(vii) The victim had not narrated about how she was informed by one Binod Tamang that he would find employment as a receptionist in the hotel; about Binod Tamang taking her to meet the Respondent who asked her to submit her passport size photograph and voter I.D. card and thereafter selecting her as a receptionist and about the victim joining her duty the following day.

(viii) The victim had not stated to her about the victim making inquiries about the Doctor and learning that he would be available only after a week.

(ix) The victim had not stated to her that after locking the rooms she had gone to the reception area and was keeping the keys of the hotel rooms when the Respondent came and suddenly caught hold of her hand and told her that he had something to tell her and to go to his room for chatting.

(x) The victim had not stated that in the room the Respondent took out the bottle of beer and glasses and offered it to the victim but the victim refusing and keeping it on the table.

(xi) The victim had not stated about the mobile phone ringing and the Respondent not allowing the victim to attend the call telling her that there was no need to do so while they were chatting and thereafter switching off her mobile.

(xii) The victim had not stated about the Respondent putting his hands over her body and during this process the beer spilling over her clothes.

(xiii) The victim had not stated that in her room the Respondent told her that they should spend the entire night talking to each other.

(xiv) The victim had not stated that the Respondent had switched on the T.V. and selected the news channel.

(xv) The victim had not stated that the message was received by her brother's friend who saw the message and informed the brother-P.W.2 about it.

(xvi) The victim had not stated that the brother-P.W.2 had called back but out of fear that the Respondent would hear her, the victim had opened the water tap in the bathroom and spoken to him.

(xvii) The victim had not stated that the victim's brother-P.W.2 could not hear her as she was whispering over the phone because of the sound of tap water.

(xviii) The victim had not stated that she had again sent another message telling him to come as soon as possible.

(xix) That the place of occurrence was a crowded place in front of a motor stand where there were other hotels adjacent to the hotel run by the Respondent on lease.

42. The cross-examination of the Investigating Officer-P.W.13 would also reflect how the defence had meticulously brought out every little discrepancy in the deposition made by the victim and other witnesses in Court highlighting the inconsistencies in the deposition and the statement recorded by the Investigating Officer-P.W.13 under Section 161 Cr.P.C.

43. The fact that the victim had been employed by the Respondent at the hotel is an admitting fact. The presence of the victim on the date of the incident has been established by the prosecution and admitted by the Respondent himself. The seizure of the victim's document from the premises of the hotel from P.W.7-wife of the Respondent vide seizure memo (exhibit-8) has been proved by the Investigating Officer-P.W.13 as well as the witness P.W.5. The other inmates of the hotel who were present on the date of the incident not having been examined the only question which was required to be examined by the Learned Judge in such circumstances was whether the evidence of the victim could stand alone and bring home the charge under Section 354 IPC.

44. A black coloured mobile was seized by the Investigating Officer from the victim's brother-P.W.2 on 12.12.2014 after 20 days of the incident and the lodging of the FIR vide seizure memo (exhibit-6). It was the case of the prosecution that the victim had sent "SMS" to P.W.2 from the bathroom of the alleged place of occurrence seeking his help. This evidence if proved would provide a vital clue. The seizure was affected in the presence of two witnesses. P.W.4 admitted in cross-examination that he could not say whether the mobile (M.O.I) was the same mobile seized by the police on the relevant day and also that he thought that the colour of the mobile was white. P.W.4 would also state that the contents of the seizure memo (exhibit-6) were not read over to him by the police and thus he did not know the contents thereof. P.W.6 also could not say definitely whether the mobile shown to him in Court was the same mobile. P.W.6 neither knew the owner of the mobile nor had any idea from whom it was seized. The

contents of the seizure memo were also not explained to him. P.W.6 also admitted that the mobile was not wrapped in any paper in front of him. The Investigating Officer-P.W.13 sought to prove the messages by producing two photographs of the screen shot taken from the mobile (M.O.I) which was marked as document C for identification bearing her signatures. This was objected to by the defence. Document C was neither proved by the victim nor by the victim's brother-P.W.2 as both the said witnesses were not even shown the said document in Court. The question of relying upon the purported message against the Respondent would not arise. Quite clearly the prosecution has failed to prove this vital probable evidence in the manner prescribed under Section 65B of the Indian Evidence Act, 1872. The victim's mobile was also not seized.

45. The evidence of the victim if read alone and minus the inconsistencies and exaggerations it may also be possible to hold that the ingredients of the alleged offence have been made out. However, the Learned Judge would hold that the altercation between the Respondent and the victim having been established and admitted to a certain extent by the victim herself and corroborated by the deposition of her brother-P.W.2, possibility of false implication could not be ruled out and therefore unsafe to convict the Respondent.

46. This Court shall thus examine each of the grounds on which the judgment of acquittal has been based keeping in mind the settled principles of law that in an appeal against an order of acquittal this Court possesses all the powers of an Appellate Court and nothing less than the power a High Court has while hearing an appeal against an order of conviction. This Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding which may be contrary to the findings recorded by the Trial Court if those findings are against the weight of evidence on record and perverse. Before reversing any finding of acquittal each ground on which the order of acquittal was based must be examined and considered and it is also incumbent upon this Court to record its reasons for not accepting those grounds and subscribing to the view expressed by the Trial Court that the accused is entitled to an acquittal. It is imperative while doing so to keep in mind that the presumption of innocence is still available in favour of the accused that no longer stands as an accused in view of the acquittal which acquittal now fortifies the presumption of innocence. If two views may be possible in a given set of facts marshalled

before the Court the view in favour of an accused must be adopted. While doing all these it is necessary to remember that the Trial Court had the advantage of looking at the demeanour of the witnesses and observing their conduct in the Court especially in the witness box which this Court would not have. The accused is entitled to the benefit of doubt even at this stage. This doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

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47. In order to prove the ingredients of Section 354 IPC no evidence of bruises or marks needs be proved. Hurt is not a necessary ingredient of either assault or criminal force. The evidence of the Doctor-P.W.8 does not therefore lead to the inevitable conclusion that there was no assault or use of criminal force upon the victim and that her modesty had not been outraged. Bruises or injury if found on the body of the victim immediately after the incidence may corroborate the victim's statement of assault or use of criminal force for outraging her modesty.

48. The victim, in her deposition before the Court would state:

> **"***At around 8 p.m. of the same day i.e. the day Aiela left for Kalimpong, I took my dinner after attending to the guests of the hotel and retired for the night. The next morning I asked the accused for an advance of my salary as I needed it to avail treatment for skin disease (hand). On hearing this the accused handed me my document and my passport photo and told me that I was no more required and I could leave the job and go. However, I told him that I would not leave the job and asked the accused for permission to visit the doctor for an hour and to this the accused agreed and also give (sic) me an amount of Rs.500/- .*
>
> *Thereafter I made queries about the availability of the Doctor and came to learn that the Doctor was not available at that time as he had gone out of state and he would return only after a week. Thereafter, I went to my room at*

Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel. **"**

49. In cross-examination the victim, on being suggested, would state:

"*It is true that at the time of appointment I was told that I cannot ask for leave now and then and I was also asked not to demand pay in advance. (The witness volunteers to say that she was not asked to demand to pay in advance.) It is true that when I asked for leave and advance payment the accused lost his tamper (sic). It is not a fact there was altercations between the accused and me regarding the leave asked for and the advance payment. It is true that accused returned all my documents i.e. my passport photo, contract of employment and xerox copy of Voters I.D. card and told me to leave and not to come. I do not know whether I stated to the Magistrate or police that however I told him that I would not leave the job and asked the accused for permission to visit the Doctor for an hour and to this the accused agreed and also gave me Rs.500/-. It is not a fact that I was fired from service and left the hotel threatening the accused with dire consequences.*

I do not remember whether I stated to the Magistrate or Police thereafter I made queries about the availability of the doctor and came to learn that the doctor was not available at that time as he had gone out of State and he would return only after a week. It is true thereafter when I went to my room at Lingding, Gangtok, East Sikkim I met my brother and his friends present in the room. It is not a fact that I discussed with my brother and his friends, altercations which I had with the accused in the

*day time regarding the leave and advance. It is not a fact that I told my brother and his friends about the accused and the temper he had lost on me.***"**

50. The victim in cross-examination would further deny the suggestion of the defence to the following effect:

> **"***It is not a fact that since I was fired from service and humiliated I decided to take revenge with the help of my brother and his friends, accordingly we have implicated the accused in a false case. It is not a fact that in the day time when I visited my room at Lingding after being fired from service I met my brother and his friends in my room and we decided and conspired to implicate the accused in a false case. I have already worked in four places including the hotel owned by the accused. It is not a fact that I was scolded by the accused on that day for having smoke in the hotel room.*
>
> *It is not a fact that I have lodged the false FIR marked Exbt.1 with totally false allegations. It is not a fact that the allegations made in the FIR and my evidence and the statements recorded by the Magistrate are totally contradictory. It is not a fact that I am deposing falsely.***"**

51. The victim would clearly state in her examination-in-chief that after the altercation with the Respondent she:

> **"***Thereafter, I went to my room at Lingding, Gangtok, East Sikkim and met my brother who stays there and spent some time with him after which I returned to the hotel.***"**

52. The victim's brother-P.W.2 would be examined as a prosecution witness. In cross-examination P.W.2 would admit:

> ***"****It is true that in the day time my sister came to my room and told me that she was fired from service by the accused and she also told me about the shouting by the accused while throwing her from service. It is true that my sister told me about the altercations which she had with the accused in the day time. It is true that my sister told me that she was scolded by the accused as he found her smoking in the hotel room. It is not a fact that I did not receive any message from my sister. It is not a fact that when I met my sister at my room we decided to take revenge against the accused. It is not a fact that in the room we decided and made a plan to implicate the accused in the false case.****"***

53. It is the case of the defence that the victim was caught smoking in her room at the hotel for which she was fired from her job. The defence made the suggestion to the victim during her cross-examination to which she stated:

> ***"****It is not a fact that I was scolded by the accused on that day for having smoke (sic) in the hotel room.****"***

54. P.W.2-the brother of the victim in cross-examination admitted to the suggestion made by the defence about the victim having told him about being scolded by the Respondent as he found her smoking in the hotel room. He also admitted that his sister i.e. the victim had a habit of taking alcohol and smoking.

55. P.W.7 is the wife of the Respondent. She would be examined as a prosecution witness. In cross-examination she would state:

> ***"****It is true that in my statement recorded by the police I had stated that on 22.11.2014 I*

*called up my husband from Kalimpong who told me that the newly appointed staff (alleged victim) was fired by him as she was not found fit. It is true that my husband told me that the said girl was caught smoking and consuming alcohol in hotel room and it was risky to keep her in the hotel.***"**

56. The evidence produced by the prosecution probabilises the version of the defence that just prior to the alleged incident complained of by the victim there was an altercation between the victim and the Respondent probably due to the fact that the victim was caught smoking in the hotel room. It is well settled that the accused need not prove his defence. It is enough if he can show by preponderance of probability that the plea taken by him is plausible and raises a reasonable doubt. Then he is entitled to the benefit. In the circumstances the judgment of the Learned Judge cannot be faulted to the extent that she comes to the conclusion that there was an altercation between the victim and the Respondent prior to the alleged incident. However, the question is whether the defence success in probabilising the altercation would lead to the inevitable conclusion that, therefore, it was certain because of the said *animus* that the victim made the false allegation of outraging her modesty.

57. The Learned Judge has held that the evidence of the victim as well as other prosecution witnesses P.W.2, P.W.7, P.W.8 and the Investigating Officer-P.W.13 established that the victim had projected different versions and tried to improve her case.

58. The deposition of P.W.2-the victim's own brother, contradicts and also does not support the deposition of the victim on material points of fact. The evidence of the victim's brother-P.W.2 is vital since the victim herself deposes that she narrated about the incident to him. Although the victim had deposed that after the incident she had tried to speak to her brother on the mobile phone after several attempts to call him from the bathroom of the room where she was allegedly assaulted, P.W.2 did not even mention about it in his deposition. The victim had also deposed that when her brother-P.W.2 came to the hotel after receiving her message she came out of the bathroom and went to her brother and told him about the incident. If that was so P.W.2 ought to have been the first person to have heard the details of the alleged assault from his sister- the victim. He would be thus a material prosecution

witness. However, P.W.2 only deposed that when he asked his sister as to what had happened she said the accused had shouted at her and had tried to catch hold of her hand. There was no whisper from the brother-P.W.2 about the allegation of outraging the modesty of the victim by the Respondent in his deposition. P.W.2 also stated that he and P.W.3 had gone to the hotel after the said P.W.3 had received the message from the victim and further that both of them heard about the incident from the mouth of the victim at the hotel itself pursuant to which they took the Respondent and the victim to the Sadar Police Station, Gangtok where the victim lodged the FIR. There is no arrest memo to verify this fact. The victim also deposes that her brother-P.W.2 came with a friend. P.W.3, however, had a different version to tell the Court. In his deposition P.W.3 stated that he had received a call from P.W.2 who had asked him to come outside the disco where he was working as a bouncer and when he went out and met him he told him that he needed a favour from him and asked him to accompany him to help his cousin who most probably had a fight with her husband. P.W.3 did not whisper anything with regard to what the victim told him and P.W.2 at the hotel when they went there. P.W.2 and P.W.3 were prosecution witnesses. The prosecution is bound by their statements which have been accepted by it as both of them have not been declared hostile and cross examined. The deposition of the P.W.2-the brother of the victim or his friend- P.W.3 does not even suggest that the victim told them that her modesty had been outraged. Thus, two views may be possible in the same set of facts marshalled before the Trial Court. One against the Respondent from the mouth of the victim and one in his favour from the mouth of the victim's own brother-P.W.2 and his friend-P.W.3 who admittedly had been told about the incident by the victim herself.

59. The victim's statement at the time of the FIR was cryptic. No fault can be attributed to that. An FIR need not necessarily be an encyclopaedic account with minute details of every fact that transpired. It is only the first information of commission of a cognizable offence. However, in the said FIR the victim mentioned that when she resisted the Respondent's advances of forcefully trying to kiss her he threatened to throw her out of her job. This statement about the Respondent threatening to throw her out of the job is particularly important because Mr. K. T. Bhutia, submits that it is precisely because of the victim's *animus* against the Respondent for having been thrown out of her job the victim had falsely accused the Respondent of outraging her modesty. The victim said nothing to the Learned Chief Judicial Magistrate while recording her statement under Section 164 Cr.P.C. and to

the Trial Court in her deposition about the threat she allegedly received from the Respondent when she resisted his sexual advances. However, as seen earlier, although the victim denied discussing about the altercation with P.W.2-her brother, he has candidly admitted that the victim had in fact visited him during the afternoon on the date of the incident and told him that she had been fired from her service by the Respondent and that she had also been scolded by him while doing so. There is no comprehensible reason why the victim's own brother-P.W.2 would not tell the Court as to what he heard from the victim about the Respondent having outraged her modesty. This was the afternoon of the same day when the alleged incident took place. He also admitted that the victim had told him that the altercation and scolding was due to the fact that she was caught smoking in the hotel room. In these peculiar circumstances the mention of the factum of being threatened to be thrown out of her job in the FIR, the first contemporaneous complaint regarding the alleged incident, gathers significance. It probabilises the defence version of an altercation between the victim and the Respondent due to which their relationship had become inimical. It also cannot be ruled out that due to this *animus* exaggerated allegation about outraging the modesty of the victim may have been made. There is substantial force in Mr. K. T. Bhutia's submission that there is difference between *"started kissing me"* and *"tried to kiss me"* and a victim would surely not forget a crucial fact when she was forced upon, allegedly by the Respondent. Either of the versions may however, constitute the offence of outraging the modesty of a woman. Equally, a victim of such circumstances facing legal proceedings for the first time out of sheer nervousness could have made inconsistent and sometimes self defeating statements in her deposition. This Court is alive to the fact that while evaluating evidence in a case of outraging the modesty of a woman, no self respecting woman would come forward just to make a humiliating statement against her honour. This Court is also alive to the fact in such cases supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the victim should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. However, the numerous discrepancies in the statements made by the victim under Section 161 and 164 Cr.P.C. and her deposition brought out by the defence in cross-examination makes it extremely difficult to separate the grain from the chaff to arrive at the ethereal truth. The narration of discrepant facts in the statements of the victim being related to the same alleged incident of outraging her modesty sieving the untruth or unacceptable portion of the evidence seems virtually impossible.

The said facts are so inseparable that any attempt to separate them would definitely destroy the substratum on which the prosecution version is founded. A judgment of conviction cannot be based on presumption and probabilities.

60. P.W.2-the victim's brother himself has proved that the victim withheld certain vital information about the altercation she had with the Respondent the same day of the incident. The probability that the incident did occur cannot be ruled out. Equally, the probability about the Respondent's innocence cannot also be ruled out. Some of the discrepancies in the conflicting statements are not minor or inconsequential. Paramount amongst all these is a question which remains unanswered in the end of the trial i.e. why did not the victim's own brother-P.W.2 depose about what the victim had narrated to him when he had gone to the hotel on receiving a message from the victim immediately after the incident? The law, well settled, is that where two reasonable conclusions can be drawn on the evidence on record, this Court should, as a matter of judicial caution, refrain from interfering with the order of acquittal recorded by the Court below. Vital evidence of the inmates or staffs of the hotel where the alleged incident took place who were present have not been brought forth by the prosecution. The evidence of the victim's own brother-P.W.2 and P.W.3-the other person who accompanied him to the hotel on receipt of information from the victim immediately after the incident, does not corroborate the victim's evidence on material particulars of the alleged act of outraging the modesty of the victim. In such circumstances, although it is absolutely true that the victim's evidence, if it is inspires confidence, can stand alone, the Learned Judge has correctly concluded that due to the various discrepancies in the prosecution versions it would not be safe to rely upon her sole testimony to convict the Respondent in the present case. Although Mr. Karma Thinlay laboured hard and well to convince this Court that the material evidence brought forth by the prosecution was enough to bring home the charge of outraging the modesty of the victim the order of acquittal cannot be interfered with because of the presumption of innocence of the Respondent which has been further strengthen by his acquittal. The golden thread, as often stated, which runs through the web of administration of justice in criminal cases, must be respected. The possible view on the evidence adduced in the case pointing to the innocence of the Respondent must be adopted. This Court is afraid that there are no compelling and substantial reasons for interfering with the judgment of acquittal. It is sincerely difficult to hold that the findings of the Trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. It cannot be said that there was no prevarication in the version

of the victim. Attempts to improve upon the evidence at different stages are apparent making it difficult to remain disturbed by the presumed anguish of the victim. A victim of crime of outraging the modesty of a woman is in the same position as an injured witness and should receive the same weight. However, while doing so the presumption of innocence of the accused must also be borne in mind especially when the accused has been acquitted after a trial. The presumption that a victim would not ordinarily tell a lie is but a presumption and that cannot be any basis for assuming that the statement of such a witness is always correct or without embellishment or exaggeration. Minor inconsistencies in the victim's statement which does not affect the substratum or the core ingredients of the alleged offence may be ignored but major discrepancies which disturb the very foundation of the prosecution must be taken note of. Judicial examination of evidence must be focused to extract the truth thereof. Truth however, does not always come in black and white. Shades of grey sometimes shadow the truth. Sometimes the shades of grey may itself be the truth. A delicate balance needs to be maintained between the judicial perception of the anguish of the victim of such crimes and the presumption of innocence of the accused. An inequitable tilt either way may not render balanced justice. While it is true that in an adversarial system of criminal justice administration the evidence adduced would inevitably lead to only one party's success, the solitary goal to search the ethereal truth can only give a quietus to the conflict. A victim's evidence, if it inspires confidence, can be the sole basis for convicting an accused without any corroboration. When a Court is however, confronted with the evidence of a victim strewn with exaggerations, embellishments and inconsistencies it must necessarily seek corroboration in material particulars before convicting an accused. In the present prosecution, corroboration to the inconsistent statement of the victim is wanting and her brother's-P.W.2 statement which could have been a clincher has raised serious doubts on the victim's version itself leaving no alternative but to give the benefit of doubt to the Respondent.

61. This Court, in the peculiar facts of the present case, is thus of the view that the benefit of doubt must be given to the Respondent who had been acquitted by the Trial Court. This Court is in agreement with the conclusion arrived at by the Learned Judge, Fast Track Court, East & North Sikkim at Gangtok in Sessions Trial (F.T.) Case No. 05 of 2016 in the impugned judgement dated 28.12.2016. Consequently the Appeal is dismissed.

SLR (2018) SIKKIM 587

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

W.A No. 01 of 2016

Malvika Foundation and Another ….. APPELLANT

Versus

Human Resource Development Department, Government of Sikkim and Another ….. RESPONDENTS

For the Appellants: Ms. Chitra Sharma, Mr. Shakeel Ahmed, Mr. Yogesh Kumar Sharma and Ms. Zola Megi, Advocates.

For the Respondents: Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. Santosh Chettri and Ms. Pollin Rai, Assistant Government Advocates, and Mr. Bhusan Nepal, Advocate (Legal Retainer, HRDD).

Date of decision: 25th May 2018

A. EIILM University Act, 2006 – S. 47 – mandates identification of mismanagement, maladministration, in-discipline, failure in the accomplishment of the objects of the University and economic hardships in the management system of the University – Direction is to be issued to the University to improve the situation before taking a decision to wind up the University – It is prescribed under proviso that no such action be initiated without affording a reasonable opportunity to show cause – Notice is well-understood, it means communication to a person for the purpose of informing something. Show-cause, which is contemplated under proviso, means to show cause a person on stating reasons as to why a particular action may not be taken against him.

(Para 14)

B. Principles of Natural Justice – Rules of natural justice are not codified cannons, which may be put in a straight jacket. While examining, it is required to be seen whether any prejudice is caused to the party concerned. The alleged prejudice is required to be pleaded specifically – The requirement of natural justice is dependent on the facts and circumstances of the case.

(Para 24)

Petition dismissed.

Chronological list of cases cited:

1. Captain Sube Singh and Others v. Lt. Governor of Delhi and Others, (2004) 6 SCC 440.
2. S. L. Kapoor v. Jagmohan and Others, (1980) 4 SCC 379.
3. Olga Tellis and Others v. Bombay Municipal Corporation and Others, (1985) 3 SCC 545.
4. Aligarh Muslim University and Others v. Mansoor Ali Khan, (2000) 7 SCC 529.
5. Canara Bank and others v. Shri Debasis Das and Others, AIR 2003 SC 2041.
6. P. D. Agrawal v. State Bank of India and Others, (2006) 8 SCC 776.
7. A. S. Motors Private Limited v. Union of India and Others, (2013) 100 SCC 114.
8. CMJ Foundation and Others v. State of Meghalaya and Others, WP (C) No.177/2014.

JUDGMENT

The Judgement of the Court was delivered by ***Satish K. Agnihotri, J***

Impugning the Judgment and Order dated 02.11.2016 rendered in WP(C) No.33 of 2015 by the learned Single Judge, the instant Appeal is filed by the Writ Petitioners (Appellants herein).

2. Learned Single Judge, on examination, came to the conclusion that

the notice was issued to the Writ Petitioners/ Appellants herein, on 29.01.2015 and also no prejudice whatsoever was caused to the Writ Petitioners and as such, the Writ Petition was dismissed.

3. The provenance of the *lis* is that the Appellant No.2-University came into existence under the provisions of the Eastern Institute for Integrated Learning in Management University, Sikkim Act 2006 (hereinafter referred to as EIILM University Act, 2006). The Appellant No. 2-University, after incorporation, commenced functioning as full-fledged University located at Jorethang, South Sikkim as notified on 26.05.2006 by the Human Resource Development Department (HRDD), Government of Sikkim. The University Grant Commission (UGC) approved the academic and other infrastructure of the Appellant No. 2, on inspection, vide letter dated 22.07.2008.

4. It is averred in the pleadings that a *suo motu* FIR was lodged against officials of the Appellant No. 2-University on the allegation of violation of the UGC and other statutory norms, on 01.09.2012, under provisions of Sections 406/420/467/120B/34 of the Indian Penal Code, 1860 (in short, IPC) by Sikkim Police at P.S. Jorethang. The charge-sheet filed thereon is pending consideration in the file of the Court of Chief Judicial Magistrate, South and West, at Namchi. A second FIR, being FIR No.92 of 2013, was also registered on the same grounds at Sadar Police Station against the officials of the Appellant No.2, which was subsequently quashed on 04.06.2013 in Crl. Misc. Case No.12 of 2013 by the High Court. The matter was referred to the Enforcement Directorate also for further investigation and the case was registered under Sections 420/467/ 120B of the IPC against the officials of the Second Appellant and others.

5. It has come on record that the bank accounts of the Appellant No.2-University were attached in the process of investigation. Under this prevailing confusion, it is stated that a chaotic situation was created, followed by mass resignations and disruption of academic activities. It is further averred that facing acute financial crisis, the Petitioners/Appellants herein made a representation to the Directorate of Higher Education, HRDD, Government of Sikkim on 08.01.2015, seeking indulgence of the HRDD by taking over the University and making it functional. It appears that several communications were sent thereafter to the University as final reminder on 12.01.2015, calling upon the Appellant No.2-University to

conduct the examination in time. Subsequently, the Appellant No. 2-University was served a notice under heading, "Request for Conduct of Examination" on 29.01.2015, wherein it was stated that activities of the University has been affected due to maladministration, mismanagement, indiscipline, failure in accomplishment of the objects of the University and economic hardships in the management of the University. The Appellant No.2-University was called upon to safeguard the students' interest and restore discipline in the University, failing which, the Appellant No.2-University was informed that the State Government would take necessary action as per Section 47(2) of the EIILM University Act, 2006. Responding to the said communication, Mr. R. P. Sharma, Acting Vice Chancellor of the University sent an e-mail to the Director, Higher Education on 31.01.2015, stating that keeping in mind the interest of the students, the University is agreeable for appointment of an independent person or any person other than Mr. P. C. Rai to get the examinations conducted.

6. On 09.02.2015, the Trustee, Malvika Foundation was called upon to submit details regarding functioning of the Appellant No.2-University. On not receiving the satisfactory response to the notice dated 29.01.2015 and further on examination of details of requisition by the HRDD on 09.02.2015, after waiting for a reasonable period of almost three months, the Cabinet took a decision on 28.04.2015 to dissolve the Appellant No.2-Univerity, which resulted into passing of the formal order on 08.05.2015. Calling in question the legality and validity of the said Cabinet decision as well as the consequential order dated 08.05.2015, the Writ Petition was filed on 04.06.2015.

7. The sole ground of challenge in the Writ Petition as well as in the Appeal is that the order dated 08.05.2015 of the Human Resource Development Department, Government of Sikkim, dissolving the Appellant No. 2-University, is not in accord with the due procedure prescribed under Section 47 of the EIILM University Act, 2006.

8. The facts as projected by the Appellants are not in dispute, except that communication dated 09.02.2015 does not bear proper address for which there is no pleading and as such, we proceed to examine the applicability of the safeguards prescribed under Section 47 of the EIILM University Act, 2006, before taking decision to wind up the University.

9. Mr. Karma Thinlay, learned Senior Government Advocate appearing for the Respondents, in response, would contend that the Appellants were noticed on several occasions about the maladministration and ill-functioning of the University. The University was unable to conduct the examination, there was indiscipline, the interest of the students was in jeopardy and, as such, they were served a notice on 29.01.2015 to hold the examination immediately within fifteen days. In failure, it was also stated that necessary action would be taken under provisions of Section 47(2) of the EIILM University Act, 2006. Moreover, the Appellants have also not shown any prejudice caused to them. The State authorities have, on passing the order dated 08.05.2015, admitted the students in other institutions. Prior to this, the Appellants have also made a request to take over the institution expressing its difficulty to make the University functional on 08.01.2015. Taking all the facts into consideration, the Cabinet took the decision to dissolve the University, which resulted into passing of the order dated 08.05.2015 and there is no prejudice as the Appellants had sufficient notice. The Appellants have failed to improve the administration and conduct examination in time as advised by the State Government, which necessitated dissolution of the University in the interest of students' education.

10. The question that arises for our considerations is as to whether the notice dated 29.01.2015 was the show-cause notice as contemplated under proviso to sub-section 3 of Section 47 of the EIILM University Act, 2006? If not, whether non-issuance of notice can be a ground to set aside the impugned order when no prejudice whatsoever was pleaded to have been caused to the Appellants/ Writ Petitioners.

11. To appreciate the lis in its proper perspective, it is apposite to extract relevant provisions of the EIILM University Act, 2006 –

> **"**47. (1) If the Sponsor proposes dissolution of the University in accordance with the law governing its constitution or incorporation, it shall give at least 12 (twelve) months notice in writing to the State government and it shall ensure that no new admissions to the University are accepted during the notice period.

(2) On identification of mismanagement, mal-administration, in-discipline, failure in the accomplishment of the objects of University and economic hardships in the management systems of University, the State Government would issue directions to the management system of University. If the directions are not followed within such time as may be prescribed, the right to take decision for winding up of the University would vest in the State Government.

(3) The manner of winding up of the University would be such as may be prescribed by the State Government in this behalf:

Provided that no such action will be initiated without affording a reasonable opportunity to show cause to the Sponsor.

.....……...……"

12. On studied examination, it is manifest that Section 47 of the EIILM University Act, 2006 contemplates dissolution of the University. Sub-Section (2) provides for identification of mismanagement, maladministration, in-discipline, failure in the accomplishment of the objects of University and economic hardships in the management systems of University. This provision further contemplates issuance of directions to the management of the University prescribing the timeline to rectify the deficiencies before taking a decision for winding up the University. Proviso to Sub-Section (3) prescribes that no such action be initiated without affording a reasonable opportunity to show cause to the Sponsor. Indisputably, in the case on hand, the First Respondent is a Sponsor of the Appellant No.2-University.

13. In the case on hand, the Appellants were sent a communication on 12.01.2015, under caption "final reminder for conduct of examination", to conduct the examination immediately to protect interest of the students as they were facing a lot of confusion and apprehension about their future. On bare reading of the communication, it is manifest that the University was informed earlier by telephonic calls and e-mail communications to conduct

the examinations. At this stage, it is apt to refer the representation dated 08.01.2015 made by the Appellant No.2-University to the Director, Higher Education, stating clearly that the University is not in a position to function properly due to financial crisis and also desertion by the staff. Thus, the Government was requested to take over the institution in the interest of the society, at large and in the interest of the students to make it functional. Eventually, a notice was issued on 29.01.2015. On careful consideration, it is evident that the notice indicates the reasons that there is maladministration, mismanagement, in-discipline, failure in accomplishment of the objects of the University and economic hardships in the management and as such, the University was called upon to conduct the examinations within fifteen days to safeguard the interest of the students. It is also clearly stated that in failure or non-compliance, the State Government would take necessary action as per Section 47 of the EIILM University Act, 2006. This notice is in accord with to the requirements of Section 47 read with proviso, as it clearly indicates that in failure, the State Government would take action under Section 47(2) of the EIILM University Act, 2006, i.e. wind up the University.

14. Section 47 mandates identification of mismanagement, maladministration, in-discipline, failure in the accomplishment of the objects of the University and economic hardships in the management system of the University. Thereafter, direction is to be issued to the University to improve the situation before taking a decision to wind up the University. It is prescribed under proviso that no such action be initiated without affording a reasonable opportunity to show cause.

Notice is well-understood, it means communication to a person for the purpose of informing something. Show-cause, which is contemplated under proviso, means to show cause a person on stating reasons as to why a particular action may not be taken against him.

15. It is well established as a general rule that when a statute provides for exercise of power in a particular manner then the power has to be exercised only in the said manner. The Supreme Court in ***Captain Sube Singh and others*** v. ***Lt. Governor of Delhi and others***[1] considered this aspect and held as under:-

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[1] (2004) 6 SCC 440

> **"29.** In *CIT* v. *Anjum M.H. Ghaswala* (2002) 1 SCC 633 a Constitution Bench of this Court reaffirmed the general rule that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection *Dhanajaya Reddy* v. *State of Karnataka* (2001) 4 SCC 9) The statute in question requires the authority to act in accordance with the rules for variation of the conditions attached to the permit. In our view, it is not permissible to the State Government to purport to alter these conditions by issuing a notification under Section 67(1)(d) read with sub-clause *(i)* thereof.**"**

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16. On several occasions, the principle of natural justice was deliberated in many cases by the Supreme Court. The Supreme Court laid down broad features to observe principle of natural justice.

17. In ***S. L. Kapoor*** v. ***Jagmohan and others***[2]**,** relied on by Mr. Shakeel Ahmed, learned Counsel for the Appellants, the Supreme Court has examined the issue of failure to observe rules of natural justice and held as under:-

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> **"17.** Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where

[2] (1980) 4 SCC 379

conclusions are controversial, however, slightly, and penalties are discretionary.**"**

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18. In ***Olga Tellis and others*** v. ***Bombay Municipal Corporation and others***[3], cited by Mr. Shakeel Ahmed, learned Counsel for the Appellants, the Supreme Court observed as under:-

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" 45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ("Hear the other side") could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. ……**"**

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19. Mr. Karma Thinlay, learned Senior Government Advocate for the Respondents, has referred and relied on observations of Supreme Court in ***Aligarh Muslim University and others*** v. ***Mansoor Ali Khan***[4], wherein it was held as under:-

[3] (1985) 3 SCC 545
[4] (2000) 7 SCC 529

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" 22. In *M.C. Mehta* [(1999) 6 SCC 237] it was pointed out that at one time, it was held in *Ridge* v. *Baldwin* [1964 AC 40 : (1963) 2 All ER 66 (HL)] that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In *S.L. Kapoor* v. *Jagmohan*[(1980) 4 SCC 379] Chinnappa Reddy, J. followed *Ridge* v. *Baldwin* [1964 AC 40 : (1963) 2 All ER 66 (HL)] and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.

23. Chinnappa Reddy, J. in S.L. Kapoor case [(1980) 4 SCC 379] laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43 : 1984 SCC (L&S) 62] Sabyasachi Mukharji, J. (as he then was)

also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)

> "[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. … There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] . In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in Rajendra Singh v. State of M.P. [(1996) 5 SCC 460]

25. The "useless formality" theory, it must be noted, is an exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta [(1999) 6 SCC 237] referred to above. This Court surveyed

the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.**"**

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20. While considering scope and ambit of Regulations 6(18) and 6(21) of the Canara Bank Officer Employees' (Conduct) Regulations, 1976, the Supreme Court in ***Canara Bank and others*** v. ***Shri Debasis Das and others***[5] observed as under :-

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" 12. Residual and crucial question that remains to be adjudicated is whether principles of natural justice have been violated; and if so, to what extent any prejudice has been caused. It may be noted at this juncture that in some cases it has been observed that where grant of opportunity in terms of principles of natural justice does not improve the situation, "useless formality theory" can be pressed into service.

13. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal

[5] AIR 2003 SC 2041

way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

14. The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

15. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. ……**"**

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21. In ***P.D. Agrawal*** v. ***State Bank of India and others***[6], the Supreme Court held as under:-

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" 30. The principles of natural justice cannot be put in a straitjacket formula. It must be seen in

[6] (2006) 8 SCC 776

circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea change.

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39. Decision of this Court in S. L. Kapoor v. Jagmohan [(1980) 4 SCC 379] whereupon Mr Rao placed strong reliance to contend that non-observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice, as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] and Rajendra Singh v. State of M.P. [(1996) 5 SCC 460] the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of audi alteram partem, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula. (See Viveka Nand Sethi v. Chairman, J&K Bank Ltd.[(2005) 5 SCC 337 : 2005 SCC (L&S) 689] and State of U.P. v. Neeraj Awasthi [(2006) 1 SCC 667 : 2006 SCC (L&S) 190 : JT (2006) 1 SC 19] . See also Mohd. Sartaj v. State of U.P. [(2006) 2 SCC 315 : 2006 SCC (L&S) 295 : (2006) 1 Scale 265])**"**

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22. In ***A. S. Motors Private Limited*** v. ***Union of India and others***[7], the Supreme Court further examined the ambit of rules of natural justice and held as under:-

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> **" 8.** Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the tribunal and the rules and regulations under which it functions. A court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are legion. We may refer to only some of the decisions on the subject which should in our opinion suffice.**"**

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23. Mr. Shakeel Ahmed, learned Counsel for the Appellants, has referred to a Judgment dated 16.07.2015 rendered by learned Single Judge

[7] (2013) 100 SCC 114

of the High Court of Meghalaya in ***CMJ Foundation and Ors.*** v. ***State of Meghalaya and Ors.*** [WP (C) No.177/2014], wherein the High Court, on examination, came to the conclusion that the State Government has not followed the provisions of CMJ University Act, 2009; the Meghalaya Private Universities (Regulation of Establishment and Maintenance of Standards) Act, 2012, strictly and directed to act fairly in the interest of justice following principles of natural justice, whereagainst a Special Leave Petition being SLP (C) No(s). 28831/2016 was filed by the State Government before the Supreme Court of India and the same was dismissed on 21.10.2016. The facts involved therein are not identical to the facts of the instant case.

24. A common thread running through the aforestated enunciation of law on principles of natural justice, propounds that Rules of Natural Justice are not codified cannons, which may be put in a straight jacket. While examining, it is required to be seen as to whether any prejudice is caused to the party concerned. The alleged prejudice is needed to be pleaded specifically. The requirement of natural justice is dependent on the facts and circumstances of the case. The useless formality theory be also examined in the facts of the case. In the case on hand, the appellants have not pleaded any prejudice either before the writ court or in the appeal. Moreover, the Appellant No.2-University had sufficient notice and also reasonable time after 29.01.2015 till a decision was taken by Cabinet on 28.04.2015, to rectify the deficiencies in the administration and also by conducting the examination. The Appellant No.2-University was clearly warned in the show-cause notice dated 29.01.2015 that in failure, the State Government may take a decision under Section 47(2) of the EIILM University Act, 2006, i.e. the dissolution or winding up of the University.

25. On anxious and careful examination of the facts and legal provisions, we are of the considered view that the impugned Judgment and Order rendered by learned Single Judge is just and proper, warranting no interference.

26. Accordingly, the Appeal is dismissed.

27. No order as to costs.

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