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EQUIVALENT CITATION

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SUBJECT INDEX

Code of Civil Procedure – O. 8 R. 6A – Time Limit to File Counter-Claim by Defendant – Defendant cannot be permitted to file counter-claim after the issues are framed and after the suit has proceeded substantially (*In re. Ashok Kumar Kalra* discussed) – It is seen that the Hon'ble Supreme Court has made it clear in illustration (x) that in any case, discretion to entertain filing of the counter-claim cannot be exercised after framing of issues – Held: In the instant case, counter-claim filed after issues were framed and the plaintiff and his constituted attorney had filed evidence and therefore, there is no merit in the petition.
Shri Roshan Giri and Another* v. *Shri Rakesh Gurung and Others ***1038-A***

Code of Civil Procedure – O. 14 R. 5 – Framing of Additional Issue – When the order of rejection of counter-claim is upheld, framing of an additional issue in the light of the counter-claim does not arise.
Shri Roshan Giri and Another* v. *Shri Rakesh Gurung and Others ***1049-A***

Code of Criminal Procedure, 1973 – S. 439 – Bail – Accused of offences under S. 376, I.P.C read with S. 4 of the POCSO Act, 2012 – Held: Alleged incident occurred on 09.07.2020 and the medical report of the victim is dated 10.07.2020. The medical report *prima facie* reveals no visible injuries either on the person of the victim or on her private parts. The vaginal wash sample was admittedly also collected and Learned Additional Public Prosecutor conceded that the vaginal wash tested negative for any spermatozoa – Fit case where the petitioner can be released on bail subject to the imposition of certain conditions.
Anthony Rai* v. *State of Sikkim ***1035-A***

Constitution of India – Article 226 – By the letter dated 15.03.2020, respondent No.1 confirmed having accepted the Bid of the petitioner and awarded them the contract for the work amounting to ₹ 1248,44,20,355/- – In terms of para 6.0 of the Letter of Acceptance (LOA), the petitioner was requested to submit the Performance Security in the form of Bank Guarantee, within twenty-eight days of issue of the LOA in terms of sub-clause 4.2 of Particular Conditions of Contract – Twenty-eight days stipulated in the LOA expired on 12.04.2020 and that the respondent No.1 extended the time for submission of Performance Bank Guarantee on various dates initially up to

31.07.2020 and thereafter up to 31.08.2020 and 05.10.2020. The last extension was allowed up to 05.11.2020. The petitioner, instead of abiding with the time frame afforded to it in terms of the LOA by the pespondents as well as extensions granted up to 05.11.2020, failed to adhere to the opportunity extended upto 05.11.2020 with the feeble explanation of intervening holidays and festivals in the State of Maharashtra – The admitted position is that the petitioner, who was the successful Bidder, failed to sign the agreement within the specified time limit or during the extensions given by the respondent Companies from April, 2020 through November, 2020 apart from which the petitioner failed to furnish the required Performance Security – The petitioner has failed to make out a *prima facie* case nor is the balance of convenience and inconvenience tilted in its favour nor have they made out a case of irreparable loss and injury for the purposes of granting them the reliefs – The Order of the Court dated 01.12.2020 requiring the parties to maintain status quo and the Order dated 02.12.2020 directing respondents No.1 and 2 to stay their hands from expending the encashed amount vacated. Petitioner failed to furnish the required Performance Security – The petitioner has failed to make out a prima facie case nor is the balance of convenience and inconvenience tilted in its favour nor have they made out a case of irreparable loss and injury for the purposes of granting them the reliefs – The Order of the Court dated 01.12.2020 requiring the parties to maintain *status quo* and the Order dated 02.12.2020 directing respondents No.1 and 2 to stay their hands from expending the encashed amount vacated.

Gammon Engineers and Contractors Private Limited* v. *Lanco Teesta Hydro Power Limited and Others ***994-A***

Constitution of India – Article 226 – Service – Both the petitioners do not have the necessary eligibility criteria of eight years of regular service required for the promotional posts of Post Graduate Teacher (Hindi). Admittedly, again the petitioners did not apply for the promotional posts. In the circumstances, the question of them continuing their service in the promotional posts they held before the issuance of the impugned office orders, cancelling their promotion orders, does not arise.

Shri Ganesh Bhandari and Another* v. *State of Sikkim and Others ***1101-A***

Constitution of India – Article 226 – Service – The impugned office orders cancelled the petitioners' appointment to the promotional posts of Post Graduate Teacher (Hindi). The promotion orders were issued to the petitioners apparently without even they applying for it or having the

necessary qualifications. Therefore, it cannot be said that they had established right to be heard before the apparently illegal appointment orders dated 14.05.2015 were cancelled – There is also no explanation given by the petitioners as to how they accepted their promotional orders dated 14.05.2015, although they had not applied for it and admittedly, not qualified too – The records reveal that they continued to enjoy the promotional posts of Post Graduate Teacher (Hindi) for more than a year and two months before the authorities realised their folly and rectified the same by issuing the impugned office orders cancelling their promotional orders – It was incumbent upon them to have notified the authorities of their having wrongly promoted them, although they had not applied for promotion, at least on the receipt of the promotional orders dated 14.05.2015 – They have enjoyed more than a year's salary, perks for holding posts they were not even eligible for – The petitioners have also disqualified themselves by their own error of judgment to their own detriment. They cannot at this juncture be considered for the direct recruitment posts advertised in the year 2014 as well. However, this would not be an impediment to them to be considered for either promotional or direct recruitment avenues in the future.

Shri Ganesh Bhandari and Another* v. *State of Sikkim and Others ***1101-B***

Hindu Law – Principle – Essence of a coparcenary under Mitakshara Law is unity of ownership – The normal state of every Hindu joint family is one of jointness. Every such family is joint in food, worship and estate in the absence of proof of division and in the absence of any positive steps taken to effect a partition (*In re. Adiveppa* discussed) – In a joint family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined – A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth, an interest in the joint or coparcenary property (*In re. Surjit Lal Chhaabda* discussed)

Mahesh Agarwal and Others* v. *Umesh Agarwal and Others ***1052-B***

Hindu Law – Whether a Power of Attorney is required to be executed in favour of a *Karta* by coparcener under the Mitakshara School of Hindu Law – A property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The Manager of a joint

family is called *"Karta."* So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family property including even charitable properties and is presumed to be the Manager until the contrary is shown. The *Karta* as the head of the family, has control over the income and expenditure and he is the custodian of the surplus, if any. The Manager has power over the income of the joint family pertaining to maintenance, education, marriage and other religious ceremonies of the coparceners and of the members of their respective families. He also has power to contract debts for family purpose and family business. Held: that no Power of Attorney is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law (*In re. Sunil Kumar* discussed).
Mahesh Agarwal and Others* v. *Umesh Agarwal and Others ***l052-D***

Indian Evidence Act, 1872 – Proof of Contents of Documents – Mere marking of an Exhibit does not dispense with its proof. Once the contents are proved, should the opposing party fail to raise objections or extract any contradictory evidence by way of cross-examination, then the contents of the document can be accepted as evidence. The probative value of a document must be established in the absence of which, the document deserves to be disregarded.
Mahesh Agarwal and Others* v. *Umesh Agarwal and Others ***1052-C***

Indian Evidence Act, 1872 – S. 67 – Proof of Signature and Handwriting of a Person Alleged to Have Signed or Written Document Produced – The production of a document purported to have been signed or written by a certain person is no evidence of authorship – As per the rules of evidence, a person who makes an assertion must prove it. The handwriting can be proved by circumstantial evidence besides direct evidence but in the instant case, the defendants failed to furnish any other documents to indicate that Exhibit "G" was authored by Bhaskaran and although the handwriting may be similar to that in Exhibit-1, this, by no means establishes that it is indeed the handwriting of Bhaskaran.
Mahesh Agarwal and Others* v. *Umesh Agarwal and Others ***1052-E***

Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 2(33) – Heinous Offences – There are many offences for which the maximum punishment is more than seven years, but for which the minimum sentence is less than seven years or for which there is no minimum sentence prescribed – Held: An offence which does not provide a minimum sentence

of seven years cannot be treated to be a heinous offence – Such offences shall be treated as serious offences (*In re. Shilpa Mittal* discussed).
Shri Sandeep Rai* v. *State of Sikkim ***1007-A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay in Fling Appeal – Appellant applied for certified copy of the impugned judgment on 01.11.2019, it was made available only on 03.02.2020 – The delay occurred further due to the nation wide lockdown and the inability thereby to appoint a Counsel for filing the appeal – On 11.06.2020, Counsel was appointed and the appeal filed on 24.06.2020 – Delay sufficiently explained and condoned – *Suo Motu Writ Petition (Civil) No(s). 3/2020, In Re: Cognizance for Extension of Limitation* discussed.
The Branch Manager, National Insurance Company Limited
v. ***Rohit Kumar Gurung and Others*** ***991-A***

Personal Laws – Presumption – In general, it may be said that in matters of status, every person is governed by the law of his personal status (*In re. Duggamma, Kom Krishna Bhat* discussed) – Where a Hindu family migrates from one State to another, the presumption is that it carries with it, its personal law, that is, the laws and customs as to succession and family relations prevailing in the State from which it came. However, this presumption can be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated (*In re. Bikal Chandra Gope* discussed.
Mahesh Agarwal and Others* v. *Umesh Agarwal and Others ***1052-A***

Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 9 – Penetrative Sexual Assault – Aggravated sexual assault – In absence of any statement regarding penetration in the evidence of PW-1, coupled with the evidence of PW-9, we are of the considered opinion that prosecution has failed to prove beyond reasonable doubt that there was any penetrative sexual assault – *"chara"* does not necessarily mean penetrative sexual assault. The word *"chara"* in Nepali may be used to describe a number of things vulgar including, but not limited to, penetrative sexual assault (*In re. Dil Kumar Bahun* discussed) – Satisfied that the prosecution has been able to establish that the appellant is guilty of aggravated sexual assault within the meaning of S. 9(l), 9(m) and 9(n) of the POCSO Act.
Shri Sandeep Rai* v. *State of Sikkim ***1007-B***

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 – Workplace – Definition – S. 2(o) – The complaint was not with regard to an isolated incident at the wedding reception but was also with regard to other incidents, one of which transpired in the office of the petitioner. It cannot be argued that the petitioner's office is not a "workplace". S. 9 of the Act of 2013 provides that a complaint of sexual harassment at workplace can be made within a period of three months from the date of incident or in case of a series of incidents, within a period of three months from the date of last incident. The last incident transpired on 05.05.2019 and the complaint was filed on 12.05.2019, within seven days after the date of the last incident. In such circumstances, *prima facie*, it cannot be said that the Internal Complaints Committee did not have the jurisdiction to examine the complaint filed by the petitioner – It is felt necessary to leave the question as to whether the incident at the wedding reception would come within the meaning of "sexual harassment at workplace" as provided in S. 9 to be decided by the Executive Authority.

Silajit Guha* v. *Sikkim University and Others ***1022-A***

University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 – Regulation 8 –Process of Conducting Inquiry – A composite reading of all the sub-clauses of Regulation 8, makes it evident that the Executive Authority could not have taken the final step of terminating the petitioner on the recommendation of the ICC before the thirty days period provided to him under Regulation 8(5) to prefer an appeal – If during the period of thirty days, the aggrieved person prefers an appeal, then the Executive Authority must await the final outcome of the appeal before taking the final step, as in the present case, issuing the termination order dated 28.06.2019 – If the Executive Authority took the final step, as was done in the present case, before the expiry of the thirty days period, then prejudice would be writ large – During the pendency of the appeal before the Executive Council, his termination order, bearing No. 201/2019 dated 28.06.2019, be kept in abeyance until the final decision in the pending appeal.

Silajit Guha* v. *Sikkim University and Others ***1022-B***

SLR (2020) SIKKIM 991

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

I.A. No. 01 of 2020 in M.A.C. App. No. 03 of 2020

The Branch Manager,
National Insurance Company Limited ….. APPELLANT

Versus

Rohit Kumar Gurung and Others ….. RESPONDENTS

For the Appellant: Mr. Madan Kumar Sundas and Mr. Sushant Subba, Advocates.

For Respondent 1-3: Ms. Vidya Lama and Mr. N.T. Sherpa, Advocates.

For Respondent No. 4: Mr. K.B. Chettri, Advocate.

For Respondent No. 5: Mr. Umesh Gurung, Advocate.

Date of decision: 7th December 2020

A. Motor Vehicles Act, 1988 –S. 173 (1) – Condonation of Delay in Fling Appeal – Appellant applied for certified copy of the impugned judgment on 01.11.2019, it was made available only on 03.02.2020 – The delay occurred further due to the nation wide lockdown and the inability thereby to appoint a Counsel for filing the appeal – On 11.06.2020, Counsel was appointed and the appeal filed on 24.06.2020 – Delay sufficiently explained and condoned – *Suo Motu Writ Petition (Civil) No(s). 3/2020, In Re: Cognizance for Extension of Limitation* discussed.

(Paras 2, 5 and 6)

Application allowed.

Case cited:

1. In Re: Cognizance for Extension of Limitation, Suo Motu Writ Petition (Civil) No(s). 3/2020.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. I.A. No.01 of 2020 is an application filed by the Appellant under Section 173(1) of the Motor Vehicles Act, 1988 ("M.V. Act") seeking condonation of delay of sixty three days in filing the Appeal.

2. Learned Counsel for the Appellant submits that the delay occurred on account of the fact that the impugned Award was passed by the Learned Member, Motor Accidents Claims Tribunal, East Sikkim at Gangtok in M.A.C.T. Case No.71 of 2017 on 31.10.2019. Although the Appellant applied for a Certified Copy of the impugned Judgment on 01.11.2019, it was made available only on 03.02.2020. The Branch Office at Gangtok was forwarded the Copy by the Counsel and received by them on 05.02.2020. Thereafter it was forwarded to the Regional Office at Kolkata on 13.02.2020 and returned with the instructions from the Kolkata Regional Office to the Branch Office at Gangtok to file the Appeal on 19.03.2020. On instructions thereof, on 20.03.2020, Counsel was appointed to file the Appeal. The ninety days limitation expired on 03.05.2020. The delay occurred further due to the nation wide lockdown and the inability thereby to appoint a Counsel for filing the Appeal. On 11.06.2020, the Counsel was appointed and the Appeal filed on 24.06.2020 and hence it is prayed that the grounds for delay have been detailed and the delay of sixty three days may be condoned.

3. Opposing the delay of sixty three days, Learned Counsel for the Respondents submitted that the Appellant had sufficient time to file the Appeal in terms of the provisions of law and the Courts were open from the month of April, 2020 and the Appeal could well have been filed Online. Hence, the Petition deserves no consideration.

4. I have heard Learned Counsel for the parties at length and considered their submissions.

5. The Hon'ble Supreme Court vide its Order dated 23.03.2020 in Suo Motu Writ Petition (Civil) No(s).3/2020, *"In Re:Cognizance for Extension of Limitation"* had ordered *inter alia* as follows;

> *"This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/ suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).*
>
> *To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings."*

6. Having considered the detailed grounds put forth by the Learned Counsel for the Appellant in the Petition and his submissions and also bearing in mind the ratio of the Hon'ble Supreme Court *supra*, I am of the considered opinion that the delay has been sufficiently explained and deserves to be and is accordingly condoned.

7. Consequently I.A. No.01 of 2020 is allowed and disposed of.

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SLR (2020) SIKKIM 994
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

I.A. No. 01 of 2020 in WP(C) No. 38 of 2020

Gammon Engineers and Contractors Private Limited ….. PETITIONER

Versus

Lanco Teesta Hydro Power Limited and Others ….. RESPONDENTS

For the Petitioner: Mr. Arunabh Choudhury, Mr. Thupden Youngda and Mr. Dechen Wangdi Lachungpa, Advocates.

For Respondent 1: Mr. A.K. Upadhyaya, Senior Advocate with Ms. Rachhitta Rai, Advocate.

For Respondent No. 2: Ms. Maninder Acharya, Senior Advocate with Mr. Om Prakash Shukla, Advocate.

For Respondent No. 3: None.

Date of decision: 7th December 2020

A. Constitution of India – Article 226 – By the letter dated 15.03.2020, respondent No.1 confirmed having accepted the Bid of the Petitioner and awarded them the contract for the work amounting to ₹ 1248,44,20,355/- – In terms of para 6.0 of the Letter of Acceptance (LOA), the petitioner was requested to submit the Performance Security in the form of Bank Guarantee, within twenty-eight days of issue of the LOA in terms of sub-clause 4.2 of Particular Conditions of Contract – Twenty-eight days stipulated in the LOA expired on 12.04.2020 and that the respondent No.1 extended the time for submission of Performance Bank Guarantee on various dates initially up to 31.07.2020 and thereafter up to 31.08.2020 and

05.10.2020. The last extension was allowed up to 05.11.2020. The petitioner, instead of abiding with the time frame afforded to it in terms of the LOA by the pespondents as well as extensions granted up to 05.11.2020, failed to adhere to the opportunity extended upto 05.11.2020 with the feeble explanation of intervening holidays and festivals in the State of Maharashtra – The admitted position is that the petitioner, who was the successful Bidder, failed to sign the agreement within the specified time limit or during the extensions given by the respondent Companies from April, 2020 through November, 2020 apart from which the petitioner failed to furnish the required Performance Security – The petitioner has failed to make out a *prima facie* case nor is the balance of convenience and inconvenience tilted in its favour nor have they made out a case of irreparable loss and injury for the purposes of granting them the reliefs – The Order of the Court dated 01.12.2020 requiring the parties to maintain *status quo* and the Order dated 02.12.2020 directing respondents No.1 and 2 to stay their hands from expending the encashed amount vacated.

(Paras 12, 13, 14 and 15)

Application dismissed.

ORDER

Meenakshi Madan Rai, J

1. The Petitioner, by filing the instant Writ Petition assails the Communication, dated 06.11.2020, issued by the Respondent No.1 by which the Award granted to the Petitioner vide Letter of Acceptance, dated 15.03.2020 for *"Construction of Balance Civil Works Package: Lot-II for Underground Power House and Transformer Cavern, Part of HRT-I and HRT-II, Surge Shafts, Pressure Shafts and Adits, TRT and other associated Structures etc. of Teesta-VI HE Project, Sikkim,"* amounting to a sum of Rs.1248,44,20,355/- (Rupees twelve hundred and forty eight crores, forty four lakhs, twenty thousand, three hundred and fifty five) only, was annulled and the Bid Security of Rs.10,00,00,000/- (Rupees ten crores) only, dated 16.01.2020 issued by the Bank of Baroda, CFS Branch, Mumbai, is sought to be forfeited by the Respondents No.1 and 2.

2. Along with the Writ Petition, I.A. No.01 of 2020 has also been filed seeking the following reliefs;

"*a.* *That the Hon'ble Court may be pleased to pass an ex-parte ad-interim order staying the effect and operation of the impugned communication No.LTHPL/Teesta-VI/CEO/2020/580 dated 06.11.2020 issued by the Respondent No.01 vide which LOA No. LTHPL/Teesta- VI/2020/255-62 dated 15.03.2020 was annulled and Bid Security submitted vide BG. No.29101GPER003820 dated 16.01.2020 issued by Bank of Baroda, CFS Branch, Mumbai having value INR 10 Crores to NHPC is sought to be forfeited; and*

b. *That the Hon'ble Court may be pleased to pass an ex-parte ad-interim order directing the Respondent No.01 to forthwith accept the Security Performance by way of Bank Guarantee by*(sic) *dated 21.11.2020 being BG. No.2910IGP001238220 issued by the Respondent No.3 and thereafter take necessary consequential steps in furtherance of the LOA dated 15.03.2020; and/or*

c. *That the Hon'ble Court be pleased to issue an ex-parte ad-interim order or direction to the Respondent No.01 and 02 restraining them from encashing the security bid in the form of BG. No.29101GPER003820 dated 16.01.2020 issued by Bank of Baroda, CFS Branch, Mumbai having value INR 10 Crores to NHPC and further restraining the Respondent No.03 from honouring any such request made by the Respondent Nos.01 and 02 for encashment of the said Bank Guarantee; and*

d. *Pass any other appropriate order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

3. Records of the Registry reveal that the Writ Petition and I.A. No.01 of 2020 were submitted before the Registry on 27.11.2020 and resubmitted on 28.11.2020.

4. Caveat Petition No.10 of 2020 was filed by the Respondent No.1 on 25.11.2020. Registry informs that the Caveator was informed of the filing of the Writ Petition. On such information, Counsel for the Respondent No.1 and Respondent No.2 entered appearance on 30.11.2020.

5. The I.A. *supra* was accordingly taken up for hearing on 30.11.2020. After the hearing commenced and Learned Counsel for the Petitioner made his submissions for some time, on account of network failure the hearing was discontinued and ordered to be listed on the next day (i.e. 01.12.2020). On 01.12.2020, Learned Counsel for the Petitioner and Respondents No.1 and 2 were heard at length and Orders reserved. In the interregnum, the parties were directed to maintain *status quo* as on 01.12.2020. On 02.12.2020, on being mentioned by Learned Counsel for the Petitioner, the matter was taken up. As per Learned Counsel for the Petitioner, although this Court had directed that the parties shall maintain *status quo* as on 01.12.2020, however, the Bank Guarantee for Bid Security of Rs.10,00,00,000/- (Rupees ten crores) only, had been transferred and encashed by the Respondent Companies on 01.12.2020. Consequently, vide Order dated 02.12.2020, the Respondents No.1 and 2 were directed to stay their hands from utilization of the encashed amount till further orders of this Court.

6. Now reverting to the I.A. No.01 of 2020, Learned Counsel Mr. Arunabh Choudhury for the Petitioner advanced the argument that an Online Bid was invited by the Respondent No.2 NHPC Ltd. on behalf of Respondent No.1 Lanco Teesta Hydro Power Limited ("LTHPL") vide Notice Inviting E-Tender, dated 06.09.2019. The Petitioner submitted its Bid for the said Contract towards which, a Bank Guarantee for Bid Security, dated 16.01.2020, amounting to Rs.10,00,00,000/- (Rupees ten crores) only, was submitted to the LTHPL as per the Bid Document along with the Bid by the Petitioner. Following this, a Letter of Acceptance ("LOA") for the said Contract Work was issued on 15.03.2020. The completion time of the Contract was to be 52.5 months from the seventh day of the date of issuance of LOA. Clause 34 (Signing of Agreement) of the Instruction to

Bidders ("ITB") stipulated that the Employers i.e. the Respondents No.1 and 2 herein and the successful Bidder were to sign the Agreement within fourteen days from the date of Notification of readiness of the Agreement. As per the provisions of the Bid Document under Clause 35 (Performance Security) of ITB, Clause 4.2 of Particular Conditions of Contract ("PCC") and Serial No.6 of the LOA, the Performance Security was to be submitted by the successful Bidder within twenty eight days from the date of issuance of the LOA. The said twenty eight days expired on 12.04.2020. That, the pandemic suddenly struck globally and the country also had to face the consequences as a result the Contract could not be signed. The Petitioner requested for relaxation in time for submission of the Performance Bank Guarantee ("PBG"), in response, the Respondent No.1 extended the time initially up to 31.07.2020 and thereafter up to 31.08.2020, 05.10.2020 and 05.11.2020. Before the expiry of 05.11.2020, vide Communication dated 04.11.2020, addressed to the Chief Executive Officer, LTHPL, the Petitioner informed the Respondent No.1 that they were in advanced discussions with the Bankers for the Bank Guarantee which required time for approval from their Corporate Office. That, due to the intervening Diwali holidays and other festivals in Maharashtra, they were apprehending some days' delay and hence requested the Respondent No.1 to grant them additional time till 30.11.2020 to submit the Performance Bank Guarantee. That, the Respondent No.1 instead annulled the Award due to non-submission of PBG and non-signing of Agreement vide its Letter dated 06.11.2020. The reasons elucidated in the Letter was that sufficient time had already been provided by LTHPL by extending the time for submission of Performance Security in the form of Bank Guarantee keeping in view the situation due to the outbreak of Covid-19 pandemic, however, the Petitioner had failed to deliver the required Performance Security in the form of Bank Guarantee and hence the Contract Agreement had not been signed till date implying non-compliance of Clauses 34 and 35 of the ITB, Sub Clause 4.2 of PCC of Bid Document and terms as per Serial No.6 of the LOA, dated 15.03.2020. It was also notified vide this Communication that apart from the annulment of the Award granted vide LOA dated 15.03.2020, a sum of Rs.10,00,00,000/- (Rupees ten crores) only, issued by the Bank of Baroda as Bid Security shall be forfeited in accordance with Clause 18.6 of ITB.

7.(i) Learned Counsel for the Petitioner drew the attention of this Court to the LOA, dated 15.03.2020 and the terms detailed therein. Reference

was also made by Learned Counsel to the *"Conditions of Contract for Construction"* at Clause 15.2 and it was submitted that as per the said provision, the Employer shall be entitled to terminate the Contract if the Contractor fails to comply with Sub Clause 4.2 of PCC or with a Notice under Sub Clause 15.1. The same Clause i.e. 15.1, also provides that in any of the events as detailed in the said Clause, the Employer may upon giving fourteen days' Notice to the Contractor, terminate the Contract and expel the Contractor from the site. That, the period of Notice was subsequently modified to forty two days, despite this provision no Notice was issued to the Petitioner by the Respondents No.1 and 2 prior to the impugned Communication dated 06.11.2020. That, in the Communication dated 05.10.2020, Clause 15.2 of the *"Conditions of Contract for Construction"* has been invoked indicating existence of Contract between the parties whereas the Letter of 06.11.2020 invokes Clause 35.3 of ITB and Bid Security which deals with failure of the successful Bidder to comply with the requirements of Clauses 34 and 35 of the ITB. The invocation of two different Clauses itself leads to an anomalous circumstance.

(ii) Emphasizing on ITB Clause 33 at 33.2, it was canvassed by Learned Counsel that, *"the notification of award (Letter of Acceptance) will constitute the formation of the contract until the contract has been effected pursuant to clause 34 hereunder."* thereby indicating that a Contract existed between the parties and this fact is fortified by the provision raised by them in their correspondence dated 05.10.2020. Moreover, the conduct of the Respondent No.1 indicates that time was not the essence of the Contract as they themselves had extended the time on several occasions and finally up to 05.11.2020. Besides, although the PBG was not deposited as per stipulation, resources *viz.* machinery and manpower, had already been mobilized by the Petitioner on the site. That, now on 21.11.2020, the Performance Security of 3% of the Contract value has been deposited by the Petitioner in terms of the Office Memorandum of the Government of India, Ministry of Finance, Department of Expenditure, Policy Division, dated 12.11.2020 giving fresh directives regarding reduction in Performance Security *viz.*

> *"……..…*
>
> ***3.*** *In view of all above, it is decided to reduce Performance Security from existing 5-10% to 3%*

> *of the value of the contract for all existing contracts. However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/court proceedings have been already started or are contemplated.* **……..**"

(iii) Hence, in view of the above facts and circumstances, the annulment of Contract is illegal and contrary to the terms set out. The impugned action of the Respondent No.1 in declining to accept the PBG and annulling the LOA is unjustified, arbitrary, unreasonable, irrational, illegal and discriminatory and violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. That, the Petitioner apprehends that Respondents No.1 and 2 will encash the Bank Guarantee of Rs.10,00,00,000/- (Rupees ten crores) only, provided as Bid Security on 27.11.2020. Hence, the prayers in the I.A. as extracted *supra.*

8. The arguments *in contra* advanced by Learned Senior Counsel for the Respondents No.1 and 2 were that, in fact, the Petition is not maintainable as in the first instance, the Contract has not come into being. If the submission of the Petitioner regarding existence of a Contract between the parties by virtue of the mere issuance of an LOA is to be assumed as correct, then in such a circumstance, an Arbitration Clause exists in the Contract which ousts the jurisdiction of this Court, and the Petitioner is to take steps in consonance with that Clause, hence even on this ground the Petition is not maintainable. That, in the absence of a Contract, no Notice is required to be issued, even assuming such Notice is mandated then the Letter of 05.10.2020 is sufficient Notice for the said purposes, as the intention of a Notice is to bring to the knowledge of the other party the relevant facts and the steps envisaged. The conduct of the Petitioner and their seriousness towards fulfilling the terms of the LOA as well as their financial capacity is suspect in view of their inaction and failure to abide by the terms as set out in the LOA. Despite the extension of dates on several occasions granted by the Respondent No.1, the Petitioner has reflected their inability to deposit the required amount of approximately Rs.67,00,00,000/- (Rupees sixty seven crores) only, as Performance Bank Guarantee. The Respondents No.1 and 2 had, in fact, deposited a sum of Rs.154,00,00,000/- (Rupees one hundred and fifty four crores) only, in the

Account of the Petitioner by way of payment towards another Award but the Petitioner has shown no inclination to utilize the amount for the present purposes. That, Paragraphs 2.0 and 3.0 of the Letter dated 06.11.2020 details the extant provisions of the Bid Document and that the Respondent No.1 has taken due consideration of the outbreak of the pandemic and granted relaxation by affording the Petitioner sufficient time for submission of PBG up to 05.11.2020. The Petitioner despite such indulgence failed to take steps for submission of PBG resulting in the non-signing of the Contract till date and thereby non-compliance of Clauses 34 and 35 of the ITB, Sub Clause 4.2 of PCC of Bid Document and terms as per Serial No.6 of the LOA. Besides, "annulment" is not "termination" as only an LOA was issued and the Contract had not been signed hence it was reiterated that the question of the existence of a Contract between the parties does not arise.

9. In response, Mr. Arunabh Choudhury for the Petitioner submitted that the two Letters from the Respondent No.1 invoked Clause 15.2 which is termination of Contract therefore indicating that the parties were in a Contract in terms of the LOA as per Clause 33.2.

10. Learned Counsel for the parties were heard *in extenso* and due consideration given to the rival submissions. I have also perused the documents relied on by the Petitioner.

11. At this juncture, the only consideration before this Court is whether the Petitioner has made out a *prima facie* case, whether the balance of convenience and inconvenience is tilted in its favour, and whether the damages likely to be incurred by the Petitioner will cause them irreparable loss and injury thereby entitling them to the reliefs claimed in the I.A. as already extracted *supra.*

12.(i) Indubitably, by the Letter dated 15.03.2020, the Respondent No.1 confirmed having accepted the Bid of the Petitioner and awarded them the Contract for the Work *viz. "Construction of Balance Civil Works Package: Lot-II for Underground Power House and Transformer Cavern, Part of HRT-I and HRT-II, Surge Shafts, Pressure Shafts and Adits, TRT and other associated Structures etc. of Teesta-VI HE Project, Sikkim,"* amounting to a sum of Rs.1248,44,20,355/- (Rupees

twelve hundred and forty eight crores, forty four lakhs, twenty thousand, three hundred and fifty five) only. In terms of Paragraph 6.0 of the LOA, the Petitioner was requested to submit the Performance Security in the form of Bank Guarantee, within twenty eight days of issue of the LOA in terms of Sub Clause 4.2 of Particular Conditions of Contract. It is not disputed that the twenty eight days stipulated in the LOA expired on 12.04.2020 and that the Respondent No.1 extended the time for submission of PBG on various dates initially up to 31.07.2020 and thereafter up to 31.08.2020 and 05.10.2020. The last extension was allowed up to 05.11.2020. The Petitioner, instead of abiding with the time frame afforded to it in terms of the LOA by the Respondents as well as extensions granted up to 05.11.2020, took its time to make the requisite financial arrangements and ultimately even failed to adhere to the opportunity extended up to 05.11.2020 with the feeble explanation of intervening holidays and festivals in the State of Maharashtra. The argument that the deposit of 3% of the value of the Contract was made on 21.11.2020 holds no water sans extension of date by the Respondents.

(ii) Clause 5.3(ii) of the ITB (Page 43 of the Paper Book), reads as follows;

> *"**5.3 Bids submitted by a Bidder with sub-contractor(s), shall comply with the following minimum requirements:***
>
> *(i)* ……
>
> *(ii) In order to ensure serious participation of the sub-contractor(s) for work proposed to be executed by the sub-contractor(s), a Joint Deed of Undertaking (as per Attachment-6(ii) shall be required to be submitted by the Contractor and sub-contractor(s). Besides this, Sub-contractor(s) shall submit an additional Performance Bank Guarantee equivalent to 5% of corresponding value of work sublet in addition to Performance Bank Guarantee for whole contract submitted by the Bidder on award of work."*

(iii) Clauses 34 and 35 of the ITB (Pages 60, 61 of the Paper Book) provides as under;

> "**34. Signing of Agreement**
>
> **34.1** After notifying the successful Bidder that its Bid has been accepted, the Employer will prepare the Agreement in the form provided in the Bidding Documents, incorporating all agreements between the parties. The contract shall be signed in three originals (two for Employer and one for Contractor). The Contractor shall provide to the Employer 35 sets of the Contract after its execution, free of charges.
>
> **34.2** After issue of Letter of Acceptance, the Employer/NHPC shall notify the contractor about the readiness of the Agreement. The Employer and the successful Bidder shall sign the Agreement within 14 days from the date of issue of such notice to the contractor.
>
> **34.3** Upon issue of Letter of Acceptance as per clause 33 hereof, the Employer/NHPC will notify the other Bidders that their Bids have been unsuccessful. The Earnest Money of all the unsuccessful bidders whose price bid has been opened will be returned by NHPC within 15 days of notification of the award of Contract to the successful bidder.
>
> **35 Performance Security**
>
> **35.1** Within 28 days from the date of issue of Letter of Acceptance, the successful bidder shall furnish to the Employer a Performance Bank Guarantee in the form stipulated in the Conditions of Contract. The bidders who are qualified on the strength of their sub-contractor shall be required to furnish an additional Performance

Bank Guarantee from their sub-contractor as per Clause 4.2 of Particular Conditions of Contract. The form of Performance Bank Guarantee provided in Section 4, of the Bidding Documents may be used. Details of Employer's Bank at Project shall be shared at the time of award of Contract.

35.2 In case Bidding Company (subsidiary company) gets qualified and awarded the work package, the Parent company/ Holding Company, within 28 days from the date of issue of Letter of Acceptance, will be required to furnish an additional performance bank guarantee, as per Clause 4.2 of Particular Conditions of Contract, of value equivalent to (5%) five percent of the Contract Price or portion of work (where subsidiary Company is Joint Venture Partner) as the case may be, in addition to normal Performance Bank Guarantee to be submitted by the Bidder to the Employer besides entering into a separate Agreement in the requisite Format provided in the Bid Document. The form of Performance Bank Guarantee provided in Section 4, of the Bidding Documents may be used.

35.3 Failure of the successful Bidder to comply with the requirements of Clause 34 or 35 hereof shall constitute a breach of contract, cause for annulment of the award, forfeiture of the Bid Security, and any such other remedy the Employer may take under the provisions of the Contract."

(iv) Clause 18.6 of the ITB (Page 52 of the Paper Book) lays down that the Bid Security may be forfeited in the following contingencies, the provision is extracted hereinbelow;

"**18.6 The Bid Security may be forfeited**:

a) if the Bidder withdraws its Bid or varies any terms & conditions in regard thereto during period of bid validity, except as provided in Sub-clause 24

b) **in the case of a successful Bidder, if he fails within the specified time limit to;**

i) sign the Agreement, or

ii) furnish the required performance security.

c) if the Bidder adopts corrupt or collusive or coercive or fraudulent practices covered under ITB Clause-37 or defaults committed under Integrity pact.

Any liability of GST arising out of forfeiture of bid security shall be borne by the concerned Bidder."

(Emphasis supplied)

13. As can be culled out from the submissions, the admitted position is that the Petitioner, who was the successful Bidder, failed to sign the Agreement within the specified time limit or during the extensions given by the Respondent Companies from April, 2020 through November, 2020 apart from which the Petitioner failed to furnish the required Performance Security. It emanates with clarity from the documents relied on by the Petitioner *supra* that the Bid Security of the successful Bidder would be returned by the Respondents when the Bidder has signed the Agreement with the Employer and furnished the required Performance Security to the Employer as laid down in Clause 18.5 of the ITB. However, on failure to take steps, the provision of Clause 18.6 of the ITB would kick into place.

14. In the light of the facts and circumstances placed before this Court and the discussions hereinabove, I am of the considered opinion that the

Petitioner has failed to make out a *prima facie* case nor is the balance of convenience and inconvenience tilted in its favour nor have they made out a case of irreparable loss and injury for the purposes of granting them the reliefs as prayed for in the I.A.

15. It concludes thereby that the Order of this Court dated 01.12.2020 requiring the parties to maintain *status quo* and the Order dated 02.12.2020 directing the Respondents No.1 and 2 to stay their hands from expending the encashed amount deserves to be and is accordingly vacated.

16. I.A. No.01 of 2020 stands dismissed and disposed of.

SLR (2020) SIKKIM 1007

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

Crl. A. No. 2 of 2020

Shri Sandeep Rai …. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Sedenla Bhutia, Legal Aid Counsel.

For the Respondent: Mr. Sudesh Joshi, Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor.

Date of decision: 7th December 2020

A. Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 2(33) – Heinous Offences – There are many offences for which the maximum punishment is more than seven years, but for which the minimum sentence is less than seven years or for which there is no minimum sentence prescribed – Held: An offence which does not provide a minimum sentence of seven years cannot be treated to be a heinous offence – Such offences shall be treated as serious offences (*In re. Shilpa Mittal* discussed).

(Paras 13)

B. Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 9 – Penetrative Sexual Assault – Aggravated sexual assault – In absence of any statement regarding penetration in the evidence of PW-1, coupled with the evidence of PW-9, we are of the considered opinion that prosecution has failed to prove beyond reasonable doubt that there was any penetrative sexual assault – "*chara*" does not necessarily mean penetrative sexual assault. The word "*chara*" in Nepali may be used to describe a number of things vulgar including, but not limited to, penetrative sexual assault (*In re. Dil Kumar Bahun* discussed) – Satisfied that the prosecution

has been able to establish that the appellant is guilty of aggravated sexual assault within the meaning of S. 9(l), 9(m) and 9(n) of the POCSO Act.

(Paras 41 and 44)

Appeal partially allowed.

Chronology of cases cited:

1. Jaya Mala v. Home Secretary, Government of Jammu & Kashmir and Others, (1982) 2 SCC 538.
2. Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681.
3. Darga Ram *alias* Gunga v. State of Rajasthan, (2015) 2 SCC 775.
4. Shilpa Mittal v. State of NCT of Delhi and Another, (2020) 2 SCC 787.
5. Dil Kumar Bahun v. State of Sikkim, Crl. A. No. 20 of 2019.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

This appeal is preferred against the judgment dated 29.08.2019 and the order of sentence dated 30.08.2019 passed by the learned Special Judge (POCSO), West Sikkim at Gyalshing in Sessions Trial (POCSO) Case No. 26 of 2018. By the impugned judgment, the appellant was convicted under Section 5 (l), 5 (m) and 5 (n) of the Protection of Children from Sexual Offences Act, 2012, for short, POCSO Act, punishable under Section 6 of the POCSO Act. The appellant was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment for one month for the offence committed under Section 5 (l) of the POCSO Act; to undergo rigorous imprisonment for a term 10 years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment for one month for the offence committed under Section 5 (m) of the POCSO Act and to suffer rigorous imprisonment for a term of 15 years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment for one month for the offence committed under Section 5 (n) of the POCSO Act. All the sentences are to run concurrently and the period of sentence already undergone during the investigation and trial was set -off under

Section 428 of the Code of Criminal Procedure, 1973, for short, Cr.P.C. A sum of Rs.1.00 lakh was awarded to the victim in terms of Sikkim Compensation to the Victim or his Dependents Scheme, 2011, as amended in 2013.

2. The prosecution case is that based upon a written statement (Exhibit-7) given by a sister of the appellant, who was examined during trial as PW-2, Gyalshing P.S Case No.10/2017 dated 03.04.2017 under Section 376D IPC read with Section 6 of POCSO Act was registered against the appellant and another, who was later on tried by Juvenile Justice Board, for short, Board, constituted under Section 4 of the Juvenile Justice (Care and Protection) Act, 2015, for short, the JJ Act of 2015, he being a child in conflict with law as defined under Section 2 (13) of the JJ Act of 2015.

3. Charge sheet was filed under Section 376 IPC read with Section 6 of POCSO Act against the appellant on 13.09.2018 wherein the age of the appellant was shown as 18 years. At the time of filing of the charge sheet, the appellant was shown to be absconding.

4. While hearing the appeal, it was brought to our notice by the learned Counsel for the appellant that PW-2, in her cross-examination, had stated that as informed by her brother (PW-8), who is also the father of the victim, the accused was around 17 years of age at the time of the occurrence. It was also brought to our notice that PW-8, who is the brother of the appellant, in his cross-examination on 13.05.2019, had stated that the accused was about 19 years of age at that point of time. On the basis of the aforesaid evidence of PW-2 and PW-8, it was submitted that the accused being below 18 years of age at the time of commission of offence was a child within the meaning of Section 2(12) of the JJ Act of 2015 and a juvenile within the meaning of Section 2 (35) of the JJ Act of 2015. Accordingly, it was submitted that the appellant ought to have been brought before the Board to face trial.

5. Having regard to the evidence of PW-2 and PW-8 relating to the age of the appellant and in view of Section 9 of the JJ Act of 2015, which provides that a claim that a person was a child at the time of commission of an offence can be raised before any Court and when such a claim is raised, the claim is required to be determined in accordance with the provisions of the JJ Act of 2015 and the rules made there under, this Court considered it

appropriate to cause an enquiry to be made to determine the age of the appellant. Accordingly, by an order dated 15.10.2020, the Board at Gyalshing was directed to determine the age of the appellant in terms of Section 94 of the JJ Act of 2015 and to submit a report before this Court on or before 25.11.2020.

6. Section 94(1) of the JJ Act of 2015 provides that where it is obvious to the Board, based on the appearance of the person brought before it under any of the provisions of the JJ Act of 2015, other than for the purpose of giving evidence, that the said person is a child, the Board shall record such observation stating the age of the child as nearly as may be and then proceed with the inquiry under Section 14 or section 36, as the case may be, without waiting for further confirmation of the age. Section 94 (2) of the JJ Act of 2015 provides that in case, the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination, by seeking evidence by obtaining (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Board.

7. As no document was available with the appellant as regards proof of age in terms of Section 94 (2) (i) and (ii) of the JJ Act of 2015, the Board took recourse to Section 94 (2) (iii) and ordered for an ossification test to be conducted on the appellant. Accordingly, ossification test was conducted at STNM Multi-Specialty (STNMMS) Hospital at Gangtok on 02.11.2020. Based on the report wherein it was opined that the accused was between 19 – 21 years of age at the time of test, the Board, by an order dated 12.11.2020 concluded that in the year 2017, the age of the appellant was between 16 – 18 years and thus, the appellant was a child within the meaning of Section 2 (12) and a juvenile within the meaning of Section 2 (35) of the JJ Act of 2015.

8. At this stage, it will be relevant to note that the report was signed by the Consultant-cum-HOD Radiology, STNMMS Hospital and such report was given on the basis of X-ray of right chest AP, X-ray of right

elbow, X-ray of right knee, X-ray of right shoulder and X-ray of right pelvis.

9. In the case of ***Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir and Ors.***, reported in ***(1982) 2 SCC 538***, the radiological age was given as between 18 – 19 years. The aforesaid petition was filed for a writ of habeas corpus for release of a detenu under the J & K Public Safety Act, 1978. The Honble Supreme Court had observed that one can take judicial notice that margin of error in age ascertained by radiological examination is two years on either side. In ***Ram Suresh Singh vs. Prabhat Singh***, reported in ***(2009) 6 SCC 681***, the Honble Supreme Court had observed that an error of two years in determining the age by radiological examination is possible.

10. In ***Darga Ram alias Gunga vs. State of Rajasthan***, reported in ***(2015) 2 SCC 775***, the Honble Supreme Court had observed that general rule about age determination is that the age as determined through medical opinion can vary plus minus two years.

11. From the cross-examination of PW-8, i.e. the father of the victim, which had taken place on 13.05.2019, it appears that a suggestion was given by the Counsel for the accused that the accused, at that point of time, was aged about 19 years. The FIR came to be lodged on 03.04.2017 and the incident had taken place, according to the FIR, about 15-20 days before. Thus, it appears that according to the projection of the accused himself, he was about 17 years at the time of occurrence. In the circumstances of the case, the age of the appellant has to be taken as 17 years at the time of occurrence and possible variation of plus minus two years need not be taken into consideration.

12. The JJ Act of 2015 takes note of three kinds of offences: petty offences, serious offences and heinous offences. 'petty offences', as defined in Section 2 (45) include the offences for which the maximum punishment under the Indian Penal Code, 1860, for short, IPC, or any other law for the time being in force is imprisonment up to three years. 'serious offences' as defined in Section 2 (54) include the offences for which punishment under IPC or any other law for the time being in force, is imprisonment between three to seven years. 'heinous offences', as defined in Section 2 (33) include the offences for which the minimum punishment under IPC or any other law for the time being

in force is imprisonment for seven years or more.

13. At this juncture, it will be relevant to note that there are many offences for which the maximum punishment is more than seven years, but for which the minimum sentence is less than seven years or for which there is no minimum sentence prescribed. In ***Shilpa Mittal vs. State of NCT of Delhi & Anr.,*** reported in (***2020) 2 SCC 787***, the Honble Supreme Court placed reliance on the word „minimum as appearing in Section 2 (33) of JJ Act of 2015 and held that an offence which does not provide a minimum sentence of seven years cannot be treated to be a heinous offence. However, as JJ Act of 2015 does not deal with the kind of offences for which maximum sentence is more than seven years imprisonment, but for which no minimum sentence or minimum sentence of less than seven years is provided, the Honble Supreme Court ruled that such offences shall be treated as serious offences.

14. However, there is no dispute in the present case that the offences for which the appellant had been convicted, come within the definition of heinous offence, as minimum punishment for offences under Section 5 (l), 5 (m) and (5 (n) is 10 years.

15. In ***Shilpa Mittal*** (supra), the Honble Supreme Court had observed that the scheme of JJ Act of 2015 is that the children should be protected and that to treat children as adult is an exception to the rule. From the Scheme of Sections 14, 15 and 19, the Honble Supreme Court observed that legislature felt that before a juvenile is tried as an adult, a very detailed study must be done and the procedure laid down has to be followed and that even if a child commits a heinous crime, he is automatically not to be tried as an adult.

16. Though a passing reference is already made to Section 9 of the JJ Act of 2015, it will now be appropriate to reproduce the same for better understanding of the scope of the provision. Section 9 of the JJ Act of 2015 reads as follows: -

> “9. Procedure to be followed by a Magistrate who has not been empowered under this Act.- (1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion

that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made there under even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the persons claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety."

17. Perusal of Section 9 of JJ Act of 2015 goes to show that the

legislature has used the expression "person alleged to have committed the offence" in Section 9 (1) and Section 9 (2) in contrast to Section 9 (3) when it uses the expression "if the Court finds that a person had committed an offence". Section 9 (1) deals with a situation when a child is brought to the Magistrate who is not empowered to exercise the powers of the Board under the JJ Act of 2015 and if he is of the opinion that the person alleged to have committed the offence is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

18. Section 9 (2) of JJ Act of 2015 provides that in case a person alleged to have committed an offence claims before a Court other than a Board, that he is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the Court shall make an inquiry by way of taking such evidence as may be necessary, but not by way of an affidavit, to determine the age of such person, and shall record a finding on the matter, 9 Crl. A. No. 02 of 2020 Shri Sandeep Rai vs. State of Sikkim stating the age of the person as nearly as may be. Section 9 (2), thus, envisages a situation when a claim as noted above is made when no judgment is passed as the word „alleged would refer to a proceeding where no final order is passed and the matter is sub-judice.

19. There is a proviso to Section 9 (2) of JJ Act of 2015 which provides that a claim that a person was a child at the time of commission of offence may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and in case such a claim is raised, the claim shall be determined in accordance with the provisions of the JJ Act of 2015 and the rules made there under even if the person has ceased to be a child on or before the date of commencement of this Act.

20. Section 9(3) of the JJ Act of 2015 provides that the Court shall forward the child to the Board for passing appropriate orders in the event the Court finds that a person has committed an offence and the person was a child on the date of commission of such offence. Thus, two condition precedents, namely, a finding has to be recorded that a person has committed an offence and the person was a child on the date of commission of such offence, are required to be fulfilled before the child is forwarded to the Board for passing appropriate orders. In other words, even when the

Court comes to a conclusion that the person on the date of commission of the offence was a child, the Court has to record a finding that the person had committed an offence, or to put it differently, the Court will have to examine the merits of the case. In this connection, it is, however, relevant to note that Section 8(2) of the JJ Act of 2015 provides that the powers conferred on the Board by or under the JJ Act of 2015 may also be exercised by the High Court or the Childrens Court when the proceedings come before them under Section 19 or in an appeal, revision or otherwise.

21. As a logical corollary, we are of the opinion that if the Court finds on examination of the case on merits that the accused had not committed an offence, it will be permissible for the Court to acquit the accused notwithstanding the fact that the child had not been tried in accordance with the provisions of the JJ Act of 2015.

22. It is in the above context, consequent upon the finding arrived at that the accused was a child of 17 years at the time of commission of the offence, it will be necessary for this Court to evaluate the evidence and record a finding as to whether the accused had committed an offence.

23. Ms. Sedenla Bhutia, learned Counsel appearing for the appellant has submitted that the prosecution has miserably failed to establish the guilt of the accused beyond reasonable doubt. She submits that evidence of PW-1 does not establish that there was any aggravated penetrative sexual assault. It is contended by her that even though her statement under Section 164 Cr. P.C. was exhibited, it has not been stated that such statements are correct and true and in that view of the matter, no reliance can be placed on her statement under Section 164 Cr. P.C., which in any view of the matter, is not a substantive piece of evidence. Learned Counsel submits that the word "*chara*" has many connotations and in this connection, refers to paragraph 9 of a decision rendered by this Court on 19.08.2020 in ***Crl. A. No. 20 of 2019, Dil Kumar Bahun vs. State of Sikkim***. It is also contended by her that though victim was stated to be a child of 5 years, the medical report does not even remotely indicate that the victim was subjected to penetrative sexual assault.

24. Mr. Sudesh Joshi, learned Public Prosecutor, while not disputing that the word "*chara*" has many connotations, submits that it can also mean penetrative sexual assault, as noted by the learned trial Court. He submits

that, may be, from the demeanor of the witness, the learned Judge had recorded that the witness meant penetrative sexual assault. He, however, admits that the Medical Report, Exhibit-6, is totally silent with regard to any penetrative sexual assault on the child.

25. We have considered the submissions of learned Counsel for the parties and have perused the materials on record.

26. The statement (Exhibit-7) of the paternal aunt of the victim, based on which the FIR was registered, is, essentially, to the effect that the mother of the victim had left the child and accordingly, the victim, who is five year old, used to stay with her father but as the father hardly resided at home, the informant was advised by the villagers to bring the victim to her house and that, accordingly, the victim was residing with her for the past 15-20 days. One day, while she was bathing her niece, she noticed a lot of whitish/yellowish discharge from her private parts. She made inquiries with PW-4 as to whether her children also release discharge and on being told in the negative, she became suspicious that something might have happened to her niece and accordingly, she asked her niece as to whether anybody had done anything to her but she did not tell anything. It is further stated that when the same question was asked two days back, she had replied that the appellant would beat her if she disclosed anything. On being pressed, her niece told her that the appellant had sexually assaulted her (*chara garyo*) multiple times at her house as well as by one Nawraj uncle. Her elder sister-in-law being informed about the incident, she advised the informant to take her niece to a doctor and also to inform her father. She, accordingly, brought the child to Gyalshing Hospital in the evening of 03.04.2017 and when the Doctor asked the child as to what had happened to her, she had told that the appellant and Nawraj Chettri had sexually assaulted her.

27. The prosecution case basically hinges on the evidence of PW-1, the victim; PW-2, the informant; PW-8, the father of the victim and PW-9, the Doctor, who had examined the victim on 03.04.2017.

28. The appellant/accused had adduced the evidence of his the other sister as DW-1.

29. PW-3 and PW-7 are the witnesses of the Rough Sketch of the place of occurrence, Exhibit-5. Reference to PW-4 is already made and she

stated in her evidence that she had advised PW-2 to take her niece to the hospital. Against PW-5 it is stated that "prosecution tenders the witness", which, it is submitted, that the witness was not examined. PW-6 is the Judicial Magistrate, who had recorded the statement of PW-1 under Section 164 Cr. P.C. PW-10 is an Investigating Officer, who had registered the FIR, Exhibit-8, and had conducted part of the investigation. PW-11 authenticated the date of birth of the victim as 08.06.2012. PW-12 also had conducted a part of the investigation and he had submitted the charge-sheet.

30. From the evidence of PW-12 it appears that Nawraj Chettri was convicted by the Board in JJB Case No. 01 of 2017 dated 30.06.2017 for committing an offence under Section 5 (m) of the POCSO Act and he was released on probation of good conduct under Section 18 (e) of the JJ Act of 2015.

31. PW-1 stated that the accused had committed "*chara*" with her on 3-4 occasions at her house. As rightly submitted by Ms. Sedenla Bhutia, the same is the only substantive evidence of PW-1 apart from the statement that she had given similar statement before the Court on earlier occasion, meaning thereby her statement under Section 164 Cr. P.C, which was exhibited as Exhibit-2. Against the word "*chara*", the Court recording evidence, had written "penetrative sexual assault". In ***Dil Kumar Bahun*** (supra), this Court, at paragraph 9, had stated as follows:

> *"9. The victim identified the appellant in court. The victim deposed, "..... I do not remember the exact date and month but one Thursday, my appa (father) while I was sleeping with my sister took me to his room and committed "chara" (penetrative sexual assault) on me. This continued one month, i.e., from the month of December to January....." The recording of the deposition does not make it clear whether the words in brackets after the word "chara", i.e., (penetrative sexual assault) was the statement of the victim or if it was the translation by the learned Special Judge. The word "chara" in Nepali may be used to describe a number of things vulgar, including, but not*

limited to penetrative sexual assault. If the victim had explained the word "chara" in Nepali it would have been advisable to record the depositions of the victim in her own words and then supply the translation. ……."

32. Today also, the learned Counsel for the parties submit that "*chara*" does not necessarily mean penetrative sexual assault and in local parlance, it may refer to any sexually offensive act.

33. PW-2 stated that while bathing PW-1, she noticed that some discharge was coming out from the private parts of PW-1. PW-1 having refused to say anything and as she was complaining of stomach pain, she was taken to Gyalshing Hospital and when the lady Doctor inquired from the victim, the victim had stated that the accused and Nawraj Chettri had committed penetrative sexual assault on her. In her cross-examination, PW-2 stated that after coming home from the hospital, she again inquired from PW-1 about the incident and then she told her that Nawraj Chettri had told her to tell the name of the accused. While in the Exhibit-7 statement, PW-2 had stated that she was already aware that the appellant/accused and Nawraj Chettri had sexually assaulted the victim before taking her to the hospital, in her evidence she had stated that she had come to learn about the appellant and Nawraj committing penetrative sexual assault only when the lady Doctor inquired from the victim.

34. PW-8, the father of the victim, stated that PW-2 had informed him that PW-1 was not well and accordingly, he and PW-2 had taken PW-1 to District Hospital and only when PW-1 was examined by the Medical Officer, he came to know that his daughter had been a victim of sexual assault at the hands of his brother i.e. the appellant and a boy called Nawraj.

35. PW-9 had exhibited the Medical Report as Exhibit-6. Exhibit-6 does not reveal that on being examined by her, PW-1 had stated about the sexual assault, let alone penetrative sexual assault. Rather, it goes to show that she was brought with the history of sexual assault by two persons at her residence. Consent for examination was given by PW-2 and therefore, it is reasonable to hold that it was PW-2 who had given the history of sexual assault. Exhibit-6 discloses that scabies was present in the body of PW-1 and

PW-1 had complained of itchiness for last 2-3 days. PW-9 stated as follows:

> "On local examination: Swelling and redness was present in the vulva. Foul smelling discharge was present over the vulva. Hymen was intact. Fourchette was normal. Redness and swelling was present over the anal region. Three vaginal swabs were taken and handed over to the police.
>
> The findings were : Redness, swelling and discharge over the vulva and anal region was suggestive of infection. Lab report was awaited and the lab report of Namchi District Hospital shows absence of spermatozoa."

36. In cross-examination, she stated that redness, swelling and discharge over the vulva and anal region of the victim were due to infection (scabies).

37. DW-1 stated that she had taken the victim to the house of PW-2 as her mother had left the house. She stated that she had taken the accused to Nepal in the year 2014 and he had returned in the year 2018. A question was put by the Court to her as to whether she was living with the victim and her family during the relevant period and she had replied that in the year 2017 she was not there and she was at the place of her in-laws. Her evidence is of no assistance to the accused.

38. In his examination under Section 313 Cr. P.C., the appellant had stated that the offence was committed by Nawraj and he had told the victim to implicate him.

39. In Exhibit-2, i.e. the statement of PW-1 under Section 164 Cr. P.C, she had stated that the appellant had forcibly put his tongue in her mouth and had put his private parts in her vagina and anus but then, the statements made under Section 164 Cr. P.C. is not substantive evidence.

40. Section 3 of the POCSO Act lays down that a person is said to commit penetrative sexual assault, if, amongst others, he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.

41. That the date of birth of the victim is 08.06.2012 is not in doubt

and thus, at the time of occurrence, PW-1 was around 5 years old. In absence of any statement regarding penetration in the evidence of PW-1, coupled with the evidence of PW-9, we are of the considered opinion that prosecution has failed to prove beyond reasonable doubt that there was any penetrative sexual assault, the term which has been used by the learned Judge while recording the statement against the word "*chara*". We have also taken note of the submission made by learned Counsel for the parties that "*chara*" does not necessarily mean penetrative sexual assault. This Court had also held in ***Dil Kumar Bahun*** (supra) that the word "*chara*" in Nepali may be used to describe a number of things vulgar including, but not limited to, penetrative sexual assault.

42. Section 7 of the POCSO Act states that whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration , commits sexual assault.

43. Section 9 of the POCSO Act deals with various forms of aggravated sexual assault. Section 9 (l) lays down that whoever commits sexual assault on the child more than once or repeatedly is said to commit aggravated sexual assault. Section 9 (m) lays down that whoever commits sexual assault on a child below twelve years is said to commit aggravated sexual assault. Section 9 (n) lays down that whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child, is said to commit aggravated sexual assault.

44. On the evidence on record we are satisfied that the prosecution has been able to establish that the appellant is guilty of aggravated sexual assault within the meaning of Section 9(l),9(m) and 9(n) of POCSO Act for which punishment is prescribed under Section 10 of the POCSO Act. Punishment prescribed being imprisonment of either description for a term which shall not be less than five years but which may extend to seven years as well as imposition of fine, the offences come under the definition of serious offences.

45. In view of the above discussion, conviction of the accused under

Section 5 (l), 5 (m) and 5 (n) of the POCSO Act is set aside and we hold that the accused had committed offences under Section 9 (l), 9 (m) and 9 (n) of the POCSO Act. Sentences passed by the learned Special Judge, POCSO Act, West Sikkim at Gyalshing in S.T. (POCSO) Case No. 26 of 2018, needless to say, shall have no effect. As the twin conditions under Section 9 (3) of the JJ Act of 2015 are satisfied, the accused is forwarded to the Board at Gyalshing for passing appropriate orders.

46. Consequently, the appellant shall be put up in a place of safety.

47. The appeal stands disposed of in the above terms.

48. Record of the Board at Gyalshing shall be returned forthwith.

SLR (2020) SIKKIM 1022

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

WP (C) No. 30 of 2019

Silajit Guha …. PETITIONER

Versus

Sikkim University and Others ….. RESPONDENTS

For the Petitioner: Mr. Kalol Basu, Mr. Suman Banerjee and Mr. Ranjit Prasad, Advocates.

For Respondents 1-5: Mr. Karma Thinlay Namgyal, Senior Advocate with Mr. K.T. Gyatso, Advocate.

Date of decision: 8th December 2020

A. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 – Workplace – Definition – S. 2(o) – The complaint was not with regard to an isolated incident at the wedding reception but was also with regard to other incidents, one of which transpired in the office of the petitioner. It cannot be argued that the petitioner's office is not a "workplace". S. 9 of the Act of 2013 provides that a complaint of sexual harassment at workplace can be made within a period of three months from the date of incident or in case of a series of incidents, within a period of three months from the date of last incident. The last incident transpired on 05.05.2019 and the complaint was filed on 12.05.2019, within seven days after the date of the last incident. In such circumstances, *prima facie*, it cannot be said that the Internal Complaints Committee did not have the jurisdiction to examine the complaint filed by the petitioner – It is felt necessary to leave the question as to whether the incident at the wedding reception would come within the meaning of "sexual harassment at workplace" as provided in S. 9 to be decided by the Executive Authority.

(Para 6)

B. University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 – Regulation 8 –Process of Conducting Inquiry – A composite reading of all the sub-clauses of Regulation 8, makes it evident that the Executive Authority could not have taken the final step of terminating the petitioner on the recommendation of the ICC before the thirty days period provided to him under Regulation 8(5) to prefer an appeal – If during the period of thirty days, the aggrieved person prefers an appeal, then the Executive Authority must await the final outcome of the appeal before taking the final step, as in the present case, issuing the termination order dated 28.06.2019 – If the Executive Authority took the final step, as was done in the present case, before the expiry of the thirty days period, then prejudice would be writ large – During the pendency of the appeal before the Executive Council, his termination order, bearing No. 201/2019 dated 28.06.2019, be kept in abeyance until the final decision in the pending appeal.

(Para 10)

Petition partially allowed.

Chronology of cases cited:

1. Regional Director, E.S.I Corporation and Another v. Francis De Costa and Another, (1996) 6 SCC 1.
2. Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali and Another, (2007) 11 SCC 668.
3. Daya Kishan Joshi and Another v. Dynemech Systems Private Limited, (2018) 11 SCC 642.
4. Saurabh Kumar Mallick v. Comptroller & Auditor General of India and Another, 2008 SCC Online Del 563.
5. Tolaram Relumal and Another v. State of Bombay, (1955) 1 SCR 158/AIR 1954 SC 496.
6. Zuari Cement Limited v. Regional Director, Employees' State Insurance Corporation, Hyderabad and Others, (2015) 7 SCC 690.
7. Khem Chand v. Union of India and Others, AIR 1958 SC 300.

8. Dr. Vijayakumaran C.P.V. v. Central University of Kerala and Others, 2020 SCC Online SC 91.

9. Medha Kotwal Lele and Others v. Union of India and Others, (2013) 1 SCC 311.

10. Fakir Mohd. (dead) by LRS v. Sita Ram, (2002) 1 SCC 741.

11. State of Uttar Pradesh v. C. Tobit and Others, AIR 1958 SC 414.

12. Gaurav Aseem Avtej v. Uttar Pradesh State Sugar Corporation Limited and Others, (2018) 6 SCC 518.

13. State of U.P. v. Harendra Arora and Another, (2001) 6 SCC 392.

14. General Manager, B.E.S.T. Undertaking, Bombay v. Mrs. Agnes, (1964) 3 SCR 930.

15. M.V. Bijlani v. Union of India and Others, (2006) 5 SCC 88.

16. Managing Director, ECIL Hydrabad and Others v. B. Karunakar and Others, (1993) 4SCC 727.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The present writ petition has been filed by the petitioner, who was a Professor in a Department of the respondent no.1 [Sikkim University (University)]. Pursuant to a complaint of sexual harassment filed by respondent no.5 (a student of that Department), the respondent no.4 [the Internal Complaints Committee (ICC)], conducted an inquiry and forwarded the inquiry report dated 08.06.2019 to the Executive Council of the University, i.e., respondent no.3 (Executive Council). The petitioner was issued a show cause notice dated 10.06.2019, in which the inquiry report was also enclosed. On 21.06.2019, the petitioner replied to the show cause notice. On 28.06.2019, the Registrar of the University issued office order bearing no. 201/2019 dated 28.06.2019, in which the petitioner was informed that the Executive Council in its 33rd Meeting held on 28.06.2019 considered the inquiry report of the ICC and the representation made by the petitioner under clause 8(6) of the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 (UGC Regulations) and that the Executive Council had come to the

conclusion that the petitioner was not fit to be retained in the service of the University and had imposed the major penalty of termination of service with immediate effect. Thereafter, on 01.07.2019, the petitioner preferred a statutory appeal. It is the petitioner's case that the impugned office order was received by him only on 03.07.2019. The writ petition seeks the quashing of the show cause notice dated 10.06.2019, the inquiry report dated 08.06.2019 and the order of termination dated 28.06.2019 and for various other consequential reliefs.

2. Heard Mr. Kalol Basu, learned Advocate for the petitioner and Mr. Karma Thinlay Namgyal, learned Senior Advocate for the Respondents.

3. Mr. Kalol Basu submitted that the facts would reveal that the alleged act complained of by the respondent no.5 was an act purportedly committed at a wedding reception in a hotel beyond the definition of workplace under section 2(o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act of 2013). Consequently, he submitted that the ICC did not have the jurisdiction to examine the complaint and give the impugned inquiry report. He relied upon the judgments of the Supreme Court in ***Regional Director, E.S.I Corporation and Another vs. Francis De Costa and Another***[1], ***Shakuntala Chandrakant Shreshti vs. Prabhakar Maruti Garvali and Another***[2] and ***Daya Kishan Joshi and Another vs. Dynemech Systems Private Limited***[3]**.** It was his contention that sweeping definition cannot be given to the term workplace relying upon the judgment of Delhi High Court in ***Saurabh Kumar Mallick vs. Comptroller & Auditor General of India & Anr***[4]. He further submitted that Regulation 8(4) of the UGC Regulations provided that the Executive Authority of Higher Educational Institution (HEI) shall act on the recommendations of the committee within a period of thirty days from the receipt of the inquiry report unless an appeal against the findings is filed within that time by either party. As admittedly, the petitioner had preferred an appeal on 01.07.2019, before the expiry of the thirty days as provided in Regulation 8(4) of the UGC Regulations, the termination order dated 28.06.2019 was illegal. Mr. Kalol Basu also submitted that since the Act of 2013 has penal consequences, it must be

[1] (1996) 6 SCC 1
[2] (2007) 11 SCC 668
[3] (2018) 11 SCC 642
[4] 2008 SCC Online Del 563

strictly construed and for construction of a penal statute, if two views are possible, then the one which supports the accused is to be adopted. For the said propositions, he relied upon ***Tolaram Relumal and Another vs. State of Bombay***[5]. Mr. Kalol Basu further submitted that the proceeding before the ICC was not conducted in the manner prescribed. To support his contention, he relied upon ***Zuari Cement Limited vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Others***[6]**.** He relied upon ***Khem Chand vs. Union of India and Others***[7] to argue that in the inquiry before the ICC, his right to cross-examination had been denied and the principles of natural justice violated. He also referred to ***Dr. Vijayakumaran C.P.V. vs. Central University of Kerala and Others***[8] and ***Medha Kotwal Lele and Others vs. Union of India and Others***[9]**,** to impress upon this court that in the present proceeding, the UGC Regulations and CCS/CCA Rules, were applicable.

4. Mr. Karma Thinlay Namgyal on the other hand submitted that since the Act of 2013 is a social and a beneficial legislation, the definition of workplace must receive a wider interpretation and if it was so done then the act complained of by the respondent no.5 would fall within the definition of workplace and more specifically under section 2(o)(v), i.e, *any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey*. It was his submission that the legislature has purposely used the disjunctive word or between the two set of words, i.e., arising out of and during the course of. Therefore, while the meaning ascribed by the Supreme Court in ***Shakuntala Chandrakant Shresthi*** (supra) and ***Daya Kishan Joshi*** (supra) would be applicable to interpret the two sets of words as used in section 2(o), the use of the word or in between them would bring any place visited by the employee either arising out of employment or during the course of employment within the mischief of the provision. He further submitted that the complaint by the respondent no.5 was not only restricted to the incident of 05.05.2019 at the wedding reception, but also for other similar instance where the petitioner had allegedly touched the respondent no.5 inappropriately. He, therefore, submitted that it would not be correct to nonsuit the complaint of the

[5] (1955) 1 SCR 158/AIR 1954 SC 496
[6] (2015) 7 SCC 690
[7] AIR 1958 SC 300
[8] 2020 SCC Online SC 91
[9] (2013) 1 SCC 311

respondent no.5 on examining only the incident of 05.05.2019 at the wedding reception. He relied upon the judgment of the Supreme Court in ***Fakir Mohd. (dead) by LRS vs. Sita Ram***[10] and ***State of Uttar Pradesh vs. C. Tobit And Others***[11]. Relying upon ***Gaurav Aseem Avtej vs. Uttar Pradesh State Sugar Corporation Limited and Others***[12]**,** it was submitted that a statute is best interpreted when we know why it was enacted and therefore, the definition of workplace in the Act of 2013 ought to be interpreted not to defeat the very purpose of its enactment. Mr. Karma Thinlay Namgyal also drew the attention of this court to Regulation 8(6) of the UGC Regulations to submit that Regulation 8(4) must be read along with Regulation 8(6) of the UGC Regulations and if so done, the termination would be legally justified. He further submitted, relying upon ***State of U.P. vs. Harendra Arora and Another***[13]**,** that Regulation 8(4) of the UGC Regulations was a procedural law and every infraction of statutory provisions would not make the consequent action void. He also relied on the judgments of the Supreme Court in ***General Manager, B.E.S.T. Undertaking, Bombay vs. Mrs. Agnes***[14] and ***M.V. Bijlani vs. Union of India and Others***[15].

5. At the very outset, it is pertinent to keep in mind that admittedly, a statutory appeal is pending before the Executive Authority. Most of the issues, which have been raised in the writ petition can very well be canvassed and pressed before the Appellate Authority. Therefore, although the issues raised by the learned counsel for the parties were tempting, this court is of the opinion that at this stage it would be better to exercise restraint. Any expression of opinion by this court on issues which have been or may be canvassed before the Executive Authority may prejudice the parties. Having said that, Mr. Kalol Basu has also pressed a jurisdictional issue before this court. In Zuari Cement Ltd. (supra), the Supreme Court held that want of jurisdiction renders orders passed by court/tribunal a nullity. Mr. Kalol Basu submits that the ICC did not have the jurisdiction to take cognizance of the complaint as the alleged incident purportedly took place in a private hotel at the wedding reception beyond the definition of workplace. This point may have to be resolved in this writ petition since an

[10] (2002) 1 SCC 741
[11] AIR 1958 SC 414
[12] (2018) 6 SCC 518
[13] (2001) 6 SCC 392
[14] (1964) 3 SCR 930
[15] (2006) 5SCC 88

appeal being an extension of the original proceeding, the appellate authority may not also then have jurisdiction to decide the pending appeal, if it were to be held that the ICC did not have the jurisdiction to hold the inquiry. Section 2(o) of the Act of 2013 reads as:

> **2. Definitions**.— In this Act, unless the context otherwise requires, —
>
> ……
>
> (o) workplace includes—
>
> (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
>
> (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities including production, supply, sale, distribution or service;
>
> (iii) hospitals or nursing homes;
>
> (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
>
> (v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;
>
> (vi) a dwelling place or a house;

6. The definition of workplace is an inclusive one and not an exhaustive one. The complaint dated 12.05.2019 alleged that the petitioner misbehaved with the respondent no.5 by touching her inappropriately and without her consent at a wedding reception of one of the faculty member‘s family on 05.05.2019. She further alleged that it was not the first time that the petitioner had tried to touch her inappropriately. The respondent no. 5 was examined on 15.05.2019 by the ICC in her statement. The respondent no. 5 gave a detailed account of what transpired on 05.05.2019 at the wedding reception. She along with the entire department had been invited by the Assistant Professor of the department for the wedding. She stated that the petitioner had put his hand on her back and stroked her bra strap and kept his hand there. According to her, she was wearing a kurta, slightly exposed at the back. The petitioner put his hand on the exposed part of her dress. She felt uneasy and tried to move his hand but he grabbed her hand and said - don‘t you want a job …. I know you want a job. The petitioner then asked the respondent no.5 to sit down. She told him that she wanted to go to the bathroom, but the petitioner insisted her to sit down. Then the respondent no.5 pushed away forcefully and walked off. She, thereafter, narrated the story to a friend Nxxx‘ (name withheld). The respondent no. 5 also asserted that everybody in the Department knew that the petitioner targeted girl students and tried to get close to them. She asserted that one day he called her separately to his office and told her to come to the class as she was a good student and needed to excel in studies. According to the respondent no.5, she could make out what kind of intention he had when he said that. The respondent no.5 further complained that there were other girls facing the same issue but they did not want to come out and speak. According to the respondent no.5, all the girls had accepted that he had touched them inappropriately. Ms ‘Nxxx’ was also examined by the ICC who corroborated the statement of the respondent no.5 regarding the incident at the wedding reception. According to Ms ‘Nxxx’, the petitioner made them feel uncomfortable by the way he looked at them. As rightly pointed out by Mr. Karma Thinlay Namgyal, the complaint was not with regard to an isolated incident at the wedding reception but was also with regard to other incidents, one of which transpired in the office of the petitioner. It cannot be argued that the petitioner‘s office is not a workplace as defined in section 2(o) of the Act of 2013. Section 9 of the Act of 2013 provides that a complaint of sexual harassment at workplace can be made within a period of three months from the date of incident or in case of a series of incidents, within a period of three months from the date of last

incident. The last incident in the present case transpired on 05.05.2019 and the complaint was filed on 12.05.2019, within seven days after the date of the last incident. In such circumstances, prima facie, it cannot be said that the ICC did not have the jurisdiction to examine the complaint filed by the petitioner. It is noticed that the petitioner has taken the ground, *inter alia*, that the alleged incident of 05.05.2019 at the wedding reception would not come within the jurisdiction of ICC as it would not fall within the definition of workplace. Therefore, it is felt necessary to leave the question as to whether the incident at the wedding reception would come within the meaning of sexual harassment at workplace, as provided in section 9 of the Act of 2013, to be decided by the Executive Authority in the pending appeal as well.

7. The petitioner next contends that the respondents no.1 to 4, ought to have allowed the period of thirty days as provided in Regulation 8(4) of the UGC Regulations before acting on the recommendation of the ICC. It is contended that the Executive Council having issued the impugned termination order dated 28.06.2019 even before the expiry of the thirty days period, has made its mala fide intention manifestly clear.

8. In ***Harendra Arora*** (supra), the Supreme Court held while referring to its earlier judgment in ***Managing Director, ECIL Hydrabad and Others vs B. Karunakar and Others***[16] that it is plain that in cases covered by the constitutional mandate, i.e., Article 311(2), non-furnishing of inquiry report would not be fatal to the order of punishment unless prejudice is shown. Therefore, requirement in the statutory rules of furnishing copy of the inquiry report cannot be made to stand on a higher footing by laying down that questions of prejudice is not material therein. It was also held:

> **"13.** The matter may be examined from another viewpoint. There may be cases where there are infractions of statutory provisions, rules and regulations. Can it be said that every such infraction would make the consequent action void and/or invalid? The statute may contain certain substantive provisions, e.g., who is the competent authority to impose a particular punishment on a particular employee. Such provision must be strictly complied

[16] (1993) 4 SCC 727

with as in these cases the theory of substantial compliance may not be available. For example, where a rule specifically provides that the delinquent officer shall be given an opportunity to produce evidence in support of his case after the close of the evidence of the other side and if no such opportunity is given, it would not be possible to say that the enquiry was not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. Even amongst procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case the theory of substantial compliance may not be available, but the question of prejudice may be material. In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available and in such cases objections on this score have to be judged on the touchstone of prejudice. The test would be, whether the delinquent officer had or did not have a fair hearing. In the case of *Russell* v. *Duke of Norfolk* [(1949) 1 All ER 109 (CA)] it was laid down by the Court of Appeal that the principle of natural justice cannot be reduced to any hard-and-fast formulae and the same cannot be put in a straitjacket as its applicability depends upon the context and the facts and circumstances of each case.

9. Regulation 8 of the UGC Regulations deals with the process of conducting inquiry and is quoted below:

> **8. Process of conducting Inquiry** – (1) The ICC shall, upon receipt of the complaint, send one copy of the complaint to the respondent within a period of seven days of such receipt.

(2) Upon receipt of the copy of the complaint, the respondent shall file his or her reply to the complaint along with the list of documents, and names and addresses of witnesses within a period of ten days.

(3) The inquiry has to be completed within a period of ninety days from the receipt of the complaint. The inquiry report, with recommendations, if any, has to be submitted within ten days from the completion of the inquiry to the Executive Authority of the HEI. Copy of the findings or recommendations shall also be served on both parties to the complaint.

(4) The Executive Authority of the HEI shall act on the recommendations of the committee within a period of thirty days from the receipt of the inquiry report, unless an appeal against the findings is filed within that time by either party.

(5) An appeal against the findings or/ recommendations of the ICC may be filed by either party before the Executive Authority of the HEI within a period of thirty days from the date of the recommendations.

(6) If the Executive Authority of the HEI decides not to act as per the recommendations of the ICC, then it shall record written reasons for the same to be conveyed to ICC and both the parties to the proceedings. If on the other hand it is decided to act as per the recommendations of the ICC, then a show cause notice, answerable within ten days, shall be served on the party against whom action is decided to be taken. The Executive Authority of the HEI shall proceed only after considering the reply or hearing the aggrieved person.

(7) The aggrieved party may seek conciliation in order to settle the matter. No monetary settlement should be made as a basis of conciliation. The HEI shall facilitate a conciliation process through ICC, as the case may be, once it is sought. The resolution of the conflict to the full satisfaction of the aggrieved party wherever possible, is preferred to purely punitive intervention.

(8) The identities of the aggrieved party or victim or the witness or the offender shall not be made public or kept in the public domain especially during the process of the inquiry.

10. Upon the receipt of the complaint by the ICC, Regulation 8 contemplates an inquiry within a period of ninety days from the date of the complaint and thereafter, the submission of the inquiry report within ten days from the completion of the inquiry to the Executive Authority. Regulation 8(4) provides that the Executive Authority shall act on the recommendation of the ICC within a period of thirty days from the receipt of inquiry report, unless an appeal against the findings is filed within that time by either party. Time, thus begins to run for the Executive Authority from the day it receives the inquiry report and stops only if an appeal is filed within the thirty days period. During the thirty days period as envisaged in Regulation 8(4), Regulation 8(6) provides for certain processes to be completed before acting on the recommendation of the ICC. A show cause notice answerable within ten days is mandated and the Executive Authority is required to proceed only after considering the reply or hearing the aggrieved person. Regulation 8(5), however, provides that an appeal against the recommendation of the ICC may be filed by either party before the Executive Authority within a period of thirty days from the recommendation of the ICC. Time for the aggrieved parties begins to run from the date of the recommendation of the ICC. Thus, an aggrieved party has a statutory right to prefer an appeal within thirty days from the date of recommendation. A perusal of Regulation 8 makes it clear that the legislative intent was to ensure that the process of inquiry is not only done fairly but also, speedily. The word act used in Regulation 8(4) would mean to take all such steps to give effect to the recommendations including following the

steps envisaged in Regulation 8(6). However, a composite reading of all the sub-clauses of Regulation 8, makes it evident that the Executive Authority could not have taken the final step of terminating the petitioner on the recommendation of the ICC before the thirty days period provided to him under Regulation 8(5) to prefer an appeal. It is noticed that an appeal is provided against the findings or/recommendations of the ICC. If during the period of thirty days as provided in Regulation 8(4), the aggrieved person preferred an appeal, then the Executive Authority must await the final outcome of the appeal before taking the final step, as in the present case, issuing the termination order dated 28.06.2019. An aggrieved person should also be given the opportunity to prefer an appeal within the time frame as contemplated in Regulation 8(5). If the Executive Authority took the final step, as was done in the present case, before the expiry of the thirty days period, then prejudice would be writ large. Admittedly, the petitioner had preferred an appeal on 01.07.2019 and the facts disclose that he could have done so on or before 08.07.2019. Thus, the impugned order of termination dated 28.06.2019 could not have been issued. This court is, therefore, of the view that during the pendency of the appeal before the Executive Council, his termination order, bearing no. 201/2019 dated 28.06.2019, shall be kept in abeyance until the final decision in the pending appeal. The appeal before the Executive Council must be decided expeditiously after giving an opportunity of hearing to both the parties.

11. The observations made on the facts of the case is only for the purpose of addressing the arguments made by the parties and it shall not influence the Executive Council before whom the appeal is pending. All issues and questions which are open to challenge under the law and taken in the appeal shall be decided by the Executive Council in its jurisdiction as the Appellate Authority.

12. Considering the fact that the petitioner has preferred an appeal which is pending, no further orders may be required to be passed in the present writ petition.

13. The writ petition is disposed accordingly.

14. No order as to costs.

SLR (2020) SIKKIM 1035

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

Bail Appln. No. 13 of 2020

Anthony Rai **….** **PETITIONER**

Versus

State of Sikkim **…..** **RESPONDENT**

For the Petitioner: Ms. Kriti Pradhan and Ms. Binu Rai, Advocates.

For the Respondent: Mr. Yadev Sharma, Additional Public Prosecutor.

Date of decision: 10th December 2020

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – Accused of offences under S. 376, I.P.C read with S. 4 of the POCSO Act, 2012 – Held: Alleged incident occurred on 09.07.2020 and the medical report of the victim is dated 10.07.2020. The medical report *prima facie* reveals no visible injuries either on the person of the victim or on her private parts. The vaginal wash sample was admittedly also collected and Learned Additional Public Prosecutor conceded that the vaginal wash tested negative for any spermatozoa – Fit case where the petitioner can be released on bail subject to the imposition of certain conditions.

(Paras 5 and 6)

Petition Allowed.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The instant application has been filed by the Petitioner under Section 439 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) seeking enlargement on bail. The Petitioner, aged about 23 years was arrested in

connection with the Sadar P.S. FIR No.112/2020, dated, 10-07-2020, under Section 376 of the Indian Penal Code, 1860 (for short, "IPC"), read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act, 2012").

2. Learned Counsel for the Petitioner submits that the Petitioner has been falsely implicated in the instant matter for allegedly committing the offence under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012, on the victim alleged to be about 16 years old. That, in fact, although it has not been averred in the Petition inadvertently, however the accused and the victim were friends and the victim had of her own free will gone to the house of the accused where the offence is alleged to have been committed but is not supported by the medical evidence which in fact reveals lack of injuries on the person of the victim and on her genitals as well. That, the Section 161 Cr.P.C. statement and Section 164 Cr.P.C. statements of the victim differ from each other rendering the Prosecution case suspect. It is urged that the Petitioner is a taxi driver and plies a taxi for his livelihood on which his family comprising amongst others of aged and ailing parents are dependent as he is the only breadwinner. That, due to the false allegation resulting in his incarceration his parents are suffering. The Petitioner undertakes not to tamper with evidence or to abscond if enlarged on bail and is willing to abide by any conditions imposed by this Court should this Court be so inclined to grant Bail . That, in the facts and circumstances of the case, the Petitioner may be set at liberty.

3. Objecting to the prayers for bail, Learned Additional Public Prosecutor submits that the victim is 16 years of age having been born on 13-12-2004, as per the Birth Certificate seized by the Investigating Officer (I.O.) of the case. That, the offence is a heinous offence committed on a minor by a 23 year old adult. That, the Charge-Sheet has already been filed and trial is yet to commence. Should the accused be enlarged on bail at this stage in all likelihood he will influence the victim and other Prosecution witnesses and thereby set to naught the Prosecution case, hence the Petition for Bail deserves to be rejected.

4. I have heard Learned Counsel for the parties *in extenso* and given due consideration to their submissions. I have also perused the documents on record, viz., Section 161 Cr.P.C. statement, Section 164 Cr.P.C. statement and the medical report of the victim.

5. The alleged incident occurred on 09-07-2020 and the medical report of the victim is dated 10-07-2020. The medical Report *prima facie* reveals no visible injuries either on the person of the victim or on her private parts. The vaginal wash sample was admittedly also collected and Learned Additional Public Prosecutor concedes that the vaginal wash tested negative for any spermatozoa.

6. In view of all the facts and circumstances placed before me, I am of the considered opinion that this is a fit case where the Petitioner can be released on bail subject to the imposition of certain conditions.

7. It is hereby ordered that the Petitioner be enlarged on bail on furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each, subject to the conditions that;

> *(i) He shall not leave Sikkim without the specific written permission of the I.O. of the case;*
>
> *(ii) He shall not be in contact either with the victim or any of the other Prosecution witnesses;*
>
> *(iii) He shall not threaten either the victim or any of the other witnesses acquainted with the facts of the case; and*
>
> *(iv) He shall appear before the Learned Trial Court on every date fixed for trial.*

Should any of the above conditions be violated his bail bonds shall stand cancelled and he shall be taken into judicial custody forthwith.

8. The observations made herein above are only for the purposes of this Bail Application and shall in no manner be construed as opinions on the merits of the matter.

9. Bail application stands disposed of accordingly.

10. Copy of this Order be sent to the Learned Trial Court for information.

SLR (2020) SIKKIM 1038

(Before Hon'ble the Chief Justice)

WP (C) No. 43 of 2020

Shri Roshan Giri and Another …. PETITIONERS

Versus

Shri Rakesh Gurung and Others ….. RESPONDENTS

For the Petitioners: Mr. N. Rai, Senior Advocate with
Ms. Sushmita Gurung, Advocate.

Date of decision:11th December 2020

A. Code of Civil Procedure – O. 8 R. 6A – Time Limit to File Counter-Claim by Defendant – Defendant cannot be permitted to file counter-claim after the issues are framed and after the suit has proceeded substantially (*In re. Ashok Kumar Kalra* discussed) – It is seen that the Hon'ble Supreme Court has made it clear in illustration (x) that in any case, discretion to entertain filing of the counter-claim cannot be exercised after framing of issues – Held: In the instant case, counter-claim filed after issues were framed and the plaintiff and his constituted attorney had filed evidence and therefore, there is no merit in the petition.

(Paras 13, 14 and 16)

Petition dismissed.

Case cited:

1. Ashok Kumar Kalra v. Surendra Agnihotri, (2020) 2 SCC 394.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

This petition under Article 227 of the Constitution of India is filed against the order dated 24.10.2020, passed by the learned Civil Judge, East

Sikkim at Gangtok, in Title Suit No. 25 of 2018, rejecting the counter-claim.

2. It is to be noted that by the aforesaid order dated 24.10.2020, the learned trial court had also rejected an application under Order 14 Rule 5 read with Section 151 of the Code of Civil Procedure, 1908, for short, the CPC, for framing of an additional issue. Against the rejection of the application under Order 14 Rule 5 read with 151 CPC, the petitioners had filed another petition under Article 227 of the Constitution of India, which is registered as WP (C) No. 44 of 2020.

3. Mr. N. Rai, learned Senior Counsel for the petitioners has submitted that the learned court below has committed illegality in rejecting the counter-claim as after framing of issues, the case has not proceeded further. He submits that though evidence of plaintiff and his constituted attorney had been filed, same have not been authenticated and they are also not cross-examined, and therefore, there is no impediment in allowing the counter-claim.

4. The petitioners are defendant nos.2 and 3 in the suit filed by the respondent no.1 for declaration, recovery of possession, injunction and other consequential reliefs. Defendant no.1 in the suit is Gangtok Municipal Corporation through its Commissioner and defendant no.1 is arrayed as respondent no.2 in the petition.

5. The petitioners had filed written statement on 17.04.2019. The plaintiff had filed an application under Order 6 Rule 17 read with Section 151 CPC and same was allowed by the learned trial court .The plaintiff had filed amended plaint on 06.02.2020. The written statement to the amended plaint was filed by the present petitioners on 18.02.2020.

6. Five issues were framed on 29.06.2020. The petitioners had filed the counter–claim and the application under Order 14 Rule 5 read with Section 151 CPC on 07.09.2020.

7. Having regard to the subject matter in dispute, it would be appropriate to reproduce paragraph 26 of the amended written statement filed by the petitioners. The same reads as follows:

"26. That with reference to the contents of paragraph 15 of the plaint, it is humbly submitted that there was no effect of the construction work resulting in the disconnection of the water pipelines and any damage to underground electricity cables. The footpath did suffer some damage which was restored immediately. It is further submitted that there was no protest and opposition to the said work as alleged by the plaintiff or at all such the allegations of challenging the people complaining and violent retaliation to their protests does not arise at all. It is denied that the plaintiff was even manhandled. Had there been any incident of manhandling there would be an FIR to that effect which is not there. The allegation that the answering defendants terrorized the plaintiff and his family is false and utterly baseless and vexatious. It is humble submitted that it is a common knowledge that when the jhora was under construction by the government the plaintiff objected to the ongoing construction when it came to his land stating that there was no compensation was paid to him as such non concrete drain was allowed to be constructed by the plaintiff to the Government. There was only a kutcha drain. Meanwhile, the owners of the adjoining buildings constructed the drain around their buildings on their own. There is no column that has been erected on or over the jhora/drain. It is reiterated that the blue print plan referred to by the plaintiff is the old one prior to the diversion of the jhora flowing through the landholding of the answering defendants. It is submitted that the plaintiff one day told the Defendant No.3 that he could buy some timber at more economic rate from one Mr. Jabber who was head mason working in the construction work of the plaintiff's sister. The Defendant No.3

told the plaintiff that he could not buy the timber at present since he had no place to store them. At this the plaintiff asked Defendant No.3 to construct a store house or kutcha sheds in their vacant land for storing the timbers and shuttering materials of the answering defendants. After few such verbal assurances and suggestions from the plaintiff the answering defendants constructed the kutcha shed with the materials of the answering defendants. The head mason, Mr. Jabber, working simultaneously as baidar for the construction works of the plaintiff and his sister offered to sell some timber to the answering defendants. Meanwhile there was some dispute between the head mason and the plaintiff's sister Mrs. Rajani Gurung and brother-in-law (Rajani Gurung's husband) over the said timber. It is to be noted that the police had taken the timber to their custody for some time and later they returned the said timber to Mr. Jabber. Being confident that the dispute has been settled and Mr. Jabber was the true owner of the timber, the answering defendants bought the timber from him. The answering defendants also brought their old timber stored in their old house and stored in the same kutcha shed. On 20.12.2018 the plaintiff and his wife came to the said kutcha shed and started taking out the timber stored therein without informing the answering defendants. When the answering defendant No.3 stopped them from doing so the plaintiff and his wife started shouting by saying that the defendant No.3 had no papers to show that the timber belonged to him. This resulted in some verbal exchange of words between the plaintiff, his wife and the answering defendant No.3 and his wife. It is further submitted that in one of the evenings following the relevant day the defendant No.3 was called by the plaintiff and his wife to their

residence to talk the matter over. They asked the defendant No.3 for Rs.1,00,000/- (Rupees one lakh only) if he wished to avoid the court case and also said that he should forego all the timber kept in the said kutcha shed in favour of the plaintiff. The plaintiff and his wife threatened the defendant No.3 that if he refused to give them the amount demanded then they would make sure that he has to go to courts for years on account of various allegations that they could and would level against him. The answering defendant No.3 did not oblige to such threats and told the plaintiff and his wife that he would not yield to such extortionist method and ill will. It is humbly submitted that this suit is the result of such refusal by the answering defendant No.3."

8. Paragraphs 5 to 8 and part of paragraph 9 of the counter-claim are more or less reproduction of the averments made in paragraph 26 of the amended written statement. In paragraphs 9 and 10 of the counter-claim, it is stated as follows:

"*9. That in one of the evenings following the instant event, the Defendant No.3 was called by the plaintiff and his wife to their residence to talk the matter over. They asked the Defendant No.3 for Rs.1,00.000/- (Rupees one lakh only) if he wished to avoid the court cases and also said that he should forego all the timber kept in the said kutcha shed in favour of the plaintiff. The plaintiff and his wife threatened the Defendant No.3 that if he refused to give them the amount demanded then they would make sure that he has to go to courts for years on account of various allegations that they could and would level against him. The Defendant No.3 did not oblige to such threats and told the plaintiff and his wife that he would not yield to such extortionist method and ill will. It is humbly submitted that*

the suit of the plaintiff is the result of such refusal by the Defendant No.3. Also the plaintiff and his wife told Defendant No.3 that if he wishes to take away the timber and materials from the kutcha shed then he or his brother (Defendant No.2) should show the No Objection Certificate issued by the plaintiff for the construction of the said kutcha shed. Further the plaintiff's wife told the Defendant No.3 that they will file a suit in the court and neither the plaintiff nor the Defendant Nos.2 and 3 shall touch the kutcha shed till the disposal of the suit. The said kutcha shed was then sealed with the nail. The plaintiff and his wife are playing with the façade of the good will they projected and afterwards turning against the Defendant No.2 and 3 to loot their properties."

10. That after the said incident neither the Defendant No.2 and Defendant No.3 nor the plaintiff and his wife had touched the said Kutcha shed. However, sometime in the month of September 2019, Smt. Yamuna Giri, the mother of the Defendant No.2 and Defendant No.3 saw the plaintiff opening the said kutcha shed and taking some timber away while the Defendant No.2 and Defendant No.3 were not at home. When the suit was brought by the plaintiff the Defendant Nos. 2 and 3 had hoped that the disposal of the suit would bring an end to their restriction imposed by the threat of the plaintiff for the access to the said kutcha shed. The instant counter claim became necessary when the plaintiff himself took away the materials belonging to Defendant Nos.2 and 3 before the disposal of the suit brought by him before this Hon'ble Court."

9. The details of timber, shuttering materials stated to be sold by Mr. Jabbar to the petitioners are stated in paragraph 11. In paragraph 12, the

petitioners had stated about the timber and shuttering materials stored in the said *kutcha* shed from their own house. It is stated in the counter-claim that the total value of the materials stored in the *kutcha* house comes to Rs.3,64,300/- and the damage caused to the materials as indicated in paragraph 13 is valued at Rs.1,25,440/- and accordingly, the counter- claim is valued at Rs.4,89,740/-. In the counter-claim, defendant nos.2 and 3 prayed for the following reliefs:

> "*20. That the Defendants Nos 2 and 3 therefore, pray for the following relieves:*
>
> *a. An Order or decree directing the plaintiff to return all the timber and shuttering materials including the bamboos if they are not used by the plaintiff for any purpose.*
>
> *Or in the alternative*
>
> *A compensation amount of Rs.4,89,740/- (Rupees four lakhs eighty nine thousand seven hundred and forty only) may be paid to the Defendant Nos.2 and 3 by the plaintiff if the said materials are used by the plaintiff for any purpose.*
>
> *b. A decree for pendent-lite and future interest at the rate of 12% from the date of the presentation of this counter claim i.e. from 06.08.2020 til the final realization of the arrears amount where the order for compensation is deemed fit by this Hon'ble Court.*
>
> *c. Any other relief or relieves as this Hon'ble Court may deem fit and proper under the present facts and circumstances.*"

10. The learned trial court noted that the issues were framed on 29.06.2020 and the evidence on affidavit of the plaintiff and the constituted attorney were filed on 20.08.2020. The learned trial court relied on a decision of the Hon'ble Supreme Court in ***Ashok Kumar Kalra vs.***

Surendra Agnihotri, reported in ***(2020) 2 SCC 394***, and held that no counter-claim can be allowed to be filed after framing of issues. Accordingly, the counter-claim was rejected.

11. Order 8 Rule 6A of the CPC reads as follows:

> "6A. Counter-claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:
>
> Provided that such counter- claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court.
>
> (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

12. The decision in ***Ashok Kumar Kalra*** (supra) was rendered by a 3-Judge Bench of the Hon'ble Supreme Court on a reference to consider, amongst others, as to whether the language of Order 8 Rule 6A CPC is mandatory in nature. In paragraph 18, the Hon'ble Supreme Court stated as follows:

> "18. As discussed by us in the preceding paragraphs, the whole purpose of the procedural law

> is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, we are of the considered opinion that the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC."

13. Although the learned trial court had quoted Paragraph 21 of the aforesaid judgement, it would be appropriate to reproduce the same in this order also for better appreciation:

> "21. We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:
>
> (*i*) Period of delay.
>
> (*ii*) Prescribed limitation period for the cause of action pleaded.
>
> (*iii*) Reason for the delay.
>
> (*iv*) Defendant's assertion of his right.
>
> (*v*) Similarity of cause of action between the main suit and the counterclaim. (*vi*) Cost of fresh litigation.
>
> (*vii*) Injustice and abuse of process.
>
> (*viii*) Prejudice to the opposite party.
>
> (*ix*) And facts and circumstances of each case.
>
> (*x*) In any case, not after framing of the issues."

14. From the above, it is seen that the Hon'ble Supreme Court has made it clear in illustration (x) that in any case, discretion to entertain filing of the counter-claim cannot be exercised after framing of issues.

15. It will also be necessary to refer to the judgment of Hon'ble Mohan M. Shantanagoudar, J, in the aforesaid case. His Lordship had partly

supplemented and partly dissented to the judgment noted above. His Lordship at paragraph 60 of the judgment observed as follows:

> "60. Having considered the previous judgments of this Court on counterclaims, the language employed in the rules related thereto, as well as the intention of the legislature, I conclude that it is not mandatory for a counterclaim to be filed along with the written statement. The court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counterclaim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff."

16. In the instant case, the counter-claim was filed after issues were framed and the plaintiff and his constituted attorney had filed evidence and therefore, there is no merit in this petition. Resultantly, the petition is dismissed.

SLR (2020) SIKKIM 1049
(Before Hon'ble the Chief Justice)

WP (C) No. 44 of 2020

Shri Roshan Giri and Another ….. PETITIONERS

Versus

Shri Rakesh Gurung and Others ….. RESPONDENTS

For the Petitioners: Mr. N. Rai, Senior Advocate with
Ms. Sushmita Gurung, Advocate.

Date of decision:11th December 2020

A. Code of Civil Procedure – O. 14 R. 5 – Framing of Additional Issue – When the order of rejection of counter-claim is upheld, framing of an additional issue in the light of the counter-claim does not arise.

(Para 9)

Petition dismissed.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

This petition under Article 227 of the Constitution of India is filed against the order dated 24.10.2020, passed by the learned Civil Judge, East Sikkim at Gangtok, in Title Suit No.25 of 2018, rejecting an application under Order 14 Rule 5 read with Section 151 of the Code of Civil Procedure, 1908, for short, the CPC, for framing of an additional issue.

2. It is to be noted that by the aforesaid order dated 24.10.2020, the learned trial court had also rejected the counter-claim filed by the petitioners and the petitioners had filed another petition under Article 227 of the Constitution of India, which is registered as WP (C) No. 43 of 2020. By an order passed today, the said petition was dismissed.

3. Mr. N. Rai, learned Senior Counsel for the petitioners has submitted that though additional issue sought to be raised in the application under Order 14 Rule 5 read with Section 151 CPC was in reference to the counter-claim filed, the said additional issue can still be framed for resolving the disputes in between the parties and in that view of the matter, the learned trial Court committed illegality in rejecting the said application.

4. The petitioners are defendant nos.2 and 3 in the suit filed by the respondent no.1 for declaration, recovery of possession, injunction and other consequential reliefs. Defendant no.1 in the suit is Gangtok Municipal Corporation through its Commissioner and defendant no.1 is arrayed as respondent no.2 in the petition.

5. The petitioners had filed written statement on 17.04.2019. The plaintiff had filed an application under Order 6 Rule 17 read with Section 151 of the CPC and same was allowed by the learned trial court.The plaintiff had filed amended plaint on 06.02.2020. The written statement to the amended plaint was filed by the present petitioners on 18.02.2020.

6. Five issues were framed on 29.06.2020. The petitioners, on 07.09.2020, had filed the counter–claim and the application under Order 14 Rule 5 read with Section 151 CPC praying for framing of an additional issue to the following effect:

> *"6. Whether the plaintiff is liable to return the timber and other construction materials of Defendant Nos.2 and 3 stored in a kutcha shed constructed by them in the vacant land of the plaintiff with his verbal permission or in the alternative pay the damages amount in favour of Defendant No.2 and 3."*

7. It is stated that on the date of framing of issue it was brought to the notice of the learned trial court by the learned counsel for the petitioner that an important issue arising out of the averments made in paragraph 26 of the amended written statement was inadvertently not included in the suggested issues. It is also stated that the learned trial court suggested to the learned counsel for the petitioner to file an application to frame the suggested issue.

8. Assuming that the statements made above are correct, no additional issue was sought to be framed on the basis of the averments made in paragraph 26 of the amended written statement, but prayer was made to frame an additional issue in view of filing of the counter- claim. Submission of Mr. Rai that even after rejection of the counter-claim, the suggested issue can still be framed is without any merit as the issue suggested is directly connected to the prayer made in the counter-claim.

9. When the order of rejection of counter-claim is upheld by this court in WP(C) No. 43 of 2020, framing of an additional issue in the light of the counter-claim, as prayed for, does not arise.

10. In view of the above discussion, the petition is dismissed.

SLR (2020) SIKKIM 1052

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

R.S.A. No. 5 of 2019

Mahesh Agarwal and Others …. APPELLANTS

Versus

Umesh Agarwal and Others ….. RESPONDENTS

For the Appellants: Mr. N. Rai, Senior Advocate with
Ms. Sushmita Gurung, Advocate.

Forthe Respondents: Mr. T.B. Thapa and Mr. Anmole Prasad,
Senior Advocates with Mr. Ranjan Chettri,
Mr. Sagar Chettri and Mr. Khemraj Sapkota,
Advocates.

Date of decision: 14th December 2020

A. Personal Laws – Presumption – In general, it may be said that in matters of status, every person is governed by the law of his personal status (*In re. Duggamma, Kom Krishna Bhat* discussed) – Where a Hindu family migrates from one State to another, the presumption is that it carries with it, its personal law, that is, the laws and customs as to succession and family relations prevailing in the State from which it came. However, this presumption can be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated (*In re. Bikal Chandra Gope* discussed).

(Para 13)

B. Hindu Law – Principle – Essence of a coparcenary under Mitakshara Law is unity of ownership – The normal state of every Hindu joint family is one of jointness. Every such family is joint in food, worship and estate in the absence of proof of division and in the absence of any positive steps taken to effect a partition (*In re. Adiveppa* discussed) – In a joint family business, no member of the family can say that he is the owner

of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined – A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth, an interest in the joint or coparcenary property (*In re.Surjit Lal Chhaabda* discussed)

(Paras 14 (iii), 17 and 22(i))

C. Indian Evidence Act, 1872 – Proof of Contents of Documents – Mere marking of an Exhibit does not dispense with its proof. Once the contents are proved, should the opposing party fail to raise objections or extract any contradictory evidence by way of cross-examination, then the contents of the document can be accepted as evidence. The probative value of a document must be established in the absence of which, the document deserves to be disregarded.

(Para 21)

D. Hindu Law – Whether a Power of Attorney is required to be executed in favour of a *Karta* by coparcener under the Mitakshara School of Hindu Law – A property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The Manager of a joint family is called "*Karta*." So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family property including even charitable properties and is presumed to be the Manager until the contrary is shown. The *Karta* as the head of the family, has control over the income and expenditure and he is the custodian of the surplus, if any. The Manager has power over the income of the joint family pertaining to maintenance, education, marriage and other religious ceremonies of the coparceners and of the members of their respective families. He also has power to contract debts for family purpose and family business. Held: that no Power of Attorney is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law (*In re. Sunil Kumar* discussed).

(Para 23 (i))

E. Indian Evidence Act, 1872 – S. 67 – Proof of Signature and Handwriting of a Person Alleged to Have Signed or Written Document Produced – The production of a document purported to have been signed or written by a certain person is no evidence of authorship –

As per the rules of evidence, a person who makes an assertion must prove it. The handwriting can be proved by circumstantial evidence besides direct evidence but in the instant case, the defendants failed to furnish any other documents to indicate that Exhibit "G" was authored by Bhaskaran and although the handwriting may be similar to that in Exhibit-1, this, by no means establishes that it is indeed the handwriting of Bhaskaran.

(Para 30 (iii))

Appeal partly allowed.

Chronology of cases cited:

1. Rangammal v. Kuppuswami and Another, (2011) 12 SCC 220.
2. Anil Rishi v. Gurbaksh Singh, (2006) 5 SCC 558.
3. Md. Kalu Sheikh @ Abdul Gani Sarkar v. On the death of Shahjahan Ali His Legal Heirs Hazarat Ali and Others, (2020) 2 Gauhati Law Reports 391.
4. Sait Tarajee Khimchand and Others v. Yelamarti Satyam *alias* Satteyya and Others, AIR 1971 SC 1865.
5. Dattatraya Shripati Mohite v. Shankar Ishwara Mohite and Another, AIR 1960 Bombay 153.
6. Bhagwan Singh v. State of Punjab, AIR 1952 SC 214.
7. Venkatlal Baldeoji Mahajan v. Kanhiyalal Jankidas and Others, AIR 1963 MP 155.
8. Biswanath Prasad and Others v. Dwarka Prasad and Others, AIR 1974 SC 117.
9. Smt. Jai Shree Lalla v. Sri Harbans Singh, 2014 SCC OnLine Del 1752.
10. Karam Kapahi and Others v. Lal Chand Public Charitable Trust and Another, AIR 2010 SC 2077.
11. Suzuki Parasrampuria Suitings Private Limited v. Official Liquidator of Mahendra Petrochemicals Limited (In Liquidation) and Others, (2018) 10 SCC 707.
12. Dasa Singh and Another v. Jasmer Singh, 2003 (2)RCR (Civil) 361.

13. Bank of India v. Allibhoy Mohammed and Others, AIR 2008 Bombay 81.

14. Sunil Kumar and Another v. Ram Prakash and Others, AIR 1988 SC 576 : (1988) 2 SCC 77.

15. Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh, AIR 1969 SC 1076 : (1969) 1 SCC 386.

16. Mst. Rukhmabai v. Lala Laxminarayan and Others, AIR 1960 SC 335.

17. Union of India v. Sree Ram Bohra and Others, AIR 1965 SC 1531.

18. Joint Family of Udayan Chinubhai Etc. v. Commissioner of Income Tax, Gujarat, AIR 1967 SC 762.

19. Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Others, (1991) 3 SCC 442.

20. A.C. Narayanan v. State of Maharashtra and Another, (2014)11 SCC 790.

21. Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade and Others, (2007) 1 SCC 521.

22. Adiveppa and Others v. Bhimappa and Another, (2017) 9 SCC 586.

23. Sankalchan Jaychandbhai Patel and Others v. Vithalbhai Jaychandbhai Patel and Others, (1996) 6 SCC 433.

24. Ramkrishna Transports, Kalahasti v. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad, 1966 SCC OnLine AP 155.

25. Madanlal (Dead) by LRs and Others v. Yoga Bai (Dead) by LRs, (2003) 5 SCC 89.

26. Chinthamani Ammal v. Nandagopal Gounder and Another, (2007) 4 SCC 163.

27. Karan Singh and Others v. State of M.P., (2003) 12 SCC 587.

28. Sita Ram Bhau Patil v. Ramchandra Nago Patil (Dead) By L.Rs. and Another, (1977) 2 SCC 49.

29. Udham Singh v. Ram Singh and Another, (2007) 15 SCC 529.

30. Nagubai Ammal and Others v. B. Shama Rao and Others, AIR 1956 SC 593.

31. Union of India v. Purushotam Dass Tandon and Another, 1986 (Supp) SCC 720.

32. Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. and Others v. State of Maharashtra and Others, (2016) SCC OnLine Bom1784.

33. Thamma Venkata Subbamma (Dead) by LR v. Thamma Rattamma and Others, (1987)3 SCC 294.

34. Tvl. M. Muthuraj (HUF), Represented by its Karta/Power of Attorney Holder v. The Commissioner of Commercial Taxes and Another, W.P (MD) No. 13340 & 13344 of 2015 and W.P (MD) No. 1 &1 of 2015 dated 26.06.2019.

35. Duggamma, Kom Krishna Bhat and Another v. Ganeshayya Bin Keshayya and Others, AIR 1965 Mysore 97.

36. Bikal Chandra Gope and Another v. Manjura Gowalin and Others, AIR 1973 Patna 208.

37. Kokilambal and Others v. N. Raman, AIR 2005 SC 2468.

38. Chandrakant Manilal Shah and Another v. Commissioner of Income Tax, Bombay-II, AIR 1992 SC 66.

39. Keshar Bai v. Chhunulal, (2014) 11 SCC 438.

JUDGMENT

Meenakshi Madan Rai, J

1. In this Second Appeal, the Judgment and Decree, both dated 28.02.2019, in Title Appeal No.18 of 2017, is being assailed. By the impugned Judgment, the Learned First Appellate Court reversed the Judgment in Title Suit No.21 of 2013, dated 28.11.2017, by which the Learned Trial Court had dismissed the Suit of the Respondents herein.

2. The substantive questions of law framed for determination before this Court, are as follows;

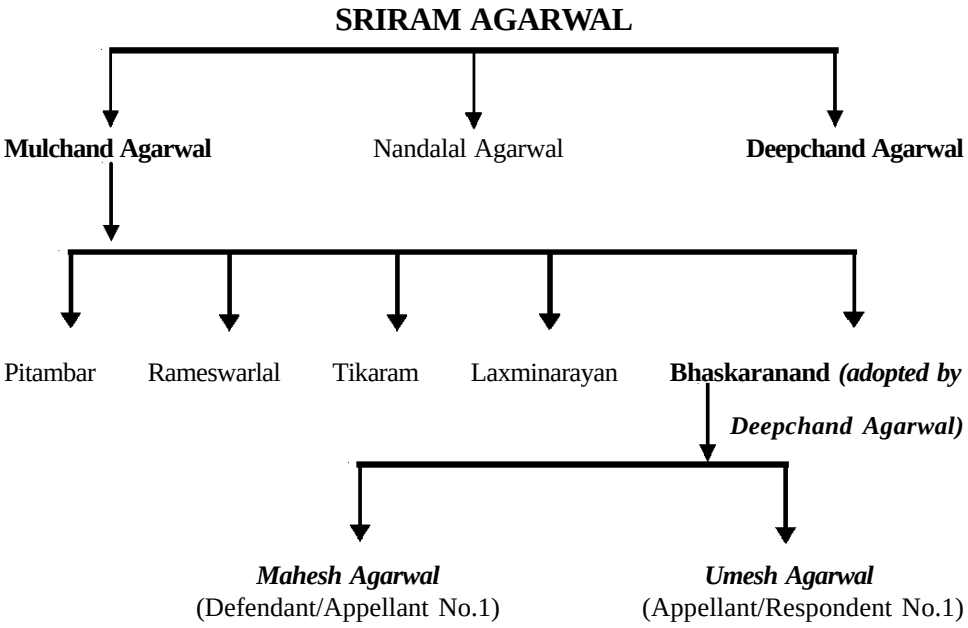
> "1. *Whether the Judgment of the learned First Appellate Court is based on misinterpretation of documentary evidence?*

2. Whether a karta of a joint family needs a Power of Attorney to deal with the properties of Hindu Undivided Family?"

3. The Respondents No.1, 2 and 3 herein were the Plaintiffs before the Learned Trial Court and hereinafter they shall be referred to as the Plaintiffs/ "P1," "P2" and "P3." The Appellants No.1, 2 and 3 herein were the Defendants before the Learned Trial Court. They shall be referred to as the Defendants/"D1," "D2" and "D3" hereinafter.

4. The Suit was originally instituted as Civil Suit No.10 of 1994 by the surviving Plaintiffs and one Bhaskaranand Agarwal, father of P1 and D1. Bhaskaranand passed away in 1999 and thereafter his name was deleted from the array of the Plaintiffs and the surviving Plaintiffs renumbered as Plaintiffs No.1, 2 and 3.

5.(i) To comprehend the dispute between the parties in its entirety, it is essential to briefly narrate the facts of the case. The Genealogical Chart of P1 and of D1 who are blood brothers, is as follows;



(ii) The Plaintiffs (P1, P2 and P3) case is that one Sriram Agarwal (see Chart *supra*) had three sons *viz.* Mulchand Agarwal, Nandalal Agarwal and Deepchand Agarwal of whom Nandalal separated from the joint family. Mulchand had five sons, of whom one i.e. Bhaskaranand, was adopted by Mulchands brother Deepchand. Together, the five sons constituted the joint family and joint family business in or around 1940 by the name of "M/s. Shree Mulchand and Sons."

6.(i) The joint family business originally was in Kalimpong, West Bengal but also had properties in Bombay, Calcutta and Siliguri. The twelve properties in Sikkim described in Schedule 'A' to the Plaint, were acquired around 1939-40 by the joint family of M/s. Shree Mulchand and Sons which included the Schedule 'B' property allotted to them by the then Maharani of Sikkim, on 14.09.1944. A seven storeyed RCC building was raised on the Schedule 'B' land for residential purposes of the joint family and for joint family business and presently, the families of both P1 and D1 are residing in this building of which they are in joint possession.

(ii) In 1968, M/s. Shree Mulchand and Sons settled the joint family properties amongst themselves amicably whereby the properties mentioned in Schedule 'A' to the Plaint, were allotted in favour of Late Bhaskaranand and his two sons. The three formed an undivided Hindu coparcenary governed by the Mitakshara School of Hindu Law and were in collective ownership of the Schedule 'A' properties, income from these properties went into a joint fund. As per P1, although some of the said properties have been recorded in the individual names of P1 and D1 in the State records, they are joint family property and none of the members thereof had individual or independent rights on the property. As D1 did not take part in the running of the business, he executed a Power of Attorney for this purpose in favour of his father, his mother Smt. Bimala Devi Agarwal and grandmother Smt. Narayani Devi Agarwal (wife of Deepchand Agarwal) on 31.03.1973. That, as females are not coparceners in a Mitakshara Hindu family, Bimala Devi and Narayani Devi were not impleaded as parties to the suit.

(iii) In 1979, D1 registered a firm in the name and style of "Shree Mulchand & Sons" for the exclusive purpose of running the joint family business but such registration does not create any absolute right, title and interest for him in the joint family properties and business nor does it confer him with powers to dispose of the properties in Schedule 'A'.

(iv) That, in order to deal with the property in Schedule 'A' to the exclusion of his coparceners, D1 took into his custody all documents and properties of the joint family business and properties of M/s. Shree Mulchand and Sons and Agarwal Trading Company on 25.01.1994, in regard to which a First Information Report ("FIR") was lodged against him.

(v) That, in February, 1994, D3 started demanding monthly rentals from the tenants of Schedule 'B' property and on enquiry, P1 and his father came to learn that D1 had on 31.01.1989, fraudulently executed a Deed of Gift of Schedule 'B' property in favour of D3 without the concurrence of the coparceners. D3 then mortgaged Schedule 'B' property for loan to a Bank. That, the Deed of Gift is void, invalid and inoperative in the eyes of law on account of non-compliance of the mandatory requirements of law, therefore no right, title or interest accrues on D3. That, D1 collusively with D3, is attempting to dispose of and may interfere in the running of the joint family business. P1, P2 and P3, therefore, sought for the following reliefs;

> *"a) For declaration that the suit properties mentioned in the Schedule 'A' hereunder are joint family properties and/or the coparcenary properties of the Plaintiffs and the Defendants.*
>
> *b) For declaration that the deed of gift executed and registered on 31.1.1989 by the Defendant No.1 in favour of Defendant No.3 in respect of the properties mentioned in Schedule 'B' hereunder is void and inoperative in law and is not binding upon the Plaintiffs and/or in coparceners of the Hindu undivided family or upon any members of the joint family of the Plaintiffs and the Defendants.*
>
> *c) For permanent injunction restraining the Defendants and each one of them from transferring, alienating, encumbering, dealing with and/or from disposing of any of the joint properties of the parties mentioned in Schedule 'A' hereunder and also from interfering with the peaceful*

possession of the Plaintiffs and their family members in all the joint properties as aforesaid including the specific residential house described in Schedule 'B' hereunder and also from interfering with running of the joint family business in any manner whatsoever.

d) For Receiver.

e) For Costs.

f) For such other relief or reliefs to which the Plaintiffs are entitled in law and equity."

7.(i) In response, the Defendants, while admitting the genealogy of the family, denied and disputed the averments in the Plaint and stated that no joint family existed nor was there joint family business in Kalimpong or other places. That, neither did Bhaskarananda and his sons P1 and D1 constitute a joint family or coparcenary, besides, the Plaintiffs failed to describe the joint family properties and denied that the properties described in Schedule 'A' and Schedule 'B' belonged to any joint family with no independent right of any individual. That, the Plaintiffs are residing in Schedule 'B' property as licensees of D3 and are not in joint possession of the property but have failed to vacate the premises despite expiry of the stipulated period. The Defendants asserted that D1 is the sole proprietor of the business of M/s. Shree Mulchand and Sons and all properties and assets belonging to and standing in the name and style of M/s. Shree Mulchand and Sons, were acquired from its funds. That, the property described in Schedule 'B' of the Plaint was the property of M/s. Shree Mulchand and Sons and D1 became its absolute owner and gifted it to his wife D3. It was denied that Schedule 'B' property was allotted to any Hindu family in 1944.

(ii) That, by the partition of 1968, the entire properties and business of M/s. Shree Mulchand and Sons in Sikkim were allotted in favour of D1 and P1 separately, with nothing given to Bhaskaranand who relinquished his interest in 1968 and the partition was between the heirs of Mulchand and P1 and D1 and the properties vested in them separately. It was stated that the concept of Hindu joint family and coparcenary governed by Mitakshara Hindu Law has no application in Sikkim.

(iii) That, in 1973, to avoid disputes and differences in the family, Bhaskaranand initiated division of all the properties allotted in 1968 to his two sons. Thereafter, the properties described in Item Nos.1, 4, 5, 6 and 8 of Schedule 'A' to the Plaint, vested on D1 as its absolute owner of which he gifted the Schedule 'B' properties to D3, with the knowledge of P1 and Bhaskaranand. Properties described in Item Nos.2, 3 and 7 of Schedule „A were allotted and given exclusively to P1 which he registered in his name as owner on 30.07.1980. D1 was the proprietor of Item No.2 premises "M/s. Laxmi Stores." In "1989," he gave up his right, title and interest in favour of Sheila Agarwal, the wife of P1, as evident from Exhibit 8, dated 30.05.1973. D1 applied for registration of the Firm "Shree Mulchand & Sons" on 07.09.1977 which was duly registered on 16.06.1979.

(iv) That, Item No.8 of Schedule 'A' to the Plaint i.e. M/s. Agarwal Trading Company was handed over to D1 in 1975 by one Balkrishna Agarwal, the ostensible owner of the Company. That, Item No.9 of Schedule 'A' belongs to M/s. Shree Mulchand and Sons and P1 in moiety, P1 having purchased the said land on 18.10.1976 from M/s. Indo Sikkim Company. That, transfer of all properties described in Schedule „A to the Plaint were made as per the laws in force in Sikkim and whatever be the source of the properties described in Schedule 'A to the Plaint, these now belong to different individuals, as detailed above. That, the Power of Attorney was executed by D1 in 1973 as he was engaged in the running of the Agarwal Wire Industries Private Limited, established in 1981. That, when D3 offered Schedule „B as collateral security against the loan availed from the Bank when objections were invited, Bhaskaranand raised a belated objection which was rejected. D1 denied any alleged illegalities or collusive acts by him and D3 and the Suit deserves to be dismissed being meritless.

8. Based on the pleadings of the parties, the Learned Trial Court settled the following issues for determination;

> *"1. Whether the plaintiffs have any cause of action to bring the instant suit?*
>
> *2. Whether the suit is barred by limitation?*
>
> *3. Whether the suit is properly valued?*
>
> *4. Whether the properties as described in Schedule 'A' to the plaint are co-parcenary*

property/joint family property of the plaintiffs and the defendants?

5. *Whether the transfer of the property under Schedule 'B' to the plaint as effected by the defendant No.1 in favour of defendant No.3 by way of gift is void, inoperative and not binding upon the plaintiffs?*

6. *Whether the suit is bad for mis-joinder and non-joinder of necessary parties?*

7. *To what relief or reliefs, if any, are the plaintiffs entitled?*

8. *Had the defendant No.1 any right and authority to transfer the joint property as described in schedule 'B' to the plaint by executing the alleged Deed of gift?"*

The Learned Trial Court while taking up the Issues, considered the evidence on record and reached a finding that the Plaintiffs are not entitled to any of the reliefs claimed and dismissed the Suit of the Plaintiffs.

9.(i) The Judgment was assailed before the Learned District Judge, Special Division-I, Sikkim at Gangtok. While setting aside the Judgment of the Learned Trial Court, the Learned First Appellate Court observed that the challenge in the Appeal before him was confined to Issues No.1, 4, 5, 7 and 8. That, Issues No.2, 3 and 6 were decided by the Learned Trial Court in favour of the Defendants. The findings in that regard were not assailed by the Defendants by Cross-Objection.

(ii) The Learned First Appellate Court took up Issue No.4 first and while considering Exhibit 1 filed by P1, concluded *inter alia* that vide Exhibit 1, the properties in Sikkim (Schedule 'A' and Schedule 'B') had been allotted to the branch of Late Bhaskaranand which included Bhaskaranand as well and that a joint and undivided family is the normal condition of a Hindu society. Bhaskaranand and his sons constituted a joint Hindu family. The Court found no reason to doubt the clear recitals made in the endorsements in Exhibit 1. That, D1 had failed to substantiate his stand that the concerned properties had only been allotted to him and the present

P1 and not their father Late Bhaskaranand. It was concluded that the Learned Trial Court, while considering the use of different pens and spacing in the endorsements made in Exhibit 1, had embarked on an issue which was not contested by either of the parties. The Learned First Appellate Court opined that there was nothing worthy on record to show that any partition with respect to the Schedule 'A' and Schedule 'B' properties ever took place between Late Bhaskaranand and his sons or even between P1 and D1 whether earlier or after the demise of Late Bhaskaranand and held the properties to be joint family/ancestral/coparcenary properties. The Learned First Appellate Court also declined to place reliance on Exhibit 'G' filed by D1 on grounds of vagueness and found that the reliance placed on it by the Learned Trial Court was totally misplaced. That, the Learned Trial Court had accepted the Defendants claim that M/s. Shree Mulchand and Sons could not be a joint family business as one of its partners was an outsider, but no restriction under law prohibits any member of a joint family to enter into a partnership with an outsider. The Learned First Appellate Court, however, declined to place reliance on Exhibit 18 Cash Book and its English translation Exhibit 20, filed by P1, on grounds that no witness in support thereof was examined and ultimately decided Issue No.4 in favour of the Plaintiffs adding that the Learned Trial Court was influenced by the admissions made by P1 in Civil Suit No.76 of 1986 but the claims of D1 so far as admissions of P1 were abandoned, as P1 was not confronted with his admissions, denying him the occasion to explain them.

(iii) Issue Nos.5 and 8 were next taken up for discussion and it was opined that unless there is clear partition and allotment of the concerned properties/businesses in D1s name, he cannot claim exclusive rights over it and found the purported transfer/gift by D1 to D3 invalid sans authority of D1 to make the transfer. The finding of the Learned Trial Court was set aside and Issue Nos.5 and 8 decided by the Learned First Appellate Court in favour of the Plaintiffs.

(iv) Issue Nos.1 and 7 were taken up finally and decided in the affirmative by the Learned First Appellate Court relying on its own findings in Issue Nos.4, 5 and 8, as discussed *supra*. It was found that the Plaintiffs had succeeded in proving their case and was entitled to the reliefs claimed by them in Prayers (a), (b) and (c) of their amended Plaint and the Suit decreed accordingly.

10.(i) Before this Court, Learned Senior Counsel Mr. N. Rai while advancing his arguments for the Defendants, contended that Issue No.4 is the crux of the case. That, the Learned First Appellate Court set aside the findings of the Learned Trial Court in respect of the document Exhibit 1 and held that the suit properties are a joint family property solely relying on Exhibit 1. That, in fact, vide Exhibit 1, the properties in Sikkim were allotted only to D1 and P1 and Bhaskaranand had endorsed acceptance on their behalf as their natural guardian.

(ii) That, the onus to prove their case is on the Plaintiffs and they cannot take advantage of the weaknesses of the Defendants case as done by the Learned First Appellate Court. On this aspect, reliance was placed on ***Rangammal*** vs. ***Kuppuswami and Another***[1]. Reliance was also placed on ***Anil Rishi*** vs. ***Gurbaksh Singh***[2] and ***Md. Kalu Sheikh @ Abdul Gani Sarkar*** vs. ***On the death of Shahjahan Ali His Legal Heirs Hazarat Ali and Others***[3].

(iii) It is contended that the properties in Schedule „A recorded in the name of M/s. Shree Mulchand and Sons were allotted in favour of D1 while those in the name of Mulchand were in favour of P1. That, those in the name of the Firm Agarwal Trading Company was transferred from Balkrishna, cousin of P1 and D1, to D1 in terms of Clause 8 of Exhibit 1. However, the Learned First Appellate Court wrongly observed that in the pleadings, the Defendants took a stand that nothing was given to Late Bhaskaranand and he had relinquished all his rights, but in the Evidence-on-Affidavit of D1, he had stated that Late Bhaskaranand had retained three properties about which he has not stated anything in his Written Statement on the plea that at the time of preparation of the Written Statement, he was not aware of the existence of Exhibit 3. That, in fact, Exhibit 3 is not a proved document and mere marking of a document does not dispense with its proof. The document finds no mention in the pleadings and was produced only at the time of evidence. On this count, reliance was placed on ***Sait Tarajee Khimchand and Others*** vs. ***Yelamarti Satyam alias Satteyya and Others***[4]. Learned Senior Counsel submitted that the Learned First Appellate Court while disagreeing with the Learned Trial Court,

[1] (2011) 12 SCC 220
[2] (2006) 5 SCC 558
[3] (2020) 2 Gauhati Law Reports 391
[4] AIR 1971 SC 1865

concluded that the Trial Court while considering Exhibit 1 had found the words "and self" interpolated and there was no mention of Bhaskaranand being the *Karta* sans raising of this issue by the parties. Learned Senior Counsel urged that the Learned Trial Court can consider all aspects of the exhibited documents.

(iv) It was next submitted that P1 did not rely on and chose not to argue on Exhibit 2, which mentions that "Shree Mulchand & Sons" of Kolkata is a "Partnership at Will" and not a joint family, indicating the frail foundation of P1s case. That, as per the Learned First Appellate Court, the Defendants had not put forward any cogent evidence to prove that Bhaskaranand was not the *Karta* of their family during his lifetime but overlooked Exhibit 'C', the admitted document of Firm Registration in 1977-1979, presented by Bhaskaranand neither did the Court consider Exhibit 'M' being a General Power of Attorney executed in 1973 by D1 in respect of his properties and businesses in favour of Bhaskaranand. Exhibit 'P', 'Q' and 'R' are Eviction Suits filed by P1 and Exhibit 'T' by D1, in their individual names in which Bhaskaranand had appeared and deposed as their Constituted Attorney. That, the partition of Schedule 'A' amongst the two brothers is indubitably proved by the admission of P1 being Exhibit „U in Civil Suit No.76 of 1986 and the General Power of Attorney executed by both brothers (D1 vide Exhibit 'M' and P1 vide Document „D18) in favour of their father, mother and grandmother who all through, acted as their Constituted Attorneys while Bhaskaranand did not act as *Karta*. In the said Suits, the Learned Court has declared that P1 was the owner of the suit property which is mentioned as Item No.3 in Schedule 'A' to the Plaint. In Exhibit 'T', D1 was declared as owner of Item No.1 (Schedule 'B' property) of the Schedule 'A' property. Exhibit 'V' is the deposition of P1 as witness in the Eviction Suit admitting that by virtue of the Firm registration in 1977-1979, D1 had become the absolute owner of the Schedule 'B' property. On this count, reliance was placed on ***Dattatraya Shripati Mohite*** vs. ***Shankar Ishwara Mohite and Another***[5]**.** That, evidence given by P1 in Civil Suit No.76 of 1986 can be considered by this Court without him having been confronted, as per the provisions of Section 145 of the Indian Evidence Act, 1872 ("Evidence Act"), as a previous admission is a substantial piece of evidence. That, there is a difference between previous statement and previous admission. To fortify

[5] AIR 1960 Bombay 153

these arguments, reliance was placed on ***Bhagwan Singh*** vs. ***State of Punjab***[6]; ***Venkatlal Baldeoji Mahajan*** vs. ***Kanhiyalal Jankidas and Others***[7]; ***Biswanath Prasad and Others*** vs. ***Dwarka Prasad and Others***[8]; ***Smt. Jai Shree Lalla*** vs. ***Sri Harbans Singh***[9]; ***Karam Kapahi and Others*** vs. ***Lal Chand Public Charitable Trust and Another***[10]; ***Suzuki Parasrampuria Suitings Private Limited*** vs. ***Official Liquidator of Mahendra Petrochemicals Limited (In Liquidation) and Others***[11] and ***Dasa Singh and Another*** vs. ***Jasmer Singh***[12].

(v) It was canvassed by Learned Senior Counsel that there is no document on record filed by P1 to indicate the role of Bhaskaranand as *Karta* or any document signed by him as *Karta.* That, Exhibit 18 was the only document claimed by P1 to have been signed by Bhaskaranand which was rejected by the Learned Trial Court and the Learned First Appellate Court as not proved. That, the documents which could have been of assistance to P1 were "Annexure 1" and "Annexure 2" filed by them in the application under Order XII Rule 6 of the Code of Civil Procedure, 1908 ("CPC"), but these documents were not produced by P1 in the instant case. That, the Learned First Appellate Court while rejecting Exhibit 'G', the document of the Defendants, recorded it as being vague and unregistered, although Section 67 of the Evidence Act allows the party to prove the document by identifying handwriting. On this aspect, reliance was placed on ***Bank of India*** vs. ***Allibhoy Mohammed & Ors***[13]. Besides, D1 has identified Exhibit 'G' as being in his fathers handwriting as also PW Gitanjali Jalan, witness for P1 *(before the Learned Trial Court, the witness was variously numbered as "PW3" and "PW2" hence, hereinafter for convenience, shall be referred to by name)* but P1 denied such claim and deposed that the document was devoid of his fathers signature although he admitted that the handwritten portion and signature in Exhibit 1 was that of his father which is similar to that in Exhibit 'G.' That, Exhibit 'G' clearly sets out the details of the properties allocated to the two brothers and correlates to the allocation made in the settlement of 1968. The document was

[6] AIR 1952 SC 214
[7] AIR 1963 MP 155
[8] AIR 1974 SC 117
[9] 2014 SCC OnLine Del 1752
[10] AIR 2010 SC 2077
[11] (2018) 10 SCC 707
[12] 2003 (2) RCR (Civil) 361
[13] AIR 2008 Bombay 81

rejected as an unregistered document while reliance was placed on Exhibit 1 by the Learned First Appellate Court also an unregistered document, but admittedly accepted by both parties.

(vi) The Learned First Appellate Court overlooked the fact that the partition was done in metes and bounds in terms of the allotment made in Exhibit 1. The admissions of Bhaskaranand and P1 in their evidence Exhibits 'U' and 'V' were also not considered. Exhibit 8 and Exhibit 21 prove the transfer and registration of business of M/s. Laxmi Stores in the name of P1s wife Sheila Agarwal from that of D1. Exhibit 'B' establishes transfer of Schedule 'B' property in favour of D3 by D1. Learned Senior Counsel also urged that no common family account, one of the essential requirements of a joint family, was produced by P1. The different properties in Schedule 'A' to the Plaint said to be in the individual exclusive ownership of P1 and D1, was highlighted by Learned Senior Counsel.

(vii) The next argument advanced was that the Learned First Appellate Court held that the eldest member of the family would be the *Karta*, but in granting the Reliefs No.(a), (b) and (c) of the Plaint, he injuncted D1, the eldest member of the family from running the joint family and joint family business, if any.

(viii) It was urged that no "Power of Attorney" is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law, as was given by the P1 and D1 to Bhaskaranand and the Learned First Appellate Court was on agreement on this aspect by placing reliance on ***Sunil Kumar and Another*** vs. ***Ram Prakash and Others***[14]. The Learned Court failed to consider that the registration of a Deed of Gift under the Sikkim Registration of Documents Rules, 1930, can be attested by one witness alone and is in force in Sikkim in terms of Article 371-f(k) of the Constitution of India. That, P1 in his evidence, has admitted the fact of partition by stating, *"……..…..in order to complete the process of partition, the original plaintiff No.1 got some of these allotted properties mutated either in my name or in the name of the defendant No.1 from the name of the coparceners in whose name the properties were acquired prior to 1968."*

(ix) That, the evidence on record establishes that the properties were individual properties on which reliance was placed on ***Mudi Gowda***

[14] AIR 1988 SC 576 : (1988) 2 SCC 77

Gowdappa Sankh vs. ***Ram Chandra Ravagowda Sankh***[15]; ***Mst. Rukhmabai*** vs. ***Lala Laxminarayan and Others***[16]; ***Sunil Kumar*** (*supra*); ***Union of India*** vs. ***Sree Ram Bohra and Others***[17]; ***Joint Family of Udayan Chinubhai Etc.*** vs. ***Commissioner of Income Tax, Gujarat***[18]; ***Tribhovandas Haribhai Tamboli*** vs. ***Gujarat Revenue Tribunal and Others***[19]; ***A. C. Narayanan*** vs. ***State of Maharashtra and Another***[20]. That, in view of the arguments advanced, the Appeal may be allowed and the Judgment of the Learned First Appellate Court set aside.

11.(i) *Per contra*, the arguments advanced by Learned Senior Counsel Mr. Anmole Prasad for the Plaintiffs, were that both P1 and D1 have descended from a common ancestor "Sriram." That, a settlement by an amicable partition took place on 06.06.1968 regarding the joint properties of the Hindu Undivided Family (for short, "HUF") of M/s. Shree Mulchand and Sons amongst the five brothers being the sons of Late Mulchand Agarwal. Schedule 'A' property (nine immovable properties) and three businesses, were allotted in favour of the coparceners of Bhaskaranand and his two sons, P1 and D1 which constituted a HUF, as all coparceners were engaged in the joint family business and properties were thrown into the joint family fund, no acquisition of property was independent. That, the evidence also reveals that over and above the nine immovable properties, there were three more properties received in the amicable partition of 1968 which was disposed of by Bhaskaranand alone, prior to the institution of the Suit. That, only in February, 1994, when the illegal alienation of Schedule „B property in 1989 by D1 to D3 was discovered, that the dispute arose between the parties. Relying on the ratio of ***Appasaheb Peerappa Chamdgade*** vs. ***Devendra Peerappa Chamdgade and Others***[21] and ***Adiveppa and Others*** vs. ***Bhimappa and Another***[22], it was urged that in a Suit for Declaration based on Title, once the Plaintiff has been able to create a high degree of probability so as to shift the onus on the Defendant, it is for the Defendant to discharge his onus in absence of which, the burden of proof lying on the Plaintiff must be held to have been discharged, thereby amounting to proof of the Plaintiffs Title.

[15] AIR 1969 SC 1076 : (1969) 1 SCC 386
[16] AIR 1960 SC 335
[17] AIR 1965 SC 1531
[18] AIR 1967 SC 762
[19] (1991) 3 SCC 442
[20] (2014) 11 SCC 790
[21] (2007) 1 SCC 521
[22] (2017) 9 SCC 586

(ii) That, the Plaintiffs have discharged the burden cast on them firstly, by establishing that there was a Hindu joint family comprising of one Sriram and his three sons, Mulchand, Nandalal and Deepchand. The parties have admitted that they are governed by the Mitakshara School of Hindu Law being Hindu by religion. Thus, the existence of a HUF consisting of members of the family of Late Mulchand having a nucleus of property, is firmly established. Drawing the attention of this Court to the documents relied on by P1, it was contended that Exhibit 1 reveals that the Gangtok allotment consisting of eleven properties, required the cooperation of all allottees for transfer of all the properties in the name of the allottee or representative. Paragraphs 2 to 7 of Exhibit 1 indicate a clear intention of separation in the family with conditions of independent business expenses, cost and liabilities and the document bears the signature of all the sons of Mulchand. The acceptance of the allotment and all terms and conditions therein proves that it was Bhaskaranand who received the Gangtok allotment for himself and his two minor sons, coparceners of the joint family. The partition was clearly amongst the brothers who were the sons of Late Mulchand and not between Bhaskaranand and his two sons. The interpretation of the Defendants that Exhibit 1 was a partition amongst Bhaskaranand and his two sons is nowhere borne out by documents. The rights of P1 and D1 over the suit properties accrued solely by virtue of the fact that they were the sons of P1. The document also does not establish that D1 was allotted all the property standing in the name of M/s. Shree Mulchand and Sons or that Bhaskaranand took three properties as his share or that P1 was allotted the remainder. That, Exhibit 1 was filed along with the Plaint and no challenge arose regarding its authenticity and, in fact, D1 has actually relied on it. The first challenge thereof emanated from the Learned Trial Judge who took upon herself the forensic duty of deciding the genuineness of Exhibit 1 ignoring that both parties were relying on the document and concluded that Bhaskaranand having mentioned the words "for and on behalf of Mahesh, Umesh and for self" does not show him to be acting as a *Karta* of his family. She also held that the words "and self" had been written by a different pen, doubting the rights of Bhaskaranand. This opportunity was thus seized by the Defendants and they questioned the endorsement in Exhibit 1.

(iii) Exhibit 3, another important document, corroborates and confirms the genuineness of Exhibit 1. Exhibit 3 is dated 04.06.1968 and was prepared by Bhaskaranand two days before Exhibit 1 was executed on

06.06.1968. That, in Exhibit 3, the valuation of the twelve Gangtok properties and other assets and liabilities amounting to a net of Rs.8.59 lakhs is rounded off and valuation is shown in Exhibit 1, i.e., Rs.8.59 lakhs. That, the Defendants raised no objections to the proof and admission of Exhibit 3 but, in fact, corroborated and relied upon it for their own evidence. In his evidence, D1 confirmed that, as per the assessment of Bhaskaranand on 04.06.1968, the valuation of the Gangtok properties was shown in Exhibit 3 and that the properties described in Item Nos.2, 3 and 7 of Schedule „A to the Plaint are out of the eleven properties mentioned in Exhibit 3 and that the eleven properties in Exhibit 3 were registered and stood in the name of different persons/entities. He further reconfirmed that of the eleven properties of Exhibit 3, there is landed property of Agarwal Trading Company at Jorethang which was transferred to the family vide Exhibit 1. That, since he was a minor, his father might have got Exhibit „H executed by his first cousin Balkrishna. Exhibit „A establishes that site allotment was made to the HUF of M/s. Shree Mulchand and Sons of Gangtok on which the Schedule „B building was constructed.

(iv) Exhibit 2 shows a partnership business in Calcutta registered in 1940. Taking advantage of this document, the Defendants have attempted to deny the existence of a HUF but that it was a "Partnership at Will" and not a HUF, sans pleadings to this effect. The statements made by D1, in fact, indicates the existence of a HUF doing diverse business and admission that M/s. Shree Mulchand and Sons had properties and businesses in Dikchu, Mangam, Dentam, Gangtok and Deorali since before 1968. Relying on Exhibits 16, 17, 18 and 19 which are Cash Books of property and business in Sikkim, it was contended by Learned Senior Counsel that no objection was taken by the Defendants at the time they were marked as genuine, the entries therein reveal jointness of the finances of the family of Bhaskaranand and their extensive businesses throughout Sikkim. Both the Learned Courts below, however, did not consider Exhibit 18 on grounds of unreliability of its translation (Exhibit 20), raised by D1 but bad translation cannot impeach the genuineness of Exhibits 16 to 19.

(v) The best evidence of physical joint status and joint possession of Schedule 'B' property comes from the testimony of D3 who admitted that when she came to Sikkim after her marriage in 1983, Bhaskaranand and his family including P1, were residing in the Schedule 'B' property. D1 admitted as much as well. The suggestions made to P1 about Bhaskaranand inducting

Central Reserve Police Force ("CRPF") in the property at Item No.7 of Schedule 'A' negates D1s claim that Bhaskaranand relinquished his share in 1968. The sisters of P1 and D1 have all corroborated the Plaintiffs case. PW Sonam Topden (before the Learned Trial Court, the witness was variously numbered as "PW2" and "PW3" hence, hereinafter for convenience, shall be referred to by name), a senior citizen, also stated that he had seen the family of Bhaskaranand and his sons and their families, living jointly in the matter of mess and enjoyment and occupation of Schedule 'B' property without disputes till 1994. D1 agreed to the suggestion of the said witness to settle the dispute, provided the share of Bhaskaranand was divided equally between him and P1. That, PW Gitanjali Jalan gave evidence that Late Bhaskaranand and his two sons constituted a joint family and Bhaskaranand was the *Karta* thereof. PW4 Kusum Bazaz also supported the evidence of PW Gitanjali Jalan and that of Bhaskaranand and P1 concerning the family dispute in 1994. The evidence of PW5 M. M. Jalan, corroborated the evidence of P1 indicating that Bhaskaranand took charge of the properties and business as *Karta* of the family comprising of himself, D1 and P1. As a *Karta*, he frequently consulted PW5 on important matters pertaining to the affairs of joint family business and initiated the process of transferring the properties and business standing in the names of Mulchand, Balkrishna and Bhagwandas Agarwal, transferred in the names of his family members. Reliance was also placed by Learned Senior Counsel on Document "X5" by which, according to him, D1 confirmed that the aforestated properties were ancestral properties and admitted to have been retained by him. Asserting that Bhaskaranand and his sons formed a coparcenary, reliance was placed on ***Sunil Kumar*** (*supra*).

(vi) That, there are glaring discrepancies between the pleadings of D1 and proof that cannot be resolved in any manner whatsoever. To substantiate this point, the attention of this Court was invited to the Evidence-on-Affidavit of D1 as well as the Document "X4" alleged to have been admitted by D1. That, D1 averred in his Written Statement that Bhaskaranand took no share in the alleged partition of 1968, which stood demolished by evidence wherein he deposed that Bhaskaranand had held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3 and had also disposed of these properties. That, he attempted to explain this lapse by stating that he only came to learn of this after Exhibit 3 was filed.

(vii) That, the Defendants perforce had to take resort to Exhibit 'G' to substantiate their claim of partition. That, although the Defendants had pleaded that the process of dividing all the properties started in or around 1973, however, as appears from the evidence of the Defendants in 1969, the name of D1 was recorded in respect of M/s. Laxmi Stores located in the building being Item No.2 of Schedule 'A' to the Plaint. This shows that there was no partition as alleged and the joint properties of the family of Bhaskaranand were being mutated in the names of his sons without specific allotment of shares. That, so far as Agarwal Trading is concerned, Exhibit 'H' reveals that Balkrishna, a cousin, was acting as a nominee of D1 since 1966, that is two years before the family settlement of 1968, indicating that the family was a joint family prior to 1968. At the relevant time *viz.* 1975, D1 was studying at Pune and hence, it cannot be said that the business of Agarwal Trading came to his absolute share when he himself stated that Balkrishna was the ostensible owner on his behalf from 01.01.1966.

(viii) That, it was the case of D1 that he became the absolute owner in respect of all the businesses, assets and properties of M/s. Shree Mulchand and Sons by virtue of the fact that in 1977-79, an entirely new Firm by the same name had been registered under his proprietorship at Mangan and Item Nos.1, 4, 6, 8 and half of 9 of Schedule 'A', vested absolutely on him as its owner. Except Exhibit 'C', no other document showing mutation of the properties of M/s. Shree Mulchand and Sons, were ever produced by D1 nor did he have documents to show transfer of Schedule 'B' property to him. The registration of "Shree Mulchand & Sons" was, in fact, only for business in general goods at Mangan Bazar having an approximate value of Rs.1,00,000/- (Rupees one lakh) only. On this count, reliance was placed on ***Sankalchan Jaychandbhai Patel and Others*** vs. ***Vithalbhai Jaychandbhai Patel and Others***[23].

(ix) The claim of the Defendants is based upon the alleged partition vide Exhibit 1. They do not claim that any of the suit properties were the self-acquired properties of D1, but denied the existence of a HUF or that the suit property was coparcenary properties. Even if D1 is claiming rights over the suit properties through succession by inheritance under the Hindu Law, no scope exists for a great grandson to lay claims over his great grandfathers property nor could he lay claim over his grandfathers property during the lifetime of this father. The only manner in which D1 could

[23] (1996) 6 SCC 433

possibly have any direct claim over the suit property is as a coparcener of the third generation from his grandfather. Relying on the ratio of ***Adiveppa*** *(supra)*, it was contended that the Defendants have not pleaded a clear chain of Title and have deliberately kept it vague and ambiguous.

(x) That, the Defendants have taken a plea that the land of Indo Sikkim Company was purchased by a Deed dated 18.10.1976, but at the same time alleged that the property at Item No.9 of Schedule 'A' belonged to M/ s. Shree Mulchand and Sons and P1 in moiety. This establishes that it was a part of the HUF property of M/s. Shree Mulchand and Sons. Relying on the ratio of ***Ramkrishna Transports, Kalahasti*** vs. ***The Commissioner of Income Tax, Andhra Pradesh, Hyderabad***[24], it was argued that the ratio observed that the *Karta* of a joint Hindu family may enter into a partnership with a stranger. Therefore, it establishes that the partnership by the five sons of Mulchand Agarwal in conjunction with one stranger, was a family business. The Schedule „B property is included in Exhibit 1 as part of the Gangtok allotment but the Defendants claim right, title and interest in Schedule 'B' vide Exhibit 1. They are estopped from turning around and deposing that Schedule 'B' property did not belong to the family of Mulchand as when they opposed the application under Order XXII Rule 3 of the CPC, they averred that only coparceners of the deceased Hindu, i.e., the male heirs, could be parties. Having obtained an Order in their favour, the Defendants are now estopped from denying the fact that they are all members of a HUF as they cannot approbate and reprobate.

(xi) During the mutation of immovable property vide Exhibit 'D' in the name of P1, the General Power of Attorney was never utilized by Bhaskaranand and the properties standing in the name of M/s. Shree Mulchand and Sons were never mutated in the name of D1. Exhibit 'H' was also created only for the purpose of giving effect to the transfer of joint family businesses in accordance with Clause 8 of Exhibit 1. The same arguments apply to Exhibit 7. That, Exhibit 'L' is ambiguous and does not help the Defendants case. That, the onus to prove partition was on the Defendants. On this count, reliance was placed on ***Madanlal (Dead) by LRS. And Others*** vs. ***Yoga Bai (Dead) by LRS.***[25] and ***Chinthamani Ammal*** vs. ***Nandagopal Gounder and Another***[26].

[24] 1966 SCC OnLine AP 155
[25] (2003) 5 SCC 89
[26] (2007) 4 SCC 163

(xii) Exhibits 'P', 'Q', and 'R' are also rife with ambiguities as Exhibit 'D' shows that the suit properties in these litigations had already been mutated for convenience in the name of P1. That, examination of Exhibits 'S', 'T', 'U', 'V' and 'W' would reveal that the HUF was dealing with the properties as a matter of convenience in the names of either of the two sons of Bhaskaranand. The ambiguity in the documents relied on by the Defendants went unexplained as no opportunity was given to do the same. That, Bhaskaranand took all actions *vis-à-vis* the tenants vide Exhibits „U and „V. The Defendants chose not to confront P1 during cross-examination with the alleged admission in terms of Section 145 of the Evidence Act nor did the Defendants afford P1 with an opportunity of explaining the same. On this count, reliance was placed on ***Karan Singh and Others*** vs. ***State of M.P.***[27]; ***Sita Ram Bhau Patil*** vs. ***Ramchandra Nago Patil (Dead) By L.Rs. and Another***[28] and ***Udham Singh*** vs. ***Ram Singh and Another***[29]. That, the Learned First Appellate Court rightly came to the finding that the Defendants are seen to have more or less abandoned their claim so far as it rested on the so called admissions of P1. Reliance was placed on ***Nagubai Ammal and Others*** vs. ***B. Shama Rao and Others***[30]. In any event, the Defendants cannot fall back on the principles of admissions, estoppel, waiver and acquiescence to confer Title upon themselves. This submission was fortified by the ratio of ***Union of India*** vs. ***Purushotam Dass Tandon and Another***[31] and ***Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. and Others*** vs. ***State of Maharashtra and Others***[32]. The reliance of D3 is on Exhibit 'B' which contains several infirmities, besides being executed without the consent of the coparceners. On this count, reliance was placed on ***Thamma Venkata Subbamma (Dead) by LR*** vs. ***Thamma Rattamma and Others***[33].

(xiii) Advancing arguments on the second substantial question of law, it was contended that the Power of Attorney Exhibit 'M' was taken at a time when D1 was away for studies at Darjeeling and Bhaskaranand was the *Karta* managing and looking after the joint properties in Gangtok. Exhibit 'M' was made out not only to Bhaskaranand, but also to the wife of

[27] (2003) 12 SCC 587
[28] (1977) 2 SCC 49
[29] (2007) 15 SCC 529
[30] AIR 1956 SC 593
[31] 1986 (Supp) SCC 720
[32] (2016) SCC OnLine Bom 1784
[33] (1987) 3 SCC 294

Bhaskaranand as well as the Defendants grandmother Narayani Devi. Exhibit 'M' was never used by P1 to represent D1 except in Civil Suit No.76 of 1986. Besides, it is not unusual for a *Karta* to take a Power of Attorney from other coparceners and the mere fact that he did so, does not divest him either of his status as *Karta* or of his right, title and interest in the coparcenary property. Reliance was placed on ***Tvl. M. Muthuraj (HUF), Represented by its Karta/Power of Attorney Holder*** vs. ***The Commissioner of Commercial Taxes and Another***[34] before the Madurai Bench of the Honble Madras High Court. Reliance was also placed on ***Tribhovandas Haribhai Tamboli*** *(supra)*. Hence, it was submitted that the Judgment of the Learned First Appellate Court requires no intervention.

12. The submissions advanced by Learned Senior Counsel for the parties were heard at length and duly considered. The pleadings, all evidence, documents on record, the Judgments of Learned Courts below and the citations placed at the Bar have also been perused.

13. Before embarking on an examination of the merits of the matter, the air needs to be cleared with regard to the personal law which governs the parties. In general, it may be said that in matters of status, every person is governed by the law of his personal status (*See* ***Duggamma, Kom Krishna Bhat and Another*** vs. ***Ganeshayya Bin Keshayya and Others***[35]). Where a Hindu family migrates from one State to another, the presumption is that it carries with it, its personal law, that is, the laws and customs as to succession and family relations prevailing in the State from which it came. However, this presumption can be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated (*See* ***Bikal Chandra Gope and Another*** vs. ***Manjura Gowalin and Others***[36]). In this regard, in the matter at hand, it is clear that the Plaintiffs assert that they are governed by the Mitakshara School of Hindu Law. Although the Defendants denied such governance in their averments, during the course of arguments, it was conceded by Learned Senior Counsel for the Defendants that the Defendants are indeed governed by the Mitakshara School of Hindu Law. In view of the fact that the documents and evidence reveal that the parties originally belonged to Haryana and migrated to Sikkim from Mumbai (then Bombay), Maharashtra and in view

[34] W.P.(MD) No.13340 & 13344 of 2015 and W.P.(MD) No.1 & 1 of 2015, dated 26.06.2019
[35] AIR 1965 Mysore 97
[36] AIR 1973 Patna 208

of the principles enunciated above pertaining to migration and the personal law, and the subsequent admission made by Learned Senior Counsel for the Defendants during the arguments, it is clear that the parties are governed by the Mitakshara School of Hindu Law.

14.(i) Now addressing the substantial questions of law framed. The apple of discord between the parties arises on account of P1, P2 and P3 asserting that the property is ancestral and no partition of the joint properties of the family that fell in the share of Bhaskaranand, P1 and D1 took place, that mutation of the properties in the names of P1 and D1 were resorted to without specific allotment of shares. D1 contrarily claims that properties which came to P1 and D1 vide Exhibit 1 excluded Bhaskaranand from its ambit and were partitioned and mutated in the names of P1 and D1, whereby Item Nos.2, 3 and 7 of Schedule „A to the Plaint fell in the share of P1 while Item Nos.1, 4, 5, 6 and 8 of Schedule „A were the share of D1.

(ii) In ***Adiveppa*** *(supra),* it was held *inter alia* as follows;

> "**16.** It is a settled principle of law that the initial burden is always on the plaintiff to prove his case by proper pleading and adequate evidence (oral and documentary) in support thereof. The plaintiffs in this case could not prove with any documentary evidence that the suit properties described in Schedules B and C were their self-acquired properties and that the partition did not take place in respect of Schedule D properties and it continued to remain ancestral in the hands of family members. On the other hand, the defendants were able to prove that the partition took place and was acted upon. ……
>
> **19.** It is a settled principle of Hindu law that there lies a legal presumption that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family. The burden, therefore, lies upon the member who after admitting the existence of jointness in the family

properties asserts his claim that some properties out of entire lot of ancestral properties are his self-acquired property. (See Mulla, *Hindu Law*, 22nd Edn. Article 23 "Presumption as to coparcenary and self-acquired property", pp. 346 and 347.)"

(iii) It thus emanates that the essence of a coparcenary under Mitakshara Law is unity of ownership. It is well settled that the normal state of every Hindu joint family is one of jointness. Every such family is joint in food, worship and estate in the absence of proof of division and in the absence of any positive steps taken to effect a partition.

15. P1 has placed reliance on Exhibit 1 (in four pages) as proof of existence of joint family. D1 has not denied this document. This document bears the heading *"Terms and Conditions for Gangtok Allotment."* The total assets therein are described as follows, *"Rs.8,59,500/- Less Rs.59,500/- Joint Pool A/c. Nett asset 8,00,000/-."* It indicates that eleven properties of Gangtok are to be received by the allottee. The three other pages bear the heading *"General Terms"* and are signed by Pitamberlal, Rameshwarlal, Tikaram, Lakshmi Narayan and Bhaskaranand. They are the sons of Mulchand, their grandfather being Sriram. When Exhibit 1 (first page) is read with the remaining pages being the *"General Terms,"* it appears that business of the five brothers named above (lineally descended from Sriram) had been divided into five lots. Exhibit 1, in no uncertain terms, reveals this circumstance and it is specified therein that the share which fell into the lot of any brother would have to be accepted without any objection by the allottee. Exhibit 1 is said to have been made by way of family settlement. In ***Kokilambal and Others*** vs. ***N. Raman***[37] it was held that a settlement or family arrangement is recognized as a valid transfer of properties under Hindu Law. Normally, Courts do lean in favour of enforcement of such an arrangement or settlement.

16. Exhibit 2 was identified by P1 as the certified copy of Firm Registration of M/s. Shree Mulchand and Sons *alias* Mulchand and Sons. P1 relied on Exhibit 2 on grounds that the name of the Firm reflected in Exhibit 2 is the same as the name of the Hindu Undivided Family, i.e. Shree Mulchand and Sons. That D1 had taken advantage of the fact that the

[37] AIR 2005 SC 2468

document was one showing a "Partnership at Will" and not a HUF, sans pleadings. While examining Exhibit 2, although the name of the Firm is *"Shree Mulchand & Sons alias & Mulchand & Sons,"* the words *"Duration or date of registration: Partnership at will."* reflects that it was a "Partnership at Will." The Indian Partnership Act, 1932 at Section 7 provides that where no provision is made by contract between the partners for the duration of their partnership or for determination of their partnership, the partnership is a "Partnership at Will." It is settled law that members of an undivided Hindu family can form a partnership without disturbing their status as members of the joint family and without disrupting the same, just as they can acquire separate property or carry on business for themselves (See ***Chandrakant Manilal Shah and Another*** vs. ***Commissioner of Income Tax, Bombay-II***[38]).

17. That having been said, it is evident that even if there was a partnership of the five brothers with an outsider, the five brothers were members of the same family lineally descended from a common ancestor and evidently maintained a joint pool of their accounts, as reflected in the "General Terms" of Exhibit 1 indicating their joint ownership of property and accounts. The existence of a Partnership Firm cannot wish away the existence of a HUF which undoubtedly existed, as can be gauged from the terms of Exhibit 1. Even if it is to be assumed that the allotment that fell in the share of P1, D1 and Bhaskaranand, was not joint family property as sought to be asserted by D1 (without fortifying such assertion with proof), once the property came into the share of Bhaskaranand, P1 and D1, it became their joint family property. The family is a joint family if it is joint in affairs of food, worship and estate as observed in ***Mst. Rukhmabai*** *(supra).* In a joint family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined. **(See Mulla, Hindu Law, 23rd Edition, Page 354)**. Hence, the family of Bhaskaranand formed a joint Hindu family comprising of Bhaskaranand, his wife, minor sons, unmarried daughters and his mother. The minor sons could not be said to be independent at that stage. Bhaskaranand signed on Exhibit 1 duly accepting the shares of P1 and D1 as also his own and being their father, became the *Karta* by virtue of the Mitakshara Law. The shares in the allotment made

[38] AIR 1992 SC 66

as per Exhibit 1 nowhere indicates that the division of properties was only between P1 and D1 or between the heirs of Mulchand and P1 and D1 and that Bhaskaranand had relinquished his claims, as claimed by D1, neither was any proof furnished by D1 that he had invested separate funds to obtain any of the Schedule 'A' properties standing in the name of M/s. Shree Mulchand and Sons, although he made such an averment in his pleadings.

18. So far as discharging the burden of proof is concerned, Learned Senior Counsel for the Defendants relied on ***Rangammal*** *(supra).* In the said ratio, the Honble Supreme Court, while discussing Section 101 of the Evidence Act, has *inter alia* held that;

> "**21.** ……
>
> Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party." The ratio in ***Anil Rishi*** *(supra)* relied on by Learned Senior Counsel for the Defendants, in sum and substance, deals with the same matter. ***Md. Kalu Sheikh @ Abdul Gani Sarkar*** *(supra)* relies on the ratio in ***Anil Singh*** and ***Rangammal*** *(supra).*

19.(i) On examining the evidence of PW Gitanjali Jalan, the blood sister of P1 and D1, she stated *inter alia* that Bhaskaranand lived *".....alongwith all his family members comprising of my brothers the Present Plaintiff No.1 and the defendant No.1, two maiden sisters and mother and grand-mother."* PW Sonam Topden claimed close acquaintance with the family of Bhaskaranand Agarwal and saw Bhaskaranand, his sons and other members living jointly in Schedule 'B' property. He came to learn of the dispute pertaining to Schedule 'B' property and on the request of Bhaskaranand, took up the matter with the Defendant No.1 who was

agreeable to partitioning of the properties in three shares i.e. between his father, himself and his brother (P1) on the condition that on the demise of Bhaskaranand, the property would then be divided equally between him and P1. According to him, *".....Seeing the relation maintained by the family of late Bhaskarananda Agarwal I felt that plaintiff no.1 and def. no.1s family were joint. ....."*

(ii) PW4 Kusum Bazaz, blood sister of P1 and D1, stated that prior to 1968, they were living at Bombay (now Mumbai) and her father Bhaskaranand Agarwal used to take care of and manage all affairs relating to the business and properties belonging to and owned by the then joint family known as M/s. Shree Mulchand and Sons. According to her, there was harmony and unity in the joint family in Sikkim. Her cross-examination however reveals her ignorance of the dealings made by Bhaskaranand Agarwal with regard to the properties and contrary to the evidence of the other witnesses of P1, she stated that Bhaskaranand received the properties in Sikkim only on his own behalf when the allotment of 1968 took place and P1 and D1 were not given any share on the said day.

(iii) PW5 M.M. Jalan is the husband of PW Gitanjali Jalan. He deposed that his father-in-law used to consult him in matters connected to the family and business matters of importance, more particularly since the middle of 1968, as all the children of Bhaskaranand Agarwal were then minors. Under cross-examination, he however admitted to having no knowledge about whether D1 transferred the business of Laxmi Stores in the name of Sheila Agarwal, wife of P1 or of the transfer of the seven storeyed building in the name of D3 on 31.03.1989. According to him, a state of distrust and hatred was prevailing amongst the members of the joint family and he tried to bring an amicable partition of the properties and businesses owned by the family but due to a condition set forth by D1, the settlement could not be achieved and this was in February, 1994.

(iv) The evidence of P1s witnesses reveal that they were unaware of the internal dealings with regard to the property of the family of Bhaskaranand but they all were aware and had seen Bhaskaranand, P1 and D1 living in a joint family.

20. Considering the above arguments advanced by Learned Senior Counsel for the Defendants, it is pertinent to mention that the reliance of P1

is on Exhibit 1. A detailed discussion has ensued on Exhibit 1 and how the property came to the coparcenary of Bhaskaranand and his two sons. Exhibit 1, on pain of repetition, it may be stated, is not denied by D1. Reliance was also placed on Exhibit 3 by P1, the contents of which were also admitted by D1. Hence, so far as burden of proof lies on P1 that the properties in Exhibit 1 fell in the share of Bhaskaranand, P1 and D1 vide the said document and that they were living in a joint family with joint properties, has duly been discharged by him. Consequently, it falls on the Defendants to prove partition, with cogent and reliable evidence.

21. While relying on Exhibits 16, 17, 18, 19 and 20 *viz.* Ledger Book/ Cash Books of various businesses said to indicate maintenance of joint accounts by the joint family of Bhaskaranand, the argument advanced by Learned Senior Counsel for the Plaintiffs was that no objection was taken by the Defendants at the time they were marked as Exhibits. P1, in his evidence, has identified Exhibit 16 as the Hand Book accounts of Laxmi Store; Exhibit 17 as the Ledger Book of the property and business in entire Sikkim; Exhibit 18 as the record of Cash Book of business and properties of entire Sikkim; Exhibit 19 as the record of Cash Book of Laxmi store and Exhibit 20 as the translated version of Exhibit 18. P1 admitted however that the entries in Exhibit 18 were in the handwriting of one "Arvind Tripathi" but "Arvind Tripathi" was not produced as a witness to prove the contents of the document. In the absence of the proof of the contents of the document, both Learned Courts below rightly disregarded these documents. In ***Sait Tarajee Khimchand*** *(supra),* it was held that mere marking of an Exhibit does not dispense with its proof. Once the contents are proved, should the opposing party fail to raise objections or extract any contradictory evidence by way of cross-examination, then the contents of the document can be accepted as evidence. The probative value of a document must be established in the absence of which, the document deserves to be and is consequently disregarded.

22.(i) So far as the properties in Schedule 'A' and Schedule 'B' to the Plaint are concerned, as can be culled out from the evidence on record, more importantly of P1 and D1, Item No.2 in Schedule 'A' to the Plaint is one wooden shop house with land measuring 17x65 at M.G. Marg, Gangtok and Item No.10 in Schedule 'A' to the Plaint is property in the form of business styled as "Laxmi Stores" at M.G. Marg, Gangtok. The business in Item No.10 is being run from the property in Item No.2. P1, in his Evidence-on-

Affidavit has stated that this property was acquired by the joint family in the year 1963 and that although it is recorded in his name with the concerned Department but Item No.2 is a joint family business. However, he went on to admit that the properties mentioned in Item Nos.2, 3 and 7 in Schedule „A to the Plaint are recorded in his name. Exhibit 8 reflects that Item No.10 is recorded in the name of the wife of P1, Sheila Agarwal. It was in the name of D1 and prior to that in the name of one Bhagwandas Agarwala. Although P1 denied in his Evidence-on-Affidavit that the change of name in the record of the business known as Laxmi Stores was the result of mutual agreement between Bhaskaranand, D1 and himself, however, under cross-examination, it was extracted from him that Item Nos.2, 3 and 7 were recorded in his name. D1, while supporting the fact that Item Nos.2, 3 and 7 were recorded in the name of P1, stated that P1 is the absolute owner of the properties described in Item Nos.2, 3 and 7 of Schedule „A to the Plaint and his wife is the sole proprietor of the business of M/s. Laxmi Stores. The evidence on record establishes that Item No.2 is in the name of P1 and Item No.10 is in the name of his wife, Sheila Agarwal who is not a coparcener in the family. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth, an interest in the joint or coparcenary property. (See ***Surjit Lal Chhaabda*** vs. ***CIT Bombay***[39]). For the aforesaid reason, Item No.10 cannot therefore be said to be joint family property having been recorded in the name of the wife of P1. No documents indicating a joint pool of expenditure for the said properties were furnished to support the contention of jointness by P1.

(ii) Item No.3 in Schedule 'A' to the Plaint *viz.* one three storeyed RCC building measuring 40X30 at Deorali, Gangtok according to P1, was acquired by the joint family in or around the year 1963 and let out to different tenants but is recorded in the name of P1. D1 admitted that Item No.3 was allotted and given exclusively to P1. Exhibit 'D' dated 30.07.1980 is a Mutation Certificate reflecting that Item No.3 is recorded in the name of P1. No proof whatsoever was furnished by P1 to prove that it was held as a joint family property having a joint pool of accounts after such mutation. In my considered opinion, it is the sole property of P1.

(iii) For Item No.7 in Schedule 'A' to the Plaint i.e. one two storeyed wooden house and land measuring 20 x80 at Rangpo, East Sikkim, P1 submits that this property was acquired by the joint family in or around the

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year 1955 and is standing in his name but is a joint family property and let out to the Government of Sikkim where CRPF have their camp. In fact, as already stated, his admission is that Item Nos.2, 3 and 7 were allotted to him and given to him exclusively and cross-examination extracted so much from him. D1 lent strength to this deposition of P1. The claim of P1 that Item No.7 is a joint family property lacks support sans any joint fund in the name of the family. Exhibit 'D' relied on by D1, proves that Item No.7 was recorded in the name of P1. In my considered opinion duly supported by the evidence in record, Item Nos.2, 3, 7 and 10 are the exclusive properties of P1.

(iv) So far as Item No.9 in Schedule 'A' to the Plaint is concerned, although parties admitted that it was held in moiety by them, according to P1, this property was acquired by the joint family in the year 1955 and is standing both in the name of M/s. Shree Mulchand and Sons and himself. D1, for his part, stated that P1 purchased Item No.9 from M/s. Indo Sikkim Company vide a Deed dated 18.10.1976 and is held in moiety by P1 and himself. No documents were furnished by either party in support of their respective evidence but both P1 and D1 are in agreement that the property belongs to them in moiety. In light of this admission of both parties even if no documents are furnished, the Court is of the view that Item No.9 belongs to them jointly.

(v) Item No.1 in Schedule 'A' to the Plaint, according to P1, is the same property as mentioned in Schedule 'B' to the Plaint which, according to him, was built out of the joint fund of the family Firm and was recorded in the name of M/s. Shree Mulchand and Sons with the concerned authorities. D1, for his part, deposed that since the registration of the Firm "Shree Mulchand & Sons" in the year 1979, he had become the owner in respect of all business, assets and properties of M/s. Shree Mulchand and Sons and the properties described in Item Nos.1, 4, 5, 6 and half of 9 in Schedule 'A' to the Plaint, vested on him as the absolute owner thereof. While examining the documents relied on by the parties it appears that so far as Item No.1 is concerned, Exhibit 'A' was relied on by D1. This is a document indicating that a site in the *"New Extension Bazar, Gangtok"* was allotted to *"Messrs. Shree Mulchand & Sons"* in the year 1944. The only reason for D1 to lay claim on Item No.1 of Schedule 'A'/Schedule 'B' property is the fact that he is the proprietor of a Firm registered in the year 1979 by the name of *"Shree Mulchand & Sons."* It is not denied that vide

Exhibit 'A' the land on which Item No.1 of Schedule 'A'/Schedule 'B' building stands, was an allotment made by the then Maharani to *"Messrs. Shree Mulchand & Sons"* in the year 1944. There is no ambiguity in the fact that Item No.1 in Schedule 'A'/Schedule 'B' property, was allotted to M/s. Shree Mulchand and Sons in the year 1944. The house on the allotted Plot was built before 1968 as per the evidence of P1. D1 does not contradict this evidence. It is evident from the deposition of the witnesses and documents on record that no transfer of Item No.1 of Schedule 'A'/ Schedule 'B' property had been made from *"M/s. Shree Mulchand and Sons"* of 1944 to *"Shree Mulchand & Sons"* registered in 1979 of which D1 is shown to be the sole proprietor. Thus, in my considered opinion, D1 cannot lay claim on Item No.1 of Schedule 'A'/Schedule 'B' property, sans documentary evidence of transfer or partition of the property causing it to fall in his share, relying on the serendipitous circumstance of having registered a Firm by the name of *"Shree Mulchand & Sons"* in his name in 1979, which was the name of the Firm to which the allotment of land was made in the year 1944, and in which Item No.1 of Schedule 'A'/ Schedule 'B' property was built. The fortuitous circumstance of the same name as elucidated above, cannot be a ground for D1 to claim Item No.1 of Schedule 'A'/Schedule 'B' property to be his separate property, lacking as it is, in supportive evidence.

(vi) That having been said, while dealing with Item Nos.4, 8, 11 and 12 mentioned in Schedule 'A' to the Plaint;

(a) According to P1, Item No.4 is standing in the name of D1. Exhibit 'C' relied on by D1 indicates that registration of a Firm by the name of "Shree Mulchand & Sons" took place on 16.06.1979, the document having been presented for registration on 07.09.1977 by Bhaskaranand Agarwal. The sole proprietor of the Firm "Shree Mulchand & Sons" as already discussed, is D1. Exhibit 'O' relied on by D1, is a document dated 03.07.1979 addressed to "M/s. Mulchand & Sons, Gangtok." It is certified therein by the *"Under Secretary, Local Self Govt. & Housing Departt."* that M/s. Mulchand & Sons owned one wooden godown in Deorali Bazar. Now, while reverting back to Exhibit 'C', the Firm came to be registered in the name of D1 on 16.06.1979 and Exhibit 'O' is dated 03.07.1979 thereby lending credence to the fact that Item No.4 belonged to D1 as the proprietor of

M/s. Shree Mulchand and Sons in view of Exhibit 'C' and Exhibit 'O' and is therefore his sole property. P1 has failed to supplicate his evidence that it is a joint family property, with any specific documentary evidence.

(b) Item No.8 in Schedule 'A' to the Plaint according to P1, is also a joint family property which was acquired in or around the year 1960. The said property comprised of a two storeyed brick built structure wherein the joint family business of petrol, diesel and kerosene oil dealership was carried out in the name and style of M/s. Agarwal Trading Co. Contrarily, D1 in his evidence, stated that the properties in Item Nos.1 and 8 belonged to him absolutely and nobody has any right, title and interest in the said property and relied on Exhibit 'L' for this purpose. No cross-examination was conducted to contradict this document. Exhibit 'L' is seen to be a "Rent Note" between 'Mahesh Agarwal', son of Bhaskaranand Agarwal as Lessor and "Devendrasingh Sanjaysingh" as the Lessee for the premises in Jorethang, Naya Bazar, South Sikkim. Thus, although P1 deposed that Item No.8 is also a joint family property, Exhibit 'L' proves that D1 is the owner of the said property mentioned in Item No.8. The position with regard to Item No.1 of Schedule 'A'/Schedule 'B' property has already been explained *supra.*
(c) Item Nos.11 and 12 in Schedule 'A' to the Plaint are evidently recorded in the name of D1, Item No.11 vide Exhibit 'H' dated 06.05.1975, giving D1 the reason to have executed Exhibit 'M' and Item No.12 vide Exhibit 'C' dated 07.09.1977. These documents can well be considered by this Court since no cross-examination of D1 was conducted with regard to these documents.

(vii) So far as Item Nos.5 and 6 are concerned, P1 stated that these properties were also acquired by the joint family in or around the year 1943-44 and under cross-examination, volunteered to state that Item Nos.5 and 6 "*are not recorded in the name of def. no.1 but in the name of Shri Mulchand and Sons.*" D1, for his part, could only state that because it was recorded in the name of M/s. Shree Mulchand and Sons, the properties belonged to him but no documentary evidence was furnished, as

before, to indicate transfer of these properties acquired by M/s. Shree Mulchand and Sons of *circa* 1940, prior to 1979, when the Firm of D1 was registered as "Shree Mulchand & Sons."

(viii) It is evident that Schedule 'B' property was transferred to the name of D3 by D1 vide Exhibit 'B', dated 31.01.1989, merely on the strength of the property standing in the name of M/s. Shree Mulchand and Sons and the fact by which D1, in 1977-79, registered a Firm by the name of Shree Mulchand & Sons in his name. The presentation of Exhibit 'C' before the concerned authority allegedly by Bhaskaranand, makes no difference to the position of Schedule 'B' property, as Bhaskaranand had not transferred the said property to D1 when he presented the application and sought registration of the Firm "Shree Mulchand & Sons" in the name of D1 nor has such intention been indicated or evidence led by D1. The transfer of Schedule 'B' property to D3 by D1 is, as a consequence, void and inoperative in law, D1 being devoid of such power. Therefore, the argument advanced by Learned Senior Counsel for the Defendants that the properties in Schedule 'A' recorded in the name of M/s. Shree Mulchand and Sons were allotted in favour of D1 while those in the name of Mulchand were allotted in favour of P1, are not borne out by the documents relied on by D1.

23.(i) Now coming to the question of whether a Power of Attorney is required to be executed in favour of a *Karta* by the coparcener, it is necessary to understand that a property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The Manager of a joint family is called "*Karta*." So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family property including even charitable properties and is presumed to be the Manager until the contrary is shown. The *Karta* as the head of the family, has control over the income and expenditure and he is the custodian of the surplus, if any. The Manager has power over the income of the joint family pertaining to maintenance, education, marriage and other religious ceremonies of the coparceners and of the members of their respective families. He also has power to contract debts for family purpose and family business. On going through Exhibit 'M' which is the General Power of Attorney executed by D1 in favour of Narayani Devi Agarwal, Bhaskaranand Agarwal and Bimla Devi Agarwal, it is clear that this document was not a Power of Attorney given solely to Bhaskaranand. Besides, it appears that D1 was a student at the relevant time and Item

No.10, later transferred to Sheila Agarwal, was registered in his name in 1972 as he had attained the age of majority in 1971 as per P1, which went uncontested, and presumably should any action be required with regard to this property owned by him, he had jointly empowered Narayani Devi Agarwal, Bhaskaranand Agarwal and Bimla Devi Agarwal.

(ii) The argument of Learned Senior Counsel for the Defendants that there is no document on record filed by P1 to indicate the role of Bhaskaranand as *Karta* or any document signed by him as *Karta,* flies in the face of the assumed state of a Hindu joint family. Bhaskaranand was the father of P1 and D1 who were both minors at the time of the settlement of 1968. As per P1, he attained majority in 1973 while D1 did so in 1971. By virtue of him having signed on the document of allotment and having taken care of the family itself makes him (Bhaskaranand) a *Karta.* An objection was raised by Learned Senior Counsel for the Plaintiffs that no Power of Attorney is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law, as was given by P1 to Bhaskaranand and the Learned First Appellate Court was on agreement on this aspect by placing reliance on ***Sunil Kumar and Another*** *(supra).* There is indeed no reason for this Court to differ from the finding of the Learned First Appellate Court. It is worth mentioning that in the said ratio, the Honble Supreme Court held *inter alia* as follows;

> "**22.** In a Hindu family, the karta or Manager occupies a unique position. It is not as if anybody could become Manager of a joint Hindu family. "As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property." The Manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them."

Document D18, dated 18.02.1977, is the Power of Attorney issued by P1. This document was neither proved nor contradicted and therefore requires no further discussion by this Court, while discussions on Exhibit „M have already ensued *supra.* These discussions would, therefore, soundly quell the second substantive question of law, extracted above.

(iii) Now, while examining and analyzing the other documentary evidence on record, Exhibit 3 was relied on by the Plaintiffs which is not an original document, D1 also relied on the contents of Exhibit 3 and stated *inter alia* in his evidence that, *"...The original Plaintiff No.1 held the properties mentioned in item No.6, 9 and 10 of Exhibit 3. He disposed of the said properties by himself. Document No. „X-4 describes one of the said three properties. ..."* P1 in his Evidence-on-Affidavit, at Paragraph 25, has deposed *inter alia* as follows;

> *"**25**. ....The original plaintiff No.1, Bhaskaranand Agarwal(since deceased) had even in his capacity as karta of his joint family, sold one of the properties allotted to his joint family by the said family settlement/arrangement of 1968, situated at Singtam Bazar...."*

These properties in Exhibit 3 are described as, *"Naya Bazar old building," "Naya bazaar thekedar building"* and a building in Singtam. Both P1 and D1 are in agreement that one property, being a building situated at Singtam Bazaar, East Sikkim, was sold by Bhaskaranand, their father, in the year 1989. Although P1 has deposed that the proceeds of the said property were deposited in a joint family account, he admitted that he had no proof of such deposit. The argument of D1 that the properties were divided only amongst himself and P1, appears to be a figment of his imagination as he himself has admitted in his evidence extracted *supra*, that three properties in Exhibit 3 were retained by Bhaskaranand.

24. Although Learned Senior Counsel for D1 contended that Exhibit 3 is an unproved document as mere marking of a document is not proof thereof, however, we may relevantly refer to Section 58 of the Evidence Act which provides;

> "**58. Facts admitted need not be proved**.—
> No fact need to be proved in any proceeding which

> the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Hence, although the document has not been proved in terms of the Evidence Act, in view of the admission of the contents of the document by P1 and D1, this Court takes note of the evidence furnished in Exhibit 3.

25. Addressing the rival arguments of "non-partition" submitted by P1 and "partition" made by D1, we may relevantly refer to the ratio in ***Mudi Gowda Gowdappa Sankh*** *(supra)* relied on by Learned Senior Counsel for the Defendants, wherein it was *inter alia* observed as follows;

> "**5.** .....It is now well established that *an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status.*"

The joint state of a Hindu family is a given, the coparcener who claims that he has separated, must prove that he has done so in terms detailed above. On careful examination of the evidence on record, it emanates that there was partial partition of the properties that came to the family of Bhaskaranand. A partition between coparceners may be partial either in respect of the property or in respect of the persons making it. **(See Mulla *supra* 23rd Edition, Page 522)**. D1 has not been able to establish by any documentary evidence that the entire joint family properties had been divided at any point of time neither has he been able to establish by an unambiguous indication of intention that he sought to separate himself from the family. The assertion of P1 that there was no partition at all, stands belied by the evidence pertaining to Item No.10 of Schedule 'A', by which the property came to be registered in the name of his wife.

26. It thus concludes from the documentary evidence on record that after the settlement of 1968, there was a partition of the properties amongst Bhaskaranand and his two sons i.e. P1 and D1, in terms of which P1 was given Item Nos.2, 3, 7 and 10, D1 was given Item Nos.4, 8, 11 and 12, as detailed in Schedule 'A' to the Plaint and Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3 which he admittedly disposed of.

27. The evidence of both P1 and D1 is a clear indication of the partial partition of the joint family property and in the absence of documentary evidence indicating transfer of Item Nos.1, 5 and 6 to either P1 or D1 or for that matter to Bhaskaranand during his lifetime, it continues to remain a joint family property.

28.(i) While referring to Exhibits 'P', 'Q', 'R', 'T', 'U' and 'V', Learned Senior Counsel for the Plaintiffs relied on Section 145 of the Evidence Act and argued that D1 had failed to comply with the legal mandate of this provision and P1 was not confronted with the said Exhibits. To the contrary, Learned Senior Counsel for the Defendants submitted that there is no hard and fast rule as regards the compliance with Section 145 of the Evidence Act and vehemently argued that in the light of the provisions of Section 80 of the Evidence Act, the necessity of Section 145 of the Act, in the instant matter, does not arise.

(ii) A careful reading of Section 80 of the Evidence Act reveals that the Section deals with presumptions attached to deposition of witnesses in a judicial proceeding or before any Officer authorized by law to take such evidence or statements or confessions by any person, taken in accordance with law. It must be borne in mind that the Section has nothing to do with the admissibility of any particular kind of evidence which has to be decided by reference to the other Sections of the Act. Section 80 of the Act dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law and gives legal sanction to the maxim *omnia praesumuntur rite essa acta*, *viz.*, that all acts are presumed to have been rightly done. This, however, does not tantamount to dispensing with the provisions of Section 145 of the Evidence Act, which provides as follows;

"**145.Cross-examination as to previous statements in writing**.—A witness may be cross-

> examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

(iii) If D1 sought to contradict the evidence of P1 in the previous Civil Suits, his attention ought to have been drawn to these parts. In ***Bhagwan Singh*** *(supra)*, relied on by Learned Senior Counsel for the Defendants, it was held that all that is required under Section 145 of the Evidence Act is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. In the said ratio, evidently the witness concerned had been questioned about each separate fact point by point, the whole statement was read out to him and he admitted that he had made it in the Committing Court. The Honble Supreme Court opined that this procedure may be open to objection when the previous statement is a long one and only one or two small passages in it are used for contradiction which may thereby confuse a witness. However, in the said case, the witness had been questioned about every material passage in it point by point and hence it was observed that the procedure adopted was in substantial compliance to Section 145 of the Evidence Act.

(iv) In ***Biswanath Prasad and Others*** *(supra)*, relied on by Learned Senior Counsel for the Defendants, the Honble Supreme Court held *inter alia* as follows;

> "**8.** .....There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfills the requirements of S. 21 of the Evidence Act: in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former

> there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by S. 145 of the Evidence Act. ……"

Learned Senior Counsel for the Defendants did not address whether the requirements of Section 21 of the Evidence Act was fulfilled or not.

(v) In ***Sita Ram Bhau Patil*** *(supra)*, relied on by Learned Senior Counsel for the Plaintiffs, the Honble Supreme Court observed *inter alia* as under;

> "**17.** If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the Indian Evidence Act that "admission is not conclusive proof" are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. ……"

(vi) Later in time, in ***Karan Singh and Others*** *(supra)*, relied on by Learned Senior Counsel for the Plaintiffs, the Honble Supreme Court, while explaining the object of Section 145 of the Evidence Act, held *inter alia* as follows;

> "**5.** When a previous statement is to be proved as an admission, the statement as such should be put to the

witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, Ext. D-4 statement as such was not put to the witness nor was the witness given an opportunity to explain it. Therefore, Ext. D-4 statement, even if it is assumed to be a statement of PW 1 Hari Singh, that is of no assistance to the appellants to prove their case of private defence."

(vii) From a reading of all of the above ratiocination, it is clear that a reasonable opportunity has to be afforded to the party alleged to have made the admission and he should be allowed to explain the contradictions in his evidence before the Court and any admission made previously. The deposition is to be put to the witness and his attention drawn to the admission. From the evidence on record, it is seen that P1 was never put the admissions said to have been made by him in the proceedings being Exhibits „P, „Q and „R neither was he confronted with the statements made by him in the said Civil Suits and it must be noted and considered that in his evidence, P1 had *inter alia* stated as follows,

> *"**21**. ……..**I say that, being told about such registration, and on misapprehension of law and in good faith**, I believed that the defendant No.1 owned the properties standing in the name of Shri Mulchand and Sons and even deposed in one civil suit No.76 of 1986, which now stands disposed of, that the defendant No.1 is the owner of the schedule 'B' property, out of such belief."*
>
> **(emphasis supplied)**

(viii) The argument of Learned Senior Counsel for the Defendants that P1 had admitted that by virtue of the Firm Registration in the name of D1 in

1977-79, D1 had become the absolute owner of the Schedule „B property, is an erroneous contention as emerges from the evidence on record wherein P1 has deposed *inter alia* as follows;

> *"It is true that item no.1, 4, 5, 6, 8 and half of 9 of schedule A property are recorded in the name of def. no.1 …….. It is true that I did not make any complaint against the above properties (1, 4, 5, 6, 8 and half of 9) being recorded in the name of def. no.1.* ***Witness again volunteers to say that properties mentioned in 1, 4, 5, 6 and half of 9 are not recorded in the name of def. no.1 but in the name of Shri Mulchand and Sons****."*
>
> **(emphasis supplied)**

(ix) The admission of Bhaskaranand and P1, in their evidence (in Civil Suit No.76 of 1986) *viz.* Exhibit „U i.e. deposition of Bhaskaranand before the Learned Civil Judge, East, Gangtok in July, 1987 and Exhibit „V i.e. deposition of P1 before the Learned Civil Judge, East, Gangtok in August, 1987, also needs no discussion in view of the discussions that have emanated under Section 145 of the Evidence Act *supra.*

29. It was the contention of Learned Senior Counsel for the Defendants that the Learned First Appellate Court had held that the eldest member of the family would be the *Karta*, but in granting the Reliefs No.(a), (b) and (c) of the Plaint, had injuncted D1, the eldest member of the family from running the joint family and joint family business. Towards this argument, it may be pointed out that D1 had stood his ground insisting that there was already a division of the properties between him and P1, in the face of the stand taken by D1, the Learned First Appellate Court had evidently granted the Reliefs to prevent D1 from taking detrimental steps or otherwise with regard to the properties in question as the finding of the Learned First Appellate Court was that all property in Schedule 'A' to the Plaint, were joint family property.

30.(i) While addressing the point on whether Bhaskaranand had relinquished his claim to any property, the averment and deposition of D1 in this context needs to be considered. D1, in his Written Statement averred as follows;

> *"**17**. ……..It is further denied that by virtue of partition in the year 1968, the entire properties and business of M/s Shree Mulchand and sons in the state of Sikkim were allotted absolutely in favour of the co-parceners of the family of the Plaintiff No.1. In fact by the said partition all the properties in Sikkim given* (sic) *to Defendant No.1 and Plaintiff No.2 separately. Nothing was given to the Plaintiff No.1 who also gave up his claim and relinquished his rights, even if there was any. …."*

but his evidence is to the contrary. In his Evidence-on-Affidavit, D1 has deposed that,

> *"……..…The original Plaintiff No.1 held the properties mentioned in item No.6, 9 and 10 of Exhibit 3. He disposed of the said properties by himself. Document No. 'X-4' describes one of the said three properties. ……."*

During cross-examination, he deposed as follows;

> *".....The statement made in paragraph 5 of exbt-DD "but in fact, the said partition was between original plaintiff no.1, the present plaintiff no.1 and me" is a true statement. It is not true the original plaintiff no.1 did not hold the properties mentioned in item no.6, 9 and 10 of exbt-3. It is true that in the W.S I have stated that "the plaintiff no.1 did not claim any interest in any property and gave up his claim and also relinquished his interest in the property so partition in 1968". Witness volunteers to say that during the time of preparation of the W.S, since exbt-3 was not in his possession and knowledge and the same was only later filed by the plaintiffs, the above statement had been given by me. Witness also states that there is no mention of the said properties in the schedule of the plaint. ....."*

The vacillating averments and evidence of D1 raises doubts about the authenticity of his case and his grip on the facts and circumstances.

(ii) Although the matter with regard to the earlier Suits vide Exhibits 'P', 'Q' and 'R' have already been discussed, I deem it imperative to emphasize that Exhibit 'P' pertains to Civil Suit No.42 of 1980. The Suit evidently was for eviction of a tenant. Exhibit 'Q' pertains to Civil Suit No.27 of 1985. This Suit was also for eviction and other reliefs. Exhibit 'R' pertains to Civil Suit No.47 of 1986. This is another Suit for eviction and other reliefs. These Suits were filed by P1 against different persons. Exhibit 'T' pertains to Civil Suit No.76 of 1986 filed by D1 against different persons for recovery of rent. None of the said Suits were Suits for declaration of Title or Ownership. In ***Keshar Bai v. Chhunulal***[40], the Honble Supreme Court held *inter alia* as follows;

> "**14**. The High Court has expressed that the respondent was justified in asking the appellant to produce the documents. Implicit in this observation is the High Court's view that the respondent could have in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. **In eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally**. …"
>
> **(emphasis supplied)**

This ratio *(supra)* would suffice to establish the position that "Title" is not decided in Suits for "Eviction."

(iii) It is also worth remarking here that although D1 is of the opinion that Exhibit 3 ought to be dispensed with, being an unregistered document but seeks to garner support from Exhibit 'G' which is clearly an unregistered document as well. The rejection of Exhibit 'G' by the Learned First Appellate Court aggrieved D1, I am of the considered opinion that such rejection was not erroneous. Although PW Gitanjali Jalan the witness of P1 identified the handwriting in Exhibit 'G' as being that of her fathers and D1 then proceeded to invoke the provisions of Section 67 of the Evidence Act, this provision elucidates that if a document is alleged to be signed or to

[40] (2014) 11 SCC 438

have been written wholly or in part, by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons handwriting, must be proved to be in his handwriting. The mode of proving the contents of a document are detailed in Sections 61 to 66 of the Evidence Act. The production of a document purported to have been signed or written by a certain person is no evidence of authorship. In other words, as per the Rules of evidence, a person who makes an assertion must prove it. The handwriting can be proved by circumstantial evidence besides direct evidence but in the instant case, the Defendants failed to furnish any other documents to indicate that Exhibit 'G' was authored by Bhaskaranand and although the handwriting may be similar to that in Exhibit 1, this, by no means establishes that it is indeed the handwriting of Bhaskaranand. Section 47 of the Evidence Act also becomes imperative for the present purposes wherein it is laid down that;

> "**47. Opinion as to handwriting, when relevant**.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact. Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."

(iv) In ***Bank of India*** vs. ***Allibhoy Mohammed & Ors*** *(supra)* relied on by Learned Senior Counsel for the Defendants, the Honble High Court of Bombay *inter alia* held as follows;

> "**36.** The definition of "proved" given under Section 3 must be read along with Section 67 which requires that there must be specified evidence that the signature purporting to be that of the executant is

> in the handwriting of the executant. Until this is proved the Court cannot proceed to consider whether execution is proved. In other words Section 67 makes proof of execution of a document something more difficult than proof of matter other than execution of a document. Original of the public document must be proved in the manner required by the provisions of the Act……..”

(v) The evidence of PW Gitanjali Jalan for the purposes of Exhibit „G was not fortified by any other proof as laid down in Section 47 of the Evidence Act *supra* and the ratio relied on by Learned Senior Counsel for the Defendants, extracted above.

(vi) Reference made to and reliance placed by Learned Senior Counsel for the Defendants on Documents “X4” and “X5” are beyond the ambit of consideration of any Court being unproved documents.

(vii) In ***Karam Kapahi and Others*** *(supra)* relied on by Learned Senior Counsel for the Defendants, the main issue under consideration was pertaining to Order XII Rule 6 of the CPC and dealt with Judgment based on admission which, in my considered opinion, is not relevant for the present purposes.

(viii) Reliance placed on ***Suzuki Parasrampuria Suitings Private Limited*** *(supra)* by Learned Senior Counsel for the Defendants, in my considered opinion, is of no assistance to the case of D1 as the Honble Supreme Court has held *inter alia* therein that a litigant can take different stands at different times but cannot take contradictory stands in the same case. In other words, a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands in the same case.

(ix) Disagreeing at this juncture with the argument of Learned Senior Counsel for the Plaintiffs that no partition as alleged, of the joint properties of the family of Bhaskaranand had taken place, the evidence on record, I find, cogently indicates that Item Nos. 4, 8, 11 and 12 of Schedule ‘A’ to the Plaint were found mutated in the name of D1, Item Nos.2, 3, 7 and 10 of Schedule ‘A’ in the name of P1 and Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3.

(x) D1 has denied in his averments that the Schedule 'B' property was allotted to any Hindu family in 1944 but has relied on Exhibit 'A' which is a document that clearly states that a site in the *"New Extension Bazar, Gangtok"* was allotted to *"Messrs. Shree Mulchand & Sons"* in the year 1944. On pain of repetition, it may be stated that "Shree Mulchand & Sons" of which D1 claims to be the proprietor, was registered only in 1979, Exhibit 'A' speaks for itself and thereby requires no explanation in terms of Section 92 of the Evidence Act.

31. In the end result, it concludes that;

(i) Vide Exhibit 1, a family settlement, which Courts are wont to accept, the properties described therein came to the family of Bhaskaranand and his two minor sons who thus formed a coparcenary in the joint Hindu family, comprising of Bhaskaranand, his wife, his minor sons, unmarried daughters and his mother;

(ii) Partly differing with the Learned First Appellate Court on its finding that all properties described in Schedule „A to the Plaint was joint family property, I find that there was partial division of the joint family properties which were allotted vide Exhibit 1 amongst Bhaskaranand, P1 and D1, wherein the properties at Item Nos. 4, 8, 11 and 12 of Schedule 'A' to the Plaint were allotted to the share of D1, Item Nos. 2, 3, 7 and 10 of Schedule 'A' to the Plaint fell in the share of P1 while Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3. In view of this finding, the Learned First Appellate Court had misinterpreted the documents pertaining to Item Nos. 2, 3, 4, 7, 8, 10, 11 and 12 of Schedule 'A' to the Plaint.

(iii) There is no proof whatsoever of relinquishment of any property by Bhaskaranand or that the partition of properties detailed in Exhibit 1 was only between the heirs of Mulchand and P1 and D1 or only between P1 and D1, as claimed by D1.

(iv) The properties at Item Nos.1, 5, 6 and 9 of Schedule 'A' to the Plaint are found to be joint family properties.

32.(i) The Learned First Appellate Court opined that unless there is clear partition and allotment of the concerned properties/businesses in D1s name,

he cannot claim exclusive rights over Schedule B property and found the purported transfer/gift by D1 to D3 invalid.

(ii) While agreeing with this view of the Learned First Appellate Court to the extent that no proof emanates to establish that Item No.1 of Schedule 'A' to the Plaint corresponding to Schedule 'B' property, fell in the share of D1, I augment it with the finding that Item No.1 of Schedule 'A' to the Plaint corresponding to Schedule 'B' property, was not partitioned, neither was it transferred or fell in the share of D1. Consequently, D1 had no right to transfer Schedule 'B' property to D3 on the basis of a serendipitous circumstance of having a Firm registered in 1979 in his name bearing the name "Shree Mulchand & Sons." Hence, the said Deed of Gift (Exhibit 'B') executed and registered on 31.01.1989 by D1 in favour of D3, is void and inoperative in law and not binding upon the Plaintiffs and/or coparceners of the HUF or upon any member of the joint family of the Plaintiffs and the Defendants. Conversely, the argument of Learned Senior Counsel for the Plaintiffs that there was no partition of the properties received vide Exhibit 1, is belied by the evidence on record.

33. Resultantly, the Defendants are restrained from transferring, alienating, encumbering, interfering with or disposing of any of the joint properties of the parties (already discussed *supra*) mentioned in Schedule 'A' to the Plaint, including the specific residential house described in Schedule 'B' to the Plaint, except by D1 in terms of the Hindu Law, he being the eldest male member and thereby the *Karta* of the family, who will expectedly stay his hands from acting to the detriment of his family or coparceners.

34. The Judgment of the Learned First Appellate Court is modified to the extent above and this Appeal stands disposed of accordingly.

35. Pending applications, if any, also stand disposed of.

36. No order as to costs.

37. Records of the Courts below be remitted forthwith along with a copy each of the Judgment, for information.

SLR (2020) SIKKIM 1101

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

WP (C) No. 24 of 2017

Shri Ganesh Bhandari and Another ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Sr. Advocate with Mr. Ranjit Prasad, Advocate.

For Respondent 1-3, 5: Dr. Doma T. Bhutia, Additional Advocate General and Mr. S.K. Chettri, Government Advocate.
Mr. Zigmee Bhutia, Standing Counsel for Education Department.

For Respondent No. 4: Mr. Bhusan Nepal, Advocate.

Date of decision: 14th December 2020

A. Constitution of India – Article 226 – Service – Both the petitioners do not have the necessary eligibility criteria of eight years of regular service required for the promotional posts of Post Graduate Teacher (Hindi). Admittedly, again the petitioners did not apply for the promotional posts. In the circumstances, the question of them continuing their service in the promotional posts they held before the issuance of the impugned office orders, cancelling their promotion orders, does not arise.

(Paras 22)

B. Constitution of India – Article 226 – Service – The impugned office orders cancelled the petitioners' appointment to the promotional posts of Post Graduate Teacher (Hindi). The promotion orders were issued to the petitioners apparently without even they applying for it or having the necessary qualifications. Therefore, it cannot be said that they had

established right to be heard before the apparently illegal appointment orders dated 14.05.2015 were cancelled – There is also no explanation given by the petitioners as to how they accepted their promotional orders dated 14.05.2015, although they had not applied for it and admittedly, not qualified too – The records reveal that they continued to enjoy the promotional posts of Post Graduate Teacher (Hindi) for more than a year and two months before the authorities realised their folly and rectified the same by issuing the impugned office orders cancelling their promotional orders – It was incumbent upon them to have notified the authorities of their having wrongly promoted them, although they had not applied for promotion, at least on the receipt of the promotional orders dated 14.05.2015 – They have enjoyed more than a year's salary, perks for holding posts they were not even eligible for – The petitioners have also disqualified themselves by their own error of judgment to their own detriment. They cannot at this juncture be considered for the direct recruitment posts advertised in the year 2014 as well. However, this would not be an impediment to them to be considered for either promotional or direct recruitment avenues in the future.

(Paras 23 and 24)

Petition partly allowed.

Chronology of cases cited:

1. Udai Shankar Triyar v. Ram Kalewar Prasad Singh and Another, (2006) 1 SCC 75.
2. Central Board of Secondary Education and Another v. Aditya Bandopadhyay and Others, (2011) 8 SCC 497.
3. S.L. Kapoor v. Jagmohan and Others, (1980) 4 SCC 379.
4. Union of India and Another v. Arulmozhi Iniarasu and Others, (2011) 7 SCC 397.
5. The Principal Secretary, Department of Commerce and Industry v. Ms. Mobile Automobile Pvt. Ltd., (SLR) 2018 Sikkim 1005.
6. Jainendra Singh v. State of Uttar Pradesh, (2012) 8 SCC 748.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The writ petition alleging violation of petitioners' fundamental rights guaranteed under Article 14, 16, 19 and 21 as well as Article 300A of the Constitution of India, has been preferred by the two petitioners who have been issued office orders no. 278/HRDD/ADM and 279/HRDD/ADM (impugned office orders) by which the Human Resource Development Department (HRDD), had cancelled their promotion orders no. 06/DIR/ HRDD(SE)/PGT and 07/DIR/HRDD(SE)/PGT both dated 14.05.2015 (promotion orders) with retrospective effect. By the impugned office orders, they were also repatriated to their respective schools as Graduate Teachers and directed to refund any excess payment made on account of their promotion. Pursuant thereto, the petitioners were issued show cause notice no. 277/ADM/HRDD dated 04.07.2016 (impugned show cause notice) by the HRDD, directing them to show cause why their co-terminus service should not be terminated and why inquiry should not be initiated against them for concealing the facts.

2. Heard Mr. A. Moulik, learned Senior Advocate for the petitioners, Dr. Doma T. Bhutia, Additional Advocate General, for respondents no. 1, 2, 3 and 5 (State respondents) and Mr. Bhusan Nepal, learned Counsel for respondent no. 4, i.e., the State Public Service Commission (Commission).

3. Mr. Moulik submits that the petitioners were eligible to be considered for the posts of Post Graduate Teachers through direct recruitment and as such, they applied for the said posts by filling in the form meant for in-service candidates, genuinely believing that they themselves were in-service candidates as they had been working as Graduate Teachers on co-terminus basis. He, therefore, submits that filling the wrong form was only procedural in nature and the petitioners should not be terminated for innocent violation of the procedural requirement. He relied upon ***Udai Shankar Triyar vs. Ram Kalewar Prasad Singh & Another***[1]**,** to submit that non-compliance with any procedural requirement should not entail automatic dismissal or rejection. These defects and irregularity, according to Mr. Moulik were procedural and should not therefore be allowed to defeat their substantive rights or to cause injustice. He submitted that the Commission which is a public authority entrusted with public functions was

required to act fairly, reasonably, uniformly and consistently in public good and in public interest. He relied upon ***Central Board of Secondary Education & Another vs. Aditya Bandopadhyay & Others***[2], for the said proposition. It was his case that the State respondents had failed to follow the principles of natural justice before issuance of the impugned office orders cancelling their appointment as Post Graduate Teachers with retrospective effect. He relied upon ***S.L. Kapoor vs. Jagmohan & Others***[3]**,** to explain the concept of natural justice in administrative law. Mr. Moulik also submitted that the records would reveal that both the Commission, as well as the State respondents, had grossly failed, in as much as, they had issued forms without any clear indication for what purpose it was, misleading the petitioners to fill the wrong forms and therefore, they could not take advantage of their own wrong.

4. The learned Additional Advocate General, *per contra*, contended that the writ petition was not maintainable as no fundamental or statutory right of the petitioners had been violated. She relied upon ***Union of India & Another vs. Arulmozhi Iniarasu & Others***[4] and submitted that a writ of mandamus can be issued by this court only when there exists a legal right in the writ petitioner and corresponding legal obligation on the state. Only because an illegality has been committed, the same cannot be directed to be perpetuated. It is trite law that there cannot be equality in illegality. It was her submission that the petitioners have not approached this court with clean hands and therefore, the writ petition should be dismissed. For the said purpose, she relied on a judgment of this Court in ***The Principal Secretary, Department of Commerce and Industry vs. Ms. Mobile Automobile Pvt. Ltd.***[5]. The learned Additional Advocate General also submitted that when the petitioners were not eligible to be promoted and they were given promotion, it was their duty to inform the Government that they were wrongly promoted. She submitted that there was deliberate suppression of facts on the part of the petitioners and therefore, they could not claim a right to continue in service. She relied upon ***Jainendra Singh vs. State of Uttar Pradesh***[6].

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[1] (2006) 1 SCC 75
[2] (2011) 8 SCC 497
[3] (1980) 4 SCC 379
[4] (2011) 7 SCC 397
[5] (SLR) 2018 Sikkim 1005
[6] (2012) 8 SCC 748

5. The petitioners were appointed as Graduate Teachers (Sanskrit language) on 04.03.2003 and 01.03.2003 on co-terminus basis under HRDD. They were posted at Government Senior Secondary Schools, Singtam and Linkey, both East Sikkim respectively, during the year 2014-15. It is the petitioners' case that pursuant to an advertisement dated 04.06.2014, published in Sikkim Express on 08.06.2014, they applied for the posts of Post Graduate Teachers through direct recruitment. It is their case that they fulfilled all the criteria required by the advertisement and thus, they applied in the "prescribed application forms" for the said posts. Along with the forms for in-service candidates, they also annexed their appointment orders appointing them on co-terminus basis as Graduate Teachers in Sanskrit along with the no objection certificates from their employer and other documents as required. The petitioners submit that the authorities scrutinised their application forms and having found them eligible they were invited to appear for the written examination and thereafter, for viva-voce on 13.04.2015. They were successful in the written examination as well as viva-voce. Both the petitioners were issued "promotion orders" and posted as Post Graduate Teachers (Hindi) in Lingee Senior Secondary School and Tikalall Niraula Senior Secondary School, respectively. The petitioners have also annexed their promotion orders. After they received their promotion orders, the petitioners joined their service on 20.05.2015 and they have worked there continuously. However, on 04.07.2017, the impugned office orders issued by the respondent no. 3, were received by them cancelling their promotions with retrospective effect and repatriating them to their respective old posts as Graduate Teachers. They were also directed to refund the excess payment made on account of their promotion. It is their case that the petitioners were paid for the services they have rendered as Post Graduate Teachers. The petitioners were also issued impugned show cause notice, directing the petitioners to show cause as to why their co-terminus service should not be terminated and inquiry not be initiated against them for concealing facts about their qualifying service and for submitting the in-service application forms when they were required to fill the forms for direct recruitment. The petitioners responded to the show cause notice by submitting their replies dated 18.09.2016 and 27.09.2016. The petitioners plead that they were not aware of any other advertisement apart from the advertisement no. 09/SPSC dated 04.06.2014 published in Sikkim Express for direct appointment (advertisement for direct recruitment) by the Commission. They further plead that they were not aware of the two separate forms available for promotion and direct recruitment. As the advertisement for direct recruitment did not have any

restrictions for application by in-service teachers like the petitioners, holding co-terminus post, they applied for direct recruitment to the posts of Post Graduate Teachers. The petitioners also aver that a combined written test for Post Graduate Teachers for both direct recruitment as well as promotion was held, and a combined result published on 18.03.2015, in which both of them featured as successful candidates. The petitioners aggrieved by the impugned office orders and impugned show cause notice sent a legal notice to the State respondents. However, the State respondents in their reply dated 06.02.2017 declined to entertain their grievances. It is in these circumstances that the petitioners have approached this court praying for the following:

> "(i) A writ or order or direction or declaration that:
>
> (a) the common show cause notice issued to petitioner nos. 1 and 2 bearing no. 277/Adm/HRDD dated 4/7/16 (annenure-P6) and
>
> (b) Office Order nos. 278/HRDD/Adm and 279/HRDD/Adm both dated 4.7.16 (Annexures-P4 and P5) are set-aside, quashed and cancelled.
>
> (ii) A writ or order or direction or declaration that the petitioners are regular Government servants as PGT (Hindi) they are entitled to all benefits of employment including seniority in their respective posts.
>
> (iii) A writ or order or direction or declaration that the promotion orders of the petitioners as PGT (Hindi) be treated as their appointment orders in the regular establishment either by conversion or otherwise as will be found fit.
>
> (iv) Costs of the proceedings;
>
> (v) Any other Writ or Order or direction or declaration as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

6. In so far, prayers (i)(a) are concerned, the learned Additional Advocate General submitted that the petitioners have now been appointed as Graduate Teachers on a regular basis vide office order no. 646/ADM/ HRDD dated 24.07.2019 and as such, the prayers are infructuous. Mr. A. Moulik submits that in fact the petitioners have been so appointed. A copy of the office order dated 24.7.2019 has been filed by the respondent no. 2 in its affidavit dated 24.11.2020, with the leave of this court. It reveals that by the office order dated 24.07.2019, the word "co-terminus" appearing in the initial appointment order in respect of both the petitioners have been removed and they have been treated as appointed on regular basis. In the circumstances, the impugned show cause notice seeking to terminate their co-terminus appointment would be infructuous and consequently, there would be no need for a direction that the show cause notice bearing no. 277/ ADM/HRDD dated 04.07.2016 be set aside.

7. The State respondents have filed a counter-affidavit dated 19.08.2017. According to the State respondents, the Human Resource and Development Department (respondent no.3) forwarded two requisitions bearing no. 567/DIR/HRDD(SE) dated 28.02.2014 and 568/DIR/ HRDD(SE) dated 28.02.2014 to the Commission. It is the case of the State respondents that the petitioners, pursuant to the advertisement for direct recruitment, applied against the 5 posts of Post Graduate Teachers (Hindi) to be filled up by in-service candidates. It is the specific case of the State respondents that the Commission forwarded a merit list of selected candidates after completing the selection process vide letter dated 298/ SPSC/2015 dated 20.04.2015 recommending the selected candidates. The petitioners were selected for the posts of Post Graduate Teacher (Hindi) through in-service quota and accordingly, appointment orders dated 14.05.2015 were issued to the petitioners. Subsequently, when it was revealed that the petitioners had worked only on co-terminus basis and therefore, not eligible to apply under promotion/in-service candidates' quota, their appointments were cancelled vide order dated 04.07.2016.

8. The Commission has filed their counter-affidavit. According to them, the Commission received a requisition dated 28.02.2014 from the respondent no.3, HRDD, for filling 127 posts of Post Graduate Teachers including 16 posts of Post-Graduate Teachers for Hindi on direct recruitment basis. The Commission also received another requisition on the same date from the HRDD for filling 35 posts of Post Graduate Teachers in different

subjects including 5 posts for Post Graduate Teacher (Hindi) for promotion/ in-service candidates. Pursuant to the first requisition, advertisement for direct recruitment was published by the Commission inviting applications from eligible candidates. On 10.06.2014, the Commission issued employment notice no. 51/SPSC/2014 dated 10.06.2014 inviting applications from eligible in-service candidates (advertisement for promotional candidates) for filling up 35 posts of Post Graduate Teachers in different subjects including Hindi by way of promotion. The commission decided to conduct a combined examination for both direct recruitment as well as promotion on 13.11.2014. It is the case of the Commission that pursuant to the advertisement for in-service candidates, the petitioners applied against the 5 posts of Post Graduate Teacher (Hindi) to be filled by in-service candidates. The written examination for both direct recruitment and promotion was conducted on 13.11.2014, in which 154 candidates were shortlisted for classroom demonstration and viva-voce test which was held on 11th, 13th and 15th of April 2015, after which the Commission finalised the merit list. On 20.04.2015, a final list of selected candidates for direct recruitment as well as for promotion were recommended by the Commission for appointment to the posts of Post Graduate Teachers. It is the specific stand of the Commission that the petitioners were recommended for appointment under the in-service category as both had applied as in-service candidates.

9. On 28.02.2014, the HRDD wrote to the Commission forwarding filled in proforma statement for filling up the posts of Post Graduate Teachers (subject wise) through direct recruitment. Sixteen posts were available for Post Graduate Teachers (Hindi) as against the total of 127 posts. The relevant notification no. 02/GEN/ADM/HRDD dated 07.01.2011 for manpower Management Guidelines of Post Graduate Teachers (Guidelines notification) was also enclosed. The Commission has not furnished a copy of the proforma with regard to direct recruitment.

10. On the same date, i.e. 28/02/2014, the HRDD wrote to the Commission forwarding filled in proforma statement for filling up the posts of Post Graduate Teachers (subject wise) through promotion. Five posts were available for Post Graduate Teacher (Hindi) as against the total of 35 posts. The Guidelines notification was also enclosed. The proforma for promotion required twelve information to be filled. The proforma forwarded by the HRDD to the Commission, is as under:

1	Name of Post and Department	Post Graduate Teacher (HINDI)
2	No. of posts to be filled up	05
3	Pay band and Pay Grade	PB(2) 9300-34800+5000/- GP
4	Total number of Posts of this grade in the Department with their nomenclature if any	
5	List of officers already holding posts in this grade, including those on Adhoc basis, in order of seniority duly indicating mode of recruitment to this grade.	
6	Complete uptodate seniority list of persons in lower grade with full service particulars	Enclosed with Notification no; 02/Gen/Adm/HRDD Dated; 07/01/2011
7	Uptodate confidential reports for the number of years as per rules, of all the persons who are to be considered for promotion.	
8	Whether Vigilance Clearance certificates in respect of all persons to be considered for promotion are enclosed.	
9	Whether Annual Property Return in respect of all persons to be considered for promotion is enclosed.	
10	Whether Departmental Clearance certificates of all eligible persons are enclosed.	
11	Number of date of Notification along with copy thereof under which the relevant promotion rules including up to date amendments are published	Notification No; 04/Gen/Adm /HRDD Dated; 21.03.2011

12	Total number of enclosures. 1. List of Officers mentioned at Sl. No.5 2. Seniority list vide SL. No; 6 3. ACRs 4. Vigilance Cleartence (sic) 5. Departmental Clearence (*sic*) 6. Annual property return 7. Others (please verify) 8. Grant total	

11. It would be relevant to note that details to be filled in the proforma, especially in serial no. 6 to 12, would have given the Commission the relevant information of those candidates who were eligible to be considered for promotion. According to the proforma, complete uptodate seniority list of persons in lower grade with full service particulars were enclosed by the HRDD and forwarded to the Commission.

12. The advertisement for direct recruitment required the following eligibility criteria:

"**3. (a) ELIGIBILITY CRITERIA**

Minimum Educational Qualification	(i)	Master's Degree in respective subject with B.Ed.
	(ii)	Master Degree without B.Ed. with 50% and above for General Category and 45% and above for reserved category in respective subject can also apply. On selection, they shall be given conditional appointment and they should acquire the B.Ed. qualification within 3 (Three) years, failing which their service is liable to be terminated.

(iii) Should have attained the age of 18 years, but should not have exceeded the age of 30 years.

(iv) In the case of Government servant not more than 40 years.

(v) 45 (Forty five) years for presently working (temporary including those working on adhoc, contract, Co-terminus) under Human Resource Development Department, Govt. of Sikkim, Substituted vide corrigendum No. 617/DIR/HRDD/SE dated 05.04.2014.

…….....…….”

13. The advertisement for promotional candidates invited applications from “*In-service Primary Teachers and Graduate Teachers working in the Government School having eligible criteria for filling up for following posts of Graduate Teachers and Post Graduate Teachers*”. A master’s degree in respective subjects with B.Ed. and eight years of regular service as Graduate Teacher was the eligibility criteria for the posts of Post Graduate Teacher (Hindi). The candidates were required to go through a written examination and after qualifying, to appear for classroom demonstration/personality test. Application form was required to be downloaded from the official website of the Commission.

14. On 08.07.2014 and 28.07.2014, the petitioners no. 1 and 2 respectively, filled the application forms for in-service applicants. This was the form required to be filled by promotional candidates pursuant to advertisement for promotional candidates. In serial no.13 of the form, the petitioners gave their designation as Graduate Teacher (Sanskrit). However, they did not mention that they were appointed on co-terminus basis. The petitioners have stated that they had enclosed a copy of their co-terminus appointment letters along with the forms. There is no specific denial about this fact in the courter-affidavits filed by the Commission as well as the State respondents.

15. According to the Commission, the petitioners also submitted no objection certificates, dated 30.06.2014 and 18.07.2014, along with the application forms. The no objection certificates certified that the HRDD had no objection for the petitioners appearing in the interview for the posts of Post Graduate Teachers being conducted by the Commission.

16. The written examination was conducted on 13.11.2014. On 18.03.2015, a notice for viva-voce and classroom demonstration was issued based on the evaluation of marks obtained by the candidates in the written examination. Both the petitioners' roll numbers were featured in the list. Those candidates selected in the written examination were to be called for viva-voce and classroom demonstration on a date to be announced later. They were asked to come with original certificates of all relevant documents listed there. The viva-voce and classroom demonstration took place on 11th, 13th and 15th of April 2015. On 18.04.2015, the Commission issued a notice declaring ninety-six candidates qualified on the basis of the written examination, classroom demonstration and viva-voce. The petitioners were also selected.

17. On 20.04.2015, the Secretary of the Commission wrote to the respondent no. 2, stating that pursuant to their letters, both dated 28.02.2014, for direct recruitment and promotion, the Commission advertised the posts in the local newspapers/dailies as well as in the Commission's website. After receiving applications, the Commission issued admit cards to 1738 candidates and conducted the written examination on 13.11.2014 and out of which, 154 candidates were shortlisted for classroom demonstration and viva-voce. The classroom demonstration and viva-voce interview were conducted on 11th, 13th and 15th April, 2015. On the basis of the marks obtained in the written examination and classroom demonstration/viva-voice test, 96 candidates were provisionally recommended for appointment. Petitioner no.2 featured in serial no. 53 and petitioner no. 1 featured in serial no. 56, in order of merit in the said list. They were both recommended for promotion. The letter also stated that the applications and other documents of the selected candidates were being forwarded and that the list was provisional subject to police verification report, medical fitness and verification of all required documents by the State government. It was also notified that all the original certificates and documents as well as original admit cards were to be checked before issuing formal office order by the HRDD.

18. It seems that both the petitioners, satisfied that they fulfilled the eligibility criteria demanded in advertisement for direct recruitment for the posts of Post Graduate Teachers, filled the forms titled "Application Form for In-service" meant for promotional candidates. The form, which the petitioners were required to fill, was, however, the form titled "Application Form" meant for direct recruitment. There is no explanation from the Commission why they could not title them in any other manner to give a clear indication to the applicants that one form was for direct recruitment and the other for promotional candidates. Although, as per the learned counsel for the Commission, there was a difference in the two forms, in as much as, it was only in the form titled "Application Form", that local Employment Card Number was sought which would reflect that it was meant for direct recruitment. It is the petitioners' case that as they were in service, in co-terminus basis, they presumed that they were required to fill the form titled "Application Form for In-service", filled the details therein and submitted to the Commission. Even in the forms filled by the petitioners they did not disclose that they were appointed on co-terminus basis in item no. 13, which sought information about their present designation. On scrutiny of their application forms, it is apparent that the Commission called them for written examination and classroom demonstration/viva-voce. If the Commission had gone through the information provided by the State respondents through the proforma giving an updated seniority list of persons in the lower grade with full service record, it is apparent that the petitioners would have not even have been invited to sit for the written examination. Apparently, the Commission completely ignored the information given by the State respondents. Again, there is no explanation as to why the Commission thought it fit to hold a combined examination for direct recruitment as well as promotion. There is also no explanation as to why the Commission thought it fit to publish the result of the written examination of both direct recruits as well as promotional candidates together. However, the notice dated 18.03.2015, publishing the list of candidates selected for viva-voce and classroom demonstration did point out that this was for "both direct & In-service promotional candidates". Further, a list of thirteen documents was sought from the candidates to be brought with them in the original. Items "i" and "j" in the said list were as follows: -

> "i. Minimum eight years of service experience certificate as regular graduate teacher (in case of in-service candidates of HRDD from respective district

Joint Director) and In-service candidates shall invariably bring existing substantive post's office order.

j. Work experience certificate (if any, in case of direct candidates)"

19. Admittedly, the petitioners did not have eight years of service experience as regular Graduate Teachers and therefore, they being considered as being in-service candidates for the promotional posts did not arise at all. Obviously, the petitioners had not furnished such certificates.

20. However, it transpires that both the petitioners were called for, sat for the viva-voce and were also selected by the Commission. The Commission, thereafter, published a notice dated 18.04.2015 declaring ninety-six candidates qualified on the basis of written examination, classroom demonstration and viva-voce once again for both direct and promotional candidates. The petitioner no.1 featured in serial no. 56 and the petitioner no.2 in serial no. 53. In the notice dated 18.04.2015, both the petitioners were shown as promoted and not as directly recruited. The petitioners' appointment orders dated 14.05.2015 also clearly records that they were promoted to the posts of Post Graduate Teachers (Hindi). It is possible that there may have been confusion created by the method adopted by the Commission in the process of recruitment. It is also, therefore, possible for the petitioners to have got confused by the wrong form for in-service candidates they filled for direct recruitment on the presumption that they too were in-service candidates. However, it is apparent that both the petitioners were absolutely clear that they were applying for the post of Post Graduate Teachers through direct recruitment. Thus, when the petitioners read the notice dated 18.04.2015 showing them as qualified for promotion they ought to have been alarmed. However, the facts reveal that both the petitioners accepted the promotional orders without any demur or protest. They enjoyed the promotional posts, the salaries, and perks, till the State respondents realised that they had been promoted without even being qualified. The advertisement for the promotional posts required eight years of regular service as Graduate Teacher as eligibility condition, which they apparently and admittedly, did not possess.

21. The Commission is a commission under Article 315 of the Constitution of India for the purpose of fulfilling the functions as provided in

Article 320 of the Constitution of India. It is the duty of the Commission to conduct examinations for appointment to the services of the State. The explanation given by the Commission for such gross failures are wanting. According to the learned counsel of the Commission, the petitioners were selected for promotion solely on the basis of the no objection certificates issued by the HRDD, dated 30.06.2014 and 18.07.2014, certifying that the department had no objection for the petitioners appearing in the interview for the posts of Post Graduate Teachers. The certificates, according to the petitioners, were furnished to the authorities along with the forms for in-service candidates they had filled and submitted. These certificates said nothing else. The proforma submitted by the State respondents to the Commission for promotion provided them with an updated seniority list of eligible persons that could be considered. Clearly, this information was ignored. Failure of the Commission to ignore such relevant information, without anything more, is grossly and patently irresponsible. Conducting examination for all government posts is a serious affair. It is unfortunate that the conduct of the examination as well as the scrutiny of the petitioners has been lacking in the responsibility demanded of the Commission to fulfil its constitutional functions. It was also the duty of the State respondents to have verified the recommendations before issuing the promotion orders. More so, when the Commission had itself cautioned the State respondents against doing so. Apparently, the State respondents trusted the Commission's recommendation and gave effect to it by promoting the petitioners who were not even in the zone of consideration.

22. In such circumstances, the question is whether the prayers as prayed for in the writ petition could be granted in favour of the petitioners. Admittedly, both the petitioners do not have the necessary eligibility criteria of eight years of regular service required for the promotional posts of Post Graduate Teacher (Hindi). Admittedly, again the petitioners did not apply for the promotional posts. In the circumstances, the question of them continuing their service in the promotional posts they held before the issuance of the impugned office orders, cancelling their promotion orders, does not arise.

23. That takes us to the next question raised by them as to the illegality of the impugned office orders, as apparently, no show cause or opportunity of hearing were afforded to the petitioners before their issuance. The impugned office orders cancelled the petitioners' appointment to the promotional posts of Post Graduate Teacher (Hindi). The promotion orders

were issued to the petitioners apparently without even they applying for it or having the necessary qualifications. Therefore, it cannot be said that they had established right to be heard before the apparently illegal appointment orders dated 14.05.2015 were cancelled**.**

24. The petitioners have also prayed for a direction that they be treated as direct recruits Post Graduate Teacher (Hindi). The petitioners are Graduate Teachers holding Post Graduate Degrees. When they apply for any post, it is incumbent upon them to be careful and fill the right form for the right job. The records reveal that right from the submission of the forms for in-service candidates, the Commission has evaluated them as promotional candidates. According to the petitioners, pursuant to the advertisement for direct recruitment, they filled the forms and applied for the direct recruitment posts of Post Graduate Teacher (Hindi). It is also their case that the petitioners were invited for viva-voce on 13.04.2015. Although, the petitioners have sought to make out a case that they became aware of the notices dated 18.03.2015 and 18.04.2015 after obtaining information under the Right to Information Act, 2005, there is no other notices by which the petitioners could have known that they had been called for viva-voce to be held on 13.04.2015, besides the said notices. There is also no explanation given by the petitioners as to how they accepted their promotional orders dated 14.05.2015, although they had not applied for it and admittedly, not qualified too. Even if the petitioners had been confused about the form they filled, at least on the receipt of office orders dated 14.05.2015, they ought to have realised that they had not been considered for the posts of direct recruitment. Even when the petitioners replied to the show cause notice they insisted that their promotions were on the basis of a selection procedure. However, the records reveal that they continued to enjoy the promotional posts of Post Graduate Teacher (Hindi) for more than a year and two months before the authorities realised their folly and rectified the same by issuing the impugned office orders cancelling their promotional orders. The writ petition was filed on 11.05.2017, almost after ten months after issuance of the impugned office orders dated 04.07.2016. The conduct of the petitioners are also wanting. It was incumbent upon them to have notified the authorities of their having wrongly promoted them, although they had not applied for promotion, at least on the receipt of the promotional orders dated 14.05.2015. Much water would have flowed under the bridge from the time of the advertisement in the year 2014 till the filing of the writ petition in the year 2017. They have enjoyed more than a year's salary,

perks for holding posts they were not even eligible for. This court is of the considered opinion that the petitioners have also disqualified themselves by their own error of judgment to their own detriment. They cannot at this juncture be considered for the direct recruitment posts advertised in the year 2014 as well. However, this would not be an impediment to them to be considered for either promotional or direct recruitment avenues in the future.

25. The only question left now is whether the petitioners should be directed to refund the excess payment made on account of their promotion. Besides the error of judgment of the petitioners, it is also apparent that both the Commission as well as the State respondents have been grossly irresponsible and wanting. It is an admitted fact that the petitioners have rendered their service during the period they served in the promotional posts of Post Graduate Teacher (Hindi) in their respective schools. Had it been a clear case of concealment of facts committed by the petitioners, which although alleged by the State respondents have not been proved, the issue would have been different. The allegation of concealment of facts would in any way not hold much water as the State respondents have thought it fit to regularise the petitioners' co-terminus service inspite of issuance of the impugned show cause notice. In the circumstances, this court is of the considered view that the State respondents could not have demanded the refund of the excess payment made on account of their illegal promotions. However, it is apparent that there has been a loss of financial resources from the State exchequer due to the follies of the Commission and the State respondents. This court is of the opinion that it should be left to their wisdom to realize the amount from their erring officers, if found guilty.

26. The writ petition is partly allowed in the above terms and disposed.

27. No order as to costs.

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