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cannot be permitted to rely upon such relinquishment of rights granted under the law to deprive the petitioners what is legally permissible. Fundamental Rule 22 includes cases of promotion as well as appointment to a post. Otherwise there was no reason for the words "or appointed" to be used after the words "is promoted" in Fundamental Rule 22 – Fundamental Rule 22 seeks to regulate the initial pay of a Government servant who is appointed to a post on a time scale of pay. Thus the relinquishment of rights of post of Pioneer by the petitioners would not change the purpose of Fundamental Rule 22 or its application to the petitioners on their subsequent appointment. It envisages a situation where a Government servant holding a post is either promoted or appointed to another post carrying duties and responsibilities of greater importance than those attaching to the post held earlier – The word used in Fundamental Rule 22 is "appointed" which would include re-appointment or fresh appointment and therefore, the difference sought to be drawn in the appointment of the petitioners and thereby to deprive them of the benefit seems lame – If the Rule making authority had desired to draw such a difference it would have done so in the Rule itself. It may not be correct to read into the clear language of Fundamental Rule 22 what is not there. If the other conditions as envisaged in Fundamental Rule 22 stand satisfied failure to grant the benefit envisaged would be illegal – Failure to grant similar benefit to the petitioners who otherwise fulfill all the requirements under Fundamental Rule 22 would also violate Article 14 and 16 of the Constitution of India.

Alok Kumar Singh and Others* v. *Union of India and Others ***217B***

Code of Criminal Procedure, 1973 – S. 164 – Use of Statement – It is settled law that where the prosecution version is not supported by its witnesses, the Court cannot rely on S. 164 statement of the witness to convict the accused as such a statement is not substantive evidence. It may be reiterated that statement under S. 164 can only be used to corroborate or contradict statements made by the witness under Ss. 145 and 157 of the Evidence Act and can never be used as substantive evidence – It would be erroneous to rely upon the S. 164 statement of the victim and thereby convict the Appellant – It may appositely be observed that S. 164 is resorted to during the course of investigation when an accused or any other person seeks to make a confession or statement, of his own free will and is generally recorded when there is apprehension that he may resile from his statement or his evidence is likely to be tampered with.

Binod Sanyasi* v. *State of Sikkim ***241A***

Code of Criminal Procedure, 1973 – S. 378 – Appeal Against Acquittal, when to be Interfered With – The parameters and contours of hearing an appeal against acquittal is no longer *res integra*. The Supreme Court in numerous judgments has defined the scope. Although, this Court while hearing an appeal against an order of acquittal possess all the powers it has while hearing an appeal against an order of conviction to reconsider the whole issue, reappraise the evidence and come to its own conclusion if the findings are against the weight of the evidence on record, before reversing such a finding of acquittal this Court has to consider each ground of acquittal and to record its reasons for not accepting those grounds. We are also bound in such circumstance to keep in view the fact that the presumption of innocence is still available in favour of the respondent which now stands fortified by the order of acquittal passed by the learned Special Judge. On a fresh scrutiny of the materials on record even if we are of the opinion that there is another view which can be reasonably taken, the view in favour of the respondent should be adopted. We are to keep in mind that the trial Court had had the advantage of looking at the demeanour of the witnesses and observing their conduct and even at this stage the respondent is entitled to benefit of doubt which is such a reasonable person would honestly and conscientiously entertain as to the guilt of the respondent.

State of Sikkim* v. *Karna Bahadur Rai ***198A***

Code of Criminal Procedure, 1973 – S. 378 – Appeal Against Acquittal, when to be Interfered With – Keeping in mind the ambit and scope of the judicial examination in the present appeal against acquittal, we are of the view that judgment of acquittal passed by the learned Special Judge is neither perverse nor against the weight of the evidence on record. The learned Special Judge, as a Judge of facts had duly applied a common sense rule while testing the reasonability of the prosecution case. A delicate balance is required to be maintained between the judicial perception of the anguish of the victim and the presumption of innocence of the accused and an inequitable tilt either way may not render sound justice – The evidence of a sole prosecutrix, if it inspires confidence, can definitely be the sole basis for conviction. However, the evidence in such cases must be of sterling quality.

State of Sikkim* v. *Karna Bahadur Rai ***198B***

Code of Criminal Procedure, 1973 – S. 378 (4) – Special Leave to Appeal – Chapter XX relating to trial of summons-cases by Magistrate provides for either conviction or acquittal of an accused. S. 255 Cr.P.C provides that if the Magistrate, upon taking the evidence referred to in S. 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal. S. 255(2) provides that where the Magistrate does not proceed in accordance with the provisions of S. 325 or S. 360, he shall, if he finds the accused guilty, pass sentence upon him according to law. Charge is not required to be framed in summons-cases and therefore, use of the word discharge in trial of summons-cases is really a misnomer.

Kiki Doma Bhutia* v. *Bijendra Kumar Singh ***147A***

Code of Criminal Procedure, 1973 – S. 378 (4) – Special Leave to Appeal – Whether on the dismissal of a complaint consequent upon rejection of an application for condonation of delay, the same amounts to acquittal of the accused? – It is no longer *res integra* that an order of dismissal of first complaint under S. 203 is no bar for the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances such as where the previous order was passed on incomplete record, or on a misunderstanding of the nature of the complaint or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceeding – The fact that a second complaint can be entertained on same facts, albeit in exceptional circumstances, after dismissal of a complaint under S. 203 demonstrates that dismissal of a complaint at every stage does not automatically result in acquittal of the accused because if the accused is acquitted, such acquittal can be questioned only by taking recourse to S. 378 (4) – Dismissal of a complaint under S. 203 is at a stage prior to issuance of process – In the instant cases, no cognizance of any offence was taken by the Court and even the cognizance of the complaint was not taken as the Court had rejected the applications for condonation of delay in not making the complaints within the prescribed period and therefore, there was no occasion to issue summons to the accused. It is manifest that criminal proceedings had not commenced based on the complaints. When criminal proceedings had not commenced, it will be incongruous to hold that the accused stands acquitted with the dismissal of the complaint – Held: In a circumstance where a complaint is dismissed as a consequence of the Court

being not satisfied that the complainant had sufficient cause for not making the complaint within the prescribed period, the same does not result in acquittal of the accused. Therefore, these leave petitions seeking leave to appeal are not maintainable.
Kiki Doma Bhutia* v. *Bijendra Kumar Singh ***147B***

Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – The seizures of controlled substances were made from the petitioner's house allegedly kept for sale. It needs no reiteration that there is rampant abuse of controlled substances by people of all ages in the State especially by the youth. The law enforcement agencies are embattled in their efforts to control the sale and use of these substances which is spreading to gargantuan proportions. The abuse of the substances is primarily on account of easy availability and sale by unconscionable persons, at exorbitant prices who having found an easy way of earning money by luring the young and indulge in its sans conscience. Besides the victim, the unsuspecting family of the victim bears the brunt of these sales and purchases which strike at the root of a stable family and society. In my considered opinion, no misplaced sympathy ought to be extended to persons who indulge in the sale and easy supply of controlled substances to the impressionable youth – The act of selling controlled substances for monetary profits without looking into deleterious effects it has on the health of the victim has to stringently be discouraged. It is reiterated that such persons strike at the very future of our society since most of the consumers are the youth who are yet to have their feet on terra-firma or to understand the consequences of the choices that they are making and its long term effects besides throwing away their future. In consideration of the provisions of the Statute there is no guarantee that the petitioner will not repeat the offence while on bail and for the present purposes there is no reason to disbelieve the Prosecution case. Although I hasten to add that this is a *prima facie* observation and will have no bearing on the merits of the case, which includes the evidence furnished by the Prosecution to establish its case.
Rupa Gurung* v. *State of Sikkim ***189A***

Constitution of India – Article 226 – A necessary party is one in whose absence a writ petition cannot be effectively adjudicated – No right of the selected candidates was sought to be impinged in the writ petition. The core question was whether an additional norm of eligibility was laid down at all

by the University and if so, whether the same was done in accordance with law. The University and the Vice-Chancellor had been made parties and rightly so, as they are certainly necessary parties. Having regard to the contour of the controversy raised in the writ petition, the learned Single Judge was wholly justified in rejecting the preliminary objection that in absence of necessary party, the writ petition is liable to be dismissed.
***The Sikkim University and Another* v.**
Dr. Vaidyanath Krishna Ananth and Another ***298A***

Constitution of India – Article 226 – There cannot be any impediment for a writ appellate Court to take note of a document in the interest of justice if the document, though subsequent in point of time, can throw light to the controversy – It is well-settled that in the facts and circumstances of a case, a writ Court will be justified to mould the relief for ends of justice.
***The Sikkim University and Another* v.**
Dr. Vaidyanath Krishna Ananth and Another ***298B***

Human Resource Development Department (Pre-Primary Teachers, Primary Teachers, Graduate Teachers and Post Graduate Teachers) Recruitment Rules, 1991 – A candidate has a limited right for being considered for selection in accordance with rules, which existed on the date of the advertisement – Relevant rule on the date of the advertisement prescribed for filling-up the posts of PGT by 100% direct recruitment. The Notification dated 03.04.2018 is prospective in nature. It is immaterial that written test was held after Notification dated 03.04.2018 was issued – The petitioners participated in the selection process and waited till the declaration of the final select list. They had not raised an issue that in view of the Notification dated 03.04.2018, the selection process initiated by the advertisement dated 22.08.2017, needed to be cancelled and a fresh selection process is to be started. Likewise, if they had any grievance with regard to change of total marks and duration of the written test, they should have agitated the matter, at least, immediately after the written test was over. Whether or not they had raised any objection during the examination, in the attending fact and circumstances, pales into insignificance in view of the subsequent course of action adopted by the writ petitioners. They waited for the publication of the result of the written test – Even in the first legal notice, no grievance was articulated with regard to the selection process and all that was said was that having regard to their performance, they ought to have been selected. It was only in the legal notice

dated 30.03.2018 (sic 2019), which was issued recalling back the earlier legal notice, that the aspects regarding Notification dated 03.04.2018 and change of marks and duration of examination time were raised. It is crystal clear from the decision in *Ashok Kumar* and the number of judgments referred to therein that a candidate, who had willingly participated in a selection process cannot turn around and complain that the process of selection was wrong or unfair or not in accordance with law after knowing of his or her non-selection. The principles of estoppel operate against such candidates. The candidates cannot be allowed to approbate and reprobate at the same time.

Choda Bhutia and Others* v. *State of Sikkim, Through the Secretary, Human Resources & Development Department, Government of Sikkim and Others ***284A***

Indian Evidence Act, 1872 – Law is well-settled that the plaintiff has to succeed on his own strength and not on the weakness of the case of the defendant – The plaintiff had to, in the first place, prove that she was capable or was in a position to, may be by herself obtaining loans from others, to provide loans to the defendant. Giving a go by to the case projected in the plaint, suggestion was given to DW-1 that she had borrowed money from the mother of the plaintiff. In the context of the case projected by the plaintiff that no documents were executed at the time when defendant had received the amounts as stated by the plaintiff and when substantial amount of loan which the plaintiff claims to have advanced to the defendant as loan was received by the plaintiff herself from others, it was necessary for the plaintiff to have examined persons from whom she had availed loan to lend credence to the fact that she had, at least, obtained some loan though the same may not have proved advancing of loan to the defendant.

Ms. Dinku Khati* v. *Smt. Kamal Kumari Subba ***319A***

Indian Evidence Act, 1872 – S. 45 – Expert Evidence – Court cannot rely on the report of the handwriting expert unless he is examined and unless the same is admitted by the parties. It is to be noted that expert evidence, though relevant in view of S. 45 of the Evidence Act, is not conclusive. It can rarely, if ever, take the place of substantive evidence – A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. However, it may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of expert comparison, but a Court can itself

compare the writings in order to appreciate properly the other evidence produced before it in that regard.
Ms. Dinku Khati* v. *Smt. Kamal Kumari Subba ***319B***

Indian Evidence Act, 1872 – S. 154 – Hostile Witness – Courts are not to reject the evidence of a hostile witness in totality but to consider that part of the witness's testimony which is found creditworthy. It is also to be assessed whether the hostility was a consequence of intimidation or inducement.
Binod Sanyasi* v. *State of Sikkim ***241B***

Indian Penal Code, 1860 – S. 200 – Exceptions 1 and 4 – S. 105 of the Indian Evidence Act provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC, or within any special exception or proviso contained in any other part of the IPC, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. This burden upon the accused would stand discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record – The deposition of PW-16 and PW-19 establishes that there was an argument between the deceased and the appellant which was also accompanied by pushing and pulling. There was some provocation is quite evident from the depositions. However, there is no evidence to establish the gravity and suddenness of the provocation. The injuries sustained by the deceased as reflected in the autopsy report (Exhibit-6) read with the deposition of PW-16 and PW-19 establishes that the appellant had taken undue advantage and acted in a cruel manner by inflicting several blows on the head of the deceased even after he had fallen with the first blow of the wooden beam (MO-X) itself. According to PW-14, the appellant had earlier passed some derogatory comments with reference to his caste due to which the appellant had gone to jail. The deceased was the son of PW-14. The evidence reflects that the appellant may have harboured a grudge against the father of the deceased. Although, the evidence suggests that there was sudden quarrel between the appellant and the deceased and that there may have been provocation on the part of the deceased, the appellant has failed to establish even by way of preponderance of probabilities that the provocation was grave and sudden enough to prevent the offence from amounting to murder or that he had not taken undue advantage or acted in a cruel or unusual manner.
Nanda Lall Sharma @ Poudyal Bajey* v. *State of Sikkim ***207A***

Motor Accidents Claim – Calculation of the quantum of the loss of income of the deceased assailed by the Appellant – Held: In the absence of any documentary evidence substantiating the monthly income of the deceased, it is but rational to compute the income of the deceased at the rate of 275/- per day, being the income notified by the Department of Labour, Government of Sikkim for "Skilled Workers" vide Notification No. 4/DL dated 01.11.2014 – Respondent No. 1 to 4 entitled to filial compensation (*Magma General Insurance Co. Ltd.* and *Rajesh and Others* discussed).
***Branch Manager, United India Insurance Co. Ltd* v.**
Dhan Bdr. Chhetri and Others ***180A***

Motor Vehicles Act, 1988 – S. 163A – Payment of Compensation on Structured Formula – While enacting the Motor Vehicles Act, 1988, the Legislature introduced S. 163-A providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of S. 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. If one proceeds under S. 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.
***Branch Manager, National Insurance Co. Ltd* v.**
Mr. Bishal Chhetri and Others ***254A***

Motor Vehicles Act, 1988 – S. 166 – Under the Act, the victim of an accident or his dependants have an option either to proceed under Ss. 166 or 163-A of the Act. Though not stated in S. 166 of the Act, in view of S. 163-A, it has to be understood that under S. 166 of the Act, the claimant has to establish proof of negligence – Materials on record amply demonstrate the hapless condition to which the Claimant had been placed and in a circumstance where the claimant is totally immobile, his inability to adduce the evidence of any other witness including an occupant of the car cannot be held

against the claimant. The fact that the vehicle had tumbled down 250 feet from the road leads to an inference of rash and negligent driving on the part of the driver – It must be held that there is sufficient evidence on record to hold that the accident had occurred due to rash and negligent driving.

***Branch Manager, National Insurance Co. Ltd* v.**
Mr. Bishal Chhetri and Others ***254B***

Motor Vehicles Act, 1988 – S. 166 – Whether in the absence of an appeal or a cross-objection, compensation to the injured victim can be enhanced? – After the 1976 amendment of O. 41 R. 22 of the Code of Civil Procedure, 1908, the insertion made in sub-rule (1) makes it permissible for respondent to file a cross-objection against a finding. The learned Tribunal did not record any adverse finding against the claimant. Surely, the claimant could have preferred an appeal seeking enhancement of the amount on the grounds urged by Mr. Rai during the course of his argument. The Act being a beneficial and welfare legislation, rules of procedure may not come in the way to award "just compensation" to the claimant even in an appeal filed by the Insurance Company or by the owner on the basis of evidence. It is to be noted that function of the Court is to award "just compensation" – I am of the considered opinion that this Court can enhance the amount of compensation in this appeal of the Insurance Company if the materials on record justify such enhancement with the object of ensuring that the claimant receives "just compensation".

***Branch Manager, National Insurance Co. Ltd* v.**
Mr. Bishal Chhetri and Others ***254C***

Motor Vehicles Act, 1988 – S. 166 – Though the claimant had prayed for a sum of 1,00,000/- each on account of "pain and suffering" and "loss of amenities", the learned Tribunal awarded 25,000/- for "pain and suffering" and 50,000/- for "loss of amenities". The nature of the injury suffered by the claimant and the consequences ensuing there from has already been noticed in an earlier part of the judgment. A young man of 22 years has to be dependent on someone else for every little single thing for his entire life and therefore, I am of the considered opinion that the claimant is entitled to 1,00,000/- each on account of "pain and suffering" and "loss of amenities".

***Branch Manager, National Insurance Co. Ltd* v.**
Mr. Bishal Chhetri and Others ***254D***

Negotiable Instruments Act, 1881 – S. 138 – Requirements of a Notice – From the provisions of S. 27 of the General Clauses Act, 1897 and S. 114 of the Indian Evidence Act, 1872 it manifests that once Notice is served by registered post by correctly addressing it to the drawer of a cheque, the service of Notice is deemed to have been effected. In such a circumstance the requirements of Proviso (b) of S. 138 of the N.I. Act stands complied if the Notice is served in the manner prescribed therein. The object of these provisions are to ensure that unscrupulous drawers of cheques are unable to avoid service of the statutory Notice by leaving their homes for sometime, and thereby evade prosecution – No deficiency emanates on the part of the Appellant for having issued Notices to the Respondent in his admitted address – Notices having been sent to the Respondent's correct address were duly served, fulfilling the requirement of "giving notice".

Sancha Bahadur Subba* v. *Ramesh Sharma ***158A***

Negotiable Instruments Act, 1881 – Ss. 118 and 139 – Presumptions – Presumption under S. 139 of the N.I. Act is an extension of the presumption of S. 118(a) of the Act. If the negotiable instrument happens to be a cheque, S. 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. S. 118 of the N.I. Act uses the phrase "until the contrary is proved," S. 139 of the N.I. Act provides "unless the contrary is proved." S.4 of the Evidence Act which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under the aforestated provisions are rebuttable – Respondent has admitted his legal liability/obligations towards the Appellant for an amount of 42,70,000/-. The three post dated cheques came to be issued consequent upon execution of Exhibit-1 thereby raising the presumption as elucidated in Ss. 139 and 118 of the N.I. Act – Respondent does not deny his signatures on the cheques which were dishonoured nor does he dispute the transactions between him and the Appellant and has accepted the execution of Exhibit-1 – S. 139 of the N.I. Act is an example of reverse onus and therefore once an admission of issuance of cheque emanates from the Respondent and the signatures on the cheques are admitted, there is always a presumption in favour of the Complainant that a legally enforceable debt or liability exists. It is for the Respondent to rebut such presumption in evidence, which he has failed to do – Findings arrived at by the learned Trial Court are perverse and erroneous.

Sancha Bahadur Subba* v. *Ramesh Sharma ***158B***

Probation of Offenders Act, 1958 – S. 4(1) – Code of Criminal Procedure, 1973 – S. 360 – Release of Offenders on Probation of Good Conduct – The paramount consideration for release of a convict who has not committed any offence punishable with death or imprisonment for life under S. 4(1) of the Probation of Offenders Act, 1958 is the nature of the offence and the character of the offender – In order to release a convict on probation under S. 360 Cr.P.C again, the character, antecedents of the offender and the circumstances in which the offence was committed are vital considerations. The record does not reveal that the appellant has a good character. The records revealed the manner and the circumstances in which the offences have been committed. It was premeditated and deliberate. The vivid description of what transpired with her in her deposition corroborated by the multiple injuries sustained by the victim clearly establishes the nature of the offences – Keeping in mind the circumstances of the case including the nature of the offences and the character of the offender, although he may have been a first time offender, this Court sees no reason to unsettle the sound reasoning given by the learned Sessions Judge in declining to apply S. 4(1) of the Probation of Offenders Act, 1958 and S. 360 Cr.P.C in exercise of his judicial discretion. ***Yabesh Rai* v. *State of Sikkim*** ***230A***

Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 7 – Penetrative Sexual Assault – Sexual Assault – Though PW-13 in his F.I.R had stated that the accused had sexually assaulted his daughter several times, in his evidence, he was conspicuously silent about such allegation and rather, in his cross-examination, had stated that his daughter had not stated anything adverse against the accused. Logical conclusion will be that PW-1 had not stated anything about any sexual assault or penetrative sexual assault to him. PW14, mother of "X", had also not stated that PW-1 ("X") had told her that the accused had made any sexual assault, far less aggravated sexual assault at any point of time to her. PW-14 stated that she does not have any complaint against the accused, while stating at the same time that the accused is not innocent. It will not be unreasonable to hold that a mother will definitely have complaint against a person if he had committed any sexual offence on her minor child. It is not clear what she meant when stated that the accused is not innocent – There is no ingredient of penetrative sexual assault in the evidence of PW-1. Evidence of PW-1 is that she had "physical relationship" with the accused 5/6 times. What is

meant by "physical relationship" had not been explained. "Physical relationship" maybe in very many ways. By a process of surmises and conjectures, "physical relationship" cannot be construed to mean penetrative sexual assault within the meaning of S. 3 of the POCSO Act – Held: Prosecution not able to establish the guilt of the accused beyond reasonable doubt. Impugned judgment set aside and accused acquitted, and set at liberty.

Depesh Tamang* v. *State of Sikkim ***272A***

Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – S. 29 of the POCSO Act invoked by the learned Assistant Public Prosecutor at the appeal stage provides a reverse burden upon the accused in a prosecution under Ss. 3, 5, 7 and 9 of the POCSO Act. Charge was framed against the respondent under S. 5(l) and therefore, S. 29 may be attracted. We are, however, of the view that in order to shift the onus upon the accused by invoking the provision of S. 29, the foundational facts of the prosecution case must be established by leading evidence – Sans the deposition of the minor prosecutrix, there is no other oral or material evidence. If, therefore, the deposition of the minor prosecutrix is disbelieved, there is no evidence in support of the prosecution's story. In such circumstances, the question of putting the onus upon the accused to prove his innocence would be contrary to well settled principles of criminal jurisprudence. Had the testimony of the minor prosecutrix sustained judicial scrutiny, the mere lack of injuries alone may not have persuaded us to discard it. We, therefore, refrain from invoking the provision of S. 29 on examination of the materials on record.

State of Sikkim* v. *Karna Bahadur Rai ***198C***

University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 – What falls for consideration is whether the University had laid down an additional criterion for promotion under CAS from Stage-IV to Stage-V in addition to norms under UGC Regulations – It is virtually the admitted position that but for the additional criterion stated to have been laid down by the University, the writ petitioner had qualified in terms of the UGC regulations. Annexure-1 of the counter-affidavit of the respondents no. 1 and 2 is not dated. Given the

importance of the issue, it is, to say the least, very surprising. Content of the same is very vague. It is not indicated when such an additional norm was "established" by the Vice Chancellor. All that is said is that the norm was "established" since 2015. That is the only document that was brought on record by the appellants relating to laying down of additional norm. There is an unequivocal admission in Annexures-A1 and A2 that the additional norm was not notified by the University. It is also admitted therein that Executive Council approved the above policy only on 29.06.2018. In view of the above, this Court is of the unhesitant opinion that even if a policy laying down additional norm was formulated, without notifying the same and without due approval, it could not have been acted upon. It was in that context the learned Single Judge had noted that the same was non-est in law – Appellants also failed to reconcile how Circular No. 13/2017 dated 07.03.2017, wherein while inviting applications for promotion under CAS, additional criterion of experience of guiding research scholars to Ph.D. was not mentioned, and Annexure-1 of the counter-affidavit of the appellants can stand together – Six candidates who were promoted under CAS may not have questioned application of additional norm. That does not mean the writ petitioner has to follow suit. He can certainly articulate his grievance in accordance with law. When this Court has held that additional criterion could not have been applied during the relevant time when the application of the petitioner for CAS was initially under consideration, an argument cannot be countenanced that the eligibility of the writ petitioner cannot be considered on a lesser yardstick as compared to other candidates in the fray.

***The Sikkim University and Another* v.**
Dr. Vaidyanath Krishna Ananth and Another ***298C***

SLR (2020) SIKKIM 147
(Before Hon'ble the Chief Justice)

Crl. L.P No. 04 of 2019

Kiki Doma Bhutia ….. PETITIONER

Versus

Bijendra Kumar Singh ….. RESPONDENT

With

Crl. L.P No. 05 of 2019

Kiki Doma Bhutia ….. PETITIONER

Versus

Bijendra Kumar Singh ….. RESPONDENT

For the Petitioner: Mr. Jorgay Namkha, Advocate.

For the Respondent: Mr. Anmole Prasad, Senior Advocate with Mr. Sagar Chettri, Advocate.

Date of decision: 4th March 2020

A. Code of Criminal Procedure, 1973 – S. 378 (4) – Special Leave to Appeal – Chapter XX relating to trial of summons-cases by Magistrate provides for either conviction or acquittal of an accused. S. 255 Cr.P.C provides that if the Magistrate, upon taking the evidence referred to in S. 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal. S. 255(2) provides that where the Magistrate does not proceed in accordance with the provisions of S. 325 or S. 360, he shall, if he finds the accused guilty, pass sentence upon him according to law. Charge is not

required to be framed in summons-cases and therefore, use of the word discharge in trial of summons-cases is really a misnomer.

(Para 26)

B. Code of Criminal Procedure, 1973 – S. 378 (4) – Special Leave to Appeal – Whether on the dismissal of a complaint consequent upon rejection of an application for condonation of delay, the same amounts to acquittal of the accused? – It is no longer *res integra* that an order of dismissal of first complaint under S. 203 is no bar for the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances such as where the previous order was passed on incomplete record, or on a misunderstanding of the nature of the complaint or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceeding – The fact that a second complaint can be entertained on same facts, albeit in exceptional circumstances, after dismissal of a complaint under S. 203 demonstrates that dismissal of a complaint at every stage does not automatically result in acquittal of the accused because if the accused is acquitted, such acquittal can be questioned only by taking recourse to S. 378 (4) – Dismissal of a complaint under S. 203 is at a stage prior to issuance of process – In the instant cases, no cognizance of any offence was taken by the Court and even the cognizance of the complaint was not taken as the Court had rejected the applications for condonation of delay in not making the complaints within the prescribed period and therefore, there was no occasion to issue summons to the accused. It is manifest that criminal proceedings had not commenced based on the complaints. When criminal proceedings had not commenced, it will be incongruous to hold that the accused stands acquitted with the dismissal of the complaint – Held: In a circumstance where a complaint is dismissed as a consequence of the Court being not satisfied that the complainant had sufficient cause for not making the complaint within the prescribed period, the same does not result in acquittal of the accused. Therefore, these leave petitions seeking leave to appeal are not maintainable.

(Paras 17, 29, 32 and 33)

Petitions dismissed.

Chronology of cases cited:

1. Vinod Kumar v. State of Punjab, 1999 SCC Online P&H 687.
2. Kalpana Tyagi v. Sneh Lata Sharma, 2003 CRI.L.J. 3395.
3. S. Rajaram v. S. Seenivasan, 2007(4) CTC 136.
4. Mander Singh and Others v. Ladi, 2008 SCC Online P&H 482.
5. Harvinder Singh v. State of Punjab, Crl. Revision No.1275/2011.
6. Skyline Constructions and Housing Pvt. Ltd v. T.D Kumaravell Vasanthan, MANU/ KA/2158/2017.
7. In Chief Enforcement Officer v. Videocon International Limited and Others, (2008) 2 SCC 492.

JUDGMENT AND ORDER (ORAL)

Arup Kumar Goswami, CJ

Crl. L.P No. 4/2019 is an application under Section 378 (4) of the Code of Criminal Procedure, 1973 (for short, CrPC), praying for special leave to appeal to the appellant to prefer appeal against the order dated 26.02.2019 passed by the learned Judicial Magistrate– Ist Class, East Sikkim at Gangtok in Private Complaint Case No. 33 of 2018. Crl. L.P No. 5/2019 is a similar application filed under Section 378 (4) CrPC praying for special leave to appeal to the appellant to prefer appeal against the impugned order dated 26.02.2019 passed by learned Judicial Magistrate-1st Class, East Sikkim at Gangtok in Private Complaint Case No. 34 of 2018.

2. Both Private Complaint Case No. 33 of 2018 and Private Complaint Case No. 34 of 2018 are complaints filed by the appellant under Negotiable Instruments Act, 1881 (for short, N.I Act) against the present respondent.

3. Private Complaint Case No. 33 of 2018 was accompanied by an application under Section 142 (1) (b) of the N.I Act for condonation of delay of 39 days in preferring the connected complaint. Private Complaint Case No. 34 of 2018 was also similarly accompanied by an application for condonation of delay under Section 142 (1) (b) of the N.I. Act for condonation of delay of 78 days.

4. The learned Magistrate had taken up the applications for condonation of delay for consideration at the first instance. Without issuing any notice to the respondent herein, after hearing the learned counsel for the appellant, the learned Magistrate had come to the conclusion that the appellant herein had not been able to show sufficient cause to allow the applications for condonation of delay and had, accordingly, rejected both the applications by separate orders dated 26.02.2019.

5. Paragraph-8 of both the orders dated 26.02.2019, which is identical, reads as follows:-

> "In view of the above and since the Complainant has not been able to show sufficient cause to allow condonation for her to file the instant complaint, the complaint fails and is dismissed accordingly."

6. Challenging the aforesaid orders dated 26.02.2019, Crl. L.P No. 4/ 2019 and Crl. L.P No. 5/2019 have been filed along with Memos of Appeal.

7. It is to be noted, at this juncture, that appeals have not been registered till now as the instant Crl. L. P. No.04/2019 and Crl. L.P No. 05/2019 are pending adjudication.

8. In both the Criminal Leave Petitions, the respondents have filed objections, contending, amongst others, that in absence of an order of acquittal passed by the learned Magistrate, no right of appeal is conferred by statute upon the appellant/complainant and therefore, the applications seeking leave to appeal are not maintainable.

9. I have heard Mr. Jorgay Namka, learned counsel for the appellant and Mr. Anmol Prasad, learned senior counsel appearing for the respondent.

10. Mr. Namka submits that since the learned Magistrate had dismissed the complaints, the same amounts to acquittal of the respondent and therefore, appeal under Section 378 (4) CrPC would be maintainable. In

support of his submissions, learned Counsel has placed reliance on the following decisions:

i. Vinod Kumar vs. State of Punjab, reported in 1999 SCC Online P&H 687.

ii. Kalpana Tyagi vs. Sneh Lata Sharma, reported in 2003 CRI.L.J. 3395.

iii. S. Rajaram vs. S. Seenivasan, reported in 2007(4) CTC 136.

iv. Mander Singh and others vs. Ladi, reported in 2008 SCC Online P&H 482.

v. Harvinder Singh vs. State of Punjab in Criminal Revision No.1275/ 2011 (Date of Decision: 28.01.2013).

vi. Skyline constructions and Housing Pvt. Ltd vs. T.D Kumaravell Vasanthan, reported in MANU/ KA/2158/2017.

11. Mr. Prasad, on the other hand, has submitted that a distinction has to be borne in mind with regard to complaint dismissed prior to the summoning of the accused and complaints dismissed subsequent to summoning of the accused. He has submitted that if a complaint is dismissed prior to the summoning of the accused, such an order of dismissal can be challenged only by way of a revision application and not by taking recourse to filing an appeal under Section 378 (4) CrPC. He submits that cases under N.I Act are tried by learned Magistrates following the procedure of trial in summons-cases and if the complaint is dismissed on the grounds mentioned in Section 256 CrPC, same will result in acquittal of the accused and in that event, an appeal will be maintainable. In support of his submissions, Mr. Prasad has also relied on Kalpana Tyagi (supra).

12. I have considered the submissions made by the learned counsel for the parties and have perused the materials on record.

13. Section 142 (1) of N.I Act reads as follows:

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) –
>
> (a) no court shall take cognizance of any offence punishable under section 138 except upon a

complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque; (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138."

14. The proviso inserted to Section 142 (1) (b) N.I Act came into effect from 06.02.2003.

15. Section 378 (4) CrPC reads as follows:- "If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

16. Section 378 (5) CrPC provides that no application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of the order of acquittal. Section 378 (6) CrPC provides that no appeal from that order of acquittal shall lie under sub-section 1 or sub-section 2 of Section 378 if, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused.

17. The question that arises for consideration is as to whether on the dismissal of a complaint consequent upon rejection of an application for condonation of delay, the same amounts to acquittal of the accused. If the answer is in the affirmative, necessarily, an application for grant of leave to prefer appeal would be maintainable.

18. Before I proceed to deal with the question, it will be appropriate to take note of the decisions cited at the Bar.

19. In Vinod Kumar (supra), Punjab & Haryana High Court had held that order of discharge in a case triable as summons-case has to be read as an order of acquittal under Section 255 CrPC.

20. In Mander Singh (supra), the Punjab & Haryana High Court had observed that order of discharge, passed by a Magistrate in a summons-case, amounts to acquittal of the accused and such an order can be assailed only before the High Court by filing special leave to appeal under Section 378 CrPC. The High Court had further observed that in summons-cases, there cannot be a question of discharge as there is no provision containing such a word.

21. In Harvinder Singh (supra), the petitioner therein had impugned an order passed by the learned Sessions Judge whereby he had allowed the revision filed by the State and had set aside the order of discharge passed by the learned trial Magistrate. Relying upon Mander Singh (supra), the Punjab and Haryana High Court held that the order of discharge passed by the learned Magistrate will have to be deemed as an order of acquittal and therefore, revision before the learned Sessions Court was not maintainable and that only remedy available to the State was to approach the High Court by way of leave to appeal.

22. S. Rajaram (supra), which is a judgment of the High Court of Madras (Madurai Bench), was passed on a Criminal Revision petition filed under Section 397 read with Section 491 CrPC. In the aforesaid case, the learned Magistrate had dismissed the complaint filed under Section 138 of NI Act on the ground that he was not satisfied with the reasons cited by the complainant to explain delay. Holding that the complainant had shown sufficient cause for condonation of delay, the High Court had allowed the Criminal Revision.

23. In Kalpana Tyagi (supra), challenge was made to orders passed by the learned Magistrate dismissing in default the complaints filed by the petitioner under Section 138 N.I Act. Such orders were passed after summons was issued to the accused. Delhi High Court has held that in such a situation, Section 256 CrPC had come into play and dismissal of

complaints resulted in acquittal of the respondent against which only appeals could be filed. Accordingly, the revision petitions filed by the petitioner were held to be not maintainable. The Delhi High Court had held that there is a distinction between complaints dismissed prior to the summoning of an accused and those dismissed subsequent to summoning of the accused. It was held that if a complaint is dismissed prior to summoning of the accused, the order may be challenged by way of a revision petition.

24. Skyline and Housing Pvt. Ltd (supra), which is a judgment of Karnataka High Court at Bengaluru, was rendered in an appeal filed challenging an order whereby the application for condonation of delay was rejected and consequently, the complaint was dismissed . The appeal came to be allowed by condoning delay of five days and restoring the complaint petition.

25. The facts before Karnataka High Court and the Madras High Court are similar to the facts of these two Criminal Leave Petitions. Perusal of the judgment of the Karnataka High Court, however, goes to show that the question with regard to maintainability of the appeal was not raised before the Court. Similarly, no issue was raised before Madras High Court that Criminal Revision Petition was not maintainable and that in such circumstances, only an appeal will be maintainable.

26. Chapter XX relating to trial of summons-cases by Magistrate provides for either conviction or acquittal of an accused. Section 255 CrPC provides that if the Magistrate, upon taking the evidence referred to in section 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal. Section 255 (2) CrPC provides that where the Magistrate does not proceed in accordance with the provisions of Section 325 or Section 360, he shall, if he finds the accused guilty, pass sentence upon him according to law. Charge is not required to be framed in summons-cases and therefore, use of the word discharge in trial of summons-cases is really a misnomer. It was in that context Punjab and Haryana High Court had held that discharge means acquittal of the accused. However, in the present cases, there is no order of discharge.

27. Section 256 CrPC provides for acquittal of the accused on entirely different grounds. Section 256 (1) CrPC provides that if the summons has

been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. Section 256 (2) CrPC provides that, so far as may be, provisions of sub-section (1) shall also apply to cases where non-appearance of the complainant is due to his death.

28. It will be necessary to also consider the provision contained in Section 203 CrPC which provides that if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry or investigation (if any) under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing. Issue of process, namely, a summons in a summons-case or a warrant in a warrant-case under Section 204 CrPC, arises only if the Magistrate taking cognizance of an offence is of the opinion that there is sufficient ground for proceeding.

29. It is no longer *res integra* that an order of dismissal of first complaint under Section 203 CrPC is no bar for the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances such as where the previous order was passed on incomplete record, or on a misunderstanding of the nature of the complaint or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceeding. The fact that a second complaint can be entertained on same facts, albeit in exceptional circumstances, after dismissal of a complaint under Section 203 CrPC, demonstrates that dismissal of a complaint at every stage does not automatically result in acquittal of the accused because if the accused is acquitted, such acquittal can be questioned only by taking recourse to Section 378 (4) CrPC. As noticed earlier, dismissal of a complaint under Section 203 CrPC is at a stage prior to issuance of process.

30. Section 142 (1) of N.I Act provides that cognizance of any offence punishable under Section 138 shall not be taken by any Court unless conditions set out in Section 142 (1) (a) and (b) are satisfied. The word ‘cognizance’ is neither defined in the N.I Act nor in CrPC. In Chief

Enforcement Officer vs. Videocon International Limited and others, reported in (2008) 2 SCC 492, the expression 'cognizance' was explained by the Honble Supreme Court at paragraph 19 as follows:

> "……..It merely means „become aware of and when used with reference to a court or Judge, it connotes „to take notice of judicially. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone."

31. At paragraph 20 of the aforesaid judgment, the Supreme Court stated as follows:-

> " "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."

32. In the instant cases, no cognizance of any offence was taken by the Court and even the cognizance of the complaint was not taken as the Court had rejected the applications for condonation of delay in not making the complaints within the prescribed period and therefore, there was no occasion to issue summons to the accused. It is manifest that criminal proceedings had not commenced based on the complaints. When criminal proceedings had not commenced, it will be incongruous to hold that the accused stands acquitted with the dismissal of the complaint.

33. In view of the above discussions, I am of the considered opinion that in a circumstance where a complaint is dismissed as a consequence of

the Court being not satisfied that the complainant had sufficient cause for not making the complaint within the prescribed period, the same does not result in acquittal of the accused. Therefore, these leave petitions seeking leave to appeal are not maintainable.

34. Accordingly, Crl. L.P No.04/2019 and Crl. L.P No.05/2019 are dismissed reserving liberty to the petitioner to pursue remedy in accordance with law. It is also made clear that this Court has not expressed any opinion on merits with regard to the orders passed by the learned Magistrate.

SLR (2020) SIKKIM 158
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 33 of 2018
Crl. A. No. 34 of 2018
Crl. A. No. 35 of 2018

Sancha Bahadur Subba ….. **APPELLANT**

Versus

Ramesh Sharma ….. **RESPONDENT**

For the Appellant: Mr. Umesh Ranpal with Mr. Raghvendra Kumar and Ms. Sanju Gupta, Advocates.

For the Respondent: Mr. S.S. Hamal with Mr. Leada T. Bhutia, Ms. Sabina Chettri and Ms. Saroja Chettri, Advocates.

Date of decision: 5th March 2020

A. Negotiable Instruments Act, 1881 – S. 138 – Requirements of a Notice – From the provisions of S. 27 of the General Clauses Act, 1897 and S. 114 of the Indian Evidence Act, 1872 it manifests that once Notice is served by registered post by correctly addressing it to the drawer of a cheque, the service of Notice is deemed to have been effected. In such a circumstance the requirements of Proviso (b) of S. 138 of the N.I. Act stands complied if the Notice is served in the manner prescribed therein. The object of these provisions are to ensure that unscrupulous drawers of cheques are unable to avoid service of the statutory Notice by leaving their homes for sometime, and thereby evade prosecution – No deficiency emanates on the part of the Appellant for having issued Notices to the Respondent in his admitted address – Notices having been sent to the Respondent's correct address were duly served, fulfilling the requirement of "giving notice".

(Paras 10 and 13)

B. Negotiable Instruments Act, 1881 – Ss. 118 and 139 – Presumptions – Presumption under S. 139 of the N.I. Act is an extension of the presumption of S. 118(a) of the Act. If the negotiable instrument happens to be a cheque, S. 139 raises a further presumption that the holder of the cheque received the cheque in discharge in whole or in part of any debt or other liability. S. 118 of the N.I. Act uses the phrase "until the contrary is proved," S. 139 of the N.I. Act provides "unless the contrary is proved." S.4 of the Evidence Act which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under the aforestated provisions are rebuttable – Respondent has admitted his legal liability/obligations towards the Appellant for an amount of 42,70,000/-. The three post dated cheques came to be issued consequent upon execution of Exhibit-1 thereby raising the presumption as elucidated in Ss. 139 and 118 of the N.I. Act – Respondent does not deny his signatures on the cheques which were dishonoured nor does he dispute the transactions between him and the Appellant and has accepted the execution of Exhibit-1 – S. 139 of the N.I. Act is an example of reverse onus and therefore once an admission of issuance of cheque emanates from the Respondent and the signatures on the cheques are admitted, there is always a presumption in favour of the Complainant that a legally enforceable debt or liability exists. It is for the Respondent to rebut such presumption in evidence, which he has failed to do – Findings arrived at by the learned Trial Court are perverse and erroneous.

(Paras 18, 20 and 21)

Appeal allowed.

Chronology of cases cited:

1. Bhagwati Kumar Gupta v. State of Rajasthan and Another, 2013 (2) RLW 1788 (Raj.).
2. Uttam Ram v. Devinder Singh Hudan and Another, (2019) 10 SCC 287.
3. Purna Kumar Gurung v. Ankit Sarda, MANU/SI/0060/2018.
4. M.D. Thomas v. P.S. Jaleel and Others, (2009) 14 SCC 398.
5. D. Vinod Shivappa v. Nanda Belliappa, (2006) 6 SCC 456.

6. Sanjay Mishra v. Kanishka Kapoor alias Nikki and Another, 2009 Cri.LJ 3777.

7. Basalingappa v. Mudibasappa, AIR 2019 SC 1983.

8. Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2002) 2 SCC (Cri) 166.

9. Rangappa v. Sri Mohan, 2010 Cri.LJ 2871.

10. Bhaskaran v. Sankaran Vaidhyan Balan and Another, (1999) 7 SCC 510.

11. C.C. Alavi Haji v. Palapetty Muhammed and Others, (2007) 6 SCC 555.

12. N. Parameswaran Unni v. G. Kannan and Another, AIR 2017 SC 1681.

13. Government of A.P. and Another v. B. Satyanarayana Rao (dead) by Legal Representatives and Others, (2000) 4 SCC 262.

14. Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673.

15. Rohitbhai Jivanlal Patel v. State of Gujarat and Others, MANU/SC/0393/2019.

16. Hiten P. Dalal v. Bratindranath Banerjee, 2001 SCC (Cri) 960.

17. Kamala S. v. Vidhyadharan M.J. and Another, (2007) 5 SCC 264.

18. Meters and Instruments (P) Ltd. v. Kanchan Mehta, (2018) 1 SCC 560.

JUDGMENT

Meenakshi Madan Rai, J

1. This common Judgment disposes of three Criminal Appeals i.e. Criminal Appeal No.33 of 2018 *(arising out of Private Complaint Case No.14 of 2015)*, Criminal Appeal No.34 of 2018 *(arising out of Private Complaint Case No.31 of 2015)* and Criminal Appeal No.35 of 2018 *(arising out of Private Complaint Case No.30 of 2015)*.

2. The Appeals assail the acquittal of the Respondent *(the accused person before the learned trial Court)* by the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, for the offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "N.I. Act"), vide Judgments dated 11.05.2018, in the afore detailed Private Complaint Cases. The grounds for acquittal were that the Appellant had failed to prove the ingredients of "giving Notice" as required under Section 138 of the N.I. Act. The Appellant failed to establish beyond a reasonable doubt that a debt or any other liability existed in his favour. That the presumption under Section 139 of the N.I. Act was successfully rebutted by the Respondent. Hence, the Appeals.

3. The facts common in all the Complaints, leading to the Appeals may briefly be adverted to. The Appellant required finances for his sons incomplete hotel project at Gangtok, Sikkim. The Respondent in the month of March, 2013 offered to assist him to obtain loan of Rupees five crores for the said purpose from Syndicate Finance Private Limited, Mumbai. The condition for obtaining such loan was an advance payment of 2% of the capital applied for, as processing fees. The Appellant agreed to the said proposal and thereafter made over a sum of Rs.12,70,000/- (Rupees twelve lakhs and seventy thousand) only, to the Respondent in March, 2013 in two tranches of Rs.10,00,000/- (Rupees ten lakhs) only, and Rs.2,70,000/- (Rupees two lakhs and seventy thousand) only, for the aforementioned purpose. Later, on doubts emerging about the credentials of the Finance Company, the Appellant instructed the Respondent not to deposit the said amounts with the Company. The Respondent however informed him that the deposit was already made, nevertheless, the amount would be refunded by the month of July, 2013. In August, 2013 in order to obtain loan for the same purpose from ICCI, Kolkata a sum of Rs.30,00,000/- (Rupees thirty lakhs) only, was again handed over by the Appellant to the Respondent as Promoters Capital contribution. The total amount thus advanced to the Respondent by the Appellant was a sum of Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only. When no loans were forthcoming, the Appellant demanded a refund from the Respondent in April, 2014, who promised to repay the entire amount by 31.05.2014, in vain. Following these events, on 07.11.2014 the Respondent executed a written Agreement (Exhibit 1), acknowledging therein receipt of Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only, from the Appellant in different tranches. He undertook to repay the entire amount towards which he issued

three post dated Cheques bearing different dates. The Cheques came to be dishonoured on various grounds when presented to the Bank for payment by the Appellant on 31.12.2014, 07.04.2015 and 17.02.2015 respectively but the Respondent neglected to repay the amount to the Appellant. The Appellant in the meanwhile lodged a Complaint against the Respondent at the Sadar Police Station, Gangtok on 05.01.2015 (Exhibit 8) for cheating and criminal breach of trust. Pursuant thereto the Appellant issued Legal Notices to the Respondent under Section 138 of the N.I. Act as follows;

> *(a)* Legal Notice on 13.01.2015 *(received by Dharni Sharma, brother of the Respondent)*, informing the Respondent that the Cheque bearing No.031570 drawn on IDBI Bank, Gangtok Branch, dated 30.12.2014 amounting to Rs.10,00,000/- (Rupees ten lakhs) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the Respondent. The Cheque was dishonoured vide its return memo dated 31.12.2014 with the remarks "Funds insufficient" *(Criminal Appeal No.33 of 2018, arising out of Private Complaint Case No.14 of 2015, for short "P.C. Case").*
>
> *(b)* Legal Notice on 05.05.2015, *(received by Pashupathi Sharma, father of the Respondent)*, informing the Respondent that the Cheque bearing No.002215 drawn on AXIS Bank, Gangtok Branch, dated 31.05.2015 amounting to Rs.21,70,000/- (Rupees twenty one lakhs and seventy thousand) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the Respondent. The Cheque was dishonoured vide its return memo dated 07.04.2015 with the remarks "Account closed" *(Criminal Appeal No.34 of 2018 arising out of P.C. Case No.31 of 2015).*
>
> *(c)* Legal Notice on 16.03.2015, *(received by Dharni Sharma, brother of the Respondent)*, informing the Respondent that the Cheque bearing

No.002217 drawn on AXIS Bank, Gangtok Branch, dated 15.02.2015 amounting to Rs.11,00,000/- (Rupees eleven lakhs) only, issued by the Respondent had been deposited by the Appellant in the Central Bank of India, Gangtok Branch with due notice to the Respondent. The Cheque was dishonoured vide its return memo dated 17.02.2015 with the remarks "Funds insufficient" *(Criminal Appeal No.35 of 2018 arising out of P.C. Case No.30 of 2015).*

Hence, the prayers in the Appeals.

4. After the Complaints were lodged under Section 138 of the N.I. Act before the learned trial Court in the three Private Complaints *supra*, cognizance was taken and substance of accusation for the offence under Section 138 of the N.I. Act in each of the Complaints was explained to the Respondent to which he pleaded "not guilty." The Appellant examined himself and four other witnesses. The Respondent was examined under Section 313 Cr.P.C. and was a witness for himself thereafter, but failed to produce two other witnesses that he had earlier sought to examine in his defence. On consideration of all materials and evidence the impugned Judgments of the learned trial Court was pronounced.

5.(a) While reiterating the facts as put forth hereinabove, it was urged by learned Counsel for the Appellant that despite the proof that the Legal Notices addressed to the Respondent in his permanent address, as indicated in Exhibit 1, had been received by his brother as reflected in P.C. Case No.14 of 2015 and P.C. Case No.30 of 2015 and by his father in P.C. Case No.31 of 2015, the learned trial Court overlooked the provisions of Section 27 of the General Clauses Act, 1897 and held that the ingredients of "giving Notice" were unfulfilled as it was not sent to the Respondents Gangtok address as he no longer resided in "Linkey." The learned trial Court thus failed to appreciate that the address furnished in Exhibit 1, executed by the Respondent on 07.11.2014 was of "Linkey" and therefore he had made a false statement before the Court. To fortify this submission reliance was placed on ***Bhagwati Kumar Gupta v. State of Rajasthan and Another***[1]. Besides, he has not denied that Dharni Sharma is his

[1] 2013 (2) RLW 1788 (Raj.)

brother and Pashupathi Sharma his father, both of whom he failed to produce as witnesses to substantiate his denial of their signatures appearing on the Acknowledgment Cards.

(b) In the next leg of his argument, learned Counsel advanced the contention that the learned trial Court concluded that neither debt nor legal liability subsisted against the Respondent, who it opined, was evidently pressurized to enter into the Agreement, Exhibit 1, as witnesses to the execution of the document were known to the Appellant but no witnesses were present from the side of the Respondent. This, despite the Respondents admission that his guardian Durga Prasad Sharma was present. The learned trial Court also opined that Exhibit R1 the General Diary extract of the Crime Branch, Crime Investigation Department, dated 18.09.2014 revealed that the Appellant had complained to the Crime Investigation Department regarding non-refund of his money amounting to Rs.45,00,000/- (Rupees forty five lakhs) only, by the Respondent, prior in time to issuance of the Cheques and hence assumed that the Respondent was coerced to execute Exhibit 1. The learned trial Court next ventured into discussing the merits of Exhibit 1, the contents of which stood admitted by the Respondent, therefore, the conclusion of the learned trial Court that the contents cannot be relied for "speaking of the actual facts" is untenable. The learned trial Court also raised doubts about the place where Exhibit 1 was signed *viz.* the Chambers of the Advocate and further opined that the Appellant had failed to prove that the Cheques had been dishonoured, whereas the documents relied on by the Appellant marked Exhibit 4 in all the Complaints, clearly indicate the rejection of the Cheques. The Respondent did not deny issuance of the Cheques.

(c) That, the learned trial Court reached a finding that the presumption against the Respondent was duly rebutted by him as required under Section 139 of the N.I. Act, when in fact none existed. On this count, reliance was placed on ***Uttam Ram v. Devinder Singh Hudan and Another***[2] and ***Purna Kumar Gurung v. Ankit Sarda***[3]. Hence, the impugned Judgments of the learned trial Court deserve to be set aside.

6.(a) Repudiating the arguments of learned Counsel for the Appellant, it was contended by learned Counsel for the Respondent that the records

[2] (2019) 10 SCC 287
[3] MANU/SI/0060/2018

reveal that no Notice was issued to the Respondent in his address at "Bypass Road, Gangtok," despite the Appellant being aware that the Respondent resided there. That, no averment was made in the Complaints that the Notices were sent to the correct address of the drawer and hence there can be no assumption of service when the Respondent has denied receipt of Notices. That in ***P.S. Jaleel and Ors.***[4] the Honble Supreme Court has unequivocally laid down that Notice must be served on the accused and not on a third person. That, there is no fixed rule that whenever Notice cannot be served due to non-availability of addressee Court would presume service of the Notice. The Appellant failed to summon the Respondents father and brother or the Postman to establish service of Notices which is therefore unproved. Support was garnered from the decision in ***D. Vinod Shivappa v. Nanda Belliappa***[5].

(b) It was next contended that the Appellant failed to establish that the Cheques were returned dishonoured. The Cheque Return Memos filed before the learned trial Court were photocopies and never a part of the documentary evidence furnished, thereby failing to establish the third ingredient of the offence. That, the Appellant is a Government servant but the source from where he obtained Rs.42,00,000/- (Rupees forty two lakhs) only, has not been disclosed. Therefore the unaccounted cash amount is not a legally enforceable liability or a legally recoverable debt and Exhibit 1 does not substantiate the Appellants case. To buttress this submission reliance was placed on ***Sanjay Mishra v. Kanishka Kapoor alias Nikki and Another6*** and ***Basalingappa v. Mudibasappa***[7].

(c) That, so far as rebuttal of presumption is concerned, the standard of proof to be discharged by the accused is not "beyond a reasonable doubt" but only to the extent or preponderance of probability. In this context reliance was also placed on ***Krishna Janardhan Bhat v. Dattatraya G. Hegde***[8] and ***Rangappa v. Sri Mohan***[9]. That, in the facts and circumstances as placed before this Court the impugned Judgments of the learned trial Court warrant no interference and the Appeals be dismissed.

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[4] (2009) 14 SCC 398
[5] (2006) 6 SCC 456
[6] 2009 Cri.LJ 3777 7 AIR 2019 SC 1983
[8] (2002) 2 SCC (Cri) 166
[9] 2010 Cri.LJ 2871

7. I have heard the rival submissions put forth by Learned Counsel at length and given due and anxious consideration to the same. I have also carefully perused the records of the case including the evidence, impugned Judgments and the citations made at the Bar.

8. The questions germane to the decision of the Appeals are;

(i) Whether the learned trial Court was in error in concluding that the Appellant failed to prove the ingredients of "giving notice" as required under Section 138 of the N.I. Act?

(ii) Whether the Appellant failed to establish beyond a reasonable doubt that the Respondent had to discharge a debt or a legal liability?

(iii) Whether the Respondent was able to rebut the presumption in terms of Section 139 of the N.I. Act?

9. In the first instance it would be relevant to notice the ingredients that make out an offence under Section 138 of the N.I. Act which are as follows;

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability.

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(iii) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that the cheque amount exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

The penalty for a dishonoured Cheque is conviction for the drawer if the demand is not met within fifteen days of the receipt of Notice. Needless to add if payment ensues within the statutory period the legal liability under Section 138 of the N.I. Act ceases.

10. To address the first question flagged *supra* it is evident that Proviso *(b)* of Section 138 of the N.I. Act specifies;

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account**. - ……
>
> (a) ……
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by **giving a notice in writing**, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> ……"

In this context it is relevant to discuss what "giving a notice in writing" tantamounts to. From the provisions of Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian Evidence Act, 1872 (for short "Evidence Act") it manifests that once Notice is served by registered post

by correctly addressing it to the drawer of the Cheque, the service of Notice is deemed to have been effected. In such a circumstance the requirements of Proviso *(b)* of Section 138 of the N.I. Act stands complied if the Notice is served in the manner prescribed therein. The object of these provisions are to ensure that unscrupulous drawers of Cheques are unable to avoid service of the statutory Notice by leaving their homes for sometime, and thereby evade prosecution. In this thread, we may usefully refer to the Judgment in ***K. Bhaskaran v. Sankaran Vaidhyan Balan and Anr.***[10] wherein it was held as follows;

> "**20**. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.
>
> **21**. **In *Maxwell's Interpretation of Statutes*, the learned author has emphasised that 'provisions relating to giving of notice often receive liberal interpretation'** …… The words in Clause (*b*) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does. ……..
>
> **24**. No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in

[10] (1999) 7 SCC 510

> Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice."
>
> **(emphasis supplied)**

11. Reiterating the observation *supra* the Hon ble Supreme Court in ***C.C. Alavi Haji v. Palapetty Muhammed and Ors.***[11] held as under;

> "**8**. .....It was observed that though Section 138 of the Act does not require that the notice should be given only by "post", yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 (for short „the G.C. Act) could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service."

In ***N. Parameswaran Unni v. G. Kannan and Another***[12] the Honble Supreme Court held as follows;

> "**15**. This Court in a catena of cases has held that when a notice is sent by registered post and is returned with postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", **due service has to be presumed**. Though in the process of

[11] (2007) 6 SCC 555
[12] AIR 2017 SC 1681

interpretation right of an honest lender cannot be defeated as has happened in this case. ..."

(emphasis supplied)

12. The decisions *supra* clear the air on the stand of the Honble Supreme Court with regard to service of Notice. It is now essential to consider the Notices issued in the instant matters. The Legal Notice in each Complaint has been marked as Exhibit 5, the Postal Receipt as Exhibit 6 and the Acknowledgment Card as Exhibit 7 respectively. In P.C. Case No.14 of 2015 and P.C. Case No.31 of 2015 the Notices allegedly were received by Dharni Sharma, while in P.C. Case No.30 of 2015 the Notice allegedly was received by Pashupathi Sharma. The Respondent has not disputed that Dharni Sharma is his younger brother and Pashupathi Sharma is his father or that they were residents of "Linkey." While carefully walking through the evidence of the Respondent he asserts that he was not residing in "Linkey," Pakyong, East Sikkim from 2012-13 and that his father resides there. That, he is now residing in Gangtok due to his business and thereby had no knowledge of the alleged Legal Notices sent by the Advocate of the Appellant. He also denied the signatures of his brother and father on the Acknowledgment Cards, Exhibit 7. However a bare perusal of Exhibit 1, the Agreement, admittedly executed between the Respondent and the Appellant on 07.11.2014, reveals the address of the Respondent as *"Linkey, P.O. & P.S. Pakyong, East Sikkim."* The circumstances elucidated hereinabove pertaining to his non residence at "Linkey" but furnishing the address of "Linkey" in Exhibit 1 controvert each other and therefore makes the evidence of the Respondent unreliable. The Respondent failed to produce his kin *supra* to establish that the signatures appearing on the Acknowledgment Cards, Exhibit 7, were not their signatures respectively despite his denials.

13. The learned trial Court relied on the ratio of ***M.D. Thomas*** *(supra)* wherein it was held that service of Notice to the wife of the accused is not sufficient compliance with the requirement of "giving Notice" in terms of proviso *(b)* to Section 138 of the N.I. Act. The ratio in ***M.D. Thomas*** *(supra)* of a two Judge Bench of the Honble Supreme Court, it may respectfully be stated is *per incuriam* in view of a prior decision of a three Judge Bench in ***C.C. Alavi Haji*** *(supra)* on the same aspect. It is apposite to state that while discussing *per incuriam* the Honble Supreme Court in

Government of A.P. and Another v. B. Satyanarayana Rao (dead) by Legal Representatives and Others[13] held as follows;

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

In ***Central Board of Dawoodi Bohra Community v. State of Maharashtra***[14] the Honble Supreme Court has observed that the law laid down by it in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength. In light of the above rulings it is clear that this Court is required to follow the ratio in ***C.C. Alavi Haji*** *(supra).* Hence, the decision in ***C.C. Alavi Haji*** *(supra)* and ***K. Bhaskaran*** *(supra)* of which the relevant portion is already extracted *supra,* would be applicable to the facts of the instant Appeals. No deficiency emanates on the part of the Appellant for having issued Notices to the Respondent in his admitted address and it therefore concludes that the Notices having been sent to the Respondent s correct address were duly served, fulfilling the requirement of "giving Notice," contrary to the finding of the learned trial Court.

14. Now to address the second question hereinabove. The learned trial Court held that no proof of a legal liability of the Respondent towards the Appellant existed as no Money Receipts were tendered in evidence to establish transactions between the Appellant and the Respondent. That although the Appellant deposed during cross-examination that money was taken by him from one Lalit Agarwal, Prem Chand Sharma and Sheetal Pradhan, he failed to examine them as witnesses. That, it was unbelievable that the Appellant would hand over money for obtaining loan without considering its mode of repayment and all other allied consequential terms of liabilities or conditions. The learned trial Court was impressed by the evidence of the Respondent that Exhibit 1 was prepared by him under coercion.

15. The contents of Exhibit 1 are explicit acceptance of liability by the Respondent. Although the learned trial Court was of the opinion that

[13] (2000) 4 SCC 262
[14] (2005) 2 SCC 673

coercion was evident on account of absence of independent witnesses from the side of the Respondent, to the contrary it is in the Respondent s evidence that one Durga Prasad Sharma his guardian was present with him. No proof whatsoever to establish coercion has been furnished. Why he did not make Durga Prasad Sharma sign on the document is not relevant for the present purposes, at the same time it is worth noticing that he has not deposed that Durga Prasad Sharma was restrained by the Appellant from signing on the document. The document was executed before an Oath Commissioner and all other allegations to the contrary have remained unproved. This Court in ***Purna Kumar Gurung*** *(supra)* while considering "debt" and "liability" held as follows;

> "**10**. …….....……
>
> Towards this, we may briefly examine what "debt" and "liability" entails. The term "debt" according to Blacks Law Dictionary, 10th edition, is;
>
> "Liability on a claim; a specific sum of money due by agreement or otherwise."
>
> The explanation to Section 138 of the NI Act clarifies that the term "debt" referred to in the Section means "legal debt", that is one which is recoverable in a Court of law, e.g. as debt on a bill of exchange, a bond or a simple contract. On the other hand, the term "liability" as per Blacks Law Dictionary, 10th edition is;
>
> "The quality, state or condition of being legally obligated or accountable."
>
> "Liability" otherwise has also been defined to mean all character of debts and obligations, an obligation one is bound in law and justice to perform; an obligation which may or may not ripen into a debt, any kind of debt or liability, either absolute or contingent, express or implied.

16. Section 138 of the N.I. Act speaks of "any debt or other liability." The explanation to Section 138 lays down as follows;

> "*Explanation*.–For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

It has to be spelt out herein that every debt is a liability but not every liability is a debt, however both are required to be legally enforceable. In view of the contents in Exhibit 1 there is a clear admission by the Respondent of his liability to repay the amounts mentioned in the document. There is no escaping the fact that it was a legally enforceable liability. The issuance of three post dated Cheques by the Respondent further endorses this circumstance. The argument of learned Counsel for the Respondent that the Appellant is a Government servant hence the source from where he afforded Rs.42,00,000/- (Rupees forty two lakhs) only, has not been indicated was never raised in the evidence of the Respondent and for the first time finds place only in Appeal. The Judgment of the Hon ble Bombay High Court in ***Sanjay Mishra*** *(supra)* relied on by the Respondent is overruled by the ratio of the Honble Supreme Court in ***Rohitbhai Jivanlal Patel v. State of Gujarat and Others***[15] wherein it was *inter alia* held as follows;

> "**17**. In the case at hand, even after purportedly drawing the presumption under Section 139 of the NI Act, **the Trial Court proceeded to question the want of evidence on the part of the complainant as regards the source of funds for advancing loan to the accused and want of examination of relevant witnesses who allegedly extended him money for advancing it to the accused. This approach of the Trial Court had been at variance with the principles of presumption in law**. After such presumption, the onus shifted to the accused and unless the accused had discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities tilting in his favour, any doubt on the complainant's case could not have been raised for want of evidence regarding the

[15] MANU/SC/0393/2019

source of funds for advancing loan to the accused-Appellant. The aspect relevant for consideration had been as to whether the accused-Appellant has brought on record such facts/material/circumstances which could be of a reasonably probable defence."

(emphasis supplied)

17. The circumstances in the instant cases also can be distinguished from the ratio in ***Basalingappa*** *(supra)* wherein the Honble Supreme Court held as follows;

"**30**. We are of the view that when evidence was led before the court to indicate that apart from loan of Rs 6 lakhs given to the accused, within 2 years, amount of Rs 18 lakhs have been given out by the complainant and his financial capacity being questioned, it was incumbent on the complainant to have explained his financial capacity. Court cannot insist on a person to lead negative evidence. **The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse, cannot be supported. We fail to see that how the trial court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence**."

(emphasis supplied)

In the above ratio it is clear that evidence was led before the Court pertaining to the financial capacity of the Appellant thereby extending him an opportunity to meet the evidence by way of cross-examination, or furnishing of witnesses. In the cases at hand, this is an altogether new point raised at the time of Appeal. The Respondent had never questioned the financial capacity of the Appellant during trial and cannot bring out a new point at the appellate stage.

18. That having been said while considering the third question formulated hereinabove, it is apposite to first discuss what Section 139 of the N.I. Act envisages. This Section is extracted hereinbelow for easy reference;

> "**139. Presumption in favor of holder**.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, or any debt or other liability."

This Section is essentially to be read with Section 118 of the N.I. Act, the relevant portion is extracted hereinbelow;

> "**118. Presumptions as to negotiable instruments**.-Until the contrary is proved, the following presumption shall be made:-
>
> (a) of consideration-that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;"

It emerges from a reading of the said provisions that the presumption under Section 139 of the N.I. Act is an extension of the presumption of Section 118(a) of the Act. If the negotiable instrument happens to be a Cheque, Section 139 raises a further presumption that the holder of the Cheque received the Cheque in discharge in whole or in part of any debt or other liability. Section 118 of the N.I. Act uses the phrase "until the contrary is proved," Section 139 of the N.I. Act provides "unless the contrary is proved." Section 4 of the Evidence Act which defines "may presume" and "shall presume" makes it clear that presumptions to be raised under the aforestated provisions are rebuttable. In ***Hiten P. Dalal v. Bratindranath Banerjee***[16] while discussing rebuttable presumption, the Honble Supreme Court held as follows;

> "**20**. That the four cheques were executed by the appellant in favour of Standard Chartered Bank (hereinafter referred to as "the Bank") has not been denied nor was it in dispute that the cheques were dishonoured because of insufficient funds in the appellants account with the drawee viz. Andhra

[16] 2001 SCC (Cri) 960

> Bank. Because of the admitted execution of the four cheques by the appellant, the Bank was entitled to and did in fact rely upon three presumptions in support of its case, namely, under Sections 118, 138 and 139 of the Negotiable Instruments Act. Section 118 provides, inter alia, that until the contrary is proved it shall be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration. The presumption which arises under Section 138 provides more specifically that where any cheque drawn by a person on an account for payment of any amount of money for the discharge in whole or in part of any debt or other liability, is returned by the drawee bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque, such person shall be deemed to have committed an offence and shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. The nature of the presumption under Section 138 is subject to the three conditions specified relating to presentation, giving of the notice and the non-payment after receipt of notice by the drawer of the cheque. All three conditions have not been denied in this case. ……

22. Because both Sections 138 and 139 require that the court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in State of Madras v. A. Vaidhyanatha Iyer *[AIR 1958 SC 61]* it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused." *(Ibid. at p. 65, para 14)* Such a presumption is a presumption of

law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the nonexistence of the presumed fact."

19. In ***Kamala S. v. Vidhyadharan M.J. and Another***[17], it was held as follows;

> "**16**. The nature and extent of such presumption came up for consideration before this Court in M.S. Narayana Menon Alias Mani v. State of Kerala and Anr. *[(2006) 6 SCC 39]* wherein it was held:
>
> > "30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon."

20. On the touchstone of the above ratios and examination of the contents of Exhibit 1 it is evident that the Respondent has admitted his legal liability/ obligations towards the Appellant for an amount of Rs.42,70,000/-

[17] (2007) 5 SCC 264

(Rupees forty two lakhs and seventy thousand) only. The three post dated Cheques came to be issued consequent upon execution of Exhibit 1 thereby raising the presumption as elucidated in Sections 139 and 118 of the N.I. Act *supra*. The Respondent does not deny his signatures on the Cheques which were dishonoured nor does he dispute the transactions between him and the Appellant and has accepted the execution of Exhibit 1. Section 139 of the N.I. Act is an example of reverse onus and therefore once an admission of issuance of Cheque emanates from the Respondent and the signatures on the Cheques are admitted, there is always a presumption in favour of the Complainant that a legally enforceable debt or liability exists. It is for the Respondent to rebut such presumption in evidence, which he has failed to do.

21. The argument of learned Counsel for the Respondent concerning non-filing of documentary evidence in the Complaints to establish that the Cheques were dishonoured has no legs to stand. It emanates with clarity that Exhibit 4, a certified copy of the Cheque Return Memo in P.C. Case No.14 of 2015 established that the Cheque was dishonoured. Neither the evidence nor the Orders of the learned trial Court, (dated 22.02.2017) reveal that any objection was raised by the Respondent to Exhibit 4 being a certified copy in P.C. Case No.14 of 2015. Such an objection not having been raised at trial cannot now be heard at the appellate stage. In P.C. Case No.31 of 2015 and P.C. Case No.30 of 2015 Exhibit 4, in original, individually, were furnished as evidence by the Appellant which established that the Cheques were dishonoured by the Bank on grounds given in the documents.

22. This Court is conscious and aware that interference against an acquittal recorded by the learned trial Court should be rare and in exceptional circumstances, however it is open to the High Court to reappraise the evidence and the conclusion drawn by the learned trial Court to consider whether the Judgment of the learned trial Court can be stated to be perverse. The word "perverse" has to be understood in law as defined to mean "against the weight of evidence." From the discussions that have ensued above I am of the considered opinion that the findings arrived at by the learned trial Court are perverse and erroneous.

23. Consequently, the Appeals are allowed.

24. The impugned Judgments are set aside.

25. The Respondent is convicted of the offence under Section 138 of the N.I. Act in each of the afore detailed Complaints.

26. He is sentenced to undergo Simple Imprisonment of three months each, under Section 138 of the N.I. Act in each of the Complaints. The Sentences shall run concurrently.

27. The Honble Supreme Court in ***Meters and Instruments (P) Ltd. v. Kanchan Mehta***[18] *inter alia* held that;

> "18.4...apart from the sentence of imprisonment, the court has jurisdiction under Section 357(3) CrPC to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 CrPC."

On the anvil of the said Judgment it is hereby ordered that the Respondent shall also pay a total compensation amounting to Rs.42,70,000/- (Rupees forty two lakhs and seventy thousand) only, within three months from today to the Appellant, in terms of Section 357(3) of the Cr.P.C., with interest at the rate of 9% per annum on the above stated amount, from the date of filing of the Complaints before the learned trial Court. In default of payment of compensation he shall undergo Simple Imprisonment of two years. The compensation shall thereafter be recovered in terms of the provisions of Section 431 Cr.P.C.

28. The Respondent/Convict shall surrender before the Court of the learned Chief Judicial Magistrate, East Sikkim at Gangtok, within sixty days from today, to undergo his Sentence. Should there be failure on his part to surrender, the learned trial Court shall issue a Non-Bailable Warrant of Arrest against the Respondent/Convict and thereafter commit him to jail for serving the Sentence.

29. Copy of this Judgment be transmitted to the learned trial Court for information and compliance.

30. No order as to costs.

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[18] (2018) 1 SCC 560

SLR (2020) SIKKIM 180
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

M.A.C. App. No. 02 of 2019

Branch Manager,
United India Insurance Co. Ltd. ….. APPELLANT

Versus

Dhan Bdr. Chhetri and Others ….. RESPONDENTS

For the Appellant: Mr. Pema Ongchu Bhutia, Advocate.

For Respondent No. 1-4: Mr. Ajay Rathi, Mr. Rahul Rathi, Ms. Tashi Doma Bhutia, Ms. Pritima Sunam and Ms. Phurba Diki Sherpa, Advocates.

For Respondent No. 5 and 6: None.

With

C.O. No. 01 of 2019

Dhan Bdr. Chhetri and Others ….. PETITIONERS

Versus

Branch Manager,
United India Insurance Co. Ltd. ….. RESPONDENTS

For the Petitioners: Ms. Tashi Doma Bhutia and Ms. Pritima Sunam, Advocates.

For Respondent No. 1: Mr. Pema Ongchu Bhutia, Advocate.

For Respondent No. 2 and 3: None.

Date of decision: 6th March 2020

A. Motor Accidents Claim – Calculation of the quantum of the loss of income of the deceased assailed by the Appellant – Held: In the absence of any documentary evidence substantiating the monthly income of the deceased, it is but rational to compute the income of the deceased at the rate of 275/- per day, being the income notified by the Department of Labour, Government of Sikkim for "Skilled Workers" vide Notification No. 4/DL dated 01.11.2014 – Respondent No. 1 to 4 entitled to filial compensation (*Magma General Insurance Co. Ltd.* and *Rajesh and Others* discussed).

(Paras 6 and10)

Appeal partly allowed. Cross-objections dismissed.

Chronology of cases cited:

1. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.
2. National Insurance Company Limited v. Pranay Sethi and Others, (2017)16 SCC 680.
3. Magma General Insurance Co. Ltd. v. Nanu Ram and Others, MANU/SC/1012/2018.
4. Rajesh and Others v. Rajbir Singh and Others, (2013) 9 SCC 54.

JUDGMENT (ORAL)

Meenakshi Madan Rai, J

1. The grievances expressed in this Appeal pertain to computation of the income of the deceased by the learned Motor Accident Claims Tribunal (for short "Tribunal), West Sikkim at and Gyalshing and the choice of Multiplier adopted. The Cross-Objection also questions the income of the deceased computed by the learned Tribunal however on a different ground *viz.* that the monthly income of the deceased ought to have been higher than computed by the learned Tribunal. The Future Prospects granted by the

learned Tribunal stands impugned as being lower than what ought to have been computed.

2. The learned Tribunal in MACT Case No.07 of 2018 *(Shri Dhan Bdr. Chhetri and Others v. Shri Bikram Tamang and Others)*, dated 29.09.2018, awarded a compensation of Rs.17,67,000/- (Rupees seventeen lakhs and sixty seven thousand) only, on the death of the deceased, to the Respondents No.1 and 2 his parents and Respondents No.3 and 4, his siblings. The deceased was travelling in the vehicle bearing Registration No.SK-02J/0095 (Mahindra Maxx), which met with an accident at "Tafel Bhir," Rinchenpong, West Sikkim on 20.04.2016, where he succumbed to his injuries at the place of accident.

3. The Appellant questions the income of the deceased placed at Rs.10,000/- (Rupee ten thousand) only, per month by the learned Tribunal, on grounds of absence of documentary evidence to establish the monthly income of the deceased. That the income assessed by the learned Tribunal has no rational basis as evident from the impugned Judgment and was a random figure arrived at for such assessment. That the income could have been based on the rates of skilled labourers as Rs.275/- (Rupees two hundred and seventy five) only, per day, in terms of the Notification of the Department of Labour, Government of Sikkim bearing No.4/DL, dated 01.11.2014. Learned Counsel for the Appellant also submitted that the Multiplier of "18" adopted by the learned Tribunal to calculate the quantum of compensation was erroneous as the deceased was 26 years of age and hence the correct Multiplier is "17."

4. *Per contra*, repudiating the arguments of the Appellant, learned Counsel for the Respondents No.1 to 4 submitted that in fact the income of the deceased was Rs.30,000/- (Rupee thirty thousand) only, per month, and not Rs.10,000/- (Rupee ten thousand) only, as arrived at by the learned Tribunal owning as he did two taxi vehicles and not one from which he derived his income. That, the Future Prospects placed at Rs.4,000/- (Rupees four thousand) only, ought to have been Rs.16,32,000/- (Rupees sixteen lakhs and thirty two thousand) only.

5. I have heard and considered the rival submissions of learned Counsel for the parties. I have also perused all documents and evidence on record and the impugned Judgment.

6. Evidently the Respondents No.1 to 4 did not furnish any Certificate of Income of the deceased or any reliable document before the learned Tribunal to indicate his income. The learned Tribunal while assuming that Rs.10,000/- (Rupee ten thousand) only, was the monthly income of the deceased has not given any ground for such assessment except the fact that the deceased was a Driver by profession and used to drive his own taxi vehicle. The arguments of the Respondents No.1 to 4 that the income ought to be Rs.30,000/- (Rupee thirty thousand) only, cannot be countenanced without supporting documentary evidence. Besides the fact that even if he owned two vehicles it was not possible, as rightly pointed out by the learned Tribunal, for him to drive two vehicles at the same time. Hence considering this circumstance, in the absence of any documentary evidence substantiating the monthly income of the deceased, it is but rational to compute the income of the deceased at the rate of Rs.275/- (Rupees two hundred and seventy five) only, per day, being the income notified by the Department of Labour, Government of Sikkim for "Skilled Workers," vide Notification No.4/DL, dated 01.11.2014.

7. In terms of the decision in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[1] the Multiplier of "17" is adopted instead of "18" as the victim was approximately 26 years of age on the date of accident.

8. In ***National Insurance Company Limited vs. Pranay Sethi and Others***[2] while discussing Future Prospects, the Hon'ble Supreme Court held as under;

> **"59.3** While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

[1](2009) 6 SCC 121
[2] (2017) 16 SCC 680

> **59.4 In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years**. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."
>
> **(Emphasis supplied)**

Hence, the learned Tribunal has correctly placed the Future Prospects of the deceased at 40% as he was 26 years of age and self-employed. However, in view of the change in Multiplier and monthly income of the deceased a fresh calculation of "40%" is required to be made.

9. It is evident from the compensation computed by the learned Tribunal that although Rs.2,00,000/- (Rupees two lakhs) only, was given for loss of love and affection however no calculation was made for loss of Filial Consortium. In ***Magma General Insurance Co. Ltd. vs. Nanu Ram and Ors.***[3] while allowing consortium not only to the spouse but also to the children and parents of the deceased the Hon'ble Supreme Court held as follows;

> "8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium.
>
> **In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'.**
>
> **The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would**

[3] MANU/SC/1012/2018

include sexual relations with the deceased spouse.

.....

Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act.

A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium.

The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in *Pranay Sethi* (supra).

In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs.40,000 each for loss of Filial Consortium."

(Emphasis supplied)

10. In ***Rajesh and Ors. vs. Rajbir Singh and Ors.***[4] the Hon'ble Supreme Court held as follows;

> "***17.*** .....In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of nonpecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. ....."

Hence, on the anvil of the aforestated ratio in ***Magma General Insurance Co. Ltd.*** *(supra)* and ***Rajesh and Ors.*** *(supra)* the Respondents No.1 to 4 are entitled to Filial compensation. In my considered opinion, there is no requirement for computing loss of love and affection in the Award in view of compensation granted by way of Filial Consortium.

11. The Litigation Costs awarded by the learned Tribunal being undisputed are allowed.

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[4] (2013) 9 SCC 54

12. Consequently, in light of the aforesaid facts and circumstances, the Judgment of the learned trial Court stands modified to the extent below;

Annual Income of the deceased	Rs.99,000.00
(Rs.275/-x30x12)	
Add 40% of Rs.99,000/- as future prospects	Rs.39,600.00
Yearly income of the deceased	Rs.1,38,600.00
Less 1/2 of Rs.1,38,600.00	Rs.69,300.00
[deducted from the said amount as expenses that the victim would have incurred towards maintenance had he been alive.]	
Net yearly income	Rs.69,300.00
Multiplier of **'17**' adopted in terms of	
Sarla Verma's case (Rs.69,300 x 17)	Rs.11,78,100.00
Add Loss of **Filial Consortium** [Rs.40,000/-	Rs.1,60,000.00
each, payable to Respondents No. 1 to 4, respectively]	
Add Funeral expenses	Rs.15,000.00
Add Loss of estate	Rs.15,000.00
Add Litigation costs	Rs.25,000.00
Total	**Rs.13,93,100.00**

(Rupees thirteen lakhs, ninety three thousand and one hundred) only.

13. The Respondents No.1 to 4 shall be entitled to simple interest @ 9% per annum on the above amount instead of 10% granted by the learned Tribunal, with effect from the date of filing of the Claim Petition before the learned Tribunal till full realisation.

14. The awarded amount shall be paid by the Appellant to the Respondents No.1 to 4 within one month from today, failing which, the Appellant shall pay simple interest @ 12% from the date of filing of the

Claim Petition till realisation, duly deducting the amounts, if any, already paid by it to the Respondents No.1 to 4.

15. Considering the age of the Respondent No.1 and Respondent No. 2, the parents of the deceased being 64 years and 55 years respectively while the Respondent No.3 and Respondent No. 4 his siblings being 26 years and 32 years respectively and are thereby in a position to fend for themselves, the awarded amount of compensation shall be divided as follows;

(i) 70% to Respondents No.1 and 2 (35% each), the parents of the deceased.

(ii) 30% to Respondents No.3 and 4 (15% each), the siblings of the deceased.

16. Appeal allowed to the extent above.

17. MAC App. No.02 of 2019 stands disposed of accordingly.

18. Cross-objection stands rejected and disposed of.

19. No order as to costs.

20. A copy of this Judgment be placed in the file of C.O. No.01 of 2019, for record.

21. Copy of this Judgment be sent to the learned Tribunal for information.

SLR (2020) SIKKIM 189

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

Bail Appln. No. 02 of 2020

Rupa Gurung ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Mr. K.T. Tamang, Advocate.

For the Respondent: Mr. Hissey Gyaltsen Bhutia and Ms. Mukun Dolma Tamang, Assistant Public Prosecutors.

Date of decision: 11th March 2020

A. Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – The seizures of controlled substances were made from the petitioner's house allegedly kept for sale. It needs no reiteration that there is rampant abuse of controlled substances by people of all ages in the State especially by the youth. The law enforcement agencies are embattled in their efforts to control the sale and use of these substances which is spreading to gargantuan proportions. The abuse of the substances is primarily on account of easy availability and sale by unconscionable persons, at exorbitant prices who having found an easy way of earning money by luring the young and indulge in its sans conscience. Besides the victim, the unsuspecting family of the victim bears the brunt of these sales and purchases which strike at the root of a stable family and society. In my considered opinion, no misplaced sympathy ought to be extended to persons who indulge in the sale and easy supply of controlled substances to the impressionable youth – The act of selling controlled substances for monetary profits without looking into deleterious effects it has on the health of the victim has to stringently be discouraged. It is reiterated that such persons strike at the very future of our society since most of the consumers are the youth who are yet to have their feet on terra-firma or to understand the consequences of the choices that they are making and its long term effects

besides throwing away their future. In consideration of the provisions of the Statute there is no guarantee that the petitioner will not repeat the offence while on bail and for the present purposes there is no reason to disbelieve the Prosecution case. Although I hasten to add that this is a *prima facie* observation and will have no bearing on the merits of the case, which includes the evidence furnished by the Prosecution to establish its case.

(Paras 5 and 9)

Application dismissed.

Chronology of cases cited:

1. State of Kerala etc. v. Rajesh etc., 2020 SCC OnLine SC 81.

2. Union of India v. Ram Samujh and Another, (1999) 9 SCC 429 .

ORDER

Meenakshi Madan Rai, J

1. The Petitioner seeks enlargement on bail by filing the instant application. Learned Counsel for the Petitioner submits that she was arrested on 18-01-2020 in connection with Singtam Police Station, East Sikkim, FIR No.03/2020, dated 18-01-2020, under Section 7(a)(b) and 14 of the Sikkim Anti Drugs Act, 2006 (for short, SADA, 2006) and under Section 9(1)(b) of the Sikkim Anti Drugs (Amendment) Act, 2017, on allegations of selling controlled substances.

2. Consequent upon the Complaint lodged against her a house search was conducted by the Singtam Police, wherein controlled substances, i.e., *Spasmo-Proxyvon plus* capsules, and *Nitrosun 10* tablets, were recovered from her residence. That, the controlled substances so recovered are not of commercial quantity besides there being an anomaly in the quantity reflected in the FIR and the Seizure Memo. The Petitioner has no criminal antecedents and her permanent home is in Singtam, therefore the question of her attempting to abscond or for that matter tamper with the Prosecution evidence does not arise. That apart, her husband infact was earlier arrested for possession/consumption of controlled substances but the Policy inquiry in the instant matter did not extend to him. That, she has several physical ailments such hypertension and high uric acid levels, added to which her

daughter is on the family way for which her presence is required. The penalty prescribed is not with death or imprisonment of life but rigorous imprisonment for two years, which may extend to five years. That, the Charge-Sheet has not yet been filed despite a lapse of more than forty-five days since the lodging of the FIR. Considering the above circumstances, she may be enlarged on bail on any stringent conditions.

3. *Per contra*, Learned Assistant Public Prosecutor objecting to the petition for bail submits that the substances were recovered not only from the house of the accused when she was present therein, but large quantities were also recovered from her next door neighbour in the same building, who is co-accused in the matter. The said co-accused in the instant matter is a habitual offender. That, the investigation is being taken up expeditiously and the report of the controlled samples sent for testing to the RFSL Saramsa, East Sikkim, are awaited which is likely to be completed within a few days. On submission of the RFSL Report, the Charge-Sheet shall be filed immediately. In view of the nature of the offence, the matter may not be considered leniently and the petition for bail rejected.

4. I have heard the rival contentions of Learned Counsel at length and taken into consideration their submissions. I have also perused the documents placed before this Court.

5. The facts are not disputed. The seizures of controlled substances were made from the Petitioner's house allegedly kept for sale. It needs no reiteration that there is rampant abuse of controlled substances by people of all ages in the State especially by the youth. The law enforcement agencies are embattled in their efforts to control the sale and use of these substances which is spreading to gargantuan proportions. The abuse of the substances is primarily on account of easy availability and sale by unconscionable persons, at exorbitant prices who having found an easy way of earning money by luring the young and indulge in its sans conscience. Besides the victim, the unsuspecting family of the victim bears the brunt of these sales and purchases which strike at the root of a stable family and society. In my considered opinion, no misplaced sympathy ought to be extended to persons who indulge in the sale and easy supply of controlled substances to the impressionable youth.

6. In this thread, useful reference may be made to the observations of the Hon'ble Supreme Court which while considering grant of bail under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, NDPS Act) in ***State of Kerala etc.*** vs. ***Rajesh etc.***[1] involving the sale of *Hashish Oil* was pleased to observe that under Section 37 of the NDPS Act bail can be granted in case there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The Hon'ble Supreme Court in Paragraph 18 of the Judgment *supra* held as follows;

> **"18.** The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. **It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed.** At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:—
>
> > *"37. Offences to be cognizable and non- bailable.*—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
> >
> > (a) every offence punishable under this Act shall be cognizable;
> >
> > (b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless—
> >
> > (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

[1] 2020 SCC Online SC 81

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

(emphasis supplied)**"**

In Paragraph 20, it was further observed as follows;

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is **that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.**

[emphasis supplied]"

In Paragraph 21, it was held thus;

"21. The expression "reasonable grounds" means something more than prima facie

grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.**"**

7. In ***Union of India*** vs. ***Ram Samujh and Another***[2] it was held as follows;

> **"7.** It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. **It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved.** .....
>
> **8.** To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

[2] (1999) 9 SCC 429

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.

[emphasis supplied]"

8. On the bedrock of the ratiocination *supra*, it is apposite to refer to the relevant provision of the SADA, 2006, viz., Section 18. Section 37 of the NDPS Act is embodied in Section 18(2) of the SADA, 2006, which reads as follows;

"18. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 –

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable under this Act shall be released on bail or on his own bond unless –

(i) the Public Prosecutor has been heard and also given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that

> **there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.**
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.
>
> **[emphasis supplied]"**

It is clear that Section 18 of the SADA, 2006 lays down the exact same requisites as Section 37 of the NDPS Act while considering a petition for bail.

9. After giving due consideration to the facts and circumstances in the instant case despite the urging of Learned Counsel for the Petitioner that she is 47 years old, a grandmother who has no criminal antecedents, I find that should this Court be inclined to grant bail for the offence, in all likelihood she will revert back to the activities she was indulging in *vis-à-vis* the controlled substances. The act of selling controlled substances for monetary profits without looking into deleterious effects it has on the health of the victim has to stringently be discouraged. It is reiterated that such persons strike at the very future of our society since most of the consumers are the youth who are yet to have their feet on *terra-firma* or to understand the consequences of the choices that they are making and its long term effects besides throwing away their future. In consideration of the provisions of the Statute there is no guarantee that the Petitioner will not repeat the offence while on bail and for the present purposes there is no reason to disbelieve the Prosecution case. Although I hasten to add that this is a *prima facie* observation and will have no bearing on the merits of the case, which includes the evidence furnished by the Prosecution to establish its case.

10. Consequently, the application for bail stands rejected. However, the Investigating Officer shall file the Charge-Sheet within the mandated period of limitation and the Learned Trial court shall take not more than eight months thereafter to dispose of the instant matter.

11. Let the Superintendent of Police (Jails) ensure that the blood pressure of the accused is measured on a daily basis at the Clinic in the Jail. That, a blood sample of the accused, subject to her consent, be drawn for checking her uric acid levels. That Doctor concerned shall take necessary steps accordingly.

12. The Bail Appln. stands disposed of.

13. Copy of this Order be made available to all the Special Judges (Sikkim Anti Drugs Act, 2006) for information.

SLR (2020) SIKKIM 198
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 07 of 2019

State of Sikkim ….. **APPELLANT**

Versus

Karna Bahadur Rai ….. **RESPONDENT**

For the Appellant: Ms. Mukun Dolma Tamang and Mr. Hissey Gyaltsen Bhutia, Assistant Public Prosecutors.

For the Respondent: Mr. B.K Gupta, Advocate (Legal Aid Counsel).

Date of decision: 14th March

A. Code of Criminal Procedure, 1973 – S. 378 – Appeal Against Acquittal, when to be Interfered With – The parameters and contours of hearing an appeal against acquittal is no longer *res integra*. The Supreme Court in numerous judgments has defined the scope. Although, this Court while hearing an appeal against an order of acquittal possess all the powers it has while hearing an appeal against an order of conviction to reconsider the whole issue, reappraise the evidence and come to its own conclusion if the findings are against the weight of the evidence on record, before reversing such a finding of acquittal this Court has to consider each ground of acquittal and to record its reasons for not accepting those grounds. We are also bound in such circumstance to keep in view the fact that the presumption of innocence is still available in favour of the respondent which now stands fortified by the order of acquittal passed by the learned Special Judge. On a fresh scrutiny of the materials on record even if we are of the opinion that there is another view which can be reasonably taken, the view in favour of the respondent should be adopted. We are to keep in mind that the trial Court had had the advantage of looking at the demeanour of the witnesses and observing their conduct and even at this stage the respondent

is entitled to benefit of doubt which is such a reasonable person would honestly and conscientiously entertain as to the guilt of the respondent.

(Para 13)

B. Code of Criminal Procedure, 1973 – S. 378 – Appeal Against Acquittal, when to be Interfered With – Keeping in mind the ambit and scope of the judicial examination in the present appeal against acquittal, we are of the view that judgment of acquittal passed by the learned Special Judge is neither perverse nor against the weight of the evidence on record. The learned Special Judge, as a Judge of facts had duly applied a common sense rule while testing the reasonability of the prosecution case. A delicate balance is required to be maintained between the judicial perception of the anguish of the victim and the presumption of innocence of the accused and an inequitable tilt either way may not render sound justice – The evidence of a sole prosecutrix, if it inspires confidence, can definitely be the sole basis for conviction. However, the evidence in such cases must be of sterling quality.

(Para 14)

C. Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – S. 29 of the POCSO Act invoked by the learned Assistant Public Prosecutor at the appeal stage provides a reverse burden upon the accused in a prosecution under Ss. 3, 5, 7 and 9 of the POCSO Act. Charge was framed against the respondent under S. 5(l) and therefore, S. 29 may be attracted. We are, however, of the view that in order to shift the onus upon the accused by invoking the provision of S. 29, the foundational facts of the prosecution case must be established by leading evidence – Sans the deposition of the minor prosecutrix, there is no other oral or material evidence. If, therefore, the deposition of the minor prosecutrix is disbelieved, there is no evidence in support of the prosecution's story. In such circumstances, the question of putting the onus upon the accused to prove his innocence would be contrary to well settled principles of criminal jurisprudence. Had the testimony of the minor prosecutrix sustained judicial scrutiny, the mere lack of injuries alone may not have persuaded us to discard it. We, therefore, refrain from invoking the provision of S. 29 on examination of the materials on record.

(Para 15)

Appeal dismissed.

JUDGMENT

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

1. The sole testimony of a minor prosecutrix that she was sexually assaulted repeatedly by the respondent was disbelieved by the learned Special Judge. The judgment of acquittal dated 28.06.2018 is under challenge by the State. According to the learned Assistant Public Prosecutor, the sole testimony of the minor prosecutrix had not been demolished during her cross-examination and as such the learned Special Judge erred in discarding it. Attention was also drawn to section 29 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') under which, where a person is prosecuted for committing any offence under sections 3, 5, 7 and 9 of the POCSO Act, the Special Court shall presume, that such person has committed the offence unless, the contrary is proved.

2. The indictment against the respondent was initiated on a complaint filed by PW-1, the aunt of the minor prosecutrix. The First Information Report (for short 'the FIR') (Exhibit-2) was recorded by Jigmee W. Bhutia (PW-14) on 01.06.2016 itself. She alleged that on 01.06.2016 when she returned home she found the minor prosecutrix crying. The minor prosecutrix was staying with the complainant (PW-1) since last four months. The FIR (Exhibit-2) stated that when the complainant (PW-1) enquired from the minor prosecutrix, she was informed that the respondent had been assaulting and raping her for many days.

3. The investigation by Prashant Rai (PW-15), the Investigating Officer, could not get any positive medical or forensic evidence. Dr. S.N. Adhikari (PW-7) who examined the minor prosecutrix on 01.06.2016 itself did not find any injury on either the "groin" or any part of the body of the minor prosecutrix. He also examined the respondent but could not find any evidence of recent sexual intercourse. The blood sample, dry and wet penile swab and undergarment of the respondent collected by Dr. Silesh Rai (PW-9) on 02.06.2016 could also not provide any forensic evidence against the respondent.

4. Dr. Sangay Pelzang Tamang (PW-10), the gynaecologist, who examined the minor prosecutrix, found an old hymenal tear at 3 O' clock

and 9 O' clock position. There was no fresh injury over her breasts, neck, perineum, vulva or any other part of her body. The pregnancy test was negative. The vaginal swab and the vaginal wash specimen collected from the minor prosecutrix by her also could not provide any forensic evidence against the respondent. There was no presence of motile or non-motile spermatozoa, blood or any other body fluid. The gynaecologist opined that clinical and cytopathological report was not suggestive of recent forceful sexual intercourse. She admitted that hymen can tear and rupture from so many other things besides sexual intercourse.

5. PW-4, PW-5, PW-6 and PW-8 are seizure witnesses during the process of investigation. Dr. Anusa Lama (PW-11), Registrar, Births and Deaths, proved the birth certificate of the minor prosecutrix in which her date of birth was recorded as 07.02.2002. The Headmaster (PW-12) of the Government Secondary School attended by the minor prosecutrix, proved that the original admission register maintained by the school also recorded her date of birth as 07.02.2002.

6. Sonam Denka Wangdi (PW-13) was the Chief Judicial Magistrate who recorded the statement under section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C') of the minor prosecutrix on 09.06.2016.

7. The crucial witnesses for the prosecution to succeed, therefore, are the complainant (PW-1), the minor prosecutrix (PW-2), minor witness (PW-3) and the wife of the respondent (DW-1).

8. The minor prosecutrix deposed that during her stay for four months in the house of the complainant (PW-1), she was sexually assaulted by the respondent who would often visit and show her obscene scenes on his mobile phone. Although, the respondents mobile had been seized there was no further investigation. According to the minor prosecutrix, although the complainant (PW-1) and her husband slept together in the same house but nobody noticed the respondent sexually assaulting her as they would be fast asleep due to tiredness. She deposed that the respondent used to bring contraceptives with him and used the same for sexually assaulting her. According to the minor prosecutrix when she attempted to raise an alarm he used to put his hand on her mouth and so she could not scream for help. The minor prosecutrix stated that she was raped by the respondent

innumerable times and also explained that he used to put his penis into her vagina. According to the minor prosecutrix, she could not disclose this fact to the complainant (PW-1), her uncle or her brother. The minor prosecutrix deposed about the minor witness (PW-3), the daughter of the complainant (PW-1), and daughter of the respondent attending the same school. According to her, on the relevant day of quarrel, the daughter of the respondent and PW-3 had gone to school. There, the daughter of the respondent told PW-3 that the minor prosecutrix was a girl of immoral character. The minor prosecutrix deposed that she was deeply hurt and mentally affected after hearing this and started crying when the complainant (PW-1) saw her. At this moment, the minor prosecutrix told the complainant (PW-1) about the sexual assault. The FIR (Exhibit-2) was lodged immediately thereafter.

9. The cross-examination of the minor prosecutrix brought out several important facts. She admitted that she and the daughter of the respondent had a hot discussion on the night of 30.05.2016 after which they did not have cordial relationship. She also admitted that on 01.06.2016 after an altercation, the respondent hit the complainant (PW-1) with a stick after which they all returned home and proceeded to the police station. More importantly, the minor prosecutrix admitted that five of them used to sleep in a single room; the respondent had a wife and three children; she did not discuss the incident to her close friends or her sisters and did not disclose about the incident although she had ample opportunities to do so.

10. The complainant (PW-1) deposed that she heard about the sexual assault from the minor prosecutrix. Her cross-examination by the defence is in great detail. She admitted that she had no personal knowledge about the sexual assault. She also admitted that the minor prosecutrix and the daughter of the accused had had some hot discussion and they had also pushed each other. The complainant (PW-1) corroborated the admission by the minor prosecutrix about the hot discussion and the bad relationship between them thereafter. The complainant also admitted that it was she who had asked the respondent to buy lipstick which she gave to the minor prosecutrix; there were three rooms in their house and there were no doors in the said three rooms; nine of them resided in the said house; she and her husband slept in one room and the minor prosecutrix along with her two daughters slept in the same room; the rooms were small and if anything happened inside the room someone sleeping would come to know; the minor prosecutrix never

discussed anything incriminating against the respondent prior to the incident; her daughter and other friends were also not informed by the minor prosecutrix; the complainant (PW-1) and the respondent used to have some differences; after the quarrel when the complainant (PW-1) went to the house of the respondent to drop his daughter she was crying and the respondent saw them, after which he hit the complainant (PW-1) with a stick twice; thereafter she came back home, looked for the minor prosecutrix and went to the '*thana*' and that although they all slept in the same room she did not see the respondent sexually assaulting the minor prosecutrix.

11. PW-3 was declared hostile. She deposed about the altercation between the daughter of the respondent and the minor prosecutrix. PW-3 did not depose anything beyond the fact that the minor prosecutrix had started crying when her mother had talked to her. During her cross-examination by the prosecution, she admitted that the minor prosecutrix and the respondent used to talk till late at night both inside and outside the house. She also admitted that on the relevant day, her mother had beaten her and the minor prosecutrix for causing trouble at which time she had disclosed about the bad relationship she had with the respondent. When PW-3 was cross-examined on behalf of the defence she admitted that the daughter of the respondent and the minor prosecutrix had had a discussion and did not enjoy a good relationship. She also admitted that she did not know anything about the bad relationship. She admitted further that the minor prosecutrix and the other children used to sleep together in a room and if somebody forces or does something the others would come to know about it. She admitted that prior to the fight between the minor prosecutrix and the daughter of the respondent, the minor prosecutrix had never told them about such bad relationship. She admitted that she had never heard of any such incident about the respondent in the village.

12. The depositions of the minor prosecutrix, the complainant (PW-1) and PW-3 churned out after the elaborate cross-examination by the defence does reflect that immediately before the complainant (PW-1) lodged the FIR (Exhibit-2) there was altercation not only between the minor prosecutrix and the daughter of the respondent but between the complainant and the respondent themselves. The altercation between the respondent and the complainant had in fact resulted in the respondent physically assaulting the complainant (PW-1). The complainant (PW-1) admitted of having lodged the

FIR (Exhibit-2) immediately after the physical assault on her. It is no doubt true that the minor prosecutrix has deposed about penetrative sexual assault committed upon her by the respondent. However, the deposition is about forceful penetrative sexual assault within the confines of a small room with five persons sleeping therein and the complainant (PW-1) and her husband sleeping in the immediate next room without any door between the two rooms, by an outsider. There is no evidence as to who allowed the respondent into the house in the night into a room with three nubile girls, two of whom were the complainants (PW-1) own daughters. More importantly, the allegation of forceful sexual assault is not of an isolated incident but of several such assaults within a period of four months. The minor prosecutrix deposed that as the respondent would close her mouth while committing the sexual assault she was unable to scream for help. However, she also admitted that she did not disclose about it to anybody thereafter even though she had opportunities to do so.

13. The parameters and contours of hearing an appeal against acquittal is no longer *res integra*. The Supreme Court in numerous judgments has defined the scope. Although, this Court while hearing an appeal against an order of acquittal possess all the powers it has while hearing an appeal against an order of conviction to reconsider the whole issue, reappraise the evidence and come to its own conclusion if the findings are against the weight of the evidence on record, before reversing such a finding of acquittal this court has to consider each ground of acquittal and to record its reasons for not accepting those grounds. We are also bound in such circumstance to keep in view the fact that the presumption of innocence is still available in favour of the respondent which now stands fortified by the order of acquittal passed by the learned Special Judge. On a fresh scrutiny of the materials on record even if we are of the opinion that there is another view which can be reasonably taken, the view in favour of the respondent should be adopted. We are to keep in mind that the trial court had had the advantage of looking at the demeanour of the witnesses and observing their conduct and even at this stage the respondent is entitled to benefit of doubt which is such a reasonable person would honestly and conscientiously entertain as to the guilt of the respondent.

14. Keeping in mind the ambit and scope of the judicial examination in the present appeal against acquittal, we are of the view that judgment of acquittal passed by the learned Special Judge is neither perverse nor against

the weight of the evidence on record. The learned Special Judge, as a Judge of facts had duly applied a common sense rule while testing the reasonability of the prosecution case. A delicate balance is required to be maintained between the judicial perception of the anguish of the victim and the presumption of innocence of the accused and an inequitable tilt either way may not render sound justice. The evidence of a sole prosecutrix, if it inspires confidence, can definitely, as submitted by the learned Assistant Public Prosecutor, be the sole basis for conviction. However, the evidence in such cases must be of sterling quality. The defence has brought out the animosity between the complainant (PW-1) and the sole prosecutrix on the one side and the respondent and his daughter on the other. The negative result of both the medical and forensic evidence collected immediately after the alleged assault does not help the prosecution case further, more so, when she alleged forceful penetrative sexual assault. Although, we hasten to add that in some cases dependent upon the degree of violation, the lack of injury alone may not be a safe gauge. The defence has also been able to bring out certain facts about the altercations and fight between them immediately preceding the lodging of the FIR (Exhibit-2) which also leans towards the claim of the innocence of the respondent.

15. Section 29 of the POCSO Act invoked by the learned Assistant Public Prosecutor at the appeal stage provides a reverse burden upon the accused in a prosecution under sections 3, 5, 7 and 9 of the POCSO Act. Charge was framed against the respondent under section 5(l) of the POCSO Act and therefore, section 29 of the POCSO Act may be attracted. We are, however, of the view that in order to shift the onus upon the accused by invoking the provision of section 29 of the POCSO Act, the foundational facts of the prosecution case must be established by leading evidence. In the present case, the learned Special Judge has disbelieved the deposition of penetrative sexual assault made by the minor prosecutrix. The disbelief is firmly based on the evidence in cross-examination of the complainant (PW-1), the minor prosecutrix and PW-3, the main witnesses. The disbelief was also fortified by the medical as well as forensic evidence which did not support the oral testimony of forceful penetrative sexual assault by the respondent and in fact overruled it. Sans the deposition of the minor prosecutrix, there is no other oral or material evidence. If, therefore, the deposition of the minor prosecutrix is disbelieved, there is no evidence in support of the prosecution s story. In such circumstances, the question of putting the onus upon the accused to prove his innocence would be contrary

to well settled principles of criminal jurisprudence. Had the testimony of the minor prosecutrix sustained judicial scrutiny, the mere lack of injuries alone may not have persuaded us to discard it. We, therefore, refrain from invoking the provision of section 29 of the POCSO Act on examination of the materials on record.

16. In such circumstances, we are of the considered view that the judgment of acquittal passed by the learned Special Judge is a reasoned one, based on materials on record and we cannot venture against it.

17. Consequently, the States appeal is dismissed and the judgment of acquittal dated 28.06.2018 in Sessions Trial (POCSO) Case No. 15 of 2016 passed by the learned Special Judge (POCSO) South Sikkim at Namchi, is upheld.

18. A certified copy of this Judgment be sent to the learned Trial Court along with the records.

SLR (2020) SIKKIM 207

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

Crl. A. No. 09 of 2018

Nanda Lall Sharma @ Poudyal Bajey ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate (Legal Aid) with Mr. Sushant Subba, Advocate (Legal Aid).

For the Respondent: Ms. Mukun Dolma Tamang and Mr. Hissey Gyaltsen Bhutia, Assistant Public Prosecutors.

Date of decision: 14th March, 2020

A. Indian Penal Code, 1860 – S. 200 – Exceptions 1 and 4 – S. 105 of the Indian Evidence Act provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC, or within any special exception or proviso contained in any other part of the IPC, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. This burden upon the accused would stand discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record – The deposition of PW-16 and PW-19 establishes that there was an argument between the deceased and the appellant which was also accompanied by pushing and pulling. There was some provocation is quite evident from the depositions. However, there is no evidence to establish the gravity and suddenness of the provocation. The injuries sustained by the deceased as reflected in the autopsy report (Exhibit-6) read with the deposition of PW-16 and PW-19 establishes that the appellant had taken undue advantage and acted in a cruel manner by

inflicting several blows on the head of the deceased even after he had fallen with the first blow of the wooden beam (MO-X) itself. According to PW-14, the appellant had earlier passed some derogatory comments with reference to his caste due to which the appellant had gone to jail. The deceased was the son of PW-14. The evidence reflects that the appellant may have harboured a grudge against the father of the deceased. Although, the evidence suggests that there was sudden quarrel between the appellant and the deceased and that there may have been provocation on the part of the deceased, the appellant has failed to establish even by way of preponderance of probabilities that the provocation was grave and sudden enough to prevent the offence from amounting to murder or that he had not taken undue advantage or acted in a cruel or unusual manner.

(Paras 21 and 22)

Appeal dismissed.

Chronology of cases cited:

1. Bishnupada Sarkar v. State of West Bengal, (2012) 11 SCC 597.

2. Bhagirath v. State of Madhya Pradesh, AIR 2019 SC 264.

JUDGMENT

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

1. Heard Mr. N. Rai, learned Senior Advocate for the appellant and Ms Mukun Dolma Tamang, learned Assistant Public Prosecutor for the State. It is Mr. N. Rai s contention that the learned Sessions Judge had erred in convicting the appellant under section 302 of the Indian Penal Code, 1860 (for short 'the IPC') as the evidence of Raman Rai (PW-16) and Suman Rai (PW-19), who were eye witnesses to the assault, has established that this was a case which fell under section 304 Part II and not under section 302 IPC. Mr. N. Rai adverted to two judgments of the Supreme Court, one judgment of Gauhati High Court and one judgment of this Court. We have read those judgments. The two judgments of the Supreme Court found relevant is discussed below. Ms Mukun Dolma Tamang, however, submits that the reasoned judgment and order on sentence, both dated 31.08.2017, brooks no interference.

2. The First Information Report (for short 'the FIR)' (Exhibit-19) was lodged on 05.04.2015 by Suman Rai (PW-19). He reported that on their way to collect wood, he and his brother reached the appellants house and saw him quarrel with the deceased and assault him repeatedly with a piece of beam. On the submission of the charge-sheet, the learned Sessions Judge framed a charge of murder against the appellant. The appellant pleaded not guilty and the trial ensued. The prosecution examined 24 witnesses.

3. Ajay Rai (PW-23) was the first Investigating Officer of the case and Sonam Doma Bhutia (PW-24) was the second Investigating Officer.

4. During the trial, the following story unfolded. Birbal Subba (PW-11) had accompanied the deceased to Bermiok Bazar on the relevant day. He had bought four plain GCI sheets and the deceased some other articles. The deceased told Birbal Subba (PW-11) that he would carry the GCI sheets. The deceased carried the GCI sheets and was paid Rs.500/- as carriage charge by Birbal Subba (PW-11). When the deceased was returning through the footpath which passed through the appellants house, Birbal Subba (PW-11) took another route. Raman Rai (PW-16) and Suman Rai (PW-19) who were passing by the appellants house witnessed an altercation between the appellant and the deceased and the assault on the deceased by the appellant. Thereafter, Suman Rai (PW-19) lodged the FIR (Exhibit-19). Nar Maya Nirola (PW-3), the ward panchayat member of the concerned area, received a call from the son of the appellant who told her that the deceased was lying on the footpath in front of the appellants house. Chandrakala Kami (PW-4), wife of the deceased, also received a phone call from the son of the appellant saying that her husband was lying unconscious near the house of the appellant. Thereafter, she proceeded to the place of occurrence and found the deceased in an unconscious state, bleeding from his head and ears. The father of the deceased Palman Kami (PW-14) also saw the deceased with injuries on his head and other parts of his body. They along with other villagers including Basant Kumar Kami (PW-7), the younger brother of the deceased and Bal Krishna Kami (PW-15) took the deceased to the Rinchenpong hospital. Doctor Amber Singh Subba (PW-18) examined the appellant at the Rinchenpong Primary Health Centre on 05.04.2015 and found no external injuries on his body. He also examined the deceased and declared him dead.

5. The appellant was arrested on 05.04.2015 by Ajay Rai (PW-23). Aitaman Limboo (PW-20) accompanied Dipen Chettri (PW-21) the panchayat member, to the Kaluk Police Station on 05.04.2015 where the appellant made a statement in their presence confessing the guilt of the crime. Both of them identified the disclosure statement (Exhibit-21) dated 05.04.2015 by which the appellant disclosed that he had concealed the wooden beam (MOX). Pursuant thereto, the wooden beam (MOX) was recovered with blood stains concealed with dry leaves of banana below the house of the appellant and the seizure memo (Exhibit-22) was prepared by Ajay Rai (PW-23).

6. During the investigation, Mon Bahadur Kami (PW-1) and Buddhiman Limboo (PW-13) witnessed the seizure of blood stained check shirt from the dead body of the deceased by Ajay Rai (PW-23) on 05.04.2015. Accordingly, seizure memo (Exhibit-1) dated 05.04.2015 was prepared. Tashi Namgyal Lepcha (PW-2) and Binod Gurung (PW-6) witnessed the seizure of a blood stained white kurta and half pants worn by the appellant at the Rinchenpong Primary Health Centre on 05.04.2015 by Ajay Rai (PW-23) who also prepared the seizure memo (Exhibit-2). Chabilall Sharma (PW-12) witnessed the seizure of blood stained soil and control sample of soil lifted from the place of occurrence on 05.04.2015 by Ajay Rai (PW-23) through seizure memo (Exhibit-7). When Birbal Subba (PW-11) came to know about the incident, he reached there and saw the GCI sheets on the footpath. The deceased and the appellant had already been taken away by the police. Birbal Subba (PW-11) and Shekhar Sewa (PW-5) are the witnesses to the seizure of GCI sheets on 07.04.2015 by Ajay Rai (PW-23). The relevant seizure memo (Exhibit-3) is dated 07.04.2015. Krishna Bir Kami (PW-8) and Tika Ram Nirola (PW-9) witnessed the seizure of the Scheduled Caste Certificate of the father of the deceased by Sonam Doma Bhutia (PW-24) through seizure memo dated 28.05.2015 (Exhibit-4).

7. Subarna Rai (PW-17), the learned Chief Judicial Magistrate, recorded the statement of Raman Rai (PW-16) and Suman Rai (PW-19) under section 164 Cr.P.C on 07.04.2015.

8. Pooja Lohar (PW-22), the Scientific Officer at the Regional Forensic Laboratory (RFSL), Saramsa, examined the soil collected from the place of

occurrence; sample blood of the appellant; a dirty cream colour kurta with blood stains said to belong to the appellant and one multi coloured striped full shirt having suspected blood stains belonging to the deceased. Pooja Lohar (PW-22) found that the sample blood of the appellant gave positive test for blood group "AB". According to her, human blood could be detected in the soil samples collected form the place of occurrence as well as the dirty cream colour kurta belonging to the appellant. Sonam Doma Bhutia (PW-24) exhibited the CFSL Report (Exhibit-34) as well as the forwarding letter vide which the CFSL report (Exhibit-34) was forwarded to the police by CFSL, Kolkata.

9. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.'). After hearing the parties, the learned Sessions Judge rendered the judgment of conviction and order on sentence both dated 31.08.2015 sentencing him to life which are assailed in the present appeal.

10. The learned Sessions Judge found that the deposition of Raman Rai (PW-16) and Suman Rai (PW-19), the two eye witnesses, corroborated each other and proved that it was the appellant who hit the deceased with a wooden beam (MOX); the wooden beam (MOX) had been positively identified by both of them; their statements recorded under section 164 Cr.P.C. were consistent with the depositions. The learned Sessions Judge relied upon the deposition of Dr. O.T. Lepcha (PW-10) and the autopsy report (Exhibit-6) to hold that the cause of death was intra-cranial haemorrhage along with fracture of the middle cranial fossa by blunt force trauma. It was found that the appellant had assaulted the deceased several times on his head with the wooden beam (MOX) which was also heard by Raman Rai (PW-16) and Suman Rai (PW-19). The learned Sessions Judge noted that the deceased was unarmed and there was no injury on the body of the appellant. The learned Sessions Judge did not agree with the contention of the defence that the injuries were caused by the appellant in his right of private defence. The disclosure statement (Exhibit-21) was held to have been adequately proved pursuant to which the wooden beam (MOX) had been discovered. The evidence that human blood could be traced in the wooden beam (MOX) was held to have supported the deposition of Raman Rai (PW-16) and Suman Rai (PW-19). The learned Sessions Judge held that the evidence gathered had also sufficiently proved

that the appellant had assaulted the deceased repeatedly with the wooden beam (MOX) on his head with the knowledge that he would die.

11. In ***Bishnupada Sarkar vs. State of West Bengal***[1], the Supreme Court found that there was no evidence to suggest any premeditation to assault the deceased, leave alone evidence to show that the assailants intended to kill the deceased. The Supreme Court also found that there was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged. It was found that only when the deceased noticed the incident and intervened to save the complainant, the appellant no.2 had started assaulting the deceased and inflicted injuries on his body that resulted in his death. In such circumstances, the Supreme Court upheld the conviction by the courts below under section 304 Part I IPC.

12. In ***Bhagirath vs. State of Madhya Pradesh***[2], the Supreme Court found that the High Court had acquitted all the other accused, since fatal blow was attributed to the appellant. The nature of the offence was examined. It was noticed that there was wordy quarrel between the accused party and the deceased. In the quarrel, the appellant inflicted injuries on the right side of the head of the deceased measuring 15 x 2½ x 3 cm. It was found that the injuries inflicted on the deceased were during the sudden fight between the deceased and the accused party and there was no premeditation. The Supreme Court held that the fourth exception to section 300 IPC deals with death committed in sudden fight without premeditation. The Supreme Court found that one injury was caused by '*farsi*' blow on the head which indicated that the appellant therein had not taken undue advantage of the deceased. Thus it was held that the manner, the occurrence and the injury inflicted on the deceased attracted Exception 4 to section 300 IPC and consequently, the conviction of the appellant under 302 IPC was modified to section 304 Part I IPC.

13. In the present case, Raman Rai (PW-16), a 14 year old minor, deposed that when he and Suman Rai (PW-19) were going to collect firewood, they saw the deceased having some arguments with the appellant in front of the appellants house. He further deposed that the deceased

[1] (2012) 11 SCC 597
[2] AIR 2019 SC 264

started pushing the appellant suddenly and after a few moments, the appellant lifted a wooden beam (MOX) and hit the deceased on the left side of the head. He further stated that the deceased fell down on the ground as a result of the assault but the appellant kept on hitting the deceased with the wooden beam (MOX). During his cross-examination, Raman Rai (PW-16) admitted that the incident took place in front of the house of the appellant; during the argument the deceased went towards the house of the appellant; the deceased started pushing the appellant; the deceased was also hitting/physically assaulting the appellant; the argument was initiated by the deceased; it was during the scuffle between the deceased and the appellant that the appellant suddenly lifted the wooden beam (MOX) and struck the deceased with it and after the first strike he did not see the appellant repeatedly striking the deceased with the wooden beam (MOX).

14. Suman Rai (PW-19) the first informant deposed that he and Raman Rai (PW-16) were going to the forest for collection of firewood. When they reached the house of the appellant they saw the appellant and the deceased quarrelling from the CC footpath near the house of the appellant. They saw the appellant going towards his house and return with a wooden beam (MOX). Thereafter, the appellant struck the deceased on the left side of his head above his ear when the deceased was looking down towards the ground. They also saw the deceased falling down on the ground. Thereafter, the appellant kept on striking him with the said wooden beam (MOX) four-five times on his head. Out of fear they did not separate them and instead he rushed to the Thana and lodged the FIR (Exhibit-19). During his cross-examination, Suman Rai (PW-19) admitted that they saw the deceased and the appellant having verbal arguments in the courtyard of the house of the appellant; a person using the footpath did not have to go to the courtyard of the house of the appellant while passing by the house; he and Raman Rai (PW-16) saw the same incident of assault; they saw the deceased pushing the appellant; the appellant and the deceased were involved in verbal altercation, pushing and pulling and the appellant suddenly picked up the wooden beam (MOX) during the altercation.

15. Dr. O.T. Lepcha (PW-10) the Medico Legal Consultant conducted the autopsy over the dead body of the deceased. He found the following

ante mortem injuries:- 1. Lacerated injury 3 x 2 cms x bone over the left side of the occipital bone; 2. Scalp haematoma 6 x 4 cms over the left side scalp; 3. Fracture of underlying occipital bone (+). 4. Comminuted fracture of the middle cranial fossa. In his opinion, the main cause of death was intracranial haemorrhage along with fracture of the middle cranial fossa caused as a result of blunt force trauma.

16. The death was caused by intracranial haemorrhage along with fracture of the middle cranial fossa caused as a result of blunt force trauma by the wooden beam (MOX). The deposition of Raman Rai (PW-16) and Suman Rai (PW-19) clearly establishes that the appellant had hit the deceased on the left side of his head first and after he fell, several blows on his head again with the wooden beam (MOX). There is adequate corroboration of the depositions of Raman Rai (PW-16) and Suman Rai (PW-19) from the autopsy report (Exhibit-6) and the deposition of Dr. O.T. Lepcha (PW-10).

17. Mr. N. Rai has sought to invoke Exception 1 as well as Exception 4 to section 300 IPC.

18. Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.

19. Exception 1 provides culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The explanation to Exception 1 provides whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

20. Exception 4 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

21. Section 105 of the Indian Evidence Act, 1872 provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC, or within any special exception or proviso contained in any other part of the IPC, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances. This burden upon the accused would stand discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record.

22. The deposition of Raman Rai (PW-16) and Suman Rai (PW-19) establishes that there was an argument between the deceased and the appellant which was also accompanied by pushing and pulling. There was some provocation is quite evident from the depositions. However, there is no evidence to establish the gravity and suddenness of the provocation. The injuries sustained by the deceased as reflected in the autopsy report (Exhibit-6) read with the deposition of Raman Rai (PW-16) and Suman Rai (PW-19) establishes that the appellant had taken undue advantage and acted in a cruel manner by inflicting several blows on the head of the deceased even after he had fallen with the first blow of the wooden beam (MOX) itself. According to Palman Kami (PW-14), the appellant had earlier passed some derogatory comments with reference to his caste due to which the appellant had gone to jail. The deceased was Palman Kamis (PW-14) son. The evidence reflects that the appellant may have harboured a grudge against the father of the deceased. Although, the evidence suggests that there was sudden quarrel between the appellant and the deceased and that there may have been provocation on the part of the deceased, the appellant has failed to establish even by way of preponderance of probabilities that the provocation was grave and sudden enough to prevent the offence from amounting to murder or that he had not taken undue advantage or acted in a cruel or unusual manner.

23. Resultantly, the appeal must fail and is accordingly dismissed.

24. The judgment of conviction and order on sentence under section 302 IPC passed by the learned Sessions Judge, South Sikkim at Namchi, are upheld.

25. The records of the learned Trial Court may be sent back. Certified copy of this Judgment be sent to the learned Trial Court and a copy also be furnished free of charge to the appellant.

SLR (2020) SIKKIM 217
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

WP (C) No. 67 of 2017

Alok Kumar Singh and Others ….. PETITIONERS

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioners: Mr. Zangpo Sherpa and Mr. Jushan Lepcha, Advocates.

For the Respondents: Mr. Karma Thinley, Senior Advocate with Mr. Karma Thinley Gyatso, Advocate.

Date of decision: 17th March 2020

A. Central Civil Services (Revised Pay) Rules, 2008 – Fundamental Rule 22 – Is only a promotee entitled to the benefit of one notional increment or even a Government servant re-appointed to a post carrying duties and responsibilities of greater importance? –The petitioners were initially appointed as Pioneers in Group D category under the respondents. Thereafter, they went through a recruitment process through proper channel and having been successful in the Departmental examinations, were appointed in different capacities in Group C category. The posts of Pioneer as well as the new Group C posts, the petitioners hold are posts under the respondents – By this process the petitioners migrated from Group D posts to Group C posts. Fundamental Rule 22 reflects that the incumbent must be a Government servant holding a post other than a tenure post – That, the Government servant could be holding the post in a substantive or temporary or officiating capacity – It is admitted that the petitioners were holding the posts in substantive capacity. In such a situation if the incumbent Government servant is appointed and is otherwise eligible under the recruitment Rules to another post, he is entitled to the notional increment as per Fundamental Rule 22. The only condition thereafter would

be that the post to which he is promoted or appointed must carry duties and responsibilities of greater importance than those attached to the post held by him – The respondents admit the petitioners' appointments – There is also no dispute that Fundamental Rule 22 is applicable in the present case. The fact that various similarly placed Government servants have been given notional increment does show that the respondents have applied Fundamental Rule 22 for them.

(Paras 1, 17 and18)

B. Central Civil Services (Revised Pay) Rules, 2008 – Fundamental Rule 22 – The respondents contend that the petitioners' appointments are rather "re-appointments" and therefore, it should be treated as "fresh appointments" disentitling the petitioners to the notional increment. It is the respondents' contention that on being re-appointed to the new posts held by the petitioners, the petitioners have relinquished all their rights to the post of Pioneers, which was earlier held by them. In fact the respondents submit that in the reappointment letter, the petitioners had to submit discharge certificate relinquishing their rights whatsoever to the post they were holding and the petitioners were not promoted but re-appointed – Respondents cannot be permitted to rely upon such relinquishment of rights granted under the law to deprive the petitioners what is legally permissible. Fundamental Rule 22 includes cases of promotion as well as appointment to a post. Otherwise there was no reason for the words "or appointed" to be used after the words "is promoted" in Fundamental Rule 22 – Fundamental Rule 22 seeks to regulate the initial pay of a Government servant who is appointed to a post on a time scale of pay. Thus the relinquishment of rights of post of Pioneer by the petitioners would not change the purpose of Fundamental Rule 22 or its application to the petitioners on their subsequent appointment. It envisages a situation where a Government servant holding a post is either promoted or appointed to another post carrying duties and responsibilities of greater importance than those attaching to the post held earlier – The word used in Fundamental Rule 22 is "appointed" which would include re-appointment or fresh appointment and therefore, the difference sought to be drawn in the appointment of the petitioners and thereby to deprive them of the benefit seems lame – If the Rule making authority had desired to draw such a difference it would have done so in the Rule itself. It may not be correct to read into the clear language of Fundamental Rule 22 what is not there. If the other conditions as envisaged

in Fundamental Rule 22 stand satisfied failure to grant the benefit envisaged would be illegal – Failure to grant similar benefit to the petitioners who otherwise fulfill all the requirements under Fundamental Rule 22 would also violate Article 14 and 16 of the Constitution of India.

(Para 19)

Petition allowed.

Chronology of cases cited:

1. Government of India and Others v. B. Anil Kumar and Others, (2010) 6 SCC 419.
2. Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The present writ petition involves the interpretation of Fundamental Rule 22. Is only a promotee entitled to the benefit of one notional increment or even a government servant re-appointed to a post carrying duties and responsibilities of greater importance?

2. The petitioners who were appointed as Pioneers (PNRs) appeared for a departmental examination in which they were successful and appointed in the following manner under the respondents:

Sl. No.	Particulars	Date of appointment as PNRs	Date of appointment in different capacities
1.	Alok Kumar Singh, Petitioner No.1	03.07.2002	01.01.2009 as LDC
2.	Anil Singh, Petitioner no.2	02.11.2002	23.12.2009 as telephone operator
3.	Master Baitha, petitioner no.3	28.03.2001	04.08.2010 as radio operator

4.	Surjit Singh, petitioner no.4	19.07.2002	09.12.2008 as driver (mechanical transport)
5.	Vinod D. petitioner no.5	20.03.2001	24.06.2009 as radio operator

3. The petitioners are presently posted/stationed at Headquarter, Project Swastik at Gangtok.

4. The petitioners seek the benefit of fundamental Rule 22 applicable to them and have been pursuing their cause before different authorities.

5. The petitioners contend that they are entitled to the notional increment as envisaged in Fundamental Rule 22 as the duties and responsibilities now attached to them carry duties and responsibilities of greater importance than those attached to the post of Pioneer initially held by them.

6. The petitioners also contend that many similarly placed had approached the High Court of Delhi pursuant to which the High Court disposed Writ Petition (C) 4462/2015 by an order dated 05.05.2015 with a direction that the writ petition would be treated as a representation to the Principal Controller of Defence Accounts (Border Roads Organization) the respondent no.1 herein and that a reasoned decision would be taken and conveyed. On 11.01.2017 the office of the respondent no.1 issued a letter to the respondent no.2 directing them to give the benefit of one notional increment to one of the petitioners i.e. Abhimanyu Kumar. A perusal of the said letter dated 11.01.2017 (Annexure P-3) reflects that the case of Abhimanyu Kumar who was also a Pioneer and later re-appointed as Lower Division Clerk (LDC) was considered by the competent authority and it was decided that his pay should be fixed by increasing one notional increment in the lower post. The respondents admit these facts as matters of record.

7. The petitioners have also highlighted various instances where other government servants similarly placed have been given the benefit of one notional increment. The petitioners contends that on the basis of letter dated

08.02.2017 of the office of the respondent no.1 the fixation of pay on re-appointment from Pioneer to LDC/operator communication/driver (mechanical transport) was implemented in all the projects under Headquarter, Director General, Border Road. The petitioners have annexed photocopies of the relevant pay fixation pro forma with audit report of Shine Kumar U and Shamsher Kumar who had earlier held the posts of Pioneer and later been re-appointed as LDC and various others who have been given the benefit of one notional increment. The respondents admit these facts as matter of record.

8. The petitioners further contend that pay fixation has already been approved of two officers - Hari Kumar P (Border Task Force stationed at Chandmari, Gangtok, Sikkim) and Rajpal Singh Rawat (Border Task Force stationed at Kalimpong, West Bengal) both Pioneers who were re-appointed as Radio Operators. Hari Kumar P's pay was fixed on his re-appointment by granting two increments, one annual increment and second on account of promotion to Radio Operator. Rajpal Singh Rawat was granted one notional increment in the scale of lowest post on re-appointment. In the counter-affidavit the respondents have not denied that the above orders have been passed and in fact admit the same as matters of record.

9. The respondents are not too clear about the position they desire to take. In the initial affidavit filed by respondent nos.2 and 5 it is stated that the grant of notional increment is under the domain of the respondent nos.1, 3 and 4. It is stated that the respondent no.4 has concurred and audited pay fixation of the petitioners on 26.12.2017; processed the matter to the office of the respondent no.3 in the year 2017 itself; on receipt of the same the respondent no.3 would process the pay fixation of the petitioner and *"shall accordingly credit the increment amount due to the petitioners in their respective statement of accounts."* It was also stated that the process of pay fixation of one notional increment has already been initiated by the concerned authorities at Project Swastik. However, in the counter-affidavit filed subsequently on 21.03.2018 and additional affidavit dated 08.04.2019 the position the respondents collectively took was slightly different. The respondents now contend that the petitioners were not promoted but were re-appointed in various categories of Group C and as such they would not be entitled to the benefit of Fundamental Rule 22. The respondents contend that since the respondent no.1 have clarified that cases

of re-appointment after qualifying open competitive examination should be treated as fresh appointment and pay in such re-appointment cases were to be fixed by giving pay protection.

10. The respondents admit that there is a difference in opinion between the offices of different executive authorities. A reading of the counter-affidavit gives an indication that the concerned authorities have not been able to take a firm decision in the matter and therefore, the file is being processed from one authority to the other without any concrete decision. It may not be necessary to enumerate and detail all the communications exchanged except the important ones, as it seems imperative to give a quietus to the issue by a judicial pronouncement.

11. On 08.02.2017 the office of the respondent no.1 wrote to the respondent no.2 that as per *"paragraph 12"* of RPR 2008 the pay on re-appointment after 01.01.2006 shall be fixed as per Fundamental Rule 22 and Swamy's interpretation of service rules also clarify that pay should be fixed by increasing one notional increment in the lower posts. It was clarified at the bar that *"RPR, 2008"* referred to in the communication is short for the Central Civil Services (Revised Pay) Rules, 2008. Hence, the respondent no.1 advised the respondent no.2 to review all such type of cases pointing out that pay has been fixed granting one notional increment. On 20.02.2017 the respondent no.2 wrote to all project Swastik and other offices advising them to review all such type cases as the office of the respondent no.1 vide letter dated 08.02.2017 had advised increase of one notional increment in the lower posts on re-appointment. However, on 22.03.2017 the respondent no.4 opined in its communication to Controller of Defence Accounts (BR), (CDA (BR)) Guwahati that it was of the considered view that individuals re-appointed after passing competitive examination is treated as fresh recruits and are not entitled for grant of notional increment on pay fixation on re-appointment. On 30.05.2017 the office of the CDA (BR) wrote to respondent no.5 stating that the case regarding re-appointment of Pioneer to Operator (communication) has been examined and that cases of re-appointment after qualifying open competitive examination should be treated as fresh appointment and pay in such cases were to be fixed by giving pay protection. It was also commented that in view of the clarification issue by the main office vide letter dated 08.02.2017 fixation on re-appointment to higher post from lower post should be fixed by granting one notional increment as per Fundamental Rule

22 and Swamy's interpretation of service rules. On 25.07.2017 the Chief Engineer of respondent no.5 wrote to the office of the respondent no.1 stating that in spite of its clear position in letters dated 11.01.2017 and 08.02.2017 his task force was still not given the benefit. The Chief Engineer further pointed out that it had come to his knowledge that the pay fixation had been complied with in all projects as also two of his task forces but there was an inhibition with respondent no.4 and the increments of seven persons named in the appendix including the petitioners were pending in spite of repeated communications. The intervention of the respondent no.1 was solicited. He pointed out otherwise the pay fixation had been implemented across the board and so it was unfair to limit restrictions to troupes of only his headquarters. On 13.02.2018 the respondent no.1 wrote to various authorities under it stating that a clarification has been received from the respondent no.2 in which it has been clearly mentioned that as per paragraph 6 (a) of the policy letter dated 22.10.1974 re-appointment means fresh appointment and hence all re-appointment cases may be treated as fresh appointments. On 04.04.2018 the respondent no.1 wrote to its various authorities stating that all previous circulars like letter dated 08.02.2017 regarding re-appointment are superseded by letter dated 13.02.2018. A perusal of the letter dated 22.10.1974 shows that it sought to deal with re-appointment of serving gref personnel to various trades. The said letter enumerates the circumstances which may necessitate re-appointment of serving individuals to another trade. It deals with pre-requisites for re-appointment; it elaborates what should be informed to the individuals in writing and acknowledgement obtained; the procedure for re-appointment and the fixation of seniority on re-appointment. However, it does not deal with fixation of pay. Paragraph 6 thereof which is relied upon is quoted under:

> ***"6.*** *Re-appointment more than once:*
>
> *(a) Every re-appointment means a fresh appointment.***"**

12. The dispute has arisen primarily due to lack of cohesive interpretation of the Fundamental Rule 22 by the respondents and whether it would apply to the petitioners who were initially appointed as Pioneers in a substantive capacity and later appointed as LDC, telephone operator, radio operator and driver again in a substantive capacity. Although from the communications that have come on record it seems that the respondent no.1

has in fact held that Fundamental Rule 22 must be applied to the case of the petitioners but it is the respondent no.4 and CDA (BR) Guwahati which holds the view that cases of re-appointment should be treated as fresh appointment and therefore not entitled to the notional increment.

13. Fundamental Rule 22(I)(a)(1) reads as under:

> **"***F.R. 22 (I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-*
>
> *(a) (1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or [rupees one hundred only], whichever is more. …***"**

14. The Supreme Court had occasion to examine Fundamental Rule 22(I)(a)(1) in ***Government of India and Ors. v. B. Anil Kumar & Ors.***[1] in a case relating to promotion to a post. It was held:-

[1] (2010) 6 SCC 419

"19. *A plain reading of FR 22(I)(a)(1), quoted above, would show that where a government servant holding a post is promoted to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, "his initial pay in the timescale of the higher post" shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued. Thus, on promotion to a post carrying duties and responsibilities of greater importance, a government servant is entitled to his initial pay "in the timescale of the higher post". In the present case, the higher post to which the respondents were promoted after 1-1-1986 was the post of Assistant Superintendent. If, therefore, the special pay of Rs 75 as has been awarded by the Board of Arbitration is for the higher post of Assistant Superintendent, the respondents would be entitled to the benefit of special pay, but if the special pay was only for the Assistant Superintendents then serving, and not for the post of Assistant Superintendent, the respondents would not be entitled to the benefit of special pay having been promoted after 1-1-1986.***"***

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"22. *In our considered opinion, the 1986 Rules and FRs 22 and 25 have to be read consistently with the equality clauses in Articles 14 and 16 of the Constitution and so read, all the Assistant Superintendents who are performing the same nature of duties and responsibilities would be entitled to the special pay and to deny such benefit of special pay to the respondents, who have been promoted to the post of Assistant Superintendents after 1-1-1986, would violate Articles 14 and 16 of the Constitution. ……..……..…..***"**

15. However, the cases relating to the petitioners do not involve promotion.

16. The Supreme Court in ***Syed Abdul Qadir v. State of Bihar***[2] held:

> ***"37***. *FR 22-C, which was substituted even prior to the issuance of the Resolution dated 18-12-1989, and was replaced by FR 22(I)(a)(1) and FR 22(I)(a)(2), read thus:*
>
> > *"22-C.Notwithstanding anything contained in these Rules, where a government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the timescale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:*
> >
> > *Provided that the provisions of this Rule shall not apply where a government servant holding a Class I post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to a higher post which is also a Class I post.*
>
> *A reading of FR 22-C makes it clear that benefit of an additional increment would be extended to a government servant in the event of his being promoted or appointed to a substantive, temporary or officiating capacity to another post*

[2] (2009) 3 SCC 47

carrying duties and responsibilities of greater importance than those attaching to the post held by him. **"**

[emphasis supplied]

17. Admittedly, the petitioners were initially appointed as Pioneers in Group D category under the respondents. Thereafter, they went through a recruitment process through proper channel and having been successful in the departmental examinations, were appointed in different capacities in Group C category. The posts of Pioneer as well as the new Group C posts the petitioners hold are posts under the respondents. There is also no dispute that by this process the petitioners migrated from Group D posts to Group C posts. A perusal of Fundamental Rule 22 reflects that the incumbent must be a government servant holding a post other than a tenure post. It is not the case of the respondents that the petitioners are not government servants and that they were not holding any post other than a tenure post. Fundamental Rule 22 provides that the government servant could be holding the post in a substantive or temporary or officiating capacity. It is also not the case of the respondents that the petitioners were not holding the post of Pioneer in substantive, temporary or officiating capacity. In fact it is admitted that the petitioners were holding the posts in substantive capacity. In such a situation if the incumbent government servant is appointed and is otherwise eligible under the recruitment Rules to another post he is entitled to the notional increment as per Fundamental Rule 22. The only condition thereafter would be that the post to which he is promoted or appointed must carry duties and responsibilities of greater importance than those attached to the post held by him. It is also not the case of the respondents that the petitioner were not otherwise eligible under the recruitment Rules. Suffice it to say that the respondents admit the petitioners' appointments.

18. The petitioners have categorically asserted that the post now held by them carry higher duties and responsibilities of greater importance as compared to the post of Pioneers. The respondents do not dispute this fact and in fact admit the same as matters of record. There is also no dispute that Fundamental Rule 22 is applicable in the present case. The fact that various similarly placed government servants have been given notional increment does show that the respondents have applied Fundamental Rule

22 for them. Normally this Court would hesitate to examine a claim of parity when such officers have not been made a party. However, the orders passed in their favour granting one notional increment have not been considered bad by the respondents in spite of the position they take in the counter-affidavit. The respondents also do not deny the assertion of the petitioners that those officers who have been granted one notional increment were similarly placed. The admitted records also reveal that they were in fact similarly placed.

19. However, the respondents contend that the petitioners' appointments are rather *"re-appointments"* and therefore, it should be treated as *"fresh appointments"* disentitling the petitioners to the notional increment. It is the respondents' contention that on being re-appointed to the new posts held by the petitioners, the petitioners have relinquished all their rights to the post of pioneers which was earlier held by them. In fact the respondents submit that in the reappointment letter the petitioners had to submit discharge certificate relinquishing their rights whatsoever to the post they were holding and the petitioners were not promoted but reappointed. The petitioners admit this fact as matters of record. However, this Court is of the view that respondents cannot be permitted to rely upon such relinquishment of rights granted under law to deprive the petitioners what is legally permissible. Fundamental Rule 22 includes cases of promotion as well as appointment to a post. Otherwise there was no reason for the words *"or appointed"* to be used after the words *"is promoted"* in Fundamental Rule 22. Fundamental Rule 22 seeks to regulate the initial pay of a government servant who is appointed to a post on a time scale of pay. Thus the relinquishment of rights of post of Pioneer by the petitioners would not change the purpose of Fundamental Rule 22 or its application to the petitioners on their subsequent appointment. It envisages a situation where a government servant holding a post is either promoted or appointed to another post carrying duties and responsibilities of greater importance than those attaching to the post held earlier. The word used in Fundamental Rule 22 is *"appointed"*. The word appointment would include re-appointment or fresh appointment and therefore, the difference sought to be drawn in the appointment of the petitioners and thereby to deprive them of the benefit seems lame. If the rule making authority had desired to draw such a difference it would have done so in the rule itself. It may not be correct to read into the clear language of Fundamental Rule 22 what is not there. If

the other conditions as envisaged in Fundamental Rule 22 stand satisfied failure to grant the benefit envisaged would be illegal. Further, on their own admission the respondents have extended the benefit of notional increment under Fundamental Rule 22 to various government servants identically placed. It is not the case of the respondents that the benefit so granted to them has been reversed. Consequently, the failure to grant similar benefit to the petitioners who otherwise fulfill all the requirements under Fundamental Rule 22 would also violate Article 14 and 16 of the Constitution of India.

20. Resultantly, the writ petition is allowed. The respondents are directed to grant the petitioners the benefits under Fundamental Rule 22 from the date and in the manner they are entitled to.

21. No order as to costs.

SLR (2020) SIKKIM 230

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

Crl. A. No. 10 of 2019

Yabesh Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Anjan Sharma and Mr. Nirmal Kr. Berdewa, Advocates.

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

Date of decision: 21st March 2020

A. Probation of Offenders Act, 1958 – S. 4(1) – Code of Criminal Procedure, 1973 – S. 360 – Release of Offenders on Probation of Good Conduct – The paramount consideration for release of a convict who has not committed any offence punishable with death or imprisonment for life under S. 4(1) of the Probation of Offenders Act, 1958 is the nature of the offence and the character of the offender – In order to release a convict on probation under S. 360 Cr.P.C again, the character, antecedents of the offender and the circumstances in which the offence was committed are vital considerations. The record does not reveal that the appellant has a good character. The records revealed the manner and the circumstances in which the offences have been committed. It was premeditated and deliberate. The vivid description of what transpired with her in her deposition corroborated by the multiple injuries sustained by the victim clearly establishes the nature of the offences – Keeping in mind the circumstances of the case including the nature of the offences and the character of the offender, although he may have been a first time offender, this Court sees no reason to unsettle the sound reasoning given by the learned Sessions Judge in declining to apply S. 4(1) of the Probation of

Offenders Act, 1958 and S. 360 Cr.P.C in exercise of his judicial discretion. (Para 25)

Appeal dismissed.

Chronology of cases cited:

1. State of Karnataka v. Muddappa, (1999) 5 SCC 732.
2. Hari Kishan v. Sukbir Singh, (1988) 4 SCC 551.
3. Sitaram Paswan v. State of Bihar, (2005) 13 SCC 110.
4. State v. Sanjiv Bhalla, (2015) 13 SCC 444.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The appellant has been convicted for the offences under Sections 279, 323, 342 and 506 of the Indian Penal Code, 1860 (IPC). The judgment of conviction and order on sentence both dated 30.03.2019 are under challenge.

2. The learned Sessions Judge on examination of the evidence of the victim came to the conclusion that it was not safe to rely upon her sole testimony to convict the appellant under Section 376 (1) and Section 354 D IPC. However, the learned Sessions Judge found corroboration of the victim's evidence in the evidence of the prosecution witnesses for the rest of the offences.

3. The First Information Report (FIR) (exhibit-1) was lodged at the police station on 10.09.2016 by the victim. Kessang D. Bhutia (P.W.16) the station house officer received the FIR (exhibit 1) on 10.07.2016 and registered it. On the basis of the FIR investigation was done by Joshna Gurung (P.W.23). Subarna Rai (P.W.18) the learned Judicial Magistrate recorded the statement of the victim under Section 164 Cr.P.C. (exhibit 11). Keshar Tamang (P.W.4) and Bikash Thapa (P.W.5) are signatories of seizure memo (exhibit-2) seizing the wooden roll (MO I). Karna Bahadur Gurung (P.W.6) and Kailash Pradhan (P.W.8) witnessed the seizure of one of the victim's slipper from below the women's hostel near her house.

Emmanuel Rai (P.W.10) and Julius Brown Rumbang Rai (P.W.11) witnessed the seizure of the ignition key and the mobile phone from the appellant. S. Ali (P.W.7) used to reside in the same building as the appellant. According to him one lady and a man had come to the appellant's room and inquired about the appellant and the girl who used to stay in the room. He told them that as far as he knew they were leaving peacefully and had not come to know anything unusual between them. He witnessed the seizure of some clothes belonging to the girl vide seizure memo (exhibit-4). Bir Bahadur Subba (P.W.21) and Dilli Ram Sharma (P.W.22) were signatories to the seizure memo (exhibit-17) by which the appellant's vehicle was seized.

4. On examination of the charge sheet and the material on record the learned Sessions Judge framed charges under Section 376 (1), 354 D, 342, 324, 506 and 279 IPC on 03.10.2018. The appellant pleaded not guilty and the trial commenced. Twenty three prosecution witnesses including the investigating officer were examined. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) on 12.03.2019. The appellant either denied having any knowledge of the circumstances put to him or stated that the allegations were not true.

5. Heard Mr. Anjan Sharma, learned Counsel for the appellant and Mr. Sujan Sunwar, learned Assistant Government Advocate for the respondent.

6. Mr. Anjan Sharma submitted that the failure of the prosecution to examine the medical officer who first examined the victim at the primary health center casts a doubt upon the prosecution case regarding the injuries sustained by the victim. He further submitted that the material discrepancies in the evidence of the prosecution witnesses Dik Bahadur Pradhan (P.W.14) and Kiran Pradhan (P.W.12) have been ignored. He submitted that the learned Sessions Judge has relied upon the uncorroborated testimony of the victim to convict the appellant. He argued that there were contradictions in the testimonies of the victim and her mother (P.W.1). It was also submitted that the mere fact that the appellant was driving the vehicle in great speed does not amount to driving in a rash and negligent manner. Finally he submitted that this was a fit case in which benefit of the Probation of Offenders Act, 1958 ought to have been given to the appellant as the offences for which he was convicted are not serious offences and that he was a first time offender. He relied upon several judgments of the Supreme Court on this point which shall be discussed later.

7. Mr. Sujan Sunwar on the other hand took this Court through the evidence and submitted that all the ingredients of the offences alleged have not only been proved by the evidence of the victim but has also been corroborated by the other witnesses. He submitted that the learned Sessions Judge had correctly appreciated the evidence on record to come to the conclusion convicting the appellant and sentencing him. Mr. Sujan Sunwar submitted that on examination of the nature of the offence it is not a fit case in which benefit of the Probation of Offenders Act, 1958 should be granted.

8. The prosecution story as it unfolded was that the victim and the appellant were known to each other. The evidence also suggests that they were known to each other quite intimately. Although, the victim desired to severe her relationship with the appellant, he had been insistent. This ultimately culminated in the incident of 09.07.2016 evening.

9. P.W.1 is the victim's mother. She identified the appellant as they belong to the same religious congregation. According to her on 09.07.2016 at around 7 to 7.30 p.m. she heard someone call out to the victim addressing her as ma'am from the bamboo grove next to the women's hostel. She thought that some student from the women's hostel was calling the victim and accordingly informed her. The victim went out. She assumed that the victim had gone to the women's hostel. At around 8 p.m. when they sat for the evening prayer she noticed that the victim was not there. She sent her younger son to the women's hostel to call the victim. Her son returned and informed that the door of the women's hostel was closed from inside. He also told her that they might be attending prayer. Thereafter, they started their prayer without the victim. After a while she tried to contact the victim but found that she had left her mobile at home. About an hour later she received a phone call from an unknown lady who told her that the victim had sustained injuries and was at the police station.

10. P.W.2 is the victim's father and P.W.3 is the victim's brother. They corroborated the statement of P.W.1.

11. The victim (P.W.17) deposed about the incident that happened on the evening of 09.07.2016 in elaborate detail. On 09.07.2016 at around 7 p.m. she heard somebody calling her - ma'am. She went towards the place. The appellant came from the bamboo grove and covered her mouth. He

dragged her down the stairs and took her to his vehicle (white Xylo) parked beside the road. He put her inside the vehicle forcibly and punched her on her right temple. She lost consciousness for a while. When she regained consciousness she saw the appellant drinking alcohol and driving the vehicle in great speed. She started shouting out for help. He stopped the vehicle and started hurling abuses at her. He also physically assaulted her with a wooden roll (MO I) in her right arm, punching her several time on her face and even tried to strangulate her. She managed to jump out of the vehicle but realized she was wearing only one slipper as the other one (MO II) had slipped off while the appellant was dragging her down the stairs near her house. She started running and saw one white Wagon R. She stopped the car, got inside the front seat and requested the driver to help her giving him her identity. The appellant reached there and told him not to interfere as it was a personal matter between them. In spite of the request the driver refused and the appellant pulled her out of the car and took her towards his vehicle. Another vehicle (Maxx) passed them and she started shouting for help but the appellant covered her mouth and the vehicle passed away. The appellant put her inside the vehicle again forcibly. He made her swear upon the bible asking him to promise to marry him or else he threatened to push her down the steep cliff. Once again he forced her to swear upon her father that she would marry him. She agreed on the condition that he would reach her home. After that the appellant turned his vehicle. As they moved a little further she saw a group of people gathered on the road and also saw the two vehicles (Maxx and Wagon R) parked on the road. She again raised an alarm. The people gathered also started shouting. Instead of taking her home the appellant drove towards Gangtok. On the way he threatened to take the vehicle and drive it off the cliff; all the while he was driving in a rash manner. On the way the tyre of the vehicle punctured, the vehicle could not be driven up and so he started driving it in the other direction. They passed by several cars. The drivers of the said cars shouted at the appellant as he was driving in high speed and in a rash and negligent manner. He punched her again on her face. When they were about the reach the bazaar she noticed a policeman standing beside the road. The appellant warned her and told her to tell the police that she was his wife and there was no problem between them. She rolled down the glass and requested the police to help her. The appellant sped the vehicle away and once again physically assaulted her. As they were driving she saw a white Swift car slowly moving towards them as it was raining heavily. At a particular point she noticed that the road had been blocked with big stones and a policeman standing next

to the road. The appellant once again warned her to tell the police that she was his wife and that there was no problem between them. She then got down the vehicle and held the police. The appellant saw this and sped the vehicle through the edge of the road. The persons inside the Swift car took her inside their car from where she called her mother. Thereafter, the police took her in their vehicle to locate the appellant. They saw the appellant's vehicle parked beside the road a little further away but without the appellant. The police deflated the tyres and took its documents. The police then took her to the police station. She verbally reported about the incident to the police who sent her for medical examination to the primary health center. The next morning she lodged the FIR after which the police sent her for medical examination to the District hospital where she was examined by the doctor. According to the victim as a result of the physical assault by the appellant on her she sustained injuries and swelling on her right eye, blood had clotted inside the eyes; injuries on her teeth; injuries on her right arm and wound on her elbows; strangulation mark on her neck and abrasion and swelling on her cheek; cut marks on her lips and injuries on her feet and legs. The following morning she vomited blood. The elaborate deposition of the victim has sustained a thorough cross-examination by the defence. The cross examination makes it clear that the defence did not dispute that the appellant and the victim were known to each other.

12. Dr. Sunita Thapa (P.W.20) the medical officer at the District hospital examined the victim on 10.07.2016. She found that the victim had sustained bruise, swelling and tenderness over her right arm, lacerated wound over right elbow, bruise and swelling over the left hand with tenderness, abrasion over right side of her neck, abrasion over both knees, tenderness, swelling and bruise over the right upper and lower eye lid, redness of conjunctiva over her right lateral side, swelling and bruise over the right side of the cheek, swelling over the right side upper lip, multiple abrasion over the left hand palmar aspect.

13. Dr. Anne Rai (P.W.15) examined the x-rays of skull and shoulder joints of the victim on 10.07.2016. There were no injuries. On 11.07.2016 the victim was sent for x-ray of the neck and chest. No injuries were found. This was on the request of Dr. Sunita Thapa (P.W.20).

14. The deposition of the victim about the injuries sustained by her due to the physical assault by the Appellant has been adequately corroborated.

15. Laxuman Rai (P.W.9) is an eye witness. On 09.07.2016 at around 7.30 to 8.30 p.m. while returning home he saw a white coloured Xylo parked on the side of the road. He also saw the front door of the vehicle open and the light switched on. After driving about 200 feet away he saw one girl being dragged by the appellant. The girl was screaming loudly for help. He parked his vehicle to see what was happening. After about five minutes the same vehicle passed by and he saw the girl waving her hand from the front seat window of the vehicle and shouting for help. He tried to stop the vehicle but the appellant drove away at high speed towards Gangtok. He was able to note down the number of vehicle which he remembered as SK-04 0113.

16. Dik Bahadur Pradhan (P.W.14) who was the policeman on duty at the bazaar received information that one vehicle (Xylo) bearing registration number SK-04Z/0113 was carrying one lady who was screaming for help. They were directed to stop the vehicle. When they tried to stop the vehicle it did not stop but sped away at high speed.

17. Kiran Pradhan (P.W.12) while on duty at the police station received a phone call from Dik Bahadur Pradhan (P.W.14) informing him that while they were on duty at the bazaar, one vehicle Xylo bearing registration number SK-04Z/0113 came at high speed and nearly hit them as it sped away. Thereafter, he along with other police personnel went to apprehend the vehicle. When they reached a particular place they found the victim surrounded by many people. They were informed by the public that the vehicle had gone towards Rabong. They found the vehicle locked and parked on the road side a little further away but did not find anyone near the vehicle.

18. The victim's narration of what transpired on 09.07.2016 after the appellant forcibly put her into his car, drove her away and driving the vehicle in a rash and negligent manner while drinking alcohol and in high speed endangering her life, punching her, physically and verbally abusing her, threatened to take the vehicle and drive it off the cliff and restraining her from alighting the vehicle although people including the police had tried to stop him till she was finally rescued clearly establishes the offence of wrongful restraint, voluntarily causing hurt, criminal intimidation and rash driving on a public way. There is adequate corroboration to the deposition of the victim from the evidence of the prosecution witnesses as discussed above.

19. The failure to examine the doctor who examined the victim at the primary health center on the night of the incident does not cast any doubt about the injuries sustained by her due the physical assault by appellant. The incident is of the late night of 09.07.2016. According to the victim she was sent for medical examination at the primary health center that night itself and thereafter she went home. This deposition remained intact in spite of detailed cross examination. The next morning after she lodged a written FIR she was once again sent for medical examination. The medical report (exhibit 16) records that the victim was examined at 12.25 p.m on 10.07.2016 itself. There is no reason to doubt the evidence.

20. The contradictions pointed out by Mr. Anjan Sharma are minor. They do not demolish the substratum of the prosecution case. While Dik Bahadur Pradhan (P.W.14) deposed about what he saw; Kiran Pradhan (P.W.12) deposed about what he heard from Dik Bahadur Pradhan (P.W.14). A minor discrepancy of what one said and what the other heard does not affect the core of prosecution case. Similarly, whether the victim's mobile was taken by the appellant as stated by her or it was left in the house as deposed by her mother (P.W.1) does not shake the foundation of the case proved by the prosecution beyond any reasonable doubt. There is evidence that the appellant was driving the vehicle not only in high speed but while consuming alcohol. That apart the evidence also shows that although a policeman tried to stop him, he did not. With such facts glaring it is difficult to hold that the ingredients of the offence under Section 279 IPC have not been proved although generally it may sometime be true as a proposition that speed alone cannot be the sole determinative factor for coming to the conclusion that the vehicle was being driven in a rash and negligent manner endangering human life.

21. Thus the conviction of the appellant under Sections 279, 323, 342 and 506 IPC are upheld. The learned Sessions Judge has sentenced the appellant to simple imprisonment for six months and a fine of Rs.500/- for each of the offences separately and in default the appellant to undergo simple imprisonment of two months. The sentences have been directed to run concurrently.

22. Mr. Anjan Sharma has vehemently argued that during the sentence hearing he had sought the release of the appellant under Section 4 (1) of the

Probation of Offenders Act, 1958 and under Section 360 Cr.P.C. however, the learned Sessions Judge declined to do so although it was a fit case.

23. In ***State of Karnataka v. Muddappa***[1] the Supreme Court examined a conviction under Section 304 part II IPC and the circumstances under which the blow was inflicted by the accused on the deceased and directed that the accused be released under Section 4 (1) of the Probation of Offenders Act, 1958. In ***Hari Kishan v. Sukbir Singh***[2] the Supreme Court while upholding the view of the High Court of releasing the accused giving them benefit of probation of good conduct held that many offenders are not dangerous criminals but are weak characters who had surrendered to temptation or provocation and in placing such type of offenders on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. It was observed that the High Court had come to a finding that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. In ***Sitaram Paswan v. State of Bihar***[3] the Supreme Court held that for exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act, 1958 is subject to the limitation embodied in the provisions and the word *"may"* clearly indicates that the discretion vest with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, 1958 having regard to the nature of the offence and the character of the offender and overall circumstances of the case. This power can be exercised by the Court even at the appellate or revisional stage and also by the Supreme Court while hearing appeal under Section 136 of the Constitution. It was held that the facts revealed that the incident had occurred at the spur of the moment and was traverse in nature. There was no material on record to indicate that the appellant's therein had previous conviction. It was in these circumstances that the Supreme Court decided that the accused was entitled to the benefit of good conduct. In ***State v. Sanjiv Bhalla***[4] the Supreme Court held:

[1] (1999) 5 SCC 732
[2] (1988) 4 SCC 551
[3] (2005) 13 SCC 110
[4] (2015) 13 SCC 444

> ***"11.*** *Every accused person need not be detained, arrested and imprisoned- liberty is precious and must not be curtailed unless there are good reasons to do so. Similarly, everybody convicted of a heinous offence need not be hanged however, shrill the cry "off with his head" – and this cry is now being heard quite frequently. Life is more precious than liberty and must not be taken unless all other options are foreclosed. Just sentencing is as much as an aspect of justice as a fair trial and every sentencing judge would do well to ask: is the sentence being awarded fair and just.***"**

The Supreme Court summed up in the following manner:

> ***"****28. To sum up:*
>
> *28.1. For awarding a just sentence, the Trial Judge must consider the provisions of the Probation of Offenders Act and the provisions on probation in the Code of Criminal Procedure;*
>
> *28.2. When it is not possible to release a convict on probation, the Trial Judge must record his or her reasons;*
>
> *28.3. The grant of compensation to the victim of a crime is equally a part of just sentencing;*
>
> *28.4. When it is not possible to grant compensation to the victim of a crime, the Trial Judge must record his or her reasons; and*
>
> *28.5. The Trial Judge must always be a life to alternative methods of a mutually satisfactory disposition of a case.***"**

24. The learned Sessions Judge has held that the appellant was a mature man of 38 years who could not be expected to treat a woman so badly that she is traumatized for the rest of her life. He held that the agony and

the pain suffered by the victim and her family members cannot be compensated in monetary terms. It was held that the appellant cannot be shown too much leniency and releasing him on probation would send a wrong signal to the society. The learned Sessions Judge has recorded his reasons for declining to exercise his discretion in the appellant's favour.

25. The paramount consideration for release of a convict who has not committed any offence punishable with death or imprisonment for life under Section 4(1) of the Probation of Offenders Act, 1958 is the nature of the offence and the character of the offender. In order to release a convict on probation under Section 360 Cr.P.C. again, the character, antecedents of the offender and the circumstances in which the offence was committed are vital considerations. The record does not reveal that the appellant has a good character. The records revealed the manner and the circumstances in which the offences have been committed. It was premeditated and deliberate. The vivid description of what transpired with her in her deposition corroborated by the multiple injuries sustained by the victim clearly establishes the nature of the offences. Keeping in mind the circumstances of the case including the nature of the offences and the character of the offender, although he may have been a first time offender, this Court sees no reason to unsettle the sound reasoning given by the learned Sessions Judge in declining to apply Section 4(1) of the Probation of Offenders Act, 1958 and Section 360 Cr.P.C in exercise of his judicial discretion.

26. The judgment of conviction and order on sentence both dated 30.03.2019 are upheld. Consequently, the appeal is dismissed. No order as to costs.

27. The appellant shall surrender before the Court of the learned Judge, Fast Track Court, East & North Sikkim at Gangtok during the course of the day to undergo sentence as pronounced.

28. Certified copies of this Judgment to be forwarded to the Court of the learned Judge, Fast Track Court, East & North Sikkim at Gangtok. A copy thereof may be supplied free of cost to the appellant.

SLR (2020) SIKKIM 241

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

Crl. A. No. 13 of 2019

Binod Sanyasi ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Bhusan Nepal, Advocate.

For the Respondent: Ms. Mukun Dolma Tamang and Mr. Hissey Gyaltsen Bhutia, Assistant Public Prosecutors.

Date of decision: 21st March 2020

A. Code of Criminal Procedure, 1973 – S. 164 – Use of Statement – It is settled law that where the prosecution version is not supported by its witnesses, the Court cannot rely on S. 164 statement of the witness to convict the accused as such a statement is not substantive evidence. It may be reiterated that statement under S. 164 can only be used to corroborate or contradict statements made by the witness under Ss. 145 and 157 of the Evidence Act and can never be used as substantive evidence – It would be erroneous to rely upon the S. 164 statement of the victim and thereby convict the Appellant – It may appositely be observed that S. 164 is resorted to during the course of investigation when an accused or any other person seeks to make a confession or statement, of his own free will and is generally recorded when there is apprehension that he may resile from his statement or his evidence is likely to be tampered with.

(Paras 11 and 12)

B. Indian Evidence Act, 1872 – S. 154 – Hostile Witness – Courts are not to reject the evidence of a hostile witness in totality but to consider that part of the witness's testimony which is found creditworthy. It is also to be assessed whether the hostility was a consequence of intimidation or inducement.

(Para 18)

Appeal allowed.

Chronology of cases cited:

1. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
2. State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360.
3. K. Anbazhagan v. Superintendent of Police and Others, (2004) 3 SCC 767.
4. State through PS Lodhi Colony v. Sanjeev Nanda, (2012) 8 SCC 450.
5. Rai Sandeep *alias* Deepu v. State (NCT of Delhi), (2012) 8 SCC 21.
6. Raju and Others v. State of Madhya Pradesh, (2008) 15 SCC 133.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellant impugns the Judgment in Sessions Trial (POCSO) Case No.25 of 2018 *(State of Sikkim vs. Binod Sanyasi),* dated 30.05.2019, and the Order on Sentence of even date, wherein he was convicted of the offence under Section 354 of the Indian Penal Code, 1860 (hereinafter "IPC") and sentenced to undergo Simple Imprisonment for a term of one year and to pay a fine of Rs.2,000/- (Rupees two thousand) only, with a default clause of imprisonment.

2. The Prosecution case is that on 08.10.2018 at around 21:00 Hrs, a verbal Complaint was received from the victim at the Kaluk Police Station (reduced into writing by the Police), to the effect that when she was alone at home that evening, after School, the Appellant came to her home, touched her body, her private parts and also attempted to sexually assault her. He was unable to accomplish his intentions as her brother returned home. She narrated the incident to her father upon which the First Information Report ("FIR") came to be lodged, seeking redressal. The case was duly registered under Section 376 IPC read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO Act") and taken up for investigation.

3. Investigation revealed that the victim, a student of Class IV, in a Senior Secondary School, was living with her family. On the relevant day when she reached home, she was followed home by her younger brother shortly, who came along with another boy and the Appellant. The victim directed her younger brother to fix the water pipes and he left along with the other boy to attend to the chore. As she was left alone with the Appellant he attempted to sexually assault her inside her home. On completion of investigation, Charge-Sheet was submitted against the accused/Appellant under Section 354 IPC read with Section 8 of the POCSO Act. The learned trial Court framed charge against the Appellant under Section 9(m) of the POCSO Act and Section 354 IPC. On examination of 11 (eleven) Prosecution witnesses and closure of evidence thereof, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter the "Cr.P.C."), pursuant to which he sought to examine one Defence Witness. His witness was accordingly examined and the final arguments of the parties were heard thereafter. The learned trial Court taking into consideration the entire evidence and documents on record, acquitted the Appellant of the offence under Section 9(m) of the POCSO Act, on the failure of the Prosecution to establish that the victim was below 12 years of age. The learned trial Court however convicted the Appellant under Section 354 IPC, observing that the Prosecution had proved its case for the said offence. The Sentence as extracted *supra* was meted out consequently.

4. Learned Counsel for the Appellant, before this Court, submits that the learned trial Court was in error in convicting the Appellant under Section 354 of the IPC, since the victim in her evidence has clearly stated that as she was afraid of her father she lied to him about the incident of sexual assault by the Appellant, when in fact no such assault had taken place. That, her cross-examination categorically reveals that the Appellant and another man had come to her house when she was washing utensils and she served them tea after which they both left the house. When her father returned home that evening and scolded her as to why she had spent time with the boys, she narrated a non-existent incident of sexual assault to him. However, she unequivocally admitted under cross-examination that the Appellant did not commit any kind of sexual assault on her. That, her evidence finds corroboration in that of PW2, her younger brother, who has stated that on the relevant day he had gone to the field to connect the water pipes and when he returned from the field he saw the Appellant along with one Manoj

(DW1) coming out from their house as also his sister (victim). No allegation of sexual assault was made by the victim to him. This finds substantiation in the evidence of DW1 as well who was with the Appellant at the victim's house that day. That, the victim herself having been declared hostile by the Prosecution, the other Prosecution witnesses have not been able to throw light on the alleged sexual assault. That, the evidence on record reveals that the victim's statement was recorded at the Police Station by a male Police personnel in contravention to the mandate of Section 24 of the POCSO Act. The conviction of the Appellant is based solely on the Section 164 Cr.P.C. statement of the victim which is not substantive evidence and the contents of Exhibit 3, the Section 154 Cr.P.C. statement of the victim, have not been proved by her. The evidence of the Doctor negatives the Prosecution case. It thus emanates that the Prosecution has failed to establish the offence against the Appellant under Section 354 IPC, hence the impugned Judgment and Order on Sentence be set aside.

5. Learned Assistant Public Prosecutor despite making efforts to support the Prosecution case conceded that the conviction of the Appellant was based on the Section 164 Cr.P.C. statement of the victim which is not substantive evidence.

6. I have heard the submissions put forth by Learned Counsel at length and given due and anxious consideration to the same. I have also carefully perused the records of the case including the evidence and the impugned Judgment and Order on Sentence.

7. The question that falls for consideration before this Court is whether the conviction handed out to the Appellant by the learned trial Court under Section 354 IPC can be sustained?

8. It is pertinent to mention that the acquittal of the Appellant under Section 9(m) of the POCSO Act has not been challenged by the Prosecution in any proceeding and has thereby attained finality.

9. While examining the evidence of the victim (PW1), it is revealed that on the relevant day when she came home from School, the Appellant along with another *"Dada"* (brother) came to her home. As she was washing utensils outside her home, the Appellant called her to the kitchen and asked for a cup of tea, which she offered, after which the said duo left the house.

When her father came home he scolded her for talking to the Appellant and due to her fear of him, she told him that the Appellant had sexually assaulted her. Although she identified Exhibit 1 and Exhibit 2 as her Section 164 Cr.P.C. statements and Exhibit 3 as her statement recorded by the Police, the Prosecution declared her hostile on grounds that she was resiling from her statements under Sections 154 and 164 Cr.P.C. Under cross-examination by the Prosecution she deposed that she was not tutored by anyone in her house to give false evidence before the Court. Her crossexamination by the learned defence Counsel *inter alia* elicited the following information;

> *".....**It is true that on the relevant day, the accused did not do any kind of sexual assault on me***.(sic) ***It is true that due to fear of my father, I gave a false statement to my father that the accused sexually assaulted me on the relevant day. It is true that in fact nothing had done*** (sic) ***to me by the accused on the relevant day***. .....***It is true that the statement given by me to the police and the Judge Madam are false statements, which I had given due to fear of my father.*** .....*It is not a fact that whatever I have statement in my examination in chief is false statement* (sic). ..."
>
> **(Emphasis supplied)**

10. On careful consideration of the evidence of this witness, it is clear that she has denied the occurrence of the incident of sexual assault. The learned trial Court in its Judgment while considering the Section 164 Cr.P.C. statement of the victim has relied on the lone sentence of the victim in the Court which has emerged under cross-examination *viz.*

> *".....It is not a fact that whatever I have statement in my examination in chief is false statement.* (sic) ....."

The learned trial Court was also impressed by the fact that the victim had consistently stated that she wanted to give her statement to the learned Magistrate so much so that she did not seek time to reflect and desired that the learned Magistrate record her statement the very same day *viz.* her

Section 164 Cr.P.C. statement. The learned trial Court however discounted the evidence of the victim as deposed in the Courtroom wherein she categorically denied any sexual assault on her by the Appellant. Her father (PW3) has also stated that his victim daughter told him that she gave a false statement to the Police and to the Court as she was afraid of him. The evidence of the victim and her father are corroborative. Also it is worthwhile noticing that while categorically denying any sexual assault on her by the Appellant, the victim has detailed her reasons for levelling a false accusation against the Appellant, *viz.* that it was on account of fear of her father when he scolded her and asked her why she was talking to the Appellant.

11. It is settled law that where the Prosecution version is not supported by its witnesses, the Court cannot rely on the Section 164 Cr.P.C. statement of the witness to convict the accused as such a statement is not substantive evidence. It may be reiterated that statement under Section 164 Cr.P.C. can only be used to corroborate or contradict statements made by the witness under Section 145 and Section 157 of the Evidence Act and can never be used as substantive evidence. In the light of this observation, it would be erroneous to rely upon the Section 164 Cr.P.C. statement of the victim and thereby convict the Appellant.

12. It may appositely be observed that Section 164 Cr.P.C. is resorted to during the course of investigation when an accused or any other person seeks to make a confession or statement, of his own free will and is generally recorded when there is apprehension that he may resile from his statement or his evidence is likely to be tampered with. The following observation pertaining to Section 164 Cr.P.C. was made by the Hon'ble Supreme Court in ***R. Shaji vs. State of Kerala***[1] wherein it was held as hereunder;

> "**26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction**. In a case where the Magistrate has to perform the duty of recording a

[1] (2013) 14 SCC 266

statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. **A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted**. (Vide *Jogendra Nahak* v. *State of Orissa* and *CCE* v. *Duncan Agro Industries Ltd.*)

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. **As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence**.

29. During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the

witnesses may be influenced. (Vide *Mamand v. Emperor, Bhuboni Sahu v. R., Ram Charan v. State of U.P. and Dhanabal v. State of T.N.)"*

(Emphasis supplied)

13. So far as the contents of Exhibit 3, her statement to the Police which was later reduced to writing and drawn up as the formal FIR, Exhibit 4, the contents therein are unproved. It was scribed by a Police personnel at the Kaluk Police Station who was not cited as a witness by the Prosecution and therefore not examined. The Prosecution evidence nowhere reflects that the contents of Exhibit 3 were read over and explained to the victim after it was reduced into writing by the Police. This fact was not tested in the evidence-in-chief of the victim. All that she has stated in cross-examination conducted by the Prosecution is that;

"It is true that my statement was recorded by the police at Kaluk PS which is marked Exhibit-3."

PW11, the Investigating Officer of the case shed no light on this aspect as well. PW3, the victim's father has stated that Exhibit 3 is the statement of his daughter but no question was put to him as to its contents.

14. Merely because the victim affixed her signature on Exhibit 3, assumptions cannot be drawn of her knowledge of its contents. The document cannot prove itself, the contents thereof are required to be proved in terms of the provisions of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") *viz.* Section 67 of the Act, unless the contents of the documents are said to be admissible by reasoning of a provision of a Statute, example, Section 90 of the Evidence Act. Identification of her signature on Exhibit 3 is not conclusive of knowledge of the contents, when the contents were not put to her to replenish her memory.

15. While addressing the question of the victim PW1 having turned hostile, the Hon'ble Supreme Court in ***State of U.P. vs. Ramesh Prasad Misra***[2] has held that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

[2] (1996) 10 SCC 360

16. In ***K. Anbazhagan vs. Superintendent of Police and Others***[3] the Hon'ble Supreme Court held that if the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.

17. The Hon'ble Supreme Court in ***State through PS Lodhi Colony vs. Sanjeev Nanda***[4] *inter alia* held as follows;

> "**101.** We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma* v. *State (NCT of Delhi)* and in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* had highlighted the glaring defects in the system like nonrecording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation."

18. It thus concludes that Courts are therefore not to reject the evidence of a hostile witness in totality but to consider that part of the witness's testimony which is found creditworthy. It is also to be assessed whether the hostility was a consequence of intimidation or inducement. In the light of the settled position of law while examining the evidence of the victim and sifting the chaff from the grain, she has clearly stated under crossexamination by the learned Defence Counsel that the Appellant committed no sexual assault on her. Her father has supported her evidence by stating;

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[3] (2004) 3 SCC 767
[4] (2012) 8 SCC 450

> *"It is true that my victim daughter told me that she gave the false statement to the police and the Court due to my fear."*

Therefore, the question of the victim being intimidated or induced by the Appellant does not arise. Her father, who is her guardian and protector also stands by the statement made by her. In the light of the denial of the incident by both daughter and father and in the absence of any other evidence to substantiate the Prosecution case, the statements of the victim and her father before the learned trial Court, are to be considered as the truthful version.

19. Indeed, sexual offences against women and children are not to be taken lightly and have to be dealt with an iron hand and the accused brought to book but such steps can be taken by the Court only if the statement of the victim is cogent and coherent pointing to the unequivocal perpetration of the offence by the accused. On this count, we may usefully rely on the decision of the Hon'ble Supreme Court in ***Rai Sandeep alias Deepu vs. State (NCT of Delhi)***[5] wherein it was held as follows;

> "**22**. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the crossexamination of any length and howsoever

[5] (2012) 8 SCC 21

strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

20. Reliance is also to be placed on ***Raju and Others vs. State of Madhya Pradesh***[6] wherein the Hon'ble Supreme Court held as under;

> "**11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the**

[6] (2008) 15 SCC 133

> **possibility of false implication, particularly where a large number of accused are involved**. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."
>
> **(Emphasis supplied)**

21. Addressing the contention flagged by learned Counsel for the Appellant that the statement of the victim was recorded in contravention of the provisions of Section 24 of the POCSO Act, it may well be recapitulated from the evidence of PW3, the victim's father, that he took the victim to the Police Station where her statement came to be recorded. The Police did not summon her there. The evidence of the victim undoubtedly reveals that a male Police personnel recorded her statement at the Police Station but it may be clarified herein that the provisions of Section 24 of the POCSO Act provide recording of a statement by a woman Police Officer "as far as practicable." In view of these discussions, I am of the considered opinion that there was no contravention of the provisions of Section 24 of the POCSO Act.

22. From a perusal of the evidence furnished by the Prosecution witnesses under no circumstance can it be said to establish the Prosecution case, against the Appellant. The evidence of the victim, PW 1, can neither be said to be cogent nor coherent, the Medical Report, Exhibit 9, shows no injuries on the person of the victim. In the gamut of the existing facts and circumstances, it would be a travesty of justice to convict the Appellant when the standard of proof as required in criminal cases being "beyond a reasonable doubt" has not been adhered to by the Prosecution.

23. Consequently, the conviction cannot sustain. The impugned Judgment and Order on Sentence of the learned trial Court is liable to be and is accordingly set aside.

24. Appeal allowed.

25. The Appellant is acquitted of the offence under Section 354 IPC.

26. The Appellant is on bail vide Order of this Court dated 30.07.2019 in I.A. No.01 of 2019. He is discharged from his bail bonds.

27. No order as to costs.

28. Copy of this Judgment be transmitted forthwith to the learned Trial Court, for information.

SLR (2020) SIKKIM 254

(Before Hon'ble the Chief Justice)

MAC App. No. 11 of 2019

Branch Manager,
National Insurance Co. Ltd. ….. APPELLANT

Versus

Mr. Bishal Chettri and Others ….. RESPONDENTS

For the Appellant: Mr. Sushant Subba, Advocate.

For Respondent No. 1: Mr. N. Rai, Senior Advocate with
Mr. K.B. Chettri, Advocate.

For Respondent No. 2: Mr. Sishir Mothay, Advocate.

Date of decision: 23rd March 2020

A. Motor Vehicles Act, 1988 – S. 163A – Payment of Compensation on Structured Formula – While enacting the Motor Vehicles Act, 1988, the Legislature introduced S. 163-A providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of S. 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. If one proceeds under S. 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.

(Para 8)

B. Motor Vehicles Act, 1988 – S. 166 – Under the Act, the victim of an accident or his dependants have an option either to proceed under Ss. 166 or 163-A of the Act. Though not stated in S. 166 of the Act, in view of S. 163-A, it has to be understood that under S. 166 of the Act, the claimant has to establish proof of negligence – Materials on record amply demonstrate the hapless condition to which the Claimant had been placed and in a circumstance where the claimant is totally immobile, his inability to adduce the evidence of any other witness including an occupant of the car cannot be held against the claimant. The fact that the vehicle had tumbled down 250 feet from the road leads to an inference of rash and negligent driving on the part of the driver – It must be held that there is sufficient evidence on record to hold that the accident had occurred due to rash and negligent driving.

(Paras 21 and 27)

C. Motor Vehicles Act, 1988 – S. 166 – Whether in the absence of an appeal or a cross-objection, compensation to the injured victim can be enhanced? – After the 1976 amendment of O. 41 R. 22 of the Code of Civil Procedure, 1908, the insertion made in sub-rule (1) makes it permissible for respondent to file a cross-objection against a finding. The learned Tribunal did not record any adverse finding against the claimant. Surely, the claimant could have preferred an appeal seeking enhancement of the amount on the grounds urged by Mr. Rai during the course of his argument. The Act being a beneficial and welfare legislation, rules of procedure may not come in the way to award "just compensation" to the claimant even in an appeal filed by the Insurance Company or by the owner on the basis of evidence. It is to be noted that function of the Court is to award "just compensation" – I am of the considered opinion that this Court can enhance the amount of compensation in this appeal of the Insurance Company if the materials on record justify such enhancement with the object of ensuring that the claimant receives "just compensation".

(Para 35)

C. Motor Vehicles Act, 1988 – S. 166 – Though the claimant had prayed for a sum of 1,00,000/- each on account of "pain and suffering" and "loss of amenities", the learned Tribunal awarded 25,000/- for "pain and suffering" and 50,000/- for "loss of amenities". The nature of the injury suffered by the claimant and the consequences ensuing there from has already been noticed in an earlier part of the judgment. A young man of 22 years has

to be dependent on someone else for every little single thing for his entire life and therefore, I am of the considered opinion that the claimant is entitled to 1,00,000/- each on account of "pain and suffering" and "loss of amenities".

(Para 38)

Appeal dismissed.

Chronology of cases cited:

1. Minu B. Mehta and Another v. Balkrishna Ramchandra Nayan and Another, (1977) 2 SCC 441.
2. Oriental Insurance Co. Ltd. v. Meena Variyal and Others, (2007) 5 SCC 428.
3. Sarla Verma (Smt) and Others v. Delhi Transport Corporation and Another, (2009)6 SCC 121.
4. Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala and Others, (2001) 5 SCC 175.
5. Andhra Pradesh State Road Transport Corporation, represented by its General Manager and Another v. M. Ramadevi and Others, (2008) 3 SCC 379.
6. Ningamma and Another v. United India Insurance Co. Ltd. (2009) 13 SCC 710.
7. Dulcina Fernandes and Others v. Joaquim Xavier Cruz and Another, AIR 2014 SC 58.
8. Sandeep Khanuja v. Atul Dande and Another, (2017) 3 SCC 351.
9. National Insurance Co. Ltd. v. Pranay Sethi and Others, (2017) 16 SCC 680.
10. National Insurance Co. Ltd. v. Darshana Devi, 2017 SCC OnLine HP 888.
11. Jagdish v. Mohan and Others, (2018) 4 SCC 571.
12. Cholamandalam MS General Insurance Co. Ltd. v. Sumitra, 2018 SCC OnLine Bom 140.
13. Sunita and Others v. Rajasthan State Road Transport Corporation and Another, AIR 2019 SC 994.
14. Nagappa v. Gurudayal Singh, (2003) 2 SCC 274,

JUDGMENT AND ORDER

Arup Kumar Goswami, CJ

Heard Mr. Sushant Subba, learned counsel appearing for the appellant. Also heard Mr. N. Rai, learned Senior Counsel assisted by Mr. K.B. Chettri, appearing for respondent no.1 and Mr. Sishir Mothay, learned counsel appearing for respondent no. 2.

2. This appeal is presented by the National Insurance Company Limited under Section 173 of the Motor Vehicles Act, 1988, for short, the Act, 2 against the judgment and order dated 25.04.2019 passed by the learned Motor Accidents Claims Tribunal, East Sikkim, for short, Tribunal, in MACT Case No. 30 of 2018.

3. The learned Tribunal, on the basis of evidence on record, more particularly, Exhibit-11, held that injured was having an annual income of Rs.1,20,000/-. It was also held that he was 22 years of age at the time of accident. On the basis of Exhbibit-9 it was also held that he suffered from 80% disablement. Accordingly, the learned Tribunal awarded compensation by calculating as follows:

1.	Annual income of the claimant	Rs. 1,20,000/-
2.	40% added as future prospect	Rs. 48,000/-
3.	Net income of the deceased	Rs. 1,68,000/-
4.	Multiplier is taken as 17 as per the second schedule of the Act	
	Rs.1,68,000 x 17	Rs.28,56,000/-
5.	Medical expenses (supported by bills and cash memos)	Rs. 1,58,933/-
6.	Pain and suffering	Rs. 25,000/-
7.	Loss of amenities	Rs. 50,000/-
	Total	Rs.30,89,933/-

4. Accordingly, it was ordered that Branch Manager, National Insurance Company Limited shall pay the compensation of Rs.30,89,933/-

(Rupees thirty lakhs eighty nine thousand nine hundred thirty three) only with interest @ 10% per annum on the said sum to the claimant from the date of filing of the claim petition i.e. 06.06.2018 till full and final payment.

5. Mr. Subba has submitted that as the claim petition was filed under Section 166 of the Act, it was necessary for the claimant to have proved that 3 he had sustained injury arising out of a vehicular accident as a result of rash and negligent driving. It is contended by him that there was no evidence whatsoever regarding the accident having occurred due to rash and negligent driving and therefore, learned Tribunal committed manifest error of law in passing the impugned Judgment awarding a sum of Rs. 30,89,933/- to the claimant. He submits that in the attending facts and circumstances and having regard to the evidence on record, the learned Tribunal ought to have awarded compensation under Section 163A of the Act, as under the aforesaid Section, the claimant is not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person. He submits that the claimant, at the relevant time, was 22 years of age and, therefore, following the Second Schedule of the Act, the learned Tribunal, taking the upper limit of Rs.40,000/- as annual income of the injured, could have awarded a sum of Rs.7,60,000/-.

6. On a specific query made by the Court as to whether any dispute is raised with regard to annual income and medical expenses as awarded by the learned Tribunal, he submitted that medical expenses as awarded is not disputed by him. He has also not disputed Exhibit-9, wherein it is certified that the claimant is suffering from paraplegia and has 80% permanent physical impairment. He has also submitted that though in the grounds of memo of appeal, annual income certificate of injured claimant was disputed, he is not disputing the finding arrived at by the learned Tribunal with regard to the income of the injured.

7. In support of his submissions, Mr. Subba has relied on decisions of the Hon ble Supreme Court in the cases of ***Minu B. Mehta and Another vs. Balkrishna Ramchandra Nayan and Another***, reported in ***(1977) 2 SCC 441*** and ***Oriental Insurance Co. Ltd. vs. Meena Variyal and Others***, reported in ***(2007) 5 SCC 428***.

8. Mr. Rai, on the other hand, has submitted that claimant has proved rash and negligent driving on the part of the driver of the vehicle and therefore, there is no merit in the contention advanced by Mr. Subba that the claimant had failed to prove rash and negligent driving. It is submitted by him that whether or not there is sufficient evidence regarding rash and negligent driving has to be judged on the touchstone of preponderance of probability and approach of the Tribunal or Court ought not to be to find fault with non-examination of witnesses.

9. Learned Senior Counsel submits that, in fact, the learned Tribunal, though enjoined in law to award just compensation, has failed to award just compensation and therefore, although the respondent no. 1/claimant has not filed any appeal or cross objection, there is no embargo or impediment on the part of this Court to enhance the compensation awarded, when the cause of justice so demands.

10. While not disputing the income of the claimant assessed by the learned Tribunal as well as the amount awarded on the head of „medical expenses, he submits that adoption of multiplier of 17 by the learned Tribunal is not in consonance with the principle laid down in the case of ***Sarla Verma (Smt) and Others vs. Delhi Transport Corporation and Another***, reported in ***(2009) 6 SCC 121*** and the learned Tribunal ought to have taken 18 as the multiplier. He submits that if it was so taken, amount of compensation awarded would have been Rs.30,24,000/- instead of Rs.28,56,000/-as awarded by the learned Tribunal.

11. He further submits that though the claimant had prayed for a sum of Rs.1,00,000/- each on account of 'pain and suffering' and 'loss of amenities', without any discussion, amounts of Rs.25,000/- and Rs.50,000/-, respectively, had been awarded on the about two counts. It is submitted by him that the evidence on record demonstrates that the claimant cannot move about without the help or assistance of others as he is suffering from 80% disability and that his condition will remain the same in the years to come, award of Rs.25,000/- and Rs.50,000/- on account of 'pain and suffering' and 'loss of amenities', respectively, is grossly on the lower side and this Court may consider to enhance the same so that the injured gets just compensation. In support of his submissions, learned Senior Counsel places reliance on ***Minu B. Mehta*** (supra), ***Oriental Insurance Co. Ltd. vs. Hansrajbhai V. Kodala and others***, reported in ***(2001) 5 SCC 175***, ***Meena Variyal***

(supra), ***Andhra Pradesh State Road Transport Corporation, represented by its General Manager and Another vs. M. Ramadevi and Others***, reported in ***(2008) 3 SCC 379***, ***Ningamma and Another vs. United India Insurance Co. Ltd.***, reported in ***(2009) 13 SCC 710***, ***Dulcina Fernandes and Others vs. Joaquim Xavier Cruz and Another***, reported in ***AIR 2014 SC 58***, ***Sandeep Khanuja vs. Atul Dande and Another***, reported in ***(2017) 3 SCC 351***, ***National Insurance Co. Ltd. vs. Pranay Sethi and Others***, reported in ***(2017) 16 SCC 680***, ***National Insurance Co. Ltd. vs. Darshana Devi***, reported ***2017 SCC OnLine HP 888***, ***Jagdish vs. Mohan and Others***, reported in ***(2018) 4 SCC 571***, ***Cholamandalam MS General Insurance Co. Ltd. vs. Sumitra***, reported in ***2018 SCC OnLine Bom 140*** and ***Sunita and Others vs. Rajasthan State Road Transport Corporation and Another***, reported in ***AIR 2019 SC 994.***

12. Mr. Mothay submits that there is no violation of the terms and conditions of the insurance policy and all the documents relating to the vehicle were valid and effective. He further submits that in the attending facts and circumstances, it will be the Insurance Company which has to pay the compensation.

13. I have considered the submissions of the learned counsel for the parties and perused the materials on record.

14. In view of the submissions of the learned Counsel for the parties, essentially, three questions arise for consideration in this appeal:-

(i) Whether the claimant has been able to establish that the vehicular accident occurred due to rash and negligent driving?

(ii) Whether in absence of an appeal or a cross objection, it will be permissible to enhance compensation to the injured victim?

(iii) If the answer to the question no. (ii) is in the affirmative, whether any case is made out for enhancing compensation on the head of ‘pain and suffering’ and ‘loss of amenities’?

15. In the claim petition, the claimant has stated that the ill-fated vehicle was driven by his cousin brother Nitesh Chettri and that the injury suffered

by him was because of the accident that occurred due to rash and negligent driving of the vehicle bearing No.SK-02P-1110 on 03.01.2017. He was admitted into hospital on 09.03.2017 and was discharged on 29.03.2017. He had suffered spinal injury (Paraplegia), as a result of which he is bed-ridden and unable to stand and walk at all and his percentage of disability was assessed at 80%. He needs assistance of helper round the clock and he cannot move without the support of another person. He was self employed, running a poultry farm and supplying broom, orange, ginger and vegetables and earning Rs. 10,000/- per month.

16. In the claim petition, age of the injured is written as 22 years in two places and 23 years in one place. It is stated that the he had filed a petition under Section 173 (8) CrPC for reinvestigation before the Court of learned Judicial Magistrate at Soreng, objecting to Final Report submitted by the Investigating Officer wherein it was stated that the vehicle was not driven in a rash and negligent manner and that the accident occurred when the driver drove the vehicle towards left side of the road in order to avert a collision with a truck which had come from opposite side. On such petition, the Court had directed the Investigating Officer to reinvestigate the case. A sum of Rs.42,68,496/- was claimed as the compensation amount. Out of the aforesaid amount, the claimant had claimed Rs.32,40,000/- on account of 'loss of earning' which was put under a head styled as 'A' and a sum of Rs. 12,44,496/- on various heads such as „pain and suffering, 'future medical expenses', 'loss of amenities', 'medical expenses' etc. under heading B. However, the calculation with regard to the amount of compensation claimed is not correct and addition of heads 'A' and 'B' actually adds up to Rs.44,84,496/-

17. In ***Minu B. Mehta*** (supra), the Honble Supreme Court was considering a question as to whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. It was noted that the liability of the owner of a car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort. The Honble Supreme Court observed the argument canvassed that the Tribunal is entitled to award compensation which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence, if accepted would lead to strange result. The Honble Supreme

Court held that proof of negligence remained the lynchpin to recover compensation and proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claims case.

18. While enacting the Motor Vehicles Act, 1988, the Legislature introduced Section 163-A providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. If one proceeds under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.

19. In ***Meena Variyal*** (supra), the Honble Supreme Court had observed that the observations in ***Minu B. Mehta*** (supra) governs the claim under Section 166 of the Act and they are inapplicable when the claim is made under Section 163-A of the Act.

20. In ***Hansrajbhai*** (supra), the Honble Supreme Court had observed that purpose of Section 163-A and the Second Schedule, laying down a structured formula, is to avoid long term litigation and delay in payment of compensation to the victim or his heirs who are in dire need of reliefs. It is also noted that benefit of Section 163-A can be availed of by the claimant by restricting his claim on the basis of income at a slab of Rs.40,000/-, which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no-fault liability to a certain limit only.

21. Under the Act, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Though not stated in Section 166 of the Act, in view of Section 163-A, it has to be understood that under Section 166 of the Act, the claimant has to establish proof of negligence.

22. To establish the case, the claimant had examined himself and had submitted his evidence on affidavit. The claimant was cross-examined on commission. Though the appellant and the present respondent no.2 had submitted their respective written objection, no evidence was led by them.

23. In his evidence the claimant stated that he was 23 years old at the time of the accident. He also exhibited birth certificate as Exhibit-12 wherein the date of birth was recorded as 27.10.1994. Going by Exhibit-12, it is evident that the age of the injured was 23 years at the time of accident.

24. In the aforesaid factual matrix, it is inexplicable how the learned Tribunal, at paragraph 28 of the judgment, could record that 'admittedly' the 'deceased' was aged about 22 years. It is to be noted that at paragraphs 27 and 28 of the judgment, the learned Tribunal repeatedly referred to the injured as deceased. A higher degree of punctiliousness is expected while writing a judgment.

25. In ***Sunita*** (supra), the Honble Supreme Court had observed that while deciding cases arising out of motor vehicle cases, the claimants are merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt cannot be applied. In ***Dulcina Fernandes*** (supra), the Honble Supreme Court reiterated that plea of negligence on the part of the driver of the offending vehicle has to be decided by the Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt.

26. In his evidence the claimant had stated that the vehicle met with the accident due to rash and negligent act of the driver as he had lost control over the vehicle due to over speed and had failed to negotiate with the curve of the road. He reiterated that he sustained major spinal injury resulting in Paraplegia (paralysis of the legs and lower body), due to which he cannot perform any work on his own, cannot stand and move at all, has to take the help of a helper even to attend to call of nature and that till his death he would need a helper to survive. He had exhibited a report submitted by Station House Officer of Nayabazaar Police Station dated 20.06.2017 to the learned Judicial Magistrate, Soreng Sub-Division as Exhibit-20. In the said report, Station House Officer of Nayabazaar Police Station stated that the vehicle in question had tumbled down approximately

250 feet from the road level. A perusal of the cross-examination of the claimant goes to show that only a suggestion that the accident did not occur due to rash and negligent driving on the part of the driver was given. The claimant was not even confronted with Exhibit-20.

27. Materials on record amply demonstrate the hapless condition to which the Claimant had been placed and in a circumstance where the claimant is totally immobile, his inability to adduce the evidence of any other witness including an occupant of the car cannot be held against the claimant. The fact that the vehicle had tumbled down 250 feet from the road leads to an inference of rash and negligent driving on the part of the driver. As noted earlier, the appellant had not led any evidence. I am of the considered opinion that it must be held that there is sufficient evidence on record to hold that the accident had occurred due to rash and negligent driving.

28. In ***Jagdish*** (supra), the Honble Supreme Court observed that the measure of compensation must reflect a genuine attempt of the law to restore the dignity of the being. Noting that injured was even unable to eat or to attend to a visit to the toilet without the assistance of an attendant, it was held that it would be denial of justice to compute the disability at 90% and held that the disability is total. The Honble Supreme Court held that compensation must provide a realistic recompense for the pain of loss and the trauma of suffering and awards of compensation, while not being laws doles, in a discourse of rights, they constitute entitlements under law.

29. In ***Ningamma*** (supra), the Hon ble Supreme Court held that Section 166 deals with 'just compensation' and even if in the pleadings no specific claim was made under Section 166 of the Act, a party should not be deprived of getting 'just compensation' in case the claimant is able to make out a case under any provision of law. It was held that the Act being a beneficial and welfare legislation, the Court is duty-bound and entitled to award 'just compensation' irrespective of the fact as to whether any plea in that behalf was raised by the claimant or not. It was also held that there is no restriction in the Act that the Tribunal/Court cannot award compensation amount exceeding the claimed amount and the function of the Tribunal/Court is to award 'just compensation' which is reasonable on the basis of evidence produced on record.

30. In ***Sandeep Khanuja*** (supra), the injured was a Chartered Accountant and he had suffered 70% permanent disability of his legs. The

learned Tribunal had taken a view that the same would not impact in his earning capacity and while arriving at the compensation amount, multiplier method was not adopted. Having regard to the nature of injuries suffered by the claimant, the Honble Supreme Court observed that there is a definite loss of earning capacity of the claimant and accordingly, adopted a multiplier of 17 as the age of the injured was of 25 years for the purpose of computing compensation.

31. In ***Sarala Verma*** (supra), the Honble Supreme Court at paragraphs 30, 31, 32 and 42 held as follows:

> *"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra [(1996) 4 SCC 362] , the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.*
>
> *31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be*

considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third.

x x x

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas [(1994) 2 SCC 176 : 1994 SCC (Cri) 335], Trilok Chandra [(1996) 4 SCC 362] and Charlie [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

32. In ***Pranay Sethi*** (supra), the Constitution Bench of the Supreme Court at paragraph-59 recorded the conclusions as follows: -

"59. In view of the aforesaid analysis, we proceed to record our conclusions:

59.1. The two-Judge Bench in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] , a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

59.2. As Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] has not taken note of the decision in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826], which was delivered at earlier point of time, the decision in Rajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] is not a binding precedent.

59.3. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

59.4. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

59.5. For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paras 30 to 32 of Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] which we have reproduced hereinbefore.

59.6. The selection of multiplier shall be as indicated in the Table in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] read with para 42 of that judgment.

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

33. In ***Sumitra*** (supra), relying upon an earlier judgment of the Bombay High Court in the case of State of Maharashtra vs. Smt. Kamaladevi Kailashchandra Kaushal, the Bombay High Court reiterated that even in absence of an appeal or cross-objection on the part of the claimants, the Appeal Court is entitled to award 'just compensation' to the claimants. While arriving at the aforesaid conclusion, the Court was guided by the

consideration of claimants getting 'just compensation'. In ***Darshana Devi*** (supra), the Himachal Pradesh High Court had also taken the view that in absence of an independent appeal or a cross-objection, the Court is competent to enhance the compensation award so as to ensure award of 'just compensation' in favour of the claimants.

34. Factual matrix in ***Ramadevi*** (supra) was that the Tribunal took the age of the deceased to be 40 years and take home pay was taken to be Rs.2,367/-. Applying the multiplier of 12 the entitlement was fixed at Rs.2,16,000/-. In addition, Rs.15,000/- for non-pecuniary damages and 16 Rs.5,000/- for loss of consortium were granted. On an appeal by the Corporation, the High Court took the view that pay of the deceased was Rs.3,536/- and accordingly, annual contribution was fixed at Rs.27,996/-. Accordingly, entitlement was fixed at Rs.3,35,952/- to which was added the sum of Rs.20,000/- additionally awarded by the Tribunal. Before the Honble Supreme Court contention was urged that when there was no appeal by the claimants, in the appeal filed by the Corporation, the High Court could not have enhanced the amount of compensation. The Honble Supreme Court in the aforesaid context referred to paragraph 21 of ***Nagappa vs. Gurudayal Singh,*** reported in ***(2003) 2 SCC 274***, which is as follows:

> *"21. For the reasons discussed above, in our view, under the MV Act, there is no restriction that the Tribunal/court cannot award compensation amount exceeding the claimed amount. The function of the Tribunal/court is to award "just" compensation which is reasonable on the basis of evidence produced on record. Further, in such cases there is no question of claim becoming time-barred or it cannot be contended that by enhancing the claim there would be change of cause of action. It is also to be stated that as provided under sub-section (4) to Section 166, even the report submitted to the Claims Tribunal under sub-section (6) of Section 158 can be treated as an application for compensation under the MV Act. If required, in appropriate cases, the court may permit amendment to the claim petition."*

35. After the 1976 Amendment of Order 41 Rule 22 of the Code of Civil Procedure, 1908, the insertion made in sub-rule (1) makes it permissible for respondent to file a cross-objection against a finding. The learned Tribunal did not record any adverse finding against the claimant. Surely, the claimant could have preferred an appeal seeking enhancement of the amount on the grounds urged by Mr. Rai during the course of his argument. The Act being a beneficial and welfare legislation, rules of procedure may not come in the way to award „just compensation to the claimant even in an appeal filed by the Insurance Company or by the Owner on the basis of evidence. It is to be noted that function of the Court is to award „just compensation. It is on the aforesaid premise, Bombay and Himachal Pradesh High Courts had held that in absence of appeal or cross-objection on the part of the claimant, the Appellate Court is entitled to enhance the compensation amount so that the claimant receives „just compensation. The decision in ***Ramadevi*** (supra), also tends to support the aforesaid view. Therefore, I am of the considered opinion that this Court can enhance the amount of compensation in this appeal of the Insurance Company if the materials on record justify such enhancement with the object of ensuring that the claimant receives 'just compensation'.

36. Let me now examine as to whether in view of submissions of Mr. Rai, any enhancement is called for.

37. In ***Pranay Sethi*** (supra), the Constitution Bench of the Supreme Court held that selection of multiplier shall be as indicated in the Table in ***Sarla Verma*** (supra) read with para 42 of that judgment. The operative multiplier as laid down therein for the age groups 15 to 20 and 21 to 25 years is 18. It is not significant whether the injured was 22 years or 23 years at the time of accident for the purpose of selection of multiplier as for both these years, multiplier remains same, which is 18. The learned Tribunal, evidently, had adopted a lower multiplier when it applied multiplier of 17. In order to grant 'just compensation' to the claimant, this Court has to apply multiplier of 18.

38. Though the claimant had prayed for a sum of Rs.1,00,000/- each on account of 'pain and suffering' and 'loss of amenities', the learned Tribunal awarded Rs.25,000/- for 'pain and suffering' and Rs.50,000/- for 'loss of amenities'. The nature of the injury suffered by the claimant and the

consequences ensuing there from has already been noticed in an earlier part of the judgment. A young man of 22 years has to be dependent on someone else for every little single thing for his entire life and therefore, I am of the considered opinion that the claimant is entitled to Rs.1,00,000/- each on account of 'pain and suffering' and 'loss of amenities'.

39. Accordingly, amount of compensation is computed as follows: -

1.	(Rs.1,68,000 x 18)	Rs.30,24,000/-
2.	Medical expenses	Rs. 1,58,933/-
3.	Pain and suffering	Rs. 1,00,000/-
4.	Loss of amenities	Rs. 1,00,000/-
	Total	**Rs.33,82,933/-**

40. The amount of Rs.33,82,933/- (Rupees thirty three lakhs eighty two thousand nine hundred thirty three) only shall be paid by the Insurance Company with interest @ 10% per annum to the claimant from date of filing of the claim petition i.e. 06.06.2018 till full and final payment.

40. Appeal stands disposed of.

41. Records of the Tribunal be sent back.

SLR (2020) SIKKIM 272
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 02 of 2019

Depesh Tamang ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Manish Kumar Jain, Legal Aid Counsel.

For the Respondent: Ms. Mukun Dolma Tamang, Asst. Public Prosecutor.

Date of decision: 23rd March 2020

A. Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 7 – Penetrative Sexual Assault – Sexual Assault – Though PW-13 in his F.I.R had stated that the accused had sexually assaulted his daughter several times, in his evidence, he was conspicuously silent about such allegation and rather, in his cross-examination, had stated that his daughter had not stated anything adverse against the accused. Logical conclusion will be that PW-1 had not stated anything about any sexual assault or penetrative sexual assault to him. PW14, mother of "X", had also not stated that PW-1 ("X") had told her that the accused had made any sexual assault, far less aggravated sexual assault at any point of time to her. PW-14 stated that she does not have any complaint against the accused, while stating at the same time that the accused is not innocent. It will not be unreasonable to hold that a mother will definitely have complaint against a person if he had committed any sexual offence on her minor child. It is not clear what she meant when stated that the accused is not innocent – There is no ingredient of penetrative sexual assault in the evidence of PW-1. Evidence of PW-1 is that she had "physical relationship" with the accused 5/6 times. What is meant by "physical relationship" had not been explained.

"Physical relationship" maybe in very many ways. By a process of surmises and conjectures, "physical relationship" cannot be construed to mean penetrative sexual assault within the meaning of S. 3 of the POCSO Act – Held: Prosecution not able to establish the guilt of the accused beyond reasonable doubt. Impugned judgment set aside and accused acquitted, and set at liberty.

(Paras 30 and 32)

Appeal allowed.

JUDGMENT

The Judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

This appeal is presented against the judgment dated 29.11.2018 and order on sentence dated 30.11.2018, passed by the learned Special Judge (POCSO), West Sikkim at Gyalshing, in Sessions Trial (POCSO) Case No. 01 of 2018, convicting the accused/appellant under Section 5(l) of the Protection of Children from Sexual Offences Act, 2012, for short, 'the POCSO Act', punishable under Section 6 of the POCSO Act and sentencing him to suffer Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine, to suffer Simple Imprisonment for two months.

2. An FIR was lodged by the father of 'X' (name withheld) before the Station House Officer, Tikjuk Police Station on 31.12.2017 stating that his daughter, aged about 15 years, did not come back after she had gone for tuition and that she had eloped with the accused and they were then traced in Gangtok. It is stated that while investigating, it came to light that the accused had sexually assaulted his daughter several times. On receipt of the FIR, GD Entry No. 138 was registered and subsequently, Gyalshing Police Station Case No. 42 of 2017 under Section 363/376 of the Indian Penal Code, 1860, for short, the IPC read with Section 4 of the POCSO Act came to be registered against the accused (Exhibit-17). After completion of investigation, police submitted charge-sheet under Sections 363/376 of the IPC, read with Section 4 of the POCSO Act against the accused whereupon ST (POCSO) Case No. 01 of 2018 was registered in the Court of Special Judge (POCSO).

3. Statement of 'X' was recorded under Section 164 of Code of Criminal Procedure, 1973, for short, 'Cr. P.C.', before the learned Judicial Magistrate (I/C), West Sikkim at Gyalshing on 29.01.2018. Both 'X' and accused were also medically examined.

4. Upon hearing learned counsel for the parties and on perusal of the materials on record, charge was framed against the accused under Section 376(2)(i) of the IPC and under Section 5(l) of the POCSO Act punishable under Section 6 of the POCSO Act. When charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried.

5. The prosecution examined 16 witnesses while defence adduced no evidence. The accused was examined under Section 313 of Cr. P.C. where he took the plea of denial. The proceedings were held in camera.

6. Mr. Manish Kumar Jain, learned Legal Aid Counsel, has submitted that 'X', who was examined as PW1 did not implicate the accused either in her Section 161 Cr. P.C. statement or under Section 164 Cr. P.C. statement which was exhibited as Exhibit-1 and only in the Court, while deposing she had stated that she and the accused had 'physical relationship' 5/6 times and therefore, such evidence cannot be relied upon. Her father (PW13) and mother (PW14) also did not implicate the accused of any penetrative sexual assault or sexual assault upon their daughter. In any view of the matter, it cannot be inferred that 'physical relationship' means aggravated sexual assault within the meaning of Section 3 of the POCSO Act, he submits. He further submits that the evidence of PW1 cannot inspire confidence as it would be wholly unrealistic to accept her statement that she did not remember the month, if not the date of having such 'physical relationship', given that she was categorical in stating 05.07.2017 as the date when their affair had developed. Over and above, no material particulars with regard to such 'physical relationship' were given. He submits that learned trial Court had relied upon the evidence of PW1, the Doctor (PW9) who had examined 'X' and the Investigating Officer (PW16) in convicting the accused. He contends that there was nothing in the evidence of PW9 suggesting that there was penetrative sexual assault on 'X' and that statement made by PW9 that 'X' had given history of sexual assault with consent 5/6 times with the accused cannot form the basis of conviction when the evidence of PW1 is wholly untrustworthy. The evidence of PW16 also in no way establishes the guilt of the accused and the statement of

PW1 under Section 161 Cr. P.C. as stated by PW16 during cross-examination demonstrates that there was no allegation of sexual offence. Accordingly, he submits that the prosecution has failed to prove the guilt of the accused beyond any reasonable doubt and, as such, the accused is entitled to acquittal.

7. Ms. Mukun Dolma Tamang, learned Assistant Public Prosecutor, submits that on the basis of testimony of PW1 alone, conviction of the accused can be sustained. Further, PW9 had corroborated the evidence of PW1 and, therefore, no interference is called for with the impugned judgment.

8. We have considered the submissions of the learned counsel for the parties and have perused the evidence and the materials on record.

9. A perusal of the judgment of the learned trial Court goes to show that on the basis of evidence of PW1, PW9 and PW16, the learned trial Court had held that the accused had committed repeated penetrative sexual assault upon PW1.

10. Learned trial Court had put certain questions to 'X' and on receiving the response from the minor witness, learned trial Court observed that 'X' was competent to testify. In her evidence, she stated that she had appeared for Class X examination and that she came to know the accused who used to drive a vehicle of a neighbour from June, 2017. She had met the accused on 05.07.2017 near her house and, thereafter, they developed an affair and started meeting each other quite often. They planned to meet at Darap on 30.12.2017 to go to Gyalshing and accordingly, having met, they left for Rimbi in a truck driven by the accused. They came back to Gyalshing with a load of stone and then the accused had gone to his house, which was near a petrol pump, to change and during that time she waited near the petrol pump. Thereafter, they went to Gangtok and reached the house of the uncle of the accused (PW6) at Bhojoghari. As her phone battery was dead, she took out the SIM card from her phone and put the same in the phone of the uncle of the accused. She received a phone call from her father who enquired her whereabouts and after informing him where she was, she disconnected the phone. As the accused told her that her parents must be worried about her, they decided to go to Sadar Police

Station, Gangtok and accordingly, she, along with the accused, his uncle and aunt went to the Police Station on the very same day that they had reached Gangtok. The elder brother of her father was waiting at the Police Station and while they were waiting for her parents to come, the accused was taken for medical examination. After her parents had arrived, they went to Tikjuk Police Station, where her statement was recorded by police. She stated that during the time when she was having an affair with the accused, they had 'physical relationship' for about 5-6 times, but she did not remember the date and month of such physical relationship, though such physical relationship was in the year 2017. She also exhibited her statement under Section 164 Cr. P.C. as Exhibit-1. She deposed that her date of birth is 14.11.2002 and she had exhibited her Birth Certificate as Exhibit-3.

In her cross-examination, she stated that one Lalita had called her over phone once and had told her that she was already married to the accused, upon which, she told her that since she had feelings for the accused, she wanted to keep relation with him. She reiterated that she and the accused were close to each other and that she stated the truth in Exhibit-1. She also stated that the accused had wanted her to go back home on 30.12.2017, but it was she who had asked him to take her to Gangtok. She stated that the accused had never threatened her or put her under any kind of pressure. She further stated that she harboured a doubt that the accused was having affair with other girls and that he might marry somebody else. She denied the suggestion that she did not have any sexual contact and also the suggestion that as she was infatuated with the accused and as he did not respond favourably to her, she had made the false allegations.

11. PW2 is a friend of PW1 and they were studying together. She stated that on 30.12.2017, she saw PW1 outside the gate of the school and she having asked her to come inside, PW1 said that she was waiting for a person. When PW2 told that her parents will reprimand her if she was found going around with a person, PW1 told her that she would come to the class after some time. During roll call, she told the teacher (PW3) that PW1 was outside the school gate and, on being so told, PW3 had gone out looking for PW1. This witness was not cross-examined.

12. PW3 is the teacher who was referred to by PW2 and he corroborated the statements of PW2. He was also not cross-examined.

13. PW4 stated that the accused used to drive the vehicle of her neighbour and at one point of time, she had rented out a room to the accused, but he left the said room on 08.07.2017. She was also not cross-examined.

14. PW5, in his evidence, stated that the accused used to drive his vehicle for 24 days and during that time, he used to stay in the rented house of PW4.

In cross-examination, he, however, stated that he was not sure whether the accused used to stay in the rented house of PW4.

15. PW6 is the uncle to whose house the accused had gone along with PW1. He stated that at around 09.30 pm, he received a phone call from the father of the accused, who enquired of him as to whether the accused and PW1 had come to his house. He, accordingly, had informed him that they had come. Father of PW1 also called him and had requested him to take the accused and the girl to Sadar Police Station, Gangtok and accordingly, he had taken them to the Police Station.

In his cross-examination, he stated that they did not stay in his house for the night and that PW1 had told him that she came with the accused on her own free will. He denied the suggestion that the father of the girl did not call him and had not requested him to take them to the Police Station.

16. PW7 is a witness to the Seizure Memo (Exhibit-4) by which Birth Certificate of PW1 was seized. He denied the suggestion that he did not sign in Exhibit-4.

17. PW8 is another witness to the Seizure Memo, Exhibit-4. He also denied the suggestion that he did not sign the Seizure Memo.

18. PW9 is the Gynaecologist posted at District Hospital, Gyalshing, West Sikkim. She deposed that on 31.12.2017, at around 10.00 am, a girl aged about 15 years was forwarded by the Gyalshing Police Station with alleged history of sexual assault by the accused. The girl stated that she eloped with the accused on 30.12.2017 and she also gave history of sexual assault with consent several times since 5-6 months. She stated that there

were old hymeneal tears present at 3, 6 and 9 O Clock position, which, according to her, was suggestive of injury in the past. Laboratory report did not indicate presence of motile or non-motile spermatozoa. She had exhibited the Medical Report prepared by her as Exhibit-5.

In her cross-examination, she stated that hymeneal tear in female child can also occur due to activities like sports and physical tasks.

19. PW10 is the District Medical Superintendent-cum-Registrar of Birth & Deaths of Gyalshing District Hospital. He stated that on a requisition of the Investigating Officer of the case, he issued a letter certifying the authenticity of the Birth Certificate of PW1, showing her date of birth as 14.11.2002 and date of registration as 21.11.2002. He had also issued certificate of authenticity of Birth Certificate of the accused showing his date of birth as 24.08.1998 and date of registration as 08.09.1998. He had exhibited as Exhibit-19, the Medical Report in respect of the accused, which was prepared by Dr. Srijana Subba.

20. PW11 is the Principal of the School where PW1 was studying and she had stated that on a requisition given to her, she had, after verifying school records, intimated a Sub-Inspector of Police that the date of birth of PW1 was 14.11.2002.

21. PW12 is the Chief Judicial Magistrate, who was also In-Charge of the Court of Judicial Magistrate, West Sikkim, Gyalshing. She deposed that she had recorded the statement of 'X' under Section 164 Cr. P.C. and before such recording, she had satisfied herself that 'X' desired to give her statement voluntarily.

In her cross-examination, she stated that the victim had not made any allegation of sexual assault in Exhibit-1.

22. PW13, the father of 'X' and the informant stated that as 'X' did not return from her tuition they searched in the nearby localities and they suspected that the accused may have taken his daughter and accordingly, verbally reported the matter to Darap Police Out-post. On the same very day, at night, they came to learn that the accused had taken his daughter to his uncles house at Gangtok. As Gangtok Sadar Police Station found his daughter along with the accused, they went there and brought them back to

Gyalshing Police Station. He stated that his daughter was born in the year 2002.

In his cross-examination, he stated that he was aware of the fact that his daughter was having an affair with the accused and that his daughter had not stated anything adverse against the accused. He denied the suggestion that he was informed by the father of the accused that his daughter and accused were in Gangtok.

23. PW14, the mother of 'X' stated that as 'X' did not return home after tuition, they looked for her in the nearby localities and they suspected that the accused had taken her daughter and accordingly, the matter was reported to Darap Police Out-post. On the same very night, they came to learn that the accused had taken her daughter to his uncles house at Gangtok. Gangtok Sadar Police found her daughter and the accused and accordingly, they went to Sadar Police Station, Gangtok and brought her daughter to Gyalshing Police Station. She also stated that 'X' was born during the year 2002.

In her cross-examination, she stated that on being asked once prior to the incident, X denied having any relationship with the accused. She also deposed that the accused was seen with another girl prior to the incident. She further stated that she does not have any complaint against the accused person.

24. PW15 was the Station House Officer of Gyalshing Police Station at the relevant point of time. He stated about the registration of the FIR lodged by the father of 'X', as Exhibit-17. He stated that PW13 had brought the victim and the accused to the Police Station.

25. PW16 is the Investigating Officer of the case. She deposed about the various steps taken by her during investigation. She stated that she had recorded the statement of witnesses under Section 161 Cr. P.C. She stated that 'X' proceeded to Gyalshing Bazaar in a tipper, which was driven by the accused and he took the victim to Gangtok in a tourist vehicle without informing anyone and stayed in the house of PW6. After strenuous search, the accused and the victim were traced early morning and they were produced at Gyalshing Police Station. It is further stated by her that during the course of investigation it was revealed that at around 12.00 hours, in the

afternoon, the complainant (father of the child victim) had seen the accused driving the tipper bearing No. SK-02D/0238 and proceeding towards Darap Bazar and he suspected that the accused had come to meet his daughter. While the accused was working in Darap as a driver there was rumour that they had an affair. As such the complainant inquired about his daughter from her tuition teacher and at around 16.30 hours, he came to know that his daughter did not go for tuition. Accordingly, the entire family then started searching for 'X'. She also stated that the accused used to call 'X' to his rented room of PW4 and 'X', unaware of the intention of the accused, had visited his room, wherein the accused used to sexually assault the child victim. It is also stated that when 'X' came to learn that her parents were searching for her she along with the accused went to Sadar Police Station, from where they were brought back to Gyalshing. She stated that the statement of victim under Section 161 Cr. P.C. and medical report of the victim suggested that she was sexually assaulted multiple times in the past.

In her cross-examination, she stated that the victim in her statement under Section 161 Cr. P.C. had stated that when she and the accused had just reached Gangtok, they received a phone call at 10.30 pm informing that her parents were looking for her and then both of them were taken to Sadar Police Station, Gangtok by the uncle of the accused (PW6). She denied the suggestion that there was no sexual contact between 'X' and the accused and she also denied the suggestion that the accused did not sexually assault her in his rented room.

26. That PW1 was a minor at the relevant time, aged about 15 years, is not disputed by Mr. Jain. The accused was, at the relevant time, aged about 19 years. It appears that it was PW1, who had asked the accused to take her to Gangtok, though the accused wanted her to go back home on 30.12.2017. It is evident from the evidence of PW1 that she had a soft corner and feelings for the accused. Though PW16, Investigating Officer, during her deposition, at one stage, had stated that after strenuous search the victim and the accused were traced next morning, in subsequent stage, she stated that PW1 and accused person themselves had gone to the Sadar Police Station, Gangtok after PW1 came to learn that her parents were searching for them. PW6 stated that father of the accused as well as father of PW1 had called him on that day and he had taken the accused and PW1 to the Sadar Police Station on the request made by father of PW1.

Though PW13 and PW14 had stated that they had come to know that the accused had taken his daughter to the house of PW6 at Gangtok, they did not divulge the source from which they came to know about the same. Deposition of PW13 makes it clear that he was aware that the accused and his daughter were having an affair.

27. This episode of accused and PW1 coming to Gangtok is not very relevant for the purpose of this case.

28. The appellant was convicted under Section 5 (l) of the POCSO Act, i.e. on the ground he had committed penetrative sexual assault on the child more than once or repeatedly. Penetrative sexual assault is defined as follows:

> "**3. Penetrative sexual assault**.- A person is said to commit "penetrative sexual assault" if-
>
> (a) 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; or
>
> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
>
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
>
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

29. It will also appropriate to note the definition of „sexual assault as per Section 7, which reads as follows:

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

30. Though PW13 in his FIR had stated that the accused had sexually assaulted his daughter several times, in his evidence as PW13, he was conspicuously silent about such allegation and rather, in his cross-examination, had stated that his daughter had not stated anything adverse against the accused. Logical conclusion will be that PW1 had not stated anything about any sexual assault or penetrative sexual assault to him. PW14, mother of 'X', had also not stated that PW1 had told her that the accused had made any sexual assault, far less aggravated sexual assault at any point of time to her. PW14 stated that she does not have any complaint against the accused, while stating at the same time that the accused is not innocent. It will not be unreasonable to hold that a mother will definitely have complaint against a person if he had committed any sexual offence on her minor child. It is not clear what she meant when stated that the accused is not innocent.

31. In her evidence, PW16 did not state on the basis of whose statement she came to learn that the accused used to call PW1 to his rented room and sexually assaulted her. There is no evidence to that effect in the depositions of any of the witnesses examined on behalf of the prosecution. From her cross-examination, it would appear that PW1, in her Section 161 Cr. P.C. statement, had only stated that when she and accused had reached Gangtok there was a phone call at 10.30 pm stating that her parents were looking for her and then both were taken to Sadar Police Station by the uncle of the accused (PW6).

Evidence of PW16 does not in any manner lead to a possible conclusion that the accused is guilty of the offence alleged.

32. There is no ingredient of penetrative sexual assault in the evidence of PW1. Evidence of PW1 is that she had 'physical relationship' with the

accused 5/6 times. What is meant by 'physical relationship' had not been explained. 'Physical relationship' may be in very many ways. By a process of surmises and conjectures, 'physical relationship' cannot be construed to mean penetrative sexual assault within the meaning of Section 3 of the POCSO Act. PW9 in her evidence had stated that PW1 had given a history of sexual assault with consent several times. As such, it may be contended that PW1 being a minor, physical relationship comes within the ambit of sexual assault as defined under Section 7 of the POCSO Act.

33. In her statement recorded under Section 164 Cr. P.C. (Exhibit-1) on 29.01.2018, PW1 had stated as follows:

> "On 30.12.2017 myself and my boyfriend, Dipesh decided to meet at Darap. After we met we came to Geyzing. It got late so we went towards Gangtok where we stayed at the house of his *Kaka*. My mother called me up and asked me where I was. After that Dipesh told me that my mother was very worried so we went to Sadar Thana and from there we were brought to Geyzing."

34. It is seen from the above that PW1 did not make any allegation of aggravated sexual assault or sexual assault or of any other sexual offence against 'X'. PW1 had stated that Exhibit-1 contained her true statement. Materials on record demonstrate that PW1 did not make allegation of sexual assault of any kind in her statement under Section 161 Cr. P.C also. In such circumstances, we find it difficult to accept the testimony of PW1, when she, for the first time, talked about a 'physical relationship' with the accused. In the aforesaid context, evidence of PW9 cannot form the basis of conviction for sexual assault also.

35. In view of the above discussion we are of the opinion that the prosecution has not been able to establish the guilt of the accused beyond reasonable doubt. Accordingly, the impugned judgment is set aside and the accused is acquitted and set at liberty.

36. Lower Court records be sent back.

SLR (2020) SIKKIM 284

(Before Hon'ble the Chief Justice)

W.P. (C) No. 16 of 2019

Mr. Choda Bhutia and Others ….. PETITIONERS

Versus

State of Sikkim, Through the Secretary, Human Resources & Development Department, Government of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. A.K. Upadhyaya, Senior Advocate.

For Respondents 1-2: Dr. Doma T. Bhutia, Additional Advocate General with Mr. Zigmee Bhutia, Advocate.

For Respondents 3-51: Mr. Zangpo Sherpa, Advocate.

Date of decision: 23rd March 2020

A. Human Resource Development Department (Pre-Primary Teachers, Primary Teachers, Graduate Teachers and Post Graduate Teachers) Recruitment Rules, 1991 – A candidate has a limited right for being considered for selection in accordance with rules, which existed on the date of the advertisement – Relevant rule on the date of the advertisement prescribed for filling-up the posts of PGT by 100% direct recruitment. The Notification dated 03.04.2018 is prospective in nature. It is immaterial that written test was held after Notification dated 03.04.2018 was issued – The petitioners participated in the selection process and waited till the declaration of the final select list. They had not raised an issue that in view of the Notification dated 03.04.2018, the selection process initiated by the advertisement dated 22.08.2017, needed to be cancelled and a fresh selection process is to be started. Likewise, if they had any grievance with regard to change of total marks and duration of the written test, they should

have agitated the matter, at least, immediately after the written test was over. Whether or not they had raised any objection during the examination, in the attending fact and circumstances, pales into insignificance in view of the subsequent course of action adopted by the writ petitioners. They waited for the publication of the result of the written test – Even in the first legal notice, no grievance was articulated with regard to the selection process and all that was said was that having regard to their performance, they ought to have been selected. It was only in the legal notice dated 30.03.2018 (sic 2019), which was issued recalling back the earlier legal notice, that the aspects regarding Notification dated 03.04.2018 and change of marks and duration of examination time were raised. It is crystal clear from the decision in *Ashok Kumar* and the number of judgments referred to therein that a candidate, who had willingly participated in a selection process cannot turn around and complain that the process of selection was wrong or unfair or not in accordance with law after knowing of his or her non-selection. The principles of estoppel operate against such candidates. The candidates cannot be allowed to approbate and reprobate at the same time.

(Paras 24 and 25)

Petition dismissed.

Chronology of cases cited:

1. Maharashtra State Road Transport Corpn. and Others v. Rajendra Bhimrao Mandve and Others, (2001) 10 SCC 51.

2. Sivanandan C.T. and Others v. High Court of Kerala and Others, (2018) 1 SCC 239.

3. Ashok Kumar and Another v. State of Bihar and Others, (2017) 4 SCC 357.

4. N.T. Devin Katti and Others v. Karnataka Public Service Commission and Others, (1990) 3 SCC 157.

5. Secretary (Health) Department of Health & F.W. and Another v. Dr. Anita Puri and Others, (1996) 6 SCC 227.

6. Manjusree v. State of A.P, (2008) 3 SCC 512.

7. Tej Prakash Pathak v. Rajasthan High Court, (2013) 4 SCC 540.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. A. K. Upadhayaya, learned senior counsel for the petitioners. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General, Sikkim appearing for respondents no. 1 & 2 and Mr. Zangpo Sherpa, learned counsel appearing for respondents no.3 to 51.

2. The respondent no.2 published an advertisement dated 22.08.2017, inviting applications from eligible candidates for filling up 233 numbers of posts, out of which 34 posts were earmarked for Post-Graduate Teacher (PGT) language, 31 posts for Graduate Teacher (GT) language and 168 posts for Primary Teacher (PT) in different languages. The qualification prescribed in PGT, as prescribed in the advertisement, was Master degree from a recognized university with minimum of 50% marks (45% for reserved category) and concerned language as Elective/MIL/Honours in Secondary, Senior Secondary and Graduation level. 34 posts of PGT were again divided into three categories – PGT in Bhutia Language, PGT in Lepcha Language and PGT in Limboo Language. 8, 13, 13 posts were earmarked for PGT in Bhutia Language, PGT in Lepcha Language and PGT in Limboo Language, respectively.

3. The petitioners, being eligible, applied for PGT in different languages. Petitioners no.1 to 17 applied for PGT in Bhutia Language, petitioners no. 18 to 24 had applied for PGT in Lepcha Language and petitioners no.25 to 42 (wrongly written as 43 as there are only 42 writ petitioners) had applied for PGT in Limboo Language. They were issued admit cards and they had also taken the written examination held on 04.11.2018. A merit list of candidates qualifying in written examination was published, which included names of the petitioners. They were also called for viva-voce.

4. Petitioners no.1 to 17 appeared for viva-voce on 28.11.2018, petitioners no.18 to 24 on 29.11.2018 and petitioners no.25 to 42 on 30.11.2018. All of them also gave class-room demonstration. The final merit list for the selected candidates in respect of PGT Language was published on 06.02.2019, wherein the petitioners had not come out successful.

5. The Writ Petition was filed on 18.04.2019 with defects and the same was re-submitted on 10.06.2019.

6. The grievance articulated in the Writ Petition is that the questions for the written examination were not based on the syllabus provided by the respondent no.2 and that in view of a Notification dated 03.04.2018, recruitment to the post of PGT Language should have been made by way of direct recruitment through written examination to the extent of 70% and balance 30% by promotion through written examination and viva-voce. It is stated that they had raised objection in the examination hall itself and had appeared in the written examination without prejudice to their rights. Though rules of examination visualized maximum marks of 25 each in the subjects of General Knowledge and General English with duration of 40 minutes for each subject, questions were set for 100 marks in total and duration of examination was increased to three hours from the earlier allotted duration of 1 hour 20 minutes and such change came to be known to the petitioners only in the examination hall. It is also pleaded that candidates having Master degree in general subjects were given first preference and that candidates having Master degree in concerned subject/language were not given preference. The petitioners had raised grievances before the authorities, but to no avail. They prayed for setting aside advertisement dated 22.08.2017, cancelling the entire selection process for the PGT Language as well as the selection of respondents no.3 to 51 and directing the respondents no.1 and 2 to start a fresh selection process in terms of Notification dated 03.04.2018 after re-advertising the posts.

7. The respondent no.1 had filed a counter-affidavit stating that the petitioners had taken part in the entire selection process without any protest and/or objection and, therefore, they are estopped from challenging the selection process after declaration of the result. It is pleaded that Notification dated 03.04.2018 is meant for future recruitment and that same is not applicable to the case of the petitioners as the advertisement pursuant to which the petitioners had taken part in selection process was issued prior to issuance of such Notification. It is further pleaded that selection of the private respondents had been done purely on merit by following due selection process. It is denied that the petitioners had raised any objection during the written test. The assertion of the petitioners that the candidates having Master degree in general subjects were given first preference is categorically denied.

8. The respondent no.2, in its counter-affidavit dated 29.06.2019, has stated that the vacancies were to be filled up by direct recruitment for the

posts of PGT in different languages. It is stated that no objections were raised when the written examination was held and no protest/objection was raised by the petitioners even after declaration of result of written examination and they had duly participated in the viva-voce test. As the selection test was same for all the candidates in their respective languages, no prejudice was caused to any of the candidates. Only after the petitioners had failed to qualify in the selection test, they have turned around and assailed the selection process. Even on the first legal notice, no grievance was raised with regard to any aspect of the selection process and it was only emphasized that respondents no.3 to 51 deserve selection in their respective language categories as they had put in best performance.

9. The respondents no.3 to 51 had also filed a counter-affidavit stating that on 23.03.2018, date for submission for application for the posts of PT, GT and PGT in Bhutia, Lepcha and Limboo Languages was extended with effect from 26.02.2018 to 15.03.2018 and that on 29.09.2018, posts in PGT in Bhutia Language, Lepcha Language and Limboo Language were increased to 14, 19 and 16, respectively. It is stated that an Office Order dated 11.06.2019 was issued in favour of respondents no.3 to 51, appointing them to the posts of PGT for which they had applied and they had joined their duties in their respective places. It is averred that Notification dated 03.04.2018 is not applicable as the advertisement was issued on 22.08.2017 and that the petitioners, having participated in selection process without any demur, cannot now challenge the selection process.

10. The petitioners had also filed rejoinder-affidavit to the counter-affidavit(s) filed by respondents no.1, 2 and 3 to 51, reiterating the stand taken in the Writ Petition and stating that as the date of written examination was fixed on 04.11.2018, which was subsequent to the issuance of Notification dated 03.04.2018, the recruitment process was liable to be governed by the aforesaid Notification dated 03.04.2018.

11. Mr. A. K. Updhayaya, learned senior counsel appearing for the petitioners, has submitted that even though the advertisement was issued prior to the Notification dated 03.04.2018, as written test was notified to be held on 04.11.2028, the respondent authorities acted illegally and arbitrarily in not following the prescription as laid down in Notification dated 03.04.2018. He has submitted that the respondents changed the rules of the

game so far as the written examination is concerned by increasing total marks and duration of the written test, and the same had taken the petitioners by surprise, having seen such change in the examination hall. He, accordingly, submits that the entire selection process is vitiated. It is submitted by him that when the entire selection process is vitiated, the petitioners can successfully challenge the selection process though such challenge was made after publication of the result. In support of his submissions, learned senior counsel placed reliance on the judgments of the Hon'ble Supreme Court in the cases of ***Maharashtra State Road Transport Corpn. and Others*** Vs. ***Rajendra Bhimrao Mandve and Others,*** reported in ***(2001)10 SCC 51*** and ***Sivanandan C.T. and Others*** Vs. ***High Court of Kerala and Others***, reported in ***(2018) 1 SCC 239***.

12. Abiding by the stand taken in the affidavit filed, Dr. Doma T. Bhutia, learned Additional Advocate General, has submitted that if the petitioners were really aggrieved by increase of the total marks and duration of time for the written test, they ought to have raised their grievance at least immediately after taking part in the written examination. On being duly selected in the written examination, they did not raise any issue and only when they found that they had not finally been selected after viva-voce, they have sought to raise such an issue. She submits that the recruitment process was started with the issuance of advertisement dated 22.08.2017, which was much prior to the issuance of Notification dated 03.04.2018 and, therefore, the plea taken by the petitioners that selection ought to have been conducted by following the same is not tenable in law. She had placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Ashok Kumar and Another*** Vs. ***State of Bihar and Others***, reported in ***(2017) 4 SCC 357***.

13. Mr. Zangpo Sherpa, learned counsel appearing for private respondents no.3 to 51, has submitted that the Human Resource Development Department (Pre-Primary Teachers, Primary Teachers, Graduate Teachers and Post Graduate Teachers) Recruitment Rules, 1991 (for short, Rules of 1991), as amended vide Notification dated 29.04.2017, which was holding the field at the time when the advertisement was issued, provided for 100% direct recruitment through written examination and viva-voce for the post of PGT and the same was also duly notified in the advertisement and, therefore, the contention advanced by the petitioners that selection process should have been in terms of Notification dated

03.04.2018 is untenable. Endorsing the submission of Dr. Doma T. Bhutia, he also contends that the petitioners, in the facts and circumstances, are estopped from questioning the selection process and the appointment of the private respondents no.3 to 51. In support of his submissions, he placed reliance on the judgments of the Hon'ble Supreme Court in the cases of ***N.T. Devin Katti and Others*** Vs. ***Karnatakan Public Service Commission and Others***, reported in ***(1990) 3 SCC 157*** and ***Secretary (Health) Department of Health & F.W. and Another*** Vs. ***Dr. Anita Puri and Others,*** reported in ***(1996) 6 SCC 227***.

14. I have considered the submissions of learned counsel for the parties and have perused the materials on record.

15. At the very outset, it is to be noted that the allegation of the petitioners that initially the written test in the subjects of General Knowledge and General English were to be held for 25 marks each with duration of 40 minutes each and that subsequently the same was changed to total of 100 marks with duration of three hours is not disputed in the affidavit(s) of the respondents. There is no explanation in the affidavit filed, either by the respondent no.1 or by the respondent no.2, as to what had necessitated such change. Whether change, in the attending facts and circumstances, can be held to have vitiated the selection process would be considered at a later point of time. However, what needs to be emphasized is that in the matter of holding of examination, the authorities have to be sensitive as the prospective examinees are always under some amount of stress and changes should not be brought about in the selection process in a causal manner.

16. Before proceeding further, it will be appropriate to take note of the judgments cited at the Bar.

17. The Hon'ble Supreme Court in ***N. T. Devin Katti*** (supra) had laid down that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules, which existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection process unless the amended rules are retrospective in nature.

18. In ***Dr. Anita Puri*** (supra), one of the questions that had fallen for consideration was whether sub-division of marks by the Public Service Commission on different facets and awarding only 2½ marks for higher qualification can be said to be arbitrary? This question has not fallen for consideration in this case as it is not the case of any of the parties that any mark on account of weightage for higher qualification was earmarked.

19. In ***Maharashtra State Road Transport Corpn.*** (supra), the Hon'ble Supreme Court held that the rules of the game, meaning thereby, the criteria for selection cannot be altered by the authorities concerned in the middle or after the selection process has commenced.

20. In ***Ashok Kumar*** (supra), the Hon'ble Supreme Court has held as follows:-

> ***"12.*** *The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.*
>
> ***13.*** *The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla [Chandra Prakash Tiwari v. Shakuntala Shukla, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar [Union of India v. S. Vinodh Kumar,*

(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , this Court held that: (SCC p. 107, para 18)

> *"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See Munindra Kumar v. Rajiv Govil [Munindra Kumar v. Rajiv Govil, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and Rashmi Mishra v. M.P. Public Service Commission [Rashmi Mishra v. M.P. Public Service Commission, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345].)"*

14. *The same view was reiterated in Amlan Jyoti Borooah [Amlan Jyoti Borooah v. State of Assam, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.*

15. *In Manish Kumar Shahi v. State of Bihar [Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , the same principle was reiterated in the following observations: (SCC p. 584, para 16)*

> *"16. We also agree with the High Court [Manish Kumar Shahi v. State of Bihar, 2008 SCC OnLine Pat 321 : (2009) 4 SLR 272] that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not*

have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in Madan Lal v. State of J&K [Madan Lal v. State of J&K, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] , Marripati Nagaraja v. State of A.P. [Marripati Nagaraja v. State of A.P., (2007) 11 SCC 522 : (2008) 1 SCC (L&S) 68] , Dhananjay Malik v. State of Uttaranchal [Dhananjay Malik v. State of Uttaranchal, (2008) 4 SCC 171 : (2008) 1 SCC (L&S) 1005 : (2008) 3 PLJR 271] , Amlan Jyoti Borooah v. State of Assam [Amlan Jyoti Borooah v. State of Assam, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] and K.A. Nagamani v. Indian Airlines [K.A. Nagamani v. Indian Airlines, (2009) 5 SCC 515 : (2009) 2 SCC (L&S) 57] ."

16. *In Vijendra Kumar Verma v. Public Service Commission [Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150 : (2011) 1 SCC (L&S) 21] , candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.*

17. *In Ramesh Chandra Shah v. Anil Joshi [Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309 : (2011) 3 SCC (L&S) 129] , candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)*

> *"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."*

18. *In Chandigarh Admn. v. Jasmine Kaur [Chandigarh Admn. v. Jasmine Kaur, (2014) 10 SCC 521 : 6 SCEC 745] , it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey [Pradeep Kumar Rai v. Dinesh Kumar Pandey, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274] , this Court held that: (SCC p. 500, para 17)*

> *"17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview*

and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in Madras Institute of Development Studies v. K. Sivasubramaniyan [Madras Institute of Development Studies v. K. Sivasubramaniyan, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462] .

19. *In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the impugned judgment [Anurag Verma v. State of Bihar, 2011 SCC OnLine Pat 1289.] that the interpretation of Rule 6 was not free from vagueness. There was, in other words, no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90 : 10 allocation.***"***

21. In ***Sivanandan C.T.*** (supra), the Hon'ble Supreme Court took note of the observation in the case of ***K. Manjusree v. State of A.P.***, reported in ***(2008) 3 SCC 512***, wherein the Hon'ble Supreme Court had held that introduction of the requirement of the minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played, which is clearly impermissible. However, the correctness of the decision rendered in ***K. Manjusree*** (supra) was doubted in ***Tej Prakash Pathak*** v. ***Rajasthan High Court***, reported in ***(2013) 4 SCC 540***, and reference was made to a larger Bench. In view of the same, the case of ***Sivanandan C.T.*** (supra) was also referred to a larger Bench to be heard along with ***Tej Prakash Pathak*** (supra).

22. Rules of 1991, as amended, which was in force when the advertisement was issued, provided for 100% direct recruitment through written examination and viva-voce for the post of PGT. The advertisement dated 22.08.2017 also made it explicitly clear that the posts were to be filled up by direct recruitment. Although, initially 34 posts (8 posts for Bhutia Language, 13 for Lepcha Language and 13 for Limboo Language) were notified in the advertisement, subsequently, number of posts for Bhutia Language, Lepcha Language and Limboo Language was increased to 14, 19 and 16, respectively and the select list dated 06.02.2019 in respect of PGT Language also correspondingly contains names of 14, 19 and 16 candidates.

23. The Notification dated 03.04.2018 states that the rules and the schedule for appointment of Primary language teachers, Graduate language teachers and Post-Graduate language teachers as per the amended Recruitment Rules, 2018 shall come into force with immediate effect. By the said Notification, two methods were provided for filling up the posts of PGT: 70% by direct recruitment through written examination and viva-voce by Sikkim State Teachers Recruitment Board (for short, SSTRC) and 30% by promotion through written examination and viva-voce by SSTRC.

24. A candidate has a limited right for being considered for selection in accordance with rules, which existed on the date of the advertisement. At the cost of repetition, it is stated that relevant rule on the date of the advertisement prescribed for filling up the posts of PGT by 100% direct

recruitment. The Notification dated 03.04.2018 is prospective in nature. It is immaterial that written test was held after Notification dated 03.04.2018 was issued.

25. There is another facet. What cannot be lost sight of the fact is that the petitioners participated in the selection process and waited till the declaration of the final select list. They had not raised an issue that in view of the Notification dated 03.04.2018, the selection process, initiated by the advertisement dated 22.08.2017, needed to be cancelled and a fresh selection process is to be started. Likewise, if they had any grievance with regard to change of total marks and duration of the written test, they should have agitated the matter, at least, as submitted by Dr. Doma T. Bhutia, immediately after the written test was over. Whether or not they had raised any objection during the examination, in the attending fact and circumstances, pales into insignificance in view of the subsequent course of action adopted by the writ petitioners. They waited for the publication of the result of the written test. They having come out successful, appeared in the viva-voce and also participated in class-room demonstration. Even in the first legal notice dated 05.03.2018 (evidently year has wrongly been typed as 2018. It should have been 2019), no grievance was articulated with regard to the selection process and all that was said was that having regard to their performance, they ought to have been selected. It was only in the legal notice dated 30.03.2018 (again year is wrongly typed as 2018 instead of 2019), which was issued recalling back the earlier legal notice, that the aspects regarding Notification dated 03.04.2018 and change of marks and duration of examination time were raised. It is crystal clear from the decision in ***Ashok Kumar*** (supra) and the number of judgments referred to therein that a candidate, who had willingly participated in a selection process, cannot turn around and complain that the process of selection was wrong or unfair or not in accordance with law after knowing of his or her non-selection. The principles of estoppel operate against such candidates. The candidates cannot be allowed to approbate and reprobate at the same time.

26. In view of the above discussions, I find no merit in this petition and, accordingly, the same is dismissed.

27. No cost.

SLR (2020) SIKKIM 298

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

W.A. No. 02 of 2018

The Sikkim University and Another ….. APPELLANTS

Versus

Dr. Vaidyanathan Krishna Ananth and Another ….. RESPONDENTS

For the Appellants: Dr. Doma T. Bhutia and Mr. Manish Kumar Jain, Advocates.

For Respondents 1: Dr. Vaidyanathan Krishna Ananth, in person.

For Respondents 3: Mr. Thinlay Dorjee Bhutia, Advocate.

Date of decision: 24th March 2020

A. Constitution of India – Article 226 – A necessary party is one in whose absence a writ petition cannot be effectively adjudicated – No right of the selected candidates was sought to be impinged in the writ petition. The core question was whether an additional norm of eligibility was laid down at all by the University and if so, whether the same was done in accordance with law. The University and the Vice-Chancellor had been made parties and rightly so, as they are certainly necessary parties. Having regard to the contour of the controversy raised in the writ petition, the learned Single Judge was wholly justified in rejecting the preliminary objection that in absence of necessary party, the writ petition is liable to be dismissed.

(Para 22)

B. Constitution of India – Article 226 – There cannot be any impediment for a writ appellate Court to take note of a document in the

interest of justice if the document, though subsequent in point of time, can throw light to the controversy – It is well-settled that in the facts and circumstances of a case, a writ Court will be justified to mould the relief for ends of justice.

(Paras 28 and 41)

C. University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 – What falls for consideration is whether the University had laid down an additional criterion for promotion under CAS from Stage-IV to Stage-V in addition to norms under UGC Regulations – It is virtually the admitted position that but for the additional criterion stated to have been laid down by the University, the writ petitioner had qualified in terms of the UGC regulations. Annexure-1 of the counter-affidavit of the respondents no. 1 and 2 is not dated. Given the importance of the issue, it is, to say the least, very surprising. Content of the same is very vague. It is not indicated when such an additional norm was "established" by the Vice Chancellor. All that is said is that the norm was "established" since 2015. That is the only document that was brought on record by the appellants relating to laying down of additional norm. There is an unequivocal admission in Annexures-A1 and A2 that the additional norm was not notified by the University. It is also admitted therein that Executive Council approved the above policy only on 29.06.2018. In view of the above, this Court is of the unhesitant opinion that even if a policy laying down additional norm was formulated, without notifying the same and without due approval, it could not have been acted upon. It was in that context the learned Single Judge had noted that the same was non-est in law – Appellants also failed to reconcile how Circular No. 13/2017 dated 07.03.2017, wherein while inviting applications for promotion under CAS, additional criterion of experience of guiding research scholars to Ph.D. was not mentioned, and Annexure-1 of the counter-affidavit of the appellants can stand together – Six candidates who were promoted under CAS may not have questioned application of additional norm. That does not mean the writ petitioner has to follow suit. He can certainly articulate his grievance in accordance with law. When this Court has held that additional criterion could not have been applied during the relevant time when the application of the petitioner for CAS was initially under consideration, an argument cannot

be countenanced that the eligibility of the writ petitioner cannot be considered on a lesser yardstick as compared to other candidates in the fray.

(Paras 35, 36 and 37)

Appeal dismissed.

Chronology of cases cited:

1. Maharashtra State Board of Secondary and Higher Secondary Education and Another v. Paritosh Bhupeshkumar Sheth and Others, (1984) 4 SCC 27.
2. Dalpat Abasaheb Solunke and Others v. Dr. B.S. Mahajan and Others, (1990) 1 SCC 305.
3. The Chancellor and Another v. Dr. Bijayananda Kar and Others, (1994) 1 SCC 169.
4. Union of India and Others v. K.V. Jankiraman and Others, (1991) 4 SCC 109.

JUDGMENT

The Judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

This writ appeal is preferred against the judgment and order dated 06.03.2018 passed by the learned Single Judge in whereby the writ petition filed by the respondent no. 1 as writ petitioner was allowed.

2. We have heard Dr. Doma T. Bhutia, learned counsel appearing for the appellants. We have also heard respondent no.1, who has appeared in-person, and Mr. Thinlay Dorjee Bhutia, learned counsel appearing for respondent no.2.

3. The writ petitioner essentially raised a grievance regarding non-consideration of his case under Career Advancement Scheme (for short, CAS) of the Sikkim University from Stage-IV to Stage-V, i.e., from Associate Professor to Professor. According to him, though he fulfilled the eligibility criteria in terms of University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in

Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010 (for short, UGC Regulations), his case was not considered.

4. For the present, to understand the core controversy, suffice it is to say that an e-mail was sent by the Registrar of the appellant University to the writ petitioner in connection with his CAS application informing him that though on scrutiny it was found that while he qualified on all other points, the Committee had observed that he had not attached with the application any documentary proof establishing the fact of his supervising award of Ph.D. and, accordingly, requesting him to send scanned copy of any documentary evidence of successfully supervising Ph.D. at the earliest. Stand of the University is that it is permissible for the university to prescribe norms over and above the UGC Regulations and that accordingly, additional criterion was laid down to the effect that Associate Professors shall be considered for promotion to the post of Professors under CAS only after they acquire the experience of guiding research scholars of Doctoral Level. The writ petitioner disputed laying down of the additional norm.

5. It will be relevant to note that 2nd, 3rd and 4th amendment of UGC Regulations, which are relevant for the purpose of consideration of this appeal, came into effect on 13.06.2013, 04.05.2016 and 11.07.2016, respectively.

6. By the 3rd amendment of the UGC Regulations, 2010, amongst others, the existing Tables I to IX under Appendix-III of UGC Regulations, and the 2nd amendment regarding computation of Academic Performance Indicator (API) score for appointment and promotion of teachers and other academic staff in the universities/colleges/institutions were amended and substituted by the revised Tables I to IX appended to 3rd amendment regulations.

7. Clause 6.4.8 of UGC Regulations, 2010 reads as follows:

> 6.4.8. Associate Professor completing three years of service in stage 4 and possessing a Ph.D. Degree in the relevant discipline shall be eligible to be appointed and designated as Professor and be placed in the next higher

grade (stage 5), subject to (a) satisfying the required credit points as per API based PBAS methodology provided in Table I-III of Appendix IV stipulated in these Regulations, and (b) an assessment by a duly constituted selection committee as suggested for the direct recruitment of Professor. Provided that no teachers other than those with a Ph.D. shall be promoted or appointed as Professor.

8. Clause 6.0.2 of the UGC Regulations, 2010 was amended and substituted by the 2nd amendment with the following clause:

6.0.2. The Universities shall adopt these Regulations for selection committees and selection procedures through their respective statutory bodies incorporating the Academic Performance Indicator (API) based Performance Based Appraisal System (PBAS) at the institutional level for University Departments and their Constituent colleges/ affiliated colleges (Government/ Government aided/ Autonomous/Private colleges) to be followed transparently in all the selection processes. An indicative PBAS template proforma for direct recruitment and for Career Advancement Schemes (CAS) based on API based PBAS is annexed in Appendix III. The Universities may adopt the template proforma or may devise their own self-assessment cum performance appraisal forms for teachers. While adopting this, universities shall not change any of the categories or scores of the API given in Appendix-III. The universities can, if they wish so, increase the minimum required score or devise appropriate additional criteria for screening of candidates at any level of recruitment.

(Emphasis ours)

9. It is the case of the writ petitioner that as he was eligible for appointment and designation as Professor from 01.07.2016, he had submitted his application on 17.06.2016 in terms of the Appendix-III of 3rd amendment of UGC Regulations. He had to re-submit his application on 01.03.2017 in view of a letter dated 27.02.2017 issued by appellant no. 2 requesting him to re-submit the application as the earlier application could not be located. After re-submission of his application on 01.03.2017, an e-mail dated 18.05.2017 was sent by the Internal Quality Assurance Cell, for short, 'IQAC', of the University requesting the writ petitioner to submit his application as per the format prescribed by the 4th amendment of UGC Regulations, as API would have to be computed in terms of 4th amendment of UGC Regulations. It was also observed in the said e-mail that the writ petitioners application was in terms of the format of the 2nd amendment. The writ petitioner by e-mail dated 19.07.2017, while questioning the authority of IQAC to deal with the subject as indicated in the e-mail dated 18.05.2017, also stated that as he had submitted his application on 17.06.2016, and date of eligibility of promotion claimed being 01.07.2016, which is prior in point of time to coming into effect of the 4th amendment of UGC Regulations, request made to him for applying on the format as prescribed in 4th amendment was inappropriate. Thereafter, an e-mail dated 10.07.2017 was sent by the Registrar of the University, amongst others, to the writ petitioner informing that his application for CAS had been scrutinized and that while he qualified on all other points, the Committee had observed that no documentary proof was attached with the application establishing the fact of supervising award of Ph.D. and, accordingly, requesting him to send scanned copy of any documentary evidence of successfully supervising Ph.D. at the earliest. The petitioner replied back by his letters dated 10.07.2017 and 17.07.2017 stating that consistent stand of the University was that award of Ph.D. under ones supervision was not necessary for promotion as Professor under CAS. The petitioner came to learn that selection committee meetings were held after 31.07.2017 and in such meetings, applications of applicants who had submitted applications much later than the petitioner, had also been considered but the case of the petitioner was not considered.

10. In the counter-affidavit filed by the respondent nos.1 and 2, a preliminary objection was taken to the effect that the writ petition suffers from non-joinder of necessary and proper party as the writ petitioner had

not made the similarly situated persons parties though he had sought parity with other Professors who were promoted under CAS. Another preliminary objection was taken that in absence of any challenge made to the rule making power of the Statutory Authority, the norms laid down seeking evidence of having guided research scholars of Doctoral Level as a pre-requisite under CAS cannot be challenged. It is pleaded that it is permissible for the university to prescribe norms over and above the UGC Regulations and that accordingly, additional criterion was laid down to the effect that Associate Professors shall be considered for promotion to the post of Professors under CAS only after they acquire the experience of guiding research scholars of Doctoral Level. It is pleaded that only because the writ petitioner had completed three years as Associate Professor would not entitle him to be promoted under CAS, but the same would entitle him to be in the zone of consideration only. It is stated that the writ petitioner had the eligibility as per UGC Regulations, 2010 including 3rd and 4th amendment up to 2016. The UGC Regulations including amendments made in the year 2016 had been adopted after approval was granted by the Executive Council in a meeting held on 10.06.2016. It is pleaded that the application submitted by the writ petitioner on 17.06.2016 was never actually received in the office files and therefore, the writ petitioner was directed to re-submit his application. It is stated that by the 4th amendment, terms of API calculation were relaxed and list of UGC approved journals were expanded and accordingly, in order to give the benefit of amendment, the writ petitioner was directed to re-submit his application in good faith. Six candidates of various departments, who applied for promotion under CAS, were promoted to the post of Professors in their respective departments as they possessed evidence of guiding research scholars of Doctoral Level. It is also stated that a departmental enquiry against the petitioner for gaining illegal access and use of confidential document in the form of Annexure-P13 was under consideration. It is stated that the application stated to have been submitted by the petitioner, annexed as Annexure-P1, would itself demonstrate that none of Ph.D. Scholars under his supervision had completed their course.

11. A reply affidavit was filed by the writ petitioner, stating, amongst others, that discretion conferred on the university to prescribe additional criteria for screening of candidates at any level of recruitment is limited to only direct recruitment and not to promotion under CAS. The petitioner

disputed laying down of an additional norm requiring experience of guiding research at Doctoral Level and had contested the document at Annexure R-1 of affidavit of respondents no.1 and 2 stating that the letter head, on which contents of Annexure R-1 had been typed, had come to be used only from the month of August, 2017. It is asserted that no such decision was taken by the appropriate authority and, therefore, the Annexure R-1 document was not put in public domain. The petitioner also placed reliance on a Circular No.13/2017 dated 07.03.2017, wherein while inviting applications for promotion under CAS, additional criterion of experience of guiding research scholars to Ph.D. was not mentioned.

12. In its affidavit, the respondent no.3 pleaded that Clause 6.0.2 of 2nd amendment of the Principal UGC Regulations confers power on the universities to increase the minimum required score or devise appropriate additional criteria or screening of candidates at any level of recruitment and that promotion under CAS would have to be considered on the basis of Regulations which were in force on the date of eligibility and not on the date of interview.

13. The learned Single Judge, on consideration of the pleadings and arguments of the parties, had noted that the following issues had arisen for consideration of the court:-

> "**11.** What falls for consideration before this Court is;
>
> 1. Whether the Petition suffers from non-joinder of necessary parties making it liable for dismissal?
>
> 2. Whether the Respondents No. 1 and 2 are competent to prescribe any new criterion or qualification in addition to the criteria enumerated in Clause 6.4.8 of the UGC Regulations, 2010 for promotion from Stage 4 to Stage 5 under the CAS, i.e. promotion from Associate Professor to the post of Professor?

3. Whether the Petitioner is entitled to consideration for promotion from the Stage 4 to Stage 5 under CAS, having fulfilled the necessary criteria as laid down in Clause 6.4.8 of the UGC Regulations, 2010 and whether the 4th amendment to the Regulations is applicable to his case?

4. Whether relieving the Petitioner for another posting on lien, as per his request, would tantamount to waiving his rights to promotion?"

14. In respect of the point no. 1 of the points for consideration, the learned Single Judge opined that when the writ petitioner had not sought for any relief against the six promoted candidates or the selection committee, the writ petition did not suffer from non-joinder of necessary parties.

15. The learned Single Judge, in point no.2 for consideration as noted above, had held that in view of Clause 6.0.2 of the UGC Regulations as amended by the 2nd Amendment, the appellant no. 1 is clothed with power to prescribe additional criteria over and above those set out in Clause 6.4.8 of the UGC Regulations for screening of candidates at any level of recruitment, which includes promotion, and thus, negating the challenge made by the writ petitioner that no additional criteria could have been prescribed by appellants no. 1 and 2 apart from those laid down in Clause 6.4.8 of the UGC Regulations for promotion from Stage-IV to Stage-V under the CAS. However, having concluded so, the learned Single Judge held that the additional criterion stated to have been laid down by the University was non-est in law. It was held that the document annexed as Annexure-I of the counter-affidavit of appellants no.1 and 2 wherein additional criterion that an Associate Professor shall be considered for promotion to the post of Professor under CAS only after acquiring the experience of guiding research at Doctoral level, was not even notified or circulated.

16. The learned Single Judge repelled the argument advanced by the appellants that application dated 17.06.2016 submitted by the writ petitioner was never received by them. As the 4th amendment of the UGC Regulations came into force with effect from 11.07.2016 and as the petitioner was held to be eligible before coming into force of the 4th amendment, relying upon a public notice dated 21.11.2014 providing that promotion under CAS shall be governed by the UGC Regulations which are in operation on the date of eligibility and not on the date of interview, concluded that appellants no. 1 and 2 could not have required the writ petitioner to submit his application under the 4th amendment.

17. So far as the point no.4 of the points for consideration, as formulated by the learned Single Judge, is concerned, it will not be necessary to dilate on the issue as Dr. Doma T. Bhutia has submitted that she will not raise the issue as the writ petitioner had re-joined the University.

18. Dr. Doma T. Bhutia, learned counsel for the appellants, has submitted that the learned Single Judge committed error of law in holding that Writ Petition did not suffer from non-joinder of parties. According to her, the six selected candidates were necessary parties as the writ petitioner had questioned his non-consideration for promotion and, therefore, for non-joinder of necessary parties, the Writ Petition is liable to be dismissed. She has submitted that all the six candidates had been considered for promotion as they had the additional norm, which is annexed as Annexure P-1 of the affidavit of the respondent no.1. The learned Single Judge was not correct in holding that there is no compliance of the provisions of Sikkim University Act, 2006 (for short, the Act) while laying down the additional criterion and therefore, the same was non-est in the eyes of law. Learned counsel also submits that the learned Single Judge was not correct, in absence of any tangible materials on record, in accepting the argument of the writ petitioner that the aforesaid document was prepared for the purpose of the case by the University. Dr. Bhutia has drawn the attention of the Court to an application filed by the writ petitioner, registered as I.A. No.02/2019, for placing additional documents and on the basis of the objection filed thereto,

contends that the documents sought to be relied upon by the writ petitioner ought not to be considered. She has also submitted that direction to consider the case of the writ petitioner for promotion under 4th Amendment is also totally uncalled for as, by the time the writ petitioner had re-submitted his application on 01.03.2017, 4th Amendment had come into effect. Drawing attention to page 125 of the paper-book under the heading – 'Details of Ph.Ds Awarded', she has pointed out that it is evident there from that no scholar under the writ petitioner was awarded Ph.D., which is a requirement under the additional criterion laid down by the University. It is also contended that learned Single Judge granted reliefs which were not even prayed for. Accordingly, learned counsel submits that it is a fit case for interference with the judgment of the learned Single Judge.

19. She has further submitted that though the case of the writ petitioner was considered because of an order dated 21.08.2019 passed in the instant appeal, the result is kept in a sealed cover as a departmental proceeding was initiated against the writ petitioner in the year 2019. Therefore, even otherwise, the result is required to be kept in sealed cover till the conclusion of the departmental proceeding. She has placed reliance on the judgments of the Honble Supreme Court in ***Maharashtra State Board of Secondary and Higher Secondary Education and Another*** Vs. ***Paritosh Bhupeshkumar Sheth and Others***, reported in ***(1984) 4 SCC 27***; ***Dalpat Abasaheb Solunke and Others*** Vs. ***Dr. B.S. Mahajan and Others***, reported in ***(1990) 1 SCC 305*** and ***The Chancellor and Another*** Vs. ***Dr. Bijayananda Kar and Others***, reported in ***(1994) 1 SCC 169***.

20. Dr. Vaidyanathan Krishna Ananth, who has appeared in person, has supported the impugned judgment and submits that he was aggrieved by the so-called additional criterion fixed by the University and, therefore, the learned Single Judge was correct in holding that the writ petition does not suffer from non-joinder of necessary parties. Referring to the Annexure-I of the counter-affidavit of respondent no.1 (appellant no.1 herein), he has submitted that the same is an undated document and was, at no point of

time, circulated. He reiterates the submissions made before the learned Single Judge that the same is a manufactured document. He has submitted that the said document was not in existence as otherwise if the aforesaid norm was really in force, there would have been no occasion for the University not to have mentioned the additional criterion purported to have been framed while inviting applications for CAS vide Circular No.13/2017 dated 07.03.2017. Rather, the said Circular refers to eligibility criteria, etc., as laid down by the UGC for promotion under CAS. Referring to page 125 of the paper-book, he submits that in absence of any requirement for guiding a scholar to Ph.D., learned counsel for the appellants is making a mountain out of a molehill. He submits that document itself indicates that information was called for with regard to Ph.D. submitted/awarded only because of the fact that 10 points are to be given for award of Ph.D. for each candidate and 7 points for submission of Ph.D. for each candidate. He has submitted that the notification dated 14.08.2018 makes it abundantly clear and re-enforces the conclusion arrived at by the learned Single Judge that the additional criterion was not earlier notified by the University. It shows that the same was formally approved only on 29.06.2018. He has submitted that contention advanced by Dr. Bhutia that a disciplinary proceeding is pending and, therefore, no direction should be issued for his consideration of promotion under CAS or that the result should be kept in a sealed cover, is without any merit as he was illegally deprived of being considered way back in the year 2016. He submits that the disciplinary proceeding was initiated for extraneous consideration. He contends that submission of Dr. Bhutia that the learned Single Judge granted relief beyond what was prayed for, is without any merit and submits that, at any rate, the Court has power to mould relief depending upon the facts and circumstances of the case. He places reliance on the judgment of the Honble Supreme Court in the case of ***Union of India and Others*** Vs. ***K.V. Jankiraman and Others***, reported in ***(1991) 4 SCC 109***.

21. We have considered the submissions of the learned counsel for the parties and have perused the materials on record.

22. A necessary party is one in whose absence a writ petition cannot be effectively adjudicated. It is to be noted that no right of the selected candidates was sought to be impinged in the writ petition. The core question was whether an additional norm of eligibility was laid down at all by the University and if so, whether the same was done in accordance with law. The University and the Vice-Chancellor had been made parties and rightly so, as they are certainly necessary parties. Having regard to the contour of the controversy raised in the writ petition, the learned Single Judge was wholly justified in rejecting the preliminary objection that in absence of necessary party, the writ petition is liable to be dismissed.

23. Relevant portion at page-125 of the paper-book, on which much reliance is placed by Dr. Bhutia, reads as follows:

"Details of Ph.Ds Awarded / submitted

Name of the Scholar	**Title of the Thesis**	**Submitted/ Awarded**	**Name of the University**	**Month and Year**	**Points**
NA	NA	NA	NA	NA	NA
Total points over assessment period					

Note: (i) 10 points / each candidates awarded.

(ii) 7 points for Ph.D submitted."

24. Though it is apparent from the above that the writ petitioner had not guided any scholar to award of Ph.D., same does not indicate laying down of additional norm. It only indicates how points are to be awarded for award/submission of Ph.D.

25. Orders of this Court dated 25.11.2019 indicated that the order dated 21.08.2019 directing the University to consider the case of the writ petitioner within a period of four weeks was not complied with in letter and spirit. Subsequently, an affidavit was filed on behalf of the University, amongst others, indicating that the case of the writ petitioner was considered by the

Selection Committee on 12.02.2020 and the decision of the Selection Committee was placed before the Executive Council. It was further stated that decision was kept in sealed cover as a disciplinary proceeding was pending against the writ petitioner. As there was substantial compliance of the order of the Division Bench dated 21.08.2019, it was noted in the order dated 20.02.2020 that these aspects would be considered in the final hearing of the appeal and accordingly, the appeal was heard.

26. Annexure-1 of the counter-affidavit in opposition of the appellants reads as follows:

> "**Statement about Sikkim University norm for Professorship under CAS**
>
> This is to state that Vice-chancellor of Sikkim University, for the sake of quality of higher education, has, since 2015, established a norm according to which an Associate Professor shall be considered for promotion to the post of Professor under Career Advancement Schemes only after acquiring the experience of guiding research at doctoral level, in addition to the norms established by the University Grants Commission under Section 26(1) of the UGC Act, 1956.
>
> The Vice-chancellor has established the above under Section 12(2) of the Sikkim University Act, 2006 (No. 10 of 2017)."

27. It is relevant to state that in the objection filed in I.A. No.02/2019, the appellant University had not disputed the documents. All that is said is that Annexures-A1 and A2 of I.A. No.02/2019 had come into effect post the date of judgment of the learned Single Judge and, therefore, the same should not be considered. Annexures-A3 and A4 are stated to be having no bearing with the instant case.

28. This Court is of the considered opinion that there cannot be any impediment for a writ appellate Court to take note of a document in the interest of justice if the document, though subsequent in point of time, can throw light to the controversy.

29. Annexure-A1 reads as follows:

> Notification – 97/ 2018
>
> Subject: Policy for promotion under CAS for placement of Stage IV (Associate Professor) to Stage V (Professor)
>
> University has adopted UGCs Regulations on minimum qualification for appointment of teachers and other academic staff in University and Colleges and measures for the maintenance of standard of higher education, 2010. University also adopted a policy of having successfully guided Ph.D as one of the requirements for promotion under CAS from Stage IV (Associate Professor) to Stage V (Professor). This was made known to all prospective candidates informally but was not notified by the University. Accordingly all those candidates who had successfully guided Ph.D after fulfillment of other conditions as prescribed in UGC Regulations were considered under CAS for placement from Stage IV to Stage V in 2017.
>
> The Executive Council in its 31st meeting held on 29th June 2018 formally approved the policy of the University of having successfully guided Ph.D (awarded) as one of the requirements for promotion under CAS for placement from Stage-IV (Associate Professor) to Stage-V (Professor). Moreover, the new UGC Regulations 2018 has also clearly mentioned the successfully guided Ph.D for promotion from Associate Professor to Professor."
>
> (Emphasis ours)

30. Relevant portion of Annexure-A2 reads as follows:

> "..... The Council was informed that the University has adopted a policy of having successfully guided Ph.D as one of the minimum requirements for promotion under CAS from Stage-4 (Associate Professor) to Stage-5 (Professor). Though this policy has not been notified by the University but it was made known to all prospective candidates informally. As such all CAS cases from Stage-4 to Stage-5 in 2017 were considered and those having successfully guided Ph.D were placed in Stage-5 (Professor), after fulfillment of other conditions as prescribed in UGCs Regulation. Case of Dr. V. Krishna Ananth, Associate Professor could not be considered for placement at Stage-5 (Professor) as he did not fulfill the criteria of having successfully guided Ph.D. He thereafter approached the High Court of Sikkim. Single bench of High Court though stated that the University is within its powers to lay down additional criteria, yet it ruled against the University as the policy of having successfully guided Ph.D had not been notified. However, University has filed a review petition for consideration of the matter by the Division Bench which has been accepted. The policy of having successfully guided Ph.D for CAS from Stage-4 to Stage-5 was kept as it is a mandatory criterion for direct recruitment at Associate Professor level as per UGC guidelines. But this guideline was not followed by the University for direct recruitment of Associate Professors from the beginning. To compensate the shortfall, the above policy for CAS from Stage-4 to Stage-5 was adopted.
>
> The Council after deliberations formally approved the policy of the University of having successfully guided Ph.D (Awarded) as one of the main requirements for promotion under CAS from Stage-4 (Associate Professor) to Stage-5 (Professor).
>
> (Emphasis ours)

> After adopting the resolution Dr. K.R. Rama Mohan, Dr. S. Manivannan and Dr. Subit Mukhopadhyay were asked to re-join the meeting.**"**

31. Relevant portion of Annexure-A3, a letter dated 13.09.2018, reads as follows:

> 5. **Withdrawal of Notification No. 97/2018:** Notification No. 97/2018 dated 14th August 2018 has been issued in pursuance to the policy approved by the Executive Council in its 31st meeting held on 29th June 2018 of having successfully guided PhD (awarded) as one of the requirements for promotion under CAS for placement from Stage-IV (Associate Professor) to Stage V (Professor). Notification of such a policy was warranted as per the advice of our Counsels to place in the Division bench of Hon'ble High Court.

32. Annexure-A4 is a notification dated 18.07.2018, whereby UGC Regulations 2010 was superseded. Annexure-A5 is a letter dated 07.08.2014 on the subject of officers performing current duties of a post which is issued by the Government of India, Ministry of Human Resource Development, Department of Higher Education.

33. Going through the contents of the documents and as the authenticity of the documents are not questioned, we are of the opinion that it will be in the interest of justice to take note of Annexures-A1 to A4. However, we do not think Annexure-A5 is relevant.

34. In ***Maharashtra State Board of Secondary and Higher Secondary Education*** (supra), the Honble Supreme Court laid down that a bye-law cannot be struck down by Court unless it can be said that a bye-law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. In ***Dalpat Abasaheb Solunke*** (supra), the Honble Supreme Court laid down that it is not the function of the Court to hear appeals over the decisions of the Selection Committees or to scrutinize the relative merits of the candidates. In ***Dr. Bijayananda Kar*** (supra), the

Honble Supreme Court has held whether a candidate fulfils the requisite qualification or not is a matter which should be entirely left to be decided by the academic bodies.

35. The application of propositions of law as laid down in the aforesaid judgments does not arise in the present case as what falls for consideration is whether the University had laid down an additional criterion for promotion under CAS from Stage-IV to Stage-V in addition to norms under UGC Regulations.

36. It is virtually the admitted position that but for the additional criterion stated to have been laid down by the University, the writ petitioner had qualified in terms of the UGC regulations. Annexure-1 of the counter-affidavit of the respondents no. 1 and 2 is not dated. Given the importance of the issue, it is, to say the least, very surprising. Content of the same is very vague. It is not indicated when such an additional norm was „established by the Vice Chancellor. All that is said is that the norm was „established since 2015. That is the only document that was brought on record by the appellants relating to laying down of additional norm. There is an unequivocal admission in Annexures-A1 and A2 that the additional norm was not notified by the University. It is also admitted therein that Executive Council approved the above policy only on 29.06.2018. In view of the above, this Court is of the unhesitant opinion that even if a policy laying down additional norm was formulated, without notifying the same and without due approval, it could not have been acted upon. It was in that context the learned Single Judge had noted that the same was non-est in law. The appellants have also failed to reconcile how Circular No.13/2017 dated 07.03.2017, wherein while inviting applications for promotion under CAS, additional criterion of experience of guiding research scholars to Ph.D. was not mentioned, and Annexure-1 of the counter-affidavit of the appellants can stand together.

37. The six candidates who had been promoted under CAS may not have questioned application of additional norm. That does not mean the writ petitioner has to follow suit. He can certainly articulate his grievance in accordance with law. When this Court has held that additional criterion could not have been applied during the relevant time when the application of the petitioner for CAS was initially under consideration, an argument cannot

be countenanced that the eligibility of the writ petitioner cannot be considered on a lesser yardstick as compared to other candidates in the fray.

38. There is an acknowledgement of receipt of the application dated 17.06.2016 of the writ petitioner for CAS. By the letter dated 27.02.2017 (Annexure P-5 of the writ petition) the Assistant Registrar of the University requested the writ petitioner to re-submit his application. The said letter indicates that his application could not be located. There was no other communication in between with regard to the aforesaid subject. The learned Single Judge had, as noted earlier, not accepted the argument of the University that the application was not received. Learned counsel for the appellants has failed to show why the aforesaid conclusion of the learned Single Judge is wrong.

39. The application dated 17.06.2016 was submitted prior to coming into force of 4th Amendment of UGC Regulations. The stand of the University was that the writ petitioner was requested to re-submit his application in order to give benefit of 4th Amendment. When the writ petitioner had qualified under the 2nd Amendment and 3rd Amendment, it is not understood why the benefit under the 4th Amendment had to be given to the writ petitioner.

40. The learned Single Judge issued the following directions:

> **"**(a) The Respondents No.1 and 2 shall take steps to consider the promotion of the Petitioner from Stage 4 to Stage 5, in terms of the UGC Regulations, 2010, Clause 6.4.8 and any other relevant provision. While doing so, due consideration shall be taken of the observations in the e-mail dated July 10, 2017 addressed to the Petitioner and one Dr. Sathyanarayanan from Mr. T.K. Kaul, Registrar, Sikkim University, wherein the Petitioner has been informed that he qualifies on all other points except the criterion added vide Annexure-I. No consideration whatsoever shall be attached to the impugned

additional criterion inserted by the Respondent No.2 vide Annexure-I (Page 143 of the Paper-Book), viz. requiring supervising award of Ph.D., the same being *non est* in the eyes law.

(b) The Respondents No. 1 and 2 shall consider the Application of the Petitioner for promotion under the 3rd amendment dated 4th May, 2016 of the UGC Regulations, 2010 which are applicable to him and not under the 4th amendment dated 11th July, 2016, which has no retrospective effect t.

(b) All necessary steps shall be completed within sixty days hence.**"**

41. The writ petitioner essentially prayed for completing the process of consideration of his case for promotion from Stage-IV to Stage-V as per 3rd Amendment of UGC Regulations. While deciding the aforesaid prayer, validity of the additional criterion as laid down in Annexure-1 of the counter-affidavit had arisen. Viewed in that context, it cannot be said that relief beyond prayer was granted by learned Single Judge. Even otherwise, it is well-settled that in the facts and circumstances of a case, a writ court will be justified to mould the relief for ends of justice.

42. The appellants have not brought on record the charge memo though 4 affidavits had been filed by them during the course of the appeal. The date of charge memo is also not mentioned. Dr. Bhutia had submitted that departmental proceeding was initiated in the year 2019. From the averments made in the affidavits and the documents annexed thereto it would appear that a disciplinary proceeding was initiated against the writ petitioner along with other members of a screening committee in respect of calculation of API score in respect of a candidate. The learned Single Judge had directed to consider the case of the writ petitioner by the order dated 06.03.2018 within 4 weeks. Prayer for stay of the judgment and order was rejected on 21.08.2019 with a further direction to consider the case of the writ petitioner within 4 weeks in terms of the order of the learned Single Judge. This order was not assailed in any forum. The order does not indicate that any submission was advanced that a disciplinary proceeding had been

initiated against the writ petitioner. The developments after 21.08.2019 had already been noted in paragraph 25 of this judgment. The counter-affidavit of the appellants dated 28.10.2017 goes to show that the 6 other applicants had been appointed as Professors by them.

43. In ***K.V. Jankiraman*** (supra), it is laid down as follows:

> *"8. ……*
>
> *The "sealed cover procedure" is adopted when an employee is due for promotion, increment etc. but disciplinary/criminal proceedings are pending against him at the relevant time and hence, the findings of his entitlement to the benefit are kept in a sealed cover to be opened after the proceedings in question are over. ……"*

At the relevant time, there was no disciplinary proceeding pending against the writ petitioner and therefore, we are of the opinion that it is not a case where result should be kept in sealed cover.

44. In view of the above discussions, we find no merit in the appeal and accordingly, the same is dismissed.

45. No cost.

SLR (2020) SIKKIM 319

(Before Hon'ble the Chief Justice)

RFA No. 03 of 2019

Ms. Dinku Khati ….. APPELLANT

Versus

Smt. Kamal Kumari Subba ….. RESPONDENT

For the Appellant: Ms Gita Bista, Advocate.

For Respondent: Mr. Vivek Anand Basnet, Advocate.

Date of decision: 24th March 2020

A. Indian Evidence Act, 1872 – Law is well-settled that the plaintiff has to succeed on his own strength and not on the weakness of the case of the defendant – The plaintiff had to, in the first place, prove that she was capable or was in a position to, may be by herself obtaining loans from others, to provide loans to the defendant. Giving a go by to the case projected in the plaint, suggestion was given to DW-1 that she had borrowed money from the mother of the plaintiff. In the context of the case projected by the plaintiff that no documents were executed at the time when defendant had received the amounts as stated by the plaintiff and when substantial amount of loan which the plaintiff claims to have advanced to the defendant as loan was received by the plaintiff herself from others, it was necessary for the plaintiff to have examined persons from whom she had availed loan to lend credence to the fact that she had, at least, obtained some loan though the same may not have proved advancing of loan to the defendant.

(Paras 19 and 28)

B. Indian Evidence Act, 1872 – S. 45 – Expert Evidence – Court cannot rely on the report of the handwriting expert unless he is examined and unless the same is admitted by the parties. It is to be noted that expert evidence, though relevant in view of S. 45 of the Evidence Act, is not

conclusive. It can rarely, if ever, take the place of substantive evidence – A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. However, it may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of expert comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard.

(Para 30)

Appeal dismissed.

Chronology of cases cited:

1. H. K. N. Swami v. Irshad Basith (Dead) by LRs., (2005) 10 SCC 243.
2. Bhagwan Kaur v. Shri Maharaj Krishan Sharma and Others, AIR 1973 SC 1346.
3. Life Insurance Corporation of India and Another v. Ram Pal Singh Baisen, (2010) 4 SCC 491.

JUDGMENT

Arup Kumar Goswami, CJ

This appeal is preferred by the plaintiff against the judgment and decree dated 27.02.2019 passed by the learned District Judge, East Sikkim at Gangtok, in Money Suit No. 14 of 2015, dismissing the suit of the plaintiff, whereby recovery of Rs.32,47,200/- was prayed for along with interest of 18% from date of filing till final execution.

2. The case of the plaintiff, in a nutshell, as projected in the plaint is as follows:

(i) The plaintiff, who is a practicing Advocate, was introduced to the defendant by the husband of the defendant, Mr. Ashok Kumar Subba (Tsong), in the year 2009 and she had rendered legal assistance to the husband of the defendant and his other family members. Husband of the defendant had started a company in the name of M/s Zingtang Consultancy

& Service Pvt. Ltd. and she had accepted the post of Legal Advisor in that company. It is pleaded that the defendant had approached the plaintiff in and around August, 2009 for a loan of Rs.2,00,000/- for the purpose of payment of fees of the daughter of the defendant who was studying in Australia with a promise to repay the loan within two months. With much difficulty, the plaintiff managed to collect the said amount and delivered the same to the defendant without executing any document. Though the plaintiff had asked for repayment of the loan after two months, the amount was not paid. Nevertheless, the plaintiff arranged one rented flat belonging to one Nima Gurung at Siliguri for the defendant and her family members to stay at Siliguri.

(ii) In respect of default of payment of loan of Rs.90,00,000/- taken by the defendant from the United Bank of India, Deorali Branch, a notice under Section 13(2) of SARFAESI Act, 2002 was issued to the defendant as well as to her husband, who was the guarantor and an amount of Rs.18,41,540/- was paid by Mr. Ashok Kumar Subba (Tsong) from the account of the company towards loan repayment. The bank loan dues of the defendant mounted to Rs.1,42,00,000/- and to save the property, the defendant requested the plaintiff to manage a loan of Rs.6,00,000/- which she stated would be paid with interest along with Rs.2,00,000/- taken earlier. It is the further case of the plaintiff that she mortgaged a plot of land along with two dwelling flats belonging to her late father, namely, Tek Bahadur Khati to one Chandra Bhusan Tiwari for Rs.6,00,000/- which was to be repaid by her within a period of six months. The plaintiff paid the defendant the amount of Rs.6,00,000/- in two installments: one of Rs.5,00,000/- on 25.05.2011 and the other a sum of Rs.85,000/- out of Rs.1,00,000/- on 22.12.2011 after deducting 15% interest at the source itself. The defendant, despite approaches made by the plaintiff, did not repay the loan with interest accrued thereon forcing the plaintiff to borrow money from her brothers, namely, Mr. Amit Khati and Mr. Manish Khati, to pay the accrued interest.

(iii) A Possession Notice as well as a Sale Notice dated 26.03.2012 were served on the defendant on 23.02.2012 by the Bank in connection with the loan taken by the defendant and in the aforesaid situation, the defendant approached the plaintiff expressing her inability to repay the loan and to protect the building constructed by her husband before the Debt Recovery Tribunal, the defendant had taken a loan from the plaintiff amounting to Rs.6,79,000/-. It is pleaded that the plaintiff paid the aforesaid amount from the amount received by her by cheque dated 10.04.2012 from one of her clients, namely, Ashok Lama.

(iv) A sum of Rs.35,000/- was also stated to be paid by the plaintiff by cash and another sum of Rs.5,000/- was deposited in the account of Mr. Yehang Subba, son of the defendant, on 20.04.2012, on being requested by the defendant when her son had gone to Delhi for his treatment of Tuberculosis.

(v) The plaintiff also stated to have mortgaged her gold ornaments for a sum of Rs.2,45,305/- to safeguard the property of the defendant and handed over the said amount to the defendant.

(vi) It is stated that plaintiff had borrowed a sum of Rs.72,895/- on 19.04.2012 from Leela Shilal, Rs.2,20,000/- on 11.07.2012 from Manju Khati, Rs.2,00,000/- on 04.09.2012 from Sashi Khati and Rs.8,50,000/- on 29.04.2012 from Jyoti Subba, totaling Rs.13,42,895/- and the said amount was given to the defendant on various dates by executing a Hand Note/Money Receipt dated 16.07.2013. In the meantime, though the plaintiff continued to appear in the legal proceedings, due to non-payment of dues, physical possession of the mortgaged building was taken over by the Bank on 20.03.2014.

(vii) It is further pleaded that by an Agreement dated 21.04.2013, the defendant had sold the property, namely, M/s Hotel Golmaheem for a consideration amount of Rs.3,00,00,000/- and received an advance amount of Rs.1,56,00,000/-, but in spite of that, the loan amount was not paid to the plaintiff. It

is stated that as despite the execution of Hand Note dated 16.07.2013, the defendant did not pay the amount to the plaintiff for long two years, the plaintiff was compelled to file the suit.

3 (i) In the written statement filed by the defendant, it is stated that the plaintiff was introduced not by her husband, but by Mr. B. Sharma, Senior Advocate, with whom the plaintiff was working as a junior and the family members of the defendant had only formal relation as she often came with Mr. Ashok Kumar Subba, who used to extract money from the defendant. Many cases were filed against the plaintiff and Mr. Ashok Kumar Subba in connection with the functioning of the company and they were also arrested on allegation of cheating people of various places.

(ii) It is categorically stated that she had never approached the plaintiff for any loan and the plaintiff had made a fabricated story. It is pleaded that it was Mr. Ashok Kumar Subba, who rented a flat for himself and not for the defendant and her family members. The defendant had admitted about availing of loan and issuance of notice under Section 13(2) of the SARFAESI Act. The defendant denied that she ever received any amount from the plaintiff and she also stated that she had not received any amount from her husband. Rather, it was Mr. Ashok Kumar Subba, who had taken a sum of more than Rs.10,00,000/- from the defendant for the purpose of a case in the Gauhati High Court.

(iii) It is pleaded that she had never taken or agreed or promised to pay the amount of Rs.6,00,000/- with interest of 5% and Rs.26,47,200/-. She also denied her signature on the said hand-note. It is submitted that the plaintiff, in collusion with Mr. Ashok Kumar Subba, had been maliciously and fraudulently trying to extract money and accordingly, a false and concocted case has been filed.

4. On the basis of the pleadings, learned trial Court framed the following two issues:

(i) Whether the defendant is liable to pay a sum of Rs.32,47,200/- to the plaintiff, and

(ii) Relief, if any.

5. During trial, plaintiff examined herself as PW1 and Ashok Kumar Subba as PW2. In support of her case, she exhibited a number of documents.

6. The defendant examined herself as DW1 and her sons as witnesses in the form of DW2 and DW3.

7. The learned trial Court held that the plaintiff could not prove advancing a loan amount of Rs.2,00,000/- by her oral evidence. Learned trial Court also held that advancing of loan amount of Rs.6,00,000/- is also not proved. It was observed that Exhibit-4 contains names of other persons and there is no indication that any money was received by the defendant from the plaintiff to substantiate her claim. Exhibits - 5, 6, 7 and 8 show that the plaintiff received certain amounts from different persons. None of the persons from whom the plaintiff received the amount has been examined and therefore, the said exhibits have no relevance in respect of the claim of the plaintiff. The learned trial Court also noticed that plaintiff failed to exhibit any document to show mortgage of gold ornaments of plaintiff for giving a sum of Rs.2,43,305/- to the defendant. With regard to the Hand Note dated 16.07.2013, the learned trial Court observed as follows:

> *"The evidence of the Plaintiff and her witness is in contrary with respect to the documents i.e. Hand Note dated 16.07.2013. Further, it may be noted here that although the Plaintiff heavily relied the Hand Note document i.e., Exhibit-9, however, on careful perusal of the content of the evidence-on-affidavit of the Plaintiff at paragraph 24 and the content of the Hand Note Exhibit-9, is contrary. Further, it may be noted here that content of the Hand Note Exhibit-9 is no consonance with the contents of the plaint. There is serious materials contradiction.*

> *On careful perusal of the evidence of the Plaintiff and her witness, it is seen that the Plaintiff failed to prove the content of Exhibit-9, simply on mere exhibiting the document is not sufficient to grant any relief in favour of the Plaintiff. Further, the Defendant denied the execution and her signature appeared in Hand Note Exhibit-9. However, the Plaintiff did not make any effort to examine the handwriting expert to prove its contents. It is to be noted here that although the expert opinion supported the case of the Plaintiff that the signature affixed in written statement marked A1 to A15 and the specimen signatures affixed marked S-1 to S-20 are similar in nature and characteristic. However, on the basis of the handwriting expert, case of the Plaintiff would be successed unless the document and its content is verified and proved. It is seen on record that the opinion of handwriting expert is inadmissible since the contents of the same is not proved by either of the party.*"

8. Ms. Gita Bista, learned counsel for the appellant has submitted that the learned trial Court failed to appreciate the evidence on record in its correct perspective. It is submitted by her that the learned trial Court erred in law in holding that Exhibits-4 series, 5, 6, 7 and 8 do not substantiate the claim of the plaintiff. While candidly admitting that there was some confusion with regard to the marking of the Hand Note as Exhibit as at various places the same is referred to as Exhibit-9 or Exhibit-10, the same does not go to the root of the matter and in that background, learned Court below failed to appreciate the Hand Note. It is submitted that the learned trial Court was seriously in error in holding that the plaintiff failed to prove the contents of the Hand Note. She contends that it was the defendant who had requested the learned trial Court to send the Hand Note for the opinion of the hand-writing expert and the hand-writing expert having opined that the signature of the defendant in the Hand Note matches with her admitted signature, the learned trial Court wrongly shifted the burden to the plaintiff and drew adverse presumption for not examining the hand-writing expert. She submits

that this Court may also compare the specimen signature of the defendant with the admitted signature of the defendant. The learned trial Court was wrong in holding that Exhibit-9 was not proved by either of the parties. According to her, the plaintiff had proved by leading cogent evidence that a sum of Rs.32,47,200/- is payable by the defendant to the plaintiff and as such the learned Court below was not justified in dismissing the suit of the plaintiff. Ms. Bista has cited a judgment of the Hon'ble Supreme Court in the case of ***H.K.N. Swami vs. Irshad Basith (Dead) By LRS.***, reported in ***(2005) 10 SCC 243***.

9. While supporting the impugned judgment, Mr. Basnett submits that entirely a false case has been filed by the plaintiff and there is no pleading even to show as to how a sum of Rs.32,47,200/- was due and payable by the defendant to the plaintiff. There is not even one single document other than the so called Hand Note evidencing receipt of money by the defendant from the plaintiff. Bald statements have been made without any material particulars regarding payment of money by the plaintiff to the defendant as loan. None of the persons from whom the plaintiff stated to have received money for the purpose of making available loan to the defendant has also been examined. It is submitted that there is no cordial relation between the defendant and Ashok Kumar Subba, who stood as alleged witness in the Hand Note.

10. Drawing attention of the Court to paragraph 21 of the plaint, he submits that the Hand Note dated 16.07.2013 was stated to be executed for an amount of Rs.13,42,895/-, which is contradicted in paragraph 26. In that Hand Note, reference is also made to the civil case of T. Lachungpa, B. Jain, etc. about whom there is no pleading whatsoever. He has submitted that the Hand Note was exhibited as Exhibit P-9 and the FIR was exhibited as Exhibit P-10 and therefore, it has to be understood that the plaintiff did not prove the Hand Note when repeatedly reference was made to Exhibit-10.

11. He has submitted that it is true that the Hand Note was sent for the opinion of the handwriting expert on the request of the defendant. However, as the defendant was not satisfied with the report, prayer was made for sending the same to another handwriting expert but such prayer was

rejected by an order dated 05.12.2017 on the ground that the defendant would get an opportunity to cross-examine the said expert. In view of the aforesaid order, it was for the plaintiff to have examined the handwriting expert, if so desired, but the plaintiff did not examine him and therefore, no reliance can be placed on the so called report of the handwriting expert. In support of his submissions, he places reliance on the cases of ***Bhagwan Kaur v. Shri Maharaj Krishan Sharma and others***, reported in ***AIR 1973 SC 1346*** and ***Life Insurance Corporation of India and another vs. Ram Pal Singh Baisen***, reported in ***(2010) 4 SCC 491***.

12. I have considered the submissions of learned counsel for the parties and have perused the materials on record.

13. ***H.K.N Swami*** (supra), relied on by Ms. Bista, lays down that the first appellate Court has to deal with all the issues and the evidence laid by the parties before recording findings.

14. The plaintiff submitted her evidence on affidavit, reiterating the version put forward in the plaint.

15. PW2 referred to the Hand Note dated 16.07.2017 as Exhibit P10 and he deposed that Exhibit P10 (a) is the signature of the defendant, which was signed in his presence. In cross-examination, he denied the suggestion that Exhibit 10(a) is not the signature of the defendant.

16. The DW1, in her evidence stated that the plaintiff had never provided any financial assistance to her and she had also not asked for any financial help. She denied execution of the Hand Note. It is stated that the plaintiff and her estranged husband had maliciously connived and filed the suit with ulterior motive. In her cross-examination she stated that her relation with the husband was cordial till the end of 2013. The suggestion given to her that the plaintiff transferred a sum of Rs.2,00,000/- to her daughter in Australia through Western Union Money Transfer, Nepal was denied. The suggestion that she had borrowed money from the plaintiff's mother was also denied. She also denied the suggestion that she was in Guwahati from 15.07.2013 to 17.07.2013.

17. DW2 deposed that his estranged father and the plaintiff had never looked after him and had not taken care of his medical expenses as alleged. He stated that signature appearing in the Hand Note is not that of his mother. He denied taking of any loan by his mother. It is stated that his mother did not go to Guwahati on 16.07.2013 and because of her illness whenever she travels long distance his elder brother or his wife mostly accompanies DW1 and sometimes he also accompanied her.

18. The evidence of DW3 is also more or less the same line as that of DW2. He also denies that the signature appearing in the Hand Note is not of his mother and that mostly he or his wife and, occasionally, DW2 accompanies DW1 on her long distance travel and that she did not go to Guwahati on 16.07.2014 (apparently year is wrongly written). He denied the suggestion that on 15.07.2014 (year again wrongly written), DW1 had boarded the flight to Guwahati with Senior Counsel B. Sharma. DW3 had denied the suggestion that plaintiff had transferred Rs.2,00,000/- from Nepal in the bank account of his sister, who was then studying in Australia.

19. Law is well-settled that the plaintiff has to succeed on his own strength and not on the weakness of the case of the defendant.

20. A perusal of the evidence goes to show that the plaintiff claims to have given a loan of Rs.2,00,000/- for payment of fees of her daughter, who was studying in Australia. When the said loan was given and in whose presence, if any, is, however, not indicated. This amount of Rs.2,00,000/- is the first loan claimed to have been advanced by the plaintiff to the defendant. The suggestion given to DW1 that money was transferred to her daughter through Western Union Money Transfer, Nepal gives a different dimension which was not pleaded. If money was transferred in the above manner, the plaintiff could have definitely pleaded so and also adduced documentary evidence.

21. Another loan of Rs.5,00,000/- was said to have been given on 25.05.2011 and an amount of Rs.85,000/- was handed over on 22.11.2011 out of an amount of Rs.1,00,000/- from which 15% was deducted. These amounts were said to have been given on the basis of a sum of Rs.6,00,000/- received by the plaintiff by mortgaging a plot of land with

two dwelling flats belonging to her father to one Chandra Bhusan Tiwari. No mortgage deed is exhibited by the plaintiff. How plaintiff could have mortgaged her father's land is not explained. Four receipts are collectively marked as Exhibit-4. By the Exhbit-4 series, one Bushan Tiwari acknowledges receipt of interest of various amounts of from one Bidhya Khati, who is the mother of the plaintiff. In all these receipts, loan amount was shown as Rs.5,00,000/-, contrary to the stand of the plaintiff that she had obtained a loan of Rs.6,00,000/- through the mortgage. Bushan Tiwari and Chandra Bhusan Tiwari, evidently, in absence of any explanation, have to be treated as different persons. That apart, name of the plaintiff does not figure in the said receipts. Signatures appearing therein are not proved. It is also significant to note that in one of the receipts dated 19.06.2011 Ashok Kumar Subba signed on 13.09.2011 as a witness. Exhibit-4 series do not substantiate taking of loan by the plaintiff for the purpose of making available the amount as loan to the defendant.

22. Another sum of Rs.6,79,000/- was said to have been taken on loan by the defendant from the plaintiff. It is the stand of the plaintiff that the said amount was paid by the plaintiff after receiving the amount by cheque from one of her clients, namely, Ashok Lama on 10.04.2012. How the amount is paid to the defendant is not indicated. The cheque was not exhibited and Ashok Lama was also not examined. It is a self-serving statement.

23. With regard to the loan amount of Rs.35,000/- as well as Rs.5,000/- also, no date has been mentioned as to when the loan was paid.

24. With regard to the amount of Rs.2,45,305/-, there is no evidence that the defendant asked for the amount as loan as the aforesaid amount was only handed over to the defendant thereby signifying a voluntary act. The said amount was stated to have been obtained by the plaintiff by mortgaging her gold ornaments. It is not stated to whom gold was mortgaged. No document is produced demonstrating that she had pledged or mortgaged or pawned some gold for obtaining some amount.

25. The plaintiff also said to have given to the defendant a sum of Rs.13,42,895/- on various dates after collecting the same from Sashi Khati, Manju Khati, Jyoti Subba and Leela Shilal. The plaintiff had exhibited

Exhibits-5, 6, 7 and 8, which are receipts signed by her and stated to have been signed by Sashi Khati, Manju Khati, Jyoti Subba and Leela Shilal, respectively. As none of them have been examined, Exhibits-5, 6, 7 and 8 cannot lead to a conclusion that the plaintiff had taken money from them.

26. The plaintiff exhibited the Hand Note dated 16.07.2013 as Exhibit-9. Where this document was executed is not mentioned in this document. PW1 stated in her cross-examination that the document was executed in Guwahati. The address of the defendant was shown at Sikkim in the said document. No cogent and reliable evidence was led by the plaintiff to establish that she was in Guwahati on that date.

27. In cross-examination of the plaintiff, the Hand Note was referred to as Exhibit-10. She admitted that apart from the Hand Note, she does not have any other document to support her claim for a sum of Rs.32,47,200/-. She denied a suggestion that the defendant did not execute or sign the Hand Note and that she had forged the signature of the defendant. It is noted earlier that PW2 had exhibited the same as Exhibit-10 and DW1, 2 and 3 had also referred to the Hand Note as Exhibit-10. This Court will not hazard a guess how it has happened. The learned trial Court, though had given much emphasis on the above discrepancy, I am of the considered opinion that the said discrepancy will not have any bearing as evidently the parties were aware that they were referring to the Hand Note.

28. The plaintiff had to, in the first place, prove that she was capable or was in a position to, may be by herself obtaining loans from others, to provide loans to the defendant. Giving a go by to the case projected in the plaint, suggestion was given to DW1 that she had borrowed money from the mother of the plaintiff. In the context of the case projected by the plaintiff that no documents were executed at the time when defendant had received the amounts as stated by the plaintiff and when substantial amount of loan which the plaintiff claims to have advanced to the defendant as loan was received by the plaintiff herself from others, it was necessary for the plaintiff to have examined persons from whom she had availed loan to lend credence to the fact that she had, at least, obtained some loan though the same may not have proved advancing of loan to the defendant.

29. In ***Ram Pal Singh Baisen*** (supra), the Hon'ble Supreme Court held mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Contents of the documents are required to be proved either by primary evidence or by secondary evidence. Admission of documents may amount to admission of contents but not its truth.

30. It is evident from the evidence on record that though a report of hand-writing expert was received by the learned trial Court, the hand-writing expert was not examined. The Court cannot rely on the report of the handwriting expert unless he is examined and unless the same is admitted by the parties. It is to be noted that Expert evidence, though relevant in view of Section 45 of the Evidence Act, is not conclusive. It can rarely, if ever, take the place of substantive evidence. As stated in ***Bhagwan Kaur*** (supra), evidence of handwriting expert is of a frail character unlike that of a fingerprint expert. A Court is competent to compare the disputed writing of a person with others which are admitted or proved to be his writings. However, it may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of expert comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard.

31. The Hand Note (without the signatures) reads as follows:

> *"HAND NOTE DOCUMENT*
>
> *I, Kamal Kumari Subba, wife of Shri Ashok Kumar Subba (Chong), resident of Sisa Golai, NH31A, Gangtok, East Sikkim, do hereby undertake I shall pay a sum of Rupees 6,00,000/- (six lakhs) with interest of 5% and Rs.26,47,200/- (twenty six lakhs fourty seven thousand and two hundred) only, on or before 15th September, 2013 to Ms, Dinku Khati, which I have borrowed to same from Dinku Khati as my legal expenses incurred in DRT case at Guwahati, Civil Cases of T. Lachungpa, Binod Jain, at Gangtok and for the*

study of my daughter Ningwaphuma Subba at abroad (Australia).

I DO HEREBY PROMISE to pay the aforesaid loan to Ms. Dinku Khati, D/o Late Tek Bahadur Khati, resident of Utpal Nagar, Road No. 4, Siliguri, P.O. Anchal & P.S. Pradhan Nagar, District Darjeeling, West Bengal, on or before 15th of September, 2013, and if I fail to repay the same amount she can recovered the same by filing money recovery suit in the competent court of law.

I FURTHER UNDERTAKE to pay the said amount on or before the said date failing which I shall be held liable for criminal breach of trust, cheating and other penal provisions also.

I sign this document on this date 16th day of July, 2013 in presence of witnesses."

32. It will be appropriate to extract the relevant part of paragraph 21 of the plaint, which is as follows:

"*xxxxxxx For this purpose, the plaintiff borrowed some amount from her friend and relatives, details of which are as under:*

1.	*Leela Shilal*	*Rs.72,895/-*	*on 19/04/2012*
2.	*Manju Khati*	*Rs.2,20,000/-*	*on 11/04/2012*
3.	*Sashi Khati*	*Rs.2,00,000/-*	*on 04/09/2012*
4.	*Jyoti Subba*	*Rs.8,50,000/-*	*on 29/04/2012*

A sum of Rs.13,42,895/- (Thirteen Lacs Forty Two Thousand Eight Hundred and Ninety five) was borrowed as above and the said money has been given to Defendant on the various dates and further executing Hand note(s) Document/ Money Receipt on 16/07/2013.

> *The copy of the Money receipts are annexed herewith and marked collectively as Annexure-14 (Colly).*"

It is to be noted that the above extract without the annexure part was repeated in the evidence in affidavit of the PW1 at paragraphs 23 and 24.

33. Paragraph 26 of the plaint reads as follows:

> "*That after much pursuance by the plaintiff and after several request, the defendant issued the Hand Note Document dated 16.07.2013 wherein she has agreed and promise to pay the amount of Rs.6,00,000/- (six lacs) only with interest of 5% and Rs.26,47,200/- only to the plaintiff on or before 15.09.2013. The said Hand Note was signed before the witnesses, Shri Ashok Kumar Subba (Tsong) the husband of the defendant and Ms. Usha Khati, sister of the plaintiff.*
>
> *Copy of the Hand note Document dated 16/07/2013 is annexed herewith and marked as ANNEXURE-17.*"

It is to be noted that the aforesaid paragraph without the annexure part was repeated in the evidence in affidavit of the PW1 at paragraph 29.

34. In the pleadings, there is no explanation how the amount of Rs.32,47,200/- was accounted for. Perusal of the aforesaid paragraphs would go to show that the pleadings and evidence in respect of the Hand Note cannot be reconciled. It is also on record that the defendant has an estranged relationship with Ashok Kumar Subba, husband of the defendant. The other witness in the Hand Note is also an interested witness, being the sister of the plaintiff. It is not pleaded what was the rate of interest on the loan amount of Rs.6,00,000/- though a statement is made in the plaint that the amount will be paid with interest. In the Hand Note, rate of interest is

shown as 5% for the amount of Rs.6,00,000/-. It is somewhat odd that plaintiff had claimed that the amount of Rs.5,00,000/- and Rs.1,00,000/-, which she had obtained on mortgaging her father's property, carried an interest of 8% on Rs.5,00,000/- and loan of Rs.1,00,000/- was to be repaid with interest of 15%. In the pleadings as well as in evidence, there is no reference to any civil cases of T. Lachungpa, Binod Jain, at Gangtok. How the amount of Rs.26,47,200/- has been calculated has not been explained. The loans stated to have been advanced by the plaintiff, without taking into account Rs.6,00,000/-, comes to Rs.25,05,200/- only.

35. In view of the discussions above and taking note of the evidence adduced by the plaintiff, I am of the considered opinion that the learned trial Court was correct in holding that plaintiff had failed to prove her case.

36. Resultantly, finding no merit, the appeal is dismissed.

37. No cost.

38. Lower Court records be sent back.

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