THE
SIKKIM LAW REPORTS

NOVEMBER - 2020

(Page 683-990)

Mode of Citation
SLR (2020) SIKKIM

Contents	Pages

TABLE OF CASES REPORTED IN THIS PART

EQUIVALENT CITATION

Sl.No.	Case Title	Equivalent Citation	Page No.
1.	M/s. Sun Pharma Laboratories Limited v. Union of India and Others **(DB)**	2020 SCC OnLine Sikk 147	683-691
2.	Bir Bahadur Limboo v. State of Sikkim	2020 SCC OnLine Sikk 148	692-702
3.	Sanchi Rai v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk -	703-726
4.	State of Sikkim v. Asal Kumar Thapa and Others	2020 SCC OnLine Sikk -	727-744
5.	Durga Bahadur Gurung v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk -	745-760
6.	Mrs. Pankhuri Mishra v. Smt. Rinzing Lachungpa and Others	2020 SCC OnLine Sikk 151	761-778
7.	Mani Kumar Rai @ Tere Naam v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk 149	779-795
8.	Kewal Rai v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk 150	796-808
9.	Tshering Ganjay Lachungpa v. State of Sikkim	2020 SCC OnLine Sikk 152	809-814
10.	Nil Kumar Dahal and Another v. Indira Dahal and Others	2020 SCC OnLine Sikk -	815-873
11.	State of Sikkim v. Tenzing Bhutia **(DB)**	2020 SCC OnLine Sikk -	874-883
12.	Mrs. V. Vijaya Lakshmi v. Additional Chief Engineer (S/W)	2020 SCC OnLine Sikk 155	884-893
13.	Sun Pharma Laboratories Limited v. Union of India and Others **(DB)**	2020 SCC OnLine Sikk 158	894-905
14.	The Dean, I.K. Gujral Punjab Technical University v. Sikkim Students Welfare Association of Chandigarh and Others **(DB)**	2020 SCC OnLine Sikk 32	906-923

SUBJECT INDEX

Chettri, respondent no. 3 – Civil Misc. Case (Succession) No. 84 of 2015 in respect of properties mentioned in the Will was disposed on 20.04.2017 by granting Letters of Administration in favour of Rajendra Chettri, respondent no. 3 – Held: In the order dated 26.08.2014 passed by this Court in RFA No. 01 of 2014, this Court had observed that there can be no manner of doubt that a widow has a right and interest in the estate of the deceased and the appellant was possessed of all necessary locus to pursue with the suit. However, the observations made have to be understood in the context in which the same were made. When the said order was passed, the application for grant of Letters of Administration in respect of the Will was not even filed. The position in law changed drastically with the grant of Letters of Administration in Civil Misc. Case (Succession) No. 84 of 2015 filed at the instance of the appellant – With the grant of Letters of Administration, the appellant ceases to have any right or interest in respect of suit properties – The appellant presently has no *locus standi* to pursue the present appeal.

Mrs. Devi Maya Chettri* v. *Mr. Mahesh Chettri and Others ***934-A***

Code of Civil Procedure, 1908 – S. 9 – Maintainability of Suit – It is one thing to say that the plaintiff is not entitled to reliefs as prayed for if the plaintiff cannot establish his or her case. But that does not mean that the suit of the plaintiff is not maintainable. Maintainability of a suit is a question of law. In view of S. 9 of the Civil Procedure Code, 1908, all suits of civil nature are maintainable unless barred either by an express provision or by implication of law. For instance, suppose jurisdiction of Civil Court is barred under a statute in respect of matters falling within it and a suit is filed in respect of a subject matter under that statute, then the suit can be said to be not maintainable. If there is any issue regarding maintainability of the suit, it is appropriate that such issue is decided at the threshold.

Mrs. Devi Maya Chettri* v. *Mr. Mahesh Chettri and Others ***951-A***

Code of Civil Procedure, 1908 – Order VI Rule 17 – Order VI Rule 17 clothes the Court with powers to allow either party to alter or amend their pleadings at any stage of the proceedings on such terms as may be just. It also requires that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties provided that no application for amendment should be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial – The provisions in the first part is

discretionary and in the second part is imperative in as much as amendments that are necessary for the purpose of determining the real question in controversy between the parties ought to be allowed – By the proposed amendments the petitioner seeks to challenge the vires of S. 174(2)(c) of the Central Goods and Services Tax Act, 2017 and Notification No. 21/ 2017-C.E., dated 18.07.2017, on the ground that it takes away the vested rights of the petitioner by reducing the exemption/benefits. The prayers in the writ petition are confined to enabling the petitioner to claim full refund of the CGST and 50% of the IGST paid through the electronic cash ledger – Cannot be said that the petitioner was unaware of the provision of the statute the vires of which they now seek to assail, nor was it inserted at some point later in time to the filing of the writ petition. The question of the petitioner's inability to raise the matter in spite of due diligence, before the matter was heard or was taken up for hearing, therefore, does not arise. In view of the questions involved in the instant writ petition, it cannot be said that the amendments are necessary for determining the real question in controversy between the parties considering the prayers of the petitioner referred above. The proposed amendments if permitted would in fact change the very nature and character of the writ petition and introduce an entirely different cause of action, which is not permissible.

***M/s. Sun Pharma Laboratories Limited* v.**
Union of India and Others ***683-A***

Code of Civil Procedure, 1908 – O. VII R. 11 – Rejection of Plaint – The whole purpose of conferment of power under O. VII R. 11, C.P.C is to ensure that a litigation which is meaningless and bound to prove abortive should not be allowed to consume judicial time of the Court. However, since the power conferred is a drastic one, the conditions enumerated in O. VII R. 11, C.P.C are required to be strictly adhered to. At the stage of consideration of an application under O. VII R. 11, C.P.C the pleas taken by the defendant in the written statement and application for rejection of plaint would be irrelevant and cannot be adverted to and taken into consideration. The plaint has to be read as a whole and the substance, and not merely the form, which has to be looked into. If the allegations in the plaint, *prima facie*, show cause of action, the Court cannot embark upon a journey to find out and inquire whether the allegations are true or false.

Mahesh Chettri and Another* v. *State of Sikkim and Others ***924-A***

Code of Civil Procedure, 1908 – O. VII R. 11 – Rejection of Plaint – When the plaintiff as the writ petitioner was not entitled to maintain a writ

petition as he did not have any legal right to claim the suit property, it is obvious that the plaintiff did not have a right to sue for a declaration of right, title and interest in respect of the very same property and thus, there is no cause of action for filing the suit against the Government of Sikkim – Held: No substantial question of law arises in second appeal.
Mahesh Chettri and Another* v. *State of Sikkim and Others ***924-B***

Code of Criminal Procedure, 1973 – Defective Investigation – Effect – While in case of defective investigation the Court has to be circumspect while evaluating the evidence it would not be right in acquitting accused person solely on account of defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective (*In re. Gajoo* discussed)
Durga Bahadur Gurung* v. *State of Sikkim ***745-C***

Code of Criminal Procedure, 1973 – S. 154 – Delay in Lodging the F.I.R – Prompt lodging of an F.I.R is an assurance regarding truth of the informant's version and that a promptly lodged F.I.R reflects the first hand account of what has actually happened, and who was responsible for the offence in question (Re. Jai Prakash Singh discussed) – Evidence of PW-1 goes to show that the baby was born sometime during November 2014 and when the villagers enquired she had told them about the accused having repeatedly raped her since she was a child. By then, the baby was four months old. It is apparent from the evidence on record that the birth of the child of PW-1 was sought to be kept a secret and the other inmates of the house had also not made the same public – PW-2 had stated that when she had asked her father about the baby he told that he had brought the baby from Yangyang making it abundantly clear that the birth of the baby was suppressed. For more than four months, people in the locality were not aware about the birth of the baby. The domineering role of the father cannot be lost sight of the fact, more so, in absence of the mother who had abandoned the children. When allegations are against the father, it is not difficult to visualize the range of emotions which the victim undergoes. It may be difficult for the daughter to be able to muster enough courage to set the machinery of law in motion by lodging a complaint against her father. However, it is seen that once enquiries were made after the birth of the baby had come to light, the victim girl made a clean breast of the entire episode – In the given circumstances, PW-1 not having lodged the F.I.R immediately does not derail the prosecution case. The F.I.R came to be lodged at the instance of co-villagers with promptitude and without any

delay after they came to learn from PW-1 how the father had committed rape and had impregnated her.
Durga Bahadur Gurung* v. *State of Sikkim ***745-B***

Code of Criminal Procedure, 1973 – S. 321 – Withdrawal from Prosecution – The petition under S. 321 Cr.P.C has not averred that the learned Special Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice – The law is, though the Government may have ordered, directed or asked the Public Prosecutor to withdraw from prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that public interest will be served by his withdrawal from the prosecution (*In re. Abdul Karim* discussed) – The petition filed by the learned Special Public Prosecutor does not record the satisfaction of the learned Special Public Prosecutor having examined the relevant material and in good faith, being satisfied that a public interest would be served by his withdrawal from the prosecution. The petition filed by the learned Special Public Prosecutor records only his opinion that because of certain lacunae, the prosecution would be rendered futile. The materials placed do not even remotely indicate to this Court that the petition under S. 321 Cr.P.C. was made in good faith or in the interest of public policy and justice – The grounds taken in the petition was in pursuance to the direction of the Government to withdraw from prosecution without properly determining if the withdrawal from prosecution would be in public interest.
State of Sikkim* v. *Asal Kumar Thapa and Others ***727-A***

Code of Criminal Procedure, 1973 – S. 439 – S. 439 provides for concurrent jurisdiction of the Sessions Court and the High Court. On a perusal of the order passed by the Special Judge, it seems clear that the applicant had moved for bail on similar grounds which was rejected. The only new circumstance which has been indicated in the present application for bail is that the investigation is over – The applicant is accused of transporting and having in his possession commercial quantities of controlled substances. The preliminary materials does not indicate that the applicant, a police officer was transporting commercial quantities of controlled substances for his personal consumption – As the applicant is a police officer, it cannot be said that the apprehension of the respondent that he may tamper with evidence is without any basis as the charge sheet is yet to be filed.
Tshering Ganjay Lachungpa* v. *State of Sikkim ***809-A***

Hindu Succession Act, 1956 – Applicability of Law not Extended or Enforced in the State – Where there is no existing old law on a particular subject in Sikkim or where the law is scanty or inadequate, the Courts in Sikkim also being Courts of equity, justice and good conscience, have to turn to the laws of the country. It is but apposite to notice that the Courts in Sikkim, even prior to being part of the Indian Union have followed principles of law in force in India if the principles were based on justice, equity and good conscience – Considering that the provisions of the Hindu Succession Act, 1956 has not been extended or enforced in the State, nor does any corresponding statute occupy the field in the State, it would, in the circumstances be just and proper to look to and apply the principles contained in the Hindu Succession Act, 1956, for the purposes of considering matters relating to Succession in Sikkim, for persons to whom it applies as personal law.

Nil Kumar Dahal* v. *Indira Dahal and Others ***815-A***

Hindu Succession Act, 1956 – Mitakshara School of Hindu Law – Partition – Effect – The parties are Hindu Brahmins. Their father Devi Prasad divided the property amongst his three sons contemporaneously which was consented to by all without any objection. As under the Mitakshara law, the father i.e. Devi Prasad had the power to divide the family property during his lifetime and exercised his power thus, for all intents and purposes, it can be gauged that their family was following the principles of the Mitakshara School of Hindu Law – Under the Mitakshara School, each son and now daughters vide the Hindu Succession (Amendment) Act, 2005 are coparceners in their own right and upon birth, take an equal interest in the ancestral property, whether movable or immovable. Thus, being entitled to a share, they can seek partition. If they do so, the effect in law is not only a separation of the father from the sons but a separation inter se, the consent of the sons is not necessary for the exercise of that power. However, no Hindu father joined with his sons and governed by the Mitakshara law although vested with the power to partition the property can make a partition of the joint family property by Will.

Nil Kumar Dahal* v. *Indira Dahal and Others ***815-B***

Hindu Succession Act, 1956 – After the partition had taken place vide Exhibit "A," the father had his own share in the property which thus, was his separate property. Bal Krishna also received his separate share. Consequently, Devi Prasad was free to decide how his share would be given away after his passing viz. by the testamentary disposition, on the

conditions therein being fulfilled – The reasoning that the share of Devi Prasad would devolve on his undivided son Bal Krishna despite him having received his share, is an erroneous interpretation of the law. Merely because Bal Krishna continued to live in the main house with the father did not vest this circumstance with the legal connotation that he was joint with the father.
Nil Kumar Dahal* v. *Indira Dahal and Others ***815-D***

Hindu Succession Act, 1956 – The list of Class-I heirs are given in the Schedule to the Act of 1956 – Under the Schedule of the Act of 1956, son, daughter and widow, apart from others, are listed as Class-I heirs – S. 8 of the Act of 1956 provides that property of a male Hindu dying intestate shall devolve, firstly, upon the heirs, being the relatives specified in Class-I of the Schedule. S. 9, which deals with the order of succession, lays down that among the heirs specified in the Schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs – The stand taken by the appellant is that as the daughters were married, they ceased to be Class-I heirs and therefore, they are not entitled to the share of the property of the deceased – The reasoning is wholly untenable for the simple reason that legislature has not made any distinction between a daughter and a married daughter in the Schedule of the Act of 1956.
Rajendra Chhetri* v. *Devi Maya Chettri and Others ***945-A***

Indian Evidence Act, 1872 – Benefit of Doubt – The benefit of doubt to which the accused is entitled is reasonable doubt – the doubt which rational thinking men will reasonably, honestly and conscientiously entertain – It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the crime. If that were so the law would fail to protect society as in no case such a possibility can be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt (*In re. Himachal Pradesh Administration* discussed).
Durga Bahadur Gurung* v. *State of Sikkim ***745-D***

Indian Evidence Act, 1872 – Circumstantial Evidence – Principle – It is no longer *res integra* that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability – Careful analysis of the evidence of PW-3, PW-4,

PW-11, PW-12 and PW-14 would indicate that though at some point of time along with them the deceased and the accused were present, their evidence does not even remotely suggest that both of them were seen together alone in the evening of 14.06.2017 or any point of time thereafter. The accused leaving them after the deceased had left cannot lead to an inference that the accused had followed the deceased, more so, when there is contradiction with regard to time that had separated their respective departures – Having regard to the evidence on record, the theory of "last seen together" as an incriminating factor qua the appellant is, thus, of no avail to the prosecution.

Mani Kumar Rai @ Tere Naam* v. *State of Sikkim ***779-A***

Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – The policy underlying Ss. 25 and 26 of the Evidence Act is to make it a substantive rule of law that confession whenever and wherever made to the police or while in the custody of the police to any person whosoever, unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the circumstances mentioned in S. 24 and therefore, inadmissible, except so far as provided by S. 27 of the Act – S. 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence – The only portion of the disclosure statement which is admissible under S. 27 is the statement of appellant that he had kept the *"khukuri"* in the corner of the kitchen, which is beside his house and he can show the place where he had kept the *"khukuri"*. The rest of the disclosure statement is inadmissible, being confessional and prohibited by Ss. 25 and 26 of the Evidence Act.

Mani Kumar Rai @ Tere Naam* v. *State of Sikkim ***779-B***

Indian Evidence Act,1872 – Documentary Evidence to be Clear and Unambiguous – Defendant no.1, as DW-1 had stated in her evidence in affidavit that as the advance money was not paid even after passage of more than a month from the date of execution of the lease deed, she and the plaintiff had decided to drop the transaction altogether and the plaintiff was asked to withdraw the lease deed and other papers from the office of the Sub-Registrar, Gangtok and the plaintiff had informed her that she had withdrawn all the documents from the office of the Sub-Registrar, Gangtok and that the transaction stood cancelled – It was further stated that she had no reason to suspect the plaintiff as they shared a good relationship and she

never thought that the plaintiff would play fraud on her on the strength of those documents pertaining to the cancelled deal – The aforesaid evidence of DW-1 was not tested by the plaintiff by way of cross-examination – The aforesaid evidence of defendant no.1 has remained un-impeached and as a consequence thereof the only conclusion that can be drawn is that the transaction was cancelled for non-payment of advance amount and the lease deed was not to be acted upon. The same also goes to show that no amount in the form of advance was paid on 30.08.2012 i.e., on the date of execution of the lease deed – Merely because it is mentioned in Exhibit-1 that amount of ₹ 44 lakhs was paid by the plaintiff, payment of ₹ 44 lakhs on the date of execution of the lease deed is not proved. Documentary evidence to outweigh oral evidence has to be clear and unambiguous.

Mrs. Pankhuri Mishra* v. *Smt. Rinzing Lachungpa and Others ***761-A***

Indian Evidence Act, 1872 – Extra-judicial Confession – Extra-judicial confession to afford a reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and the person selected in whom confidence is reposed *(In re. Heramba Brahma* referred) – Another incriminating piece of evidence sought to be highlighted by the prosecution is the telephonic call stated to have been made by the accused to PW-3 – In his cross-examination, PW-3 had admitted that he could not say whether the person who made the phone call was actually the accused or not. It is very surprising that he did not even note down the phone number from which he had received the call. In his cross-examination, PW-5 admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him. In cross-examination, PW-6 admitted that in his statement before police he did not state that PW-5 had told him that the appellant had committed murder of her husband. PW-22, on the other hand, had deposed that PW-5 had telephonically informed him to the effect that Nima Tshering was found in a serious condition in his room. Though PW-10 had stated that he was told by PW-6 that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under S. 161, Cr.P.C. In view of above, no credence can be placed on the so-called telephone call received by PW-3 that it was the accused, who had made the call and had informed him that she had committed the murder of her husband – Evidence of PW-3, PW-5 and PW-6 with regard to the information received by PW-3 that the accused had committed the murder of her husband is of no consequence – PW-8, in her cross-examination, had

clarified that she could not say whether the accused was saying *"daju moryo"* (her husband was dead) or *"daju mare"* (she had killed her husband) as her child was crying. Therefore, it cannot be said that there was any extra-judicial confession by the accused in presence of PW-8.
Sanchi Rai* v. *State of Sikkim ***703-A***

Indian Evidence Act, 1872 – Evidence of Defence Witness – Credibility – The evidence of defence witness is not to be ignored by the Courts. However, his evidence has also to be tested on the touchstone of reliability, credibility and trustworthiness – Evidence tendered by defence witnesses cannot always be termed as a tainted one, the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution (*In re. Banti alias Guddu and Ram Singh* discussed).
Sanchi Rai* v. *State of Sikkim ***703-E***

Indian Evidence Act, 1872 – S. 6 – Res Gestae – S. 6 is an exception to the general rule where under hearsay evidence becomes admissible. Such evidence must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. The essence of the doctrine is that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction that it becomes relevant by itself. Evidence of PW-5 and PW-6 may fall in the category of hearsay evidence. However, we have already held that evidence of PW-5 and PW-6 is of no consequence with regard to the information received from PW-3 that the accused committed murder of her husband as no reliance was placed on the evidence of PW-3 itself.
Sanchi Rai* v. *State of Sikkim ***703-D***

Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Admissibility – Exhibit-7 is stated to be a disclosure statement. The same reads as follows: "My true statement is that yesterday dated 6/4/2018 my husband had gone to Dubdi for unloading sandstone on his own house truck. At that time, I lied to my house owner, Aunty Boi Maya Gurung, and purchased mouse-poisoning medicine for Rs. 20. The time was around 5 pm. After sometime, my husband Nim Tsh. Lepcha returned and I mixed that mouse-poisoning medicine in a cup of tea and gave it to him, which he drank completely. At around 7 pm, he ate food and I also ate. At that time, he had started to appear a bit sick as that mouse medicine might have started to take

effect. After eating food, he went to his room and I also went inside after finishing my kitchen works. He was playing with his mobile and we argued about his girlfriend and then he slapped me. After that, I went inside the kitchen and took out a wooden log from the collection and hit him two times on his head and one time on his leg with it, after this, he kept on shaking continuously. At that time, I felt that he would surely die that is why I told everything to Yoksom OP Mingma Police, and asked them to arrest me. The wooden log with which I had hit him is on my bed/bed room and the cover of mouse-poisoning medicine is on the dustbin outside which I had thrown, and the tea cup which was used was washed and kept in the kitchen; these items I can hand over to the police in the presence of witnesses. This is my true statement." –The only portion which is admissible under S. 27 of the Evidence Act is the portion containing the statement that wooden log with which she had hit the deceased is on her bed/bed room, the cover of mouse-poisoning medicine is on the dustbin outside which she had thrown, and the tea cup used which was washed and kept in the kitchen, rest being confessional and prohibited by Ss. 25 and 26 of the Evidence Act.
Sanchi Rai* v. *State of Sikkim ***703-B***

Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Essential Requirements – Merely because a person was not under arrest while making a disclosure statement under S. 27 of the Evidence Act will not render such disclosure statement inadmissible in evidence – If Exhibit-10 passes judicial scrutiny, the only portion that would be admissible under S. 27 is the portion where he stated that he could show the things which he was wearing on the date of the occurrence and the checked shirt that he had used to swipe blood and that they were kept in his house.
State of Sikkim* v. *Tenzing Bhutia ***874-A***

Indian Evidence Act, 1872 – S. 45 – Expert Evidence – The wooden log was not shown to PW-21 – It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of offence, if available, be shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may at times cause aberration in the course of justice (*In re. Ishwar Singh* discussed).
Sanchi Rai* v. *State of Sikkim ***703-C***

Indian Evidence Act,1872 – S. 65 – Cases in Which Secondary Evidence Relating to Documents may be Given – To prove the contents

of a document, a party must adduce primary evidence of the contents and only in exceptional cases will secondary evidence be admissible. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original *(In re. M. Chandra* discussed) – The factual foundation to establish the right to give secondary evidence by way of a duplicate copy was not laid by PW-17. When there was no reference to a duplicate copy in the deposition of PW-17, obviously there is no evidence that the duplicate copy was in fact a true copy of the original. In cross-examination, when confronted with Exhibit-24, PW-17 admitted that he was not acquainted with the signatures of Dr. H.K. Pratihari and Dr. Subhankar Nath – Neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispenses with its proof which is otherwise required to be done in accordance with law – In view of above, Exhibit-24 cannot be taken into consideration.

Durga Bahadur Gurung* v. *State of Sikkim ***745-A***

Indian Penal Code, 1860 – S. 304 (Part-II) – Culpable Homicide not amounting to Murder – To make out an offence punishable under S. 304 II, I.P.C, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his was likely to cause death. If there is intent and knowledge both, the same would fall under S. 304 I, I.P.C but if it is only a case of knowledge and not intention to cause death or bodily injury the same would fall under S. 304 II, I.P.C – According to Dr. O.T. Lepcha (PW-16), the death of the deceased was due to hypovolaemic shock as a result of stab injury to the femoral vessels by a sharp single edged weapon – The depositions of the two injured witnesses, i.e. PW-1 and PW-5 along with the depositions of PW-3, PW-4 and the first informant – PW-2, makes the fact leading to the stabbing of the deceased and the immediate facts thereafter, abundantly clear leaving no room to doubt that there was an altercation between the appellant and the deceased over two petty issues which led to a physical fight between them and culminated in the appellant stabbing the deceased. Although, it is certain that there was no intention to cause death of the deceased, it is apparent that the appellant had the requisite knowledge that by using an 8 inch sharp edged knife and stabbing over the left inguinal space with substantial force to have caused spindle shaped injury would have caused such bodily injury as is likely to cause death – In the circumstances, the conviction of the appellant under S. 304 II, I.P.C is confirmed.

Kewal Rai* v. *State of Sikkim ***796-A***

Indian Penal Code, 1860 – Ss. 307, 308 – In order to bring home the charge for attempt to murder it must be shown that the appellant acted with such intention or knowledge or under such circumstances that if he by that act caused death, he would be guilty of murder. Intention or knowledge to commit murder must thus necessarily exist. Both the intention or knowledge relating to commission of murder and the doing of the act towards it form the two vital ingredients of the offence punishable under S. 307, I.P.C. If both the ingredients are established, irrespective of the resultant injury, the offence of attempt to murder is made out – The established fact reflects a sudden attack, a singular stab injury on PW-5's right anterior chest wall which was grievous in nature caused by an 8 inch sharp edged knife. It seemed to have happened on the spur of the moment, in a fit of rage and not with any intention or knowledge relating to commission of murder – In the totality of the facts and circumstances, we are of the view that the offence committed by the appellant on PW-5 would not amount to attempt to murder punishable under S. 307, I.P.C but would amount to attempt to commit culpable homicide under S. 308, I.P.C.

Kewal Rai* v. *State of Sikkim ***796-B***

Indian Penal Code, 1860 – S. 354A – Sexual Harassment – The ingredient of the offence is the commission of physical contact and advances involving unwelcome and explicit sexual overtures and making sexually coloured remarks – The victim identified the revisionist as the manager of the bank and gave a detailed account of what transpired on 06.09.2017 in the interview that she had attended. Both the learned Chief Judicial Magistrate and the learned Sessions Judge have found the evidence of the victim reliable – The victim deposed that the revisionist told her that she should be wearing figure hugging clothes as women look attractive in such clothes. She further deposed that the revisionist also showed her how to speak with customers in order to attract them. The victim deposed that the revisionist also touched her body particularly on the hook of the bra as well as her backside while showing her how to speak to the customers. She deposed that she was not comfortable and wanted to leave the bank – At the interview, there was no reason for the revisionist to ask the victim to change her clothes and appear in a particular manner and further to touch her on the pretext of teaching her the correct posture while dealing with customers. The detailed account as to what transpired on that particular date of interview does establish that the revisionist had committed physical contact and made unwelcome advances and explicit sexual overtures. It also establishes that the revisionist had made sexually coloured remark upon the victim.

Sashi Shekhar Thakur* v. *State of Sikkim ***969-A***

Probation of Offenders Act, 1958 – S. 4 – Release of Certain Offenders on Probation of Good Conduct – Neither the learned Chief Judicial Magistrate nor the learned Sessions Judge had examined the applicability of S. 360, Cr.P.C or S. 4 of the Probation of Offenders Act, 1958 – While declining to interfere with the judgments of the trial Court and first appellate Court, matter remitted to the Court of the learned Chief Judicial Magistrate for the limited purpose for deciding whether the benefit of S. 360, Cr.P.C and S. 4 of the Probation of Offenders Act, 1958 can be extended to the revisionist.

Sashi Shekhar Thakur* v. *State of Sikkim ***969-B***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Though PW-13 stated to have verified the Birth Certificate of PW-1 from the Births and Deaths Register maintained by the PHC, the Register was not produced. According to PW-13, in Exhibit-2, the surname of the victim girl did not tally. It is not very clear from the judgment rendered in *Padam Kumar Chettri* (supra) as to whether the Register was produced before the Court. Therefore, following the judgment rendered in *Lall Bahadur Kami* (supra), which is directly on the point, it is held that Exhibit-2 cannot be relied upon for the purpose of determining the age of PW-1 – In this connection, it would also be relevant to note that PW-9 and PW-12, father and mother of the victim girl, respectively, in their cross-examination had stated that they do not remember the date, month and year on which their daughter was born. PW-12, however, stated that her daughter is 16 years old. What transpires from the above is that the parents could not even remember in which year PW-1 was born. Merely saying that the daughter is 16 years old will not make the daughter 16 years old when they cannot even recall the year in which the daughter was born – Prosecution has failed to establish that PW-1 was a minor on the date of incident.

Bir Bahadur Limboo* v. *State of Sikkim ***692-A***

Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 4 – Penetrative Sexual Assault – The evidence of PW-3, PW-4 and PW-11, at whose instance the whole episode came to light, does not lend assurances to the evidence of PW-1 that the accused, by suddenly appearing had forcefully taken her away to a secluded place for committing penetrative sexual assault. It is also difficult for this Court to accept that PW-3 and PW-4 had witnessed the penetrative sexual assault committed by the accused on PW-1, as there are contradictions on material aspects with

regard to the evidence of PW-3 and PW-4 with that of PW-11. What, however, is established on record from their evidence is that the accused and PW-1 were found in an intimate position – Appellant held to be entitled to benefit of doubt.

Bir Bahadur Limboo* v. *State of Sikkim ***692-B***

Revenue Order No.1 of 1917– – By Revenue Order No. 1 dated 17.05.1917, it was notified to all *Kazis*, *Thikadars* and *Mandals* in Sikkim that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their lands to any person other than a Bhutia or a Lepcha without the express sanction of the Durbar, or officers empowered by the Durbar in their behalf, whose order will be obtained by the landlord concerned – Trial Court had held that transaction was shown to be a lease transaction only to avoid the operation of Revenue Order No. 01 of 1917 – It is manifestly clear that Revenue Order No. 1 of 1917 expressly relates to land and not to any building or flats. Only because of the fact that in Exhibit-3, the word "purchase" was written by the concerned Advocate of defendant no. 2, the Trial Court held that the transaction was not a lease transaction but was a transaction of purchase. The Trial Court had also observed that on 30.08.2012 when the lease deed was executed, lease upto a period of 99 years was permissible. Nothing contrary is shown by the Counsel for the defendants to take a view that execution of lease deed was not permissible in law – While upholding the decision in issue no. 4, issue no. 3 is decided holding the suit was not barred by Revenue Order No. 01 of 1917.

Mrs. Pankhuri Mishra* v. *Smt. Rinzing Lachungpa and Others ***761-B***

Sikkim Allotment of House-sites and Construction of Building (Regulation and Control) Act, 1985 – The demolition notice dated 03.07.2020 was issued under S. 8 of the Act. The reply given by the appellant being found unsatisfactory, demolition order dated 29.09.2020 was issued. The permission itself provided that the appellant shall demolish the structure as and when the Government wanted it to be demolished. The same was accepted by the appellant. In the attending facts and circumstances, submission advanced that denial of opportunity of hearing had resulted in violation of principles of natural justice cannot be countenanced – Held: We find no merit in this appeal, and accordingly, the same is dismissed. No cost.

D. B. Thapa* v. *Urban Development and Housing Department ***982-A***

Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – As could be culled out from the submissions of Learned Assistant Public Prosecutor, the charge-sheet is yet to be filed as the RFSL report has not yet been received by the I.O. However, the F.I.R does not reveal the role of the petitioner save to the extent that the I.O sought legal action against her. Kiran Darjee who is accused of being a peddler of controlled substances is her husband and she lives with him in the rented premises, that by itself does not *prima facie* establish her complicity in the offence in the absence of a specific role attributed to her in the F.I.R – This is a fit case where the petitioner can be enlarged on bail.
Sita Rai @ Sita Darjee* v. *State of Sikkim ***987-A***

The Sikkim State General Department Notification No.385/G, dated 11.04.1928 – Unregistered Document – Exhibit "A" is an unregistered document. The Sikkim State General Department Notification No. 385/G dated 11.04.1928 requires all documents such as mortgage and sale deeds and "other important documents" and deeds to be registered and will not be considered valid unless they are duly registered – Nevertheless, it is now no more res integra that the Courts can look into unregistered documents more so, if it is a family settlement (*In re: Thulasidhara v.* discussed).
Nil Kumar Dahal* v. *Indira Dahal and Others ***815-C***

Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 148 (1) – Letters Patent Appeals – A perusal of order dated 15.05.2019 goes to show that appellant was required to submit a fresh comprehensive representation to UGC by 20.05.2019 duly annexing a comparative chart of the syllabi of the courses as indicated with their change in nomenclature and UGC was directed to consider the representation filed by the appellant in the joint presence of the representatives of the appellant as also five representatives of the petitioner-Association and UGC was to dispose of the matter within eight weeks with a reasoned order. The expenses for the meeting to be attended by the five representatives of the petitioner-Association, was to be borne by the appellant – A reading of the aforesaid order would go to show that the learned Single Judge was led to believe that the appellant had not taken steps in compliance of the order dated 15.05.2019 as the respondent no. 4 (appellant) had not informed the writ petitioners of the date that was fixed for them to appear before UGC, which belief was further bolstered by the submission of the learned Counsel for UGC that no steps had been taken by the appellant and that no

representation was also filed. After recording the above conclusion, the learned Single Judge referred to the previous orders – Reading of paragraphs 10 and 13 of the order dated 22.07.2019 leaves no manner of doubt that the direction to pay a sum of ₹ 1 lakh each to each of the petitioner students was by way of compensation – The direction to make payment of compensation by the order dated 22.07.2019 attaches finality so far as that issue is concerned. Such direction for compensation could not have been passed on presumption. It will be relevant to note that in the writ petition, the writ petitioners, amongst others, had prayed for compensation for the affected students. It was a collateral issue arising out of perceived violation of direction of this Court, which was evidently not a subject matter of the writ petition – There was no basis for the learned Single Judge to accept the submission of learned Counsel appearing for the UGC and at the same time, to reject the submission of learned Counsel for the appellant. Learned Single Judge also presumed that because no date for meeting is given, the same is evidently a pointer to the fact that the appellant had not taken steps. It has come to light that the submission of learned Counsel appearing for the UGC was not factually correct and he had made the submission without any basis. It has also transpired that despite being aware of the order of this Court, no date for meeting was given by UGC within a period of eight weeks and the meeting finally took place only on 06.09.2019. It was UGC which had not complied with the order of this Court dated 15.05.2019 in letter and spirit – It is evident that the order dated 22.07.2019 was based on a mistaken fact going to the root of the matter. In our considered opinion, when the representation submitted by the petitioner was brought to the notice of the Court by way of filing a review petition, it should have been taken as a sufficient reason in the facts and circumstances of the case to review the order dated 22.07.2019 –In view of the above discussions, impugned orders dated 22.07.2019 and 03.09.2019 are set aside and quashed.

The Dean, I.K. Gujral Punjab Technial University* v. *Sikkim Students Welfare Association of Chandigarh and Others ***906-A***

Specific Relief Act, 1963 – Specific Performance – Plaintiff had failed to perform her obligation in accordance with the lease deed. Specific performance of immovable property is not automatic. Jurisdiction to grant specific performance is discretionary. It is one of discretion to be exercised on sound principles. The Court would have to take into consideration, amongst others, the circumstances arising in the case as also the conduct of the parties – In view of the materials on record, no case is made out for

grant of a decree for specific performance of the lease deed – Defendant no. 2 to make payment of 12 lakhs to the plaintiff within a period of 45 days from today failing which it will carry interest @ 6% per annum from the date of filing of the suit 01.09.2015 till payment is made.

Mrs. Pankhuri Mishra* v. *Smt. Rinzing Lachungpa and Others ***761-C***

Transfer of Property – Necessity of a Deed of Transfer – Whether by way of letter dated 08.06.1978, defendant no.1 could have transferred his property to the husband of the plaintiff and also whether the husband of the plaintiff could have verbally transferred the land to the plaintiff? – Held: The identity of the land was not ascertainable from the letter dated 08.06.1978. That apart, it is also not indicated that DW-2 was requesting recording of his brother's name because he had relinquished his rights or had transferred the same, as is sought to be contented by the plaintiff. Plaintiff has failed to produce any document of title. If document of title was not so required, it was plaintiff's burden to establish the same – Use of the expression "relinquished" by DW-2 in his evidence cannot have any legal effect unless relinquishment was done in accordance with law. Such expression at best conveys his wish and desire to vest the property on his brother, but a wish will not transfer land to his brother or vest the same on his brother – Schedule-A land was not transferred to the husband of the plaintiff and therefore, husband of the plaintiff could not have transferred the land to his wife, that too, without a deed of conveyance – Plaintiff has no right, title or interest over the Schedule-A land

Mrs. Devi Maya Chettri* v. *Mr. Mahesh Chettri and Others ***951-B***

Transfer of Property – Whether a Building Standing On the Soil Becomes Part of It? – So far as Schedule-B and Schedule-C buildings are concerned, it is to be stated the plaintiff claims her right over the Schedule-B and Schedule-C buildings on the basis that the buildings stand over Schedule-A land, which belongs to her. It is admitted by the defendants that the buildings were constructed by the husband of the plaintiff. It is already noticed that Schedule-A land is recorded in the name of defendant no. 1 on the basis of purchase. Held: As the foundation of the claim in respect of Schedule-B and Schedule-C buildings have not been established, as a logical corollary, it must be held that the plaintiff cannot claim right, title and interest over the Schedule-B and Schedule-C buildings on the basis of ownership and therefore, question of recovery of possession from defendant no.2 does not arise – There is no law or custom which lays down that whatever is affixed or built on the soil becomes a part of it, and

SLR (2020) SIKKIM 683

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

I.A. No. 03 of 2020 in WP (C) No. 47 of 2018

M/s. Sun Pharma Laboratories Limited ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner: Ms. Gita Bista and Mr. Karan Sachdev, Advocates.

For Respondent 1-2: Mr. B. K. Gupta, Advocate.

For Respondent No. 3: Mr. Santosh Kumar Chettri, Government Advocate.

Date of decision: 2nd November 2020

A. Code of Civil Procedure, 1908 – Order VI Rule 17 – Order VI Rule 17 clothes the Court with powers to allow either party to alter or amend their pleadings at any stage of the proceedings on such terms as may be just. It also requires that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties provided that no application for amendment should be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial – The provisions in the first part is discretionary and in the second part is imperative in as much as amendments that are necessary for the purpose of determining the real question in controversy between the parties ought to be allowed – By the proposed amendments the petitioner seeks to challenge the vires of S. 174(2)(c) of the Central Goods and Services Tax Act, 2017 and Notification No. 21/

2017-C.E., dated 18.07.2017, on the ground that it takes away the vested rights of the petitioner by reducing the exemption/benefits. The prayers in the writ petition are confined to enabling the petitioner to claim full refund of the CGST and 50% of the IGST paid through the electronic cash ledger – Cannot be said that the petitioner was unaware of the provision of the statute the vires of which they now seek to assail, nor was it inserted at some point later in time to the filing of the writ petition. The question of the petitioner's inability to raise the matter in spite of due diligence, before the matter was heard or was taken up for hearing, therefore, does not arise. In view of the questions involved in the instant writ petition, it cannot be said that the amendments are necessary for determining the real question in controversy between the parties considering the prayers of the petitioner referred above. The proposed amendments if permitted would in fact change the very nature and character of the writ petition and introduce an entirely different cause of action, which is not permissible.

(Paras 9 and 11)

Petition dismissed.

Case cited:

1. Union of India and Another Etc. Etc. v. M/s. V.V.F. Ltd. and Another Etc. Etc., Civil Appeal Nos. 2256-2263 of 2020 arising out of S.L.P (C) Nos. 28194-28201/2010 dated 22.04.2020.

ORDER

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

1. The Petitioner has filed an application under Order VI Rule 17 read with section 151 of the Code of Civil Procedure, 1908 (in short, "CPC"), seeking to insert amendments in the Writ Petition. The proposed amendments are as follows;

Insertion of Paragraph 4.1 and 4.2 after the existing Paragraph 4:

> **"***4.1. The Petitioner is also challenging the proviso to Section 174(2)(c) of the Central Goods and Services Tax Act, 2017 which provides that tax*

exemption granted as an incentive through a notification would not continue if such notification is rescinded.

4.2 Further, the Petitioner is also challenging the Notification No.21/2017-C.E. dated 18.07.2017 vide which the exemption notifications issued under the erstwhile regime (including Notification No.20/2007-C.E. dated 25.04.2007) were rescinded."

Replacing the contents of the existing Paragraph 32 with the following:

"*32. Thus, aggrieved by the impugned proviso to Section 174(2)(c) of the CGST Act, the impugned Notification No.21/2017-C.E. dated 18.07.2017 and the Budgetary Support Scheme which have resulted in denial of vested right to the Petitioner to continue to enjoy the benefits promised to it, the Petitioner is filing the present petition based on the following grounds. Each ground is independent and without prejudice to one another.*"

Incorporating Paragraph A18 after the existing paragraph A17:

"*A.18 It is submitted that the proviso to Section 174(2)(c) of the CGST Act and the impugned Notification No.21/2017-C.E. dated 18.07.2017 are in effect taking away the vested rights of the Petitioner by reducing the exemptions/benefits promised to the Petitioner. Thus, the impugned*

*proviso to Section 174(2)(c) of the CGST Act and the impugned Notification No.21/2017-C.E. dated 18.07.2017 are contrary to the established principles of promissory estoppel and legitimate expectation as submitted in foregoing Grounds. For this reason, the impugned proviso to Section 174(2)(c) of the CGST Act and the impugned Notification No.21/2017-C.E. dated 18.07.2017 are liable to be struck down being violative of Article 14 of the Constitution of India and the vested rights of the Petitioner. It may be noted that this submission is without prejudice to Petitioner's contention that the exemptions promised to the Petitioner is a vested right.***"***

Incorporating **the following clauses in place of existing clauses (c) to (e):**

"*(c) strike down the proviso to Section 174(2)(c) of the Central Goods and Services Tax Act, 2017 as unconstitutional being contrary to Article 14 of the Constitution of India;*

(d) strike down the Notification No.21/ 2017-C.E. dated 18.07.2017 issued by the Respondent No.1 as unconstitutional being contrary to Article 14 of the Constitution of India

(e) Hold that proviso to Section 174(2)(c) of the Central Goods and Services Tax Act, 2017; Notification No.21/2017-C.E. dated 18.07.2017 and the Scheme of Budgetary support

under Goods and Service Tax regime to the units located in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North-East including Sikkim to Article 14 and the vested rights of the Petitioner;

(f) Issue any other writ, order or direction as this Hon'ble Court may deem just and fair and circumstances of the case;

*(g) For such further and other reliefs as the nature and circumstances of the case may require.***"**

3. Learned Counsel for the Petitioner submits that the proposed amendments are necessary for an effective adjudication of the main Writ Petition and will under no circumstance cause any harm, loss or prejudice to the Respondents. The proposed amendments do not change the nature and character of the Writ Petition and are being sought *bona fide* in the interest of justice. The proposed amendments hence be considered and allowed.

4. *Per contra*, the Learned Counsel for the Respondents No.1 and 2 filed his reply to the I.A. and in the averments thereof objected to the proposed amendments. Learned Counsel contended that post the Judgment of the Hon'ble Supreme Court in Civil Appeal Nos.2256-2263 of 2020 arising out of S.L.P.(C) Nos.28194-28201/2010 dated 22-04-2020 in the matter of the ***Union of India & Another Etc. Etc.*** vs. ***M/s. V.V.F. Ltd. & Another Etc. Etc.***, the Hon'ble Supreme Court in Paragraph 14.3 has observed as follows;

> **"**14.3 As observed hereinabove, the subsequent notifications/industrial policies do not take away any vested right conferred under the earlier notifications/ industrial policies. Under the subsequent notifications/ industrial policies, the persons who establish the new undertakings shall be continue to get the refund of the excise duty. However, it is clarified by the subsequent notifications that the

> refund of the excise duty shall be on the actual excise duty paid on actual value addition made by the manufacturers undertaking manufacturing activities. Therefore, it cannot be said that subsequent notifications/industrial policies are hit by the doctrine of promissory estoppel. The respective High Courts have committed grave error in holding that the subsequent notifications/industrial policies impugned before the respective High Courts were hit by the doctrine of promissory estoppel. As observed and held hereinabove, the subsequent notifications/ industrial policies which were impugned before the respective High Court can be said to be clarificatory in nature and the same have been issued in the larger public interest and in the interest of the Revenue, the same can be made applicable retrospectively, otherwise the object and purpose and the intention of the Government to provide excise duty exemption only in respect of genuine manufacturing activities carried out in the concerned areas shall be frustrated. ……**…"**

5. That, the Hon'ble Supreme Court has thereby rejected the original Petition of the Petitioner wherein they had sought benefits on the ground of promissory estoppel and hence this Petition deserves no consideration. It was further contended that the I.A. has been brought at a belated stage when the original Writ Petition has been heard in its entirety and the Judgment in the matter was reserved, indicating the *mala fides* of the Petitioner. It was next pointed out that with the Goods and Services Tax being rolled out a new Scheme has been offered as a measure of goodwill, only to the units which were eligible for drawing benefits under the earlier excise duty exemption/refund scheme, but has no relation to the erstwhile schemes, thus the Petitioner has been compensated for the benefits that they were drawing in the earlier excise regime. That, instead of the 56% that was fixed earlier, the amount to be refunded is fixed at 58% giving the Petitioner the benefit of an additional 2%. Denying the statements of the Petitioner in Paragraphs 2 to 5 of the I.A. in totality it was contended that the proposed amendments change the entire nature and character of the suit besides the fact that nothing remains for adjudication in the Writ Petition in view of the

above cited ratiocination of the Hon'ble Supreme Court and the proposed amendments merit no consideration and the petition ought to be dismissed.

6. We have heard Learned Counsel for the parties at length. We have also perused the Writ Petition and the amendments proposed as detailed in the I.A.

7. The prayers in the Writ Petition *inter alia* read as follows;

> **"**(a) Issue an appropriate Writ reading down Clause 5.1 & 5.2 of the Notification F.No.10(1)/2017-DBA-II/NER, notifying 'Scheme of Budgetary support under Goods and Service Tax regime to the units located in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North-East including Sikkim' so as to enable the Petitioner to claim full refund of the CGST and 50% of IGST paid through the electronic cash ledger;
>
> (b) Or, in the alternative, issue a writ of mandamus or any other writ/order/direction, to the Respondents No.1 to 3, directing them to fix a special rate of refund eligible to the Petitioner so that under the Budgetary Support Scheme, the Petitioner is entitled to refund equivalent to that under the erstwhile regime;
>
> (c) Hold that the Scheme of Budgetary support under Goods and Service Tax regime to the units located in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North-East including Sikkim is contrary to Article 14 and the vested rights of the Petitioner;
>
> (d) Issue any other writ, order or direction as this Hon'ble Court may deem just and fair and circumstances of the case;
>
> (e) For such further and other reliefs as the nature and circumstances of the case may require.**"**

8. The prayers, therefore, are confined to granting the Petitioner refund of the Central Goods and Services Tax and 50% of the Integrated Goods and Services Tax paid through the electronic cash ledger. An alternative prayer ensues directing the Respondents to fix a special rate of refund

eligible to the Petitioner to entitle them to refund equivalent to that available under the erstwhile regime which should also be granted under the budgetary support scheme.

9. Order VI Rule 17 of the CPC clothes the Court with powers to allow either party to alter or amend their pleadings at any stage of the proceedings on such terms as may be just. It also requires that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties provided that no application for amendment should be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. Thus, the provisions in the first part is discretionary and in the second part is imperative inasmuch as amendments that are necessary for the purpose of determining the real question in controversy between the parties ought to be allowed.

10. In the matter at hand, the Writ Petition was finally heard on 03-09-2019 and Judgment reserved. In the interim, the Petitioner filed an application being I.A. No.02 of 2019, wherein it was averred that the Hon'ble Supreme Court took up the entire batch of appeals filed by the Respondent against the Judgments passed by the Hon'ble High Court of Gujarat, Jammu and Kashmir, Guwahati and Sikkim on the issue of curtailment of central excise duty exemption, on 04-09-2019 in the Miscellaneous List. The appeal filed by the Respondent against the Judgment of this High Court dated 21-11-2017 was heard on 05-09-2019 and Judgment reserved. This fresh development was brought to the notice of this Court. Evidently the Judgment then came to be pronounced by the Hon'ble Supreme Court on 22-04-2020 in ***M/s. V.V.F. Ltd.*** (*supra)*, the relevant Paragraph being 14.3 has already been extracted and reflected in the arguments of Learned Counsel for the Respondents No.1 and 2 hereinabove. Subsequent thereto, the amendment application being I.A. No.03 of 2020 was filed on 06-06-2020, seeking to incorporate amendments already extracted *supra.*

11. By the proposed amendments the Petitioner seeks to challenge the *vires* of Section 174(2)(c) of the Central Goods and Services Tax Act, 2017 and Notification No.21/2017-C.E., dated 18-07-2017, on the ground that it takes away the vested rights of the Petitioner by reducing the

exemption/benefits to the Petitioner. The prayers in the Writ Petition are confined to enabling the Petitioner to claim full refund of the CGST and 50% of the IGST paid through the electronic cash ledger. It cannot be said that the Petitioner was unaware of the provision of the statute the *vires* of which they now seek to assail, nor was it inserted at some point later in time to the filing of the Writ Petition. The question of the Petitioner's inability to raise the matter in spite of due diligence, before the matter was heard or was taken up for hearing, therefore, does not arise. In view of the questions involved in the instant Writ Petition it cannot be said that the amendments are necessary for determining the real question in controversy between the parties considering the prayers of the Petitioner referred above. The proposed amendments if permitted would in fact change the very nature and character of the Writ Petition and introduce an entirely different Cause of action, which is not permissible.

12. Consequently, we are not inclined to exercise our discretion in favour of the Petitioner**,** hence the Petition stands rejected and dismissed.

SLR (2020) SIKKIM 962

(Before Hon'ble the Chief Justice)

Crl. A. No. 11 of 2019

Bir Bahadur Limboo …. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

For the Respondent: Mr. S.K. Chettri, Addl. Public Prosecutor.

Date of decision: 3rd November 2020

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Though PW-13 stated to have verified the Birth Certificate of PW-1 from the Births and Deaths Register maintained by the PHC, the Register was not produced. According to PW-13, in Exhibit-2, the surname of the victim girl did not tally. It is not very clear from the judgment rendered in *Padam Kumar Chettri* (supra) as to whether the Register was produced before the Court. Therefore, following the judgment rendered in *Lall Bahadur Kami* (supra), which is directly on the point, it is held that Exhibit-2 cannot be relied upon for the purpose of determining the age of PW-1 – In this connection, it would also be relevant to note that PW-9 and PW-12, father and mother of the victim girl, respectively, in their cross-examination had stated that they do not remember the date, month and year on which their daughter was born. PW-12, however, stated that her daughter is 16 years old. What transpires from the above is that the parents could not even remember in which year PW-1 was born. Merely saying that the daughter is 16 years old will not make the daughter 16 years old when they cannot even recall the year in which the daughter was born – Prosecution has failed to establish that PW-1 was a minor on the date of incident.

(Para 27)

B. Protection of Children from Sexual Offences Act, 2012 – Ss. 3 and 4 – Penetrative Sexual Assault – The evidence of PW-3, PW-4 and PW-11, at whose instance the whole episode came to light, does not lend assurances to the evidence of PW-1 that the accused, by suddenly appearing had forcefully taken her away to a secluded place for committing penetrative sexual assault. It is also difficult for this Court to accept that PW-3 and PW-4 had witnessed the penetrative sexual assault committed by the accused on PW-1, as there are contradictions on material aspects with regard to the evidence of PW-3 and PW-4 with that of PW-11. What, however, is established on record from their evidence is that the accused and PW-1 were found in an intimate position – Appellant held to be entitled to benefit of doubt.

(Paras 34 and 35)

Appeal allowed.

Chronology of cases cited:

1. Lal Bahadur Kami v. State of Sikkim, Crl. A. No. 08 of 2017 (High Court of Sikkim).
2. Sadashiv Ramrao Hadbe v. State of Maharashtra and Another (2006) 10 SCC 92.
3. Padam Kumar Chettri v. State of Sikkim, Crl. A. No. 12 of 2018 (High Court of Sikkim).
4. State of Himachal Pradesh v. Manga Singh, (2019) 16 SCC 759.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. Gulshan Lama, learned Legal Aid Counsel appearing for the appellant and Mr. S.K. Chettri, learned Additional Public Prosecutor, Sikkim appearing for the respondent.

2. This appeal is directed against the judgment dated 27.03.2019 passed by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012, (POCSO Act), East District, in Sessions Trial (POCSO) Case No. 7 of 2017 convicting the appellant under Section 3

(a)/4 of POCSO Act, 2012 and Section 376 (l) IPC and the order of sentence dated 28.03.2019 whereby the appellant was sentenced to suffer SI for a period of 7 years and fine of Rs.10,000/- under Section 3 (a) punishable under Section 4 of the POCSO Act, in default of payment of fine, to undergo SI for two months and to suffer RI for a period of 7 years and fine of Rs.10,000/- under Section 376 (l) IPC, in default of payment of fine, to undergo SI for two months.

3. It is to be noted at the very outset that for an offence under Section 376(1) IPC, except for an offence under Section 376(2) IPC, minimum punishment prescribed is rigorous punishment which shall not be less than ten years. However, the learned trial court inexplicably sentenced the appellant with RI for seven years while convicting him under Section 376(1) IPC. It is impermissible in law to award sentence which is less than the statutorily prescribed punishment.

4. The sentences were directed to run concurrently and the period of imprisonment already undergone during the investigation and trial was set-off. By the aforesaid judgment, the victim was also granted compensation of Rs.1.00 lakh under the Sikkim Compensation to the Victims or its Dependants Scheme, 2011.

5. The father of the victim girl, who will be referred to as 'X' whenever required, lodged a first information report(F.I.R) on 26.02.2017 before the Officer-in-Charge, Singtam Police Station stating that his daughter, 'X', who is aged about 16 years, was sexually assaulted by the accused/appellant in Rangrang jungle at around 11.00 a.m. on that date and the said incident was witnessed by three boys, namely, Bharat Adhikari, Jainarayan Adhikari and Diwas Bhattarai of the same village. Based on the aforesaid F.I.R (Exhibit-6), Singtam Police Station Case No. 10 of 2017 was registered under Section 376 IPC read with Section 4 of the POCSO Act against the accused/appellant and the case was entrusted to one Vijay Basnett for investigation. After investigation was over, finding that a prima facie case has been established under Section 376 IPC read with Section 4 of the POCSO Act, 2012, charge-sheet was filed on 24.05.2017.

6. Learned Special Judge, POCSO Act, 2012, after hearing the parties and on consideration of materials on record framed charges under Section 4

of the POCSO Act, 2012 and Section 376 (1) of IPC. Charges being read over, the accused pleaded not guilty and claimed to be tried.

7. During trial, the prosecution had examined 15 witnesses while the defence adduced no evidence. In his statement under Section 313 Cr. P.C., the accused had not set up any specific plea.

8. Mr. Gulshan Lama, learned Legal Aid Counsel has submitted that the prosecution has failed to establish that the alleged victim was a minor girl. He contends that the Birth Certificate (Exhibit-2) was not proved in accordance with law. In this connection he relies on a Division Bench Judgment of this Court dated 25.10.2017 in ***Crl. A. No. 08 of 2017*** (***Lal Bahadur Kami vs. State of Sikkim***). He submits that even the father and mother of the victim girl, in their cross-examination, had admitted that they did not know the date, month and year of birth of their daughter. He submits that the three persons whose names were mentioned in the FIR were examined as PW-3, PW-4 and PW-11, respectively, and if their evidence is considered in its entirety, the same would, at the most, point towards a consensual act. The seized underwear and the penile swab of the accused were subjected to forensic examination in the Regional Forensic Science Laboratory (RFSL) and PW-5, an Analyst in RFSL, in her evidence has stated that no blood, semen or any other fluid were detected and the same belies the prosecution case totally in as much as the victim girl was having menstrual cycle and if there was any penetration, there surely would have been some tell-tale sign of blood. Accordingly, he submits that the accused/appellant is entitled to acquittal. He also relies on a decision of the Hon'ble Supreme Court in the case of ***Sadashiv Ramrao Hadbe vs. State of Maharashtra and another***, reported in ***(2006) 10 SCC 92***.

9. Mr. S.K. Chettri, learned Additional Public Prosecutor, while supporting the judgment, contends that there is no reason to disbelieve the evidence of PW-1, the victim girl. He relies on a Division Bench Judgment dated 11.09.2019 of this Court passed in Crl. A. No. 12 of 2018 (***Padam Kumar Chettri vs***. ***State of Sikkim***) to contend that the Birth Certificate, Exhibit-2 was duly proved.

10. The evidence of PW-1 clearly demonstrates that the accused had forcefully committed penetrative sexual assault on her and as such no

interference is called for with the impugned judgment and the appeal is liable to be dismissed, Mr. Chettri submits.

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

12. PW-1 deposed that she had seen the accused occasionally prior to the incident which happened while she was studying in class VII. Day of incident being a holiday she was going to the house of one of her friends by taking a village footpath which was passing through a jungle and the accused, by suddenly appearing, forcibly took her towards Rangrang Khola, removed her skirt and underwear, removed his own pant and thereafter, forcefully laying her on the ground had committed penetrative sexual assault. She further stated that she cried for help and on hearing her cries, the persons named in the FIR (who were examined as PW-3, PW-4 and PW-11), whom she called 'dada' (elder brother), reached there and on seeing them the accused left her. The accused was assaulted by PW-3, PW-4 and PW-11 and they had taken them to her house. On reaching home, she narrated the incident to her parents, who took her to Singtam Police Station from where she was referred to the District Hospital, Singtam for medical examination. She also stated about recording of her statement under Section 164 Cr. P.C. (Exhibit-1).

13. PW-2 and PW-8 are the witnesses of Seizure Memo (Exhibit-3), by which the Birth Certificate (Exhibit-2) of PW-1 was seized.

14. PW-3 stated that while he, Bimal, Bharat (PW-11) and Jainarayan (PW-4) were chit-chatting, PW-4 left for his house and after sometime PW-11 received a call from PW-4 telling him that he had seen the accused in a compromising position with PW-1 behind the local school and as they had heard earlier that the accused had misbehaved with the victim girl they decided to follow the accused and the victim girl. Accordingly, he and PW-11 came down, met PW-4 and they looked around for the accused and the girl and finally found them in a compromising position near a big boulder on the riverside. Both of them were nude and the accused was committing penetrative sexual assault on PW-1. On being asked to wear their clothes they put on their clothes and immediately after wearing her clothes the victim girl had run away from the spot. The accused was caught by him and he

had asked PW-4 to run after the girl and to catch her. Thereafter, both of them were taken to the house of victim and he had made a call to the In-charge, Makha Police Outpost regarding the incident. While they reached the house of the victim, the victim's father was only present and subsequently, the mother had also arrived. After some time, the In-charge, Makha Police Outpost along with police personnel came there and after making some preliminary enquiries the police took the victim, accused and the victim's father with them.

15. PW-4 deposed that he, after having chatted with PW-3 and PW-11, had left for his house and while proceeding towards his house, he saw the accused holding the victim girl close to him near the school. He called PW-11 and asked them to come down to school. Accordingly, they arrived near the school but the accused and the victim were not to be found there and as such they started looking for the accused and victim and finally found them in a compromising position at Rangrang Khola near a big boulder on the river side. Both of them were nude and the accused was committing penetrative sexual assault on the victim. They asked them to put on their clothes and as the victim had run away immediately after putting her clothes, he ran and caught hold of her. In the meanwhile PW-3 caught hold of the accused. He deposed that they took the victim and accused to the house of the victim. He also narrated the events in the house of the victim as stated by PW-3.

16. PW-5 is the Analyst and Assistant Chemical Examiner in the RFSL. She stated that blood, semen and any other fluid were not detected in Exbt. BIO 287 A (MO II) and Exbt. BIO 287 B (MO III) . Exbt. BIO 287A (MO II) is the underwear of the accused, marked as Exhibit-A by police and Exbt. BIO 287B (MO III) is the penile swab of the accused collected in two cotton clothes, marked as Exhibit-B by police.

17. PW-6 was the Station House Officer of Singtam Police Station on the relevant date when the FIR was filed by the father of the victim and he had registered the case.

18. PW-7 is the Judicial Magistrate who had recorded the statement of PW-1 under Section 164 Cr. P.C.

19. PW-9 is the father of PW-1. He stated that PW-1 was 16 years at the time of the incident and the accused is a fellow villager. He stated that three boys of the village brought his daughter and the accused to their house and they told him that they had personally seen the accused committing sexual assault on his daughter and accordingly, he had filed the written complaint (Exhibit-6). He had handed over the Birth Certificate (Exhibit-2) of PW-1 to the police.

20. PW-10 is a Gynecologist, posted at the relevant time in the District Hospital, Singtam, who had examined PW-1 at around 4.15 p.m. on 26.02.2017. She deposed that the undergarment worn by the victim was blood-stained and she had handed over the same to the police. She also deposed that victim was having menstrual cycle. She deposed that although there was no sign of use of force, she reserved her final opinion pending availability of FSL Report.

21. PW-11 deposed that PW-4, who had left their company a little earlier, informed over telephone that he had seen the accused along with the victim girl in a compromising position and asked them to come down to the spot where the accused and victim girl were found. By the time they reached there, the accused and the victim had left the spot and as such they started looking for them and ultimately they found the accused committing sexual intercourse on PW-1 underneath a big boulder. On seeing them they arranged their clothes and they took both of them to the house of the victim girl. He deposed that on instruction of one elderly person present at the residence of the victim, Makha Police Outpost was informed and police accordingly came to the residence of victim girl and took them to Makha Police Outpost. He deposed that they had also accompanied them.

22. PW-12, who is the mother of the victim girl, stated that her daughter was 16 years old at the time of offence and she was studying in Class VII. She stated that on the fateful day her daughter told her that she was going to a friend's house and when she returned back home she found her husband with PW-3, PW-4 and PW-11 along with the accused. PW-3, PW-4 and PW-11 told her that the accused and victim girl were located by them at Rangrang Khola and the accused was found to be committing sexual assault on her daughter. On being asked, the girl confirmed the incident and stated that she was forcefully taken to the Rangrang Khola and the accused had committed sexual act on her. Thereafter, all of them had

gone to the police station to lodge a complaint and accordingly, her husband had lodged a complaint at Singtam Police Station.

23. PW-13 was posted as a Medical Officer at Dikchu Primary Health Centre (PHC) and was also functioning as the Registrar, Births and Deaths at Dikchu PHC. She deposed that on a requisition (Exhibit-14) received from the IO of the case for authentication of the Birth Certificate issued by the Dikchu PHC vide Registration No. 169/01 in favour of the victim girl, she had verified the Birth Certificate with the register maintained by the Dikchu PHC and finding that the Birth Certificate was genuine and correct based on the records maintained there had issued a certificate (Exhibit-15) to that effect. In her cross-examination, she admitted that in Exhibit-2 the surname of the victim girl did not tally. She also admitted that the birth register is not part of case record.

24. PW-14 is the Medical Officer posted at District Hospital Singtam, who, on 26.12.2017 at around 03.40 p.m., had medically examined the appellant. On such examination he had found bruise and swelling on bridge of nose with bleeding from left nostril, bruise and swelling of lower lip, pain and tenderness over left thigh, pain and tenderness over right knee. He noticed no injuries on his private parts and found that he is capable of having sexual intercourse, which was confirmed by the appellant himself.

25. PW-15 is the I.O who had conducted investigation and had submitted the charge-sheet.

26. It would be appropriate to first take up the issue regarding the age of PW-1. In ***Lall Bahadur Kami*** (supra), it was observed at paragraph 20 as follows:

> "*20. This Court is conscious and aware that the Birth Certificate of the Victim gains precedence over every other document as proof of age, however, we may beneficially refer to the Judgments hereinabove and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the parents or legal guardians. Such a Register*

is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court for unexplained reasons. We are, thus, constrained to hold that the evidence furnished casts a shadow on the probative value of Exhibit 4, thereby rendering it unfit for consideration."

27. In the instant case though PW-13 stated to have verified the Birth Certificate of PW-1 from the Births and Deaths Register maintained by the PHC, the Register was not produced. According to PW-13, in Exhibit-2, the surname of the victim girl did not tally. It is not very clear from the judgment rendered in ***Padam Kumar Chettri*** (supra) as to whether the Register was produced before the Court. Therefore, following the judgment rendered in ***Lall Bahadur Kami*** (supra), which is directly on the point, it is held that Exhibit-2 cannot be relied upon for the purpose of determining the age of PW-1. In this connection, it would also be relevant to note that PW-9 and PW-12, father and mother of the victim girl, respectively, in their cross-examination had stated that they do not remember the date, month and year on which their daughter was born. PW-12, however, stated that her daughter is 16 years old. What transpires from the above is that the parents could not even remember in which year PW-1 was born. Merely saying that the daughter is 16 years old will not make the daughter 16 years old when they cannot even recall the year in which the daughter was born. In view of the state of affairs on record regarding age of PW-1, I am of the considered opinion that the prosecution has failed to establish that PW-1 was a minor on the date of incident.

28. PW-1 sought to portray a picture that the accused had suddenly appeared and had taken her to a secluded place and thereafter had forcibly committed penetrative sexual assault on her. It is her version that she cried for help and on hearing her cries PW-3, PW-4 and PW-11 had reached there and had rescued her. PW-3 and PW-4, however, categorically stated that they did not hear any sound for help negating the version of PW-1.She stated that the accused had removed her skirt and underwear. However, in her statement under Section 164 Cr. P.C. she had stated that the accused had removed her pant. PW-4, who was the first witness to have seen the accused and the victim girl together, had stated that he had seen the accused holding the girl close to him with his arms near the school. PW-11,

to whom the call was made by PW-4 in connection with the accused and the victim girl being found together, in his cross-examination, stated that PW-4 had told him that the accused and the victim were sitting beside the school. Their version belies the statement of PW-1 that the accused had suddenly appeared and dragged her to the river side. By the time PW-3, PW-4 and PW-11 had reached the school, the accused and the victim girl were no longer there. They tried to find the accused and the victim girl and finally found them near Rangrang Khola.

29. While PW-3 and PW-4 stated that they found the accused and the victim girl in nude condition, it has come out from evidence of PW-11 that the accused and the victim girl were clothed below their waist and they had only arranged their clothes. He also admitted that he did not witness the incident of sexual act. PW-3, PW-4 and PW-11 were admittedly together and there is material contradiction with regard to witnessing the alleged penetrative sexual assault and in what state they were found. However, PW-3, PW-4 and PW-11 were unanimous that the victim girl did not tell them anything in connection with the incident.

30. PW-9, the father of the girl also stated that his daughter did not tell him anything with regard to the incident even when he had enquired regarding the incident. PW-12 had stated that on being enquired PW-1 had told her about the incident. PW-12 was together along with PW-3, PW-4, PW-9 and PW-11 and none of them had deposed that PW-12 had made any enquiry with PW-1.

31. In ***State of Himachal Pradesh vs. Manga Singh***, reported in ***(2019) 16 SCC 759***, the Hon'ble Supreme Court had stated as follows;

> *"10. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration is required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances.*

Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."

32. In ***Sadashiv*** (supra), finding that the version given by the prosecution is unsupported by any medical evidence and the whole surrounding circumstances belie the case set up by the prosecutrix, the Hon'ble Supreme Court had acquitted the accused on benefit of doubt.

33. The appellant was taken to the police station from the residence of PW-1, where they were taken to straight from the place where the appellant and PW-1 were found. Penile swab and underwear worn by the appellant were collected by PW-14 on that very day of the incident at around 4.20 p.m. The appellant had no opportunity to change the underwear and to have a wash. In these circumstances the evidence of PW-5 that blood, semen and any other fluid were not detected in the penile swab and the underwear of the accused assumes significance as the victim girl was having menstrual cycle.

34. The evidence of PW-3, PW-4 and PW-11, at whose instance the whole episode came to light, does not lend assurance to the evidence of PW-1 that the accused, by suddenly appearing had forcefully taken her away to a secluded place for committing penetrative sexual assault. It is also difficult for this Court to accept that PW-3 and PW-4 had witnessed the penetrative sexual assault committed by the accused on PW-1, as there are contradictions on material aspects with regard to the evidence of PW-3 and PW-4 with that of PW-11. What, however, is established on record from their evidence is that the accused and PW-1 were found in an intimate position.

35. In view of the above discussion, the appellant is held to be entitled to benefit of doubt. Accordingly, the appeal is allowed by setting aside the impugned judgment. The appellant is set at liberty.

SLR (2020) SIKKIM 703

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

Crl. A. No. 3 of 2020

Sanchi Rai **….** **APPELLANT**

Versus

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

For the Appellant: Mrs. Puja Lamichaney, Advocate (Legal Aid Counsel).

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor.

Date of decision: 6th November 2020

A. Indian Evidence Act, 1872 –Extra-judicial Confession– Extra-judicial confession to afford a reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and the person selected in whom confidence is reposed (*In re. Heramba Brahma* referred) – Another incriminating piece of evidence sought to be highlighted by the prosecution is the telephonic call stated to have been made by the accused to PW-3 – In his cross-examination, PW-3 had admitted that he could not say whether the person who made the phone call was actually the accused or not. It is very surprising that he did not even note down the phone number from which he had received the call. In his cross-examination, PW-5 admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him. In cross-examination, PW-6 admitted that in his statement before police he did not state that PW-5 had told him that the appellant had committed murder of her husband. PW-22, on the other hand, had deposed that PW-5 had telephonically informed him to the effect that Nima Tshering was found in a serious condition in his room. Though PW-10 had stated that he was told by PW-6 that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under S. 161, Cr.P.C. In

view of above, no credence can be placed on the so-called telephone call received by PW-3 that it was the accused, who had made the call and had informed him that she had committed the murder of her husband – Evidence of PW-3, PW-5 and PW-6 with regard to the information received by PW-3 that the accused had committed the murder of her husband is of no consequence – PW-8, in her cross-examination, had clarified that she could not say whether the accused was saying "*daju moryo*" (her husband was dead) or "*daju mare*" (she had killed her husband) as her child was crying. Therefore, it cannot be said that there was any extra-judicial confession by the accused in presence of PW-8.

(Paras 35, 37 and 40)

B. Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Admissibility – Exhibit-7 is stated to be a disclosure statement. The same reads as follows: "My true statement is that yesterday dated 6/4/2018 my husband had gone to Dubdi for unloading sandstone on his own house truck. At that time, I lied to my house owner, Aunty Boi Maya Gurung, and purchased mouse-poisoning medicine for Rs. 20. The time was around 5 pm. After sometime, my husband Nim Tsh. Lepcha returned and I mixed that mouse-poisoning medicine in a cup of tea and gave it to him, which he drank completely. At around 7 pm, he ate food and I also ate. At that time, he had started to appear a bit sick as that mouse medicine might have started to take effect. After eating food, he went to his room and I also went inside after finishing my kitchen works. He was playing with his mobile and we argued about his girlfriend and then he slapped me. After that, I went inside the kitchen and took out a wooden log from the collection and hit him two times on his head and one time on his leg with it, after this, he kept on shaking continuously. At that time, I felt that he would surely die that is why I told everything to Yoksom OP Mingma Police, and asked them to arrest me. The wooden log with which I had hit him is on my bed/bed room and the cover of mouse-poisoning medicine is on the dustbin outside which I had thrown, and the tea cup which was used was washed and kept in the kitchen; these items I can hand over to the police in the presence of witnesses. This is my true statement." –The only portion which is admissible under S. 27 of the Evidence Act is the portion containing the statement that wooden log with which she had hit the deceased is on her bed/bed room, the cover of mouse-poisoning medicine is on the dustbin outside which she had thrown, and the tea cup used which was washed and kept in the kitchen, rest being confessional and prohibited by Ss. 25 and 26 of the Evidence Act.

(Paras 44 and 45)

C. Indian Evidence Act, 1872 – S. 45 – Expert Evidence – The wooden log was not shown to PW-21 – It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of offence, if available, be shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may at times cause aberration in the course of justice (*In re. Ishwar Singh* discussed).

(Para 48)

D. Indian Evidence Act, 1872 – S. 6 – *Res Gestae* – S. 6 is an exception to the general rule where under hearsay evidence becomes admissible. Such evidence must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. The essence of the doctrine is that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction that it becomes relevant by itself. Evidence of PW-5 and PW-6 may fall in the category of hearsay evidence. However, we have already held that evidence of PW-5 and PW-6 is of no consequence with regard to the information received from PW-3 that the accused committed murder of her husband as no reliance was placed on the evidence of PW-3 itself.

(Para 50)

E. Indian Evidence Act, 1872 – Evidence of Defence Witness – Credibility – The evidence of defence witness is not to be ignored by the Courts. However, his evidence has also to be tested on the touchstone of reliability, credibility and trustworthiness – Evidence tendered by defence witnesses cannot always be termed as a tainted one, the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution (*In re. Banti alias Guddu* and *Ram Singh* discussed).

(Para 51)

Appeal allowed.

Chronology of cases cited:

1. Ishwar Singh v. State of U.P., AIR 1976 SC 2423.
2. Lakshmi Singh and Others v. State of Bihar, (1976) 4 SCC 394.
3. Heramba Brahma and Another v. State of Assam, AIR 1982 SC 1595.
4. Jaharlal Das v. State of Orissa (1991) 3 SCC 27.

5. State of Haryana v. Ram Singh, (2002) 2 SCC 426.
6. Suchand Pal v. Phani Pal and Another, AIR 2004 SC 973.
7. State of Goa v. Sanjay Thakran and Another, (2007) 3 SCC 755.
8. State of Rajasthan v. Hakam Singh, (2011) 15 SCC 171.
9. Sahadevan and Another v. State of Tamil Nadu, AIR 2012 SC 2435.
10. Sahoo v. State of UP, AIR 1963 SCC 40.
11. Bhugdomal Gangaram and Others v. State of Gujarat, (1984) 1 SCC 319.
12. Divakar Neelkantha Hegde and Others v. State of Karnataka, (1996) 10 SCC 236.
13. State of UP v. Harban Sahai and Others, (1998) 6 SCC 50.
14. Banti alias Guddu v. State of M.P., (2004) 1 SCC 414.
15. Dhanaj Singh and Others v. State of Punjab, (2004) 3 SCC 654.
16. State of M.P (through CBI) and Others v. Paltan Mallah and Others, (2005) 3 SCC 169.
17. Manoranjan Sil v. State of West Bengal, 2008 Cri. L.J. Cal 4719.
18. Javed Alam v. State of Chhattisgarh and Another, (2009) 6 SCC 450.
19. Krishna Kumar Malik v. State of Haryana, (2011) 7 SCC 130.
20. Pattu Ranjan v. State of T.N., (2019) 4 SCC 771.

JUDGMENT

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

This appeal is preferred by the appellant against the judgment dated 21.11.2019 passed by the learned Sessions Judge, West Sikkim at Gyalshing in Sessions Trial Case No.02/2018 whereby the appellant was convicted under Section 302 of Indian Penal Code,1860 (for short, IPC). The learned Sessions Judge, Sikkim had sentenced the appellant to suffer imprisonment for life and to pay a fine of Rs.10,000/-.

2. It is also to be noticed that learned Sessions Judge, West Sikkim had awarded compensation to the minor daughter of the deceased and the appellant, who is aged about 13-14 years, a sum of Rs.1 lakh under Sikkim Compensation to the Victims or his Dependants Amendment Scheme, 2016.

3. The appellant is accused of mariticide. An FIR was lodged by one Naresh Chettri, Sub-Inspector of Police of Gyalshing Police Station before the Station House Officer(SHO), Gyalshing Police Station on 06.04.2018 at about 11:45 pm stating that on being directed, he had visited Yuksom Public Health Centre (PHC), and it was learnt upon enquiry that at around 09.45 pm, one Nima Tshering Lepcha was declared brought dead by the Medical Officer of PHC, Yuksam with alleged history of murder by his wife by poisoning him with rat poison and by assaulting him with wooden log on his head. On the basis of the said FIR, G.P.S Case No.17/2018 under Section 302 IPC was registered against the appellant and the SHO had taken up the investigation himself.

4. After completion of investigation, finding that a *prima facie* case is made out against the appellant under Section 302 IPC, charge sheet was submitted on 31.05.2018. Subsequently, in the Court of learned Sessions Judge, West Sikkim at Gyalshing Sessions Trial Case No.02/2018 was registered. Charge being read over, the appellant pleaded not guilty and claimed to be tried.

5. During trial, prosecution examined 22 witnesses and the accused had also examined two witnesses. Statement of the accused was recorded under Section 313 Cr.P.C.

6. The learned Sessions Judge, on consideration of materials on record including the evidence of the doctor (PW-21), who conducted the post-mortem of the deceased, and the Forensic Report (Exhibit-17), which revealed that the viscera of the deceased tested negative for poison, held that the allegation of the prosecution that the accused had poisoned the deceased had not been proved beyond reasonable doubt. The learned Sessions Judge held that voluntary extra- judicial confession made by the accused to PW-1, PW-3, PW-4 and PW-8 is a strong circumstance pointing unerringly towards commission of the offence by the accused. Learned Sessions Judge held that PW-4, who was declared hostile, must have been won over by the accused being a friend. It was also held that recovery of the fire-wood, the weapon of offence, in the bed room of the accused is also a vital link in the circumstances. The probability of the deceased sustaining injuries in the form of an assault elsewhere was discounted holding that in such an event the deceased would have gone for seeking medical attention. The evidence of DW-1 was considered unbelievable and unreliable in view of evidence of PW-4, the hostile witness.

Evidence of DW-2 was found to be not convincing because of evidence of PW-8.

7. Ms. Puja Lamichaney, learned Counsel for the appellant has submitted that the learned trial Court committed error of law as well as of facts in convicting the appellant in as much as the prosecution failed to bring home the guilt of the accused beyond reasonable doubt. It is submitted that prosecution had hoisted a false case against her and had also falsely introduced poisoning of her husband by her. She submits that the learned trial Court committed manifest error of law in relying upon on the extra-judicial confession allegedly made by the appellant to PW-1, 3 and 4 and 8. She submits that there is glaring contradiction on vital aspects going to the root of the prosecution case and as such the appellant cannot be convicted on the basis of alleged circumstantial evidence. Call details of PW-3 being not produced, no reliance can be placed on the evidence of PW-3, who deposed that the accused had called her up confessing her guilt, she submits. Non-examination of B. L. Bhandari, a policeman who appears to be the first person at the P.O before anybody else vitiates the prosecution case in the facts of the case, she contends. It is submitted that the learned trial Court totally misconstrued the evidence of PW-8 .She submits that no reliance can be placed on recovery of the "wooden log", stated to be the weapon of offence and the Discovery Statement because of inherent infirmities. She submits that the alleged weapon of offence having not been shown to the doctor (PW-21), adverse presumption may be drawn against the prosecution. Accordingly, she submits that the appellant is entitled to acquittal. She places reliance on the judgments in the cases of ***Ishwar Singh vs. State of U.P.,*** reported in ***AIR 1976 SC 2423, Lakshmi Singh And Ors. vs. State of Bihar,*** reported in ***(1976) 4 SCC 394, Heramba Brahma and anr. vs. State of Assam,*** reported in ***AIR 1982 SC 1595, Jaharlal Das vs. State of Orissa,*** reported in ***(1991) 3 SCC 27, State of Haryana vs. Ram Singh,*** reported in ***(2002) 2 SCC 426, Suchand Pal vs. Phani Pal and Anr.,*** reported in ***AIR 2004 SC 973, State of Goa vs. Sanjay Thakran & Anr.,*** reported in ***(2007) 3 SCC 755, State of Rajasthan vs. Hakam Singh,*** reported in ***(2011) 15 SCC 171*** and ***Sahadevan Anr. vs. State of Tamil Nadu,*** reported in ***AIR 2012 SC 2435.***

8. Dr. Doma T. Bhutia, learned Public Prosecutor supports the impugned judgment and contends that impugned judgment does not suffer from any infirmity and therefore, the appeal is liable to be dismissed. She submits that confessional soliloquy of the accused admitting his guilt, evidence of PW-3 as

well as *res gestae* witnesses in the form of PW-5 and PW-6, the accused being present alone with the deceased at the P.O on the date of incident, recovery of murder weapon "wooden log" from the bed-room of the accused and the motive to murder the husband for extra-marital affairs coupled with the extra-judicial confession on record clearly establish the prosecution case. She further submits that that the accused had not gone to the hospital when the injured husband was taken to the hospital , is also an indication that she had committed the murder of her husband. She has placed reliance on the judgments in the cases of ***Sahoo vs. State of UP***, reported in ***AIR 1963 SCC 40***, ***Bhugdomal Gangaram & Ors vs. State of Gujarat***, reported in ***(1984) 1 SCC 319***, ***Divakar Neelkantha Hegde & Ors vs. State of Karnataka***, reported in ***(1996) 10 SCC 236, State of UP vs. Harban Sahai & others***, reported in ***(1998) 6 SCC 50***, ***Banti alias Guddu vs. State of M.P.***, reported in ***(2004) 1 SCC 414***, ***Dhanaj Singh & Ors vs. State of Punjab***, reported in ***(2004) 3 SCC 654***, ***State of MP (through CBI) & Ors vs. Paltan Mallah and Ors.***, reported in ***(2005) 3 SCC 169***, ***Manoranjan Sil vs. State of West Bengal***, reported in ***2008 Cri. L.J. Cal 4719***, ***Javed Alam vs. State of Chhattisgarh & Anr.***, reported in ***(2009) 6 SCC 450***, ***Krishna Kr. Malik vs State of Haryana***, reported in ***(2011) 7 SCC 130*** and ***Pattu Ranjan Vs. State of T.N.***, reported in ***(2019) 4 SCC 771***.

9. We have considered the submissions of the learned Counsel for the parties and have examined the materials on record.

10. The deceased and the accused were married for 13 years and they have one 11 year old daughter. There is no evidence with regard to where the daughter was on that fateful day.

11. PW-1, Nar Bahadur Gurung stated that the accused had been his tenant from 17.12.2017. On 06.04.2018 at around 08.00 pm, they went to sleep after having dinner and at around 09.30 pm , his wife (PW-7) woke him up and told him that one Reena (PW-4) had called her up to say that the appellant had committed murder of her husband. Hearing that he rushed to the place of occurrence (P.O) and finding one police personnel P.L Bhandari present there, both of them went inside the house of the accused. They found the deceased lying on the mattress on the floor and the accused walking around the house saying that she had killed her husband. He stated that as the police personnel said that the deceased was still breathing, they immediately took him to hospital and in the

meantime, one lady police personnel had arrived at the P.O. He also deposed that he had recorded his statement under Section 164 Cr.P.C (Exhibit-1). In cross-examination, he stated that the accused had made the self implicating statements in presence of police personnel.

12. PW-2 is the informant of FIR, which he exhibited as Exhibit-3. In his cross-examination, he stated that he did not go to the P.O.

13. PW-3, Mingma D. Sherpa stated that on 06.04.2018, while he was conducting patrolling duty at Yuksom *Bazar*, he received a phone call from the accused, who told him that she had committed murder of her husband Nima Tshering Lepcha and asked him to arrest her. On receiving the call, he informed about the same to the In-charge Head Constable Padam Lal Chettri (PW-5) and later on both of them went to the house of Nim Tshering Lepcha where they found the deceased lying on the floor. He also stated that they had evacuated him to Yuksom PHC.

In cross-examination, he admitted that he cannot say whether the person who had made the phone call was actually the accused and that he also does not know the phone number from which he had received the call.

14. PW-4, Ms.Reena Gurung, who is a neighbour of the accused, stated that on 6th day of a month she had heard some noise from the house of the accused and had accordingly informed the landlord through phone. When she stated that she did not tell police that the accused had knocked on her door and had said that she had killed her husband, prayer was made to declare her a hostile witness, which was allowed.

In her cross-examination by the prosecution, she admitted that she had stated before police that when she was sleeping, one Manita Rai (PW-8) had knocked on her door and had told her that the appellant had telephonically informed police that she had committed murder of her husband and that she had also telephonically informed the landlord that some fight was going on in the house of the accused and he should therefore go there. She admitted the statement recorded under Section 164 (Exhibit-5) to be her statement and signature in questionnaire (Exhibit-6) to be her signature. However, in cross-examination by the defence, she stated that she did not hear any scream or noise from the room of the deceased. She stated that she did not state in her statement under Section 164 Cr.P.C that she had heard

the accused knocking at her door and saying that she had killed her husband and that she had also not stated that she had called up the wife of the landlord and told her that the accused was saying that she had murdered her husband. A perusal of her statement made under Section 164 Cr.P.C belies such assertion and it is also seen that she had stated that the accused was saying that she killed her husband because he had tortured her for years. She also stated that she did not remember anything about Manita (PW-8) coming to her house as she was in deep sleep owing to her post-delivery recovery and had called up the house owner only when she heard noise of the neighbours outside.

15. PW-5, Padam Lall Chettri is a Head Constable of Yuksom Police Out-post. He stated that on 06.04.2018 at 09.00 pm constable Migma Sherpa (PW-3) telephonically informed him to convey that the appellant had telephonically informed him that she had committed murder of her husband and had asked him to arrest her accordingly. Thereafter, he went to the house of Nima where he found him lying on bed unconscious in a serious condition. He informed SHO of Tikjuk Police Station. He further stated that Tenzing Bhutia (PW-6) and other villagers evacuated Nima Tshering Lepcha to Yuksom PHC.

In his cross-examination, he admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him.

16. PW-6, Tenzing W. Bhutia also claims to be Head Constable of Yuksam Police Outpost. He stated that on 06.04.2018 at around 09.10 pm Head Constable Padam Lall Chettri (PW-5) telephonically informed him that the appellant had committed murder of her husband Nima Tshering Lepcha at Kopchay and asked him to go to the place of occurrence and as such, he went to the P.O in the vehicle of one Naren (PW-10). Finding that Nima Tshering Lepcha was lying on the floor with blood oozing from mouth and ear, he took the injured in the vehicle of PW-10 to Yuksom PHC where the Medical Officer on duty had declared him brought dead.

In cross-examination, PW-6 admitted that in his statement before police he did not state that Padam Lall Chettri (PW-5) had told him that the appellant had committed murder of her husband.

17. PW-7, Boi Maya Gurung is the wife of PW-1. She deposed that on the relevant day at around 03.30 pm the accused had come to her shop and had purchased a packet of rat killer poison and that at around 09.30 pm Reena Gurung (PW-4) telephonically informed her that the appellant was shouting that she had killed her husband. Hearing that she along with her husband immediately went to the place of occurrence and they noticed that police and some persons had already assembled there and subsequently, police had taken the appellant and the deceased to Yuksom PHC.

In her cross-examination, she stated that the deceased and accused was a lovely and caring couple and that she had not ever seen them fight. She stated that the room occupied by the accused and deceased was a *kutcha* wooden house and there were other rooms of neighbours which were so close to each other that any kind of noise, shout or talk could easily be overheard by the neighbours. She admitted that she cannot say whether the accused had brought rat killer on the day of incident and that she did not tell police about Reena Gurung (PW-4) telephonically informing her at around 09.30 pm regarding the appellant shouting that she had killed her husband.

18. Manita Rai, PW-8 stated that at around 09.00 pm on the day of occurrence the accused had knocked her door and had shouted "Daju Marey" (she had killed her husband) but as she was not well she did not visit the room of the accused.

In her cross-examination, she admitted that they were next door neighbours and the accused and the deceased were a happily married couple and she had not seen them fight or exchange heated words. She stated that they share a common toilet accessible by a common passage and while going to the toilet they see the room of the deceased and accused. She had seen the deceased sleeping in his room and at that time neither the accused nor her brother was present. The deceased had returned home after many days and lights of the rooms were not turned on. It is also stated by her that the accused along with her brother returned to the rented room only around 09.30 pm. They had come to her room at first and had enquired about her well being. Just 2-3 minutes after they left her place the accused had screamed and started crying uncontrollably but she could not say with certainty whether the accused had screamed "Daju Maryo" (her husband was dead) or Daju Marey (she had killed her husband) as her child was crying. She also stated that she did not find any unnatural behaviour on the part of the accused on that day.

19. PW-9, Promod Chettri is the son of Padam Lall Chettri (PW-5). He deposed that his father had left for the house of the accused after receiving a phone call. He also proceeded to the house of the accused and he had helped in evacuation of the deceased to the hospital on being requested by one police person called Tenzing with the help of Naren (PW-10). In his cross-examination, he stated that the accused was sitting near the deceased and was crying uncontrollably.

20. PW-10, Naren Rai is a co-villager of the accused. He stated that at around 09.30 pm while he was in Yuksom *Bazar* with friends, one Tenzing Bhutia (PW-6) requested him to take him to Kopche in his vehicle. On being requested by police person he evacuated the deceased in his vehicle along with Tenzing Bhutia (PW-6) and some other police personnel and villagers to Yuksom PHC.

Though he had stated that he was told by Tenzing Bhutia (PW-6) that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under section 161 Cr.P.C.

21. PW-11, Anish Gurung is aged about 17 years and his deposition was recorded by the learned trial Court on being satisfied that he is competent to testify. PW-11 is the son of PW-1 and PW-7. He deposed that at around 08.00 pm on the relevant date, Reena (PW-4) telephonically called her mother over to the ground floor of their house and accordingly, he along with his mother, had proceeded to the ground floor room where accused with her family was residing and by the time they had reached, many villagers and police had already gathered. He stated that after evacuating the deceased to Yuksom PHC along with police and villagers he had returned home and later on he came to learn that the deceased had expired at Yuksom PHC.

In his cross-examination, he stated that he had not seen the accused and deceased fight and he had not heard any abnormal or unusual sound coming from the house of the deceased.

22. PW-12, Ms. Tshering Bhutia is a Panchayat Member, who stated that at around 02.00 pm she had received a call from Gyalshing Police outpost enquiring whether Nima was from her Ward. She stated that she gave phone number of police to the relative of the deceased.

23. PW-13, Dawgay Lepcha is sister-in-law of the accused. She stated that she had received a phone call from Tshering Bhutia (PW-12) at around 02.30 am and was informed that her brother was killed by the accused whereupon she along with her family members had gone to Yuksom PHC. In her cross-examination, she stated that she was initially informed that her brother had met with an accident.

24. PW14, Damber Singh Chettri stated that hearing some noise coming from the rented house of the accused at around 09.30 pm on the fateful day he had rushed to the house of the accused and found some police personnel and villagers there. He stated that on being requested, he along with police and others took the husband of the accused to Yuksom PHC. In cross-examination, he stated that he did not know whether the deceased used to drink alcohol on a regular basis or whether he used to get involved in fights with villagers.

25. PW-15, Mingma Tshering Bhutia is a monk of Dubdi Monastery. He stated that he knows nothing about this case. In cross-examination, he stated that he had paid Rs.7,500/- to a driver, whose name he did not know, for carriage of sand.

26. PW-16, T.N.Chettri is a co-villager. He stated that one packet of rat killer poison and one fire-wood log were seized in his and one Bhim Bahadur Gurung s (PW-17) presence. He also stated that police recorded the statement of the accused (Exhibit-7) in his presence. He also deposed that material objects, namely, cover of rat killer poison (MO-I), firewood (Mo-II), tea cup (MO-III) were seized under Seizure Memo (Exhibit-8) and he had put his signature in MOs and Exhibit-8. He also deposed that bed sheet (MO-IV) and pillow cover (MO-V) were seized in his presence vide Seizure Memo (Exhibit-9) where he was a witness. It is further stated by him that he had put his signature in the sketch map of the place of the occurrence (Exhbit-10).

In cross-examination, he, however, admitted that he did not hear the accused stating anything to police. Confronted with Exhibits-7, 8, 9 and 10, he stated that on being asked by police to sign the documents he had affixed his signature thereon but he does not know their contents and purpose.

27. PW-17, Bhim Bahdaur Gurung stated that he was called by police to the house of the accused. He deposed with regard to MO-I, MO-II, MO-III,

MO-IV and MO- V and Exhibits- 7, 8, 9 and 10 in similar vein as PW-16. In his cross-examination, he stated that MOs were taken and seized by police on their own**.**

28. PW-18, Uday Chandra Chettri stated that he had been called by police to the house of the accused and he had signed on Inquest Report (Exhibit-11).

29. PW-19, Madan Bishwakarma is a photographer and he stated that he had taken six numbers of digital photographs (Exhibit-12) of the P.O and the deceased.

30. PW-20, Om Prakash Subba, at the relevant time, was posted at Gyalshing Police Station. He stated that he had taken the body of Nima Tshering Lepcha to STNM Hospital for post-Mortem and had handed over the body after post-Mortem to the family by preparing a Memo (Exhibit-13).

31. PW-21, Dr.O.T.Lepcha is the Chief Medical Legal Consultant of STNM Hospital. He deposed that on 08.04.2018 at around 10.00 am he had conducted the post-Mortem of Nima Tshering Lepcha and had prepared Autopsy Report (Exhibit-14). He opined that approximate time since death is 12-24 hours. He had stated as follows:-

> *"On my examination :-*
>
> *The body was identified, Rigor mortis was present, there was faint and fixed PMS over the back. There was bleeding from the face, nose/ear and a bruise 2X3 cm was present over the left eye. There was bruise 4X6 over the posterior aspect of left ear. Scalp haematonma 8X4 cm over the occipital and parietal bone situated just above and posterior to left ear with depressed comminuted fracture of the left parieto temporal bone with radiating fracture running anteriorly and involving the frontal bone and running positively along the occipital bone. The fracture also runs interiorly and involves the base of the skull. There was also presence of depressed fracture measuring 6X% cm, over the left temporoparietal bone.*

(B) Head and Neck. -Subdural Haematoma 6X5X1 cm present over the left parietal bone, with diffuse subarachnoid haemorrhage.

(C) Chest (Thorax)-NAD

(D) Abdomen- Stomach contained around 400 ml of dark fluid.

(E) Spinal Column-NAD

(F) The sample of blood (specimens) was taken in filter paper and was handed over to the I.O."

In his cross-examination, he stated that the injuries mentioned in Exhibit-14 could be sustained as a result of a fall or if one bangs his/her head on a concrete surface/ wall; that such kind of injuries might not cause immediate death of a person ; that it is also possible that after having such kind of an injury a person can come back home and sleep. He also stated that Exhibit-14 does not suggest presence of any poison.

32. PW-22, Mahendra Pradhan is the Investigating Officer. He deposed that at around 09.25 pm , he had received a telephonic information from Padam Lall Chettri (PW-5) to the effect that Nima Tshering was found in a serious condition in his room and he had been taken to Yoksom PHC for medical treatment with the help of his wife and neighbours and on receipt of the above information, he directed SI Naresh (PW-2) to enquire into the incident and PW-2 having gone to PHC Yuksom, found that Nima Tshering was declared brought dead by Medical Officer of Yuksom PHC and accordingly, PW-2 had lodged the FIR (Exhibit-3). He stated that Inquest was conducted over the dead body in the PHC. On inspection of the P.O, (MO-I), (MO-II), (MO-III) were recovered and seized vide Exhibit-8. He also stated that he had sent (i) one black-coloured T-shirt with reddish stains of deceased, (ii) blood sample of deceased, (iii) viscera of the deceased, (iv) one empty packet of rat killer poison written as knock out rat killer cake (Suriys) "Eats in dies out" on it, (v) one bed sheet pink white-colour with reddish stains and (i) one light white coloured pillow with cover with reddish stains to the RFSL, Ranipool for forensic analysis and expert opinion. He deposed that RFSL Report (Exhibit-17) was negative in respect of rat poison. He had also deposed with reference to Exhibit-7.

33. The evidence of PW-1 discloses that his wife (PW-7) had woken him up and told him that Rina (PW-4) had called her up to say that the appellant had committed murder of her husband and that on hearing the same he rushed to the P.O, where he found one police personnel, B.L. Bhandari. He also stated that the accused was walking around the house shouting that she had killed her husband. PW-7 had deposed that PW-4 had telephonically informed her that the appellant was shouting that she had killed her husband. In cross-examination, she admitted that she did not tell police about Rina Gurung (PW-4) telephonically informing her at around 9.30 pm regarding the accused shouting that she had killed her husband. PW-22 also confirmed the same in his cross-examination. Though she went along with her husband to the P.O, it is not in her evidence that the accused was saying that she had killed her husband. PW-11 also referred to a telephonic call from PW-4 to his mother, PW-7, to go to the ground floor of their house and accordingly, he along with his mother, had gone down. He also did not say that the accused was shouting that she had committed the murder of her husband.

34. The evidence of PW-1, PW-7, PW-11 and PW-14 go to show that by the time they had reached the P.O, some people were already there. In cross-examination, PW-1 had stated that the accused had made the statements implicating her in presence of police personnel. PW-1 in his Section 164 Cr. PC statement had stated that the accused was saying that she had killed her husband as he was having an illicit affair with another woman and that she would kill her too. No other witnesses, who were present along with PW-1 had deposed with regard to the accused pacing up and down in the room and muttering that she had killed her husband. Therefore, we are unable to accept the testimony of PW-1.

35. In ***Heramba Brahma*** (supra) The Honble Supreme Court laid down that extra-judicial confession to afford a reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and the person selected in whom confidence is reposed. In ***Sahadevan*** (supra)**,** the Honble Supreme Court laid down the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. It is laid down as follows:

> *(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.*

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law

36. Who were the people who had gathered in the P.O are not known. It is also not known how other persons were already there when people residing in the same building like PW-1, PW-7, PW-11 had not even reached the P.O. They were stated to have been informed about the incident immediately and they also stated to have gone to the P.O immediately on receipt of information. Presence of police personnel, B. L. Bhandari, remains a mystery. What he was doing there at 9.00 pm in the P.O is anybodys guess. His presence at the P.O at the earliest point of time throws up many questions which the prosecution had not even attempted to meet; rather the same has been suppressed.

37. Another incriminating piece of evidence sought to be highlighted by the prosecution is the telephonic call stated to have been made by the accused to PW-3. On this aspect, less said is the better. In his cross-examination, PW-3 had admitted that he could not say whether the person who made the phone call was actually the accused or not. It is very surprising that he did not even note down the phone number from which he had received the call. In his cross-examination, PW-5 admitted that in his statement before police he did not say that PW-3 had told him that wife of Nima had called him. In cross-examination, PW-6 admitted that in his statement before police he did not state that Padam Lall Chettri (PW-5) had told him that the appellant had committed murder of her husband. PW-22,

on the other hand, had deposed that Padam Lall Chettri (PW-5) had telephonically informed him to the effect that Nima Tshering was found in a serious condition in his room. Though PW-10 had stated that he was told by Tenzing Bhutia (PW-6) that some fight was going on between one Nima and his wife, he admitted in cross-examination that he had not made any such statement in his statement under section 161 Cr.P.C. In view of above, no credence can be placed on the so-called telephone call received by PW-3 that it was the accused, who had made the call and had informed him that she had committed the murder of her husband. Therefore, evidence of PW-3, PW-5 and PW-6 with regard to the information received by PW-3 that the accused had committed the murder of her husband is of no consequence.

38. PW-7, PW-8, who is the next door neighbour, and PW-11, in their cross-examination, had stated that the deceased and the accused was a loving couple and they had not seen them fight. It is seen from the evidence on record that the room occupied by the accused and the deceased was a *kutcha* wooden house and all other rooms were so close to each other that any kind of noise, shout or talk could easily be over heard by the neighbours. Their evidence does not indicate that the accused and the deceased had an estranged relationship over some extra-marital affairs of the deceased and that the accused had a motive to murder her husband. In ***Hakam Singh*** (supra), the Hon ble Supreme Court held that it is well established that motive is a relevant factor, whether based on the testimony of ocular evidence of occurrence or circumstantial evidence. However, when the participation of an accused is established by evidence of an eyewitness, absence of motive becomes insignificant. Absence of motive, however, puts the courts on guard to scrutinize the circumstances more carefully to ensure that suspicion and conjecture do not take place of legal proof.

39. Though Dr. Doma T. Bhutia has submitted that the accused having not gone to the hospital along with the injured husband is also a circumstance to show that she was the perpetrator of the crime is difficult to accept. Even if a wife does not accompany the husband when her husband was taken to hospital in a seriously injured condition, the same cannot be an incriminating piece of evidence pointing to the guilt of the accused. Factually also, the submission is not correct as PW-22 had stated that the injured was taken to the Yuksom PHC for medical treatment with the help of his wife and neighbours.

40. PW-8, in her cross-examination, had clarified that she could not say whether the accused was saying "*daju moryo*" (her husband was dead) or "*daju mare*" (she had killed her husband) as her child was crying. Therefore, it cannot be said that there was any extra-judicial confession by the accused in presence of PW-8. Her evidence goes to show that the accused along with her brother had returned back at about 9.30 pm and they had first come to her room and had enquired about her well-being. Just 2-3 minutes after they had left her place the accused had screamed and started crying uncontrollably. She also stated that she did not find any unnatural behaviour on the part of the accused on that day. She did not say in her evidence that she had knocked on the door of PW-4 and had told her that the accused had telephonically informed the police that she had committed the murder of her husband. PW-8 was categorical that she did not visit the room of the accused after hearing "*daju moryo*" (her husband was dead) or "*daju mare*" (she had killed her husband) as she was unwell. It appears that PW-4 had stated before police that PW-8 had knocked on her door and had told her that the appellant had telephonically informed police that she had committed murder of her husband. However, in her statement under Section 164 Cr.P.C she changed her statement to the effect that she had heard the accused knocking at her door and saying that she had killed her husband.

41. In ***Sahoo*** (supra), the Honble Supreme Court had held that a confessional soliloquy is a direct piece of evidence and Dr. Doma T. Bhutia, sought to contend that the statement made by the accused as deposed by PW-1 and PW-8 fall into the category of a confessional soliloquy. In view of our discussion supra we are unable to accept the aforesaid contention.

42. In ***Jaharlal Das*** (supra), the Honble Supreme Court laid down that the circumstantial evidence in order to sustain the conviction must satisfy three conditions: (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) such circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. In ***Pattu Ranjan*** (supra), the Honble Supreme Court laid down that doctrine of last seen, if proved,

shifts the burden of proof onto the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish information in this regard or furnishing false information would give rise to a strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances. In the instant case ,the doctrine of last seen has not come into play.

43. PW-18 stated that he was made to sign on Exhibit -11, Inquest Report, by police at the residence of the accused. Evidently, he was not present when inquest was conducted, as deposed by PW-22, at the PHC.

44. Exhibit-7 is stated to be a Disclosure Statement. The same reads as follows:

> "Exhibit-7
>
> Identification memorandum of accused Sanchi Rai aged 30 years W/O Lt. Nim Tsh. Lepcha R/o Yangtay, Gyalshing A/P Kopchay, Yaksom recorded on 7/2/2018 in presence of two witnesses. Time 0630 hours. My true statement is that yesterday dated 6/4/2018 my husband had gone to Dubdi for unloading sandstone on his own house truck. At that time, I lied to my house owner, Aunty Boi Maya Gurung, and purchased mouse-poisoning medicine for Rs.20. The time was around 5 pm. After sometime, my husband Nim Tsh. Lepcha returned and I mixed that mouse-poisoning medicine in a cup of tea and gave it to him, which he drank completely. At around 7 pm, he ate food and I also ate. At that time, he had started to appear a bit sick as that mouse medicine might have started to take effect. After eating food, he went to his room and I also went inside after finishing my kitchen works. He was playing with his mobile and we argued about his girlfriend and then he slapped me. After that, I went inside the kitchen and took out a wooden log from the collection and hit him two times on his head and one time on his leg with it, after this, he kept on

shaking continuously. At that time, I felt that he would surely die that is why I told everything to Yoksom OP Mingma Police, and asked them to arrest me. The wooden log with which I had hit him is on my bed/bed room and the cover of mouse-poisoning medicine is on the dustbin outside which I had thrown, and the tea cup which was used was washed and kept in the kitchen; these items I can hand over to the police in the presence of witnesses.

This is my true statement."

45. The only portion which is admissible under Section 27 of the Evidence Act is the portion containing the statement that wooden log with which she had hit the deceased is on her bed/bed room, the cover of mouse-poisoning medicine is on the dustbin outside which she had thrown, and the tea cup used which was washed and kept in the kitchen, rest being confessional and prohibited by Sections 25 and 26 of the Evidence Act.

46. By Exhibit-8, one wooden log (fire wood) along with rat killer cake and tea-cup were seized. PW-16, who was witness to Exhibit-7, Disclosure Statement, Exhibit-8 and Exhibit-9 (Seizure Lists) stated that he did not know the contents of the documents and he was made to sign on these documents. In his cross-examination, he also stated that he did not know if the accused had given any statement or whether any other statement of the accused was recorded. PW-17 also stated similarly about Exhibit-7, Exhibit-8 and Exhibit-9 in his cross-examination. In his evidence-in-chief also, it is not stated by him that Exhibit-7 was prepared in his presence or the statement of the accused was recorded in his presence. In view of such evidence of PW-16 and PW-17, we are of the opinion that no reliance can be placed on Exhibit-7, Disclosure Statement, Exhibit-8 and Exhibit-9 (Seizure Lists).

47. Though other items seized by Exhibits-8 and 9 were sent to RFSL, Ranipool for forensic analysis and expert opinion, the weapon of offence, i.e., wooden log, was not sent. The size of the seized wooden log is given as measuring 2-7" in length and 11" in radius. If the radius is 11", the diameter is 22", which is nearly 2. We will not hazard a guess as to whether the size of that kind of log can be used by a woman for assaulting a person in the manner it has been suggested.

48. The wooden log was also not shown to PW-21. In ***Ishwar Singh*** (supra), the Honble Supreme Court stated it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of offence, if available, be shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may at times cause aberration in the course of justice. From the evidence of PW-16 and PW-17, it is seen that the wooden log was shown to them in court.

49. In his cross-examination, PW-21 stated that injuries mentioned in Exhibit-14 could be sustained as a result of a fall or if one bangs his/her head on a concrete surface/ wall and that such kind of injuries might not cause immediate death of a person and that it is also possible that after having such kind of an injury a person can come back home and sleep.

50. Dr. Doma T. Bhutia has submitted that Section 6 of the Evidence Act is attracted in the instant case and, accordingly, she has cited decisions in ***Javed Alam***(supra) and ***Krishna Kr. Malik*** (supra). Section 6 of the Evidence Act contains the doctrine of *res gestae*. Section 6 is an exception to the general rule whereunder hearsay evidence becomes admissible. Such evidence must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. The essence of the doctrine is that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction that it becomes relevant by itself. Evidence of PW-5 and PW-6 may fall in the category of hearsay evidence. However, we have already held that evidence of PW-5 and PW-6 is of no consequence with regard to the information received from PW-3 that the accused committed murder of her husband as no reliance was placed on the evidence of PW-3 itself.

51. In ***Banti alias Guddu*** (supra), the Honble Supreme Court laid down that evidence of defence witness is not to be ignored by the courts. However, his evidence has also to be tested on the touchstone of reliability, credibility and trustworthiness. In ***Ram Singh*** (supra), the Honble Supreme Court laid down that the evidence tendered by defence witnesses cannot always be termed as a tainted one- the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution.

52. DW-1 is a brother-in-law of the accused being husband of the sister of the accused. He stated that on 06.04.2018 he had informed the accused that he will perform *puja* in his house as his mother-in-law was sick and therefore, the accused had come to his house with her younger brother at around 01:00-01.30 pm and had returned to Yuksom at around 06:00 to 06:30 pm. He had received a call from Kiran Rai (DW-2) that the husband of the accused and the accused had been taken to the Hospital.

53. DW-2, Kiran Rai stated that the accused is his elder sister and he used to live with the accused and his sister earlier at Yuksom. He stated that on the day of occurrence the accused and PW-4 had gone to one '*Maraw'* at 09.00 am and he had also gone there later on and stayed for about an hour. Thereafter he and the accused had started for Chota Samdong at around 10:00 am and reached there around 01:30 pm. *Shaman* was performing rites and they started for home at around 06:30 pm and reached Yuksom at around 09:30 pm. After reaching Yuksom, his sister went inside the room of Manita Rai, PW-8, who was very sick, as her child was crying very loudly, and he had waited outside. While his sister was talking with PW-8, he suddenly noticed that the door of his sisters room was open. His sister told him that her husband always does that sort of a thing and comes home without calling. Saying she has to prepare dinner, she went inside the room while he followed her. When the room light was switched on they found Nima lying on the mattress spread on the floor and they started shaking him. He was found to be unconscious and bleeding from ear and there was blood all over the pillow. His sister started screaming "Daju Moryo" "Daju Moryo" and then people started arriving. His brother-in- law was alive till then and so police and his sister took the injured to the Hospital while he remained in the room. No suggestion was given to DW-2 in his cross-examination by the prosecution that he was not with the accused and that he was not present at the P.O.

54. Evidence of PW-8 coupled with the evidence of DW-2 establish that DW-2 was present with the accused on the day of occurrence.

55. The appellant in her statement under Section 313 Cr. P.C., while taking the plea of denial, had stated that they had returned from Chota Samdong at around 07.00 to 07.30 pm and reached home at around 09.00 to 09:30 pm and went to the house of Manita Rai (PW-8) and while she was there she saw light in her house. When she went inside the room she

found her husband lying on the floor. She then called Manita Rai but she did not come. While DW-2 had stated that they discovered Nima lying on the mattress on the floor when the accused had switched on the light, the accused had stated that the light was on. DW-2 had stated about the conversation he had with the accused when he had noticed the open door of the room. In the circumstances of the case whether the light was on or off is not very significant. Evidence of PW-8, at the cost of repetition, shows that the deceased had come home after a couple of days and the accused along with her brother had returned back at about 9.30 pm. They had first come to her room and had enquired about her well-being. Just 2-3 minutes after they had left her place, the accused had screamed and started crying uncontrollably. The time-gap being only 2-3 minutes, it is more plausible that the incident had taken place before the arrival of the accused and DW-2.

56. In ***Suchand Pal*** (supra), the Honble Supreme Court held that the prosecution can succeed by substantially proving the version it alleges. It must stand on its own legs and cannot take advantage of the weakness in a defence case. In ***Sanjay Thakran*** (supra), the Honble Supreme Court observed that recovery of articles from the accused in the absence of identification as belonging to the deceased does not take the prosecution case any further. In ***Harban Sahai*** (supra), the Honble Supreme Court laid down that omission to send the earth from the place of occurrence for chemical examination, in the facts and circumstances of the case, had not vitiated the investigation to any extent. In ***Dhanaj Singh*** (supra), the Honble Supreme Court held that when direct testimony of eye witness corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the investigation officer to send the firearms to the forensic test laboratory for comparison cannot affect the credibility of prosecution version as the report of the forensic expert would be in the nature of an expert opinion without any conclusiveness attached to it. In ***Paltan Mallah*** (supra), the Honble Supreme Court laid down that even if a search is illegal the seizure of the articles is not vitiated. In a case of illegality of search the court may be inclined to examine carefully the evidence regarding the seizure. The above-referred judgments are not relevant for the purpose of the present case. In ***Manoranjan Sil*** (supra), the Calcutta High Court had held that non-examination of a Magistrate who recorded the statement under Section 164 Cr.P.C cannot be a ground for disbelieving the statement of the accused. In

the instant case, statement of the accused was not recorded under Section 164 Cr.P.C.

57. In ***Lakshmi Singh*** (supra), the Honble Supreme Court laid down that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the court to reject the prosecution version. In ***Bhugdomal Gangaram*** (supra), it was held that no amount of suspicion will constitute legal evidence for sustaining a conviction. In ***Divakar Neelkantha Hegde*** (supra), the Honble Supreme Court held that the principle of extending the benefit of reasonable doubt to the accused cannot be readily accepted, but should be carefully applied if certain circumstances exist and warrant the application of the principle.

58. On an overall consideration of materials on record, we are of the opinion that the prosecution has not been able to establish the guilt of the appellant beyond reasonable doubt and the appellant is entitled to benefit of doubt. Resultantly, the appeal is allowed.

59. The impugned conviction and sentence of the appellant is set aside. The appellant is set at liberty.

60. Lower court records be sent back.

SLR (2020) SIKKIM 727

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

Crl. Rev. P. No. 3 of 2020

State of Sikkim …. REVISIONIST

Versus

Asal Kumar Thapa and Others ….. RESPONDENTS

For the Revisionist: Dr. Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri, Additional Public Prosecutor.

For the Respondents: Mr. Ajay Rathi, Advocate.

Date of decision: 6th November 2020

A. Code of Criminal Procedure, 1973 – S. 321 – Withdrawal from Prosecution – The petition under S. 321 Cr.P.C has not averred that the learned Special Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice – The law is, though the Government may have ordered, directed or asked the Public Prosecutor to withdraw from prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that public interest will be served by his withdrawal from the prosecution (*In re. Abdul Karim* discussed) – The petition filed by the learned Special Public Prosecutor does not record the satisfaction of the learned Special Public Prosecutor having examined the relevant material and in good faith, being satisfied that a public interest would be served by his withdrawal from the prosecution. The petition filed by the learned Special Public Prosecutor records only his opinion that because of certain lacunae, the prosecution would be rendered futile. The materials placed do not even remotely indicate to this Court that the petition under S. 321 Cr.P.C. was made in good faith or in the interest of public policy and justice – The grounds taken in the petition was in pursuance to

the direction of the Government to withdraw from prosecution without properly determining if the withdrawal from prosecution would be in public interest.

(Paras 27 and 28)

Petition Dismissed.

Chronology of cases cited:

1. Bairam Muralalidhar v. State of Andhra Pradesh, (2014) 10 SCC 380.
2. Niranjan Hemchandra Sashittal and Another v. State of Maharashtra, (2013) 4 SCC 642.
3. Capt. Ram Singh v. State of Himachal Pradesh and Others, 2016 Cri. L.J 4469 (HP).
4. Sheonandan Paswan v. State of Bihar and Others, (1987) 1 SCC 288.
5. Abdul Karim and Others v. State of Karnataka and Others, (2000) 8 SCC 71.
6. State of Bihar v. Ram Naresh Pandey, AIR 1957 SC 389.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The State of Sikkim has preferred the revision petition seeking to invoke the powers of this court under sections 397 and 401 of the Code of Criminal Procedure, 1973 (Cr.P.C.) against the order dated 13.12.2019, passed by the learned Special Judge (PC Act, 1988), East Sikkim at Gangtok, in Sessions Trial (Vigilance) Case No. 01 of 2019 [*State of Sikkim (Through Vigilance Department) vs. Asal Kumar Thapa & Others*].

2. On 15.11.2016, a First Information Report (FIR) was lodged at the Sikkim Vigilance Police Station, Gangtok, against respondent no.1, the then Director, Food Security & Agriculture Development Department (FS & ADD); respondent no.2, the then Additional Director, FS & ADD; respondent no.3, Joint Director/IPM/INM, FS & ADD and Ringzing Doma

Bhutia, Senior Accounts Officer-cum-D&DO, FS & ADD; Lily Bhutia, Manager, Srijanasil Labour Women Cooperative Society; Pasangkit Lepcha, President, Srijanasil Labour Women Cooperative Society and others unknown, for commission of offences under section 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988 (PC Act, 1988). A Regular Case No. R.C. 14 of 2016 was registered and taken up for investigation.

3. Charge-sheet no. 1/SUPS/19 dated 29.07.2019 was filed against the three respondents for commission of offences punishable under sections 120B, 420, 468, 471 of the Indian Penal Code, 1860 (IPC) and under section 13(1)(d) read with section 13(2) of the PC Act, 1988. According to the charge-sheet, as no evidence could be found to attribute criminality to the acts of Rinzing Doma Bhutia, Pasangkit Lepcha and Lily Bhutia, a prayer was made for their discharge. It was further prayed that Pasangkit Lepcha and Lily Bhutia may be taken as approvers in the case. Amongst the 59 persons listed as prosecution witnesses, Rinzing Doma Bhutia, Lily Bhutia and Pasangkit Lepcha were also listed. The statements recorded under section 161 Cr.P.C. were also part of the charge-sheet. 59 documentary evidence formed the list of documents filed along with it. According to the learned Public Prosecutor, charges are yet to be framed.

4. The charge-sheet alleged that the above dishonest and fraudulent acts of the respondents had caused undue wrongful, pecuniary loss of Rs.8,48,675/- to the Government of Sikkim and corresponding undue pecuniary gain to themselves.

5. A petition under section 321 Cr.P.C. (the petition) was filed by the learned Special Public Prosecutor on 27.11.2019 before the learned Special Judge, P.C. Act, 1988, East Sikkim at Gangtok, for consent to withdraw the case from prosecution. A copy of the instructions of the State Government dated 22.10.2019, was also annexed thereto. The petition was heard by the learned Special Judge and vide the impugned order dated 13.12.2019, it was held that the court was not inclined to accord consent for withdrawal from prosecution and the petition was rejected. While doing so, after hearing the learned counsel for the parties, the learned Special Judge referred to the judgment of the Supreme Court in ***Bairam Muralalidhar vs. State of Andhra Pradesh***[1] and ***Niranjan Hemchandra***

[1] (2014) 10 SCC 380

Sashittal & Anr. vs. State of Maharashtra[2] and of the High Court of Himachal Pradesh in ***Capt. Ram Singh vs. State of Himachal Pradesh & Ors.***[3]. The learned Special Judge held that no case for according consent for withdrawal from prosecution had been made out by the learned Special Public Prosecutor. The learned Special Judge further held that although it was urged that the quality of evidence was poor, the records would, at least at this stage, indicate otherwise. The learned Special Judge held that the statements of witnesses like Tshering Ongmu Wangchuk, Laxmi Rai, Bina Gurung, Sanjit Tamang, Pabel Majumdar (In-charge, CIPMC) and Lily Bhutia would give altogether different picture then sought to be projected. The learned Special Judge refrained from making any further observation lest it may affect the merits of the case.

6. Heard Dr. Doma T. Bhutia, learned Public Prosecutor for the Revisionist and Mr. Ajay Rathi, learned counsel for the respondents.

7. The learned Public Prosecutor submitted that a perusal of the impugned order would reveal that the learned Special Judge had failed to consider whether the learned Special Public Prosecutor applied his independent application of mind and acted in good faith and in public interest, which is a *sine qua non* of section 321 Cr.P.C. Dr. Doma further submitted that the learned Special Judge ought to have considered that the petition was also supported by the instructions from the Secretary (Protocol), Home Department, that the State Government had taken a decision to withdraw the case in accordance with section 321 Cr.P.C. It was urged that the learned Special Public Prosecutor had opined that it would be expedient to withdraw from prosecution as the materials placed on record by the investigation would not lead to successful trial causing wastage of the court's precious time as well as unnecessary sufferings of the accused persons. Thus, it was contended that the impugned order was unreasonable and unsustainable in law and deserved to be set aside in the interest of justice and in public interest. It was the case of the learned Public Prosecutor that saving the precious time of the court could also be considered public policy or public interest. Dr. Doma referred to and relied upon the judgment of the Supreme Court in ***Sheonandan Paswan vs. State of Bihar & Ors***.[4], in which it was held that when an application under section 321 Cr.P.C. is made, it is not necessary for the

[2] (2013) 4 SCC 642
[3] 2016 Cri. L.J 4469 (HP)
[4] (1987) 1 SCC 288

court to assess the evidence to discover whether the case would end in conviction or acquittal.

8. Mr. Ajay Rathi, to supplement the arguments made by the learned Public Prosecutor, placed the judgment of the Supreme Court in ***Abdul Karim & Others vs. State of Karnataka & Others5,*** where the Supreme Court explained the principle underlying section 321 Cr.P.C.

9. Section 397 Cr.P.C. mandates that the High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior criminal court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior court. It is settled that the scope of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceedings.

10. Section 321 Cr.P.C provides, thus:

> "**321. Withdrawal from prosecution.** - The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—
>
> (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
>
> (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:
>
> Provided that where such offence—
>
> (i) was against any law relating to a matter to which the executive power of the Union extends, or

[5] (2000) 8 SCC 710

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

11. A perusal of section 321 Cr.P.C. reflects that the consent of the court is mandatory before the public prosecutor in charge of a case withdraws from the prosecution of any person either generally or in respect of anyone or more of the offences for which he is tried.

12. The Constitutional Bench of the Supreme Court in ***Sheonandan Paswan*** (supra) examined, *inter alia*, the provision of section 321 Cr.P.C. The majority dismissed the appeal preferred by Sheonandan Paswan. It was held that section 321 Cr.P.C. needs three requisites to make an order under it valid: (1) the application should be filed by a public prosecutor or assistant public prosecutor who is competent to make an application for withdrawal, (2) he must be in charge of the case and (3) the application should get the consent of the court before which the case is pending. A perusal of the impugned order leads one to conclude that it was only the

third requisite, i.e., the consent of the court before which the case was pending, which was not fulfilled.

13. The Supreme Court also held that the impugned order giving consent under section 321 Cr.P.C. was a revisable order and that the revisional court considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting its own conclusion on an elaborate consideration of evidence. It was further held that since section 321 Cr.P.C. does not give any guidelines, the grounds on which a withdrawal application can be made, such guidelines have to be ascertained with reference to decided cases under the section as well as its predecessor's section 494. It was held that ***State of Bihar vs. Ram Naresh Pandey***[6] is a landmark case which has laid down the law on the point with precision and certainty. In the said judgment, while discussing the role of the court, the Supreme Court observed:

> *"**92**. ……*
>
> *His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and it is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by court. It cannot be taken to place on the court the responsibility for a prima facie determination of a triable issue. For instance the discharge that results therefrom need not always conform to the standard of 'no prima facie case' under Sections 209(1) and 253(1) or of 'groundlessness' under Sections 209(2) and 253(2). This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made."*

[6] AIR 1957 SC 389

14. In ***Abdul Karim*** (supra), the Supreme Court held:

> *"**18.** The law as it stands today in relation to applications under Section 321 is laid down by the majority judgment delivered by Khalid, J. in the Constitution Bench decision of this Court in Sheonandan Paswan v. State of Bihar [(1987) 1 SCC 288 : 1987 SCC (Cri) 82] . It is held therein that when an application under Section 321 is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. What the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration all the material before him, the court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent or decline consent. The section should not be construed to mean that the court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher court is satisfied that such consent was given on an overall consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the court in a supervisory and not an adjudicatory manner. What the court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused.*

The discretion exercisable under Section 321 is fettered only by a consent from the court on a consideration of the material before it. What is necessary to satisfy the section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

19. *The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.*

20. *It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The*

court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent."

15. On the touchstone of the laws so well established, this Court shall now examine the petition as well as the impugned order refusing to grant consent to be satisfied as to its correctness, legality or propriety. The said petition reads:

"……

1. That the aforementioned case is at its initial stage of trial before this Hon'ble Court.

2. That while going through the case papers relating to this case including the charge sheet and the evidences relied on by the investigating agency in the case, it has been noticed that the nature and quality of evidences placed on record by the investigating agency in support of the case are such that the trial of the case, if allowed to continue, is likely to end in discharge/acquittal of the accused broadly for the reasons hereinunder enumerated.

(a) The star Prosecution witnesses in the case, namely Smt. Rinzing Doma, Smt. Passangkit Lepcha and Smt. Lily Bhutia who were themselves partners in the offence and coaccused in the case, have been impleaded as, Prosecution

witnesses in this case without following the procedure laid down in Section 306 Cr.P.C.

(b) This defect in investigation, renders the testimony of such witnesses inadmissible in evidence.

(c) The questioned documents including the questioned writings and signatures of the accused therein, relied on by the investigating agency in support of the case, have been examined by the Government Examination of Questioned Documents (GEQD) of Regional Forensic Science Laboratory (RFSL), Saramsa, which is under the Department of Police, Govt. of Sikkim and hence not an independent body like the Central Forensic Science Laboratory (CFSL). More over RFSL Saramsa does not appear to have been accredited as a Forensic Laboratory by the National Accreditation Board for testing and Calibration Laboratories (NABL) which is the competent authority to accredite (sic, 'accredit') Forensic Science Laboratories in the country.

(d) For the reason at (c) above, the certain vital documents relied on by the investigating agency in support of the case, are likely to be rendered inadmissible in evidence to the detriment of the Prosecution case.

(e) The instant prosecution case also suffers from the vice of withholding important witnesses whose evidence is vital for success of the case.

(f) In order to come to a just and proper finding on the guilt of the accused persons in this case, it is necessary to examine, whether the CIPMC training programme initiated and organized by the accused persons, in the instant case, was technically identical or different from the one earlier organized by the CIPMC, Govt. of India. The accused persons would be proved to be guilty only if there are evidences on record to prove similarity in the two training programmes. The investigation report in the case, lacks these particulars, thereby leaving a lacuna in the Prosecution case, benefit of which will ultimately go to the accused persons.

3. That in view of the above defects in the prosecution case, the trial of the accused in the case is likely (sic, 'to') end in their discharge / acquittal.

4. That in view of the above, the entire legal proceedings in the matter, if allowed to continue, is likely to be a futile exercise at the cost of harassment to the accused persons and witnesses, consumption of precious time of this Hon'ble Court and loss of other men (sic, 'man') hours and therefore not likely to serve the interest of administration of justice.

> *5. That the State Government of Sikkim, has also desired this case to be withdrawn from Prosecution in the interest of administration of Justice. A letter to his (sic, 'this') effect received by the undersigned Special Public Prosecutor from Secretary (Protocol), Home Department, Government of Sikkim, is filed as an Annexure herewith.*
>
> *In the circumstances, this Hon'ble Court may be placed (sic, 'pleased') to allow the State to withdraw this case from Prosecution, in the interest of fair and just, administration of justice.*
>
> *……."*

16. On a perusal of the petition, it is noticed that the learned Special Public Prosecutor desired to withdraw the case from prosecution on the ground that the case papers produced were such that if the trial of the case was allowed to continue was likely to end in discharge/acquittal of the respondents. It was also asserted that therefore it was likely to be *"a futile exercise at the cost of harassment to the accused persons and witnesses, consumption of precious time of this honourable court and loss of other men-hours (sic, man-hours) and therefore, not likely to serve the interest of administration of justice"*. Besides, the learned Special Public Prosecutor also stated that the Government of Sikkim had also desired the case to be withdrawn in the interest of administration of justice.

17. The letter of the Secretary (Protocol), Home Department, Government of Sikkim, dated 22.10.2019, addressed to the learned Special Public Prosecutor, is quoted hereinbelow:

> "**GOVERNMENT OF SIKKIM**
> **HOME DEPARTMENT**
> **GANGTOK**
>
> No. 10/528/LD/2019/777 Date: 22/10/19
>
> To
>
> Shri N.P. Sharma,
> Special Public Prosecutor,

District & Sessions Court,
Sichey, East Sikkim at Gangtok.

Subject: Withdrawal of Sessions Trial (Vigilance) Case No. 01 of 2019.

Sir,

I am directed to inform you that the State Government has taken a decision to withdraw the above mentioned case from prosecution in accordance with the provisions under Section 321 of the Code of Criminal Procedure, 1973.

Therefore, I am directed to request you to kindly convey the decision of the State Government to the Hon'ble Court and withdraw the case from prosecution against all the accused and also submit a report in the matter to this office.

This is for your kind information and necessary action.

Yours sincerely,
(Sd/-)
Secretary (Protocol)
Home Department
Government of Sikkim,
Fax No. 03592-202721
Email: hd.confdlsection@gmail.com"

18. The instructions dated 22.10.2019 by the Secretary (Protocol), Home Department, Government of Sikkim, to the learned Special Public Prosecutor, conveys only the decision of the State Government to withdraw the case from prosecution with a further direction to convey that decision to the court and after doing so to submit a report. The said instructions does not reflect the reasons for directing the learned Special Public Prosecutor to do so.

19. The petition under section 321 Cr.P.C. has not averred that the learned Special Public Prosecutor is, in good faith, satisfied, on

consideration of all relevant material that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The Supreme Court in ***Abdul Karim*** (supra) had held that the application under section 321 Cr.P.C. must aver so.

20. The learned Special Public Prosecutor has enumerated the relevant material examined by him. It was, therefore, vital for the learned Special Judge to examine the reasons enumerated by the learned Special Public Prosecutor in the petition and come to a conclusion, whether or not to grant consent. For the said purpose, the learned Special Judge was required to satisfy himself that the material placed by the learned Special Public Prosecutor could reasonably lead to the conclusion that his withdrawal from prosecution would serve public interest. The learned Special Judge was also to consider whether the grant of consent may thwart or stifle the courts of law or result in manifest injustice.

21. The first ground taken by the learned Special Public Prosecutor was that the star prosecution witnesses, namely, Rinzing Doma Bhutia and Lily Bhutia, who were themselves partners and coaccused in the case had been impleaded as prosecution witnesses without following the procedure laid down in section 306 Cr.P.C. and this defect in investigation renders the testimony of such witnesses inadmissible in evidence.

22. At this point, it is relevant to note that as per the learned Public Prosecutor, the case is at its initial stage and charges are yet to be framed. The charge-sheet filed by the Investigating Officer prays for making Pasangkit Lepcha and Lily Bhutia approvers in the case. This prayer is yet to be considered by the learned Special Judge.

23. Section 306 Cr.P.C. provides that with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, the court at any stage of the investigation or inquiry into, or the trial of, the offence may tender a pardon to such person on certain conditions enumerated therein.

24. Thus, it is seen that the anxiety of the learned Special Public Prosecutor that testimonies of the said witnesses would be rendered inadmissible as the procedure laid down in section 306 Cr.P.C. had not

been followed, was premature. The law itself mandates that the offenders could be tendered pardon even at the stage of trial, which trial had not even begun.

25. The next ground taken by the learned Special Public Prosecutor was that the questioned documents including the questioned writings and signatures of the respondents herein had been examined by the Government Examination of Questioned Documents (GEQD) of Regional Forensic Science Laboratory (RFSL), Saramsa, which is under the Department of Police, Government of Sikkim and hence, not an independent body like the Central Forensic Science Laboratory (CFSL). The learned Special Public Prosecutor also submitted that the RFSL, Saramsa did not "*appear"* to have been accredited as a Forensic Laboratory by the National Accreditation Board for Testing and Calibration Laboratories and for this reason, "*certain vital documents relied on by the investigating agency in support of the case, are likely to be rendered inadmissible for evidence to the detriment of the prosecution case*". The pleadings make it clear that RFSL, Saramsa had been established by the Government of Sikkim. No further material seemed to have been placed before the learned Special Judge on the issue of non-accreditation of RFSL, Saramsa. No such material has been placed before this court as well and no indications have been given as to which are those "*certain vital documents*" that would be rendered inadmissible. This court is, thus, of the view that the ground does not reasonably lead to the conclusion that withdrawal would serve public interest.

26. The third ground taken by the learned Special Public Prosecutor is that of withholding of important witnesses whose evidence was vital. Besides this statement, there was no further elaboration. If the learned Special Public Prosecutor found that vital witnesses were withheld, section 311 Cr.P.C. would aid the court in summoning and examining them if their evidence appear to be essential to the just decision of the case. This ground, in any case, is too vague to give it any deeper consideration. It is, however, definite that the ground does not satisfy the rationale for grant of consent.

27. The fourth ground taken by the learned Special Public Prosecutor was that in his opinion, it was necessary, in the facts of the present case, to examine whether the Central Integrated Pest Management Centre (CIPMC) training programme initiated and organised by the respondents was

technically identical or different from the earlier ones organised and that they would be proved guilty only if the evidences on record proved similarity in the two programmes. It was his opinion that the investigation report lacked these particulars, thereby leaving a lacuna in the prosecution case. If the learned Special Public Prosecutor was of the opinion that there was certain evidence lacking, section 173(8) Cr.P.C. would have come to the rescue of the investigating agency. This ground again fall short of the requirement mandated by section 321 Cr.P.C.

28. The last ground taken was that the State Government desired that the present case be withdrawn. In ***Abdul Karim*** (supra), it has been clearly held that the law is, though the government may have ordered, directed or asked the public prosecutor to withdraw from prosecution, it is for the public prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that public interest will be served by his withdrawal from the prosecution. The petition filed by the learned public prosecutor does not record the satisfaction of the learned Special Public Prosecutor having examined the relevant material and in good faith, being satisfied that a public interest would be served by his withdrawal from the prosecution. The petition filed by the learned Special Public Prosecutor records only his opinion that because of certain lacunae, the prosecution would be rendered futile. The materials placed do not even remotely indicate to this Court that the petition under section 321 Cr.P.C. was made in good faith or in the interest of public policy and justice. The learned Special Judge has examined the materials and opined that the statement of witnesses recorded by the prosecution gives an altogether different picture than what was suggested by the learned Special Public Prosecutor and in such circumstances, has declined to grant consent. The facts reveal that after an elaborate investigation, chargesheet had been filed against the public servants for criminal misconduct and other offences. The purpose for the enactment of the PC Act, 1988 is to eradicate corruption and provide deterrent punishment when criminal culpability is proven. That is the paramount public interest in corruption cases. In ***Niranjan Hemchandra Sashittal*** (supra), it has been held by the Supreme Court that an attitude to abuse the official position is an anathema to the basic tenets of democracy, for it erodes the faith of the people in the system and creates an incurable concavity in the rule of law. Sans the mandatory averment of the learned Special Public Prosecutor as required under section 321 Cr.P.C. and as held above, it is difficult to hold that the proposed withdrawal by the

learned Special Public Prosecutor would not stifle or thwart the process of law or cause manifest injustice. In ***Sheonandan Paswan*** (supra), the Supreme Court held that the power of the public prosecutor to withdraw from prosecution under section 321 Cr.P.C. is not absolute and unrestricted and that it has to be controlled and guided power or else it will fall foul of Article 14 of the Constitution of India. It was further held that once prosecution is launched, its relentless course only be halted on sound consideration germane to public justice and it is not left to the sweet will of the state or the public prosecutor to withdraw from prosecution. In the present case, the learned Special Judge was of the view that manifest injustice would be caused if consent was given. This court, on thorough examination of the material placed, is of the view that the grounds taken in the petition was in pursuance to the direction of the Government to withdraw from prosecution without properly determining if the withdrawal from prosecution would be in public interest. The impugned order passed by the learned Special Judge refusing to grant consent is correct, legal and proper. None of the grounds enumerated in the petition individually or collectively permits this court to express an opinion that the withdrawal was sought for in public interest and it was not to stifle or thwart the process of law or cause manifest injustice.

29. The Criminal Revision Petition therefore fails and is dismissed.

30. Consequently, I.A. No. 1 of 2020 stands disposed.

SLR (2020) SIKKIM 745

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

Crl. A. No. 30 of 2017

Durga Bahadur Gurung …. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. U.P Sharma, Advocate (Legal Aid Counsel).

For the Respondent: Mr. S.K. Chettri, Addl. Public Prosecutor.

Date of decision: 6th November 2020

A. Indian Evidence Act,1872 – S. 65 – Cases in Which Secondary Evidence Relating to Documents may be Given – To prove the contents of a document, a party must adduce primary evidence of the contents and only in exceptional cases will secondary evidence be admissible. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original (*In re. M. Chandra* discussed) – The factual foundation to establish the right to give secondary evidence by way of a duplicate copy was not laid by PW-17. When there was no reference to a duplicate copy in the deposition of PW-17, obviously there is no evidence that the duplicate copy was in fact a true copy of the original. In cross-examination, when confronted with Exhibit-24, PW-17 admitted that he was not acquainted with the signatures of Dr. H.K. Pratihari and Dr. Subhankar Nath – Neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispenses with its proof which is otherwise required to be done in accordance with law – In view of above, Exhibit-24 cannot be taken into consideration.

(Para 31, 33 and 34)

B. Code of Criminal Procedure, 1973 – S. 154 – Delay in Lodging the F.I.R – Prompt lodging of an F.I.R is an assurance regarding truth of the informant's version and that a promptly lodged F.I.R reflects the first hand account of what has actually happened, and who was responsible for the offence in question (*In re. Jai Prakash Singh* discussed) – Evidence of PW-1 goes to show that the baby was born sometime during November 2014 and when the villagers enquired she had told them about the accused having repeatedly raped her since she was a child. By then, the baby was four months old. It is apparent from the evidence on record that the birth of the child of PW-1 was sought to be kept a secret and the other inmates of the house had also not made the same public – PW-2 had stated that when she had asked her father about the baby he told that he had brought the baby from Yangyang making it abundantly clear that the birth of the baby was suppressed. For more than four months, people in the locality were not aware about the birth of the baby. The domineering role of the father cannot be lost sight of the fact, more so, in absence of the mother who had abandoned the children. When allegations are against the father, it is not difficult to visualize the range of emotions which the victim undergoes. It may be difficult for the daughter to be able to muster enough courage to set the machinery of law in motion by lodging a complaint against her father. However, it is seen that once enquiries were made after the birth of the baby had come to light, the victim girl made a clean breast of the entire episode – In the given circumstances, PW-1 not having lodged the F.I.R immediately does not derail the prosecution case. The F.I.R came to be lodged at the instance of co-villagers with promptitude and without any delay after they came to learn from PW-1 how the father had committed rape and had impregnated her.

(Paras 39 and 41)

C. Code of Criminal Procedure, 1973 – Defective Investigation – Effect – While in case of defective investigation the Court has to be circumspect while evaluating the evidence it would not be right in acquitting accused person solely on account of defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective (*In re. Gajoo* discussed)

(Para 45)

D. Indian Evidence Act, 1872 – Benefit of Doubt – The benefit of doubt to which the accused is entitled is reasonable doubt – the doubt

which rational thinking men will reasonably, honestly and conscientiously entertain – It does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the crime. If that were so the law would fail to protect society as in no case such a possibility can be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt (*In re. Himachal Pradesh Administration* - discussed).

(Para 48)

Appeal dismissed.

Chronology of cases cited:

1. Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808.
2. Jai Prakash Singh v. State of Bihar and Another, (2012) 4 SCC 379.
3. Rajiv Singh v. State of Bihar and Another, (2015) 16 SCC 369.
4. The State of Bihar v. Kanu Gope and Another, AIR 1954 Patna 131.
5. State of Orissa v. Prechika Parvatisam, AIR 1954 Orissa 58.
6. Bhakta Bahadur Subba v. State of Sikkim, Crl. A. No. 19 of 2019 (High Court of Sikkim).
7. Rajinder alias Raju v. State of Himachal Pradesh, (2009) 16 SCC 69.
8. State of Himachal Pradesh v. Manga Singh, (2019) 16 SCC 759.
9. M. Chandra v. M. Thangamuthu, (2010) 3 SCC 712.
10. State represented by the Drugs Inspector v. Manimaran, (2019) 13 SCC 670.
11. Gajoo v. State of Uttarakhand, (2012) 9 SCC 532.
12. Himachal Pradesh Administration v. Om Prakash, AIR 1972 SC 975.

JUDGMENT

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

This appeal is directed against the judgment and order dated 25.09.2017 passed by the learned Sessions Judge (POCSO Act), South

Sikkim at Namchi in Sessions Trial (POCSO) Case No. 10 of 2015 convicting the appellant under Section 376(2)(f)/372(2)(i)/376(2)(n) of the Indian Penal Code, 1860 (for short, the IPC) and sentencing him to undergo RI of 15 years for the offence committed under Section 376(2)(f) IPC, to suffer RI for 15 years for the offence committed under Section 376(2)(i) and to suffer RI for 15 years for the offence committed under Section 376(2)(n), providing that the sentences imposed will run concurrently. The learned Sessions Judge by the aforesaid impugned judgment acquitted the accused of the offence under Section 5(l)/ 5(j)(ii)/ 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012(for short, the POCSO Act).

2. The learned trial Court, relying on Exhibit-3, the birth certificate of the victim, had held that the date of birth of the victim girl is 02.07.1994. The reasoning assigned for acquitting the appellant of the offence under POCSO Act was that the victim girl had attained the age of 18 years in the month of July 2012 whereas the POCSO Act came into force on 14.11.2012.It was also observed that criminal law cannot be applied with retrospective effect.

3. In this case, the father is convicted for committing rape of his own daughter, resulting in birth of a child.

4. The brother of the appellant, Smt. P. Gurung (Ward Panchayat), Ram Kumar Kothwal (District Panchayat), Navraj Gurung and Ganga Maya Gurung lodged a first information report (F.I.R) before the In-charge, Lingmoo Out Post alleging that the appellant had raped his daughter and had hidden about the fact of birth of a baby. Based on the aforesaid F.I.R (Exhibit-6), Ravangla P.S. Case No. 8 of 2015 under Section 376 IPC was registered against the accused and investigation had commenced. On conclusion of investigation, finding a prima facie case, the Investigating Officer (I.O) filed charge-sheet under Section 376 (2) (f) (k) (h) IPC read with Section 4 of the POCSO Act against the accused.

5. Initially charges under Section 5 (l)/5 (n) of POCSO Act and under Section 376 (2) IPC were framed on 22.08.2015 and charges being explained, the accused pleaded not guilty and claimed trial. However, subsequently, learned Sessions Judge (POCSO Act), by an order dated 10.06.2016 framed charges under Section 5 (l)/5(j)(ii)/5(n) of the

POCSO Act/376(2)(f)/376(2)(i) and 376(2)(n) IPC. Charges being explained, the accused pleaded not guilty and claimed trial. By then some witnesses were already examined. The learned trial Court, by the order dated 10.06.2016, decided to hold a *de novo* trial.

6. During trial, while the prosecution examined 17 witnesses, defence adduced no evidence. The statement of the accused was recorded under Section 313 Cr. P.C. where, apart from taking a plea of denial, he stated that the Ward Panchayat was not in good terms with him and as such she had made a false case against him .He had also stated that his daughter had told that the baby was that of one Prem Lal Mangar.

7. Mr. U.P. Sharma, learned Legal Aid Counsel submits that the learned trial Court had committed manifest error of law in convicting the appellant as the prosecution miserably failed to prove the guilt of the accused beyond reasonable doubt. Drawing attention of the Court to the evidence of PW-4, PW- 7, PW-11 and PW-12, it is submitted by him that the victim had initially told them that she had been impregnated by one Prem Lal Manger and yet the IO, in spite of being aware of the aforesaid fact, did not cause any investigation in that regard and therefore, the entire prosecution case is liable to be thrown overboard. The learned counsel submits that evidence of PW-1 is not trustworthy and therefore, conviction of the appellant cannot be based on the testimony of PW-1. He has further submitted that PW-11 and PW-12 had deposed that the victim had claimed that the new born baby was born out of a relationship between her and her father and if that be so, offence of rape cannot be attracted in the instant case. The learned counsel submits that no reliance can be placed on Exhibit-24, it being a duplicate copy of the DNA Report prepared by one Dr. Subankar Nath, Deputy Director –cum-Assistant Chemical Examiner, Government of Tripura, Tripura State Forensic Laboratory. It is contended that Dr. Subankar Nath was not examined and no explanation was given as to why the original of Exhibit-24 could not be produced. He submits that IA No. 06 of 2020, which is an application filed by respondent, to place on record the certified copy of the DNA Report in connection with the blood samples collected from the accused, the victim girl and the baby, deserves to be dismissed being not maintainable. He submits that if PW-1 was raped for a long period of time as alleged, it is surprising that no action was taken by PW-1 by way of reporting to the police or by way of informing her family members. It is submitted that the prosecution did not ascertain by way of medical examination as to whether the appellant was

capable of having sexual intercourse. He submits that in the attending facts and circumstances of the case, the appellant is entitled to acquittal. In support of his submissions, learned counsel places reliance on ***Kali Ram vs. State of Himachal Pradesh***, reported in ***(1973) 2 SCC 808***, ***Jai Prakash Singh vs. State of Bihar and another***, reported in ***(2012) 4 SCC 379***, ***Rajiv Singh vs. State of Bihar and another***, reported in ***(2015) 16 SCC 369***, ***The State of Bihar vs. Kanu Gope and another***, reported in ***AIR 1954 Patna 131*** and ***State of Orissa vs. Prechika Parvatisam***, reported in ***AIR 1954 Orissa 58***.

8. Mr. S.K. Chettri, learned Additional Public Prosecutor, Sikkim, while supporting the impugned judgment, submits that evidence of PW-1 has not been impeached in any manner and based on her evidence alone conviction can be sustained. He also submits that there is no reason as to why the daughter will falsely implicate her father with an offence like rape. Drawing attention of the Court to the evidence of PW-3 and PW-12, younger brother and elder sister of PW-1, respectively, he submits that they have also supported PW-1 and there is no plausible reason as to why all of them should be falsely implicating their father. While conceding that initially on enquiry PW-1 had named one Prem Lal Manger as the person responsible for impregnating her and the I.O had not carried out investigation in that regard, he submits that the same is of no consequence as further investigation clearly pointed towards the guilt of the accused. Placing reliance on IA No. 06 of 2020, he submits that for ends of justice, certified copy of the DNA Report may be taken on record. He has further contended that even if Exhibit-24 is discarded, non-production of DNA Report cannot be fatal to the prosecution case. It is submitted that in view of unimpeachable testimony of PW-1 as well as her siblings, prosecution case is firmly established. He has relied on a judgment of this Court in ***Bhakta Bahadur Subba vs. State of Sikkim*** (Crl. A. No. 19 of 2019) decided on 14.09.2020 to contend that in view of the evidence on record in that case this court had convicted an accused despite there being no DNA report establishing paternity of the new born child. He also places reliance in the cases of ***Rajinder alias Raju vs. State of Himachal Pradesh***, reported in ***(2009) 16 SCC 69*** and ***State of Himachal Pradesh vs. Manga Singh,*** reported in ***(2019) 16 SCC 759***.

9. We have heard the learned counsel for the parties and have perused the materials on record.

10. PW-1 is the victim girl. In her evidence she stated that her younger sister and two younger brothers were residing with their father and their mother had left them when she was 8 years old. She stated that since the time she was around 12 years old, the accused used to come to her bed during night and sexually abuse her on many occasions. Her father used to rape and molest her and during the year 2014 as a result of rape committed by the accused she gave birth to a baby in November 2014. Though pregnancy was concealed by the accused, the villagers had come to know that she had given birth to a baby and when they had enquired, she had told them that the accused had raped her since she was a child. She deposed that she had given her statement, Exhibit-2, to the Magistrate. She exhibited her birth certificate as Exhibit-3 and had deposed that the baby's as well as her blood samples were collected at Namchi District Hospital.

11. PW-2, who was 18 years of age at the time of trial, is the younger sister of the victim. She stated that she was residing at Lingee in a rented house and when she visited her father's house she saw a baby and when she enquired about the baby, her father had told her that he had brought the baby from Yangyang. Later on, she came to know that the baby was fathered by her father. PW-2, in her cross-examination had stated that PW-1 did not tell her that she was impregnated by their father.

12. PW-3 is the younger brother of PW-1. He deposed that PW-1 was impregnated by his father and the baby was that of PW-1.

13. PW-12, who is a married daughter of the accused, had deposed that one day PW-1 informed her telephonically that she had delivered a baby at home and that allegations are levelled by the villagers that the baby was borne out of an illicit relationship between her and her father. On request of PW-1 she had come to her father's house on the day following the receipt of the phone call and on being asked who the father of the new born baby was, PW-1 told her that the accused had impregnated her. She further stated that the accused had sexually assaulted her even when she was small. In her cross-examination she stated that initially PW-1 had informed her that she was impregnated by one *latta* (deaf and dumb person), but she did not enquire about the said *latta.*

14. PW-4, PW-7, PW-11 and PW-13 are the co-villagers who had filed the FIR along with PW-5, who is the younger brother of the accused.

15. Evidence of PW-4 is to the effect that during March 2015 he and some other villagers came to learn that the accused was hiding a small baby in his house and later on he came to learn that the accused had impregnated his own minor daughter, who had also confirmed the same. In cross-examination he said that on the following day of their initial enquiry, the victim had informed that she was impregnated by one Prem Lal Manger.

16. PW-7, who is the Panchayat Secretary, deposed that some time during March 2015 it came to light that the accused had impregnated his minor daughter. The daughter also confirmed that her father had raped her since she was a child and accordingly, F.I.R (Exhibit-6) was lodged by her and other Panchayat Members.

17. PW-11 stated that a rumour was going around in the village that a new born baby was found in the house of the accused and that the father of the baby could be the accused borne through his daughter. She stated that the accused had confessed in presence of Panchayat Members that the new born baby was born to his daughter. On being asked, the victim stated that the baby was born after being impregnated by the accused. As they claimed that the baby was born out of an illicit relationship, an FIR was filed. In her cross-examination she also stated that initially the victim and the accused had told them that the father of the new born baby was Prem Lal Manger.

18. PW-13 stated that when Panchayat Members and police asked in his presence about the baby, the accused stated that he was the father of the baby born through his daughter.

19. PW-5 stated that during March 2015 he came to know that there was a small baby in the house of the accused and later on it came to light that the accused had impregnated his minor daughter. He deposed that he was a witness to Seizure List (Exhibit-3) by which the birth certificate of the victim was seized. In cross-examination, he admitted that PW-1 never informed him that the accused had impregnated her.

20. PW-6 deposed that on 15.03.2015, as a Medical Officer of Ravangla Primary Health Center (PHC), he had examined the accused and had found bruises on his left hand and the bridge of the nose and had made a report (Exhibit-9). He also stated that the accused was referred to Medico Legal Specialist for further examination.

21. PW-8 was the Officer In-Charge of Ravangla Police Station, who investigated the case on the basis of FIR (Exhibit-6).

22. PW-9, who was posted at Yangyang PHC, had stated that she had verified the authenticity of the birth certificate of the minor victim.

23. PW-10 is the Pathologist of the District Hospital, Namchi who had drawn blood sample of the accused for DNA testing.

24. PW-14 is the Judicial Magistrate, who had recorded the statement made by PW-1 under Section 164 Cr. P.C.

25. PW-15 is the Pathologist in the Namchi District Hospital, who had collected blood samples of the victim as well as the infant baby of the victim. He stated that by a requisition (Exhibit-14), addressed to the Medical Officer on duty at District Hospital, Namchi, the I.O of the case requested to preserve blood samples of the victim and the new born baby for DNA examination.

26. PW-16 is a social worker under Integrated Child Protection Scheme (ICPS) and he deposed that on being asked by the Legal Officer of the Social Justice Empowerment and Welfare Department, he had accompanied the victim and her baby to District Hospital at Namchi on 18.05.2015 for medical examination. He also deposed that the blood samples were collected by the Pathologist of the District Hospital.

27. PW-17 is the I.O who had taken steps during the investigation. He stated that Exhibit-24, the DNA Report shows that the victim was the biological mother of newly born infant (male) and the accused is his biological father. He admitted that he had not collected the blood sample of Prem Lal Manger and had also not examined him and that initially the victim had stated that Prem Lal Manger is the father of the baby.

28. In the evidence of PW-17, there is no reference that Exhibit-24 is a duplicate copy of the DNA Report. In the judgment under appeal also, it is not indicated that Exhibit-24 is a duplicate copy. Though the author of the Report, Dr. Subhankar Nath was not examined, the learned trial court took Exhibit-24 on record in view of Section 293(4)(e) Criminal Procedure

Code,1973 (for short,Cr.P.C). Relying on that Report, it was held by the learned trial court that the victim girl is the biological mother of the baby and the accused is the biological father.

29. In the paper book in Exhibit-24 DUPLICATE COPY‘ was written by hand. An application was filed by the I.O (PW-17) registered as IA. No. 06 of 2020, seeking liberty to produce a certified copy of the DNA Report dated 26.11.2015. It is stated in the application that he had submitted a duplicate copy of DNA report before the learned trial court and as I.A No.03 of 2019 was filed by the appellant contending that Exhibit-24 being a duplicate copy is not admissible in evidence and certified copy of DNA Report is sought to be produced by him.

30. In ***M.Chandra* vs.*M.Thangamuthu***, reported in ***(2010) 3 SCC 712***, the Hon‘ble Supreme Court considered the requirement of Section 65 of the Indian Evidence Act,1872 (for short, Evidence Act)and held as under:

> *“47. …….. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party”.*

31. From the above, it is clear that to prove the contents of a document a party must adduce primary evidence of the contents and only in exceptional cases will secondary evidence be admissible. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original.

32. In ***State represented by the Drugs Inspector vs. Manimaran,*** reported in ***(2019) 13 SCC 670***, the Hon'ble Supreme Court had held that carbon copies are primary evidence. It is not stated in the application that Exhibit-24 is a carbon copy.

33. It is evident that the factual foundation to establish the right to give secondary evidence by way of a duplicate copy was not laid by PW-17. When there was no reference to a duplicate copy in the deposition of PW-17, obviously there is no evidence that the duplicate copy was in fact a true copy of the original. In cross-examination, when confronted with Exhibit-24, PW-17 admitted that he was not acquainted with the signatures of Dr. H.K. Pratihari and Dr. Subhankar Nath.

34. It is well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispenses with its proof which is otherwise required to be done in accordance with law**.** In view of above, Exhibit -24 cannot be taken into consideration. In ***Kanu Gope*** (supra), the Patna High Court had observed that a Chemical Examiner's original report and not a copy of such report may be used as evidence under Section 293 Cr. P.C., 1893 without formal proof.

35. In ***Prechika Parvatisam*** (supra), the Orissa High Court had declined to give direction for taking further evidence to bring on record the original report of chemical examination. Even at the appellate stage, in IA. No. 06 of 2020, there is no explanation as to why the original document cannot be produced. As such, we are not inclined to take the certified copy on the record of the case. IA No. 06 of 2020 stands dismissed of accordingly.

36. In the statement made by PW-1 under Section 164 Cr. P.C. (Exhibit-1), she had stated that she was sexually assaulted by her father since she was 12-13 years of age. Her father had threatened her not to divulge about the sexual assaults and she was scared that her father would kill her if she disclosed the same and therefore, she had not told anyone about her father committing rape on her on a regular basis. It was stated that she had conceived in the month of March 2014 and had given birth to a baby during November 2014. She further stated that although the baby was kept hidden at the instance of her father, when on a particular day the baby started crying

the entire village gathered outside their house and enquired about the baby. Initially, father of the victim told the villagers that he had brought the baby from the hospital and had accordingly informed Lingmo Outpost. When the police came to make enquiry, she and her father disclosed that it was her baby and the father of the baby was her father himself.

37. Though PW 1, while recording her statement under Section 164 Cr. P.C. (Exhibit-1), had elaborately described the ordeal faced by her at the hands of her father, such detailed description does not find place in her evidence. It must not be forgotten that the statement under Section 164 Cr. P.C. is not substantive evidence and that it can only be used to corroborate or contradict a witness.

38. However, perusal of Section 164 Cr. P.C. statement goes to show that the same corroborates the evidence of PW-1 with regard to the core of the allegation that she had been subjected to sexual assault from the age of 12-13 years and that she was raped by her father as a result of which she gave birth to a child in November 2014.

39. In ***Jai Prakash Singh*** (supra) the Hon'ble Supreme Court had observed that prompt lodging of an FIR is an assurance regarding truth of the informant's version and that a promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

40. Mr. Sharma had submitted that although the accused stated to have committed rape on PW-1 for many years, yet PW-1 had not lodged any FIR and the FIR came to be lodged only by certain villagers and on that count, the prosecution case is vitiated. We find the argument to be without any merit.

41. Evidence of PW-1 goes to show that the baby was born sometime during November 2014 and when the villagers enquired she had told them about the accused having repeatedly raped her since she was a child. By then, the baby was four months old. It is apparent from the evidence on record that the birth of the child of PW 1 was sought to be kept a secret and the other inmates of the house had also not made the same public. PW-2 had stated that when she had asked her father about the baby he told that he had brought the baby from Yangyang making it abundantly clear that the birth

of the baby was suppressed. For more than four months, people in the locality were not aware about the birth of the baby. The domineering role of the father cannot be lost sight of the fact, more so, in absence of the mother who had abandoned the children. When allegations are against the father, it is not difficult to visualize the range of emotions which the victim undergoes. It may be difficult for the daughter to be able to muster enough courage to set the machinery of law in motion by lodging a complaint against her father. However, it is seen that once enquiries were made after the birth of the baby had come to light, the victim girl made a clean breast of the entire episode. In the given circumstances, PW-1 not having lodged the FIR immediately does not derail the prosecution case. The FIR came to be lodged at the instance of co-villagers,i.e, PW-4, PW-5, PW-7, PW-11 and PW-13, with promptitude and without any delay after they came to learn from PW-1 how the father had committed rape and had impregnated her.

42. PW-12 asserted that PW-1 had told her that the baby was born after she was impregnated by her father and that he used to sexually assault her when she was a child also. It is true PW-2 and PW-3 had admitted that PW-1 had not told them that she had been impregnated by her father. They may not have been told by PW-1 directly about the father committing rape on her and impregnating her resulting in birth of a baby, but that does not weaken the prosecution case as they categorically stated that they came to know later on about the identity of the father of the child. In this context, it is also relevant to note that PW-12 had visited her father‘s house and that PW-1 had told her that the baby was born after she had been impregnated by her father. There is no reason to disbelieve the evidence of the son and daughters of the accused. In the facts of the case, the statement of the accused in his statement recorded under Section 313 Cr.P.C. that PW-7, who is the Panchayat Secretary, was inimical to him and therefore, a false case was lodged against him does not commend for acceptance.

43. It has come out in the cross-examination of PW-12 that the victim girl had initially told her that the person responsible for pregnancy is one *latta* (deaf and dumb person). PW-4, PW-7 and PW-11, on the other hand, stated that the victim had initially stated that the father of the new born baby was Prem Lal Manger. There is no evidence as to whether Prem Lal Manger is a deaf and dumb person. PW-1, in her evidence, did not say a word about the *latta* or Prem Lal Manger. Significantly, PW-1 was not confronted with her alleged statement that she was impregnated by Prem Lal

Manger or by one *latta*. It is significant to note that the accused in his statement under Section 313 Cr. P.C. had stated that he did not know whose baby it was, though he stated that his daughter had told the villagers that the baby was that of Prem Lal Manger. It appears that there was some attempt at the very initial stage of enquiry made by the villagers to deflect the accusation away from the father and to implicate Prem Lal Mangar or a *latta*. However, later on she narrated the ordeal faced by her at the hands of her father since she was 12-13 years old.

44. In ***Rajiv Singh,*** (supra) the Hon'ble Supreme Court had stated that the investigating agency has to maintain balance of the competing rights of the offenders and the victim as constitutionally ordained.

45. Surely, PW-17 ought to have examined Prem Lal Mangar or the *latta* as their names had cropped up. However, we are of the opinion that failure on the part of PW-17 to do so will not vitiate the prosecution case in view of the evidence on record. In ***Gajoo vs. State of Uttarakhand***, reported in ***(2012) 9 SCC 532***, the Hon'ble Supreme Court had observed that while in case of defective investigation the Court has to be circumspect while evaluating the evidence it would not be right in acquitting an accused person solely on account of defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

46. A requisition, Exhibit-15, was made by the Officer In-Charge, Ravangla P.S.to the Medical Officer, Ravangla PHC for medical examination of the accused to ascertain whether the accused is capable of having sexual intercourse or not. However, no finding was recorded on that count .The contention advanced by Mr. Sharma on the basis thereof that the prosecution had failed to establish the guilt of the accused beyond any reasonable doubt is without any merit. It is a fact that on the query as noted hereinabove, no opinion was recorded and the Medical Officer vide Exhibit-9, after noting the injuries, had referred the accused to the Medico Legal Specialist for expert opinion, whose opinion, if there was any, is not brought on record. However, what cannot be brushed aside is that PW-1 was not confronted with the assertion that the accused was incapable of having sexual intercourse. Merely because there was an omission, the same cannot vitiate the prosecution case in view of cogent, reliable and trustworthy evidence of the victim.

47. In ***Kali Ram*** (supra), the Hon'ble Supreme Court had laid down that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted and that this principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resorting to surmises, conjectures or fanciful considerations. It is also laid down that in arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses.

48. In ***Himachal Pradesh Administration vs. Om Prakash***, reported in ***AIR 1972 SC 975***, the Hon'ble Supreme Court had observed that benefit of doubt to which the accused is entitled is reasonable doubt — the doubt which rational thinking men will reasonably, honestly and conscientiously entertain. It is further held that it does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the crime. If that were so the law would fail to protect society as in no case such a possibility can be excluded. It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt.

49. In ***Rajinder alias Raju*** (supra), the Hon'ble Supreme Court had observed as follows:

> *"19. In the context of Indian culture, a woman—victim of sexual aggression—would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore,*

*ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private par*ts of the victim can be construed as evidence of consent".

50. In ***Manga Singh*** (supra), the Hon'ble Supreme Court had observed as follows:

"10. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration is required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."

51. In view of the above discussion, we are of the considered opinion that there is no merit in the appeal and accordingly, the same is dismissed.

52. Lower court records be sent back.

SLR (2020) SIKKIM 761
(Before Hon'ble the Chief Justice)

R.F.A. No. 08 of 2018

Mrs. Pankhuri Mishra …. APPELLANT

Versus

Smt. Rinzing Lachungpa and Others ….. RESPONDENTS

For the Appellant: Mr. B. Sharma, Senior Advocate with
Mr. M.N. Dhungel, Advocate.

For Respondent No.1: Mr. Sudesh Joshi, Advocate.

For Respondent 2-4: Mr. S.S. Hamal, Advocate.

WITH

R.F.A. No. 09 of 2018

Smt. Rinzing Lachungpa …. APPELLANT

Versus

Mrs. Pankhuri Mishra and Others ….. RESPONDENTS

For the Appellant: Mr. Sudesh Joshi, Advocate.

For Respondent No.1: Mr. B. Sharma, Senior Advocate with
Mr. M.N. Dhungel, Advocate.

For Respondent 2-4: Mr. S.S. Hamal, Advocate.

Date of decision: 9th November 2020

A. Indian Evidence Act,1872 – Documentary Evidence to be Clear and Unambiguous – Defendant no.1, as DW-1 had stated in her evidence in affidavit that as the advance money was not paid even after passage of more than a month from the date of execution of the lease deed, she and the plaintiff had decided to drop the transaction altogether and the plaintiff was asked to withdraw the lease deed and other papers from the office of the Sub-Registrar, Gangtok and the plaintiff had informed her that she had withdrawn all the documents from the office of the Sub-Registrar, Gangtok and that the transaction stood cancelled – It was further stated that she had no reason to suspect the plaintiff as they shared a good relationship and she never thought that the plaintiff would play fraud on her on the strength of those documents pertaining to the cancelled deal – The aforesaid evidence of DW-1 was not tested by the plaintiff by way of cross-examination – The aforesaid evidence of defendant no.1 has remained un-impeached and as a consequence thereof the only conclusion that can be drawn is that the transaction was cancelled for non-payment of advance amount and the lease deed was not to be acted upon. The same also goes to show that no amount in the form of advance was paid on 30.08.2012 i.e., on the date of execution of the lease deed – Merely because it is mentioned in Exhibit-1 that amount of ₹ 44 lakhs was paid by the plaintiff, payment of ₹ 44 lakhs on the date of execution of the lease deed is not proved. Documentary evidence to outweigh oral evidence has to be clear and unambiguous.

(Paras 33, 34 and 35)

B. Revenue Order No.1 of 1917– – By Revenue Order No. 1 dated 17.05.1917, it was notified to all *Kazis*, *Thikadars* and *Mandals* in Sikkim that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their lands to any person other than a Bhutia or a Lepcha without the express sanction of the Durbar, or officers empowered by the Durbar in their behalf, whose order will be obtained by the landlord concerned – Trial Court had held that transaction was shown to be a lease transaction only to avoid the operation of Revenue Order No. 01 of 1917 – It is manifestly clear that Revenue Order No. 1 of 1917 expressly relates to land and not to any building or flats. Only because of the fact that in Exhibit-3, the word "purchase" was written by the concerned Advocate of defendant no. 2, the Trial Court held that the transaction was not a lease transaction but was a transaction of purchase. The Trial Court had also observed that on 30.08.2012 when the lease deed was executed, lease upto

a period of 99 years was permissible. Nothing contrary is shown by the Counsel for the defendants to take a view that execution of lease deed was not permissible in law – While upholding the decision in issue no. 4, issue no. 3 is decided holding the suit was not barred by Revenue Order No. 01 of 1917.

(Paras 39 and 40)

C. Specific Relief Act, 1963 – Specific Performance – Plaintiff had failed to perform her obligation in accordance with the lease deed. Specific performance of immovable property is not automatic. Jurisdiction to grant specific performance is discretionary. It is one of discretion to be exercised on sound principles. The Court would have to take into consideration, amongst others, the circumstances arising in the case as also the conduct of the parties – In view of the materials on record, no case is made out for grant of a decree for specific performance of the lease deed – Defendant no. 2 to make payment of 12 lakhs to the plaintiff within a period of 45 days from today failing which it will carry interest @ 6% per annum from the date of filing of the suit 01.09.2015 till payment is made.

(Paras 42 and 43)

Appeal in RFA No. 08/2018 dismissed.

Appeal in RFA No. 09/2018 partially allowed.

Chronology of cases cited:

1. Heeralal v. Kalyan Mal, (1998) 1 SCC 278.
2. General Court-Martial and Others v. Col. Aniltej Singh Dhaliwal, (1998) 1 SCC 756.
3. Delhi Development Authority v. Durga Chand Kaushish, (1973) 2 SCC 825.
4. Laxman Haraklal and Others v. U.Z. Mahajan and Others, AIR 2011 Bom 159.
5. M/S Jain Udyog Limited v. M/S Mahindra and Mahindra Limited, 2011 SCC Online Jhar 62.
6. P. Madhusudhan Rao v. Ravi Manan, MANU/AP/0139/2015.

7. Rajgopal (dead) by LRs v. Kishan Gopal and Another, (2003)10 SCC 653.

8. Fine Knitting Co. Ltd. v. Union of India, (1986)4 SCC 276.

JUDGMENT

Arup Kumar Goswami, CJ

Appellant in RFA No.08/2018 had filed a suit against the appellant in RFA No.09/2018 for specific performance of contract in the Court of District Judge, East Sikkim at Gangtok.

2. The case was transferred to the Court of District Judge, Special Division-I, East Sikkim at Gangtok where the same was registered as Title Suit No.14/2015. Subsequently, the father of appellant in RFA No.09/2018, on an application being filed by him, was arrayed as Defendant no.2 in the suit.

3. Later on, one Mr.Taktuk Bhutia and one Mr.Bimal Kumar Jain also filed applications to implead them as parties. Mr. Taktuk Bhutia claimed that he was in possession of the suit property. The plea taken by Mr. Bimal Kumar Jain was that he had purchased a portion of the suit property by a registered sale deed dated 27.03.2008. The learned Trial Court impleaded the aforesaid two individuals as Intervener nos.1 and 2, respectively.

4. By Judgement and Order dated 28.09.2018, the learned Trial Court, while declining to grant a decree of specific performance of contract in respect of a lease deed dated 30.08.2018, ordered defendant no.1 (appellant in RFA No.09/2018) to refund an amount of Rs.27 lakhs to the plaintiff along with interest @6% per annum with effect from 18.12.2012 till the date of filing of the suit i.e.01.09.2015, pendente lite interest @6% per annum and further interest @6% on the principle sum adjudged till fully recovery.

5. In both the appeals, while the father of appellant in RFA No.09/2018 is arrayed as Respondent no.2, Mr.Taktuk Bhutia and Mr.Bimal Kumar Jain are arrayed as respondent no.3 and 4, respectively.

6. Aggrieved by the aforesaid judgment, plaintiff has filed the appeal contending that the learned Trial Court ought to have granted a decree of

specific performance of contract as prayed for and the learned Trial Court committed error of law even in decreeing the suit for Rs.27 lakhs in as much as materials on record demonstrate that a sum of Rs.71 lakhs had been paid to the defendant no.1/appellant in RFA No.09/2018.

7. Defendant no.1 had also filed an appeal being RFA No.09/2018 being aggrieved by the direction to pay an amount of Rs.27 lakhs to the plaintiff.

8. The suit was filed stating that a lease deed was entered into by the plaintiff and defendant no.1 on 30.08.2012 to lease out a flat on the ground floor of the building mentioned in Schedule A to the plaint measuring about 40 ft.x21 ft. for a period of 99 years with a renewable clause of 99 years on a consideration amount of Rs.1 crore, out of which, the plaintiff had paid Rs.44 lakhs as advance payment. Subsequently, the plaintiff also paid a sum of Rs.5 lakhs on 01.11.2012 and Rs.12 lakhs on 14.11.2012, thereby, making a total payment of Rs.61 lakhs.

9. The defendant no.1 had submitted the lease deed before the Sub-Registrar, East District for registration. The brother, mother and father of the defendant no.1 had issued No Objection Certificate(NOC) in favour of the defendant no.1 for leasing out the suit property in favour of the plaintiff. However, in spite of several requests the defendant no.1 did not turn up for necessary registration formalities though the plaintiff was ready and willing to pay the balance amount of Rs.39 lakhs at the time of execution of the lease deed.

10. A lawyer's notice dated 06.09.2012 was issued in this connection but even after that as the defendant no.1 did not perform registration of the lease deed in favour of the plaintiff, the suit came to be filed for specific performance of contract. An alternative prayer was made for a decree directing the defendant no.1 to return the advance amount of Rs.61 lakhs to the plaintiff along with 12% interest if the decree for specific performance of contract cannot be granted.

11. The plaint was subsequently amended to the effect that the plaintiff had also paid an amount of Rs.10 lakhs vide debit voucher no.235 dated 13.12.2012 and thus, a total amount of Rs.71 lakhs was paid leaving an amount of Rs.29 lakhs to be paid.

12. The defendant no.1 had filed written statement to the original plaint as well as to the amended plaint. In the written statement filed to the original plaint, apart from taking the usual pleas such as there is no cause of action for the suit, suit is not maintainable, etc., it is stated that plaintiff and her husband were family friends of defendant no.1 and they shared a very cordial and warm relationship. The plaintiff had expressed her desire to purchase the suit property. However, as the plaintiff is a non-sikkimese lady, defendant no.1 had proposed that a lease deed can be entered into. Accordingly, plaintiff proposed to pay Rs.1 crore as the full and final consideration amount and she promised to pay an advance of Rs.44 lakhs and the balance amount on registration of the lease deed. The plaintiff brought printed lease deed, typed application addressed to the Sub-Registrar dated 30.08.2012 and three number of typed NOCs. She affixed her signature on the said documents and by obtaining the signatures of her brother, father and mother on the NOCs had handed over all the documents to the plaintiff. The plaintiff, however, told that the advance of Rs.44 lakhs could not be arranged and that the same would be paid soon. Since the relationship was cordial, she did not suspect foul play on the part of the plaintiff.

13. But since the plaintiff did not make any payment even after lapse of a considerable period of time from the date of execution of the lease deed, defendant no.1 decided to withdraw the agreement and accordingly, she had asked the plaintiff to withdraw all the documents from the office of Sub-Registrar. The plaintiff had informed the defendant no.1 that she had withdrawn the documents. While categorically stating that she had not received any money from the plaintiff, the defendant no.1 also denied receipt of any legal notice from the plaintiff. It is pleaded that the lease deed dated 30.08.2012 is basically a sale deed and as such the suit was barred by law in view of Revenue Order No.1 of 1917, the plaintiff being a non-Sikkimese lady. It is also pleaded that the lease deed is violative of Government Notifications which provide that period of lease deed cannot exceed 35 years.

14. The written statement of the defendant no.1 to the amended plaint is almost a verbatim reproduction of the written statement to the original plaint. Additionally, the defendant no.1 denied payment of Rs.12 lakhs by the plaintiff vide debit voucher no.235 dated 13.12.2012 to defendant no.2 and receipt of a sum of Rs.71 lakhs.

15. The defendant no.2 in the written statement to the original plaint had stated that a lease deed of 99 years with a renewal clause of another term of 99 years is nothing but a sale deed in the garb of a lease deed and as such the same is violative of Revenue Order No.1 of 1917. It is averred that husband of the plaintiff, who is a businessman, had a cordial and good business relation with him for many years and in connection with such business, many documents were exchanged between them bearing their signatures. He had denied receipt of Rs.5 lakhs and Rs. 12 lakhs as alleged by the plaintiff. In the written statement filed against the amended plaint, he had stated that the plaintiff had obtained his signatures on some blank papers and misusing the same he had been made a witness to the lease deed. He denied receipt of Rs.12 lakhs from the plaintiff vide debit voucher no.235 dated 13.12.2012 as well as total payment of Rs.71 lakhs made by the plaintiff.

16. Intervener No.1 did not file any written statement but Intervener no.2 had filed a written statement. In his written statement Intervener No.2 had stated that he had purchased a portion of the ground floor of the property which is mentioned in Money Receipt dated 14.11.2012 from one Smt. Kamal Kumari Subba much before the lease deed between plaintiff and defendant no.1 was executed and he had been running a sweet-meat shop in the name and style of Unique. It is also stated that a suit being Title Suit No.01/2013 filed by him against Smt. Kamal Kumari Subba and her husband is pending in the Court of learned Civil Judge, East Sikkim.

17. The learned trial Court had framed the following issues:

"1. Whether the suit is maintainable? (onus on the Plaintiff).

2. Whether the suit is barred by the law of limitation? (onus on the Defendants).

3. Whether the suit is barred by Revenue Order No.1 of 1917? (onus on the Defendant)

4. Whether the law of land permits lease deed for more than 35 years with automatic renewal clause? (onus on the Defendants)

5. Whether the Plaintiff had paid a sum of Rs.71,00,000/- as advance to Defendant no.1 and 2? (onus on the Plaintiff)

6. Whether the defendant no.2 at all received any amount on behalf of Defendant no.1 in the form of advance from Plaintiff in consideration of the lease agreement dated 30.08.2012? (onus on the Plaintiff)

7. Whether the lease agreement dated 30.8.2012 is valid in the eyes of law? (onus on the Plaintiff)

8. Whether the Plaintiff is entitled to a decree of specific performance of contract for effecting lease deed dated 30.08.2012 registered and delivery of possession of the suit land? (onus on the Plaintiff).

9. Whether the Plaintiff is entitled to a decree for return of the advance money paid with 12% interest from the Defendants no.1 and 2? (onus on the Plaintiff)

10. Whether in view of registered agreement dated 27.03.2008 executed by Smt. Kamal Kumari Subba, wife of Shri Ashok Kumar Subba, the plaintiff and defendant no.1 could have executed Money Receipt dated 14.11.2012? (onus on the Plaintiff) and

11. Reliefs, if any?"

18. During trial, plaintiff had examined herself and 2 other witnesses. While defendant no.1 had examined herself, defendant no.2 examined himself and another witness.

19. Mr. B. Sharma, learned Senior Counsel for the appellant submitted that the learned Trial Court committed manifest error of law in declining to grant specific performance of contract holding that the lease deed was a sham document. Payment of Rs.44 lakhs by the plaintiff was acknowledged by the defendant no.1 in clause 1 of the lease deed (Exhibit-1). However, the learned Trial Court, on a totally wrong understanding of clause 2 of the lease deed, came to an erroneous conclusion that it was difficult to accept that Rs.44 lakhs was paid by the plaintiff. He submits that a total amount of Rs.71 lakhs was paid by the plaintiff but the learned Trial Court had accepted on the basis of Exhibits-2, 3 and 4 that the plaintiff had paid only a sum of Rs.27 lakhs. He has contended that a document has to be read as a whole and a sentence

here and there cannot be picked up and looked into in isolation. Further contention advanced by Mr. Sharma is that in any view of the matter documentary evidence must prevail over oral evidence of defendant no.1 regarding non-payment of Rs.44 lakhs. Mr. Sharma submits that it is only because of the fact that Rs.44 lakhs was paid at the time of execution of the lease deed, in Exhibit-3, payment of the amount of Rs.12 lakhs was shown as part-payment. He has submitted that in Exhibit-3, apart from the description of the property being wrongly mentioned, it is wrongly noted that payment was made for purchase of the property. He submits that in the written statement filed to the original plaint an admission was made by the defendant no.2 but while filing the written statement to the amended plaint, such admission was omitted and in that context, he has drawn the attention of the Court to paragraphs 13 and 14 of both the written statements. He forcefully argues that it is a fit case where this Court ought to decree the suit of the plaintiff for specific performance of contract. By way of alternative submission, Mr. Sharma submits that if for some reason this Court is not inclined to grant specific performance of contract, direction may be issued for refund of Rs.71 lakhs. He has placed reliance on *Heeralal* v.*Kalyan Mal*, reported in *(1998) 1 SCC 278* , *General Court-Martial & ors.* v. *Col. Aniltej Singh Dhaliwal*, reported in *(1998) 1 SCC 756*, *Delhi Development Authority* v. *Durga Chand Kaushish*, reported in *(1973) 2 SCC 825*, *Laxman Haraklal & ors.*v.*U.Z.Mahajan & ors*, reported in *AIR 2011 Bom 159*, *M/S Jain Udyog Limited* v. *M/S Mahindra and Mahindra Limited*, reported in *2011 SCC Online Jhar 62* and *P. Madhusudhan Rao* v. *Ravi Manan*, reported in *MANU/AP/ 0139/2015*.

20. Mr. S. Joshi, learned Counsel for the defendant no.1/appellant in RFA No.09/2018 submits that plaintiff is a housewife and no where she had stated about her ability to pay such a substantial amount of Rs.1 crore. He has submitted that the learned Trial Court rightly disbelieved alleged payment of Rs.44 lakhs made by the plaintiff to the defendant no.1 as clause no.2 of the lease deed also recited that the plaintiff had paid a sum of Rs.1 crore and it was in the aforesaid context the learned Trial Court had concluded that the lease deed was a sham document. He submits that although no amount was paid, defendant no.1 had executed the lease deed on implicit trust because of the good relationship that she shared with the plaintiff, which trust, however, was belied by the plaintiff. It is submitted that the falsity of the case of the plaintiff would be apparent from the legal notice

dated 12.10.2015 (Exhibit-12) wherein it is categorically stated that Rs.61 lakh was paid on 14.11.2012 which is in total contradiction to what is recorded in the lease deed. It is difficult to believe that the plaintiff could not remember payment of Rs.10 lakhs if really such payment was made necessitating amendment of the plaint and that shows the hollowness of the claim of the plaintiff, he contends. He has submitted that though in cross-examination PW-1 had stated that she had paid Rs.30 lakhs out of Rs.44 lakhs in cash and Rs.14 lakhs by cheque, the plaintiff did not lead any evidence with regard to such payment through cheque and the same also demonstrates that the plaintiff had instituted a false case. He contends that Exhibit-2 dated 01.11.2012 and Exhibit-4 dated 13.12.2012 do not show payment made by the plaintiff to the defendant no.1. Drawing the attention of the Court to Money Receipt dated 14.11.2012(Exhibit-3) for an amount of Rs.12 lakhs, he submits that the aforesaid amount was also paid to the defendant no.2 and not to the defendant no.1. Even payment of this amount was not established in view of the evidence of Mr. A.K. Upadhyay, a senior advocate who deposed on behalf of the defendant no.2, he contends. He has submitted that the learned Trial Court, in absence of any material on record, erroneously came to the conclusion that there was an implied agency in between the defendant no.1 and defendant no.2. He submits that the defendant no.1 cannot be saddled with any liability for payment of any amount when there was no agency, express or implied, with defendant no.2. He has placed reliance in the cases of *Rajgopal(dead) by LRs* v. *Kishan Gopal & another* ,reported in *(2003)10 SCC 653* and *Fine Knitting Co. Ltd.* v. *Union of India,* reported in *(1986)4 SCC* 276.

21. Drawing attention of the Court to Exhibits-2 and 4, Mr.S.S Hamal submits that assuming that the amount was paid to the defendant no.2, it is not the plaintiff who had made the payment and therefore, the said payment, in any view of the matter, cannot be a part-payment towards the consideration amount. With regard to Exhibit-3 he submits that the Money Receipt does not pertain to the suit premises and that apart, payment is also not proved and therefore, no liability can arise out of Exhibit-3.

22. I have considered the submissions of the learned Counsel for the parties and have perused the materials on record.

23. The learned Counsel for the parties submit that issue nos.1, 2 and 10 are not pressed. Learned Trial Court had observed that in view of

decision in issue nos.7, 8 and 9, issue no.3 as well as issue no.4 had become academic. However, at the same time, an observation was made that, as on 30.08.2012, a lease up to a period of 99 years was permissible.

24. Relevant portions of paragraphs 13 and 14 of the written statement, which Mr. Sharma claims to be an admission, are identical. For better appreciation, the same is reproduced herein below:

".....For the past more than five years the defendant no.2 had not ascertain from plaintiff in connection with what business transaction he had given such signed document of his including those mentioned in the plaint and the same is therefore yet to be ascertain by him without which he is not in position to admit the plea of the plaintiff as alleged or at all in Para under reference."

The reply extracted above was in respect of paragraphs 3 and 4 of the plaint wherein the plaintiff had stated that defendant no.2 had signed as a witness to the lease deed dated 30.08.2012.

In the amended written statement the aforesaid extracted portion was omitted and corresponding portion at paragraphs 13 and 14 reads as follows:

".....At the relevant time he has several business transactions with the defendant no.2 and in connection with some business transaction the plaintiff had obtained the signature in some blank papers from defendant no.2. The defendant no.2 has only in this case now learnt that his signatures has been misused by the plaintiff and he is made as witness to a lease agreement which is for 99 years with compulsory renewal of another term of 99 years not permissible in law."

25. In *Heeralal* (supra), it was held that an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed.A perusal of the extracts above will go to show that so far signing of the document by defendant no.2 is concerned the same is not disputed and therefore, it does not amount to omission of any admission. The defendant no.1, in his examination-in-chief, had admitted that he was a witness to the lease deed,

Exhibit-1 and therefore, the contention raised by Mr. Sharma regarding omission of alleged admission in the amended written statement,in any view of the matter, loses relevance.

26. Now, I shall take up issue nos. 5 and 6 together. There is no dispute that the suit property belongs to the defendant no.1. The positive case of the plaintiff in the plaint is that she had paid Rs.44 lakhs as advance and the same was duly acknowledged in the lease deed.

27. It is also the case of the plaintiff that she had paid Rs.5 lakhs on 01.11.2012 vide Exhibit-2, Rs.12 lakhs on 14.11.2012 vide Exhibit-3 and Rs.10 lakhs on 13.12.2012 vide Exhibit-4.

28. The decision in *Delhi Development Authority* (supra) was pressed into service by Mr. Sharma to contend that a document has to be read as a whole and not piecemeal in the context of clause 1 and clause 2 of the lease deed and that if it is so read it will become crystal clear that recital of payment of Rs.1 crore was an inadvertent error. In *M/S Jain Udyog* (supra), Jharkhand High Court had held that it is not open to lead collateral evidence to contradict the statement made in the agreement (clause 37 of the agreement in that case) in view of Sections 91 and 92 of the Evidence Act. In *Madhusudhan* (supra), Andhra Pradesh High Court had observed that when language in a document is clear and unambiguous, intention of the parties need not be looked into. In *Laxman* (supra), on the facts of the case Bombay High Court found that there was no reason to disbelieve the recital in the agreement.

29. Clauses 1 and 2 of the lease agreement dated 30.08.2012, Exhibit-1, read as follows:

> *"1. That the total premium for the entire period of Lease of 99 (Ninety-nine) years and renewal of one more period of 99 (Ninety-nine) years is fixed at Rs.1,00,00,000/- (One Crore only) the lessee has already paid an amount of Rs.44,00,000/- (Forty-four Lakhs) in the form of advance, which the Lessor do hereby acknowledges. The balance amount of the total premium amounting to Rs.56,00,000/- (fifty-six*

Lakhs) only shall be paid by the Lessee on completion of the Registration of the Lease Deed.

2. That in consideration of the premium amounting to Rs.1,00,00,000/- (One Crore only) paid by the Lessee to the Lessor (the receipt of which is acknowledged) reserved and of the covenants on the part of the Lessee hereinafter contained the Lessor both hereby demise after registration of this presents and after full and final payment of the total consideration amount unto the Lessee all the part of said flat with all its advantages and disabilities hidden or obvious containing more particularly described in the Schedule hereunder written the possession of the said flat has been delivered to the Lessee, together with all rights, easement and appurtenances whatsoever to the said flat or belongings or in anyway appertaining to hold the same for a term of NINETY-NINE YEARS (99 YEARS) with a compulsory right of renewal of one more period of NINETY-NINE YEARS (99 YEARS) each."

30. A perusal of clause 1 goes to show that an amount of Rs.44 lakh was already paid as advance and payment of such amount is acknowledged by the lessor,ie., the defendant no.1 and Rs.56 lakhs more is to be paid by the lessee ,ie., plaintiff, on completion of registration of the lease deed. When the said amount of Rs.44 lakhs was paid is not reflected. There is lack of clarity in clause 2. However, what is clear is the recital that premium amounting to Rs.1 crore was paid by the lessee to the lessor and the receipt of the same is also duly acknowledged. Even if it is assumed that recital of payment of Rs.1 crore was an error, clause 1 has to be considered in the light of evidence on record.

31. In *General Court-Martial* (supra), the Honble Supreme Court had observed that an admission can be explained by the makers thereof and an admission is not conclusive as to the truth of the matter stated therein and that it is only a piece of evidence, the weight to be attached to which must

depend upon the circumstances under which it is made. It may be shown to be erroneous or untrue so long as the person to whom it was made has not acted upon it at the time when it might become conclusive by way of estoppel.

32. In the paper book, 2nd page of legal notice dated 12.10.2015, Exhibit -12, was inadvertently left out but the same is made available by Mr. M.N Dhungel, learned Counsel appearing for the appellant in RFA No.08/2018. In the said legal notice, it is categorically stated that the plaintiff had paid Rs. 61 lakhs on 14.11.2012 towards advance thereby totally nullifying clause 1 of lease deed dated 30.08.2012. If Rs.44 lakhs was paid as stated in the lease agreement, then there was no question of amount of Rs.61 lakh being an advanced amount and further there was also no necessity to make payment of Rs.61 lakhs as in that event total amount paid would have been Rs.1.05 crore, which exceeds the agreed consideration amount of Rs.1 crore.

33. The defendant no.1, as DW-1 had stated in her evidence in affidavit that as the advance money was not paid even after passage of more than a month from the date of execution of the lease deed, she and the plaintiff had decided to drop the transaction altogether and the plaintiff was asked to withdraw the lease deed and other papers from the office of the Sub-Registrar, Gangtok and the plaintiff had informed her that she had withdrawn all the documents from the office of the Sub- Registrar, Gangtok and that the transaction stood cancelled. It was further stated that she had no reason to suspect the plaintiff as they shared a good relationship and she never thought that the plaintiff would play fraud on her on the strength of those documents pertaining to the cancelled deal.

34. The aforesaid evidence of DW-1 was not tested by the plaintiff by way of cross-examination. Thus, the aforesaid evidence of defendant no.1 has remained un-impeached and as a consequence thereof only conclusion that can be drawn is that the transaction was cancelled for non-payment of advance amount and the lease deed was not to be acted upon. The same also goes to show that no amount in the form of advance was paid on 30.08.2012 i.e., on the date of execution of the lease deed.

35. In view of the above discussion, I am of the considered opinion that learned Trial Court was justified in coming to the conclusion that merely

because it is mentioned in Exhibit-1 that amount of Rs.44 lakh was paid by the plaintiff, payment of Rs.44 lakhs on the date of execution of the lease deed is not proved. Documentary evidence to outweigh oral evidence has to be clear and unambiguous. Reliance placed by Mr. Sharma on the decision in *Fine Knitting Co. Ltd* (supra) to contend that in absence of a receipt, payment of Rs.44 lakh has be accepted because it is so mentioned in the lease deed, is wholly misconceived. The aforesaid judgment does not lay down any such proposition. The Honble Supreme Court had only made an observation that it was not clear as to whether the sale has in fact taken place pursuant to the agreement of sale as neither a receipt for the money received nor a receipt for the machinery delivered has been placed before the Court.

36. There is no pleading whatsoever in the plaint that there was an agency in between the defendant no.1 and the defendant no.2. The plaintiff though stated that defendant no.1 had told her that she could make remaining payment to her father, such evidence cannot be looked into when the plea is not taken as held in *Rajgopal* (supra). In cross-examination, the plaintiff had stated that there is nothing on record to prove that defendant no.2 is an agent, authorised signatory or power-of-attorney holder of defendant no.1 in respect of the suit property.

37. PW-2, the husband of the plaintiff admitted that neither he nor his wife is the owner of Rajeev Electronics and that it was his father who is owner/proprietor of Rajeev Electronics. The same was contradicted by PW-3, who was working as a Manager of Rajeev Electronics for about 6-7 years, stating that Rajeev Electronics is a company. Exhibit-2 is a debit voucher dated 01.11.2012 issued by Rajeev Electronics to defendant no.2 for an amount of Rs.5 lakhs. Exhibit-4 is also a debit voucher dated 13.12.2012 issued by Rajeev Electronics to defendant no.2 for an amount of Rs.10 lakhs. Admittedly, the aforesaid amounts were not paid to defendant no.1. It is not the pleaded version in the plaint that Rajeev Electronics had made part payment on behalf of the plaintiff. There is no indication in the aforesaid debit vouchers the purpose for which the alleged payment were made. By Exhibit-3, the plaintiff also claims that a sum of Rs.12 lakhs was paid for the transaction. I will discuss regarding Exhibit-3 in a while. It is, however, to be noted at this stage that in Exhibit-3 also the amount was shown to have been paid to the defendant no.2 .When the lease deed at clause 1 provided for payment of balance amount of Rs. 56

lakhs on completion of registration of lease deed, it is also not explained by the plaintiff why before completion of registration, amounts of Rs.5 lakhs, Rs.10 lakh and Rs.12 lakhs came to be paid**.**

38. PW-1 in her evidence has stated that Money Receipt dated 14.11.2012, Exhibit-3, for Rs.12 lakhs was executed by defendant no. 2 and that Exhibit-3 (a) is the signature of defendant no. 2 on Exhibit-3, which she had identified. PW-2 had also deposed in the same manner. While there was no cross-examination on behalf of defendant no. 1 with regard to Exhibit-3 (a), defendant no.2 merely adopted the cross-examination made by defendant no. 1. Though PW-2 in cross-examination had stated that the amount of Rs.12.00 lakhs was paid in the chambers of the advocate of defendant no. 2 and the said Advocate, as DW-2 for defendant no. 2, had stated that no monetary transaction had taken place in him chambers, the same will not make much difference in view of the positive evidence of PW-1 and PW-2 that Exhibit-3 (a) is the signature of defendant no. 2, which has remained un-impeached. Mr. A.K. Upadhyay, DW-2 for defendant no. 2 was categorical that the signature Exhibit-3 (a) was not there when he had made the Money Receipt in his own hand writing thereby ruling out the possibility of there being a signature of defendant no.2 on a blank paper. Thus, there is no escape from the conclusion that vide Exhibit-3, a sum of Rs.12 lakhs was received by defendant no. 2 in connection with a transaction relating to property. Unlike Exhibit-2 and Exhibit-4, Exhibit-3 demonstrates payment of money on account of a transaction relating to immovable property. It has not been brought on record by the defendants that defendant no. 1 had any other property other than the suit property and therefore, it is apparent that mistakes were committed by Mr. A.K. Upadhyay, DW-2 on behalf of defendant no.2, in describing the suit property and the purpose for which the money was paid. On the basis of preponderance of probabilities it has to be accepted that the payment was made in connection with Exhibit-1 to defendant no.2, who though not authorised, had received the amount in respect of the transaction. In view of the above discussion, issue nos. 5 and 6 are decided holding only a sum of Rs.12 lakhs was paid by the plaintiff towards payment of consideration amount of the lease deed dated 30.08.2012 and that defendant no. 2 had received the said amount.

39. So far as issue no. 3 is concerned, it is to be noted that vide Revenue Order No. 1 dated 17.05.1917, it was notified to all Kazis,

Thikadars and Mandals in Sikkim that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their lands to any person other than a Bhutia or a Lepcha without the express sanction of the Durbar, or officers empowered by the Durbar in their behalf, whose order will be obtained by the landlord concerned. The term 'mortgage' is defined to mean the whole or part of a holding on the Biyaz or Masikata system and the term sub-let was defined to mean sub-letting the whole or part of holding on the Pakuria system. 'Biyaz' is defined to mean mortgaging land to another person who enjoys the produce of the land as interest, so long as the principle loan remains unpaid. 'Masikata' is defined to mean mortgaging of fields to a creditor who enjoys the produce of the field as annual instalment towards the loan. 'Pakuria' is defined to mean sub-letting, where a rayot allows another new rayot to settle upon a portion of his own holding, generally receiving from him some rent in cash and some assistance in cultivating his own fields.

40. The learned Trial court had held that transaction was shown to be a lease transaction only to avoid the operation of Revenue Order No. 01 of 1917. It is manifestly clear that Revenue Order No. 01 of 1917 expressly relates to land and not to any building or flats. Only because of the fact that in Exhibit-3, the word "purchase" was written by the concerned Advocate of defendant no. 2, the learned Trial court held that the transaction was not a lease transaction but was a transaction of purchase. The learned Trial court had also observed that on 30.08.2012 when the lease deed was executed, lease up to a period of 99 years was permissible. Nothing contrary is shown by the learned Counsel for the defendants to take a view that execution of lease deed was not permissible in law. Accordingly, while upholding the decision in issue no. 4, issue no.3 is decided holding the suit was not barred by Revenue Order No. 01 of 1917.

41. The learned Trial Court, in view of Revenue Order No. 01 of 1917, Exhibit-3, and also taking into account the finding arrived at that no advance payment of Rs.44 lakhs was paid to the defendants, though reflected in the lease deed, held the lease deed to be a sham document indicating a sham transaction. However, no specific finding was recorded on issue no. 7 as to whether the lease deed dated 30.08.2012 was valid in the eye of law. When a lease deed was permissible to be executed under the law and when Revenue Order No. 01 of 1917 is not attracted, it cannot be said that the lease deed dated 30.08.2012 is not valid in law only because of apparent

RFA NO. 08 OF 2018 (Pankhuri Mishra vs. Rinzing Lachung & Ors.) With RFA No. 09 of 2018 (Rinzing Lachungpa vs. Pankhuri Mishra & Ors.) 20 contradiction in between clause (1) and clause (2). It is a different matter altogether whether because of inherent contradiction in the lease deed, the plaintiff will be entitled to succeed in an action in law. Issue no.7 is, accordingly, decided holding the lease deed to be valid in law.

42. The position that has emerged is that though reflected in the lease deed, Exhibit-1, that a sum of Rs.44 lakhs was paid as advance, in reality the same was not paid and till the date of filing of the suit, only Rs.12 lakhs was paid. The plaintiff had failed to perform her obligation in accordance with the lease deed. Specific performance of immovable property is not automatic. Jurisdiction to grant specific performance is discretionary. It is one of discretion to be exercised on sound principles. The Court would have to take into consideration, amongst others, the circumstances arising in the case as also the conduct of the parties. In view of the materials on record, this Court is of the opinion that no case is made out for grant of a decree for specific performance of the lease deed. Issue no.8 is decided accordingly.

43. The plaintiff had not made defendant no. 2 a party to the suit, but he had impleaded himself in the suit. In view of the foregoing discussions, issue no.9 is decided by directing defendant no. 2 to make payment of Rs.12 lakhs to the plaintiff within a period of 45 days from today failing which it will carry interest @6% per annum from the date of filing of the suit i.e. from 01.09.2015 till payment is made. The judgment of the learned Trial Court, accordingly, stands modified as indicated above.

44. RFA No. 08 of 2018 and RFA No. 09 of 2018 are disposed of in terms of above. No cost.

SLR (2020) SIKKIM 779

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

Crl. A. No. 04 of 2020

Mani Kumar Rai @ Tere Naam ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor.

Date of decision: 9th November 2020

A. Indian Evidence Act, 1872 – Circumstantial Evidence – Principle – It is no longer *res integra* that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability – Careful analysis of the evidence of PW-3, PW-4, PW-11, PW-12 and PW-14 would indicate that though at some point of time along with them the deceased and the accused were present, their evidence does not even remotely suggest that both of them were seen together alone in the evening of 14.06.2017 or any point of time thereafter. The accused leaving them after the deceased had left cannot lead to an inference that the accused had followed the deceased, more so, when there is contradiction with regard to time that had separated their respective departures – Having regard to the evidence on record, the theory of "last seen together" as an incriminating factor qua the appellant is, thus, of no avail to the prosecution.

(Paras 32 and 33)

B. Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – The policy underlying Ss. 25 and 26 of the Evidence Act is to make it a substantive rule of law that confession whenever and wherever made to the

police or while in the custody of the police to any person whosoever, unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the circumstances mentioned in S. 24 and therefore, inadmissible, except so far as provided by S. 27 of the Act – S. 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence – The only portion of the disclosure statement which is admissible under S. 27 is the statement of appellant that he had kept the "*khukuri*" in the corner of the kitchen, which is beside his house and he can show the place where he had kept the"*khukuri*". The rest of the disclosure statement is inadmissible, being confessional and prohibited by Ss. 25 and 26 of the Evidence Act.

(Paras 38 and 39)

Appeal allowed.

Chronology of cases cited:

1. Pulkuri Kotayya and Others v. The King Emperor, AIR 1947 PC 67.
2. Sahoo v. State of U.P, AIR 1963 SC 40.
3. Himachal Pradesh Administration v. Om Prakash, AIR 1972 SC 975.
4. Kishore Bhadke v. State of Maharashtra, AIR 2017 SC 279.
5. Gajoo v. State of Uttarakhand, 2012 (9) SCC 532.
6. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.
7. Anter Singh v. State of Rajasthan, (2004) 10 SCC 657.

JUDGMENT

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

This appeal is directed against the judgement dated 28.11.2019 passed by the learned Sessions Judge, South, Namchi in S.T Case No.05/ 2017 convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life and to pay a fine of Rs.10,000/-. By the judgement under appeal, compensation of Rs.50,000/- was also directed to be paid to the wife of the deceased under Sikkim Compensation to Victims or his Dependants Scheme, 2016 by the Sikkim State legal Service Authority.

2. On 15.06.2017, Kinga T. Bhutia (PW-25), who at the relevant point of time was posted as Station House Officer (SHO), Jorethang Police Station (P.S), registered Jorethang P.S U.D case No.07/2017 under Section 174 Cr.P.C on the basis of a complaint made by Kharga Maya Manger (PW-13), Ward Panchayat, Upper Wok to the effect that one Krishna Prasad Rai was found lying dead with face downwards at Forest Area, Upper Wok and he endorsed the U.D Case to Sub-Inspector Prashant Rai (PW-20). PW-20 had proceeded to the place of occurrence (P.O) and had started investigation. However, as it was about 09.00 pm, being dark, no further investigation could be carried out on that day. P.O was cordoned-off and inquest was conducted over the dead body of the deceased on the morning of 16.06.2017 in presence of Kharka Maya Manger (PW-13) and Mani Kumar Subba. Inquest Report (Exhibit-5) was prepared indicating the injuries noticed. A rough sketch map (Exhibit-17) was drawn. Blood stains found in the *kutcha* foot path and some items found near the P.O were seized vide Exhibit-16 in presence of Prakash Manger (PW-15) and Dhan Bahadur Rai (PW-18). After inquest was done, PW-20 forwarded the dead body for post-mortem examination, initially to District Hospital Namchi and later on, to STNM Hospital Gangtok because of non-availability of Medico Legal Specialist at District Hospital, Namchi. Post-mortem on the deceased was conducted on 16.06.2017 by Dr. O.T Lepcha (PW-09) and Medico Legal Autopsy Report (Exhibit-10) was prepared by him and he had also handed over to the Investigating Officer (I) clothing (ii) blood in filter paper (iii) hair and (iv) nail clippings of the deceased to the Investigating Officer.

3. Coming to the conclusion that cause of death of Krishna Prasad Rai was unnatural and homicidal, an FIR (Exhibit-18) was lodged by PW-20 before the SHO, Jorethang P.S stating the above facts. Accordingly, Jorethang P.S case No.30/2017 under Section 302 IPC was registered against unknown persons and the case was endorsed to Jigmee W. Bhutia (PW-24). PW-20 handed over the seized articles and the related documents to SHO, Jorethang P.S and charge of investigation was taken over by PW-24. He examined witnesses and based on the revelations made the appellant was arrested vide Exhibit-31 on 16.06.2017 at 06.50 p.m.

4. After arrest, the accused was examined under Police custody on 16.06.2017 by Dr. Anand Subba (PW-7), the Medical Officer of Jorethang PHC. No injury was noticed on his body by him and he had prepared a Medical Report (Exhibit-8). Accused was also taken to Namchi District

Hospital on 21.06.2017 for psychiatric evaluation and one Dr. C.L Pradhan (PW-6), who examined him, found no past or present history of mental illness and he noted that the accused had given a history of alcohol addiction for the past 15 years. On 22.06.2017, the accused was brought to Jorethang CHC and his blood sample was collected in presence of Om Prakash Gupta (PW-8), who had gone there for his own treatment and Rinku Rai (PW-19), who had gone for treatment of his ailing son.

5. Based on a statement, stated to be a Disclosure Statement (Exhibit-25) made by the accused under Section 27 of the Evidence Act in presence of Rajesh Sarkar (PW-21) and Pravesh Lohagan (PW-22), the weapon of offence, a *khukuri* (a kind of knife), was seized by PW-24 on 18.06.2017 under Seizure Memo (Exhibit-22). Certain items like vests, etc., details of which will be noted in a subsequent part of the judgment, were also seized by him in presence of PW-21 and PW-22. On 17.06.2017, the Sr. Superintendent of Police had passed an order transferring investigation of the case with immediate effect to PW-25 and thereafter, on 20.06.2017, PW-24 handed over papers and documents of the case to PW-25, who then took charge of investigation. On 25.07.2017, PW-25 forwarded the case exhibits to RFSL Kolkata for forensic expert opinion and analysis (Exhibit-39) and on the basis of his application dated 31.07.2017, statement of Sarika Rai (PW-12) and Himalaya Rai (PW-13) and Laxuman Thapa (PW-14) were recorded by the Magistrate under Section 164 Cr.P.C.

6. On completion of investigation, PW-25 had submitted a Charge Sheet on 06.09.2017. After receipt of RFSL report dated 17.09.2017, he had also submitted a supplementary charge sheet.

7. In the Court of learned Sessions Judge, South, S.T Case No.05/2017 was registered. On consideration of materials on record, charge was framed against the appellant under Section 302 IPC. The same being read over and explained to the appellant, he pleaded not guilty and claimed to be tried.

8. During trial, prosecution examined 25 witnesses and after closure of the evidence of the prosecution, statement of the accused was recorded under Section 313 Cr.P.C where he had taken a plea of denial. However, no witness was examined on his behalf.

9. The learned Sessions Judge opined that the circumstantial evidence produced by the prosecution in the form of evidence of PW-1, PW-9, PW-10, PW-11, PW-12, Pw-14, PW-19 and PW-21 unerringly pointed out that it was the accused who had committed the crime with pre-mediation, intention and knowledge. The learned Trial Court noted that the evidence of PW-11, PW-12 and PW-14 proved that the deceased and the accused were with them at a labour camp in the evening of the day before the discovery of the body of the deceased. It was also recorded that it is proved by PW-21 that accused had confessed in his presence as well as in the presence of PW-24 and another witness that he had stabbed the deceased with his *khukuri* (MO-VI). Reliance was also placed on the Disclosure Statement (Exhibit-25). Accordingly, the learned Trial Court held that the offence punishable under Section 302 IPC was established against the appellant beyond reasonable doubt.

10. Ms. Gita Bista, learned Legal Aid Counsel appearing for the appellant submits that the learned Trial Court was not correct in holding that evidence on record clearly proved that it was the accused who had killed the deceased. She submits that the evidence of PW-1 and PW-10, upon which much reliance was placed by the learned Trial Court, suffers from gross contradictions. She submits that according to PW-5 dead body was first noticed by Suresh Chettri but he was not examined without any explanation. Similarly, *Bari*, in whose residence the accused was working as a helper was not examined. Such non-examination of material witnesses casts doubt about the prosecution case, she contends. It is submitted that approximate time of death of the deceased was also not indicated in the Autopsy Report, Exhibit-10 and therefore, in any view of the matter, last seen theory sought to be projected by the prosecution has no legs to stand. It is submitted by her that though in the remarks column of Exhibit-22, the Seizure Memo, it is indicated that one *khukuri* was recovered from the kitchen of the accused as per his Disclosure Statement recorded under Section 27 of the Evidence Act, such recovery is belied by the evidence of PW-22 and therefore, no reliance can be placed on the said so-called Discovery Statement, more so, when it was impossible for the accused to have pointed out the place where the *khukuri* was kept as the hands of the appellant was tied from behind by a rope. She has placed reliance on the judgment in the case of ***Pulkuri Kotayya and others vs. The King Emperor***, reported in ***AIR 1947 PC 67***.

11. Dr. Doma T. Bhutia, learned Public Prosecutor submits that evidence of PW-1 and PW-10 goes to show that the appellant had made an ominous statement two days before the deceased was found dead that they would have to observe religious rites and the evidence of PW-1 further goes to show that the appellant had stated before her that he would eliminate a person who had annoyed him. Such utterances, as the events unfolded, are pointer to the fact that the appellant was contemplating to murder the deceased, she submits. It is contended by her that the evidence of PW-3, PW-4, PW-11, PW-12 and PW-14 establishes beyond reasonable doubt that the accused was in the company of the deceased before his death. She asserts discovery of *khukuri* (MO-VI) at the instance of the accused is firmly established on the evidence on record and therefore, the learned Trial Court was justified in convicting the appellant. She has placed reliance on the judgements in the cases of ***Sahoo vs State of U.P*** reported in ***AIR 1963 SC 40, Himachal Pradesh Administration vs. Om Prakash,*** reported in ***AIR 1972 SC 975, Kishore Bhadke vs. State of Maharashtra,*** reported in ***AIR 2017 SC 279 and Gajoo vs. State of Uttarakhand,*** reported in ***2012 (9) SCC 532.***

12. We have considered the submissions of the learned Counsel for the parties and have examined the materials on record.

13. That the deceased had died a homicidal death is not in dispute. PW-9, who conducted autopsy, had found the following ante-mortem injuries on the deceased:

> *"1. Incised chop wound (16 x4cms x spinal cord over the right side of neck). The death of the cut was more over the right side.*
>
> *2. Chop wound (19x4x3cms placed 4 cm below the left earlobe).*
>
> *3. Reddish abraded contusion (6x3 cms over the left temple).*
>
> *4. Abraded contusion (3x2 cms over the right forehead)."*

According to him, the cause of death was due to hypovolaemic shock as a result of incision of the carotid artery due to chop wound, which is homicidal in nature.

14. Evidence of PW-1, who is the sister of the deceased, goes to show that the deceased had left for his work at a work site on 14.06.2017 but he did not return home and in the morning of 15.06.2017 at 08:00 am the accused had come to their house searching for the wife of the deceased, PW-10, who was then in the kitchen. According to her, the accused told PW-10 in her presence, the English translation of which is something to the effect that after about two days, the family members would have to observe "*Chhak Barnu*" (death rites). On being asked by him she called her brother thrice but his mobile was switched off and then the accused started laughing. On being asked the accused told her that he had met her missing brother the previous day but he had returned home and slept. It is stated by her that three days prior to the aforesaid visit, the accused had also visited their house and had told her that a man had made him angry and he would eliminate him in seven days. She stated that on 15.06.2017 the dead body of her brother was recovered about 100 feet above their house. It is to be noted that in her statement under section 164 Cr.P.C (Exhibibt-1) recorded on 04.08.2017, she had stated in similar lines.

In cross-examination, however, she admitted that she was not present in the kitchen but was present in another room adjacent to the kitchen.

15. PW-10, the wife of the deceased, had stated in her evidence that the accused had told PW-1 that they have to observe death rituals in two days. According to her, the accused failed to notice her as she was in the extreme corner of the kitchen and she had heard the accused asking PW-1 about her whereabouts. She stated that as the accused and her husband used to be together on previous occasions, PW-1 had asked the accused the whereabouts of her husband and as stated by PW-1, she also deposed that PW-1 had made telephone calls but the phone was found to be switched off. PW-10, in her statement under Section 164 Cr.P.C (Exhibit-12), had given the same version.

16. PW-2 stated that the accused used to work in her household as a domestic helper earlier and the deceased used to go to his house taking thefoot path in front of her house. She stated that on his last visit to her house the deceased was accompanied by four friends from Rabangla but the accused was not with them though, subsequently, the accused had come and left after some time.

17. PW-3, who is a petty contractor, deposed that the deceased was working as a petty contractor at a different site under a different contractor. The evidence of PW-3 is to the effect that on 14.06.2017 he had met and talked with the deceased, who is also known as Dilay. He had gone to the house of one *Bari* (Aunt) and the accused had also come there after about 5 minutes. He did not know where the deceased had gone and was also not aware after how much time the accused had left the house of *Bari*.

In his cross-examination, he stated that the accused used to stay in the house of *Bari*.

18. PW-4 is also a petty contractor who had taken the work of construction of a retaining wall of a newly constructed road along with PW-3, PW-16 and three others. He deposed that all of them used to go to the house of *Bari* for tea/milk after work. The deceased was also a petty contractor in respect of a different site one kilometre away and his labour camp was on the way to the house of *Bari*. On 14.06.2017, the deceased had accompanied him to the house of *Bari* and on being asked to return a measuring tape which he had taken earlier, the deceased had left the house of *Bari* but he did know where the deceased had gone. He deposed that after about 5-6 minutes the accused came to the house of *Bari* and had left again after 5 minutes.

He also deposed in cross-examination that the accused was staying in the house of *Bari*.

19. PW-5 deposed that on 14.06.2017, at about 2.00-3.00 pm, he had received a call from Prakash Rai, brother of the deceased, informing him about the recovery of the dead body of his brother and requesting him to accompany Jorethang police to the P.O as he resided in Jorethang. According to him, he had reached the P.O on his own as the police had already left. He had remained in the P.O with police the whole night and he was a witness to Inquest Report, Exhibit-5. He stated that he came to learn at the P.O that one Suraj Chettri, who was residing with the family, had seen some blood stains on the foot path and he discovered the dead body after following the trail of blood stains.

20. PW-11 stated that he had taken a contract along with PW-12 and deceased from PW-14 for construction of a retaining wall of a new road

and while he and PW-12 used to stay in the labour shed, the deceased used to work from his house which is located at a distance of 20 minutes. On the relevant day at around 04.30 to 5.00 pm, PW-14 had brought some meat and liquor and at around 05.30 pm, the accused had come and had some food. After 15-20 minutes of the deceased having left the shed, the accused had also left. Thereafter, they had taken meal and had gone to the house of the accused, where there were four other labourers also. While he along with PW-12 went inside, PW-14 left for his house. But neither the accused nor the deceased was present in the house of the accused. On the evening of the following day they learnt from *Bari*, the owner of the house where the accused used to reside during the relevant time, that the deceased died as a result of a fall from a height.

21. In cross-examination, PW-11 stated that in the kitchen of *Bari* they used to play carrom and charge mobile phones. There are two houses and a separate kitchen of *Bari* and an old man used to reside in the wooden house where the accused also resided. He stated that the house of the deceased was located below the house of the accused and house of PW-14 is located below the house of deceased and all of them have to take the same road to go to their respective houses. He stated that PW-14 had left the shed after the deceased had left.

22. PW-12 deposed in similar lines as PW-11. He further stated that when he had reached the house of *Bari*, neither the deceased nor the accused was present there. He also deposed that PW-14 had left the house by the same route after the deceased had left for his house.

23. As noted earlier, PW-13 is a witness to the Inquest Report (Exhibit-5). According to her, on 14.06.2017, in the afternoon some boys of the village and Sukbir Rai, father of the deceased, had informed her regarding recovery of the dead body of the deceased.

24. PW-14 is a contractor who had hired the deceased, PW-11 and PW-12. According to him, on 14.06.2017 he had snacks with PW-11, PW-12 and the deceased and they were joined by the accused later on. When some workers from another work site came, the deceased left with them. When requested to stay for dinner he said that he would come back again. Immediately after the deceased had left the accused also left and proceeded in the same direction in which the deceased had gone. They waited for the

deceased till 08.30 pm but since he did not come they had dinner and then had left for their respective homes. He stated in his cross-examination that he left for his house at around 09.00 pm. While PW-11 and PW-12 stated that after around 15-20 minutes of the deceased having left the shed the accused also left, PW 14 stated the accused had left almost immediately.

25. PW-16 had come to work with his brother about 6-7 months ago. His evidence does not throw any light on the prosecution case and his cross-examination was declined.

26. PW-17 is a cook and he had come for a short visit to join his uncle who is a petty contractor. Name of the uncle is, however, not indicated. His evidence does not throw any light and therefore, his cross-examination also declined.

27. PW-21 deposed that in the month of June 2017 there was a fight between the accused and deceased at Wok Chemchey and that he had confessed in his presence as well as in presence of PW-24 and another witness that he had stabbed the deceased with his *khukuri* which was carried by him and that he had also stated that he can show the place where he had kept the weapon of offence. Accordingly, he along with another witness and PW-24, accompanied by the accused, had gone to the house of the accused where he used to live and on reaching there the accused pointed out the place in the kitchen where he had kept the *khukuri*. Accordingly, the *khukuri* was recovered and seized and he had affixed his signature in the Seizure Memo (Exhibit-22). He had identified the *khukuri*. He had also stated that on search being made in the house of the accused the police recovered the blood stained clothes of the accused, i.e. blue coloured track paint, cream coloured vest, orange coloured vest, bed cover, pillow covers under Seizure Memo (Exhibit-23) to which he was a witness. He also identified the material objects seized vide Exhibit-23. He stated that after the Disclosure Statement (Exhibit-25) was recorded, they had recovered materials objects including the *khukuri*.

In cross-examination he admitted that when the accused was taken to P.O his hand was tied with rope from behind.

28. PW-22 had also accompanied PW-24 and PW-21 along with the accused to the house of the accused. He stated that the accused showed them the weapon of offence which was kept by him above the *'chulha'*

inside the kitchen. He was also witness to Exhibit-22 and Exhibit-23. He had also identified the material objects seized by the Police.

In cross-examination he stated that he went to Jorethang Police station to stand as witness on being called by his brother-in-law. He stated that PW-24 and his brother-in-law had told him that the accused had killed a boy. He stated that Exhibit-25 was prepared after completion of search and seizure and that he had signed in Exhibit-25 after the recovery of alleged weapon of offence at Chemchey. He stated that the hand of the accused was tied with a rope when he was taken to his residence. He also stated that accused used to stay in the house as a helper.

29. PW-23 is a Junior Scientific Officer working in the Central Forensic Science Laboratory, Kolkata. On the basis of result of examination of specimen, it was concluded by her as follows:

> *"1.The human blood stains present on exhibit B2/MO-XI (vest) belongs to Mr. Mani kumar Rai.*
>
> *2.The human blood stains present on exhibit D/MO-XXIII(Blood stained mud),exhibit G/ MO-XIX (coll)(Nail clipping) and exhibit H/MO-XXI (coll.)(Hair) belongs to the deceased.*
>
> *3.Human blood present on exhibit B5/MO-XII(Quilt cover) is from another male individual.*
>
> *4.The genetic profile could not be developed from exhibit A/MO-VI, B1/MO-IX, B3/ MO-X, B4/MO-XIV and E/MO-XXV. But presence of 'XY' peak shows male individual(s)."*

30. From the conclusion as indicated above, it appears that blood of the deceased was not detected in any of the aforesaid items belonging to the accused. Though blood stain of the accused is found in Exhibit-B2/MO-11, it is to be noticed that when the accused was examined on 16.06.2017 by PW-7, no injury was detected on his body and therefore, blood-stain in Exhibit-B2/MO-11 is not of any consequence.

31. In ***Sharad Birdhichand Sarda vs. State of Maharashtra***, reported in ***(1984) 4 SCC 116***, the following observations were made:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between „may be and „must be is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. The evidence adduced by the prosecution is circumstantial in nature with no direct proof of the perpetration of the alleged offence by the appellant. It is no longer *res integra* that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability.

33. A careful analysis of the evidence of PW-3, PW-4, PW-11, PW-12 and PW-14 would indicate that though at some point of time along with them the deceased and the accused were present, their evidence does not even remotely suggest that both of them were seen together alone in the evening of 14.06.2017 or any point of time thereafter. The accused leaving them after the deceased had left cannot lead to an inference that the accused had followed the deceased, more so, when there is contradiction with regard to time that had separated their respective departures. While PW-11 and PW-12 had stated that the accused left after 15-20 minutes of departure of the deceased, PW-14 stated that the accused had left almost immediately. Having regard to the evidence on record, the theory of "last seen together" as an incriminating factor qua the appellant is, thus, of no avail to the prosecution.

34. PW-3, PW-4, PW-11, PW-12 and PW-14 had not deposed that there was any fight or ill feeling between the deceased and the accused. They were most likely persons who could have known if there was a fight between the accused and the deceased. However, PW-21 referred to a fight without amplifying whether he had witnessed the fight. He did not depose that he was at Chemchey on the day when there was a fight. PW-21 is a resident of Jorethang and distance between Jorethang and the P.O. is 38 kms. Even PW-1 and PW-10 did not say that there was enmity between the accused and deceased. Therefore, in absence of any corroboration we are not inclined to place any reliance with regard to the fight as deposed by PW-21, who, for reasons not known, was called to the Police Station to stand witness by PW-24.

35. The Disclosure Statement, Exhibit-25, reads as follows.

> "*This is my true statement that on 14/06/2017 at evening time at around 07.30, there had been an argument between me and Krishna Prasad Rai just below my house. I took out the 'khukhuri'*

(knife) that had been strapped on my waist and attacked Krishna Prasad Rai on his neck. That 'khukhuri' (knife) I have kept in a corner of the wooden kitchen, which is just beside my house; and I can show the place where I have kept the 'khukhuri' (knife)."

36. In the celebrated decision of ***Pulukuri Kottaya*** (supra), the scope and ambit of Section 27 of the Evidence Act had been stated and the relevant portion of the same is extracted herein below:

"it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

37. The Apex Court in ***Anter Singh vs. State of Rajasthan***, reported in ***(2004) 10 SCC 657***, summed up various requirements of Section 27 of Evidence Act as follows: -

"(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do

> *with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible. (2) The fact must have been discovered. (3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act. (4) The person giving the information must be accused of any offence. (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to. (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.*"

38. The policy underlying Section 25 and 26 of the Evidence Act is to make it a substantive rule of law that confession whenever and wherever made to the police or while in the custody of the police to any person whosoever, unless made in the immediate presence of a Magistrate shall be presumed to have been obtained under the circumstances mentioned in Section 24 and therefore, inadmissible, except so far as provided by Section 27 of the Act. Section 27 of the Indian Evidence Act is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence.

39. The only portion of the Disclosure Statement which is admissible under Section 27 of the Evidence Act is the statement of appellant that he had kept the "*khukuri*" in the corner of the kitchen, which is beside his house and he can show the place where he had kept the "*khukuri*". The rest of the Disclosure Statement is inadmissible, being confessional and prohibited by Section 25 and 26 of the Evidence Act.

40. The Disclosure Statement, Exhibit-25, which is reduced to in the form of a Memorandum shows that the place of Memorandum is Jorethang Police Station and the time shown as 11.20 am. Under the heading 'details of further Memorandum', at Sl. No. 8, recording the time as 3.40 pm, it is

stated that as per the Disclosure Statement recorded under Section 27 of the Evidence Act, one *khukuri*, with description indicated therein, was recovered from the wooden kitchen of the accused. In the Seizure List (Exhibit-22) also time was shown as 3.40 pm of 18.06.2017. In Sl. No. 13 of Exhibit-22, under the heading 'remarks of Investigating Officer', it is noted that the seized exhibit i.e. the *khukuri* was disclosed and recovered as per the Disclosure Statement recorded under Section 27 of the Evidence Act. However, evidence of PW-22 goes to show that Exhibit-25 was prepared after completion of search and seizure which negates that recovery was made after recording of Disclosure Statement. It is also seen from the evidence of PW-22 that he had signed in Exhibit-25 after recovery of the alleged weapon of offence at Chemchey, though the Memorandum was written at Jorethang Police Station. Evidence of PW-22 casts a serious doubt about the Disclosure Statement and the alleged discovery of the *khukuri*. It is also surprising that two witnesses had been taken by PW-24 to a distance of 38 kms, as if there would be no witness available there. It is also to be noted that genetic profile could not be detected from Exhibit-A, the *khukuri*.

41. PW-3, PW-4 and PW-11 had all stated that the accused was staying in the house of *Bari*. The accused in his statement under Section 313 Cr.P.C stated that the *khukuri* belongs to his landlady (*Bari*) and that the police took out the *khukuri* of his landlady from the kitchen. It is to be stated that *khukuri* is a very common household implement in these areas. It is surprising that *Bari* was not even cited as a witness in the Charge-Sheet. PW-3, PW-4, PW-7, PW-10, PW-11, PW-12 and PW-14 have all referred to regularly going to the house of *Bari*. It appears that PW-2 is the daughter-in-law of *Bari*, whose name is Nar Maya Mangar. PW-2 deposed that the accused used to work in her house as domestic help and after he had left their house, he had started working as a labourer. From her evidence it does not appear whether she was residing with the *Bari* or living separately. In the circumstances of the case, it is also very surprising that Suraj Chettri, who had discovered the dead body was not examined as a witness.

42. In ***Gajoo*** (supra), the Honble Supreme Court had observed that while in case of defective investigation the Court has to be circumspect while evaluating the evidence it would not be right in acquitting an accused person solely on account of defect as to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

43. In ***Sahoo*** (supra), the Honble Supreme Court had held that a confessional soliloquy is a direct piece of evidence and Dr. Doma T. Bhutia, sought to contend that the statement made by the accused as deposed by PW-1 and PW-10 fall into the category of a confessional soliloquy. We are unable to accept the aforesaid contention. There is a serious contradiction in the evidence of PW-1 and PW-10. While PW-1 stated that the statement was made to PW-10, PW-10, on the contrary, stated that accused was talking to PW-1 and the accused had not even noticed her. It is not possible to reconcile such a contradiction. It is also established that PW-1 and PW-10 were not in the same room. Furthermore, it is also noticed that PW-1 and PW-10 did not refer to any conversation between them consequent upon the statement allegedly made by the accused that they have to perform death ritual which would have been the normal course of conduct if the statement was really alarming. Moreover, the statement, even if accepted on face value, is not an admission of guilt.

44. In ***Omprakash*** (supra), the Honble Supreme Court had observed that benefit of doubt to which the accused is entitled is reasonable doubt — the doubt which rational thinking men will reasonably, honestly and conscientiously entertain. It is further held that it does not mean that the evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the crime. If that were so the law would fail to protect society as in no case such a possibility can be excluded .It will give room for fanciful conjectures or untenable doubts and will result in deflecting the course of justice if not thwarting it altogether. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt.

45. On due appreciation of the evidence on record, we are of the opinion that that the prosecution has not been able to establish the guilt of the accused beyond reasonable doubt and in the given facts and circumstances of the case, the appellant is entitled to benefit of doubt.

46. Resultantly, the appeal is allowed. The impugned conviction and sentence is set aside. The appellant is set at liberty.

47. Lower Court record be sent back.

SLR (2020) SIKKIM 796

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

Crl. A. No. 21 of 2019

Kewal Rai ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Jorgay Namka, Advocate (Legal Aid Counsel).

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor.

Date of decision: 9th November 2020

A. Indian Penal Code, 1860 – S. 304 (Part-II) – Culpable Homicide not amounting to Murder – To make out an offence punishable under S. 304 II, I.P.C, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his was likely to cause death. If there is intent and knowledge both, the same would fall under S. 304 I, I.P.C but if it is only a case of knowledge and not intention to cause death or bodily injury the same would fall under S. 304 II, I.P.C – According to Dr. O.T. Lepcha (PW-16), the death of the deceased was due to hypovolaemic shock as a result of stab injury to the femoral vessels by a sharp single edged weapon – The depositions of the two injured witnesses, i.e. PW-1 and PW-5 along with the depositions of PW-3, PW-4 and the first informant – PW-2, makes the fact leading to the stabbing of the deceased and the immediate facts thereafter, abundantly clear leaving no room to doubt that there was an altercation between the appellant and the deceased over two petty issues which led to a physical fight between them and culminated in the appellant stabbing the deceased. Although, it is certain that there was no intention to cause death of the deceased, it is apparent that

the appellant had the requisite knowledge that by using an 8 inch sharp edged knife and stabbing over the left inguinal space with substantial force to have caused spindle shaped injury would have caused such bodily injury as is likely to cause death – In the circumstances, the conviction of the appellant under S. 304 II, I.P.C is confirmed.

(Paras 18 and 19)

B. Indian Penal Code, 1860 – Ss. 307, 308 – In order to bring home the charge for attempt to murder it must be shown that the appellant acted with such intention or knowledge or under such circumstances that if he by that act caused death, he would be guilty of murder. Intention or knowledge to commit murder must thus necessarily exist. Both the intention or knowledge relating to commission of murder and the doing of the act towards it form the two vital ingredients of the offence punishable under S. 307, I.P.C. If both the ingredients are established, irrespective of the resultant injury, the offence of attempt to murder is made out – The established fact reflects a sudden attack, a singular stab injury on PW-5's right anterior chest wall which was grievous in nature caused by an 8 inch sharp edged knife. It seemed to have happened on the spur of the moment, in a fit of rage and not with any intention or knowledge relating to commission of murder – In the totality of the facts and circumstances, we are of the view that the offence committed by the appellant on PW-5 would not amount to attempt to murder punishable under S. 307, I.P.C but would amount to attempt to commit culpable homicide under S. 308, I.P.C.

(Paras 22 and 24)

Appeal dismissed.

Chronology of cases cited:

1. State of M.P. v. Deshraj and Another, (2004) 13 SCC 199.
2. State of Madhya Pradesh v. Kanha *alias* Omprakash, (2019) 3 SCC 605.
3. Om Prakash v. State of Punjab, AIR 1961 SC 1782.

JUDGMENT

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

1. The learned Sessions Judge, District Court at Namchi, South Sikkim (learned Sessions Judge), has convicted the appellant for culpable homicide not amounting to murder, attempt to murder and for voluntarily causing hurt by a knife in Sessions Trial Case No. 09 of 2016 (*State of Sikkim vs. Kewal Rai*), on 28.09.2019. He was sentenced to simple imprisonment of 10 years and a fine of Rs.10,000/-, 5 years and a fine of Rs.5000/- and 1 year and a fine of Rs.2000/- for each of the offences, respectively. The judgment of conviction and order on sentence, both dated 28.09.2019, are assailed by the appellant.

2. Heard Mr. Jorgay Namka, learned Legal Aid Counsel for the appellant and Dr. Doma T. Bhutia, learned Public Prosecutor, for the respondent.

3. Mr. Namka submitted that the evidence produced by the prosecution does not establish the case under sections 304 II and 307 IPC. He further submitted that as the appellant has been found not guilty of the charge under section 302 IPC, he could not have been, in any case, convicted under section 307 IPC. It was argued, at the most, the appellant could have been convicted for causing grievous hurt. The learned Public Prosecutor, on the other hand, submitted that the prosecution has been able to lead cogent evidence and all the ingredients of the offences have been duly established beyond all reasonable doubt. She relied upon the judgment of the Hon'ble Supreme Court in the ***State of M.P. vs. Deshraj & Anr.***[1], in which it was held that conviction under section 304 II IPC would be proper as there was a sudden quarrel and death was caused as a result of the injuries inflicted.

4. The learned Sessions Judge after taking into consideration the evidence of the first informant – Basanti Subba (PW-2), injured witnesses – Purna Subba (PW-1) and Kedar Subba (PW-5), and other witnesses who were present during the incident, held the appellant guilty.

5. 30 witnesses were examined by the prosecution. They have been elaborately discussed by the learned Sessions Judge. We shall only discuss the evidence of the material witnesses needed for the proper adjudication of the present appeal.

[1](2004) 13 SCC 199

6. The incident occurred on 04.09.2016 at Gairi Gaon, Mamring, South Sikkim. The place of occurrence, it transpires, had the common residences of all the material witnesses as well as the appellant – the tenant in the house of Jasman Subba @ Laxuman (PW-6) and Ashmati Subba (PW-3) who are the parents of Mangal Dhoj Subba (deceased) and Purna Subba (PW-1) – one of the injured witnesses. There was an altercation between the deceased and the appellant in the house of the deceased. Basanti Subba (PW-2), wife of the deceased, was an eyewitness to the altercation between them. Basanti Subba (PW-2), Jasman Subba *alias* Laxuman (PW-6), Ashmati Subba (PW-3), Purna Subba (PW-1), Kedar Subba (PW-5) – nephew of PW-6 and PW-3, and Bunu Sherpa (PW-4) - wife of PW-1, all identified the appellant.

7. The FIR (Exhibit-13) was lodged by Basanti Subba (PW-2). She gave a detailed account of what transpired on 04.09.2016 when her husband - the deceased, died and her two brothers-in-law, Purna Subba (PW-1) and Kedar Subba (PW-5), were injured. The altercation between them was regarding the mobile phone of the deceased. The appellant had taken it a few days ago and damaged it. The appellant had assured the deceased that he would have the mobile phone repaired. On the day of the incident, in the evening, the deceased, Kedar Subba (PW-5) and the appellant had gone to Rangpo for marketing and to have the mobile phone repaired. The mobile phone could not be repaired. The appellant and the deceased returned home. The appellant was also angry that the deceased had not taught him driving. According to Basanti Subba (PW-2), the altercation continued in their courtyard. Around the same time, Kedar Subba (PW-5) had also arrived from the market and a quarrel started between him and the appellant as well. When she went out on hearing the deceased shout that he had been hit by the appellant, she saw the deceased lying in a pool of blood with injuries. She also saw the appellant stabbing Kedar Subba (PW-5) and Purna Subba (PW-1) with a knife.

8. Purna Subba (PW-1) - the brother of the deceased, and Kedar Subba (PW-5), are both injured victims and prosecution witnesses. Both of them identified the appellant as the one who stabbed them with a knife. They too have given detailed accounts of what transpired on 04.09.2016 and how they sustained injuries. Kedar Subba (PW-5) deposed that the appellant suddenly stabbed him when he tried to separate the appellant and the deceased while they were having a physical fight. Purna Subba (PW-1)

deposed that the appellant stabbed him and he sustained injuries on both his wrists when he intervened and tried to separate the appellant after the appellant stabbed Kedar Subba (PW-5).Both, Purna Subba (PW-1) and Kedar Subba (PW-5), identified the knife (MO-XIII) as the knife which was used by the appellant to injure them.

9. Dr. O.T. Lepcha (PW-16), Medico Legal Consultant, STNM Hospital, conducted the autopsy over the body of the deceased on 05.09.2016. Thereafter, he handed over the clothes worn by the deceased to the Investigating Officer who in turn sent it for forensic examination.

10. Dr. Silash Rai (PW-8), the Medical Officer at District Hospital, Namchi and Lab Technician Mansingh Kalikotay (PW-17) collected the blood sample of Purna Subba (PW-1) on 23.09.2016 and handed it over to the Station House Officer of the Namchi Police Station. Dr. Yogesh Verma (PW-11), Professor, Department of Pathology, Sikkim Manipal Institute of Medical Sciences, Tadong, East Sikkim and Lab Technician Pemba Sherpa (PW-12) collected the blood sample of Kedar Subba (PW-5) for DNA profiling on 26.09.2016 and handed it over to Kessang D. Bhutia, the Investigation Officer.

11. Dr. Rajiv Sharma (PW-15), Medical Officer, District Hospital, Namchi, examined the appellant on 04.09.2016 itself and noted that he had two incision wounds on his left wrist. One was 2 x 1 cm long and the other was a C‘ shaped wound 4 x 2 cms. He noted that the appellant had a faint smell of alcohol but his gait and speech were normal. On the request of the duty officer, the wearing apparel of the appellant was collected and handed over to the police escort. Nanda Kishore Sharma (PW-25) and Ramesh Rai (PW-26) are the seizure witnesses when the Investigating Officer seized the clothes worn by the appellant at Namchi District Hospital. Although the appellant denied that his clothes had been seized at the hospital, he stated that they were seized at the Namchi Police Station in his statement recorded under section 313 Cr.P.C. The appellant admitted to his injuries when he was examined under section 313 Cr.P.C.

12. On 27.09.2016, Dr. Sanjay Rai (PW-9), the Medical Officer. District Hospital, Namchi, collected the blood sample of the appellant with the assistance of Lab Technician Chandra Lachi Rai (PW-10) and handed it

over to the Investigating Officer. The appellant admitted to this fact in his statement recorded under section 313 Cr.P.C.

13. The material exhibits collected during investigation along with the blood samples of Purna Subba (PW-1), Kedar Subba (PW-5) and the appellant, were sent for forensic investigation by the Investigating Officer and Dr. Kshitij Chandel (PW-27), Scientist from the Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Human Affairs, Government of India, Kolkata, examined them and prepared his forensic report (Exhibit-39). As per his forensic report, human blood could be detected in the appellant's navy blue vest (MO-VII), black colour jeans pant (MO-IX), a pair of black and white coloured shoes (MO-XI) and knife (MO-XIII), cotton gauzes (MO-XX and MO-XXI), filter paper (MO-XXII), filter paper (MO-XXIII), filter paper (MO-XXIV) and in red coloured half pant (MO-**7** XXVI) and blue coloured underwear (MO-XXVII) of the deceased. Dr. Kshitij Chandel (PW-27) also opined that the blood stains present on the navy blue vest (MO-VII), black coloured jeans pant (MO-IX), a pair of black and white coloured shoes (MO-XI), filter paper (MO-XXII), filter paper (MO-XXIII) and filter paper (MO-XXIV) belonged to the appellant. He opined that the blood stains present on the knife (MO-XXIII), cotton gauzes (MO-XX and MO-XXI) collected from the place of occurrence and the red coloured half pant (MO-XXVI) was that of the deceased.

14. Kishan Gurung (PW-23) was the Head Constable, Mamring Outpost under Namchi Police Station, South Sikkim. He corroborated the deposition of Bunu Sherpa (PW-4), Basanti Subba (PW-2), Purna Subba (PW-1) and Jasman Subba @ Laxuman (PW-6) that the appellant fled away after the incident. He was later informed that the appellant was found hiding in between the space of a building and was apprehended. The Investigating Officer confirmed that the appellant was rounded up on 04.09.2016 itself.

15. The evidence of the injured witnesses and the eyewitnesses makes it evident that the appellant had a petty quarrel with the deceased which led to the altercation and physical fight with the deceased. When Kedar Subba (PW-5) tried to separate them, the appellant suddenly stabbed him. Purna Subba (PW-1) was stabbed by the appellant on both his wrists when he intervened and tried to separate the appellant after he stabbed Kedar Subba (PW-5). The appellant sustained incision wounds on his left wrist. There is

evidence that his wearing apparels also had blood stains. The failure of the prosecution and the appellant to explain the injury and the blood stain leads us to believe that the appellant sustained them during the occurrence.

16. The presence of the injured witnesses, the eyewitnesses along with the appellant in the place of occurrence at the relevant time cannot be doubted. Basanti Subba (PW-2) and Kedar Subba (PW-5) witnessed the altercation between the appellant and the deceased. Besides them, Ashmati Subba (PW-3) saw the appellant standing nearby when she saw the deceased and Kedar Subba (PW-5) lying injured in the courtyard. Bunu Sherpa (PW-4) also saw the appellant carrying a knife at the place of occurrence and thereafter fleeing away. She saw Purna Subba (PW-1), Kedar Subba (PW-5) and the deceased injured. Jasman Subba *alias* Laxuman (PW-6) also saw the deceased, Purna Subba (PW-1) and Kedar Subba (PW-5) injured and helped evacuate them to the hospital. There is no doubt that the appellant was the sole person armed with a knife (MO-XIII) at the relevant time. The fact that the sheath (MO-I) of the knife (MO-XIII) had the name of the appellant on it also sufficiently proves that it was the appellant's knife. The forensic evidence proves the fact that the knife (MO-XIII) had stains of blood of the deceased on it.

17. Section 304 II IPC reads:

> **"304. Punishment for culpable homicide not amounting to murder.** — Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

18. To make out an offence punishable under section 304 II IPC, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his was likely to cause death.If there is intent and knowledge both, the same would fall under section 304 I IPC but if it is only a case of knowledge and not intention to cause death or bodily injury the same would fall under section 304 II IPC. The death of the deceased is proved beyond reasonable doubt. According to Dr. O.T. Lepcha (PW-16), the death of the deceased was due to hypovolaemic shock as a result of stab injury to the femoral vessels by a sharp single edged weapon. Dr. O.T. Lepcha (PW-16) noted spindle shaped 2.1 x 1.5 x 6 cms injury placed diagonally over the left inguinal space. The injury was directed downwards, backwards and medially. The margins of the wound were clean cut with sharp cut on the medial and wedge shaped over the lateral end (single edged sharp weapon). He also noted that the upper and middle area of the left thigh, testis and the penis were swollen and tensed with multiple blood clots and blood. According to Dr. O.T. Lepcha (PW-16), the injury had incised the left femoral artery and vein leading to profuse haematoma, clot formation and bleeding which also involved the muscles of the left anterior thigh. The injury was caused by a sharp-edged weapon. The depositions of the two injured witnesses, i.e., Purna Subba (PW-1) and Kedar Subba (PW-5), along with the depositions of Ashmati Subba (PW-3), Bunu Sherpa (PW-4) and the first informant – Basanti Subba (PW-2), makes the fact leading to the stabbing of the deceased and the immediate facts thereafter, abundantly clear leaving no room to doubt that there was an altercation between the appellant and the deceased over two petty issues which led to a physical fight between them and culminated in the appellant stabbing the deceased. Although, it is certain that there was no intention to cause death of the deceased, it is apparent that the appellant had the requisite knowledge that by using an 8-inch sharp edged knife (MO-XIII) and stabbing him over the left inguinal space with substantial force to have caused spindle shaped 2.1 x 1.5 x 6 cms injury as deposed by Dr. O.T. Lepcha (PW-16) would have caused such bodily injury as is likely to cause death.

19. Although, Dr. O.T. Lepcha (PW-16) was not shown the knife (MO-XIII), which must be the practice in such cases by investigating officers, there is no confusion that it was the appellant and the appellant alone who caused the injury and it was the appellant‘s 8-inch knife (MO-XIII) which was the weapon of offence. The prosecution has been able to cogently

prove that the appellant used his own knife (MO-XIII) to stab the deceased. The evidence of the Investigating Officer and Dr. Kshitij Chandel (PW-27) establishes that the knife (MO-XIII) had the blood stains of the deceased on it. In the circumstances, the conviction of the appellant under section 304 II IPC is confirmed.

20. Section 307 IPC reads as follows:

> **"307. Attempt to murder.** - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act cause death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

21. Kedar Subba (PW-5) has given a detailed account as to how the appellant stabbed him on his chest. According to Basanti Subba (PW-2), Kedar Subba (PW-5) had gone to Rangpo with the appellant and the deceased for marketing and repairing the mobile phone that evening before the incident. There was thus no strong previous animus between the appellant and Kedar Subba (PW-5). Although, Basanti Subba (PW-2) deposed that the appellant had a quarrel with Kedar Subba (PW-5) just before the act of stabbing him, Kedar Subba (PW-5), however, did not state so. According to him, the appellant stabbed Kedar Subba (PW-5) when he sought to intervene in the physical fight between the deceased and the appellant. The evidence produced by the prosecution thus establishes that Kedar Subba (PW-5) was attacked with a knife by the appellant when he was having a physical fight with the deceased. Purna Subba (PW-1) also saw the appellant stabbing Kedar Subba (PW-5) with a knife (MO-XIII). Dr. Nima Dolma Sherpa (PW-24) examined Kedar Subba (PW-5) on 04.09.2016 and found deep cut injury on his right-side upper chest and a cut injury on his right forearm. Dr. Deepika Gurung (PW-29), who also examined Kedar Subba (PW-5) on the same day, opined that the stab injury measuring 7 x 3 cms on his anterior chest wall was a grievous injury. Kedar Subba (PW-5) identified the knife (MO-XIII) as the one the

appellant was carrying in the sheath (MO-I) a day earlier and by which he had sustained injuries. In order to bring home the charge for attempt to murder it must be shown that the appellant acted with such intention or knowledge or under such circumstances that if he by that act caused death, he would be guilty of murder. Intention or knowledge to commit murder must thus necessarily exist. Both the intention or knowledge relating to commission of murder and the doing of the act towards it form the two vital ingredients of the offence punishable under section 307 IPC. If both the ingredients are established, irrespective of the resultant injury, the offence of attempt to murder is made out. In ***State of Madhya Pradesh vs. Kanha alias Omprakash***[2], the Hon'ble Supreme Court after examining several judgments rendered by it earlier held that proof of grievous or life threatening hurt is not a *sine qua non* for the offence under section 307 IPC. It was also held that the intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Amongst other things, the nature of the weapon used, and the severity of the blows inflicted can be considered to infer intent. The established fact reflects a sudden attack, a singular stab injury on Kedar Subba's (PW-5) right anterior chest wall which was grievous in nature caused by an 8-inch sharp edged knife (MO-XIII). It seemed to have happened on the spur of the moment, in a fit of rage and not with any intention or knowledge relating to commission of murder.

22. Although not argued before us, we deem it appropriate to contrast the provision of section 307 IPC with section 308 IPC, i.e., attempt to commit culpable homicide at this stage. Section 308 IPC reads:

> **308. Attempt to commit culpable homicide**. — Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

[2](2019) 3 SCC 605

23. In ***Om Prakash vs State of Punjab***[3], the Hon'ble Supreme Court in paragraph 9 of the judgment, held as follows:

> "***9.*** *……. that a person commits an offence under Section 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in Section 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression "whoever attempts to commit an offence" in Section 511, can only mean "whoever: intends to do a certain act with the intent or knowledge necessary for the commission of that offence". The same is meant by the expression "whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder" in Section 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression "by that act" does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time."*

[3]AIR 1961 SC 1782

24. In the totality of the facts and circumstances, we are of the view that the offence committed by the appellant on Kedar Subba (PW-5) would not amount to attempt to murder punishable under section 307 IPC but would amount to attempt to commit culpable homicide under section 308 IPC. The fact that the appellant used an 8-inch sharp edged knife (MO-XIII) and stabbed the right anterior chest wall of Kedar Subba (PW-5) causing him grievous injury convinces us that the appellant by doing so had the requisite knowledge that if he had by that act caused death he would be guilty of culpable homicide not amounting to murder. Although, no charge was framed under section 308 IPC in view of the fact that the punishment prescribed under section 308 IPC is lesser in degree than the one prescribed under 307 IPC, we deem it appropriate to convict the appellant for the offence of attempt to commit culpable homicide and sentence him with simple imprisonment for a term of 7 years and a fine of Rs.5000/-. In default of payment of fine, the appellant shall undergo further simple imprisonment of one month. Consequently, his conviction under section 307 IPC and sentence thereof, are set aside.

25. Section 324 IPC reads:

> **"324. Voluntarily causing hurt by dangerous weapons or means.** - Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

26. Section 324 IPC provides for punishment for voluntarily causing hurt by dangerous weapons or means. The evidence of Purna Subba (PW-1) clearly establishes that the appellant had stabbed him when he had intervened when the appellant was stabbing Kedar Subba (PW-5). As a

result of this, Purna Subba (PW-1) sustained deep cut injuries on his wrists. This was not an accident as the appellant had stabbed the deceased and Kedar Subba (PW-5) as well. The appellant had voluntarily caused hurt on the wrists of Purna Subba (PW-1) with an 8-inch sharp edged knife (MO-XIII). According to Dr. Nima Dolma Sherpa (PW-24), the injuries needed seven stitches on each of the wrists. Dr. Nima Dolma Sherpa (PW-24) opined that the injuries sustained by Purna Subba (PW-1) were simple in nature. It has been established that those injuries were caused by the appellant's knife (MO-XIII) which is a dangerous weapon. As a result, it is clear that the conviction of the appellant for voluntarily causing hurt by a dangerous weapon must be sustained as well.

27. Resultantly, the conviction of the appellant under sections 304 II and 324 IPC are confirmed. The conviction under section 307 IPC is set aside. He is, however, convicted under section 308 IPC. We are also of the considered view that the sentences awarded to the appellant for the offences under sections 304 IIand 324 IPC, are well balanced and correct and need not be interfered with.All the sentences shall run concurrently.

28. The appeal is partly allowed. The impugned judgment and the order on sentence, both dated 28.09.2019, are modified to the above extent.

29. Copy of this judgment be sent to the learned trial Court for information and a copy granted free of cost to the appellant.

30. Lower Court records be remitted forthwith.

SLR (2020) SIKKIM 809

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

Bail Appln. No. 9 of 2020

Tshering Ganjay Lachungpa ….. APPLICANT

Versus

State of Sikkim ….. RESPONDENT

For the Applicant: Mr. Leonard Gurung and Mr. Shakil Karki, Advocates.

For the Respondents: Mr. Thinley Dorjee Bhutia, Addl. Public Prosecutor and Mr. Hissey Gyaltsen, Asstt. Public Prosecutor.

Date of decision: 11th November 2020

A. Code of Criminal Procedure, 1973 – S. 439 – S. 439 provides for concurrent jurisdiction of the Sessions Court and the High Court. On a perusal of the order passed by the Special Judge, it seems clear that the applicant had moved for bail on similar grounds which was rejected. The only new circumstance which has been indicated in the present application for bail is that the investigation is over – The applicant is accused of transporting and having in his possession commercial quantities of controlled substances. The preliminary materials does not indicate that the applicant, a police officer was transporting commercial quantities of controlled substances for his personal consumption – As the applicant is a police officer, it cannot be said that the apprehension of the respondent that he may tamper with evidence is without any basis as the charge sheet is yet to be filed.

(Paras 11 and 12)

Application dismissed.

Chronology of cases cited:

1. Dataram Singh v. State of U.P, (2018) 3 SCC 22.
2. Sanjay Chandra v. C.B.I,(2012) 1 SCC 40.
3. Gurjit Singh v. State of Punjab, MANU/PH/3876/2012.

ORDER

Bhaskar Raj Pradhan, J

1. This is an application for bail filed by the applicant under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) read with Section 37 of Sikkim Anti Drugs Act, 2006 (SADA, 2006).

2. The First Information Report (FIR) against the applicant was lodged on 07.10.2020 before the Rangpo, Police Station alleging that on 07.10.2020 while on a routine checking at the Rangpo check post the applicant was intercepted in a Siliguri- Gangtok bound incoming commercial vehicle bearing registration number SK01J-0042 under suspicious circumstances. The applicant was searched in the presence of two witnesses and the SDPO/Rangpo after he exercised his option under Section 24 of the SADA 2006. During the search the following items were seized:-

> **"** *i) 45 bottles of OWNREX cough syrup having batch no.020620-SH2, mfg. June 2020, exp. May 2022 (Each bottle contains 100 ml, thus 45x100=4500 ml)*
>
> *ii) 10 files of Nitrosun-10 having batch no. AB32109, mfg 03/2020, exp 02/2023 totalling of 98 tablets (02 tablets consumed)*
>
> *iii) 33 files of Spasmoproxyvon plus totalling of 787 capsules having batch no. JU10711, mfg Nov/2019, Exp. Oct 2021 (05 capsules consumed)*
>
> *iv) One green folder containing a) 02 sheets of STNM Medical card issued in the name of Tshering G. Lachungpa, b) Court appearance certificate issued to CT. Tshering Lachungpa.*
>
> *v) Police Track suit (one set) vi) Purple luggage trolley labelled Safari with check in tag of Airport having named Tshering Lachungpa.***"**

3. It was alleged that the applicant was not able to produce any valid license under the Drugs and Cosmetics Act, 1940 or the Sikkim Trade License Act and the prescription of a qualified medical practitioner. Thereafter, the aforesaid items were seized and the applicant was arrested under Section 7(a)7(b)/9 and14 of the SADA, 2006.

4. The applicant preferred a bail application before the learned Special Judge, SADA, 2006 East Sikkim at Gangtok (the learned Special Judge) which was rejected on 14.10.2020. The applicant had prayed for bail mainly on the ground of undergoing treatment for de-addiction in a detoxification/rehabilitation centre. The learned Special Judge held that there is nothing to indicate that the applicant was dependent on drugs or was a habitual consumer as nothing was brought on record before him. It was held that substantial quantity of controlled substances had been recovered from the applicant and that the investigation was still under progress. On these grounds the bail application of the applicant was rejected by the learned Special Judge.

5. The present bail application was filed on 17.10.2020. It is urged that the applicant is a 33 years old law abiding and a responsible citizen having no past criminal records and a permanent resident of Bichhu, Lachung, North Sikkim. It is stated that he has been falsely implicated in the case; he has to take care of his 55 years old ailing mother and his father having died on 16.09.2020 he has been traumatized with psychological problems and mental health concomitant disorders. He seeks voluntarily rehabilitation and detoxification for his drug dependency and for which purpose he has also sought admission to FREEDOM rehabilitation centre. The applicant states that he had applied for bail before the learned Special Judge but it was rejected on the ground that the investigation was still under process and there was no document to indicate that the applicant was dependent on drugs. The applicant further states that the fact that he has been forwarded to judicial custody on 08.10.2020 indicates that the investigation is over and his incarceration further would cause him mental health and harm his reputation. It is urged that custodial interrogation and search and seizure being completed, the applicant is no longer required in custody. The applicant assures not to tamper with the prosecution evidence/witnesses; cooperate with the investigation; not evades the process of law and to face the trial. The applicant further assures that if bail is granted he would not violate any terms and conditions which may be imposed and is willing to furnish reliable surety.

6. A reply dated 02.11.2020 has been filed by the respondent opposing the application for bail on various legal grounds. It is urged that there is no material placed to shown that he is an *"addict"* dependent on drugs to get the advantage of Section 37 of the SADA, 2006. In the reply it has been pointed out that the applicant was intercepted at Rangpo check post attempting to bring in commercial quantities of controlled substances into the State and the same could not compute a reasonable proportion for individual use/consumption. It is further pointed out that the investigation is at the initial stage and there is every possibility of the applicant tampering with evidence. It is urged that if the application is allowed there is a high probability that the applicant might be involved in peddling of the controlled substances again. It is also pointed out that the applicant is a police personnel.

7. Heard Mr. Leonard Gurung assisted by Mr. Sakil Karki, learned counsel on behalf of the applicant and Mr. Hissey Gyaltsen, learned Assistant Public Prosecutor on behalf of the respondent.

8. Mr. Leonard Gurung relied upon the judgments of the Supreme Court in ***Dataram Singh v. State of U.P.***[1] and ***Sanjay Chandra v. CBI***[2] as well as the judgment of the Punjab & Haryana High Court in ***Gurjit Singh v. State of Punjab***[3].

9. In ***Dataram (supra)*** the Supreme Court held that a fundamental postulate of criminal jurisprudence is the presumption of innocence. It was held that another important facet is that grant of bail is the general rule and putting a person in jail is an exception. The Supreme Court held that although grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by large number of decisions rendered by the Supreme Court and even by every High Court in the country. Humane attitude was required to be adopted by a judge, while dealing with application for remanding a suspect or an accused to police custody or judicial custody. One of the factors, it was held, that needed to be considered was whether the accused was arrested during investigation when that person perhaps has the best opportunity to tamper with evidence or influence witnesses.

---

[1] (2018) 3 SCC 22
[2] (2012) 1 SCC 40
[3] MANU/PH/3876/2012

10. In ***Sanjay Chandra (supra)*** the Supreme Court held that gravity of alleged offence and severity of punishment prescribed ought to be considered simultaneously and gravity alone cannot be decisive ground to deny bail. It was held that competing factors were to be balanced by court while exercising its discretion. While reiterating the principles for exercise of court's discretion, it was also held that each case however, was to be decided on its own merits.

11. Section 439 Cr.P.C. provides for concurrent jurisdiction of the Sessions Court and the High Court. On a perusal of the order dated 14.10.2020 passed by the learned Special Judge it seems clear that the applicant had moved for bail on similar grounds which was rejected. The only new circumstance which has been indicated in the present application for bail is that the investigation is over. On a query made, the learned Assistant Public Prosecutor submitted that except for securing the forensic report on the seized substances, investigation is more or less over and it would take at least six weeks to file its report under Section 173 Cr.P.C.

12. The applicant has been accused of transporting and having in his possession commercial quantities of controlled substances and is being proceeded under Section 7(a)7(b)/9 and 14 of SADA, 2006. The preliminary materials does not indicate that the applicant, a police officer was transporting commercial quantities of controlled substances for his personal consumption. According to the respondent the applicant is a serving police officer and therefore, there is a possibility of the applicant tampering with evidence. The respondent is also anxious that the applicant may resort to further peddling of controlled substances if enlarged on bail at this stage. The applicant, admittedly, has been in custody for 28 days. The fact that he is a serving police officer is also not in dispute. Prima facie he was intercepted with commercial quantities of controlled substances. If the allegations are proved the applicant may suffer punishment with imprisonment for 10 years or more. The scheme of SADA, 2006 makes the commission of the offence by a Government servant graver. As the applicant is a police officer it cannot be said that the apprehension of the respondent that he may tamper with evidence is without any basis as the charge sheet is yet to be filed. This is a case in which the learned Assistant Public Prosecutor has opposed the bail application. At the same time there is no reasonable ground for believing that the applicant is not guilty of the alleged offence.

13. Considering the entirety of the facts and circumstances of the case this court is of the considered view that bail cannot be granted to the applicant at this stage. It is accordingly rejected.

14. However, keeping in mind the submissions made on behalf of the applicant that he is in need of rehabilitation and detoxification for his drug dependency, the respondent is directed to have the applicant assessed by a psychiatrist and the State Medical Board for appropriate recommendations.

SLR (2020) SIKKIM 815

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

RFA No. 10 of 2017

Nil Kumar Dahal and Another ….. APPELLANTS

Versus

Indira Dahal and Others ….. RESPONDENTS

For the Appellants: Mr. A. Moulik, Senior Advocate with Ms. K.D. Bhutia and Mr. Ranjit Prasad, Advocates.

For Respondent No.1: Mr. Jorgay Namka, Advocate.

For Respondent 2-3: Mr. Sudesh Joshi, Addl. Advocate General with Mr. Sujan Sunwar and Mr. Hissey Gyaltsen, Assistant Government Advocates.

For Respondent No.4: Ms. Kunzang Choden Lepcha and Ms. Neetu Tamang, Advocates.

Date of decision: 12th November 2020

A. Hindu Succession Act, 1956 – Applicability of Law not Extended or Enforced in the State – Where there is no existing old law on a particular subject in Sikkim or where the law is scanty or inadequate, the Courts in Sikkim also being Courts of equity, justice and good conscience, have to turn to the laws of the country. It is but apposite to notice that the Courts in Sikkim, even prior to being part of the Indian Union have followed principles of law in force in India if the principles were based on justice, equity and good conscience – Considering that the provisions of the Hindu Succession Act, 1956 has not been extended or enforced in the State, nor does any corresponding statute occupy the field in the State, it would, in the circumstances be just and proper to look to and

apply the principles contained in the Hindu Succession Act, 1956, for the purposes of considering matters relating to Succession in Sikkim, for persons to whom it applies as personal law.

(Para 36)

B. Hindu Succession Act, 1956 – Mitakshara School of Hindu Law – Partition – Effect – The parties are Hindu Brahmins. Their father Devi Prasad divided the property amongst his three sons contemporaneously which was consented to by all without any objection. As under the Mitakshara law, the father i.e. Devi Prasad had the power to divide the family property during his lifetime and exercised his power thus, for all intents and purposes, it can be gauged that their family was following the principles of the Mitakshara School of Hindu Law – Under the Mitakshara School, each son and now daughters vide the Hindu Succession (Amendment) Act, 2005 are coparceners in their own right and upon birth, take an equal interest in the ancestral property, whether movable or immovable. Thus, being entitled to a share, they can seek partition. If they do so, the effect in law is not only a separation of the father from the sons but a separation *inter se*, the consent of the sons is not necessary for the exercise of that power. However, no Hindu father joined with his sons and governed by the Mitakshara law although vested with the power to partition the property can make a partition of the joint family property by Will.

(Paras 37 and 38)

C. Sikkim State General Department Notification No.385/G, dated 11.04.1928 – Unregistered Document – Exhibit "A" is an unregistered document. The Sikkim State General Department Notification No. 385/G dated 11.04.1928 requires all documents such as mortgage and sale deeds and "other important documents" and deeds to be registered and will not be considered valid unless they are duly registered – Nevertheless, it is now no more *res integra* that the Courts can look into unregistered documents more so, if it is a family settlement (*In re: Thulasidhara* discussed).

(Para 40)

D. Hindu Succession Act, 1956 – After the partition had taken place vide Exhibit "A," the father had his own share in the property which thus, was his separate property. Bal Krishna also received his separate share.

Consequently, Devi Prasad was free to decide how his share would be given away after his passing viz. by the testamentary disposition, on the conditions therein being fulfilled – The reasoning that the share of Devi Prasad would devolve on his undivided son Bal Krishna despite him having received his share, is an erroneous interpretation of the law. Merely because Bal Krishna continued to live in the main house with the father did not vest this circumstance with the legal connotation that he was joint with the father. (Para 54)

Appeal allowed.

Chronology of cases cited:

1. Govind Singh v. Harchand Kaur, AIR 2011 SC 570.
2. M. Chinnasamy v. K.C. Palanisamy and Others, (2004) 6 SCC 341.
3. Union of India v. Ibrahim Uddin and Another, (2012) 8 SCC 148.
4. Kiran Limboo v. Kussang Limboo, 2020 SCC OnLine Sikk 2.
5. Karedla Parthasaradhi v. Gangula Ramanamma (Dead) through LRs and Others, AIR 2015 SC 891.
6. Sadhu Singh v. Gurdwara Sahib Narike and Others, AIR 2006 SC 3282.
7. Vineeta Sharma v. Rakesh Sharma, MANU/SC/0582/2020.
8. Anar Devi and Others v. Parmeshwari Devi and Others, AIR 2006 SC 3332.
9. State of Andhra Pradesh v. Abdul Khader, AIR 1961 SC 1467.
10. Ass Kaur (Smt.) (Deceased) by LRs. v. Kartar Singh (Dead) by LRs. and Others, (2007) 5 SCC 561.
11. Daya Ram v. Sohel Singh, (1908) P.R. No.110 1906, F.B.
12. H.H. Mir Abdul Hussain Khan v. Bibi Sona Dero, MANU/PR/0125/1917.
13. Ujagar Singh v. Jeo, MANU/SC/0187/1959.
14. Basanti Rai and Others v. State of Sikkim and Others, 2017 SCC OnLine Sikk 123.

15. Sonam Topgyal Bhutia v. Gompu Bhutia, AIR 1980 Sikk 33.

16. Bishnu Kala Karki Dholi and Others v. Bishnu Maya Darjeeni, Civil First Appeal No. 8 of 1976.

17. Jas Bahadur Rai v. Putra Dhan Rai, 1978 (3) Sikkim Law Journal.

18. Durga Prasad Pradhan v. Palden Lama, Second Appeal No.1 of 1980.

19. Kalyani (Dead,) by LRs. v. Narayanan and Others, 1980 Supp SCC 298.

20. C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar and Another, AIR 1953 SC 495.

21. Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Others, (1987) 1 SCC 424.

22. Anwar Hasan Khan v. Mohd. Shafi and Others, (2001) 8 SCC 540.

23. Thulasidhara and Another v. Narayanappa and Others, (2019) 6 SCC 409.

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

25. V. Tulassama and Others v. Sesha Reddy (Dead) by LRs, (1977) 3 SCC 99.

26. Ramachandra Shenoy and Another v. Mrs. Hilda Brite and Others, AIR 1964 SC 1323.

27. Ganduri Koteshwaramma and Another v. Chakiri Yanadi and Another, (2011) 9 SCC 788.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellants were the Plaintiffs before the learned trial Court, in Title Suit No.08 of 2011 *(Nil Kumar Dahal and Another v. Indira Dahal and Others)*, a Suit for Declaration, Recovery of Possession, Injunction and other Consequential Reliefs, against the Respondents No.1 to 4 herein, who were the Defendants No.1 to 4 in the said Title Suit. The learned trial Court on consideration of the evidence and all materials on record dismissed the

Suit of the Appellants, by the impugned Judgment, dated 26.07.2017. Dissatisfied thereof this Appeal has arisen.

2. Parties shall hereinafter be referred to in their order of appearance before the learned trial Court.

3. The Plaintiffs are blood brothers being the sons of one Devi Prasad Dahal. The Defendant No.1 is their step mother and the Defendant No.4 is their niece, being the daughter of their deceased step brother, Bal Krishna Dahal, the son of Defendant No.1 and the Plaintiffs father. Defendant No.4 is represented by her guardian Devi Kala Sharma. Defendants No.2 and 3 are Government officials *inter alia* concerned with registration of land. The Plaintiffs claim to be governed by the Mitakshara School of Hindu Law. The dispute between the parties pivots around the *"jiwni"* land described in the Schedule to the Plaint, kept aside by their late father from the ancestral properties, for his upkeep and sustenance during his lifetime at Raley Block, East Sikkim, after partitioning the ancestral properties amongst his sons. By the *"Banda Patra"* ("Partition Deed"), Exhibit "A," dated 17.05.1985, their father devised dual conditions for the *"jiwni"* land to be passed on to his sons i.e. *"fathers "jiwni" share would go to the son who would look after and perform death rites."* On his passing on 23.09.2001, the Plaintiffs and the father of the Defendant No.4, each laid claims to the said *"jiwni"* land on grounds that each of them fulfilled the conditions laid out in Exhibit "A." Defendant No.1, for her part, while denying governance by the Mitakshara School of Hindu Law, claims the property on grounds that she has been in unencumbered physical possession of the property since the execution of Exhibit "A" and exercising all rights over it as its owner, sans interference from any quarter.

4.(i) Undisputedly, the property is ancestral having belonged to the Plaintiffs great-grandfather, one Parmananda Bahun. He had three sons Bishnu Lall (grandfather of the Plaintiffs), Purananda and Lok Nath. Bishnu Lall and Lok Nath passed away before the properties could be partitioned, Lok Nath having died issueless, as a result, the properties came to be partitioned amongst the four remaining sons of Bishnu Lall (out of his five sons) and Purananda Bahun. One of the sons of Bishnu Lall was their father Devi Prasad.

(ii) According to the Plaintiffs, on 26.03.2010, the Defendant No.1, who also allegedly maintains her Nepalese citizenship, filed an application before the District Collector (Defendant No.2), East Sikkim, seeking mutation of the *"jiwni"* land to her name from that of Devi Prasad. Despite objections raised by the Plaintiffs, by the impugned Order dated 03.11.2010, the Defendant No.2, allowed mutation of the *"jiwni"* land in the name of Defendant No.1 and ordered that Plots bearing No.450 and 452 measuring an area of 0.3050 hectares at Raley Khesey Block, be mutated in the name of the Defendant No.1 although Plot No.452 was already mutated in the name of the Plaintiff No.2, as his share, vide Exhibit "A." That, the Order lacked jurisdiction as the Defendant No.2 was not vested with powers to decide Title disputes and exhibited lack of application of mind for ordering mutation of Plot No.452 in the name of the Defendant No.1. That, as the Plaintiffs have fulfilled the dual conditions laid down in Exhibit "A," they are entitled to the *"jiwni"* land to the exclusion of Defendant No.1 and Defendant No.4, the latter allegedly having no *locus* to claim a share in the testamentary disposition as her father (Bal Krishna) was a Nepalese citizen and had passed away before the issue of sharing of *"jiwni"* land came up for consideration. Besides, the Partition Deed nowhere mentions that a daughter or granddaughter is entitled to the *"jiwni"* land. That, when proceedings were taken up before the Defendant No.2, the Defendant No.1 had stated that her son Bal Krishna had two sons therefore it is unclear as to how Defendant No.4 has now emerged as the legal heir of Bal Krishna. The Plaintiffs also objected to the Guardianship Certificate issued to the guardian of Defendant No.4 alleging that she too is a Nepalese citizen. Hence, the prayers in the Plaint which are extracted hereinbelow;

> *"In the circumstances the plaintiffs pray for a Decree:*
>
> *i.* *Declaring that the defendant no0*(sic)*.2 has no right, title and authority to pass an Order*(sic) *dated 03/11/2010;*
>
> *(i)A* *Declaring that late Bal Krishna Dahal predeceased his father and having waived to perform certain obligations towards father, as such, his legal heirs has*(sic) *no right, title and interest over the 'jiwni*

land'; (i)B Declaring that defendant no.4 not being son of late Devi Prasad Dahal has no right, title and interest over the 'Jiwni land';

(i)C Declaring that a portion of the 'jiwni land' cannot and shall not be mutated in the name of defendant no.4;

(i)D Declaring that the Guardianship Certificate obtained by Smt. D.K. Sharma by misrepresentation of facts is liable to be set aside and cancelled.

(i)E Praying for recovery of possession of Jiwni land from defendant no.1.

(i)F Declaring that the defendnat(sic) *no.1 being a Nepal subject has no right to claim any share of the suit property.*

ii Declaring that the Order dated 03/11/2010, i.e. Annexure-15 to be null and void and the same is nonest;

iii. Declaring that the Order dated 03/11/2010, i.e. Annexure 15 be set aside and quashed.

iv. Declaring that the plaintiffs are only entitled for the jiwni land that is Plot no.450;

v. Declaring that the schedule property cannot and shall not be mutated in the name of the defendant no.1;

vi. In the mean time if the Schedule property is mutated/transferred in the name of the defendant no.1 then to set aside, quash and cancel such mutation/ order of mutation;

vii. Declaring that the plaintiffs have their right, title and interest on the Schedule Property

viii. A permanent injunction

(a) restraining the defendant no.3 from mutating/transferring the Schedule Property in the name of Defendant No.1;

ix. A temporary injunction in terms of Prayer no.(X);

x. Any other relief or reliefs as this Honble Court may deem fit and proper."

5. Contesting the claims of the Plaintiffs, the Defendant No.1 while denying that neither she nor her son were citizens of Nepal or that they were governed by the Mitakshara School of Hindu Law, averred that they were governed by the 'Law of the land" which did not differentiate between male and female heirs. The Plaintiff No.1 had voluntarily left the *"mul ghar"* ("main house") in 1983-84 as he did not get along with his father and the Plaintiff No.2 left after the execution of Exhibit "A." Consequent thereto, it fell upon her son Bal Krishna to take care of the family and Devi Prasad financially as he was ailing and bedridden for almost a decade, with no moral or financial support from the Plaintiffs. All medical expenses and expenses for death rites were arranged by the Defendant No.1 and her son by borrowing money from their well wishers. The Defendant No.1 asserts that she is entitled to fifty percent of her husbands property as per the "Law of the land" while the Plaintiffs have no such entitlement on their failure to fulfill the conditions in Exhibit "A" which, according to her, were *"to look after their parents and perform death rites."* She denies that the Defendant No.2 had no jurisdiction to issue the impugned Order or that only "sons" are entitled to the *"jiwni"* land. That, the entire Plot No.452 does not belong to the Plaintiff No.2 as his Plot is numbered "452/1192" which measures 0.325 hectares, while Plot No.452 measures 0.560 hectares. That, the cause of action arose after the completion of the forty-five days death ritual of the deceased and hence the Suit is barred by limitation, has no cause of action and is undervalued and on these grounds, liable to be dismissed.

6. Defendant No.4, the minor daughter of late Bal Krishna Dahal, was abandoned by her mother after her fathers death and is thus represented by

her paternal aunt and legal guardian Devi Kala Sharma, the sister of Bal Krishna, claiming to be a *bona fide* Sikkimese. She had obtained a Guardianship Certificate from the Family Court. In pith and substance, the Written Statement of the Defendant No.4 is similar to and reiterates the averments made by the Defendant No.1. According to her, the property kept as *"jiwni"* is the land on which the main house stands and has been in the unencumbered physical possession of the Defendant No.1 after the death of her grandfather, without objection or interference from any quarter including the Plaintiffs, hence, the Defendant No.1 is entitled to fifty per cent of her late husbands property as per the Law of the Land.

7. The Defendants No.2 and 3 had no Written Statements to file.

8. It is essential for clarity to recapitulate here that earlier in the same matter i.e. Title Suit No.08 of 2011, the learned trial Court vide its Judgment dated 30.11.2013, concluded that the Plaintiffs are entitled to one-third share each from the *"jiwni"* land which was in the possession of the Defendant No.1. Calling in question the said decision, the Defendant No.1 was before this Court in Appeal being Regular First Appeal No.04 of 2014 (*Indira Dahal v. Nil Kumar Dahal and Another)*. The Appellant therein (Defendant No.1 herein) argued that the Suit ought to have failed on account of non-joinder of necessary parties as the son of Bal Krishna was not made a party to the Suit. This Court vide its Judgment, dated 22.04.2016, in the said RFA, remanded the matter back to the learned trial Court for impleadment of the legal heirs and successors of late Bal Krishna Dahal. The Plaintiffs filed their Amended Plaint, impleading the daughter of late Bal Krishna as Defendant No.4 in the instant Suit. The Defendants No.1 and 4 also filed their amended responses and the learned trial Court resettled the Issues for determination after the remand, as follows;

> *"1. Whether the Suit is maintainable?*
>
> *Onus on Plaintiffs.*
>
> *2. Whether the Plaintiffs have right, title and interest in the suit property i.e., 'jiwni land' being plot No.450?*
>
> *Onus on Plaintiffs.*

3. *Whether the Plaintiffs are entitled to recover the suit land i.e. the 'jiwni land' from the possession of the Defendant No.1?*

   Onus on Plaintiffs.

4. *Whether the „jiwni land can be mutated in the name of the Defendant Nos.1 and 4?*

   Onus on Defendant Nos.1 and 4. (Issue No.4 modified vide Order dated: 21.06.2016)

5. *Whether the Defendant Nos.1 and 4 are entitled to any share in the 'jiwni land' as per 'banda patra' dated: 17.05.1985?*

   Onus on Defendant Nos.1 and 4.

6. *Whether the Defendant Nos.1 and 4 have already got their shares as per 'banda patra' dated 17.05.1985?*

   Onus on Plaintiffs. (Modified vide order dated: 21.6.2016?

7. *Whether the Plaintiffs have looked after and performed the death rites of the late Devi Prasad Dahal?*

   Onus on Plaintiffs.

8. *Whether Devi Kala Sharma has right to act as a guardian of the minor i.e. Defendant No.4 in force of*(sic) *Guardianship Certificate?*

   Onus on Defendant No.4.

9. *Whether Devi Kala Sharma has obtained the guardianship certificate fraudulently?*

   Onus on Plaintiffs. (Issue framed vide Order dated: 21.6.2016)

10. Whether the Defendant No.1, being the wife of Late Devi Prasad Dahal have(sic) *any right, title and interest over the property recorded in the name of Late Devi Prasad Dahal?*

Onus on Defendant No.1.

11. To what relief or reliefs, if any, are the Plaintiffs entitled?

Onus on Plaintiffs."

9.(i) The Plaintiffs, in order to establish their case, before the remand, had examined themselves as PW1 and PW2 and four other witnesses being Kunta Maya Dahal *(she was variously numbered as "PW3" and "PW2" hence, hereinafter for convenience shall be referred to by name)*, PW3 Man Bahadur Kharka, PW6 Krishna Prasad Sapkota and PW7 Tanka Maya Adhikari. After remand, the Plaintiffs again examined themselves as PW1 and PW2 and one Laxuman Nepal, *(son of Krishna Lall Nepal)* as "PW1" and Ram Chandra Koirala as "PW2." Since Plaintiffs have also been numbered as "PW1" and "PW2," the witnesses above shall also be referred to by their names to avoid confusion.

(ii) The Defendant No.1, before the remand, had examined herself as DW1, Tika Devi Sharma as DW2, Madhav Prasad Adhikari *(he was variously numbered as "DW1" and "DW3" hence, hereinafter shall be referred to by name)* and Dol Nath Gautam *(he was variously numbered as "DW3" and "DW4" hence, hereinafter for convenience shall be referred to by name)*. After remand, she examined herself as DW1, Dhan Maya Adhikari as DW2, Dol Nath Gautam as DW3, Punya Prasad Adhikari *(witness not numbered)* and Ramesh Kumar Dahal as DW4.

(iii) The Defendant No.4 examined one Laxuman Nepal, son of Jai Narayan Nepal as DW1 *(to be distinguished from Laxuman Nepal, son of Krishna Lall Nepal, witness of the Plaintiffs)*, Madhav Prasad Adhikari as DW2, Tika Devi Sharma as DW3, Bishnu Khatiwada as DW4 and her legal guardian (Devi Kala Sharma) *(witness not numbered)*.

(iv) Defendants No.2 and 3 had no witnesses to examine.

(v) It may be remarked here that the numbers allotted to the witnesses by the learned trial Court are slipshod and rather unhappily maintained, which should be discouraged. Due care ought to be taken by the concerned Court while numbering witnesses to avoid any conundrum in referring to them in the Judgment either by the learned trial Court itself or by the Appellate Court. The learned trial Court is expected to heed to this suggestion.

10. The learned trial Court while taking up the Issues for consideration, took up Issue No.7 first and concluded that although the Plaintiffs did perform the death rites of their father, however, the evidence on record reflected that they had not taken care of him during his lifetime including the time of his ailment and therefore did not meet the dual conditions laid out in Exhibit "A." The Issue was decided against the Plaintiffs. Issue No.2 was next taken up for consideration and it was concluded that while the Plaintiffs had only performed the death rites of their father, late Bal Krishna had performed the death rites and also taken care of their father by incurring expenditure for their fathers treatment vide loans obtained from different persons and was, thus, entitled to the *"jiwni"* land to the exclusion of the Plaintiffs. This Issue also went against the Plaintiffs. Issues No.4, 5, 6 and 10 were taken up together and relying on the provisions of the Sikkim Succession Act, 2008, the learned trial Court held that the Defendant No.4 and the Defendant No.1 would be eligible to inherit the properties left behind by Bal Krishna, in equal portions and the said properties should be mutated in their names. While deciding Issues No.8 and 9, it was concluded that there was nothing to suggest that the Guardianship Certificate was obtained by Devi Kala Sharma fraudulently and that the learned Family Court, East Sikkim had found Devi Kala Sharma competent to be the guardian of the minor Defendant No.4 therefore it could not be held that she had no such right. These Issues were also decided against the Plaintiffs. Issues No.1, 3 and 11 were taken up together and the Court concluded that the Plaintiffs are not entitled to the concerned *"jiwni"* land or its recovery. That, the Suit filed by them was clearly not maintainable and was thereby dismissed.

11.(i) Advancing his arguments for the Plaintiffs, learned Senior Counsel walked this Court through the evidence of the parties and their witnesses as well as the findings of the learned trial Court and contended that a careful scrutiny of Exhibit "A" reveals that vide the document, Devi Prasad made

no provision for the Defendant No.1 and he was concerned with bequeathing the *"jiwni"* property on his sons only. That, Defendant No.1 has falsely laid claim to it sans any intention of Devi Prasad.

(ii) That, the Defendant No.2 not being a Civil Court, has passed the impugned Order, dated 03.11.2010, Exhibit 12, illegally ordering mutation of the *"jiwni"* land in favour of the Defendant No.1, in the teeth of the conditions laid down in the Partition Deed, Exhibit "A."

(iii) That, the Defendant No.1, besides being ineligible for the property, holds dual citizenship, being a Nepalese citizen also. Hence, the claim of the Defendant No.1 seeking mutation of the property and the Order of the Defendant No.2, dated 03.11.2010, have no legal validity.

(iv) That, Issues No.4, 5 and 6 ought to have been decided in favour of the Plaintiffs and *"jiwni"* land granted to them, they having fulfilled both conditions mentioned in Exhibit "A."

(v) That, the evidence reveals that the Plaintiffs were driven out from the main house by an intolerant Defendant No.1 with a *"khukuri"* (sharp edged weapon) and they thus had inimical relations, which their father was aware of. Despite the said circumstances, the Plaintiffs were expected to and did take care of their father although living away from the main house. After being driven out, the Plaintiff No.1 had to take shelter consecutively in the house of one Kunta Maya Dahal, Krishna Lall Nepal and Rinzing Tongden. Thereafter on passing his Class VIII, he secured Government employment. The Plaintiff No.2 similarly was constrained to leave the main house due to the ill-treatment of his father and step-mother and had taken shelter in the house of his sister, PW7 Tanka Maya Adhikari, who has substantiated this fact. Thus, the Plaintiffs were compelled to leave the main house which was not of their own volition. In spite of living separately from the main house, the Plaintiff No.1 replaced its thatched roof with GCI Sheets, this has been fortified by the evidence of PW6 Krishna Prasad Sapkota and PW7 Tanka Maya Adhikari and was not demolished in cross-examination.

(vi) While referring to the observation of the learned trial Court in Issue No.7, learned Senior Counsel contended that in fact late Devi Prasad used to visit both Plaintiffs in the absence of the Defendant No.1 and they extended

financial help to him for the purposes of his medication and clothing. They also visited him when he was ill and this evidence has remained unimpeached. As their father was compelled to live with Defendant No.1 and her son Bal Krishna, the Plaintiffs could not take care of him directly but did so whenever the occasion arose. Devi Prasad left no documentary evidence to suggest that the Plaintiffs did not take care of him. That, the Defendant No.1 failed to examine any Doctor to establish that Devi Prasad was ailing for a decade while Defendant No.4, in cross-examination, could not stand by her evidence in this context. No Medical Certificates suggesting that Devi Prasad was ailing and bedridden were also furnished. DW Dol Nath Gautam, in fact, was only eleven years in 1985 when the Plaintiff No.1 was driven out but deposed that he was aware of the entire circumstance in which the Plaintiffs left the house therefore he cannot be said to be a truthful witness. The four Defence witnesses are also unreliable as their evidence were verbatim reproduction of each others statements.

(vii) The learned trial Court while deciding Issues No.1, 2, 3, 7 and 11 against the Plaintiffs failed to appreciate the uncontroverted evidence of their witnesses.

(viii) PW Kunta Maya Dahal affirmed that the annual death rites were observed by the Plaintiffs besides stating that the Plaintiffs were present beside the body of their late father immediately after his death and her evidence remained uncontroverted as also the evidence of PW3 Man Bahadur Kharka who deposed about Devi Prasad meeting the Plaintiffs. None of the DWs have disputed the evidence to the effect that the Plaintiffs performed the death rites of their father.

(ix) The learned trial Court while concluding that the Plaintiffs had failed to prove that they maintained and looked after their late father did not discuss the yardstick required for such maintenance. That, the dual conditions were inserted into Exhibit "A" despite their fathers knowledge that the Plaintiffs lived separately from him which goes to establish that he had acknowledged that they had taken care of him during his lifetime. That, Bal Krishna had an advantageous position as he continued to live with his parents even after the partition and thereby could look after them directly. The learned trial Court observed that the Plaintiffs had failed to prove through documentary evidence that they had taken care of their father. In doing so, the Court failed to consider that children do not maintain books of

accounts while rendering financial assistance to take care of their parents. Nor did the Court consider that the evidence of the witnesses pertaining to the Plaintiffs visiting their father, were not controverted in crossexamination.

(x) That, the observation of the learned trial Court regarding Hindu Law by Raghavachariar **[N.R. Raghavachariar's Hindu Law]** is totally misconceived and out of context.

(xi) That, reliance on the Sikkim Succession Act of 2008 by the learned trial Court, is also erroneous as the Law was never enforced in the State of Sikkim.

(xii) In view of all the facts and circumstances and the evidence on record, the prayers in the Plaint be granted and the impugned Judgment and Decree of the learned trial Court be set aside as the Plaintiffs have proved that they complied with the terms of Exhibit "A" with regard to the *"jiwni"* land.

12.(i) Learned Counsel for the Defendant No.1, repudiating the arguments of learned Senior Counsel for the Plaintiffs, contended that the Plaintiffs had filed the Suit only on their failure to obtain a favourable Order from the Defendant No.2, despite knowing fully well that the Plaintiff No.1 had failed to step into the main house from the year 1983-84.

(ii) Learned Counsel also advanced the contention that the Plaintiffs had voluntarily left the house and separated from their father and the Defendant No.1.

(iii) That, when their father was ailing for almost a decade, Bal Krishna along with the Defendant No.1 tended to him, providing for the house financially and also for his treatment, which has been extracted in the evidence of the Defendant No.1 duly supported by the evidence of her witnesses and of Defendant No.4.

(iv) On his death, the Plaintiffs came reluctantly to the main house only on the request of the village elders and lit their fathers funeral pyre but offered no financial assistance. The evidence of the Defendant No.1 and her witnesses establishes as much. Contrarily, both Plaintiffs have no evidence to establish that they supported their father during his illness, took care of him in the Hospitals or contributed financially or morally during his illness.

(v) It was contended that the Plaintiffs, by virtue of Exhibit "A," had already received sufficient landed property while the Defendant No.1, despite her contribution to the family, has not inherited any property and she is entitled to fifty per cent of her husbands property as per the Law of the land.

13.(i) It was the next argument of the learned Counsel that the Plaintiffs had, only in the second Amended Plaint, at Paragraph 22 "G," spun out a new story of having taken care of their father. To support this in evidence, sans pleadings, they deposed that the thatched roof of the main house was replaced by the Plaintiff No.1 and that he was driven out by the Defendant No.1 and his father with a *"khukuri."* That, it is a well settled principle of Law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. Such evidence is therefore to be disregarded. On this aspect, reliance was placed on ***Govind Singh v. Harchand Kaur***[1], ***M. Chinnasamy v. K.C. Palanisamy and Others***[2] and ***Union of India v. Ibrahim Uddin and Another***[3].

(ii) That, even if the roof had been replaced in 1978-79 as contended, it is evident that the Plaintiff No.1 was living in the main house at that time. The Plaintiff No.1 has admitted that he lived separately from his father and visited the house only on 23.09.2001 on hearing of his fathers death. His further admission was that no custom in their family debars the females from shares in the family property and that none of his sisters were married when Exhibit "A" was executed. The Plaintiff No.2 also admitted to living separately from his father. That, the evidence of the Plaintiffs witnesses failed to support that of Plaintiff No.1 with regard to his replacing the thatched roof, while the evidence of PW7 Tanka Maya Adhikari proves that it was not only the sons of Devi Prasad but all the children of the deceased, numbering fifteen, who performed his death rites.

(iii) It was further canvassed by learned Counsel that the Plaintiffs have to prove their case "beyond a reasonable doubt" and the Plaintiffs must stand or fall on their own case. On this count, learned Counsel sought assistance from the ratio in ***Kiran Limboo v. Kussang Limboo***[4].

---

[1] AIR 2011 SC 570
[2] (2004) 6 SCC 341
[3] (2012) 8 SCC 148
[4] 2020 SCC OnLine Sikk 2

(iv) Reliance was also placed on the provisions of Order VII Rules 1 and 3 and Order II Rule 2 of the Code of Civil Procedure, 1908 ("CPC") and it was urged that the Suit must include the whole claim but the Plaintiffs have only sought for a declaration that they are entitled to the *"jiwni"* land.

14.(i) DW Punya Prasad Adhikari, the witness for the Defendant No.1, has deposed that Defendant No.1 did not ill-treat the Plaintiffs. Placing reliance on the ratio of ***Karedla Parthasaradhi v. Gangula Ramanamma (Dead) Through Legal Representatives and Others***[5] and ***Sadhu Singh v. Gurdwara Sahib Narike & Ors.***[6], it was contended that the wife is the Class I heir of her husband and entitled to his properties on his death. That, the Hindu Succession (Amendment) Act, 2005 and Section 6 of the Act, in particular, removes discrimination by giving equal rights to daughters/widows in the Hindu Mitakshara coparcenary property for which strength was drawn from ***Vineeta Sharma v. Rakesh Sharma***[7]. That, accordingly the Defendant No.1 and the Defendant No.4 are entitled to fifty per cent each of the *"jiwni"* land despite the conditions laid down in Exhibit "A." Reliance was placed on ***Anar Devi and Others v. Parmeshwari Devi and Others***[8].

(ii) Arguments were also advanced denying that Defendant No.1, late Bal Krishna Dahal and Devi Kala Sharma were citizens of Nepal. In this context, learned Counsel placed reliance on ***State of Andhra Pradesh v. Abdul Khader***[9].

(iii) That apart, the Plaintiffs are well settled in life being Government employees and have received their respective shares of the property.

(iv) That, this Court in its Judgment, dated 22.04.2016, in *"**RFA No.04 of 2014 (Smt. Indira Dahal v. Shri Nil Kumar Dahal and Another)**"* had held that *"…Indisputably, Bal Krishna Dahal used to live with his parents, looked after them and had also performed the death rites of his father along with……"* Hence, the observations of the learned trial Court in the impugned Judgment requires no interference.

---

[5] AIR 2015 SC 891
[6] AIR 2006 SC 3282
[7] MANU/SC/0582/2020
[8] AIR 2006 SC 3332
[9] AIR 1961 SC 1467

15. Learned Counsel Ms. Kunzang Choden Lepcha, appearing for the Defendant No.4 made no verbal submissions but filed her written synopsis of arguments reiterating the facts as averred in the pleadings and in sum and substance, also reiterating the arguments advanced by learned Counsel for the Defendant No.1. Learned Counsel led this Court through the evidence of the various witnesses and ultimately contended that the Defendant No.1, besides the Defendant No.4, is also entitled to fifty per cent of the *"jiwni"* land.

16. Learned Additional Advocate General for State-Respondents No.2 and 3 had no submissions to make.

17. The submissions advanced by learned Counsel for the parties were heard at length and duly considered. The pleadings, all evidence, documents on record, the impugned Judgment and the citations placed at the Bar have also been perused.

18.(i) Before embarking into a discussion on the merits of the matter, it is essential to point out here that the averments made by both Defendants No.1 and 4 in Paragraph "17" of their respective written statements *inter alia* reflects as follows;

> "**17**. ……..The said two pre conditions which are also acknowledged by the Honble High Court in its Judgment dated 22.04.2016 passed in RFA No.04 of 2016 between Smt. Indira Dahal versus Shri Nil Kumar Dahal & another are "look after the parents and also perform death rites" which were not fulfilled by the Plaintiffs. **It is only Defendant No.1 and her son, Bal Krishna Dahal who fulfill both this** *(sic 'these')* **pre conditions and hence entitled to the JEWNI land as per the Hon'ble High Court**…"
>
> **(Emphasis supplied)**

(ii) Learned Counsel for the Defendant No.1 in his written arguments has *inter alia* contended as under;

> "……And finally when one comes to the case of respondent No. 4, it is not in doubt that **Late Bal Krishna Dahal** (**the respondent No. 4 before this Hon'ble Court**) had taken care of Late

> Devi Prasad Dahal during his lifetime and he had also performed his death rites thus fulfilling the twin conditions laid down in the Banda Patra.
>
> This was the observation of this Honble Court way back on **22.04.2016** when **Late Bal Krishna Dahal** was not even impleaded as respondent No. 4 in the instant case in **Judgment dated 22.04.2016** passed in **R.F.A. No. 4 of 2014** at **paragraph 15** concluded.-
>
> *"What stares one in the face is that the Appellant (Respondent No. 1/Defendant No. 1) bore one son Bal Krishna Dahal to Devi Prasad Dahal. It appears that the said Bal Krishna Dahal died in an accident in Nepal leaving behind his widow and a daughter.* ***Indisputably, Bal Krishna Dahal used to live with his parents, looked after them and had also performed the death rites of his father*** *along with his step brothers, the Respondent……..".*"

(iii) The Defendant No.4, in her written arguments stated that the Defendant No.1, at Paragraph "3" of her Additional Evidence-on-Affidavit (Exhibit D1/G), has affirmed that, "*The Honble High Court in its Judgment dated 22.04.2016 passed in RFA No. 04 of 2016 came to the conclusion that only my son, Bal Krishna Dahal fulfill the two conditions "look after the parents and also perform death rites", specifically laid down in the Banda Patra dated 17.05.1985* ***Exhibit D1/A*** *is the Judgment dated 22.04.2016 passed in RFA No. 04 of 2016.*"

19. It is imperative to clarify here that the interpretation given to the Judgment of this Court in RFA No.04 of 2014 *(supra)* as reflected in the averments of the Written Statements of the Defendant No.1 and Defendant No.4 and their written arguments, are misleading, erroneous and mischievous. It is necessary to refer herein to the Judgment and extract the relevant portion thereof;

> "**15**. What stares one in the face is that the Appellant bore one son Bal Krishna Dahal to Devi Prasad Dahal. It appears that the said Bal Krishna

Dahal died in an accident in Nepal leaving behind his widow and a daughter. Indisputably, Bal Krishna Dahal, used to live with his parents, looked after them and had also performed the death rites of his father **along with his step brothers**, the Respondents. Although the Learned Trial Court in its Judgment has alluded to the fact that Bal Krishna Dahal looked after and maintained his late father as well as performed the death rites, however, in paragraph 56 of the impugned Judgment has recorded *inter alia,* that *"……..…..*.*It may be necessary to mention that though the younger son of late Devi Prasad Dahal, Bal Krishna (since deceased) also maintained/looked after and performed the death ritual of their father, however, neither his legal heir and successor were made parties in the present suit nor any of them came as interested party to claim the said Jiwni land, as such, it is not necessary to go into the details."*

……..……...

23. It is hereby ordered that the legal heirs and successors of Bal Krishna Dahal be impleaded as Defendants in the Title Suit which shall be readmitted to its original number in the Register of Civil Suits of the Learned Court of the District Judge, Special Division-I, Sikkim at Gangtok. The Suit be determined as per Law within six months from today in view of the fact that the Title Suit is of the year 2010."

(Emphasis supplied)

From a reading of the above, it is clear that this Court had observed that Bal Krishna lived with his parents, looked after them and also performed the death rites of his father "along" with his step brothers i.e. the Plaintiffs. The adverb "along" which obtains in the relevant sentence, has to be read in its correct perspective. It is clear that no decision with regard to the merits

of the case has been made, as sought to be insinuated by the Defendant No.1 and Defendant No.4. The facts and circumstances at that juncture were duly considered and direction issued by this Court to implead the descendants of late Bal Krishna on account of his admitted role in his family. The Judgment, by no stretch of the imagination stated that only Bal Krishna fulfilled both the conditions. Such an erroneous interpretation cannot be given to the decision of this Court in the RFA *supra* and parties ought to refrain from such misrepresentation.

20. That having been said, while perusing the averments of the parties in their pleadings, it is clear that the Plaintiffs claim to be governed by the Mitakshara School of Hindu Law while the Defendants No.1 and 4 deny it, asserting that they were governed by the Law of the land. The learned trial Court ought to have settled an issue for determination on this point in view of the provisions of Order XIV of the CPC, which *inter alia* provides that Issues arise when a material proposition of fact or Law is affirmed by the one party and denied by the other. Nonetheless, this matter shall be taken up for discussion herein. Accordingly, the questions that fall for consideration before this Court are;

(i) Whether the Mitakshara School of Hindu Law was applicable to the Plaintiffs?;

(ii) Who is entitled to succeed to the *"jiwni"* land of deceased Devi Prasad Dahal?; and

(iii) Whether the Defendant No.1 is entitled to fifty per cent of the *"jiwni"* land despite the conditions laid down in the testamentary disposition of the Partition Deed, Exhibit "A"?

21. Taking up the first question framed hereinabove, in the first instance, we may relevantly examine whether there are Laws of Succession in the State protected by the provisions of Article 371-F of the Constitution of India ("Constitution"). Necessary reference is made to the provisions of Article 371-F(k), (l) and (n) of the Constitution which provides;

> "**371-F. Special provisions with respect to the State of Sikkim**.—Notwith-standing anything in this Constitution,—
>
> ……......………………………………………………

(*k*) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;

……

(l) for the purpose of facilitating the application of any such law as is referred to in clause (k) in relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law;

……

(n) the President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a State of India at the date of the notification;

……."

These provisions are self-explanatory and have been extracted to elucidate the position of the old Laws in Sikkim as well as provisions existing for extension and enforcement of the Laws of the country to the State, consequent upon the 36th Amendment Act to the Constitution, whereby Sikkim became a part of the Indian Union.

22. It was the vehement argument of learned Counsel for the Defendant No.1 that the parties are bound by the Law of the land which do not

differentiate between men and women in terms of Succession thereby entitling Defendant No.1 to fifty per cent of her husbands property. No specific Law was brought forth for the perusal of this Court by the Defendant No.1. It may be noticed that *lex terrae* or Law of the land refers to Laws within a country or region, but no effort was made by the Defendant No.1 to clarify either the "Law" or the "land" referred to in view of the aforeextracted provisions of Article 371-F of the Constitution. Before the learned trial Court, reliance had been placed by the Defendant No.1 on the Sikkim Succession Act, 2008, therefore it can be safely presumed that this was the Statute being referred to. The fate that this Law has met will be discussed later.

23. The contention of the Defendant No.1 was that both Plaintiffs in their cross-examination, admitted that they belonged to the Brahmin community and follow their community traditions and customs and were unaware of the words "Mitakshara School" or what it stood for.

24. In the light of the statement relating to customs and traditions extracted *supra* from the Plaintiffs in cross-examination, it would be relevant to examine what "Customs" are and the method of proof of such "Customs" for Courts to take it into consideration for the purposes of adjudication. In **Halsbury's Laws of England, (Fourth Edition), Volume 12(1)**, the attributes of "Custom" was enumerated as follows;

> "**606. Essential attributes**. To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin. These characteristics serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted.
>
> **[Page No.160]**
>
> **626. Nature of proof.** All customs of which the courts do not take judicial notice must be clearly

proved to exist, the onus of establishing them being upon the parties relying upon their existence. Proof must be made either by matter of record or by evidence of usage since time immemorial. Evidence to prove a custom must not only be consistent with the custom which is alleged, but must also prove a custom which is no wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest.

[Page No.177]

627. Usual method of proof. In proving an immemorial custom, the usual course taken is to call persons of middle or old age to state that in their time, usually at least half a century, the custom has always prevailed. This is considered, in the absence of countervailing evidence, to show that the custom has existed from all time. There are two sorts of countervailing evidence. First, other old person may be called to show that there was an interruption during the period spoken of by the first set of witnesses; secondly, evidence may be given that, from the nature of the case, it was quite impossible that such a right should have existed from time immemorial, or that there is some legal difficulty or obstacle in the way which makes the alleged assertion of the right incompatible with the law of the country. Whether the evidence supports the custom as alleged or not is a question of fact for the court. A custom possible in law, being reasonable and otherwise fulfilling the requisites of a good custom, may be established by very slender evidence.

[Page No.178]

The extracts *supra* throw light on what comprises “Customs” and the usual method of proof required.

25. In ***Ass Kaur (Smt.) (Deceased) by LRs. v. Kartar Singh (Dead) by LRs. and Others***[10], a two Judge Bench of the Honble Supreme Court observed that in the absence of any proof of custom, indisputably the Hindu Law would apply.

26. As far back as in 1908, in ***Daya Ram v. Sohel Singh***[11], the Chief Court of Punjab while dealing with the true effect of Section 5 of the Punjab Laws Act, 1872, Robertson, J held as follows;

> "In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamored of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not...' and it therefore, appears to me clear that **when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so Clause (b) of Section 5 of the Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause**."
>
> **(Emphasis supplied)**

27. In ***H.H. Mir Abdul Hussain Khan v. Bibi Sona Dero***[12], the question of custom came up for consideration in view of the difference in

[10] (2007) 5 SCC 561
[11] (1908) P.R. No.110 1906, F.B.
[12] MANU/PR/0125/1917

opinions of the Court of first instance and the Court of Appeal. The District Court held that the custom was established and the Court of the Judicial Commissioner of Sind decided that custom was not established. The Appeal arose from the latter decision and the Honble Supreme Court *inter alia* observed as follows;

> "**6**. ……It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognised in India (see Soorendronath Roy v. Mussamut Heeramonee Burmoneah (1868) 12 M.I.A. 81, although such a custom is unknown to the law of this country and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting-rights of inhabitants of a particular district are perhaps the nearest analogies in this country. .....
> ……
> **19**. In every case of this kind the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.
> ……"

A reading of this Judgment thus reflects that the Honble Judges were aware of the myriad of castes and customs of the country and that custom in one family may not necessarily be the custom of another family and thereby the lack of uniformity in customs. In other words, it is accepted in our country that every family may have their own customs but it is for the person asserting it to establish that such a custom exists by sufficient proof, as laid down in ***Daya Ram v. Sohel Singh*** and ***H.H. Mir Abdul Hussain Khan*** *(supra)*.

28. In ***Ujagar Singh v. Jeo***[13] the Honble Supreme Court held *inter alia* as follows;

> "**13**. It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under s. 57 of the Evidence Act however nothing need be proved of which courts can take judicial notice. Therefore it is said that if there is a custom of which the courts can take judicial notice, it need not be proved. Now the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in Raja Rama Rao v. Raja of Pittapur I.L.R. (1918) IndAp 148, in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case." When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under s. 57(1) of the Evidence Act. It appears to us that in the courts in the Punjab the expression "general custom" has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in Bawa Singh v. Mt. Taro A.I.R. 1951 Simla 239 and 13 MANU/SC/0187/1959 Sukhwant Kaur v. Balwant Singh A.I.R. 1951 Simla 242..
>
> .....
>
> **30**. It was then said that in the plaint it had been admitted by the respondent that there was a general custom as alleged by the appellant and so no proof of that general custom was required in this case. We do not think this contention is justified. No doubt in her plaint the respondent referred to a custom entitling her to succeed and termed it a special custom. We are unable to read the reference

[13] MANU/SC/0187/1959

to a special custom as amounting to an admission of a general custom or its terms.

……

41. As we have earlier said this observation was approved by the Judicial Committee in Abdul Hussain Khan v. Bibi Sona Dero I.L.R.(1917) IndAp 10. In Fatima Bibi v. Shah Nawaz I.L.R. (1920) Lah. 98., a case to which we have earlier referred, the Court allowed the plaintiff's sisters, who had based their claim on custom and not on the personal law, to fall back on Mohammedan law, the personal law of the parties, on their failure to establish the custom, no custom against them having been proved by the collaterals. **There are a number of other authorities, to which it is not necessary to refer, in which personal law was resorted to when no custom on either side was established. We agree that is the correct view to take**. We therefore think that even if the respondent had been unable to prove the custom in her favour she is entitled to succeed in the suit on the basis of the personal law of the parties, namely, the Hindu law."

(Emphasis supplied)

It thus follows that where custom is not established, the personal Law of the parties becomes applicable.

29. To be fair to the Plaintiffs, it was not their averment in the pleadings that their family had established customs for Succession. The statement, as already reflected above, came to be extracted in cross-examination in which both Plaintiffs made identical statements *viz.*;

"……..It is true that I belonged(sic) *to the Brahmin community and we follow our own traditions and customs as per the said community. It is true that I am not aware of the word Mitakshara School and I cannot say what it stands for. ……."*

However, as seen from the text of **Halsbury** *(supra)* and the catena of ratiocination referred to above, if a person claims governance by custom, he is to prove it to enable the Courts to apply it, failing which the personal Law of the parties will be applicable. Ironically, from the evidence on record neither have the Plaintiffs been able to establish by furnishing any evidence, the customs followed either in their community or specifically in their family nor has the Defendant No.1, for her part, been able to show any Law of the land which confers rights on her to acquire her husbands property.

30. Assuming that the reference made by the Defendant No.1 was to the Sikkim Succession Act, 2008, it may pertinently be pointed out here that a Division Bench of this High Court in ***Basanti Rai and Ors. v. State of Sikkim and Ors.***[14] was considering the legality and validity of the said Statute issued vide Notification No.22/LD/P/2008, dated 24.07.2008, of the Law Department, Government of Sikkim. In the said Writ Petition, the State Government in its Return, clearly stated that the Act is only on paper and has not yet been notified, as required, to bring the same into force and contended that the Petition was premature. This Court, on examining the reply filed by the State-Respondents, vide its Order, dated 31.07.2017, concluded as follows;

> "**4**. ……that the Sikkim Succession Act, 2008 is not yet enforced, the same having not been notified as yet. Consequently, Orders, if any, passed by the Authorities, in terms of the provisions of the Sikkim Succession Act, 2008, are declared null and void ab initio. Examination of the validity of an enactment, which is nonexistent, is not required, as it is premature.
> ……"

31. In the absence of any established custom of the parties pertaining to Succession, any State enactment occupying the field and the absence of personal Law, the quandary therefore would now be how the matter is to be adjudicated upon. At this juncture, it is thus imperative that we refer to the ratiocination of ***Sonam Topgyal Bhutia v. Gompu Bhutia***[15], decided on 14.06.1979, by a Division Bench of this High Court, comprising of M.S.

[14] 2017 SCC OnLine Sikk 123
[15] AIR 1980 Sikk 33

Gujral, C.J. and A.M. Bhattacharjee, J. The Court was concerned with a matter relating to Wills and whether Buddhists in Sikkim can legally make testamentary disposition. It was also specified that though this point was not taken up by any of the parties in their pleadings or otherwise but had cropped up during the hearing of the Appeal. The Court was of the opinion that the question would go to the root of the matter and was of general public importance in Sikkim as there was no judicial pronouncement of the Court or any other Court on this point. It was observed therein as follows;

> "**9**. There is no doubt that in Sikkim, there is, as yet, no statutory law authorising testamentary disposition. But as will appear from the unchallenged evidence of the witnesses appearing before us, in practice Wills had been and have been recognised, acted upon and given effect to in the Courts of Sikkim as valid modes of post-mortem disposition of properties and witnesses Sarki Bhutia, Karma Pintso Bhutia and T.D. Densapa have also referred to several instances of the execution of Will by Sikkimese-Buddhists. The question before us is whether Wills in Sikkim can be regarded to be valid and legal without any legislative provision to that effect. The Shastric Hindu Law did not recognise testamentary disposition and statutory provisions had to be made by and under the provisions of the Hindu Wills Act, 1870, empowering the Hindus to make Wills. Buddhism also favoured intestacy and as pointed out by the Privy Council in *Dwe Maung* v. *Khoo Haung Shein* (AIR 1925 PC 29 at p. 31), according to "the strict Buddhist view" "intestacy is compulsory". As the personal laws of the Hindus and Buddhists did not recognise testamentary disposition, doubts have arisen as to whether the Hindus and Buddhists in Sikkim can validly make Wills in the absence of legislative provisions.
>
> .....
>
> **26.** But though there is no legislation in Sikkim relating to Wills, the Courts in Sikkim have

followed and applied the provisions of the Indian Succession Act, 1925 in all matters relating to Wills including granting of Probates and Letters of Administration. The question, therefore, is whether the provisions relating to Wills in the Indian Succession Act, 1925, which have never been formally adopted in or extended to Sikkim by any formal legislative authority are to be regarded as laws in force in Sikkim? Salmond has defined law as a body of principles recognised and applied by the State in the administration of Justice and as to consist of "of the rules recognised and acted on by Courts of justice". Holland has defined law as "a rule of external human action enforced by a Sovereign political authority." Therefore, the provisions relating to Wills in the Indian Succession Act, 1925, having so long been "recognised" "applied" and "acted on" by the Courts of justice in Sikkim in the administration of justice in matters relating to Wills, are also to be regarded as Laws in force in Sikkim.

27. In other words the statutory laws relating to Wills as contained in the Indian Succession Act, 1925 have, as a result of their continuous and systematic recognition and application by the Courts in Sikkim, become the non-statutory laws of Sikkim. Law does not and need not always flow formally or directly from a legislative authority. For otherwise, personal laws, customary laws, common laws or even precedents cannot be regarded as laws. Reference in this connection may be made to a recent decision of Sikkim High Court in *Asharam Agarwala* v. *Union of India*, (reported in 1978 Sikkim LJ 18) where it has been held that though the Arbitration Act, 1940 has never been formally made applicable in Sikkim, yet the provisions of the said Act, having so long been recognised, applied and acted upon by the Courts of Justice in Sikkim in the administration of justice in matters relating to

Arbitration, are to be regarded as laws in force in Sikkim, though not as direct statutory laws. In dealing with the question as to whether such non-statutory laws could or can also create jurisdictions for the Courts to entertain applications, appeals and other proceedings under the said Act, it has been observed as hereunder:—

> "If as already noted, Courts in Sikkim have all along not only applied the provisions of the Arbitration Act in between the parties to arbitration but have also applied the provisions relating to entertainment of all applications and appeals as provided in the said Act, then the latter provisions also, as a result of application and recognition by Courts, became the laws in force within the meaning of Article 371-F(K) of the Constitution whereunder all laws in force in Sikkim immediately before the commencement of the Constitution (Thirty-Sixth Amendment) Act, 1975, shall continue in force until amended or repealed by a competent Legislature or other competent authority. In other words, if by and under the Laws of Sikkim, though not statutory, the Courts had been exercising the jurisdiction to entertain applications relating to arbitration matters and also appeals therefrom, such laws and jurisdiction have also continued and shall continue in force."

28. Following this decision, I would hold that not only the provisions relating to the execution, interpretation or effect of Wills in the Indian Succession Act, 1925, but all the provisions therein relating to Wills including the provisions relating to grants of Probate and Letters of Administration and

> also appeals and other proceedings therefrom have become the laws of Sikkim. ……"

32. On the same lines, in ***Bishnu Kala Karki Dholi and Others v. Bishnu Maya Darjeeni, Civil First Appeal No.8 of 1976,*** decided earlier on, *viz.* 06.03.1978 by the same Bench of this High Court, the two questions requiring determination in the Appeal were, whether a mortgager is entitled to file a Suit and to obtain a decree for redemption of mortgage, where a Deed of mortgage is invalid for want of registration and, if not, whether the mortgager is entitled in such a Suit to a decree for recovery of possession on proof of title. Speaking for the Court, Justice A.M. Bhattacharjee while considering and observing that the Transfer of Property Act had not been extended and enforced in the State of Sikkim then, held as follows;

> "**9.** ……The observation quoted above should be read with the observation of the Supreme Court in the above noted decision in *Namdeo v. Narmada Bai* (AIR 1953 Supreme Court 228 at p. 230) quoted hereinbelow:-
>
> > "It is axiomatic that the Courts must apply the principles of justice, equity and good conscience to transactions which come up before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. It follows therefore that the provisions of the Act which are but a statutory recognition of the rules of justice, equity and good conscience also governs those transfers."
>
> And when so read will lead to the conclusion that even though the Transfer of Property Act does not formally apply in Sikkim, the Courts in Sikkim, in discharging their paramount duty to act in the absence of statutory provisions, according to the principles of justice, equity and good conscience should reasonable*(sic)* and properly apply the

principles contained in Section 60 of the Transfer of Property Act relating to redemption of mortgage and unenforceability of any clog on the right of redemption. This is what was also done by the Rajasthan High Court in Dev Karan v. Murarilal (ILR 1958 Rajasthan 811) in a case arising from the former State of Alwar before the extension of the Transfer of Property Act thereto and this decision has been affirmed by the Supreme Court in Murarilal v. Devkaran (AIR 1965 SC 225) and relying in the observations made therein at page 231, I would hold that it would be reasonable to assume that the Civil Courts established in Sikkim, like Civil Courts all over India, were and are required to administer justice according to the principles of equity and justice where there was or is no specific statutory provision to deal with the question before them and, therefore, it would be just and proper to apply the principles contained in Section 60 of the Transfer of Property Act relating to the right of redemption and clog on the equity of redemption."

33. In ***Jas Bahadur Rai v. Putra Dhan Rai, 1978 (3) Sikkim Law Journal***, decided on 29.07.1978, the same Bench of this High Court, while considering whether the provisions of the Indian Easements Act, 1882, should be applied in Sikkim sans extension or enforcement of the Law, in the absence of any corresponding Law on the point, in Sikkim, held as follows;

"**3**. The Indian Easements Act, 1882, was never formally adopted in Sikkim prior to its incorporation in the Union of India; nor the same has been extended to Sikkim by any notification under Article 371-F (n) of the Constitution of India or otherwise; and neither there was nor there is any corresponding statutory law relating to easement or licence in force in Sikkim. But when a point for decision was not covered by the provision of any law in force in Sikkim, the Courts in Sikkim, from

long before its incorporation in the Union of India, have followed the principles of laws in force in India in deciding such a point, if such principles appeared to them to be based on or in consonance with the principles of justice, equity and good conscience. If this is characterized as making of laws by Courts, it may be pointed out that the very same thing was done by the Courts in India during the early British period when legislative laws in India were scanty and the Courts in India freely followed and adopted the principles of the English law in deciding points not covered by the provisions of the Indian laws in force. As is well-known, India was then a country which was almost empty of legislative laws and the void was to a great extent filled up by Courts through their decisions by importing the principles of English law, both common and statutory.

4. ….....……

5. The principles contained in the Section quoted above are no doubt based on justice, equity and good conscience as has been held by the Division Bench of the Allahabad High Court in Mathuri versus Bhola Nath (AIR 1934 Allahabad 517) and the principles of this section have been applied in those parts of India where this Easements Act does not expressly extend and apply. As I have already pointed out, the Courts in Sikkim have freely applied the provisions of Indian Laws in cases not specifically covered by the laws in Sikkim, if the relevant provisions of the Indian laws appeared - to them to be consonant with the principles of equity and justice. In my view, therefore, the provisions of Section 60, Indian Easements Act, 1882 can be invoked and should be applied in Sikkim in the absence of any corresponding law in Sikkim on the point. I would repeat that if this amounts to making of laws by Courts, the Courts in Sikkim will have to

continue to do so until the field is occupied or is substantially occupied by specific laws. ……"

34. In the decision of ***Durga Prasad Pradhan v. Palden Lama, Second Appeal No.1 of 1980***, decided on 03.06.1981, the Division Bench of this High Court while considering the submissions of Counsel for the Respondent that the Specific Relief Act of 1963 had not been extended to Sikkim and therefore did not apply to Sikkim, held as follows;

"**5**. ……It is true that the Specific Relief Act, 1963, does not apply in Sikkim and there is no statutory law in Sikkim on this subject. But it is now beyond doubt that even if an enactment does not extend and apply to any area *ex proprio vigore*, but the enactment contains provisions which are statutory embodiment of the rules of equity and justice, such provisions have been, are and may be applied by the Courts to transactions beyond such area, in the absence of any law operating therein. ……"

35. It may also be recounted here that Justice A.M. Bhattacharjee, J in his notes sent to the Law Commission of Sikkim, reported in **1978 (3) Sikkim Law Journal, at Page 4**, wrote as follows;

"……

The provisions of the Hindu Law and the Mahomedan Law having been so long applied, recognised, administered, enforced and acted upon by the State and its Judicial Organ, the Courts of Sikkim, the provisions so applied became laws in Sikkim and have continued as laws under the principle enunciated in those Privy Council and Supreme Court cases and have actually been continued as laws under the provisions of Clause (k) of Article 371F of the Constitution whereunder "all laws in force immediately before the applinted*(sic)* day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in

> force therein until amended or repealed by a competent Legislature or other competent authority." The provisions of the Hindu Law and the Mahomedan Law, therefore, to the extent they have been applied, recognised, administered, enforced and acted upon by the Courts in Sikkim before its incorporation in the Union of India, still continue as laws in force under the mandate of Article 371F (k). ……
>
> I am, therefore, of opinion that notwithstanding the absence of any statutory provisions making Hindu Law and Mahomedan Law applicable to Hindus and Mahomedans in Sikkim, the provisions of Hindu Law and Mahomedan Law would apply to Hindus and Mahomedans of Sikkim to the extent those have been applied, recognised, administered, enforced and acted upon by the Courts of Sikkim prior to its incorporation in the Union of India. ……"

36. Relying on the various ratio referred to hereinabove and on the bedrock of the reasoning thereon, it is evident that where there is no existing old Law on a particular subject in Sikkim or where the Law is scanty or inadequate, the Courts in Sikkim also being Courts of equity, justice and good conscience, have to turn to the Laws of the country. It is but apposite to notice that the Courts in Sikkim, even prior to being part of the Indian Union have followed principles of Law in force in India if the principles were based on justice, equity and good conscience, as already reflected in the plethora of ratio of this High Court referred to above. In ***Jas Bahadur Rai*** *(supra)*, it may be reiterated that it was observed as follows;

> "**5**.……In my view, therefore, **the provisions of Section 60, Indian Easements Act, 1882 can be invoked and should be applied in Sikkim in the absence of any corresponding law in Sikkim on the point**. I would repeat that if this amounts to making of laws by Courts, **the Courts in Sikkim**

> **will have to continue to do so until the field is occupied or is substantially occupied by specific laws**. ……"
>
> **(Emphasis supplied)**

Considering that the provisions of the Hindu Succession Act, 1956, has not been extended or enforced in the State, nor does any corresponding Statute occupy the field in the State, it would, in the circumstances be just and proper to look to and apply the principles contained in the Hindu Succession Act, 1956, for the purposes of considering matters relating to Succession in Sikkim, for persons to whom it applies as personal Law.

37. The parties are Hindu Brahmins. This is not disputed. Their father Devi Prasad divided the property amongst his three sons contemporaneously which was consented to by all without any objection. As under the Mitakshara Law, the father i.e. Devi Prasad had the power to divide the family property during his lifetime and exercised his power, as evident from Exhibit "A" which is admitted to by all parties, thus, for all intents and purposes, it can be gauged that their family was following the principles of the Mitakshara School of Hindu Law. The above discussions soundly answers the first question settled for determination by this Court.

38. Now to address the second question flagged, under the Mitakshara School of Hindu Law, each son and now daughters vide the Hindu Succession (Amendment) Act, 2005, in Section 6, are coparceners in their own right and upon birth, take an equal interest in the ancestral property, whether movable or immovable. Thus, being entitled to a share, they can seek partition. If they do so, the effect in Law is not only a separation of the father from the sons but a separation *inter se*, the consent of the sons is not necessary for the exercise of that power. However, no Hindu father joined with his sons and governed by the Mitakshara Law although vested with the power to partition the property can make a partition of the joint family property by Will. In ***Kalyani (Dead) by Lrs. v. Narayanan and Others***[16], the Honble Supreme Court has propounded this principle. Once partition is complete, the property then becomes the separate property of each of the coparceners, however, in the hands of the son, the property will be ancestral property and the natural or adopted son of that son will take

[16] 1980 Supp SCC 298

interest in it and be entitled to it by survivorship and joint family property. **[See Mullah's Hindu Law, 22nd Edition, Chapter XII]**. The Honble Supreme Court in ***C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar and Another***[17] considered the question as to where a Hindu, instead of requiring his self-acquired or separate property to go by descent, makes a gift of it to his son, or bequeaths it to him by Will, whether such property is the separate property of the son or whether it is ancestral in the hands of the son as regards his male and female issues. It was observed that if there are no clear words describing the kind of interest intended to be given, the Court would have to collect the intention from the language of the document, taken along with the surrounding circumstances in accordance with the established cannons of construction.

39. It is apparent from the records, that the parties are in agreement that the property partitioned amongst the Plaintiffs and the deceased Bal Krishna, were ancestral properties. Late Devi Prasad, during his lifetime, vide Exhibit "A," partitioned all movable and immovable property amongst his three sons, the Plaintiffs being his sons from his first wife and Bal Krishna being the son from his second wife, the Defendant No.1. He set aside some property for himself during the said partition, for his sustenance during his lifetime, known in common local parlance as *"jiwni."* Admittedly, Exhibit "A" was prepared by Devi Prasad in his full consciousness and consented to by his three sons, duly witnessed by the Panchayat and the village elders, who also affixed their signatures on the document along with the Plaintiffs. On partition, the share of Devi Prasad became his separate property, and he was free to dispose it off as he thought fit including bequeathing it by a Will. Exhibit "A" is thus, not only a Deed of Partition but a testamentary disposition for the *"jiwni"* property of Devi Prasad. On pain of repetition, it may be stated that vide Exhibit "A," Devi Prasad laid down conditions *viz. "fathers "jiwni" share would go to the son who would look after and perform death rites."* It needs to be clarified here that he has not mentioned "parents" as claimed by the Defendant No.1 and Devi Kala Sharma, guardian of Defendant No.4, in their evidence. In the scheme of Exhibit "A," no reference has been made to Defendant No.1 save to the effect that when the partition was executed, the "sons" were referred to as the "sons of first wife" and "sons of second wife" and not by their own names. On this aspect, in ***Reserve Bank of India v. Peerless General***

[17] AIR 1953 SC 495

Finance and Investment Co. Ltd. And Others[18], it was *inter alia* observed as under;

> "**33.** Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. …… No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. ……"

Further, in ***Anwar Hasan Khan v. Mohd. Shafi and Others***[19], the Honble Supreme Court *inter alia* held thus;

> "**8**. …… It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved."

The testamentary disposition of Devi Prasad of course, in no way, can be described as a Statute, nevertheless the principles enunciated above for

[18] (1987) 1 SCC 424
[19] (2001) 8 SCC 540

interpretation, may well be adopted for the purposes of interpreting the relevant portion of Exhibit "A." Thus, on the anvil of the said principles, a careful scrutiny of Exhibit "A" indubitably establishes that Devi Prasad was referring to himself only and none else for the purposes of the conditions laid down in the testamentary disposition.

40. While further considering Exhibit "A," it is evidently an unregistered document. The Sikkim State General Department Notification No.385/G, dated 11.04.1928, requires all documents such as mortgage and Sale Deeds and *"other important documents"* and Deeds to be registered and will not be considered valid unless they are duly registered. Nevertheless, it is now no more *res integra* that the Courts can look into unregistered documents more so, if it is a family settlement. The Honble Supreme Court in ***Thulasidhara and Another v. Narayanappa and Others***[20] held *inter alia* as follows;

> "**9.4**…… The High Court has refused to look into the said document and/or consider document dated 23-4-1971 (Ext. D-4) solely on the ground that it requires registration and therefore as it is unregistered, the same cannot be looked into. However, as observed by this Court in Kale [Kale v. Director of Consolidation, (1976) 3 SCC 119] that such a family settlement, though not registered, would operate as a complete estoppel against the parties to such a family settlement. ……
>
> **9.5.** As held by this Court in *Subraya M.N.* [*Subraya M.N.* v. *Vittala M.N.*, (2016) 8 SCC 705 : (2016) 4 SCC (Civ) 163] even without registration a written document of family settlement/family arrangement can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. In the present case, as observed hereinabove, even the plaintiff has also categorically admitted that the oral partition had taken place on 23-4-1971 and he also admitted that 3 to 4 panchayat people were also present. However, according to him, the same was not reduced in

[20] (2019) 6 SCC 409

> writing. Therefore, even accepting the case of the plaintiff that there was an oral partition on 23-4-1971, the document, Ext. D-4 dated 23-4-1971, to which he is also the signatory and all other family members are signatory, can be said to be a list of properties partitioned. Everybody got right/share as per the oral partition/partition. Therefore, the same even can be used as corroborative evidence as explaining the arrangement made thereunder and conduct of the parties. Therefore, in the facts and circumstances of the case, the High Court has committed a grave/ manifest error in not looking into and/or not considering the document Ext. D-4 dated 23-4-1971."

The Law having been thus settled, Exhibit "A" reveals the family arrangement pertaining to partition of the ancestral properties as well as bequeathment by Will.

41. It would now be relevant to consider and address the contesting arguments of the parties regarding the care given by the Plaintiffs to their deceased father. The averments in the Plaint at Paragraph 22 "G" reveal as follows;

> *"That, the Plaintiffs had taken care of their father during his lifetime and never performed death rites under duress. The Plaintiffs had also provided financial, medical and all types of help those are given by son*(sic) *to their father late D.P. Dahal during his lifetime."*

The Plaintiffs contention and evidence is that the Plaintiff No.1 was driven out of the main house in 1983-84 with a *"khukuri"* by his father and step mother. Notwithstanding such treatment, he took care of his father by replacing the thatched roof of the main house with GCI sheets and extending all financial and other relevant help. The Defendant No.1 asserted that the two points raised above were never pleaded and it is settled Law that evidence cannot be adduced beyond the pleadings. Beneficial reference on this count is made to ***M. Chinnasamy*** *(supra)* relied on by Defendant No.1, wherein it was held *inter alia* as follows;

> "**42.** With respect, we are not in a position to endorse the views taken therein in their entirety. Unfortunately, the decision of a larger Bench of this Court in *Jagjit Singh* [AIR 1966 SC 773] had not been noticed therein. Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a re-counting has been directed, it would not be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. **It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading**."
>
> **(Emphasis supplied)**

In ***Union of India v. Ibrahim Uddin and Another*** *(supra),* the Honble Supreme Court observed *inter alia* as under;

> "**85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored**. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and the parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it. ……"
>
> **(Emphasis supplied)**

42. In light of the established position of Law, the Plaintiffs evidence, as well as those of their witnesses with regard to the instance of the Plaintiff No.1 being chased out by his father and step mother with a *"khukuri"* and replacement by him of the thatched roof of his main house, being over and above the averments in his pleadings, is rejected and disregarded in totality by this Court.

43. However, the pleadings of the Plaintiffs do also contain the averment that they had provided financial, medical and other assistance to their father as expected of sons. I now examine the proof thereof.

44. Plaintiffs No.1 and 2 both deposed that during their fathers visits to their respective houses, they gave him money for medicine and clothing, apart from which they also took him for medical treatment to Doctors. PW Kunta Maya Dahal, relative of the Plaintiffs, supported their evidence, her evidence found substantiation in the evidence of PW7 Tanka Maya Adhikari, the blood sister of the Plaintiffs. PW Laxuman Nepal and PW Ram Chandra Koirala, both known to the Plaintiffs and their father, were witness to the Plaintiffs visiting their father during his illness and stated as much. A perusal of the cross-examination of Plaintiffs No.1 and 2 reveal that no questions were put to them in crossexamination to test the veracity of their statements pertaining to extension of financial help to their father and taking him to the Doctor, save to the extent that they did not furnish documentary evidence of such facts. With regard to the second condition in Exhibit "A" i.e. *"perform death rites,"* both Plaintiffs deposed that they had performed their fathers death rites and rituals voluntarily. This evidence was buttressed by the deposition of PW Kunta Maya Dahal, PW3 Man Bahadur Kharka, PW 7 Tanka Maya Adhikari, PW Laxuman Nepal *(son of Krishna Lall Nepal)*, PW Ram Chandra Koirala and PW6 Krishna Prasad Sapkota. Both PW3 Man Bahadur Kharka and PW6 Krishna Prasad Sapkota admitted to being illiterate but no questions were put to them in cross-examination to test their knowledge or otherwise of the contents of their evidence-in-chief nor was any effort made by Defendant No.1 and Defendant No.4 to gauge as to whether they had each been explained the contents of Exhibit 17 and Exhibit 18, their respective Evidence-on-Affidavit. It was also the admission of both witnesses that the contents were in "English" and they did not know what it stated but the contents of the documents were not translated for their benefit during crossexamination. Omnibus and vague questions put to the witnesses from rural backgrounds, in cross-examination, is not only unacceptable but such

questions, in no way, demolish the evidencein-chief. In this context, apposite reference may be made to ***Shivaji Sahabrao Bobade and Another v. State of Maharashtra***[21] wherein the Honble Supreme Court observed *inter alia* as follows;

> "**8.** Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. ……"

45. It therefore transpires that the rustic background and education of the witnesses *viz.* PW3 and PW6 were not taken into consideration by the learned Defence Counsel when the questions were put to them in cross-examination. Notwithstanding such a circumstance, even if the evidence of PW3 and PW6 are to be disregarded, the claim of the Plaintiffs that they had extended monetary assistance to their father, spent time with him by visiting him when he was unwell and both of them having performed the death rites of their late father, could not be said to be untrue, the evidence of the Plaintiffs and their two witnesses having stood resolute under cross-examination on these two counts. In fact, even the evidence of DW2 Tika Devi Sharma, witness for Defendant No.1, reveals that both Plaintiffs used to visit the main house in intervals and they behaved cordially with their father and Defendant No.1, while Laxuman Nepal *(son of Jai Narayan Nepal),* witness for the Defendant No.4, admitted that the Plaintiffs performed the death rites of their father voluntarily. It may be observed here that taking care of parents cannot be construed only as financial assistance rendered, time spent with parents is also to be given the credit it deserves.

[21] (1973) 2 SCC 793

46. Defendant No.1, for her part, denied the claims of the Plaintiffs that they had contributed financially towards the treatment of Devi Prasad as, according to her, only she and her son Bal Krishna, bore all required expenses, even to the extent of having taken loans. Exhibit D4/A, dated 16.08.2001 and Exhibit D4/B, dated 23.09.2001, i.e. documents purportedly establishing loan taken by her son for her husbands treatment from Bishnu Khatiwada and Laxuman Nepal *(son of Jai Narayan Nepal)*, were strongly relied upon by her. No documents were furnished to establish the decade long illness of Devi Prasad or his bedridden and convalescent condition. No explanation ensued as to why Exhibit D4/A and Exhibit D4/B were not furnished before the learned trial Court before the remand of the matter. The scribe of the said documents were also not produced as witnesses either by the Defendant No.1 or the Defendant No.4 and although DW1 Laxuman Nepal ventured to state that Bal Krishna was the scribe of Exhibit D4/B, no handwriting of Bal Krishna was furnished for comparison. The credibility of these documents, in my considered opinion, is suspect. Reliance on the ratio of ***Kiran Limboo*** *(supra)* and on the provisions of Section 67 of the Indian Evidence Act, 1872, in fact, goes against the Defendant No.1 as no witness has proved the contents of Exhibit D4/A and Exhibit D4/B.

47. Although, DW2 Tika Devi Sharma made an effort to support the evidence of the Defendant No.1, however, under crossexamination, buckled and admitted that the Plaintiffs used to visit the main house at intervals and behave cordially with her parents. According to her, there was no quarrel between her father and the Plaintiffs on the execution of Exhibit "A." The evidence of DW Dol Nath Gautam can scarcely be relied on considering that when the partition was affected in 1985, he was eleven years old and could have had no personal knowledge of events that took place then. DW2 Dhan Maya Adhikari, the half sister of the Plaintiffs, supported the evidence of Defendant No.1, her evidence withstood crossexamination. DW Punya Prasad Adhikari, known to the Plaintiffs and their father as well as the Defendant No.1, brought a new twist to the tale by stating in his evidence that the Plaintiffs were disgruntled with the family partition which he had learnt from Devi Prasad and therefore the Plaintiffs and their father did not share cordial relations. He supported the evidence of Defendant No.1 that only she and her son took care of Devi Prasad and performed the death rites, however, later he admitted that no issue was raised by any of the sons relating to the shares allotted and that the Plaintiffs had performed

the thirteenth day funeral rites of their father. His evidence is therefore vacillating with regard to the conduct of the Plaintiffs in the context of execution of Exhibit "A" as reflected *supra* and cannot be considered reliable. DW4 Ramesh Kumar Dahal is the son of Plaintiff No.1, born in 1982. He failed to give any substantive evidence pertaining to the case save to the extent that his parents are separated and that Bal Krishna had participated in the *"Anthyesthi Kriya"* (death rites) of his grandfather.

48. For the Defendant No.4, DW1 Laxuman Nepal *(son of Jai Narayan Nepal)*, known to the Plaintiffs and their father and the Defendants No.1 and 4, had no knowledge of the relations between the Plaintiffs and their father. He, however, admitted that the Plaintiffs performed the death rites of their father voluntarily. According to him, vide Exhibit D4/B, dated 23.09.2001, he loaned Rs.20,000/- (Rupees twenty thousand) only, to Bal Krishna. Exhibit D4/B is an unregistered document. It does not mention the interest amount nor does it mention that the interest amount would be fixed subsequently on non-payment of the principle amount, thus the contents are rather nebulous for a loan document. The only witness to Exhibit D4/B is the elder sister of Bal Krishna, Devi Kala Sharma. The entire circumstances of the document having been furnished only after the matter was sent back on remand and produced before the learned trial Court with Bal Krishnas sister as the sole witness, lends suspicion to it. Considering the belated appearance of the document and lack of proof thereof, it is reiterated that it appears to have been manufactured for the purposes of the instant matter and cannot be relied upon.

49. Madhav Prasad Adhikari examined as witness No.2 for Defendant No.4, was also a witness for Defendant No.1. In his evidence as witness for Defendant No.1, he stated that he is the maternal uncle of late Devi Prasad. Contrarily, in his evidence as witness for Defendant No.4, he stated that Devi Prasad was his maternal uncle. Relevantly, in Paragraph "5" of his evidence as witness for Defendant No.1, he has stated that the Plaintiffs being satisfied with the respective shares that they received, in full consent, scribed their signature on the said Partition Deed. Conversely, as witness for the Defendant No.4, in Paragraph "3" of his evidence, he stated that he had learnt from late Devi Prasad that both the Plaintiffs did not share good relations with him as they were unhappy with the family partition and after the said partition, they had discarded their father and had very sour relations with his entire family. The witness appears to be confused with regard to

how he was related to Devi Prasad added to which, his inconsistent and ambivalent evidence reflected hereinabove makes him an unreliable and untrustworthy witness. His evidence thereby merits no reliance.

50. DW3 Tika Devi Sharma, was witness for Defendant No.1 and also appeared as witness for the Defendant No.4. She sought to establish that Bal Krishna as also her sister Devi Kala, the guardian of Defendant No.4, were *bona fide* Sikkimese Indians and reiterated that only Defendant No.1 and her brother looked after their father but admitted that she had no documents relating to her fathers prolonged ailment and that they were not on talking terms with the Plaintiffs. DW4 Bishnu Khatiwada, son-in-law of late Devi Prasad being the husband of DW3, also narrated the story of the Plaintiffs abandoning their parents after voluntarily leaving the main house and identified Exhibit D4/A as the receipt for a sum of Rs.50,000/- (Rupees fifty thousand) only, taken by Bal Krishna from him, for his fathers treatment. The cross-examination of this witness revealed that he was a Bus conductor in the SNT Department and in 2001, his monthly salary was around Rs.15,000/- (Rupees fifteen thousand) only, besides which he had two School going sons and a wife to support. He was unaware as to who had scribed Exhibit D4/A and did not state its contents although he identified it as a "Money Receipt" and his signature on it. Admittedly, he was not on speaking terms with the Plaintiffs and did not share good relations with them. His evidence of having loaned Rs.50,000/- (Rupees fifty thousand) only, to Bal Krishna has to be taken with a pinch of salt as he was earning Rs.15,000/- (Rupees fifteen thousand) only, per month as the sole bread winner in his family comprising of his wife and two School going sons. Mere marking and exhibiting of documents is not proof of its contents. His evident inimical relations with the Plaintiffs and lack of proof of Exhibit D4/A, renders his evidence unreliable. DW Devi Kala Sharma, half sister of the Plaintiffs, is the guardian of the Defendant No.4. She too asserted that the family of Devi Prasad is governed by the Law of the land and not by the Mitakshara School of Hindu Law. According to her, the Plaintiffs are signatories to Exhibit "A" and they have already acted upon the Partition Deed. She further stated that Bal Krishna and Defendant No.1 looked after Devi Prasad and she was aware of this fact as she helped them, being a Staff Nurse at the Central Referral Hospital, Tadong. From there, he was taken to Siliguri for further treatment. After he passed away, the Plaintiffs were forced to come to the main house and perform the death rites. According to her, the "*jiwni*" land had been kept by her father for her

mothers welfare and he had sold a piece of land to meet her (witnesss) educational expenses. While considering her evidence, it is clear that she is now making an endeavour to insert a tangential angle to the case of the Defendant No.1 by stating that the "*jiwni bari*" was kept for her mothers welfare. Her deposition is evidently an attempt to protect her mother (Defendant No.1) and ensure that she gets the property although Exhibit "A" specifically mentions the conditions on which the son(s) of Devi Prasad would get the *"jiwni"* property. In tandem with the evidence of Defendant No.1, this witness has also stated that the conditions in the Partition Deed are that the son *"look after the **parents** and also perform their death rites."* This is an erroneous interpretation of the document as already discussed in detail above. No mention of either "mother" or "parents" has been made in the document neither was any witness of the Plaintiffs, Defendant No.1 or Defendant No.4, confronted with the contents of the document to explain or expound this portion. She denied all suggestions put to her with regard to manufacturing of the documents exhibited and stated that the Plaintiff No.1 had not been maintaining his first wife. This is contrary to the evidence of DW4 Ramesh Kumar Dahal, the son of the Plaintiff No.1, who stated under cross-examination that his father pays maintenance to his mother after she had filed a Maintenance Case in the Court in 1998. Her evidence, therefore, cannot be accepted in its totality in view of the exacerbations she has made with regard to the interpretation of Exhibit "A" and that the *"jiwni bari"* was for her mothers welfare.

51. The foregoing evidence, thus, establishes that the Plaintiffs did assist their father financially whenever he visited them and they also visited him at intervals, behaved cordially with him as also with the Defendant No.1 and were seen to be with their father when he fell ill. The weight of the evidence furnished by the parties tilts in favour of the Plaintiffs notwithstanding the fact that they were living apart from him and were involved in running homes for their own separate families as against the ambivalent and vacillating evidence of the witnesses of the Defendant No.1 and Defendant No.4, as already discussed. Bal Krishna had the advantage of living with his parents and it is not contested that he took care of them by virtue of such a circumstance. The fact that the Plaintiffs along with Bal Krishna, performed the death rites of their father withstood all cross-examination and, in any event, the Defendant No.1 and her witnesses have also admitted this fact. I have to agree with the observation of learned Senior Counsel for the Plaintiffs that no son or daughter worth their salt would keep an account book of the

expenditure made towards maintaining or taking care of their parents. It would indeed be an abhorrent circumstance sufficient to arouse indignation in any person. Devi Prasad evidently made no complaints to any witness of nonchalant or callous attitude of the Plaintiffs towards him.

52. In this context, the learned trial Court while deciding Issue No.7, was of the opinion that the Plaintiffs were unable to substantiate their claims of having taken care of their father during his lifetime by any documentary proof thereof. The evidence of PW Laxuman Nepal and PW Ram Chandra Koirala were found to be unreliable as according to the learned trial Court, these witnesses had only made bald claims with regard to the Plaintiffs having taken care of Devi Prasad when he was unwell. The learned trial Court desired *"corroboration from worthy evidence,"* however, it was not specified as to what the "worthy evidence" was to comprise of. The learned trial Court had concluded that although the Plaintiffs had performed the death rites of their father, however, they had not taken care of their father during his lifetime. In the light of the evidence on record and the foregoing discussions already discussed by me, I am unable to bring myself to agree with the finding of the learned trial Court in Issue No.7.

53. While deciding Issue No.2, the learned trial Court relied heavily on the evidence of Defendant No.1 and DW4 Bishnu Khatiwada, the witness for Defendant No.4, Exhibit D4/A, the unregistered Money Receipt, the evidence of Laxuman Nepal *(son of Jai Narayan Nepal)* and Exhibit D4/B. Learned trial Court was impressed with the production of Exhibit D4/A and Exhibit D4/B despite the fact that these documents had been filed rather belatedly, only after the matter having been sent back on remand, thereby raising doubts about the authenticity of the documents. The reasoning of the learned trial Court at Paragraph "43" of the impugned Judgment *inter alia* was that,

> *"**43**. ……..…The Plaintiffs on the other hand were already staying separately from Late Devi Prasad Dahal and once the partition took place the severance of joint status, even if the same were to be assumed, would also be deemed to have taken place. Once it is held so, even if there was no banda patra/ testamentary disposition above the „jiwni land of Late Devi Prasad Dahal (which became his separate*

> *property after the partition) would devolve on his undivided son (Late Bal Krishna Dahal) to the exclusion of his divided sons (Plaintiffs)……. ……Raghavachariar in his Hindu Law, Second Edition, Page 444 states that where a father was joint at the time of his death with some only of his sons, the others having already separated from him, those who remained joint with him, whether they were sons born before or after the partition, succeed to the whole property, whether ancestral or selfacquired, to the exclusion of the divided sons. ……"*

54. The learned trial Court concluded that this seems to be the settled position under the Mitakshara Law which solely governed the Hindus in the State during the year 2001 when Devi Prasad had died. I have to disagree with this finding and the interpretation given to the above position of Law as stated by Raghavachariar in view of the fact that after the partition had taken place vide Exhibit "A," as already discussed *supra*, the father had his own share in the property which thus, was his separate property. Bal Krishna also received his separate share. Consequently, Devi Prasad was free to decide how his share would be given away after his passing *viz.* by the testamentary disposition, on the conditions therein being fulfilled. The reasoning that the share of Devi Prasad would devolve on his undivided son Bal Krishna despite him having received his share, is an erroneous interpretation of the concerned Law. Merely because Bal Krishna continued to live in the main house with the father did not vest this circumstance with the legal connotation that he was joint with the father, as Exhibit "A," with clarity states that all the sons were given properties and they had separated and the father had kept *"jiwni"* land for himself. I am inclined to agree with the arguments canvassed by learned Senior Counsel for the Plaintiffs in this context wherein it was stated that the observation of the learned trial Court regarding Hindu Law by Raghavachariar is totally misconceived and out of context.

55. The learned trial Court, also discussed the provisions of the Sikkim Succession Act, 2008, and held that the Act is applicable to all Sikkimese who possess Sikkim Subject Certificate and die *intestate*. He further opined that although the Defendant No.1 had denied that she and the Plaintiffs were

governed by the Mitakshara School of Hindu Law, in fact, till 2008 the Hindus in Sikkim were solely governed by the said Law.

56. The above statement leads to the conclusion that the learned trial Court was of the opinion that in fact the Mitakshara School of Hindu Law governed the Hindus in the State till 2008. The Sikkim Succession Act, 2008, as already discussed, never saw the light of day. Hence, the reliance of the learned trial Court on a *nonest* Statute is erroneous.

57. While deciding Issues No.4, 5, 6 and 10, the learned trial Court, in Paragraph "45" of the impugned Judgment, observed *inter alia* as under;

> *"**45**. ……Strictly speaking, the Defendants No.1 & 4 cannot therefore claim any share on the basis of the concerned 'banda patra' and the question of their having gotten any share vide the said 'banda patra' also does not arise. However, it may be mentioned here that while Late Devi Prasad Dahal had died during September 2001 Late Bal Krishna Dahal died in the year 2010. On the death of Late Devi Prasad Dahal, as discussed above, it was Late Bal Krishna Dahal who was entitled to get, and did acquire, his fathers 'jiwni land' and therefore he is to be regarded as being the owner of the 'jiwni land' till he expired in the year 2010. When he died intestate in the year 2010, which is seen to be the case here, the Sikkim Succession Act, 2008, which as discussed earlier is applicable to persons possessing Sikkim Subject Certificate/Certificate of Identification(COI) and those who are descendants of Sikkim Subject Certificate holder identified through COI, had already come into force in the State of Sikkim and was/is applicable throughout the State(in cases where a person dies intestate after its enactment). ……"*

The learned trial Court, invoking the provisions of Section 5 of the Sikkim Succession Act, 2008, and Note II appended to Section 2 and the

provisions of Section 6 of the said Act, concluded that the Defendant No.1 and Defendant No.4 would be eligible to inherit the properties left behind by Bal Krishha, including the *"jiwni"* land.

58. In the first instance, I have to disagree with the finding of the learned trial Court vide which he has divided the entire property of Bal Krishna including the *"jiwni"* land between Defendant No.1 and Defendant No.4, for the reason that the Issues under discussion do not deal with the separate property of Bal Krishna. The passing away of Bal Krishna if *intestate*, entitles the Defendant No.1 to a share in his properties in view of the provisions of the Hindu Succession Act, 1956, however, this is not the Issue in the instant matter and discussions thereof stand truncated here. Issues No.4 and 5 revolve around the *"jiwni"* land and Issue No.6 is not even relevant for the disposal of the present Suit as the claim of the Plaintiffs is confined to the "*jiwni"* land in terms of Exhibit "A". There is no ambiguity in the conditions laid down by Devi Prasad in Exhibit "A", the intention has to be collected from the language of the document as observed in ***C.N. Arunachala Mudaliar*** *supra.*

59. With regard to Issues No.8 and 9, the Plaintiffs could not have raised the Issues before the learned trial Court and ought to have approached the correct Forum if they were of the opinion that the Certificate of Guardianship had been obtained fraudulently. Consequently, I am in agreement with the findings of the learned trial Court on these Issues.

60. While disagreeing with the view of the learned trial Court on Issues No.1, 3 and 11, it is clear from the evidence before the Court that the Plaintiffs, having fulfilled both requisite conditions of Exhibit "A," are entitled along with Defendant No.4, the daughter of their half brother Bal Krishna, to a share each of the *"jiwni"* land.

61. Now addressing question No.3 framed hereinabove, the Defendant No.1 has staked a claim to fifty per cent of the properties recorded in the name of her late husband by virtue of being his second wife and having cared for him, during his lifetime. Devi Prasad did not make any provision for the Defendant No.1 in his separate property i.e. the *"jiwni"* land by arranging for a life estate for her. He did not die *intestate*. Had Devi Prasad died *intestate,* then in terms of Section 8 of the Hindu Succession Act, 1956, a share of her husbands property would have devolved upon her, she being a Class I heir as per the Schedule to Section 8 of the Act.

62. In ***Sadhu Singh*** *(supra)* relied on by the Defendant No.1, the Honble Supreme Court dealt with the provisions of Section 8, Section 14(1) and Section 30 of the Hindu Succession Act, 1956. One Ralla Singh had a wife Isher Kaur. They had no children. Ralla Singh executed a Will on 07.10.1968 and died on 19.03.1977. His widow Isher Kaur on 21.01.1980, purported to gift the property in favour of a Gurdwara. The Appellant (Sadhu Singh) filed a Suit challenging the Deed of Gift and also prayed for recovery of possession after the death of Isher Kaur. According to the Appellant, under the Will of Ralla Singh, Isher Kaur took only a life estate and the properties were to vest in the Appellant and his brother. She had no right to gift the property to the Gurdwara under the terms of the Will under which she took the properties. She was bound by the terms of the bequest. Isher Kaur and the Gurdwara contended that the property received by her on the death of her husband was as his heir and it was taken by her absolutely and she was competent to deal with the property. It was pleaded that in any event Section 14(1) of the Hindu Succession Act entitled her to deal with the property as an absolute owner. The Appellant countered that Isher Kaur, having taken the property under the disposition of her husband, was bound by its terms and she had only a life estate and no competence to donate the property. It was a case to which Section 14(2) of the Hindu Succession Act applied and the limitation on right imposed by the Will was binding on Isher Kaur. Her estate could not get enlarged under Section 14(1) of the Act. The trial Court held that the Will executed by the Appellant was not genuine and dismissed the Suit holding that Isher Kaur had taken the property absolutely on the death of her husband as an heir and under the circumstances she was entitled to donate the property to the Gurdwara. The lower Appellate Court, on Appeal by the Appellant, held that the Will propounded by the Appellant was found to be the last Will and Testament of Ralla Singh and was a valid execution and upheld it. Thus, the trial Court decree was reversed and the Suit decreed. The Gurdwara was in Second Appeal before the High Court which reversed the decision of the first Appellate Court. The Honble Supreme Court while citing various other decisions in the matter, set aside the Judgment and Decree of the High Court and passed a Decree in favour of the original Plaintiff for recovery of possession of the property from the Gurdwara, the donee from Isher Kaur, and anyone claiming under or through it, on the strength of his title and to hold it for himself and his brother. The Honble Supreme Court while considering the ratio of the Second Appeal, held as follows;

> "**3**. ……What it has presumably held is that Isher Kaur had pre-existing right in the property and consequently the limitation placed on her rights in the will, could not prevail in view of Section 14(1) of the Hindu Succession Act. **It did not bear in mind that the property was the separate property or self-acquired property of Ralla Singh and his widow, though she might have succeeded to the property as an absolute and sole heir if Ralla Singh had died intestate on 19-3-1977, had no pre-existing right as such. The widow had, at best, only a right to maintenance and at best could have secured a charge by the process of court for her maintenance under the Hindu Adoptions and Maintenance Act in the separate property of her husband. May be, in terms of Section 39 of the Transfer of Property Act, she could have also enforced the charge even as against an alienee from her husband. Unlike in a case where the widow was in possession of the property on the date of the coming into force of the Act in which she had a preexisting right at least to maintenance, a situation covered by Section 14(1) of the Hindu Succession Act, if his separate property is disposed of by a Hindu male by way of testamentary disposition, placing a restriction on the right given to the widow, the question whether Section 14(2) would not be attracted, was not considered at all by the High Court**. It proceeded as if the ratio of *V. Tulasamma* [(1977) 3 SCC 99 : (1977) 3 SCR 261] would preclude any enquiry in that line."
>
> **(Emphasis supplied)**

The Honble Supreme Court, while referring to the ratio of ***V. Tulassama and Others v. Sesha Reddy (Dead) by L.Rs.***[22] concluded that on the wording of Section 14(1) of the Hindu Succession Act and the context of the decision,

[22] (1977) 3 SCC 99

the ratio would apply only when a female Hindu is possessed of the property on the date of the Act under semblance of a right, whether it be a limited or a preexisting right to maintenance in lieu of which she was put in possession of the property. The Honble Supreme Court also held therein;

> "**13**. An owner of property has normally the right to deal with that property including the right to devise or bequeath the property. He could thus dispose it of by a testament. Section 30 of the Act, not only does not curtail or affect this right, it actually reaffirms that right. **Thus, a Hindu male could testamentarily dispose of his property. When he does that, a succession under the Act stands excluded and the property passes to the testamentary heirs**. Hence, when a male Hindu executes a will bequeathing the properties, the legatees take it subject to the terms of the will unless of course, any stipulation therein is found invalid. Therefore, there is nothing in the Act which affects the right of a male Hindu to dispose of his property by providing only a life estate or limited estate for his widow. The Act does not stand in the way of his separate properties being dealt with by him as he deems fit. His will hence could not be challenged as being hit by the Act."
>
> **(Emphasis supplied)**

The Court went on to refer to the decision in ***Ramachandra Shenoy and Another v. Mrs. Hilda Brite and Others***[23]. The ratio therein observed;

> "**14**. ……It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. ……"

That, the Court has to attempt a harmonious construction to give effect to all terms of the Will if it is in any manner possible.

[23] AIR 1964 SC 1323

63. This sets to rest the rights of Defendant No.1 with regard to the land that she is in occupation of being the *"jiwni"* land. Defendant No.1 was not possessed of the property under the semblance of a right, whether limited or for the purposes of maintenance. Suffice it to state here that the *"jiwni"* land is to descend in terms of the testamentary disposition of Exhibit "A" and the Defendant No.1, as also all other parties to the Suit, are bound by the terms of the bequest.

64. While considering the decisions of the Honble Supreme Court and various High Courts relied on by the Defendant No.1, it is worth mentioning here that the ratio in ***Karedla Parthasaradhi*** *(supra)* is not relevant for the present purposes as it deals with a Hindu male having died *intestate* and the Defendant therein asserting that she was his legally married wife and thereby entitled to his house after his death being the Class I heir of her husband. While considering the reliance made on ***Ganduri Koteshwaramma and Another v. Chakiri Yanadi and Another***[24] and ***Vineeta Sharma*** *(supra)*, it is worth noticing that the Defendant No.1, after averring rather vaguely that she was governed by the Law of the land, has taken a U-turn and placed reliance on the ratio *(supra)* which are centred around the Hindu Succession Act, 1956, and contrary to the stance taken by her. No reasons have been extended for such reliance which thereby requires no consideration.

65. Next, it may be clarified here that in a civil dispute the standard of proof extends to a "preponderance of probability" and not "beyond a reasonable doubt," as canvassed by learned Counsel for the Defendant No.1. The latter is the standard required for proof in a criminal case against an accused. The argument of learned Counsel for the Defendant No.1 contending that the Plaintiffs have to prove their case beyond a reasonable doubt is therefore rejected. ***Anar Devi and Others*** *(supra)* relied on by the Defendant No.1 being a Suit for partition of notional share of the deceased father in a coparcenary property, is not relevant to the issue at hand. The argument of learned Counsel for the Defendant No.1 that the Suit is only for declaration cannot be countenanced as the prayers in the Plaint reveal otherwise.

66. In light of the foregoing discussions and the reasons set forth by me, I cannot bring myself to agree with the observations and findings of the

[24] (2011) 9 SCC 788

learned trial Court on the Issues settled by it for determination, save in Issues No.8 and 9, as already discussed.

67. In conclusion, it follows that;

(i) In the absence of any statutory provision dealing with Succession in the State and as the Hindu Succession Act, 1956, has not been extended and enforced in the State but considering that the Courts in Sikkim have applied the provisions of the Laws of the country where the Laws in Sikkim are inadequate or do not cover a specific area, it stands to reason that the provisions of the Hindu Succession Act, 1956, can be invoked and applied for the purposes of determining matters relating to Succession in Sikkim, involving parties to whom the personal Law is applicable, till specific Laws occupy the field.

(ii) The Sikkim Succession Act, 2008, is not a notified Act and being *non est* no reliance can be placed on it.

(iii) The Plaintiffs and late Bal Krishna are entitled to an equal share each of the *"jiwni"* land of late Devi Prasad as described in the Schedule to the Plaint and are also entitled to take steps with regard to their respective shares. Defendant No.4 being the daughter of Bal Krishna would be entitled to his share of the *"jiwni"* property.

(iv) The question of Defendant No.1 being entitled to the *"jiwni"* property does not arise at all sans any such intention of Devi Prasad in Exhibit "A" and the provisions of Law.

68. The contention of the Defendant No.1 that the Suit is barred by limitation is not tenable as it is clear that the cause of action arose only after the issuance of the impugned Order by the Defendant No.2, dated 03.11.2010.

69. The prayer of the Plaintiffs seeking a declaration that Bal Krishna predeceased his father has no legs to stand as the evidence on record establishes that Devi Prasad passed away in "2001" and Bal Krishna was witnessed performing his fathers death rites. Evidence also reveals that Bal Krishna died in "2010," no evidence to the contrary was furnished by the Plaintiffs.

70. Similarly, as no evidence was led on the averment of the Plaintiffs that the Defendant No.1 had claimed before the Defendant No.2 that Bal Krishna had left behind two sons and the existence of a daughter was never pleaded, it requires no further discussion. Besides, by filing the Amended Plaint and impleading the Defendant No.4 as a party, they have recognized the daughter of Bal Krishna as his legal heir.

71. The prayer that the Defendant No.4 not being a son of Devi Prasad, had no right, title and interest over the *"jiwni"* land, is correct to that extent as it does not fulfill the specific conditions set out in Exhibit "A," however she is the legal heir and successor of Bal Krishna and thereby entitled to his share.

72. The prayer seeking a declaration that the Defendant No.1 is a Nepal citizen and that the Guardianship Certificate of Devi Kala Sharma was obtained fraudulently, deserves no consideration. If the Plaintiffs are aggrieved by such a circumstance, they are to approach the correct Forum.

73. The impugned Order of the Defendant No.2, dated 03.11.2010, is hereby declared as null, void and *non est* and is quashed and set aside, having been issued without jurisdiction.

74. Appeal allowed to the extent above and disposed of accordingly. Pending applications, if any, also stand disposed of.

75. No order as to costs.

76. Copy of this Judgment be sent to the learned trial Court for information.

77. Records of the learned trial Court be remitted forthwith.

———

SLR (2020) SIKKIM 874

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

Crl. A. No. 28 of 2018

State of Sikkim ….. **APPELLANT**

Versus

Tenzing Bhutia ….. **RESPONDENT**

For the Appellant: Mr. Vivek Kohli, Public Prosecutor.

For the Respondent: Ms. Gita Bista, Advocate (Legal Aid Counsel).

Date of decision: 12th November 2020

A. Indian Evidence Act, 1872 – S. 27 – Disclosure Statement – Essential Requirements – Merely because a person was not under arrest while making a disclosure statement under S. 27 of the Evidence Act will not render such disclosure statement inadmissible in evidence – If Exhibit-10 passes judicial scrutiny, the only portion that would be admissible under S. 27 is the portion where he stated that he could show the things which he was wearing on the date of the occurrence and the checked shirt that he had used to swipe blood and that they were kept in his house.

(Paras 18 and 19)

Appeal dismissed.

Chronology of cases cited:

1. Ranjit Kumar Haldar v. State of Sikkim, (2019) 7 SCC 684.
2. Niranjan Singh and Another v. Prabhakar Rajram Kharote and Others, (1980) 2 SCC 559.
3. Sundeep Kumar Bafna v. State of Maharashtra and Another, (2014)16 SCC 623.

4. Directorate of Enforcement v. Deepak Mahajan, (1994) SCC 3 SCC 440.

5. Vikram Singh and Others v. State of Punjab, (2010) 2 SCC 56.

6. Chandra Prakash v. State of Rajasthan, (2014) 8 SCC 340.

7. Ghurey Lal v. State of U.P, (2008)10 SCC 450.

JUDGMENT

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

This appeal by the State is against the judgment dated 30.11.2017 passed by the learned Sessions Judge, South Sikkim at Namchi, acquitting the accused of the offences under Section 302/449 IPC on benefit of doubt.

2. Sonam W. Bhutia (PW-1), Ward Panchayat of 02-Nambong Ward had lodged a first information report (FIR)before the Station House Officer, Temi Police Station on 13.08.2016 stating that she had received information to the effect that wife of Santosh Rai (PW-16) was murdered. Accordingly, Temi Police Case No.20(8)/16 under Section 302 IPC was registered.

3. Evidence on record discloses that the deceased, namely, Durga Rai was found dead in the courtyard of her house with blood all over her body. A sickle was found near the dead body. 2 Crl. A. No.28 of 2018 (State of Sikkim vs Tenzing Bhutia)

4. Evidence of PW-14 goes to show that the accused was living with him since four months prior to the date of the incident. After returning from a Ben *Gompa*, PW-14 was watching TV along with the accused. The accused had gone out to the nearby jungle to collect fodder. However, after few minutes he came back running in a nervous state and told him that wife of Santosh Rai (PW-16) was lying in a pool of blood and the people from *Gompa* had gathered there. The house of the PW-14 is located below the house of PW-16.

5. The accused came to be arrested on 17.08.2016.

6. It is relevant to note at this juncture that the Investigating Officer, (PW-18), in her cross-examination had admitted that apart from the disclosure statement, Exhibit-10, there is no other evidence or material to connect the accused with the offence.

7. The learned Trial Court had held that Exhibit-10 was not recorded in presence of PW-5 and PW-6, who were witnesses to Exhibit-10. It was held that when the disclosure statement was recorded the accused was not in the custody of the police, he having not been arrested and therefore, requirement of Section 27 of the Evidence Act being not satisfied, Exhibit-1 was inadmissible in evidence. The learned Trial Court further held that prosecution failed to prove that Material Objects (MO)s were recovered as per the disclosure statement and at the instance of the accused from his house. Such conclusion was derived on appreciation of the evidence of PW-5 and PW-6 who were also witnesses to Exhibit-11, a Seizure Memo, by which (i) green slipper with blood stains (MO-VII), (ii) white T-shirt (checked) with blood-stains (MO-VIII), (iii) green and black full shirt with blood- stains (MO-VI) and (iv) blood sample were stated to be recovered at the instance of the accused from his house. It was also held that there was no evidence that the seized slippers and wearing apparels belonged to the accused.

8. Mr. Vivek Kohli, learned Public Prosecutor, Sikkim has submitted that the learned Trial Court was not correct in holding that Exhibit-10 is not admissible in evidence on the ground that the accused was not in police custody when he had made the disclosure statement. It is submitted that it is not necessary that an accused must be under arrest when a disclosure statement is made. He had drawn the attention of the Court to the cross-examination of PW-5 to contend that PW-5 was asked by PW-18 to ask the accused about the incident in Bhutia language and when so asked, the accused had confessed about the incident and therefore, even if it is accepted that Exhibit-10 was prepared, as held by the learned Trial Court, before PW-5 had reached the police station, he signed as a witness only after he had asked the accused about the incident and therefore, there is no infirmity in Exhibiit-10.

9. Mr. Kohli submits that even if Exhibit -10 is discarded, then also, seized articles under Exhibit-11 having being recovered from the house of

the accused, in terms of Section 106 of the Evidence Act, it was his burden to discharge how his clothes had blood-stain of the deceased but the accused had not been able to offer any explanation. In this connection, he relies on a decision of the Hon ble Supreme Court in the case of ***Ranjit Kumar Haldar vs. State of Sikkim***, reported in ***(2019) 7 SCC 684.*** He submits that the learned Trial Court failed to appreciate the evidence in its correct perspective in coming to the conclusion that prosecution witnesses failed to prove seizure of articles under Exhibit-11 and that such articles belong to the accused and that the same were seized from the house of the accused. On the above premises, he contends that the appeal deserves to be allowed. In support of his submissions, learned counsel places reliance on the following judgments: ***Niranjan Singh and Anr. Prabhakar Rajram Kharote and Ors.***, reported in ***(1980) 2 SCC 559*** and (ii) ***Sundeep Kumar Bafna vs. State of Maharashtra and Anr.,*** reported in ***(2014) 16 SCC 623***.

10. Ms. Gita Bista, learned Legal Aid Counsel submits that the learned Trial Court was justified in holding that the prosecution miserably failed to prove the case against the accused. It is submitted that there is no infirmity in the impugned judgment and therefore, the appeal deserves to be dismissed.

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

12. At the outset, it will be appropriate to consider as to whether Exhibit-10 is inadmissible as held by the learned Trial Court. It is also required to be noted at this juncture that though the same was held to be inadmissible, the learned Trial Court had considered the evidence of PW-5 and 6 qua Exhibit-10.

13. Section 27 of the Evidence Act, reads as follows:

> *"27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of*

a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

14. A perusal of the provision goes to show that that the person from whom the information is received has to be an accused of any offence and he has to be in the custody of a police officer.

15. In ***Niranjan Singh*** (supra), in the context of Section 439 Cr.P.C, which provides "that any person accused of any offence and in custody be released on bail.....", the Honble Supreme Court held that he who is under control of the court or in the physical hold of a police officer with coercive power can be said to be in police custody.

16. In ***Sandeep Kumar Bhatna*** (supra), after considering various dictionaries to appreciate the contours of the terms „custody, „detention or „arrest in ordinary and legal parlance and also considering various decisions, the Honble Supreme Court held that „custody, „detention and „arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then not preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against the suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. Reliance was placed on an earlier decision in the case of ***Directorate of Enforcement v. Deepak Mahajan***, reported in ***(1994) SCC 3 SCC 440,*** wherein it was held that in every arrest, there is custody but not vice- versa and that the words „custody and „arrest are not synonymous terms.

17. In this context, it is also relevant to take note of the decision of Honble Supreme Court in the case of ***Vikram Singh and ors. vs. State of Punjab***, reported in ***(2010) 2 SCC 56***, wherein the Honble Supreme Court in the context of Section 27 of the Evidence Act, at paragraph 39, held that

for the application of Section 27 of the Evidence Act, it is not essential that such an accused must be under formal arrest. The aforesaid judgment in ***Vikram Singh*** (supra) was referred to in ***Chandra Prakash vs. State of Rajasthan***, reported in ***(2014) 8 SCC 340.***

18. Thus, merely because a person was not under arrest while making a disclosure statement under Section 27 of the Evidence Act will not render such disclosure statement inadmissible in evidence and to that extent the learned Trial Court was not correct in holding otherwise. That the accused was in the custody of the police is not in dispute. Immediately after 10 minutes of making of the said disclosure statement, the accused came to be arrested.

19. If Exhibit-10 passes judicial scrutiny, the only portion that would be admissible under Section 27 of the Evidence Act is the portion where he stated that he could show the things which he was wearing on the date of the occurrence and the checked shirt that he had used to swipe blood and that they were kept in his house.

20. It is deposed by PW-5 in his evidence-in-chief that the accused had made the disclosure statement in his presence and his statement was recorded by the Officer-In-Charge of Temi Police Station and accordingly, he had signed as a witness in Exhibit-10. After Exhibit-10 was recorded, they were taken to the place of occurrence (P.O) where the accused showed his blood-stained wearing apparels. In cross-examination, he conceded that Exhibit-10 was already prepared by the police before he had reached the police station. The alleged confession made in Bhutia language by the accused to PW-5 cannot be proved against him as the accused was in custody of the police and thus, hit by Section 26 of Evidence Act. PW-6, the other witness in Exhibit-10, even in his examination-in-chief stated that he did not know if the accused had made any statement regarding the incident to police and that Exhibit-10 was already prepared before he had signed on it. He further stated that he signed on the same as PW-1 and PW-5 had told him that Exhibit-10 was prepared in their presence as per the version of the accused. In view of such evidence of PW-5 and PW-6 as noted above, it is manifest that disclosure statement was not recorded in their presence and therefore, no reliance can be placed on Exhibit-10.

21. So far as recovery of the slipper and wearing apparels etc under Exhibit-11 is concerned, it appears from the cross-examination of PW-5 that the police had already recovered the MOs before he had reached the P.O. What is significant is that he had also stated that police had told him about the place in the house where they were to go and where the MOs could be found. Even in Exhibit-10, the place where wearing apparels were kept was not mentioned. PW-6 also stated that police had already recovered the MOs under Exhibit-11 before he had reached the P.O. In the background of the above testimony, the learned Trial Court came to the conclusion that the seizure witnesses had failed to establish that the MOs were recovered at the instance of the accused as shown by the accused and that they were actually recovered from the house of the accused. Furthermore, the learned Trial Court rightly noted that there is no evidence that the seized slippers and wearing apparels belong to the accused. In this context, it will be apposite to note that PW-5 had stated that he did not know to whom the MOs belong. In the circumstances as noted above, Section 106 of the Evidence Act, on which reliance was placed by Mr. Kohli, is not attracted.

22. PW-18 stated that during inspection of the house of the accused, some blood-stain (MO-XXV) was found near the door of the house and the same was lifted by him after scrapping it and he had seized the same under Seizure Memo, Exhibit-11. Therefore, the blood sample referred to in Exhibit-11 is blood-stain. He also stated that he had sent the blood-stain scrapped from the wall of the house of the accused to Regional Forensic Science Laboratory (RFSL), Saramsa. PW-5 stated that blood–stain was found on the stairs of the house of the accused. He did not say about any blood-stain having been collected from the wall of the house. PW-6 did not say that any blood-stain was found near the stairs but he stated that blood-stains found on the wall of the house of the accused were scrapped and lifted and MO-IX was, accordingly, prepared. But there is no evidence under which Seizure Memo it was seized. In his evidence, PW-18 also did not say that he had seized any blood-stain found on the wall of the house of the accused. From the evidence of PW-16, Deputy Director-cum-Assistant Chemical Examiner, Tripura State Forensic Science Laboratory (FSL), it appears that one plastic pouch which contained some dust like particles said to be the blood-stain specimen (MO-XXV) from the house of the accused was received by him. Thus, two blood-stain samples, MO-IX

and MO-XXV, were sent to two different FSLs. However, there is no evidence regarding collection of two blood-stain samples and even in respect of seizure of one sample of blood-stain referred to in the evidence, there are glaring contradictions in the deposition of witnesses. That apart, as already noted both PW-5 and PW-6 had stated that the MOs under Exhibit-11 had been recovered before they had reached P.O.

23. The green shirt (MO-VI) and the slippers (MO-VII) indicated presence of human female origin as deposed by PW-16. PW-13 deposed that blood-stain (MO-XIV), white shirt (MO-VIII) and vaginal swab, necklace and the vest of the deceased gave positive test for blood group-O. The FSL reports as deposed by PW-13 and PW-16 have no meaning when prosecution has failed to prove that above MOs along with other MOs under Exhibit-11 were recovered from the house of the accused and that wearing apparels belonged to the accused.

24. In the case of ***Ghurey Lal vs. State of U.P***, reported in ***(2008) 10 SCC 450,*** the Honble Supreme Court enunciated the following principles in respect of scope of exercise of power by the Appellate Court against a judgment of acquittal under 378 and 386 Cr.P.C.:-

> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*
>
> *2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. " "very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused."

25. In view of our above discussion, we find no infirmity in the judgment of the learned Trial Court and accordingly, there being no merit in the appeal, the same is dismissed.

SLR (2020) SIKKIM 884

(Before Hon'ble the Chief Justice)

Arb. A. No. 01of 2019

Mrs. V. Vijaya Lakshmi ….. APPELLANT

Versus

Additional Chief Engineer (S/W),
Roads and Bridges Department,
Government of Sikkim ….. RESPONDENT

For the Appellant: Ms. Sangita Agarwal, Advocate.

For the Respondent: Mr. Vivek Kohli, Advocate General.

Date of decision: 19th November 2020

A. Arbitration and Conciliation Act, 1996 – S. 34 (3) – Application for setting aside arbitral award – The language of S. 34(3) of the Arbitration Act amounts to an "express exclusion" of S. 17 of the Limitation Act – Exclusion of S. 17 of the Limitation Act was also necessarily implied when one looks at the scheme and object of the Arbitration Act – There is no escape from the conclusion that application of the appellant under S. 34 of the Arbitration Act was barred by law (*In re. P. Radha Bai* discussed)

(Paras 22 and 24)

Appeal dismissed.

Case cited:

1. P. Radha Bai and Others v. P. Ashok Kumar and Another, 2018 SCC Online SC 1620.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

Heard Ms. Sangita Agarwal, learned counsel for the appellant. Also heard Mr. Vivek Kohli, learned Advocate General, Sikkim appearing for the respondent.

2. This appeal under Section 37 (1) (c) of the Arbitration and Conciliation Act, 1996, for short "the Arbitration Act", is preferred against the judgment dated 25.10.2018 passed by the learned District Judge, Special Division-II, Sikkim at Gangtok in Arbitration Case No. 4 of 2017, dismissing the petition filed by the appellant under Section 34 of the Arbitration Act not only by holding that the same is time-barred but also recording a finding that the appellant had failed to make out any ground for interfering with the Award.

3. At the very outset, Mr. Kohli submits that in view of the judgment of the Hon'ble Supreme Court in the case of ***P. Radha Bai and Ors. vs. P. Ashok Kumar and Anr.***, **(Civil Appeal Nos. 7710-7713 of 2013)**, reported in ***2018 SCC Online SC 1620***, there is no escape from the conclusion that the application of the appellant was time-barred.

4. Ms. Sangita Agarwal, learned counsel for the appellant submits that she is aware of the aforesaid judgment and contends that in the fact situation obtaining in the present case, the judgment would not be applicable and therefore, it cannot be said that application of the appellant is required to be dismissed as time-barred. She has drawn the attention of this Court to paragraph 46 of ***Radha Bai*** (supra) and contends that the antecedent facts necessary to pursue a legal proceeding was suppressed by the respondent from the appellant and the appellant came to learn about the fraud played by the respondent only on 04.05.2017 and thus, the application filed by the appellant was within the period of limitation. Learned counsel for the appellant also drew the attention of the Court to Section 36 of the Arbitration Act as amended by the Arbitration and Conciliation (Amendment) Ordinance, 2020, which came into effect from 04.11.2020.

5. The appellant offers Engineering Consultancy Service by way of designing bridges and roads, providing services in the field of topographic

and engineering service, geo-tech investigation, etc. Pursuant to an Expression of Interest invited by the respondent for carrying out geo-technical investigation, hydrological survey, design and preparation of detailed estimate for construction of double length bridges along with L.D. Kazi Bridge, Yangyang University Road, South Sikkim, the appellant had submitted bid which was accepted by the respondent and accordingly, a work order dated 29.06.2009 was issued to the appellant. An agreement dated 10.07.2009 was also executed in between the parties.

6. The appellant had prepared Detailed Project Report (DPR) for 13 bridges, which were then sent by the respondent to North Eastern Council (NEC).

7. A dispute had arisen between the parties with regard to non-payment by the respondent for the work carried out by the appellant and accordingly, a legal notice dated 03.09.2014 was issued by the appellant demanding a sum of Rs.3,52,55,860/-. The notice having failed to elicit any response, the arbitration clause reserved in the agreement dated 10.07.2009 was invoked by the appellant. Subsequently, on an application filed by the appellant under Section 11 of the Arbitration Act for appointment of an Arbitrator, this Court, in Arbitration Petition No. 02 of 2014, vide order dated 17.3.2015, had appointed Hon'ble Mr. Justice A.K. Patnaik, a former Hon'ble Judge of Supreme Court of India as the Sole Arbitrator to adjudicate the disputes.

8. The Sole Arbitrator passed an Award on 27.05.2016 awarding a sum of Rs.65,43,468/- along with interest calculated @ 18% per annum from the date of Award.

9. The appellant had filed an application under Section 34 of the Arbitration Act on 25.07.2017 in the Court of the learned District Judge, East Sikkim at Gangtok. Subsequently, the same was transferred to the Court of learned District Judge, Special Division-II.

10. Learned District Judge held that in absence of any affidavit and as the probative value of documents relied on by the appellant was not proved, therefore, the case of the appellant that the respondent had obtained the arbitral award by way of fraud is not proved.

11. On the basis of Section 34 (3) of the Arbitration Act, it was held that the application for setting aside the Award was time-barred. It was also held that in view of Section 29 (2) of the Limitation Act, 1963, for short, the Limitation Act, provisions of Limitation Act shall not apply to the Arbitration Act, the same being a special law.

12. Against the statement of facts and claims made by the appellant before the Sole Arbitrator, in the reply filed by the respondent on 17.06.2015, amongst others, it was stated that out of 13 number of bridges for which DPR was prepared by the appellant, only 6 number of bridges were sanctioned by the NEC. It was only after the award was passed on 27.05.2016, the appellant had taken recourse to Right to Information Act, 2005, for short, the RTI Act, seeking information from the Public Information Officer of NEC Secretariat as to why sanction was granted only in respect of 6 number of bridges. After submitting a number of applications under RTI Act, it was learnt by the appellant that the respondent had dropped 7 DPRs without furnishing any clarification or justification which was sought for by the Ministry of Roads Transport.

13. It is the case of the appellant that the said information was fraudulently withheld by the respondent from the Sole Arbitrator. It was also pleaded that the limitation period will begin to run from 04.05.2017 as the appellant came to learn about the fraud played by the respondent only on 04.05.2017.

14. It will be relevant to record at this stage that Section 36 of the Arbitration Act as amended by the Arbitration and Conciliation (Amendment) Ordinance, 2020, relating to enforcement of award is not applicable to the facts and circumstances of the case.

15. Section 34 (3) of the Arbitration Act reads as under:

> "34. Application for setting aside arbitral award: ……
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made

> under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

16. The question that had fallen for consideration in ***P. Radha Bai*** (supra) was whether Section 17 of the Limitation Act is applicable while determining the limitation period under Section 34(3) of the Arbitration Act. Relevant part of Section 17 of the Limitation Act reads as under:

> "17. Effect of fraud or mistake.— (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—
>
> (a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or
>
> (b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
>
> (c) the suit or application is for relief from the consequences of a mistake; or
>
> (d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him,
>
> the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:"

17. It was held that Section 17 of Limitation Act does not defer the starting point of the limitation period merely because fraud was committed and that Section 17 does not encompass all kinds of frauds and mistakes. In paragraph 46 of ***P. Radha Bai*** (supra) it was pointed out that Section 17 (1) (b) and (d) only encompasses those fraudulent conduct or act of concealment of documents which have the effect of suppressing the knowledge entitling a party to pursue its legal remedy. Once a party becomes aware of the antecedent facts necessary to pursue a legal proceeding, the limitation period commences. Submission of Ms. Agarwal that the respondent suppressed antecedent facts necessary to pursue a legal proceeding is without any merit. As noticed earlier, in the reply to the statement of facts and claims made by the appellant, respondent had stated that out of 13 number of bridges for which DPRs were prepared by the appellant, only 6 number of bridges were sanctioned by the NEC and therefore, it cannot be said that there was any concealment of material and relevant facts by the respondent which prevented the appellant from pursuing legal proceeding.

18. Section 29(2) of the Limitation Act reads as follows:

> "29. Savings.- (1) …….....
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

19. The Hon'ble Supreme Court observed that Section 29 of the Limitation Act has two parts. First part stipulates that the limitation period prescribed by the special law or local law will prevail over the limitation period prescribed in the Schedule of the Limitation Act. The Arbitration Act is a special law which prescribes a specific period of limitation in Section

34(3) for filing objections to an arbitral award passed under the Arbitration Act and therefore, the provisions of Arbitration Act would apply. It was also noticed that there is no provision under the Limitation Act dealing with challenging of an award passed under the Arbitration Act. The second part mandates that Sections 4 to 24 of the Limitation Act will apply for determining the period of limitation only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. Hon'ble Supreme Court held that the phrase "expressly excluded" under Section 29 (2) of the Limitation Act can be inferred from the language of the special law or it can be necessarily implied from the scheme and object of the special law.

20. Hon'ble Supreme Court at paragraph 36 of ***P. Radha Bai*** (supra) noted the consequences that will follow if Section 17 of the Limitation Act were to be applied to determine the limitation period under Section 34 (3) of the Arbitration Act. Paragraph 36 reads as follows:

> *"**36.** If Section 17 of the Limitation Act were to be applied to determining the limitation period under Section 34(3), it would have the following consequences:*
>
> > *(a) In Section 34(3), the commencement period for computing limitation is the date of receipt of award or the date of disposal of request under Section 33 (i.e. correction/ additional award). If Section 17 were to be applied for computing the limitation period under Section 34(3), the starting period of limitation would be the date of discovery of the alleged fraud or mistake. The starting point for limitation under Section 34(3) would be different from the Limitation Act.*
> >
> > *(b) The proviso to Section 34(3) enables a court to entertain an application to challenge an award after the three months' period is expired, but only within an additional period of thirty dates, "but not*

thereafter". The use of the phrase "but not thereafter" shows that the 120 days' period is the outer boundary for challenging an award. If Section 17 were to be applied, the outer boundary for challenging an award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34(3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Mktg. Ltd. , (2012) 2 SCC 624 and Anilkumar Jinabhai Patel (D) through LRs v. Pravinchandra Jinabhai, (2018) SCC Online 276)."

21. It will be also relevant to take note of paragraphs 37, 38, 39 and 40 which read as follows:

*"**37.** In our view, the aforesaid inconsistencies with the language of Section 34(3) of the Arbitration Act tantamount to an "express exclusion" of Section 17 of the Limitation Act.*

***38.** This Court in Popular Construction case [Union of India v. Popular Construction Co., (2001) 8 SCC 470] followed the same approach when it relied on the phrase "but not thereafter" to hold that Section 5 of the Limitation Act was expressly excluded.*

***39.** As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter" used in the proviso to sub-section*

> *(3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result."*
>
> (emphasis added)
>
> ***40.*** *Further,the exclusion of Section 17 is necessarily implied when one looks at the scheme and object of the Arbitration Act."*

22. Thus, the Hon'ble Supreme Court on a scrutiny and analysis of Section 34 (3) of the Arbitration Act held that the language of Section 34(3) of Arbitration Act amounts to an "express exclusion" of Section 17 of the Limitation Act. It was further held that the exclusion of Section 17 of the Limitation Act was also necessarily implied when one looks at the scheme and object of the Arbitration Act.

23. In paragraphs 49 and 51 of ***P. Radha Bai*** (supra), the Hon'ble Supreme Court has laid down as follows:

> *"**49.** In the context of Section 34, a party can challenge an award as soon as it receives the award. Once an award is received, a party has knowledge of the award and the limitation period commences. The objecting party is therefore precluded from invoking Sections 17(1)(b) and (d) once it has knowledge of the award. Sections 17(1)(a) and (c) of the Limitation Act may not even apply, if they are extended to Section 34, since they deal with a scenario where the application is "based upon" the fraud of the respondent or if the application is for "relief from the consequences of a mistake". Section 34*

> *application is based on the award and not on the fraud of the respondent and does not seek the relief of consequence of a mistake.*
> ***** ***** ******
> ***51.*** *In view of the above, we hold that once the party has received the Award, the limitation period under Section 34(3) of the Arbitration Act commences. Section 17 of the Limitation Act would not come to the rescue of such objecting party."*

24. In view of the above position in law, there is no escape from the conclusion that application of the appellant under Section 34 of the Arbitration Act was barred by law.

25. Accordingly, the appeal is dismissed. No order as to costs.

SLR (2020) SIKKIM 894

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

WP (C) No. 9 of 2020

Sun Pharma Laboratories Limited ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner: Mr. Rahul Tangri, Ms. Gita Bista and Mr. Vivek Jain, Advocates.

For the Respondents: Mr. B.K. Gupta, Advocate.

Date of decision: 19th November 2020

A. Central Goods and Services Act, 2017 – 107 (11) – Having regard to the contour and ambit of S. 107 (11) of CGST Act, in our considered opinion, the Appellate Authority cannot be faulted for undertaking an enquiry even after observing that the order of the Adjudicating Authority was erroneous because the Appellate Authority has to decide whether the petitioner has made out a case for grant of refund – The Appellate Authority had acknowledged that there was an error in payment of tax in GSTR-3B for the month of August 2017 and that there was an excess payment of tax – Two questions had arisen for consideration before the Appellate Authority: (i) whether there was excess payment of tax by the petitioner, and (ii) whether the petitioner is entitled for refund. Once it was held that there was excess payment of tax, obviously, the issue that would engage attention is as to whether refund ought to be granted – The Appellate Authority, in the context of a claim for refund for excess payment of tax, may be justified to look into contemporaneous materials, but in such a circumstance, it will be imperative and mandatory for the Appellate Authority to afford an opportunity to the petitioner (appellant) to furnish its comments on the aspects on which the Appellate Authority would like to examine the matter by way of further enquiry – The Appellate Authority, in the instance case,

was required to grant the petitioner an opportunity to explain its stand on GSTR-1 and GSTR-3B as also the Circulars. Impugned order militates against the principles of natural justice – Order dated 11.09.2019 set aside and quashed.

(Paras 18, 20 and 21)

Petition allowed.

JUDGMENT (ORAL)

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

Heard Mr. Rahul Tangri, learned Counsel for the petitioner. Also heard Mr. B.K. Gupta, learned Counsel appearing for the respondents.

2. The petitioner is a Private Limited Company engaged in the supply of patented and propriety medicines falling under Chapter 29 and 30 of the Customs Tariff Act, 1975, made applicable to the supplies made under the Central Goods and Services Act, 2017 (for short, the CGST Act). It has two Units in the State of Sikkim, one of which is located at Nandok Block and the other at Namli Block, which will, hereinafter be referred to as Unit-I and Unit-II, respectively. Both the Units are registered under General Sales Tax Index (GSTI) vide GSTI number.

3. It is the case of the petitioner that during the month of August, 2017 two consignments of pine bark extract and Crospovidone NF were transferred by the petitioner from Unit-II to Unit-I. As the transfer did not qualify as supply in terms of Section 7 of the CGST Act, such transfer ought to have been effected under the cover of a delivery challan but, inadvertently two invoices bearing No. S 11725000335 dated 14.08.2017 and S 11725000354 dated 17.08.2017 came to be issued. Having realized the mistake, the transfers were not declared as "outward supply" in the Form GSTR-01 for the month of August, 2017. However, at the time of filing of the GSTR-3B return for the month in question, the petitioner inadvertently took these two invoices into consideration and discharged GST amounting to Rs.15,82,938.72 and Rs.1,659.42, respectively, totalling Rs.15,84,598/-. Subsequently, the petitioner filed an online application dated 01.12.2018 in Form GST RFD-01A under Section 54 of the CGST Act seeking refund of such amount. The acknowledgment copy along with all

annexures including a copy of the certificate of Chartered Accountant certifying that the petitioner had not passed incidence of tax to any other person was physically delivered before respondent no.2 on 04.12.2018. Respondent no.2, thereafter issued a Show Cause Notice (for short, SCN) dated 08.03.2019 for rejection of application for refund in Form GSTRFD-08 with reference to Rule 92(3) of the Central Goods and Services Tax Rules, 2017 (for short, the CGST Rules), asking the petitioner to show cause within 15 days from the date of receipt of notice with further direction to appear before the Assistant Commissioner of Gangtok Division, Siliguri GST Commissionerate on 27.03.2019, indicating therein that in case the petitioner failed to furnish the reply or failed to appear as stipulated, the case would be decided ex-parte on the basis of available records on merit.

4. The petitioner submitted reply dated 27.03.2019 to the SCN for rejection of application for refund and had requested for processing the refund claim on the basis of clarification and reply furnished by sanctioning the amount in cash or by sanctioning direct credit in the Input Tax Credit (for short, ITC) credit ledger on portal of the amounts in question in their respective heads of GST Taxes. Representative of the petitioner also appeared for personal hearing in terms of SCN and thereafter, respondent no.2 passed an order dated 01.04.2019/02.04.2019 in Form – GST-RFD-06 under Rule 92(1) of the CGST Rules, 2017 read with Section 54 and Section 56 of the CGST Act rejecting the prayer holding that there was no provision under GST Act and GST Rules for refund of excess payment of tax, if payment was made through ITC.

5. An appeal was preferred by the petitioner before the Commissioner (Appeals), CGST and Central Excise, Siliguri on 01.07.2019, who passed an order dated 11.09.2019 holding that the ground of rejection of the refund claim in the impugned order was erroneous. However, after an examination as to whether or not any excess payment of tax had actually occurred in the case, rejected the appeal by holding that there is no requirement of refund.

6. Therefore, recourse is taken to redress the grievance of the petitioner by filing this writ petition before this Court, as no Goods and Services Tax Appellate Tribunal had been constituted to entertain an appeal under Section 112 of the CGST Act.

7. Mr. Rahul Tangri, learned Counsel for the petitioner submits that the impugned order dated 11.09.2019 that travelled beyond the grounds cited in the SCN dated 08.03.2019, and therefore, the impugned order is violative of principles of natural justice. It is submitted by him that once the reason for rejection of the prayer for refund was found to be erroneous, the appeal of the petitioner ought to have been allowed. It is submitted that the findings recorded by the Appellate Authority that the petitioner had rectified the error committed in payment of tax in GSTR-3B for the month of August, 2017 in the GSTR-1 of the respective month and that the petitioner had carried forward the excess amount of tax to the next month's return to be offset against the output tax liability of that month are perverse. It is submitted that an analysis and scrutiny of GSTR-1, GSTR-2A and GSTR-3B of the petitioner for the month of September, 2017 would demonstrate that there was no adjustment of tax paid in excess in the month of August, 2017 against GST liability for the month of September, 2017, in any form. Mr. Tangri submits that though in the normal course, GSTR-1 was required to be filed before GSTR-3B, filing of GSTR-1 was deferred by the authorities and the petitioner and all others falling under GST Act was required to submit GSTR-3B before filing GSTR-1. He has submitted that reliance placed on the Circular No. 7/7/2017-GST dated 01.09.2017 issued by the Central Board of Excise and Customs (presently known as Central Board of Indirect Taxes and Customs), which was issued to address the difficulties faced by the assesses regarding the system based reconciliation of forms GSTR-1, GSTR-2 and GSTR-3B, was suspended by Circular No. 26/26/ 2017-GST dated 29.12.2017 indicating therein that system based Circular dated 01.09.2017 can be operationalized only after the relevant notification is issued, which, however, has not been issued till date. He submits that it was also laid down in the said Circular dated 29.12.2017 that excess amount of tax paid in a month by mistake may be adjusted in returns in Form GSTR-3B of subsequent months and in cases where such adjustment is not feasible, refund can be claimed. He has submitted that the Circulars issued by the Board are binding on the Department and that the petitioner had fulfilled all the conditions precedent in terms of Section 54 of CGST Act and CGST Rules to obtain refund or tax paid in excess. Learned counsel submits that in the circumstances of the case, tax paid inadvertently by the petitioner has been appropriated and retained by the department without any authority of law.

8. Mr. Tangri has strenuously urged that the petitioner had not adjusted the excess tax amount paid and therefore, this Court may pass appropriate orders directing the respondents to refund the tax along with interest as envisaged under Section 56 of the CGST Act.

9. Mr. B.K. Gupta, learned counsel for the respondents, abiding by the stand taken in the affidavit filed on behalf of respondent nos. 1 to 4, supports the impugned order dated 11.09.2019 and contends that order dated 11.09.2019 is not beyond the scope of SCN dated 08.03.2019 as it was noted therein that there is no evidence of payment of tax. He has submitted that Section 107(11) of the CGST Act empowers the Appellate Authority to pass order, confirming, modifying or annulling the decision or order of the Adjudicating Authority after making such further inquiry as may be considered necessary. The two invoices in respect of which refund had been claimed having been issued in the month of August, 2017, there is no illegality in placing reliance on the said Circular dated 01.09.2017 as the same was very much in force at that point of time. It is submitted by him that the petitioner was required to adjust the error following the steps outlined in the Circular dated 29.12.2017. He has also reiterated the finding recorded by the Appellate Authority that the excess payment of tax in GSTR-3B is not actually an excess payment of tax as it can be auto adjusted in the subsequent months. However, the appellant did not adjust its excess payment of tax in subsequent months.

10. In reply, learned counsel for the petitioner submits that while it was alleged in the SCN that there was no evidence of excess tax paid, in the impugned order dated 11.09.2019, it is held that the petitioner had rectified the error by carrying forward the excess payment of taxes to the next month's return against the output tax liability in terms of the Circular dated 01.09.2017 which goes to show that the petitioner had, in fact, paid taxes in excess for the month of August, 2017. He has contended that the power of the Appellate Authority cannot be stretched to permit the Appellate Authority to make further inquiry in respect of a matter which is not part of SCN and any such further inquiry conducted beyond the SCN will fall foul of the principles of natural justice. It is submitted by him that even while making such inquiry no documents or explanations were sought for from the petitioner. He has contended that on surmises and conjectures and on presumption, the Appellate Authority had passed the impugned order without even verifying as to whether, in reality, the excess tax paid was adjusted in subsequent months.

11. Learned counsel submits that due to non-operationalization of adjustment feature in the GST portal and also because of lack of clarity as to how to adjust, adjustment was not carried out by the petitioner, and therefore, refund application was submitted in terms of Section 54 of the CGST Act. It is also contended that the Circulars did not provide details as to how to make adjustments. That there were deficiencies in the GST portal is fortified by the fact that time limit for filing GSTR-1 return for the month of August, 2017 was extended up to 10.01.2018 and then again up to 31.03.2018 and the petitioner had filed GSTR-1 only on 29.12.2017. He has argued that there being no doubt regarding excess payment of tax by the petitioner as also non-adjustment of the same by the petitioner in the subsequent months, refund claim made by the petitioner merits to be allowed.

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

13. In the SCN dated 08.03.2017, it was stated that refund application is liable to be rejected on the following reasons:

> "(i) On scrutiny of cash ledger in GST portal for the relevant period of refund, it has been noticed that the said refund claim has not been debited from the cash ledger. There is also not any evidence of Excess payment of tax as declared in refund claim. As such it appears that it is contrary to the provisions of Section 16, Section 31 and Section 54 of the CGST Act, 2017 and Rules 36, 46 and 89 of the CGST Rules, 2017.
>
> (ii) As per Section 34 of CGST Act, 2017 along with Circulars No. 17/17/2017-GST dated 15.11.2017, 24/24/2017-GST dated 21.12.2017 and 37/11/2018-GST dated 15.03.2018, you failed to submit the requisite documents such as - all the invoices (in original) for the purpose of evidencing the supply of goods made and Delivery of challan (in original) for the purpose of evidencing that this was only movement of goods to one unit to another, payment particulars, statement in respect of excess

payment of tax etc. as per the instruction given in Circular No. 37/11/2018-GST dated 15.03.2018 and required declarations also as stated in the said circular of refund."

14. Both the above points were required to be clarified by the petitioner. The petitioner had, accordingly, submitted its reply on 27.03.2019 and representative of the petitioner had also appeared for personal hearing before respondent no. 2. The operative portion of the order dated 01.04.2019/02.04.2019 reads as follows:

> "I, hereby reject an amount of Rs.15,84,599/- (Rupees fifteen lakhs eighty four thousand five hundred and ninety nine) only to M/s Sun Pharma Laboratories Ltd., having GSTIN 11AACCS61631Z4 under Rule 92 (1) of the CGST Rules, 2017 read with Section 54 and 56 of CGST Act, 2017, since, there is no provision under GST Act and GST Rules for refund of excess payment of tax, if payment made through Input Tax Credit".

15. The order seems to suggest that there was excess payment of tax. However, prayer for refund was rejected on the ground that there is no provision under GST Act and GST Rules for refund of excess payment of tax, if such payment is made through ITC. As noted earlier, the Appellate Authority in its order dated 11.09.2019 had categorically held that the ground of rejection of refund claim in the impugned order is erroneous. It would be relevant to extract paragraphs 8, 9 and 10 (recorded as paragraph 9 again) of the order of the Appellate Authority, which read as under:

> "8. I have carefully gone through the records of the case including the submission made by the appellant. I fully agree with the contention of the appellant that GST laws do not distinguish between the mode of payment of excess tax for the purpose of refund. Therefore, the ground of rejection of the refund claim in the impugned order is erroneous. However, it is required to examine whether or not any excess payament of tax has actually occurred in the instant case. On comparison of the details of all

invoices considered while discharging GST liability in GSTR-3B for the month of Aug. 2017 and details of invoices as uploaded in GSTR-1 for the month of Aug. 2017, it is seen that two invoices in respect of which refund has been claimed in the instant case, have been taken for tax liability in GSTR-3B, but those invoices were not uploaded in GSTR-1 of the respective month. In this respect it is pertinent to mention following two paras of C.B.E. & C. Circular No. 7/7/2017-GST. dated 1-9-2017:-

> *"Correction of erroneous details furnished in FORM GSTR-3B:*
>
> *6. In case the registered person intends to amend any details furnished in FORM GSTR3B, it may be done in the FORM GSTR-1 or FORM GSTR-2, as the case may be. For example, while preparing and furnishing the details in FORM GSTR-1, if the outward supplies have been under reported or excess reported in FORM GSTR-3B, the same may be correctly reported in the FORM GSTR-1. Similarly, if the details of inward supplies or the eligible ITC have been reported less or more than what they should have been, the same may be reported correctly in the FORM GSTR-2. This will get reflected in the revised output tax liability or eligible ITC, as the case may be, of the registered person. The details furnished in FORM GSTR-1 and FORM GSTR-2 will be auto-populated and reflected in the return in FORM GSTR-3 for that particular month.*
>
> *Reduction in output tax liability:*
>
> *10. Where the output tax liability of the registered person as per the details furnished in FORM GSTR-1 and FORM*

GSTR-2 is less than the output tax liability as per the details furnished in the FORM GSTR-3B and the same is not offset by a corresponding reduction in the input tax credit to which he is entitled, the excess shall be carried forward to the next month's return to be offset against the output liability of the next month by the taxpayer when he signs and submits the return in FORM GSTR-3. However, simultaneously, if there is a decrease in the eligible input tax credit, the same will be adjusted against the above mentioned reduction in output tax liability and the balance, if any, of the reduction in output tax liability shall be carried forward to the next month's return to be offset against the output liability of the next month."

9. It is evident from the above two paras that payment of tax in GSTR-3B is not final. If any error is crept in it, there is the chance of rectifying it at the time of submission of GSTR-1 and GSTR-2. In the instance case, the appellant have rectified their error in tax payment in GSTR-3B for the month of Aug. 17 in the GSTR-1 of the respective month, and the excess payment of tax has been carried forward to the next month's return to be offset against the output tax liability of that month. Thus, any excess payment of tax in GSTR-3B is not actually an excess payment of tax as it will be auto adjusted subsequently by the system. 9. In view of the discussion as mentioned in para(s) 8 and 9 above, there is no requirement of refund in the instance case, and so I reject the instant appeal submitted by the appellant. The instant appeal is disposed off accordingly."

16. We are unable to accept the submission of learned counsel for the petitioner that once the order of the Adjudicating Authority was held to be

erroneous by the Appellate Authority, the Appellate Authority ought to have allowed refund of excess tax paid by allowing the appeal of the petitioner (the appellant) without any further consideration.

17. Relevant part of section 107(11) of CGST Act,2017 reads as under:

> (11) The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order.

18. Having regard to the contour and ambit of section 107 (11) of CGST Act, in our considered opinion, the Appellate Authority cannot be faulted for undertaking an enquiry even after observing that the order of the Adjudicating Authority was erroneous because the Appellate Authority has to decide whether the petitioner has made out a case for grant of refund. The Adjudicating Authority had only scrutinized the cash ledger in GST portal for the relevant period of refund. In the reply to the SCN, the petitioner had stated that the GST liability for the month of August, 2017 had been discharged by debiting from ITC credit ledger to the extent of its availability and the balance liability was paid from cash ledger for the month and that since there is no requirement of debiting invoice-wise liability from the said ledger, the same may not be visible on the portal. The Appellate Authority concluded that the petitioner had rectified their error in tax payment in GSTR-3B for the month of August, 2017 in the GSTR-1 of the respective month, and the excess payment of tax had been carried forward to the next month's return to be offset against the output tax liability for that month. In other words, the Appellate Authority had acknowledged that there was an error in payment of tax in GSTR-3B for the month of August 2017 and that there was an excess payment of tax. Submission of Mr.Tangri that the inquiry conducted by the Appellate Authority was beyond the scope of SCN cannot be accepted. Two questions had arisen for consideration before the Appellate Authority: (i) whether there was excess payment of tax by the petitioner, and (ii) whether the petitioner is entitled for refund. Once it was held that there was excess payment of tax, obviously, the issue that would engage attention is as to whether refund ought to be granted. It is in that context the question of adjustment had come to the fore and therefore,

it cannot be said that the inquiry conducted by the Appellate Authority do not have even any remote nexus with the SCN.

19. However, it does not appear from the order of the Appellate Authority that the Appellate Authority had perused and examined GSTR-1, GSTR-2 and GSTR-3B for the month of September, 2017 to actually find out whether excess payment of tax had been carried forward to be offset against the output tax liability of that month. It was presumed by the Appellate Authority that the petitioner had rectified the error in the GSTR-1 for the month of August, 2017 and that the excess payment of tax had been carried forward in the return of September, 2017. On that presumption, it was held that excess payment of tax in GSTR-3B is not actually an excess payment of tax as it will be auto adjusted by the system and therefore, there is no requirement of refund. No finding has been recorded that, subsequently, excess payment of tax had been auto adjusted. It is to be noted that by the time Appellate Authority had passed the order, more than two years had elapsed. It is also significant to note that in the affidavit of respondent nos.1 to 4, a statement is made in paragraph 23 that the petitioner had not adjusted excess payment in corresponding months, which is contrary to the observation of the Appellate Authority.

20. It is the positive case of the petitioner that excess payment of tax had not been carried forward to the subsequent months. The Appellate Authority, in the context of a claim for refund for excess payment of tax, may be justified to look into contemporaneous materials, but in such a circumstance, it will be imperative and mandatory for the Appellate Authority to afford an opportunity to the petitioner (appellant) to furnish its comments on the aspects on which the Appellate Authority would like to examine the matter by way of further enquiry.

21. It appears from a reading of the order dated 11.09.2019 of the Appellate Authority that only argument that was advanced by the petitioner (appellant) was with regard to the finding recorded by the Adjudicating Authority and on no other point. The Appellate Authority, in the instance case, was required to grant the petitioner an opportunity to explain its stand on GSTR-1 and GSTR-3B as also the Circulars. We are of the opinion that the impugned order militates against the principles of natural justice. Accordingly, the order dated 11.09.2019 is set aside and quashed.

22. We do not consider it appropriate to embark upon an inquiry to examine the claim of the petitioner that excess payment of tax has not been carried forward or that the same has not been adjusted. These are matters to be reconsidered by the Appellate Authority. It will not be necessary for the Appellate Authority to indicate the aspects that it would like to examine, as the same are self-evident from the order dated 11.09.2019.

23. In that view of the matter, the petitioner is permitted to file a representation dealing with the aspects as reflected in paragraphs 8, 9 and 10 of the order dated 11.09.2019 and such representation would be filed within a period of eight weeks from today before the Appellate Authority. After the representation is filed, an opportunity shall be granted to the representative/counsel for the petitioner for hearing and thereafter, the Appellate Authority shall pass a fresh order with expedition and without any delay regarding the claim made by the petitioner for refund.

24. The writ petition is allowed with the above directions and observations. No cost.

SLR (2020) SIKKIM 906
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

WA No. 02 of 2019

The Dean,
I.K. Gujral Punjab Technical University ….. APPELLANT

Versus

Sikkim Students Welfare Association of
Chandigarh and Others ….. RESPONDENTS

For the Appellant:	Mr. A.K. Upadhyaya, Senior Advocate with Mr. D.K. Siwakoti and Mr. Sonam Rinchen Lepcha, Advocates.
For Respondent 1-3:	Mr. Gulshan Lama, Advocate.
For Respondent 4, 5, 8:	Mr. Sudesh Joshi, Addl. Advocate General with Mr. Sujan Sunwar, Asstt. Govt. Advocate.
For Respondent 6,10,11:	Mr. Karma Thinlay, Central Government Counsel with Mr. Thinlay Dorjee Bhutia, Advocate.
For Respondent No.9:	Mr. Leonard Gurung, Advocate.
For Respondent No.7:	None.

Date of decision: 20th November, 2020

A. Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 148 (1) – Letters Patent Appeals – A perusal of order dated 15.05.2019 goes to show that appellant was required to submit a fresh

comprehensive representation to UGC by 20.05.2019 duly annexing a comparative chart of the syllabi of the courses as indicated with their change in nomenclature and UGC was directed to consider the representation filed by the appellant in the joint presence of the representatives of the appellant as also five representatives of the petitioner-Association and UGC was to dispose of the matter within eight weeks with a reasoned order. The expenses for the meeting to be attended by the five representatives of the petitioner-Association, was to be borne by the appellant – A reading of the aforesaid order would go to show that the learned Single Judge was led to believe that the appellant had not taken steps in compliance of the order dated 15.05.2019 as the respondent no. 4 (appellant) had not informed the writ petitioners of the date that was fixed for them to appear before UGC, which belief was further bolstered by the submission of the learned Counsel for UGC that no steps had been taken by the appellant and that no representation was also filed. After recording the above conclusion, the learned Single Judge referred to the previous orders – Reading of paragraphs 10 and 13 of the order dated 22.07.2019 leaves no manner of doubt that the direction to pay a sum of ₹ 1 lakh each to each of the petitioner students was by way of compensation – The direction to make payment of compensation by the order dated 22.07.2019 attaches finality so far as that issue is concerned. Such direction for compensation could not have been passed on presumption. It will be relevant to note that in the writ petition, the writ petitioners, amongst others, had prayed for compensation for the affected students. It was a collateral issue arising out of perceived violation of direction of this Court, which was evidently not a subject matter of the writ petition – There was no basis for the learned Single Judge to accept the submission of learned Counsel appearing for the UGC and at the same time, to reject the submission of learned Counsel for the appellant. Learned Single Judge also presumed that because no date for meeting is given, the same is evidently a pointer to the fact that the appellant had not taken steps. It has come to light that the submission of learned Counsel appearing for the UGC was not factually correct and he had made the submission without any basis. It has also transpired that despite being aware of the order of this Court, no date for meeting was given by UGC within a period of eight weeks and the meeting finally took place only on 06.09.2019. It was UGC which had not complied with the order of this Court dated 15.05.2019 in letter and spirit – It is evident that the order dated 22.07.2019 was based on a mistaken fact going to the root of the

matter. In our considered opinion, when the representation submitted by the petitioner was brought to the notice of the Court by way of filing a review petition, it should have been taken as a sufficient reason in the facts and circumstances of the case to review the order dated 22.07.2019 –In view of the above discussions, impugned orders dated 22.07.2019 and 03.09.2019 are set aside and quashed.

(Paras 21, 23, 25, 26, 30, 31 and 32)

Appeal dismissed.

Chronology of cases cited:

1. Shah Babulal Khimji v. Jayaben D. Kania and Another, (1981) 4 SCC 8.
2. Midnapore Peoples' Coop. Bank Ltd. and Others v. Chunilal Nanda and Others, (2006) 5 SCC 399.
3. Central Mine Planning and Design Institute Ltd. v. Union of India and Another, (2001) 2 SCC 588.

JUDGMENT (ORAL)

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

This appeal under Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011, for short, the P.P. Rules, is preferred challenging the orders dated 22.07.2019, 06.09.2019 and 18.10.2019 passed in W.P.(C) No. 60 of 2016 as well as order dated 03.09.2019 passed in Review Pet.(C) No. 01 of 2019 by which review of the order dated 22.07.2019 was prayed for. However, at the very outset, Mr. A. K. Upadhyaya, learned Senior Counsel appearing for the appellant submits that this appeal may not have been taken to be preferred against the orders dated 06.09.2019 and 18.10.2019.

2. Learned counsel appearing for the parties submit that since all the parties are represented, save and except respondent no.7, who had not entered its appearance despite service effected pursuant to the notice issued in the application for condonation of delay, and since any order passed in this appeal will not in any way prejudice the respondent no.7, the appeal may be taken up for disposal at the admission stage.

3. In view of the submissions of the learned counsel for the parties and on being satisfied that having regard to the relief prayed for by the appellant any order passed in the appeal will not cause any prejudice to the respondent no.7, we dispense with notice to respondent no.7 and take up the appeal for disposal at the admission stage.

4. Mr. Upadhyaya submits that on 15.05.2019, a direction was given by the learned Single Judge directing respondent no. 4 (who is the appellant herein) to submit a fresh comprehensive representation to respondent no. 8 of the writ petition, University Grants Commission(UGC) by 20.05.2019, annexing a comparative chart of the syllabi of course in Bachelor in Airlines Tourism and Hospitality Management (B.Sc. ATHM) and a comparative chart for the course of Bachelor of Health and Spa and Resort Management (BHSRM) with the changes in their nomenclature. When the matter was taken up for consideration on 22.07.2019, submissions were advanced on behalf of the appellant that necessary steps had been taken in terms of order dated 15.05.2019 but the learned Counsel appearing for UGC submitted that no representation had been received in terms of the order dated 15.05.2019. It is submitted that the learned counsel for the appellant did not have the copy of the representation on that day with him when the matter was taken up on 22.07.2019. On the basis of the submission of the learned Counsel appearing for UGC, it was construed that no action was taken by the appellant and accordingly, learned Single Judge directed the appellant to pay a sum of Rs.1.00 lakh each to each of the petitioners. Learned Senior Counsel submits that though references were made in the order dated 22.07.2019 to some previous orders, it would be apparent that the direction to pay a sum of Rs.1.00 lakh each to each of the students was on account of alleged non-compliance of the order dated 15.05.2019 and such alleged non-compliance was accepted by the Court only because of the incorrect submission made by the learned Counsel for UGC. It is submitted that though the writ petition was filed by the office bearers of Sikkim Students Welfare Association of Chandigarh through its President, General Secretary and Treasurer as petitioner nos. 1, 2 and 3, in the writ petition, a list of 236 students, shown to be affected students is enclosed and, therefore, amount payable by the appellant will be to the tune of Rs. 2.36 crores. It is submitted by him that amount directed to be paid, as would be evident from the order dated 22.07.2019, is by way of compensation, and that too, on a factually wrong premise.

5. Learned Senior Counsel submits that against the said order dated 22.07.2019, a review petition was filed being Review Pet.(C) No. 01 of 2019 enclosing thereto the representation dated 16.05.2019 submitted by the appellant before UGC which was also duly acknowledged on 20.05.2019 and accordingly, had prayed for review of the order. However, the review petition was also rejected. It is submitted that when the representation was filed by the appellant in terms of order dated 15.05.2019 was placed on record of the review petition, the learned Single Judge ought to have reviewed the order dated 22.05.2019 and failure to do so had occasioned irreparable loss and injury to the appellant.

6. He submits that pursuant to the representation dated 16.05.2019, in terms of the order of this Court dated 15.05.2019 a meeting was convened on 06.09.2019 by UGC. Subsequently, an order dated 25.09.2019 was issued by UGC, in effect, rejecting the prayer made in the representation as against which the appellant had filed a writ petition before the Punjab & Haryana High Court, registered as CWP No. 29701/2019. He has also submitted that against the orders dated 22.07.2019 and 06.09.2019 passed in Writ Petition (C) No. 60 of 2016 as well as order dated 03.09.2019 passed in Review Pet.(C) No. 01 of 2019, the appellant had filed a Special Leave Petition, which was registered as SLP(C) No. 22416 of 2019 and the same was listed on 30.09.2019. However, the said petition was withdrawn with liberty to approach the High Court and the Hon'ble Supreme Court had passed an order on 30.09.2019 dismissing the petition as withdrawn with liberty as prayed for.

7. The writ petitioners as respondent nos.1 to 3 had filed an affidavit in the appeal. It is submitted on the basis thereof by Mr. Gulshan Lama, learned Counsel for the respondent nos. 1, 2 and 3 that the appellant is adopting dilatory tactics to the detriment of the writ petitioners. It is contended that various orders reflected in the order dated 22.07.2019 will go to show the callous conduct of the appellant. He submits that as the appellant had been negligent in complying with various directions issued from time to time, on an earlier occasion, cost of Rs.1 lakh was imposed on the appellant. He has submitted that when the welfare of the students was involved, the appellant not only ought to have produced the representation

but also ought to have filed a compliance report. He submits that there is no merit in the appeal and therefore, no interference is called for with the orders of the learned Single Judge and the appeal deserves to be dismissed.

8. Mr. Sudesh Joshi, learned Additional Advocate General, Sikkim appearing for respondent nos. 4,5 and 8 supports the contentions of the learned counsel for the appellant and submits that but for the wrong submission of learned Counsel for UGC, no occasion would have arisen for direction to make payment of compensation amounting to Rs.2.36 crores. He further submits that when the incorrect submission made by the learned Counsel appearing for UGC was pointed out by the appellant by filing a review petition enclosing thereto the copy of the representation dated 16.05.2019, the order dated 22.07.2019 ought to have been reviewed.

9. Mr. Karma Thinlay, learned Senior Counsel appearing for respondent no. 6 as well as UGC submits that he was not instructed by UGC that it had received a copy of the representation dated 16.05.2019 submitted by the appellant and therefore, he had made the submission as noted in the order dated 22.07.2019. He has further submitted that even though the appellant may have submitted the representation on 16.05.2019, the appellant had not pursued the matter and therefore, there was laches and negligence on the part of the appellant. He further submits that if the appellant had produced the representation, then there would have been no occasion for passing the order dated 22.07.2019.

10. Mr. Leonard Gurung, learned Counsel appearing for respondent no. 9 submits that he does not have much to offer in the present proceedings.

11. Though none of the respondents had raised the plea of maintainability of the appeal and no such plea had also been taken by the respondent nos. 1 to 3 in the affidavit filed in the writ appeal, we had entertained some doubts about the maintainability of the appeal against the two orders dated 22.07.2019 and 03.09.2019 and had accordingly, sought for the response of Mr. Upadhyaya.

12. Mr. Upadhyaya, learned Senior Counsel, responding to the question posed by the Court, submits that the direction to pay Rs.1.00 lakh each to each of the students is by way of compensation and therefore, such a

direction as contained in the order dated 22.07.2019 being a judgment within the meaning of Rule 148 of the P.P. Rules, the appeal is maintainable. He submits that the appeal is also maintainable against rejection of the prayer for review. He has further submitted that the orders dated 22.07.2019 and 03.09.2019 have worked serious injustice to the appellant for its no fault. He has placed reliance in the cases of ***Shah Babulal Khimji vs Jayaben D. Kania And Anr.,*** reported in ***(1981) 4 SCC 8*** and ***Midnapore Peoples' Coop. Bank Ltd. & Ors. vs. Chunilal Nanda & Ors.,*** reported in ***(2006) 5 SCC 399***.

13. Rule 148 (1) of the P.P. Rules reads as under: -

> "148. Letters Patent Appeals:- (1) An appeal shall lie to the Division Bench, not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court, and not being an order made in the exercise of revisional jurisdiction, and not being sentence or order passed or made in exercise of Criminal jurisdiction of a Judge of the High Court sitting singly."

14. In ***Shah Babulal Khimji*** (supra), the Hon'ble Supreme Court was considering Clause 15 of the Letters Patent of the High Court of Bombay. It was observed that the concept of a judgment as defined by Code of Civil Procedure,1908(CPC) seems to be rather narrow and the limitations engrafted by Section 2(2)CPC cannot be physically imported into the definition of the word "judgment" as used in Clause 15 of the Letters Patent because the Letters Patent has not used the term "order" or "decree" and accordingly, observed that intention, therefore, of the givers of the Letters Patent was that the word "judgment" should receive a much wider and more liberal interpretation than the word "judgment" used in the CPC. It was also cautioned that at the same time it cannot be said that any order passed by a trial judge would amount to a judgment as otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. The Hon'ble Supreme Court held that a judgment can be of three kinds, namely, a final judgment, a preliminary judgment and an intermediary or interlocutory judgment. A final judgment is one which

decides all the questions or issues in controversy so far as the trial judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench. A preliminary judgment may take two forms – where the trial judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. In such an event in any case the suit is finally decided in one way or the other. The other kind of preliminary judgment would be where the trial judge passes an order after hearing preliminary objections raised by the defendant relating to maintainability of the suit, e.g. bar of jurisdiction, *res judicata*, a manifest defect in the suit, absence of notice under Section 80 CPC and the like, and these objections are decided by the trial judge against the defendant. In such an event the suit is not terminated but continues and has to be tried on merits but the order of the trial judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be a appealable to a larger Bench. So far as intermediary or interlocutory judgment is concerned it was observed that most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of the Order 43 Rule 1 CPC which had already been held to be judgments. There would be interlocutory orders though not covered under Order 43 (1) CPC, which also possess the characteristics and trappings of finality in that the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding but such adverse effect on the party concerned must be direct or immediate rather than indirect or remote. It was held that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which works serious injustice to the party concerned.

15. In paragraph 103, the Hon'ble Supreme Court quoted as follows:-

> "**103.** ……We might mention here that under clause (w) of Order 43 Rule 1 an order granting an application is appealable. On a parity of reasoning, therefore, an order dismissing an application for review would also be appealable under Letters Patent being a judgment though it is not made appealable under Order 43 Rule 1."

16. Hon'ble Supreme Court at paragraph 115 observed that every interlocutory order cannot be regarded as judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned.

17. At paragraph 120, the Hon'ble Supreme Court laid down some of the principles for guidance in deciding whether an order passed by the trial judge amounts to a judgment within the meaning of the Letters Patent. Paragraph 120 reads as follows: -

> **"120.** Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the trial Judge amounts to a judgment within the meaning of the letters patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:
>
> (1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.
>
> (2) An order rejecting the plaint.
>
> (3) An order refusing leave to defend the suit in an action under Order 37, of the Code of Civil Procedure.

(4) An order rescinding leave of the trial Judge granted by him under clause 12 of the letters patent. 11 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive.

(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.

(7) An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.

(8) An order varying or amending a decree.

(9) An order refusing leave to sue in forma pauperis.

(10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

(13) An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court fees against the plaintiff."

18. At paragraphs 15 and 16 of ***Midnapore Peoples' Coop. Bank Ltd.*** (supra), the Hon'ble Supreme Court laid down as follows:

> **"15.** Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:

(*i*) Orders which finally decide a question or issue in controversy in the main case. 12 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh

(*ii*) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(*iii*) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.

(*iv*) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(*v*) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

16. The term "judgment" occurring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2(9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which will affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fall under categories (*i*) to (*iii*) above, are, therefore, "judgments" for the purpose of filing appeals under the Letters Patent. On the other hand, orders falling under categories (*iv*) and (*v*) are not "judgments" for the purpose of filing appeals provided under the Letters Patent."

19. In ***Central Mine Planning and Design Institute Ltd. vs. Union of India and another***, reported in ***(2001) 2 SCC 588***, which was noted in ***Midnapore Peoples' Coop. Bank Ltd.*** (supra), Clause 10 of the Letters Patent of Patna High Court was considered. In the aforesaid case, an award of the Industrial Disputes Tribunal directing reinstatement and partial payment of back wages was challenged in a writ petition. The workmen had 13 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh claimed interim relief under Section 17-B of the Industrial Disputes Act, 1947. The learned Single Judge directed the employer to pay full wages to the workmen during the pendency of the writ petition. This order being challenged in a Letters Patent appeal, it was held by the Division Bench that the appeal was not maintainable as the order directing payment by the Single Judge was not a judgment. However, the Hon'ble Supreme Court held that an interlocutory order passed in a writ proceeding directing payment under Section 17-B of the Industrial Disputes Act, 1947 was a final determination affecting vital and valuable rights and obligations of parties and therefore, would fall under the category of intermediary or interlocutory judgment against which Letters Patent appeal would lie.

20. It will be relevant to take note of the order dated 15.05.2019 and accordingly, the same is extracted herein below:

> "It is submitted by learned Senior Counsel for Respondent No. 4 that they have submitted another representation to the University Grants Commission (UGC), Respondent No. 8, duly annexing a comparative chart of the syllabus for the courses offered in their University in Bachelor in Airlines, Tourism and Hospitality Management (B.Sc. ATHM) the nomenclature of which was changed to Bachelor of Management (Airlines, Tourism and Hospitality Management) and also a comparative chart for the courses of Bachelor in Health, Spa & Resort Management (BHSRM) changed to Bachelor of Management (Health, Spa & Resort Management).

Learned Additional Advocate General submits that eight weeks time may be afforded to the Respondent No. 4 and Respondent No. 8 to take steps in the matter. 14 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh

Learned Counsel for the Petitioner submits that five representatives of the Petitioner-Association also be allowed to be present before the Respondent No. 8 when the matter is being taken up by the said Respondent.

Considered submissions.

The Respondent No. 4 shall submit a fresh comprehensive representation to the Respondent No. 8 by 20.05.2019 duly annexing a comparative chart of the syllabi of the courses as detailed supra with their change in nomenclature.

The Respondent No. 8 is directed to consider the representation filed by Respondent No. 4 in the joint presence of the representatives of the Respondent No. 4 as also five representatives of the Petitioner-Association and shall dispose of the matter within eight weeks from today with a reasoned order.

Costs of travel, boarding and food for the five representatives of the Petitioner-Association shall be borne by the Respondent No. 4 from the date that they embark on the journey till the time they are required by Respondent No. 8. The modalities on this aspect shall be worked out between the Petitioners and the Respondent No. 4.

List on 22.07.2019."

21. A perusal of the above order dated 15.05.2019 goes to show that appellant was required to submit a fresh comprehensive representation to

UGC by 20.05.2019 duly annexing a comparative chart of the syllabi of the courses as indicated with their change in nomenclature and UGC was directed to consider the representation filed by the appellant in the joint presence of the representatives of the appellant as also five representatives of the petitioner-Association and UGC was to dispose of the matter within eight weeks with a reasoned order. The expenses for the meeting to be attended by the five representatives of the petitioner-Association, was to be borne by appellant.

22. Paragraphs 5, 6, 7, 8, 9, 10 and 13 of the order dated 22.07.2019 read as follows:

> "5. Despite clear and unambiguous directions of this Court dated 15-05-2019 which for brevity is not being reiterated, the Respondent No.4 has failed to take any steps in compliance thereof. This is evident from the fact that neither did the Respondent No.4 inform the Petitioners of the date that was being fixed by them to appear before the Respondent No.8, while the unequivocal submissions of Counsel for the Respondent No.8 lends credence to the fact that infact no steps have been taken by the Respondent No.4 before them, nor was any representation filed.
>
> 6. The records of the case reveal that as far as back in 28-09-2018 the Respondent No.4 voluntarily undertook to take steps with the Respondent No.8, the University Grants Commission (UGC), as remedial measures for recognition of the Degrees in controversy, i.e., Bachelor in Airlines, Tourisms and Hospitality Management (B.Sc. ATM) and Bachelor in Health, Spa and Resort Management (BHSRM), for the years 2011 to 2014 and 2012 to 2015.
>
> 7. The records also reveal that on 12-10-2018 letter was issued by the Registrar of the Respondent No.4 to the Respondent No.8 requesting

them to take steps for recognition of the Courses. 16 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh

8. The Order dated 02-11-2018 observes the callous attitude adopted by Respondent No.4 towards the circumstance in the Writ Petition and due to their inaction the Respondent No.4 had been directed to pay total costs of Rs.1,00,000/- (Rupees one lakh) only, to the Petitioners.

9. Subsequent thereto, on 14-11-2018 this Court had observed that the Orders of the Court are being flouted by the Respondent No.4 and treated callously and not given the seriousness it deserves.

10. Thereafter, an Order followed on 29-11-2018 wherein the Respondent No.4 submitted that their representative had met the Additional Secretary of the UGC, Respondent No.8 on 16-10-2018, sans documentary proof of such meeting. Consequently, the Respondent No.4 sought time to take steps. The Respondent No.4 was warned that should they fail to take steps as required they shall compensate each of the students.

x x x

13. In view of the non-action of the Respondent No.4 despite directions of this Court they are directed to pay a sum of Rs.1,00,000/- (Rupees one lakh) only, each to the each of the Petitioner Students by 31-08-2019 without fail and submit report before the next date fixed."

23. A reading of the aforesaid order would go to show that the learned Single Judge was led to believe that the appellant had not taken steps in compliance of the order dated 15.05.2019 as the respondent no.4 (appellant) had not informed the writ petitioners of the date that was fixed

for them to appear before UGC, which belief was further bolstered by the submission of the learned Counsel for UGC that no steps had been taken by the appellant and that no representation was also filed. After recording the above conclusion, the learned Single Judge referred to the previous orders as noticed hereinabove.

24. In paragraph 10, it was noted that on 29.11.2018 it was observed that if the respondent no. 4 (appellant) failed to take steps as required, they should compensate each of the students. Non-action of the respondent no. 4 (appellant), as is referred to in paragraph 13 of the order dated 22.07.2019 relates to failure of the respondent no. 4 (appellant) to take steps in compliance of the order dated 15.05.2019.

25. Reading of paragraphs 10 and 13 of the order dated 22.07.2019 leaves no manner of doubt that the direction to pay a sum of Rs.1.00 lakh each to each of the petitioner students was by way of compensation.

26. The direction to make payment of compensation by the order dated 22.07.2019 attaches finality so far as that issue is concerned. Such direction for compensation could not have been passed on presumption. It will be relevant to note that in the writ petition, the writ petitioners, amongst others, had prayed for compensation for the affected students. It was a collateral issue arising out of perceived violation of direction of this Court, which was evidently not a subject matter of the writ petition. In ***Midnapore Peoples' Coop. Bank Ltd.*** (supra), the Hon'ble Supreme Court had observed that an interlocutory order which finally decides a collateral issue or question which is not a subject matter of the main case is a judgment for the purpose of filing appeal under the Letters Patent. As noted earlier, in ***Shah Babulal Khimji*** (supra), the Hon'ble Supreme Court had also held that an order dismissing an application for review, being a judgment, will also be appealable under Letters Patent. We are satisfied that this appeal is maintainable. 18 WA No. 02 of 2019 The Dean, I.K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh

27. At this juncture, we would like to make it clear that this Court has not made any comment on merits with regard to the case of the writ

petitioners or of the respondents in the writ petition. We have confined ourselves only to the correctness or otherwise of the order dated 22.07.2019 so far as direction to pay compensation to the students is concerned and the order dated 03.09.2019 passed in Review Pet.(C) No. 01 of 2019.

28. Materials on record, without any ambiguity, demonstrate that a representation was submitted by the appellant on 16.05.2019 and receipt of the said representation was duly acknowledged on 20.05.2019. On 20.06.2019, the Registrar of the appellant had written a letter to the Secretary, UGC to fix a date in terms of the order of this Court dated 15.05.2019 so that the petitioner-Association may be informed and the case may be disposed of within eight weeks from 15.05.2019. IA No. 5 of 2019 filed in the writ petition, which is also annexed with the writ appeal, goes to show that the meeting was scheduled by UGC on 06.09.2019.

29. Mr. Gulshan Lama had submitted that not only the appellant should have produced a copy of the representation submitted by the appellant before the Court on 22.07.2019, but also should have filed a compliance report. So far as submission of filing of compliance report is concerned, it is noticed there was no direction for filing of compliance report in the order dated 15.05.2019. If there was any such direction for filing a compliance report, certainly it would have been obligatory on the part of the appellant to have filed a compliance report. It is not the requirement in law that for each and every direction that may be given during the course of a writ proceeding, a party to whom a direction is issued must necessarily file a compliance report. However, as the interest of the students is involved, it would have been appropriate for the appellant to have furnished a copy of the representation to the learned Counsel so that he could have produced the same before the court, if so required.

30. There was no basis for the learned Single Judge to accept the submission of learned Counsel appearing for the UGC and at the same time, to reject the submission of learned Counsel for the appellant. Learned Single Judge also presumed that because no date for meeting is given, the same is evidently a pointer to the fact that the appellant had not taken steps. It has

come to light that the submission of learned Counsel appearing for the UGC was not factually correct and he had made the submission without any basis. It has also transpired that despite being aware of the order of this Court, no date for meeting was given by UGC within a period of eight weeks and the meeting finally took place only on 06.09.2019. It was UGC which had not complied with the order of this Court dated 15.05.2019 in letter and spirit.

31. It is evident that the order dated 22.07.2019 was based on a mistaken fact going to the root of the matter. In our considered opinion, when the representation submitted by the petitioner was brought to the notice of the Court by way of filing a review petition, it should have been taken as a sufficient reason in the facts and circumstances of the case to review the order dated 22.07.2019.

32. In view of the above discussions, impugned orders dated 22.07.2019 and 03.09.2019 are set aside and quashed.

33. Resultantly, the appeal is allowed. No cost.

SLR (2020) SIKKIM 924

(Before Hon'ble the Chief Justice)

RSA No. 01 of 2020

Mahesh Chettri and Another ….. APPELLANTS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Appellants: Mr. A.K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha, Advocate.

For Respondent 1-2: Mr. Sudesh Joshi, Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor.

For Respondent 3: Mr. Karma Thinlay, Central Government Counsel.

Date of decision: 20th November 2020

A. Code of Civil Procedure, 1908 – O. VII R. 11 – Rejection of Plaint – The whole purpose of conferment of power under O. VII R. 11, C.P.C is to ensure that a litigation which is meaningless and bound to prove abortive should not be allowed to consume judicial time of the Court. However, since the power conferred is a drastic one, the conditions enumerated in O. VII R. 11, C.P.C are required to be strictly adhered to. At the stage of consideration of an application under O. VII R. 11, C.P.C the pleas taken by the defendant in the written statement and application for rejection of plaint would be irrelevant and cannot be adverted to and taken into consideration. The plaint has to be read as a whole and the substance, and not merely the form, which has to be looked into. If the allegations in the plaint, *prima facie*, show cause of action, the Court cannot embark upon a journey to find out and inquire whether the allegations are true or false.

(Para 14)

B. Code of Civil Procedure, 1908 – O. VII R. 11 – Rejection of Plaint – When the plaintiff as the writ petitioner was not entitled to maintain a writ petition as he did not have any legal right to claim the suit property, it is obvious that the plaintiff did not have a right to sue for a declaration of right, title and interest in respect of the very same property and thus, there is no cause of action for filing the suit against the Government of Sikkim – Held: No substantial question of law arises in second appeal.

(Paras 20 and 22)

Appeal dismissed.

Chronology of cases cited:

1. Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) (D) through LRs and Others, 2020 SCC Online SC 562.
2. Arivandandam v. T.V Satyapal and Others, (1977) 4 SCC 467.

JUDGMENT (ORAL)

Arup Kumar Goswami, CJ

Being aggrieved by the judgment and decree dated 30.07.2019, passed by the learned District Judge, Special Division-I, Sikkim at Gangtok, in Title Appeal Case No.12/2017, dismissing the appeal and affirming the judgment and decree dated 26.07.2017 passed by the learned Civil Judge, East Sikkim at Gangtok in Title Suit Case No.15/2016, rejecting the plaint by allowing an application filed by the defendant no.3 under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, for short, CPC, this Second appeal is filed.

2. The suit was filed by the father of the present appellants. The case of the plaintiff as set out in the plaint is that the plaintiff is the absolute owner of a plot bearing nos.342, 343, 344 and 346 (P) measuring a total area of 0.41 acres under Gangtok Block above Tibet Road, Gangtok, which will, herein after, be referred to as the „suit property. The suit was filed praying for declarations that the plaintiff is the absolute owner of the suit property and the possession of the defendants over the suit property is illegal and for recovery of possession.

3. It is pleaded that the then Chogyal gave the suit property to the father of the plaintiff in the year 1969 and that in that connection, Shri. P.T Namgyal, the then Maharaja of Sikkim had passed an order on 08.09.1981 to the following effect: "We may write Mr. L.B Chettri that the land and house is granted to him in fulfilment of commitment made to his late father Mandal PB Chettri for loyal and meritorious services."

4. It is stated that an order dated 19.09.1996 was passed by the Government of Sikkim withdrawing No Objection Certificate and allotment order pertaining to the suit property (these two aspects are not spelt out in the plaint). Being aggrieved by the said actions, the plaintiff had filed a writ petition being WP(C) No.64/2001 before this Court and the same was dismissed by an order dated 21.07.2003 as against which the plaintiff had preferred an appeal before the Honble Supreme Court which was registered as Civil Appeal No.6216 of 2004. Suffice it to say at this stage that by an order dated 14.02.2013, the Honble Supreme Court had upheld the order of this Court dated 21.07.2003 and that the order goes to show that by the order dated 19.09.1996, No Objection Certificate was withdrawn for the purpose of mutation proceedings and by the order dated 19.09.1996, allotment order was cancelled by withdrawing an earlier order dated 21.04.1992.

5. It is pleaded by the plaintiff that the suit property is recorded as private residence of Chogyal and when the property in question was granted by the Chogyal of Sikkim, such a grant cannot be revoked by any authority and the same had also not been revoked.

6. Further case set out in the plaint is that the defendant no.2 had filed an application under Section 5 of The Sikkim Public Premises (Eviction of Unauthorized Occupants and Rents Recovery Act), 1980, for short, the Act, against the plaintiff for eviction, which was registered as Case No. 101/2014. Thereafter, under Section 4 of the Act, a notice dated 02.12.2014 was issued to the plaintiff to show cause as to why an order of eviction should not be passed against him. The plaintiff had submitted show cause reply. Upon hearing the parties, the Prescribed Authority, East Sikkim had passed an order dated 20.01.2015 directing the plaintiff to vacate the property within one month from the date of the order. The appeal preferred under Section 9 of the Act, registered as Appeal No.01/2015, was also

dismissed by an order 11.03.2015. Subsequently, the plaintiff was evicted from the suit property on 02.09.2016.

7. Defendant nos.1 and 2 had filed a common written statement and defendant no. 3 had filed a separate written statement. The defendant no.3 had filed an application under Order VII Rule 11 CPC read with Section 151 CPC for rejection of the plaint to which an objection was filed by the plaintiff stating that the defendant no.3 had failed to establish that the plaintiff had no cause of action and that the suit is barred by any law.

8. The learned Trial Court noted that the plaintiff was making the same claim which he had made in earlier cases. It was noted that the plaintiff had filed no document to show that the suit property was recorded in the name of the Chogyal as private or personal property and the documents numbered as 2, 3 and 4 filed along with the plaint did not reveal the details of the property. The learned Trial Court allowed the application taking recourse to the doctrine of res-judicata.

9. In the appeal, the learned Lower Appellate Court held that the learned Trial Court was not correct in holding that the suit was barred by res-judicata while considering an application under Order VII Rule 11 CPC read with Section 151 CPC. However, the learned Lower Appellate Court endorsed the observations of the learned Trial Court as noted above. In view of the order of Hon ble Supreme Court dated 14.02.2013 in Civil Appeal No.6216 of 2004, the learned Lower Appellate Court held that if anybody has any right to sue against the Government of Sikkim in respect of the suit property, it was the Chogyal alone who may have the right to sue in case the High Power Committee returns a finding in favour of the Government of Sikkim and , accordingly, holding that the plaintiff did not have any cause of action with regard to the suit property, dismissed the appeal. However, inexplicably, the learned Lower Appellate Court recorded that observations made by it regarding ownership and title of the suit property will not affect the case of the appellants if trial continues.

10. Mr. A.K. Upadhyaya, learned Senior Counsel for the appellants submits that the use of the expression „if twice by the Honble Supreme Court in the order dated 14.02.2013 passed in Civil Appeal No.6216 of 2004 makes it abundantly clear that the Honble Supreme Court had not recorded any finding that the suit property had vested in the Government of

Sikkim and therefore, the learned Courts below had committed manifest error of law in rejecting the plaint by holding that there was no cause of action. He has submitted by referring to the averments made in the plaint that the plaintiff has cause of action. He has urged that plaintiff had sought for recovery of khas possession as he was dispossessed from the suit property and the same also gives rise to cause of action.

11. Mr. Sudesh Joshi, learned Additional Advocate General, Sikkim submits that a bare reading of the plaint would disclose that there was no cause of action for filing the suit for declaration in respect of the suit property in view of the order of the Honble Supreme Court. He also submits that prayer for recovery of possession is a consequential relief prayed for by the plaintiff and the same cannot form a part of cause of action.

12. Mr. Karma Thinlay, learned Central Government Counsel submits that in view of the clear and categorical observation of the Honble Supreme Court in the order dated 14.02.2013 passed in the Civil Appeal No. 6216 of 2004, the plaintiff did not have any right to sue in respect of the suit property and therefore, no substantial question of law arises in the instant second appeal.

13. Order VII Rule 11 CPC reads as follows:

> *11. Rejection of plaint.— The plaint shall be rejected in the following cases:—*
>
> *(a) where it does not disclose a cause of action;*
>
> *(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
>
> *(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*

> *(d) where the suit appears from the statement in the plaint to be barred by any law; 1*
>
> *(e) where it is not filed in duplicate;*
>
> *(f) where the plaintiff fails to comply with the provisions of rule 9:*
>
> *Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.*

14. The whole purpose of conferment of power under Order VII Rule 11 CPC is to ensure that a litigation which is meaningless and bound to prove abortive should not be allowed to consume judicial time of the Court. However, since the power conferred is a drastic one, the conditions enumerated in order VII Rule 11 CPC are required to be strictly adhered to. At the stage of consideration of an application under Order VII Rule 11 CPC, the pleas taken by the defendant in the written statement and application for rejection of plaint would be irrelevant and cannot be adverted to and taken into consideration. The plaint has to be read as a whole and the substance, and not merely the form, which has to be looked into. If the allegations in the plaint, prima facie, show cause of action, the Court cannot embark upon a journey to find out and inquire whether the allegations are true or false.

15. In ***Dahiben vs Arvindbhai Kalyanji Bhanusali (Gajra) (D) Thr Lrs and Others,*** reported in ***2020 SCC online SC 562,*** the Hon ble Supreme Court had held that documents filed along with the plaint are required to be taken into consideration for deciding an application under Order VII Rule 11 CPC.

16. It would be appropriate, at this stage, to reproduce the aforesaid order dated 14.02.2013 passed in Civil Appeal No.6216 of 2004, which is annexed with the plaint. The order reads as follows:

> *"This appeal has been preferred against the impugned judgment and order dated 21.7.2003 passed by the High Court of Sikkim in Writ Petition (C)No.64/2001 by way of which the High Court has dismissed the writ petition filed by the appellant challenging the order of withdrawing the no objection certificate and also cancelling the allotment made in favour of the appellant earlier.*
>
> *The facts of the case have elaborately been mentioned in the impugned judgment of the High Court and there is no need for us to repeat the same. The appellant has filed the writ petition challenging the order of withdrawal of the no objection certificate for the purpose of mutation proceedings and cancellation of allotment dated 19.6.1996 withdrawing the earlier order dated 21.4.1992. The High Court has dealt with all legal and factual issues and came to the conclusion that the appellant did not have any legal right to claim the property and thus was not entitled to maintain the writ petition. The letter or will expressed by Late Chogyal Palden Thendup Namgyal on 8.9.1981 and the application datd 3.7.1978 was filed by the appellant for allotment. If the property has vested in the State Government, there was no question of grant by Chogyal in favour of the father of the appellant. If the property had rested in the State, the High Court came to the right conclusion that the allotment made by the State Government was void as there was no statutory provision and it has rightly been withdrawn.*
>
> *So far as the mutation proceedings are concerned, the mutation in favour of the appellant was also cancelled on the petition filed by other family members of Chogyal and the State Government*

has also withdrawn the no objection certificate for that purpose.

It is settled legal proposition that court should not interfere and set aside an order, if setting aside it could revive a wrong and illegal order, as it would perpetuate illegality and fraud upon the statute. In the instant case, as the order of allotment made in 1992 in favour of the appellant was void itself, quashing the order of cancellation would revive the illegal and void order of allotment. Therefore, we are of the considered opinion that the High Court has rightly dismissed the writ petition filed by the appellant.

So far as the issue of application of principles of natural justice is concerned, as the order of allotment had been void which means non est i.e. never came into existence, no person can claim the right of hearing for quashing or recalling of an order which could not have came into existence. Therefore, there can be no concept of application of the doctrine of principles of natural justice in the facts and circumstances of this case.

In view of the above, we do not find any force in the appeal and same is dismissed. However, we make it clear that in case this property come or allotted by the Central government to the Chogyal family, it will be open to the appellant to raise any dispute against them.

Any observation made herein regarding the title of the property will not adversely affect the case of the Chogyal family pending before the Central Government, if any."

17. It will be apposite to reproduce another order dated 14.02.2013 of the Honble Supreme Court, passed in Civil Appeal No.6217 of 2004, which is also annexed with the plaint. The said Civil Appeal was filed by the Chogyal and the plaintiff of the present suit was one of the respondents.

The order reads as follows:

> *"Mr. P.S. Narsimha, learned senior counsel appearing for the appellant states that the matter as to whether a particular property belongs to the Chogyal family or to the State Government has to be exclusively determined by the Central Government and for that purpose, the Central government has appointed a High Power Committee and the matter is still pending before the said Committee and in view of that, he prays and is permitted to withdraw the Civil Appeal No.6217/2004 and 6218/2004 as well as the suit filed by the appellant. Therefore, the matter adjudicated before the civil court or the High court will have no bearing so far as such rights of the appellant are concerned and it may be determined by the Central Government without being influenced by any observation made herein, if such a dispute is pending before it.*
>
> *With these observations, the appeals are accordingly dismissed as withdrawn.*
>
> *In view of the above, applications for impleadment do not survive in these appeals and are therefore dismissed."*

18. A perusal of the order dated 14.02.2013 in Civil Appeal No.6216 of 2004 goes to show that the Honble Supreme Court had held that the High Court had rightly dismissed the writ petition being WP(C) No.64/2001 by the order dated 21.07.2003. It was observed that the High Court had dealt with all legal and factual issues and had come to the conclusion that the appellant did not have any legal right to claim the property and thus, was not entitled to maintain writ petition. The use of the expression „if by the Honble Supreme Court in the order dated 14.02.2013 passed in Civil Appeal No.6216 of 2004 has to be understood in the context in which it was said. The order dated 14.02.2013 passed in Civil Appeal No.6217 of 2004 of the Honble Supreme Court shows that a High Power Committee was appointed by the Central Government to determine whether a particular property belongs to the Chogyal family or to the State Government and the matter was pending

before the High Power Committee. It is not disputed by Mr. Upadhyaya that suit property was the subject matter of WP(C) No.64/2001 and Civil Appeal No.6216 of 2004 and the particular property referred to in the order dated 14.02.2013 passed in Civil Appeal No.6217 of 2004 is also the suit property. It is in that context, an observation was made by the Honble Supreme Court protecting the interest of the appellant (plaintiff of the present suit), that in case the suit property comes to the Chogyal family or is allotted by the Central Government to the Chogyal family it will be open to the appellant (plaintiff of the present suit) to raise any dispute against them. In paragraph 34 of the plaint, the plaintiff himself had stated that title to the property in question has to be settled between the palace and the plaintiff, meaning thereby, the Chogyal family and the plaintiff.

19. In the suit, no declaration was sought that the proceeding initiated under the Act and the orders dated 20.01.2015 and 11.03.2015 are illegal and void. The said orders had attained finality. It is relevant to note that the plaintiff had not specifically mentioned in the plaint the cause of action for filing the suit. Submission of Mr. A.K. Upadhyaya that prayer for recovery of khas possession gives rise to a cause of action has no merit in absence of any challenge to the orders noted supra by virtue of which the appellant had been evicted.

20. When the plaintiff as the writ petitioner was not entitled to maintain a writ petition as he did not have any legal right to claim the suit property as held by the Honble Supreme Court, it is obvious that the plaintiff did not have a right to sue for a declaration of right, title and interest in respect of the very same property and thus, there is no cause of action for filing the suit against the Government of Sikkim.

21. In ***Arivandandam Vs. T. V Satyapal and Ors,*** reported in ***(1977) 4 SCC 467***, which is also referred to by the learned Courts below, the Honble Supreme Court had laid down that if on a meaningful reading of the plaint it is found to be manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, power under Order VII Rule 11 CPC has to be exercised.

22. In view of the above discussion, no substantial question of law arises in this second appeal and accordingly, the appeal is dismissed. No cost.

SLR (2020) SIKKIM 934

(Before Hon'ble the Chief Justice)

RFA No. 05 of 2015

Mrs. Devi Maya Chettri ….. APPELLANT

Versus

Mr. Mahesh Chettri and Others ….. RESPONDENTS

For the Appellant: Mr. T.B. Thapa, Senior Advocate with
Mr. B.K. Gupta, Advocate.

For Respondent 1-2: Mr. N. Rai, Senior Advocate with
Ms. Malati Sharma, Advocate.

For Respondent 3: None.

Date of decision: 23rd November 2020

A. Code of Civil Procedure, 1908 – Maintainability of Suit – *Locus Standi* – The original plaintiff, Karna Bahadur Chettri had executed a Will dated 19.06.2010 bequeathing the suit properties to his son, Rajendra Chettri, respondent no. 3 – Civil Misc. Case (Succession) No. 84 of 2015 in respect of properties mentioned in the Will was disposed on 20.04.2017 by granting Letters of Administration in favour of Rajendra Chettri, respondent no. 3 – Held: In the order dated 26.08.2014 passed by this Court in RFA No. 01 of 2014, this Court had observed that there can be no manner of doubt that a widow has a right and interest in the estate of the deceased and the appellant was possessed of all necessary locus to pursue with the suit. However, the observations made have to be understood in the context in which the same were made. When the said order was passed, the application for grant of Letters of Administration in respect of the Will was not even filed. The position in law changed drastically with the grant of Letters of Administration in Civil Misc. Case (Succession) No. 84 of 2015 filed at the instance of the appellant – With

the grant of Letters of Administration, the appellant ceases to have any right or interest in respect of suit properties – The appellant presently has no *locus standi* to pursue the present appeal.

(Paras 32 and 33)

Appeal dismissed.

JUDGMENT

Arup Kumar Goswami, CJ

This appeal is preferred against the judgment and decree dated 30.07.2015 passed by the learned District Judge, Special Division-II, at Gangtok in Title Suit No.10/2014 dismissing the suit, which was filed for declaration of right , title and interest in respect of the suit properties described in the Schedule- A,B and C to the plaint and for recovery of khas possession of the suit properties by evicting the defendant and his family members, agents, etc., for permanent injunction and for compensation of Rs.10,000/- per annum from the date of filing of the suit till recovery of possession.

2. The Schedule of the plaint reads as follows:

> "(A) All that land measuring .7440 hectares being Plot No.1077 of Samdong Block (East Sikkim) with two storied building (new house) puja ghar, servants quarter and cow shed, latrine etc. recorded in Khatian No.103 in the name of the Plaintiff.
>
> (B) All that piece or parcel of land measuring .320 hectares in Plot No.1068 with one kacha house standing thereon in Samdong Block (East Sikkim) recorded in Khatian No.103 in the name of the Plaintiff.
>
> (C) All that land measuring .1700 Hectares in Plot No.1076 in Samdong Block (East Sikkim) recorded in Khatian No.103 in the name of the Plaintiff.
>
> All the above properties are in Samdong Block Khatian, Samdong Elaka, East Sikkim and are recorded in Khatian No.103 in the name of Plaintiff."

3. The suit was filed by Karna Bahadur Chhetri, husband of the appellant, against Lall Bahadur Chettri in the court of District Judge, East and North Sikkim, wherein the same was registered as Title Suit No 12/ 2008. Subsequently, the suit was numbered as Title Suit No 10/2014 on being transferred to the Court of District Judge, Special Division-II, at Gangtok. The plaintiff had earlier filed a suit being Civil Suit No.28/1997 in the Court of Civil Judge, East Sikkim. The suit was valued at Rs.1501/-. It appears from an order dated 30.05.1998 passed in the suit that the defendant had raised a preliminary objection with regard to the valuation of suit and had filed a petition for rejection of the plaint. However, by the order dated 30.05.1998, the learned Court returned the plaint with a direction that suit be valued correctly and filed in an appropriate forum.

4. The subsequent suit came to be filed on 29.08.2008 and it is stated that the plaint was not returned with necessary endorsement as required under Order VII Rule 10 CPC and only after an application dated 28.02.2008 was filed before the learned Civil Judge, East Sikkim to return the plaint, by an order dated 29.08.2008 the plaint was returned to the plaintiff on 29.08.2008 with necessary endorsement.

5. The pleaded case as set out by the husband of the appellant is that Purna Bahadur Chettri, who had considerable landed properties in Samdong Block in East district, had three sons, namely, Jangbir Chettri, Lall Bahadur Chettri (defendant no.1) and the plaintiff, who was the youngest. During the minority of plaintiff and Lall Bahadur Chettri, Jangbir Chettri had taken his share by separating from his father in the year 1951. The plaintiff and Lall Bahadur remained joint in mess and properties with their father till his death in 1975 and after about one year of his demise, they mutually partitioned the properties left behind by their father and started possessing the properties which fell in their respective shares.

6. Further case of the plaintiff is that on partition, he became the owner of 5.0280 hectares of land in Plot nos.1035, 1036, 1064, 1065, 1066, 1067, 1068, 1069, 1071, 1076 and 1077 recorded in Khatian no.103 and the defendant became the owner of 6.0920 hectares in Plot nos.1006, 1007, 1011, 1031, 1032, 1034, 1073, 1074, 1075, 1096, 1097, 1098, 1099 and 1100. During the survey of 1979, properties were recorded in the name of the plaintiff and Lall Bahadur based on partition and possession and the same was accepted by the parties as final. Accordingly, Daddha/

Parcha was issued in the name of the plaintiff and defendant separately. Though Jangbir Chettri had made some untenable claim about the partition, such claim was rejected.

7. It is pleaded that two old and dilapidated dwelling houses adjacent to each other, constructed by their father in Plot nos.1068 and 1069 , had fallen in the share of the plaintiff. The plaintiff and the defendant being in government service were residing in other places and their mother used to live in the said dwelling houses and they had contributed equally for maintenance of their mother.

8. The plaintiff also stated that he had an orange nursery in part of the Plot nos.1076 and 1077 and the rest portion was under paddy cultivation. As the aforesaid two buildings had become very old and were not comfortable for their mother, the plaintiff agreed to construct a new house in the northern portion of Plot no.1077 with the defendant as he said that he would not like to construct a house in the village but had expressed a desire to live with the mother till her death under the same roof. Accordingly, a new building measuring about 55 ft.X 60 ft. was constructed for which expenses were jointly incurred by them. After construction of the ground floor was completed, the defendant again requested the plaintiff to construct one more floor jointly so that the members of the families do not feel crammed for space. It was agreed that after death of the mother, new house in Plot no.1077 with other structures will remain the exclusive property of the plaintiff and the defendant will have no claim over the same.

9. Construction was started in the year 1985 and completed in the year 1988 and after such completion, they occupied one suit each in the first floor whenever they used to visit the village. A small flower garden, a courtyard and a vehicular road from the PWD road up to the new residential house were made in a part of Plot no. 1077. More than 50 numbers of fruit bearing orange trees came to be uprooted in the process as a result of which plaintiff suffered loss of income and to partly compensate the plaintiff, the defendant gave his Plot no.1074 to the plaintiff and accordingly, he started cardamom cultivation through Sri Lall Bahadur Dahal in the said plot of land from the year 1989.

10. Their elder brother Jangbir Chettri tried to create rift between them and had also succeeded in gaining some control over their mother. In the

months of October and November, 1995, the defendant requested the plaintiff to shift to the guest room in the ground floor of the new house on account of wedding of his son and accordingly, he shifted to the ground floor and the same continued to be in his exclusive possession.

11. However, on 21.10.1996, i.e., on the day of *Viajaya Dashmi* and *Tika*, the defendant, along with some of his men, had thrown out his belongings from the said room, cut down half-ripened paddy plants from Plot no.1067 and broken open the old dwelling house of the plaintiff in Plot no.1068 where plaintiff had stored paddy and other food grains and had taken forcible possession of the same. A meeting was convened by the defendant on 25.10.1996 with the help of Jangbir Chettri where they had obtained the signature of their mother in some documents. In view of the above, the plaintiff had lodged a complaint on 31.10.1996.

12. Emboldened by the order dated 30.05.1998 passed in Civil Suit No.28/1997, defendant dispossessed the plaintiff from the entire land of Plot no.1077 including the new house, Plot no.1076 and the old house in Plot no.1068. Attempt was also made to dispossess the plaintiff from other house in plot no.1069. However, the defendant had not succeeded in his attempt.

13. After mother of the parties had died in the month of March, 2001, the plaintiff requested the defendant to give back possession of the new house in Plot no.1077 by honoring his commitment, but the defendant refused to deliver possession and as such the suit came to be filed..

14. In the written statement, the defendant, apart from taking usual pleas such as the suit is barred by law of limitation, etc., stated that suit is grossly under-valued as the value of property cannot be less then Rs.3,05,95,165/-. It is stated that after demise of his father, the land in Ipsing (area where the land is situated) was divided in two parts along the village road starting from „Bar Pipal trees to “Dhar Ghar”, the house of the grandfather. The plaintiff being younger in age was given the first option to choose his share and he had opted to take up the land above the village road which was to the east of the village road and the land below was left for the defendant. It was mutually agreed that the inheritance will take place on the basis of such division only after the death of their mother. Though there was neither any formal partition nor any written document, the partition was made by the

boundary of the road and not by distribution of specific plots of land and Plot nos.1076 and 1077 being below the village road i.e. west of the Road, did not fall in the share of the plaintiff and the same fell in the share of the defendant and accordingly he was in possession of the same. It is stated that the plaintiff concocted the story of cultivating the same through Adhiadars/Kutiadars.

15. It is pleaded that survey of 1978 was conducted in absence of the parties and Plot nos.1074, 1076 and 1077 were wrongly surveyed in favour of the plaintiff. He had nowhere admitted that the aforesaid plots fell in the share of plaintiff. It is denied that Parcha was issued in favour of defendant and plaintiff separately. It is stated that their father had decided that both of them will have one house each, built over Plot nos.1068 and 1069 , and while the defendant possessed the old house in Plot no.1968, the plaintiff demolished his old house and built a new house in the same place. It is denied that the new house in Plot no.1077 was built jointly and it is asserted that he had started construction in the year 1983, by initially constructing approach road, leveling ground etc. and completed the house having two floors by engaging 3 contractors incurring an expenditure of more than 3.5 crores. The plaintiff had not contributed any amount for the construction of the house. While denying the statements made by the plaintiff with regard to the two-storied building, defendant stated that being his younger brother he was allowed to stay in that house whenever he visited the village. While denying that he ever proposed to give up Plot no.1074 as compensation to the plaintiff, it is stated that in the said plot he had planted Chinese teak trees.

16. While denying that the plaintiff was dispossessed from the Plot nos. 1068, 1074, 1076 and 1077 after 30.05.1998, it is pleaded that the defendant is in possession of Plot nos. 1068, 1074, 1076 and 1077 as owner from 1984 and he also claims to be the owner by way of adverse possession from the time of partition if the above plots had been recorded in the name of the plaintiff. The mother of the parties desired that both plaintiff and defendant live in peace and harmony and accordingly, had left behind a sworn affidavit stating the factual aspects which belie the claims of the plaintiff.

17. It appears that on the death of the original plaintiff, i.e. Karna Bahadur Chettri, the appellant, her son, Rajendra Chettri, and daughters,

namely, Mamta Chettri, Gitanjali Chettri, Maheshwari Chettri had filed an application under Order XXII Rule 3 read with Section 151 CPC for substitution and it is seen that by an order dated 20.04.2011 Rajendra Chettri alone was substituted. On an application filed by the present appellant under Order 1 Rule 10 read with Section 151 CPC, by an order dated 06.06.2012, she was impleaded as plaintiff. It is further seen that by a subsequent order dated 15.10.2012, Rajendra Chettri was transposed as Pro forma defendant no.2.

18. By an order dated 25.09.2014, the appellant was given an opportunity by the learned trial court to file additional pleading. Thereafter, the appellant filed additional pleading stating that she wants to continue with the suit filed by her deceased husband and verified the pleadings filed by her husband.

19. After the appellant had filed additional pleading on 29.09.2014, the defendant had filed another written statement which is more or less replica of the earlier written statement. Additionally, it is stated that after return of the plaint for presenting before the appropriate Court after rectification of valuation of the suit, the original plaintiff made changes in the plaint for which it cannot be taken to have been filed in the same suit. It is also stated that additional pleading filed is no pleading in the eye of law and the suit is liable to be dismissed as the present plaintiff filed no plaint.

20. During pendency of the appeal, Lall Bahadur Chettri, as respondent no. 1, had filed a petition under Section 151 CPC supported by his sworn affidavit for dismissing the appeal as infructuous. It is also stated in the said petition that the petition has been filed on behalf of respondent no. 2. The petition was registered as IA No. 02 of 2017. It is stated in the petition that Karna Bahadur Chettri had executed a Will dated 19.06.2010 whereby he had bequeathed the suit properties to his son, Rajendra Chettri, arrayed as respondent no. 2 in the appeal. It is averred that the appellant had filed Civil Misc. Case (Succession) No. 84 of 2015 in respect of properties mentioned in the Will. The aforesaid case was disposed on 20.04.2017 by granting Letters of Administration and therefore, the appellant lost her *locus standi* to continue with the appeal.

21. Reply affidavit was filed by the appellant. It is stated that against an order dated 10.09.2013 passed by the learned trial court rejecting the

plaint, an appeal was filed before this Court, registered as RFA No. 01 of 2014. While disposing of RFA No. 01 of 2014 by an order dated 26.08.2014, this Court had observed that the appellant has *locus standi* and therefore, the petition is misconceived.

22. When the present appeal was taken up for consideration along with RFA No. 4 of 2016 and RFA No. 11 of 2017 on 26.02.2020, this Court had observed that hearing of the appeals may be commenced and at the time of consideration of RFA No. 5 of 2015, contention advanced in the petition under Section 151 CPC would be taken into consideration by this Court. As reflected in the order, learned counsel for the parties had also agreed to the course of action proposed by the Court and accordingly, hearing of RFA No. 05 of 2015 had commenced. The case was again listed for consideration on 03.03.2020 but the hearing of the cases could not be completed. Because of lockdown and prayer for adjournment, etc. the cases were subsequently released from part-heard. The appeals having again been listed on 19.10.2020 before this court, the same were taken up for consideration. The learned counsel appearing for the parties submitted that hearing of the cases may be proceeded with in terms of the order dated 26.02.2020. Though three appeals are listed together, it is to be stated that all the appeals relate to different properties but involving same parties except in RFA No. 4 of 2016.

23. Accordingly, Mr. T.B. Thapa, learned Senior Counsel for the appellant and Mr. N. Rai, learned Senior Counsel appearing for the substituted legal representatives of respondent no.1, namely, Mahesh Chettri and Naresh Chettri are heard. None has appeared for Rajendra Chettri .
24. IA No.4 of 2019 is an application by which the appellant prays for bringing on record the certified copy of the application for Letters of Administration with all the annexures. The same is taken on record and IA No.4 of 2019 is disposed of.

25. While arguing the appeal, both the counsel have addressed arguments on IA No. 02 of 2017. IA No. 02 of 2017 is taken up first.

26. Abiding by the averments made in the petition, Mr. Rai contends that in view of the judgment rendered in Civil Misc. Case (Succession) No. 84 of 2015, disputed plots of land which are subject matter of Title Suit No. 10 of 2014 having fallen in the share of Rajendra Chettri, the appellant,

Smt. Devi Maya Chettri, has no *locus standi* to maintain the appeal. Accordingly, he submits that it is only Rajendra Chettri, to whom the suit property was bequeathed, who can maintain and continue to proceed with appeal.

27. Mr. Thapa submits that right, title and interest in respect of property cannot be determined in a petition for grant of Letters of Administration. Relying on the order of this Court dated 26.08.2014 passed in RFA No. 01 of 2014, he contends that a widow has a right and interest in the estate of the deceased and this Court had held that the appellant is possessed of necessary locus to pursue with the suit and therefore, there is no merit in the petition and accordingly, the same is liable to be dismissed.

28. Mr. Karna Bahadur Chettri had died on 22.11.2010. The Will was executed on 09.06.2010. The learned District Judge, East at Gangtok at paragraph 63 of the judgment dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015 had recorded that she found no reason to disbelieve the authenticity of the Will. It is submitted at the Bar that the judgment dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015 had not been put to challenge and has attained finality.

29. Paragraph 10 of the Will reads as follows:

That I have got the landed properties at Samdong Block in the East District of Sikkim as share to my ancestral property comprising Plot Nos. 1035, 1036, 1064, 1065, 1066, 1067, 1068, 1069, 1071, 1076 and 1077 recorded under Khatian No. 103.

In Plot No.1077, there is a building jointly constructed by me and my brother Shri Lall Bahadur Chettri with an understanding that after the death of our mother, the house constructed in Plot No. 1077 with other structures will remain my exclusive property and my brother Shri Lall Bahadur Chettri will not lay any claim in the said house. The said house was constructed for beneficial and comfortable living with the mother as my brother did not want to construct a house in the village and would like to live with mother till the mother's death. However, my brother Lall Bahadur Chettri forcefully took possession of Plot No. 1077 with two storied building, Plot No. 1068 with one kutchha house therein and Plot No. 1076 and illegally dispossessed me

from the above plots of land. On such illegal dispossession I have filed a civil suit claiming for declaration, recovery of possession, compensation and for other consequential reliefs before the Court of District Judge, East at Sikkim, which is registered as Title Suit No. 12 of 2008 and pending disposal.

30. It is to be noted that Title Suit No. 12 of 2008, referred to in the above order, came to be subsequently registered as Title Suit No. 10 of 2014 in the Court of District Judge, Special Division-II at Gangtok.

31. The relevant portion of paragraph 13 of the Will reads as follows:

> "13. Whereas, I hereby depose and bequeath that the above said properties are under to my wife, daughters and son which will take effect only after my death:-
>
> ……. …… …….. ……
>
> (E) That I have got the landed properties at Samdong Block, East District of Sikkim which I have inherited and are my ancestral properties. I hereby bequeath all my share/interest on the said landed properties together with cottage type house constructed by me and all other structures/houses therein to my son Shri Rajendra Kumar Chettri. The details of the properties are given in paragraph ten (10) above.

32. In the order dated 26.08.2014 passed by this Court in RFA No. 01 of 2014, this Court had observed that there can be no manner of doubt that a widow has a right and interest in the estate of the deceased and the appellant was possessed of all necessary locus to pursue with the suit. However, the observations made have to be understood in the context in which the same were made. When the said order was passed, the application for grant of Letters of Administration in respect of the Will was not even filed. The position in law changed drastically with the grant of Letters of Administration in Civil Misc. Case (Succession) No. 84 of 2015 filed at the instance of the appellant. The appellant in the application for grant of Letters of Administration had stated that Schedule D property was given to Rajendra Chettri. Schedule D properties included the suit properties

of Title Suit No. 10 of 2014 and presently of RFA No. 05 of 2015. Letters of Administration was granted in respect of suit properties along with some other properties. However, the learned District Judge had declined to grant Letters of Administration in respect of certain properties which were sought to be bequeathed by the testator but which were not recorded in his name. With the grant of Letters of Administration, the appellant ceases to have any right or interest in respect of suit properties. It is worthwhile to recapitulate that Rajendra Chettri, who was substituted as plaintiff, had transposed himself as defendant and was not contesting the suit subsequent to the impleadment of the appellant as plaintiff in the suit.

33. In view of the above discussion, I am of the considered opinion that the appellant presently has no *locus standi* to pursue the present appeal.

34. In view of the above determination, discussion on the merit of the appeal is not called for.

35. IA No. 02 of 2017 is allowed.

36. Accordingly, the appeal is dismissed as not maintainable at the instance of the present appellant. No cost.

37. LCRs be sent back.

SLR (2020) SIKKIM 945

(Before Hon'ble the Chief Justice)

RFA No. 04 of 2016

Rajendra Chhetri ….. APPELLANT

Versus

Devi Maya Chettri and Others ….. RESPONDENTS

For the Appellant: Mr. A.K. Upadhyaya, Senior Advocate with Ms. Rachhitta Rai, Advocate.

For Respondent 1: Mr. T.B. Thapa, Senior Advocate with Mr. B.K. Gupta, Advocate.

For Respondent 3-5: Ms. Puja Lamichaney, Advocate.

Date of decision: 23rd November 2020

A. Hindu Succession Act, 1956 – The list of Class-I heirs are given in the Schedule to the Act of 1956 – Under the Schedule of the Act of 1956, son, daughter and widow, apart from others, are listed as Class-I heirs – S. 8 of the Act of 1956 provides that property of a male Hindu dying intestate shall devolve, firstly, upon the heirs, being the relatives specified in Class-I of the Schedule. S. 9, which deals with the order of succession, lays down that among the heirs specified in the Schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs – The stand taken by the appellant is that as the daughters were married, they ceased to be Class-I heirs and therefore, they are not entitled to the share of the property of the deceased – The reasoning is wholly untenable for the simple reason that legislature has not made any distinction between a daughter and a married daughter in the Schedule of the Act of 1956.

(Paras 17, 18 and 19)

Appeal dismissed.

Chronology of cases cited:

1. Prakash and Others v. Phulavati and Other, (2016) 2 SCC 36.

2. Sonam Topgyal Bhutia v. Gombu Bhutia, AIR 1980 Sikkim 33.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. A.K. Upadhyaya, learned Senior Counsel, assisted by Ms. Rachhitta Rai appearing for the appellant, Mr. T.B. Thapa, learned Senior Counsel assisted by Mr. B.K. Gupta for respondent no. 1 and Ms. Puja Lamichaney, learned counsel appearing for respondent nos. 3, 4 and 5.

2. An application under Section 372 of the Indian Succession Act, 1925 (for short, the 1925 Act) for grant of Succession Certificate in respect of a sum of Rs.6,99,699/- being the payment of arrears due to Karna Bahadur Chettri, who died on 22.11.2010, from Sikkim Public Service Commission(SPSC),was filed by the appellant in the Court of District Judge, East and North, Sikkim at Gangtok wherein the same was registered as Civil Misc. Case (Succession) No. 43 of 2014. By the said application, the appellant had prayed for grant of Succession Certificate along with a prayer to direct SPSC to allow the appellant and respondent no. 1 to collect and receive 50% each out of the dues and securities standing in the name of late Karna Bahadur Chettri.

3. This appeal is preferred against the judgment dated 31.12.2015 passed by the learned District Judge, East District at Gangtok, in Civil Misc. Case (Succession) No. 43 of 2014, whereby the sum of Rs.6,99,699/- was directed to be divided into five equal proportion of Rs.1,39,939.80 each for the appellant, respondent no. 1 and respondent nos. 3, 4 and 5.

4. In paragraph 5 of the application it is stated that the deceased, at the time of his death, left behind the following family members and other close relatives: (i) Smt. Devi Maya Chettri, (ii) Shri Rajendra Chettri (son), (iii) Smt. Anjana Chettri (Sharma) (daughter-in-law), (iv) Master Adithya Chettri (Elder Grandson) and (v) Master Sidharth Chettri (Younger Grandson). The three daughters, namely, (i)Smt. Mamita Chettri @ Upreti, (ii) Smt. Gitanjali Chettri and (iii) Smt. Maheswari Chettri @ Singh of the

deceased were not included in the list of family members in paragraph 5 but in paragraph 6, a reference was made to the effect that they are all married and settled with their respective families in the house of their in-laws.

5. Respondent no. 1 had filed an objection to the application stating that the three daughters have not been made parties despite being legal heirs and as such the application is not maintainable for non-joinder and mis-joinder of necessary parties. It is stated that three daughters are also entitled to equal share of the dues and securities left behind by her deceased husband. It is also stated that the three daughters want to give their shares to her. A prayer was also made that a Maruti SX4 Car, the value of which is about Rs.5 lakhs, left behind by her late husband, is to be included in the schedule of the application filed by the appellant and the same be given to her by adjusting a sum of Rs.1 lakh in favour of the appellant, if he has any objection to her prayer.

6. At this juncture, it is relevant to note that the learned District Judge declined to consider the prayer made in respect of Maruti SX4 Car holding that the vehicle is not a due or security left behind by the deceased.

7. Smt. Mamita Chettri filed an objection stating that all the surviving Class-I legal heirs i.e. herself, appellant, respondent no.1 and respondent nos. 4 and 5 are entitled to the assets left behind by the deceased Karna Bahadur Chettri in equal share and that the appellant is not entitled to 50% of the arrear amount as prayed for by him.

8. A reply was filed by the appellant to the objection filed by Smt. Mamita Chettri. In the said reply it is stated that Smt. Mamita Chettri has no *locus standi* to file objection as she is not impleaded in the said proceedings. It is further stated that she having been married long ago and settled with her husband cannot claim to be a Class-I legal heir of Late Karna Bahadue Chettri as per law for the time being enforced and extended to the State of Sikkim. It is also stated that he being the only son is entitled to 50% of the amount under the law. It is asserted that he being the son and respondent no.1 being the widow of the deceased are the only Class-I legal heirs and there are no other legal heirs. It is also stated that there is no precedence or law enforced in the State of Sikkim enabling the married daughters to claim share of dues of deceased father. In the said reply, it is also stated that the objector had given false declaration of her age.

9. Smti. Gitanjali Chettri and Smti. Maheswari Chettri had also filed a joint objection, which is more or less identical to the objection filed by Smti.Mamita Chettri. The appellant had filed a reply, which is more or less similar to the reply filed to the objection filed by Smti. Mamita Chettri.

10. Mr. Upadhyaya submits that the learned District Judge fell in error in dividing the sum of Rs.6,99,699/- in five equal shares to include the appellant, respondent no. 1 and the respondent nos. 3, 4 and 5 as it is only the appellant and respondent no. 1, who are entitled on 50:50 basis to the aforesaid amount of Rs.6,99,699/-. He submits that the Hindu Succession Act, 1956, for short, Act of 1956, is not in force in Sikkim and therefore, there was no question of application of Hindu Succession (Amendment) Act, 2005, on which the learned Judge had placed reliance. He also submits that reliance placed on the judgment of the Hon'ble Supreme Court in the case of ***Prakash and others vs. Phulavati and other***, reported in ***(2016) 2 SCC 36*** , relating to Hindu Succession (Amendment) Act, 2005 is misplaced.

11. Mr. T.B. Thapa, learned Senior Counsel appearing for respondent no. 1 submits that not only the Act of 1956 but the Act of 1925 is also not enforced in Sikkim. However, all along, applications under Section 372 of the Act of 1925 have been filed in Sikkim and the same are also entertained by Courts. This submission of Mr. Thapa has not been disputed by Mr. Upadhyaya and Ms. Lamichaney. Mr.Thapa has drawn the attention of the Court to a judgment of this Court in the case of ***Sonam Topgyal Bhutia vs. Gombu Bhutia*** ,reported in ***AIR 1980 Sikkim 33***.

12. Ms. Lamichaney has submitted that not only applications under Section 372 of the Act of 1925 are filed but Succession Certificates have also been issued in respect of daughters and therefore, the appeal deserves to be dismissed.

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

14. In ***Sonam Topgay Lepcha*** (supra), the subject matter was a Will, which was held to be not a genuine Will of the deceased by the learned District Judge. This Court noted that though there is no legislation in Sikkim

relating to Wills, the Courts in Sikkim had followed and applied the provisions of the Act of 1925 in all matters relating to Wills including granting of probate and Letters of Administration. A question was posed as to whether the provisions relating to Wills in the Act of 1925, which have never been formally adopted in or extended to Sikkim by any form of legislative authority are to be regarded as laws in force in Sikkim. A Division Bench of this Court held that the statutory laws relating to Wills as contained in the Act of 1925 have, as a result of their continuous and systematic recognition and application by the Courts in Sikkim, become the non-statutory laws of Sikkim. An earlier decision of this Court in the case of ***Jas Bahadur Rai vs. Puttra Dhan Rai***, wherein it was observed that the Courts in Sikkim will have to continue to do that amount of law-making until such time when direct legislative laws will begin to hold and occupy the field, was referred in this context.

15. In the application under Section 372 of the Act of 1925, while making a statement that the appellant is entitled to receive 50% amount out of the arrear amount, the source of his entitlement is not indicated. In his replies to the objections filed by (i) Smti.Mamita Chettri and (ii) Smti.Gitanjali Chettri and Smti.Maheswari Chettri, wherein they had taken a stand that they being surviving Class-I heirs of the deceased, are entitled to equal share, the appellant had stated that he and respondent no. 1 being the son and wife, respectively, of the deceased, are the only Class-I heirs and the daughters being married and settled with their husbands, they can no longer claim themselves to be Class-I heirs.

16. This Court will not comment on the submission of Ms. Lamichaney that daughters are also granted Succession Certificate as the said position has not been conceded by Mr. Upadhyaya. Since there are no materials on record to come to any conclusion in that regard, this Court will proceed on the basis of materials placed before the court on the premise that the Act of 1956 is not formally extended to the State of Sikkim.

17. Though the Act of 1956 is not enforced, what cannot escape the notice of the Court is that entitlement of the appellant is founded on the basis that he is a Class-I heir. The list of Class-I heirs are given in the Schedule to the Act of 1956. Attention of the Court is not drawn to any other statute or law in force in Sikkim where there is reference to Class-1

heirs. Thus, appellant's prayer for Succession Certificate has to be considered to be based on Act of 1956. If that be so, necessarily, relevant provisions of Act of 1956 have to be taken note of and considered.

18. Under the Schedule of Act of 1956, son, daughter and widow, apart from others, are listed as Class-I heirs. Section 8 of the Act of 1956 provides that property of a male Hindu dying intestate shall devolve, firstly, upon the heirs, being the relatives specified in Class-I of the Schedule. Section 9, which deals with the order of succession, lays down that among the heirs specified in the Schedule, those in Class-I shall take simultaneously and to the exclusion of all other heirs. Though learned District Judge had relied on Section 6 of Act of 1956, as amended, Section 6 will not be attracted in as much as the arrear amount of the deceased lying in SPSC was not part of any coparcenary property but was his exclusive and individual property.

19. The stand taken by the appellant is that as the daughters were married, they ceased to be Class-I heirs and therefore, they are not entitled to the share of the property of the deceased reflected in the Schedule of Debts and Securities. The reasoning is wholly untenable for the simple reason that legislature has not made any distinction between a daughter and a married daughter in the Schedule of the Act of 1956.

20. In view of the above discussion, no interference is called for with the impugned judgment and the appeal is dismissed.

21. LCR be sent back.

SLR (2020) SIKKIM 951

(Before Hon'ble the Chief Justice)

RFA No. 11 of 2017

Mrs. Devi Maya Chettri ….. APPELLANT

Versus

Mr. Mahesh Chettri and Others ….. RESPONDENTS

For the Appellant: Mr. T.B. Thapa, Senior Advocate with Mr. B.K. Gupta, Advocate.

For Respondent 1-2: None.

For Respondent 3: Mr. A.K Upadhyaya, Senior Advocate with Ms. Rachhitta Rai, Advocate.

Date of decision: 23rdNovember 2020

A. Code of Civil Procedure, 1908 – S. 9 – Maintainability of Suit – It is one thing to say that the plaintiff is not entitled to reliefs as prayed for if the plaintiff cannot establish his or her case. But that does not mean that the suit of the plaintiff is not maintainable. Maintainability of a suit is a question of law. In view of S. 9 of the Civil Procedure Code, 1908, all suits of civil nature are maintainable unless barred either by an express provision or by implication of law. For instance, suppose jurisdiction of Civil Court is barred under a statute in respect of matters falling within it and a suit is filed in respect of a subject matter under that statute, then the suit can be said to be not maintainable. If there is any issue regarding maintainability of the suit, it is appropriate that such issue is decided at the threshold.

(Para 32)

B. Transfer of Property – Necessity of a Deed of Transfer – Whether by way of letter dated 08.06.1978, defendant no.1 could have transferred his property to the husband of the plaintiff and also whether the

husband of the plaintiff could have verbally transferred the land to the plaintiff? – Held: The identity of the land was not ascertainable from the letter dated 08.06.1978. That apart, it is also not indicated that DW-2 was requesting recording of his brother's name because he had relinquished his rights or had transferred the same, as is sought to be contented by the plaintiff. Plaintiff has failed to produce any document of title. If document of title was not so required, it was plaintiff's burden to establish the same – Use of the expression "relinquished" by DW-2 in his evidence cannot have any legal effect unless relinquishment was done in accordance with law. Such expression at best conveys his wish and desire to vest the property on his brother, but a wish will not transfer land to his brother or vest the same on his brother – Schedule-A land was not transferred to the husband of the plaintiff and therefore, husband of the plaintiff could not have transferred the land to his wife, that too, without a deed of conveyance – Plaintiff has no right, title or interest over the Schedule-A land.

(Paras 39, 44 and 45)

C. Transfer of Property – Whether a Building Standing On the Soil Becomes Part of It? – So far as Schedule-B and Schedule-C buildings are concerned, it is to be stated the plaintiff claims her right over the Schedule-B and Schedule-C buildings on the basis that the buildings stand over Schedule-A land, which belongs to her. It is admitted by the defendants that the buildings were constructed by the husband of the plaintiff. It is already noticed that Schedule-A land is recorded in the name of defendant no. 1 on the basis of purchase. Held: As the foundation of the claim in respect of Schedule-B and Schedule-C buildings have not been established, as a logical corollary, it must be held that the plaintiff cannot claim right, title and interest over the Schedule-B and Schedule-C buildings on the basis of ownership and therefore, question of recovery of possession from defendant no.2 does not arise – There is no law or custom which lays down that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same right of property, as the soil itself – Buildings and other improvements do not by the mere accident of their attachments to the soil become the property of the owner of soil (*In re. Narayan Das Khettri* referred).

(Paras 46 and 51)

Appeal dismissed.

Chronology of cases cited:

1. Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) (D) through LRs and Others, 2020 SCC Online SC 562.
2. Arivandandam v. T.V Satyapal and Others, (1977) 4 SCC 467.
3. Pipon Langchen *alias* Tholung Pipon v. Thondup Bhutia *alias* Thondup Lepcha and Another, 1977 (2) Sikkim Law Journal 40.
4. Suraj Bhan v. Financial Commissioner and Others, (2007) 6 SCC 186.
5. Narayan Das Khettri v. Jatindra Nath Roy, AIR 1927 PC 135.

JUDGMENT

Arup Kumar Goswami, CJ

This appeal is preferred against the judgment and decree dated 31.07.2017 passed by the learned District Judge, Special Division-II, East Sikkim in Title Suit No.05/2014 dismissing the suit of the plaintiff.

2. Defendant no.1 is the brother-in-law of the plaintiff, he being an elder brother of her late husband Karna Bahadur Chettri. The defendant no.2 is her son. On the death of defendant no. 1, his legal representatives were brought on record. They are respondent nos. 1 and 2 in the appeal. Defendant no.2 is the respondent no.3 in the appeal.

3. Defendant no. 1 had filed written statement but for non-appearance, the suit proceeded ex-parte against him from 02.07.2015. It appears that without having the ex-parte order against him vacated, evidence on affidavit was filed by him. In the paper book also there is a copy of the evidence-on-affidavit filed by him as defendant no.1. The same was not considered by the learned Trial Court. He was examined as a witness by defendant no. 2.

4. It is the case of the plaintiff that she is the owner of land described in Schedule-A and the two three-storied RCC Buildings, described in Schedules-B and C, standing over it. While Schedule-B building was constructed in the year 1998-1999 and occupied by defendant no.2, Schedule-C building was constructed in the year 1982-1983 and the same is in occupation of several tenants.

5. It is pleaded that the suit land was purchased by her father-in-law late Mandal Purna Bahadur in the name of defendant no.1 in the year 1969-70 as the husband of the plaintiff had gone for higher training outside the state. During the survey operation conducted in the year 1976-1978, the plot of land was recorded in the name of defendant no.1 vide Plot No.604/ 1056 under Khatiyan No.162, measuring an area of 0.1500 hectare. The defendant no.1 had submitted an application to the Director, Survey and Settlement, Government of Sikkim on 08.06.1978 requesting him to correct the records and register the plot of land in Sichey Basti, standing in his name, to K.B Chettri, husband of the plaintiff. The aforesaid land was transferred on the condition that two plots of land - one at Samdong known as "Buri Baju Ko khayal" and the other at Tumin Block, recorded in the name of her husband, were to be transferred and mutated in favour of defendant no.1. Though no attested Parcha was provided to the plaintiff, a non-attested Parcha was given.

6. Further case of the plaintiff is that as her husband was in dire need of money in 1979, a verbal arrangement was worked out in between her and her husband that on her providing a sum of Rs.2000/-, her husband would transfer the land mentioned in Schedule –A measuring 0.1500 hectare in her favour. It is stated that the aforesaid land is maintained by Land Revenue Department as Plot Nos.1622, 1623 and 1624 under Khatiyan no.544.

7. It is pleaded that the suit properties are under the possession of plaintiff and her husband since last forty-four years and the plaintiff is enjoying the same uninterruptedly. Further case of the plaintiff is that relationship of the plaintiff and her son was not cordial as a Will was executed by the husband of the plaintiff bequeathing some landed property to their daughters. On instigation of defendant no.1, defendant no.2 is giving harassment to the plaintiff. Defendant no.1 had also executed a Gift Deed dated 31.03.2011 in favour of the defendant no.2 in respect of Schedule-A land, as against which an objection was lodged by her before the Registrar of the District Collectorate, East Sikkim. Though the plaintiff used to collect rent from the tenants residing in Schedule-C building, by threatening the tenants in the month of December 2012, the defendant no.2 started collecting rents from them from the month of February, 2013, compelling her to lodge a complaint before the Superintendent of Police, East Sikkim and to issue legal notices to the tenants. It is averred that defendant no.2, with

an ulterior motive, had received all such notices. Reference is made to an appeal preferred against dismissal of Title Suit No.1/2013, instituted by the husband of the plaintiff, where the defendants were parties.

8. Under the direction of the defendant no.1, defendant no.2 started making additions and alterations on and from 01.01.2014 to the Schedule-B building occupied by him and had also started to construct a fourth storey in the terrace of the building without any permission from the plaintiff. Though the plaintiff had repeatedly requested the defendant no.2 not to construct the fourth storey and not to collect rent, the same was to no avail.

9. With the above broad facts, the suit was filed essentially for (i) a declaration that the plaintiff has right, title and interest over the suit property and that defendants have no right and title over the same, (ii) permanent injunction against the defendants from raising the fourth storey, (iii) restraining defendant no.2 from collecting rent from the tenants over the RCC building and delivery of possession of the suit premises.

10. The learned Trial Court had recorded that the suit had proceeded ex-parte against the defendant no.1. The defendant no. 1, during his cross-examination, had stated that he had not contested the suit on merit. But since he was examined by the defendant no. 2 as his witness, it will be appropriate to broadly take note of the stand taken by him in the written statement.

11. In the written statement, defendant no.1, in substance, had stated that the property mentioned in the Schedule-A of the plaint is covered by Plot No.604/1059 under Khatiyan No.162, which is wrongly recorded by the plaintiff as Plot No. 604/1056 at Paragraph-5 of the plaint. The schedule-A, B, C properties had never been recorded in the name of the plaintiff and the Schedule-A stands recorded in his name. He had purchased Schedule-A land with his money in order to settle the family of his younger brother, i.e. husband of the plaintiff, at Gangtok as his brother had gone outside the state to pursue higher studies.

12. It is denied that by him that plaintiff and her husband were in possession of building for the last forty-four years. It is also denied that Schedule-B property was constructed in the year 1998-1999 and the Schedule-C building in the year 1982-83. It is stated that husband of the

plaintiff had requested him to transfer the suit land along with the two buildings in the name of defendant no.2. It is pleaded that his brother late Karna Bahadur Chettri had no authority to execute the Will in respect of the property belonging to him. He had admitted gifting plot of land bearing Plot No.604/1059 to defendant no.2 out of love and affection.

13. The defendant no.2, in his written statement, stated that none of the properties, i.e. Schedules-A, B and C, are transferred or mutated in the name of the plaintiff and that Schedule-A land was purchased by defendant no.1. His father had constructed Schedule-B and Schedule-C buildings during the years 2000-2002 and 1986-89, respectively. The Schedule-B building is in his exclusive possession from the year 2002. The allegation of there being some understanding between his father and defendant no.1 regarding transfer of land is denied. The version put forth by the plaintiff that on providing a sum of Rs.2,000/- in the year 1979 her husband had transferred Schedule-A land in her favour is denied as false. It is stated that his father was a man of means and in the year 1979, he was the Managing Director of State Bank of Sikkim and the Head of the Department. It is also denied that Schedule-A property was with his father for last forty-four years uninterruptedly. He had approached his mother after the demise of his father to tell her that he would be collecting rent from January, 2013 and the plaintiff had also agreed that she would collect rent till the year 2012 in respect of Schedule-C property. It is stated that the plaintiff still continues to collect rent from the building occupied by UCO Bank.

14. It is pleaded that he started construction of the fourth-floor above the existing terrace of third floor in the month of January, 2014 and the plaintiff who resides nearby did not raise any objection to such construction until he had already completed essential part of the construction work and only sanitary fittings and floor works had remained to be done. It is stated that the plaintiff had turned hostile towards him ever since he had married, as his wife belongs to another community.

15. On the basis of pleadings, the learned trial Court had framed the following issues:-

> *"(1) Whether the plaintiff is the owner of the suit property and if so the Defendant No.2 is liable to be evicted from there and the plaintiff is entitled to recovery of the same?*

(2) Whether the Defendant No.2 illegally started to collect the rent from the tenants of the Schedule C property?

(3) Whether the Defendant No.2 has illegally made addition and alternation as well as constructed fourth storey on the terrace of the building, Schedule B property and if so whether the same is liable to be removed?

(4) Whether the suit of the plaintiff is maintainable?

(5) Whether the suit is bad for non-joinder and mis-joinder of necessary party?

(6) Whether the plaintiff has right, title and interest over the suit properties?

(7) Whether Defendant No.1 has gifted the landed property covered under Khatian No.162, plot No.604/1059 measuring 0.32 acres, situated at Middle Sichey, Gangtok to Defendant No.2?

(8) Any other relief/reliefs?"

16. During trial, plaintiff had examined 8 witnesses and defendant no.2 had examined 4 witnesses including defendant no.1 as DW-2.

17. At this juncture, it is relevant to note that in the evidence on affidavit submitted by Rajendra Prasad Upreti, he is shown as Witness No.6 RFA No. 11 of 2017 Mrs. Devi Maya Chettri vs. Mr. Mahesh Chettri & Ors. 7 for the plaintiff but in cross-examination he is shown as PW-2. Abhi Chandra Sharma is examined as PW-3. Gitanjali Chettri, a daughter of the plaintiff, is examined as PW-4. In the evidence on affidavit of Vikash Chettri, Witness No. is not indicated. However, the learned Trial Court has treated him as PW-5. Same is the case with. Kavita Jayaru and Manu Kumar Giri. However, the learned Trial Court treated them as PW-6 and 7, respectively. Though, evidence on affidavit of Madhu Poudyal shows that she is Witness No.5 for the plaintiff, the learned Trial Court had recorded her as PW-8. In order not to create any further confusion I will proceed to describe the witnesses in the manner as numbered by the learned District Judge.

18. I have heard Mr. T.B. Thapa, learned Senior Counsel for the appellant and Mr. A.K Upadhyaya, learned Senior Counsel for the respondent no.3. None appears for respondent nos.1 and 2.

19. Mr. Thapa has submitted that the learned Court below committed manifest error of law as well as of facts in dismissing the suit of the plaintiff. He submits that letter dated 08.06.1978 (Exhibit-2) demonstrates that the defendant no.1 had requested the authorities to record the name of the husband of the plaintiff in respect of the suit land and that fact itself demonstrates that the defendant no.1 had thereafter, no right, title and interest in respect of the suit land. He also contends that learned Court below was not justified in not placing any reliance on Exhibit-1 and Exhibit-3, which are Parcha Khatiyans. He places reliance on a judgment of this Court in the case of ***Pipon Langchen alias Tholung Pipon vs. Thondup Bhutia alias Thondup Lepcha and Anr.***, reported in ***1977 (2) Sikkim Law Journal 40*** .

20. Mr. A.K Upadhyaya, learned Senior Counsel for respondent no.3, while supporting the impugned judgment, contends that the plaintiff had failed to produce any document of title and there is no evidence that the defendant no.1 had transferred the suit land in favour of his brother in accordance with law. He has also contended that record-of-rights do not confer title.

21. I have considered the submission of the learned Counsel for the parties and have examined the materials on record.

22. The appellant had filed her evidence on affidavit as PW-1. The evidence, so filed, is in tune with the averments made in the plaint. She had exhibited as Exhibit-1, a Parcha Khatiyan, in respect of Schedule-A land. The application dated 08.06.1978 written by the defendant no.1 to the Director, Survey and Settlement, Government of Sikkim was exhibited as Exhibit-2. She had exhibited a non-attested Parcha Khatiyan as Exhibit-3. Apart from some other documents such as notices issued from Gangtok Municipal Corporation, electricity bill, etc., the plaintiff had also exhibited the Will and the Gift Deed as Exhibits-11 and 12, respectively.

23. Rajendra Prasad Upreti (PW-2) is the son-in-law of the plaintiff being married to the eldest daughter of the appellant. He had deposed that the suit properties are the properties of the plaintiff and that RCC buildings were constructed by his father-in-law. Though the Schedule-A still remains recorded in the name of defendant no.1, defendant no.1 had relinquished his right, title and interest over the same forty-five years ago and he had never

claimed the same during the life time of his father-in-law and it is only after the death of his father-in-law, the defendant no.2 has tried to grab the Schedules-B and C buildings by seeking to record the same in his name. It is stated that there was some understanding in between defendant nos.1 and 2 regarding properties at Samdong and Sichey and it is in that view, defendant no.1 sought to gift the Schedule-A land to defendant no.2 and in lieu of that, defendant no.2 is helping him to claim the properties at Samdong. After the death of his father, the defendant not.2 did not allow the plaintiff to cultivate the suit land and also to keep cows there and by threatening the tenants, he started collecting rent. Evidence of PW-2 from paragraph nos.5 to 16 and 18 to 24 are almost verbatim reproduction of the contents of the plaint, with change of the word „the plaintiff appearing in the said paragraphs, to 'mother-in-law'.

24. PW-3, who is the Revenue Officer-cum-Assistant Director, came along with records. He stated that Exhibit-3 (under objection) is the original unattested Parcha Khatiyan pertaining to Plot Nos.1622, 1623 and 1624 under Khatiyan No.544. He deposed that he had issued extracted photocopy of Exhibit-3 under his signature.

25. Gitanjali Chettri, PW-4, is the daughter of the plaintiff. Her evidence is more or less similar to the evidence on affidavit of PW-2.

26. PW-5, PW-6, PW-7 and PW-8 were examined by the plaintiff in connection with payment and collection of rent.

27. DW-1, in his evidence, stated that no land as described in Schedule-A exists in the record of Land Revenue Department or Revenue Division of District Administrative Centre. He had stated that the plaintiff at paragraph 5 had wrongly given the Plot No. as Plot No.604/1056. The land described in Schedule-A, actually covered by Plot No.604/1059 under Khatiyan No.162, is recorded in the name of the defendant no.1 and he had exhibited the Parcha Khatiyan as Exhibit-D2-A. Schedule-B and Schedule-C buildings were constructed by his father with due consent of defendant no.1 on condition that the same would ultimately be transferred in his name. The Schedule-B building was partially constructed in the year 2000-01 and Schedule-C building was constructed in the year 1986-89 and he had shifted to Schedule-B property in the year 2002 on the request of his father. He also stated that defendant no.1 had executed a Gift Deed in

his favour on 31.03.2011 in respect of the land covered by Plot No.604/1059 under Khatiyan No.162 and exhibited an attested copy of the same as Exhibit-D2-C. He stated that registration of the same could not be done because of an objection lodged by the plaintiff. His father had told him during the year 2006-07 to collect rent from the tenants of Schedule-C building so as to provide better education to his grand-sons for whom he had immense love and affection and he started collecting rent from Schedule-C property from February, 2013. The plaintiff is collecting rent from the building occupied by the UCO Bank and she is also receiving family pension of Rs.30,000/- per month. By filing additional evidence on affidavit, DW-1 had exhibited the Parcha Khatiyan stating the same to be the original copy as Exhibit-D2-Y.

28. DW-2 stated that he had purchased the Schedule-A land by his own means. He admitted that he had written a letter to the concerned department for recording Schedule-A land in favour of his younger brother but the same was not processed and consequently, Schedule-A property remained in his name. There was no talk with his brother for exchange of some other properties with the suit land. He stated that his brother had requested him to transfer Schedule-A land along with two buildings to the defendant no.2. He also stated that out of love and affection, he gifted plot of land bearing Plot No.604/1059 under Khatiyan No.162, covering an area of 0.1500 hectare on 31.03.2011 to the defendant no.2.

29. DW-3 is an Additional Secretary, Land Revenue and Disaster Management Department. He stated that Exhibit-3 is a record of Gangtok Station Survey Record of 1976-80 and the same being not attested, has no legal basis and as such, nobody can claim title or ownership on the basis of the extract taken out of such unattested record.

30. DW-4 is a Deputy Director in the Revenue Section of the District Collectorate. He had produced original khatiyan of land record of 1950-54 before the Court and based on the same, he had exhibited as Exhibit-C1-A, the attested copy of the original khatiyan. He stated that plot of land falling under Plot No. 604/1059 measuring an area of 0.32 acres of Khatiyan No.162, stands in the name of defendant no.1 and that the aforesaid land was not mutated or transferred in the name of any other individual. He also stated that Exhibit-3 is not available in his office and as such, the name of

defendant no. 1 is not found recorded under Plot Nos. 1622, 1623 and 1624 of Khatiyan No. 544.

31. Learned Trial Court had decided issue no. 5 in favour of the plaintiff. Having decided issue nos. 1, 2, 3, 6 and 7 against the plaintiff, issue no. 4 i.e. "Whether the suit of the plaintiff is maintainable" was decided against the plaintiff holding that the suit is not maintainable.

32. It is one thing to say that the plaintiff is not entitled to reliefs as prayed for if the plaintiff cannot establish his or her case. But that does not mean that the suit of the plaintiff is not maintainable. Maintainability of a suit is a question of law. In view of Section 9 of the Civil Procedure Code, 1908, all suits of civil nature are maintainable unless barred either by an express provision or by implication of law. For instance, suppose jurisdiction of civil court is barred under a statute in respect of matters falling within it and a suit is filed in respect of a subject matter under that statute, then the suit can be said to be not maintainable. If there is any issue regarding maintainability of the suit, it is appropriate that such issue is decided at the threshold.

33. As issue nos. 1 and 6 were decided by the learned Trial Court together, I consider it appropriate to take up both the issues together.

34. In the plaint itself at paragraph 5, it is stated that the land of Plot No.604/1056 under Khatiyan No.162 situated at Sichey Busty is still recorded in the name of L.B. Chettri (defendant no. 1). It appears that the same very plot of land is claimed by the plaintiff to be under Plot Nos.1622, 1623 and 1624 under Khatiyan No.544 on the strength of Exhibit-1. It is noticed that Exhibit-D2-A and Exhibit-D2-Y(Parcha) is the same copy though DW-1 had stated that Exhibit-D2-Y is the original copy. However, this will not be very material since it is an admitted position that Schedule-A land was recorded in the name of the defendant no.1 after purchase. Though, it was pleaded by the plaintiff that her father-in-law had purchased the property in the name of defendant no. 1, such assertion has not been proved by the plaintiff in evidence. The plaintiff claims that her husband had become the owner of the Schedule-A land on the basis of letter dated 08.06.1978 issued by defendant no. 1 and that later on, she became the owner of Schedule-A land in view of the arrangement with her husband as she had provided Rs.2000/- to her husband.

35. Relevant portion of the letter dated 08.06.1978, Exhibit-2, reads as follows:

> *"To:-*
> *The Director,*
>
> *Survey and Settlement, Government of Sikkim,*
>
> *Gangtok (Sikkim). Dated, Gangtok 8th June, 1978.*
>
> *Dear Sir,*
>
> *You may please find from your record that a small plot of land in Sichey Busty stands recorded in my name. The said plot at present is being occupied by my immediate younger brother Mr. K.B. Chettri.*
>
> *I request your esteemed department to change your records and register the said plot of land in the name of Mr. K.B. Chettri."*

36. Defendant no. 1, who deposed as DW-2 for defendant no. 2, stated that though he had submitted the application dated 08.06.1978, the application was not processed and his brother Karna Bahadur Chettri had requested him to transfer the Schedule-A property along with the two buildings in the name of defendant no. 2, who is in actual possession of the same. The aforesaid letter does not indicate what property was being referred to and as such, the identity of the plot of land, in any view of the matter, could not have been ascertained there from.

37. Karna Bahadur Chettri died on 22.11.2010. After his death, a letter dated 31.03.2011, Exhibit-D2-H, was issued by defendant no.1 to the Registrar, East District, Gangtok, Sikkim. The relevant portion of the said letter reads as follows:

> "Sir,
>
> I, L.B. Chettri, Son of late Shri P.B. Chettri, resident of Ipsing, Samdong, had given my land bearing plot no. 604/1059 situated in Sichey, measuring 0.32 acres to my brother Shri K.B. Chettri. My brother is now dead as such the property be registered in the name of only son of K.B. Chettri i.e. Shri Rajendra Chettri."

38. From a combined reading of Exhibit-2 and Exhibit-D2-H, it will appear that defendant no.1 did not want to retain the suit land and had verbally given the aforesaid land to the husband of the plaintiff. In his cross-examination, he had said that by Exhibit-2, he had relinquished his right, title and interest over Schedule-A land, but before completion of mutation, his brother died. PW-2, in his evidence, had also stated that though the Schedule-A land still remains recorded in the name of defendant no. 1, he had relinquished his share, title and interest over the said land forty-five years ago. PW-1 admitted in cross-examination that Schedule-A land, where Schedule-B and Schedule-C buildings are standing, was not mutated in the name of her husband during his life time as also in her name. PW-4 also stated that the land in Plot No.604/1059 under Khatiyan No.162, stands recorded in the name of defendant no. 1 and the same is not mutated and transferred in the name of any other individual.

39. Admittedly, there is no conveyance deed transferring the suit land by defendant no. 1 to the husband of the plaintiff or by the husband of the plaintiff to the plaintiff. Question arises as to whether by way of letter dated 08.06.1978 defendant no.1 could have transferred his property to the husband of the plaintiff and also whether the husband of the plaintiff could have verbally transferred the land to the plaintiff**.**

40. Learned counsel for the parties have submitted that the Transfer of Property Act, 1882 (for short, T.P Act) was brought into force in the State of Sikkim with effect from 01.09.1984.

41. There is no evidence on record that prior to coming into force of the T.P Act, transfer of property could be made orally or by simply writing a letter to the authorities in the State of Sikkim. Rather, the concept of mortgage and sale deed was not unknown and way back on 11.04.1928, the General Secretary of His Highness the Maharaja of Sikkim had issued a Notification No. 385/G wherein it is stated that documents such as mortgage and sale deeds and other important documents and deeds will not be considered valid unless they are duly registered. It is further provided that the contents of the unregistered documents, which ought to be in the opinion of the Court to have been registered, may be provided in Court but a penalty of 50 times of registration fee shall be charged. Para 2 of the said notification was subsequently amended by Notification No. 2947G dated

22.11.1946, providing that an unregistered document, which in the opinion of the Court ought to have been registered, may, however, be validated and admitted in Court to prove title or other matters contained in the documents on payment of penalty up to 50 time the usual registration fees. It seems to suggest that for transfer of property in any form, either by sale or gift or by relinquishment, a deed was required. As noticed earlier, the identity of the land was not ascertainable from the letter dated 08.06.1978. That apart, it is also not indicated that DW-2 was requesting recording of his brothers name because he had relinquished his rights or had transferred the same, as is sought to be contented by the plaintiff. Plaintiff has failed to produce any document of title. If document of title was not so required, it was plaintiffs burden to establish the same. The plaintiff claims title solely on the basis of Exhibit-1 and Exhibit-3. Exhibit-1, unattested Parcha Khatiyan, is in the name of the plaintiff. In Exhibit-3, unattested Parcha Khatiyan, after striking off the name of Karna Bahadur , name of plaintiff is written.

42. In ***Pipon Langcheng*** (supra), this Court had stated that even if record-of-rights are not prepared under statutory law, but are prepared by public servants in discharge of their official duty under executive orders of the Government, the entries in such records cannot but still be regarded to have been made by public servants in discharge of their official duty within the meaning of Section 35 of Evidence Act and, therefore, are to be treated as evidence of the facts recorded in them. PW-1 and PW-2, in their cross-examination, admitted that Exhibit-1 and Exhibit-3 do not bear the seal and signatures of Amin, Surveyor and the District Collector as also the date, month and year. When the same were prepared or who, under what authority had prepared the same is anybodys guess. In cross-examination, PW-3 admitted that original record of Exhibit-3 is not signed or counter-signed by the competent authority or by any other authority. As such, Exhibit-1 and Exhibit-3 have no evidentiary value. In ***Suraj Bhan vs. Financial Commissioner & Ors.***, reported ***in (2007) 6 SCC 186,*** the Honble Supreme Court had held that it is well-settled that an entry in revenue records does not confer title on a person whose name appears in the record-of-rights. It is also well-settled that revenue records are not documents of title. In ***Pipon Langcheng*** (supra) also, this Court recorded that the entry in record-of-rights, in that case Exhibit-1, is not a document or instrument of title. Therefore, Exhibit-1 and Exhibit-3 cannot form the basis for declaration of title.

43. No person can divest himself of a title in respect of immovable property which has come to be vested on him by taking recourse to a disclaimer of the kind as noticed in the letter dated 08.06.1978. A title once vested in a person can be divested only by a recognized mode of conveyance or in a manner which is permitted by law.

44. Use of the expression "relinquished" by DW-2 in his evidence cannot have any legal effect unless relinquishment was done in accordance with law. Such expression at best conveys his wish and desire to vest the property on his brother, but a wish will not transfer land to his brother or vest the same on his brother.

45. In view of the above discussion, it is held that the Schedule-A land was not transferred to the husband of the plaintiff and therefore, husband of the plaintiff could not have transferred the land to his wife, that too, without a deed of conveyance. Accordingly, it is held that the plaintiff has no right, title or interest over the Schedule-A land.

46. So far as Schedule-B and Schedule-C buildings are concerned, it is to be stated the plaintiff claims her right over the Schedule-B and Schedule-C buildings on the basis that the buildings stand over Schedule-A land, which belongs to her. It is admitted by the defendants that the buildings were constructed by the husband of the plaintiff. It is already noticed that Schedule-A land is recorded in the name of defendant no. 1 on the basis of purchase. As the foundation of the claim in respect of Schedule-B and Schedule-C buildings have not been established, as a logical corollary, it must be held that the plaintiff cannot claim right, title and interest over the Schedule-B and Schedule-C buildings on the basis of ownership and therefore, question of recovery of possession from defendant no.2 does not arise.

47. In view of the above discussion, issue nos. 1 and 6 are decided against the plaintiff.

48. As Schedule-A land had not been alienated and was not transferred by the defendant no.1, he continued to have right, title and interest over the same. It is an admitted position that a Gift Deed dated 31.03.2011 was executed by defendant no.1 in favour of defendant no. 2 relating to the suit land and the same was submitted for registration. An objection was lodged by the plaintiff against its registration. During the course of submission Mr.

Upadhyaya has submitted that after the suit of the plaintiff was dismissed, the Gift Deed was registered on 01.09.2017. In the Gift Deed, Exhibit-12, there is no reference to the two buildings standing over Schedule-A. Issue no.7 is, accordingly, decided against the plaintiff with the above observations.

49. Now I come to the question as to whether defendant no. 2 illegally started to collect rent of Schedule-C property, which is covered under issue no. 2. To substantiate the same, the plaintiff had examined PW-5, PW-6, PW-7 and PW-8.

50. PW-5, PW-6 and PW-7 initially had refused to depose, but finally came to give evidence on receipt of non-bailable warrants of arrest. PW-5 had taken a garage on rent from the husband of the plaintiff and he stated that he used to pay rent to the maid servant of the appellant and later on he started to pay rent to defendant no. 2. He did not mention since when he started to pay rent to defendant no. 2, but in cross-examination he stated that defendant no. 2 had not threatened him not to give monthly rent to plaintiff and to pay rent to him. PW-6 was a tenant 20 years ago and she had tendered rent to the maid-servant of the plaintiff. PW-7 was also a tenant and he had also tendered rent to the maid-servant of the plaintiff. Evidence of PW-6 and PW-7 go to show they had given rent to the plaintiff. PW-8 resides in the residence of the plaintiff as her brother-in-law i.e. the husband of her sister, is employed as a driver by the plaintiff. In her evidence she has stated that the plaintiff had asked her to collect rent from her tenants but later on they refused to give rent because defendant no. 2 had started asking for rent from them and had instructed them not to pay rent to the plaintiff. In cross-examination she stated that she had never issued rent receipts to the tenants and that there is no document to show that she had collected rent from the tenants. Evidence of DW-1 goes to show that he had started collecting rent from Schedule-C property from February, 2013 with the consent of plaintiff. However, it does not appear that consent was taken because first cause of action for filing the suit, according to plaintiff, arose when defendant no.1 started collecting rent from the month of February, 2013. Fact remains that before February, 2013, the plaintiff was collecting rent from the Schedule-C building.

51. In ***Narayan Das Khettri vs. Jatindra Nath Roy,*** reported in ***AIR 1927 PC 135***, the Privy Council recognized that there is no law or custom

which lays down that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same right of property, as the soil itself. It was also held that buildings and other improvements do not by the mere accident of their attachments to the soil become the property of the owner of soil.

52. After the gift by defendant no.1, defendant no.2 would have right, title and interest over Schedule-A land. Defendant no.1, in the Gift Deed, did not make any reference to the two buildings standing over it. He had not claimed ownership of the buildings. Defendant no.2 automatically does not become the owner of the buildings in the attending facts and circumstances as the same were constructed by his father. So far as the Schedule-B and Schedule-C buildings are concerned, law of succession as prevailing in the State of Sikkim will operate. In order to claim exclusive ownership of the buildings, Defendant no.2 will have to pay compensation to all the lawful successors–in-interest of Karna Bahadur Chettri, who may have a share in the buildings. What would be the compensation amount could be amicably settled or it could be a subject matter in a different suit or proceeding. There is no material on record to indicate numbers of tenants in Schedule-C building. What amount of rent was paid by them or what is the total amount of rent collected are also not known. There is no prayer in the suit for a decree to pay to the plaintiff the rent collected by defendant no.2. Evidence on record seems to suggest that the tenants had not paid rent voluntarily to defendant no.2 and it is established on record that notices issued by the plaintiff to the tenants were unauthorizedly received by defendant no.2. PW-5, Vikash Chettri had categorically stated that he did not know about any notice issued by the plaintiff. But DW-1 had stated that a reply was given by Vikash Chettri. He had admitted in cross-examination that replies to the notices sent by the tenants including Vikash Chettri did not contain their signatures which seems to support the stand of the plaintiff that defendant no.2 had engineered responses to the notices. However, the plaintiffs assertion that she was the owner of the buildings having not been established, it will be difficult to record a finding that the rent was illegally collected by defendant no.2 though evidently, there was a change of person to whom rent was tendered. In the present fact situation, I am of the opinion that till the issue of ownership in respect of Schedule-B and Schedule-C buildings is settled as per the law of succession as prevailing in the State of Sikkim, the plaintiff should be granted some amount by way of her maintenance. I think 50% of rent towards the maintenance of the plaintiff will be a just, reasonable and equitable amount. Accordingly, it is

provided that from the month of January, 2021, defendant no. 2 will give 50% of the rent collected to the plaintiff by way of her maintenance. Issue no.2 stands disposed of in the above terms.

53. The allegation of illegal construction was based on the premise that the Schedule-B building is the property of the plaintiff. There is no dispute that defendant no. 2 was in occupation of the building. Reliance was also placed on the Will (Exhibit-11). Perusal of the order dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015, which was registered on the basis of an application filed by the appellant under Section 278 of the Indian Succession Act, 1925 in respect of the Will dated 09.06.2010 goes to show that Letters of Administration was not granted in respect of the three-storied building and the vacant land (suit property) on the ground that the said properties were not recorded in the name of the testator. While coming to the aforesaid conclusion, reference was made to certified copies of evidence on record of the present suit. It is pointed out by the learned counsel for the parties that no appeal was preferred against the aforesaid order 20.04.2017 and the order has attained finality. It is noticed from the cross-examination of PW-1 that by the time the suit was filed, on her own admission, fifty percent of construction had taken place. There is no allegation that additions and alterations were being made in violation of any law in force. In that view of the matter, issue no. 3 is decided against the plaintiff.

54. The appeal stands disposed of in terms of the above. No costs.

55. LCRs be sent back.

SLR (2020) SIKKIM 969

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

Crl. Rev. P. No. 03 of 2018

Sashi Shekhar Thakur ….. REVISIONIST

Versus

State of Sikkim ….. RESPONDENT

For the Revisionist: Mr. N. Rai, Sr. Advocate with
Ms. Sushmita Gurung, Advocate.

For the Respondent: Mr. Sudesh Joshi, Public Prosecutor with
Mr. Sujan Sunwar and Mr. Hissey Gyaltsen,
Assistant Public Prosecutors.

Date of decision: 23rd November 2020

A. Indian Penal Code, 1860 – S. 354A – Sexual Harassment – The ingredient of the offence is the commission of physical contact and advances involving unwelcome and explicit sexual overtures and making sexually coloured remarks – The victim identified the revisionist as the manager of the bank and gave a detailed account of what transpired on 06.09.2017 in the interview that she had attended. Both the learned Chief Judicial Magistrate and the learned Sessions Judge have found the evidence of the victim reliable – The victim deposed that the revisionist told her that she should be wearing figure hugging clothes as women look attractive in such clothes. She further deposed that the revisionist also showed her how to speak with customers in order to attract them. The victim deposed that the revisionist also touched her body particularly on the hook of the bra as well as her backside while showing her how to speak to the customers. She deposed that she was not comfortable and wanted to leave the bank – At the interview, there was no reason for the revisionist to ask the victim to change her clothes and appear in a particular manner and further to touch her on the pretext of teaching her the correct posture while dealing with customers. The detailed account as to what transpired on that particular date of interview

does establish that the revisionist had committed physical contact and made unwelcome advances and explicit sexual overtures. It also establishes that the revisionist had made sexually coloured remark upon the victim.

(Paras 13, 14 and 15)

B. Probation of Offenders Act, 1958 – S. 4 – Release of Certain Offenders on Probation of Good Conduct – Neither the learned Chief Judicial Magistrate nor the learned Sessions Judge had examined the applicability of S. 360, Cr.P.C or S. 4 of the Probation of Offenders Act, 1958 – While declining to interfere with the judgments of the trial Court and first appellate Court, matter remitted to the Court of the learned Chief Judicial Magistrate for the limited purpose for deciding whether the benefit of S. 360, Cr.P.C and S. 4 of the Probation of Offenders Act, 1958 can be extended to the revisionist.

(Para 25)

Chronology of cases cited:

1. State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand and Others, (2004) 7 SCC 659.
2. Central Bureau of Investigation v. Ashok Kumar Aggarwal and Another, (2013) 15 SCC 222.
3. State of Haryana v. Prem Chand, (1997) 7 SCC 756.
4. Pritam Singh v. State of H.P., 2011 SCC Online HP 6249 / 2012 Cri. L.J. 468.
5. B.S. Narayanan v. State of A.P, 1987 (Supp) SCC 172.
6. Chandreshwar Sharma v. State of Bihar, (2000) 9 SCC 245.
7. Eliamma and Another v. State of Karnataka, (2009) 11 SCC 42.
8. State of Rajasthan v. Sri Chand, (2015) 11 SCC 229.
9. Ramji Missar v. State of Bihar, AIR 1963 SC 1088

JUDGMENT

Bhaskar Raj Pradhan, J

1. On 08.09.2017, the victim lodged a First Information Report (FIR) before the police station alleging that the branch manager of Syndicate Bank (the bank) had, while taking her interview on 06.09.2017, talked to her

inappropriately by asking her to wear her dress that showed her breasts and had also touched her body. The investigation conducted by Joshna Gurung (PW-7), the Investigating Officer of the case, culminated in filing of a charge-sheet having found prima facie case under section 509 of the Indian Penal Code, 1860 (IPC). On 22.02.2018, a charge under section 354-A IPC was framed against the revisionist. The revisionist pleaded not guilty. During the trial, seven witnesses were examined by the prosecution and one by the defence. The revisionist was examined under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) in which he admitted that the victim had come for the interview and that he had asked her to change her clothes as the clothes were dirty and tight fitting. He also admitted that he had touched her backbone just to show her the right posture to stand and did not touch her on any other part of her body. He denied that he had told her that she should look hot and sexy when at work and explained that he had only told her that for official work an employee should be properly dressed and should be attractive. He stated that the victim's assertion that throughout the interview she was uncomfortable was incorrect and that she was smiling all through out. He took the plea that after the interview Romi Rai had demanded money from him which he refused after which the false FIR had been lodged. It was also alleged by the revisionist that the relatives of the victim also demanded money and that he had been falsely implicated in the case to extract money from him.

2. On 30.04.2018, the learned Chief Judicial Magistrate, South Sikkim at Namchi, convicted the appellant for the offence of sexual harassment under section 354-A(1) IPC and sentenced him to undergo simple imprisonment for a period of two years and a fine of Rs.5000/-. The fine was directed to be given to the victim by way of compensation.

3. Dissatisfied with the judgment and order on sentence, both dated 30.04.2018, Criminal Appeal Case No. 2 of 2018 was preferred by the revisionist before the Court of the Sessions Judge, South Sikkim at Namchi. On 24.10.2018, the learned Sessions Judge upheld the judgment and order on sentence both passed by the learned Chief Judicial Magistrate and dismissed the appeal. The learned Sessions Judge while doing so held that the learned Chief Judicial Magistrate had not specified the particular clause of section 354-A IPC for which the appellant had been found guilty. It was held that the prosecution had established the case against the appellant under section 354-A(1)(i) & (iv) IPC and accordingly, modified the conviction.

4. Criminal Revision Petition No. 3 of 2018 has been preferred by the revisionist against the impugned judgment dated 24.10.2018 passed by the learned Sessions Judge.

5. Heard Mr. N. Rai, learned Senior Advocate and Mr. Sudesh Joshi, learned Public Prosecutor.

6. This is a case, in which, both learned Chief Judicial Magistrate as well as the learned Sessions Judge, have arrived at concurrent factual findings. At the outset, when this court enquired from Mr. N. Rai as to whether concurrent findings of fact could be upset by the revisional court in the absence of any incorrectness, illegality, impropriety or irregularity, he submitted that section 397 Cr.P.C. must be read along with section 401 Cr.P.C. which has also been invoked and in so doing, it would be seen that the revisional court would have all the powers of the appellate court. Mr. N. Rai's submission in this regard may not be entirely correct in view of the law laid down by the Supreme Court.

7. In ***State of Maharashtra vs. Jagmohan Singh Kuldip Singh Anand & Others***[1], the Supreme Court held that:

> *"**22.** The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be, "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court". It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an*

[1] (2004) 7 SCC 659

appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

***23.** On this aspect, it is sufficient to refer to and rely on the decision of this Court in Duli Chand v. Delhi Admn. [(1975) 4 SCC 649 : 1975 SCC (Cri) 663 : AIR 1975 SC 1960] in which it is observed thus: (SCC p. 651, para 5) "The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse."*

8. The Supreme Court in ***Central Bureau of Investigation vs. Ashok Kumar Aggarwal and Another***[2], held that the revisional powers under section 397 read with section 401 Cr.P.C. can be exercised to examine the correctness, legality or propriety of any findings, sentence or order and as to the regularity of any proceeding of the inferior court. Sections 397 and 401 Cr.P.C do not create any right in favour of the litigant but only empower and enable the High Court to see that justice is done in accordance with recognised principles of criminal jurisprudence.

9. The learned Sessions Judge had held that the victim had made similar allegations in her statement recorded under section 164 Cr.P.C. (Exhibit-3) as the one deposed by her in court. Mr. N. Rai, in this context, urged that Exhibit-3, however, does not reflect that it was a statement

[2](2013) 15 SCC 222

recorded under section 164 Cr.P.C. and therefore, reliance upon the same by the learned Sessions Judge would amount to perversity. A perusal of Exhibit-3 reflects that it is recorded in the form for recording depositions. It also records that the deposition of the victim was recorded under section 5 of the Indian Penal Code, 1860. This was incorrect. However, perusal of Exhbit-3 and preliminary examination of the victim (Exhibit-4) reflects that the procedure prescribed under section 164 Cr.P.C. had been followed. The learned Judicial Magistrate was not examined as a prosecution witness. The victim exhibited Exhibit-3 as her statement recorded under section 164 Cr.P.C. The exhibition of the said Exhibit-3 by the victim was not objected to by the defence. According to the Investigating Officer, Exhibit-15 was the application she made before the learned Judicial Magistrate for recording the statement of the victim under section 164 Cr.P.C. The defence did not even cross-examine the Investigating Officer about Exhibit-3. Mr. N. Rai fairly admitted that this point had neither been raised during the trial nor in the appeal. The trial court record reveals that the revisionist himself had asserted to the victim that Exhibit-3 was a statement under section 164 Cr.P.C. Even if we were to remove Exhibit-3 from consideration, the evidence led by the prosecution clearly establishes the ingredients of the offence of sexual harassment. This court is thus not inclined to interfere with concurrent findings of facts on this ground.

10. Mr. N. Rai further urged that the finding of the learned Sessions Judge in paragraph 16 of the impugned judgment is perverse in as much as video clipping titled "ch03_20170906141614" is actually not there in the video footage (MO-I). The learned Chief Judicial Magistrate examined the contents of MO-I and held that the clip showed the accused touching the back of the victim and teaching her how to stand emphasising on the chest area to be out and the back to be straight. She also held that the video clip titled "ch03_20170906141420" clearly showed the revisionist touching the back of the victim as well as her buttock. These clippings were once again examined by the learned Sessions Judge who held that on going through the contents of MO-I (video footage), it was clearly seen in the video clippings titled "ch03_20170906141614" and "ch03_20170906141420", that the revisionist had touched the back as well as the buttock of the victim. It is noticed that this plea is also being raised for the first time in the revision. MO-I was exhibited by PW-5, Raman Kumar Choudhary, Assistant Branch Manager of the bank, without any objection from the defence. Neither Raman Kumar Choudhary (PW-5) nor the Investigating Officer were cross-

examined on this aspect by the defence. A perusal of the appeal, i.e., Criminal Appeal No. 2 of 2018 filed before the learned Sessions Judge, also does not reflect that such an issue had been raised by the revisionist. In fact, it was urged that the victim was seen smiling frequently in the video footage contained in MO-I. In the circumstances, this court is of the view that there was no perversity in the finding of the learned Sessions Judge in paragraph 16 of the impugned judgment.

11. Mr. N. Rai urged that the Investigating Officer had started investigating the case before the lodgement of the FIR and consequently, the FIR is hit by the provision of section 162 Cr.P.C. The Investigating Officer stated during cross-examination that the case was endorsed to her after 6:15 p.m. on 08.09.2017. She, however, denied the suggestion that she had gone to the bank at around 12:30-1:00 p.m. on 08.09.2017 along with the victim and that she had seen the CCTV footage prior to the registration of the FIR. There is no material, therefore, to show that the Investigating Officer had started investigating the case before the FIR was lodged. According to Mr. N. Rai, the contents of MO-II falsify the stand of the Investigating Officer that she started investigating the case after the lodging of the FIR. A perusal of the cross-examination reflects that not even a suggestion was made to the Investigating Officer about it. Consequently, the revisionist is precluded to agitate this issue in the present revision.

12. Mr. N. Rai finally submitted that the learned Chief Judicial Magistrate and the learned Sessions Judge had erred in convicting the revisionist for sexual harassment.

13. Section 354-A(1)(i) & (iv) IPC reads as under:

> **"354A. Sexual harassment and punishment for sexual harassment.** – (1) A man committing any of the following act-
>
> (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
>
> (ii) …….
>
> (iii) …….
>
> (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment."

14. The ingredient of the offence is the commission of physical contact and advances involving unwelcome and explicit sexual overtures and making sexually coloured remarks.

15. The victim dock identified the revisionist as the manager of the bank and gave a detailed account of what transpired on 06.09.2017 in the interview that she had attended. Both the learned Chief Judicial Magistrate and the learned Sessions Judge have found the evidence of the victim reliable. The setting of the crime is an interview for a vacant post at the bank. PW-2 had informed the victim about the job opening in the bank and taken her for the interview. According to her, the victim informed her about the incident after the interview. The victim deposed that the revisionist told her that she should be wearing figure hugging clothes as women look attractive in such clothes. She further deposed that the revisionist also showed her how to speak with customers in order to attract them. The victim deposed that the revisionist also touched her body particularly on the hook of the bra as well as her backside while showing her how to speak to the customers. She deposed that she was not comfortable and wanted to leave the bank. PW-3, the victim's sister, deposed that the victim told her she was not interested in the job as she was not comfortable after the interview. PW-4, the victim's sister-in-law, deposed that the victim had told her that she had been asked to change her clothes and return. She was also told by the victim that she did not want to work with the bank as she was not comfortable. At the interview, there was no reason for the revisionist to ask the victim to change her clothes and appear in a particular manner and further to touch her on the pretext of teaching her the correct posture while dealing with customers. The detailed account as to what transpired on that particular date of interview does establish that the revisionist had committed physical contact and made unwelcome advances and explicit sexual overtures. It also establishes that the revisionist had made sexually coloured remark upon the victim.

16. The learned Chief Judicial Magistrate and the learned Sessions Judge have unanimously held that the prosecution had been able to establish the case of sexual harassment committed by the revisionist. This court does not find any perversity in their findings.

17. Alternatively, and without prejudice to his aforesaid contentions, Mr. N. Rai prays that the revisionist may be given the benefit of section 4 of the Probation of Offenders Act, 1958. On this aspect, he relied upon the

judgments of the Supreme Court in ***Haryana vs. Prem Chand***[3], ***Pritam Singh vs. State of H.P.***[4], ***B.S. Narayanan vs. State of A.P.***[5] and ***Chandreshwar Sharma vs. State of Bihar***[6] and ***Eliamma & Another vs State of Karnataka***[7].

18. Mr. Sudesh Joshi, learned Public Prosecutor, submitted that considering the fact that the revisionist had been convicted for sexual offence he may not be granted the benefit of section 4 of the Probation of Offenders Act, 1958. For the said purpose, he relied upon judgment of the Supreme Court in ***State of Rajasthan vs. Sri Chand***[8].

19. When Mr. N. Rai was asked by this Court as to whether it was permissible for the revisional court to exercise the power under section 4 of the Probation of Offenders Act, 1958, Mr. Sudesh Joshi fairly pointed out the provision of section 11 of the Probation of Offenders Act, 1958 and submitted that the revisional court did in fact have the power to do so. Mr. Joshi also referred to the judgment of the Supreme Court in ***Ramji Missar vs. State of Bihar***[9] to support that view.

20. In ***Prem Chand*** (supra), the Supreme Court held that the trial court was justified in extending benefit of probation to the accused therein under the Probation of Offenders Act, 1958. The learned Sessions Judge had held that the prosecutrix therein had not been actually raped but an attempt had been made in that direction. The accused therein was held guilty for the offence under section 376/511 IPC but since he was less than 21 years of age the benefit of probation, it was held, could not be denied when he was not a previous convict. The Supreme Court was of the view that since the offence for which the accused had been found guilty was for attempt to rape it would not attract imprisonment for life disentitling him to the benefit of probation.

21. In ***Chandreshwar Sharma*** (supra), the Supreme Court held on the facts of that case that the courts below including the High Court had not

---

[3] (1997) 7 SCC 756
[4] 2011 SCC Online HP 6249 / 2012 Cri. L.J. 468
[5] 1987 (Supp) SCC 172
[6] (2000) 9 SCC 245
[7] (2009) 11 SCC 42
[8] (2015) 11 SCC 229
[9] AIR 1963 SC 1088

considered the question of applicability of section 360 Cr.P.C. The Supreme Court also held that section 361 and 360 Cr.P.C. on being read together would indicate that in any case where the court could have dealt with an accused under section 360 of the Code and yet does not want to grant the benefit of the said provision then it shall record in its judgment specific reasons for not having done so. The Supreme Court in the facts of the case, which was a case of theft, thought it fit while maintaining the conviction of the accused to direct release of the accused on probation of good conduct instead of sentencing him under section 360 Cr.P.C.

22. In ***Pritam Singh*** (supra), the Himachal Pradesh High Court deemed it fit to extend the benefit of section 4 of the Probation of Offenders Act, 1958 to the accused therein considering his young age and the fact that his social standing had taken a mauling and he had to marry and settle in life.

23. In ***Sri Chand*** (supra), the Supreme Court was examining a case under section 376 read with sections 511 and 354 IPC for attempt to rape and outraging the modesty of a woman. The Supreme Court held that the offences under section 354 had been proved beyond reasonable doubt. The question of sentence and benefit under the Probation of Offenders Act, 1958 was thereafter examined and it was held:

> ***"10.*** *Now we move to the question of sentence vis-à-vis the benefit granted under the Probation of Offenders Act, 1958. In Ajahar Ali v. State of W.B. [Ajahar Ali v. State of W.B., (2013) 10 SCC 31 : (2013) 3 SCC (Cri) 794], this Court while dealing with the question of applicability of the 1958 Act to an offence under Section 354 IPC, found as follows: (SCC p. 35, para 12) "12. In the instant case, as the appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the appellant behaved like a roadside Romeo, we do not think it is a fit case where the benefit of the 1958 Act should be given to the appellant."*

11. *In State of H.P. v. Dharam Pal [State of H.P. v. Dharam Pal, (2004) 9 SCC 681 : 2004 SCC (Cri) 1477] this Court was dealing with probation of offenders in case of offence of attempt to commit rape. The finding of this Court in the said judgment is relevant for all the offences against women, which is as follows: (SCC p. 682, para 6) "6. According to us, the offence of an attempt to commit rape is a serious offence, as ultimately if translated into the act leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour. In a traditional and conservative country like India, any attempt to misbehave or sexually assault a woman is one of the most depraved acts. The Act [Probation of Offenders Act, 1958] is intended to reform the persons who can be reformed and would cease to be a nuisance in the society. But the discretion to exercise the jurisdiction under Section 4 [of the Probation of Offenders Act, 1958] is hedged with a condition about the nature of the offence and the character of the offender." In the above case although this Court did not interfere with the benefit of probation granted by the High Court due to peculiar facts of the case however it did not approve the reasoning given by the High Court.*

12. *In the present case the accused is not a minor, rather he has committed an offence against a minor girl who is helpless. Further, it is clear from the evidence on record that he ran away only when the prosecutrix screamed and PW 3 came to the place of incident, which goes on to show that the accused could have had worse intentions. The offence is heinous in nature and there is no reason for granting benefit of probation in this case. The trial court has not*

given any special consideration to the character of the accused apart from the fact that this was the first conviction of the accused. We find this is far from sufficient to grant probation in an offence like outraging the modesty of a woman.

13. *In view of the discussion in the foregoing paragraphs, we allow this appeal to the limited extent that the respondent-accused is not granted the benefit of the Probation of Offenders Act, 1958, but his conviction is maintained under Section 354 IPC only. The respondent-accused is hereby sentenced to rigorous imprisonment for two years. The respondent is directed to surrender within a period of two weeks to serve out the sentence, failing which the Additional District and Sessions Judge, Laxmangarh, shall take necessary steps to take him into custody to serve out the sentence. Let a copy of this judgment be sent to the Additional District and Sessions Judge, Laxmangarh for information and necessary action."*

24. In ***Eliamma*** (supra), before the Supreme Court it was pleaded that neither the trial court nor the High Court considered the effect of section 360 Cr.P.C. The Supreme Court while upholding the conviction remitted the matter to the trial court for deciding whether the benefit under section 360 Cr.P.C. can be extended to the appellant therein.

25. The record reveals that neither the learned Chief Judicial Magistrate nor the learned Sessions Judge had examined the applicability of section 360 Cr.P.C. or Section 4 of the Probation of Offenders Act, 1958. Therefore, while declining to interfere with the judgments of the learned Chief Judicial Magistrate and the learned Sessions Judge, in exercise of this court's power conferred by sections 397 and 401 Cr.P.C., the matter is remitted to the court of the learned Chief Judicial Magistrate for the limited purpose for deciding whether the benefit of section 360 Cr.P.C. and section 4 of the Probation of Offenders Act, 1958 can be extended to the revisionist. The revisionist shall appear before the learned Chief Judicial Magistrate, South Sikkim at Namchi on 25.11.2020 for the said purpose.

26. The revisionist is presently on bail. He shall continue to be on bail until the learned Chief Judicial Magistrate takes a decision. In case the learned Chief Judicial Magistrate arrives at a conclusion that the revisionist is not entitled to the benefit of section 360 Cr.P.C. or section 4 of the Probation of Offenders Act, 1958, his bail bonds shall automatically stand cancelled.

27. Criminal Revision Petition No. 3 of 2018 is disposed accordingly.

28. Copy of this judgment be made over to the court of the learned Sessions Judge and to the court of the learned Chief Judicial Magistrate, South Sikkim at Namchi, forthwith.

29. Records of the courts below be remitted.

SLR (2020) SIKKIM 982

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

W.A No. 04 of 2020

D. B. Thapa ….. APPELLANT

Versus

Urban Development and Housing Department ….. RESPONDENT

For the Appellant: Mr. Yam Kumar Subba.

For the Respondent 1: Dr. Doma T. Bhutia, Additional Advocate General with Mr. S.K. Chettri, Government Advocate.

Date of decision: 26th November 2020

A. Sikkim Allotment of House-sites and Construction of Building (Regulation and Control) Act, 1985 – The demolition notice dated 03.07.2020 was issued under S. 8 of the Act. The reply given by the appellant being found unsatisfactory, demolition order dated 29.09.2020 was issued. The permission itself provided that the appellant shall demolish the structure as and when the Government wanted it to be demolished. The same was accepted by the appellant. In the attending facts and circumstances, submission advanced that denial of opportunity of hearing had resulted in violation of principles of natural justice cannot be countenanced – Held: We find no merit in this appeal, and accordingly, the same is dismissed. No cost.

(Paras 9 and 11)

Appeal dismissed.

Case cited:

1. Muni Suvrat-Swami Jain S.M.P. Sangh v. Arun Nathuram Gaikwad and Others, (2006) 8 SCC 590.

JUDGMENT AND ORDER (ORAL)

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

This Writ Appeal is preferred under Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011 against a judgment and order dated 17.10.2020 passed by the learned Single Judge in WP(C) No. 31 of 2020, dismissing the writ petition, which was filed challenging a demolition notice issued under Memo No. 21/275/509 dated 03.07.2020 and the demolition order issued under Memo No. 21(275)97/UD&HD/1628 dated 29.09.2020.

2. We have heard Mr. Yam Kumar Subba, learned Counsel appearing for the appellant and Dr. Doma T. Bhutia, learned Additional Advocate General, Sikkim assisted by Mr. S.K. Chettri, appearing for the respondent.

3. Mr. Subba submits that the learned Single Judge committed a manifest error of law as well as of facts in dismissing the writ petition, *in limine*. He contends that the appellant was granted a permission dated 23.04.2013 by the Assistant Town Planner, on an application submitted by him to construct a temporary shed/garage to keep his vehicle and on the strength of that permission, the appellant had constructed a garage. He submits that there are many in the locality where the appellant resides who had constructed garages without their being any permission whatsoever and the appellant has been singled out while issuing demolition notice inasmuch as he is a member of the Sikkim Democratic Front, which is in the opposition, out of political vendetta. He has submitted that the appellant had served as a Cabinet Minister during the period from 1994-1999 and from 2009-2014. It is contended by him that after filing the reply to the demolition notice dated 03.07.2020, no opportunity of hearing was granted before issuing the final demolition order and therefore, the impugned action of the respondent cannot be sustained in law, the same being in violation of principles of natural justice. In support of his submission, learned counsel refers to paragraph 45 of a judgment in the case of ***Muni Suvrat- Swami Jain S.M.P. Sangh vs. Arun Nathuram Gaikwad & Ors.,*** reported in ***(2006) 8 SCC 590.***

4. Dr. Doma T. Bhutia submits that no vested right had accrued on the appellant. In the very first place, permission granted by the Department was

unauthorized in law as the Sikkim Allotment of House-sites and Construction of Building (Regulation and Control) Act, 1985,for short, the Act, does not have any provision for grant of such permission. She submits that no interference is called for with the judgment and order under challenge.

5. The learned Single Judge at paragraphs 8, 9, 10 and 11 had observed as follows:-

> *"8. The facts have already been put forth supra and for brevity are not being repeated. Relevant reference in this context may be made to the conditions put forth in the letter dated 23-04-2013 bearing No.21(275)/1026/UD&HD, wherein the Petitioner was granted permission to construct a temporary shed/garage, viz.;*
>
> *"(i) That the permission is purely for security reasons;*
>
> *(ii) That, you shall have no right or claim over the land;*
>
> *(iii) That you shall demolish the same as and when the Government desires; and*
>
> *(iv) That your car shall not be parked in a way that will obstruct the free flow of pedestrian movement."*
>
> *9. As admitted by Learned Counsel for the Petitioner these conditions have not been contested by the Petitioner since the year 2013. No change in the conditions were sought for by the Petitioner from the Respondent Department at any point in time, till date. It is also admitted that the shed stands on land which was never allotted to the Petitioner by the concerned Department or any other Department of the Government.*
>
> *10. It is thus evident that the portion of land on which the Petitioner was allowed to construct the shed/garage was a temporary arrangement for*

security purposes at the relevant time as he was a sitting Minister to the Government of Sikkim. Admittedly, it was not a Government allotment made to him in terms of any Rules prevalent at that time. Evidently, he has no right over the said area sans allotment neither does he claim ownership upon it under any law. The conditions spelt out in the letter of permission allowing construction of the shed being clear and unambiguous do not require further elucidation.

11. In consideration of the submissions of Learned Counsel for the parties, the facts involved in the instant matter, the conditions laid down in the letter granting permission to construct the temporary shed and in the absence of any indication that the any right of the Petitioner has been violated, I am of the considered opinion that the matter merits no further consideration and nothing remains for adjudication thereof."

6. In his application dated 04.04.2013 addressed to the Additional Chief Town Planner of Urban Development and Housing Department for grant of permission it is stated that as it is dangerous to park his vehicle in open space along 31-A National Highway it is necessary to construct a shed measuring 15x13 S.ft. It is relevant to note that at the relevant point of time, the appellant himself was the Minister of Urban Development and Housing Department.

7. We asked a specific question to Mr. Subba as to whether there is any law in force in the State of Sikkim to grant permission of the kind granted to the appellant. Mr. Subba very fairly submits that he had not come across any law conferring a power to grant such permission. It appears that without there being any power, permission was granted to construct a shed/garage over a plot of land, which, admittedly, does not belong to the appellant, as a request was made by the departmental Minister.

8. No specific instances have been given and only sweeping and omnibus statements had been made in the writ petition that many temporary sheds/ garages had been constructed for parking vehicles on the National Highway by many people in his locality and as such, submission of Mr. Subba that the appellant has been subjected to hostile discrimination does not commend for acceptance.

9. The demolition notice dated 03.07.2020 was issued under Section 8 of the Act. The reply given by the appellant being not found satisfactory, demolition order dated 29.09.2020 was issued. The permission itself provided that the appellant shall demolish the structure as and when the Government wanted it to be demolished. The same was accepted by the appellant. In the attending facts and circumstances, submission advanced that denial of opportunity of hearing had resulted in violation of principles of natural justice cannot be countenanced.

10. In paragraph 45 of ***Muni Suvrat-Swami Jain*** (supra), the Hon'ble Supreme Court had extracted paragraph 35 of the judgment of Bombay High Court in the case of *G.J. Kanga vs. S.S. Basha*, reported in *(1992) 2 Mah LJ 1573*. Paragraph 35 contains submissions advanced by the learned Counsel for the Municipal Corporation. The High Court of Bombay had passed an order directing the Bombay Municipal Corporation, for short, BMC, to demolish an illegal and unauthorized construction despite noticing that the issue of regularization was a matter which rested with the BMC. The Hon'ble Supreme Court, in the context of Section 351 of the Bombay Municipal Corporation Act, 1888, had observed that the power under Section 351 of the Bombay Municipal Corporation Act, 1888, has to be exercised only by the Municipal Commissioner either to order or not to order the demolition of the alleged unauthorized temple. The above decision has no application in the facts of the present case.

11. In view of the above discussion, we find no merit in this appeal, and accordingly, the same is dismissed. No cost.

———

SLR (2020) SIKKIM 987

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

Bail Appln. No. 11of 2020

Sita Rai @ Sita Darjee ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent : Ms. Pema Tamang, Assistant Public Prosecutor.

Date of decision: 27th November 2020

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – As could be culled out from the submissions of Learned Assistant Public Prosecutor, the charge-sheet is yet to be filed as the RFSL report has not yet been received by the I.O. However, the F.I.R does not reveal the role of the petitioner save to the extent that the I.O sought legal action against her. Kiran Darjee who is accused of being a peddler of controlled substances is her husband and she lives with him in the rented premises, that by itself does not *prima facie* establish her complicity in the offence in the absence of a specific role attributed to her in the F.I.R – This is a fit case where the petitioner can be enlarged on bail.

(Paras 5 and 6)

Petition allowed.

ORDER (ORAL)

Meenakshi Madan Rai J

1. The Petitioner, aged about 29 years, was arrested by the Singtam Police Station, in connection with FIR No.50/2020, dated 15-10-2020, at

around 02.35 a.m., under Section 7(a)(b) and 14 of the Sikkim Anti Drugs Act, 2006 (for short, "SADA, 2006") read with Section 9(1)(b) of the Sikkim Anti Drugs (Amendment) Act, 2017, Sections 22/27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act") and Section 34 of the Indian Penal Code, 1860, from Dhamala Colony, Singtam, East Sikkim. The controlled substances allegedly seized at around 01.40 a.m. from the rented premises of the Petitioner which she shares with her husband and twelve year old son, comprised of 614 files of *Spasmo-Proxyvon Plus* capsules.

2. Learned Counsel advancing his arguments for the Petitioner drew the attention of this Court to the FIR lodged and submitted that although the name of the Petitioner finds place in the FIR there is in fact no specific allegation against her. She is neither alleged to be a consumer of controlled substances nor is she said to be a peddler of controlled substances. That, Kiran Darjee, whose name appears in the FIR is her husband, a truck driver who is accused of being a seller of controlled substances. For her part she is unaware of the activities of her husband pertaining to sale of controlled substances neither was she aware that controlled substances recovered from beneath her bed had been kept there as the articles were concealed with a cloth. That, she is a house wife and a mother of a twelve year old child and is not involved in any offence either under the SADA or the NDPS Act, besides which she has no criminal antecedents. It was also urged by Learned Counsel that there was no compliance of Section 21 of the SADA, 2006, when the search and seizure was carried out by the Investigating Officer (I.O.) apart from which the seizure memo reveals that although the seizures were made on 15-10-2020 the I.O. they were forwarded to the RFSL for forensic examination only on 22-10-2020, raising doubts about the authenticity of the seizure of the controlled substances. That, in consideration of the facts and circumstances canvassed the Petitioner deserves to be released on bail.

3. *Per contra*, Learned Assistant Public Prosecutor while objecting to the Petition contended that the controlled substances seized were in commercial quantity and recovered from beneath the bed of the Petitioner. That, it is an appalling contention that she could be unaware of the articles

which were placed below her bed when she shares the rented premises with her husband. That, she is complicit with her husband in selling the controlled substances to the youth in Singtam town and, therefore, deserves no consideration at this stage.

4. I have heard the rival contentions advanced before me. The FIR, the Seizure Memo and the Arrest Memo have also been duly perused by me.

5. Admittedly, as could be culled out from the submissions of Learned Assistant Public Prosecutor, the Charge-Sheet is yet to be filed as the RFSL report has not yet been received by the I.O. However, the FIR does not reveal the role of the Petitioner save to the extent that the I.O. sought legal action against her. Kiran Darjee who is accused of being a peddler of controlled substances is her husband and she lives with him in the rented premises, that by itself does not *prima facie* establish her complicity in the offence in the absence of a specific role attributed to her in the FIR. At this stage, I am not inclined to consider the submissions of Learned Counsel for the Petitioner pertaining to the lack of compliance of procedure for seizure or authenticity of the seizures made, these are to be left for consideration at the time of the trial.

6. Accordingly, in the light of the rival submissions, the facts and circumstances placed before me and the resultant discussions *supra*, I find that this is a fit case where the Petitioner can be enlarged on bail.

7. It is hereby ordered that the Petitioner be enlarged on bail on furnishing PB&SB of Rs.35,000/- (Rupees thirty-five thousand) only, each, subject to the conditions that;

(i) *She shall not leave Singtam Police Station without the specific written permission of the I.O. of the case;*

(ii) *She shall not threaten or induce any witnesses acquainted with the facts of the case; and*

(iii) *She shall appear before the Learned Trial Court as and when required.*

Flouting any of the above conditions, will lead to her bail bonds being cancelled.

8. The observations made for the purpose of this Bail Appln. shall in no manner be construed as opinions on the merits of the matter.

9. Bail Appln. stands disposed of.

10. Copy of this Order be sent to the Learned Special Judge (SADA, 2006), East Sikkim at Gangtok, for information.

HIGH COURT OF SIKKIM
GANGTOK
(Order Form)

To,

The Court Officer,
High Court of Sikkim,
Gangtok-737101.

Sub.: Subscription of Sikkim Law Reports, 2020.

Sir,

Kindly arrange to supply the aforesaid law journal as per the details mentioned below :

1. Mode of subscription :

   a) From the Registry.....

   b) Registered Post .....

   c) Book Post .....

2. Period of subscription : Annual (8 issues i.e. January & February to December, 2020)

3. Price :

   a) From the Registry : @ Rs. 105/- x 8/-
   = Rs. 840/- .....

   b) Registered Post : Rs. 840/- + Rs. 896/- (Postal Charge)
   = Rs. 1736/- .....

   c) Book Post : Rs. 840/- + Rs. 168/- (Postal Charge)
   = Rs. 1,008/- .....

4. Number of copies (Please mention No. of copies here) .....

5. *Bank Receipt No. ..... Date ...../...../.....
   Amount Rs. .....In words (Rupees .....
   .....)

6. Name of subscriber/ Institute : .....
.....

7. Postal Address : .....
.....
..... Pin .....
Phone : ..... Mobile : ..... Fax : .....
E-mail: .....

Place :

Date : Signature

*Note : Bank Receipt should be drawn as per the mode of subscription and number of copies under the Head : **0070-01-501 OAS** from the State Bank of Sikkim and attached with this Form.