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controversy between the parties apart from testing whether the amendment if allowed would cause injustice to the other side which cannot be compensated in material terms – Technicalities of law ought not to hamper justice to the parties, as it goes without saying that procedure is the handmaid to the administration of justice. Amendments are essentially to be allowed to prevent multiplicity of proceedings and for dispensing even handed justice.

Shri S.P. Subba* v. *Sukhim Yakthung Sapsok Songiumbho (Sikkim Limboo Literacy Society) ***529-A***

Civil Procedure Code, 1908 – Order VI Rule 17 – Amendment of Pleadings – Petitioner seeks to insert facts about events that took place subsequent to the filing of the suit that would be essential for a just decision in the matter and of course prevent multiplicity of proceedings. The proposed amendments to the written statement and insertion of counter-claim do not change either the nature or the character of the suit. It would in fact inject clarity into the dispute and facilitate a just decision of the matter – O VI R 17 permits the Court at any stage of the proceedings to allow either party to alter or amend the pleadings for the purpose of determining the real questions in controversy between the parties – Procedural law is to facilitate and not obstruct the course of substantial justice.

Shri S.P. Subba* v. *Sukhim Yakthung Sapsok Songiumbho (Sikkim Limboo Literacy Society) ***529-B***

Code of Civil Procedure, 1908 – S. 24 – Transfer of Suit – District Judge, West Sikkim at Gyalshing sent a letter dated 09.08.2019 along with a copy of Order dated 07.08.2019 passed by in Title Suit No.01 of 2019 conveying that Counsel for both the parties seeks transfer of the suit from Gyalshing, West Sikkim to Gangtok, East Sikkim under S. 151 CPC on the ground of convenience – This suit being recently transferred from the Court of District Judge, South Sikkim at Namchi to the Court of District Judge, West Sikkim at Gyalshing – Held: District Judge not correct in referring the matter to the High Court – Transfer of a case from one's Court can be sought on the following grounds: (a) his close family member is appearing before him, (b) he is related to any of the parties in the case, (c) earlier he had been Counsel for any of the parties in the case, or (d) he has financial interest in the matter – In other circumstances, a Court should not ask for transfer of case from his Court – S. 24 CPC explained: Law is clear on this point. The case can be transferred from one Court to another Court on an application moved by any of the parties and after notice to the parties

obtained when a student misplaces the certificate and applies for a fresh copy. Copy issued many years thereafter is also relevant document as fresh copy issued subsequently cannot change the relevant record which is in existence in the record of the School.
Shri Ravi Chandra Dhakal v. State of Sikkim and Others ***547-C***

Constitution of India – Article 226 – Submission of Tender Bid Documents Beyond the Stipulated Time – Permissibly –Despite the time detailed in the advertisement pertaining to the purchasing of Bids, Respondent No.2 failed to comply and did not release the documents timely to the Petitioner. This delay led to a consequential delay of twenty minutes by the Petitioner in his submission of the documents – Had Respondent No.2 been diligent and handed over the document to the Petitioner on 05.03.2019, as detailed in the advertisement, it would have enabled the Petitioner to act diligently in response. The delay of twenty minutes of the Petitioner is a consequence of the delay of more than twenty four hours meted out to him by Respondent No.2. The action of Respondent No.2 cannot be exonerated – Petitioner allowed to submit his documents before Respondent No.2 on or before 12 noon of 27.08.2019.
Sajan Kumar Agarwal* v. *State of Sikkim and Another ***569-A***

Indian Evidence Act, 1872 – S. 45 – Medical Evidence of Age – If the margin of error is two years on either side, the age of the victim may cross the borderline between a child and adult – Held: bone age estimation or ossification test is a medical evaluation on the basis of a scientific study of the bone age. It is estimation only. There is a margin of error. However, it cannot be said that in every case there has to be an error.
Ashok Kumar Pariyar alias Ashok Pariyar* v. *State of Sikkim ***534-C***

Indian Evidence Act, 1872 – S. 45 – Medical Evidence of Age – No evidence to suggest that non-production of documentary proof of age was deliberate and intended to mislead the Court or suppress the truth. The Investigating Officer clarified that he did not seize the birth certificate of the victim as it was not available – Oral testimony of the father (who would have the best knowledge about the birth of the victim) and the victim corroborated by the bone age estimation report established by Senior Radiologist proved that the victim was a child.
Ashok Kumar Pariyar alias Ashok Pariyar* v. *State of Sikkim ***534-D***

National Highways Act, 1956 – S. 3G (5) – Determination of

Compensation – S. 3G (5) specifically provides that should the compensation determined by the Competent Authority be unacceptable to either of the parties, an Arbitrator shall determine the amount *on an application by either of the parties*. The Arbitrator is to be appointed by the Central Government – Appointment of Arbitrator shall be subsequent to an application made by either of the parties, on dissatisfaction of either party of the amount of compensation determined by the Competent Authority – Application for appointment of an Arbitrator was made by the Petitioner on 30.05.2018 while the Notification of intention of acquisition was published on 13.04.2016 and Declaration of acquisition notified on 09.07.2016 – Despite the above position, Arbitrator was appointed on 08.07.2016 itself, even before the Declaration of 09.07.2016 was notified – Law does not envisage putting an Arbitrator in place preceding an application of any aggrieved party or for that matter, before publication of notification of Declaration.

Prakash Chand Pradhan* v. *Union of India and Another ***580-A***

National Highways Act, 1956 – S. 3G (5) – Determination of Compensation – If the amount determined by the Competent Authority is not to the satisfaction of any aggrieved person, on an application being filed by either of the parties, the Central Government is to appoint an Arbitrator for determination of the compensation amount, in terms of S. 3G (5). The appointment of an Arbitrator is to be followed by an application filed by any aggrieved party.

Prakash Chand Pradhan* v. *Union of India and Another ***580-C***

Indian Penal Code, 1860 – S. 376 (2)(j) –Before an accused is punished for the offence provided in S. 376(2) (j) I.P.C, it is incumbent upon the Court to examine if the woman who has been raped is "a woman incapable of giving consent" - A serious charge of rape-a heinous offence must be proved by cogent evidence.

Dal Bahadur Darjee* v. *State of Sikkim ***558-A***

Indian Penal Code, 1860 – S. 376 (2)(l) – Rape on a Woman Suffering from Mental or Physical Disability – S. 2(s) of the Rights of Persons with Disabilities Act, 2016 defines "person with disability" to mean a person with long term physical, mental, intellectual or sensory impairment which, in the interaction with barriers, hinders his full and effective participation in society equally with others – A deaf and dumb person would be a person with physical disability, so would a person who is even partially paralysed.

Dal Bahadur Darjee* v. *State of Sikkim ***558-B***

Protection of Children from Sexual Offences Act, 2012 – Consensual Act – Consent implies voluntary participation. Submission of the body, if at all, under threat cannot be construed as a consented sexual act. Consent of a child in any case is no consent.
Ashok Kumar Pariyar alias Ashok Pariyar* v. *State of Sikkim ***534-E***

Protection of Children from Sexual Offences Act, 2012 – S. 2(d) – In the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case the untainted evidence of the father (PW-3) clearly establishes that the victim was in fact 16 years at the time of the incident. In re: Vishnu *alias* Undrya referred.
Ashok Kumar Pariyar alias Ashok Pariyar* v. *State of Sikkim ***534-A***

Protection of Children from Sexual Offences Act, 2012 – S. 2(d) – Procedure laid down by the Supreme Court in re: Mahadeo and Jarnail Singh i.e. ascertaining the age of the child by adopting the method postulated in Rule 12 (3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 not followed by the Special Judge – The question is if the procedure laid down by the Supreme Court (supra) has not been followed, what is the evidentiary value of the depositions of the father (P.W.3) and the victim regarding her minority? Held: Non-production of the certificates or any one of them is not, however, fatal to the claim of juvenility, for Rule 12 (3) (b) makes a provision for determination of the question on the basis of the medical examination of the accused in the absence of the certificates – Mere non-production may not, therefore, disentitle the accused of the benefit of the act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth. In re: Abuzar Hossain referred.
Ashok Kumar Pariyar alias Ashok Pariyar* v. *State of Sikkim ***534-B***

Protection of Children from Sexual Offences Act, 2012 – S. 5 –A victim of sexual assault is not an accomplice to a crime and stands at a higher pedestal than an injured witness as she suffers from emotional injury. In re: Mohd. Imran Khan referred.
Deepen Darjee alias Sungurey Bada* v. *State of Sikkim ***601-A***

SLR (2019) SIKKIM 529

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

WP (C) No. 39 of 2018

Shri S. P. Subba ..... PETITIONER

Versus

Sukhim Yakthung Sapsok Songjumbho — (Sikkim Limboo Literary Society) ..... RESPONDENT

For the Petitioner: Mr. S.S. Hamal with Ms. Priyanka Chhetri and Ms. Srijana Chhetri, Advocates.

For the Respondents: Mr. N. Rai, Senior Advocate with Ms. Malati Sharma, Advocate.

Date of decision: 7th August 2019

A. Civil Procedure Code, 1908 – Order VI Rule 17 – Amendment of Pleadings – The guiding principle for an amendment is whether the amendment sought is for the purpose of determining the "real questions" in controversy between the parties apart from testing whether the amendment if allowed would cause injustice to the other side which cannot be compensated in material terms – Technicalities of law ought not to hamper justice to the parties, as it goes without saying that procedure is the handmaid to the administration of justice. Amendments are essentially to be allowed to prevent multiplicity of proceedings and for dispensing even handed justice.

(Para 5)

B. Civil Procedure Code, 1908 – Order VI Rule 17 – Amendment of Pleadings – Petitioner seeks to insert facts about events that took place subsequent to the filing of the suit that would be essential for a just decision in the matter and of course prevent multiplicity of proceedings. The proposed amendments to the written statement and insertion of counter-

claim do not change either the nature or the character of the suit. It would in fact inject clarity into the dispute and facilitate a just decision of the matter – O VI R 17 permits the Court at any stage of the proceedings to allow either party to alter or amend the pleadings for the purpose of determining the real questions in controversy between the parties – Procedural law is to facilitate and not obstruct the course of substantial justice.

(Para 6)

Petition allowed.

Chronological list of cases cited:

1. Rajesh Kumar Aggarwal and Others, v. K.K. Modi and Others, AIR 2006 SC 1647.
2. Shri Subash Gupta v. Shri Yadap Nepal, SLR (2017)Sikkim 424.
3. Karma Denka Bhutia v. Sarki Lamu, AIR 2005 Sikkim 1.
4. A. K. A. CT. V. CT. Meenakshisundaram Chettiar v. A. K. A. CT. V. CT. Venkatachalam Chettiar, AIR 1980 Madras 105.
5. Kaluram v. Shakuntala Devi, AIR 1992 Rajasthan 6.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner herein impugns the Order dated 31-07-2018 in Title Suit No.05 of 2017 of the Learned Civil Judge (Jr. Division), Chungthang Sub-Division, North Sikkim, stationed at Gangtok, by which the prayer of the Petitioner seeking to amend the written statement was disallowed and the Petition dismissed.

2. Briefly, the facts put forth by Learned Counsel for the Petitioner was that the "*Sukhim Yakthung Sapsok Songjumbho*" (Sikkim Limboo Literary Society) was formed in the year 1979 for improvement and development of Limboo literature and culture. It is a registered body with a constitution, permitting only registered members to participate in the elections of the Society. On 04-12-2016, a General Body Meeting was held wherein it was

resolved that elections for the new Executive Body of the Society would be held only after 31-03-2017 towards which a notice was issued to all concerned on 11-03-2017, informing therein that, election for the office bearers of the Society would be held in the second week of April, 2017. In the interim, Title Suit No.05 of 2017 came to be filed by the Respondent, against the Petitioner, before the Court of the Learned Civil Judge (Jr. Division), East Sikkim, at Gangtok, and vide Order of *ex parte ad interim* injunction on 07-04-2017 the Petitioner was injuncted from holding elections. Later, on 28-10-2017 the Title Suit was dismissed in default on account of the non-appearance of the Respondent before the Learned Trial Court. Subsequently, the Learned Trial Court restored the Suit to its File on 01-11-2017, setting aside its own Order of dismissal sans Notice to the Petitioner. The matter came before this High Court with the Petitioner assailing the Order of restoration. This Court on 30-11-2017 set aside the impugned Order and the Suit was restored to the File. That, from the facts and circumstances placed above, according to the Petitioner, from 28-10-2017 to 09-04-2018 the latter being the date on which the restoration application was allowed, no Suit was pending before the Learned Trial Court. In such circumstance, on 06-11-2017 the registered members elected and constituted a new Executive Body as the term of the previous Executive Body had expired on July, 2014. That, after restoration of the Suit, in order to bring the aforesaid circumstances before the Learned Trial Court, the Petitioner filed an Application under Order VI Rule 17 read with Section 151 of the Civil Procedure Code, 1908 (CPC), seeking to amend the written statement and also to insert a counter-claim. This was dismissed by the impugned Order dated 31-07-2018, hence the instant Petition. To bolster his submissions Learned Counsel for the Petitioner placed reliance on ***Rajesh Kumar Aggarwal & Ors.* v. *K. K. Modi and Ors.***[1] : and ***Shri Subash Gupta* v. *Shri Yadap Nepal***[2].

3. Learned Senior Counsel for the Respondent while vehemently repudiating the Petition *inter alia* on grounds that exhaustive amendments are sought which would naturally require the Respondent to also amend the Plaint, postulated that, the amendments sought would not only change the entire nature and character of the Suit, but would prejudice the case of the Respondent. That, infact the election held on 06-11-2017 and the

[1] AIR 2006 SC 1647
[2] SLR (2017) Sikkim 424

constitution of a new body were *mala fide* and the Petitioner had failed to take steps on time as required, for the benefit of the Society following which an ad hoc Committee was constituted by the Respondent and later on 12-03-2017 an election was conducted and new Executive Committee constituted for two years. That, the facts as projected by the Petitioner are erroneous and the amendments sought to be inserted apart from deserving a dismissal, do not assist in the administration of justice. The Writ Petition being mis-conceived and devoid of any merit deserves to be dismissed. Learned Senior Counsel for the Respondent garnered strength from ***Karma Denka Bhutia* v. *Sarki Lamu***[3], ***A. K. A. CT. V. CT. Meena kshisundaram Chettiar* v. *A. K. A. CT. V. CT. Venkatachalam Chettiar***[4] and ***Kaluram* v. *Shakuntala Devi***[5].

4. I have heard the rival contentions of Learned Counsel for the parties at length, perused the impugned Order and the records of the case including the proposed amendments.

5. The guiding principle for an amendment is whether the amendment sought is for the purpose of determining the "real questions" in controversy between the parties apart from testing whether the amendment if allowed would cause injustice to the other side which cannot be compensated in material terms. That having been said it would do well to be cognizant that technicalities of law ought not to hamper justice to the parties, as it goes without saying that procedure is the handmaid to the administration of justice. Amendments are essentially to be allowed to prevent multiplicity of proceedings and for dispensing even handed justice.

6. The controversy herein between the parties pivots around the Society and election to the Executive Body thereof with both parties being convinced that they are the legitimate Executive Body of the Society. It is not repudiated by the Respondent that a subsequent election was held to constitute a new Executive Body. I, ofcourse, refrain from voicing any opinion as to the merits of the matter, being unwarranted at this stage. However, from the proposed amendments, I find that the Petitioner seeks to insert facts about events that took place subsequent to the filing of the Suit

[3] AIR 2005 Sikkim 1
[4] AIR 1980 Madras 105
[5] AIR 1992 Rajasthan 6

that would be essential for a just decision in the matter and ofcourse prevent multiplicity of proceedings. The proposed amendments to the written statement and insertion of counter-claim, in my considered opinion, do not change either the nature or the character of the Suit. It would infact inject clarity into the dispute and facilitate a just decision of the matter. Besides, before the Learned Trial Court the parties were examined under Order X of the CPC but admittedly the issues have not been struck for adjudication, in other words, the suit is at an initial stage. It would be trite to recapitulate that Order VI Rule 17 of the CPC permits the Court at any stage of the proceedings to allow either party to alter or amend the pleadings for the purpose of determining the real questions in controversy between the parties. While on this aspect, it may be reiterated that procedural law is to facilitate and not obstruct the course of substantial justice.

7. Consequently, in view of the foregoing discussions and reasons, the Writ Petition is allowed.

8. The impugned Order dated 31-07-2018 is set aside.

9. The Learned Trial Court shall allow the amendments proposed by the Petitioner herein and thereafter take steps as envisaged by law.

10. I hasten to add that observations made in this matter are not to be interpreted as opinions expressed on the merits of the case.

11. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance.

SLR (2019) SIKKIM 534

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

Crl. A. No. 37 of 2018

Ashok Kumar Pariyar *alias* Ashok Pariyar ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Tashi Norbu Basi, Legal Aid Counsel.

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

Date of order: 20th August 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 2(d) –In the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case the untainted evidence of the father (PW-3) clearly establishes that the victim was in fact 16 years at the time of the incident. In re: Vishnu *alias* Undrya referred.

(Para 9)

B. Protection of Children from Sexual Offences Act, 2012 – S. 2(d) – Procedure laid down by the Supreme Court in re: Mahadeo and Jarnail Singh i.e. ascertaining the age of the child by adopting the method postulated in Rule 12 (3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 not followed by the Special Judge – The question is if the procedure laid down by the Supreme Court (supra) has not been followed, what is the evidentiary value of the depositions of the father (P.W.3) and the victim regarding her minority? Held: Non-production of the certificates or any one of them is not, however, fatal to the claim of juvenility, for Rule 12 (3) (b) makes a provision for determination of the question on the basis of the medical examination of the accused in the absence of the certificates – Mere non-production may not, therefore,

disentitle the accused of the benefit of the act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth. In re: Abuzar Hossain referred.

(Paras 12 and 13)

C. Indian Evidence Act, 1872 – S. 45 – Medical Evidence of Age – If the margin of error is two years on either side, the age of the victim may cross the borderline between a child and adult – Held: bone age estimation or ossification test is a medical evaluation on the basis of a scientific study of the bone age. It is estimation only. There is a margin of error. However, it cannot be said that in every case there has to be an error.

(Para 18)

D. Indian Evidence Act, 1872 – S. 45 – Medical Evidence of Age – No evidence to suggest that non-production of documentary proof of age was deliberate and intended to mislead the Court or suppress the truth. The Investigating Officer clarified that he did not seize the birth certificate of the victim as it was not available – Oral testimony of the father (who would have the best knowledge about the birth of the victim) and the victim corroborated by the bone age estimation report established by Senior Radiologist proved that the victim was a child.

(Para 20)

E. Protection of Children from Sexual Offences Act, 2012 – Consensual Act – Consent implies voluntary participation. Submission of the body, if at all, under threat cannot be construed as a consented sexual act. Consent of a child in any case is no consent.

(Para 28)

Appeal partly allowed.

Chronological list of cases cited:

1. Sunil v. State of Haryana, (2010) 1 SCC 742.
2. Vishnu *alias* Undrya v. State of Maharashtra, (2006) 1 SCC 283.

3. Mahadeo v. State of Maharashtra and Another, (2013) 14 SCC 637.

4. Jarnail Singh v. State of Haryana, (2013) 7 SCC 263.

5. Abuzar Hossain v. State of West Bengal, (2012) 10 SCC 489.

6. Jaya Mala v. Government of Jammu & Kashmir, (1982) 2 SCC 538.

7. Mukarrab and Others, v. State of Uttar Pradesh, (2017) 2 SCC 210.

8. State of Sikkim v. Girjaman Rai @ Kami and Others, SLR (2019) Sikkim 266.

9. Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681.

10. Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC 1.

11. Om Prakash v. State of Rajsthan, (2012) 5 SCC 201.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Appellant assails the judgment of conviction dated 27.09.2018 passed by the learned Special Judge, POCSO, East Sikkim at Gangtok, convicting him for penetrative sexual assault as defined in Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012), wrongful confinement under Section 342 of the Indian Penal Code, 1860 (IPC) and for rape as defined in Section 376 (2) (i) of the IPC. The order on sentence dated 28.09.2018 is assailed as well.

2. The learned Special Judge relying upon the evidence of the victim (P.W.1), her father (P.W.3) and Dr. K. N. Sharma (P.W.14) the Senior Radiologist, STNM Hospital, Gangtok who had conducted and determined the bone age of the victim (exhibit-23) came to the conclusion that the victim was a child within the meaning of Section 2(d) of the POCSO Act, 2012.

3. The learned Special Judge held that the evidence of the victim, her brother (P.W.13) and her father (P.W.3) were duly corroborated by the medical evidence and therefore no further proof was required for arriving at the conclusion that the Appellant had wrongfully confined the victim and committed penetrative sexual assault on her.

4. The learned Legal Aid Counsel for the Appellant contested the determination of the age of the victim; the finding of conviction based on the evidence which according to him clearly proved that the act was consensual; the conviction of the Appellant under Section 376 (2) (i) of the IPC as the prosecution had failed to prove that the victim was *"under sixteen years of age"* and the Appellant's conviction for wrongful confinement.

5. The learned Additional Public Prosecutor for the Respondent *per contra* submitted that the victim's statement was clear, unequivocal and reliable which was duly corroborated by her brother (P.W.13). He submitted that the evidence led by the prosecution had clearly brought home the guilt of the Appellant.

6. The POCSO Act, 2012 defines the word *"child"* to mean any person below the age of 18 years. This is required to be proved by the prosecution who alleges that the victim was a child against whom the alleged crime was committed. In re: ***Sunil v. State of Haryana***[1] the Supreme Court held that it would be quite unsafe to base conviction on an approximate date of birth of the prosecutrix.

7. Section 3 of the Indian Evidence Act, 1872 defines the word *"evidence"* in the following manner.

> *"Evidence means and includes-*
>
> *(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.*
>
> *(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."*

8. The oral evidence of the father (P.W.3) that the victim, his daughter, was 16 years old and studying in Class VIII at the time of the incident could not be demolished in his cross-examination. In fact besides a denial no attempt was made by the defence to even question the truthfulness of the oral evidence of the father (P.W.3). The victim also deposed that she was

[1] (2010) 1 SCC 742

"16 plus years" at the time of her deposition and attending school in Class VIII. In her cross-examination she admitted she did not know her actual date of birth. She however, volunteered to state that her mother told her that she was 16 years old then. The victim was further cross-examined and she admitted that her mother had told her that she had attained 16 years of age based on her Aadhar Card. The victim denied the suggestion that she was an adult during the time of the incident.

9. In re: ***Vishnu Alias Undrya v. State of Maharashtra***[2] the Supreme Court while considering an appeal against the conviction under Section 376/366 IPC examined the question of date of birth of the victim and held that in the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case the untainted evidence of the father (P.W.3) clearly establishes that the victim was in fact 16 years at the time of the incident. This proves that the victim fell within the definition of the word *"child"* as defined by Section 2(d) of the POCSO Act, 2012. What the victim heard from her mother about her age being 16 years was reiterated by her in her deposition. Although this is hearsay, the evidence of her father (P.W.3) confirms what the victim heard from her mother was true.

10. The learned Counsel for the Appellant submitted that the prosecution has not attempted to produce the birth certificate or the school records to establish her age through documentary evidence and therefore the prosecution had failed to follow the law declared by the Supreme Court in re: ***Mahadeo* v. *State of Maharashtra & Anr.***[3] and ***Jarnail Singh v. State of Haryana***[4].

11. The judgment of the Supreme Court in re: ***Mahadeo (supra)*** and ***Jarnail Singh (supra)*** are dated 23.07.2013 and 01.07.2013 respectively. The Supreme Court in both the said cases examined Juvenile Justice (Care & Protection of Children) Act, 2000 (Act 56 of 2000) and Juvenile Justice (Care & Protection of Children) Rules, 2007 (2007 Rules). Juvenile Justice (Care & Protection of Children) Act, 2015 came into force on 15.01.2016 repealing Act 56 of 2000. Juvenile Justice (Care & Protection of Children) Model Rules, 2016 came into force on 21.09.2016 repealing the 2007

[2] (2006) 1 SCC 283
[3] (2013) 14 SCC 637
[4] (2013) 7 SCC 263

Rules. The alleged act is of 11.01.2016 when Act 56 of 2000 and 2007 Rules were still applicable.

12. The prosecution has not followed the procedure laid down by the Supreme Court in re: ***Mahadeo (supra)*** and ***Jarnail Singh (supra)*** i.e. ascertaining the age of the child by adopting the method postulated in Rule 12(3) of the 2007 Rules. Had the learned Special Judge followed the procedure laid therein there would be certainty and definiteness in ascertainment of the age of the victim. The question is, if therefore, as submitted by the learned Counsel for the Appellant, the procedure laid down by the Supreme Court has not been followed what is the evidentiary value of the depositions of the father (P.W.3) and the victim regarding her minority?

13. A three Judge Bench of the Supreme Court in re: ***Abuzar Hossain v. State of West Bengal***[5] examined Rule 12(3) of the 2007 Rules and held that non-production of the certificates or any one of them is not, however, fatal to the claim of juvenility, for sub-Rule (3) (b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the absence of the certificates. It was further held that mere non-production may not, therefore, disentitle the accused of the benefit of the act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth.

14. The Senior Radiologist (P.W.14) examined the victim and prepared the report of bone age estimation (exhibit-23) on 15.01.2011. He recorded the following findings and then his opinion:

> ***"****(1) Distal Radius and ulna-not completely firmed. (2) Epiphysis around elbow joint are fused.*
>
> *(3) Epiphysis around knee joint are fused.*
>
> *(4) Upper humerus epiphysis show incomplete fusion.*
>
> *(5) lliac crest-epiphysis append and not fused.*
>
> *Imp:-*
>
> *The bone age range between 15 yrs to 16.5 years.****"***

[5] (2012) 10 SCC 489

15. Therefore, the prosecution has led three evidences to prove that the victim was a child. There is oral evidence of the father (P.W.3) and the victim that the victim was sixteen years old. Then there is the bone age estimation by the Senior Radiologist (P.W.14) opining that the bone age range of the victim was between 15 years to 16.5 years.

16. In re: ***Jaya Mala v. Government of Jammu & Kashmir***[6] the Supreme Court held that the Court could take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. While considering the juvenility of a child under the Juvenile Justice (Care & Protection of Children) Act, 2000 the Supreme Court in re: ***Mukarrab & Ors. v. State of Uttar Pradesh***[7] held:-

> ***"10.*** *Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juveniles in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.*
>
> ***11.*** *Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the authority concerned, determination of age becomes a very difficult task providing a lot of*

[6] (1982) 2 SCC 538
[7] (2017) 2 SCC 210

> *discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused.***"**

17. The question of age determination of a victim in a criminal case is vital to the prosecution. A Division Bench of this Court in re: ***State of Sikkim v. Girjaman Rai @ Kami & Ors.***[8] ***held that date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with a proof of minority of the victim drags an accused to the rigours of the POCSO Act, which mandate a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim.***

18. As seen earlier there is no documentary evidence of proof of age of the victim although there is evidence that the victim was attending Class VIII in a School. There is oral evidence of the father (P.W.3) and the victim that the victim is sixteen years old. There is also the bone age estimation report (exhibit-23) which estimates the bone age of the victim to be between 15 to 16.5 years of age. The learned Counsel for the Appellant submits that if the margin of error is two years on either side the age of the victim may cross the border line between a child and adult. Bone age estimation or ossification test is a medical evaluation on the basis of a scientific study of the bone age. It is estimation only. There is a margin of error. However, it cannot be said that in every case there has to be an error.

19. In re: ***Sunil (supra)*** cited by the Appellant it was held that in the absence of primary evidence, reports of the dental Surgeon and the Radiologist would have helped in arriving at the conclusion regarding the age of the prosecutrix. In re: ***Ram Suresh Singh v. Prabhat Singh***[9] the Supreme Court found that the medical evidence of the ossification test corroborated the entry in the school register of the juvenile. In re: ***Suchita Srivastava v. Chandigarh Admn.***[10] the Supreme Court held that the result of the ossification test conclusively proved that the victim was a minor. In re: ***Om Prakash v. State of Rajsthan***[11] the Supreme Court held:

> ***"35.*** *While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical tests like ossification and radiological*

[8] SLR (2019) Sikkim 266
[9] (2009) 6 SCC 681
[10] (2009) 9 SCC 1
[11] (2012) 5 SCC 201

*examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused.***"**

20. There is no evidence to suggest that non-production of documentary proof of age was deliberate and intended to mislead the Court for suppress the truth. The Investigating Officer (P.W.15) clarified that he did not seize the birth certificate of the victim as it was not available. During his cross-examination no suggestion was made that documentary proof of age of victim was suppressed. In view of the aforesaid this Court is of the opinion that the oral testimony of the father (P.W.3) (who would have the best knowledge about the birth of the victim) and the victim corroborated by the bone age estimation report (exhibit-23) established by Senior Radiologist (P.W.14) proved that the victim was a child. The learned Special Judge considering the matter before it believed and concluded that the victim was a child. This Court does not find any evidence contrary thereto to hold that the finding was incorrect.

21. Section 3(a) of the POCSO Act, 2012 states that a person is said to commit *"penetrative sexual assault"* if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.

22. The victim (P.W.1) and her brother (P.W.13) deposed that they had gone to their aunt's residence at Ranka, East Sikkim during winter vacation where they stayed for fifteen days. The fact that they had gone to their aunt's place is confirmed by their father (P.W.3). The victim's brother (P.W.13) and their father (P.W.3) confirm that the brother (P.W.13) returned home alone. P.W.4 the owner of the vehicle which was seized by the Singtam Police in connection with this case as being used for the offence confirmed that the Appellant was the driver of the vehicle during the relevant time plying in an around Singtam area. The victim (P.W.1) and her brother (P.W.13) who boarded the said vehicle driven by the Appellant positively identified the Appellant. The then Chief Judicial Magistrate (P.W.12) conducted the test identification parade of the Appellant by the victim on30.05.2019. He deposed that the victim positively identified the Appellant during the Test Identification Parade. P.W.15 the Sub-Inspector posted at the Singtam Police Station identified the Appellant as the person he had arrested from Singtam bazaar after he commenced investigation. P.W.7 a

resident of Singtam identified the Appellant as the driver of the vehicle whose owner is his neighbour. He was the seizure witness to seizure memo (exhibit-7) through which the vehicle was seized. He proved the seizure of the vehicle.

23. The victim deposed that their aunt arranged a vehicle for their return journey from Gangtok to Singtam. After reaching Singtam they went to a *"Mela"* after which they boarded a vehicle for their journey up to *(Axxx)*i*. However, the driver of the said vehicle dropped them at *(KKxxx)** as he was going somewhere else. Thereafter, they started walking towards their residence taking a short cut from *(KKxxx)**. At that time a vehicle came there and the Appellant stopped the vehicle and inquired as to where they were proceeding. They told him that they were proceeding to their residence at *(Kxxx)**. The Appellant told them that he was also proceeding there and he would drop them. They boarded the vehicle and occupied the second seat. The Appellant drove the vehicle to a hotel on the way and purchased beer for them which they refused to consume. The Appellant consumed two bottles of beer. The Appellant then drove them towards some unknown place. They requested the Appellant to drop them to their residence as promised. The Appellant drove the vehicle towards *(Dxxx)** and dropped the victim's brother (P.W.13) but did not permit the victim to get down from the vehicle. He threatened her that he would hit her with the vehicle. Thereafter, the Appellant drove her towards an unknown place. The Appellant also asked the victim to marry him and accompany him to his residence. Thereafter, the victim states that *"the accused kissed me, opened my clothes below my waist and did chara to me. By chara I mean the accused put his pisab garney (penis) into my susu garney (vagina)."*

24. The victim was subjected to elaborate cross-examination. The cross-examination reveals that the Appellant did not deny the fact that the victim and her brother had boarded his vehicle on the relevant day. The victim admitted that the Appellant who had given them lift did not forcibly put them in the vehicle and that they had boarded it on their own accord. She admitted that she did not know the colour, type of vehicle or the registration number. She admitted that while travelling to the house an old man was also inside the said vehicle. She denied the suggestion that what she stated about the Appellant kissing her, opening her clothes below her waist and committing penetrative sexual assault was a false statement. She

denied all suggestions that she was tutored. She admitted that she did not raise any hue and cry at the hotel. She admitted that when three persons boarded the vehicle she got down but did not narrate about the incident to any of them nor did she request them to take the Appellant and the vehicle to the Police Station. She denied the suggestion that she started blackmailing the Appellant to marry her and because of that she had falsely implicated the Appellant. She also admitted that when she got off at *"Goshkhan Dara"* which is a crowded place she again did not raise hue and cry.

25. The cross-examination of the father (P.W.3) has brought out discrepancy between his statement to the police and his deposition. Various statements which were not stated by the father (P.W.3) to the police have been brought out in his deposition. Much of these statements in the deposition which are in variance with the statement to the police relates to what he was told about the incident by the victim and her brother (P.W.13) and the details thereof. It does not demolish the fact that the victim's brother (P.W.13) had returned home alone and the victim (P.W.1) was brought back by the father (P.W.3) and the brother (P.W.13) the next day from Singtam. It also does not demolish the fact that the father (P.W.3) and the brother (P.W.13) had gone to Singtam and found the victim, lodged the FIR before the Singtam Police Station pursuant to which the Appellant was arrested and identified by both the victim and her brother (P.W.13).

26. P.W.5-the SHO of Singtam Police Station confirmed that on 11.01.2016 the victim appeared at the Singtam Police Station with her parents with the complaint against the Appellant that he had committed sexual assault on her the previous evening. He had the victim's statement recorded under Section 154 Cr.P.C. and registered a case against the Appellant. P.W.5 also identified the Appellant in Court.

27. The victim was medically examined on 11.01.2016. The incident was of the day before. The allegation is of penetrative sexual assault committed after threatening the victim with dire consequence. The testimony of the victim doesn't reflect that it was a case of violent sexual aggression or strong resistance by the victim. The Medico-Legal Report (exhibit-8) by Dr. Jai Bahadur Gurung (P.W.8) a Gynaecologist who examined the victim did not see any bruises or acute injuries. There was an old tear of the hymen at 6 O'clock position and the vagina accommodated two fingers. He opined that examination of the old tear suggested she had intercourse. He also opined that

recent intercourse could not be ruled out. He did not explain why recent intercourse could not be ruled out. The Appellant was medically examined by Dr. Pranoy Kishore Chettri (P.W.10) the Medical Officer on the same day. He opined that the Appellant was capable of performing intercourse. The forensic investigation drew a blank. The medical evidence does not conclusively establish penetrative sexual assault. It does not rule it out either.

28. Thus, the only evidence left is the testimony of the victim. The evidence of the victim which is elaborate in its details inspires confidence. There was no reason for the victim to falsely implicate the Appellant and expose herself to social ridicule. The explanation of the Appellant to the circumstances against him is of complete denial. Curiously, during cross examination the suggestions put to the victim and her brother (P.W.13) does show that he did not dispute that he had in fact given them a lift and the victim had spent the night with him. The evidence of the victim and her brother (P.W.13) proves that they did not know the Appellant before the date of the incident. The victim's brother (P.W.13) corroborates her statement till the Appellant dropped him and proceeded with the victim on that fateful day. The father (P.W.3's) deposition corroborates the fact that the victim and her brother (P.W.13) had gone away to their aunt's house and while returning home it was only the brother (P.W.13) who reached. The identification of the Appellant is incontestable. The deposition of the victim is also adequately corroborated by other prosecution witnesses. The evidence of the victim clearly reflects that the Appellant penetrated his penis into the victim's vagina. The argument of the defence that the act was consensual cannot detain this Court any further as the evidence of the victim makes it clear that the Appellant had threatened her. Consent implies voluntary participation. Submission of the body, if at all, under threat cannot be construed as a consented sexual act. Consent of a child in any case is no consent. The conviction of the Appellant under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 by the learned Special Judge cannot be faulted.

29. The conviction of the Appellant under Section 376(2)(i) IPC for committing *"rape on a woman when she is under sixteen years of age"* however, cannot be sustained as the prosecution has failed to prove that the victim was under sixteen years of age. The father (P.W.3) had deposed that the victim was sixteen years old. The victim herself stated that when she deposed on 11.05.2017 she was *"now 16 plus years."* Although these

depositions clearly establishes that the victim was a child, to establish one of the ingredients of Section 376(2) (i) IPC it must necessarily be established that victim was under sixteen years of age which was not done.

30. The Appellant has also been convicted under Section 342 IPC. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said *"wrongfully to confine"* that person. The victim has deposed that the Appellant dropped her brother but did not allow her to get down from the vehicle and drove her to an unknown place. The victim's brother (P.W.13) also corroborated this testimony of the victim. Their depositions establishes that the victim was wrongfully restrained preventing her from proceeding beyond the vehicle driven by the Appellant which are the ingredients of the offence of wrongful confinement as defined in Section 340 IPC. The conviction of the Appellant under Section 342 IPC must therefore, also be upheld. The Appellant has been sentenced to rigorous imprisonment for a period of one year and a fine of Rs.1000/- for the said offence which is the maximum sentence prescribed. Considering the nature of the offence this Court is of the view that the sentence must be upheld.

31. The sentence under Section 4 of the POCSO Act, 2012 and the sentence under Section 342 IPC shall run concurrently.

32. The learned Special Judge had granted compensation of Rs.1,00,000/- (Rupees one lakh) to the victim which is maintained.

33. The appeal is partly allowed. The conviction and sentence under Section 376(2) (i) IPC are set aside. The conviction and sentence under Section 4 of the POCSO Act, 2012 and Section 342 IPC are upheld. The Appellant is in jail. He shall continue there to serve the rest of the sentences.

34. Certified copies of the judgment shall be sent forthwith to the Court of the learned Special Judge, POCSO, 2012 East Sikkim at Gangtok and to the Sikkim State Legal Services Authority for compliance. A copy thereof shall also be furnished to the Appellant.

SLR (2019) SIKKIM 547
(Before Hon'ble the Chief Justice)

WP (C) No. 75 of 2017

Shri Ravi Chandra Dhakal ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Sunil Rai, Advocate.

For the Respondents: Dr. Doma T. Bhutia, Addl. Advocate General, Mr. S.K. Chettri and Ms. Pollin Rai, Asstt. Govt. Advocates, Mr. Zigmee P. Bhutia, Standing Counsel for H.R.D.D.

Date of decision: 21st August 2019

A. Constitution of India – Article 226– Correction of Service Record – No doubt, petition for correction of date of birth in the service record should not be entertained at highly belated stage and in such matter discretionary jurisdiction of the High Court under Article 226 of the Constitution of India should be exercised reasonably and judiciously. Ordinarily, High Court should not exercise its discretionary jurisdiction while entertaining a writ petition filed by the Government employee at belated stage or at the fag end of his service, seeking correction of his date of birth entered in his service record – At the same time it cannot be said that a Government servant who has declared his age at the time of his appointment in the service record should not be permitted to seek correction of his date of birth in the service record. It is open for a Government servant to claim correction of his date of birth if he is in possession of a valid proof relating to his date of birth, which is different from the one which was recorded at

the time of his entering in the service. Correction of date of birth in the service record of an employee can be made even at the fag end of his service or at highly belated stage, if proof relating to his date of birth is valid, genuine and was in existence at the time of his joining of service. But, in such matter, the Court is required to be very careful.

(Para 9)

B. Constitution of India – Article 226 – Correction of Service Record – Date of birth as recorded in the matriculation examination, carries a greater evidential value than other certificates or documents issued by any other authority – Matriculation certificate issued by the CBSE is of the year 1980 whereas the petitioner joined the service in the year 1981 – If a person is in possession of valid certificate, why will he enter wrong date of birth in his service record. In such matter, inference is to be drawn that wrong date of birth was entered by him inadvertently.

(Paras 10 and 11)

C. Constitution of India – Article 226– Correction of Service Record – It cannot be said that transfer certificate/school leaving certificate issued many years after leaving the School is not genuine – Copy of the same can be obtained when a student misplaces the certificate and applies for a fresh copy. Copy issued many years thereafter is also relevant document as fresh copy issued subsequently cannot change the relevant record which is in existence in the record of the School.

(Para 12)

Petition allowed.

Chronological list of cases cited:

1. Union of India v. Ram Sula Sharma, (1996) 7 SCC 421.
2. Burn Standard Co. Ltd. and Others v. Dinabandhu Majumdar and Another, (1995) 4 SCC 172.
3. State of MP v. Mohanlal Sharma, (2002) 7 SCC 719.

JUDGMENT

Vijay Kumar Bist, CJ

Petitioner has approached this Court seeking following reliefs:-

> **"**a) A writ of and /or in nature of mandamus directing the respondent(s) their agents, and subordinate to withdraw, rescind, cancel or quash the early retirement order dated 15.12.2014.
>
> b) A writ of or in the nature of mandamus commanding the Respondents to take up necessary steps to correct the date of birth of the aggrieved Petitioner;
>
> c) A writ of in the nature of mandamus commanding the respondent to reinstate his service for the remaining period of 5 (Five) years or pay compensation for giving early retirement;
>
> d) An ad interim Order directing the Respondents, to take necessary steps to make Compensation or to reinstate the aggrieved Petitioner's service until the final disposal of the Writ Petition;
>
> e) An explanation from the Respondents as to the cause for their negligence or inaction on their Part form the year 2004 till date.**"**

2. Facts, in brief, are that the petitioner was appointed as a Primary Teacher under the Human Resource Development Department, Government of Sikkim vide Office Order No. 826/Est/Edn. dated 22.04.1981 and was posted at Khanigaon Primary School, East Sikkim. In the service book prepared at the time of entering into the service, his date of birth was recorded as 07.09.1956. It is the case of the petitioner that the same was incorrectly recorded though he had supplied the correct date of birth, i.e. 20.09.1961 along with the supporting documents. When the petitioner came to know about the incorrect date of birth recorded in the service book, the petitioner made representation to the respondent no.2 with the plea that at the time of joining the service, his date of birth was incorrectly

recorded in the service book by the concerned department. He requested for correction of date of birth recorded in his service record. The petitioner also submitted matriculation certificate bearing his correct date of birth. The first representation made by the petitioner for correction of date of birth was in the month of February, 2004. Thereafter, several representations were made by the petitioner but his date of birth was not corrected. Only reply given by the concerned department was that in his service book, his date of birth was recorded as 07.09.1956. Petitioner also served legal notice on the respondent-department but when nothing was done, the present writ petition is filed.

3. Contention of the learned counsel for the petitioner is that the respondent-department is duty bound to correct the date of birth as the petitioner had supplied the matriculation certificate issued by the Central Board of Secondary Education (for short CBSE) in time. He submitted that matriculation certificate issued by the Board cannot be questioned and that is the best document which can be relied for correction of date of birth of the petitioner.

4. Per contra, the Learned Additional Advocate General submitted that the petitioner's case deserves to be dismissed simply on the ground of delay and laches. The petitioner did not file writ petition during his service period but he filed it after three years of his superannuation. She submitted that the petitioner could have filed writ petition in the year 2004 itself when his first representation was not considered. She submitted that the petitioner joined service in the year 1981 but he kept mum for 24 years and approached the respondent-department only in 2004 for the correction of date of birth. The department gave reply to his representation and informed him that his date of birth recorded in the service book is 07.09.1956 and the same cannot be corrected. The Learned Additional Advocate General referred letter dated 01.05.2013 written by the petitioner to the Chief Minister in which he himself has stated that at the time of joining service, he recorded his date of birth as 07.09.1956. She submitted that petitioner is not illiterate person and he consciously recorded his date of birth in his service record. Therefore, he should not be permitted to raise the issue of date of birth after a very long period. She submitted that in service record, certificate regarding date of birth of the petitioner (07.09.1956) is also mentioned as kept at CP-124 but that certificate is not found on record. She also referred the transfer

certificate filed by the petitioner which was issued in the year 2000. According to her, the transfer certificate should have been issued by the school at the time of leaving the institution as every institution gives school leaving certificate/transfer certificate at the time of leaving the institution. She submitted that this is done by the petitioner to improve his case. She also referred a photocopy of one admission register submitted by the petitioner in which the name of one Mukul Balaram Dhakal has been cut and the name of the petitioner is written. She also submitted that at the top of this paper (copy of admission register), the Darbhanga Examination Board, Rajput Colony, Laheriasarai is written whereas the petitioner passed his matriculation Examination from Central Pendam and therefore, this paper is not a genuine paper. She submitted that this document is a forged document and petition deserves to be dismissed on this count also.

5. The Learned Counsel for the respondent referred the **Rule 96 of the Sikkim Government Establishment Rules, 1974** which is as follows:-

> "96. Date of birth.-
>
> (1) Every person newly appointed to a service or post under the Government shall at the time of appointment declare the date of birth by the Christian era with as far as possible confirmatory documentary evidence such as school leaving certificate, municipal birth certificate and so on. If the exact date is not know, an approximate date shall be given.
>
> (2) The actual date or the assumed date determined under rule 97 shall be recorded in the history of service, service book or any other record that may be kept in respect of the Government servant's service under the Government and once recorded, it cannot be altered, except in the case of a clerical error, without the previous orders of the Head of the Department concerned."

6. By referring Rule 96 of the Sikkim Government Establishment Rules, 1974, the learned Additional Advocate General submitted that since at the time of joining service the petitioner himself entered his date of birth in the service record and the same is not a clerical error, the same cannot be corrected.

7. On the question of delay, the learned counsel for the respondent referred paragraph 2 of the judgment reported in **(1996) 7 SCC 421: Union of India Vs. Ram Sula Sharma** and submitted that when a person wakes up after a long time, he cannot claim correction in his date of birth. Paragraph 2 of the judgment is quoted below:-

> **"2.** The controversy raised in this appeal is no longer res integra. In a series of judgment, this court has held that a court or tribunal at the belated stage cannot entertain a claim for the correction of the date of birth duly entered in the service records. Admittedly, the respondent had joined the service on 16-12-1962. After 25 years, he woke up and claimed that his correct date of birth is 2-1-1939 and not 16-12-1934. That claim was accepted by the Tribunal and it directed the Government to consider the correction. The direction is per se illegal.**"**

8. She also referred paragraph 10 and 12 of the Judgment reported in **(1955) 4 SCC 172: Burn Standard Co. Ltd. And Others**, which are quoted below:-

> **"10.** Entertainment by High Courts of writ applications made by employees of the Government or its instrumentalities at the fag end of their services and when they are due for retirement from their services, in our view, is unwarranted. It would be so for the reason that no employee can claim a right to correction of birth date and entertainment of such writ applications for correction of dates of birth of some employees of Government or its instrumentalities will mar the chances of promotion of his juniors and prove to be an undue encouragement to the other employees to make similar applications at the fag end of their service careers with the sole object of preventing their retirements when due. Extra-ordinary nature of the jurisdiction vested in the High Courts under Article 226 of the Constitution, in

> our considered view, is not meant to make employees of Government or its instrumentalities to continue in service beyond the period of their entitlement according to dates of birth accepted by their employers, placing reliance on the so called newly found material. The fact that an employee of Government or its instrumentality who will be in service for over decades, with no objection whatsoever raised as to his date of birth accepted by the employer as correct, when all of a sudden comes forward towards the fag end of his service career with a writ application before the High Court seeking correction of his date of birth in his Service Record, the very conduct of nonraising of an objection in the matter by the employee, in our view, should be a sufficient reason for the High Court, not to entertain such applications on grounds of acquiescence, undue delay and laches. Moreover, discretionary jurisdiction of the High Court can never be said to have been reasonably and judicially exercised if it entertains such writ application, for no employee, who had grievance as to his date of birth in his 'Service and Leave Record' could have genuinely waited till the fag end of his service career to get it corrected by availing of the extraordinary jurisdiction of a High Court. Therefore, we have no hesitation, in holding, that ordinarily High Courts should not, in exercise of its discretionary writ jurisdiction, entertain a writ application/petition filed by an employee of the Government or its instrumentality, towards the fag end-of his service, seeking correction of his date of birth entered in his 'Service and Leave Record' or Service Register with the avowed object of continuing in service beyond the normal period of his retirement.
>
> xxx xxx xxx xxx

12. When a person seeks employment, he impliedly agrees with the terms and conditions on which employment is offered. For every post in the service

of the Government or any other instrumentality there is the minimum age of entry prescribed depending on the functional requirements for the post. In order to verify that the person concerned is not below that prescribed age he is required to disclose his date of birth. The date of birth is verified and if found to be correct is entered in the service record. It is ordinarily presumed that the birth date disclosed by the incumbent is accurate. The situation then is that the incumbent gives the date of birth and the employer accepts it as true and accurate before it is entered in the service record. This entry in the service record made on the basis of the employee's statement cannot be changed unilaterally at the sweet will of the employee except in the manner permitted by service conditions or the relevant rules. Here again considerations for a change in the date of birth may be diverse and the employer would be entitled to view it not merely from the angle of there being a genuine mistake but also from the point of its impact on the service in the establishment. It is common knowledge that every establishment has its own set of service conditions governed by rules. It is equally known that practically every establishment prescribes a minimum age for entry into service at different levels in the establishment. The first thing to consider is whether on the date of entry into service would the employee have been eligible for entry into service on the revised date of birth. Secondly, would revision of his date of birth after a long lapse of time upset the promotional chances of others in the establishment who may have joined on the basis that the incumbent would retire on a given date opening up promotional avenues for others. If that be so and if permitting a change in the date of birth is likely to cause frustration down the line resulting in causing an adverse effect on efficiency in functioning, the employer may refuse to permit correction in the date at a belated stage. It must be remembered that such sudden and belated change may upset the legitimate expectation of others who may have joined service hoping that on the retirement of the senior on the due date there would be an upward movement in the hierarchy. In any case in such cases Interim injunction for continuance in service should not be granted as it visits the juniors with irreparable injury, in that, they would be denied promotions a damage which cannot be repaired if the claim is ultimately found to be unacceptable. On the other hand, if no interim relief for continuance in service is granted and ultimately his claim for correction of birth date is found to be acceptable, the damage can be repaired by granting him all those monetary benefits which he would have received had he continued in service. We are, therefore, of the opinion that in such cases it would be imprudent to grant interim relief."

9. I have considered the submission of the learned counsel for the parties. No doubt, petition for correction of date of birth in the service record should not be entertained at highly belated stage and in such matter discretionary jurisdiction of the High Court under Article 226 of the Constitution of India should be exercised reasonably and judiciously. Ordinarily, High Court should not exercise its discretionary jurisdiction while entertaining a writ petition filed by the government employee at belated stage or at the fag end of his service, seeking correction of his date of birth entered in his service record. But at the same time it cannot be said that a government servant who has declared his age at the time of his appointment in the service record should not be permitted to seek correction of his date of birth in the service record. It is open for a government servant to claim correction of his date of birth if he is in possession of a valid proof relating to his date of birth, which is different from the one which was recorded at the time of his entering in the service. Correction of date of birth in the service record of an employee can be made even at the fag end of his service or at highly belated stage, if proof relating to his date of birth is valid, genuine and was in existence at the time of his joining of service. But, in such matter, the Court is required to be very careful.

10. In the present case, the petitioner was appointed in the year 1981. At the time of joining, he recorded 07.09.1956 as his date of birth. The case of the petitioner is that though he submitted a correct date of birth at the time of joining but the same was recorded wrongly. When he came to know about the incorrect date of birth being recorded in his service record, he immediately approached the respondent-department. According to him, his first representation was given in the year 2004, whereas as per the respondent-department his representation was received in the year 2000. He also submitted his matriculation certificate issued by the CBSE. The respondentdepartment did not consider the certificate issued by the CBSE and no change was made in his service record. In my view, the respondents should have considered the case of the petitioner and corrected his date of birth as recorded in the matriculation examination, carries a greater evidential value than other certificates or documents issued by any other authority as held by the Hon'ble Supreme Court in the matter of **State of MP** Vs. **Mohanlal Sharma : (2002) 7 SCC 719.**

11. The next point to be considered by the Court is whether on the basis of matriculation certificate submitted by the petitioner, his date of birth

in the service record should be corrected. Present case is not a case where the petitioner applied for correction of date of birth at the fag end of his service career. In fact, he represented 10 years before his retirement with valid documentary proof. The matriculation certificate issued by the CBSE is of the year 1980 whereas the petitioner joined the service in the year 1981. Therefore, the genuineness of the certificate issued by the CBSE cannot be doubted. Moreover, it is not the case of the respondents that the matriculation certificate issued by the CBSE and submitted by the petitioner is not a genuine certificate. Rather they admit the same. If a person is in possession of valid certificate, why will he enter wrong date of birth in his service record. In such matter, inference is to be drawn that wrong date of birth was entered by him inadvertently. In such circumstances, in my view, the certificate issued by the CBSE should have been considered by the respondent-department for correction of date of birth. The petition filed by the petitioner cannot be dismissed on the ground of delay and laches. In case claim of the petitioner is not permitted to be allowed, which is based on valid and genuine matriculation certificate, in that event, injustice will be done to him.

12. One argument of the learned counsel for the respondentdepartment is that the transfer certificate filed by the petitioner was issued in the year 2000 and that should not be relied. She rightly says that generally transfer certificate/school leaving certificate is issued at the time of leaving the school by the student. But on the basis of this argument, it cannot be said that transfer certificate/school leaving certificate issued many years after leaving the school is not genuine. In fact, later on, only a copy of the same can be obtained when a student misplaces the certificate and applies for a fresh copy. Copy issued many years thereafter is also relevant document as fresh copy issued subsequently cannot change the relevant record which is in existence in the record of the school.

13. Another argument of the learned Additional Advocate General is that the correction could be made as per Rule 96 of the Sikkim Government Establishment Rules, 1974 and since the case of the petitioner cannot be said clerical error, therefore, the date of birth cannot be changed. This argument is also not correct in view of the fact that matriculation certificate submitted by the petitioner is issued by genuine body, i.e. CBSE, and was issued prior to joining in service by the petitioner. Therefore, on the basis of that certificate the correction could be made in the service record.

14. In view of above discussion, the Writ Petition is allowed. The Office Order vide O.O. No.2870/HRDD/E dated 15.12.2014 issued by respondent no.2- Human Resource Development Department, Government of Sikkim is quashed. The respondents are directed to take necessary steps for correction of date of birth of the petitioner as prayed by him on the basis of the matriculation certificate issued by the CBSE. The petitioner shall be treated in continuous service till the date of his retirement by treating his date of birth as 20.09.1961. So far salary from 01.01.2015 is concerned, the petitioner shall not be paid salary from 01.01.2015 till he rejoins the post as he has not worked during this period. However, this period will be counted by the department for the purpose of other benefits including the pension. The department shall grant him annual increment every year from 2014 on notional basis for the purpose of fixation of pension. Respondents are further directed to permit the petitioner to join the service on or before 01.09.2019. In case he is not permitted to join the service on or before 01.09.2019, in that event the petitioner will be entitled for salary from 01.09.2019 till the date of his retirement, which according to his matriculation certificate and as per relevant rule, will be 30.09.2019.

15. No order as to costs.

SLR (2019) SIKKIM 558

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

Crl. A. No. 08 of 2019

Dal Bahadur Darjee ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate with Ms. Malati Sharma, Advocate.

For the Respondent: Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 23rd August 2019

A. Indian Penal Code, 1860 – S. 376 (2)(j) –Before an accused is punished for the offence provided in S. 376(2) (j) I.P.C, it is incumbent upon the Court to examine if the woman who has been raped is "a woman incapable of giving consent" - A serious charge of rape-a heinous offence must be proved by cogent evidence.

(Paras 9 and 27)

B. Indian Penal Code, 1860 – S. 376 (2)(l) – Rape on a Woman Suffering from Mental or Physical Disability – S. 2(s) of the Rights of Persons with Disabilities Act, 2016 defines "person with disability" to mean a person with long term physical, mental, intellectual or sensory impairment which, in the interaction with barriers, hinders his full and effective participation in society equally with others – A deaf and dumb person would be a person with physical disability, so would a person who is even partially paralysed.

(Para 14)

Appeal allowed.

Chronological list of cases cited:

1. State of Rajasthan v. Darshan Singh *alias* Darshan Lal, (2012) 5 SCC 789.
2. Tameezuddin alias Tammu v. State (NCT of Delhi), (2009) 15 SCC 566.
3. Kaini Rajan v. State of Kerala, (2013) 9 SCC 113.
4. Sadashiv Ramrao Hadbe v. State of Maharashtra and Another, (2006) 10 SCC 92.
5. Thanedar Singh v. State of M.P., (2002) 1 SCC 487.
6. Sunil Kumar v. State Govt. of NCT Delhi, (2003) 11 SCC 367.

JUDGMENT

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

1. The prosecution case was of rape committed by the Appellant on the victim-a 55 year old deaf and dumb lady suffering from paralysis. Two separate charges under Section 376 (2) (j) and (l) of the Indian Penal Code, 1860 (IPC) were framed by the learned Judge, Fast Track Court (learned Judge). The Appellant pleaded not guilty and claimed trial.

2. The victim was not examined although the records reveal that a commission was ordered by the learned Judge. The prosecution therefore, banks on the evidence of P.W.6-the daughter-in-law of the victim who is said to be the sole eye witness and the *"Bara"* (P.W.4), a witness who reached the place of occurrence immediately after the alleged act.

3. The learned Judge vide judgment of conviction dated 27.02.2019 has convicted the Appellant under Section 376(2)(j) and 376(2)(l) of the Indian Penal Code, 1860 (IPC). He has therefore, sentenced the Appellant to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.5000/- for each of the said offences separately. The period of sentence has been directed to run concurrently.

4. Heard. The learned Senior Advocate for the Appellant submitted that the reliance upon the sole testimony of P.W.6-the daughter-in-law of the

victim to hold the Appellant guilty when the victim herself had not been examined was wrong. He submitted that the evidence produced by the prosecution clearly reflects that this was a false case and the deposition of P.W.6 is not trustworthy. He pointed out that the medical and forensic evidence also supports his innocence. He relied upon the judgment of the Supreme Court in re: ***State of Rajasthan v. Darshan Singh alias Darshan Lal***[1]***; Tameezuddin alias Tammu v. State (NCT of Delhi)***[2]***; Kaini Rajan v. State of Kerala***[3] and ***Sadashiv Ramrao Hadbe v. State of Maharashtra & Anr.***[4]***.***

5. The learned Assistant Public Prosecutor on the other hand submitted that the evidence of P.W.1 to P.W.6 and P.W.9 proved the prosecution case. It was submitted that the deposition of P.W.6 who was a natural eye witness is wholly reliable and it has not been demolished by the defence. He submitted that it was not necessary in every case to examine the victim and if the other evidence produced would bring home the guilt the judgment of conviction must be upheld. He relied upon the judgment of the Supreme Court in re: ***Thanedar Singh v. State of M.P.***[5] and ***Sunil Kumar v. State Govt. of NCT Delhi***[6].

6. Section 376(2) (j) and (l) IPC reads as under:

> ***"376. Punishment for rape***.-
>
> *(2) Whoever,-*
>
> *(j) commits rape, on a woman incapable of giving consent; or*
>
> *(l) commits rape on a woman suffering from mental or physical disability;*
>
> *shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.***"**

[1] (2012) 5 SCC 789
[2] (2009) 15 SCC 566
[3] (2013) 9 SCC 113
[4] (2006) 10 SCC 92
[5] (2002) 1 SCC 487
[6] (2003) 11 SCC 367

7. Section 376(2)(j) prescribes the punishment for commission of rape on a woman incapable of giving consent. The two ingredients which the prosecution must prove are the (i) commission of rape on a woman (ii) who is incapable of giving consent.

8. Commission of rape upon a *"a woman incapable of giving consent"* leads to punishment with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The punishment prescribed in Section 376 (2) IPC is thus greater in degree than the punishment prescribed for rape simplicitor as provided in Section 376(1) IPC.

9. Before an accused is punished for the offence provided in Section 376(2) (j) IPC it is incumbent upon the Court to examine if the woman who has been raped is *"a woman incapable of giving consent."*

10. From the deposition of P.W.1 and P.W.2-the victim's nephews, P.W.3-the victim's elder brother, P.W.6-the victim's daughter-in-law, it can safely be held that the victim was deaf and dumb and suffering from some form of paralysis although no medical evidence was led by the prosecution to establish the same. The prosecution has also not led any medical evidence to reflect the state of her mental health. P.W.1 deposed that P.W.6, P.W.2 and the victim went to Rangpo Police Station to lodge the FIR. According to Nima Tshering Bhutia (P.W.9) Special Educator he tried to communicate with the victim through hand gestures when her statement under Section 164 Cr.P.C. was attempted to be recorded and came to learn that the victim suffers from multiple disabilities and was completely dependent on others for sustenance. The Investigating Officer (P.W.13) also deposed that the victim was forwarded to District Hospital, Singtam along with her guardian where the P.W.12 opined that she was deaf and dumb. He deposed that the victim was unable to give her statement before the learned Magistrate under Section 164 Cr.P.C. as she had never attended special school for deaf and dumb and could not communicate with the special educator. This also confirms that the victim was deaf and dumb and reflects that the victim was not completely paralysed. The cross-examination of P.W.1, P.W.2, P.W.3 and P.W.6-the relatives of the victim suggests that the Appellant also conceded to the fact that the victim was deaf and dumb. That however, does not necessarily mean that she was incapable of giving consent. The Supreme Court in re: ***Darshan***

Singh (supra) held that a deaf and dumb is a competent witness. The prosecution asserts that the victim was 55 years old. Therefore, she was not a child incapable of giving consent. The Investigating Officer (P.W.13) deposed that the victim could not express anything except by moving her hands when she is hungry which is understood by her family members.

11. The prosecution relied upon exhibit-7 as the opinion of the Special Educator-(P.W.9). The said document is signed by the learned Judicial Magistrate (P.W.10) in the form for recording statements of the victim. It states why the victim's statement under Section 164 Cr.P.C. could not be recorded. Both the learned Judicial Magistrate (P.W.10) and the Special Educator (P.W.9) deposed that exhibit-7 was his opinion. Apart from stating that he was a Special Educator he did not provide any further details about his expertise. He also did not clarify what multiple disabilities the victim suffered from. The learned Judicial Magistrate (P.W.10) has also recorded in exhibit-7 that P.W.1 submitted that the victim just shows her hand when she is hungry and apart from that she does not communicate with them in any other way for any other matter. This is hearsay evidence. P.W.1 did not say so when he deposed before the Court. This evidence also therefore, does not help the prosecution.

12. Thus the prosecution has failed to prove that the victim was a woman incapable of giving consent. Resultantly, the conviction and sentence under Section 376(2) (j) must be set aside.

13. Section 376(2)(l) (IPC) prescribes the punishment for commission of rape on a woman suffering from mental or physical disability. The two ingredients which the prosecution must prove are the (i) commission of rape on a woman (ii) who is suffering from mental or physical disability.

14. Section 2 (s) of the Rights of Persons with Disabilities Act, 2016 defines *"person with disability"* to mean a person with long term physical, mental, intellectual or sensory impairment which, in the interaction with barriers, hinders his full and effective participation in society equally with others. A deaf and dumb person would be a person with physical disability, so would a person who is even partially paralysed. Thus the evidence led by the prosecution establishes one of the ingredients of Section 376(2)(l) IPC. We shall now examine whether the prosecution has been able to prove that the Appellant had committed rape upon the victim.

15. The offence was allegedly committed on 07.01.2018. Section 375 IPC as amended by Criminal Law (Amendment) Act, 2013 would apply.

16. Section 375 IPC reads as under:

> ***"375. Rape**.—A man is said to commit "rape" if he -*
>
> *(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
>
> *(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus, of a woman or makes her to do so with him or any other person; or*
>
> *(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or*
>
> *(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with or any other person,*
>
> *Under the circumstances falling under any of the following seven descriptions:-*
>
> *(First) — Against her will.*
>
> *(Secondly) —Without her consent.*
>
> *(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*
>
> *(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. (Seventhly)- When she is unable to communicate consent. Explanation 1.— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

*Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.***"**

17. Different forms of rape have been defined in Section 375 IPC. The prosecution must prove beyond reasonable doubt that the accused committed rape upon the victim without her consent and against her will. The allegation against the Appellant is of penetrative sexual assault. Penetration even if partial is a *sine qua non* to the offence of rape falling under Section 375 (a) IPC.

18. Although the learned Judge vide order dated 28.05.2018 allowed the application of the prosecution under Section 284 Cr.P.C. to examine the victim on commission in the Court of the learned Judicial Magistrate, Rangpo

on 04.06.2018 the records reveal that the victim was not examined. Therefore, the only evidence available is the evidence of the eye witness i.e. P.W.6 the daughter-in-law of the victim. Conviction on the basis of the testimony of a sole eye witness is maintainable if it is found to be reliable and trustworthy. It was held so in re: ***Sunil Kumar (supra)***. Sometimes even if the victim is not examined but the evidence produced unerringly proves the accused guilty beyond reasonable doubt, conviction could be upheld.

19. P.W.6 is the daughter-in-law of the victim who is her aunt-in-law. She deposed that on 07.01.2018 she had left the victim in their courtyard after bathing her and giving her food. She returned home after about half an hour. When she was about to reach home she saw the victim in a fully naked condition and the Appellant naked from his waist down as well. The Appellant was on top of the victim whose legs were spread out by the Appellant and he was performing *"penetrative sexual assault"* upon the victim. On seeing the act she screamed aloud and hurriedly reached the place of occurrence. There she saw the Appellant pulling up his pants and giving the victim her clothes. After this the Appellant bit his fingers and went towards the toilet and pretended to look for their family saying he could not see any of them present there. She confronted the Appellant and asked him as to what he was doing to the victim. The Appellant replied that the victim was already in a nude condition when he reached there. Then she asked the Appellant why he was also naked and he replied that his pants were loose so it slid down on its own. In the meanwhile she noticed that the victim was still naked waist down and was trying to wear her clothes but she was not able to do so. She helped the victim get dressed. After about five minutes one *"Bara"* (P.W.4) who lives close to their house reached the place of occurrence as he heard her scream. The *"Bara"* (P.W.4) asked her what happened and she narrated the incident to him. The *"Bara"* (P.W.4) scolded the Appellant and asked him why he had committed the act. The Appellant replied that nothing had happened. Thereafter, when the Appellant started walking away she asked him to stay and face her husband who would return in a while. The Appellant did not listen to her and went away. P.W.6 also exhibited her statement recorded under Section 164 Cr.P.C.

20. In her cross-examination P.W.6 admitted that she was not informed about the victim's condition prior to her marriage; the financial condition of her parental house was stable and she had never served a person like the victim prior to her marriage; her in-laws were staying with them however,

during the relevant time they had gone to Delhi; normally she and her mother-in-law would take care of the victim; during the relevant time she had responsibility to look after her minor daughter, the victim and the cattle and at times it was frustrating and irritating. She denied the suggestion that she made a false rumour against the Appellant to shift her responsibility and burden upon him. More importantly, she denied the suggestion that her statement under Section 164 Cr.P.C. was not recorded and that she did not narrate the entire incident to the learned Judicial Magistrate. The learned Senior Counsel for the Appellant submitted that in the statement under Section 164 Cr.P.C. P.W.6 had not stated that she saw the Appellant committing penetrative sexual assault. This is true. P.W.6 had stated to the learned Judicial Magistrate that the victim was completely naked from her hips; the Appellant's track pant was down to his knees; the victim was on her back and her legs were raised up and the Appellant was down on his knees and bending towards her. She did not state that the Appellant was committing penetrative sexual assault on the victim in her statement recorded under Section 164 Cr.P.C. From the angle and distance P.W.6 claims to have witnessed the act it would be impossible to see the actual act of penetrative sexual assault.

21. The FIR was registered on 08.01.2018. The alleged incident was of 07.01.2018. On 08.01.2018 itself the victim was medically examined by Dr. Jai Bahadur (P.W.12) the Medical Officer at Singtam District Hospital. He recorded that the victim's labia majora/minora were normal; there was no tear of the hymen, no haemotoma and vaginal bleeding was seen. He opined that there was no sign of use of force. He however, explained that lack of genital injuries could be because of use of lubricant, fingering with lubricant or being over powered. He opined that sexual violence could not be ruled out. He did not explain why. During cross-examination he admitted that although the victim had not taken bath or changed her underwear he did not find any semen stains or pubic hair on the genital of the victim; he did not find any trace of lubricant in the genital area of the victim; as per his finding there was no penetrative sexual assault; he did not find any bodily injury or any sign of forceful sexual intercourse on the body of the victim. The forensic investigation of the victim's trouser, Appellant's black coloured underwear, victim's vaginal swab/wash, Appellant's penile swab could not point any guilt towards the Appellant. Blood, semen or any other bodily fluid was not detected in any of them.

22. P.W.6's husband-P.W.1 deposed that when he heard about the incident from his wife he and his uncle went to the Appellant's house and confronted him. The Appellant denied having committed the offence. P.W.1 told the Appellant to come to his house the following morning and he would gather the village elders to look into the matter. According to P.W.1 the following morning the village elders along with his family members gathered in his house. The Appellant reached and offered two bottles of liquor and Rs.101/- as a token of apology. P.W.1 refused to accept it. The village elders suggested that the Appellant take the victim as his wife or else bear all her medical expenses if the victim got pregnant. The Appellant refused both the conditions. Thereafter, P.W.6, the victim and P.W.2 along with another went to Rangpo Police Station and lodged the FIR.

23. P.W.2 corroborated P.W.1's statement about the village elders suggesting to the Appellant to take the victim as his wife or bear the medical expenses if she got pregnant. Even P.W.1 deposed that the Appellant refused the conditions. Thereafter, he went with others to lodge the FIR.

24. The *"Bara"* (P.W.4) deposed that when he heard P.W.6 shout *"kay bako kay gareko daju"* he hurriedly went home, kept the fodder and went to the victim's house. During cross-examination he admitted having not stated to the police that he had heard P.W.6 shout *"kay bako kay gareko daju"*. The *"Bara"* (P.W.4) then stated that in the courtyard he saw P.W.6, the victim and the Appellant. The Appellant and the victim were fully clothed then. There was an element of exaggeration in the *"Bara's"* (P.W.4) statement as well.

25. P.W.5-wife of the *"Bara"* (P.W.4) however, deposed that the following evening police personnel from Rangpo Police Station came to the house of the victim where the Appellant confessed the crime, offered two bottles of liquor and a sum of Rs.100/- to the victim. During her cross-examination she admitted that she did not see the two bottles of liquor and Rs.100/- offered by the Appellant. No police officer corroborated P.W.5's deposition about the confession. In any case the alleged confession is also barred by Section 26 of the Indian Evidence Act, 1872.

26. Dr. N. Subba (P.W.11) who examined the Appellant on 08.01.2018 admitted during cross-examination that he had not mentioned whether the

Appellant was capable of performing sexual intercourse. However, when the learned Judge questioned him he stated that he did not find anything in his examination to show the Appellant was incapable of performing sexual intercourse. Dr. N. Subba (P.W.11) deposed that he did not see any sign of forceful intercourse on the Appellant. His evidence in inconclusive.

27. A serious charge of rape-a heinous offence must be proved by cogent evidence. The prosecution has failed to do so. The evidence of P.W.6-the sole eye witness is doubtful on the aspect of penetrative sexual assault and unsubstantiated by medical evidence. P.W.1, P.W.2, P.W.3 and P.W.6 were all related to the victim. This alone is not a factor to affect their depositions credibility. However, P.W.1 and P.W.2 repeated what they were told by P.W.6 about the alleged rape. P.W.3 however, deposed that the Appellant had a good moral character. The defence has also been able to cast a shadow of doubt on the intention of P.W.6 in exaggerating the incident. There is evidence that they sat with the village elders who put the condition upon the Appellant to marry the victim although the village elders themselves were not examined. There is evidence that the Appellant did not agree to the condition. The two condition put were based on the allegation made by P.W.6. To what extent P.W.6 exaggerated the incident cannot be satisfactorily determined due to the absence of the victim's testimony and the hazy evidence led by the prosecution. This is an unfortunate situation resulting from lack of special education to person in need of it. The evidence led by the prosecution also does not establish the absence of consent. The learned Judge's finding that the prosecution has been successful in proving the case beyond reasonable doubt against the Appellant under Section 376(2)(l) IPC cannot be sustained.

28. In the circumstances, the impugned judgment is set aside. The Appellant is given the benefit of doubt and acquitted of both the charges under Section 376 (2) (j) and under Section 376 (2) (l) IPC. The Appellant shall be released forthwith from custody if not required in any other case.

29. Certified copies of the judgment be sent forthwith to the Court of the learned Judge, Fast Track Court, East & North Sikkim at Gangtok. A copy thereof shall also be furnished to the Appellant.

SLR (2019) SIKKIM 569

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

WP (C) No. 07 of 2019

Sajan Kumar Agarwal ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner: Mr. Tashi Norbu Basi and Mr. William Tamang, Advocates.

For the Respondents: Dr. Doma T. Bhutia, Additional Advocate General with Mr. Thupden Youngda, Government Advocate, Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Government Advocates.

Date of decision: 26th August 2019

A. Constitution of India – Article 226 – Submission of Tender Bid Documents Beyond the Stipulated Time – Permissibly –Despite the time detailed in the advertisement pertaining to the purchasing of Bids, Respondent No.2 failed to comply and did not release the documents timely to the Petitioner. This delay led to a consequential delay of twenty minutes by the Petitioner in his submission of the documents – Had Respondent No.2 been diligent and handed over the document to the Petitioner on 05.03.2019, as detailed in the advertisement, it would have enabled the Petitioner to act diligently in response. The delay of twenty minutes of the Petitioner is a consequence of the delay of more than twenty four hours meted out to him by Respondent No.2. The action of Respondent No.2 cannot be exonerated – Petitioner allowed to submit his documents before Respondent No.2 on or before 12 noon of 27.08.2019.

(Paras9 and 10)

Petition allowed.

Chronological list of cases cited:

1. G.J. Fernandes v. State of Karnataka, 1990 SCC (2) 748.
2. Vijay Kumar Kaul and Others v. Union of India and Others, (2012) 7 SCC 610.

JUDGMENT

Meenakshi Madan Rai, J

1. The only question for determination herein is whether the Respondent No.2 ought to be directed to accept the Tender Bid Documents including the Term Deposit Receipt (hereinafter "TDR"), of Rs.90,62,000/- (Rupees ninety lakhs and sixty two thousand) only, submitted by the Petitioner on 07.03.2019 at 12.20 p.m., beyond the stipulated time of submission, fixed at 12 noon, by the Respondent No.2.

2. The Petitioner is a registered Government Contractor, Grade IAA. An advertisement was published in a local daily newspaper "Sikkim Express," dated 02.03.2019, on behalf of the Gangtok Smart City Development Limited (hereinafter "GSCDL"), inviting sealed Tenders from eligible Contractors enlisted with the State Government, for construction of Social Housing for Economically Weaker Sections, under Affordable Housing for Urban Poor at Sokaythang, Gangtok, East Sikkim. The advertisement, in the paragraph "Instructions to Bidders," specified *inter alia* that a complete set of Bid Documents may be purchased by interested eligible bidders from the Chief Executive Officer, GSCDL, on payment of nonrefundable cost of Bid Documents. Forms would be available from 05.03.2019 to 06.03.2019 between 13:00 Hrs to 15:00 Hrs. The Petitioner, in response thereto, purchased the said Bid Documents for Rs.2,00,000/- (Rupees two lakhs) only, vide a Demand Draft of the Central Bank of India, Gangtok Branch, dated 04.03.2019 payable to "CEO, GSCDL." Admittedly, the last date for submission of the Bid Documents was fixed on or before 12:00 Hrs on 07.03.2019. The Petitioner avers that although he attempted to collect the entire Bid Documents from the Respondent No.2 on 05.03.2019 at 13:00 Hrs, he was told that the said documents were not ready and was instructed to collect it on 06.03.2019. The documents were issued to him on 06.03.2019 at 14:00 Hrs. On 07.03.2019, the Petitioner telephonically sought extension of one hour for submission of the documents,

from the Additional Chief Engineer and the Assistant Engineer of the GSCDL in view of the time taken to complete the documents and the aforestated circumstances, apart from being obstructed by traffic on the same day. An assurance was given by the Additional Chief Engineer that his request shall be taken into consideration. However, when the Petitioner reached the Office of the GSCDL at 12.20 Hrs, he found the Office closed despite the fact that the Office Hours are till 4 p.m. and thereby could not submit his Bid Documents. The Petitioner however learnt that the Respondent No.2 had relaxed the scheduled time for other Contractors and had permitted them to file their Bid Documents at around 12.10 p.m. while denying him of such opportunity. Laying the blame at the door of the Respondent No.2 for availability of the Bid Documents only on 06.03.2019 instead of 05.03.2019, the Petitioner sought the following reliefs i.e., a direction to the Respondent authorities to accept his Bid Documents for the Contract Work as published vide "Notice Inviting Re-Tender (NIT) No.GSCDL/TENDER/NIT/SHEWS/2019 vide its Ref. No.15/ SPV/ GSCDL/SHEWS/2019, Dated 28-02-2019," in Sikkim Express on 02.03.2019, and in the alternative, to quash the said Notice. A further direction was sought to the Respondents to re-tender the Contract Work.

3. The Respondent No.1 had no Counter-Affidavit to file.

4. The Respondent No.2, in its Counter-Affidavit, stated that initially a Notice Inviting Tender bearing Reference No.08/SPV/GSCDL/SHEWS/ 2019, dated 01.02.2019, was uploaded in its official website on the same day and published in a local daily newspaper on 03.02.2019. The Notice Inviting Tender gave specific instructions to the Bidders. The instructions also stated that the Bid Documents would be available from 11.02.2019 to 13.02.2019 between 11:00 Hrs to 14:00 Hrs on 22.02.2019. The Petitioner was one of the seven Bidders who purchased the tender documents. Later, due to reduction in the bid security value for various reasons, a Corrigendum dated 12.02.2019, was issued by the Respondent No.2. As per instructions issued therein, the sealed Bids duly signed by the authorized signatory were to be delivered to the CEO, GSCDL, Gangtok, on or before 12:00 Hrs on 22.02.2019 but the Respondent No.2 did not receive any Bids despite purchase of seven Tender Documents from their Office. In view of this circumstance, a proposal for re-tendering the Contract Work was made and Notice Inviting Re-Tender dated 28.02.2019 for the Project,

as reflected in the petition, was again uploaded in the official website and published in the daily newspaper "Sikkim Express." That, it was specified therein that 'Sealed bid in duplicate duly signed by authorised signatory must be delivered to CEO, GSCDL, Gangtok on or before 12:00 Hrs of 07.03.2019' and that "Late bid will not be accepted by tendering authority." A total of eleven Bidders thereafter purchased the Tender Documents which included the Petitioner. On 07.03.2019, seven Bidders out of the eleven intending Bidders, submitted their sealed documents on or before 12:00 Hrs at the Office of the Chief Executive Officer of the Respondent No.2, however, the Bid of the Petitioner was not accepted as he arrived beyond the scheduled time of 12:00 Hrs, which disqualified him outright, in view of instruction No.5 of the "Instruction to Bidders." Besides the Petitioner, one Nirmal Bajaj, also an intending Bidder, was not permitted to submit his Bid after the closing time. The Petitioner having purchased the Bid Documents twice, was fully aware of the requirements, consequently the petition is not maintainable as the Petitioner was not diligent and slept over his rights. Hence, the petition deserves a dismissal.

5. In Rejoinder, the Petitioner while reiterating the facts made in the Writ Petition supported his pleadings with an Affidavit filed by one Bhola Nath Sharma, representative of Tejasurya Construction Pvt. Ltd., Siliguri, who swore that his tender bid documents was accepted by the Respondent No.2 at "12.10 Hrs," on 07.03.2019.

6. Learned Counsel for the Petitioner canvassed the arguments that although the Petitioner was denied his rights for the reason that he reached the Office of the Respondent No.2 at 12.20 Hrs, but as evident from the Affidavit of Bhola Nath Sharma, representing Tejasurya Construction Pvt. Ltd., Siliguri, despite him having reached the Office of the Respondent No.2 at 12:10 Hrs, beyond the time prescribed, he was permitted to submit his Bid Documents. That, although Annexure R-6, dated 28.02.2019 relied on by the Respondent No.2, details the 'List of Bidders who submitted their Bids on 07.03.2019 at 12:00 Hrs,' and lists Tejasurya Construction Pvt. Ltd., Siliguri, as having submitted the Bid at 12 noon, but the reverse side of the document would demolish this contention in the absence of Bhola Nath Sharma's signature in the list of signatories. Only six signatures are affixed when the Bid Documents were accepted at 12:00 Hrs and the seventh signature is non-existent, indicating falsity in the assertion of the

Respondent No.2. That, the same opportunity extended to Tejasurya Construction Pvt. Ltd., Siliguri, ought to be given to the Petitioner, as he was delayed by only another ten minutes. To augment his submissions, learned Counsel placed reliance on ***G.J. Fernandes v. State of Karnataka***[1]. Reiterating the time schedule for collecting the Bid Documents, it was urged that the Respondent No.2, in his Counter Affidavit, has accepted the fact that the Petitioner had indeed come to their Office on 05.03.2019 to collect the Bid Documents. However, he reached at 1 p.m. and not earlier as sought to be posited by the Respondent No.2. That, the ineptitude of the Respondent No.2 resulted in the delayed delivery of the Bid Documents to the Petitioner and hence the petition be allowed.

7. Vehemently resisting the arguments of the Petitioner, learned Additional Advocate General would submit that in the first instance, the petition is not maintainable for the reason that the alternative prayer of the Petitioner includes quashing of the "Notice Inviting Re-Tender (NIT) No.GSCDL/TENDER/NIT/SHEWS/2019 vide its Ref. No.15/SPV/ GSCDL/SHEWS/2019, Dated 28-02-2019." Should this Court be inclined to grant the prayer, then the other Bidders who are not impleaded as parties would suffer the consequences. Thus, their impleadment is imperative, failing which, the petition deserves to be dismissed. That apart, the "Instructions to Bidders" specifically states that Bids were to be submitted on or before 12:00 Hrs of 07.03.2019 and there would be no extension of time. That, no proof of a third person having been afforded extra time by the Office of the Respondent No.2, was presented before this Court and the Petitioner rather belatedly by an Affidavit of a third person seeks to bring this stance on record. The Deponent of the said Affidavit has no *locus standi* and therefore the Affidavit deserves to be ignored by this Court. In support of her contentions, learned Additional Advocate General placed reliance on ***Vijay Kumar Kaul and Others v. Union of India and Others***[2].

8. Parties have been heard at length, their submissions considered and all documents on record duly perused as also the citations made at the Bar.

9. On pain of repetition, it is but apposite to notice that the Instructions to Bidders of the Notice Inviting Tender specify as follows;

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[1] 1990 SCC (2) 748
[2] (2012) 7 SCC 610

> "A complete set of bidding documents in the English language, may be purchased by the interested eligible bidders on submission of bidder application to Chief Executive Officer, GSDCL, Gangtok 737102, Sikkim (India) and on payment of the non-refundable cost of bidding document as specified in Column no. 6 of above during normal office hours and all working days from **Date-05.03.2019 to 06.03.2019, 13:00 hrs to 15:00 hrs**."
>
> **(emphasis supplied)**

It issues with clarity that the Bid Documents were to be made available to the interested Bidders on both dates i.e. 05.03.2019 and 06.03.2019 at the hours stipulated therein. The averments of the Respondent No.2 admitted at paragraph 13 as follows;

> "13. It is submitted that as per the instructions more particularly serial No.3, the intending bidders were required to purchase the tender documents from **5.03.2019 to 6.03.2019 within 13.00 hrs to 15.00hrs on the said days**. ..."
>
> **(emphasis supplied)**

This averment is an unequivocal admission that the Bid Documents were to be made available to the Contractors on both days mentioned, at the scheduled time of 13:00 Hrs to 15:00 Hrs. In contradiction to the assertion of the Petitioner that he reached the Office of the Respondent No.2 on 05.03.2019 at 13:00 Hrs, it is stated by the Respondent No.2 as follows;

> "... It is submitted that the petitioner came to the office of the respondent no. 2 during morning hours on 5/3/2019 instead of the facts *(sic)* that the documents was to be collected after 1300 hours. The petitioner failed to come during the time prescribed in NIT. In other words, the petitioner failed to comply with the terms and condition for collection of the bid documents as prescribed under instruction to the bidders."

From the above, it is evident that the Petitioner had indeed reached the Office of the Respondent No.2 on 05.03.2019. This fact has not been controverted by the Respondent No.2, save to the effect that the Petitioner reached in the "morning hours," without delineating the exact hour. In other words, the Respondent No.2 has failed to disclose the facts purported to be within their knowledge. It is indeed incongruous to imagine that the Petitioner having reached the Office of the Respondent No.2, be it in the morning hours of 05.03.2019, would not have waited till 13:00 Hrs to collect the documents. This is an inconceivable argument and deserves to be and is discarded by this Court. Despite the time detailed in the advertisement pertaining to the purchasing of Bids, lamentably, the Respondent No.2 failed to comply with its part of the bargain as described and enumerated in the advertisement and did not release the documents timely to the Petitioner. This delay led to a consequential delay of twenty minutes by the Petitioner in his submission of the documents for reasons enumerated by him. The argument of the Respondent No.2 that the Petitioner was aware of the contents of the Bid Documents having purchased it earlier thereby insinuating that he ought not to have been enmeshed in filling the details, is an incongruous and unsustainable argument, besides being timorous. If an act is expected from the Petitioner then it has to be reciprocated by the Respondent No.2, in other words, had the Respondent No.2 been diligent and handed over the document to the Petitioner on 05.03.2019, as detailed in the advertisement, it would have enabled the Petitioner to act diligently in response. The delay of twenty minutes of the Petitioner is a consequence of the delay of more than twenty four hours meted out to him by the Respondent No.2. The action of the Respondent No.2 cannot be exonerated. Besides, if the Respondent No.2 had no intention of releasing the Bid Documents on 05.03.2019, they ought to have confined the date to 06.03.2019 for such purposes.

10. So far as the Affidavit of the third party Bhola Nath Sharma is concerned, it is irrelevant for the present purposes, having been filed by a third person who is not a party to the proceedings, neither does he claim to be prejudicially affected by the act of the Respondent No.2 which is being assailed before this Court and is, therefore, not even being considered.

11. In view of the aforestated circumstances and the discussions that have ensued, I am of the considered opinion that the Petitioner ought to be allowed to submit his documents before the Respondent No.2, which he

shall do so on or before 12 noon tomorrow i.e. 27.08.2019. Be it noted that the relief granted to the Petitioner shall not apply to any other party who may consider himself aggrieved by the act of the Respondent No. 2 but is not a party to the instant proceedings.

12. In consideration of the undertaking given by learned Counsel for the Respondents that the Respondent No.2 shall stay its hands from taking any further steps in connection with the Notice Inviting Re-Tender (NIT) No.GSCDL/TENDER/NIT/SHEWS/2019 vide its Ref. No.15/SPV/ GSCDL/SHEWS/2019, dated 28-02-2019, till 12.30 p.m. tomorrow i.e. 27.08.2019, the Order dated 29.04.2019 stands vacated.

13. Writ Petition disposed of accordingly as also I.A. No. 01 of 2019.

14. No order as to costs.

SLR (2019) SIKKIM 577

(Before Hon'ble the Chief Justice)

Tr. P. (Suo Motu) (C) No. 09 of 2019

Tshewang Rinzing Dorjee ….. PETITIONER

Versus

Uwendra Thapa @ Nordy and Others ….. RESPONDENTS

Date of decision: 28th August 2019

A. Code of Civil Procedure, 1908 – S. 24 – Transfer of Suit – District Judge, West Sikkim at Gyalshing sent a letter dated 09.08.2019 along with a copy of Order dated 07.08.2019 passed by in Title Suit No.01 of 2019 conveying that Counsel for both the parties seeks transfer of the suit from Gyalshing, West Sikkim to Gangtok, East Sikkim under S. 151 CPC on the ground of convenience – This suit being recently transferred from the Court of District Judge, South Sikkim at Namchi to the Court of District Judge, West Sikkim at Gyalshing – Held: District Judge not correct in referring the matter to the High Court – Transfer of a case from one's Court can be sought on the following grounds: (a) his close family member is appearing before him, (b) he is related to any of the parties in the case, (c) earlier he had been Counsel for any of the parties in the case, or (d) he has financial interest in the matter – In other circumstances, a Court should not ask for transfer of case from his Court – S. 24 CPC explained: Law is clear on this point. The case can be transferred from one Court to another Court on an application moved by any of the parties and after notice to the parties and after hearing the parties – Application moved by the parties under S. 151 CPC cannot be referred by the District Judge to the High Court for transfer.

(Paras 1, 2, 4, 5 and 6)

Petition dismissed.

JUDGMENT

Vijay Kumar Bist, CJ

1. The learned District & Sessions Judge, West Sikkim at Gyalshing has sent a letter bearing No.841/D&SJ(W) dated 09.08.2019 along with the copy of the order dated 07.08.2019 passed by her in Title Suit Case No.01 of 2019 *(Shri Tshewang Rinzing Dorjee Versus Shri Uwendra Thapa @ Nordy & 4 others)*.

2. In the said order, the learned District & Sessions Judge has stated that counsel for both the parties filed applications under Section 151 of Code of Civil Procedure, 1908 (for short CPC) stating therein that the plaintiff and defendants no.1 & 2, all are residents of Gangtok, East Sikkim and as such, it will be convenient for all concerned, if the matter is taken up at Gangtok, East Sikkim, as great hardship and inconvenience is being faced by the parties in coming to Gyalshing especially during the monsoon season. It is also observed in the order that plaintiff is a senior citizen of ailing health. Hence both the learned Counsel for parties prayed that in *(Page*-1 of 4) CJ Court the interest of justice and convenience of the parties the matter be referred to the High Court of Sikkim for necessary orders for transfer of the same to East District.

3. Considering the applications of the parties, the learned District & Sessions Judge forwarded the matter to the High Court on administrative side.

4. Earlier also the matter relating to Title suit Case No.01 of 2019 was referred to the High Court by the District & Sessions Judge, South Sikkim at Namchi on administrative side expressing his inability to hear the matter by stating therein that the document dated 23.09.2008 was issued by him, when he was practicing advocate and an empanelled counsel for Union Bank of India pertaining to certificate of title of landed property in question and the same document was being relied upon by the defendant No.3. Considering the said facts, this Court transferred the case from the Court of learned District & Sessions Judge, South Sikkim at Namchi to the Court of learned District & Sessions Judge, West Sikkim at Gyalshing. Now, the learned District & Sessions Judge, West Sikkim at Gyalshing has referred the matter to the High Court for transfer of case from her Court on the

ground of inconvenience of the parties.

5. In my view, the learned District & Sessions Judge is not correct in referring the matter to the High Court. Judicial Officer can seek transfer of a case from his Court if (a) his close family member is appearing before him, (b) he is related to any of the parties in the case (c) earlier he had been counsel for any of the parties in the case (d) he has financial interest in the matter. In other matter Court should not ask for transfer of case from his Court. Section 24 CPC speaks about power of transfer and withdrawal of the case. According to this Section, the High Court or the District Court may on the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same and retransfer the same for trial or disposal to the Court from which it was withdrawn. Therefore, the law is clear on this point. The case can be transferred from one Court to the another Court on the application moved by any of the parties and after notice to the parties and after hearing to the parties.

6. In this case also the request was made by the parties by moving application under Section 151 of CPC for transfer of the case from the Court of learned District & Session Judge, West Sikkim at Gyalshing, to another District. The application moved by the parties under Section 151 CPC cannot be referred by the District Judge to the High Court for transfer**.** The case can be transferred from one District to another District by High Court only but in such cases one of the parties or both the parties are required to approach the High Court under Section 24 of CPC to transfer the case to another District. Here none of the parties have approached the High Court.

7. In view of above, the request made by the learned District & Session Judge, West Sikkim at Gyalshing for transfer of Title Suit Case No.01 of 2019 *(Shri Tshewang Rinzing Dorjee Versus Shri Uwendra Thapa @ Nordy & 4 others)* is hereby rejected.

8. This Suo Motu Transfer Petition is, accordingly, disposed of.

SLR (2019) SIKKIM 580

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

WP (C) No. 36 of 2018

Prakash Chand Pradhan ….. PETITIONER

Versus

Union of India and Another ….. RESPONDENTS

For the Petitioner: Mr. T.B. Thapa, Senior Advocate with Mr. Ashok Kumar Shahi, Mr. Ranjan Chettri and Mr. Khem Raj Sapkota, Advocates.

For Respondent No.1: Mr. Karma Thinlay, Central Government Advocate.

For Respondent No.2: Mr. Thupden Youngda, Government Advocate.

Date of decision: 28th August 2019

A. National Highways Act, 1956 – S. 3G (5) – Determination of Compensation – S. 3G (5) specifically provides that should the compensation determined by the Competent Authority be unacceptable to either of the parties, an Arbitrator shall determine the amount *on an application by either of the parties*. The Arbitrator is to be appointed by the Central Government – Appointment of Arbitrator shall be subsequent to an application made by either of the parties, on dissatisfaction of either party of the amount of compensation determined by the Competent Authority – Application for appointment of an Arbitrator was made by the Petitioner on 30.05.2018 while the Notification of intention of acquisition was published on 13.04.2016 and Declaration of acquisition notified on 09.07.2016 – Despite the above position, Arbitrator was appointed on 08.07.2016 itself, even before the Declaration of 09.07.2016 was notified – Law does not envisage putting an Arbitrator in place preceding an application of any aggrieved party or for that matter, before publication of notification of Declaration.

(Para 10)

B. Arbitration and Conciliation Act, 1996 – S. 12 – Challenge of the Arbitrator's Appointment – Provisions in the Fifth, Sixth and Seventh Schedule of the Act prohibits appointment of a person as an Arbitrator, should the conditions enumerated therein be fulfilled – Sixth Schedule requires the Arbitrator to disclose any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to the Arbitrator's independence or impartiality.

(Para 11)

C. National Highways Act, 1956 – S. 3G (5) – Determination of Compensation – If the amount determined by the Competent Authority is not to the satisfaction of any aggrieved person, on an application being filed by either of the parties, the Central Government is to appoint an Arbitrator for determination of the compensation amount, in terms of S. 3G (5). The appointment of an Arbitrator is to be followed by an application filed by any aggrieved party.

(Para 14)

D. Arbitration and Conciliation Act, 1996 – S. 12 – Challenge of the Arbitrator's Appointment – The Arbitrator i.e. the Secretary, LR&DM Department, is an IAS Officer. Respondent No.1 is the Secretary, Ministry of Road Transport and Highways. Both are part and parcel of the Central Government, IAS Officers being Central Government Officers working under the State Governments. These Officers are recruited and trained by the Central Government and then allotted to different State cadres. In the same thread, the District Collector, East District, Respondent No.2, being a Government servant, is subordinate to Respondent No.1. Even assuming that the District Collector belongs to the State cadre, he is subordinate to the Secretary, LR&DM Department – Parties in dispute must have the confidence that they would be meted out even handed justice by the Arbitrator on the edifice of the presumption that he is independent and impartial. Should there be existence, either direct or indirect, of a relationship of the sole Arbitrator with any of the parties, professional or otherwise, as envisaged in the Fifth and Seventh Schedules of the Act of 1996, this is likely to give rise to justifiable doubts as to his independence or impartiality. Provisions of the Fifth and Seventh Schedules of the Act of 1996 have been circumvented by Respondent No.1, as also the Sixth Schedule. Held: Order dated 08.07.2016 issued by Respondent No.1

rescinded – Respondent No.1 directed to appoint a new sole Arbitrator in terms of S. 3G (5) of the N.H. Act duly conforming with the provisions of the Act of 1996.

(Para 19)

Petition allowed.

Chronological list of cases cited:

1. M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., AIR 2017 SC 939.
2. TRF Limited v. Energo Engineering Projects Ltd., (2017) 8 SCC 377.
3. Bharat Broadband Network Ltd. v. United Telecoms Ltd., AIR 2019 SC 2434.
4. Suganthi Suresh Kumar v. Jagdeeshan, (2002) 2 SCC 420.
5. Anil Kumar Neotia and Others v. Unionof India and Others, (1998) 2 SCC 587.
6. Sabia Khan and Others v. State of U.P. and Others, (1999) 1 SCC 271.
7. HRD Corporation v. GAIL (India) Ltd., (2018) 12 SCC 471.
8. National Highways Authority of India v. Sayedabad Tea Company Ltd. and Others, Civil Appeal No(s).6958-6959 of 2009.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner calls into question the appointment of the Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim, as an Arbitrator, on 08.07.2016 by Respondent No.1, prior to the Petitioner's application, dated 30.05.2018, seeking such appointment. Maintaining that the appointment is bereft of the eligibility criteria laid down in Section 12 read with the Fifth, Sixth and Seventh Schedules of the Arbitration and Conciliation Act of 1996, as amended in 2015, (hereinafter the "Act of 1996"), with no communication of such appointment being made to the Petitioner, he seeks rescission of the

Order *supra* and issuance of a Writ of Mandamus or any other applicable Writ, directing the Respondent No.1 to appoint a new sole Arbitrator in conformity with the requisite legal provisions.

2. To comprehend the matter, we may briefly advert to the facts as put forth by the Petitioner. Land belonging to the Petitioner on a stretch from kilometre 51.870 to kilometre 53.900 on the National Highway, Rangpo Sub Division, was acquired by the Ministry of Road Transport and Highways, Government of India, in the year 2016, under the National Highways Act, 1956, for widening of the "National Highway 10." This intention was notified in the Gazette of India on 13.04.2016 and on receipt of the Report of the Competent Authority, a Declaration under Section 3D(1) of the National Highways Act, 1956, (hereinafter the "N.H. Act"), was notified on 09.07.2016. After such Declaration, the Petitioner submitted details to the designated Competent Authority about the reasonableness of the price, based *inter alia* on sale of land in the proximity, in the preceding years. The Competent Authority, Respondent No.2, however, ignoring the Petitioner's submissions, served a cheque of Rs.10,92,04,010/- (Rupees ten crores, ninety two lakhs, four thousand and ten) only, to the Petitioner, drawn on the AXIS Bank, Tadong Branch, Gangtok, Sikkim, as compensation. Although the cheque was received by him on 13.01.2017, under protest and without prejudice to his legal rights, nevertheless, aggrieved with the compensation, the Petitioner moved the Respondent No.1 through the Respondent No.2 on 17.01.2017, for appointment of an Arbitrator for determination of fair compensation, under Section 3G(5) of the N.H. Act. When no communication of appointment of Arbitrator for over ninety days was received, the Petitioner filed a Petition under Section 11(4), (5) and (6) of the Act of 1996, before this Court on 24.04.2017, being Arbitration P. No. 01 of 2017, for appointment of an Arbitrator. During the Court proceedings, the Respondent No.1 for the first time, informed this Court that the Secretary-cum-Relief Commissioner, Land Revenue and Disaster Management Department, Government of Sikkim, (hereinafter "Secretary, LR&DM Department"), was appointed as an Arbitrator by the Respondent No.1 on 08.07.2016. This appointment was made prior to the date of Declaration and Notification, issued by the Respondent No.1, dated 09.07.2016, for acquisition of the land. Vide its Judgment dated 05.07.2017, this Court appointed an Arbitrator, as prayed. Aggrieved by the Judgment, the General Manager (Projects), National

Highways and Infrastructure Development Corporation Limited (hereinafter "NHIDCL") (the Respondent No.2 in the Arbitration P. No. 01 of 2017*)*, was before the Hon'ble Supreme Court, who, by its Order dated 16.05.2018, set aside the Order of this Court with the observation that, an application under Section 11 of the Act of 1996, for appointment of an Arbitrator to determine fair compensation does not apply under the N.H. Act. It was further held that if a demand is made for appointment of an Arbitrator and the Central Government does not appoint an Arbitrator within a reasonable time, the remedy thereof is by way of a Writ Petition or a Suit. Pursuant to the Order dated 16.05.2018 *(supra)*, the Petitioner, vide his letter dated 30.05.2018, requested the Central Government to appoint an Arbitrator in terms of Section 3G(5) of the N.H. Act, in place of the Secretary, LR&DM Department, whose appointment did not meet the requirements of the Act of 1996, as the Arbitrator is required to be impartial and independent of the Central or State Government and the land owner. Hence, the prayers as detailed hereinabove.

3. Vide Interlocutory Application (I.A.) No.1 of 2019, the Petitioner placed on record a copy of the letter addressed to him by the Respondent No.1, dated 05.09.2018 as also a copy of the Petitioner's related response, dated 02.01.2019. In the said application, the fact of submission of letter dated 30.05.2018, was reiterated. It was averred in response thereto, that the Respondent No.1 issued letter dated 05.09.2018 to the Petitioner, erroneously conveying that the Hon'ble Supreme Court in its Order dated 16.05.2018 has upheld and allowed continuation of the appointment of the Secretary, LR&DM Department as the Arbitrator under Section 3G(5) of the N.H. Act, by the Central Government. In reply, the Petitioner on 02.01.2019, pointed out that no such opinion had been expressed by the Hon'ble Supreme Court in its Order.

4. The Respondent No.1, in his Counter-Affidavit, would state that this Court vide the impugned Judgment, dated 05.07.2017, had appointed Justice A.P. Subba, retired Judge of the High Court of Sikkim, as the Arbitrator on grounds that the Central Government had failed to take steps for such appointment within the prescribed time. The question in respect of neutrality, impartiality and independence of Arbitrator was not found relevant to the issue while disposing of the application as being premature. It was also averred that the Hon'ble Supreme Court, in its Order had observed that the argument of Counsel for the Respondents therein (Petitioner herein),

that the Arbitrator had now been appointed under Section 11 of the Act of 1996 and therefore no prejudice would be caused if allowed to continue, ignored the fact that Section 11 of the Act of 1996 does not apply and that under Section 3G of the N.H. Act, the Central Government alone can appoint an Arbitrator. Thus, the Petitioner is now estopped from raising the same issue pertaining to the appointment of an Arbitrator. That, in view of the said Order of the Hon'ble Supreme Court, the Writ Petition is barred by *res judicata*, as the issue involved between the said parties has already been decided therein. That, the appointment of an independent and impartial Arbitrator as raised in Paragraph 21 of the instant Writ Petition had been raised before the Hon'ble Supreme Court in the said Civil Appeal and the Court had rejected the same.

5. The Respondent No.2 had no Counter-Affidavit to file and the Petitioner declined Rejoinder to the Counter-Affidavit of Respondent No.1.

6. Learned Senior Counsel for the Petitioner, while deprecating the inaction of the Respondent No.1 with regard to appointment of an Arbitrator despite the Petitioner's letter dated 30.05.2018, contended that the appointment of the Secretary, LR&DM Department is vitiated, being prior in time to any application made by the Petitioner, and an Officer superior in line in the hierarchy to the District Collector, East Sikkim (Respondent No.2). The Respondent No.2 is the Competent Authority designated under Section 3A of the N.H. Act and the appointment of the Secretary, LR&DM Department, thereby flouts the spirit of Section 12 and the related Schedules of the Act of 1996. Besides, the Secretary, LR&DM Department, is an Indian Administrative Service ("IAS") Officer and an employee of the Central Government, his service conditions being governed by the Central Government Rules and thus subject to the control of the Central Government. He, therefore, cannot be held to be independent of the Central Government and remain impartial throughout the arbitral proceedings. While urging that the neutrality of Arbitrators is of pivotal concern, strength was drawn from the ratiocination in ***M/s. Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd.***[1]. That, the Judgment, while examining Section 12(5) of the Act of 1996 observed that the test of neutrality is not whether, given the circumstances, there is any actual bias but whether the circumstances in question give rise to any justifiable apprehensions of bias. That, in the instant matter, there is indeed a justifiable apprehension of bias

[1] AIR 2017 SC 939

in view of the position of the Secretary, LR&DM Department, as posited *supra*, hence the requirement for appointment of an independent and impartial Arbitrator. To further augment his submissions, succour was garnered from ***TRF Limited v. Energo Engineering Projects Limited***[2]. Reliance was also placed on ***Bharat Broadband Network Limited v. United Telecoms Limited***[3], wherein the conditions for eligibility of an Arbitrator have been enumerated.

7. In vehement repudiation, learned Counsel Mr. Karma Thinlay for the Respondent No.1, while reiterating the averments in his Counter-Affidavit, would canvass that only the Central Government has the prerogative of appointing an Arbitrator in terms of Section 3G(5) of the N.H. Act, in pursuance to which, an Arbitrator has already been put in place by the Central Government on 08.07.2016. Although this may be prior in time to the Petitioner's application but this was in consideration of the circumstance that it was not only the Petitioner's land that was acquired but also lands of several others being acquired for the selfsame purpose. That, no law debars the Central Government from appointing an Arbitrator prior in time to a petition being filed by an aggrieved party. That, the apprehensions of bias are unsubstantiated and the relevant provisions of law have not been flouted. Contending that the Petitioner ought to appear before the Arbitrator to settle any grievance, it was reasoned by learned Counsel that the Hon'ble Supreme Court has not set aside the appointment of the Arbitrator made on 08.07.2016. While placing reliance on ***Suganthi Suresh Kumar v. Jagdeeshan***[4]**,** learned Counsel for the Respondent No.1 contended that the High Court cannot override the decision of the Hon'ble Supreme Court. Contending that the matter was already settled by the Orders of the Hon'ble Supreme Court, he drew the attention of this Court to ***Anil Kumar Neotia and Others v. Union of India and Others***[5] wherein it has been ruled out that once a question is settled by the Hon'ble Supreme Court, it is no longer open for agitation by the Petitioners. Reliance was also placed on ***Sabia Khan and Others v. State of U.P. and Others***[6] to press the argument that the Order of the Hon'ble Supreme Court has not been understood in its correct perspective by the Petitioner insofar as the appointment of the Appellant is concerned. That, the Petitioner cannot

[2] (2017) 8 SCC 377
[3] AIR 2019 SC 2434
[4] (2002) 2 SCC 420
[5] (1998) 2 SCC 587
[6] (1999) 1 SCC 271

question the correctness of the Order of the Court through a petition under Article 226 of the Constitution of India, before this Court when it is settled that there is no irregularity in the appointment of the Arbitrator made on 08.07.2016. Thus, the petition be dismissed.

8. The rival contentions were heard at length, considered and all documents on record duly perused as also the citations made at the Bar.

9. I deem it essential to first refer to the Order of the Hon'ble Supreme Court dated 16.05.2018 in Civil Appeal No. 5250 of 2018 (Arising out of S.L.P. (C) No. 20049 of 2017). This Order came to be pronounced in a challenge to a Judgment of this Court appointing an Arbitrator under Section 11 of the Act of 1996, dated 05.07.2017, in Arb. P. No.01 of 2017 between the Petitioner herein and the Respondents No.1 and 2, and the General Manager (Projects), NHIDCL (as Respondent No.2 in the said petition). Setting aside the Judgment dated 05.07.2017, the Hon'ble Supreme Court in its Order *supra*, considered Section 3G of the N.H. Act dealt with Sub Sections 5 and 6 of Section 3G and *inter alia* held as follows;

> "A cursory reading of sub-section (5) shows us that appointment of the arbitrator under the said sub-section is only in the hands of the Central Government. Subsection (6) begins with the important expression "subject to the provisions of this Act", the provisions of the Arbitration and Conciliation Act, 1996 shall apply.
>
> Having heard learned counsel for the parties, we are, therefore, of the view that a Section 11 application under the 1996 Act cannot be made as the Central Government alone is to determine who is to be an arbitrator under Section 3-G (5) of the National Highways Act. If a demand is made for the appointment of an arbitrator, and the Central Government does not appoint an arbitrator within a reasonable time, the remedy that is to be availed of is a writ petition or a suit for the said purpose, and not Section 11 of the Arbitration and Conciliation Act, 1996.

A similar provision contained in Section 86 (1)(f) of the Electricity Act, 2003 specifically gives the State Commission power to refer any dispute for arbitration. In this view of the matter, this Court in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd., (2008) 4 SCC 755, held as under:

> "28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation."

We respectfully agree with the ratio of the said judgment. Likewise, Section 3-G of the National Highways Act is a special provision which will be given effect insofar as the appointment of an arbitrator is concerned.

Learned counsel appearing on behalf of the respondents has, however, argued that an arbitrator has now been appointed under Section 11 of the Arbitration and Conciliation Act, 1996 and, that, therefore, no prejudice will be caused if he is allowed to continue. This arguments ignores the fact that Section 11 of the Arbitration and Conciliation Act does not apply and that, under Section 3-G, the Central Government alone can appoint an arbitrator.

Accordingly, the impugned Judgment is set aside and the appeals are allowed. …"

The Hon'ble Supreme Court has thus spelt out that Section 3G of the N.H. Act is a special provision which will be effected insofar as appointment of an Arbitrator is concerned. The provisions of Section 3G(5) and (6) of the said Act, have been lucidly explained as also the legal position that it envisages.

10. For convenience, Section 3G (5) and (6) of the N.H. Act is extracted hereinbelow;

> "**3G. Determination of amount payable as compensation.** – (1) …
> (2) …
> (3) …
> (4) …
> (5) If the amount determined by the competent authority under sub-section *(1)* or sub-section *(2)* is not acceptable to either of the parties, the amount shall, **on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government**.
> (6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act. …"
>
> **(emphasis supplied)**

Section 3G(5) *supra* specifically provides that should the compensation determined by the Competent Authority be unacceptable to either of the parties, an Arbitrator shall determine the amount *on an application* by either of the parties. The Arbitrator is to be appointed by the Central Government. In my considered opinion, the Section provides with clarity that appointment of an Arbitrator shall be subsequent to an application made by either of the parties, on dissatisfaction of either party of the amount of compensation determined by the Competent Authority. At this juncture, it may suitably be noted that the application for appointment of an Arbitrator was made by the Petitioner on 30.05.2018 while the Notification of intention of acquisition was published on 13.04.2016 and Declaration of acquisition notified on 09.07.2016, by the Respondent No.1. Curiously,

despite the above position, the Arbitrator was appointed on 08.07.2016 itself, even before the Declaration of 09.07.2016, was notified. The Respondent No.1 has failed to satisfy this Court as to which provision permits such a step and allows them to bypass or circumvent the provisions of the statute. The law does not envisage putting an Arbitrator in place preceding an application of any aggrieved party or for that matter, before publication of notification of Declaration.

11. That having been said, Section 12 of the Act of 1996, has to be given due consideration in tandem with the Fifth, Sixth and Seventh Schedules of the Act. Section 12, it may be stated, provides for grounds of challenge to the appointment of an Arbitrator, which, to prevent prolixity, are not extracted herein. The provisions of the Fifth and Seventh Schedules of the Act of 1996, relied on by the Petitioner, provides as follows;

> "THE FIFTH SCHEDULE
> [*See* section 12(1)(b)]
>
> The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:
>
> **Arbitrator's relationship with the parties or counsel**
>
> 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
> 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
> 3. …
> 4. …
> 5. …
> 6. …
> 7. …
> 8. …
> 9. …
> 10. …
> 11. …

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. …
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. …
16. The arbitrator has previous involvement in the case."

"THE SEVENTH SCHEDULE
[*See* section 12(5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. …
4. …
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. …
7. …
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. …
10. …
11. …
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. …
14. …

Relationship of the arbitrator to the dispute

15. …
16. The arbitrator has previous involvement in the case."

A bare perusal of the provisions extracted hereinabove prohibits appointment of a person as an Arbitrator, should the conditions enumerated therein be fulfilled. Apart from the above two Schedules, the Sixth Schedule requires the Arbitrator to disclose any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to the Arbitrator's independence or impartiality. It is the Petitioner's case that no such disclosure was made by the Arbitrator who is a Central Government employee.

12. We may, thus, examine whether the appointment of the Arbitrator stands vitiated on account of non-compliance of the mandate of the statutes. In this context, we may appositely refer to ***Bharat Broadband Network Limited*** *(supra).* The Hon'ble Supreme Court was considering an Appeal filed by Bharat Broadband Network Limited against the United Telecoms Limited. The Appellant floated a tender dated 05.08.2013 for installation of certain equipments. The Respondent was the successful bidder. The conditions of Contract provided for arbitration. As disputes and differences arose between the parties, the Respondent invoked the Arbitration Clause vide letter dated 03.01.2017 and called upon the Appellant's Chairman and Managing Director to appoint an independent and impartial Arbitrator. One K.H. Khan was appointed as the sole Arbitrator on 17.01.2017. In the meanwhile, on 03.07.2017, the Hon'ble Supreme Court vide its Judgment in ***TRF Limited*** *(supra)* held that since a Managing Director of a Company, which was one of the parties to the arbitration was himself ineligible to act

as Arbitrator, such ineligible person could not appoint an Arbitrator and any such appointment would have to be held null and void. Consequently, the Appellant, Bharat Broadband Network Limited, itself having appointed the aforestated sole Arbitrator, referred to the Judgment *supra* and stated that being a declaration of law, appointments of Arbitrators made prior to the Judgment are not saved. Thus, the prayer before the sole Arbitrator was that since he is *de jure* unable to perform his function as Arbitrator, he should withdraw from the proceedings to allow the parties to approach the Hon'ble Court for appointment of a substitute Arbitrator in his place. Shri Khan on 21.10.2017, rejected the Appellant's application after hearing both sides sans reasons. The petition thus came to be filed before the Hon'ble High Court of Delhi on 28.10.2017 under Sections 14 and 15 of the Act of 1996 stating that the Arbitrator had become *de jure* incapable of acting as such and a substitute Arbitrator be appointed. The Hon'ble High Court of Delhi, vide the impugned Judgment dated 22.11.2017 rejected the petition stating that the very person who appointed the Arbitrator is estopped from raising a plea that such Arbitrator cannot be appointed after participating in the proceedings. It was also pointed out that under the proviso to Section 12 (5) of the Act of 1996, the Appellant had appointed Shri Khan while the Respondent had filed a statement of claim without any reservation in writing, which would amount to an express agreement in writing and, therefore be a waiver to the applicability of Section 12 (5) of the Act of 1996. In Appeal, the Hon'ble Supreme Court, discussed the ratiocinations in ***Voestalpine Schienen GMBH*** *(supra),* ***HRD Corporation v. GAIL (India) Ltd.***[7] and ***TRF Ltd.*** *(supra),* which had dealt with Section 12(5) of the Act of 1996, the Fifth and Seventh Schedules of the Act of 1996, as also the indispensable requirement of impartiality and neutrality in an Arbitrator. The Hon'ble Supreme Court concluded as hereinbelow;

> "**14**. From a conspectus of the above decisions, it is clear that Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence and impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and

[7] (2018) 12 SCC 471

> the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. …
>
> **15**. Section 12(5), on the other hand, is a new provision which relates to the *de jure* inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the nonobstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a personal falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. …"

Resultantly, the Appeals were allowed, the impugned Judgment set aside and the High Court was to appoint a substitute Arbitrator with the consent of both parties.

13. It would be worthwhile to notice that in ***Voestalpine Schienen GMBH*** *(supra),* the Hon'ble Supreme Court held as follows;

> "**23**. It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself."
>
> Xxx xxx xxx

> "25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as competent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the person empanelled by the respondent are not covered by any of the items in the said list."

In ***HRD Corporation v. GAIL (India) Ltd.***[8], it was held as hereinbelow;

> "**12**. After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes to the root of the appointment, Section 12(5)

[8] (2018) 12 SCC 471

> read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes *de jure* unable to perform his functions inasmuch as, in law, he is regarded as "ineligible." …"

In ***TRF Ltd.*** *(supra)* the Hon'ble Supreme Court held as under;

> "**50**. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. …"

14. More recently, on 27.08.2019, the Hon'ble Supreme Court, in ***National Highways Authority of India v. Sayedabad Tea Company Ltd. and Ors.***[9], while agreeing with the legal position exposited in ***General Manager (Project), National Highways and Infrastructure Development Corporation Ltd. v. Prakash Chand Pradhan & Ors.*** and discussing Section 3G(5) of the N.H. Act, would also elaborate as follows;

> "**16.** … It is a comprehensive code and a special enactment which provides an inbuilt mechanism not only in initiating acquisition until culmination of the proceedings in determining the

[9] Civil Appeal No(s).6958-6959 of 2009

> compensation and its adjudication by the Arbitrator to be appointed by the Central Government and if still remain dissatisfied, by the Court of law.
>
> **17.** In compliance of the mandate of Sections 3A to 3F of the Act, 1956, after the land is acquired, there shall be paid an amount of compensation which shall be determined by an order of the competent authority under sub-sections (1) or (2) of Section 3G of the Act, 1956 and any person who is aggrieved by the amount so determined by the competent authority or what being determined is not acceptable to either of the parties, on an application being filed by either of the parties, has to be determined by the Arbitrator to be appointed by the Central Government in terms of sub-section (5) of Section 3G of the Act, 1956."

This Judgment postulates with clarity that if the amount determined by the Competent Authority is not to the satisfaction of any aggrieved person, on an application being filed by either of the parties, the Central Government is to appoint an Arbitrator for determination of the compensation amount, in terms of Sub Section 5 of Section 3G of the N.H. Act. The appointment of an Arbitrator it emanates, is obviously to be followed by an application filed by any aggrieved party.

15. On the bedrock of these precedents, in the matter at hand, it goes without saying that the Arbitrator i.e. the Secretary, LR&DM Department, is an IAS Officer. The Respondent No.1, is the Secretary, Ministry of Road Transport and Highways. Both are part and parcel of the Central Government, IAS Officers being Central Government Officers working under the State Governments. These Officers are recruited and trained by the Central Government and then allotted to different State cadres. In the same thread, the District Collector, East District, Respondent No.2, being a Government servant, is subordinate to the Respondent No.1. Even assuming that the District Collector belongs to the State cadre, he is subordinate to the Secretary, LR&DM Department. The parties in dispute must have the confidence that they would be meted out even handed justice by the Arbitrator on the edifice of the presumption that he is independent and

impartial. Should there be existence, either direct or indirect, of a relationship of the sole Arbitrator with any of the parties, professional or otherwise, as envisaged in the Fifth and Seventh Schedules of the Act of 1996, this is likely to give rise to justifiable doubts as to his independence or impartiality. A cursory reading of the provisions of the Fifth and Seventh Schedules of the Act of 1996, would indicate that these provisions have clearly been circumvented by the Respondent No.1, as also the Sixth Schedule of the Act. Besides which, the appointment of the Secretary, LR&DM Department, has been made prior in time to the application of the Petitioner.

16. To address the argument of the Respondent No.1 that the question of neutrality, impartiality and independence of the Arbitrator was not found relevant, in the impugned Judgment of this Court dated 05.07.2017, it would be relevant to point out that the Court has qualified the statement by adding that,

> *"The appointment of the Arbitrator made by the Central Government before 08th July 2016 is found as invalid. In such view, the Court is not inclined to examine this issue at this stage as it is premature."*

17. The further contention of the Respondent No.1 that the Petitioner is estopped from raising the issue pertaining to appointment of Arbitrator in view of the Order of the Hon'ble Supreme Court dated 16.05.2018 is unfathomable and appears to be an incorrect interpretation of the said Order. The Order clearly spells out as follows;

> "… Learned counsel appearing on behalf of the respondents has, however, argued that an arbitrator has now been appointed under Section 11 of the Arbitration and Conciliation Act, 1996 and, that, therefore, no prejudice will be caused if he is allowed to continue. This arguments ignores the fact that Section 11 of the Arbitration and Conciliation Act does not apply and that, under Section 3-G, the Central Government alone can appoint an arbitrator. …"

One of the Respondents before the Hon'ble Supreme Court, is the Petitioner in the instant petition. Obvious reference was being made to the appointment of Justice A.P. Subba as the Arbitrator, vide the impugned Judgment of this Court, dated 05.07.2017. On this question, the Hon'ble Supreme Court has clarified that this argument of the Respondents therein (the Petitioner here), ignores the fact that Section 11 of the Act of 1996 does not apply as under Section 3G of the N.H. Act, the Central Government alone can appoint an Arbitrator. It clarifies the position of law that the appointment of an Arbitrator under Section 11 of the Act of 1996 is inapplicable to matters as the instant one. The merits of the appointment of Secretary, LR&DM Department, as an Arbitrator on 08.07.2016, as sought to be made out by Respondent No.1, in its correspondence dated 05.09.2018, has not been discussed by the Hon'ble Supreme Court. Neither does the Order observe that such appointment is upheld by the Hon'ble Supreme Court. It is undisputed that the Respondent No.1 is clothed with the powers to appoint an Arbitrator but this is in compliance to the provisions of Section 3G(5) of the N.H. Act, and not otherwise. Therefore, in my considered opinion, the Order of the Hon'ble Supreme Court has been misconceived and misinterpreted by the Respondent No.1. No question of the Petitioner being estopped from raising the issue pertaining to appointment of Arbitrator arises.

18. The averment of the Respondent No.1 that the Hon'ble Supreme Court had rejected the contention of the Petitioner seeking appointment of an independent and impartial Arbitrator, is shorn of any truth, and is to say the least, a ludicrous interpretation. The ratiocinations discussed hereinabove clearly reflects the stance of the Hon'ble Supreme Court on this aspect and it has been exposited without any ambiguity that neutrality, independence and impartiality, are the hallmark of an Arbitrator which has to be maintained. This Court is by no stretch of the imagination making any effort to go beyond the Order of the Hon'ble Supreme Court, being well aware of the sanctity of Article 141 and Article 144 of the Constitution, thus, the Judgments relied on by learned Counsel for the Respondent No.1, in this context, are of no assistance to his case.

19. In view of the discussions that have ensued hereinabove, the Writ Petition is allowed and disposed of, with the following directions;

(i) The Order dated 08.07.2016 issued by the Respondent No.1 stands rescinded;

(ii) The Respondent No.1 is hereby directed to appoint a new sole Arbitrator in terms of Section 3G(5) of the N.H. Act duly conforming with the provisions of Section 12 of the Act of 1996, as amended in the year 2015, and adhering with the Fifth, Sixth and Seventh Schedules of the said Act.

20. No order as to costs.

SLR (2019) SIKKIM 601

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

Crl. A. No. 07 of 2019

Deepan Darjee *alias* Sungurey Bada ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Mr. B. K. Gupta, Advocate.

For the Respondent: Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor and Ms. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 31st August 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 5 –A victim of sexual assault is not an accomplice to a crime and stands at a higher pedestal than an injured witness as she suffers from emotional injury. In re: Mohd. Imran Khan referred.

(Para 13)

Petition partially allowed.

Case cited:

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

JUDGMENT

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

1. The Appellant was convicted under Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012

(hereinafter, POCSO Act, 2012), and under Section 506 of the Indian Penal Code, 1860 (hereinafter, IPC), vide the impugned Judgment dated 20-12-2018, in Sessions Trial (POCSO) Case No.31 of 2017. The Order on Sentence, dated 21-12-2018 incarcerated the Appellant to rigorous imprisonment for a period of 10 years and fined him Rs.5,000/- (Rupees five thousand) only, under Section 5(m) punishable under Section 6 of the POCSO Act, 2012, with a default clause of imprisonment. Under Section 506 of the IPC, the Appellant was to undergo imprisonment (sans description) for one year and fined Rs.1,000/- (Rupees one thousand) only, also with a default clause of imprisonment. The sentences of imprisonment were ordered to run concurrently.

2. Assailing both, the Appellant contends that the Prosecution case is unsustainable as there was no corroboration in the evidence of the victim P.W.1, her mother P.W.8 and grandmother P.W.11 with that of P.W.3, the Doctor, who examined the victim but did not detect any abrasion or injuries in the victim s vagina. P.W.6 the Junior Scientific Officer of the Biological Division, RFSL, Saramsa, East Sikkim, has also failed to corroborate the Prosecution case. That, the statement of P.W.8 the victims mother and P.W.11 her grandmother are exacerbated versions of the victims statement who has nowhere stated that she was unable to walk or bled while passing urine or that the Appellant threatened to kill P.W.8 and P.W.11. The discrepancies in the statements of the witnesses lead to doubts in the Prosecution case the benefit of which ought to be extended to the Appellant. Hence, the impugned Judgment and Order on Sentence be set aside.

3. Resisting these contentions, Learned Additional Public Prosecutor while drawing the attention of this Court to the evidence of not only P.W.1 the victim but also P.W.3 the Gynaecologist who examined the victim, urges that the Doctor has specifically stated that he prescribed medication to the victim since she complained of pain in her genital region, thereby establishing some injuries therein and substantiating the Prosecution case. The evidence of P.W.8 the victims mother reveals with clarity that on the relevant day her daughter complained of pain in her abdomen and passed some blood in her

urine. She also complained of pain while passing urine and was unable to walk, apart from P.W.8 detecting redness and bruising of the genital of the victim duly corroborated by P.W.11. The evidence of P.W.1 and P.W.8 finds support in the evidence of P.W.11 who stated that on their questioning P.W.1 narrated the incident of sexual assault by the Appellant on her. That, due to fear on account of the threat of physical harm held out by the Appellant to P.W.1 she had not revealed the incident to anyone earlier. Both P.W.8 and P.W.11 took the victim to the Doctor who advised them to approach the Police. As the Prosecution case has been established the Appeal be dismissed. Learned Additional Public Prosecutor in support of his case relied on ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[1].

4. The rival contentions of the Learned Counsel have been heard. Evidence, documents on record and the impugned Judgment and Order on Sentence perused.

5. The facts, according to the Prosecution, are that on 16-06-2017, P.W.8 lodged an FIR Exhibit 14, before the Singtam Police Station to the effect that her minor daughter P.W.1, aged about 5 years, was sexually assaulted by the Appellant. She learnt of the incident when she took the victim to urinate and the victim cried out due to pain in her private area. On enquiry, the victim reported to the complainant that the Appellant had inserted his finger into her vagina. Singtam P.S. Case FIR No.43/2017 dated 16-06-2017 under Section 376 IPC read with Section 6/10 of the POCSO Act, 2012, was registered against the Appellant. On the edifice of Exhibit 14, investigation commenced, on completion of which Charge-Sheet came to be filed against the Appellant under the above Sections of law.

6. Was the conviction marred by any error and consequently the sentence? This is the question for determination by this Court.

7. P.W.1, the victim, deposed on 23-11-2017 before the Learned Trial Court. When questions were put to her under Section 33 of the POCSO

[1] (2011) 10 SCC 192

Act, 2012 and Section 118 of the Indian Evidence Act, 1872, she stated that she was four years old. According to her, on the relevant day, when she was alone in her house the Appellant came there, carried her down the stairs, removed her trousers and inserted his finger nails into her vagina upon which she cried in pain. Thereafter, the Appellant left her threatening to throw her out of the window should she narrate the incident to anyone. She dressed herself and climbed up the stairs. That, thereafter she had pain while passing urine upon which she revealed the incident to her mother. P.W.8, the victim s mother deposed that at the time of the incident the victim was aged six years. Her evidence while fortifying the evidence of P.W.1 regarding the incident has gone a step further. She stated that on her arrival home on the relevant day her daughter walked up awkwardly to her, then kneeled on the bed, complained of pain in her abdomen and wanted to go to the toilet. When P.W.8 took her there P.W.1 complained of pain in her private part. When the victim passed urine P.W.8 saw some blood therein. On the victims inability to walk she carried her to the room and she along with P.W.11, her mother-in-law, checked the victims private part, which they found was reddish and bruised. On enquiry from her daughter, she told them that the Appellant had given her some chocolate, carried her downstairs, kept her on his lap, removed her clothes, touched her private parts and inserted his fingers thereto. When she complained of pain, he threatened to throw her out of the window and also to kill P.W.8 and P.W.11. Thereafter, Exhibit 14 came to be lodged at the Police Station. However, she could not identify the scribe of the document. The victim was then forwarded to the District Hospital for medical examination and she accompanied her daughter. While being cross-examined she admitted to not stating in Exhibit 14 that her victim daughter complained of stomachache and that there was bleeding from and bruise marks on her private part. P.W.11 in sum and substance supported the evidence of P.W.8. However, according to her, they took the victim to the Doctor first who then advised them to approach the Police. It is relevant to notice that P.W.8 has contrarily stated that they first lodged Exhibit 14, upon which the victim was forwarded to the District Hospital, Singtam for medical check-up.

8. P.W.3 the Gynaecologist posted at District Hospital Singtam examined the victim on 16-06-2017, the day of the incident, at around 11.21 p.m. The victim had given a history of being sexually assaulted by the Appellant. She had not taken a bath after the incident and was infact produced at the Hospital at 10.40 p.m. His medical examination was revelatory of the following;

> **"**……
> Chest, CVS, CNS-no abnormality defined.
>
> **On local examination, mons pubis-normal, labia majora and minora-normal, hymen intact, no abrasion or haemotoma. My provisional report was to the effect that there was no signs of force but sexual assault could not be ruled out.**
>
> I obtained the vaginal swab of the victim and handed it over to the Police along with the pajama (grey coloured with white dots and butterflies) of the victim.
>
> I advised counselling and care by CWC Counsellor.
>
> I also prescribed medication since the victim complained of pain in her genital region.
>
> Exhibit 4 is the Medical Examination Report prepared by me under my signature Exbt. 4(a).
>
> The consent for medical examination of the victim was given by her mother who had also affixed her signature in the column 'consent for examination' in Exbt.4.

> I did not receive the report of the vaginal swab form the Pathology Lab till preparation of Exbt.4 and collection of the same by the Police.
> ……."

The vaginal swab M.O.I and coloured Pyjama M.O.II of the victim were forwarded to P.W.6, the Forensic Expert who examined the articles but found no foreign materials therein or for that matter in M.O.IV the penile swab of the Appellant.

9. From a careful consideration and analysis of the evidence on record, the evidence of P.W.8 undoubtedly amplifies the evidence of P.W.1. According to P.W.8 not only did the victim complain of pain but she also walked awkwardly, over and above the evidence of P.W.1, who has nowhere deposed about her inability to walk. P.W.8 added that P.W.1 bled while urinating, this fact found no place in the evidence of P.W.1. She has also stated that the Appellant, according to P.W.1, had given her some chocolates and thereafter committed the act, besides threatening to throw her out of the window and threatening to and kill P.W.8 and P.W.11. The act of giving chocolates and threatening to kill both P.W.8 and P.W.11 are absent in the evidence of P.W.1. According to P.W.1 the threat held out to her was confined to throwing her out of the window and no one else. P.W.11 was present when P.W.1 narrated the incident to P.W.8. The evidence of P.W.11 supports the evidence of P.W.1 to the extent that the Appellant took her to a place below the staircase and inserted his finger into her private part and threatened to throw her out of the window if she narrated the incident to anyone else. However, her evidence, like that of P.W.1, does not indicate that P.W.1 stated that the Appellant threatened to kill P.W.8 and P.W.11. She would however support the evidence of P.W.8 with regard to the bruise and redness in the genital of P.W.1. Strangely, in contradiction to the evidence of P.W.8 and P.W.11, P.W.3 the Gynaecologist despite having examined P.W.1 at around 11.21 p.m. following the incident which had occurred at 5.50 p.m., neither found any bleeding nor bruises or redness in the genital of the victim. His evidence is clear that there was no haematoma or abrasion on the mons pubis, labia majora and minora. Her

hymen was also intact besides which she had not taken a bath after the incident. In such circumstances, it is unfathomable as to why the Doctor would opine that there was no sign of force but sexual assault could not be ruled out. Surely force would have been required to aid the act of the Appellant on a mere child. Had finger nails been inserted tell tale injuries would have emerged in the allegedly violated aspect of the victims body. This is not the finding of P.W.3, who has mentioned that there were no injuries in the victims private part.

10. There is also a discrepancy pertaining to the age of the victim since before the Court she has stated that she was four years at the time of deposition, while her mother P.W.8 stated that she is six years old. The date of birth of the victim as per Exhibit 10 is "20-09-2012", thereby making P.W.1 about four years and nine months at the time of incident and approximately five years and two months at the time of deposition before the Learned Trial Court. P.W.8 appears to be unmindful of the age of her child. In such circumstances, it would be relevant to mull over what weight is to be attached to the entire evidence of P.W.8, although we add that this point would in no way vitiate the Prosecution case.

11. The Appellant for his part was medically examined by P.W.2 Dr. Nima Dolma Sherpa, Medical Officer at the District Hospital Singtam, on the date of the alleged incident, i.e., 16-06-2017. According to the Doctor the individual denied the allegation of sexual assault levelled against him. She found no smell of alcohol in his breath and on examination of his genital she found no redness. No blood stains were present on his garments. The penile swab and nail clippings of both hands of the Appellant were taken and his undergarment handed over to the Police. The evidence of P.W.6 would indicate that the nail clippings of both hands of the Appellant were not forwarded to the Laboratory for examination and instead one glass vial containing the nail wash and hand wash of the victim, M.O.V were forwarded. No evidence worthy of consideration was found in the articles.

12. In view of the evidence on record, the amplifications therein of the injuries and considering that the Doctor found no injuries on the genital of

the victim, we are of the considered opinion that the offence of penetrative sexual assault on the victim has not been established whatsoever by the Prosecution. The evidence of P.W.8 and P.W.11 are not consistent with that of P.W.1 and have to be taken with a pinch of salt, their effort evidently being to enhance the gravity of their case. The Appellant in his Section 313 Cr.P.C. statement denied the allegations against him, however despite asserting that the allegations were due to enmity, he failed to bolster the statement with evidence, nor could he take advantage of the provisions of Section 30 of the POCSO Act, 2012.

13. This Court is conscious and aware that a victim of sexual assault is not an accomplice to a crime and stands at a higher pedestal than an injured witness as she suffers from emotional injury. This has been stated in ***Mohd. Imran Khan*** (*supra*) relied on by the Prosecution, however the Court is also to be alive to the circumstances of the Prosecution case and whether the evidence establishes the case sought to be put forth.

14. Thus, to conclude, we are of the considered opinion that the Prosecution has failed to make out a case of penetrative sexual assault, to that extent we differ with the finding of the Learned Trial Court. The conviction of the Appellant for penetrative sexual assault was based *inter alia* on Exhibit 1 the Section 164 Cr.P.C. statement of the victim and her oral evidence tendered during trial. However, when examining the evidence of the Prosecution witnesses we find that no reference has been made to the Section 164 Cr.P.C. statement of the victim save to the extent that Exhibit 1 shown to P.W.1 in the Court was the same document which she signed in the presence of a Magistrate. It is trite to mention here that a statement recorded under Section 164 Cr.P.C. is not substantive evidence and can be used either for contradiction or corroboration. No exercise to contradict or corroborate the statement made in Exhibit 1 was made by the Prosecution when examining the witness and is therefore out of the purview of consideration of this Court.

15. However, bearing in mind the evidence of the victim, an offence under Section 7 of the POCSO Act, 2012, i.e., sexual assault, is made out

against the Appellant. In view of the threat meted out by him to the victim, which went unscathed in cross-examination, the offence under Section 506 of the IPC sustains.

16. Consequently, the conviction of the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act, 2012, is set aside as also the imprisonment and fine imposed.

17. The Appellant shall instead undergo simple imprisonment of 3 years under Section 7, punishable under Section 8 of the POCSO Act, 2012, and pay a fine of Rs.1,000/- (Rupees one thousand) only. In default thereof, he shall undergo simple imprisonment of one month.

18. The sentence handed out under Section 506 of the IPC warrants no interference.

The sentences of imprisonment shall run concurrently.

19. The Learned Trial Court had ordered that the fine, if recovered, shall be made over to the victim as compensation. We find no reason to interfere with this order of the Learned Trial Court save to the effect that the amount of fine to be made over shall be Rs.1,000/- (Rupees one thousand) only.

20. The Learned Trial Court also granted compensation of a sum of Rs.1,00,000/- (Rupees one lakh) only, to the victim under the Sikkim Compensation to Victims or his Dependents Scheme, 2011. On this count, it is apposite to mention that the offence was committed on 16-06-2017, by which time the Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016 was already notified vide Notification No.66/ Home/2016, dated 18-11-2016, Government of Sikkim. Thus, the order of the Learned Trial Court pertaining to compensation is set aside.

21. In terms of the amended Scheme 2016 *supra* and on account of the finding of sexual assault of the victim, a sum of Rs.50,000/- (Rupees fifty

thousand) only, is awarded to the victim as compensation. The Sikkim State Legal Services Authority (SSLSA) shall take necessary steps as required in this context. The entire compensation amount shall be deposited in a Nationalised Bank, in a Fixed Deposit, in the name of P.W.1. The certificate of TDR shall be produced before the SSLSA by the victims guardian for perusal and verification. P.W.1 shall be eligible to withdraw the amount when she attains the age of majority.

22. Appeal disposed of accordingly.

23. No order as to costs.

24. Copy of this Judgment be sent to the Learned Trial Court along with records of the Learned Trial Court.

25. Copy of this Judgment also be forwarded to the Member Secretary, SSLSA, for information and compliance.

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