THE
SIKKIM LAW REPORTS

DECEMBER - 2019

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Mode of Citation
SLR (2019) SIKKIM

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induced, coerced, promised or advised by the Police to make a statement to which his reply was in the negative. The Learned Magistrate also enquired whether the confession was prompted by any harsh treatment by anyone to which he again replied in the negative. These questions reveal that all necessary precautions were taken indeed by the Magistrate, however the statement of A1 was recorded without affording him time for reflection and as the form reveals she administered oath to A1 which is specifically barred by law.

Abdul @ Badrul* v. *State of Sikkim ***969-B***

Code of Criminal Procedure, 1973 – S. 164 – Administration of Oath while Recording of Confession of Accused – Effect – The statement was taken after administering oath to A1 as reflected in the document, thereby leading to an insinuation that the statement was recorded under coercion – It was self-exculpatory and he has stated nothing about his role in the murder of the deceased but has specifically asserted that he is innocent and has been falsely implicated thereby denuding the statement of the nature of confession. The whole burden of establishing the case lies on the Prosecution. Where the Prosecution relies upon the confessional statement of the accused in proof of the charge strict compliance with the provisions of S. 164 of the Cr.P.C. is essential. The administering of oath itself would make a confessional statement totally inadmissible in evidence in view of the mandatory provisions of Article 20(3) of the Constitution and S. 281 of the Cr.P.C. It would be apposite to bear in mind that A1 in his S. 313 Cr.P.C. statement has retracted his purported confession – As a matter of caution the Courts require corroboration to a retracted confession, although not a rigid rule of law, procedure or practice and the amount of corroboration necessary would be a question of fact to be determined in the light of the circumstances of each case.

Abdul @ Badrul* v. *State of Sikkim ***969-C***

Code of Criminal Procedure, 1973 – S. 202 – Issue of Process – S. 202 provides that any Magistrate on receipt of the complaint of an offence in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding – The addresses provided in the complaint by the respondent No.1 reflects that all the Petitioners were from Pondicherry and therefore, residing at a

place beyond the area in which the learned Magistrate exercised her jurisdiction – The records however, does not reveal that the learned Magistrate had complied with the provisions of S. 202 Cr.P.C. and applied her mind to the facts of the case and the law applicable thereto. The order dated 23.02.2019 states that "cognizance of the matter is taken against accused no.1, 2, 3 and 4."– S. 190 Cr.P.C. deals with cognizance of offence by Magistrate. The said provision provides that the learned Magistrate "may take cognizance of any offence." It is settled law that cognizance is taken of the offence and not the offender. The learned Magistrate has not even mentioned which of the offences she had taken cognizance of – Held: that the learned Magistrate has failed to exercise her discretion to issue summons against the Petitioners residing beyond her territorial jurisdiction in the manner required.

***Mr. Mohamed Yusufuddin Ahmed and Others* v.**
Mrs. Ruth Karthak Lepchani ***1026-B***

Code of Criminal Procedure, 1973 – S. 223 – Persons to be Charged Jointly – The F.I.R was lodged by an ASHA member (PW-1). It reported two aspects. Firstly, that the sixteen year old victim who seemed abnormal was "reportedly raped" by one Deepak Subba. Secondly, the victim was three to four months pregnant – The F.I.R reported about the pregnancy of the victim who was a minor. It was, therefore, incumbent upon the Investigating Officer to investigate whether Deepak Subba had raped the victim. It was also important for the Investigating Officer to investigate about the pregnancy of the victim who was a minor. Failure to mention the name of the Appellant in the F.I.R was of not much significance, as admittedly, the fact that the Appellant was the biological father of the baby came to light only after the DNA profiling – DNA profiling was done during the period of investigation. The charge-sheet was filed against both Deepak Subba and the Appellant – The learned Special Judge, however, while examining Sessions Trial (POCSO) Case No. 11 of 2017 registered against both Deepak Subba and the Appellant vide order dated 21.02.2018 came to the conclusion that the alleged offences allegedly committed by them were committed separately/independently and did not form part of the same transaction. Therefore, in view of S. 223 Cr.P.C., the learned Special Judge considered it appropriate to try them separately so that no prejudice is caused to them. Accordingly, the appellant was separately tried in the present case right from the inception till the judgment. This order dated 21.02.2018 was not assailed by the appellant. In fact, the Appellant fully

participated in the trial. It is apparent that no prejudice was caused to him.
Kiran Karki @ Chettri Uncle* v. *State of Sikkim ***1089-B***

Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power of the High Court – The law is well settled on the ambit and scope of S. 482 Cr.P.C. If the complaint does not disclose any offence or if it is frivolous, vexatious, or oppressive inherent power may be exercised. The power should be sparingly exercised to ensure that the process of the Court is not abused. This Court is not to embark upon an enquiry on the probability, reliability or the genuineness of the allegations made in the complaint. At this stage meticulous analysis of the case should not be done to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for this Court to interfere.
***Mr. Mohamed Yusufuddin Ahmed and Others* v.**
Mrs. Ruth Karthak Lepchani ***1026-A***

Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power by the High Court – In the F.I.R filed by Respondent No.1 in Crl. M.C. No. 08 of 2019, it is stated that while a training programme was going on, the Petitioner suddenly barged into the training hall and hurled abuses at her and there was a possibility of the Petitioner hitting her. In the complaint filed by the Petitioner in Crl. M.C. No. 08 of 2019, it is stated that he was not aware that any meeting was going on and he had only entered the hall to request Respondent No.1, a Doctor to attend to a patient, namely, Poonam Limboo, who was his daughter's classmate and whose condition was critical – Having regard to the facts and circumstances of the case, I am of the considered opinion that the allegations being not heinous and serious and as the parties have amicably resolved their differences, it would be unfair and contrary to the interest of justice to continue with the criminal proceeding.
Shri Krishna Lall Timsina* v. *Kanu Priya Rai and Another ***957-A***

Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power of the High Court – There is no material before the Court to proceed under the criminal jurisdiction – Held: Continuation of the private complaint case would amount to an abuse of the process of Court. The complaint along with the other evidence led by Respondent No.1 does not make out any Criminal offence. It is suggestive of a Civil dispute which has

been given the colour of criminality sans any material. Mere use of appropriate words is not enough. Facts asserted and materials produced must satisfy the ingredient of each of the offences alleged.

***Mr. Mohamed Yusufuddin Ahmed and Others* v.**
Mrs. Ruth Karthak Lepchani ***1026-C***

Constitution of India – Article 226 – Annexure-R/10 makes it clear that the Petitioner was considered for the post of "Attendant" which is a reserved post on or before 09.11.2015 and he was appointed as "Attendant" w.e.f. 10.08.2015. Annexure-R/10 dated 09.11.2015 is subsequent to the offer letter dated 01.06.2015. Neither in the counter-affidavit nor at the hearing before this Court has the Respondent No. 2 and 3 been able to explain to this Court as to whether the post of "Junior Attendant" is a reserved post – However, the appointment letter states that the Petitioner has been appointed as "Junior Attendant (W0)". There is no document filed either by the Petitioner or by Respondent No. 2 and 3 to show whether the post of "Junior Attendant" is a reserved post and whether the salary structure for "Junior Attendant" and "Attendant" are the same. Nevertheless, in view of Annexure-R10 it is clear that the intention of Respondent No. 2 and 3 was to appoint him as an "Attendant" – Justice would be served if Respondent No. 2 and 3 are directed to issue an appointment letter to the Petitioner appointing him in the post of "Attendant" in terms of their decision as reflected in Annexure-R/10 dated 09.11.2015 w.e.f. 10.08.2015 – Accordingly so directed – Petitioner shall be entitled to all benefits, financial and otherwise, that may accrued to him considering his appointment from 10.08.2015 to the post of "Attendant".

Md. Nasiruddin Ansari* v. *State of Sikkim and Others ***962-A***

Constitution of India – Article 226 – Honourably Acquitted – Meaning – In absence of any definition in the Criminal Procedure Code or Indian Penal Code, it is difficult to give a precise definition of what is meant by the expression "honourably acquitted", an expression coined by judicial pronouncements – The Hon'ble Supreme Court observed that when the accused is acquitted after full consideration of prosecution evidence holding that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted – A perusal of the judgment of this Court dated 30.03.2015 passed in Crl. A. No.12 of 2014 goes to show that the prosecution case was based on circumstantial evidence. This Court observed that the deceased was allegedly in the company of the petitioner on 03.08.2009 and

her dead body was found in an abandoned condition in a jungle on 06.08.2009 and thus, the circumstance of last seen together was not fully established. It was also observed that even if it is accepted as held by the learned Session Judge that there was illicit relationship between the petitioner and the deceased, in absence of any other positive reasons, one cannot be said to have motive to commit murder of the other. Observing that it was a case in which nothing was conclusively established against the appellant, this Court held that the appellant was entitled to benefit of doubt and accordingly, had allowed the appeal – Such an acquittal does not come within the expression "honourably acquitted" as expounded by the Hon'ble Supreme Court.

Shri Kharga Bahadur Pradhan* v. *State of Sikkim and Others ***990-C***

Constitution of India – Article 226– The claim made by the Petitioner for regularization of service with effect from 05.08.1984 in the post of Meter Reader, on the ground that a similarly placed incumbent had been granted regularization on 05.08.1984, is a stale claim and ought not to be gone into at this point of time – The submission of Mr. Sharma in reply that his case may be considered for regularization from the date of filing the representation, i.e. from 27.03.1995, is also without any merit. If there was any real grievance regarding he being meted out with discriminatory treatment, the Petitioner ought to have approached the Court within a reasonable period of time and not after 34 years from 05.08.1984 or after 23 years from the date of filing the representation – It is noticed that the Petitioner was regularized as a Junior Meter Reader on 25.04.2018. The writ petition was filed on 29.06.2018, that is, after his service was regularized as Junior Meter Reader, raising a grievance that he ought not to have been appointed as a Junior Meter Reader. By the time the writ petition was filed, more than 3 ½ years had gone by from the date of his appointment on 20.09.2014 and the Petitioner had also been regularized in the meantime as Junior Meter Reader and therefore, I am of the considered opinion that even this aspect of the matter, in the attending facts and circumstances of the case, ought not to be considered at this point of time in exercise of discretionary power under Article 226 of the Constitution of India.

Shri Rajen Kumar Chettri* v. *State of Sikkim and Others ***1039-A***

Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed –Though NIT was issued on "As is where is basis", barely after one month from the date of taking possession, on 03.10.2016, the Petitioner made a request to the Minister, Tourism and Civil Aviation for permitting her

to collect revenue from the shops of the Park as was allowed in the previous term, so as to enable her to make payment of rent to the Department. Though contention was advanced by Mr. Pradhan that the Petitioner was new in business, such a claim is, *ex facie*, not correct as demonstrated by Petitioner's own assertion that she be allowed to collect revenue from the shops of the Park as was allowed in the previous term. The Petitioner also wanted to undertake construction of swimming pool with restaurant and bar, eco huts, rock climbing and traversing and Brahmabridge, musical hall (traditional song & music), traditional dress & photography stalls, traditional food court, kids playing kingdom, fishing pond, etc. Though not stated so in the letter dated 03.10.2016, the Petitioner in the writ petition had made a categorical statement that unless the facilities and infrastructure as indicated by her were not provided or created it would be difficult for her to pay the lease amount. A request was also made to approve the rates of entry and parking fees as indicated in the said letter. The Petitioner being the previous lessee, it is reasonable to hold that the Petitioner was aware of the potential of the Park and accordingly, had submitted her tender and therefore, the stand taken by the Petitioner barely one month after the lease period had commenced raises many questions.

Mrs. Menuka Devi Bhattarai* v. *State of Sikkim and Another *1058-A*

Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed –Though pleas are taken in the writ petition that Petitioner was unaware of the contents of the lease deed, it is to be remembered, as is evident from the letter dated 03.10.2016, the Petitioner was also the lessee in the previous term. Contents of the letter dated 03.10.2016 also belies the contention of the Petitioner that she was unaware of the terms and conditions of the lease. It cannot be countenanced that the Petitioner was not aware of the requirement of payment of lease rent in terms of lease deed inasmuch as the Petitioner had paid an amount of 51.00 lakhs as advance rent for one quarter. Even otherwise, such a contention cannot be accepted in a writ proceeding in respect of a commercial contract entered into by the Petitioner with the State, the same being a disputed question of fact.

Mrs. Menuka Devi Bhattarai* v. *State of Sikkim and Another *1058-B*

Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – The assertion of the Petitioner is that the Petitioner was given to understand that lease rent would be lowered in view of her request made in the letter/representation to the Chief Minister praying for reduction of lease

rent at the rate of "Rs.1.20 lakhs". The letter is undated but there is an endorsement of the Chief Minister dated 28.11.2017 to consider the request as per norms. It is to be noted that the Department had already rejected the prayer for relaxation of payment of rent by letter dated 26.07.2017 in response to the letter of the Petitioner dated 14.06.2017, about which the Petitioner made no mention in the writ petition – Petitioner submits that she had not received the aforesaid letter dated 26.07.2017. It will be unrealistic to proceed on the assumption that the Petitioner never enquired about the outcome of the request for relaxation of payment of rent even if it is assumed that the Petitioner had not received the letter dated 26.07.2017. It was the responsibility of the Petitioner to make payment of rent in terms of lease deed – A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round and question the validity of those obligations – (*In Re. State of Orissa and Others v. Narain Prasad referred*).

Mrs. Menuka Devi Bhattarai* v. *State of Sikkim and Another* *1058-C

Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes – If the contract between the private party and the State or instrumentally of the State is under the realm of private law with no element of public law, the appropriate remedy for the aggrieved party is to approach the ordinary Civil Court and that writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred – (*In Re. Joshi Technologies International Inc. v. Union of India and Others referred*).

Mrs. Menuka Devi Bhattarai* v. *State of Sikkim and Another* *1058-D

Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – The controversy in the instant case is purely in the realm of private law – By the said letters, the Petitioner was directed to make the payment within seven days from the date of receipt of letter failing which it was indicated that legal action shall be initiated as per lease deed. In spite of clear indication in the said notices that legal action shall be initiated on failure to deposit the arrears rent, the Petitioner did not make good the breach complained of. It was in this background, in terms of the lease deed, termination order dated 22.07.2019 was issued stating that the lease deed will stand cancelled within 30 days of receipt of the same – Petitioner has

continued to run the Park and it is an admitted position that even during the pendency of the writ petition no amount towards payment of rent has been paid by the Petitioner. Thus, from May 2017 till the date of hearing spanning over a period of more than 2 years 6 months, no rent has been paid by the Petitioner – In a matter of the present nature, when the impugned action had been taken in terms of the lease deed, I am of the considered opinion that the submission advanced by the Petitioner that the impugned order is vitiated as no opportunity of hearing was afforded to the Petitioner is without any merit.

Mrs. Menuka Devi Bhattarai* v. *State of Sikkim and Another ***1058-E***

Indian Evidence Act, 1872 – Circumstantial Evidence – Principle – In a case of circumstantial evidence, all circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent with the hypothesis of the guilt of the accused, should be conclusive in nature and exclude every other hypothesis except the unerring guilt of the accused. The circumstances must form an unbroken chain of events leading to the proof of the guilt of the accused. Should any of the circumstances not be explained by reasonable hypothesis, the benefit thereof accrues to the accused.

Abdul @ Badrul* v. *State of Sikkim ***969-D***

Indian Evidence Act, 1872 – Confession –By making a statement if the accused does not acknowledge his guilt, it does not tantamount to a confession although some incriminating facts may have been stated – It is now settled law that conviction of an accused can be based on confession only if the confession so recorded is found to be voluntary and true.

Abdul @ Badrul* v. *State of Sikkim ***969-A***

Indian Evidence Act, 1872 – Previous Bad Character – When Relevant – S. 54 provides that in criminal proceedings the fact that the accused person had a bad character is irrelevant, unless evidence had been given that he has a good character, in which case it becomes relevant. Explanation 2 thereof provides that a previous conviction is relevant as evidence of bad character – No evidence was given that Appellant No.1 had good character. The Trial Court's judgment had also been reversed by this Court – Since Appellant No.1 had been acquitted subsequently, the learned Judge being influenced by it was not correct.

Binod Pradhan and Another* v. *State of Sikkim ***1126-A***

Indian Evidence Act, 1872 – Evidence – Although there is no material to show that there was any grudge or reason for the victim to falsely implicate the Appellants, that alone does not help the prosecution to establish the case beyond all reasonable doubt. When the Court lacks confidence to rely upon the version of the victim alone without any corroboration faced with conflicting medical evidence, it would not be proper to uphold the Appellants conviction – It is settled that even in a case of rape the prosecution is not excused from leading cogent and trustworthy evidence to establish the heinous offence.

Binod Pradhan and Another* v. *State of Sikkim ***1126-B***

Motor Vehicles Act, 1988 – S. 166 – Proof of Negligence – Respondent No.2 had consistently taken this stand before the Tribunal from the time of lodging the F.I.R till her evidence on affidavit. Inspite of such clear assertion neither Respondent No.3 nor the Appellant contested the same. The Appellant as well as Respondent No.3 failed to lead any evidence contrary to the evidence led by Respondent Nos.1 and 2 with regard to rash and negligent driving by Respondent No.3. In fact, even when an opportunity to cross-examine Respondent No.2 was granted to the Appellant and Respondent No.3, they did not even attempt a denial of the assertion made by Respondent No. 2 – The contention raised by Appellant that there was no evidence to prove that the Respondent No.3, i.e.,the driver of the vehicle, had been rash and negligent rejected.

***The Branch Manager, National Insurance Co. Ltd.* v.**
Master Sang Dorjee Tamang and Others ***1117-A***

Protection of Children from Sexual Offences Act, 2012 – Requirement of Consent of a Child – If the woman is below the age of eighteen, consent is immaterial. To constitute rape otherwise, consent is vital. If it is a case falling under the POCSO Act, consent is immaterial – Mere failure to physically resist the sexual act of penetration cannot be regarded as her consenting to sexual activity – The victim has deposed that both of them raped her. She even described that the appellant No. 1 had inserted his penis into her vagina. When the victim says that she was raped by the appellants there is no reason to doubt the same. More so, her deposition is corroborated by forensic evidence. Mere passive submission and the victim's inability to say no in the given situation cannot be termed as victim's consent.

***Raj Kumar Darjee alias Vodafone and Another* v.**
State of Sikkim ***1101-A***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – The defence did not raise any objection when the victim exhibited her birth certificate. A suggestion was made to the Investigating Officer that the birth certificate was not of the victim which was denied – If the defence desired to question the veracity of the information in the birth certificate, they ought to have objected to its exhibition which would have, if taken at the appropriate point of time, enabled the prosecution tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object thus becomes fatal because by the failure of the defence who was entitled to object, allowed the prosecution to tender the evidence and act on an assumption that the defence is not serious about the mode of proof. The victim's statement that she was sixteen was not even questioned during her cross-examination – Learned Special Judge accepting the birth certificate as that of the victim and holding that the victim was a minor at the time of the offence brooks no interference. However, the prosecution ought to have led cogent evidence both documentary and oral to prove the minority of the victim since it is on the basis of this determination that the Court proceeds to examine the case under the POCSO Act.

Raj Kumar Darjee alias Vodafone and Another* v. *State of Sikkim ***1101-B***

Protection of Children from Sexual Offences Act, 2012 – S. 7 – Sexual Assault – Sexual assault includes touching of the private parts and the breasts of a child with sexual intent and involves physical contact without penetration – Since the Appellant touched the breasts of the victim no other conclusion can be drawn from the act except that it was with sexual intent.

Lok Prasad Limboo @ Lokay* v. *State of Sikkim ***1047-A***

Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 9 (ii) – Inquiry – Special Procedure in Certain Cases – Disciplinary proceeding was initiated under Rule 7 of the Rules by a Memorandum dated 08.01.2009 and the Inquiry Authority had submitted a Report dated 11.04.2011 to the Disciplinary Authority, holding the charges to be proved. However, the Disciplinary Authority, on consideration of materials on record, noticing that due and fair opportunity was not afforded to the writ petitioner, had remanded the matter back to the Inquiry Authority to conduct the inquiry in accordance with law after fully complying with principles of natural justice. The petitioner was, at the relevant time, lodged in Namchi Jail and, therefore, an application was filed before the learned Sessions Judge, South

& West at Namchi, who was holding trial, to permit the authorities to hold departmental enquiry at District Jail premises at Namchi. However, the learned trial Court, by an order dated 30.08.2011, had rejected the said petition. It was in that circumstance, the Disciplinary Authority being satisfied that it is not reasonably practicable to hold an enquiry in the manner as provided under the Rules and opining that retention of the petitioner in police service was detrimental to the morale and over all image of Sikkim Police Force, had issued the order of dismissal dated 19.11.2011.12 – The order of dismissal was not passed by following the procedure laid down under Rule 7, but was passed by taking recourse to Rule 9(ii) of the Rules – The contention with regard to violation of principle of natural justice in the course of the inquiry proceeding is misconceived. True, an Inquiry report was submitted by the Inquiry Officer but the Disciplinary Authority itself had not acted upon such Inquiry Report in view of violation of principles of natural justice during the Inquiry.

Shri Kharga Bahadur Pradhan* v. *State of Sikkim and Others ***990-A***

Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 9(ii) – Inquiry – Special Procedure in Certain Cases – No specific challenge was mounted with regard to the order of dismissal dated 19.11.2011 on the touchstone of exercise of power under Rule 9(ii) of the Rules. There is no challenge on the ground that the satisfaction derived by the Disciplinary Authority cannot receive judicial imprimatur or that the same has been passed *mala fide* or in extraneous or irrelevant consideration. The thrust in the writ petition as well as the rejoinder affidavit is that since the Petitioner had been honourably acquitted by this Court of the charge under S. 302 of the I.P.C and the order of dismissal has a relation to the criminal case against the Petitioner, the order of dismissal, because of turn of events, cannot be sustained in law – Rule 9 (ii) of the Rules is some what similar to Article 311 (2)(b) of the Constitution. Article 311(2) provides that no person as specified in Article 311(1) shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Proviso to Article 311(2) states that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. Article 311(2)(b) provides that Article 311(2) shall not apply where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason,

to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. Article 311(2)(a), (b) and (c) are exceptions to the general rule of holding an inquiry as Article 311(2) is not made applicable to Article 311(2)(a), (b) and (c).

Shri Kharga Bahadur Pradhan* v. *State of Sikkim and Others ***990-B***

SLR (2019) SIKKIM 957
(Before Hon'ble the Chief Justice)

Crl. M.C. No. 08 of 2019

Shri Krishna Lall Timsina ….. PETITIONER

Versus

Kanu Priya Rai and Another ….. RESPONDENTS

For the Petitioner: Mr. Simeon Subba, Advocate.

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

For Respondent No.2: Ms. Pollin Rai, Assistant Government Advocate.

With

Crl. M.C. No. 11 of 2019

Dr. Kanu Priya Rai ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Jorgay Namkha, Advocate.
For Respondent No.1: Ms. Pollin Rai, Assistant Government Advocate.
For Respondent No.2: Mr. Simeon Subba, Advocate.
For Respondent 3-5: Mr. Mahendra Thapa and Mr. Durga Prasad Luitel, Advocates.

Date of order: 2nd December 2019

A. Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power by the High Court – In the F.I.R filed by Respondent

No.1 in Crl. M.C. No. 08 of 2019, it is stated that while a training programme was going on, the Petitioner suddenly barged into the training hall and hurled abuses at her and there was a possibility of the Petitioner hitting her. In the complaint filed by the Petitioner in Crl. M.C. No. 08 of 2019, it is stated that he was not aware that any meeting was going on and he had only entered the hall to request Respondent No.1, a Doctor to attend to a patient, namely, Poonam Limboo, who was his daughter's classmate and whose condition was critical – Having regard to the facts and circumstances of the case, I am of the considered opinion that the allegations being not heinous and serious and as the parties have amicably resolved their differences, it would be unfair and contrary to the interest of justice to continue with the criminal proceeding.

(Paras 15 and 16)

Case cited:

1. Gian Singh v. State of Punjab and Another, (2012) 10 SCC 303.

Both petitions allowed.

ORDER

Arup Kumar Goswami, CJ

Heard Mr. Simeon Subba, learned counsel appearing for the petitioner in Crl. M.C. No. 08 of 2019 and for respondent no.2 in Crl. M.C. No. 11 of 2018. Also heard Mr. Jorgay Namka, learned counsel for respondent no.1 in Crl. M.C. No. 08 of 2019 and petitioner in Crl.M.C. No.11 of 2018. Ms. Pollin Rai, learned Assistant Public Prosecutor, Sikkim for respondent no.2 in Crl. M.C. No. 08 of 2019 and for respondent no.1 in Crl. M.C. Case No.11 of 2019 is also heard along with Mr. Mahendra Thapa as well Mr. Durga Pd. Luitel, learned counsel for respondent nos. 3 and 5 in Crl. M.C. No. 11 of 2018.

2. In Crl. M.C. No. 08 of 2019, which is registered on an application under Section 482 of the Code of Criminal Procedure, 1973, for short, 'Cr. P.C.', the petitioner prays for quashing of G.R. Case No.105/2018 (*State of Sikkim vs. Krishna Lall Timsina*) pending in the Court of learned Judicial Magistrate, Yangang Sub-Division, South Sikkim.

3. On the basis of a complaint filed by respondent no.1 in Crl. M.C. No. 08 of 2019, Ravangla Police Station Case No. 16 of 2017 was registered under Section 509/186/353 IPC and subsequently, G.R. Case No. 105/2018 was registered. On completion of investigation, Charge-sheet under Sections 353/186/290/509/506/500 IPC was laid against the petitioner in Crl. M.C. No. 08 of 2019.

4. Learned trial Court, by an order dated 11.02.2019, framed charges, as indicated in the Charge-sheet, and the said order was challenged by the petitioner in Crl. M.C. No. 08 of 2019 by filing a revision application, registered as Criminal Revision Case No.01 of 2019, before the learned Sessions Judge at Namchi, South Sikkim.

5. Learned Sessions Judge, by an order dated 12.06.2019, held that there was no material to frame charge under Section 506 IPC, and with that modification the petition was disposed of.

6. The petitioner in Crl. M.C. No. 08 of 2019 had also filed a complaint before the Yangang Out Post, which was subsequently registered as Private Complaint Case No. 13 of 2018, against respondent no.1, which is now pending before the Court of Judicial Magistrate, South Sikkim at Namchi.

7. Against the orders dated 11.05.2018 and 28.05.2018, whereby summons was issued to respondent no. 1 in Crl. M.C. No. 08 of 2019, she had filed a revision application, registered as Criminal Revision Case No. 01 of 2018, before the learned Sessions Judge at Namchi and by an order dated 24.10.2018, the revision was dismissed.

8. Respondent no.1 in Crl. M.C. No. 08 of 2019 had assailed the said order by filing an application under Section 482 Cr. P.C., which is registered as Crl. M.C. No. 11 of 2018. By filing IA No. 01 of 2019, respondent no.1 in Crl. M.C. No. 08 of 2019, who is the petitioner in Crl. M.C. No. 11 of 2018, prays for withdrawal of Crl. M.C. No. 11 of 2018.

9. As agreed upon, both Crl. M.C. No. 11 of 2018 and Crl. M.C. No. 08 of 2019 are heard together and are being disposed of by this order.

10. Mr. Subba submits that the petitioner and respondent no.1 in Crl. M.C. No. 08 of 2019 have resolved their differences and a Deed of Compromise dated 04.11.2019 (Annexure-P6) was also entered into by and between them and in the said Deed of compromise, it was recorded that the petitioner will withdraw the Private Complaint Case No. 13 of 2018 and that respondent no.1 will not object to the application to be filed by the present petitioner under Section 482 Cr. P.C.. It is submitted by Mr. Subba that when the parties have resolved their differences, it will be in the interest of justice that G.R. Case No. 105 of 2018 is quashed.

11. Mr. Namka submits that IA No. 01 of 2019 was filed in Crl. M.C. No. 11 of 2018 for permitting the petitioner therein to withdraw the aforesaid Crl. M.C. No. 11 of 2018 so that the petitioner in Crl. M.C. No. 08 of 2019 can take appropriate step to withdraw the Private Complaint Case No. 13 of 2018 pending before the Court of Judicial Magistrate, Yangang Sub – Division, South Sikkim. He further submits that as both the parties have resolved the disputes between them, it would be appropriate that G.R. Case No. 105 of 2018 is given a quietus.

12. Ms. Pollin Rai, learned Assistant Public Prosecutor, Sikkim endorses the submission of Mr. Subba and Mr. Namka.

13. It is seen that the petitioner in Crl. M.C. No. 08 of 2019 is facing trial under Sections 353/186/290/500/509 IPC. Offences under Sections 353/186/290 IPC are non-compoundable offences.

14. In ***Gian Singh vs. State of Punjab and another***, reported in ***(2012) 10 SCC 303***, which is referred to by both Mr. Subba and Mr. Namka, the Hon'ble Supreme Court had laid down that it will be permissible for the High Court to quash a criminal proceeding although the offences are not compoundable, if the High Court is of the opinion that continuation of the criminal proceeding will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored, thereby, securing the ends of justice. Hon'ble Supreme Court, however, sounded a note of caution that before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc., as also offences under special statutes like

the Prevention of Corruption Act, 1988 or the offences committed by public servants while working in that capacity cannot be quashed even if the parties have entered into any settlement.

15. In the FIR filed by the respondent no.1 in Crl. M.C. No. 08 of 2019, it is stated that while a training programme was going on, the petitioner suddenly barged into the training hall and hurled abuses at her and there was a possibility of the petitioner hitting her. In the complaint filed by the petitioner in Crl. M.C. No. 08 of 2019, it is stated that he was not aware that any meeting was going on and he had only entered the hall to request the respondent no.1, a doctor, to attend to a patient, namely, Poonam Limboo, who was his daughter's classmate and whose condition was critical.

16. Having regard to the facts and circumstances of the case, I am of the considered opinion that the allegations being not heinous and serious and as the parties have amicably resolved their differences it would be unfair and contrary to the interest of justice to continue with the criminal proceeding.

17. Taking that view, criminal proceeding in G.R. Case No. 105 of 2018, presently pending in the Court of Judicial Magistrate, Yangang is quashed. Crl. M.C. No. 08 of 2019 is, accordingly, disposed of.

18. On the prayer of Mr. Namka, Crl. M.C. No. 11 of 2018 is also disposed of on withdrawal. IA No. 01 of 2019 also stands disposed of. 19. At this stage, Mr. Subba submits that the petitioner in Crl. M.C. No. 08 of 2019 will take immediate steps for withdrawal of Private Complaint Case No. 13 of 2018 as steps could not be taken earlier in that regard in view of pendency of Crl. M.C. No. 11 of 2018 before this Court.

SLR (2019) SIKKIM 962

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

WP (C) No. 52 of 2018

Md. Nasiruddin Ansari ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista, Advocate.

For Respondent 1 & 4: Mr. S. K. Chettri, Assistant Govt. Advocate.

For Respondent 2 & 3: Mr. A. K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha.

Date of decision: 4th December 2019

A. Constitution of India – Article 226 – Annexure-R/10 makes it clear that the Petitioner was considered for the post of "Attendant" which is a reserved post on or before 09.11.2015 and he was appointed as "Attendant" w.e.f. 10.08.2015. Annexure-R/10 dated 09.11.2015 is subsequent to the offer letter dated 01.06.2015. Neither in the counter-affidavit nor at the hearing before this Court has the Respondent No. 2 and 3 been able to explain to this Court as to whether the post of "Junior Attendant" is a reserved post – However, the appointment letter states that the Petitioner has been appointed as "Junior Attendant (W0)". There is no document filed either by the Petitioner or by Respondent No. 2 and 3 to show whether the post of "Junior Attendant" is a reserved post and whether the salary structure for "Junior Attendant" and "Attendant" are the same. Nevertheless, in view of Annexure-R/10 it is clear that the intention of Respondent No. 2 and 3 was to appoint him as an "Attendant" – Justice would be served if Respondent No. 2 and 3 are directed to issue an appointment letter to the Petitioner appointing him in the post of "Attendant"

in terms of their decision as reflected in Annexure-R/10 dated 09.11.2015 w.e.f. 10.08.2015 – Accordingly so directed – Petitioner shall be entitled to all benefits, financial and otherwise, that may accrued to him considering his appointment from 10.08.2015 to the post of "Attendant".

(Paras 8, 9 and 10)

Petition allowed.

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, CJ

1. The question that falls for consideration before this Court in the present Writ Petition is short. However, the process of dispensation of justice to the satisfaction of the petitioner has taken a remarkably long time. The petitioner suffered an accident in the year 1993 while working in the premises of respondent nos. 2 and 3. His left arm had to be amputated and he was permanently disabled. On 26.03.2008 the Court of the Chief Commissioner for Persons with Disabilities rejected the complaint filed by the petitioner as he was found not to have been in the direct employment of respondent nos. 2 and 3. However, keeping in view the fact that the petitioner had acquired disability while in employment of the contractor, who was working for the respondent nos. 2 and 3, the respondent nos.2 and 3 were advised to consider the petitioner and give him preference while making recruitment against *"reserved vacancies"* in future. In the second round of litigation, which was before this Court, in Writ Petition (C) No.15 of 2008, the petitioner lost and his writ petition was dismissed. However, in view of the permanent disability of the petitioner and considering his poor economic condition, the respondent nos. 2 and 3 were asked to consider the petitioner for appointment against any *"reserved vacancies."* When the petitioner was not so considered by the respondent nos. 2 and 3, the third round of litigation started. In Writ Petition (C) No. 09 of 2014 preferred by the petitioner a judgment dated 02.03.2015 (for short 'the judgment') was passed by this Court. The following directions in paragraph 6 of the judgment are relevant:

> ***"6.*** *For the reasons stated above, it is deemed appropriate in the interest of justice to direct the Respondents No.2 and 3 as follows:-*

(i) To comply with the directions contained in paragraph 13 of ***Justice Sunanda Bhandare Foundation*** *vs.* ***Union of India and Others*** *: AIR 2014 SC 2869 and implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Respondents-NHPC shall ensure that reservation under Section 33 of the Act of 1995 is made in terms of the identification of the posts indicated in Annexure 'G' filed with the application dated 26-02-2015, is made within a period of 60 (sixty) days from the date of this judgment;*

(ii) After such reservation, within 30 (thirty) days and not later than that, the case of the Petitioner shall be considered in light of the observation made by the Division Bench of this Court in its judgment dated 27-08-2009 in WP(C) No.15 of 2008 reproduced in sub-paragraph (iv) of Paragraph 5 above and also the written assurance given to the Petitioner by the Respondent No.2 way back in the year 1999 and 2010, Annexure P-2 (collectively).

(iii) In the meanwhile, the Respondents No.2 and 3 shall consider as to whether the Petitioner can be appointed in any one of the vacancies arising up to the month of February, 2015, in keeping with the commitment expressed by the Respondents No.2 and 3 in paragraph 21 of the counter-affidavit by considering the circumstance as very rare and unavoidable having regard to the observations made by the Division Bench of this Court in WP(C)

*No.15 of 2008 and the assurances of the Respondents-NHPC referred to above.***"**

2. It is an admitted fact that the judgment of this Court was not assailed by the respondent nos.2 and 3. The judgment therefore has attained finality. This was in the year 2015.

3. In the year 2018 the petitioner is back before this Court. The petitioner complains about non-adherence of the judgment of this Court by the respondent nos. 2 and 3.

4. The pleadings in the writ petition and the counter-affidavit shows that pursuant to the judgment the petitioner was issued a letter by the respondent nos. 2 and 3 dated 01.06.2015 stating that they were offering him appointment as a *"Junior Attendant"* in the scale of pay of Rs.8700-3%-20000 (IDA), (WO) in the company. The terms and conditions of the appointment were also spelled out. It transpires that on 28.07.2015 the petitioner issued a legal notice to the respondent nos. 2 and 3. The petitioner was aggrieved by the fact that although respondent nos.2 and 3 had made an offer to him for the post of *"Junior Attendant"* which was accepted by him and that he had also submitted the required documents he had not yet been allowed to join. However, he was made to continue doing work and no appointment order had been issued to him. The legal notice was replied to by the respondent nos. 2 and 3 on 27.08.2015 in which the respondent nos. 2 and 3 disputed the allegation made by the petitioner. On 04.09.2017 the petitioner wrote to the respondent nos. 2 and 3 in which he asserted that this Court had directed them to consider his case for appointment to the post of electrician (Workman-4) as he was working as an electrician before the accident. The respondent nos. 2 and 3 responded to this letter dated 04.09.2017 on 21.02.2017 alleging misconduct against the petitioner. The petitioner replied reiterating his assertions but offering his apology for not processing the letter through proper channel. Another reminder dated 12.12.2017 was sent thereafter by the petitioner. It is the case of the petitioner that he was considered for training as an electrician vide Circular dated 23.01.2018 which was subsequently modified and his name deleted by the respondent nos. 2 and 3 from the training programme. Ultimately, on 14.03.2018 the petitioner issued a legal notice seeking consideration of his case from W0 to W4. The respondent nos. 2 and 3

responded to the legal notice and asserted that the petitioner was appointed as *"Junior Attendant"* pursuant to the judgment passed by this Court. The respondent nos. 2 and 3 further asserted that the petitioner could not be considered for training as an electrician due to his 85% disability. As the petitioner was not satisfied the present writ petition was filed.

5. The petitioner has prayed that a direction be issued to the respondent nos. 2 and 3 to comply with the judgment and for his appointment to the post of electrician at W-4 grade with all monetary benefits.

6. Pursuant to the order dated 04.11.2019 passed by this Court the respondent nos. 2 and 3 have filed compliance affidavit dated 21.11.2019 with various documents. Annexure R/8 (Colly) has a document titled *"post identified to be reserved for the persons with disabilities in Group D"*. Serial No. 104 reflects the post of *"Attendant"*. As per the learned Senior Counsel for the respondent nos.2 and 3 it is a reserved post for which the petitioner was considered. The respondent nos. 2 and 3 has also filed another document titled *"identification of post in Group A, B, C & D for reservations of posts for physically handicapped persons"* as Annexure R/8 (collectively). The present case relates to Group D. Under the category *"Group C & D"* at serial No. 20 is the post of *"Attendant"*. Both the said documents have abbreviations under the head categories of disabled. The learned Senor Counsel for the respondent nos. 2 and 3 clarify that the abbreviation *"OA"* is short for *"one arm affected"*. Admittedly, due to the accident the petitioner has lost one of his arms and therefore it is quite evident that he could be considered for this post of *"Attendant"*. Sanction order No. PIE/40/2011 dated 31.03.2011 also shows that under the unskilled category *"Attendant"* is a sanctioned post.

7. This Court had by the judgment directed that the petitioner should be considered against any of the *"reserved vacancies"* after reservation in terms of Section 33 of the Persons with Disabilities (Equal Opportunities/ Protection of Rights and Full Participation) Act, 1995. The post of *"Attendant"* is definitely a reserved post. Although the petitioner has prayed for his appointment as an electrician the learned Senior Counsel for the petitioner concedes that because of his disability he would not be able to perform a job of an electrician. The issue therefore, is limited. This Court had directed the respondent nos. 2 and 3 to consider the petitioner for a

"reserved vacancies". The respondent nos. 2 and 3 had offered him a job of *"Junior Attendant"* vide letter dated 01.06.2015. It is the persistent stand of the respondent nos. 2 and 3 that the judgment has been complied with and therefore the petitioner was offered the post of *"Junior Attendant"* which he accepted without any demur. In the affidavit dated 21.11.2019 filed by the respondent nos. 2 and 3 it is stated. *"Hence, in compliance of the direction of this Honble Court in Writ Petition (Civil) No. 09/2014, after considering the total strength of Group-D-Unskilled Posts, one post has been earmarked in "Attendant" category as per Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, being an office based job, in the reservation roster, as there was no representation of PWD personnel in Roster Point. Accordingly, one post (Sl. No.6) was earmarked for reservation for persons with Disabilities (PWD) under the Act of 1995 ibid."* Copy of the reservation roster was annexed and marked at Annexure-R/10. This is an important document. This document reflects that pursuant to the judgment passed by this Court on 02.03.2015 the respondent considered the petitioner's case for appointment in the reserved category for the reserved post. The details are ais under:

"RESERVATION ROSTER FOR PERSON WITH DISABILITIES.

Name of the Organisation : RANGIT POWER STATION, NHPC LTD.

Name of the Post : GROUP D

Method of Recruitment : DIRECT

Number of Posts in Cadre : 20

Percentage of Reservation prescribed : VH-1%, HH-1%, OH-1%

Year of Recruitment	Cycle No. and Point No.	Name of post	Whether identified for person with Disabilities suffering from			Unreserved or Reserved	Name of the person appointed and date of appointment	Whether the person appointment is VH/HH/OH or None	Remarks, if any.
			VH	HH	OH				
1	2	3	4	5	6	7	8	9	10
.....	.....	.....				.....	.....	.....	.....
2015	6	ATTENDENT				UR	MD NASIRUDDIN ANSARI (10.08.2015)	OH	

8. Annexure-R/10 therefore, makes it clear that the petitioner was considered for the post of *"Attendant"* which is a reserved post on or before 09.11.2015 and he was appointed as *"Attendant"* w.e.f. 10.08.2015. Annexure-R/10 dated 09.11.2015 is subsequent to the offer letter dated 01.06.2015. Neither in the counter-affidavit nor at the hearing before this Court has the respondent nos. 2 and 3 been able to explain to this Court as to whether the post of *"Junior Attendant"* is a reserved post. The learned Senior Counsel for the respondent nos. 2 and 3 submits that the entry level post of an unskilled worker appointed with the respondent is the *"W0"* level and the rest are promotional posts. As he climbs, the ladder by way of promotion his grade would increase from *"W0"* to *"W5"*. The learned Counsel also referred to the recruitment rules of the respondent nos. 2 and 3 filed along with the affidavit of compliance dated 21.11.2019. Rule 5 deals with method and principles of recruitment. Rule 5.1 deals with level of recruitment. It states that *"recruitment shall generally be made to the lowest of the Grades in each cadre/Group, as indicated below, but can also be made in the higher grades, wherever considered necessary by the company."* The said rule also clarifies that in the non-supervisory category the unskilled grade is *"W-0"* and skilled/ministerial is *"W-4"*.

9. However, the appointment letter states that the petitioner has been appointed as *"Junior Attendant (W0)"*. There is no document filed either by the petitioner or by the respondent nos.2 and 3 to show whether the post of *"Junior Attendant"* is a reserved post and whether the salary structure for *"Junior Attendant"* and *"Attendant"* are the same. Nevertheless, in view of Annexure-R10 it is clear that the intention of the respondent nos. 2 and 3 was to appoint him as an *"Attendant"*.

10. In the facts and circumstances of this case, this Court is of the view that justice would be served if the respondent nos. 2 and 3 are directed to issue an appointment letter to the petitioner appointing him in the post of *"Attendant"* in terms of their decision as reflected in Annexure-R/10 dated 09.11.2015 w.e.f. 10.08.2015. It is accordingly so directed. Needless to say, the petitioner shall be entitled to all benefits, financial and otherwise, that may accrue to him considering his appointment from 10.08.2015 to the post of *"Attendant"*.

11. Nothing further survives in the writ petition and the same is disposed of in terms of the directions above. In the circumstances parties to bear their own cost.

SLR (2019) SIKKIM 969

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

Crl. A. No. 23 of 2017

Abdul @ Badrul ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Ajay Rathi and Ms. Phurba Diki Sherpa, Advocates.

For the Respondent: Mr. Vivek Kohli, Advocate General with Mr. Thupden Youngda, Additional Public Prosecutor and Mr. S.K. Chettri, Assistant Public Prosecutor.

With

Crl. A. No. 24 of 2017

Prem Kumar Tiwari and Others ….. APPELLANTS

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate with Ms. Sudha Sewa, Advocate.

For the Respondent: Mr. Vivek Kohli, Advocate General with Mr. Thupden Youngda, Additional Public Prosecutor and Mr. S.K. Chettri, Assistant Public Prosecutor.

Date of decision: 4th December, 2019

A. Indian Evidence Act, 1872 – Confession –By making a statement if the accused does not acknowledge his guilt, it does not tantamount to a confession although some incriminating facts may have been stated – It is now settled law that conviction of an accused can be based on confession only if the confession so recorded is found to be voluntary and true.

(Para 12)

B. Code of Criminal Procedure, 1973 – S. 164 – Administration of Oath while Recording of Confession of Accused – Effect – A1 was arrested on 23.02.2014 and remanded to police custody on 27.02.2014. He was produced before the Learned Magistrate on 10.03.2014 for the purpose of recording a confession. The Learned Magistrate explained to him that he was not in Police custody and enquired from him as to whether he was induced, coerced, promised or advised by the Police to make a statement to which his reply was in the negative. The Learned Magistrate also enquired whether the confession was prompted by any harsh treatment by anyone to which he again replied in the negative. These questions reveal that all necessary precautions were taken indeed by the Magistrate, however the statement of A1 was recorded without affording him time for reflection and as the form reveals she administered oath to A1 which is specifically barred by law.

(Para 13)

C. Code of Criminal Procedure, 1973 – S. 164 – Administration of Oath while Recording of Confession of Accused – Effect – The statement was taken after administering oath to A1 as reflected in the document, thereby leading to an insinuation that the statement was recorded under coercion – It was self-exculpatory and he has stated nothing about his role in the murder of the deceased but has specifically asserted that he is innocent and has been falsely implicated thereby denuding the statement of the nature of confession. The whole burden of establishing the case lies on the Prosecution. Where the Prosecution relies upon the confessional statement of the accused in proof of the charge strict compliance with the provisions of S. 164 of the Cr.P.C. is essential. The administering of oath itself would make a confessional statement totally inadmissible in evidence in view of the mandatory provisions of Article 20(3) of the Constitution and S.

281 of the Cr.P.C. It would be apposite to bear in mind that A1 in his S. 313 Cr.P.C. statement has retracted his purported confession – As a matter of caution the Courts require corroboration to a retracted confession, although not a rigid rule of law, procedure or practice and the amount of corroboration necessary would be a question of fact to be determined in the light of the circumstances of each case.

(Para 14)

D. Indian Evidence Act, 1872 – Circumstantial Evidence – Principle – In a case of circumstantial evidence, all circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent with the hypothesis of the guilt of the accused, should be conclusive in nature and exclude every other hypothesis except the unerring guilt of the accused. The circumstances must form an unbroken chain of events leading to the proof of the guilt of the accused. Should any of the circumstances not be explained by reasonable hypothesis, the benefit thereof accrues to the accused.

(Para 15)

Appeal allowed.

Chronology of cases cited:

1. Suren Rai v. State of Sikkim, SLR (2018) Sikkim 108.
2. Nathu v. The State of Uttar Pradesh, AIR 1956 SC 56.
3. Haricharan Kurmi v. State of Bihar, AIR 1964 SC 1184.
4. Aghnoo Nagesia v. State of Bihar, AIR 1966 SC 119.
5. Damber Bahadur Chhetri v. State of Sikkim, 2010 Cri.L.J. 3076 (Sikkim).
6. Raj Kumar Singh *alias* Raju *alias* Batya v. State of Rajasthan, (2013) 5 SCC 722.
7. Hanumant v. State of Madhya Pradesh, AIR 1952 SC 343.
8. K. Venkateshwarlu v. State of Andhra Pradesh, (2012) 8 SCC 73.
9. Champa Rani Mondal v. State of W.B., (2000) 10 SCC 608.

10. Lokeman Shah and Another v. State of W.B., AIR 2001 SC 1760.

11. Pakala Narayana Swami v. The King-Emperor, AIR 1939 PC 47.

12. Palvinder Kaur v. State of Punjab, AIR 1952 SC 354.

13. Central Bureau of Investigation v. V.C. Shukla and Others, AIR 1998 SC 1406.

14. Ranjit Kumar Haldar v. State of Sikkim, (2019) 7 SCC 684.

15. M. Nageshwar Rao v. State of Andhra Pradesh, (2011) 2 SCC 188.

JUDGMENT

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

1. This common Judgment disposes of both Appeals which impugn the Judgment, dated 21.07.2017, being Sessions Trial Case No.09 of 2015 of the Court of the Sessions Judge, West Sikkim, at Gyalshing. In Criminal Appeal No.24 of 2017, the Appellants No.1, 2, 3 and 4 were the accused persons No.2, 3, 4 and 5 respectively before the learned trial Court, (hereinafter referred to as "A2," "A3," "A4," and "A5"). In Criminal Appeal No.23 of 2017 the Appellant was the accused No.1 before the learned trial Court and shall be referred to as "A1" herein.

2. Relying upon the alleged confessional statement of A1 being Exhibit 30 and circumstantial evidence, the Learned trial Court found A1, A2, A3 and A4 guilty of the offence under Section 302 and Section 120B of the Indian Penal Code, 1860 (for short, "IPC") both read with Section 34 IPC. A5 was found guilty of the offence under Section 201 IPC. A1 to A4 were convicted and sentenced to suffer imprisonment for life under Section 302 IPC and to pay fine of Rs.50,000/- (Rupees fifty thousand) only, each. Under Section 120B IPC, A1 to A4 were sentenced to undergo life imprisonment and to pay fine of Rs.50,000/- (Rupees fifty thousand) only, each. The sentences of imprisonment were ordered to run concurrently. A5 was sentenced to undergo rigorous imprisonment under Section 201 IPC for a term of four years and to pay fine of Rs.50,000/-, (Rupees fifty thousand) only, with a default clause of imprisonment.

3. Assailing this finding, in Criminal Appeal No.24 of 2017, learned Senior Counsel for A2 to A5 advanced the argument that their conviction is

based entirely on the purported confessional statement of A1 a co-accused, under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."), Exhibit 30. However, this statement is in the first instance inadmissible in evidence as A1 was administered oath prior to the recording of his statement. Towards this end, reliance was placed on ***Suren Rai v. State of Sikkim***[1]. That, assuming that the statement of A1 is admissible, it cannot be relied on to convict another accused, the statement having been made by an accused himself. In this context, the observation in ***Nathu v. The State of Uttar Pradesh***[2] and ***Haricharan Kurmi v. State of Bihar***[3] was pressed into service where it was held *inter alia* that the confession of a co-accused cannot be treated as substantive evidence. A1, in his statement has unequivocally stated that he is innocent, thereby decimating the value of the purported confessional statement. That, the impugned Judgment however erroneously held that the statement of A1 was a confession which is an incorrect finding and the Prosecution cannot rely on the statement to foist the offence on the Appellants. Besides, the learned Magistrate who recorded Exhibit 30, ought to have recorded it only as a statement, in view of its exculpatory nature. That, A1 had asserted that the statement was tutored thereby exposing its falsity and rendering it inconsequential to the Prosecution case, strength on this count was drawn from ***Aghnoo Nagesia v. State of Bihar***[4]. That, no other evidence collated by the Prosecution establishes the guilt of A2 to A5 in the offence. That, by mustering the call records of A1 and the deceased Rekha Tiwari, an attempt was made by the Investigating Officer (for short, "I.O.") to establish that A1 being familiar with the deceased had called her on her cell phone thereby enabling and facilitating the Appellants to commit the alleged offence, as she heeded to his request and came out of her house. Towards this end, the Prosecution relied on Exhibit 44 wherein the exact tower location of A1 and the deceased were sought to be verified from the mobile number of the I.O., which in itself is a preposterous proposition besides failing to establish *mens rea*. That, A1 in Exhibit 30, had stated that A4 had used a '*khukuri'* (a sharp edged weapon) to slit the throat of the deceased. This statement stands belied by Exhibit 27, the Post-Mortem Report, prepared by P.W.40, Dr. O.T. Lepcha, who detected no such injury as evident from its absence in Exhibit 27, raising doubts on the veracity of Exhibit 30. That, the

[1] SLR (2018) Sikkim 108
[2] AIR 1956 SC 56
[3] AIR 1964 SC 1184
[4] AIR 1966 SC 119

categorical statement of P.W.1 the daughter of A2 and the deceased, under cross-examination is that her parents shared cordial relations and A2 loved the deceased. On the face of such evidence the Prosecution has failed to assign any motive to A2 to commit the heinous offence. That, the evidence of P.W.2 reveals that the victim was epileptic and prone to seizures hence her falling down the stairs and to her death on account of such a seizure cannot be ruled out. The attention of this Court was drawn to Exhibit 10, the Crime Scene Reconstruction Memorandum and it was contended that the document was inadmissible in evidence in terms of the provisions of Section 25 of the Indian Evidence Act, 1872 (for short, "Evidence Act") having been prepared by the I.O. on the basis of the statement made by A1, allegedly in the presence of witnesses. It was further urged that the Prosecution has relied on Exhibit 22, Diary of the deceased but as per the evidence of the Handwriting Expert, P.W.39, only signatures of the deceased have been proved but not her handwriting. It was next contended that the admitted handwritings of the deceased in the Devanagari script, in the Nepali vernacular, were not forwarded to the Handwriting Expert along with the questioned documents, and thereby remained uncompared. That, A3 had lodged the First Information Report (for short, "FIR"), Exhibit 32, however on account of his arrest in connection with the crime neither the contents nor the signature in Exhibit 32 have been proved, which forthwith crumbles the Prosecution case striking at its very foundation. The Prosecution also sought to augment its case relying on Exhibit 34, the FIR dated 24-04-2012 said to have been lodged by the deceased against one Dilip Chettri, alleging verbal abuse by him. However he is not arrayed as an accused in the instant matter, the document is thus irrelevant as the deceased has not incriminated any of the Appellants in the said document which thereby lends no assistance to the Prosecution case. Exhibit 46 the blood samples of A1 and A3 and some pieces of cloth were forwarded to the Expert for his opinion, who for his part could not arrive at a conclusion. That, uncompared and unproved Exhibits including cash and other articles from the room of A5 cannot support the Prosecution case. In the absence of any evidence linking the offence to A2 to A5 the impugned Judgment of the Learned trial Court is obviously perverse and deserves to be set aside. On this count reliance was placed on ***Damber Bahadur Chhetri v. State of Sikkim***[5] and ***Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan***[6].

[5] 2010 CRI.L.J. 3076 (Sikkim)
[6] (2013) 5 SCC 722

4. Mr. Ajay Rathi, Learned Counsel for A1 in Crl.A. No.23 of 2017, while adopting the arguments canvassed by Learned Senior Counsel for A2 to A5 *supra* would contend that in fact A1 had no role in the alleged incident neither did he aid or abet the alleged offence. It is the clear and categorical statement of A1 in his examination under Section 313 Cr.P.C. that the purported confessional statement under Section 164 Cr.P.C. was made under threat, duress and coercion apart from oath having been administered to him and cannot be rendered as evidence. He sought assistance from the ratio in ***Suren Rai*** *(supra).* That, no evidence emanates against A1 in connection with the incident and the Prosecution case rests entirely on circumstantial evidence which however is disjuncted and does not establish the guilt of A1. He relied on ***Hanumant v. State of Madhya Pradesh***[7] and ***K. Venkateshwarlu v. State of Andhra Pradesh***[8]. A1 in his alleged confessional statement did not inculpate himself, hence the statement being exculpatory is inadmissible in evidence. On this count, reliance was placed on ***Champa Rani Mondal v. State of W.B.***[9] Besides, A1 did not abscond at any stage of the proceedings nor does he have criminal antecedents. That, the evidence is bereft of links to A1, hence he deserves an acquittal.

5. Learned Advocate General in repudiation of the contentions of learned Counsel for A1 and learned Senior Counsel for A2 to A5, submitted that there is no strength in their submissions that the confessional statement of A1 was recorded after oath was administered as it is evident that the statement was recorded on paper which was previously formatted. Walking this Court through the evidence of the other Prosecution witnesses, he pointed out that before recording the evidence of the Prosecution witnesses the words “oath administered” have been typed to indicate administration of oath to them. These words are conspicuously absent in the document on which the Section 164 Cr.P.C. statement of A1 was recorded, hence, the question of oath having been administered is devoid of any merit. That, this Court is aware of such preformatted forms on which confessional statements are recorded and has taken note of it in ***Suren Rai*** (*supra*). That, the statement of A1 was voluntary and no proof of coercion as alleged exists as can be gauged from the evidence of the Magistrate PW 41, who took necessary precautions before recording Exhibit 30 and

[7] AIR 1952 SC 343
[8] (2012) 8 SCC 73
[9] (2000) 10 SCC 608.

ensured that the statements were voluntary. Exhibit 30 having been recorded on 10.03.2014, eight months after the incident is untutored and made while he was in judicial custody and not police custody. It was canvassed that this statement clearly fell within the parameters of a confession since he has stated that he was present at the scene of the crime, confessed his role in the incident, and clearly elucidated the role of A2 to A5. His confession is admissible and enables the Court to draw an inference of the common object of A1 and A2 to A5. On this aspect reliance was placed on ***Lokeman Shah and Another v. State of W.B.***[10] and ***Aghnoo Nagesia*** *(supra).* That, the circumstantial evidence furnished by the Prosecution is of an unbroken and cogent chain establishing the guilt of A1 to A5. That, A4 the second wife of A2 had gone to the room of the deceased, as per P.W.1, at around 2 a.m. to check on her but found her missing from the room and thereupon telephonically intimated P.W.1. That, the action of A4 defies all logic as no reasons have been put forth as to why she took such a step at that time of the night. Investigation found A4 in possession of bank notes of the ICICI Bank which was in fact money withdrawn by the deceased a few days prior to the incident. That, in the absence of any explanation by A4 as to how she came to be in possession of the bank notes, Section 106 of the Evidence Act kicks into place shifting the onus on A4. The next contention urged was that the investigation had revealed that gold jewellery belonging to the deceased was found to be in the possession of A4 as also her "*Mother Infant Immunization Card*" and Diary, Exhibit 22 and the circumstance remained unexplained by A4. That it was indeed incongruous that none of the occupants of the house heard any untoward sound as evidently the victim was strangulated, although they were all (except A2) present in the house. That, Exhibit 22 also implicates A2 to A4 as it is clear from the details therein that attempts had been earlier made by them on the life of the deceased. Hence, the circumstances as narrated above being cogent and continuous, clearly links the offence to all the Appellants. Consequently, the Appeals lacking merit deserve a dismissal.

6. The rival contentions were heard *in extenso*. The evidence and documents scrutinised carefully. The impugned Judgment was perused and considered as also the citations made at the Bar.

7. The questions that fall for consideration before this Court are;

[10] AIR 2001 SC 1760

(i) Whether the purported confessional statement of A1 can be considered as a confession?

(ii) Whether circumstantial evidence links the offence to the Appellants?

8. Before dealing with the above questions, it is but imperative to delve into the facts of the case for clarity. On 13-07-2013, the FIR Exhibit 31 was lodged by A3 at the Gyalshing P.S. to the effect that on 13-07-2013 in the absence of his brother (A2), his sister-in-law Rekha Tiwari was found dead in one corner of the courtyard of their house, near the Tulsi plant, covered by a bag and a cloth tied around her neck. Her gold jewellery was missing, thus suspecting foul play he had filed the report seeking an enquiry into the matter. Consequent thereto, Gyalshing P.S. Case came to be registered against unknown persons under Sections 392/302 of the IPC, dated 13-07-2013, and endorsed to P.W.42 for investigation. It transpired that the deceased was from Bhutan, had married A2 and from the wedlock they had a son and a daughter, the former however fell victim to a road accident. Following the incident A2 married A4, from whom a son was born. A2 shared his house at Gyalshing with both his wives, his unmarried elder sister A5 and the son of A3. A1 had come to Sikkim about 12-13 years ago and was a tenant in the house of one Pradeep, the brother of A2 in Gyalshing. In the course of his employment in constructions he became acquainted with A2 and his family, including the deceased. The deceased confided to A1 that her husband did not want to give a share in his landed property to their daughter which was evidently a bone of contention between them. Consequently A2 made plans to do away with the deceased and approached A1 for this purpose telling him to call the deceased outside the house to enable his family to settle the matter pertaining to landed property with the deceased 10-15 days prior to the incident. On 12-07-2013, A2 left for Siliguri. In accordance with the plan A1 called the deceased to meet him outside her house at around 12.30 pm on 13-07-2013. Initially she rejected the idea but on his insistence she came out at around midnight and made her way towards A1 who was waiting near the water tank of the house of A2. However, as she stepped into the courtyard towards the water tank A3 suddenly appeared and started strangulating her from behind. On witnessing this, A1 rushed to obstruct A3 but was impeded by A4 who also suddenly appeared from below the staircase and placed a '*khukuri*' on his neck threatening him with dire consequences.

The deceased was strangulated by A3 and her body lain close to the Tulsi plant. Being threatened by A3 with death if he remained in Gyalshing, A1 left the spot for his rented room. The conversation of A1 with the deceased on the intervening night of 12-07-2013 and 13-07-2013, A1 and his location were revealed by call details and route mapping. After commission of the offence A3, A4 and A5 removed the jewellery from the deceased, went to her room and scattered her valuables and cash to make out a scene of robbery. Later, a sum of Rs.2,75,000/- (Rupees two lakhs and seventy five thousand) only, was found in the possession of A5 the source of which she failed to cogently explain leading to the possibility that the money belonged to the deceased. After the crime A5 stayed back in the house, A3 returned to his house while A4 went to the house of her husbands nephew situated at a walking distance of two minutes. A4 then informed Tulshi Chettri P.W.2 that the deceased had disappeared and asked him to fetch A3. Around 4.30 a.m., A5 with the ruse of getting water went towards the water tank and claimed to have discovered the body of the deceased. Meanwhile, A1 was also informed of the incident by his friends, apprehending arrest he absconded to his native place and thereafter to Chandigarh from where he was arrested on 23.02.2014. In view of the facts and circumstances, a *prima facie* case was made out against A1, A2, A3, A4 and A5 under Sections 302/201/392/120B of the IPC and Charge-Sheet submitted accordingly.

9. While dealing with the first question formulated, it would be apposite to examine what "confession" means. The Evidence Act is bereft of the definition of the word "confession." In ***Pakala Narayana Swami v. The King-Emperor***[11], Lord Atkin while discussing the word, at Paragraph 15 of the Judgment, observed as follows;

> "...Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, *e.g.*, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22

[11] AIR 1939 PC 47

> of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author, after dealing with admissions generally, is applying himself to admissions in criminal cases and for this purpose defines confessions so as to cover all such admissions; in order to have a general term for use in the three following articles confession secured by inducement, made upon oath, made under a promise of secrecy. ..."

Consequently, the definition of "confession" as given in Stephen's Digest of the Law of Evidence *supra* was discarded.

10. In ***Palvinder Kaur v. State of Punjab***[12] the Hon'ble Supreme Court dealt with "confession" and "exculpatory statements." The matter pertained to an allegation of murder of the Appellants husband by the Appellant and an accomplice, Mohinderpal, by administering poison. The Appellant made a confessional statement to the Magistrate which was relied on by the Honble High Court to establish the charge against her under Section 201 IPC. The Supreme Court *inter alia* held as follows;

> "**16.** The statement read as a whole is of an exculpatory character. It does not suggest or prove the commission of any offence under the Indian Penal Code by any one. It not only exculpates her from the commission of an offence but also exculpates Mohinderpal. It states that the death of Jaspal was accidental. The statement does not amount to a confession and is thus inadmissible in evidence.
> …"

The Honble Supreme Court further held that the Court accepted the inculpatory part of that statement and rejected the exculpatory. That, the

[12] AIR 1952 SC 354

Court is not competent to accept only the inculpatory part, it must either be accepted in whole or rejected in whole.

11. In ***Aghnoo Nagesia*** *(supra)*, the Hon'ble Supreme Court dealt with "confession" as envisaged under Section 24 to Section 30 of the Evidence Act and Section 162 and Section 164 of the Cr.P.C. and *inter alia* held that *"A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provisions of law."* It was further observed that a statement or confession made in the course of an investigation may be recorded by a Magistrate under Section 164 Cr.P.C. subject to the safeguards imposed by the Section. "Confession" was therefore summarized as follows;

> "**12.** Shortly put, a confession may be defined as an admission of the offence by a person charged with the offence. A statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. If an admission of an accused is to be used against him the whole of it should be tendered in evidence, and if part of the admission is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. See *Hanumant* v. *State of U.P.* [(1952) SCR 1091, 1111] and *Palvinder Kaur* v. *State of Punjab* [(1953) SCR 94, 104]. The accused is entitled to insist that the entire admission including the exculpatory part must be tendered in evidence. But this principle is of no assistance to the accused where no part of his statement is self-exculpatory, and the prosecution intends to use the whole of the statement against the accused.
>
> .....
>
> **15.** Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under Section 304-A of the Indian Penal Code and a statement made

by him to a police officer that "I was drunk; I was driving a car at a speed of 80 miles per hour; I could see A on the road at a distance of 80 yards; I did not blow the horn; 1 made no attempt to stop the car; the car knocked down *A*". No single sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under Section 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement. Again, take a case where a single sentence in a statement amounts to an admission of an offence. '*A*' states "I struck 'B' with a *tangi* and hurt him". In consequence of the injury '*B*' died. '*A*' committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. Each and every admission of an incriminating fact contained in the confessional statement is part of the confession."

12. In ***Central Bureau of Investigation v. V.C. Shukla and Others***[13] it was *inter alia* held as follows;

"**45.** …The distinction between admissions and confessions is of considerable importance for two reasons. Firstly, a statement made by an accused person, if it is an admission, is admissible in evidence under Section 21 of the Evidence Act, unless the statement amounts to a confession and was made to

[13] AIR 1998 SC 1406

> a person in authority in consequence of some improper inducement, threat or promise, or was made to a Police Officer, or was made at a time when the accused was in custody of a Police Officer. If a statement was made by the accused in the circumstances just mentioned its admissibility will depend upon the determination of the question whether it does not amount to a confession. If it amounts to a confession, it will be inadmissible, but if it does not amount to a confession, it will be admissible under Section 21 of the Act as an admission, provided that it suggests an inference as to a fact which is in issue in, or relevant to, the case and was not made to a Police Officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure. Secondly, a statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession. Where the statement falls short of a confession, it is admissible only against its maker as an admission and not against those who are being jointly tried with him. Therefore, from the point of view of Section 30 of the Evidence Act also the distinction between an admission and a confession is of fundamental importance."

Hence, by making a statement if the accused does not acknowledge his guilt, it does not tantamount to a confession although some incriminating facts may have been stated. Besides the above, it is now settled law that conviction of an accused can be based on confession only if the confession so recorded is found to be voluntary and true.

13. On the anvil of the observations made in the citations *supra* we may now examine the statement of A1 recorded purportedly under Section 164 Cr.P.C. by P.W.41 and whether it qualifies as a confession fulfilling the requirements of voluntariness and truthfulness. In the first instance, records reveal that A1 was arrested on 23-02-2014 and remanded to police

custody on 27-02-2014. He was produced before the Learned Magistrate on 10-03-2014 for the purpose of recording Exhibit 30. The Learned Magistrate explained to him that he was not in police custody and enquired from him as to whether he was induced, coerced, promised or advised by the Police to make a statement to which his reply was in the negative. She also enquired whether the confession was prompted by any harsh treatment by anyone to which he again replied in the negative. These questions reveal that all necessary precautions were taken indeed by the Magistrate, however she recorded the statement of A1 without affording him time for reflection and as the form reveals she administered oath to A1 which is specifically barred by law. As per A1 on the directions of A2, *"The same night I called the deceased at around 11:30 pm and asked her to come out at 12:30 am. I had asked the deceased to come out near the tank of their house. At 12:30 am I was waiting for the deceased near the tank. She switched on the light and she saw me. When the deceased was walking down the stairs, Arjun and the second wife were hiding under the stairs. I saw them when the deceased switched on the light. The deceased started walking towards me and had only taken two steps of the stairs, when Arjun used a cloth and put it across her neck and tried to strangulate her from the back. When I saw this I ran towards the deceased to separate Arjun. However, by then the second wife pounced on the deceased and grabbed her hair and slit her throat with a khukuri. The deceased could not make any sound/noise. The dead body of the deceased was made to rest on the wall of the house. Arjun also had a khukuri and he placed that on the back of my head and made me touch the dead body. He threatened to kill me if I told anyone about the incident and that if I did report the matter then I would be implicated in the murder. He asked me to run away from Gyalshing and asked me to go to my home town. I have been falsely implicated in this case. Arjun and Prem Tiwari are also in judicial custody. In the jail they had offered me rupees 2.50 lakhs if I lied and owned up to the murder. I am innocent. Arjun, Prem Tiwari and the second wife have to be punished. …"*

14. Firstly, it may be reiterated that the statement was taken after administering oath to A1 as reflected in the document, thereby leading to an insinuation that the statement was recorded under coercion. Even assuming that this was not the case and as argued by Learned Advocate General that the statement was recorded in a pre-typed format and thereby admissible, it

does not qualify as a confessional statement on the touchstone of the observations in the ratiocinations *supra.* It was self-exculpatory and he has stated nothing about his role in the murder of the deceased but has specifically asserted that he is innocent and has been falsely implicated thereby denuding the statement of the nature of confession. The whole burden of establishing the case lies on the Prosecution. Where the Prosecution relies upon the confessional statement of the accused in proof of the charge strict compliance with the provisions of Section 164 of the Cr.P.C. is essential. The administering of oath itself would make a confessional statement totally inadmissible in evidence in view of the mandatory provisions of Article 20(3) of the Constitution and Section 281 of the Cr.P.C. It would be apposite to bear in mind that A1 in his Section 313 Cr.P.C. Statement has retracted his purported confession. As a matter of caution the Courts require corroboration to a retracted confession, although not a rigid rule of law, procedure or practice and the amount of corroboration necessary would be a question of fact to be determined in the light of the circumstances of each case. In view of the above discussions Exhibit 30 deserves to be and is discarded as evidence. The finding of the Learned trial Court that it was a confessional statement is in our considered opinion, fallacious.

15. Addressing the second question formulated *supra*. The prosecution examined 45 witnesses. As we carefully walk through the evidence of the witnesses, P.W.3 to P.W.6, P.W.8 to P.W.16, P.W.18 to P.W.26, P.W.30 to P.W.32, P.W.34 and P.W.36 it is apparent that the evidence is devoid of any assistance to the Prosecution case. From the remaining 18 witnesses, it is to be examined whether the offence can be linked to the Appellants. At this juncture, it would do well to observe that in a case of circumstantial evidence, all circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. All the facts so established should be consistent with the hypothesis of the guilt of the accused, should be conclusive in nature and exclude every other hypothesis except the unerring guilt of the accused. The circumstances must form an unbroken chain of events leading to the proof of the guilt of the accused. Should any of the circumstances not be explained by reasonable hypothesis, the benefit thereof accrues to the accused.

16. P.W.1, the daughter of the deceased and A2 was informed at around 2 am on "13.07.2013/2014" by her stepmother A4 that the

deceased was missing from her room which was found open and household articles were scattered. A4 also told her that despite a thorough search the deceased could not be found anywhere. At around 5 am-6 am the same morning A4 called her on the phone and told her that the deceased was found dead. PW 1 accordingly went to the house of her deceased mother and found her lying in the courtyard. The crossexamination of P.W.1 elicited the fact that A2 used to love the deceased immensely and their relations were cordial and harmonious. Her evidence thus shed no assisting light on the case. P.W.2 is similarly unable to throw light on the incident as her evidence is only to the extent that A4 went to her house at around 12.30 a.m. and informed her that the deceased was missing from the house. She went to their house and tried to inform A3 of the circumstance but found his phone to be switched off. The next morning the body of the deceased was discovered in the courtyard.

17. P.W.43, the second I.O. of the case went to the State Bank of Sikkim, Gyalshing where P.W.17 was a Senior Manager and seized Exhibit 7 the Account Opening Form of the deceased in the State Bank of Sikkim, allegedly bearing the admitted signatures of the deceased. Exhibit 24 an Account Opening Form of the deceased in the Union Bank of India, alleged to contain her admitted signatures was also seized. P.W.39, the Expert in his evidence has stated that the admitted writings A1 to A4 on Exhibit 7 and the admitted writings A5 to A7 on Exhibit 24 were written by the same person. Exhibit 22, a yellow coloured pocket notebook, as per P.W.39, contained red enclosed questioned writings stamped and marked Q1, Q2 and Q3. Exhibit 23, one brown coloured telecom diary contained the questioned markings Q4 to Q8. According to P.W.39, the person who wrote A1 to A7 (the admitted writings of the deceased) also wrote Q1, Q4, Q5, Q7 and Q9. Exhibit C was a blue coloured pocket diary containing questioned writings marked Q7 and Q9. As per P.W.39 *"...My opinion that the person who wrote the blue enclosed writings stamped and marked A1 to A7 also wrote the red enclosed questioned writings similarly stamped and marked here as A1,* (sic) *Q4, Q5, Q7 and Q9 is based on the following considerations:..."* thereafter he elucidates the reasonings for his findings. We have to differ with the contention of Learned Senior Counsel for A2 to A5 that only the signatures of the deceased were proved but not her handwritings, for the reasons as given by P.W.39 *supra*. Besides, the documents marked "Q" encircle the handwritings and not only the signatures of the deceased and were examined by P.W.39. That having

been said how the identification of the handwriting of the deceased lends any support to the Prosecution case is unfathomable since the contents of the questioned document Q2 on Exhibit 22 pertains to an incident of 2011, wherein Pradeep the brother of A2 had suspected the deceased of some extra marital relations and had informed her husband A2. Pradeep then allegedly attempted to murder her, however he is not an accused in the instant matter. In the questioned document Q3 also in Exhibit 22, she has stated that on 23-08-2011 A3 had bad mouthed her, evidently no threat of death was held out to her by him. It is also recorded that one Rupa tried to assault her but the deceased also assaulted her. In the questioned document Q6 on Exhibit 23 she appears to have some grievance against one Dilip Budathoki who also is not an accused in the instant case neither has she made any allegation of physical assaults on her or attempt to murder her. The questioned document Q8 also does not indicate anything against A1 to A5. Consequently, the writings marked Q1, Q2 and Q3 in Exhibit 22 and the writings marked Q4 to Q8 in Exhibit 23 establishes that the handwritings are of the deceased but the contents do not implicate A1 to A5 in any way. The evidence of P.W.17 and P.W.39 also fail to support the Prosecution case. The Learned trial Court had considered Exhibit 22 and concluded that the diary entries revealed attempts on the life of the deceased. For the foregoing reasons we differ from this finding.

18. P.W. 42, the first I.O. of the case has stated that he had seized three bundles of sealed bank notes in the denomination of Rs.100/-, two of which were of the ICICI Bank and one of the SBI Bank from the room of A5 and other currency notes. The Learned Advocate General would have us believe that since A5 was in possession of these notes the provisions of Section 106 of the Evidence Act fell into place on her inability to account for such possession. In our considered opinion, this argument has no legs to stand since it is for the Prosecution in the first instance to establish its case beyond a reasonable doubt. In ***Ranjit Kumar Haldar v. State of Sikkim***[14] it was *inter alia* observed as follows;

> "**14.** The general rule is that the burden of proof is on the prosecution. Section 106 of the Act was introduced not to relieve the prosecution of their duty but it is designed to meet the situation in which it would be impossible or difficult for the prosecution to

[14] (2019) 7 SCC 684

> establish facts which are especially within the knowledge of the accused."

In the instant matter, had the investigation been diligently conducted it could well have been established by the Prosecution as to who had withdrawn the said amount from the ICICI Bank and the SBI Bank. The Prosecution cannot expect the accused persons to prove the Prosecutions case. The argument that the money belonged to the deceased was bereft of any evidence since no proof emanated on this count. The Bank Passbook of the deceased was not furnished to indicate the deposits made by her or withdrawals for that matter, hence this argument must fail. It was also contended that certain other articles of the deceased were found in the room of A5. Since they lived in the same house and are undoubtedly related to each other, it can be presumed, in the absence of proof, that the deceased had handed over the articles to her for safekeeping considering that the evidence establishes that the deceased used to go to the market for running her clothes business, along with A2.

19. P.W.7 who is a co-villager of A2 to A5 was witness to the seizures made by the Prosecution but this lends no support to the Prosecution case. She deposed that the Police seized some cash amounts from the possession of A5, vide Exhibit 3, on which she affixed her signature but she was unable to disclose the reasons for such seizure or conclusion thereof. In this connection, it would be appropriate to examine Exhibit 3, the Seizure Memo vide which the cash amounts were seized from the room of A5 from a wooden box. It was not established by evidence as to whom the wooden box belonged to. Exhibit 5 is also a Seizure Memo in which P.W.7 affixed her signature as a witness vide which gold ornaments and some documents were recovered, however the seizure of these articles fails to link the crime to the Appellants. P.W.33 was another witness to seizures in Exhibit 3 along with P.W.7 and Exhibit 4, but he was unaware of any details pertaining to the matter. The role of P.W.27 was to the extent that he handed over Exhibit 9 in four bundles being the entire call details printed by him as he was working as a Computer Operator under the Department of Information and Technology and deputed to the Crime Branch. This document reveals details of calls made but reveals no link to the crime. P.W.28 claims that his mobile phone was used to trace the mobile tower location of A1 but his mobile phone was admittedly never seized. P.W.37 was present when

P.W.29 took the hair samples of A1 to A4, however what became of these hair samples is anyones guess, since no statements have been made in this context by the I.Os of the case. P.W.35 has furnished the call detail numbers pertaining to mobile number "918802684316" and "918285138714." These numbers according to the witness was issued to one Salaudin and one Amit. The seizure of Exhibit 12 the Customer Application Form of of Amit and Exhibit 13 the Customer Application Form of Salaudin could also not establish anything pertaining to the offence. P.W.38 although witnessed the seizure of articles lying in the courtyard of the house and some jewellery and cash from inside the house, he was unaware of the ownership of the articles. P.W.40 is the Doctor who conducted post mortem examination on the body of the victim at around 2.40 pm to 3.30 pm on 13.07.2013. He recorded the injuries found on the person of the victim and opined as follows, *"…The opinion as to the approximate time since death was around 12 hours and the cause of death to the best of my knowledge and belief was due to asphyxia as a result of homicidal ligature strangulation. …"* This was not demolished in cross-examination but the fact remains that the Prosecution is required to establish beyond reasonable doubt that the death took place by strangulation and P.W.42, the first I.O. of the case despite having conducted the initial investigation and making seizures as discussed hereinabove, in cross-examination admitted unequivocally that he did not find any material to show the involvement of the Appellants in this case. P.W.43, the second I.O. of the case who was a Deputy Superintendent of Police posted at the Crime Branch took gargantuan steps in his effort to establish the Prosecution case but his efforts were in vain. The Crime Scene Reconstruction Memorandum, Exhibit 10 is as pointed out by Learned Senior Counsel for A2 to A5 inadmissible in evidence in view of the embargo of Section 25 of the Indian Evidence Act although both P.W.42 and P.W.44 could substantiate its existence. Steps were initiated by him to locate A1, and the call details Exhibit 9 were collected by him nevertheless nothing points to the involvement of the Appellants in the death of the victim nor could *mens rea* of A1 be established by Exhibit 9. P.W.45, the final I.O. of the case also was unable to indicate any evidence to link the Appellants to the offence.

20. The Learned trial Court was of the opinion that the confessional statement was valid and discovery of the belongings of the deceased with A5 raises a strong suspicion and points to her involvement in the crime.

Suspicion undoubtedly rears its head against A2 to A5 in view of the place and circumstances of the death but suspicion however strong cannot take the place of proof as has been propounded in ***Raj Kumar Singh alias Raju alias Batya*** *(supra)* and ***M. Nageshwar Rao vs. State of Andhra Pradesh***[15]. Hence, the finding of the Learned trial Court that an attempt had been made on the victims life and she feared attempts were still being made on her life, cannot sustain in view of the gamut of facts and evidence as already discussed *supra*. In conclusion we are of the considered opinion that the impugned Judgment and Order on Sentence deserves to be and is set aside.

21. A1 to A4 are acquitted of the offence under Section 302 and Section 120B of the IPC read with Section 34 IPC.

22. A5 is acquitted of the offence under Section 201 IPC.

23. All Appellants be set at liberty forthwith, if not required in any other matter.

24. Both the Appeals are allowed.

25. Fine, if any, deposited by the Appellants in terms of the impugned Order on Sentence, be reimbursed to them.

26. No order as to costs.

27. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

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[15] (2011) 2 SCC 188

SLR (2019) SIKKIM 990

(Before Hon'ble the Chief Justice)

W.P. (C) No. 35 of 2018

Shri Kharga Bahadur Pradhan ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. N. Rai, Senior Advocate, Ms. Malati Sharma and Ms. Sudha Sewa, Advocates.

For the Respondents: Dr. Doma T. Bhutia, Additional Advocate General, and Mr. Thupden Youngda, Government Advocate.

Date of decision: 6th December 2019

A. Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 9 (ii) – Inquiry – Special Procedure in Certain Cases – Disciplinary proceeding was initiated under Rule 7 of the Rules by a Memorandum dated 08.01.2009 and the Inquiry Authority had submitted a Report dated 11.04.2011 to the Disciplinary Authority, holding the charges to be proved. However, the Disciplinary Authority, on consideration of materials on record, noticing that due and fair opportunity was not afforded to the writ petitioner, had remanded the matter back to the Inquiry Authority to conduct the inquiry in accordance with law after fully complying with principles of natural justice. The petitioner was, at the relevant time, lodged in Namchi Jail and, therefore, an application was filed before the learned Sessions Judge, South & West at Namchi, who was holding trial, to permit the authorities to hold departmental enquiry at District Jail premises at Namchi. However, the learned trial Court, by an order dated 30.08.2011, had rejected the said petition. It was in that circumstance, the Disciplinary Authority being satisfied that it is not reasonably practicable to hold an enquiry in the manner as provided under the Rules and opining that retention of the petitioner in police service was detrimental to the morale and over all

image of Sikkim Police Force, had issued the order of dismissal dated 19.11.2011.12 – The order of dismissal was not passed by following the procedure laid down under Rule 7, but was passed by taking recourse to Rule 9(ii) of the Rules – The contention with regard to violation of principle of natural justice in the course of the inquiry proceeding is misconceived. True, an Inquiry report was submitted by the Inquiry Officer but the Disciplinary Authority itself had not acted upon such Inquiry Report in view of violation of principles of natural justice during the Inquiry.

(Paras 11 and 12)

B. Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 9(ii) – Inquiry – Special Procedure in Certain Cases – No specific challenge was mounted with regard to the order of dismissal dated 19.11.2011 on the touchstone of exercise of power under Rule 9(ii) of the Rules. There is no challenge on the ground that the satisfaction derived by the Disciplinary Authority cannot receive judicial imprimatur or that the same has been passed *mala fide* or in extraneous or irrelevant consideration. The thrust in the writ petition as well as the rejoinder affidavit is that since the Petitioner had been honourably acquitted by this Court of the charge under S. 302 of the I.P.C and the order of dismissal has a relation to the criminal case against the Petitioner, the order of dismissal, because of turn of events, cannot be sustained in law – Rule 9 (ii) of the Rules is some what similar to Article 311 (2)(b) of the Constitution. Article 311(2) provides that no person as specified in Article 311(1) shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Proviso to Article 311(2) states that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. Article 311(2)(b) provides that Article 311(2) shall not apply where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. Article 311(2)(a), (b) and (c) are exceptions to the general rule of holding an inquiry as Article 311(2) is not made applicable to Article 311(2)(a), (b) and (c).

(Paras 18 and 19)

C. Constitution of India – Article 226 – Honourably Acquitted – Meaning – In absence of any definition in the Criminal Procedure Code or Indian Penal Code, it is difficult to give a precise definition of what is meant by the expression "honourably acquitted", an expression coined by judicial pronouncements – The Hon'ble Supreme Court observed that when the accused is acquitted after full consideration of prosecution evidence holding that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted – A perusal of the judgment of this Court dated 30.03.2015 passed in Crl. A. No.12 of 2014 goes to show that the prosecution case was based on circumstantial evidence. This Court observed that the deceased was allegedly in the company of the petitioner on 03.08.2009 and her dead body was found in an abandoned condition in a jungle on 06.08.2009 and thus, the circumstance of last seen together was not fully established. It was also observed that even if it is accepted as held by the learned Session Judge that there was illicit relationship between the petitioner and the deceased, in absence of any other positive reasons, one cannot be said to have motive to commit murder of the other. Observing that it was a case in which nothing was conclusively established against the appellant, this Court held that the appellant was entitled to benefit of doubt and accordingly, had allowed the appeal – Such an acquittal does not come within the expression "honourably acquitted" as expounded by the Hon'ble Supreme Court.

(Para 31 and 35)

Petition dismissed.

Chronology of cases cited:

1. Khem Chand v. Union of India and Others, AIR 1958 SC 300.
2. Union of India and Others v. Mohd. Ramzan Khan, (1991) 1 SCC 588.
3. M/s. Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur and Others, (1992) 2SCC 598.
4. Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and Another, (1999) 3 SCC 679.
5. G. M. Tank v. State of Gujarat and Others, (2006) 5 SCC 446.

6. Ayaaubkhan Noorkhan Pathan v. State of Maharashtra and Others, (2013) 4 SCC 465.

7. Madhav Chettri v. The State of Sikkim and Others, MANU/SI/0064/ 2015.

8. Hari Niwas Gupta v. State of Bihar and Another, 2019 SCCOnline SC 1446.

9. In Re: Om Prakash Kapoor and Union of India & Others of the High Court of Judicature at Calcutta, 1993 –II L.L.N. 812.

10. P. S. Sadasivaswamy v. State of Tamil Nadu, (1975) 1 SCC 152.

11. Union of India and Another v. Tulsiram Patel, (1985) 3 SCC 398.

12. Shiba Shankar Mohapatra and Others v. State of Orissa and Others, (2010) 12 SCC 471.

13. Ajit Kumar v. State of Jharkhand and Others, (2011) 11 SCC 458.

14. Commissioner of Police, New Delhi and Another v. Mehar Singh, (2013) 7 SCC 685.

15. Avtar Singh v. Union of India and Others, (2016) 8 SCC 471.

16. Union Territory, Chandigarh Administration and Others v. Pradeep Kumar and Another (2018) 1 SCC 797.

17. Shashi Bhusan Prasad v. Inspector General, Central Industrial Security Force and Others, AIR 2019 SC 3586.

18. State of Jammu and Kashmir v. R.K Zalpuri, AIR 2016 SC 3006.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. N. Rai, learned Senior Counsel assisted by Ms. Malati Sharma and Ms. Sudha Sewa, for the petitioner. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General assisted by Mr. Thupden Youngda, Government Advocate, for the respondents.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner has called into question the order of suspension dated 11.08.2009 passed by the Superintendent of Police, West District, Gyalshing

and the order dated 19.11.2011 passed by the Senior Superintendent of Police, West District, Gyalshing, dismissing the petitioner from service with effect from 19.11.2011, with a further prayer to allow him to join in his duty without break in his service with all admissible pay and allowances.

3. The facts, as pleaded in the writ petition, are that the petitioner, while working as policeman (materials on record do not indicate what post the petitioner was holding) and posted at Kaluk police station, was suspended in terms of Rule 10(2)(a) of Sikkim Police Force (Discipline and Appeal) Rules, 1989, as amended (for short, the Rules), as he was detained in custody from 08.08.2009 for a period exceeding 48 hours in connection with a criminal case, being Criminal Case No. 09 (08) 09 under Sections 302/201 of the Indian Penal Code, 1860 (for short, IPC). While he was facing trial, a notice dated 12.08.2011 was served upon him on 14.08.2011, informing him that he could submit his reply to the said notice within 20.08.2011. Though no departmental enquiry was conducted as per the said notice dated 12.08.2011, the petitioner was served with an order dated 19.11.2011 terminating his service.

4. It is further pleaded that in Sessions Trial Case No.816 of 2013 corresponding to Kaluk P. S. Case No. 09 (08) 09, he was convicted under Section 302 of the IPC by an order passed by the learned Sessions Judge, Special Division-II at Gangtok, East Sikkim dated 24.02.2014. However, he was acquitted of the charge under Sections 201 and 364 of the IPC. The petitioner had preferred an appeal against the judgment and order dated 24.02.2014, being Criminal Appeal No.12 of 2014 before this Court and this Court, by a judgment dated 30.03.2015, set aside his conviction and sentence imposed upon him and the said judgment had attained its finality.

5. It is further stated that the petitioner had faced trial in General Register Case No. 21 of 2016 under Sections 420/468/120-B/471 of the IPC in the Court of learned Judicial Magistrate, West Sikkim at Gyalshing and by a judgment dated 23.08.2016, the learned Judicial Magistrate, West Sikkim had acquitted the petitioner of all the charges and the said judgment also attained its finality in absence of any challenge thereto.

6. The petitioner had issued a lawyer's notice dated 17.07.2017, praying for revocation of order of dismissal dated 19.11.2011 and his

reinstatement with full back wages within a period of one month. However, as no action was taken on the said legal notice, the petitioner had approached this Court by filing this writ petition.

7. Mr. N. Rai, learned Senior Counsel for the petitioner, submits that the petitioner was not given any opportunity to cross-examine the witnesses and the enquiry proceeding had proceeded in gross violation of the principles of natural justice. He has submitted that the departmental proceeding was initiated on the same set of charges which were also part of the criminal trial and the petitioner, having been honourably acquitted by this Court, the order of dismissal cannot sustain scrutiny of law. It is also contented by him that the respondent authorities could not have taken recourse to provision of Rule 9(ii) of the Rules while passing the order of dismissal. He has submitted in this context that in order not to continue with the departmental proceeding, for extraneous consideration, power under Rule 9(ii) of the Rules was exercised, although, in the attending facts and circumstance of the case, provision of Rule 9(ii) could not have been invoked. He has contended that the petitioner was not given any show cause notice before proposing to pass the order of dismissal and, therefore, the order of dismissal was violative of Article 311 of the Constitution of India. In support of his submissions, Mr. Rai has placed reliance on the cases of (i) ***Khem Chand, Appellant* vs. *Union of India & Ors.,*** reported in ***AIR 1958 SC 300***; (ii) ***Union of India & Ors.* vs. *Mohd. Ramzan Khan,*** reported in ***(1991) 1 SCC 588***; (iii) ***M/s Dehri Rohtas Light Railway Company Limited* vs. *District Board, Bhojpur & Ors.,*** reported in ***(1992) 2 SCC 598***; (iv) ***Capt. M. Paul Anthony* vs. *Bharat Gold Mines Ltd. & Anr.,*** reported in ***(1999) 3 SCC 679***; (v) ***G. M. Tank* vs. *State of Gujarat & Ors.,*** reported in ***(2006) 5 SCC 446***; (vi) ***Ayaaubkhan Noorkhan Pathan* vs. *State of Maharashtra & Ors.***, reported in ***(2013) 4 SCC 465***; (vii) ***Madhav Chettri* vs. *The State of Sikkim & Ors.,*** reported in ***Manu/SI/0064/2015;*** (viii) ***Hari Niwas Gupta* vs. *State of Bihar & Anr.***, reported in ***2019 SCC Online SC 1446*** and ***(***ix) ***In Re: Om Prakash Kapoor and Union of India & Ors.*** of the High Court of Judicature at Calcutta, reported in ***1993 – II L.L.N. 812***.

8. Relying on the affidavit filed, Dr. Doma T. Bhutia, learned Additional Advocate General for the respondents, has submitted that though the order of dismissal was passed way back in the year 2011 and though the criminal

appeal itself came to be disposed of in the year 2015, the petitioner had approached this Court only in the later part of 2018, after almost 7 years from the date of issuance of order of dismissal and, therefore, this petition is liable to be dismissed on the ground of delay, more particularly, having regard to the fact that the petitioner being a police man is not in service for the last 10 years. It is contended by her that although Mr. Rai assailed the order of dismissal on the ground that the authorities could not have taken recourse to dispense with the inquiry in terms of Rule 9(ii) of the Rules, no foundation for articulating such a contention is laid in the writ petition as well as in the reply affidavit filed. There is not even a whisper in the pleadings to that effect and, therefore, this Court may not go into that aspect of the matter. It is submitted by her that though initially the petitioner was suspended in view of his being detained for more than 48 hours in terms of Rule 10(2)(a) of the Rules and subsequently, a disciplinary proceeding was also initiated, due to reasons beyond the control of the authorities, the disciplinary proceeding had to be aborted and order of dismissal was required to be passed in terms of Rule 9 (ii) of the Rules. She has submitted that police force, being a disciplined force, police personnel must have impeccable integrity and reputation to inspire confidence of the people. As the petitioner was not honourably acquitted but was acquitted on benefit of doubt, he is not entitled to reinstatement in service automatically as of right. The petitioner had never challenged the initiation of departmental proceeding on the ground that on the same set of charges he was also facing criminal trial and therefore, at this stage, the Court may not go into the question that disciplinary proceeding, in the first place, could not have been proceeded with. In support of her submissions, learned Additional Advocate General has placed reliance in the cases of (i) ***P. S. Sadasivaswamy*** vs. ***State of Tamil Nadu,*** reported in ***(1975) 1 SCC 152***; (ii) ***Union of India & Anr.*** vs. ***Tulsiram Patel,*** reported in ***(1985) 3 SCC 398***; (iii) ***Shiba Shankar Mohapatra & Ors.*** **vs.** ***State of Orissa & Ors.,*** reported in ***(2010) 12 SCC 471***; (iv) ***Ajit Kumar*** vs. ***State of Jharkhand & Ors.,*** reported in ***(2011) 11 SCC 458***; (v) ***Commissioner of Police, New Delhi & Anr.*** vs. ***Mehar Singh,*** reported in ***(2013) 7 SCC 685***; (vi) ***Avtar Singh*** vs. ***Union of India & Ors.,*** reported in ***(2016) 8 SCC 471***; (vii) ***Union Territory, Chandigarh Administration & Ors.*** vs. ***Pradeep Kumar & Anr.,*** reported in ***(2018) 1 SCC 797*** and (viii) ***Shashi Bhusan Prasad*** vs. ***Inspector General Central Industrial Security Force & Ors.,*** reported in ***AIR 2019 SC 3586***.

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

10. At the very outset, it will be fruitful to take note of the order dated 19.11.2011, which reads as under:-

"***Government of Sikkim***
OFFICE OF THE SR. SUPERINTENDENT OF POLICE
WEST DISTRICT, GYALSHING.

O.O. No.291/POL/SP/W/R/2009 Dated: 19/11/2011.

ORDER

WHEREAS a Departmental Enquiry under Rule 7 of the Sikkim Police Force (Discipline & Appeal) Rules, 1989 as amended from time to time, was proposed to be held against Nk/1593 Kharga Bahadur Pradhan of Kaluk Police Station and accordingly the Memorandum dated 08/12/2009 alongwith the articles of charges, the statement of imputation of misconduct, lists of documents and witnesses were served upon the delinquent, (under judicial custody), who acknowledged receipt of the same.

(2) Whereas the articles of charges against the delinquent NK/Kharga Bahadur Pradhan framed by the disciplinary authority read as follows:-

"ARTICLE – I

Kaluk PS Case No. 09(08)09, dated 08/08/2009 undr section 302/201/IPC was registered and NK/1593 Kharga Bahadur Pradhan, age 44 years, S/o Dak Man Pradhan, R/o Radhu Khandu, Dentam, West Sikkim posted at Kaluk PS was arrested on 08/08/2009 for committing murder of one lady Mrs. Aitamati Lepcha, age 35 years, W/o Pemtuk Lepcha, R/o Boom Busty, Kaluk, West Sikkim.

ARTICLE – II

Sikkim Police has a duty of wide responsibility to protect innocent men/women from any other threat and difficulties. In spite of doing the prime duty he is accused of section 302/201/IPC.

ARTICLE – III

Due to his suspected behaviour and misconduct he had created bad image to the service of Sikkim Police. A person who is accused of Section 302/201 IPC, his doubtful integrity to the service is in question.

He is therefore, charged with conduct unbecoming of a Government Servant".

(3) Whereas in response to the above memorandum the delinquent Nk/1593 Kharga Bahadur Pradhan denied the charges in his written statement of defense and claimed that he was falsely implicated in the criminal case.

(4) Whereas Shri T. D. Kazi, the then SDPO/ Soreng was appointed as the Inquiry Officer to enquire into the charges framed against Nk/Kharga Bahadur Pradhan.

(5) Whereas the Inquiry Officer submitted his findings on 11/04/2011 followed by supplementary report on 10/11/11 wherein he has held the delinquent NK/1593 Kharga Bahadur Pradhan guilty of all the charges.

(6) Whereas the Inquiry Officer has indicated in his report that Hon'ble Session Judge, South & West at Namchi denied permission to conduct departmental proceeding against the delinquent in the District Jail, Namchi vide Order dated 30/08/11 hence the procedures laid down under Rule 7 of the Sikkim Police Force (Discipline & Appeal) Rules, 1989 could not be followed so far the examination of the delinquent and

examination of witnesses/documents by him are concerned.

(7) Whereas as per Rule 9 (ii) of the Sikkim Police Force (Discipline & Appeal) Rules, 1989 the undersigned is satisfied that it is not reasonably practicable to hold the enquiry in the manner as provided in the Rules because of the reason as indicated in para 6 above.

(8) Whereas on careful perusal of findings of the Inquiry Officer and the conduct which led to the filing of charge sheet in aforesaid Criminal Case against the delinquent NK/Kharge Bahadur Pradhan the undersigned has come to the conclusion that retention of NK/1593 Kharga Bahadur Pradhan in Police Service is detrimental to the morale and over all image of Sikkim Police Force.

(9) Now, therefore, in exercise of the power conferred on the undersigned vide the Sikkim Police Force (Discipline & Appeal) Rules, 1989, as amended vide Notification No. 81/Gen/DOP dated 23/11/1998, NK/1593 Kharga Bahadur Pradhan of Kaluk Police Station, West District is dismissed from service with effect from 19/11/ 2011. NK/1593 Kharga Bahadur Pradhan shall not be entitled to any monitory benefits of service except his GPF.

(10) The receipt of this order should be acknowledged by NK/1593 Kharga Bahadur Pradhan.

Sd/-
(D. G. Giri, IPS)
Sr. Superintendent of Police
West District, Gyalshing."

11. A perusal of the aforesaid order goes to show that a disciplinary proceeding was initiated under Rule 7 of the Rules by a Memorandum dated 08.01.2009 and the Inquiry Authority had submitted a Report dated 11.04.2011 to the Disciplinary Authority, holding the charges to be proved.

However, the Disciplinary Authority, on consideration of materials on record, noticing that due and fair opportunity was not afforded to the writ petitioner, had remanded the matter back to the Inquiry Authority to conduct the inquiry in accordance with law after fully complying with principles of natural justice. The petitioner was, at the relevant time, lodged in Namchi Jail and, therefore, an application was filed before the learned Sessions Judge, South & West at Namchi, who was holding trial, to permit the authorities to hold departmental enquiry at District Jail premises at Namchi. However, the learned trial Court, by an order dated 30.08.2011, had rejected the said petition. It was in that circumstance, the Disciplinary Authority being satisfied that it is not reasonably practicable to hold an enquiry in the manner as provided under the Rules and opining that retention of the petitioner in police service was detrimental to the morale and over all image of Sikkim Police Force, had issued the order of dismissal dated 19.11.2011.

12. Thus, it is evident that the order of dismissal was not passed by following the procedure laid down under Rule 7, but was passed by taking recourse to Rule 9(ii) of the Rules. Therefore, the contention advanced by Mr. Rai with regard to violation of principle of natural justice in the course of the inquiry proceeding is misconceived. True, an Inquiry report was submitted by the Inquiry Officer but the disciplinary authority itself had not acted upon such Inquiry Report in view of violation of principles of natural justice during the Inquiry.

13. Rule 3 of the Rules provides that penalties, as indicated in clauses (i) to (xv), may, for good and sufficient reasons, be imposed on any police officer. Rule 5 provides that disciplinary authority may impose on a police officer of the rank of Head Constable and below any of the penalties specified in clauses (i) to (iii) of Rules summarily. The procedure for imposing penalties specified in clauses (iv) to (x) of Rule 3 is prescribed in Rule 6. Procedure for imposing penalties specified in clauses (xi) to (xv) of Rule 3 is prescribed in Rule 7. Clause (xv) is dismissal from service which shall ordinarily be a disqualification for future employment under the Government.

14. Rule 7 (1) provides that no order imposing any of the penalties specified in clauses (xi) to (xv) of Rule 3 shall be made except after an inquiry held, as far as may be, in the manner provided in the Rules. Rule 8 provides that where two or more police officers are concerned in any case,

the Governor or any other disciplinary authority may make an order directing that disciplinary action against all of them may be taken in a common proceeding.

15. Rule 9 is an exception to the normal rule of holding an inquiry and it reads as under: -

> *"**9. Special procedure in certain cases.-** Notwithstanding anything contained in rules 6, 7 and 8 –*
>
> *(i) where any penalty is imposed on police Officer on the ground of conduct which has led to his conviction on a criminal charge, or*
>
> *(ii) where the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or*
>
> *(iii) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon it deems fit.*
>
> *Provided that the Commission shall be consulted where such consultation is necessary before any order is made in any case under this rule."*

16. In paragraphs 11 and 12 of the writ petition, the petitioner stated as follows:-

> *"11. That the order of termination dated 19.11.2011 (Annexure – 4) do not have legal force now in view of the following:*
>
> *(a) The termination order was passed ex-parte.*

(b) The Petitioner was not given an opportunity to examine the witnesses and the documents concerned.

(c) The Petitioner is not aware as to what evidences were considered by the inquiring authority.

(d) The Petitioner is also not aware as to whether the inquiry authority examined any witness or not.

(e) The Petitioner is deprived of any hearing thereby violating the principle of audi alterem partem.

12. That the Petitioner has been illegally terminated on the basis of the said illegal, false and make belief departmental inquiry."

17. In the ground (d), it is urged that the petitioner has been illegally terminated and removed from his service and in ground (f), it is contended that no valid grounds have been given by the respondents for termination and removal of the petitioner from his service. In the rejoinder affidavit filed by the petitioner, at paragraph 16, it is stated that principles of natural justice was grossly violated while dismissing the petitioner from service without giving him any chance of hearing.

18. A perusal of the pleadings in the writ petition as well as rejoinder affidavit persuades me to observe that Dr. Bhutia was right in submitting that no specific challenge was mounted with regard to the order of dismissal dated 19.11.2011 on the touchstone of exercise of power under Rule 9(ii) of the Rules. There is no challenge on the ground that the satisfaction derived by the disciplinary authority cannot receive judicial imprimatur or that the same has been passed malafide or in extraneous or irrelevant consideration. The thrust in the writ petition as well as the rejoinder affidavit is that since the petitioner had been honourably acquitted by this Court of the charge under Section 302 of the IPC and the order of dismissal has a relation to the criminal case against the petitioner, the order of dismissal, because of turn of events, cannot be sustained in law.

19. Rule 9 (ii) of the Rules is somewhat similar to Article 311 (2)(b) of the Constitution. Article 311(2) provides that no person as specified in

Article 311(1) shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Proviso to Article 311(2) states that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. Article 311(2)(b) provides that Article 311(2) shall not apply where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry. Article 311(2)(a), (b) and (c) are exceptions to the general rule of holding an inquiry as Article 311(2) is not made applicable to Article 311(2)(a), (b) and (c).

20. In ***Khem Chand (supra)***, the Hon'ble Supreme Court had held that as no show cause notice was issued to the appellant affording an opportunity to him to show cause as to why the particular punishment should not be inflicted on him, the same was in violation of Article 311 (2) of the Constitution of India and that being the position, his dismissal from service could not be sustained. Relying on the judgment, Mr. Rai had submitted that impugned dismissal order is bad in law because of denial of opportunity to show cause against the proposed punishment. It is to be noticed that when ***Khem Chand*** (supra) was decided, there was a requirement in Article 311(2) to afford an opportunity to the delinquent to show cause against the proposed punishment. However, by the Constitution (Forty-second Amendment) Act, 1976, Article 311(2) was amended w.e.f. January 3, 1977 and the aforesaid provision which formed the basis in ***Khem Chand (supra)*** is no longer there.

21. In ***Tulsiram Patel (supra)***, the Hon'ble Supreme Court has held that the phrase "this clause shall not apply" in the second proviso to Article 311(2) is mandatory and, therefore, there is no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. The second proviso has been inserted in the Constitution as a matter of public policy and public interest. The argument that in a case falling under clause (b) or (c), a government servant ought to be placed under suspension until the situation improves or the danger to the

security of the State has passed, as the case may be, and it becomes possible to hold an inquiry, was repelled.

22. In ***Ajit Kumar (Supra),*** the Hon'ble Supreme Court had observed that power under clause (a), (b), (c) of Article 311(2) is an absolute power of the disciplinary authority, who, after following the procedure laid down therein, can resort to such extra-ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively. In ***Hari Niwas Gupta (supra)***, the Hon'ble Supreme Court has reiterated that the obligation of the competent authority to record reasons when passing an order under clause (b) to the second proviso to Article 311(2) is mandatory.

23. In ***Mohd. Ramzan Khan (Supra)***, the Hon'ble Supreme Court held that wherever an Inquiry Officer has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge. However, the ratio laid down will have no application in the instant case.

24. In ***Capt. M. Paul Anthony (supra)***, the question that had fallen for consideration before the Hon'ble Supreme Court was as to whether departmental proceeding and proceeding in a criminal case launched on the basis of the same set of facts can be continued simultaneously. The Hon'ble Supreme Court, at paragraph 22, has held as follows:-

> *"**22.** The conclusions which are deducible from various decisions of this Court referred to above are:*
>
> *(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.*
>
> *(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against*

the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

25. In ***G. M. Tank (supra)***, the Hon'ble Supreme Court has held that the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the department's case against the appellant and the charge before the criminal court are also one and the same. It was observed that the nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. It was in the aforesaid background when

the criminal court came to the conclusion that the prosecution had not proved the guilt alleged against the petitioner beyond any reasonable doubt and acquitted the appellant, it was held that it would be unjust, unfair and oppressive to allow the findings recorded in the departmental proceedings to stand.

26. The petitioner had never challenged drawing up of disciplinary proceeding on any ground including on the ground that the proceeding could not have been initiated because charges in the disciplinary proceeding are same as in the criminal proceeding. That apart, the order of dismissal, as noted earlier, was passed dispensing with inquiry by taking recourse to Rule 9 (ii) of the Rules and therefore, decisions in the cases of ***Capt. M. Paul Anthony (supra)*** and ***G. M. Tank (supra)*** will not have much relevance in the facts of the present case. So also the decision in ***Ayaaubkhan Noorkhan Pathan (supra),*** where the Hon'ble Supreme Court had observed that right of cross-examination is an integral part of principles of natural justice. In ***Om Prakash Kapoor (supra)***, issue pertained to continuance of a suspension order after acquittal of the employee concerned and the decision rendered in the aforesaid context is not applicable in the instant case as the petitioner had been dismissed from service.

27. In ***Mehar Singh (Supra)***, the Hon'ble Supreme Court had observed that police force is a disciplined force and as people repose great faith and confidence in it, it must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in that category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force.

28. In ***Avtar Singh (supra),*** the Hon'ble Supreme Court, at paragraphs 38.4.3 had noted that if acquittal had already been recorded in a case of moral turpitude or offence of heinous/serious nature on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

29. In ***Sashi Bhusan Prasad (supra)***, the Hon'ble Supreme Court had laid down that acquittal by the court of competent jurisdiction in judicial proceedings does not *ipso facto* absolve the delinquent from the liability under the disciplinary jurisdiction of the authority.

30. In ***Pradeep Kumar (Supra)***, it is held that if a person is acquitted or discharged, it cannot be always inferred that he is falsely implicated or he has no criminal antecedents. It was further observed that unless it was an honourable acquittal, the candidate cannot claim the benefit of the case. The Hon'ble Supreme Court referred to the decision rendered in the case of ***Inspector General of Police vs. S. Samuthiram***, reported in ***(2013) 1 SCC 598***, to explain what honourable acquittal means. In parapgraph 24 of ***S. Samuthiram***, the Supreme Court had observed as follows:-

> 24. *The meaning of the expression "honourable acquittal" came up for consideration before this Court in RBI v. Bhopal Singh Panchal. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal", "acquitted of blame", "fully exonerated" are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted". When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."*

31. A perusal of the above paragraph goes to show that in absence of any definition in the Criminal Procedure Code or Indian Penal Code, it is

difficult to give a precise definition of what is meant by the expression "honourably acquitted", an expression coined by judicial pronouncements. The Hon'ble Supreme Court observed that when the accused is acquitted after full consideration of prosecution evidence holding that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

32. In ***Madhav Chettri (supra)***, a show-cause notice was issued to the appellant to show cause as to why he should not be discharged from service in terms of Rule 7(a)(ii) of the Sikkim Government Establishment Rules, 1974, as he was arrested in connection with a case under Section 457/380 of the IPC. A reply to show cause was given on 27.11.2013 and, thereafter, the petitioner was discharged from service vide order dated 03.12.2013. A writ petition was filed immediately seeking to quash the order of discharge. This Court had quashed the discharge order on the ground that that the charge in the departmental case against the appellant and the charge before the criminal court being one and the same, the impugned action ought not to have been initiated against the appellant.

33. In ***M/s. Dehri Rohtas Light Railway Company Ltd. (supra)***, the Hon'ble Supreme Court had observed that the rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion and that each case must depend upon its own facts. It was further held that the principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. In ***P. S. Sadasivaswamy (supra)***, it was observed that though there is no period of limitation for the courts to exercise their powers under Article 226 of the Constitution of India, it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. In the context of promotion, the Hon'ble Supreme Court had observed that against an order of promotion one should

approach the Court at least within six months or at the most a year of such promotion. In ***Shiba Shanker Mohapatra (supra)***, the Hon'ble Supreme Court had observed that seniority dispute should not be entertained once the seniority has been fixed and it has remained in existence for a reasonable period. It was also observed that no party can claim a relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and laches.

34. In ***State of Jammu and Kashmir* vs. *R.K Zalpuri***, reported in ***AIR 2016 SC 3006,*** the Supreme Court had observed that writ court is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner and that stale claims are not to be adjudicated unless non-interference would cause grave injustice. The facts of the case before the Hon'ble Supreme Court go to show that the employee was dismissed from service in the year 1999 and he did not choose to avail any departmental remedy and approached the High Court after a lapse of five years. In the aforesaid background, the Supreme Court had declined to consider the grievance agitated by the employee on merits on the ground that there was delay and laches in approaching the court.

35. A perusal of the judgment of this Court dated 30.03.2015 passed in Crl. A. No.12 of 2014 goes to show that the prosecution case was based on circumstantial evidence. This court observed that the deceased was allegedly in the company of the petitioner on 03.08.2009 and her dead body was found in an abandoned condition in a jungle on 06.08.2009 and thus, the circumstance of last seen together was not fully established. It was also observed that even if it is accepted as held by the learned Session Judge that there was illicit relationship between the petitioner and the deceased, in absence of any other positive reasons, one cannot be said to have motive to commit murder of the other. Observing that it was a case in which nothing was conclusively established against the appellant, this court held that the appellant was entitled to benefit of doubt and accordingly, had allowed the appeal. Thus, such an acquittal does not come within the expression "honourably acquitted" as expounded by the Hon'ble Supreme Court.

36. The petitioner has filed this writ petition after almost 7 years of passing of the order of dismissal dated 19.11.2011 and after about 3 years 6 months from passing of the judgment passed in Crl. A. No.12 of 2014.

There is no explanation whatsoever for such gross delay. In that view of the matter, having regard to the facts and circumstances of the case, I am of the considered opinion that this is not a fit case for examination on merits the legality or validity of the order dated 19.11.2011 in exercise of powers under Article 226 of the Constitution of India.

37. Resultantly, the writ petition is dismissed. No costs.

SLR (2019) SIKKIM 1011

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

Tax App. No. 01 of 2017

The Commissioner of Central Excise & Service Tax ….. APPELLANT

Versus

Sikkim Manipal University of Health, Medical and Technological Science ….. RESPONDENT

With

Tax App. No. 02 of 2017

The Commissioner of Central Excise & Service Tax ….. APPELLANT

Versus

Sikkim Manipal University of Health, Medical and Technological Science ….. RESPONDENT

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

For the Respondent: Mr. Sameer Rohtagi, Ms. Bhoomija Verm and Mr. Ugang Lepcha, Advocates.

Date of decision: 6th December, 2019

A. Central Excise Act, 1944 – Ss. 35G & 35L – The key to the question posed with regard to maintainability of the appeals lies on the meaning to be ascribed to the expression "determination of any question

having a relation to the rate of duty of excise or to the value of goods for purposes of assessment", which expression finds place in S. 35G as well as in S. 35L of the Act of 1944 – S. 35G provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 except an order relating, among other things, to determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment, if the High Court is satisfied that the case involves a substantial question of law – Thus, an appeal against an order relating to determination of any question having a relation to the duty of excise or to the value of goods for the purpose of assessment will not be maintainable before the High Court – S. 35L (b) goes to show that an appeal against any order passed by the CESTAT relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment shall lie directly to the Hon'ble Supreme Court. Such order, as is noticed earlier, is not made appellable to the High Court, as S. 35G specifically excludes such an order from being a subject matter of an appeal before the High Court.

(Paras 20, 22 and 24)

Both appeals dismissed.

Chronology of cases cited:

1. Punjab Technical University v. Commissioner of Central Excise and Service Tax, MANU/CE/ 0655/2015.
2. Commissioner of Customs, Bangalore-1 v. M/s Motorola India Ltd., Civil Appeal No.10083 of 2011.
3. Commissioner of Service Tax v. Ernst & Young Pvt. Ltd., MANU/DE/ 0539/2014.
4. Navin Chemicals Mfg. and Trading Co. Ltd. v. Collector of Customs, MANU/ SC/0571/1993.

JUDGMENT AND ORDER

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

Tax Appeal No. 01 of 2017 is preferred under Section 35G of the Central Excise Act, 1944 (for short, "the Act of 1944") against the Order No. 2 Tax App. No. 01 of 2017 with Tax App. No. 02 of 2017 The Commissioner of Central Excise & Service Tax, Siliguri vs. Sikkim Manipal University of Health, Medical and Technological Science. 76311/2016 dated 16.12.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata in Appeal No. ST/ 75010/2013 whereby, while allowing the appeal with consequential reliefs, the Order-in-Original No. 11/COM/ST/SLG/12-13 dated 01.10.2012 passed by the Commissioner of Customs, Excise and Service Tax, Siliguri, hereinafter referred to as Commissioner, was set aside.

2. Tax Appeal No. 02 of 2017 is an appeal under Section 35G preferred against the Order No. 75757/2016 dated 14.12.2016 passed by the CESTAT, Eastern Zonal Bench, Kolkata in Appeal No. ST/76840/2016 whereby, while allowing the appeal with consequential reliefs, the Order-in-Original No. 22/COMM/ST/SLG/16-17 dated 08.09.2016 passed by the Commissioner was set aside.

3. In both the appeals parties are same. The respondent in the appeals had raised a preliminary objection to the maintainability of both the appeals under Section 35G of the Act of 1944 by filing separate preliminary objections to that effect on 20.09.2017.

4. We have heard Mr. B.K. Gupta, learned counsel appearing for the appellant in both the appeals and Mr. Sameer Rohtagi, learned counsel, who also appear for the respondent in both the appeals on the maintainability of the appeals under Section 35G of the Act of 1944.

5. The respondent is a University set up under the Sikkim Manipal University of Health, Medical and Technological Science Act, 1995, enacted by the Sikkim State Legislature.

6. For the purpose of proper appreciation we will take note of the basic facts that gave rise to both the appeals as hereunder: Tax Appeal No. 01 of 2017

7. A show cause-cum-demand notice dated 07.03.2012 was issued to Sikkim Manipal University, for short, „SMU, by the Commissioner, on the allegation that SMU was found engaged in providing "franchise service" as defined in sub-clause (zze) of clause (105) of Section 65 of the Finance Act, 1994 (for short, "the Act of 1994") to different Learning Centres in contravention of the provisions of Sections 66, 67, 68, 69 and 70 of the Act of 1994 read with Rules 4, 6 and 7 of Service Tax Rules, 1994, as amended, (for short, "the Rules of 1994") inasmuch as it failed to obtain service tax registration for providing franchise service, which is a taxable service, and it failed to discharge its due service tax liability inclusive of Education Cess and Secondary & Higher Education Cess amounting to Rs.1,13,06,993/- only for the period from April 2007 to February 2011.

8. Though no reply was submitted by the respondent, the representative of the respondent had availed the opportunity of personal hearing and had also submitted written submissions.

9. The Commissioner recorded a finding in the Order-in-Original dated 01.10.2012 that more than 860 Learning Centres were in operation as on 24.02.2011. SMU had collected registration fee, accreditation fee, affiliation fee and inspection fee from different Learning Centres spread throughout the country. It is also recorded that there was a relationship of 'franchisor' and 'franchisee' in between SMU as 'franchisor' and Learning Centres as 'franchisee' for the purpose of the Act of 1994. It was recorded that non-payment of service tax did not appear to be bona fide and facts were suppressed from the Department by not submitting statutory returns. Though the jurisdictional Service Tax Authority in the show cause-cum-demand notice had taken the amount received by SMU from Learned Centres as accreditation fee/registration and inspection fee as taxable value and had indicated service tax amount as Rs.1,13,06,993/-, on recalculation, the Commissioner determined the total amount of service tax inclusive of Education Cess and Secondary & Higher Education Cess to be Rs.1,01,51,705/-. Consequently, the Commissioner at paragraph 5.1 of the Order-in-Original ordered as follows:

> "5.1 In view of the above discussion and findings, I do hereby order the following.
>
> [A] I confirm the demand of Service Tax including Education Cess and Secondary & Higher Education Cess, to the tune of Rs.1,01,51,705/- (Rupees one crore one lakh fifty one thousand seven hundred five) only from the said noticee under Section 73 (1) of the Finance Act, 1994.
>
> [B] Applicable interest for the relevant period is to be paid by the said noticee in terms of Section 75 of the Finance Act, 1994.
>
> [C] I impose penalty of Rs.1,01,51,705/- (Rupees one crore one lakh fifty one thousand seven hundred five) only on the said noticee in terms of Section 78 of the Finance Act, 1994."

10. The CESTAT accepted the argument of the respondent that when the fee charged by SMU and shared with Learning Centres is not subject to service tax, amount in respect of accreditation fee cannot be brought under the net of service tax. Tax Appeal No. 02 of 2017

11. A show cause-cum-demand notice dated 08.04.2016 was issued stating that SMU had been collecting alumni fees along with admission fee at the time of registration from their students and it had violated the provisions of Section 68, 69 and 70 of the Act of 1994 read with Rules 4, 6 and 7 of the Rules of 1994 inasmuch as SMU failed to obtain service tax registration and it failed to pay service tax amounting to Rs.2,25,64,753/- for the period from 2011-12 to 2015-16 (up to September 2015) in respect of alumni fee so collected by them which was taxable to service tax under the category of „Business Auxiliary Services for the period up to 30.06.2012 and thereafter under „Other than Negative Services for the period from 01.07.2012 under Section 66B of the Act of 1994.

12. The respondent submitted reply and the representative of the respondent had availed the opportunity of personal hearing and had also submitted written submissions.

13. The Commissioner recorded a finding in the Order-in-Original dated 08.09.2016 that activity of the alumni services provided by SMU is not in relation to furtherance of education and the same is for the benefit of the former students and not for the existing students and accordingly, held that taxability of alumni fees prior to 01.07.2012 will fall under sub-clause (6) of the definition of 'Business Auxiliary Services' and post 01.07.2012 under 'Other than Negative Service'. It was also recorded that there was suppression of facts with intention to evade payment of service tax. Consequently, the Commissioner at paragraph 7 of the Order-in-Original ordered as follows:

> "7. Considering all the facts of the case, I pass the following order:
>
> i) I confirm the demand of Service Tax and Cess amounting to Rs.2,25,64,753.00 (Rupees two crores twenty five lakhs sixty-four thousand seven hundred and fifty three) only, for the period from 2011-12 to 2015-16 (upto September 2015), as detailed in calculation sheet marked as Annexure-A enclosed with the Show cause Notice, in terms of proviso to sub-section (1) of Section 73(1) of the Finance Act 1994; read with sub-section(2) of Section 73 of the Finance Act, 1994.
>
> ii) Interest at the appropriate rate as per Section 75 of the said Act as applicable during the material period for delayed payment of Service Tax including Education Cess and Secondary & Higher Education Cess upon the entire demand as referred above is also to be paid.
>
> iii) I impose penalty equal to the unpaid duty amount of Rs.2,25,64,753.00 (Rupees two crores twenty five lakhs sixty-four thousand seven hundred and fifty three) only, under Section 78 of the said Act for failure to pay Service Tax in accordance with provision 68 of the said Act. However, the Noticee can avail the option of paying only 25% of

such amount i.e. Rs.56,41,188.00 (Rupees fifty six lakhs forty one thousand one hundred and eighty-eight) only, as 'penalty', subject to fulfillment of the conditions as prescribed under the 2nd and 3rd Proviso of Section 78(1) of the Finance Act, 1994.

iv) I impose a penalty of Rs.10,000.00 (Rupees ten thousand) only under Section 77(1)(a) of the said Act for failure to take registration under the category of Business Auxiliary service as provided under Section 69 of the said Act.

v) I impose a penalty of Rs.10,000.00 (Rupees ten thousand) only under Section 70 of the said Act read with Rule 7C of the Service Tax Rules, 1994; for failure to submit statutory returns in prescribed manner under the category of Business Auxiliary Service."

14. The CESTAT recorded a finding that SMU had collected some money in the name of alumni fee but without providing any service and so, when no service is provided then applicability of service tax is not in question.

15. Mr. B.K. Gupta, learned counsel for the appellant submits that taxability of accreditation fee is not an issue in Tax Appeal No. 01 of 2017. It is further submitted that CESTAT was wholly wrong in holding that the decision rendered by CESTAT, New Delhi in the case of ***Punjab Technical University vs. Commissioner of Central Excise and Service Tax***, reported in ***MANU/CE/ 0655/2015***, is not applicable to the facts of Tax Appeal No. 01 of 2017 though the ratio of the above case applies in all fours to the facts of the case. CESTAT did not pass any order regarding the rate or value of the service, or its classification regarding its taxability, he contends. Since orders of the CESTAT in both the appeals is not in relation to the determination of any question having a relation to the rate of duty for service tax for the purpose of assessment, the appeals are maintainable before this Court. He has placed reliance on the judgment dated

05.09.2019 of the Honble Supreme Court in the case of ***Commissioner of Customs, Bangalore-1 vs. M/s Motorola India Ltd.***, passed in Civil Appeal No.10083 of 2011.

16. Mr. Sameer Rohtagi, learned counsel for the respondent submits that having regard to the Orders-in-Original and the Orders passed by the CESTAT, it is evident that determination of taxability of accreditation fee as received by the respondent University as well as alumni fee is an issue in the appeals. Substantial questions of law, as formulated by the appellant in both the appeals, also bear out the same. It is submitted that what is meant by the term "determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment" had fallen for consideration before the High Court of Delhi in the case of ***Commissioner of Service Tax vs. Ernst & Young Pvt. Ltd.***, reported in ***MANU/DE/0539/2014*** and the High Court of Delhi had held that determination of any question relating to rate of tax would directly and proximately involve the question as to whether the activity falls within the charging section and service tax is leviable on the said activity. It is submitted that after the aforesaid judgment was delivered on 25.02.2014, sub-Section (2) of Section 35L was inserted by the Finance (No.2) Act, 2014 making it clear that determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of the goods or service for the purpose of assessment and therefore, these appeals are not maintainable before this Court. He also places reliance in the case of ***Navin Chemicals Mfg. and Trading Co. Ltd. vs. Collector of Customs***, reported in ***MANU/ SC/0571/1993***. It is also submitted by Mr. Rohtagi that the Special Leave Petition filed by the Revenue against the decision in ***Ernst & Young Pvt. Ltd.*** (supra) was dismissed as withdrawn by the Honble Supreme Court by an order dated 19.01.2015.

17. We have considered the submissions of learned counsel for the parties and have perused the material on record.

18. Whether or not the CESTAT was correct in not following the decision rendered by CESTAT, Principal Bench, New Delhi, in ***Punjab Technical University*** (supra) is a question that will take us to examine the issue on merits. When we are considering a preliminary objection regarding

maintainability of the appeals before this Court, we deem it appropriate not to examine the correctness or otherwise of the order of the CESTAT dated 16.12.2016 at this stage.

19. Section 83 of the Finance Act, 1994 provides, amongst others, that Section 35G and Section 35L of the Act of 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise and therefore, Section 35G as well as 35L are applicable for the purpose of preferring an appeal in relation to service tax.

20. The key to the question posed with regard to maintainability of the appeals lies on the meaning to be ascribed to the expression „determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment, which expression finds place in Section 35G as well as in Section 35L of the Act of 1944.

21. Section 35G (1) of the Act of 1944, which is relevant for our purpose, is reproduced herein below:

> "35G. Appeal to High Court. - (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."
>
> (emphasis supplied by us)

22. Section 35G provides that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 except an order relating, among other things, to determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment, if the High Court is satisfied that the case involves a substantial question of law. Thus, an appeal

against an order relating to determination of any question having a relation to the duty of excise or to the value of goods for the purpose of assessment will not be maintainable before the High Court.

23. It will also be relevant to take note of Section 35L of the Act of 1944 and therefore, the same is reproduced hereunder for better appreciation.

> "35L. Appeal to Supreme Court.—An appeal shall lie to the Supreme Court from—
>
> (a) any judgment of the High Court delivered—
>
> (i) in an appeal made under section 35G; or
>
> (ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003; 11 Tax App. No. 01 of 2017 with Tax App. No. 02 of 2017 The Commissioner of Central Excise & Service Tax, Siliguri vs. Sikkim Manipal University of Health, Medical and Technological Science.
>
> (iii) on a reference made under section 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or
>
> (b) any order passed before the establishment of the National Tax Tribunal] by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment. (emphasis supplied by us) (2) For the purpose of this Chapter, the determination of any

> question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment."

24. A perusal of Section 35L (b) goes to show that an appeal against any order passed by the CESTAT relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment shall lie directly to the Honble Supreme Court. Such order, as is noticed earlier, is not made appellable to the High Court, as Section 35G specifically excludes such an order from being a subject matter of an appeal before the High Court.

25. In ***Navin Chemicals Mfg. and Trading Co. Ltd.*** (supra), the Honble Supreme Court observed that the phrase "relation to" is, ordinarily of wide import but in the context of its use in the expression in Section 129-C of the Customs Act, 1962, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purpose of assessment. The Honble Supreme Court, while considering Section 129-D of the Customs Act, 1962, at paragraph 11, had observed as follows:

> *"11. It will be seen that Sub-section 5 uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition*

of the said expression to Sub-section 5 of Section 129-D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods."

26. A perusal of the judgment of the High Court of Delhi in ***Ernst & Young Pvt. Ltd.*** (supra) goes to show that a contention was advanced by the Revenue that the expression „rate of duty or „value of service should be construed in a narrow manner limiting it to the rate of duty payable on the service chargeable to tax or the valuation of the service which is chargeable to tax and that the same will not encompass the question as to whether the activity is a taxable service under the charging section. It was also contended that when the question relates to excisability or levy of tax, the same does not amount to a dispute about the rate of tax. The High Court of Delhi held that determination of any question relating to rate of tax would necessarily directly and proximately involve the question, which is, whether the activity falls within the charging section and service tax is leviable on the said activity. It was further held that the said determination is integral and an

important injunct to the question of rate of tax. In case service tax is not to be levied or imposed and cannot be imposed under the charging section, no tax would be payable. Accordingly, it was held the words „rate of tax in relation to rate of tax would include the question whether or not the activity is excisable to tax under a particular or specific provision.

27. In the Memo of Appeal of Tax Appeal No. 01 of 2017, the appellant has, amongst others, framed the following substantial questions of law:

> "A. xxxxxxxxxxxxx
>
> B. Whether the respondent is liable to pay service tax or not?
>
> C. xxxxxxxxxxxxx"

By filing an affidavit dated 12.03.2018, the appellant has framed the following substantial questions of law, which are as follows:

> "I. Whether the respondent University is liable to pay service tax on "Accreditation Fees" received by it from its Learning Centres under Sections 65(47) & (48) of Finance Act, 1994.
>
> II. xxxxxxxxxxxxxxx."

Subsequently, another affidavit dated 26.08.2019 was filed framing the following substantial questions of law:

> "(I) xxxxxxxxxxxxxxx
>
> (II) xxxxxxxxxxxxxxx
>
> (III) xxxxxxxxxxxxxxx
>
> (IV) Whether the Honble Tribunal is justified in setting aside the Order-in-Original without appreciating the fact that service rendered by the party falls under the purview of Sub

Section (47) and (48) of Section 65 of the Finance Act 1994 as per which they were liable to pay service tax and were also required to get registered for paying tax and filing returns?

(V) xxxxxxxxxxxxxxxxx"

28. Similarly, in Tax Appeal No. 02 of 2017, the appellant has framed the following substantial questions of law:

"A. xxxxxxxxxxxxxxxx

B. Whether M/s Sikkim Manipal University has failed to obtain Service Tax Registration and failed to pay Service Tax amounting to Rs.2,25,64,753/- only for the period from 2011-12 to 2015-16 (up to September 2015) in respect of alumni fee collected by them at the time of registration from their students which was taxable to Service Tax under the category of "Business Auxiliary Services" for the period up to 30.06.2012 and thereafter under "Other than Negative Services" for the period from 01.07.2012 under Section 66B of the Finance Act, 1994.

C. xxxxxxxxxxxxxxxx"

Subsequently, another affidavit dated 12.03.2018 was filed framing the following substantial questions of law:

"I. Whether the respondent University is liable to pay service tax on "Alumni Fees" received by it from its students under Section 65(19) & Section 66 D (i) of Finance Act, 1994.

II. xxxxxxxxxxxxxxxxx"

29. Having regard to the nature of the Orders-in-Original as well as the orders of CESTAT, it is evident that determination of the question as to whether service tax demand on the accreditation fees received by the respondent as also on alumni fees collected can stand to be levied by the Department or not arise in these appeals. The substantial questions of law framed by the appellant, as noted herein above, also demonstrate that the question as to whether the respondent is liable to pay service tax on accreditation fee and alumni fee as collected by SMU very much arises in the appeals.

30. In ***M/s Motorola India Ltd.*** (supra), the question that arose for consideration was as to whether an appeal from CESTAT, involving an issue regarding violation of conditions contained in the customs exemption notification would lie before the High Court under the provisions of Section 130 of the Customs Act, 1962 or to the Hon ble Supreme Court under the provisions of Section 130E of the Customs Act, 1962. It is noticeable that Section 130E does not have a provision like Section 35L (2) of the Act of 1944.

31. The Honble Supreme Court, on the facts of the case, held that neither any question with regard to determination of rate of duty nor a question relating to valuation of goods for the purpose of assessment arose in the case and that the only question that had arisen was as to whether the assessee had breached conditions which are imposed by the notification for getting exemption from payment of customs duty or not.

32. While respectfully following the decision of High Court of Delhi in ***Ernst & Young Pvt. Ltd.*** (supra), we also note that Sub-Section (2) of Section 35L, which was inserted by the Finance (No.2) Act, 2014 with effect from 06.08.2014, makes it abundantly clear that the determination of any question having relation to the rate of duty shall include determination of taxability or excisability of goods for the purpose of assessment.

33. In view of our discussions above, we are of the considered opinion that these appeals before this Court are not maintainable under Section 35G of the Act of 1944.

34. Preliminary objection of the respondent having been upheld, the appeals are disposed of as not maintainable.

SLR (2019) SIKKIM 1026

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

Crl. M.C. No. 05 of 2019

Mr. Mohamed Yusufuddin Ahmed and Others ….. **PETITIONERS**

Versus

Mrs. Ruth Karthak Lepchani ….. **RESPONDENT**

For the Petitioner: Mr. A. Thameem Mohideen and Ms. A. B. Reehana Begum, Advocates.

For Respondent No. 1: Mr. S. S. Hamal, Legal Aid Counsel.

For Respondent No. 2: Mr. S. K. Chettri, Assistant Public Prosecutor.

Date of decision: 7th December 2019

A. Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power of the High Court – The law is well settled on the ambit and scope of S. 482 Cr.P.C. If the complaint does not disclose any offence or if it is frivolous, vexatious, or oppressive inherent power may be exercised. The power should be sparingly exercised to ensure that the process of the Court is not abused. This Court is not to embark upon an enquiry on the probability, reliability or the genuineness of the allegations made in the complaint. At this stage meticulous analysis of the case should not be done to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for this Court to interfere.

(Para 6)

B. Code of Criminal Procedure, 1973 – Ss. 202 and 190 – Issue of Process – Cognizance – S. 202 provides that any Magistrate on

receipt of the complaint of an offence in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding – The addresses provided in the complaint by the respondent No.1 reflects that all the Petitioners were from Pondicherry and therefore, residing at a place beyond the area in which the learned Magistrate exercised her jurisdiction – The records however, does not reveal that the learned Magistrate had complied with the provisions of S. 202 Cr.P.C. and applied her mind to the facts of the case and the law applicable thereto. The order dated 23.02.2019 states that "cognizance of the matter is taken against accused no.1, 2, 3 and 4."– S. 190 Cr.P.C. deals with cognizance of offence by Magistrate. The said provision provides that the learned Magistrate "may take cognizance of any offence." It is settled law that cognizance is taken of the offence and not the offender. The learned Magistrate has not even mentioned which of the offences she had taken cognizance of – Held: that the learned Magistrate has failed to exercise her discretion to issue summons against the Petitioners residing beyond her territorial jurisdiction in the manner required.

(Paras 10, 11 and 13)

C. Code of Criminal Procedure, 1973 – S. 482 – Exercise of Inherent Power of the High Court – There is no material before the Court to proceed under the criminal jurisdiction – Held: Continuation of the private complaint case would amount to an abuse of the process of Court. The complaint along with the other evidence led by Respondent No.1 does not make out any Criminal offence. It is suggestive of a Civil dispute which has been given the colour of criminality sans any material. Mere use of appropriate words is not enough. Facts asserted and materials produced must satisfy the ingredient of each of the offences alleged.

(Para 31)

Petition allowed.

Chronology of cases cited:

1. Binod Kumar v. The State of Bihar, (2014) 10 SCC 663.

2. Sau. Kamal Shivaji Pokarnekar v. State of Maharashtra and Others, AIR 2019 SC 847.

3. Birla Corporation Ltd. v. Adventz Investments and Holdings Ltd. & Others, 2019 SCC OnLine SC 682.

4. SWIL Ltd v. State of Delhi, (2001) 6 SCC 670.

5. Rajinder v. State of Haryana, (1995) 5 SCC 187.

6. Prof RK Vijayasarathy and Another. v. Sudha Seetharam and Another, 2019 SCC OnLine SC 208.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The petitioners seeks to invoke the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') for quashing Private Complaint Case No.43 of 2018 (for short 'the complaint') pending before the learned Judicial Magistrate, First Class, Gangtok, East Sikkim (for short 'the learned Magistrate') for the offences under Sections 405, 420 read with 120 B, 441 read with 120 B of the Indian Penal Code, 1860 (for short 'the IPC') and also for quashing the warrants against the petitioners.

2. The petition was initially filed by Mohammed Yusufuddin Ahmed (petitioner no.1) and Ifroze Faizia Ahmed (petitioner no. 2) who were accused nos. 2 and 4 in the complaint. On 30.11.2019 I.A. No. 04 of 2019 was allowed by this Court and M/s Pristine Life Sciences and M/s Jun Sui Pharma who were accused nos.1 and 3 in the complaint, were added as petitioner nos.3 and 4.

3. Heard Mr. A. Thameem Mohiden, learned Counsel for the petitioners, Mr. S.S. Hamal, learned Counsel for the respondent no.1 and Mr. S. K. Chettri, learned Assistant Public Prosecutor for the respondent no.2.

4. Mr. A. Thameem Mohiden submitted that the complaint does not make out any criminal liability and it is an abuse of the process of Court. He took this Court through the pleadings in the complaint and the evidence

led before the learned Magistrate to demonstrate that none of the ingredients of the offences alleged has been made out. He also pointed out the order dated 18.12.2018, 23.02.2019 and 02.05.2019 passed by the learned Magistrate and submitted that the learned Magistrate has failed to apply her mind before issuing process under Section 204 Cr.P.C.

5. Mr. S. S. Hamal on the other hand submitted that the complaint read with the documents and the evidence make out the offences as alleged in the complaint. He particularly drew the attention of this Court to the documents filed by the respondent no.1 along with the complaint to emphasize that the alleged offences were committed.

6. The law is well settled on the ambit and scope of Section 482 Cr.P.C. If the complaint does not disclose any offence or if it is frivolous, vexatious, or oppressive inherent power may be exercised. The power should be sparingly exercised to ensure that the process of the court is not abused. This Court is not to embark upon an enquiry on the probability, reliability or the genuineness of the allegations made in the complaint. At this stage meticulous analysis of the case should not be done to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for this Court to interfere[1].

7. The complaint was filed on 18.12.2018. The respondent no.1 was examined by the learned Magistrate on the same day. On 23.02.2019 cognizance was taken and summonses issued against the petitioners. On 02.05.2019 non-bailable warrants of arrest were also issued against the petitioners.

8. As the petitioners have challenged not only the complaint but the issuance of process by the learned Magistrate under Section 204 Cr.P.C it is important to appreciate the mandate of the law pertaining to it.

9. Chapter XV of the Cr.P.C. deals with complaints to Magistrates. Section 200 relates to the examination of the complainant. Section 201 deals with procedure by Magistrate not competent to take cognizance of the

[1] Binod Kumar v. The State of Bihar: (2014) 10 SCC 663; *Sau. Kamal Shivaji Pokarnekar v. State of Maharashtra & Ors:* AIR 2019 SC 847.

case. Section 202 deals with postponement of issue of process. Section 203 deals with dismissal of complaint. The issue of process under Section 204 falls under Chapter XVI of Cr.P.C.

10. Section 202 provides that any Magistrate on receipt of the complaint of an offence in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

11. The addresses provided in the complaint by the respondent no.1 reflects that all the petitioners were from Pondicherry and therefore, residing at a place beyond the area in which the learned Magistrate exercised her jurisdiction.

12. In re: ***Birla Corporation Limited v. Adventz Investments and Holdings Limited & Ors.***[2] the Supreme Court held that under the amended sub-section (1) to section 202 Cr.P.C., it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall inquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused. The Supreme Court also held that the order of the Magistrate must reflect that he has applied his mind to the facts of the case and the law applicable thereto. It was also held that the application of mind has to be indicated by disclosure of mind on the satisfaction and considering the duties of the magistrates for issuance of summons to accused in a complaint case there must be sufficient indication of it. The Supreme Court after referring to a catena of its previous judgments held that summons may be issued if the allegations in the complaint, the complainant statement and other materials would show that there are sufficient grounds for proceeding against the accused.

13. The records however, does not reveal that the learned Magistrate had complied with the provisions of Section 202 Cr.P.C. and applied her

[2] 2019 SCC OnLine SC 682

mind to the facts of the case and the law applicable thereto. The order dated 23.02.2019 states that *"cognizance of the matter is taken against accused no.1, 2, 3 and 4."* Section 190 Cr.P.C. deals with cognizance of offence by Magistrate. The said provision provides that the learned Magistrate *"may take cognizance of any offence."* It is settled law that cognizance is taken of the offence and not the offender[3]. The learned Magistrate has not even mentioned which of the offences she had taken cognizance of. It is thus held that the learned Magistrate has failed to exercise her discretion to issue summons against the petitioners residing beyond her territorial jurisdiction in the manner required.

14. The respondent no.1 has given the details of the rental/lease agreement between her and the petitioners for the period 2006 till the filing of the complaint and the various negotiations and their outcome. The respondent no.1 has also complained about the failure of the petitioners to follow up their commitments with regard to the rental/lease agreements. The respondent no.1 has complained about how the petitioners have allegedly misused her property; not paid the rents on time and therefore were liable for payment of interest; constructed illegal structures; installed heavy machinery; dismantled the premises with a promise to return it in the original condition but left it in inhabitable condition and failed to renew the agreements or register them.

15. The respondent no.1 has also given her evidence on affidavit of the constituted attorney and exhibited the various documents filed along with the complaint. The evidence on affidavit also reiterates the averments and allegations made in the complaint. The evidence on affidavit was thereafter, confirmed by the respondent no.1 through her constituted attorney on 18.12.2018.

16. The respondent no.1 had alleged commission of offence under Sections 405, 420, 441 read with 120B IPC in the complaint.

17. This Court shall now endeavor to examine whether the allegations made in the complaint and the evidence on affidavit are sufficient for proceeding against the petitioners. The respondent no.1 allege:

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[3] SWIL Ltd v. State of Delhi: (2001) 6 SCC 670

> ***"28.*** *It is pertinent to mention here that the accused persons have installed heavy machines after constructing concert of 4 inches on the 1st floor without the prior permission of the complainant, as at the relevant time the complainant was undergoing treatment of her both eyes i.e. Macula Hole. Further the renewing of the old lease for the accused no.1 which the accused no.2 had promised to be done in the month of August, 2015 was never renewed. As such, the accused persons were illegally running their business in the premises of the complainant, through the accused no.1 and 2 entered into the property lawfully, however, they remain in the premises unlawfully after 2015 with an intention to making unauthorized use of the property belonging to the complainant, thereby caused great annoyance to the complainant, as such, the accused no. 1 and 2 are liable to be tried and punished under section 441 for committing offence of criminal Trespass into the property of the complainant.***"***

18. The first allegation in the complaint is with regard to alleged criminal trespass by the petitioners. Section 441 IPC is as under:

> ***"441. Criminal trespass****.—Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,*
>
> *or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,*
>
> *is said to commit "criminal trespass".*

19. In re***: Rajinder v. State of Haryana***[4] the Supreme Court examined Section 441 IPC and held:

[4] (1995) 5 SCC 187

> ***"21.*** *It is evident from the above provision that unauthorised entry into or upon property in the possession of another or unlawfully remaining there after lawful entry can answer the definition of criminal trespass if, and only if, such entry or unlawful remaining is with the intent to commit an offence or to intimidate, insult or annoy the person in possession of the property. In other words, unless any of the intentions referred in Section 441 is proved no offence of criminal trespass can be said to have been committed......"*

20. The allegation made by the respondent no.1 reflects that the failure of the petitioner no.3 as promised by petitioner no.1 did annoy the respondent no.1. However, there is no allegation, leave alone any material whatsoever, to show that there was any intent on the part of the petitioners to intimidate, insult or annoy the respondent no.1, or with intent to commit an offence.

21. The second allegation is of cheating. The respondent no.1 allege:

> ***"36*** *That the accused persons have cheated the complainant intentionally, firstly they dismantled the premises of the complainant with a promise they shall return the premises in the original condition i.e., 13 rooms, 13 bathrooms, 11 sanitary rooms, 14 water taps and 2 large halls in the ground floor, together with electrical fittings, concrete walls sanitary and water pipes with windows and doors to all rooms, however, the property of the complainant is not in the original condition, the accused persons have altered the property and left it in uninhabitable condition i.e., without sanitary.*
>
> ***37.*** *That the accused persons have fraudulently misrepresented the complainant that they shall return the property in its original condition, thereby induce the complainant to*

deliver her property to the accused persons. Hence, accused persons are liable to be tried and punished under section 420 of the IPC for cheating the complainant.

22. Section 420 IPC reads as under:

> *"**420. Cheating and dishonestly inducing delivery of property**.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

23. In re: ***Prof RK Vijayasarathy & Anr. V. Sudha Seetharam & Anr.***[5] the Supreme Court held the ingredients of the offence of cheating as under:

> **Section 415 IPC**
>
> *"The ingredients to constitute an offence of cheating are as follows:*
>
> *i) there should be fraudulent or dishonest inducement of a person by deceiving him;*
>
> *ii) (a) the person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or*
>
> *(b) the person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and iii) in*

[5] 2019 SCC OnLine SC 208

*cases covered by (ii) (b) above, the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property. A fraudulent or dishonest inducement is an essential ingredient of the offence, a person who dishonestly induces another person to deliver any property is liable for the offence of cheating.***"**

Section 420 IPC

"*The ingredients to constitute an offence under Section 420 are as follows:*

i) a person must commit the offence of cheating under Section 415; and

ii) the person cheated must be dishonestly induced to (a) deliver property to any person; or

*(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Cheating is an essential ingredient for an act to constitute an offence under Section 420.***"**

24. The allegation made in the complaint does not contain the essential ingredients of cheating or that the petitioners had dishonestly induced the respondent no.1 to deliver the property.

25. The third allegation made in the complaint pertains to criminal breach of trust. It is alleged:

"38. *That the act on the part of the accused persons to make the complainant believe that they shall return the property in its original condition, thereby the complainant in good faith*

*entrusted the property to the accused persons, however, the accused persons misrepresented the fact to the complainant amounts to breach of trust, as the agreement was made in the name of one company and they were running the business in the name of another company without having valid lease agreement to run his business. Hence, the accused persons are liable to be tried and punished under section 405 and punishable under section 406 of the IPC, for criminal breach of trust.***"**

26. Section on 405 IPC reads as under:

> ***"405. Criminal breach of trust.***—*Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*
>
> *Explanation 2[1].—.....*
> *Explanation 2.—.....***"**

27. In re: ***Prof RK Vijayasarathy (supra)*** the Supreme Court held the ingredients of the offence of criminal breach of trust as under:

> ***"i)*** *A person should have been entrusted with property, or entrusted with dominion over property;*
>
> ***ii)*** *That person should dishonestly misappropriate or convert to their own use that property, or dishonestly used or disposed of that property*

or willfully suffered any other person to do so; and

iii) *That such misappropriation, conversion, used or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.*

*Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punishable under Section 406 of the Indian Penal Code.***"**

28. The allegation made in the complaint does not reflect any criminality amounting to an offence of criminal breach of trust on the part of the petitioners. There is no allegation of dishonest misappropriation or conversion of the property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract made.

29. The respondent no.1 has also invoked Section 120B IPC. Criminal conspiracy is defined in Section 120A IPC. It reads as under:

"120A. Definition of criminal conspiracy*.—When two or more persons agree to do, or cause to be done,—*

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties

to such agreement in pursuance thereof. Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

30. The respondent no.1 had arrayed the four petitioners as accused in the complaint. There is no allegation whatsoever that they have conspired with each other and agreed to do, or cause to be done, any illegal act, or an act which is not illegal by illegal means. The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence and the said ingredient is missing in the complaint.

31. This Court having examined the complaint, the evidence on affidavit of the respondent no.1 and the exhibited documents filed by the respondent no.1, is of the firm view that there is no material before the Court to proceed under the criminal jurisdiction. Resultantly, it is held that continuation of the private complaint case would amount to an abuse of the process of Court. The complaint along with the other evidence led by respondent no.1 does not make out any criminal offence. It is suggestive of a civil dispute which has been given the colour of criminality sans any material. Mere use of appropriate words is not enough. Facts asserted and materials produced must satisfy the ingredient of each of the offences alleged.

32. The Private Complaint Case No.43 of 2018 pending before the Court of Judicial Magistrate, First Class, East Sikkim at Gangtok is hereby quashed. Consequently, all orders, summons and warrants passed and issued by the learned Magistrate in P.C. Case No. 43 of 2018 are set aside. The Crl. M.C. No. 05 of 2019 is allowed.

33. Should the respondent no.1 choose to take recourse to a civil action she is at liberty to do so.

SLR (2019) SIKKIM 1039

(Before Hon'ble the Chief Justice)

W.P. (C) No. 33 of 2018

Shri Rajen Kumar Chettri ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. B. Sharma, Sr. Advocate with Mr. B.N. Sharma, Advocate.

For the Respondents: Dr. Doma T. Bhutia, Additional Advocate General with Ms. Tamanna Chhetri, Advocate.

Date of decision: 7th December, 2019

A. Constitution of India – Article 226– The claim made by the Petitioner for regularization of service with effect from 05.08.1984 in the post of Meter Reader, on the ground that a similarly placed incumbent had been granted regularization on 05.08.1984, is a stale claim and ought not to be gone into at this point of time – The submission of Mr. Sharma in reply that his case may be considered for regularization from the date of filing the representation, i.e. from 27.03.1995, is also without any merit. If there was any real grievance regarding he being meted out with discriminatory treatment, the Petitioner ought to have approached the Court within a reasonable period of time and not after 34 years from 05.08.1984 or after 23 years from the date of filing the representation – It is noticed that the Petitioner was regularized as a Junior Meter Reader on 25.04.2018. The writ petition was filed on 29.06.2018, that is, after his service was regularized as Junior Meter Reader, raising a grievance that he ought not to have been appointed as a Junior Meter Reader. By the time the writ petition was filed, more than 3 ½ years had gone by from the date of his appointment on 20.09.2014 and the Petitioner had also been regularized in the meantime as Junior Meter Reader and therefore, I am of the considered

opinion that even this aspect of the matter, in the attending facts and circumstances of the case, ought not to be considered at this point of time in exercise of discretionary power under Article 226 of the Constitution of India.

(Paras 17 and 18)

Petition dismissed.

Chronology of cases cited:

1. State of Jammu and Kashmir v. R.K. Zalpuri and Others, AIR 2016 SC 3006.
2. State of Tamil Nadu Through Secretary to Government, Commercial Taxes and Registration Department, Secretariat and Another v. A. Singamuthu, (2017) 4 SCC 113.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. B. Sharma, learned Senior Counsel assisted by Mr. B.N. Sharma, learned counsel for the petitioner. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General, Sikkim assisted by Ms. Tamanna Chhetri, learned counsel for the respondents.

2. The petitioner was initially appointed on muster roll basis during October, 1979 and thereafter he was brought under work-charged establishment with effect from 01.04.1980 by an order dated 10.04.1980. In pursuance of the notification dated 12.02.2014 issued by the Commissioner-cum-Secretary, Department of Personnel, Administrative Reforms, Training and Public Grievances, Government of Sikkim, by an order dated 20.09.2014 the petitioner came to be appointed as Junior Meter Reader, on probation for a period of one year from the date of joining. It was indicated therein that the appointment shall be governed by the Memorandum No. 1235/Adm. dated 19.09.2014.

3. The prayers made in the writ petition are as follows: -

> "(a) A Rule upon the respondent Nos.1 to 3 and each of them to show-cause as to why the case of the petitioner cannot

be regularized w.e.f. 05.08.1984 and on subsequent dates as done in similarly placed incumbents;

(b) Writ order/direction to the respondent No.2 or each of the respondents to regularize the service of the petitioner without putting him under probation and with retrospective effect by duly computing half of the entire work-charge service rendered by the petitioner;

(c) A writ order/direction to the respondent No.2 or each of the respondents to grant up gradation pay duly considering the past services;

(d) A writ order/direction to the respondent No.2 or each of the respondents to regularize the petitioner in the post of Meter Reader or higher post as the case may be duly correcting the office order dated 29.09.2014 with retrospective date and if necessary by relaxing the condition;

(e) A writ order/direction to the respondent No.2 or each of the respondents to grant all service benefits with retrospective date as prayed above;

(f) Cost of the case;

(g) Any other relief or reliefs the petitioner is entitled to."

4. The petitioner in the writ petition has referred to the cases of one Kamal Bahadur Gurung and Tara Lohagan @ Lohar, who were brought under temporary regular establishment with effect from 01.11.1985 and 05.08.1984, respectively. It is pleaded that they were brought to work-charged establishment from muster roll line staff of Power Department along with the petitioner by the very same order dated 10.04.1980. It is on the basis of the order dated 05.08.1984 in respect of Tara Lohagan @ Lohar that the petitioner is claiming regularization with effect from 05.08.1984. The petitioner has also cited the instance of one Tilak Bahadur Rai, Assistant Turbine Operator, who was regularized with effect from 29.07.2004. One more instance, that of one Navin Tamang, is also brought into focus. It is stated that Navin Tamang is the son of one late Passang Tshering Tamang, who was brought into the work-charged establishment along with the petitioner, and while Navin Tamang is enjoying the basic pay of Rs.13,020/-,

ironically, the basic pay of the petitioner is fixed at Rs.10,220/-. It is pleaded that the petitioner had been working as Meter Reader but by the order dated 20.09.2014 he was absorbed in the post of Junior Meter Reader.

5. Mr. Sharma has submitted that the respondents acted illegally and arbitrarily in not regularizing the service of the petitioner retrospectively with effect from 05.08.1984, i.e., the date when service of Tara Lohagan @ Lohar was regularized or from 01.11.1985 when Kamal Bahadur Gurung was regularized. He submits that though the order dated 20.09.2014 would show that the petitioner was appointed, that too, on probation, it is, in fact, an order of regularization of his service. Putting the petitioner on probation for a period of one year is wholly uncalled for, unjustified and arbitrary. He has submitted that the petitioner has been grossly discriminated in the matter of regularization of his service. The petitioner could have been regularized with retrospective effect by taking recourse to Clause 37 of the Work-Charged Establishment Manual brought into force with effect from 01.06.1981 by a Notification dated 21.05.1981. When the petitioner was working as Meter Reader, there could not have been any justification for appointing him in a lower post of Junior Meter Reader. Further contention advanced by Mr. Sharma is that unlike in the orders dated 05.08.1984 and 01.11.1985 in respect of Tara Lohagan @ Lohar and Kamal Bahadur Gurung, respectively, in the order dated 20.09.2014, the benefit of Clause 21 of the Work-Charged Establishment Manual, providing that one half of the continuous service rendered in the work-charged establishment shall be treated as continuous and qualifying service in a regular establishment for purpose of pension and gratuity, was not reflected.

6. Relying on the affidavit dated 12.10.2018 filed on behalf of the respondents 1, 2 and 3, it is submitted by Dr. Bhutia that the Government had taken a sympathetic view in respect of temporary employees working as muster roll, ad hoc, work-charged, etc., who had completed 15 years of service or more as on 31.01.2013, to bring them on to regular establishment and for that purpose, 4002 posts in various Departments were created for appointment of such temporary employees belonging to Group 'C' and Group 'D'. 115 numbers of posts of Junior Meter Reader, which is a post in Group 'C' category, were created in the Energy and Power Department and the petitioner along with 16 others, who were appointed as Meter Readers on muster roll basis, were appointed as Junior Meter Readers.

7. She has submitted that without going to the merits of the writ petition, the writ petition is liable to be dismissed in view of gross and unexplained delay in claiming regularization of service with effect from 05.08.1984 in the year 2018. The petitioner had voluntarily accepted the offer of appointment contained in the Memorandum dated 19.09.2014 and after accepting the offer of appointment and on being appointed, after a lapse of almost four years, the present petition was filed. In this context, she has relied on a decision of the Honble Supreme Court in the case of ***State of Jammu and Kashmir vs. R.K. Zalpuri and others***, reported in ***AIR 2016 SC 3006***.

8. She further submits that Tara Lohagan @ Lohar and Kamal Bahadur Gurung were holding the post of Line Assistant on muster roll basis and they were brought in temporary regular establishment in the vacant posts of Line Assistant, which are Group 'D' posts. There were no vacant posts for Meter Reader. Since the petitioner was in muster roll in a different post, the petitioner is not similarly situated with the aforesaid employees. The post of Junior Meter Readers were created in which the petitioner was appointed and in absence of challenge to the creation of posts of Junior Meter Readers for the purpose of appointment of temporary employees such as the petitioner, the contention advanced by the petitioner that he has been downgraded is without any basis inasmuch as the petitioner was earlier working as Meter Reader in a work-charged establishment only and not in a regular establishment. By producing a document at the time of hearing, Dr. Doma submits that four verification committees had been constituted by the Energy and Power Department to scrutinize the cases of the temporary employees. Based on the above, she submits that Dhan Bahadur Chettri, who was a Meter Reader and whose name figured above the petitioner in the order dated 10.04.1980, was also appointed as Meter Reader along with the petitioner. Dr. Bhutia also places reliance in the case of ***State of Tamil Nadu Through Secretary to Government, Commercial Taxes and Registration Department, Secretariat and another vs. A. Singamuthu***, reported in ***(2017) 4 SCC 113.***

9. In reply, Mr. Sharma has submitted that the petitioner had demanded justice by submitting a representation for regularization as also for change of designation as Lower Division Clerk from the post of Meter Reader (Annexure P-14) on 27.03.1995, and therefore, this Court may also consider the case of the petitioner for regularization with effect from 27.03.1995.

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

11. Perusal of the notification dated 12.02.2014 (Annexure R-1 of the affidavit of the respondents) goes to show that 4002 posts in various Departments were created to exclusively appoint temporary employees belonging to Group 'C' and Group 'D' categories who had completed 15 years of service or more as on 31.01.2013. For Energy and Power Department, 860 posts in Group 'C', 820 posts in Group 'D' and 33 posts of Junior Driver, totaling 1713 posts, were created and categories of Group 'C' and Group 'D' posts were to be in terms of Annexure-VI thereto. Annexure-VI, as aforesaid, goes to show that a total number of 115 posts were meant for Junior Meter Readers. Based on the aforesaid notification dated 12.02.2014, the petitioner was offered appointment on temporary capacity to the post of Junior Meter Reader vide Memorandum dated 19.09.2014. One of the terms of appointment was that the work-charged employee shall draw the new pay structure with protection of pay in the form of personal pay. It was indicated that the permanent absorption of the appointee will be considered strictly in accordance with Rules in force for such appointment.

12. The petitioner had accepted the Memorandum dated 19.09.2014 and thereafter, order of appointment dated 20.09.2014 was issued indicating that he would be on probation for a period of one year from the date of joining.

13. It appears that the petitioner was subsequently regularized by order dated 25.04.2018, which is annexed as Annexure R-10 to the affidavit of the respondents. Though a grievance is raised by the petitioner that the respondents acted illegally in placing the petitioner on probation, it is to be noted that before the writ petition came to be filed in the month of June 2018, the period of probation had long back expired and therefore, this Court need not advert to this aspect of matter any further.

14. In ***R.K. Zalpuri*** (supra), the Honble Supreme Court has emphasized that a writ Court, while deciding a writ petition, is required to remain alive to the nature of the claim and the unexplained delay on the part of the petitioner. Stale claims are not to be adjudicated unless non-interfereance would cause grave injustice.

15. In the aforesaid case, the employee was dismissed from service in the year 1999 and he did not choose to avail any departmental remedy and had knocked the doors of the High Court after a lapse of five years. In the aforesaid background the Supreme Court had observed that the grievance agitated by the employee did not deserve to be addressed on merits on the ground of delay and laches.

16. ***Singamuthu*** (supra) was a case relating to part-time employees who were working for more than ten years. They were regularized and provided grant of monetary benefits from the date of issuance of the Government Order (G.O.). The High Court had granted regularization to the employees from the date of completion of service of ten years with salary and other benefits. While setting aside the order of the High Court, the Honble Supreme Court held that the employees would be entitled to the monetary benefits only from the date of issuance of the G.O.

17. I am of the considered opinion that the claim made by the petitioner for regularization of service with effect from 05.08.1984 in the post of Meter Reader, on the ground that a similarly placed incumbent had been granted regularization on 05.08.1984, is a stale claim and ought not to be gone into at this point of time. Mr. Navin Tamang was appointed on compassionate ground in the year 1995-96 and therefore, his case stands on a different footing. It also appears that Tilak Bahadur Rai was regularized on the basis of recommendation of the Departmental Promotion Committee. The submission of Mr. Sharma in reply that his case may be considered for regularization from the date of filing the representation, i.e. from 27.03.1995, is also without any merit. If there was any real grievance regarding he being meted out with discriminatory treatment, the petitioner ought to have approached the Court within a reasonable period of time and not after 34 years from 05.08.1984 or after 23 years from the date of filing the representation.

18. It is noticed that the petitioner was regularized as a Junior Meter Reader on 25.04.2018. The writ petition was filed on 29.06.2018, that is, after his service was regularized as Junior Meter Reader, raising a grievance that he ought not to have been appointed as a Junior Meter Reader. By the time the writ petition was filed, more than 3 ½ years had gone by from the date of his appointment on 20.09.2014 and the petitioner had also been regularized in the meantime as Junior Meter Reader and therefore, I am of

the considered opinion that even this aspect of the matter, in the attending facts and circumstances of the case, ought not to be considered at this point of time in exercise of discretionary power under Article 226 of the Constitution of India.

19. Prayer (c) to the writ petition, to say the least, is vague and there is no factual foundation also in the writ petition for up gradation of pay.

20. In the affidavit, at paragraph 18, it is stated that since the petitioner falls under Contributory Pension Fund (CPF) Scheme, his service will be recognized only for gratuity benefits and the department will issue orders accordingly as and when the petitioner requires/retires. In that view of the matter, arguments advanced by Mr. Sharma that continuous service rendered by the petitioner in the work-charged establishment shall have to be treated as continuous and qualifying service in the regular establishment for the purpose of gratuity in terms of Clause 21 of the Work-Charged Establishment Manual, is not gone into and considered, reserving liberty to the petitioner to agitate the issue, if need be, in future, by putting forth all contentions in that regard.

21. In view of the above discussion, the writ petition is dismissed with observations as indicated herein above.

22. No costs.

SLR (2019) SIKKIM 1047
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 19 of 2018

Lok Prasad Limboo @ Lokay ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista, Legal Aid Counsel and Ms. Anusha Basnet, Advocate.

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

Date of decision: 9th December, 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 7 – Sexual Assault – Sexual assault includes touching of the private parts and the breasts of a child with sexual intent and involves physical contact without penetration – Since the Appellant touched the breasts of the victim no other conclusion can be drawn from the act except that it was with sexual intent.

(Para 8)

Appeal partially allowed.

Chronological list of cases cited:

1. Taraman Kami v. State of Sikkim, SLR (2017) Sikkim 781.
2. State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp (1) SCC 335.
3. Prakash Singh Badal and Others v. State of Punjab and Others, (2007) 1 SCC 1.

4. Lalita Kumari v. Government of Uttar Pradesh and Others, (2014) 2 SCC 1.

5. Youth Bar Association of India v. Union of India and Others, MANU/SCOR/18594/2016.

JUDGMENT

Meenakshi Madan Rai, J

1. In Sessions Trial (POCSO) Case No.13 of 2017 the Appellant faced trial under Section 7 and Section 9(l) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act) and Section 354 of the Indian Penal Code, 1860 (hereinafter, IPC). Vide the impugned Judgment dated 31-05-2018, the Appellant was convicted on two counts for the offence under Section 7 of the POCSO Act, Section 9(l) of the POCSO Act and on two counts for the offence under Section 354 of the IPC. Consequently, he was sentenced to suffer simple imprisonment of four years on each count of the offence under Section 7 of the POCSO Act with fine of Rs.30,000/- (Rupees thirty thousand) only, each, with default clauses of imprisonment. For the offence under Section 9(l) of the POCSO Act, he was sentenced to undergo simple imprisonment for a period of five years and to pay a fine of Rs.40,000/- (Rupees forty thousand) only, also with a default clause of imprisonment. On each count of the offence under Section 354 of the IPC, simple imprisonment for a period of four years and fine of Rs. 40,000/- (Rupees forty thousand) only, each, default clauses of imprisonment were prescribed. The periods of imprisonment were ordered to run concurrently.

2. Dissatisfied with the impugned Judgment and Order on Sentence the Appellant is before this Court contending that in the first instance no evidence determines that the victim was a minor as her Birth Certificate was not seized. Secondly, the victim complained of sexual assault on two occasions and deposed that when the earlier incident occurred her brother had also accompanied her to the shop of the Appellant for some errand. P.W.5, her brother however did not shed any light on this aspect in his evidence. It was next contended that when the first alleged sexual assault took place the victim did not disclose it to any person neither did she reveal it in her statement under Section 164 of the Code of Criminal Procedure,

1973 (for short, Cr.P.C.) to the Learned Magistrate and came to light for the first time in her evidence before the Court, thereby reeking of falsity. That, the evidence of the victim indicates a motive to falsely implicate the Appellant as she had stated that her uncle P.W.3 and the Appellant did not share cordial relations. It was urged that prior to the alleged incident the victim frequented the shop of the Appellant but no such incident had ever been complained of. That, in all likelihood she was tutored by her uncle and aunt to depose against the Appellant when she went to record her statement under Section 164 Cr.P.C. That, the victim s case is that she had gone to the shop of the Appellant at 7 p.m. when infact his shop closes down at 6 p.m., revealing the intent of P.W.3 and P.W.4 to falsely implicate the Appellant by sending her after his shop closed. The Appellant, for his part has clearly denied the allegations made against him in his responses under Section 313 Cr.P.C. The medical evidence does not support the Prosecution case, accordingly the case not having been proved beyond a reasonable doubt, the Appellant deserves an acquittal

.

3. Learned Assistant Public Prosecutor refuting the contentions so advanced, argued that no doubt arises on the age of the victim, since Exhibit 9, the Admission Register of the School in which she was admitted, was produced in evidence before the Learned Trial Court and proved. That, the victims name and date of birth is recorded therein and the Headmistress of the School, P.W.10, has vouched for the authenticity of the entries by her evidence and issuance of a Certificate Exhibit 10. The incident took place on 27-06-2017, hence the victim was a minor in terms of the POCSO Act her date of birth being 02-10-2000. The victim has categorically described the sexual assault perpetrated on her by the Appellant. That, in his response to Question no.4 of the Section 313 Cr.P.C. statement, the Appellant admitted that the victim had indeed come to his shop to purchase biscuits. That, this statement itself confirms the victims presence at the place of occurrence. Hence, in view of the evidence furnished by the Prosecution no requirement arises to interfere with the impugned Judgment and Order on Sentence.

4. The rival submissions of Learned Counsel have been heard at length and duly considered, all evidence and documents as also the impugned Judgment have been duly perused and carefully considered.

5. The questions that fall for consideration before this Court is *(i)* whether the alleged incident indeed took place and *(ii)* whether the impugned Judgment is sustainable in its entirety, the Appellant having been convicted on two counts of Section 7 of the POCSO Act and on two counts of Section 354 of the IPC, sans FIR in the first incidents alleged.

6. In this regard, we may first look into the facts of the case. On 27-06-2017, P.W.3, the maternal uncle of the victim lodged an FIR, Exhibit 4, before the Mangan Police Station, at around 2200 hours, informing therein that on the same date, at around 1900 hours, his niece the victim had gone to purchase biscuits from the shop of the Appellant. She returned home crying and reported that the Appellant had sexually assaulted her by fondling her breasts at his shop. P.W.3 and his wife along with their son went to confront the Appellant at his house, who attempted to compromise the matter by offering them "*Khadas*" (ceremonial silk scarf) and money. P.W.3 reported the matter to the local Panchayat and on being so advised by him, to the Police. Based on the FIR, Mangan P.S. Case dated 27-06-2017, under Section 8 of the POCSO Act was registered against the Appellant. During investigation it transpired that the victim was living with her aunt and uncle, the Appellant was their neighbour. In sum and substance investigation revealed the sexual assault on the victim as complained in Exhibit 4. The victim in her Section 164 Cr.P.C. statement stated that the Appellant had previously also fondled her breasts near his residence when she was studying in Class VII but she did not reveal the incident to anyone for fear of being disbelieved considering her young age. Charge-Sheet was submitted under Sections 8 and 10 of the POCSO Act against the Appellant. The Learned Trial Court framed Charge as reflected in the impugned Judgment. On his plea of "not guilty" the trial commenced, where the prosecution examined sixteen witnesses. On consideration of the evidence, the impugned Judgment and Order on Sentence came to be pronounced.

7. While addressing the first question formulated, I have examined the contents of Exhibit 9 the School Admission Register. The contents therein have been vouched for by P.W.10 Headmistress of the School. She identified Exhibit 9(a) as the entry pertaining to the victim. Exhibit 10 as the Certificate issued by her certifying therein that the date of birth of the victim as per Exhibit 9 was "02-10-2000". P.W.10 deposed that the minor victim had been admitted in their School in the pre-Primary Section on 21-02-

2005 and left School in 2016. Considering the contents of the document no ambiguity whatsoever concerning the age of the victim exists. Consequently, it is found that the victim was a minor when the incident took place and a child as defined under Section 2(d) of the POCSO Act.

8. The victim before the Learned Trial Court had stated that when she was in the 7th standard her brother and herself had gone to the shop of the Appellant to reach some '*bajri*' and sand. When her brother went to drink water, the Appellant suddenly put his hands on her breasts. Her cross-examination elicited the fact that this incident went unreported by her, either to her family or any authority. Pausing here momentarily it may be remarked that an FIR was lodged in the matter consequently no investigation ensued. She then narrated the incident that took place on 27-06-2017. She categorically stated that the Appellant fondled her breasts and on her resistance he left her upon which she ran home and reported the incident. That, she and her family rejected the offer of compromise by the Appellant when she and P.W.3 and P.W.4 confronted him. The statements made by the victim withstood the test of cross-examination. The evidence of P.W.3 would substantiate the Prosecution case pertaining to the lodging of the FIR, he also corroborated the evidence of the victim which found further corroboration in the deposition of P.W.4. P.W.5 was the brother of the victim who was present when they confronted the Appellant. His evidence corroborated the evidence of P.Ws 2, 3 and 4. P.W.6 was witness to the seizure of two *Khadas* and 10 number of Rs.500/- (Rupees five hundred) notes, from the Appellant at the Mangan Police Station. P.W.7 was a neighbour of the minor victim and went to the Appellants house on hearing a commotion, he witnessed the Appellant offering *Khadas* to the minor victim and her family members on the relevant night in the Appellants house. The Panchayat, P.W.13, vouched for the fact that P.Ws 2, 3 and 4 had come to his residence informing him about the said sexual assault upon which he instructed them to report the matter to the Police. Although P.W.8 the Gynaecologist, who medically examined the victim stated that on examining the breasts of the victim she found no injury either there or on the person of the victim. No contradiction emanates in her statement and the Prosecution case as the victim has made no allegation of use of violence by the Appellant or of penetrative sexual assault. Her evidence is that he had fondled her breasts for which obviously unless violence was used there would be no signs of the assault. However, the statement of the victim with regard to the sexual assault on her on 27-06-2017 is consistent, cogent and

reliable. As pointed out by Learned Assistant Public Prosecutor it is clear from the response to the question put to him under Section 313 Cr.P.C. statement the Appellant has admitted that the victim had come to his shop to purchase biscuits. Sexual assault includes touching of the private parts and the breasts of a child with sexual intent and involves physical contact without penetration. On the touchstone of this definition, it is obvious that since the Appellant touched the breasts of the victim no other conclusion can be drawn from the act except that it was with sexual intent. It is found from the evidence on record that the Prosecution has proved its case beyond a reasonable doubt based on the anvil of the statement of the victim and the supporting witnesses.

9. Dealing with the second question it may be recapitulated here that this Court in ***Taraman Kami*** vs. ***State of Sikkim*** and ***State of Sikkim*** vs. ***Taraman Kami***[1] had considered a similar question. The question that fell for consideration therein *inter alia* was (i) whether the Appellant can be convicted and sentenced for an alleged offence against "Victim A", P.W.3, sans FIR, based on her statement under Section 161 of the Cr.P.C.? The provisions of Section 154 of the Cr.P.C. was discussed and reference made to the ***State of Haryana and Others*** vs. ***Bhajan Lal and Others***[2], ***Prakash Singh Badal and Others*** vs. ***State of Punjab and Others***[3] and ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[4]. It would be apt to reiterate here that in ***Lalita Kumari*** (*supra*) the Supreme Court held that;

> **"93.** The object sought to be achieved by registering the earliest information as FIR is inter alia twofold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later.
>
> **120.** ……...…

[1] SLR (2017) Sikkim 781
[2] 1992 Supp (1) SCC 335
[3] (2007) 1 SCC 1
[4] (2014) 2 SCC 1

> **120.1.** The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
>
> **120.2.** If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
>
> **120.3.** If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
>
> **120.4.** The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
>
> ……."
>
> **[emphasise supplied]**

Thereafter, in Paragraphs 13 and 14 of ***Taraman Kami*** (*supra*) it was observed that;

> ***"13.*** On a reading of the above rationale, it is indeed explicit that when an offence is committed it is imperative that a complaint under Section 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps as enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of

the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest.

14. In ***Youth Bar Association of India*** vs. ***Union of India and Others***[5] the Honble Supreme Court while issuing directions to the States to upload each and every FIR registered in all the Police Stations within the territory of India in their official website, observed, *inter alia*, that;

> **"12.** .....
>
> (a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.
>
> (b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a

[5] MANU/SCOR/18594/2016

First Information Report can submit an application through his representative/agent/ parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.

(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C. .....

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person. ....."

The above ratio emphasises the importance of an FIR in a criminal offence, in the absence of which

> an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case. Thus, in view of the gamut of discussions which have taken place hereinabove, it concludes that the answer to the first question is in the negative.**"**

Although the accused herein is the same person alleged to have committed the offence on an earlier occasion, when an offence was revealed in her Section 161 Cr.P.C. statement the Investigating Officer was required to take steps as necessitated by law.

10. The Judgment *supra* of the Division Bench of this Court appears to have escaped the noticed of the Learned Trial Court.

11. Thus, sans FIR and investigation the Appellant cannot be convicted for the alleged previous offence.

12. Hence, the conviction of the Appellant on the first count for the offence under Section 7 of the POCSO Act and the first count under Section 354 of the IPC is set aside.

13. The conviction for the offence under Section 9(l) of the POCSO Act, i.e., for repeated sexual assault, is set aside and he is acquitted of the said offence.

14. The Appellant stands convicted on one count for the offence under Section 7 of the POCSO Act and one count for the offence under Section 354 of the IPC.

15. He is accordingly sentenced to undergo simple imprisonment of four years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only, under Section 7 punishable under Section 8 of the POCSO Act. In default thereof further simple imprisonment of three months. He shall undergo simple imprisonment for a period of four years and pay a fine of Rs.40,000/- (Rupees forty thousand) only, under Section 354 of the IPC. In default, further simple imprisonment of three months.

16. The Appeal is allowed to the extent above.

17. The order pertaining to compensation in terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, warrants no interference.

18. No order as to costs.

19. Copy of this Judgment be forwarded to the Learned Trial Court for information.

SLR (2019) SIKKIM 1058

(Before Hon'ble the Chief Justice)

W.P. (C) No. 27of 2019

Mrs. Menuka Devi Bhattarai ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner: Mr. J.B. Pradhan, Sr. Advocate with
Mr. D.K. Siwakoti, Advocate.

For the Respondents: Dr. Doma T. Bhutia, Addl. Advocate General.

Date of decision: 14th December, 2019

A. Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed –Though NIT was issued on "As is where is basis", barely after one month from the date of taking possession, on 03.10.2016, the Petitioner made a request to the Minister, Tourism and Civil Aviation for permitting her to collect revenue from the shops of the Park as was allowed in the previous term, so as to enable her to make payment of rent to the Department. Though contention was advanced by Mr. Pradhan that the Petitioner was new in business, such a claim is, *ex facie*, not correct as demonstrated by Petitioner's own assertion that she be allowed to collect revenue from the shops of the Park as was allowed in the previous term. The Petitioner also wanted to undertake construction of swimming pool with restaurant and bar, eco huts, rock climbing and traversing and Brahmabridge, musical hall (traditional song & music), traditional dress & photography stalls, traditional food court, kids playing kingdom, fishing pond, etc. Though not stated so in the letter dated 03.10.2016, the Petitioner in the writ petition had made a categorical statement that unless the facilities and infrastructure as indicated by her were not provided or created it would be difficult for her to pay the lease amount. A request was also made to approve the rates of entry and parking fees as indicated in the said letter.

The Petitioner being the previous lessee, it is reasonable to hold that the Petitioner was aware of the potential of the Park and accordingly, had submitted her tender and therefore, the stand taken by the Petitioner barely one month after the lease period had commenced raises many questions.

(Para 14)

B. Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed –Though pleas are taken in the writ petition that Petitioner was unaware of the contents of the lease deed, it is to be remembered, as is evident from the letter dated 03.10.2016, the Petitioner was also the lessee in the previous term. Contents of the letter dated 03.10.2016 also belies the contention of the Petitioner that she was unaware of the terms and conditions of the lease. It cannot be countenanced that the Petitioner was not aware of the requirement of payment of lease rent in terms of lease deed inasmuch as the Petitioner had paid an amount of 51.00 lakhs as advance rent for one quarter. Even otherwise, such a contention cannot be accepted in a writ proceeding in respect of a commercial contract entered into by the Petitioner with the State, the same being a disputed question of fact.

(Para 17)

C. Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – The assertion of the Petitioner is that the Petitioner was given to understand that lease rent would be lowered in view of her request made in the letter/representation to the Chief Minister praying for reduction of lease rent at the rate of "Rs.1.20 lakhs". The letter is undated but there is an endorsement of the Chief Minister dated 28.11.2017 to consider the request as per norms. It is to be noted that the Department had already rejected the prayer for relaxation of payment of rent by letter dated 26.07.2017 in response to the letter of the Petitioner dated 14.06.2017, about which the Petitioner made no mention in the writ petition – Petitioner submits that she had not received the aforesaid letter dated 26.07.2017. It will be unrealistic to proceed on the assumption that the Petitioner never enquired about the outcome of the request for relaxation of payment of rent even if it is assumed that the Petitioner had not received the letter dated 26.07.2017. It was the responsibility of the Petitioner to make payment of rent in terms of lease deed – A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be

allowed to turn round and question the validity of those obligations – (*In Re. State of Orissa and Others v. Narain Prasad referred*).

(Paras 20 and 26)

D. Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes – If the contract between the private party and the State or instrumentally of the State is under the realm of private law with no element of public law, the appropriate remedy for the aggrieved party is to approach the ordinary Civil Court and that writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred – (*In Re. Joshi Technologies International Inc. v. Union of India and Others referred*).

(Para 39)

E. Constitution of India – Article 226 – Notice Inviting Tender – Lease Deed – The controversy in the instant case is purely in the realm of private law – By the said letters, the Petitioner was directed to make the payment within seven days from the date of receipt of letter failing which it was indicated that legal action shall be initiated as per lease deed. In spite of clear indication in the said notices that legal action shall be initiated on failure to deposit the arrears rent, the Petitioner did not make good the breach complained of. It was in this background, in terms of the lease deed, termination order dated 22.07.2019 was issued stating that the lease deed will stand cancelled within 30 days of receipt of the same – Petitioner has continued to run the Park and it is an admitted position that even during the pendency of the writ petition no amount towards payment of rent has been paid by the Petitioner. Thus, from May 2017 till the date of hearing spanning over a period of more than 2 years 6 months, no rent has been paid by the Petitioner – In a matter of the present nature, when the impugned action had been taken in terms of the lease deed, I am of the considered opinion that the submission advanced by the Petitioner that the impugned order is vitiated as no opportunity of hearing was afforded to the Petitioner is without any merit.

(Para 40)

Petition dismissed.

Chronological list of cases cited:

1. Union of India and Another v. Tulsiram Patel, (1985) 3 SCC 398.
2. Express Newspapers Pvt. Ltd. and Others v. Union of India and Others, (1986) 1 SCC 133.
3. Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another, (1986) 3 SCC 156.
4. State of U.P and Others v. Maharaja Dharmander Prasad Singh and Others, (1989) 2 SCC 505.
5. Kumari Shrilekha Vidyarthi and Others v. State of U.P and Others, (1991) 1 SCC 212.
6. Janab Salehbhai Saheb Safiyuddin v. The Municipal Corporation of Greater Bombay and Others, (1993) SCC OnLine Bom 74.
7. Canara Bank and Others v. Debasis Das and Others, (2003) 4 SCC 557.
8. Joshi Technologies International Inc. v. Union of India and Others, (2015) 7 SCC 728.
9. Indian Oil Corporation Limited v. Nilofer Siddiqui and Others, (2015) 16 SCC 125.
10. M/s Radhakrishna Agarwal and Others v. State of Bihar and Others, (1977) 3 SCC 457.
11. Bareilly Development Authority and Another v. Ajai Pal Singh and Others, (1989) 2 SCC 116.
12. State of Gujarat and Others v. Meghji Pethraj Shah Charitable Trust and Others, (1994) 3 SCC 552.
13. State of Orissa and Others v. Narain Prasad and Others, (1996) 5 SCC 740.
14. State of M.P and Others v. M.V Vyavsaya & Co., (1997) 1 SCC 156.
15. State of Bihar and Others v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. J.B. Pradhan, learned Senior Counsel as well as Mr. D.K. Siwakoti, learned counsel for the petitioner. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General, Sikkim for the respondents.

2. The case of the petitioner, as presented in the writ petition, is that in the year 2004, respondent no. 2, i.e., Tourism and Civil Aviation Department purchased a plot of land belonging to the father-in-law and husband of the petitioner as well as a few others for the purpose of construction of Banjhakri Falls Energy Park, hereinafter referred to as the Park. A Notice Inviting Tender (for short, 'NIT') was issued on 14.06.2016, inviting sealed tenders for taking the Park on lease. Tenders were opened on 09.07.2016 and bid of the petitioner having been found to be the highest, a lease agreement was entered into on 01.09.2016 and the Park was handed over to the petitioner. It is stated that the petitioner was not given any opportunity to examine the document or to consult any other person and besides, the petitioner having studied only up to Class VIII in a Nepali School, she had to sign and execute the deed without understanding the terms and conditions of the lease deed. In terms of Clause 3.2 of the agreement she had paid advance rent for three months amounting to Rs. 51,00,000.00 (Rupees Fifty-one Lakhs) and she had also deposited a sum of Rs. 20,00,000.00 (Rupees Twenty Lakhs) as interest free refundable security deposit. As the Park did not have proper infrastructure like swimming pool, adventure sports, restaurant, etc., the petitioner apprised the officers of respondent no.2 to create such infrastructure indicating that if such infrastructure is not provided, it would be difficult for her to raise revenue to pay the lease amount. Respondent no.2 informed her that for construction of additional facilities and infrastructure a Memorandum of Understanding, for short, 'MoU', has to be entered into and accordingly, an MoU was prepared by respondent no.2. The said MoU was executed on 12.11.2016 and an order dated 12.11.2016 was issued granting permission to the petitioner for construction of infrastructure as indicated therein, besides granting permission for revenue collection from the shops within the Park.

3. It is pleaded by the petitioner that she informed the authorities that when the lease period was only for five years it would not be possible for her to make investment for establishment of such infrastructure which may

run into a few crores of rupees and in response, the petitioner was given to understand that in view of a Circular dated 25.02.2013, her lease period will be extended to 20 years from 5 years. Relying on the said assurance as well as on the assurance that she would be compensated at a reasonable market rate for investment made for creation of permanent immovable assets, she started to make investments for creating additional infrastructure and she completed the construction of swimming pool, fish pond, traditional food court and eco hut at a cost of about rupees three crores. In addition, some construction for adventure sports was still continuing. It is further pleaded that there was an indefinite shut-down including many cases of arson from the month of June, 2017 in view of protests raised by Gorkha Janmukti Morcha in the wake of Government of West Bengal declaring that 'Bengali' subject would be a compulsory subject from Class I to X in the entire State of West Bengal including in the hill district of Darjeeling. Such violent protests disrupted vehicular movement in the National Highway connecting Sikkim and during the "bandh" period, which was called off on 27.09.2017, spanning about 100 days, not even a single tourist visited the Park. In view of the aforesaid circumstances, the petitioner submitted a representation on 28.11.2017 to the Chief Minister, which was endorsed by the Member of Legislative Assembly (MLA) of the constituency. However, instead of fulfilling the given assurances, a termination order dated 22.07.2019 came to be issued terminating the lease of the Park. It is pleaded that the petitioner did not receive any letter/order other than the termination order and that the petitioner was neither heard personally nor granted an opportunity to justify her case before issuing the termination order, which was issued only to bestow undue favour to a blue-eyed person. It is pleaded that Clause 6.24 of the lease deed and Clauses 4 and 5 of the MoU are arbitrary, unjust and unconscionable. The petitioner had submitted a notice through her advocate but the same having failed to evoke any response, the writ petition was filed.

4. In the counter affidavit filed on behalf of the respondents, it is stated that the petitioner was declared successful as she was the highest bidder amongst seven tenderers and she had executed the lease deed voluntarily without there being any coercion or deception. The petitioner being a politically influential person, she had submitted a representation to the Minister, Tourism and Civil Aviation, Government of Sikkim for allotment of shops and permission for construction of various infrastructures which was

forwarded for consideration of respondent no.2 and, accordingly, in terms of Clause 5.4 of the lease deed, a MoU dated 12.11.2016 was executed after the terms of the same were explained in Nepali language to the petitioner. In the said MoU, it was made clear that the construction or renovation of additional infrastructure as indicated therein would have to be made at her own expense for which no claim for compensation at the time of surrendering possession after expiry of the lease period would be entertained, though moveable assets belonging to the petitioner in the nature of removable fittings, fixtures, furniture and other moveable installations as laid down in the agreement would be allowed to be removed and taken away. It is stated that request made by the petitioner vide letter dated 14.06.2017 for relaxation of payment of quarterly rent in respect of the Park was declined by a letter dated 26.07.2017 and by the said letter, the petitioner was also asked to pay due rent as stipulated in the lease deed. A number of reminders were issued asking the petitioner to pay due rent but the petitioner did not pay any heed and did not pay rent causing huge loss to the respondents and resulting in difficulty in making payment of salaries to the staff engaged in the Park. A letter dated 27.06.2019 was issued asking the petitioner to deposit arrear rent amounting to Rs.4,25,00,000.00 with effect from May, 2017 to May, 2019 within 7 days from the date of receipt of the letter failing which it was indicated that legal action would be initiated as per the lease deed. Even thereafter, the petitioner did not pay any rent as a result of which the notice of termination dated 22.07.2019 was issued.

5. It is stated in the affidavit that land of the Park was not acquired by respondent no.2 but by the Rural Management and Development Department and the same was handed over to respondent no.2 on 29.08.2011. The allegation of not having proper infrastructure is denied and it is stated that the infrastructure such as swimming pool, adventures sports, fish pond and restaurant were already in existence but they needed additional repair works, improvements, alterations, modifications, etc. Statements made by the petitioner that assurances were given by the authorities that compensation would be paid for the investment made and lease period would be extended are denied. It is also stated that the Park is the main tourist spot and being close to Gangtok, a large number of tourists visit the Park throughout the year and the petitioner had earned huge income running the Park but despite opportunities being granted, the petitioner failed to pay outstanding arrears of rent. It is stated that once the possession is

taken back of the leased out property, fresh tender notice will be issued. It is denied that the terms of the lease agreement and MoU are unconscionable as pleaded by the petitioner.

6. A reply affidavit is filed by the petitioner reiterating the assertions made in the writ petition but conceding that the land in question was acquired by the Rural Management and Development Department.

7. Mr. J.B. Pradhan, learned Senior Counsel for the petitioner submits that the petitioner is not a businesswoman in the real sense of the term and she and her husband were farmers before venturing into the present contract. She is barely illiterate having read up to Class VIII and she was not even granted an opportunity to consult any person before executing the lease deed. It is contended by him that the petitioner does not raise any issue relating to breach of contract or interpretation of terms of the contract for the purpose of determining the rights and liabilities of the petitioner under the lease deed. He, however, submits that Clause 6.24 of the lease deed and Clauses 4 and 5 of the MoU are unjust and unconscionable and, therefore, same are not enforceable in law. It is contended that the petitioner made investment for creation of permanent immovable assets only on the assurance that the lease term would be extended to 20 years in terms of Government Circular dated 25.02.2013 and that she would be compensated at a reasonable market rate for the investment made. However, assurances were not fulfilled leaving the petitioner high and dry. He strenuously argued that in the circumstances of the case where the petitioner had made huge investments, the petitioner was entitled to a show cause notice as well as an opportunity of personal hearing and the same having not been granted the impugned termination order cannot withstand the scrutiny in law. According to him, apart from the fact that the impugned order had been passed in violation of principles of natural justice, action of the state is also in violation of Articles 14, 19(1)(g), 21 and 300-A of the Constitution of India. In support of his submissions, learned Senior Counsel relies on the judgments in the cases of ***Union of India and Anr. Vs. Tulsiram Patel***, reported in ***(1985) 3 SCC 398***, ***Express Newspapers Pvt. Ltd. & Ors. Vs. Union of India & Ors.***, reported in ***(1986) 1 SCC 133***, ***Central Inland Water Transport Corporation Limited and Anr. Vs. Brojo Nath Ganguly & Anr.***, reported in ***(1986) 3 SCC 156***, ***State of U.P and Ors. Vs. Maharaja Dharmander Prasad Singh & Ors.***, reported in ***(1989) 2 SCC 505***, ***Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P &***

Ors., reported in ***(1991) 1 SCC 212***, ***Janab Salehbhai Saheb Safiyuddin Vs. The Municipal Corporation of Greater Bombay And Ors.***, reported in ***(1993) SCC OnLine Bom 74***, ***Canara Bank & Ors. Vs. Debasis Das & Ors.***, reported in ***(2003) 4 SCC 557***, ***Joshi Technologies International Inc. Vs. Union of India & Ors.***, reported in ***(2015) 7 SCC 728*** and ***Indian Oil Corporation Limited Vs. Nilofer Siddiqui & Ors.***, reported in ***(2015) 16 SCC 125***.

8. Dr. Bhutia, learned Additional Advocate General, submits that petitioner was also the earlier lessee of the Park and therefore, the submission of Mr. Pradhan that the petitioner is a lay person in the business arena is not correct. Being fully aware, she had executed the lease deed and had also initially followed the terms and conditions of the lease deed. It was only at the instance of the petitioner that permission for repair, addition, etc., of permanent structures was allowed and in that regard an MoU was entered into between the parties. It is not correct that the petitioner had made new constructions and had created assets but she had only made improvements and undertaken repair works in already existing assets. The petitioner had undertaken such work as an experienced businesswoman in order to generate more revenue and the plea that she had incurred huge investments in this regard only on the assurance that lease would be extended for a period of 20 years and that reasonable compensation at market rate shall be paid is wholly without any basis. The request made by the petitioner for reduction of rent was also not permissible and therefore, the same was also rejected. Yet, the petitioner, while continuing to run the business of the Park and earning handsome revenue, had not paid rent from May 2017 till date, which is more than two and a half years and therefore, on the face of it, the petitioner is not entitled to any discretionary relief in the equitable jurisdiction under Article 226 of the Constitution of India. The petitioner is bound by the terms and conditions incorporated in the lease deed and the MoU and the submission that Clause 6.24 of the lease deed and Clauses 4 and 5 of the MoU are unconscionable and unjust has no merit. In a case of the present nature, the principles of natural justice is not attracted and when the termination order was issued on the basis of the lease deed, no interference with the order of termination order dated 22.07.2019 is called for in this writ petition. In support of her submissions, learned counsel places reliance on the judgments in the cases of ***M/s Radhakrishna Agarwal & Ors. Vs. State of Bihar & Ors.***, reported in ***(1977) 3 SCC 457***, ***Bareilly Development Authority & Anr. Vs. Ajai***

Pal Singh & Ors., reported in ***(1989) 2 SCC 116***, ***State of Gujarat & Ors. Vs. Meghji Pethraj Shah Charitable Trust & Ors.***, reported in ***(1994) 3 SCC 552***, ***State of Orissa & Ors. vs. Narain Prasad & Ors.***, reported in ***(1996) 5 SCC 740***, ***State of M.P & Ors. Vs. M.V Vyavsaya & Co.***, reported in ***(1997) 1 SCC 156***, and ***State of Bihar & Ors. Vs. Jain Plastics and Chemicals Ltd.***, reported in ***(2002) 1 SCC 216***.

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

10. A perusal of the NIT dated 14.06.2016 goes to show that the tenders were invited for taking the Park on lease on "As is where is basis". The terms and conditions of the NIT, amongst others, lay down that the lease deed shall be valid for a period of 5 years which is extendable by another 5 years based on the performance of the lease holder and timely payment of lease rental. The entry fees to the Park for the visitors as well as vehicles are indicated. It is also indicated that the successful bidder shall not be permitted to construct any commercial or recreational assets within the premises during the period of lease and all existing shops and commercial units shall not be covered in the lease deed of the successful bidder.

11. The petitioner was the highest tenderer with bid amount of Rs.2,04,00,000/- (Rupees two crores four lakhs) only per annum. The lease deed dated 01.09.2016 reflects that the lease commenced from 01.09.2016 and that the same shall remain in force for a period of 5 years i.e. till 31.08.2021. Clause 4.1 prescribes quarterly payment of rent for the first three years of the lease at the rate of Rs.51,00,000/- per quarter and for the last two years at the rate of Rs.53,55,000/-. Four quarters are divided from 1st September to 30th November, 1st December to 28th February, 1st March to 31st May and 1st June to 31st August. The rent is payable on 10th of next month of each quarter i.e. 10th December, 10th March, 10th June and 10th September.

12. It is considered appropriate to reproduce Clauses 5.2, 5.3, 5.4, 6.5, 6.12, 6.16, 6.24, 6.32, 9.1, 10 and 13.1 of the lease deed herein below as under:

> "5.2. The Lessee shall have the right to renovate and reorganize the "BANJHAKRI FALLS

ENERGY PARK" at his own cost and expenses, so as to run the said premises in the best possible manner, however, prior permission has to been obtained by the Lessee from the Lessor for such renovation and reorganization.

5.3 The Lessee shall have the right to bring in any new/ additional moveable assets and or to replace any such moveable assets in the said leasehold premises at his own costs, and such assets shall at all times be the properties and belong to the Lessee and she shall have the right to deal with the same in any manner. On the expiry of the lease period or earlier determination thereof, the Lessee shall have the right to take away such moveable assets.

5.4 In case, the Lessee makes any improvements, additions, alterations in the leasehold premises, summing up to a valuation of Rs.5 lakhs and below per year, all such improvements, additions, alterations shall always be the absolute properties of the Lessor and the Lessee shall not be entitled to claim any cost or expenses for such improvements, additions, alterations, relocations nor shall the Lessee claim any return in the yearly rentals payable or the interest free refundable security deposit. For any improvements, additions, alterations above the sum of Rs.5 lakhs per year the lessee shall take prior permission and approval in writing of the lessor before undertaking the works, for which a separate agreement shall be drawn on the modalities of payment and execution of works.

x x x

6.5 The Lessee shall not erect, built or permit to

be erected to built any permanent structure in the premises "BANJHAKRI FALLS ENERGY PARK", situated at Lower Sichey, East Sikkim nor make any addition or alteration thereto save and except with the permission and approval in writing from the Lessor. Excluding repair/s and renovation/s to the existing structure, the costs of which shall be responsibility of the Lessee, all civil works involving alteration/s to the existing structures, must have the prior written approval and consent of the Lessor.

x x x

6.12 The lessee shall not collect rent from the existing shops of commercial unit as the same is not covered in the lease deed. The rent so collected shall be deposited to the Department under the revenue head 1452/TD 105/- Rent & Catering.

x x x

6.16 The lessee shall fix the tariff as per the rates prescribed in the tender documents which are as follows: (Sl. No. 3.9) The entry fee of Asset chargeable to visitors of the asset shall be as follows:

Sl. No.	ENTRY FEE	Amount in INR
1	Single Adult	Rs.40
2	Group of 10	Rs.300
3	Group of 20	Rs.600
4	Group of 20 or more	Multiple of Sl no 3
5	Students with ID	Rs.10
6	Children below 4 years	Exempted

PARKING FEE	Amount in INR
Two Wheeler/small vehicle	Rs.10 for 3 hours
Medium Vehicle (Passenger)	Rs.20 for 3 hours
Large Vehicle	Rs.40 for 3 hours
Night Parking charges for all types of vehicles	Rs.50 per night

(The lessee shall have to provide for automation and dispensation of ticket through a ticketing machine only and ensure CCTV surveillance at the entrance and main locations of the complex and the footage shall be produced to the Government of Sikkim as and when asked for).

x x x

6.24 The Lessee shall not claim any title to the superstructure already put up or claim any compensation at the time of surrendering possession after the expiration of the Lease period.

x x x

6.32 That in the event of failure of the Lessee to vacate the said leasehold premises and hand over the possession thereof to the Lessor upon expiry of the lease or earlier determination thereof, the Lessee shall pay mesne profit/compensation to the Lessor as per the prevailing market rate at the point of time. Till the Lessee hands over possession of the leasehold premises to the Lessor, notwithstanding the right of the Lessor to recover possession of the said premises through due process of law at the cost of the Lessee, deductible from the interest free refundable security deposit, and the payment

of such mesne profit/compensation will not in any way dilute the Lessor s right to recover possession of the same.

x x x

9.1 That in the event of the quarterly rent remaining arrears for one month after the due date or that there has been a breach of any of the covenants herein contained or that if there has been violation of any of the terms of this lease deed by the Lessee, the Lessor by giving one months notice in writing to the Lessee may cancel the lease deed and re-enter the demised premises/property i.e. "BANJHAKRI FALLS ENERGY PARK", situated at Lower Sichey, East Sikkim.

10. TERMINATION

10.1 In the event of the Lessee committing breach of this Lease Deed Agreement, the Lessor shall have the right in case of default/delay or of breach of any of the terms, conditions and stipulations of this Lease to impose and levy the penalties in accordance with the terms contained herein or to terminate this Lease Deed Agreement within two weeks from the date of giving such notice of such breach in writing by the Lessor to the Lessee and the Lessee does not make good the breach complained of.

x x x

13. Waiver

13.1 No waiver of any default of Lessor or Lessee hereunder shall be implied from any omission to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other

than the default specified in the express waiver and that only for the time and to the extent therein stated."

13. The last page of the lease deed is not annexed with the writ petition. However, the same was produced before this Court by Dr. Bhutia.

14. Though NIT was issued on "As is where is basis", barely after one month from the date of taking possession, on 03.10.2016, the petitioner made a request to the Minister, Tourism and Civil Aviation for permitting her to collect revenue from the shops of the Park as was allowed in the previous term, so as to enable her to make payment of rent to the Department. Though contention was advanced by Mr. Pradhan that the petitioner was new in business, such a claim is, ex facie, not correct as demonstrated by petitioners own assertion that she be allowed to collect revenue from the shops of the Park as was allowed in the previous term. The petitioner also wanted to undertake construction of swimming pool with restaurant and bar, eco huts, rock climbing and traversing and Brahma Bridge, musical hall (traditional song & music), traditional dress & photography stalls, traditional food court, kids playing kingdom, fishing pond, etc. Though not stated so in the letter dated 03.10.2016, the petitioner in the writ petition had made a categorical statement that unless the facilities and infrastructure as indicated by her were not provided or created it would be difficult for her to pay the lease amount. A request was also made to approve the rates of entry and parking fees as indicated in the said letter. The petitioner being the previous lessee, it is reasonable to hold that the petitioner was aware of the potential of the Park and accordingly, had submitted her tender and therefore, the stand taken by the petitioner barely one month after the lease period had commenced raises many questions.

15. Pursuant to the above request made by the petitioner, having regard to Clauses 5.2, 5.4 and 6.5, MoU dated 12.11.2016 was executed on 12.11.2016. Clauses 2, 3, 4, 5, 6 and 7 are relevant for the purpose of the case and as such the same are quoted herein below:

"2. That the First Party has granted the allotment and revenue collection of shops to the Second Party.

3. That the First Party has granted permission to the Second Party for construction/renovation/ addition of various infrastructures at the premises of Banjhakri Falls Energy Park as per clause (6.5) of the Lease Deed Agreement dated 01.09.2016 which is as under:-

    1. Swimming Pool with Restaurant Bar.
    2. Eco Huts.
    3. Rock Climbing & Traversing, Brahma Bridge.
    4. Musical Hall (traditional song & music).
    5. Traditional dress and Photography.
    6. Traditional Food court.
    7. Kids playing kingdom.
    8. Fishing pond.

4. That the Second Party shall undertake the construction/ renovation/addition of the following infrastructures at her own expense within the premises of Banjhakri Falls Energy Park.

5. That the Second Party shall not claim any right, title or interest in the leasehold property (said premises) and shall not claim any compensation for the construction/ renovation/ addition of various infrastructures at the premises of Banjhakri Falls Energy Park as mentioned in clause-2 of this MOU at the time of surrendering possession after the expiry of the lease period/term.

6. That the Second Party shall collect/charge the rates of Entry and Parking Fees till the expiry of lease period as under:

1. Entry fee-Rs.50 per head.
2. Parking fees – Small vehicle Rs.20/- per vehicle.
3. Medium vehicle- Rs.30/- per vehicle.
4. Larger vehicle – Rs.40/- per vehicle.
5. Two wheeler-Rs.10/
6. Entry for students with School Uniform and ID card Rs.10/- per head.
7. Camera charge Rs.10/-
8. For shooting extra charge as per the duration.
9. Installation of Transformer for smooth supply of electricity.
10. Water supply.

7. That after the expiry of the Lease Period, the Second Party may be allowed to remove and take away all other moveable assets belonging to her in the nature of removable fittings, fixtures, furniture and other moveable installations as laid down in the Lease Deed Agreement.

16. A perusal of the MoU would go to show that despite a clear stipulation in the terms and conditions of the NIT that all existing shops and commercial units shall not be covered in the lease deed and despite rates of entry fees, etc. being fixed, the revenue collection from the shops was allowed in favour of the petitioner, besides increasing the entry and parking fee in respect of some categories such as single adult, small vehicle, medium vehicle, etc.

17. Though pleas are taken in the writ petition that petitioner was unaware of the contents of the lease deed, it is to be remembered, as is evident from the letter dated 03.10.2016, the petitioner was also the lessee

in the previous term. Contents of the letter dated 03.10.2016 also belies the contention of the petitioner that she was unaware of the terms and conditions of the lease. It cannot be countenanced that the petitioner was not aware of the requirement of payment of lease rent in terms of lease deed inasmuch as the petitioner had paid an amount of Rs.51.00 lakhs as advance rent for one quarter. Even otherwise, such a contention cannot be accepted in a writ proceeding in respect of a commercial contract entered into by the petitioner with the State, the same being a disputed question of fact.

18. Contention is advanced by the petitioner that an assurance was given to her that investment made by her towards making permanent constructions would be compensated and that the lease deed would be extended to 20 years on the basis of the Circular dated 25.02.2013. It is to be noted that NIT was issued on 14.06.2016 inviting tenders for grant of lease for five years, despite the aforesaid Circular holding the field. The Circular reads as follows:

> "CIRCULAR
>
> Whereas, the Department has notified that the properties valued at an annual basic price of Rs.10.00 lakhs and above are unable to be leased out due to short lease term and publicity of the newly created properties.
>
> Now in order to overcome this, the Government has been pleased to fix the lease term as under:

	Valuation of Property	Lease term	Category
1.	Upto 30.00 lakhs	5 years	'D'
2.	From Rs.30 lakhs to Rs.60 lakhs	10 years	'C'
3.	From Rs.60 lakhs to Rs.90 lakhs	15 years	'B'
4.	Above Rs. 1 crore	20 years	'A'

The above is in partial supersession of circular No. 10(351)08/TD dated 17.01.2009."

19. Perusal of the Circular goes to show that the properties valued at an annual basic price of Rs.10.00 lakhs and above was difficult to be leased out due to short term of lease and lack of publicity of the newly created properties. Valuation of property up to Rs.30.00 lakhs is placed at category 'D' and lease term is fixed at 5 years. The NIT goes to show that offered lease rent per annum, which is to be taken as the annual basic price, is Rs.24,70,000/- in respect of the Park. It is the considered opinion of the Court that annual basic price being less than Rs.30.00 lakhs, the lease term conforms to the Circular dated 25.02.2013.

20. The assertion of the petitioner is that the petitioner was given to understand that lease rent would be lowered in view of her request made in the letter/representation to the Chief Minister praying for reduction of lease rent at the rate of "Rs.1.20 lakhs". The letter is undated but there is an endorsement of the Chief Minister dated 28.11.2017 to consider the request as per norms. It is to be noted that the Department had already rejected the prayer for relaxation of payment of rent by letter dated 26.07.2017 in response to the letter of the petitioner dated 14.06.2017, about which the petitioner made no mention in the writ petition. The petitioner submits that she had not received the aforesaid letter dated 26.07.2017. It will be unrealistic to proceed on the assumption that the petitioner never enquired about the outcome of the request for relaxation of payment of rent even if it is assumed that the petitioner had not received the letter dated 26.07.2017. It was the responsibility of the petitioner to make payment of rent in terms of lease deed.

21. The Park was handed over to the Tourism Department by the Rural Management and Development Department on 29.03.2011 and a perusal of the document evidencing handing and taking over goes to show that the cost of the project of the Park in 3 phases amounted to Rs.3.82 crores. On the date of such handing over, the petitioner was the lessee and 29 assets, a list of which was enclosed, were already created. A list of renewable energy exhibits mentioning 36 items is also enclosed.

22. In the letter dated 14.06.2017 and the representation to the Chief Minister, the petitioner had not indicated that any assurance was given by

any authority that for the improvement or for new construction, compensation would be paid to her. Even the assurance stated to have been given as indicated in paragraph 24 of the writ petition was not specific : the investment could be adjusted against the rent or compensation may be paid at the time of determination of the lease after verification and Government approval. Except for self-serving statements of the petitioner, there is no material on record to suggest even remotely that any such assurance was given. There is no document on record evidencing any assurance being given by the authorities that the lease term would be extended to 20 years. There was no compulsion for the petitioner to have undertaken such constructions. It was on the own volition of the petitioner that such construction works were taken up on her own initiative and therefore, it must be understood that the plea of assurance given by the authorities for payment of compensation as canvassed by the petitioner is a hollow claim with no foundation, either in law or in equity, and a ruse contrived for the purpose of the case. Therefore, not to pay rent in terms of the lease deed on the plea that a request was pending or an assurance was given cannot be accepted in a matter of the present nature.

23. In ***Central Inland Water Transport Corporation Ltd.*** (supra), the Hon ble Supreme Court had held that right to terminate the employment of a permanent employee by giving him three months notice, or pay in lieu of the notice as contained in the Service Rules, is unconscionable, unfair, unreasonable and opposed to public policy and void under Section 23 of the Contract Act, 1872. It was held that the Rules formed part of the contract between the corporation and its employees, but the employees had no voice in the framing of the Rules and they had to accept the Rules as part of their contractual employment. It had been entered into between the parties between whom there is gross inequality of bargaining power. The Supreme Court further held that such a contract of employment between a powerful employer and a weak employee cannot be equated with a mercantile transaction between two businessmen.

24. In ***Kumari Shrilekha Vidyarthi*** (supra), the Government of State of Uttar Pradesh had terminated by a general order the appointments of all Government Counsel by resorting to the spoils system and directed preparation of fresh panels to make appointment in place of the existing incumbents. The question that had fallen for consideration before the Honble Supreme Court was as to whether the impugned circular was amenable to

judicial review and, if so, whether it was liable to be quashed as violative of Article 14 of the Constitution of India. In the aforesaid context, the Honble Supreme Court held that the requirement of Article 14 should extend even in the sphere of contractual matter for regulating the conduct of the state activity, as Article 14 casts a duty on the state to act fairly, justly and reasonably. It was held that every state action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law. The Honble Supreme Court further held that bringing the state activity in contractual matters also within the purview of judicial review is inevitable and it was found that arbitrariness was writ large in the impugned circular.

25. In **Nilofer Siddiqui** (Supra), the respondents 2 and 3 before the Supreme Court started their business without standard agreement being signed by both of them and therefore, the said standard agreement in question was held to be not a completed contract between the parties in law and thus, it was held that the same cannot be made binding upon the allottees of distributorship of Indian Oil Corporation Ltd. (IOCL). Condition No.8 of the letter of allotment was held to be unconscionable as it gave IOCL an unfettered right to terminate the distributorship without assigning any reason and it was also noted that the respondent 2 was far weaker in economic strength and had no bargaining power with the IOCL. In the aforesaid context, Condition No.8 of the letter of allotment providing for unilateral termination of distributorship without assigning any reason was read down in the light of Article 14 of the Constitution of India as well as observations of the Supreme Court in ***Central Inland Water Transport Corpn. Ltd.*** (supra), as made in paragraph 89, essentially mandating that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between parties who are not equal in bargaining power.

26. Though Mr. J.B. Pradhan had contended that Clause 6.24 and Clauses 4 and 5 of the MoU are unconscionable, such argument does not have any merit. Clause 6.24 of the lease deed provides that the lessee shall not claim any title to the superstructures already put up or claim any compensation at the time of surrendering possession after expiration of the lease period. It is not understood how any title can be claimed by a lessee in respect of superstructures already put up by the lessor or a claim can be put up for compensation within the ambit of Clause 6.24. Clause 5.2

provides that the lessee shall have the right to renovate and reorganize the Park at her own cost and expenses by taking prior permission so as to run the premises in the best possible manner. Clause 5.4 of the lease deed seems to suggest that improvements, additions, alterations in the leasehold premises up to Rs.5.00 lakhs would not require any prior permission. However, for any improvement above Rs.5.00 lakhs per year prior permission and approval in writing shall be taken and for the said purpose a separate agreement shall be drawn on the modalities of payment and execution of works. Clause 6.5 also prohibited erection, addition, alteration, or building of any permanent structure without permission and approval in writing from the lessor. It also laid down that cost of repair/renovation shall be borne by the lessee. The modality of payment and execution of works as indicated in Clause 5.4 are embodied in the MoU in Clauses 4 and 5. Clause 4 of MoU provides that the petitioner shall undertake construction/ renovation/addition of the following infrastructures at her own expense. The word "following" at Clause 4 is not the appropriate word and it must be understood that infrastructure mentioned at Clause 3 was referred to. Clause 5 of the MoU provides that the petitioner shall not claim any title or interest on the leasehold property and shall not claim any compensation for the construction/renovation/ addition of various infrastructures as mentioned in Clause 2 (This is also wrong. It should have been Clause 3) at the time of surrendering possession after the expiry of lease period. Though Clause 2 is wrongly referred, intent is explicit that it referred to the infrastructure for which permission was accorded. It is to be remembered that it was the petitioner, being the previous lessee and having responded to the NIT issued on "As is where is basis", had raised issues within a month of taking the lease that unless certain infrastructures are created as indicated by her, she will not be able to pay rent. That begs the question as to why in that circumstance the petitioner had quoted the rate as she did. Respondents had not asked the petitioner to make any constructions or improvements and it was at the instance of the petitioner that the respondents had permitted her to raise constructions/ improvements on the basis of terms and conditions as envisaged in the MoU. And as agreed upon and on her volition construction works were taken up by the petitioner. In the MoU, collection of revenue from the existing shops within the Park by the petitioner was permitted though the NIT had specifically laid down that all existing shops and commercial units shall be outside the purview of the lease. Not only that, at the request of the petitioner rates of entry and parking fees in respect of some categories had been changed from what was stated in the NIT to her advantage by increasing the rates and therefore, it cannot be accepted that the petitioner

was coerced into accepting terms of the MoU or that Clause 4 and 5 had been imposed upon her by the state taking advantage of its position. In my considered opinion, the ratio of the aforesaid judgments will not be applicable in the facts of the instant case. In ***Narain Prasad*** (supra), the Honble Supreme Court laid down that a person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round and question the validity of those obligations.

27. The MoU, however, does not indicate specifically whether the permission was granted for construction or renovation/ addition of various infrastructures. While in the petition it is asserted that the swimming pool, fish pond, traditional food court and eco hut were constructed along with the infrastructure for adventure sports, such assertion is denied in the affidavit by contending that the swimming pool, fish pond, restaurant and bar were already in existence but additional work of repair, improvements, additions and alterations of infrastructure were to be carried out on the existing infrastructure. Assets created as on 29.03.2011 goes to show that, amongst others, there was a cafeteria, fish pond with decorative dragon, filtration pond at catch-pit etc. In absence of any other materials on record, this Court will not venture into the disputed question as to whether the infrastructures were newly created or the existing structures/assets were repaired, altered or improved by the petitioner pursuant to the execution of the MoU.

28. In the case of ***Maharaja Dharmander Prasad Singh*** (supra), the Honble Supreme Court had observed that a lessor, with the best of title, has no right to resume possession extra judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise and a lessee cannot be dispossessed otherwise than in due course of law.

29. In the aforesaid case, by notice dated 19.11.1985, the Government had cancelled the lease under deed dated 07.10.1961 comprising of 9885 Sq. Metres of Nazool land, which was to expire on 31.03.1991. Another controversy had arisen out of the order dated 19.04.1986 issued by the Vice-Chairman, Lucknow Development Authority (LDA) cancelling the earlier order dated 31.01.1985 granting permission in favour of the respondent lessees to develop the leasehold property by erecting thereon a multi-storeyed building comprising of flats. With regard to the cancellation of lease in respect of the land, the Honble Supreme Court held that whether

the purported forfeiture and cancellation of lease deed were valid or not should not have been allowed to be agitated in a proceeding under Article 226 of the Constitution of India. So far as cancellation of granting permission was concerned, though a show cause notice was issued preceding the cancellation, the Honble Supreme Court held that where the stakes are high for the lessees who claim to have made large investments on the project and where a number of grounds required the determination of factual matters of some complexity, the statutory authority, in the facts of the case, should have afforded a personal hearing to the lessees.

30. In ***Express Newspaper Pvt. Ltd.*** (supra), the Honble Supreme Court observed that the lessor must enforce its right of re-entry upon forfeiture of lease under Clause 5 of the lease deed in question executed by the parties by filing a suit due to breach of terms of lease and not by taking law into its own hands. 31. In the instant case, the termination order itself indicates that if the possession is not delivered by the petitioner consequent upon termination of the lease, the authorities will take recourse to filing of a suit for eviction of the petitioner.

32. ***Tulsiram Patel*** (supra) is a judgment rendered primarily in the context of the second proviso to Article 311 (2) dealing with dismissal, removal or reduction in rank in respect of persons employed in civil services or a civil post and in that context had considered the scope and expanse of principles of natural justice. In ***Canara Bank*** (supra), in a matter arising out of dismissal from service, the Honble Supreme Court had laid down that even an administrative order which involves civil consequences must be consistent with the rules of natural justice. In ***Janab Salehbhai Saheb Safiyuddin*** (supra), a notice of termination was issued because of a complaint of alleged malpractices and irregularities in the management of a cemetery and the Corporation had decided to take over the management of the cemetery departmentally. It was in view of the above grounds, the Bombay High Court held that the principles of natural justice required that complaints and any material in support thereof ought to have been disclosed to the petitioner and he ought to have been given an opportunity of making a representation against the proposed termination of licence.

33. In the instant case, the termination notice was issued on account of admitted fact of non-payment of lease rent by the petitioner for more than two years. In ***M/s Radhakrishna Agarwal*** (supra), the Honble Supreme

Court observed that when contract is sought to be terminated by the officers of the state, under the terms of an agreement between the parties, such action is not taken in exercise of any statutory power at all and the limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only action which normally arises in such cases as to whether the action complained of is or is not in consonance with the terms of the agreement.

34. In ***M.P. Shah Charitable Trust*** (supra), the contention advanced on behalf of the respondent Trust that the contract between the parties could not have been terminated unilaterally without observing the principles of natural justice was found to be without any substance. It was observed that if the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, where the matter is governed by non-statutory contract.

35. In ***Bareilly Development Authority*** (supra), the Honble Supreme Court noted that there is a line of decisions laying down that where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as compel the authorities to remedy a breach of contract pure and simple. It was also noted that after voluntarily accepting the conditions imposed by the Bareilly Development Authority, the respondents had entered into the realm of concluded contract with Bareilly Development Authority and hence they can only claim the right conferred upon them by the said contract and were bound by the terms of contract.

36. In ***Jain Plastics and Chemicals Ltd.*** (supra), the Honble Supreme Court had laid down that writ is not the remedy for enforcing contractual obligations and it is always open for the aggrieved party to approach the court of competent jurisdiction for appropriate relief for breach of contract.

37. In ***M.V. Vyavsaya*** (supra), the Honble Supreme Court observed that where there are disputed questions of fact, the High Court does not normally go into or adjudicate upon the disputed questions of fact and that a person who solemnly enters into a contract cannot be allowed to wriggle out of it by resorting to Article 226 of the Constitution.

38. In ***Joshi Technologies International Inc.*** (supra), at paragraphs 69 and 70, the Honble Supreme Court held as under:-

> "**69.** The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such discretion:
>
> **69.1.** The Court may not examine the issue unless the action has some public law character attached to it.
>
> **69.2.** Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
>
> **69.3.** If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
>
> **69.4.** Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
>
> **70.** Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach

may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice. 29 WP (C) No. 27 of 2019 Mrs. Menuka Devi Bhattarai vs. State of Sikkim & Anr.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction. **70.9.** The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be

examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

39. A perusal of the aforesaid judgment goes to show that occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It is also laid down that if the contract between the private party and the state or instrumentally of the state is under the realm of private law with no element of public law the appropriate remedy for the aggrieved party is to approach the ordinary civil court and that writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred.

40. The controversy in the instant case is purely in the realm of private law. In the writ petition, averments have been made that advance payment of rent of three months to the tune of Rs.51.00 lakhs had been paid and the same has also been admitted by the respondents. Letter dated 14.06.2017 of the petitioner (Annexure R-2 of the affidavit) goes to show

that an amount of Rs.30.00 lakhs for the months of January, 2017 to March, 2017 was also paid. Letter dated 08.09.2017 goes to show that the petitioner had not paid an amount of Rs.51.00 lakhs being the rent for the period from April, 2017 to June, 2017 as also Rs. 21.00 lakhs for the months of January, 2017 to March, 2017, thus admitting payment of Rs.30.00 lakhs for the aforesaid period. Letter dated 22.11.2017 also goes to show that apart from not clearing the dues of Rs.21.00 lakhs, the petitioner had not paid any amount of rent for the period from April, 2017 to November, 2017. Letter dated 10.01.2019 goes to show that total dues from May, 2017 to December, 2018 was Rs.3,40,00,000/-. It appears that in the meantime defaulted amount of Rs.21.00 lakhs for the period from January, 2017 to March, 2017 and some payment for the months of April, 2017 was paid. Letters dated 22.05.2019 and 27.06.2019 were on the subject of payment of arrears amounting to Rs.4,25,00,000/- for the period from May, 2017 to May, 2019. By the said letters, the petitioner was directed to make the payment within seven days from the date of receipt of letter failing which it was indicated that legal action shall be initiated as per lease deed. In spite of clear indication in the said notices that legal action shall be initiated on failure to deposit the arrear rent, the petitioner did not make good the breach complained of. It was in this background, in terms of the lease deed, termination order dated 22.07.2019 was issued stating that the lease deed will stand cancelled within 30 days of receipt of the same. Though the contention advanced by the petitioner is that the aforesaid letters except order/letter dated 22.07.2019 was not received, which is denied by respondents, this Court ought not to go into such disputed fact. The writ petitioner has continued to run the Park and it is an admitted position that even during the pendency of the writ petition no amount towards payment of rent has been paid by the petitioner. Thus, from May 2017 till the date of hearing spanning over a period of more than 2 years 6 months, no rent has been paid by the petitioner. In a matter of the present nature, when the impugned action had been taken in terms of the lease deed, I am of the considered opinion that the submission advanced by the petitioner that the impugned order is vitiated as no opportunity of hearing was afforded to the petitioner is without any merit.

41. In view of the above discussions, I find no merit in this writ petition and, accordingly, the writ petition is dismissed. No costs.

SLR (2019) SIKKIM 1088

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

Crl. A. No. 24 of 2018

Kiran Karki @ Chettri Uncle ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Thupden Youngda, Addl. Public Prosecutor.

Date of decision: 17th December, 2019

A. Code of Criminal Procedure, 1973 – S. 154 – First Information Report – It is well settled that the F.I.R is only the first information about a cognizable offence. S. 154 provides that every information relating to the commission of a "cognizable offence" must be recorded. When the F.I.R gives information of a "cognizable offence" having been committed it is incumbent upon the Investigating Officer to investigate the crime and bring the culprit to book even if there is no information as to who the culprit is.

(Para 16)

B. Code of Criminal Procedure, 1973 – S. 223 – Persons to be Charged Jointly – The F.I.R was lodged by an ASHA member (PW-1). It reported two aspects. Firstly, that the sixteen year old victim who seemed abnormal was "reportedly raped" by one Deepak Subba. Secondly, the victim was three to four months pregnant – The F.I.R reported about the pregnancy of the victim who was a minor. It was, therefore, incumbent upon the Investigating Officer to investigate whether Deepak Subba had raped the victim. It was also important for the Investigating Officer to investigate about

the pregnancy of the victim who was a minor. Failure to mention the name of the Appellant in the F.I.R was of not much significance, as admittedly, the fact that the Appellant was the biological father of the baby came to light only after the DNA profiling – DNA profiling was done during the period of investigation. The charge-sheet was filed against both Deepak Subba and the Appellant – The learned Special Judge, however, while examining Sessions Trial (POCSO) Case No. 11 of 2017 registered against both Deepak Subba and the Appellant vide order dated 21.02.2018 came to the conclusion that the alleged offences allegedly committed by them were committed separately/independently and did not form part of the same transaction. Therefore, in view of S. 223 Cr.P.C., the learned Special Judge considered it appropriate to try them separately so that no prejudice is caused to them. Accordingly, the appellant was separately tried in the present case right from the inception till the judgment. This order dated 21.02.2018 was not assailed by the appellant. In fact, the Appellant fully participated in the trial. It is apparent that no prejudice was caused to him.

(Para 16)

Appeal partly allowed.

Chronological list of cases cited:

1. Labhuji Amratji Thakor and Others v. State of Gujarat and Another, AIR 2019 SC 734.
2. Taraman Kami v. State of Sikkim, SLR (2017) Sikkim 781.
3. Nandalal Wasudeo Badwaik v. Lata Nandlal Badwaik and Another, (2014) 2 SCC 576.

JUDGMENT

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

1. The criminal investigation was set in motion when PW-1, ASHA member, lodged the First Information Report (for short 'the FIR') (Exhibit-1) at the Mangan Police Station on 20.09.2016 alleging that the victim (PW-3) who was a 16 year old child, had been "*reportedly raped*" by one Deepak Subba @ Dupli Gogo (for short 'Deepak Subba') "*since 3 (three) to 4 months ago*" and she was found pregnant. In the said FIR (Exhibit-1), the victim was referred to as an abnormal child.

2. On 01.08.2017, a charge-sheet was filed against Deepak Subba and the appellant. It was alleged that investigation revealed that the appellant, in fact, was the first one to rape the victim.

3. On 21.02.2018, eleven charges were framed against the appellant under section 5(l), 5(k) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') (for three occasions), sections 376(2)(n) and 376(2)(l) of the Indian Penal Code, 1860 (for short „the IPC) (for three occasions), 376(2)(j) IPC (for three occasions), section 5(j)(ii) of the POCSO Act and section 354B IPC.

4. 17 witnesses including the Investigating Officer (PW-17) were examined by the prosecution. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') on 06.06.2018. The appellant stated that he was falsely implicated in the case and he had never sexually assaulted the victim. The appellant blamed the victims mother (PW-4) for the false implication. The appellant stated that the victims mother (PW-4) disliked him as she reportedly lost Rs.4000/- (Rupees four thousand) in his house during one of her visits and blamed him for it.

5. The learned Special Judge convicted the appellant under sections 5(k)/6, 5(j)(ii)/6 of the POCSO Act, section 376(2)(l), section 376(2)(j) and section 354B of the IPC (all on single counts) and acquitted him of other charges vide impugned Judgment dated 23.06.2018. The learned Special Judge sentenced the appellant in the following manner:-

(a) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 376(2)(l) IPC and section 5(k)/ 6 of the POCSO Act. In default to pay fine to undergo simple imprisonment for 6 months.

(b) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 5(j)(ii)/6 of the POCSO Act. In default to pay fine to undergo simple imprisonment for 6 months.

(c) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 376(2)(j) IPC. In default to pay fine to undergo simple imprisonment for 6 months.

(d) Simple imprisonment of 5 years and fine of Rs.40,000/- for the offence under section 354B IPC. In default to pay fine to undergo simple imprisonment for 3 months.

(e) The period of imprisonment was directed to run concurrently.

6. The appellant is aggrieved by the conviction and the sentences.

7. Heard Mr. Jorgay Namka, learned counsel for the appellant. It is submitted that except the DNA profiling report (Exhibit-12) there is no clinching evidence against him. In so far as the DNA profiling report is concerned, he submits the evidence as to how the blood sample was collected by the Investigating Officer is wanting. It is argued that neither the FIR (Exhibit-1) nor the deposition of the victim blamed the appellant for the crime he has been convicted for and in fact there is no FIR against the appellant. The FIR (Exhibit-1), in fact, blamed one Deepak Subba. The victim had also blamed Deepak Subba in her statement recorded under section 164 Cr.P.C. (Exhibit-14) and no allegation was made against the appellant. He relied upon the judgment of the Hon ble Supreme Court in ***Labhuji Amratji Thakor and others vs. State of Gujarat and another***[1] and the judgment of this Court in ***Taraman Kami vs. State of Sikkim***[2]. He pointed out that the FIR (Exhibit-1) was registered against another accused and not the appellant. He also pointed out that the appellant was made an accused only subsequently after the DNA profiling. In the circumstances, Mr. Jorgay Namka contended that the case was squarely covered by the aforesaid two judgments. Mr. Jorgay Namka did not question the determination of the age of the victim and her minority.

8. Mr. Thupden Youngda, learned Additional Public Prosecutor, *per contra*, submitted that the order dated 29.07.2017 passed by the learned Judicial Magistrate reflects that an application – for permission to collect the blood sample of the appellant for the purposes of DNA profiling was allowed. A copy of the order was also handed over to this Court. Learned Additional Public Prosecutor submitted that DNA profiling is accurate and the result binding. He relied upon the judgment of the Honble Supreme Court in ***Nandalal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Another***[3]. The learned Additional Public Prosecutor clarified that the DNA

[1] AIR 2019 SC 734
[2] SLR (2017) Sikkim 781
[3] (2014) 2 SCC 576

profiling report (Exhibit-12) was placed before the learned Special Court by way of a supplementary charge-sheet. He submitted that the result of the DNA profiling clearly establishes the fact that the appellant was guilty of commission and therefore, liable for the offences.

9. The FIR (Exhibit-1) was lodged by PW-1, an ASHA member, when she heard that the victim was pregnant; reportedly Deepak Subba was responsible for it and subsequently, she delivered a baby. The mother of the victim (PW-4) who was the natural witness about the age of the victim and the Headmaster (PW-9) who produced the school admission register of the school she first attended, established and corroborated that the victim was a minor. There is overwhelming evidence that the victim was pregnant. Her mother (PW-4) confirmed not only her pregnancy but the birth of a child. She also deposed that the victim had blamed the appellant for her pregnancy initially. The ASHA member (PW-1) who lodged the complaint, the former Panchayat member (PW-2), the Panchayat (PW-5), the owner of the land cultivated by the appellant (PW-7), all talked about it. The victims pregnancy is, however, confirmed by Dr. Dawa Dolma Bhutia, the Medical Officer (PW-16), at the District hospital who examined her on 20.09.2016 and Dr. Chungden Lepcha, Gynaecologist (PW-10), who examined her on 21.09.2016. Until the victims pregnancy was visible, no one seems to have had an idea that anyone had sexual intercourse with her. The evidence led by the prosecution established that although there was an indication that the appellant may have been responsible, the evidence is sketchy and most of it hearsay.

10. The victim was examined by the learned Special Judge who found her capable of answering properly in Nepali language although with some difficulty. The victim was able to speak slowly, her speech was occasionally unclear and required some time. She was found competent to communicate. The learned Special Judge found that she did not know the sanctity of oath and therefore, oath was not administered to her. Oath was, however, administered to the special educators present. The victims evidence was recorded in question and answer form and is reproduced below:

> "....
>
> **Q.** Do you know accused Kiran Karki *alias* Chetti uncle? (*in Nepali vernacular*).

Ans: Nods signaling '*yes'* and says 'Chettri uncle'.

Q. Do you know Deepak Subba *alias* Dupli Gogo?(*in Nepali vernacular*)

Ans: Says, '*gothala'* meaning that Deepak Subba is also known as gothala.

Q. What did *Chettri uncle* and *gothala* do to you?(in Nepali vernacular).

Ans: Says, '*Chettri uncle' ley sutayo* meaning *Chettri uncle made me sleep*. Also says, '*ulle pet ma nani huda pani luga kholera photo khichyo'* meaning *even when I was pregnant he took my photos after opening my clothes*. Also says, '*gothala ra Chettri uncle aama ghansma jada ghar aunthyo anta chya khanthyo'* meaning *gothala and Chettri uncle used to come home when my mother used to be out for cutting grass/collecting fodder and have tea*. Also says, '*Chettri uncle ley mero pant kholthyo'* meaning *Chettri uncle used to open my pants*. Also says, '*gothala ley pani maatera kapal ra luga tanthyo' 'gotma lagera mobile ma gaana sunaunthyo'* meaning *gothala also used to pull my hair and clothes after being drunk – He used to take me to the cowshed and make me listen songs on his mobile hand*set. Also says, '*Chettri ko ma pura paisa cha ra malai luga haru pani kindinchu bhanthyo'* meaning *Chettri has lots of money and he used to tell me that he would buy clothes for me*. Finally says, '*aaru kei pani bhayana'* meaning *nothing else happened.*

XXX on behalf of the accused person

A Questionnaire has been given to this Court by the Ld. Defence Counsel. Questions are accordingly put to the minor victim through the Special Educators:-

Q. Did Chettri uncle used to open your clothes?(*in Nepali vernacular*).

Ans: Feels shy and says, *„testo na sodhu, malai saram lagcha* meaning *don't ask me that as I feel shy.*

Q. You used to go to Chettri uncles home, isnt it?(*i Nepali vernacular*).

Ans: *'Paila jhanthe', 'aaile jhandena'* meaning *earlier I used to go, not now.*

Q. Chettri uncle and gothala used to go for collecting fodder along with your mother, isnt it?

Ans: Says, *'haina, aama matai jhanthyo'* meaning *No, only mother used to go.*

Q. Who all used to be in your house with your younger brother when you used to go out of the house?

Ans: Says, *'thumba'.*

Q. Did Chettri uncle take your photos?

Ans: Says, *'tha chaina'* meaning *I don't know*. Again says, *'testo na bhannu'* meaning *don't say so.*

....."

11. The deposition of the victim suggests that the appellant used to visit her house when her mother was out. The victim stated that "*Chettri uncle ley sutayo*". Colloquially, it would mean that the appellant had made the victim sleep with him. The victim also deposed that the appellant used to open her pant; took her picture after opening her clothes even when she was pregnant and he promised to buy her clothes as he had lots of money. The statement of the victim has been adequately corroborated.

12. The deposition of Dr. O.T. Lepcha (PW-14) confirmed that the victim, her baby, Deepak Subba and the appellants blood samples had been collected and sent for DNA profiling.

13. The Investigating Officer (PW-17) confirmed having sent the blood samples for DNA profiling. Dr. Subhankar Nath, Deputy Director [DNA Typing Division of State Forensic Science Laboratory (SFSL), Tripura] (PW-12) confirmed that it was the appellant who was the father of the child and not Deepak Subba.

14. At this juncture, we must first deal with the concern of the learned counsel for the appellant. According to him, the evidence led by the prosecution regarding the collection of appellant s blood sample is wanting.

15. Dr. O.T. Lepcha (PW-14) clearly narrates how the blood sample of the appellant was obtained, preserved and handed over to the Investigating Officer (PW-17). Dr. O.T. Lepcha (PW-14) obtained the blood sample of the appellant in filter paper (MO-IV). He had earlier obtained the blood sample from the victim and her baby (MO-I and MO-II). All blood samples were obtained by the Pathologist of the hospital under his instructions and supervision. He exhibited the certified copies of the Biological Specimen Authentication Forms for DNA testing filled by him with respect to the appellant (Exhibit-19), victim (Exhibit-20) and the new born baby (Exhibit-21). He informed that the originals were in the case records of ST (POCSO) Case No. 11 of 2017, State vs. Deepak Subba @ Dupli Gogo. Dr. O.T. Lepcha (PW-14) deposed that after the blood samples were obtained, they were put in sealed envelopes. He identified the envelopes as well as the filter papers and the blood samples. During his cross-examination, he admitted that he had not himself drawn the blood of the appellant, minor victim and the new born baby. He also admitted that the blood sample of the appellant was taken on 29.07.2017 in the Pathological Department of the hospital in his presence. The witnesses to the blood sample collection vide Exhibit-19, Exhibit-20 and Exhibit 21 have not been produced by the prosecution. However, it is of not much significance because when the maker of the documents, Dr. O.T. Lepcha (PW-14), exhibited them it was done without objection. More importantly, during his cross-examination, the defence re-confirmed that in fact the blood sample of the appellant was collected on 29.7.2017 which is the date endorsed in Exhibit 19. The appellant confirmed this fact in his answer to question 26 during his examination under section 313 Cr.P.C. He stated that his blood sample was not taken by Dr. O.T. Lepcha (PW-14) but by a ward boy. The defence also confirmed that thereafter, Dr. O.T. Lepcha (PW-14) forwarded the blood samples to the Senior Superintendent of Police, CID,

on 18.08.2017. The Investigating Officer (PW-17) confirmed having sent the blood sample for forensic examination. Dr. Subhankar Nath (PW-12) confirmed having examined the blood samples and submitting his DNA profiling report (Exhibit-12) to the forwarding Authority, i.e., the Senior Superintendent of Police, vide the forwarding letter (Exhibit-13). Dr. Subhankar Nath (PW-12) is the expert who examined the sample of the victim, newly born male baby and Deepak Subba. On DNA analysis, it was found that the victim was the mother of the baby but Deepak Subba was not his biological father. He also examined the blood sample of the appellant sent for DNA profiling and concluded vide his DNA profiling report (Exhibit-12) that the appellant was the father of the male baby. The learned Judicial Magistrate on 29.07.2017 allowed the application filed by the Investigating Officer (PW-17) praying for permission to collect the blood sample of the appellant to send the same for DNA profiling. The order also records that the accused had given his consent and that the blood sample was required to be collected at the STNM Hospital. We are of the considered view that the prosecution has been able to establish that the blood samples of the victim, her baby, Deepak Subba and the appellant had been obtained, sent for DNA profiling and result obtained.

16. The next issue raised by the learned counsel for the appellant was about the non-mention of the name of the appellant in the FIR (Exhibit-1). The judgment of the Honble Supreme Court in ***Labhuji Amratji Thakor*** (supra) was on the scope of section 319 Cr.P.C. and therefore, not dealing with the issue raised. In ***Taraman Kami*** (supra), the Division Bench of this Court had examined a case in which the allegation against the appellant therein was independent of the offence alleged in the FIR. The FIR was lodged by the victims mother categorically stating that the victim had revealed that the appellant therein had sexually assaulted her. However, during the course of investigation, it came to light the elder daughter had also been subjected to sexual assault and therefore, her statement under section 161 Cr.P.C. was recorded and thereafter charge-sheet filed against the appellant for commission of both the offences committed by him to the victim and her elder sister at different points of time. The present case is quite different. The FIR (Exhibit-1) was lodged by an ASHA member (PW-1). It reported two aspects. Firstly, that the sixteen year old victim who seemed abnormal was "*reportedly raped*" by one Deepak Subba. Secondly, the victim was three to four months pregnant. It is well settled that the FIR is only the first information about a cognizable offence. Section

154 provides that every information relating to the commission of a "*cognizable offence*" must be recorded. When the FIR gives information of a "*cognizable offence*" having been committed it is incumbent upon the investigating officer to investigate the crime and bring the culprit to book even if there is no information as to who the culprit is. The FIR (Exhibit-1) reported about the pregnancy of the victim who was a minor. It was, therefore, incumbent upon the Investigating Officer (PW-17) to investigate whether Deepak Subba had raped the victim. It was also important for the Investigating Officer (PW-17) to investigate about the pregnancy of the victim who was a minor. Failure to mention the name of the appellant in the FIR (Exhibit-1), therefore, was of not much significance, as admittedly, the fact that the appellant was the biological father of the baby came to light only after the DNA profiling. The DNA profiling was done during the period of investigation. The charge-sheet was filed against both Deepak Subba and the appellant. The learned Special Judge, however, while examining Sessions Trial (POCSO) Case No. 11 of 2017 registered against both Deepak Subba and the appellant vide order dated 21.02.2018 came to the conclusion that the alleged offences allegedly committed by them were committed separately/independently and did not form part of the same transaction. Therefore, in view of section 223 Cr.P.C., the learned Special Judge considered it appropriate to try them separately so that no prejudice is caused to them. Accordingly, the appellant was separately tried in the present case right from the inception till the judgment. This order dated 21.02.2018 was not assailed by the appellant. In fact, the appellant fully participated in the trial. It is apparent that no prejudice was caused to him.

17. In ***Nandlal Wasudeo Badwaik*** (supra), the Honble Supreme Court held:

> "**13.** Before we proceed to consider the rival submissions we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillions of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a

> total of six billion base pairs in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earths population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in *Kamti Devi* that the result of a genuine DNA test is scientifically accurate. It is nobodys case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl child."

18. It is, therefore, evident that the prosecution has been able to prove the fact that it was the appellant and the appellant alone who was responsible for making the victim pregnant and the baby she delivered was his. For the offences the appellant has been convicted for, penetration to any extent is a necessity except for the offence under section 354B IPC. When there is an allegation of making the victim pregnant, insertion of the penis into the vagina would be integral cause, and pregnancy, the effect. The victim has clearly deposed that the appellant had made her sleep with him. The prosecution has proved that the victim was a child. The defence does not make an issue about the victims minority. Minority having been established, victims consent or lack of it is immaterial. We are of the considered view that the ingredients of the offence of rape have been made out by the prosecution.

19. Having held so, we venture to examine the conviction and sentences imposed on the appellant. Rape having been established, to prove the offence under section 376(2)(l) IPC, the prosecution is required to prove the victims mental or physical disability. The prosecution examined Archana Chettri (PW-11). She is an Assistant Professor (Clinical Psychologist) in the Department of Psychiatry, Central Referral (Manipal) Hospital. The victim was referred to her by Dr. C. S. Sharma, Psychiatrist of the STNM Hospital for her psychological evaluation. She examined the victim on

21.06.2016. On psychological evaluation using Vineland Social Maturity Scale (for short 'VSMS method'), Archana Chettri (PW-11) came to an opinion that the victims mental age was five years old as compared to her chronological age. She further opined that the victims Intelligence Quotient (IQ) was calculated at 31 suggestive of severe mental retardation. She also exhibited certified copy of her psychological evaluation report (Exhibit 9) and the certified copy of OPD Form (Exhibit 10) by which she forwarded the report to the concerned Authority. The deposition of Archana Chettri (PW-11) and her opinion makes it evident that the victim was suffering from mental disability.

20. Consequently, it is also apparent that the victim was incapable of giving consent. Thus, the offence under section 376(2)(j) IPC also stands established.

21. The evidence led by the prosecution also establishes that the appellant had committed penetrative sexual assault on the victim who was a female child having taken advantage of her mental disability and made her pregnant as a consequence of the penetrative sexual assault. The ingredients of section 5(j) and 5(k) of the POCSO Act also stands proved.

22. Section 42 of the POCSO Act and section 71 of the IPC have, however, not been considered by the learned Special Judge while imposing the sentences. Where an act or omission constitutes an offence punishable under the POCSO Act and also under sections 376 IPC amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under either the POCSO Act or the IPC as provides for punishment which is greater in degree. The offences under sections 376(2)(j) and 376(2)(l) IPC is punishable 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 persons natural life, and shall also be liable to fine. The offences under section 5 of the POCSO Act is punishable under section 6 thereof with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. We are of the view that the punishment prescribed under section 376(2) IPC is greater in degree than the one provided under the POCSO Act. Consequently, although the appellant is found guilty and convicted for the offences under the POCSO

Act, the sentences under sections 5(j) and (k) of the POCSO Act awarded to him is set aside.

23. The learned Special Judge had charged the appellant of using criminal force with the intention of disrobing the victim in order to rape her. In view of section 71 IPC, the sentence cannot stand. Consequently, we set aside the sentence under section 354B IPC as well.

24. The conviction of the appellant and the sentences awarded to him under sections 376(2)(l) and 376(2)(j) of the IPC are upheld. As directed by the learned Special Judge, the period of imprisonment shall run concurrently. The award of compensation to the victim as directed by the learned Special Judge is maintained.

25. Consequently, the appeal is partly allowed. The impugned order on sentence stands modified to the above extent.

26. Copy of this Judgment be transmitted to the Court of the learned Special Judge (POCSO) North Sikkim at Mangan.

27. The records of the learned Trial Court be returned forthwith.

SLR (2019) SIKKIM 1101

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

Crl. A. No. 2 of 2018

Raj Kumar Darjee *alias* Vodafone and Another ….. **APPELLANTS**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellants: Mr. Birendra Pourali, Advocate (Legal Aid Counsel).

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

Date of decision: 17th December, 2019

A. Protection of Children from Sexual Offences Act, 2012 – Requirement of Consent of a Child – If the woman is below the age of eighteen, consent is immaterial. To constitute rape otherwise, consent is vital. If it is a case falling under the POCSO Act, consent is immaterial – Mere failure to physically resist the sexual act of penetration cannot be regarded as her consenting to sexual activity – The victim has deposed that both of them raped her. She even described that the appellant No. 1 had inserted his penis into her vagina. When the victim says that she was raped by the appellants there is no reason to doubt the same. More so, her deposition is corroborated by forensic evidence. Mere passive submission and the victim's inability to say no in the given situation cannot be termed as victim's consent.

(Paras 17 and 22)

B. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – The defence did not raise any objection when the victim exhibited her birth certificate. A suggestion was made to the Investigating Officer that the birth certificate was not of the

victim which was denied – If the defence desired to question the veracity of the information in the birth certificate, they ought to have objected to its exhibition which would have, if taken at the appropriate point of time, enabled the prosecution tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object thus becomes fatal because by the failure of the defence who was entitled to object, allowed the prosecution to tender the evidence and act on an assumption that the defence is not serious about the mode of proof. The victim's statement that she was sixteen was not even questioned during her cross-examination – Learned Special Judge accepting the birth certificate as that of the victim and holding that the victim was a minor at the time of the offence brooks no interference. However, the prosecution ought to have led cogent evidence both documentary and oral to prove the minority of the victim since it is on the basis of this determination that the Court proceeds to examine the case under the POCSO Act.

(Para 20)

Appeal dismissed.

Chronological list of cases cited:

1. R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752.
2. Hanuman Prasad and Another v. State of Rajasthan, (2009) 1 SCC 507.

JUDGMENT

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

1. A joint appeal has been preferred by the two appellants convicted by the learned Special Judge (POCSO), South Sikkim at Namchi in Sessions Trial (POCSO) Case No. 1 of 2016. The impugned judgment dated 26.07.2017 rendered the appellants guilty under section 5(g) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and under section 376D of the Indian Penal Code, 1860 (for short 'the IPC'). The appellants were sentenced to undergo rigorous imprisonment of twenty years under section 376D of the IPC and in view of section 42 of the POCSO Act, no separate sentence was imposed under section 5(g) thereof.

2. The learned Special Judge held that the victim was a fifteen year old minor at the time of the incident relying upon her birth certificate (Exhibit-14) as it was not disputed by the defence. The learned Special Judge found the deposition of the victim reliable and that it clearly established the ingredients of the offence. The learned Special Judge held that the evidence of Dr. Sanjay Rai (PW-10) and the medical reports of the appellants (Exhibit-18 and Exhibit-19) established that they were capable of sexual intercourse. The absence of smegma noticed during the appellants penile examination was held to support the evidence of the victim that they have committed sexual intercourse recently. The learned Special Judge opined that it was not always necessary that there would be injuries on the victims private part as there was evidence to suggest that she was used to sexual intercourse. The learned Special Judge found that the green cloth (MO-III) which was sent for forensic examination and examined by Pooja Lohar (PW-9) was detected with semen. According to the victim, the green cloth (MO-III) was used by the appellant no.2 to wipe his penis after he discharged some liquid after the rape. He found that there was semen not only on the green cloth (MO-III) but also on the brown underwear (MO-I) and thus supported the evidence of the victim that she was sexually assaulted by the appellants.

3. Heard Mr. Birendra Pourali, learned counsel for the appellants and Mr. S.K. Chettri, learned Assistant Public Prosecutor for the respondent.

4. Mr. Birendra Pourali submitted that prosecution had failed to establish that the victim was a minor by leading cogent evidence. According to the learned counsel there is no evidence to show how the birth certificate (Exhibit-14) was seized. He submitted that search and seizure of various material exhibits have not been properly proved. He also submitted that the medical evidence led by the prosecution completely belies the allegation that the appellants had committed gang rape on her and therefore her evidence is not reliable. It was argued that the victims statement was inconsistent and the prosecution had failed to relate the semen detected during forensic examination to any of the appellants

5. Mr. S.K. Chettri on the other hand submitted that the prosecution has been able to prove that the victim was a minor and that the appellants were guilty. He submitted that failure to find any marks or injuries on the person of the appellants does not lead to an inference that they had not

committed the offence and conviction may be based upon the sole testimony of the victim. He cautioned that the Court must be sensitive while dealing with cases involving sexual offences.

6. Eleven witnesses were examined by the prosecution during the trial. Ganga Prasad Sharma (PW-3)-Head Constable at the police station stopped one Ecomet vehicle WB-73D/0558 (for short 'the vehicle') on 12.10.2015 at around 5:30 a.m. when he saw the appellant no.2 with a girl and another boy in it. He knew the appellant no.2. The appellant no.2 tried to cover and hide the girl. Suspecting, he told them to get out and informed Karma Chedup Bhutia (PW-1) who was the officer-in-charge of the police station.

7. The victim was handed over to Alvina Rai (PW-8), the Sub-Centre Head of Childline. The First Information Report (for short „the FIR) (Exhibit-1) lodged on 12.10.2015 by Alvina Rai (PW-8) confirms the assertion made by Ganga Prasad Sharma (PW-3) and Karma Chedup Bhutia (PW-1). The victim was forwarded to the primary health centre for medical examination by the Investigating Officer (PW-11) on 12.10.2015 at 12:25 hours. The prosecution did not produce the doctor who examined the victim at the primary health centre in Court. Resultantly, the medical report (Exhibit-24) of the victim after her examination on 12.10.2015 at the primary health centre remains not proved. On the same day at 6 p.m. Dr. Rajesh Kharel (PW-5) examined the victim. Dr. Rajesh Kharel (PW-5) found no external injury on her person. Her hymen was lax which according to him suggested that the victim was used to sexual intercourse. There was no fresh injury on her hymen. Dr. Rajesh Kharel (PW-5) obtained her vulva-vaginal swab/wash and forwarded it for cytopathological analysis. However, Pooja Lohar (PW-9) could not detect any blood, semen or any other body fluid from the swab/wash of the victim.

8. The appellants were sent for medical examination on 13.10.2015 after their arrest. Dr. Sanjay Rai (PW-10) examined them. He did not find any injury on the appellants. He opined that the appellants were capable of performing sexual intercourse. According to Dr. Sanjay Rai (PW-10), smegma was absent from both the appellants.

9. On the basis of the statement of the victim, the Investigating Officer (PW-11) seized a truck no. SK-04D/0531 (for short 'the truck') from the

appellant no.1 and the vehicle from the appellant no.2 which was detained at the Check Post in the presence of Amit Pradhan (PW-7) and Pranab Sharma (PW-2). Seizure memos (Exhibit-3 and Exhibit-4, respectively) were prepared thereafter. Both Amit Pradhan (PW-7) and Pranab Sharma (PW-2) confirmed the seizure of the truck and the vehicle. Both the witnesses also confirmed the seizure of the two underwears from the truck and the vehicle. Amit Pradhan (PW-7) confirmed that the brown underwear (MO-I) was recovered from the truck and the grey underwear (MO-II) from the vehicle, although he could not confirm which belonged to whom. However, seizure memo (Exhibit-3 and Exhibit-4) reflects that the brown underwear (MO-I) was seized from appellant no. 1 and grey underwear (MO-II) from the appellant no.2. This fact has been proved by the Investigating Officer (PW-11) as well. Alvina Rai (PW-8) deposed that on 12.10.2015 at the police station, the victim disclosed to her that she had been sexually assaulted by the driver of a TATA vehicle. She also deposed that she had accompanied the police and the minor victim to the place of occurrence where the victim had been sexually assaulted. A green cloth (MO-III) was found there. It was seized by the police through seizure memo (Exhibit-17) in her presence. Amit Pradhan (PW-7) was the other witness to the seizure of the green cloth (MO-III) vide seizure memo (Exhibit-17). He also confirmed the seizure of the green cloth (MO-III) which was lying on the ground at the place of occurrence. The green cloth (MO-III) and the two underwear (MO-I and MO-II) were sent for forensic examination. Pooja Lohar (PW-9) detected human semen in the green cloth (MO-III) which gave positive test for blood group 'A'. Pooja Lohar (PW-9) also detected human semen in the brown underwear (MO-I) which belongs to the appellant.

10. The evidence led by the prosecution proves that the victim first travelled in the truck with the appellant no.1 and thereafter in the vehicle with the appellant no.2 after which she was rescued. The prosecution has also been able to establish that there was sexual activity in the night before the apprehension. Therefore, the evidence of the victim became vital.

11. The victim was examined on 27.10.2015 by the learned Judicial Magistrate (PW-4) and her statement under section 164 of the Code of Criminal Procedure, 1973 (for short „the Cr.P.C.) was recorded after being satisfied that she understood the nature of the proceedings and could be a competent witness.

12. The victim deposed before the Court on 11.05.2016. She stated that she was sixteen years old and not studying in any school. She recognised the appellants. She deposed that:

> "I know the two accused persons who are present before the Court. Few months back, I had gone to Siliguri with one Puran daju (my cousin). At Siliguri I met accused Vodafone at Big Bazaar shopping complex. After being familiar with him I came to Jorethang in his vehicle on the following day. I had spent the night in my cousins place at Siliguri. The said accused brought me to Jorethang where I met my aunt. In fact, the handy boy of accused Vodafone was also there when we came to Jorethang from Siliguri. That evening I again met accused Vodafone near Jorethang bridge. He told me that he would drop me to Melli. Accordingly, I boarded his truck and we started proceeding towards Melli. His handy boy was also there. On the way to Melli the accused stopped the truck at one place and asked his handy boy to leave. He then raped me by putting his pishab garney(penis) into my pishab garney(vagina). He did it once. After sometime the other accused came over there in an Ecomate truck. His young handy boy was also with him. Accused Vodafone asked me to get inside that Ecomate truck. The other accused and his handy boy then raped me inside the said truck. Later, while we reached the Melli Checkpost (on Sikkim border) for entering in West Bengal I was spotted by the police. I told the police about the above incidents. ....."

13. The victim was cross-examined by the defence. It transpires that the vehicle arrived at the place of occurrence after half an hour. According to the victim, she spent the night in the vehicle and it is only in the morning hours that she was taken towards the check post where the police found her. She could not recollect from where the green cloth (MO-III) was recovered. The victim had gone to Siliguri looking for a hotel job with the permission from her mother.

14. From the evidence of the victim, it is clear that there were three persons involved. The victim had befriended the appellant no.1 at Big Bazaar shopping complex and after becoming familiar; she voluntarily went to Jorethang with him in his truck the following day. One handy boy of the appellant no.1 was also there in the truck. The victim met her aunt at Jorethang. Later in the evening she met the appellant no.1 again near the bridge. Appellant no.1 told her that he would drop her. Accordingly, she boarded the truck with the appellant no.1 and the handy boy. On the way, the appellant no.1 stopped the truck, asked his handy boy to leave and thereafter, he committed rape on her. After sometime, the appellant no.2 came there in the vehicle with his handy boy. The appellant no.1 asked her to get inside the vehicle where both the appellant no.1 and his handy boy committed rape on her.

15. Rape is defined in section 375 IPC, 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 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 him 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 eighteen 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."

16. There is no medical evidence to support the prosecution version that the victim was raped by the appellants. Forensic investigation, however, detected semen on the green cloth (MO-III) and the brown underwear (MO-I). The discovery of the semen on the green cloth (MO-III) corroborates the evidence of the victim that the appellant no.2 had used it to wipe his penis after ejaculation. The detection of semen in the brown underwear (MO-I) which was seized from the appellant no.1 connects him to the act of sexual intercourse as deposed by the victim. In the circumstances what is necessary to be examined is whether it amounted to rape and if so, the appellants could be punished for gang rape.

17. If the woman is below the age of eighteen, consent is immaterial. To constitute rape otherwise, consent is vital. If it is a case falling under the POCSO Act, consent is immaterial.

18. Mr. Birendra Pouralis submission that the prosecution has failed to prove that the victim was a minor gathers importance. The victim has stated that she was sixteen years old in answer to the questions put by the learned Special Judge. Besides this statement, there is a birth certificate (Exhibit-14). There is no evidence to show how the birth certificate (Exhibit-14) was procured by the prosecution. The Investigating Officer (PW-11) is silent about it. The prosecution exhibited the birth certificate (Exhibit-14) through the victim. She deposed that it was hers. The defence did not cross-examine the victim on the birth certificate (Exhibit-14) or her age. The birth certificate (Exhibit-14) reflects the date of registration on 07.04.2000 which is much prior to the incident. The difference in the surname of the victim in

the birth certificate (Exhibit-14) and her deposition pointed out in the appeal was not put to the victim during her cross-examination. In any case, both surnames are alternate surnames of the same community. The Investigating Officer (PW-11) identified the birth certificate (Exhibit-14) as the victims in which her date of birth was recorded as 26.03.2000. The defence denied that the birth certificate (Exhibit-14) which recorded the victims birth date as 26.03.2000 was the birth certificate (Exhibit-14) of the victim. No other evidence was brought forth by the prosecution to establish the age of the victim.

19. In ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple***[1], the Honble Supreme Court elucidated:

> **"20.** The learned counsel for the defendant-respondent has relied on *Roman Catholic Mission* v. *State of Madras* [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (*i*) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (*ii*) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence

[1] (2003) 8 SCC 752

> and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

20. The defence did not raise any objection when the victim exhibited her birth certificate (Exhibit-14). A suggestion was made to the Investigating Officer (PW-11) that the birth certificate (Exhibit-14) was not of the victim which was denied. The contention of Mr. Birendra Pourali that the

prosecution had failed to prove the birth certificate (Exhibit-14) by leading cogent evidence has to be rejected in view of the fact that the defence failed to object to the exhibition of the birth certificate (Exhibit-14) by the victim. It was the victims birth certificate (Exhibit-14) and therefore, she would have knowledge about it. If the defence desired to question the veracity of the information in the birth certificate (Exhibit-14), they ought to have objected to its exhibition which would have, if taken at the appropriate point of time, enabled the prosecution tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object thus becomes fatal because by the failure of the defence who was entitled to object, allowed the prosecution to tender the evidence and act on an assumption that the defence is not serious about the mode of proof. The victims statement that she was sixteen was not even questioned during her cross-examination. In the circumstances, we are of the considered view that the learned Special Judge accepting the birth certificate (Exhibit-14) as that of the victim and holding that the victim was a minor at the time of the offence brooks no interference. However, the prosecution ought to have led cogent evidence both documentary and oral to prove the minority of the victim since it is on the basis of this determination that the Court proceeds to examine the case under the POCSO Act.

21. As the learned counsel for the appellants challenges the impugned judgment on the question of the minority of the victim, it is necessary for us to examine whether the evidence led by the prosecution allows us to believe that the act was consensual. Explanation 2 to section 375 IPC explains that 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*." The evidence of the victim reflects no such communication either by words, gestures or any form of verbal or non-verbal communication. In such circumstances, mere failure to physically resist the sexual act of penetration cannot be regarded as her consenting to sexual activity. That there was penetration in the sexual intercourse with the appellants cannot be doubted. The victim has deposed that both of them raped her. She even described that the appellant no. 1 had inserted his penis into her vagina. When the victim says that she was raped by the appellants there is no reason to doubt the same. More so, her deposition is

corroborated by forensic evidence. Mere passive submission and the victim s inability to say no in the given situation cannot be termed as victims consent. We are of the view that the victim being a minor, the question of consent has no relevance. Even otherwise, the evidence is not suggestive of consent as per Explanation 2 to section 375 IPC.

22. We shall now examine whether the act of rape committed by the appellant no.1 in the truck and thereafter, by the appellant no.2 in the vehicle amounts to gang rape. Section 376D defines gang rape as under:-

> "**376D. Gang rape**. – Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that persons natural life, and with fine:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the victim."

23. The ingredients of the offence of gang rape are:

(i) a woman is raped;

(ii) (a) she is raped by one or more persons constituting a group; or

(b) she is raped by one or more persons acting in furtherance of a common intention;

24. In ***Hanuman Prasad and Another vs. State of Rajasthan***[2], the Honble Supreme Court while explaining section 376(2)(g) IPC before the insertion of section 376D IPC, held:

[2] (2009) 1 SCC 507

> "**10.** The important expression to attract Section 376(2)(*g*) is "common intention". The essence of the liability in terms of Section 376(2) is the existence of common intention. In animating the accused to do the criminal act in furtherance of such intention, the principles of Section 34 IPC have clear application. In order to bring in the concept of common intention it is to be established that there was simultaneously consensus of the minds of the persons participating in the act to bring about a particular result. Common intention is not the same or similar intention. It presupposes a prior meeting and prearranged plan. In other words, there must be a prior meeting of minds. It is not necessary that preconcert in the sense of a distinct previous plan is necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons which has to be gauged on the facts and circumstances of each case."

25. There is no evidence that the appellants formed a group of one or more persons. The victim had travelled voluntarily with the appellant no.1 and the first act of sexual intercourse with him in the truck was much before the appellant no.2 arrived in the vehicle. There is no evidence led by the prosecution that the appellants were known to each other prior to the incident. That the appellant no.2 also raped the victim in the vehicle along with another is clearly established. The victim, however, deposed that the appellant no.1 asked her to get inside the vehicle of the appellant no.2 after which the appellant no.2 and his handy boy raped her in the vehicle. This circumstance clearly leads us to unflinchingly infer that the appellants were known to each other and that the common intention is clearly reflected by the element of participation in action at the place of occurrence. The two vital ingredients necessary for constituting the offence of gang rape being satisfied, the conviction of the appellants under section 376D IPC cannot be faulted.

26. The appellants have also been convicted for gang penetrative sexual assault on a child under section 5(g) of the POCSO Act. The said provision reads as under:

> "**5. Aggravated penetrative sexual assault**. – (g) whoever commits gang penetrative sexual assault on a child.
>
> *Explanation*. – When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone;
>
> is said to commit aggravated penetrative sexual assault."

27. In view of the fact that we have held that there was common intention between the appellants and the act of rape had been committed by them, the conviction of the appellants for commission of aggravated penetrative sexual assault must also be upheld.

28. The learned Special Judge has sentenced the appellants to undergo rigorous imprisonment for twenty years for the offence of gang rape. That was the minimum sentence prescribed under section 376D IPC. Section 376D IPC mandates that in addition to imprisonment, the appellants must also be imposed fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and that the said fine would be paid to the victim. The learned Special Judge has failed to impose fine although he has sentenced the appellants to rigorous imprisonment for a period of twenty years. This was incorrect. Section 53 IPC provides that fine is a mode of punishment. Section 386 Cr.P.C. provides that in an appeal from conviction, the appellate court may not enhance the sentence. Thus, in view of the failure of the prosecution to seek enhancement of the sentence, we are precluded from imposing the fine as mandated.

29. Nevertheless, we are of the considered view that the victim must be compensated for the offence of rape committed on her under the Sikkim Compensation to Victims or his Dependents Schemes, 2001 as amended. Since the offence was committed in October 2015, the victim shall be given

an amount of Rs.1,00,000/- (one lakh) as compensation by the Sikkim State Legal Services Authority on due verification.

30. We, therefore, uphold the impugned judgment dated 26.07.2017 and the order on sentence dated 28.07.2017 but with the above caveat. Consequently, the appeal is dismissed.

31. We direct the Registry to transmit a copy of this judgment to the Court of the learned Special Judge (POCSO), South Sikkim at Namchi and another to the learned Member Secretary, Sikkim State Legal Services Authority, for compliance.

32. A copy of this judgment shall also be furnished free of cost to the appellants.

33. The record of the learned trial Court be returned forthwith.

SLR (2019) SIKKIM 1117

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

MAC. APP. NO. 5 of 2019

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

Versus

Master Sang Dorjee Tamang and Others ….. RESPONDENTS

For the Appellant: Ms. Kesang Choden Tamang, Advocate.

For the Respondents: Mr. Kumar Sharma and Mr. Bhupendra Giri, Advocates.

Date of decision: 17th December, 2019

A. Motor Vehicles Act, 1988 – S. 166 – Proof of Negligence – Respondent No.2 had consistently taken this stand before the Tribunal from the time of lodging the F.I.R till her evidence on affidavit. Inspite of such clear assertion neither Respondent No. 3 nor the Appellant contested the same. The Appellant as well as Respondent No.3 failed to lead any evidence contrary to the evidence led by Respondent Nos.1 and 2 with regard to rash and negligent driving by Respondent No. 3. In fact, even when an opportunity to cross-examine Respondent No. 2 was granted to the Appellant and Respondent No. 3, they did not even attempt a denial of the assertion made by Respondent No. 2 – The contention raised by Appellant that there was no evidence to prove that the Respondent No. 3, i.e., the driver of the vehicle, had been rash and negligent rejected.

(Para 14)

Appeal dismissed.

Chronological list of cases cited:

1. New India Assurance Co. v. Nakul Gurung, AIR 2010 Sikkim 13.

2. Magma General Insurance Co. Ltd. v. Nanu Ram and Others, 2018 ACJ 2782.

3. National Insurance Co. Ltd. v. Pranay Sethi and Others, 2017 ACJ 2700 (SC).

JUDGMENT

Bhaskar Raj Pradhan, J

1. An accident occurred on 03.02.2018. The mother (respondent no.2) of the deceased lodged an FIR (Exhibit-1). A vehicle bearing registration no. SK-04-P-2158 (Bolero SLX) (the vehicle) hit the deceased, a ten year old child studying in Class five, as a result of which he died on 07.02.2018. The father (Claimant No.1) and respondent no.2 filed a claim under section 166 of the Motor Vehicles Act, 1988 for compensation on account of death of the deceased against Dipen Rai (the driver of the vehicle / respondent no.3), Abel Gayom Targain (the owner of the vehicle / respondent no.4) and Branch Manager, National Insurance Company Limited (the appellant) seeking a claim of Rs.14,33,739/-. The respondent no.1 substituted his late father i.e. the Claimant No.1 after his death.

2. In the claim petition, it was asserted by the respondent nos.1 and 2 that the vehicle driven by respondent no.3 while returning from Namthang hit the deceased who was walking on the right side of the road at Nagi near food godown. It was asserted that the respondent no.3 did not look towards the right side and as a result the deceased was crushed, causing injuries to his head. This accident was witnessed by villagers including one Tsheringmit Lepcha of Nagi who screamed on seeing the accident. The claim petition stated that it was only after hearing her scream that the respondent no. 3 stopped the vehicle. The deceased was, thereafter, evacuated to Namchi District Hospital and then to Siliguri at the North Bengal Neuro Centre for four days. The deceased was brought back to Namchi District Hospital. On 07.02.2018 he succumbed to his injuries.

3. The respondent no.3 filed his written objection on 25.07.2018. In his written objection, he claimed that it was an accident which transpired when he was about to park the vehicle and the deceased had suddenly run towards it. Although he had exercised due diligence and applied the break

the vehicle did not stop. He also asserted that at the relevant time the speed of the vehicle was 10-15 km/hour. The respondent no.3 submitted that the claim was excessive and in view of the fact that the vehicle was validly insured, the appellant was liable.

4. The respondent no. 4 filed his written objection on 25.07.2018 and submitted that the claim was excessive. The respondent no.4 asserted that the vehicle was duly insured.

5. The appellant filed their written objection on 20.08.2018. According to the appellant, there was neither any statutory liability nor any contractual obligation on their part to pay any compensation either to the claimants or to indemnify the owner of the vehicle. The appellant also denied and disputed the contentions made in the claim petition and raised various legal issues related to the maintainability, etc.

6. On 14.09.2018 a singular issue i.e. *"Whether the claimants are entitled for compensation, if so, who is liable to pay the same?"* was framed by the learned Tribunal.

7. On 05.10.2018, the respondent no. 2 filed her evidence on affidavit. She asserted that on 03.02.2018 at Namthang Nagi Road the vehicle driven by the respondent no. 3 crushed the deceased walking on the right side of the road. The respondent no. 3 had failed to see the deceased. It caused injuries on the head of the deceased. She was cross-examined on 05.10.2018. Neither the respondent no. 3 nor the appellant cross-examined her with regard to how the accident occurred.

8. No other witness for any of the parties was examined except the respondent no.2. The learned Tribunal rendered her judgment on 06.11.2018. The learned Tribunal allowed the claim made by respondent nos.1 and 2 and calculated the same in the following manner:-

> ***"****Thus, the total amount of compensation which stands calculated and is found to be "just" by this Tribunal is as follows:-*
>
> *1. Loss of earning : 5,40,000/-*
>
> *2. Funeral Expenses: 15,000/-*

3. Loss of Estate:	*15,000/-*
4. Medical Expenses:	*1,18,739/-*
5. Non-pecuniary Damages:	*1,00,000/-*
Total	*7,88,739/-"*

9. The appellant was directed to pay a total compensation amount of Rs.7,88,739/- to the respondent nos.1 and 2 with interest @ of 10% per annum on the said sum from the date of filing of the claim petition i.e. 14.05.2018 till full and final payment. The learned Tribunal also passed an award dated 06.11.2018 for the said amount. Aggrieved thereby, the appellant preferred the present appeal under section 173 of the Motor Vehicles Act, 1988.

10. Ms. Kesang Choden Tamang, learned Counsel for the appellant raised two contentions. According to her, negligence on the part of the driver, i.e., the respondent no.3, has not been proved and since it is mandatory to prove negligence in a claim under section 166 of the Motor Vehicles Act, 1988 the impugned judgment is bad and liable to be set aside. The learned Counsel for the appellant also contests the determination of the monthly income of the deceased by the learned Tribunal as Rs.6000/- per month. According to the learned Counsel, the learned Tribunal did not consider the Second Schedule to the Motor Vehicles Act, 1988 which provides that notional income for compensation to those who had no income prior to accident as Rs.15,000/- per annum. The learned Counsel submitted that as admittedly the deceased was a ten year old child he would have no income and therefore, clause 6 of the Second Schedule to the Motor Vehicles Act, 1988 would come into play. Consequently, the learned Tribunal ought to have quantified his notional income at Rs.15,000/- a year and not Rs.6000/- per month.

11. Mr. Kumar Sharma, learned Counsel for the respondent nos. 1 and 2, *per contra*, submits that the issue of negligence has been raised for the first time in the appeal and the assertions made by the respondent nos. 1 and 2 in the proceedings before the learned Tribunal was not even contested by the appellant. Besides, Mr. Kumar Sharma points out that

there was sufficient evidence before the learned Tribunal to establish that it was a case of rash and negligent driving on the part of the respondent no.3. He pointed out that the evidence on affidavit of respondent no.2 read with the documents exhibited including the FIR and the post mortem report (Exhibit-3) reveals that the respondent no.3 was rash and negligent while driving the vehicle and the appellant, as well as the respondent no.3 failed to lead any evidence contrary to the assertion. With respect to the second contention raised by the appellant, the learned Counsel for the respondent nos.1 and 2 submits that the Second Schedule to the Motor Vehicles Act, 1988 is applicable for those claims preferred under section 163 A and therefore, not applicable to a claim petition under section 166 of the Motor Vehicles Act, 1988. He referred to the judgment of this Court in ***New India Assurance Company vs. Nakul Gurung***[1] and submitted that the learned Tribunal was not bound by the Second Schedule, which is, but a guideline to determine the notional income. Mr. Kumar Sharma also relied upon the judgment of the Supreme Court in ***Magma General Insurance Co. Ltd. vs. Nanu Ram and Others***[2] to seek for filial consortium in favour of the respondent no.2 due to the accidental death of the child of the deceased.

12. Mr. Bhupendra Giri, learned Counsel for respondent no.4 submitted that paragraph 7 of the written objection filed by the respondent no.3 makes it clear that the driver was not rash and negligent. He further submits that all the relevant documents required to be maintained by the respondent no.4 were up to date and as such respondent no.4 is not liable.

13. This Court has examined and perused the impugned judgment and the evidence led before the learned Tribunal, both oral and documentary.

14. The first contention raised by the appellant that there was no evidence to prove that the respondent no.3, i.e., the driver of the vehicle, had been rash and negligent is taken up first. The learned Tribunal had examined this contention. The learned Tribunal noticed that the respondent no.2 was not an eye witness to the accident but her evidence on affidavit about the accident was not contested either by the respondent no.3 or the appellant. The learned Tribunal examined the evidence before it especially

[1] AIR 2010 Sikkim 13
[2] 2018 ACJ 2782

the FIR (Exhibit-1) and the post mortem report (Exhibit-3) which shows the cause of death as *"acute sub-dural hematoma and sub-arachnoid haemorrhage"* and concluded that the deceased died as he was crushed after being hit by the vehicle driven by the respondent no.3. It is seen that the respondent no.2 had consistently taken this stand before the Tribunal from the time of lodging the FIR (Exhibit-1) till her evidence on affidavit. In spite of such clear assertion neither the respondent no.3 nor the appellant contested the same. The appellant as well as respondent no.3 failed to lead any evidence contrary to the evidence led by respondent nos.1 and 2 with regard to rash and negligent driving by the respondent no.3. In fact, even when an opportunity to cross-examine the respondent no.2 was granted to the appellant and respondent no.3, they did not even attempt a denial of the assertion made by the respondent no. 2. Thus, the first contention of the appellant is rejected.

15. With regard to the second contention raised by the appellant, the learned Tribunal considered the age of the deceased to be nine plus years at the time of his death. The learned Tribunal also considered the fact that he was studying in class five and thus concluded that he would have earned at least Rs.6000/- (Rupees six thousand) per month. Accordingly, the loss of earning was calculated in the following manner:-

> Rs.6000/- x 12 x 15 – ½ = Rs.5,40,000/-. ½ being deducted from the loss of earnings on the assumption that the deceased, being a bachelor, would have utilised the said amount towards his maintenance and upkeep, had he been alive.

16. In ***New India Assurance Co. Ltd. vs. Nakul Gurung*** this Court examined an identical contention regarding the Second Schedule to the Motor Vehicles Act, 1988. This Court held in paragraph 20 as under:-

> ***"20.*** *In so far as the feeble plea of the victim being a non-earning member entitling the claimants compensation of Rs.15,000/- only is concerned, it is to be borne in mind that the claim is made under Section 166 of the Motor Vehicle Act, 1988 and by virtue of Section 168,*

*the Tribunal is vested with the discretion to award just and reasonable compensation against such claim. It is not bound by the second schedule to the Act which may, however, be considered as a guideline while determining the notional income of the deceased. It is a well settled principle of law that in applying a law like the present one which is a piece of social legislation, the Courts shall construe the provision liberally and wherever in a given situation relief may be given in exercise of its discretion, it shall give the optimum possible under the law. In the present case, the claim being under section 166 of the Motor Vehicles Act, the Court has the choice to apply the second schedule as a guideline for computing the compensation and that the schedule leaves it upon the Court to adopt either of the two methods provided therein, i.e., either the multiplier system in Clause 1 or the fixed compensation or under Clause 6 of the second schedule, it shall adopt the one which is more beneficial to the claimant. This appears to have been done in the present case by applying more beneficial multiplier in Clause 1. Therefore, the plea stand rejected as untenable.***"***

17. In ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** the Supreme Court held as under:-

"*50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in Second Schedule to the Act. The said Schedule has been found to be defective as stated by the court in Trilok Chandra, 1996 ACJ 831 (SC). Recently in Puttamma v. K.L. Narayana Reddy, 2014 ACJ (SC), it has been reiterated by stating: "... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario*

*including the present cost of living and current rate of inflation and increased life expectancy."***"**

18. Thus, the second contention raised by the learned Counsel for the appellant being squarely covered by the judgment of this Court as quoted above must also be rejected.

19. This Court shall now examine the contention raised by the learned Counsel for respondent nos.1 and 2 regarding the payment of filial consortium. In ***Magma General Insurance Company Limited*** (supra) the Supreme Court observed that its Constitutional Bench in ***Pranay Sethi***[3] dealt with various heads under which compensation is to be awarded in a death case and one of these heads is loss of consortium. The Supreme Court after holding that in legal parlance „consortium is a compendious term which encompasses „spousal consortium, „parental consortium and „filial consortium went on to observe:

"8.7 ……..The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse [Rajesh v. Rajbir Singh, 2013 ACJ 1403 (SC)].

Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of „company, society, cooperation, affection, and aid of the other in every conjugal relation. [Blacks Law Dictionary: 5th Edn., 1979].

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

[3] 2017 ACJ 2700 (SC)

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

(emphasis supplied)

20. In ***National Insurance Co. Ltd vs. Pranay Sethi and others***[4], the Supreme Court held:-

> *"61. ……*
>
> *(viii) Reasonable figures under conventional heads, namely, loss to estate, loss of consortium and funeral expenses should be Rs.15,000, Rs.40,000 and Rs.15,000 respectively. The aforesaid amounts should be enhanced at the rate of 10 per cent in every three years."*

21. The learned Tribunal has not granted filial consortium to the respondent no.2. The Supreme Court had quantified, for the present, loss of consortium at Rs. 40,000/-. Non-grant of filial consortium would not be just compensation. Accordingly, this Court is of the view that in addition to the compensation awarded by the learned Tribunal an amount of Rs. 40,000/- as loss of filial consortium must also be awarded. It is so ordered.

22. The appeal fails. The appellant is directed to pay compensation of 8,28,739/-(Rupees Eight lakhs twenty eight thousand seven hundred and thirty nine only) i.e., (7,88,739 + 40,000) to the respondent nos.1 and 2 with interest @ 10 per cent per annum on the said sum from the date of filing of the claim petition i.e., 14.05.2018 till full and final payment.

[4] 2017 ACJ 2700 (SC)

SLR (2019) SIKKIM 1126

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

Crl. A. No. 31 of 2017

Binod Pradhan and Another ….. APPELLANTS

Versus

State of Sikkim ….. RESPONDENT

For the Appellants: Mr. Tashi Rapten Barphungpa, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Thupden Youngda, Addl. Public Prosecutor.

Date of decision: 20th December, 2019

A. Indian Evidence Act, 1872 – Previous Bad Character – When Relevant – S. 54 provides that in criminal proceedings the fact that the accused person had a bad character is irrelevant, unless evidence had been given that he has a good character, in which case it becomes relevant. Explanation 2 thereof provides that a previous conviction is relevant as evidence of bad character – No evidence was given that Appellant No.1 had good character. The Trial Court's judgment had also been reversed by this Court – Since Appellant No.1 had been acquitted subsequently, the learned Judge being influenced by it was not correct.

(Para 23)

B. Indian Evidence Act, 1872 – Evidence – Although there is no material to show that there was any grudge or reason for the victim to falsely implicate the Appellants, that alone does not help the prosecution to establish the case beyond all reasonable doubt. When the Court lacks confidence to rely upon the version of the victim alone without any corroboration faced with conflicting medical evidence, it would not be proper to uphold the Appellants conviction – It is settled that even in a case

of rape the prosecution is not excused from leading cogent and trustworthy evidence to establish the heinous offence.

(Para 24)

Appeal allowed.

Chronological list of cases cited:

1. Sri Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233.
2. Vijender v. State of Delhi, (1997) 6 SCC 171.
3. Vithal Tukaram More and Others v. State of Maharashtra, (2002) 7 SCC 20.
4. Umakant and Another v. State of Chhattisgarh, (2014) 7 SCC 405.
5. Mousam Singha Roy and Another v. State of W.B, (2003) 12 SCC 377.
6. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
7. State of Orissa v. Thakara Besra and Another, (2002) 9 SCC 86.

JUDGMENT

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

1. The appellant no.1 has been convicted under sections 376(2)(n), 342 and 120B read with section 34 of the Indian Penal Code, 1860 (for short 'IPC'). He has been sentenced to rigorous imprisonment for twenty years and a fine of Rs.20,000/- for each of the offences under sections 376(2)(n) IPC and 120B IPC. He has been further sentenced for one year under section 342 IPC. The appellant no.2 has been convicted under sections 120B and 342 read with section 34 IPC. For the offence under section 120B, the appellant no.2 has been sentenced to undergo simple imprisonment for ten years and to pay a fine of Rs.10,000/-. She has been sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.10,000/- under section 342 IPC. All sentences have been directed to run concurrently. An amount of Rs.3,00,000/- has been awarded to the victim as victim's compensation.

2. The judgment of conviction and order on sentence dated 21.09.2017 passed by the learned Judge, Fast Track, South and West Sikkim at Gyalshing (for short 'the learned Judge'), in Sessions Trial (F.T) Case No. 8

of 2016 are under challenge by both the appellants. The appellant nos.1 and 2 are husband and wife respectively.

3. The investigation of the case emanated from the First Information Report (for short 'the FIR') (Exhibit-5) lodged by the victim (PW-6) on 08.10.2016. The victim alleged that on 07.10.2016, the appellant no.2 asked her to go to her house. They reached her house at 6:30 p.m. At night, she had dinner with the appellants and their child. At 8:30 p.m. they allotted her a room to sleep in. The appellant no.2 asked her if she wanted a sleeping pill, which she declined. When she was sleeping at around 9:00 p.m., the appellant no.1 came to her bed without her consent. She took him out of the room and latched the door. She, thereafter, tried to call the appellant no.2 but she refused to wake up. After a while, the appellant no.1 entered through the ceiling. When he started to force himself on her, she screamed but in spite of that he raped her and kept her locked inside the room. At around 3:00 a.m. in the morning, he once again raped her. During the night, she had called her friend (PW-1) on his mobile and requested him to come and get her. She also messaged him. On 08.10.2016 at around 8:00 a.m., she ran away from the house and went to a Church a little below the appellants house. She asked for help and the people at the Church kept her hidden in the storeroom. The appellants, however, came and took her out. She told the appellant no.2 about the incident but the appellant no.2 supported the appellant no.1 and threatened her. PW-1 and one Badhal came looking for her and took her away. Thereafter, the victim told her sister (PW-2) about the incident and lodged the FIR. It appears that the signature of the victim in the formal FIR (Exhibit-6) dated 08.10.2016 was obtained only on 13.10.2016.

4. The appellant no.1 was arrested on 17.10.2016 and appellant no.2 on 18.10.2016.

5. The final report dated 30.11.2016 was filed against the appellants as well as Subash Pradhan. It alleged that the appellant no.1 had committed rape on the victim and the appellant no.2 had conspired with the appellant no.1. Subash Pradhan was alleged to have concealed the appellants to screen them from legal punishment. On 23.02.2017, the learned Judge framed three charges under sections 376(2)(n), 342/34 and 120B read with 34 IPC against the appellant no.1. Two charges under sections 120B/34 and 342/34 IPC were framed against the appellant no.2. Charges were also framed against Subash Pradhan.

6. During the course of trial, the prosecution examined eleven witnesses including the Investigating Officers. The appellants were examined under section 313 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') on 05.08.2017. Both the appellants stated that they did not have any witness to their defence.

7. The learned Judge found that the prosecution had not adduced any evidence against Subash Pradhan and accordingly acquitted him of both the charges.

8. Heard Mr. Tashi Rapten Barfungpa, learned Counsel for the appellants and Mr. Thupden Youngda, learned Additional Public Prosecutor for the respondent.

9. Mr. Barpungpa submitted that in the facts and circumstances set out in the prosecution case, the statement of the victim is unreliable; there are material contradictions in the evidence produced; vital independent witnesses who could have deposed about what actually transpired have not been examined; there is no evidence to prove that blood of the appellant no.1 was drawn and sent for forensic examination and consequently, the forensic evidence that semen was found in the victim's underwear cannot be connected to the appellant and more importantly, the medical examination of the victim completely demolishes the allegation of rape. Relying upon the judgment of the Supreme Court in ***Sri Rabindra Kumar Dey v. State of Orissa***[1], he emphasised that the prosecution is required to prove its case beyond reasonable doubt; cannot derive any benefit from weakness or falsity of the defence version and that the accused is presumed innocent until proven guilty. He would rely upon the same judgment to submit that investigation implies the search for truth and not to bolster the allegation against the accused. The judgment of the Supreme Court in ***Vijender v. State of Delhi***[2] was cited by him to submit that the result of investigation cannot be the basis for the finding of guilt against an accused. The judgment of the Supreme Court in ***Vithal Tukaram More & others v. State of Maharashtra***[3] was cited in support of his argument that it is the duty of the Court to see that penal provisions intended to curb the crime by bringing the offenders to book do not cause injustice to the innocent. He submitted

[1] (1976) 4 SCC 233
[2] (1997) 6 SCC 171
[3] (2002) 7 SCC 20

that if two views are possible on evidence adduced, the view favourable to the accused should be adopted while relying on ***Umakant & another v. State of Chhattisgarh***[4]. Mr. Barfungpa further submitted that as per settled principles of criminal jurisprudence, more serious the offence, more strict the degree of proof. For the said proposition, he cited the judgment of the Supreme Court in ***Mousam Singha Roy & another v. State of W.B***[5]. Relying upon ***R. Shaji v. State of Kerala***[6], he submitted that if the prosecution seeks to establish its case by way of circumstantial evidence, it must do so beyond reasonable doubt.

10. *Per contra*, Mr. Thupden Youngda submitted that the evidence of the victim and the other prosecution witnesses clearly establishes the guilt of the appellants beyond reasonable doubt. The deposition of the victim is beyond reproach and nothing substantial was extracted by the defence during the cross-examination of the prosecution witnesses including the victim. He relied upon the judgment of the Supreme Court in ***State of Orissa v. Thakara Besra & another***[7] to submit that victim of rape were not women of easy virtue and since there was no suggestion made to the victim in cross-examination or in the defence plea in the course of his examination under section 313 of the Cr.P.C. that the victim had any grudge or reason to falsely implicate the appellants in such a heinous crime in which she herself was ravished and her honour was at stake.

11. The learned Judge has convicted the appellants on the basis of the testimonies of the victim (PW-6); Dr. Karma Choden Bhutia (PW-8) who found *"bluish discoloured bruise on right arm"* of the victim on 08.10.2016 when she examined her and Prem Kumar Sharma (PW-9) the Junior Scientific Officer at the RFSL, Ranipool who found that the victims underwear had human semen which matched the blood group of the appellant no.1. The learned Judge also relied upon the deposition of the victims friend (PW-1) who had gone to the appellants house and brought the victim back the next day after she had sought his help during the night. The learned Judge found that the appellant had been identified by the victim as well as her friend (PW-1) in Court. The learned Judge held that failure to seize the cell phone of the victims friend (PW-1) and her sister (PW-2) are inconsequential and did

[4] (2014) 7 SCC 405
[5] (2003) 12 SCC 377
[6] (2013) 14 SCC 266
[7] (2002) 9 SCC 86

not affect the prosecution case of rape and wrongful confinement. The learned Judge thus concluded that the victim had been repeatedly raped by the appellant no.1 with the appellant no.2 sleeping just next door. The learned Judge found corroboration in the forensic examination of the black underwear by Prem Kumar Sharma (PW-9) when he detected semen on it which matched the blood group of appellant no.1. The learned Judge also held that the appellant no.2 had wrongfully restrained the victim having entered into conspiracy with the appellant no. 1 in the commission of rape of the victim.

12. The prosecution evidence does establish that the FIR had been lodged against the appellants. The evidence of the victim's friend (PW-1), the victim's sister (PW-2), the victim's brother-in-law (PW-3), Deepak Gurung (PW-4) who accompanied PW-3 to the Police Station, the victim and Police Inspector Karma Chedup Bhutia (PW-7) who received the complaint and registered the FIR have adequately established this fact. It is also certain that the victim had accompanied the appellant no.2 to her house and the next day her friend (PW-1) picked her up from there.

13. As per the FIR, the victim was with the appellants on 07.10.2016. Besides the appellants, their child was also in the house where the alleged incident is said to have taken place. The child was not examined. The appellants enjoyed their right of silence. What happened on the night of 07.10.2016 can therefore be gathered only from the victim's evidence. The victim also spoke about informing her friend (PW-1) and her sister (PW-2). They have been examined and their evidence could provide corroboration if found convincing. PW-1s friend Badhal was not examined by the prosecution.

14. The victim elaborated what she stated in the FIR during her deposition. She reiterated that she had accompanied the appellant no.2 to her house on 07.10.2016. She deposed that the appellant no.2 had offered her sleeping pills but she had declined. She stated that the appellant no.2 had offered her another room. She deposed that she had sent a text message to PW-1 and talked to him on his mobile. The victim also deposed about the appellant no.1 committing rape twice. She reiterated that she had run away the next morning and hid herself in a Church just below the appellants house but the appellants had come to the Church and taken her back. The substantial discrepancies between the FIR, her statement recorded under section 164 Cr.P.C and the deposition of the victim were not brought out in cross-examination by the defence. What was brought out in cross-examination

is that the appellant no.2 had not forced the victim and taken her to their house and that she did not know the appellant since long. The deposition of the victim also elaborated on the participation of the appellant no.2. According to her deposition although appellant no.2 was her friend she did not permit her to sleep in her room but instead offered her another room with two beds, one for the victim and the other for the appellant no.1. She also deposed that the appellant no.2 had told her that the appellant no.1 normally sleeps in that room. According to the victim the appellant no.2 did not help her even when she saw the appellant no.1 pulling and dragging her back to the room and when the victim told the appellant no.2 about the rape she refused to believe her. The victim had not stated so in the detailed FIR lodged by her.

15. he victim deposed about how she tried to escape from the appellants house the next day. Most of the witnesses deposed about by the victim i.e. "*M Didi*", Sushila and the people at the Church who hid her when she fled from the house and took refuge there, have not been examined.

16. The victim deposed that the appellant no.1s brother had left after dinner on 07.10.2016. She did not depose about him returning thereafter. However, the victims friend (PW-1) deposed that he was there in the appellants house the next day.

17. The victim deposed about the two acts of forceful rape which was committed on her at the appellants house by the appellant no.1 on the night of 07.10.2016 and the morning of 08.10.2016. Dr. Karma Choden Bhutia (PW-8) the Medical Officer who examined her on 08.10.2016 at around 5 p.m. noted "*bluish discoloured bruise on her right arm*". Although, the communication dated 08.10.2016 from the Officer-In-Charge of the police station to the Medical Officer had specially asked whether the victim had sustained any injury on her private part, Dr. Karma Choden Bhutia (PW-8) noted that besides the bruise there were no other external marks of violence. During cross-examination Dr. Karma Choden Bhutia (PW-8) admitted that he had not mentioned the age of the bruise but clarified that the bruise being bluish was suggestive of being a day old as it was not red in colour.

18. As correctly pointed out by Mr. Tashi Rapten Bafungpa there is no evidence to prove that the blood sample of the appellant no.1 had been collected. The two Investigating Officers i.e. Kunchok N. Wangdi (PW-10) and Damdi Lachungpa (PW-11) both deposed that blood sample of the

appellant no.1 had been collected and sent for forensic examination. According to Damdi Lachungpa (PW-11) the blood sample was collected at Namchi District Hospital. The defence did not dispute these assertions by the Investigating Officers during their cross-examination. However, there is no evidence led by the prosecution which would establish that the appellant no.1 was in fact taken to the Namchi District Hospital. No record of Namchi District Hospital was produced to establish what the Investigating Officers stated were true. Kunchok N. Wangdi (PW-10) proved the letter dated 29.10.2016 sent by him to RFSL, Ranipool (Exhibit-14) purportedly forwarding exhibits including blood sample of the appellant no.1. The handing / taking memo (Exhibit-15) proved by Kunchok N. Wangdi (PW-10) also records the handing over of a requisition for blood specimen of the appellant no.1. However, there is no material to even suggest that the appellant no.1 who had been alleged to have raped the victim had been examined by a medical practitioner under section 53 A of the Cr.P.C. The appellant no.1 when asked about the collection of blood sample from him denied that Kunchok N. Wangdi (PW-10) had taken his blood sample. We are of the view that the prosecution has failed to lead cogent evidence to establish that the blood sample examined by Prem Kumar Sharma (PW-9) the Junior Scientific Officer at RFSL, Ranipool was in fact of the appellant no.1. The prosecution ought to have led evidence to prove that the blood sample was collected from the appellant no.1 and sent for forensic examination. The oral evidence of the Investigating Officers alone would not satisfy the requirement of proof of the fact in a criminal case. Otherwise, a bare statement of an Investigating Officer would send the accused to the gallows.

19. The victim deposed that vide seizure memo (Exhibit-1) her black underwear (MO-I) was seized from her before two witnesses. The black underwear (MO-I) is shown to have been seized from the victim on 08.10.2016 at the Melli Police Station in the presence of Deepak Gurung (PW-4) and PW-1. Deepak Gurung (PW-4) the person who accompanied the victim's brother-in-law (PW-3) to the police station deposed that he witnessed the seizure of the victim's clothes there. He identified the black underwear (MO-I). PW-1 also deposed that the black underwear (MO-I) was seized from the victim. During cross-examination PW-1 admitted that at the time of the seizure the black underwear (MO-I) was at the police station and he volunteered to state that he had been called to the police station the next day when he signed on the seizure memo (Exhibit-1). More importantly, he admitted he had no idea where the black underwear (MO-I) was seized

from and whether it belonged to the victim. The black underwear (MO-I) which was examined by Prem Kumar Sharma (PW-9) who detected human semen on it is said to be of the victim. The victim unfortunately, did not identify the same in Court as the prosecution failed to show it to her during her deposition. Although, human semen could be detected on the black underwear (MO-I) the crucial identification of the underwear (MO-I) which is missing, dents the prosecution case. The seizure memo (Exhibit-1) records that the seizure took place at the Melli Police Station on 08.10.2016. PW-1 is uncertain about it although he was a friend of the victim. However, both Dr. Karma Choden Bhutia (PW-8) who examined the victim on 08.10.2016 at Namchi District Hospital and Dr. Mani Gurung (PW-5) who examined the victim at STNM Hospital, Gangtok on 09.10.2016 deposed that the victims undergarment was removed by them and given to the lady home guard and the police respectively. The prosecution evidence on this aspect is also profoundly confusing and uncertain. Resultantly, we have but no option but to discard this evidence.

20. The deposition of the victim is of forceful rape, not once but twice the same night. The victim was examined by Dr. Mani Gurung (PW-5) at the STNM Hospital, Gangtok on 09.10.2016. On local genital examination, Dr. Mani Gurung (PW-5) found that the hymen admitted one finger. No fresh injury was seen. Vaginal wash was taken on 09.10.2016 and sent for pathological examination for presence of spermatozoa which turned negative. Dr. Mani Gurung (PW-5) finally opined after clinical examination and the lab reports that it does not suggest of recent forceful sexual act.

21. The alleged rape is said to have transpired in the confines of the appellants house. The testimony of the victim stands alone. It seems that the victim told her friend (PW-1) that the appellant had raped her when they were on their way to her sisters house. According to her sister (PW-2) the victim had been raped twice by the appellant no.1. According to the victims brother-in-law (PW-3) the victim told him that the appellant no.1 had forcibly raped her. He also deposed about bruises on her arms and all her clothes being torn. According to Deepak Gurung (PW-4) who accompanied the victim's brother-in-law (PW-3) to the Police Station the victim told them that she had been raped thrice. The victim herself did not depose about her clothes being torn. The Investigating Officers also did not depose that they had seized any torn clothes of the victim. The seizure memo (Exhibit-1) also does not record that the track pant and jeans were torn. Although Dr. Karma Choden Bhutia

(PW-8) did find *"bluish discoloured bruise"* on the victim's right hand no such bruises were detected in the other arm as deposed by the victims brother-in-law.

22. It is true that if the victim's deposition is found credible that alone could lead to a conviction. The medical evidence however, is contradictory to the victims version of multiple forceful rapes committed on her. The victim was eighteen years old. The appellant no.1 is said to be 36 years of age. Dr. Mani Gurung (PW-5) who examined her on 09.10.2016 did not notice any injury on her genital examination although her hymen admitted one finger only. The victims deposition gives us a sense that there has not been a full disclosure. In the circumstances it is vital for us to seek corroboration. The victim had deposed that after the appellant no.1 had entered the room from the ceiling she had sent a text message and also talked to PW-1 on his mobile. According to PW-1 the victim had sent a text message stating *"Please come I am in a trouble"*. However, admittedly, both the mobiles were not seized and examined. Although, the victim's friend (PW-1) was examined, his friend Badhal who is said to have accompanied PW-1 to the appellants house the next day was not examined by the prosecution. It is the victim's version that after the incident she tried to make excuses to escape by calling one *"M Didi"* and that the appellant no.2 had cross-checked with one Sushila about the victim's version. However, both of them were also not examined. The victim further deposed that she fled the next morning and hid herself in the Church a little below with the help of some persons there. None of them were also examined. Their evidence would have been crucial to corroborate the version of the victim.

23. The learned Judge was also moved by the fact that the appellant no.1 had been found guilty, convicted and sentenced for the offence under section 376 IPC by the Trial Court earlier in a case in which both the appellants were tried. Although, the learned Judge noted that this Court had subsequently acquitted the appellant no.1, she still expressed her shock that within a span of two years and seven months the present case had been lodged once again. Section 54 of the Indian Evidence Act, 1872 provides that in criminal proceedings the fact that the accused person had a bad character is irrelevant, unless evidence had been given that he has a good character, in which case it becomes relevant. Explanation 2 thereof provides that a previous conviction is relevant as evidence of bad character. No evidence was given that the appellant no.1 had good character. The Trial Courts judgment had also been

reversed by this Court. Thus, this Court is of the view that since the appellant no.1 had in fact been acquitted subsequently, the learned Judge being influenced by it was not correct.

24. In ***State of Orissa*** (supra) the Supreme Court had noted that the testimony of the victim was truthful and trustworthy and was corroborated by her immediate and subsequent conduct as also the medical evidence. The present case lacks in both medical as well as forensic corroboration and there is an element of uncertainty in the deposition of the victim. The present case is a case where the prosecution has failed to put forth credible evidence to establish the offences. Therefore, although there is no material to show that there was any grudge or reason for the victim to falsely implicate the appellants, that alone does not help the prosecution to establish the case beyond all reasonable doubt. When the Court lacks confidence to rely upon the version of the victim alone without any corroboration faced with conflicting medical evidence it would not be proper to uphold the appellants conviction. It is settled that even in a case of rape the prosecution is not excused from leading cogent and trustworthy evidence to establish the heinous offence.

25. We are of the view that the prosecution has failed to establish the offences by leading cogent evidence. Resultantly, the appeal is allowed, the impugned judgment and order on sentence passed by the learned Judge are set aside. The appellants are given the benefit of doubt. The appellant no.1 is acquitted of the offences under sections 376(2)(n), 342 and 120B read with section 34 of the IPC and appellant no.2 is acquitted of the offences under sections 120B and 342 read with section 34 of the IPC.

26. Appellant no.1 be set at liberty forthwith, if not required in any other matter.

27. The appellant no.2 who is presently on bail is discharged from her bail bonds.

28. Fine, if any, deposited by the appellants in terms of the impugned order on sentence be reimbursed to them.

29. Copy of this judgment be transmitted to the learned Trial Court forthwith.

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