THE
SIKKIM LAW REPORTS

AUGUST - 2021

(Page 493-632)

Mode of Citation
SLR (2021) SIKKIM

Contents	Pages

TABLE OF CASES REPORTED IN THIS PART

EQUIVALENT CITATION

Sl.No.	Case Title	Equivalent Citation	Page No.
1.	Jigmi Phunchok Bhutia v. Aishwarya Rai and Another	2021 SCC OnLine Sikk 141	493-498
2.	Santosh Kumar Pandey v. State of Sikkim **(DB)**	2021 SCC OnLine Sikk 105	499-531
3.	M/s North East Group of Engineers (P) Ltd. and Another v. General Manager, BSNL	2021 SCC OnLine Sikk 106	532-556
4.	Ram Naresh Giri v. Krishnawati Devi and Others	2021 SCC OnLine Sikk 108	557-570
5.	Naina Kala Sharma and Others v. Deepak Kumar Rai	2021 SCC OnLine Sikk 109	571-575
6.	Jyoti Agarwal v. State of Sikkim and Others	2021 SCC OnLine Sikk 114	576-600
7.	Norbu Doma Bhutia v. The Chief Secretary and Others	2021 SCC OnLine Sikk 116	601-608
8.	Hem Prasad Subedi v. Deo Narayan Dahal and Another	2021 SCC OnLine Sikk	609-621
9.	Rabin Baraily and Another v. State of Sikkim	2021 SCC OnLine Sikk 119	622-632

SUBJECT INDEX

information to the special juvenile police or the local police. S. 19(7) provides that no person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1) – The POCSO Act therefore, clearly ensure that no sexual offence against a child goes unreported and for that matter further assures that the informant would also be protected if such information is in good faith – S. 19(7) of the POCSO Act is a central legislation and the law of the land. It would squarely fall within the meaning of law as contemplated in O. 7 R. The protection under S. 19(7) is unequivocal. The plaint was clearly barred under the provision as the F.I.R was lodged by the petitioner in good faith. If the plaint is allowed to continue the purpose of S. 19 of the POCSO Act would be lost and people would fear to lodge genuine complaints of sexual assault upon a child.

Hem Prasad Subedi* v. *Deo Narayan Dahal & Another ***609A***

Code of Civil Procedure, 1908 – O. 7 R. 17 – Once an application seeking amendment has been set aside by the High Court without granting any leave to bring the same pleadings by way of an amendment, it cannot be inserted subsequently – In the subsequent application, except for two paragraphs, the remaining paragraphs of the proposed amendment is identical word to word – Trial Court committed illegality, an error of jurisdiction by allowing subsequent similar application for amendment ignoring the order of this Court – Impugned order set aside.

Jigmi Phunchok Bhutia* v. *Aishwarya Rai & Another ***493A***

Code of Civil Procedure, 1908 – O. 41 Rr. 1 and 2 – First appeal is a valuable right for the aggrieved. It is beyond doubt that all question of facts and law decided by the trial Court are open for reconsideration. It is, however, necessary for the appellate Court to carefully examine and deeply consider both the fact as well as the law arising herein and give cogent reasons while disposing the appeal. It is our duty to properly deal with all the issues and the evidence led by the parties.

M/s. North East Group of Engineers (P) Ltd & Another
v. *General Manager, BSNL* ***532A***

Code of Criminal Procedure 1973 – Section 100 – Section 100 of the Cr. P.C. would apply only if the conditions mentioned in section 24 (2) of SADA, 2006 is fulfilled, which means that only when the person cannot be searched in the presence of a gazetted officer or a Magistrate as it is not possible to take the person to be searched to them without the possibility of

the suspect parting with possession of the controlled substance he could proceed to search the person as provided under section 100 of the Cr. P.C. As the appellant no. 1 was searched in the presence of a Magistrate, section 24 (2) would not apply. In the circumstances, the evidence of Mahindra Pradhan (PW-10) and the seizure witness Sonam Bhutia (PW-7), would be sufficient to establish beyond reasonable doubt that the seizure was effected in the manner contemplated – What matters is the carrying out of search of the person suspected in the presence of the nearest Gazetted Offcer or the nearest Magistrate to ensure that the search is conducted fairly and to overrule the possibility of false accusations. That having been done, it cannot be now heald that the mere fact that the SDM accompanied the police to the house of the appellant no. 2 would make the search illegal.
Rabin Baraily and Another* v. *State of Sikkim ***622B***

Code of Criminal Procedure, 1973 – S. 164 – Recording of confessions and statements – A statement under S. 164, Cr.P.C. is resorted to by the I.O. during the course of investigation when an accused or any other person seeks to make a confession or a statement, respectively. This is done of their own free will and is recorded as per the procedure established by law when there is an apprehension that either the accused or the witness may resile from their statements or likelihood of evidence being tampered with – Could only rely on the evidence given on oath in the Court and not one under S. 164 which can be relied on for the purposes of corroboration and contradiction only.
Santosh Kumar Pandey* v. *State of Sikkim ***499C***

Code of Criminal Procedure, 1973 – S. 174 – Inquiry on unnatural death – The basic purpose of holding an inquest is to report the apparent cause of death, namely, whether it was suicidal, homicidal, accidental or by some machinery (*In re. Amar Singh* v. *Balwinder Singh and Others* referred) – The inquest report or the Sub-Divisional Magistrate (PW-13) have not enlightened the Court as to whether the death came under any of the aforesaid categories. PW-13 merely mentioned that foul play was suspected requiring detailed enquiry – Pursuant to the investigation into the UD case by PW-15, the I.O. (PW-17) was expected to carry out an independent investigation for the purposes of the offences alleged to have been committed by the Appellant. Even the rough sketch map of the place of occurrence was prepared by PW-15, hence doubts arise as to whether PW-17 even visited the site of the alleged crime at all despite the mandate

Indian Contract Act, 1872 – S. 55 – Effect of failure to perform at fixed time, in contract in which time is essential –If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. A voidable contract is a contract that can be affirmed or rejected at the option of one of the parties or in other words the contract which, in its inception, is valid, but which may be avoided i.e. rendered void at the option of one of the parties.

M/s. North East Group of Engineers (P) Ltd & Another **v.** ***General Manager, BSNL*** ***532C***

Indian Easements Act, 1882 – S. 52 – License – Reference to S. 52 of the Indian Easements Act of 1882, pertaining to license, in paragraph 44 of the impugned judgment is uncalled for and irrelevant, for the reason that license does not create any interest in the property which it relates. It only confers legality on an act which would otherwise become unlawful. The issue in the suit is not concerned with license at all.

Ram Naresh Giri **v.** ***Krishnawati Devi & Others*** ***557B***

Indian Evidence Act, 1872 – Last seen theory – Court cannot be expected to reach a conclusion of guilt based on conjectures and surmises drawn by the prosecution. The last seen theory is an indispensable link in the chain of circumstances that would point towards the guilt of the accused, but it is no more *res integra* that it is not prudent for the Court to base its conviction solely on the basis of last seen theory. This theory is to be invoked only on due consideration of the entirety of the prosecution case and the circumstance that have emerged prior to the parties being seen together.

Santosh Kumar Pandey **v.** ***State of Sikkim*** ***499E***

Indian Evidence Act, 1872 – S. 45 – Expert opinion – In case of inconsistency, the medical report of the doctor will prevail (*In re. Javed Abdul Razzaq Shaikh* v. *State of Maharashtra* referred)–Medical Expert (PW-14) ought to have differentiated between burns which are caused by heated substance applied on the surface of the skin and burns caused by electricity, this differentiation being necessitated on account of the evidence

of PW-2, 3 and 6 who saw naked wires above the bed of the deceased and of PW-9 who said that 230 volts which could pass through the wires in the room could be fatal. Medical Expert failed to enlighten as to how the burn injuries could be classified, viz., electrical burns or burns applied by other methods. Instead of making a thorough examination of the burns and classifying it, PW-14 appears to have been swayed by the prosecution showing him the iron rod as the alleged weapon of offence – The burn injuries have not been related to or linked to the iron rod by conclusive prosecution evidence.

Santosh Kumar Pandey* v. *State of Sikkim ***499A***

Indian Evidence Act, 1872 – S. 58 – Facts admitted need not be proved – Admission in pleadings, if true and clear are the best proof of the facts admitted. Admission in pleadings are judicial admissions and admissible under S. 58 of the Indian Evidence Act stands on a higher footing than evidentiary admissions, fully binding and constitutes waiver of proof. Facts admitted need not be proved unless the Court requires otherwise.

M/s. North East Group of Engineers (P) Ltd & Another
v. *General Manager, BSNL* ***532B***

Indian Evidence Act, 1872 – S. 101 – Burden of proof – Trial Court observed in the impugned judgment that the appellant had failed to give cogent reasons for the injuries found over the body of the deceased. This observation of the trial Court is legally untenable for the reason that the reverse burden falls on the appellant only when the prosecution has made out a plausible cause for the appellant having committed the offence and sufficient reasons having established that the crime was committed by him – Prosecution failed to build up a plausible case against the appellant and the burden does not lie on the accused to prove he did not commit the murder until sufficient evidence incriminates him on the crime.

Santosh Kumar Pandey* v. *State of Sikkim ***499A***

Hindu Succession Act, 1956 –Distribution of self-acquired property – It is now settled law that the father has the prerogative to distribute his self-acquired property as he desires. When the property is self-acquired by the father and he has the right of disposition over it, no exception can be taken by his sons/male descendants – Neither can the appellant seek an equitable distribution of the schedule "A" building nor does he have any entitlement to it merely by virtue of being the son of Thakur Giri and he can lay no claim

of equitable share in it. If Thakur Giri chose not to execute a Will after execution of Exhibit-A, the appellant has no authority to question his decision.

Ram Naresh Giri* v. *Krishnawati Devi & Others ***557A***

Sikkim Anti Drugs Act 2006-Chapter V – Chapter V of the SADA, 2006 deals with the procedure to be followed during investigation. Section 21 deals with power of entry, search, seizure and arrest without warrant or authorization by any personal knowledge or information given by any person and taken down in writing that any controlled substance in respect of which the offence punishable under the Act has been committed or any document or other article which furnished evidence after commission of such offence is kept or concealed in any building, conveyance or enclosed space and sealed it in the manner provided. Section 22 of SADA, 2006 deals with the power of seizure and arrest in any public place. Section 23 of SADA, 2006 empowers any officer authorized under section 21 if he has reason to suspect that any conveyance is used for the transport of controlled substances to conduct a search of the conveyance. Section 24 mandates that when the officer is about to search any person under the provision of section 22, he shall, if possible, take such person to the nearest gazette officer of any of the departments mentioned in section 21 or to the nearest Magistrate.

Rabin Baraily and Another* v. *State of Sikkim ***622A***

Specific Relief Act, 1963 – S. 10 – Specific performance in respect of contracts – The process of acquisition always begins with a notification under S. 4(1) of the Land Acquisition Act, 1984. Similarly, the process of acquisition of land under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 would begin with the issuance of the notification under S. 11 thereof. S. 11 contemplates the declaration of the Government that the land is required or likely to be required for any public purpose. No such notification had been issued. It is also seen that though there was a proposal to purchase the plaintiff's land, it was not done. There is no evidence of a concluded contract. Consequently, the plaintiff failed to establish what she had asserted in her plaint about the conclusive agreement entered between her and the defendants (*In re. State of Madhya Pradesh* v. *Vishnu Prasad* referred) – Since the plaintiff has failed to establish such an agreement, the prayers cannot be granted.

Norbu Doma Bhutia v. The Chief Secretary & Others ***601A***

SLR (2021) SIKKIM 493

(Before Hon'ble the Chief Justice)

WP (C) No. 26 of 2021

Jigmi Phunchok Bhutia ….. PETITIONER

Versus

Aishwarya Rai and Another ….. RESPONDENTS

For the Petitioner: Mr. Nilanjan Bhattacharjee, Mr. Souri Ghosal, and Mr. Amresh Kumar Mandal, Advocates.

For Respondent No.1: Mr. N.B Khatiwada, Senior Advocate with Ms. Navtara Sarda, Legal Aid Counsel.

For Respondent No.2: None.

Date of decision: 3rd August 2021

A. Code of Civil Procedure, 1908 – O. 7 R. 17 – Once an application seeking amendment has been set aside by the High Court without granting any leave to bring the same pleadings by way of an amendment, it cannot be inserted subsequently – In the subsequent application, except for two paragraphs, the remaining paragraphs of the proposed amendment is identical word to word – Trial Court committed illegality, an error of jurisdiction by allowing subsequent similar application for amendment ignoring the order of this
Court – Impugned order set aside.

(Paras 8 and 11)

Petition allowed

Case cited:

1. Malika Rai v. Siri Bahadur Bhujel and Others, WP(C) No. 43 of 2018.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Being aggrieved by the Order dated 10.09.2019 passed by learned Senior Civil Judge, East Sikkim at Gangtok in Title Suit No. 39/2014 allowing the application filed under Order VI Rule 17 of the Code of Civil Procedure, 1908, for short, CPC, seeking amendment to the plaint, this writ petition has been preferred.

2. Learned Counsel representing the petitioner contends that the application under Order VI Rule 17 CPC allowed by the trial Court is by ignoring the order dated 29.03.2019 of this Court in C.R.P. No. 05/2018 in the same suit. It is urged that with altogether identical pleadings earlier an application for amendment was filed by the plaintiff which was allowed by the Trial Court vide order dated 14.05.2018. The said order was assailed in C.R.P. No. 05/2018. This Court vide order dated 29.03.2019 set aside the order of allowing the amendment, as the Counsel for the plaintiff/ respondent no.1 has conceded before the High Court that the Trial Court has not followed the procedure prescribed by law, therefore, if the order of the trial Court is being set aside, they have no objection. While passing the said order leave was not prayed for or granted, to apply afresh for the amendment. In absence thereto, the order passed subsequently by filing a subsequent amendment application, with the identical pleadings cannot be allowed by the order impugned, therefore, the Trial Court committed illegality much less an error of jurisdiction while passing the order impugned.

3. On the other hand, learned Senior Counsel representing the plaintiff/ respondent no.1 without defending the said issue made an attempt to satisfy this Court that after remand necessary parties have been joined, therefore, the amendment is necessary to adjudicate the issue and the Trial Court has not committed any error while passing the order. Reliance has been placed on the order of this Court in **Malika Rai vs. Siri Bahadur Bhujel & Ors.** passed in **WP(C) No.43/2018** on 01.03.2021. It is inter alia further contended that looking to the merits of the suit, amendment is necessary, therefore, it may be allowed.

4. After having heard learned Counsel for the parties, it is not disputed by the Counsel for the plaintiff/respondent no.1 that the application

previously filed which was allowed by the Trial Court vide order dated 14.05.2018 and the application subsequently filed which is allowed by the impugned order dated 10.09.2019 is altogether identical in nature except two paragraphs. It is also not disputed that in the previous round when the application for amendment was allowed by the Trial Court the defendant preferred C.R.P. No.05/2018 in the same proceedings (Suit) and this Court vide Order dated 29.03.2019 allowed the Revision and set aside the Order passed by the Trial Court. The Order is important, therefore, the relevant portion of the Order is reproduced thus:

> "It is submitted by learned Counsel for the Petitioner that the suit had been filed under Section 34 of the Specific Relief Act, 1963 with specific prayers for declaration. The learned Appellate Court while remanding the case had specified in its order that the matter was being remanded back to the learned trial Court for impleading the legal heirs of Late Sonam Topden Bhutia as Defendants in the suit. It was further ordered that the suit shall be readmitted in its original number and if need be the Appellant/Plaintiff, shall be allowed to amend her pleadings. That the order is a speaking order and amendment was allowed only to the extent required after impleading the necessary parties. However, the Respondent No.1 inserted the amendments as delineated supra over and above the order of the learned Appellate Court or the provisions of law, hence the order of the learned Civil Judge be set aside.
>
> Learned Counsel for the Respondent No.1 on the other hand fairly conceded that the procedure prescribed by law was not adhered to, consequently he has no objection if the order of the learned Civil Judge is set aside in the aforestated circumstances.
>
> Considered submissions.
>
> In view of the learned Counsel for the Respondent No.1 having conceded to the position of law, the impugned order dated 14.05.2018 passed

by the learned Civil Judge, East Sikkim at Gangtok is set aside.

The stay granted by this Court vide order dated 28.06.2018 stands vacated.

C.R.P. No. 5 of 2018 disposed of accordingly.

In view of the above, I.A. No.1 of 2018 also stands disposed of."

5. On perusal, it is apparent that after passing the judgment of remand by the Lower Appellate Court directing to implead the legal heirs of late Sonam Topden Bhutia as defendants in the suit and the plaintiff was allowed to amend the pleadings to the extent required after impleading the necessary parties. The Court observed that the plaintiff/respondent no.1 inserted the amendments over and above the order of the learned Appellate Court or the provisions of the law, as per the submissions of the defendant. On the said submission Counsel for the plaintiff/respondent no.1 has conceded before the Court that the procedure prescribed by law was not adhered to, however, having no objection if the order of the Civil Judge dated 14.05.2018 allowing the amendment may be set aside.

6. Considering the aforesaid and considering the position of law, the High Court set aside the order dated 14.05.2018. The consequent net result was the amendment which was proposed in the earlier round of litigation allowed by the Trial Court vide Order dated 14.05.2018 was set aside.

7. Subsequently, another application was filed by the plaintiff/respondent no.1 which was allowed by the impugned order dated 10.09.2019 inter alia observing that the trial has not commenced and the necessary party have been added as defendant against whom the relief is claimed, therefore, the Court found no harm in allowing the said application.

8. As argued by the Counsel for the petitioner that once an application seeking amendment filed earlier allowed by the Trial Court, the said order has been set aside by the High Court without granting any leave to bring the same pleadings by way of an amendment, however, it cannot be inserted by

the impugned order. As discussed hereinabove that except two paragraphs of the subsequent application the other remaining paragraphs of the proposed amendment as brought by the plaintiff in the application which is allowed by the order impugned is identical in word to word.

9. It is to observe here that the pleadings proposed for amendment by way of previous application if not permitted to be incorporated by the order of the Court in view of the order of C.R.P. No.05/2018 dated 29.03.2019 the same pleading cannot be permitted to be incorporated by a subsequent order of the Trial Court. As from the aforesaid quoted order of the High Court it is clear that the plaintiff/respondent no.1 was not permitted to file a fresh application granting leave. However, the issue which has been decided previously by the order of the Court rejecting the application for amendment as per the concession given by the plaintiff/ respondent no.1 itself cannot be directed to be allowed by the Trial Court on filing subsequent application. The order of Malika Rai (supra) as relied by the learned Senior Counsel for respondent no.1 is on the merit of the case, not on the issue as referred above.

10. Learned Senior Counsel appearing on behalf of the plaintiff/ respondent no.1 contends that the concession given in the previous order before this Court was because the leave was not prayed for before the Trial Court. The said argument is bereft of any merit looking to the provision of Order VI Rule 17 CPC. On perusal thereto it is clear that at any stage of the proceedings the Court may allow either party to alter or amend the pleadings as may be necessary for the purpose of determining the real questions in controversy between the parties on such terms as may be just. Therefore, it is the discretion of the Court by allowing an application to amend the pleadings or not. It cannot be on the leave of the Court.

11. It is to further observe that in the order of Civil Revision Petition No.05/2018 by making a concession of the Counsel it is nowhere mentioned that the said concession is because of not seeking leave, therefore, the argument as advanced cannot be accepted and meritless. Therefore, in the opinion of this Court, the trial Court had committed illegality, much less an error of jurisdiction to allow subsequent similar application for amendment ignoring the order of this Court.

12. In view of the foregoing discussions, this writ petition is hereby allowed and the Order impugned is hereby set aside.

13. It is to observe here that looking to the Judgment of remand passed by the lower Appellate Court dated 25.09.2017 affirmed by this Court in FAO No.03/2018 vide order dated 06.03.2021, on joining Sonam Topden Bhutia as defendant in the suit and other legal heirs, on readmitting, the amendment to the extend required after impleadment can be permitted, if prayed by the plaintiff. Therefore, with the said observation the plaintiff/ respondent no.1 is permitted to amend afresh. It is further made clear here that if any pleading proposed by way of an amendment application relating to the newly added defendants and newly added legal heirs is overlapping to the pleadings of the subsequent application or of previous application it would not be an impediment to reject such application because it is in consequence to the Judgment of remand which is affirmed by this Court.

SLR (2021) SIKKIM 499

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

Crl. A. No. 22 of 2019

Santosh Kumar Pandey ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

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

Date of decision: 5th August 2021

A. Indian Evidence Act, 1872 – S. 45 – Expert opinion – In case of inconsistency, the medical report of the doctor will prevail (*In re. Javed Abdul Razzaq Shaikh* v. *State of Maharashtra* referred)–Medical Expert (PW-14) ought to have differentiated between burns which are caused by heated substance applied on the surface of the skin and burns caused by electricity, this differentiation being necessitated on account of the evidence of PW-2, 3 and 6 who saw naked wires above the bed of the deceased and of PW-9 who said that 230 volts which could pass through the wires in the room could be fatal. Medical Expert failed to enlighten as to how the burn injuries could be classified, viz., electrical burns or burns applied by other methods. Instead of making a thorough examination of the burns and classifying it, PW-14 appears to have been swayed by the prosecution showing him the iron rod as the alleged weapon of offence – The burn injuries have not been related to or linked to the iron rod by conclusive prosecution evidence.

(Paras 9 (vi) and (viii))

B. Code of Criminal Procedure, 1973 – S. 174 – Inquiry on unnatural death – The basic purpose of holding an inquest is to report the apparent cause of death, namely, whether it was suicidal, homicidal, accidental or by some machinery (*In re. Amar Singh* v. *Balwinder Singh and Others* referred) – The inquest report or the Sub-Divisional Magistrate (PW-13) have not enlightened the Court as to whether the death came under any of the aforesaid categories. PW-13 merely mentioned that foul play was suspected requiring detailed enquiry – Pursuant to the investigation into the UD case by PW-15, the I.O. (PW-17) was expected to carry out an independent investigation for the purposes of the offences alleged to have been committed by the Appellant. Even the rough sketch map of the place of occurrence was prepared by PW-15, hence doubts arise as to whether PW-17 even visited the site of the alleged crime at all despite the mandate of the statute, to verify the facts, which thereby indicates a lackadaisical attitude which manifested in shoddy investigation – The purpose of an inquest in cases of accidental or suspicious deaths under Ss. 174 and 175 of the Cr.P.C. is distinct from investigation under S. 157 (*In re. Manoj Kumar Sharma and Others* v. *State of Chattisgarh* referred).

(Para 9 (xvi))

C. Code of Criminal Procedure, 1973 – S. 164 – Recording of confessions and statements – A statement under S. 164, Cr.P.C. is resorted to by the I.O. during the course of investigation when an accused or any other person seeks to make a confession or a statement, respectively. This is done of their own free will and is recorded as per the procedure established by law when there is an apprehension that either the accused or the witness may resile from their statements or likelihood of evidence being tampered with – Could only rely on the evidence given on oath in the Court and not one under S. 164 which can be relied on for the purposes of corroboration and contradiction only.

(Para 10 (ii))

D. Indian Evidence Act, 1872 – S. 101 – Burden of proof – Trial Court observed in the impugned judgment that the appellant had failed to give cogent reasons for the injuries found over the body of the deceased. This observation of the trial Court is legally untenable for the reason that the reverse burden falls on the appellant only when the prosecution has made out a plausible cause for the appellant having committed the offence and

sufficient reasons having established that the crime was committed by him – Prosecution failed to build up a plausible case against the appellant and the burden does not lie on the accused to prove he did not commit the murder until sufficient evidence incriminates him on the crime.

(Para 11)

E. Indian Evidence Act, 1872 – Last seen theory – Court cannot be expected to reach a conclusion of guilt based on conjectures and surmises drawn by the prosecution. The last seen theory is an indispensable link in the chain of circumstances that would point towards the guilt of the accused, but it is no more *res integra* that it is not prudent for the Court to base its conviction solely on the basis of last seen theory. This theory is to be invoked only on due consideration of the entirety of the prosecution case and the circumstance that have emerged prior to the parties being seen together.

(Para 14)

Appeal allowed.

Chronology of cases cited:

1. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.
2. Javed Abdul Razzaq Shaikh v. State of Maharashtra, (2019) 10 SCC 778.
3. Dayal Singh and Others v. State of Uttaranchal, (2012) 8 SCC 263.
4. Pedda Narayana and Others v. State of Andhra Pradesh, (1975) 4 SCC 153.
5. Tehseen Poonawalla v. Union of India and Another, (2018) 6 SCC 72.
6. Amar Singh v. Balwinder Singh and Others, (2003) 2 SCC 518
7. Manoj Kumar Sharma and Others v. State of Chattisgarh and Another, (2016) 9 SCC 1.
8. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
9. Shambu Nath Mehra v. The State of Ajmer, AIR 1956 SC 404.

10. Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808.

11. Mahila Roomabai Jatav v. The State of Madhya Pradesh, MANU/SC/1607/2019 : Criminal Appeal No.1989/2010.

12. Dayal Singh v. State of Maharashtra, (2007) 12 SCC 452.

13. Mukesh Singh v. State (Narcotic Branch of Delhi), (2020) 10 SCC 120.

14. C. Muniappan and Others v. State of Tamil Nadu, (2010) 9 SCC 567.

15. Shailendra Rajdev Pasvan and Others v. State of Gujarat and Others, (2020) 14 SCC 750.

16. Rajiv Singh v. State of Bihar and Another, (2015) 16 SCC 369.

JUDGMENT

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

1. The Appellant was convicted of the offences under Sections 302/ 201 of the Indian Penal Code, 1860 (for short, IPC) in Sessions Trial Case No.13 of 2018, vide Judgment dated 25-09-2019 and sentenced to undergo –

(i) imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, under Section 302 of the IPC;

(ii) imprisonment for a term of three years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, for the offence under Section 201 of the IPC, vide Order on Sentence, dated 26-09-2019.

The sentences of imprisonment were ordered to run concurrently and both sentences of fine bore default clauses of imprisonment. Set off was granted in terms of Section 428 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.).

2. Impugning both, the Judgment and Order on Sentence, Learned Counsel for the Appellant advanced the contentions that the Learned Trial Court erred in convicting the Appellant as the Prosecution had failed to

establish its case beyond reasonable doubt, instead the Court shifted the burden to the Appellant against the mandate of law. That, the alleged weapon of offence M.O.I, was not recovered from the rented room of the Appellant, but from an open, unoccupied and accessible adjacent room, sans disclosure statement of the Appellant. P.W.6 and P.W.8 who were present during recovery of M.O.I by the Police and P.W.10 and P.W.12 the witnesses to the seizure of M.O.I. gave no evidence to establish that M.O.I was the weapon of offence. P.W.15 and P.W.17, the Investigating Officer (I.O.) in the Unnatural Death (UD) Case and in the instant Case respectively, concluded that the burn injuries on the deceased was caused by M.O.I but furnished no proof on this aspect. This allegation was also categorically belied by the RFSL Report, Exhibit 28, which the P.W.17 identified and admitted that as per Exhibit 28 human skin or foreign particles were not found on M.O.I. That, the RFSL Expert was not examined as a Prosecution witness and the Medico Legal Consultant, P.W.14 failed to reveal his professional experience in his evidence. He found cigarette burns on the body of the deceased in addition to the injuries allegedly caused by M.O.I, but no investigation regarding the cigarette burns was carried out. The cause of death said to have been by vasovagal shock was not linked to the Appellant by any cogent evidence, neither his intention nor motive proved. Finger prints were not lifted by the I.O. from the place of occurrence or from M.O.I to inculpate the Appellant. That, P.W.15, the Complainant in the instant case, had conducted the inquest along with P.W.13 the Sub-Divisional Magistrate in the U.D. Case and also a large part of the investigation in the instant case, hence being both the Complainant and the I.O., his investigation is unfair and biased. Besides, the original complaint lodged by P.W.1 on the basis of which the UD Case was registered at the Singtam P.S. was not made a part of the records of this case, rendering the Prosecution case suspect from its inception. Hence, both the impugned Judgment and Order on Sentence deserve to be set aside and the Appellant set at liberty.

3. *Per contra*, Learned Public Prosecutor while supporting the conclusion arrived at by the Learned Trial Court submitted that the circumstantial evidence on record unerringly points to the guilt of the Appellant. That, P.W.15 was in fact the I.O. in Singtam P.S. U.D. Case No.10 of 2018, dated 25-04-2018 and not in the instant case and the FIR lodged in the UD Case by P.W.1 is of no relevance to this case as an independent investigation under Section 174 of the Cr.P.C. was carried out

by P.W.15 in that matter. That, the 11 (eleven) burn injuries found on the body of the victim has been opined by P.W.14 to have been caused by M.O.I and the recovery of the article in the room adjacent to the Appellant's tenanted room fortifies the Prosecution case. That, the death of the victim was not on account of electrocution as falsely claimed by the Appellant but was the result of the injuries inflicted by him upon the deceased by M.O.I. The motive of the Appellant is writ large in the Section 164 Cr.P.C. statement of P.W.6 which supports the Prosecution case. Hence, the Judgment of the Learned Trial Court be upheld and the Appeal be dismissed.

4. In order to examine the rival contentions raised in the Appeal, we may consider the chronology of events of the Prosecution case. On 25-04-2018, at 08:10 hours, P.W.1 the Panchayat President of the concerned area, lodged a Complaint before Singtam P.S. informing them of the death of the victim, the wife of the Appellant, in the couple's rented room. P.W.1 had received telephonic information about the death from P.W.7, the landlord of the Appellant at around 6:30 a.m. the same morning. P.W.15 thereupon reached the place of occurrence following which, Singtam P.S. UD/Case No.10/2018, dated 25-04-2018, under Section 174 of the Cr.P.C, was duly registered and endorsed to him for investigation. During investigation, a Magisterial inquest was held by P.W.13, the Sub-Divisional Magistrate, who suspected foul play in the death of the deceased. P.W.15, for his part, on noticing several burn injuries on the deceased suspected that she had been electrocuted and, therefore, requisitioned for P.W.9 an Electrical Engineer to examine the electrical wiring in the tenanted room. P.W.9 on inspection found no short circuit or any fault in the electrical wiring. Thereafter, P.W.15 seized some articles (M.O.II to M.O.XIV) from the tenanted room and a rusted iron rod (M.O.I) measuring 2.6 ft. concealed in a pile of wood from the adjacent vacant room, allegedly the weapon of offence. Based on his investigation, he suspected that the Appellant had caused the victim's death and accordingly lodged the FIR, Exhibit 18.

5. On receipt of Exhibit 18, Singtam P.S. Case No.23/ 2018, dated 25-04-2018, under Sections 302/201 of the IPC was registered against the Appellant and his arrest effected the same day. Witnesses were said to have been re-examined by P.W.17, the I.O., for the purposes of this case and Exhibits seized in the U.D. Case and in the instant matter allegedly were

forwarded to the RFSL, Saramsa, East Sikkim for scientific analysis. P.W.17 during his investigation found that the Appellant worked in a nearby tissue paper factory and he had rented one room in the house of P.W.7 where he lived with the deceased and their girl child, aged about 18 (eighteen) months at the relevant time. On the morning of 25-04-2018, the Appellant informed P.W.6 (the wife of P.W.7) that his wife had passed away due to electrocution. Investigation further revealed that Criminal Case [Exhibit 23, in three pages (collectively)] had been registered against the Appellant on 26-10-2012 at the Hardi Police Station, Uttar Pradesh, under Sections 498A/323 of the IPC and Sections 3/4 of the Dowry Prohibition Act, 1961, for harassing the deceased. A Compromise vide the same Exhibit was effected before the Family Court at Bahraich, Uttar Pradesh, on 21-06-2014. As per the I.O. the statement of witnesses recorded by him indicated that the Appellant used to torture the victim both physically and mentally. On conclusion of his investigation Charge-Sheet was submitted against the Appellant under Sections 302/201 of the IPC.

6. Charges were framed against the Appellant by the Learned Trial Court under Sections 302 and 201 of the IPC where he took a plea of not guilty, whereupon 17 (seventeen) Prosecution witnesses took the stand in the Court. The Appellant was thereafter examined under Section 313 of the Cr.P.C. where he claimed innocence and instead asserted that there were naked electric wires in his room which had not been secured by P.W.7 despite the Appellant‘s request. His wife thus died due to electrocution.

7. In the impugned Judgment, the following factors weighed with the Learned Trial Court while convicting the Appellant, viz.;

(a) The FIR and the identity of the Appellant had been proved;

(b) The injuries over the body of the deceased had been proved;

(c) That the Appellant had failed to give cogent reasons for the injuries which were found over the body of the deceased;

(d) The seizure of M.O.I the alleged weapon of offence was proved;

(e) The evidence of P.W.9 proved that there was no faulty wiring;

(f) The evidence of P.W.14, the Medico Legal Consultant who opined that the injuries on the body of the deceased matched the patterns on M.O.I.;

(g) The Section 164 of Cr.P.C. statement of P.W.6.

8 (i). We are unable to agree with the findings of the Learned Trial Court for the reasons enumerated in the discussions that ensue hereinbelow.

(ii) It is necessary to notice firstly that there were no eyewitnesses to the offence, consequently, the Prosecution case is based entirely on circumstantial evidence and hence, motive assumes importance. We hasten to add that even if motive is not established the Appellant without doubt can be convicted provided each of the circumstances that allegedly link the crime to the Appellant is proved. The Prosecution is thus to prove beyond reasonable doubt that all links in the chain of circumstances point unerringly to the guilt of the accused and none else. In ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[1] the Hon'ble Supreme Court while discussing a case based on circumstantial evidence observed as follows;

> **153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :
>
> *(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> .....
>
> *(2)* the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

[1] **(1984) 4 SCC 116**

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

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

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

9 (i). It is now to be examined as to whether the Prosecution case was able to withstand the test extracted *supra* to establish its case.

(ii) P.W.1, P.W.2, P.W.4, P.W.5, P.W.6 and P.W.8 all saw injuries on various parts of the body of the deceased which they described as burn injuries except for P.W.1. She did not describe the injuries. P.W.3 was the only witness to specify that the injuries were burn injuries caused by an *iron rod*, but could not say whether the injuries were freshly inflicted. P.W.5 saw M.O.I recovered from outside the place of occurrence, she is not a seizure witness. P.W.6 and P.W.8 saw M.O.I in the next room below wooden planks. They are also not witnesses to the seizure. According to P.W.6, it was a *black colour rod.* P.W.8 could not identify M.O.I during trial, as the same rod seen by her on that day. P.W.10 and P.W.12 were witnesses to the seizure of M.O.I and M.O.II to M.O.XIV. M.O.I, according to them, was seized from the place of occurrence. Their evidence about the place of recovery of M.O.I is in direct contradiction to the evidence of P.Ws 5, 6, 8 as seen above and P.W.15. P.W.15 the I.O. in the UD case recovered and seized M.O.I, vide Exhibit 6, the Seizure Memo, he testified that he found M.O.I, one *iron rod rusted* measuring 2.6 ft. in length, concealed between piles of wood in the room adjacent to the place of occurrence. P.W.14 the Medico Legal Consultant who was shown M.O.I on 28-04-2018, stated that M.O.I had the presence of black soot over one end, none of the other P.Ws, not even P.W.15 had seen black soot on M.O.I. That having been said, it emerges from the evidence that M.O.I was seized from an adjacent room not rented by the Appellant and accessible to all and sundry. We are

aware that articles recovered from an open and accessible place cannot be disregarded only for that sole reason, however, M.O.I was recovered sans disclosure statement of the Appellant and the recovery is suspicious in view of the evidence as has emerged *supra.* P.W.15 admitted that there were construction materials stored in the adjacent room, therefore, how P.W.15 conclusively opined that M.O.I was the weapon of offence has not been explained nor is there evidence in this context for the Court to draw succour from. According to P.W.15, he affixed green tape on the M.O.I for identification. The evidence of P.Ws 5, 6, 8, 10, 12 and 14 do not lend support to the evidence of P.W.15 regarding the green tape, denuding the evidence of credence. The crossexamination of P.W.17 revealed that M.O.I was seized by P.W.15, therefore, his testimony about the seizure of M.O.I is hearsay only, although he was the I.O. of the instant case. He thus fails to buttress the Prosecution case with regard to the seizing of M.O.I. Hence, in the first instance, contradictions have emerged in the evidence of the P.Ws *supra*, with regard to the place of recovery of M.O.I and the various descriptions ascribed to the object render the Prosecution evidence with regard to M.O.I unreliable.

(iii) P.W.14, the Medico-Legal Consultant conducted the autopsy of the victim on 28-04-2018. The victim had passed away on 25-04-2018. His evidence pertaining to the injuries is as follows;

> ***Ante mortem injuries***
>
> *(1) Linear patterned burnt injuries (7 x 0.8 cm) extending from right side neck (4 cm) below the right ear lobe and downwards and posteriorly down the neck.*
>
> *(2) Multiple criss cross burnt injury placed over middle chest towards the upper central part of the chest with patterned marks whereby each gap is spaced at approximately 0.5 cm apart.*
>
> *(3) Circular burnt marks (12 in numbers) placed over the front upper chest with a diameter of (0.5 x 0.6 cm) suspected cigarette burnt marks.*

(4) Longitudinal burnt skin over right clavicle measuring 1.8 x 1 cm - the burnt wound involves the skin, dermis and also the muscles (deep burn).

(5) Multiple circular and linear burn injuries (cigarette burn injuries) placed over the dorsun of right hand involving 60-80% of dorsun of hand. The injuries measures over an area of 8 x 6 cm.

(6) Multiple patterned linear injuries (burnt) over the right lateral aspect of forearm, involving the elbow joint. The wound measures 7 x 1.5 cm and 6.5 x 1.2 cm with involvement of skin, dermis and muscles.

(7) Multiple circular and linear burn injuries 8 x 1.5 and 5.5 x 1 cm placed over right upper arm involving the elbow and invoking skin, dermis and muscles.

(8) Linear patterned over the right lower chest. The injuries shows peeling of skin with burn margins and measures 13 x 0.5 cm.

(9) Linear patterned injuries 10 x 0.5 cm over the front of abdomen involving the epigastric and right hypocondrium region.

(10) Criss cross burnt linear injuries placed just below injury No.9 and measuring 8 x 0.8 cm and 5 x 0.5 cm.

(11) Multiple circular shaped burnt injuries over the dorsun of the left hand (cigarette burns).

Chest

(1) There was severe congestion of lungs present.

Abdomen

The stomach contained around 300 ml of fluid and the uterus was non gravid.

At the time of the autopsy I was also shown the suspected weapon of offence by the I.O. which was an iron (building rod) with presence of black soot over one end with patterns matching with the injuries observed over the body of the deceased.

Based on my findings I opined that the time since death was more than 24 to 36 hours and the cause of death to the best of my knowledge and belief was due to severe shock as a result of vasovagal stimulation, due to severe burn.

After the autopsy I handed over to the I.O. of the case the following by duly preparing a handing and taking memo;

Nail clippings of the deceased packed and sealed in an envelope which is not in the Court record.

M.O.I already marked is the said rod which was shown to me by the police in connection with this case.

Exbt.11 is the autopsy report prepared by me.

Exbt.11 (a) and (b) are my signatures on the same.

(iv) Neither P.W.15 nor P.W.17 gave reasons as to why the body was kept in the Singtam Hospital Mortuary from 25-04-2018 (three days) and forwarded for autopsy only on the fourth day, i.e., on 28-04-2018. P.W.14, the Medico Legal Consultant admitted that he could not say exactly as to when the deceased had died nor did he state the age of the burns on the deceased or whether all the burn injuries were *ante mortem*. He also failed to opine whether the burns caused were homicidal or suicidal, this has to be

considered in view of the evidence of P.W.13 that there were no marks of struggle on the victim's body and her bangles on both her wrists and her nose ring on her left nostril were found intact and unbroken. P.W.13 during inquest recorded 6 (six) number of injuries on the body of the deceased and admitted under crossexamination that he did not find struggle marks on the body of the deceased. No foreign materials were seen on the dead body or attached to the dead body. He, however, suspected foul play in the death of the deceased. No reason for such suspicion was elucidated. Relevantly, Q.12(f) on Exhibit 1 which is the format of the inquest report is as follows;

> f) Do you notice anything in the surroundings to suspect foul play?

P.W.13 in response has written **"***Foul play suspected, requiring detailed enquiry and investigation***"** without answering the question in the format.

(v) While addressing the question of burns found on the victim, the definition of burns as detailed in ***Modi A Textbook of Medical Jurisprudence and Toxicology, 24th Edition***, at Page 485, may relevantly be referred to, the relevant portion is extracted hereunder;

> **"Definition**.–Burns are injuries produced by the application of dry heat such as flame, radiant heat or some heated solid substance like metal or glass, to the surface of the body. Injuries caused by friction, lightning, electricity, ultra-violet or infra-red light rays, X-rays and corrosive chemical substances are all classified as burns for medico-legal purposes. ……."

At Page 496, it reads thus;

> **"The Joule Burns (Endogenous burn)**.– When contract with current is more prolonged, **the skin in the mark acquires a biscuit or brown tint** and with yet further contract, there may be charring. **These changes are due to burning, the so-called**

> **Joule burn, a term which distinguishes it from the changes caused by exogenous thermal heat, following contract with high voltage - flash burn.** ..... When a current is passed at 240 Volts via a one cm diameter brass wire to the skin, tiny discrete pate blisters appear first. **Then the blisters grow bigger and coalesced to produce a crateran electric mark**. **Ordinarily, these electric marks are roundish with a shallow crater surrounded by a slightly elevated ridge of the skin with a grey ashy based and it may resemble the shape of the object contacted.** If the contact is continued for a few more seconds, the skin in the mark turns brown and becomes Joule burn.
> .....”

(vi) Thus, in this context, P.W.14 ought to have differentiated between burns which are caused by heated substance applied on the surface of the skin and burns caused by electricity, this differentiation being necessitated on account of the evidence of P.W.2, P.W.3 and P.W.6 who saw naked wires above the bed of the deceased and of P.W.9 who said that 230 volts which could pass through the wires in the room could be fatal. The Medical Expert thus failed to enlighten the Court as to how the burn injuries could be classified, viz., electrical burns or burns applied by other methods. Instead of making a thorough examination of the burns and classifying it P.W.14 appears to have been swayed by the Prosecution showing him the iron rod M.O.I as the alleged weapon of offence.

(vii) The Appellant works in a tissue paper factory, how he obtained M.O.I is not detailed. If M.O.I was heated and used for inflicting the burns no investigation has been carried out by forensic tests to establish whether the heat would burn the alleged rust seen by P.W.15, on the M.O.I or whether the burn injuries on the victim‘s body bore traces of rust neither does the evidence of P.Ws 13, 14, 15 and 17 shed light on this count. Concededly, no injuries including burn injuries were found on the Appellant as can be gauged from the evidence of P.W.15 and P.W.17 who have not stated that medical examination of the accused revealed injuries on his

person nor did investigation reveal tell tale signs on his wearing apparels. It is not the Prosecution case that he had changed out of the clothes worn by him after he allegedly committed the crime and made the evidence disappear. It is humanly impossible to imagine that the victim would have quietly accepted the torture meted out to her without a fight having regard to the common course of human conduct. Conversely, the Appellant in its Section 313 Cr.P.C. statement under Question No.91 put to him has categorically stated as follows;

> **"**Q. 91 Do you have anything to say which you think should be brought to the notice of this Court? Do you have any witnesses to produce before this Court in your defence?
>
> Ans: The room where I stayed had all naked wires for which I complained my landlord but he did not take heed of my complains, my landlord used to drink a lot though, I always used to complaint about it my landlord asked me to vacate the room instead of fixing the wires. ***The injuries were caused due to those wires and electrocution. My wife succumbed to the injuries.***
>
> ***There were a lot of construction materials kept in the adjacent room. I am innocent and have not killed my wife."***
>
> Emphasis supplied]

(viii) Reverting to the injuries noted in Exhibit 1, the inquest report and on Exhibit 11, the autopsy report, the injuries recorded in the two Exhibits differ, however as held in ***Javed Abdul Razzaq Shaikh*** vs. ***State of Maharashtra***[2] in case of inconsistency the medical report of the doctor will prevail. Nevertheless, even if Exhibit 11 prevails, the burn injuries have not been related to or linked to M.O.I by conclusive Prosecution evidence. The doctor deposed that; **"**..... *the cause of death to the best of my knowledge and belief was due to severe shock as a result of vasovagal stimulation, due to severe burn.***"** His cross-examination merely explains that vasovagal shock is a form of shock where the heart stops due to severe

[2] **(2019) 10 SCC 778**

shock. No further elucidation regarding the reason of the vasovagal shock or the reason for the burns was ventured into. He also testified that the patterns on M.O.I matched the injuries over the body of the deceased without specifying details for his conclusion. As pointed out by the Learned Counsel for the Appellant P.W.14 has failed to detail his experience in the field to enable the Court to assess his competence. In light of the discussions above, his evidence including the autopsy results fails to convince this Court.

(ix) The alleged cigarette burn injuries mentioned at Serial No.5 and Serial No.11 of Exhibit 11 detected by P.W.14 have not been investigated into by both P.W.15 and P.W.17 despite the categorical description of the injuries. The length of M.O.I is said to be 2.6 ft., but the measurement of the diameter is absent.

(x) The cross-examination of P.W.17 elicited the fact that he had sent M.O.I seized by P.W.15, to the RFSL vide Exhibit 25 to verify whether there was any human skin or foreign object thereon. Exhibit 28 was identified by him to be the report submitted by RFSL, Saramsa, wherein it was stated that **"**H*uman skin or any other foreign particle were not detected in M.O.I*" Thus, it is clear that M.O.I bore no traces of human skin or foreign particles neither did the forensic examination detect any black soot on the object. The analyst who prepared the report was not cited as a Prosecution witness for what appears to be obvious reasons and thereby prompts this Court to draw an adverse inference against the Prosecution. If M.O.I was indeed the weapon of offence and the Appellant had cleaned it of traces of human skin, then the rust would have been wiped off along with remnants of human skin, and on recovery by P.W.15 immediately on the morning that the death was reported, M.O.I would have had no rust on it but the evidence of P.W.15 is that there was rust on M.O.I. Finger prints were not lifted from M.O.I or from the crime scene to definitely incriminate the Appellant as the author of the crime.

(xi) In ***Dayal Singh and Others*** vs. ***State of Uttaranchal***[3] the Supreme Court observed as follows;

> **"21. The investigating officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to**

[3] **(2012) 8 SCC 263**

act in accordance with the Police Manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An investigating officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. **It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free.** …….

……

37. Profitably, reference to the value of an expert in the eye of the law can be assimilated as follows:

The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence.

If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his

opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based." [See *Forensic Science in Criminal Investigation & Trial* (4th Edn.), by B.R. Sharma.]

[Emphasis supplied]"

Bearing the ratio cited above in mind, it emerges with clarity that evidence with regard to M.O.I is riddled with contradictions as discussed *supra*, raising serious doubts as to whether it was indeed the weapon of offence and whether it had been utilized for inflicting injuries on the victim which allegedly caused her death as no link in the chain of Prosecution evidence even remotely establishes M.O.I as the weapon of offence. The

evidence of P.Ws 14, 15 and 17 do not inspire the confidence of this Court on this aspect. Therefore, the finding of the Learned Trial Court with regard to M.O.I cannot be sustained.

(xii) P.W.2, P.W.3 and P.W.6 saw naked wires above the bed of the deceased. P.W.2 testified that he along with his friend P.W.3 shifted the bed of the deceased to about one foot away from the wall where he saw naked wires above the bed. P.W.3 supported his evidence. P.W.9, the Assistant Engineer, made no mention of having seen the deceased in the rented room when he went to examine the electrical wiring in that room as requisitioned by P.W.15 in the UD case. He prepared Exhibit 3 his report which *inter alia* reads as follows;

> "…….....…
>
> I, the undersigned along with my sub-ordinates went for verification of the room of a deceased person on the same day and observed that there was no any faulty line. Since, there was only one S/S combine and one LED bulb drawn with the 1.5 sq.mm insulated Copper wires which is only for lighting purpose and consumes very less energy. And as per the verification those equipments were not even damaged/short-circuited. All the electrical equipments were found ok. Hence, there is no possibility of electrocution.

Under cross-examination, he admitted that he had not mentioned in Exhibit 3 whether there was any leakage of current in the electrical line at the place of occurrence. That, 1.5 sq.mm. insulated in the room is a normal household electrical line, however, he added that 230 volts of current passes through such wires which can be lethal. Despite his inspection and conclusion he made no mention or reference to the naked wires seen by P.Ws 2, 3 and 6 in the tenanted room and P.W.15 and P.W.17 have failed to address this circumstance both in their investigation and their evidence. P.W.9 has also not detailed his years of professional experience neither did he disclose whether he took any electrician or requisite implements along with him to inspect the electrical fittings. He failed to explain as to how he concluded that there was no fault in the electric lines without specifying the steps taken by him to examine the wiring during inspection. His evidence is unreliable.

(xiii) Photographs of the place of occurrence and that of victim, Document A‘ were said to have been taken by P.W.15. P.W.17, while echoing the evidence of P.W.15 that photographs at the place of occurrence had been taken, stated that Document A‘ (collectively) being twenty-one photographs were submitted to the Court along with the Charge-Sheet. Twenty-one photographs were marked only as Document A‘ and not as Exhibits, thereby indicating that the Prosecution placed no reliance on the photographs. In fact, no explanation was furnished for consideration of the photographs in terms of the provisions of Section 65B(4) of the Indian Evidence Act, 1872, by P.W.17. Hence, the photographs are outside the ambit of consideration of this Court.

(xiv) Relevantly, it is to be noticed that the investigation conducted by P.W.15 was under Section 174 of the Cr.P.C. The Hon‘ble Supreme Court while dealing with this provision in ***Pedda Narayana and Others*** vs. ***State of Andhra Pradesh***[4] observed as hereinbelow;

> **“11.** A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. **The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174.** In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report. ……..
>
> **[emphasis supplied]”**

In ***Tehseen Poonawalla*** vs. ***Union of India and Another***[5] the Supreme Court cited with approval the observation made in ***Pedda Narayana*** (*supra*). In ***Amar Singh*** vs. ***Balwinder Singh and Others***[6] the Supreme Court held that the basic purpose of holding an inquest is to

[4] **(1975) 4 SCC 153**
[5] **(2018) 6 SCC 72**
[6] **(2003) 2 SCC 518**

report the apparent cause of death, namely, whether it was suicidal, homicidal, accidental or by some machinery. Pausing here momentarily it may be remarked that Exhibit 1 or P.W.13 have not enlightened the Court as to whether the death came under any of the aforesaid categories. It is reiterated here that P.W.13 merely mentioned that foul play was suspected requiring detailed enquiry. In ***Manoj Kumar Sharma and Others*** vs. ***State of Chattisgarh and Another***[7] a Bench of two Learned Judges held that the purpose of an inquest in cases of accidental or suspicious deaths under Section 174 and Section 175 of the Cr.P.C. is distinct from investigation under Section 157 of the Cr.P.C. under which an Officer-in-Charge of a Police Station who is empowered to investigate, shall proceed to the spot in person to investigate the facts and circumstances of the case, if he has reason to suspect the commission of an offence. Consequently, pursuant to the investigation into the UD Case by P.W.15, P.W.17 was expected to carry out an independent investigation for the purposes of the offences alleged to have been committed by the Appellant. Even Exhibit 13 the rough sketch map of the place of occurrence was prepared by P.W.15, hence doubts arise as to whether P.W.17 even visited the site of the alleged crime at all despite the mandate of the Statute, to verify the facts, which thereby indicates a lackadaisical attitude which manifested in shoddy investigation.

(xv) P.W.14 revealed that nail clippings of the deceased were packed and sealed by him in an envelope. Exhibit 14 reveals that P.W.14 was specifically requested to preserve the nail clippings of the deceased which was duly complied with by him, but the I.O. failed to forward it for scientific analysis as appears from Exhibit 25. P.W.17 further states that he had seized Exhibits handed over to him by P.W.15, therefore, when the autopsy was conducted investigation was already handed over to P.W.17. This circumstance reinforces the suspicion that P.W.17 did not carry out an independent investigation into the matter and relied solely on the investigation of P.W.15 made in the UD Case.

(xvi) Reverting to the evidence of P.Ws 1, 6 and 15, they saw the burnt curtains M.O.XIII at the place of occurrence. No investigation was evidently taken up nor reasons given by the Prosecution as to how the curtains came to be burnt although the said articles, M.O.XIII have been seized vide Exhibit 7.

---

[7] **(2016) 9 SCC 1**

10(i). The Learned Trial Court was also impressed with the Section 164 Cr.P.C. statement of P.W.6 and relied on it as substantive evidence. In Paragraph 68 of the impugned Judgment it is recorded *inter alia* that nothing on record created a doubt that P.W.6 would be deposing falsely nor was there reason to disbelieve her statement made before the Learned Magistrate who recorded her Section 164 Cr.P.C. statement. That, P.W.6 having deposed the same facts before the Learned Trial Court her statements were reliable. On meticulously walking through the deposition of P.W.6 it is clear that she has made no whisper of the Appellant's involvement in the alleged offence. The reliance of the Learned Trial Court on the Section 164 Cr.P.C. statement of P.W.6 was legally erroneous as P.W.6 was never confronted with her Section 164 Cr.P.C. statement in the Court either during her evidence-inchief or cross-examination, to corroborate or contradict its contents. Her only statement against the Appellant was that the deceased complained to her that accused had beaten her once. Would this suffice to establish the offence against the Appellant under Section 300 and Section 201 of the IPC? In our considered opinion, this would be an appalling conclusion. P.W.17 made a frail attempt to incriminate the Appellant by stating that during his investigation it was revealed that P.W.6 had heard the deceased crying in the room, but P.W.6 has made no such revelation before the Court to corroborate P.W.17.

(ii) It may appositely be observed here that a statement under Section 164 Cr.P.C. is resorted to by the I.O. during the course of investigation when an accused or any other person seeks to make a confession or a statement, respectively. This is done of their own free will and is recorded as per the procedure established by law when there is an apprehension that either the accused or the witness may resile from their statements or likelihood of evidence being tampered with. In ***R. Shaji*** vs. ***State of Kerala***[8] the Hon'ble Supreme Court observed as follows;

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

[8] **(2013) 14 SCC 266**

> **27.** So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. **A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.** (Vide *Jogendra Nahak* v. *State of Orissa* [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and *CCE* v. *Duncan Agro Industries Ltd.* [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])
>
> **28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. **As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.**
>
> [Emphasis supplied]"

Hence, the Learned Trial Court could only rely on the evidence given on oath in the Court and not one under Section 164 of the Cr.P.C. which can be relied on for the purposes of corroboration and contradiction only. The evidence of P.W.6 in the Court cannot be discarded.

11. The Learned Trial Court next observed in the impugned Judgment that the Appellant had failed to give cogent reasons for the injuries found over the body of the deceased. In our considered opinion, this observation of the Learned Trial Court is legally untenable for the reason that the reverse burden falls on the Appellant only when the Prosecution has made out a plausible cause for the Appellant having committed the offence and sufficient reasons having established that the crime was committed by him. This aspect has been explained by the Hon'ble Supreme Court in ***Shambu Nath Mehra*** vs. ***The State of Ajmer***[9] as follows;

[9] **AIR 1956 SC 404**

"(10) Section 106 is an exception to S.101. Section 101 lays down the general rule about the burden of proof.

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Illustration (*a*) says—

A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(11) This lays down the general rule that in a criminal case the burden of proof is on the prosecution and S.106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain

other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R, 1936-3 All ER 36 at p.49 (B).

…….....……

(13) We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused.

This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.

[Emphasis supplied]

The Prosecution, in our considered opinion, has failed to build up a plausible case against the Appellant and the burden does not lie on the accused to prove he did not commit the murder until sufficient evidence incriminates him on the crime. We may beneficially rely on the ratio in ***Kali Ram*** vs. ***State of Himachal Pradesh***[10], where the Supreme Court observed as follows;

[10] (1973) 2 SCC 808

> **"25.** Another golden thread which runs through the web of the administration of justice in criminal cases is that **if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted**. **This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the Court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the Court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt.** Of course, the doubt regarding the guilt of the accused should be reasonable; it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. .....
>
> **[Emphasis supplied]"**

12. Although P.W.15 claims to have discovered during his investigation that the deceased and the Appellant were married about three years ago, according to P.W.17, it was six years, thus, there is no uniformity even on this aspect. However, no other witness or documentary evidence was forthcoming in this context to support either of the claims. Both P.Ws have made no effort to examine other angles pertaining to the death of the victim more so in light of the provisions of Section 113A of the Indian Evidence Act, 1872.

13. The Prosecution proved seizure of M.O.II to M.O.XIV vide Exhibits 6 and 7 in the presence of P.W.10 and P.W.12, who deposed as much. Presumably, P.W.15 seized these articles as P.W.10 and P.W.12

stood witnesses to the seizing of M.O.I and the other articles enumerated hereinbelow, viz.;

> *M.O.II* - Gas stove; *M.O.III* - Gas lighter; *M.O.IV* - Gas pipe; *M.O.V* - Gas regulator; *M.O.VI* - Filled cylinder; *M.O.VII* - Electric wire; *M.O.VIII* - Switch Board; *M.O.IX* - Bed switch; *M.O.X* – Bulb; *M.O.XI* - Mobile charger; *M.O.XII* – Bangle; *M.O.XIII* - Green curtain; *M.O.XIV* - Mobile phone.

The reasons for seizing these objects and how they were connected to the offence or how the seizure of these objects were relevant in garnering strength for the Prosecution case has remained shrouded in mystery.

14. None of the Prosecution witnesses have made any statement about having seen the Appellant with the victim before the murder. Be that as it may, even if this Court is inclined to believe the Prosecution version of the Appellant having been seen last with the victim, it does not absolve the Prosecution from examining all possibilities and placing before the Court an irrefutable theory that the crime was committed by none else but the Appellant. The Court cannot be expected to reach a conclusion of guilt based on conjectures and surmises drawn by the Prosecution. The last seen theory is an indispensable link in the chain of circumstances that would point towards the guilt of the accused, but it is no more *res integra* that it is not prudent for the Court to base its conviction solely on the basis of last seen theory. This theory is to be invoked only on due consideration of the entirety of the Prosecution case and the circumstance that have emerged prior to the parties being seen together. In ***Mahila Roomabai Jatav*** vs. ***The State of Madhya Pradesh***[11] the Supreme Court observed that the circumstance of last seen also is not sufficient to hold the accused guilty of the offence committed. On the anvil of the discussions above, can the Appellant be held to be the perpetrator of the offence and the crime foisted on him conclusively merely for the reason that he is the husband of the deceased and was presumably with her in the room that night? Deaths do occur in one house occupied by two or more people. In fact, families spend nights together under one roof, in such a circumstance should a sudden death occur can the Prosecution unilaterally conclude that it was murder without furnishing cogent evidence to link the crime to the suspect? The life

[11] **MANU/SC/1607/2019 : Criminal Appeal No.1989/2010**

and liberty of an individual are at stake requiring the investigation to be painstaking and diligent to prevent a wrong conviction or for that matter a wrong acquittal.

15. The entire Prosecution case appears to have been built on the edifice of Exhibit 22 and Exhibit 23 (collectively) upon which motive was attributed to the Appellant without the strength of any proof. Exhibit 23 (collectively) indicates (*i*) a compromise was effected before the Family Court at Bahraich, Uttar Pradesh, on 21-06-2014 (*ii*) vide the same Exhibit *supra* a Criminal Case had been registered against the Appellant on 26-10-2012 at the Hardi Police Station, Uttar Pradesh, for harassing the deceased, under Sections 498A/323 of the IPC and Sections 3/4 of the Dowry Prohibition Act, 1961. That, dispute arose in 2012 and was compromised in 2014, there is no proof thereafter of deteriorating relations between them. The evidence of the Prosecution witnesses is devoid of knowledge of the relationship between the Appellant and the victim and none of the witnesses have claimed to have seen the Appellant ill-treating the victim or physically assaulting her during their stay at the tenanted premises. Thus, no motive has been attributed to the Appellant. Besides, the contents of Exhibit 23 have not been proved by any witness who was privy to the contents of the document which thereby has no probative value.

16. That having been said, it is relevant here on this count to consider the evidence of P.W.16 one Uttam Kumar Pandey who was furnished as a Prosecution witnesses before the Court. His statement under Section 161 of the Cr.P.C. was not recorded during the investigation. However, in this context, the Supreme Court in ***Dayal Singh*** vs. ***State of Maharashtra***[12] held as follows;

> **"18.** In *Tilkeshwar Singh* v. *State of Bihar* [AIR 1956 SC 238 : 1956 Cri LJ 441] statements of three witnesses were jointly recorded by the investigating officer in violation of Section 161(3) CrPC. **It was contended that the evidence of the said three witnesses in court was inadmissible as there was no record of their statement under Section 161 CrPC. The contention was repelled and it was held that while the failure to comply**

[12] **(2007) 12 SCC 452**

> **with the requirements of Section 161(3) CrPC might affect the weight to be attached to the evidence of the witnesses, it does not render it inadmissible.** In the facts and circumstances of the present case we are of the opinion that the testimony of PW 9 and PW 10 cannot be discarded on the ground urged by the learned counsel for the appellant and the trial court and the High Court rightly relied upon their statement which was given in court.
>
> **[Emphasis supplied]"**

Hence, there is no illegality in the production of P.W.16 as a Prosecution witness or his examination in the Court room. According to him, like the Appellant he is a resident of Bahraich, Uttar Pradesh. He is related to the Appellant by marriage and claimed that the deceased was his niece as he had married her maternal aunt. While being cross-examined he revealed that the deceased and the accused were on very good terms and they were very happy and the deceased had no problem with the accused person. However, the deceased had complained to his wife that there were unattended naked electrical wiring all over the room where she was residing. The evidence of this witness is in tandem with the response of the Appellant in Question No.91 under Section 313 Cr.P.C. as reflected *supra.*

17. While considering the conduct of the Appellant post the death of the victim, he went and informed P.W.6 that his wife had been electrocuted. Pursuant thereto even after the arrival of P.W.15 and other P.Ws at the spot he continued to remain therein. He was not apprehended either by the Police or by any of the witnesses but remained voluntarily at the place of occurrence. This conduct of the Appellant by itself does not warrant an acquittal, but has to be considered together with the evidence furnished by the Prosecution which fails to inculpate the Appellant.

18. Now to address the argument of Learned Counsel for the Appellant that since P.W.15 was the I.O. in the UD Case and the Complainant in the instant case and he had conducted a large part of the investigation pertaining to this case, therefore, his evidence would be rife with bias and ought not to be considered, the Supreme Court in this context in ***Mukesh Singh*** vs. ***State (Narcotic Branch of Delhi)***[13] has held as follows;

[13] **(2020) 10 SCC 120**

> **"13.2. (II) In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal.** The matter has to be decided on a case-to-case basis. A contrary decision of this Court in *Mohan Lal* v. *State of Punjab* [(2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.
>
> **[Emphasis supplied]"**

19. The above ratio soundly quells the doubts raised by Learned Counsel for the Appellant. Besides the investigation by P.W.15 was only with regard to Section 174 of the Cr.P.C. in UD Case No.10/2018 and he was not the I.O. in the instant case. The non-filing of the original complaint of the UD case does not vitiate this case in anyway as we are dealing with the offence under Sections 302/201 of the IPC registered under Singtam P.S. Case No.23/2018 and not UD Case No.10/2018.

20(i). We are aware that defective investigation or error in the investigation by itself ought not to be a ground of acquittal, the Supreme Court has held as much in ***C. Muniappan and Others*** vs. ***State of Tamil Nadu***[14] wherein it was propounded that there is a legal obligation on the part of the Court to examine the Prosecution case *dehors* lapses in investigation and to find out whether the evidence is reliable or not and whether the lapses affected the object of finding out the truth. The conclusion of the trial cannot be allowed to depend solely on the probity of the investigation.

[14] **(2010) 9 SCC 567**

(ii) On the bedrock of this observation *supra*, on examining the evidence on record, we are constrained to observe that no incriminating circumstantial evidence has been furnished against the accused. It is settled law that in a case based on circumstantial evidence the Courts have to have a conscientious approach and conviction ought to be recorded only in the event that all links of the chain are complete, pointing to the guilt of the accused (***Shailendra Rajdev Pasvan and Others*** vs. ***State of Gujarat and Others***[15]). It is also well-established that suspicion however grave cannot take the place of proof and in ***Rajiv Singh*** vs. ***State of Bihar and Another***[16] it was observed as follows;

> **"66.** It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. **The well-established canon of criminal justice is "fouler the crime higher the proof".** In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.
>
> **67.** The above enunciations resonated umpteen times to be reiterated in *Raj Kumar Singh* v. *State of Rajasthan* [(2013) 5 SCC 722 : (2013) 4 SCC (Cri) 812] as succinctly summarised in para 21 as hereunder: (SCC pp. 731-32)
>
> *21.* **Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved and 'will be proved'.** ***In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite***

[15] (2020) 14 SCC 750
[16] (2015) 16 SCC 369

> ***large and divides vague conjectures from sure conclusions.*** In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. ……..
> ……..
>
> **72.** Viewed from the moral and political perspectives, it has been observed that in liberal States, the rule about the burden of proof has been elevated to the status of fundamental human right encompassing the assurance of liberty, dignity and privacy of the individual and from this standpoint it is essential that the State should justify fully its invasion of the individual's interest by proving that he had committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal State.
> …….
>
> **[Emphasis supplied]"**

21. Accordingly, in view of the foregoing discussions, we are of the considered opinion that the circumstances from which the conclusion of guilt of the Appellant is to be drawn has not been fully established. The evidence led by the Prosecution falls short of the test laid down by the ratio in ***Sharad Birdhichand Sarda*** (*supra*). Moral conviction cannot replace the requirement of **"**proof beyond all reasonable doubt**"** and the Supreme Court in ***Sharad Birdhichand Sarda*** (*ibid*) has clarified as follows;

> **"179.** We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.

> **180.** It must be recalled that the well established rule of criminal justice is that fouler the crime higher the proof. In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautions and meticulous approach was necessary to be made."

22. In conclusion, after carefully sifting the chaff from the grain of the Prosecution evidence, undoubtedly the chain of circumstances from which the conclusion of guilt of the Appellant is to be drawn is not linked inextricably to the Appellant to conclusively arrive at the finding that he is the author of the crime. The benefit of doubt must be and is thereby extended to the Appellant.

23. Consequently, Appeal is allowed.

24. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

25. The Appellant is acquitted of the offence charged with, i.e., under Sections 302/201 of the IPC. He be set at liberty forthwith if not required to be detained in any other case.

26. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

27. No order as to costs.

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

SLR (2021) SIKKIM 532

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

R.F.A. No. 5 of 2019

M/s North East Group of Engineers (P) Ltd. and Another ….. **APPELLANTS**

Versus

General Manager, BSNL ….. **RESPONDENT**

For the Appellants: Mr. Zangpo Sherpa and Mr. Sayshay Hang Subba, Advocates.

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

Date of decision: 6th August 2021

A. Code of Civil Procedure, 1908 – O. 41 Rr. 1 and 2 – First appeal is a valuable right for the aggrieved. It is beyond doubt that all question of facts and law decided by the trial Court are open for reconsideration. It is, however, necessary for the appellate Court to carefully examine and deeply consider both the fact as well as the law arising herein and give cogent reasons while disposing the appeal. It is our duty to properly deal with all the issues and the evidence led by the parties.

(Para 1)

B. Indian Evidence Act, 1872 – S. 58 – Facts admitted need not be proved – Admission in pleadings, if true and clear are the best proof of the facts admitted. Admission in pleadings are judicial admissions and admissible under S. 58 of the Indian Evidence Act stands on a higher footing than evidentiary admissions, fully binding and constitutes waiver of proof. Facts admitted need not be proved unless the Court requires otherwise.

(Para 30)

C. Indian Contract Act, 1872 – S. 55 – Effect of failure to perform at fixed time, in contract in which time is essential –If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. A voidable contract is a contract that can be affirmed or rejected at the option of one of the parties or in other words the contract which, in its inception, is valid, but which may be avoided i.e. rendered void at the option of one of the parties.

(Para 40)

Appeal allowed.

Chronology of cases cited:

1. Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates (P) Ltd. (2011) 9 SCC 147.
2. Orissa Textile Mills Ltd. v. Ganesh Das Ramkishun, AIR 1961 Patna 107.
3. Dr. Bal Saroop Daulat Ram v. Lt. Col. Lakhbir Singh Kirpal Singh, AIR 1964 Punjab 375.
4. M/s. Hind Construction Contractors v. State of Maharashtra, (1979) 2 SCC 70.
5. Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This is a first appeal from the judgment and decree of the Learned District Judge, Special Division-1 (learned Trial Court) dated 28.02.2019. First appeal is a valuable right for the aggrieved. It is beyond doubt that all question of facts and law decided by the learned Trial Court are open for reconsideration. It is, however, necessary for this Court to carefully examine and deeply consider both the fact as well as the law arising herein and give

cogent reasons while disposing the appeal. It is our duty to properly deal with all the issues and the evidence led by the parties. Learned Counsel Mr. Zangpo Sherpa for the appellant and Mr. K. T. Tamang for the respondent have been heard in detail on facts as well as in law. This judgement reflects their erudite submissions.

2. A money suit was filed by the plaintiffs (the appellants herein) against the defendant (the respondent herein) for recovery of money towards payment for work done under a contract. The suit went for trial after the defendant filed the written statement and eight issues were framed.

3. The learned Trial Court while dismissing the suit held that time was the essence of the agreement dated 22.02.2008 (exhibit-2) (the agreement); that although the defendant had extended the time for completion, time did not cease to be of the essence merely because a party agreed to short extensions; that the contract awarded to the plaintiff no.1 by the defendant was not completed within the stipulated/extended time limit; that the plaintiffs were in breach of the terms of the agreement and therefore, the defendant was not liable to pay any amount to the plaintiffs. The learned Trial Court held that the suit was not barred by limitation, but it was not maintainable as plaintiffs had not been able to substantiate their case and had not approached the court with clean hands. The learned Trial Court further held that the defendant cannot be held liable to pay the interest amount paid by the plaintiffs to Punjab National Bank towards the loan taken by them, as it was the plaintiff who had committed the breach of the terms of the agreement. Accordingly, the learned Trial Court dismissed the suit filed by the plaintiffs. The plaintiffs have therefore, filed the present appeal against the judgment and decree both dated 28.02.2019 passed by the learned Trial Court.

4. Out of the eight issues framed by the learned Trial Court issue no.2 on the point of limitation and issue no.4 as to whether valid extensions were given to plaintiff no.1 from time to time to complete the concerned work was held against the defendant and in favour of the plaintiffs. There is no appeal by the defendant on both these issues. The rest of the issue which are agitated are taken up.

5. The first issue was whether the suit was maintainable. If the plaintiffs had failed to substantiate their case, the suit would fail. The question of maintainability of a suit is a question of law. Section 9 of the Code of Civil

Procedure, 1908 (CPC) provides that the court shall have jurisdiction to try all suits of civil nature, accepting suits of which their cognizance is either expressly or impliedly barred. The point of limitation was separately decided in favour of the plaintiffs. The record reveals that the defendant's contention that no notice under Section 80 CPC was given by the plaintiffs was also decided in favour of the plaintiffs while deciding an application under Order 7 Rule 11 CPC filed by the defendant.

6. It is also urged by the defendant that the plaintiff no.2 has filed a letter dated 14.05.2010 bearing No.W-290/2007-08/23 to project that time had been extended till 21.02.2010. This document was exhibited by the plaintiff no.2 as exhibit-7. Exhibit 7 clearly mentions that it related to another work order. During the cross-examination he explained- *"Exhibit-7 though filed by me does not seem to be with regard to Namchi work. It seems it was inadvertently filed. Since I had performed many works for the defendant I am often confused regarding the said documents."* Besides, exhibit-7 the plaintiff had also filed other documents claiming that they related to the work. However, a bare perusal of exhibit-5 and exhibit-N makes it evident that they related to some other work as specifically mentioned therein. During cross-examination the plaintiff No.2 again admitted that exhibit-N and exhibit-5 did not relate to the Namchi work. Therefore, there was no way the defendant could be misled by those correspondences since they themselves were the issuer of the work orders and correspondences. With the aforesaid explanation, which is a plausible one, the weight of the defendant's argument that the plaintiff no.2 had sought to mislead the court would lose much of its weight. Resultantly, it may not be possible to hold that the plaintiffs had approached the court with unclean hands on these facts to such an extent that it would disentitle them for any relief. It is also the defendant's case that the plaintiffs had sought to mislead the court by stating that they had completed the work although it was not true. The defendant's own witness, Jay Prakash Thapa (D.W.2) the engineer who supervised the work having admitted during cross-examination that he had issued the work certificate (exhibit-K) which reflects that the work was completed on 28.02.2010 nullifies this argument.

7. There was no other plea taken by the defendant in the written statement which would touch upon the maintainability of the suit. It must, therefore, be held that that the suit was maintainable.

8. In answer to question no.3 it must be held that the plaintiff no.1 had been able to complete the works as recorded in the measurement book.

9. Issue no.5 was whether the plaintiff no.1 committed breach of the terms of the agreement, in respect of the work, and whether the defendant could avoid its liability. The learned Trial Court found that the plaintiffs had committed breach of the agreement, thereby causing loss to the defendant. This finding that the defendant had suffered loss is held to be *dehors* the evidence on record. The defendant had not even pleaded so. Whether time was of the essence or not is always a question of the intention of the parties. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. The defendant had allowed the plaintiffs to complete the work by extending the time and the last of such extension was open ended. Further, there is neither a plea for compensation due to any loss suffered nor any evidence of any loss suffered by the defendant. Thus, it is held that there was no breach and breach of timelines, if at all, were all condoned by the defendant by extending it again and again.

10. On issue no.6 it is held that although time was originally agreed to be of the essence under clause 8 of the agreement, the defendant by its own action extended the original deadline from time to time and finally allowed the plaintiff to complete the work as soon as possible making time no longer the essence of the contract.

11. The findings of the learned Trial Court on issue no 8 that the defendant cannot be held liable to pay the interest amount paid by the plaintiff to Punjab National Bank on account of delay, is upheld. It is held that the defendant is not liable to do so. There was no such provision in the agreement. However, the rest of the learned Trial Court's finding that it was the plaintiff who had committed the breach of the terms of the contract and work order are set aside.

12. Thus, in answer to issue no.7 which is decided in the affirmative, it is held that the plaintiffs are entitled to the reliefs as granted below. The reasons are also discussed in detail hereinbelow.

13. The plaintiffs filed Money Suit No.25 of 2016 on 28.12.2016. It was the case of the plaintiffs that a work order No.22 D(a)/05-06 dated 25.09.2008 (work order) was issued in favour of the plaintiff no.2 by the defendant for execution of work of laying of primary cables, distribution of U/G cables, erection of DP's, carrying of stores and distribution to different sites (carrying of stores from Gangtok to Namchi and distribution) under the work name of *„beautification of Namchi Town Area*. The work order was awarded to the plaintiff no.2 to execute and complete within 45 days of the date of its issuance. No estimate cost of the work was fixed by the defendant in the work order, but it was decided between the parties that the plaintiffs shall be paid according to the work done and charges incurred. Although, the plaintiff no. 2 commenced the work soon after the issuance of work order there were many hindrances and work could not be completed on time due to the defaults of the defendant. The plaintiffs, therefore, sought extension of time on various occasions which was considered and granted by the defendant. The plaintiffs completed the work within the extended period pursuant to which the defendant was informed, and bill presented for payment. The plaintiff No.2 had also taken a loan from the Punjab National Bank for the said work and the plaintiff no.2 received a notice on 19.10.2012 to pay back the loan with interest. The plaintiffs asserted that the work was monitored by the concerned engineer of the defendant who entered the progress of the work in the measurement book. The plaintiffs pleaded that the concerned engineer also issued work completion certificate but despite that the defendant failed to make payments although various request and reminders were made. Due to this the plaintiffs were compelled to approach the Lok Adalat for settlement of disputes. It is the case of the plaintiffs that during the Lok Adalat proceedings the General Manager, DGM and AGM of the defendant assured that they shall investigate the matter and disburse the payment as soon as possible. Due to the assurance given by them the plaintiffs withdrew the case before the Lok Adalat. However, despite various visits by the plaintiff no.2 to the office of the defendant they failed to make the payments compelling the plaintiffs to issue a legal notice dated 04.03.2016. Despite the receipt of the notice no payment was made and thus, the Money Suit was filed.

14. The defendant filed its written statement. It was contended that the suit was barred by limitation. The defendant also alleged that the plaintiffs had not approached the court with clean hands and suppressed material facts misleading the court with documents which did not relate to the work

order. The defendant admitted the issuance of the work order and stated that prior to the issuance of work order the agreement had been entered between the plaintiffs and the defendant for execution of such works in the State of Sikkim. The defendant stated that time was the essence of the contract. However, the plaintiffs did not complete the work on time and instead sought for extensions. The defendant agreed to such extension and the last of the extensions was agreed upon by the defendant vide letter dated 27.01.2009. The defendant stated that plaintiff had to complete the work by the end of February 2009 and no further time would be granted by the defendant. The defendant stated that the plaintiffs failed to complete the work even till January 2011 which gets established by their letter bearing No.SDE(P)/NMC-2010-11/CW-2 dated 28.01.2011 (exhibit-P). It is the case of the defendant that as the plaintiffs did not complete the work within the stipulated time, they were not liable to make any payment at all. The defendant denied having assured the plaintiffs for payment.

15. The plaintiffs examined Taktuk Bhutia (plaintiff no.2) as P.W.1 and two other witnesses i.e., Gambu Tamang (P.W.2) and Pema Tamang (P.W.3). The defendant examined Deepak Agrawal (D.W.1) the General Manager and Jay Prakash Thapa (D.W.2).

16. The plaintiff no.2 reiterated the pleadings in the plaint in his evidence on affidavit. In his crossexamination the plaintiff no.2 admitted that exhibit-N did not relate to the work order and related to work carried out for the defendant from Mangan to Makha via Dikchu covered by Work Order No. W-290/07-08/12. He also admitted that exhibits 5 & 7 also did not pertain to the work order. He admitted that although he had filed exhibit-7 he did so inadvertently as he was confused since he was working for the defendant on several similar projects.

17. Gambu Tamang stated that he knew the plaintiffs and reiterated what plaintiff no.2 deposed in his evidence on affidavit. He exhibited the AT report for u/g cable laying as work completion certificate dated 18.12.2012 (exhibit-15) issued by A.K. Dey, Sub-Divisional Engineer of the defendant after inspection of the work. During crossexamination Gambu Tamang stated that he was employed by plaintiff No.2 who was his supervisor. He admitted that the initial time for completion of the work order was 45 days which was extended from time to time. According to him the concerned work was completed in the year 2010. It is important to note that this fact has been stated by Gambu Tamang during his cross-examination by the defendant.

18. Pema Tamang also reiterated the facts as stated by the plaintiff no.2 in his evidence on affidavit. He also stated during cross-examination that as far as he could recollect the contract work was completed by the plaintiffs within the extended time frame and that the measurement books would depict the true completion work.

19. Deepak Agrawal reiterated the averments in the written statement in his evidence on affidavit. He stated that the agreement was entered between the plaintiffs as the contractor and the defendant. As per Clause 8 thereof time was of the essence and work order required it to be completed within 45 days. The plaintiffs failed to complete the work on time and instead sought extensions. The defendant vide letter dated 18.11.2008 (exhibit-4) allowed extension for a further period of 60 days in response to the plaintiffs' letter dated 05.11.2008 (exhibit-C). He stated that vide letter dated 15.01.2009 (exhibit-D) the plaintiff no.2 was informed that they had been receiving complaints and pressure from public and government departments regarding the slow process in works and request the plaintiffs to gear up the process of work to be completed within the extended time frame. The plaintiffs failed to complete the work even during extended period of 60 days therefore, by letter dated 20.01.2009 (exhibit-F) the plaintiff request for further extension of one month. The defendant vide letter dated 27.01.2009 allowed extension of 30 days (exhibit-J). According to Deepak Agrawal the further period of one month granted vide letter dated 27.01.2009 (exhibit-J) was the maximum period that the defendant could have allowed and no further extension was given. Thus, the plaintiff was bound to complete the work by end of February 2009.

20. On 06.02.2009 the defendant issued another communication (exhibit-I) to the plaintiffs to complete the work on time and in the event of their failure departmental action could also be initiated.

21. Deepak Agrawal stated that although it was incumbent upon the plaintiff to complete the work by the end of February 2009 the plaintiff with malafide intention filed letter dated 14.05.2010 bearing No. W-290/2007-08/23 (exhibit-7) with the plaint to project that time frame to complete the work was extended till 21.02.2010 when in fact this letter related to another work as laying underground cables from Mangan to Makha via Dikchu. It was therefore, submitted that the plaintiff has not approached the trial court with clean hands.

22. Deepak Agrawal stated that the work completion certificate forming part of the measurement book (exhibit-13 collectively and exhibit-O) proved that the plaintiff carried out only 60% of the assigned work and did not complete 40% of the work and even out of the said 60% only 10% underground cables were made up to date with respect to point-to-point jointing/joining work. Deepak Agrawal stated that the defendant was not liable for the loan taken by the plaintiffs. He stated that the work was not completed till the month of January 2011 which is established by the letter dated 28.01.2011 (exhibit-P) which was filed by the plaintiff before the Lok Adalat.

23. Deepak Agrawal authenticated his evidence on affidavit and exhibited various communications including the extensions. During his cross examination he admitted that the defendant had not terminated the contract awarded to the plaintiffs; that the original measurement book (exhibit-O) were misplaced in their office; that once a contract work is given their engineers also supervise the work and in the present contract work their engineers were involved in supervising it; that the progress of work in the measurement book is recorded by their engineers; that exhibit-K (comprised of exhibit-O) was also recorded by the engineer from their department; exhibit-K only mentions that 60% of the concerned contract work awarded to the plaintiffs work had been completed and it does not specifically say that the remaining 40% work is incomplete; the plaintiffs had repeatedly submitted letters for release of bills in respect of the concerned work; there was nothing in writing given by them to show that the defendant had refused the prayer of the plaintiffs to release the payments; and that they had extended the time frame for completion of their contract work from time to time on the request of the plaintiffs.

24. Jay Prakash Thapa was the Sub Divisional Engineer of the defendant. He reiterated what was stated in the written statement by the defendant in his evidence on affidavit. He also admitted to the issuance of the work order; the failure of the plaintiff to execute the work on time; the extension granted by the defendant from time to time and the failure of the plaintiff to complete the work even during the extended period. During his crossexamination Jay Prakash Thapa admitted that he was the supervisor of the concerned work as per exhibit-2; the defendant had not terminated the contract work; exhibit-13 (collectively) and exhibit-4 are the measurement book/copy in respect of the entire work carried out by the

plaintiffs pertaining to this case; exhibit-K (its original) was written by him in which he had mentioned that the work had been completed on 28.02.2010; exhibit-15 was written by A.K. Dey, the Sub-Divisional Engineer of the defendant and as per exhibit-15 he had checked the concerned work undertaken by the plaintiffs and was satisfied with the work; that since he worked in the field he could say that it is not possible for contract work to be completed within the stipulated time mentioned in the work order and that the General Manager of the defendant who had come and deposed before the court was not present during the execution of the said contract work.

25. The admitted fact seems to be that the plaintiffs had been awarded the work order by the defendant. Prior to that the agreement had been entered between them for execution of similar works by the plaintiffs for the defendant throughout Sikkim. Although the plaintiffs initially were hesitant to admit that the agreement related to the work order as well, he did so during his crossexamination. Apparently, the work order was issued pursuant thereto.

26. The agreement between the plaintiff no.1 and the defendant was executed on 22.02.2008. The following clauses are relevant and quoted herein below:

…….

> ***"3***. *The CONTRACTOR will, during the period of this CONTRACT from 22.02.2008 to 21.02.2009 or until this contract shall be terminated by such notices as is hereafter mentioned, whichever is earlier, safely carry out at his own expense and by means of tools, implements equipments etc., to be arranged by him* at *his own expense all repair works as described in the said Tender document hereunder which the BSNL or the General Manager Telecom, Gangtok, Sikkim or Divisional Engineer concerned under the jurisdiction of Gangtok Telecom District authorized by the General Manager Telecom, Gangtok, Sikkim in that behalf shall require.*

The contract is extendable for further period of one year considering performance of the

Contractor as per discretion of the General Manager Telecom, Gangtok.”

…….....……..……..……..……..…..

“6. *The CONTRACTOR shall promptly carry out the work wherever called upon by the Competent Authority of BSNL or any of the officers mentioned in the term & conditions above within the jurisdiction of the General Manager Telecom, Gangtok, Sikkim and within the time frame specified in the terms and conditions hereof at the time of issuing WORK ORDER.*

7. *The CONTRACTOR shall execute the work as specified in the Work Order using his own good tools and required instruments so that to maintain the standard of work as specified by the BSNL.*

8. *The above work shall, throughout the stipulated time period, be executed with all due diligence and the time allowed for completing the work as specified in Tender paper strictly be observed by the CONTRACTOR. The time in this respect shall be deemed to be essence of the Contract on the part of the CONTRACTOR.*

9. *If the CONTRACTOR fails to carry out any of his obligations under this Agreement. Penalty or recovery at the rate as prescribed at terms and conditions shall be imposed by the concerned officers mentioned in Tender Paper.”*

…….....……..……..……..……..…..

"14. *The aforesaid Security Deposit of Rs.3.00.000/- (Rupees Three Lakh only) furnished by the CONTRACTOR shall be retained by the BSNL as security for the due and faithful performance by the CONTRACTOR of all the covenants herein contained and on his/her part to be satisfactory fulfill, keep and observes all or any of the covenants, conditions or agreements on his/her part contained herein, then, unless the same is already forfeited, the General Manager Telecom, Gangtok, Sikkim will have the power to retain the whole or any part of the same and to appropriate the same or any part thereof to the use of BSNL, absolutely as and when by way of liquidated damages and or other dues and without reference to the relative importance of the particular breach or breaches of Contract which might have given occasion for such appropriate and whether the BSNL may aforesaid or not. In the case of such appropriation or retention of whole or part of the amount or an amount sufficient to make up the deficit as the case may be.***"***

……..……..……..……..……..……..……..……..……..……..……..……..……..

"16. *That the BSNL will pay the CONTRACTOR for the work, which the CONTRACTOR was called upon by the BSNL or by the concerned officers and which was satisfactorily done by the CONTRACTOR at the rates approved. For this purpose the CONTRACTOR should submit to the General Manager Telecom, Gangtok, Sikkim his/their bill for the terms of the work done by him/them against a particular work order at the rates approved within 30*

(thirty) days of the items of work covered by that work order having been satisfactorily completed by him/them.

17. *The bill will ordinarily be payable within two (2) months of the date of its submission.***"**

.....

"25. *The CONTRACTOR will submit for examination in the office of the General Manager Telecom, Gangtok, Sikkim its books of account and all concerned papers immediately by it in this connection within fifteen (15) days from the date of its being called upon to do so if the CONTRACTOR fails to do so, and /or*

….…….....…….…….…….…….…….…….…….…….

(i) If the CONTRACTORs work is found unsatisfactory in the opinion of the General Manager Telecom, Gangtok, Sikkim the General Manager Telecom, Gangtok shall be at liberty by notice in writing to the CONTRACTOR, terminate the Contract in any of the cases stated above. The CONTRACTOR shall thereupon pay to the General Manager Telecom, Gangtok, Sikkim in addition to any sum or sums of money which the CONTRACTOR may be able to pay under the provisions herein before stated, such sum or sums as the General Manager Telecom, Gangtok, Sikkim may decide to be reasonable compensation for loss or inconvenience caused. The amount of the sum or sums for such breach on the part of

the CONTRACTOR will be fixed by the General Manager Telecom, Gangtok, Sikkim and shall be final and conclusive against the CONTRACTOR."

27. Clause 3 of the agreement provides a definite time frame for execution of the contract extendable by one more year as per discretion of the General Manager. Clause 6 mandates that the plaintiff No.1 complete the work within the time to be provided in the work order. The work order provided that the work should be completed within 45 days. Clause 8 provided time was of the essence. However, clause 9 provided for payment of penalty or recovery at the rate prescribed if the plaintiff no.1 failed to carry out any of its obligations under the agreement. Clause 8 providing that time was of the essence was also one of the obligations under the agreement. Clause 14 further provided that the security deposit was liable to be appropriated as liquidated damages by the defendant on the failure of the plaintiff No.1 to duly and faithfully perform all the covenants and to satisfactory fulfill, keep and observe all or any of the covenants, conditions of agreement. The agreement must be read in its entirety and not individual clause alone. True intent of the parties needs to be ascertained.

28. In ***Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates (P) Ltd.***[1] the Supreme Court held:

"***50.*** *By referring to various judgments, the Constitution Bench in Chand Rani (1993) 1 SCC 519] formulated the proposition that even where parties have expressly provided time to be of the essence of the contract, such a stipulation will have to be read along with other terms of the contract. Such other terms, on a proper construction, may exclude the inference that the completion of work by a particular date was meant to be fundamental. The learned Judges indicated the following circumstances which may indicate a contrary inference; (a) if a contract includes clauses providing for extension of time in certain contingencies, or (b) if there are clauses for payment of fine or penalty for every day or week,*

[1](2011) 9 SCC 147

> *the work undertaken remains unfinished after the expiry of time. The Constitution Bench held that such clauses would be construed as rendering ineffective the express provision relating to time being of the essence of contract (see para 22 at p. 528 of the Report).***"**

29. Reading the agreement in its entirety it is held that clauses for imposition penalty and forfeiture of the security deposit for nonadherence to the covenants also diluted clause 8 of the agreement.

30. The work was to be completed under the supervision of Jay Prakash Thapa. The defendant admits that the plaintiffs had done some work although not as contemplated within the initial time frame in the work order. The defendant admits to the extensions of time granted by them to the plaintiff and in fact exhibited various correspondences to that effect. The defendant also admits that they have not yet taken any action against the plaintiffs for the plaintiffs' nonadherence to the time schedule. Admission in pleadings, if true and clear are the best proof of the facts admitted. Admission in pleadings are judicial admissions and admissible under Section 58 of the Indian Evidence Act, 1872. It stands on a higher footing than evidentiary admissions, fully binding and constitutes waiver of proof. Facts admitted need not be proved unless the court requires otherwise.

31. The defendant contention that time was the essence of the agreement despite the extensions granted seems to have appealed to the learned Trial Court. The learned Trial Court relied upon the judgment in ***Orissa Textile Mills Ltd. vs. Ganesh Das Ramkishun***[2] and ***Dr. Bal Saroop Daulat Ram vs. Lt. Col. Lakhbir Singh Kirpal Singh***[3] to hold that:

> **"***it is trite that if the time is originally of the essence of the contract it does not seize to be of the essence merely because a party agrees to short extensions. Instead, such brief extension may at the most amount only to a waiver to the extent of substituting such extended time for the original time and does not destroy the essential character of time.***"**

[2] **AIR 1961 Patna 107**
[3] **AIR 1964 Punjab 375**

32. In ***Orissa Textile Mills*** (supra) the Patna High Court was examining a revision application against the judgment of the learned Small Cause Court, Judge, decreeing the plaintiff's suit for damages for breach of contract. The plaintiff had placed the order with the defendant no.1 through its selling agent for supply of five bales. The goods were to be delivered within January 1956. The order had been accepted by the defendant no.1. Out of these five bales, only one bale was supplied to the plaintiff till February 1956, but the remaining four bales were not at all supplied by the defendant to the plaintiff. The plaintiffs were informed that they would deliver the remaining bales if they agreed to pay the new excise duty. The defendant No.1 was informed that the plaintiff was prepared to take delivery of the remaining bales but only at the old contract rate. The remaining goods were therefore, not supplied. The suit was, thereafter, filed for recovery of damages for breach of contract. On facts it was held that the plaintiff in his order had fixed the month of January 1956 for the fulfillment of contract. The defendants while accepting the plaintiff order had extended the time of delivery to the end of February 1956. Both the parties conceded before the court that the plaintiff agreed to the extension of time and therefore end of February 1956 was the date fixed for the fulfillment of contract. It was in such fact situation that the Patna High Court held: -

> ***"16.*** *This extension of time by the defendants and its acceptance by the plaintiff clearly shows that time was of the essence of the contract. Where time is of the essence of the contract and is extended the extended date is also of the essence of the contract the time of delivery was certainly a necessary term, and that is the reason why the parties intended it to be a term of the contract. The letter sent by defendant 2 in March, 1956, Exhibit A (1), offering to supply the remaining goods in March, 1956, on the plaintiff agreeing to pay the new Excise Duty and the plaintiffs reply to it, Exhibit A, agreeing to accept the goods in March, 1956, at the old rate, but reluctant to pay the new Excise Duty, also point to time being of the essence of the contract. In my opinion, therefore, the learned Judge has rightly held that time was of the essence of the contract."*

33. In ***Dr. Bal Saroop Daulat Ram*** (supra) the Punjab and Haryana High Court was examining the plaintiff's first appeal against the judgment and decree dismissing his suit for specific performance of the agreement to sell relating to a bungalow in Amritsar. The Punjab & Haryana High Court held:

> ***"46.*** *On the facts and circumstances of the case in hand, time was presumably of the essence and this view seems to find additional support from the subsequent conduct of the parties. The fact that the vendor granted some extension for specified period would not seem to detract from the intention of making time of the essence; it may on the contrary support the existence of such an intention. But as I have observed earlier, in view of the finding that there was no term of delivery of vacant possession, and that the plaintiff-appellant had repudiated performance of his part of the contract without getting vacant possession it is unnecessary to express any considered view on this point***".**

34. In both the judgments cited above, the High Court of Patna as well as the Punjab and Haryana High Court have held that time was of the essence as it was specifically agreed between the parties that it would be done within the specified time.

35. The work order provided for a definite time frame of 45 days to complete the work. This was, however, extended by the defendant for a further period of 60 days. Thereafter, it was also extended for a period of 30 days taking the time for completion of the work till end of February 2009. This is an admitted position. However, admittedly the plaintiffs did not complete the work by the end of February 2009.

36. Section 55 of the Indian Contract Act, 1872 which is important at this juncture, provides:

> ***"55. Effect of failure to perform at fixed time, in contract in which time is essential.—*** *When a party to a contract promises to do a certain thing at or before a specified time, or*

certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

***Effect of such failure when time is not essential.**—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

***Effect of acceptance of performance at time other than that agreed upon.**—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."*

37. In ***M/s. Hind Construction Contractors vs. State of Maharashtra***[4] relating to building contracts, the Supreme Court relying upon the 4th edition of Halsbury's Laws of England held that even where the parties had expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instances, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken

[4] **(1979) 2 SCC 70**

remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

38. In ***Arosan Enterprises Ltd. v. Union of India***[5] the Supreme Court held:

> ***"13.*** *These presumptions of the High Court in our view are wholly unwarranted in the contextual facts for the reasons detailed below but before so doing it is to be noted that in the event the time is the essence of the contract, question of there being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension if there be any, should and ought to be categorical in nature rather than being vague or on the anvil of presumptions. In the event the parties knowingly give a go-by to the stipulation as regards the time — the same may have two several effects: (a) parties name a future specific date for delivery, any (b) parties may also agree to the abandonment of the contract — as regards (a) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. Be it recorded that in the event the contract comes within the ambit of Section 55, Contract Act, the remedy is also provided therein. For convenience sake Section 55 reads as below:*
>
> *"55. When a party to a contract promises to do a certain thing at or before a specified*

[5] **(1999) 9 SCC 449**

time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

14. *Incidentally the law is well settled on this score on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first para of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise.***"**

39. If time had been of the essence, on the failure of the plaintiffs to complete the work on time, the agreement would become voidable at the option of the defendant. However, the defendant admittedly has not terminated the agreement or taken any action contemplated under the agreement. Jay Prakash Thapa as well as Deepak Agrawal both admits that the defendant had not terminated the contract/work order. There is not a single correspondence after the extended completion period or material placed which reflect that any action was taken or even contemplated by the defendant. In fact, it is the defendant's case that the plaintiffs had not completed the work even till January 2011 which gets established from the correspondence written by the defendant dated 28.01.2011 (exhibit-P) filed by the plaintiffs before the Lok Adalat. The defendant has extracted the contents of exhibit-P in the written statement and exhibited it through Deepak Agrawal. This admitted correspondence is of relevance. The contents are extracted below:

> **"***Sir,*
>
> *This is for your kind information and necessary action to the fact that only approximately 10% u/g cable laying byyour concern has become up to date with respect to point to point verification under Namchi jurisdiction vide work order no-22D(a)/05-06 dt 25/9/08 as intimated from our T.M. Station Namchi.*
>
> *Henceforth you are requested to arrange for completion of rest as early as possible especially at the eve of visiting of Honble Prime Minister on 12/2/2011.***"**

40. This correspondence establishes that the defendant had requested the plaintiffs vide letter dated 28.01.2011 to complete making up to date the cable laying with respect to point-to-point verification "*as early as possible*" especially on the eve of the Hon'ble Prime Minister's visit and

kept it open ended. This correspondence establishes that the point-to-point verification of the underground cable laying by the plaintiffs had been completed only up to 10%. This was not a complaint of complete non completion of work which as per defendant's witness Jay Prakash Thapa was done in the year 2010. The work order did not specify point-topoint verification and the defendant have not pleaded what work remained to be completed. Thus, it would not be possible for this court to agree to the view taken by the learned Trial Court that although time was of the essence of the contract, it did not cease to be of the essence merely because the defendant agrees to grant short extensions. The learned Trial Court seems to have failed to examine the correspondence in his correct prospective. The learned Trial Court seems to have ignored the pleadings in the written statement as well as affidavit on evidence of Deepak Agrawal which clearly takes a position that the plaintiff had not completed the work till January 2011 which was established by exhibit-P. With such clear stand taken by the defendant there was no reason for the learned Trial Court, with great respect, to wonder about the reason for the issuance of the letter dated 28.01.2011 as being abruptly and hastily issued to the plaintiffs. Thus, if, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the nonperformance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. A voidable contract is a contract that can be affirmed or rejected at the option of one of the parties or in other words the contract which, in its inception, is valid, but which may be avoided i.e. rendered void at the option of one of the parties. The defendant however, as seen from its conduct, has not avoided the contract but continued to request the plaintiffs to complete the work even in the year 2011.

41. Deepak Agrawal exhibited the measurement book of the contract (exhibit-O), the copy whereof was exhibited by the plaintiff No.2. He has also exhibited the work certificate (exhibit-K) forming part of the measurement book. Jay Prakash Thapa admitted he supervised the work and wrote the

work certificate. He admitted in cross-examination that he had mentioned that the work had been completed on 28.02.2010 by the plaintiffs in the work certificate. In his evidence on affidavit, he has however, stated that the plaintiff no.2 executed the work by successfully completing only 60% of the underground cable and did not complete 40% of the work and out of the 60% assigned work only 10% of underground laying cables was made up to date with respect to point-to-point jointing/joining work. It is settled that the documents speak for itself. Section 94 of the Indian Evidence Act, 1872 provides when language used in a document is plain, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The work certificate reads thus:

> **"***work certificate*
>
> *It is certified that the excavating, trenching, construction of cabinet, pillar and laying of U/G cable has been tested and 60% U/G cable pair found ok. The work has been completed on 28.2.2010.***"**

42. Further, Jay Prakash Thapa stated that he had himself mentioned in the work certificate that the work has been completed on 28.02.2010 by the plaintiffs. He had also admitted that since he worked in the field, he could say that it was not possible for contract work to be completed within the stipulated time mentioned in the work order. There is also clear admission of Deepak Agrawal that the plaintiffs had in fact done work to the extent of 60%. Thus, in any case this was not a case in which no work at all was done. Be that as it may there is no dispute about the contents of the measurement book filed by the defendant. Deepak Agrawal admits that the progress of the work in the measurement book was recorded by the defendant's engineers. The total work done quantified in terms of money is reflected as Rs.12,13,321/- therein. The measurement book records the date of commencement as 21.11.2008 and date of completion as 28.02.2010. The measurement book also reflects that the work continued even after the end of February 2009 which according to the defendant was

the last extension. The plaintiff No.2 has stated that on 04.07.2012 the Sub Divisional Engineer submitted the total contractor's bill along with the measurement book to the defendant for further action. The letter dated 04.07.2012 written by the Sub Divisional Engineer to the General Manager submitting the contractors bill as enclosed has been exhibited as exhibit-11 by the plaintiffs and the bills as exhibit-12. The defendant has denied that the Sub Divisional Engineer has submitted the contractor's bill to the defendant's office by contending it was the contractor's job to do so. The defendant has admitted that the concerned officer had forwarded the measurement book. The Sub Divisional Engineer's letter dated 04.07.2012 (exhibit-11) however, forwards both the bill and the measurement book together. Although, the plaintiffs had furnished a copy of the bill (exhibit-12) the defendant has not denied the contents thereof. The plaintiff no.2 also stated that the original bill is in the possession of the defendant. The plaintiff no.2 was not cross-examined on this aspect by the defendant and therefore, there is no denial of the contents of the bill. The bill is dated 15.06.2012 and contain the particulars, quantity, rate and the amount and totals to Rs.12,97,412/- only round about the same figure of Rs.12,13,321/- as reflected in the measurement book. Deepak Agrawal admits that the plaintiffs had written several letters reminding the defendants to make the payment. These correspondences have also been exhibited by the plaintiffs.

43. In view of all the above facts, circumstances and applying the ratio of the judgment as discussed above, it must be held that although the clause 8 of the agreement provided time was of the essence, the conduct of the defendant allowing extensions and finally the open ended one, time no longer remained of the essence. As held above, the defendant by their own act had waived their right to make the contract voidable, even if the penalty and forfeiture clauses are ignored, and permitted the plaintiffs to continue the work. No action of termination, forfeiture or imposition of penalty has been taken by the defendant against the plaintiffs. Having thus, extended the time for completion of work even till 2011 and requiring the plaintiffs to do the work as indicated in the measurement book at their own costs, it would not be correct on the part of the defendant not to pay the plaintiffs what was

legitimately due to them for works already completed. There is no dispute about the measurement book which reflects the amount of Rs.12,13,321/- as work done till then. Therefore, this court is of the view, that the plaintiffs are entitled to a decree of the aforesaid amount of Rs.12,13,321/-.

44. In the entirety of the records of the case there is not a single correspondence from the defendant disputing the reasons mentioned by the plaintiffs in their correspondences seeking extension save complaining that the progress was slow. Although the defendant did threaten departmental action because of slow progress no action was taken. There is no correspondence from the defendant complaining of non-completion of work after the last communication on 06.02.2009 (exhibit-I) till 28.01.2011 (exhibit-P). There was a duty for the defendant to speak and its failure to do so constitutes a waiver of the delay in execution of the work. Under clause 17 of the agreement the plaintiffs' bill became payable within two months of its submission.

45. It is held that the payment became payable on 03.09.2012 i.e. before the expiry of the two months of submission of bill on 04.07.2012. Therefore, the defendant is also liable to pay interest thereon at the rate of 6% per annum from 03.09.2012 till date of actual payment on the amount of Rs.12,13,321/-.

46. The appeal is allowed. The impugned judgement and decree of the learned Trial Court are set aside. In the facts of the present case, no order as to costs.

47. The decree may be drawn accordingly.

SLR (2021) SIKKIM 557

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

R.F.A. No. 2 of 2019

Ram Naresh Giri ….. APPELLANT

Versus

Krishnawati Devi and Others ….. RESPONDENTS

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

For the Respondents: Mr. Udai P. Sharma, Legal Aid Counsel.

Date of decision: 9th August 2021

A. Hindu Succession Act, 1956 –Distribution of self-acquired property – It is now settled law that the father has the prerogative to distribute his self-acquired property as he desires. When the property is self-acquired by the father and he has the right of disposition over it, no exception can be taken by his sons/male descendants – Neither can the appellant seek an equitable distribution of the schedule "A" building nor does he have any entitlement to it merely by virtue of being the son of Thakur Giri and he can lay no claim of equitable share in it. If Thakur Giri chose not to execute a Will after execution of Exhibit-A, the appellant has no authority to question his decision.

(Paras 12 and 13(i))

B. Indian Easements Act, 1882 – S. 52 – License – Reference to S. 52 of the Indian Easements Act of 1882, pertaining to license, in paragraph 44 of the impugned judgment is uncalled for and irrelevant, for the reason that license does not create any interest in the property which it relates. It only confers legality on an act which would otherwise become unlawful. The issue in the suit is not concerned with license at all.

(Paras 13(iv))

Appeal dismissed.

Chronology of cases cited:

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

2. Govindbhai Chhotabhai Patel and Others v. Patel Ramanbhai Mathurbhai, (2020) 16 SCC 255.

JUDGMENT

Meenakshi Madan Rai, J

1. Aggrieved with the Judgment in Title Suit No.02 of 2016, dated 31.12.2018, of the Learned District Judge, Special Division-I, Sikkim at Gangtok, whereby the Learned Trial Court dismissed the Appellants Suit, the Appellant assails it herein.

2.(i) Learned Counsel for the Appellant advanced the argument that undisputedly the Appellants father Thakur Giri had three sons, the Appellant being his second son. Suresh Giri the eldest, is untraceable since 1996 and is the husband of Respondent No.1. She is the mother of Respondents No.2 and 3. Respondent No.4 the third son, suffered from mental illness from the year 2000 to 2005. That, in 1998, the Appellants father was allotted a plot of land measuring 12 feet x 10 feet vide Exhibit 1, by the Government of Sikkim wherein the Appellant constructed a four storeyed RCC building with his finances to the exclusion of his father and brothers. That, the dispute has arisen on account of inequitable distribution of the First Floor by their father, wherein two shops are being run by Respondents No.2 and 4 but a portion thereof was not allotted to the Appellant who claims one-third share in it. It was urged that in the alternative, the Respondents are liable to compensate him monetarily for his financial investment in the construction. That, the Appellant furnished sufficient evidence before the Learned Trial Court to establish his case, which was however disregarded. Even assuming that the evidence was inadequate, by right he was entitled to one-third share in his father s property, which was denied to him. The Learned Trial Court reasoned that Exhibit A said to be a *"Banda Patra"* executed by the Appellants father in their presence, had distributed the property at his discretion. That, the Learned Trial Court failed to appreciate that Exhibit A was executed by the *"Sikkim Bihari Jagran Manch, Branch Singtam, East Sikkim"* and not executed between the

father and his sons only, dividing the property in metes and bounds. While drawing the attention of this Court to the determination of the Issues framed, it was contended that Issues No.3 and 4 were erroneously concluded observing that the Appellant was not entitled to a share of the Schedule "B" property in the Schedule "A" building, the parties having been given their respective shares therein. That, the Learned Trial Court failed to appreciate that Thakur Giri, in his evidence Exhibit G, before the Sub Divisional Magistrate, East District at Gangtok, had stated clearly that he would draw up a "Will" later for distribution of the property and Exhibit A was only a stop gap arrangement for the purposes of residence and business not ownership, therefore the question of the Appellant having been allotted his respective share did not arise. That, although the Learned Trial Court relied on Exhibit G, it chose to ignore the deposition with regard to legal distribution of the said property.

(ii) In the next leg of his argument, Learned Counsel for the Appellant contended that the Learned Trial Court erred in concluding that the Appellant had not constructed the Schedule "A" building when, in fact, adequate evidence including documentary evidence was furnished to buttress this point, hence the Judgment of the Learned Trial Court be set aside and the Appellant be given his fair share.

3. Repelling the arguments of the Appellant, Learned Counsel for the Respondents submitted that in Prayer "a)" of the Plaint, he seeks one third-share on the First Floor of the building to be given to him for his absolute occupation and use, while in Prayer "b)," he seeks an order in his favour directing the Respondents to pay him monetary compensation for the investment he had made in the building. That, the Prayers are contradictory for the reason that either he ought to claim one-third share in the property, or monetary compensation for the investment made by him. Further, till his father was alive, he made no claims of financial investment, such claims have arisen post his fathers demise in 2013, the Suit having been filed on 15.01.2016, sans explanation for the delayed filing. That, the bone of contention is Exhibit A, dated 26.03.2006 but this document, with clarity, indicates division of the selfacquired property of Thakur Giri equally between his three sons. Paragraph "3." of Exhibit A categorically indicates that although two shops were given to his two sons, one *Paan Gomti* (betel shop) was given to the Appellant, thereby providing all of them with business avenues. Rather fairly, Thakur Giri had elucidated in Exhibit A that

should the *Paan Gomti* come to be closed by the Government then the two shops in the First Floor would be divided into three and the Appellant given one of the shops. Exhibit A was duly signed by Thakur Giri and the Appellants brothers Suresh Giri and the Respondent No.4. Despite his presence at the meeting, the Appellant refused to sign on the document which, in any event, is of no consequence since his father had chosen to distribute his self-acquired property as he saw best. If the Appellant was disgruntled by such distribution, he ought to have assailed it during the lifetime of his father apart from the fact that all the sons, including the Appellant, acted upon the contents of Exhibit A and took possession of the respective floors allotted to them in consonance with Exhibit A. That, there is no denial by the Appellant that Schedule "A" was a self-acquired property neither was any evidence furnished to prove the contrary. The vehement claim that the Appellant had incurred financial expenditure in the construction, failed to find support in the evidence brought forth by him as all such vouchers pertained to the year 2006, whereas the Schedule "A" premises were concededly completed in the year 2004, fortified by the fact that no documentary evidence emanated to establish that he had any source of income at the relevant time. In light of the arguments canvassed, the Judgment of the Learned Trial Court warrants no interference and the Appeal deserves a dismissal.

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

5. Before embarking on a discussion on the merits of the matter, we may briefly refer to the facts of the case. The Appellant as Plaintiff, filed a Suit for Partition, Declaration, Recovery of Possession and other Consequential Reliefs. The Appellants father vide Exhibit A, divided Schedule "A" property *viz.* one four storeyed RCC building, measuring 12 feet x 10 feet, at Singtam Bazaar, East Sikkim, amongst his sons i.e. the Appellant, Respondent No.4 and one Suresh Giri the husband of Respondent No.1. The building was constructed on the self-acquired property of Thakur Giri, the land being an allotment made by the Urban Development and Housing Department, Government of Sikkim vide Exhibit 1, dated 28.10.1998. Schedule "B" premises which houses two shops, were allotted to Respondent No.1s husband and to Respondent No.4. The Appellant is aggrieved that he was not allotted shop space in the Schedule

"B" premises. His additional grievance is that he is entitled to one-third share thereof, as he has solely constructed the Schedule "A" building apart from which he claims monetary compensation for his financial investment in Schedule "A." Hence, the prayers in the Plaint *inter alia* as follows:

> "a) Transfer of absolute/rightful possession in respect of proportionate share i.e. 1/3 on the first floor (Shop rooms) of the said building in his name for his absolute occupation and use.
>
> b) An order may kindly be passed in favour of the Plaintiff, directing the Respondents to pay the commensurate amount of their share on account of the construction materials used/ purchased by the Plaintiff during the construction of the said building, the said amount may kindly be paid to this Plaintiff.
>
> c) Any other relief or reliefs……"

6. The Respondents denied and disputed the claims of the Appellant and claimed that the Schedule "A" property being self acquired, could be distributed by Thakur Giri as he thought fit. That, the Appellant had no evidence to establish his claim of financing the construction of the building and his claims being false and baseless, are liable to be rejected with exemplary costs.

7. The Learned Trial Court settled the following issues for determination:

> *"(1) Whether the suit is maintainable? (OPP)*
>
> *(2) Whether the Plaintiff had constructed the Schedule-A building without any help or investment from the Defendants or his father Late Thakur Giri? And if so, whether he is entitled to be reimbursed for the expenses incurred by him(particularly, for the portions under occupation of the Defendants)? (OPP)*

(3) *Whether the Plaintiff is entitled to one-third share of the Schedule B property i.e., the first floor of the Schedule A building? (OPP)*

(4) *Whether the Schedule B property was given to the Defendant No.4 and Late Suresh Giri(husband of Defendant No.1 and father of Defendants No.2 & 3) during the partition done by their father Late Thakur Giri on 26.03.2016*(sic)*? (OPD)"*

8. The Appellant filed his Evidence-on-Affidavit as PW1 and that of his seven witnesses *viz.* PW2 Parsuram Giri, PW3 Prabhunath Giri, PW4 Dhan Kumar Kami, PW5 Dawa Tamang, PW6 Ram Shankar, PW7 Sambhu Giri and PW8 Basisth Singh. The Respondents filed the Evidence-on-Affidavit of Respondent No.3 as DW1 and their witnesses DW2 Gayatri Devi, DW3 Nanda Kishore Prasad and DW4 Basanti Giri.

9.(i) After examining the evidence of the witnesses and hearing the arguments of Counsel for the parties, the Learned Trial Court took up Issue No.2 first for discussion. The Court examined the certified copies of various vouchers/payments (Exhibit 4 to Exhibit 18) and found that Exhibits 5, 7, 11, 13 and 16 were prepared on various dates in the year 2006, two years after completion of the Schedule "A" building, these documents resultantly did not support the Appellants case. Exhibits 8 and 9 revealed various sums of money were taken by the Appellant but as loan in his fathers name. The authors of Exhibits 4, 6, 12, 14, 15, 17 and 18 were not produced before the Court by the Appellant. Exhibit 10 was discarded by the Court for the reason that it was improbable that accounts from July, 1999 to July, 2004 would have been maintained on a single slip of paper. Exhibit 37, said to be admissions by Respondents No.2 and 3 of the fact that the Appellant had incurred expenditure for construction of the Schedule "A" building, were disregarded by the Learned Trial Court lacking substantiation of the claims as required by the provisions of the Indian Evidence Act, 1872. Exhibit 38 was also rejected as the author of the document was not produced as a witness. On the other hand, the Court observed that the Respondents had failed to prove that there was any financial contribution made by them

towards the construction of the Suit building which, it emerged in evidence, was solely constructed by Thakur Giri as proved by Exhibit B, a Mortgage Deed, indicating that he had obtained loan from a financial Institution *viz.* SIDICO in Sikkim after mortgaging the Schedule "A" property. Exhibit D, which was produced by the Respondents to prove that Thakur Giri had taken loan from his daughter Gayatri Devi for construction of the Third Floor of the Schedule "A" building, was rejected having been found suspicious, as the Stamp Paper on which the loan agreement was executed, was admittedly manufactured by the Sikkim Government in the year 2018, whereas the execution of the contents were said to have been prepared and signed in 2004. Resultant, Issue No.2 was decided in the negative.

(ii) Issues No.4 and 3 were next taken up together and it was observed that vide Exhibit A, Thakur Giri had distributed the various floors of the Suit building amongst his sons. That, the property was neither joint family property nor ancestral property, in which the sons of Thakur Giri would have any interest while he was alive. That, Thakur Giri having distributed the various floors of the Suit building vide Exhibit A, amounted to irrevocable license in favour of his sons in terms of Section 52 of the Indian Easements Act, 1882 and the Appellant was not entitled to any share in the First Floor of the Suit building. Issue No.4 was decided in the affirmative and Issue No.3 in the negative.

(iii) On Issue No.1, the Learned Trial Court concluded that in view of the findings on the various Issues, the Suit cannot be held as maintainable and the Issue decided accordingly.

10. The Issues that arise for determination by this Court are;

1. Whether the Appellant is entitled to onethird share in the Schedule "B" premises which exists in Schedule "A" building, the self-acquired property of his father? and
2. Whether the Appellant constructed the Schedule "A" building by investing financially to the exclusion of his father and brothers?

11. While considering the first Issue as settled by this Court *supra*, the undisputed fact is that the property is the selfacquired property of Thakur

Giri having been allotted to him vide Exhibit 1. Consequently, vide Exhibit A he distributed the property amongst his sons and the contents of Exhibit A have been duly proved and admitted by the parties. It is now settled law that the father has the prerogative to distribute his self-acquired property as he desires. In this context, beneficial reference may be made to the decision of the Honble Supreme Court in ***C.N. Arunachala Mudaliar vs. C.A. Muruganatha Mudaliar and Another***[1], wherein it was held *inter alia* as follows;

> "**8.** For a proper determination of the question, **it would be convenient first of all to refer to the law laid down in Mitakshara in regard to the father's right of disposition over his self-acquired property and the interest which his sons or grandsons take in the same**. Placitum 27, Chapter I, Section 1 of Mitakshara lays down:
>
> > "It is settled point that property in the paternal or ancestral estate is by birth, though the father has independent power in the disposal of effects other than the immovables for indispensable acts of duty and for purposes prescribed by texts of law as gift through affection, support of the family, relief from distress and so forth; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether *acquired by himself* or inherited from his father or other predecessors since it is ordained, „though immovables or bipeds have been acquired by man himself, a gift or sale of them should not be made without convening all the sons". Mitakshara insists on the religious duty of a man not to leave his family without means of support and concludes the text by saying: "They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support. No gift or sale should therefore be made."

[1] **AIR 1953 SC 495**

9. Quite at variance with this precept which seems to restrict the father's right of disposition over his self-acquired property in an unqualified manner and in the same way as ancestral lands, there occur other texts in the commentary which practically deny any right of interference by the sons with the father's power of alienation over his selfacquired property. Chapter 1, Section 5, Placitum 9 says:

> **"The grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from the grandfather: but he has no right of interference if the effects were acquired by the father. On the contrary he must acquised, because he is dependent."**

The reason for this distinction is explained by the author in the text that follows:

> **"Consequently the difference is this: although he has a right by birth in his father's and in his grandfather's property; still since he is dependent on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property."**

…….....…….....

The question came pointedly for consideration before the Judicial Committee in the case of *Rao Balwant* v. *Rani Kishori* [25 IA 54] and Lord Hobhouse who delivered the judgment of the Board, observed in course of his judgment that in the text books and commentaries on Hindu law, religious and moral considerations are often mingled with rules of positive law. It was held that the passages in Chapter

I, Section 1, Verse 27 of Mitakshara contained only moral or religious precepts while those in Section 5, Verses 9 and 10 embodied rules of positive law. **The latter consequently would override the former. It was held, therefore, that the father of a joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his selfacquired immovable property and his male issue could not interfere with these rights in any way. This statement of the law has never been challenged since then and it has been held by the various High Courts in India, and in our opinion rightly, that a Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons** [Vide *Muddun* v. *Ram*, 6 WR 71] **but he can make a gift of such property to one of his own sons to the detriment of another** [Vide *Sital* v. *Madho*, ILR 1 All 394] ; **and he can make even an unequal distribution amongst his heirs** [Vide *Bawa* v. *Rajah*, 10 WR 287].

.....

11. In view of the settled law that a Mitakshara father has right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest. .....The other ground put forward is that the definition of "selfacquisition" as given by Mitakshara does not and cannot comprehend a gift of this character and consequently such gift cannot but be partible property as between the donee and his sons."

(Emphasis supplied)

12. More recently in ***Govindbhai Chhotabhai Patel and Others vs. Patel Ramanbhai Mathurbhai***[2], the Honble Supreme Court, observed *inter alia* thus;

> "**5.** The findings recorded by the High Court, inter alia, are that execution of the gift deed was not specifically denied in the suit filed. Therefore, it is not necessary for the donee to examine one of the attesting witnesses in terms of the proviso to Section 68 of the Evidence Act, 1872 (for short "the Evidence Act"). It is also held that the suit property is not ancestral property. The property was purchased by Ashabhai Patel, father of the donor and it is by virtue of will executed by Ashabhai Patel, property came to be owned by the donor in the year 1952-1953. The High Court, thus, held that the donor was competent to execute the gift deed dated 15-11-1977 as the property was not ancestral in the hands of donor. The relevant findings on such questions which arose for consideration in the second appeal, read as under:
>
> "……..
>
> ***105*. The case of the plaintiffs is very specific. According to them, the suit properties were purchased by their grandfather and those properties came to be devolved upon their father by testamentary disposition i.e. on the strength of the will of their grandfather. The Hindu law, as it stands today, clearly postulates that if it is a self-acquired property of the father, it falls into the hands of his sons not as coparcenary property, but would devolve on them in their individual capacity. Where the property is a self-acquired property of the father, it falls into the hands of his son in his individual capacity and not as coparcenary property in such case son's son cannot claim right in such property.**
>
> * * *

[2] (2020) 16 SCC 255

.....

114. **In view of the above, I hold that the suit properties were self-acquired properties of the father of the plaintiffs, and in such circumstances, it was open for the father of the plaintiffs to execute the gift deed in favour of the defendant**."

....."

(Emphasis supplied)

The ratiocinations extracted *supra* propound with clarity the position of law when the property is self-acquired by the father and he has the right of disposition over it, to which no exception can be taken by his sons/male descendants, as in the instant case.

13.(i) Exhibit A has been executed by Thakur Giri in the presence of the *"Sikkim Bihari Jagran Manch"* and in the presence of his two sons and he was clothed with the discretion to dispose of his self-acquired property as he deemed fit. Further arguments on this point stand truncated in view of the established position of law, suffice it to add that neither can the Appellant seek an equitable distribution of the Schedule "A" building nor does he have any entitlement to it merely by virtue of being the son of Thakur Giri and he can lay no claim of equitable share in it. If Thakur Giri chose not to execute a Will after execution of Exhibit A, the Appellant has no authority to question his decision.

(ii) PW3 runs a stationery business and claimed to have loaned Rs.45,208/- (Rupees forty five thousand, two hundred and eight) only, to the Appellant and construction materials including bricks. Considering that he runs a stationery business, it is not explained as to how he would be in a position to supply construction materials to the Appellant. Exhibit 10, said to support this transaction is dated 15.11.2004 but does not specify that it was for construction of the Schedule "A" building.

(iii) As observed by the Learned Trial Court, it is highly unlikely that accounts from the year July, 1999 to July, 2004 could have been maintained on a single slip of paper with no history of repayment during the five years. Evidently, it is a document prepared for the purposes of this Suit and cannot

be said to be unimpeachable. Exhibits 5, 7, 13 and 16 came into existence after October, 2006 except Exhibit 11 which is dated 20.10.2006. Although the Appellant relied on Exhibit 8 and Exhibit 9 as loan documents, however, PW2 while identifying Exhibit 9, deposed that the document revealed that Rs.8,000/- (Rupees eight thousand) only, cash had been taken in the name of the Appellants father from one Balbachan Giri as loan for construction of a house. PW7 Sambhu Giri, son of Balbachan Giri also identified Exhibit 9 and supported the evidence of PW2 to the extent that the loan was taken by the Appellant in the name of his father. It is not their evidence that the Appellant had taken the loan personally. The evidence of the masons, PW4 and PW5 who deposed that payments used to be made by the Appellant during the construction of Schedule "A" building, does not establish that the payment incurred for their wages was his exclusive expenditure, this is fortified by the fact that the Appellant has not furnished evidence to reveal his income at the relevant time. If the Appellant was constructing the house single handedly, why would the need arise for him to take monetary loan from all and sundry in his fathers name? Exhibits 4, 6, 12, 15, 17 and 18 have no probative value, the contents of the documents remaining unproved. Schedule "A" building was completed in the year 2004, the money receipts are of 2006, and therefore can be met with nothing but disbelief and points to manufacturing of evidence rather unsuccessfully. The Learned Trial Court has correctly concluded that Exhibits 5, 7, 11, 13 and 16 were prepared post the construction *viz.* in the year 2006, two years after construction of Schedule "A" building which admittedly was completed in 2004. Exhibits 23 and 24 are Government Revenue Receipts in the name of Thakur Giri, dated 07.04.2003 and 06.01.2000 respectively, whereby he has deposited Ground Rent. These documents were identified by the Appellant himself and buttress the fact that as owner of the building on the allotted land, he was responsible for payment of the Ground Rent.

(iv) The issue of inequitable distribution of the Schedule "A" building and of the Appellant having financed it, arose only after the death of Thakur Giri. Even during the preparation and execution of Exhibit A, the Appellant made no such claim. This fact by itself fails to lend credence to the belated claims of the Appellant. At this juncture, it may be remarked that reference to Section 52 of the Indian Easements Act of 1882, pertaining to License, in Paragraph 44 of the impugned Judgment is uncalled for and irrelevant, for the reason that License does not create any interest in the property which it relates. It only confers legality on an act which would otherwise become

unlawful. The issue in the Suit is not concerned with License at all. Having said that, both the Issues *supra* are thus determined against the Appellant.

14. That apart, although it is not the subject matter of the Suit but from the evidence it can be culled out that the Appellant though not given a shop in the four storeyed building, was given a *Paan Gomti* in Singtam Bazaar for the purposes of running his business.

15. Hence, in consideration of the entirety of the facts and circumstances hereinabove, I find that the Judgment of the Learned Trial Court brooks no interference.

16. Appeal fails and is dismissed.

17. RFA disposed of accordingly, as also I.A. No.01 of 2019.

18. No order as to costs.

19. Copy of the Judgment be sent to the Learned Trial Court for information, along with its records.

SLR (2021) SIKKIM 571

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

WP (C) No. 4 of 2021

Naina Kala Sharma and Others ….. PETITIONERS

Versus

Deepak Kumar Rai ….. RESPONDENT

For the Petitioners: Mr. Yam Kumar Subba, Advocate.

For the Respondent: Mr. N. Rai, Senior Advocate with
Ms. Vani Vandana Chhetri, Advocate.

Date of decision: 9th August 2021

A. Code of Civil Procedure, 1908 – O.6 R.17 – Amendment of pleadings – Protection of Women from Domestic Violence Act, 2005 – S. 26 – Relief in other suits and legal proceedings – If any suit or legal proceedings affecting the person is pending before a Civil Court, a Family Court or a Criminal Court, S. 26 gives an option to the aggrieved person to seek any relief available under Ss. 18,19, 20, 21 and 22 of the Act in the said proceeding – No independent application under the D.V. Act is maintainable before the Civil Court or the Family Court if no proceedings are pending before them affecting the aggrieved person and the respondent. If this be the circumstance, then the party is required to approach the Magisterial Court in terms of the provisions of S. 12 of the Act – No anomaly arises in the instant matter should the amendment be allowed in view of the clear provision of S. 26 – Impugned order set aside – Amendment permitted.

(Paras 7 and 9)

Petition allowed.

Chronology of cases cited:

1. Vaishali Abhimanyu Joshi v. Nanasaheb Gopal Joshi, (2017) 14 SCC 373.
2. Gurdial Singh and Others v. Raj Kumar Aneja and Others, (2000) 2 SCC 445.
3. Raghbinder Singh v. Darshan Singh, 1999 SCC OnLine P&H 1223.
4. Subba v. Sukhim Yakthung Sapsok Songjumbho, 2019 SCC OnLine Sikk 117.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. Heard Learned Counsel for the parties.

2. Learned Counsel for the Petitioners submits that he is aggrieved by the impugned Order in Title Suit No.03 of 2019 in the Court of the Learned Civil Judge, West District at Gyalshing, dated 23.02.2021, on grounds that the Learned Trial Court rejected his petition filed under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (for short, "CPC"). The attention of this Court was drawn to the application filed before the Learned Trial Court and it was submitted that the Petitioner No.1 is the divorced wife of the Respondent therefore she has the right to stay in the property she is occupying presently, as envisaged by Section 19 of the Protection of Women from Domestic Violence Act, 2005 (for short "D.V. Act"). That, this was the only amendment that he sought to insert in the Written Statement which was inadvertently omitted. That, the Learned Trial Court vide the impugned Order however observed that the Learned District Judge in Title Suit No.43 of 2013 (*Mrs. Naina Kala Sharma and Others vs. Deepak Kumar Rai)* held that the Defendants cannot be regarded as having any right, title and interest over the Suit property and thereby rejected the application. Relying on the decision of the Hon'ble Supreme Court in ***Vaishali Abhimanyu Joshi vs. Nanasaheb Gopal Joshi***[1], it was contended that the Petitioners have the right to insert this averment as provided by Section 26 of the D.V. Act. Hence, the Learned Trial Court be directed to allow the amendment.

[1] **(2017) 14 SCC 373**

3. *Per contra*, Learned Senior Counsel for the Respondent submits that in the first instance, the petition under Order VI Rule 17 read with Section 151 of the CPC filed by the Petitioners does not even mention the proposed amendment and is therefore vague. That, when the amendment is vague, it ought not to be allowed as held in ***Gurdial Singh and Others vs. Raj Kumar Aneja and Others***[2]. Reliance was also placed on the decision of the Hon'ble Punjab and Haryana High Court in ***Raghbinder Singh vs. Darshan Singh***[3]. That, Section 26 of the D.V. Act provides for reliefs only when a case under the D.V. Act is pending before the Learned Magisterial Court and no relief accrues to the Petitioners in the instant Suit pending before the Court of the Learned Civil Judge. Hence, the petition be rejected as the observations of the Learned Trial Court require no interference.

4. I have heard the rival contentions of Learned Counsel for the parties. I have also perused the records placed before me.

5. From the petition filed by the Petitioners under Order VI Rule 17 read with Section 151 of the CPC, before the Learned Trial Court, it can be culled out that the following sentence is sought to be inserted in the Written Statement by way of amendment;

> *"3. That the defendant no.1 is the divorced wife of the plaintiff, due to which, the defendant No.1 has right to stay in the shared property as it is conferred by the section 19 of the Protection of Women from Domestic Violence Act, 2005* (sic)*."*

6. At this juncture, it is relevant to go through the provisions of Section 26 of the D.V. Act which provides as follows;

> "**26. Relief in other suits and legal proceedings.—**(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

[2] **(2000) 2 SCC 445**

[3] **1999 SCC OnLine P&H 1223**

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

7. The mandate contained in Section 26 of the D.V. Act *supra* is therefore clear and requires no further elucidation. If any suit or legal proceedings affecting the person is pending before a Civil Court, a Family Court or a Criminal Court, Section 26 gives an option to the aggrieved person to seek any relief available under Sections 18, 19, 20, 21 and 22 of the Act in the said proceeding. I hasten to clarify that no independent application under the D.V. Act is maintainable before the Civil Court or the Family Court if no proceedings are pending before them affecting the aggrieved person and the Respondent. If this be the circumstance, then the party is required to approach the Magisterial Court in terms of the provisions of Section 12 of the Act. That having been said, no anomaly arises in the instant matter should the amendment be allowed in view of the clear provision of Section 26 *supra*.

8. That apart, it is relevant to point out that this Court in ***S.P. Subba vs. Sukhim Yakthung Sapsok Songjumbho***[4], at Paragraph 5 of the Judgment, has observed that;

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

[4] **2019 SCC OnLine Sikk 117**

> administration of justice. Amendments are essentially to *Shri S.P. Subba* v. *Sukhim Yakthung Sapsok Songjumbho (Sikkim Limboo Literary Society)* be allowed to prevent multiplicity of proceedings and for dispensing even handed justice."

9. Concededly, the stage before the Learned Trial Court presently is for examination of the parties under Order X of the CPC, hence in my considered opinion no prejudice is being caused to the Respondent as the matter is in the early stage of the trial. It is also relevant to observe that the right, title and interest of the Petitioner No.1 has undoubtedly been settled in T.S. No.43 of 2013, however, the amendment seeks to insert reliefs under Section 19 of the D.V. Act which, thus, has to be differentiated. Accordingly, the impugned Order dated 23.02.2021 is hereby set aside. The amendment is permitted. The Learned Trial Court shall allow the amendment sought to be inserted in the Written Statement to prevent obstruction of the course of substantial justice.

10. Writ Petition allowed and disposed of accordingly, as also I.A. No.01 of 2021.

11. The observations made hereinabove will have no consequences on the merits of the matter which shall be considered independently at the time of trial.

SLR (2021) SIKKIM 576

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

WP (C) No. 56 of 2018

Jyoti Agarwal ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Appellant: Mr. Pushkar Mehrotra and Mr. Saurav Singh, Advocates.

For Respondents 1-2: Dr. (Ms.) Doma T. Bhutia, Additional Advocate General with Mr. S.K. Chettri, Government Advocate.

For Respondent 3: Mr. Karma Thinlay, Senior Advocate with Mr. Thinlay Dorjee Bhutia, Advocate.

For Respondents 4-5: None.

Date of decision: 16th August 2021

A. Constitution of India – Article 226 – Petitioner claims to have enrolled in M.A. (Math) under Distance Education Programme in EIILM University for the 2010-2012 session. She claimed to have appeared in the internal and external examinations conducted by the University and cleared the examinations in the First Division – As per the UGC notification, State Universities (both private and Government funded) could offer programmes only within the State and Deemed Universities from the Headquarters and in no case outside the State. That, Deemed Universities and Central Universities were to adhere to the UGC norms. That, the territorial jurisdiction for the institutions (both private and Government funded) would be the headquarters and in no case outside the State. EIILM University was specifically directed to note that the territorial jurisdiction of their institution would be within the State of Sikkim. DEC prohibited franchising of study

centres and that EIILM University was not to franchise any study centre – No study centres of EIILM University were to be opened outside the territorial jurisdiction of the State of Sikkim – The fact of the subject of M.A. (Math) having been offered by EIILM University is denied and disputed by the UGC and no documents support the claim of the petitioner. It is no one's case that EIILM University was not a UGC recognized University. It is also no one's case that it was not empowered to grant Degrees on completion of the course. The only issue is that it did not offer M.A. (Math) in the Distance Education Programme as stands unraveled by all documentary evidence before this Court – Held: The larger question is whether this Court is in a position to declare valid, a degree granted for a non-existent subject alleged to have been offered by the EIILM University? This would be crossing the amplitude of all legal parameters and the answer would obviously be in the negative. Needless to add that the High Court, while exercising extraordinary jurisdiction under Article 226 of the Constitution, cannot perpetuate illegalities, irregularities or improprieties based on what evidently is a nebulous plea.

(Paras 10(ii), 15, 20 and 21)

Petition dismissed.

Chronology of cases cited:

1. Deepak Rajak v. Scheduled Caste Certificate Scrutiny Committee and Other, Special Leave to Appeal (C) No(s).27886/2019.
2. Vineet Singh and Another v. State of Sikkim and Others, 2016 SCC OnLine Sikk 210.
3. Shanti Lal v. State of Rajasthan, S.B. Civil Writ Petition No.9198/ 2017.
4. Prof. Yashpal and Another v. State of Chhattisgarh and Others, (2005) 5 SCC 420.
5. Sikkim Manipal University v. Indira Gandhi National Open University and Others, 2014 SCC OnLine Sikk 46.
6. Deepak Rajak v. Scheduled Caste Certificate Scrutiny Committee and Others, 2019 SCC OnLine MP 4900.
7. Kumari Madhuri Patil & Another v. The Additional Commissioner, Tribal Development and Other, (1994) 6 SCC 241.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner, by filing the instant Writ Petition, seeks the following reliefs;

> **a.** Writ or Direction in the nature of Certiorari quashing the written Communication, dated 08.08.2018 (Annexure P-8), issued by the Human Resource Development Department, Government of Sikkim.
>
> **b.** Writ or Direction in the nature of Mandamus declaring the Degree, Master of Arts in Mathematics, obtained by the Petitioner from the Eastern Institute for Integrated Learning in Management University, Sikkim, as legal, genuine and valid for all purposes.
>
> **c.** Further orders as this Court may consider necessary.

2. The Petitioner assails the Communication, dated 08.08.2018, vide which the State-Respondents No.1 and 2 informed the Respondent No.4-C.M.P. College, Allahabad University, where the Petitioner was employed, that Master of Arts in Mathematics [for short, M.A. (Math)] is not a recognized Course in the University Grants Commission (UGC)/Distance Education Council (DEC) for the Eastern Institute for Integrated Learning in Management University, Sikkim (EIILM University). Therefore, the Degree of the Petitioner in the subject was neither valid nor genuine.

3. Learned Counsel for the Petitioner, advancing his arguments before this Court, submitted that the Petitioner has been a meritorious student all through her academic career. On graduating in History and Mathematics from the Allahabad University, she enrolled in the EIILM University for M.A. (Math) in the 2010-2012 Session, after making all relevant queries with regard to the validity of the Degrees conferred by the University, which was listed on the official Website of the Respondent No.3-UGC, as a recognized University. Similarly, the official Website of the EIILM University indicated that all Courses offered by it were UGC recognized. The Petitioner appeared in the Internal and External Examinations conducted by

the University for the Session 2010-2012 and successfully cleared the M.A. (Math) in the First Division. Pursuant thereto, she appeared in the Graduate Aptitude Test in Engineering in 2014 in which she duly qualified. On 22.06.2014, the Petitioner appeared in the Joint Council of Scientific and Industrial Research (CSIR)-UGC Test for Junior Research Fellowship and National Eligibility Test (NET) for Lectureship and emerged successful. That, thereafter she pursued a Doctoral Degree in Philosophy (Mathematics) in Motilal Nehru National Institute of Technology, Allahabad and cleared the First and Second Semester Examinations in 2017-2018. That, on applications being invited from eligible candidates for the post of Assistant Professor in the Department of Mathematics by the Respondent No.4, she applied for and was appointed in the said post, which she joined on 08.01.2018. That, the instant matter arose on an anonymous Complaint lodged with the College regarding the Petitioner's Degree, upon which the Principal sought information from State-Respondent No.2 and in response received the impugned Communication of 08.08.2018. It is urged by Learned Counsel for the Petitioner that the impugned Communication is absolutely vague lacking material facts. That, the EIILM University, Jorethang, Sikkim, was established in 2006 and under Section 22 of the University Grants Commission Act, 1956 (Act No.3 of 1956) (UGC Act), any University defined under Section 2 (f) of the UGC Act can grant/confer a Degree, on the Degree being notified by the Central Government under Section 22 (3) of the Act. That, Master of Arts is reflected in the Notification of the UGC issued on 07.06.1999, at Serial No.60 of Appendix-I of the UGC Act. Consequently, once the Degree was specified in the Notification, the question of the Petitioner's Degree being invalid does not arise. Admittedly, the EIILM University was dissolved by the State vide its Order dated 08.05.2015, however the Petitioner had already completed her Course and Degree awarded to her in 2013, hence the dissolution of the University has no effect on her Degree. Now, no explanation is forthcoming from any authority on why her Degree is invalid, which is prejudicial to her as she has completed several other Courses pursuant to her Degree in M.A. (Math). Moreover, her salary has also been withheld by the College where she was employed. Hence, the prayers in the Writ Petition *supra.* To buttress his contentions, Learned Counsel relied on the Order of the Hon'ble Supreme Court, dated 06.12.2019, in ***Deepak Rajak vs. Scheduled Caste Certificate Scrutiny Committee and Others***[1]. It

[1] **Special Leave to Appeal (C) No(s).27886/2019**

was argued that although the Petition therein was dismissed by the Hon'ble Madhya Pradesh High Court, the Hon'ble Supreme Court despite dismissing the Special Leave Petition, clarified in the Order that the impugned Order of the Madhya Pradesh High Court shall be confined to the M.D. Course and not to the M.B.B.S. Course. Reliance was also placed on the decision of this High Court in ***Vineet Singh and Another vs. State of Sikkim and Others***[2] and the Judgment of the High Court of Judicature for Rajasthan at Jodhpur, in ***Shanti Lal vs. State of Rajasthan***[3].

4. Learned Additional Advocate General for the State- Respondents No.1 and 2, while repelling the arguments raised by Learned Counsel for the Petitioner submitted that the EIILM University was closed down by the State in the year 2015, on account of the sale of fake Degrees and Certificates after Suo Motu FIR was registered against the sponsoring body of the University by the Sikkim Police in 2012. The University suspended Examinations on 24.12.2014 on account of the absence of the Management authorities including the Vice Chancellor, Registrar, Deputy Controller of Examination and other Faculty. Due to the chaotic situation that prevailed in the University, the State was constrained to interfere and after achieving a semblance of order with regard to holding of Examinations for Regular students, the University was dissolved. That, EIILM University issued the Degree in M.A. (Math) to the Petitioner without approval of the UGC-DEC, duly communicated vide the assailed Communication. That, the Petitioner herself has not revealed whether she was enrolled as a Regular student or by Distance Education Mode nor are there documents to buttress her claim that M.A. (Math) was a recognized Degree. While admitting that EIILM University was established by an Act of State Legislature of Sikkim as a Private University, it was contended that it was not authorized to open a Study Centre/Off Campus Centre beyond the territorial jurisdiction of the State, as per the Judgment of the Hon'ble Supreme Court in ***Prof. Yashpal and Another vs. State of Chhattisgarh and Others***[4]. Further, in terms of the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 (UGC Regulations), EIILM University was not permitted to open its Centres even within the State without the approval of the UGC. That, following several complaints from individuals across the country against the EIILM University, a Fact Finding Committee was

[2] 2016 SCC OnLine Sikk 210
[3] S.B. Civil Writ Petition No.9198/2017
[4] (2005) 5 SCC 420

constituted by the UGC to verify the complaints which found that the Courses to be offered by the University were only those detailed in Annexure R-1, dated 27.10.2015, relied on by the State-Respondents No.1 and 2, wherein M.A. (Math) finds no place, rendering the Petitioner's Degree invalid. Hence, the Writ Petition is not sustainable and deserves rejection by this Court.

5.(i) Learned Senior Counsel appearing for the Respondent No.3-UGC, while endorsing the submissions made by the State-Respondents No.1 and 2 added that firstly, the Petitioner has not come with clean hands before the Court given that she has concealed the fact as to whether she was enrolled in Distance Education Mode or was a Regular student in the University. Neither the averments in her Writ Petition including the amended Writ Petition nor the Rejoinders filed by her clarify her status as a student. Admittedly, the EIILM University was empowered to award Degrees as specified under Section 22 of the UGC Act but this pertained to its main Campus and students appearing in Regular Mode with the approval of the Statutory Bodies/Councils wherever required. The University had no jurisdiction to extend its operations beyond Sikkim. To fortify this submission, reliance was placed on ***Prof. Yashpal's*** case *supra*. It was emphasized that the Hon'ble Supreme Court observed therein *inter alia* that the Chhattisgarh Enactment which provided for extra territorial operation in the form of permission to open Off Campus Centre, Off Shore Campus and Study Centres at different places in India and other countries, was beyond the legislative competence of the Chhattisgarh Legislature. It was urged that in the light of the Judgment cited above, each University in the country must limit their jurisdiction to their own territory and cannot travel beyond the territorial jurisdiction of the State concerned, for the purposes of opening Off Campus Centres or Study Centres. That, the issue of territorial jurisdiction was also taken up for consideration by a Division Bench of this High Court in ***Sikkim Manipal University vs. Indira Gandhi National Open University and Others***[5] wherein one of the questions formulated by the Court for determination was whether it was permissible for Universities of all categories to run Distance Education Programmes outside the territorial limits of the State. Relying on the ratio of ***Prof. Yashpal*** *(supra),* the Division Bench propounded that the University shall be subject to its operation within the geographical territorial limits of the State under the Statute which created the University.

[5] **2014 SCC OnLine Sikk 46**

(ii) That, the UGC as far back as in 2009, vide its Letter No.F.9-8/ 2008 (CPP-I), dated 16.04.2009, Annexure R-2, informed all the State Governments *inter alia* that the action of the Private Universities established by the State Governments and State Universities in opening Off Campuses, Study Centres and Franchise in the name of Distance Education Programmes outside the State, was impermissible in terms of the Judgment of ***Prof. Yashpal*** *(supra)*. Drawing the attention of this Court to Annexure R-7 *viz.* Communication to the Vice Chancellor, EIILM University, dated 09.09.2009, by the DEC, Indira Gandhi National Open University (IGNOU), it was pointed out that for the Academic Year 2009-2010, the DEC had recommended the following Courses by Distance Mode for one year *viz.* (1) B.A. (Hospitality & Tourism); (2) BCA; and (3) MBA. No Course in B.A. (Math) or M.A. (Math) was alluded to nor specified. The said Communication also enumerated the Programmes not recommended by the DEC, IGNOU and the Universities were directed to note that the latest UGC Notifications would prevail over all previous Notifications and Circulars with regard to territorial jurisdiction of Programmes through Distance Mode. The Communication thus expounded in no uncertain terms that State Universities (both private and Government funded) could offer Programmes only within the State and Deemed Universities from the Headquarters. In any case, no Courses were to be offered from outside the State, hence granting of the Course and the Degree in a Course being M.A. (Math) which was not recognized by the UGC, is illegal and thereby invalid. That, recognition given by the UGC vide Letter, dated 22.07.2008, to EIILM University, authorized it to issue Degrees under Clause 22 of the UGC Act but did not give it unbridled right to start Courses/Programmes beyond the jurisdiction of the State in Distance Mode. Hence, the Petition lacking in merits be dismissed.

6. Rebutting the arguments of the Respondents No.1, 2 and 3, it was contended by Learned Counsel for the Petitioner that M.A. (Math) was duly approved by the UGC for EIILM University as is evident from its Web Portal. That, the UGC ought to penalize the EIILM University for its mischief if any and not the Petitioner. That, the Public Notice with regard to Study Centres and territorial jurisdiction was issued by the UGC only on 27.06.2013, whereas the Petitioner had completed her Course in June, 2012, a year before the Notice and would thus be inapplicable to her circumstance. That, as nothing material has been concealed, the Petition be allowed.

7. The submissions of Learned Counsel for the parties were heard *in extenso* and all documents on record meticulously perused as also the citations made at the Bar.

8. What falls for determination by this Court is whether the Degree of M.A. in Mathematics obtained by the Petitioner from the EIILM University, Sikkim, is a valid Degree.

9. Before discussing the merits of the matter, it may be pointed out that the instant Petition was filed on 26.12.2018. Thereupon, Notice was issued to the State-Respondents No.1 and 2, who were the only Respondents arrayed in the Petition. On the third date i.e. 12.04.2019, the Petitioner sought to file an Impleadment application to implead other Respondents. I.A. No.03 of 2019 was consequently filed on 27.06.2019 by the Petitioner, seeking to implead (a) University Grants Commission, (b) Chairperson/Principal, Governing Body, EIILM University, (c) Chairman/ Principal, Governing Body, C.M.P. Degree College and (d) Director, Alpha Edutech Pvt. Lt. The application was allowed on 06.08.2019, on which date, however, the Petitioner submitted that she did not desire to implead the Director, Alpha Edutech Pvt. Ltd. in the array of Respondents. Notice to Respondent No.5-Chairperson/Principal, Governing Body, EIILM University, was returned with the report EIILM closed since 5 yrs. Thereafter Notice was effected upon Respondent No.5 by publication in the National Daily Newspaper The Statesman on 04.11.2019 and the Local Daily Newspaper Sikkim Express on 02.11.2019. No one represented the Respondent No.5. On the date fixed for final hearing i.e. 24.06.2021, Learned Counsel for the Petitioner sought to file certain documents which had not been annexed initially to the Writ Petition, on the plea that the documents were imperative for a just decision in the matter. This prayer being unopposed was permitted and the Petitioner took steps by filing an Additional Affidavit with documents purported to be print outs of the Web Portal of the EIILM University.

10.(i) That having been said, undisputedly EIILM University was established by an Act of the State Legislature of Sikkim as a Private University on 22.07.2008. Annexure R-1 (document of the Respondent No.3), which is the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003, *inter alia* defines Private University at 2.1, Off-Campus Centre at 2.2, Study Centre at 2.4 and Student at 2.5 as follows;

2. Definitions

2.1. private university" means a university duly established through a State/Central Act by a sponsoring body viz. a Society registered under the Societies Registration Act 1860, or any other corresponding law for the time being in force in a State or a Public Trust or a Company registered under Section 25 of the Companies Act, 1956.

2.2. "off-campus centre"* means a centre of the private university established by it outside the main campus (within or outside the State) operated and maintained as its constituent unit, having the university's compliment of facilities, faculty and staff.

……..……..

2.4 "study centre"* means a centre established and maintained or recognized by the university for the purpose of advising, counseling or for rendering any other assistance required by the students used in the context of distance education.

2.5. "student" means a person duly admitted and pursuing a programme of study.

Regulation 3.3 *inter alia* reveals thus;

3. Establishment and recognition of Private Universities

…..….....……

3.3. A private university established under a State Act shall operate ordinarily within the boundary of the State concerned. However, after the development of main campus, in exceptional circumstances, the university may be permitted to open off-

campus centres, off-shore campuses and study centres after five years of its coming into existence, subject to the following conditions:

3.3.1. The off-campus centre(s) and/or the study centre(s) shall be set up with the prior approval of the UGC and that of the State Government(s) where the centre(s) is/are proposed to be opened.

3.3.2. The over-all performance of the off-campus centre(s) and/or the study centre(s) shall be monitored annually by the UGC or its designated agency. The directions of the UGC for management, academic development and improvement shall be binding.

3.3.3. If the functioning of the said centre(s) remains unsatisfactory, the private university shall be instructed by the UGC to close down the said centre(s), which shall be binding on the university. In such a situation, the interests of the students already enrolled therein shall be protected.

……...…….

(Emphasis supplied)

(ii) In tandem with the Regulations *supra,* Annexure R-2 (document of the Respondent No.3) is Correspondence, dated 16.04.2009, addressed by the Secretary, UGC to all the State Governments, whereby the State Governments have been directed to stop all the State/State Private Universities in the State from operating beyond the territorial jurisdiction in the State in any manner, either in the form of Off-Campus/Study Centre/ Affiliated College and the Centres operating through Franchises. Vide Annexure R-4 (document of the Respondent No.3) i.e. Communication, dated 15.06.2009, addressed to all the Vice Chancellors of the State Universities by the UGC, it is reiterated therein *inter alia* as under;

"……

Keeping in view the above, you are requested to take an immediate action on the following:

i) To ensure that no off campus centre(s)/ study centre/affiliating college and the centres operating through franchises is opened by your University outside the territorial jurisdiction of the State in view of the judgment of Hon'ble Supreme Court of India in case of Prof. Yashpal vs. Government of Chhattisgarh.

ii) In case your university has already started any offcampus/ study centre/ affiliating college and the centre operating through franchises outside the State, it must be closed immediately.

iii) No distance education programmes shall be started without the prior approval of Joint Committee of UGC-AICTE-DEC for which DEC is the Coordinator."

(Emphasis supplied)

The EIILM University was evidently recognized by the UGC in terms of Section 2 (f) of the UGC Act as can be culled out from the undisputed averments. Section 22 (1) of the UGC Act provides the University the right of conferring or granting Degrees to its students. Section 22 (3) of the Act defines Degree as follows;

22. Right to confer degrees.—…..……

(3) For the purposes of this section, degree means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette.

Contravention of the provisions invites penalty in terms of Section 24 of the UGC Act. In view of this provision, EIILM University being a Private University established by an Act of the State Legislature, was also clothed with the right to confer Degrees.

(iii) Annexure R-9 (document of the Respondent No.3), dated 07.05.2012, is Correspondence issued to the Pro-Vice Chancellor, EIILM University by the Director, IGNOU. The Correspondence is extracted hereinbelow for reference and convenience;

> Dr. Bharat Bhushan
>
> Director
>
> F. No.DEC/SIK/EIILM/2008/2040
> Date: 07.05.2012
>
> Sub: Various complaints received against the EIILM University, Jorethang, Sikkim-reg.
>
> Sir,
>
> This is in continuation to our earlier letters regarding receipt of various complaints against EIILM University and request to EIILM University, Sikkim to apply afresh on the prescribed proforma of the DEC. Till date DEC has not received any response from you in this regard.
>
> Further DEC continues to receive several complaints against your University wherein, the complainants have alleged that the EIILM University has opened hundreds of study centres in Kerala, Delhi, UP, Maharashtra etc. and other parts of the Country and giving advertisements for awarding degree within 6 months/one year and providing graduation degree in single sitting. One of the complainant has also alleged that the University has entered into agreement with collaborators which have further opened many centres. The applicant has stated that after having taken admission in the BA programme of EIILM University, the applicant is

feeling cheated. The applicant has also enclosed copies of the various advertisements, website domains advertising one sitting degree/one year degree etc. offered by the EIILM University. The copies of the complaints are enclosed herewith.

In this connection it is hereby informed that the DEC had accorded recognition to the EIILM University for one year only i.e. 2009-10 and for offering three programmes through distance mode i.e. BA (Hospitality & Tourism), BCA and MBA. The recognition has expired long back in September, 2010, yet the University has not stopped offering programmes through distance mode and continues to offer more than 100 programmes and is claiming to be recognized by the DEC, which is false and misleading.

In view of the above, without obtaining prior approval of the DEC you are requested to immediately stop offering any programme through distance mode and issuing misleading advertisements failing which DEC would be forced to initiate appropriate action, as deemed necessary against your University.

Yours faithfully

(Bharat Bhushan)

Shri O.B. Vijayan
Pro-Vice Chancellor
EIILM University
8th Mile, Budang
Malabassey
West Sikkim-737121

Encl: As above (5 complaints)

.....

(Emphasis supplied)

This Correspondence reveals that the University, without the requisite approval was offering Programmes through Distance Mode in more than 100 subjects.

(iv) By a Public Notice, dated 27.06.2013, Annexure R-5 (document of the Respondent No.3), the UGC cautioned people across the country that there was a compromise with standards of education by Private Institutions claiming to award University Degrees. It was clarified for the information of the students and parents that the Central or State Government could conduct Courses through its own Departments, its constituent Colleges or through its affiliated Colleges. The Students were advised not to take admissions in unapproved Study Centres, Off-Campus Centres, Franchisee Institutions, Colleges/Institutions claiming to be affiliated with Private Universities or Deemed Universities.

(v) Annexure R-8 (document of the Respondent No.3), dated 26.06.2014, addressed to the Vice Chancellor of the EIILM University by the UGC, reflects that the UGC had taken a decision to constitute a Fact Finding Committee to look into the issues related to the Courses conducted by the EIILM University through Distance Mode, unauthorized Study Centres, Franchisee etc. Pursuant to the constitution of the Fact Finding Committee, the Committee visited EIILM University Campus during the month of April, 2015, and concluded *inter alia* as follows;

> **"REPORT OF FACT FINDING COMMITTEE**
>
> **1.** EIILM University, 8th Mile, Budang, West Sikkim was not authorized to open study centre/Off Campus Centre beyond the territorial jurisdiction as per the Judgment of Hon'ble Supreme Court of India in case of Prof. Yaspal Vs. State of Chattisgarh. The University was not permitted to open its centre(s) even within the State as per the provision of UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 without the approval of UGC. The UGC has not granted any approval to the University to open off campus/study centre.

2. Complaints were received by UGC from individuals across the Country, against EIILM, Jorethang District – Namchi about numerous programmes being run through distance mode, opening of unauthorized study centre(s), franchising of higher education, issuing degrees to students without conducting any exams or practical. Misleading students by promoting wrong information on website, selling degrees by charging money instead of providing classes or conducting exams, selling degrees in India, conducting programmes through collaborative mode with industries/firms/companies and abroad by conducting courses in one sitting and establishment of Off Shore Campus at Mauritius.

3. State Government of Sikkim has accorded approval for the dissolution of EIILM University in its Cabinet meeting held on 28th April, 2015. However in the bestinterest of regular students of EIILM University, the State Government has appointed interim management to conduct the affairs of the University till the completion of the process of dissolution.

4. Being unitary University, EIILM did not have any mandate to affiliate any College/Institute. UGC never granted any permission/approval to EIILM University to establish any Off Campus Centre(s)/Study Centre(s) Off-Shore Centre(s).

5. The Committee recommended to request the State Government to take steps to protect the interest of unsuspecting students of EIILM University, residing in Sikkim who has taken admission on regular basis. On Campus students may be accommodated by the State Government in different close*(sic)* by Colleges and Universities till completion of their courses.

6. Regarding validity of degrees of Distance Courses, The Committee recommended UGC to

authorize the Directorate of Higher Education, Govt. of Sikkim to validate the degrees of 2009-2010 in three disciplines i.e. B.A. (Hospitality & Tourism), BCA and MBA for students admitted within the territorial jurisdiction of State of Sikkim based on the admission records available with the University's Sikkim Campus/State Government. Degrees in other disciplines except in three as specified in preceding lines and beyond academic year 2009-2010 shall not be valid.

……."

(vi) Annexure R-2 (document of State-Respondents No.1 and 2), dated 10.08.2015, is Correspondence between the UGC and the Director Higher Education, Human Resource Development Department, Government of Sikkim. It reveals *inter alia* thus;

"No.F.9-19/2007 (CPP-I/PU) 10 August, 2015

Sh. Jitendra Singh Raje, IAS,
Director Higher Education,
Human Resource Development Deparment,
Govt. of Sikkim, Gangtok,
Sikkim.

Sub: - Status of EIILM University, Sikkim.

Sir,

With reference of your letter No.189/ DIR(HE)/HRDD dated 28.07.2015 on the above subject, I am directed to inform you that Eastern Institute for Integrated Learning in Management University (EIILM), 8th Mile, Malbasey, Budang, West Sikkim-737121 was established by an Act of State Legislature of Sikkim as a Private University and was empowered to award degrees as specified under Section 22 of the UGC Act through its main campus in regular mode with the approval of Statutory Bodies/Councils, wherever its required.

> Eastern Institute for Integrated Learning in Management University (EIILM), 8th Mile, Malbasey, Budang, West Sikkim-737121 was not authorized to open study centre/off campus centre beyond the territorial jurisdiction of the state as per the judgment of Hon'ble Supreme Court of India in case of Prof. Yashpal Vs. State of Chhattisgarh. The University was not permitted to open its centre(s) even within the state as per the provision of UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 without the approval of UGC.
>
> The UGC has not granted any approval to the University to open off campus/study centre.
>
> ……"

(vii) Vide Annexure R-1 (document of State-Respondents No.1 and 2) i.e. Notice, dated 27.10.2015, issued by the Director, Human Resource Development Department, Government of Sikkim, it was brought to the notice of all concerned that the Department was receiving numerous applications seeking certain information relating to Courses offered by the EIILM University through Distance Mode and Regular Mode. The Department, in order to clarify the status of the EIILM University and Courses offered through Distance and Regular Mode, reproduced the Observation and Report of the Fact Finding Committee of the UGC, already extracted *supra.*

11. In the backdrop of the chronology of events which have unfolded as hereinabove, the Petitioner claims to have enrolled in M.A. (Math) in the EIILM University for the 2010-2012 Session. Although the documents of the State-Respondents No.1 and 2 *viz*. Notice dated 27.10.2015 (Annexure R-1), Communication dated 10.08.2015 (Annexure R-2), the documents of the Respondent No.3 *viz.* Communication dated 27.06.2013 (Annexure R-5), Communication dated 26.06.2014 (Annexure R-8) and Communication dated 07.05.2012 (Annexure R-9), were issued after the Petitioner's claim of enrolment in the M.A. (Math) Course for the Session 2010-2012, however, it is worthwhile remarking here that all through her averments, she has failed to enlighten this Court as to whether she was a

student on Regular Mode or a student of the Distance Education Programme. Nevertheless, it is also pertinent to consider that Learned Counsel for the Petitioner conceded in his verbal submissions that although this fact had not been clarified before the Court in the averments, but the Petitioner was indeed a student enrolled in the Distance Education Programme. The Petitioner claimed to have appeared in the Internal and External Examinations conducted by the University and cleared the Examinations in the First Division. To buttress this claim, she has placed reliance on Annexure P-3. On perusal of Annexure P-3, all that can be culled out from the document which is said to be a Statement of Marks, is that the Petitioner was a student of Master of Arts (Maths) for the Session July 2011-June 2012, there is no document to lend credence to her claim that she appeared in the Examinations of 2010-2011 as well. No documents have been filed by her to support her claim of admission in the Distance Education Programme in M.A. (Math) Course for the 2010-2012 Session. No documents indicating payment of fees, date of admission, or any correspondence between her and the University have been filed to support her stance.

12. Pausing here momentarily, it is beneficial to peruse Annexure P-8 (Page 32 of the Paper Book) i.e. the UGC Act, 1956, relied on by the Petitioner and to notice that the Petitioner has averred that Master of Arts is reflected in the Notification of the UGC issued on 07.06.1999. No such Notification has been placed by the Petitioner for the perusal of this Court. Notably, at Annexure P-8 (Page 35 of Paper Book), the list of Degrees specified by UGC are enumerated in Appendix-I and Appendix-II. Neither of the Appendices indicate M.A. (Math) as a subject offered. Even assuming that MA shown in Serial No.60 of Appendix-I is revelatory of the fact that generically M.A. was offered, the Appendices do not specify subjects offered in the Degree of Master of Arts. That apart, it is clear that for the Distance Education Mode, specific approval of the DEC was required, as evident from Annexure R-7, which approval has not been filed for perusal of the Court.

13. Relevantly, on perusal of Annexure R-7 (document of the Respondent No.3) specifically addressed to the Vice Chancellor, EIILM University by the IGNOU, DEC, dated 09.09.2009, reference has been made to Courses offered by the EIILM University through Distance Education Mode in the Academic Year 2009-2010. The Programmes

recommended for that year have also been listed in the document and have already been reflected *supra* in the submissions of Learned Senior Counsel for the UGC. In fact, the Programmes not recommended by the DEC have also been reflected in the self-same Communication. The University has been specifically directed to note at Serial No.6 that with regard to territorial jurisdiction for offering Programmes through Distance Mode, the latest UGC Notifications would prevail over all previous Notifications and Circulars. The Correspondence, dated 16.04.2009, Annexure R-2 (document of the Respondent No.3), addressed to all the State Governments by the Secretary, UGC, communicates *inter alia* as follows;

> "……..….....
>
> It is brought to your kind notice that the UGC has received information through RTI applications or through various students visiting UGC Office that the State Universities/State Private Universities established by the State Governments have opened off campuses, study centres and have also created franchise in the name of distance education programmes outside the State. This action on the part of the State Universities or Private Universities established by the State Governments beyond the territorial jurisdiction of the respective State Governments is not permissible in the light of observations made by the Hon'ble Supreme Court of India in the famous Prof. Yash Pal case. The Hon'ble Supreme Court has held the view that Parliament alone is competent to enact laws for any part or for the whole country and the State Legislature can enact law only in respect of its territorial jurisdiction confined to the concerned State. A copy of the relevant extract of the Judgement of the Hon'ble Supreme Court is enclosed herewith.
>
> However, notwithstanding the above provision in law and the judgement of the Hon'ble Supreme Court, the State Governments have enacted laws establishing State Universities and Private Universities which allow them operating beyond the territorial jurisdiction of the concerned State in the form of off-

campus/study centres, affiliated colleges and the centres operating through franchises etc. This has resulted into an anomalous situation and is also causing hardship to the student community at large.

Keeping in view the above, I shall be grateful if you kindly use your good offices and take an immediate action on the following:

i) To take suitable steps for amending the existing Acts made so as to bring the same in conformity with the observations made by the Hon'ble Supreme Court of India in the case of Prof. Yash Pal and State of Chhattisgarh. This should be adhered in all future cases.

ii) To stop all the State/State Private Universities in the State from operating beyond the territorial jurisdiction of your State in any manner either in the form of offcampus/study centre/affiliated college and the centres operating through franchises.

……"

14. Vide Annexure R-3 (document of the Respondent No.3) i.e. Communication to the Vice Chancellors of all Private Universities, dated 28.04.2009, the Secretary, UGC, reiterated the stand taken in the Communication, dated 16.04.2009, to the State Governments. Therefore, not only the State Governments but also the Vice Chancellors of all Private Universities were aware of the unequivocal position of the UGC in compliance with the Judgment of ***Prof. Yashpal*** *supra*. It needs no reiteration here that the EIILM University was set up by the State Act of 2006 and consequently, well aware of the Communications, dated 16.04.2009 and 28.04.2009.

15. Reverting to Annexure R-7, it was also clarified therein that as per the UGC Notification, State Universities (both private and Government funded) could offer Programmes only within the State and Deemed Universities from the Headquarters and in no case outside the State. That, Deemed Universities and Central Universities were to adhere to the UGC norms. That, the territorial jurisdiction for the Institutions (both private and

Government funded) would be the Headquarters and in no case outside the State. EIILM University was specifically directed to note that the territorial jurisdiction of their Institution would be within the State of Sikkim. Serial No.7 reveals that the DEC prohibited franchising of Study Centres and that the EIILM University was not to franchise any Study Centre. With all the Communications referred to above, the unambiguous position is that no Study Centres of the EIILM University were to be opened outside the territorial jurisdiction of the State of Sikkim.

16. Assuming that the Petitioner had indeed enrolled in the M.A. Course for the year 2010, she has not filed any document to enable this Court to reach a finding that Distance Education Programme was allowed for the Academic Year 2010-2012 for the reason that Annexure R-7 *viz.* Correspondence by the DEC, IGNOU, dated 09.09.2009, to the Vice Chancellor, EIILM University, categorically lays down that EIILM University had been accorded recognition for a period of one Academic Year with effect from 2009-2010 for offering the Programmes listed in the Communication through Distance Education Mode. At Serial No.8 of Annexure R-7, it has been specified that the Institution's management of the Distance Education Programmes will be open for review and inspection from time to time by the DEC to provide inputs for further improvement or as deemed necessary. That, the academic norms of the Programmes shall be under monitoring and regulation by the concerned regulatory authorities. Even if it was to be assumed that the Petitioner was a regular student, there are no documents filed by her to establish that M.A. (Math) was offered as a subject by the EIILM University for the Academic Year 2010-2012. On the other hand, if she was a student enrolled in the Distance Education Programme as claimed, this is also not buttressed by any document. Annexure P-3 relied on by her is issued only for the Session July, 2011 to June, 2012. Although the Petitioner's categorical contention was that she had joined the 2010-2012 Session, no document reflecting her appearance and clearing the previous years' Examinations *viz.* 2010-2011 have been placed for perusal of this Court. Annexure P-11 (five pages collectively) said to be print outs of the Web Portal of the EIILM University, bears no date nor does it reveal the date of insertion of the details or updation. At Page 5 of Annexure P-11, Mathematics has been indicated as a subject available but the Court is at sea as to whether this was offered in the Regular Mode or in the Distance Education Mode or for that matter, whether the subject was offered at all, sans documents substantiating such claim. The Court cannot adjudicate on the

alleged trammelled rights of an individual on the basis of vague and unreliable documents. Page 4 of Annexure P-11 (Page 128 of the Paper Book) reveals that M.A. (All Subjects) is for a duration of two years. While on this point, it is apposite to notice that the subjects enlisted do not indicate Mathematics as a subject so offered. The document merely mentions Subject Available but does not state whether the subject offered is for the Undergraduate Level or at the Masters Level. Thus, in the absence of any specific document to indicate availability of the subject, the Court cannot conclude that Mathematics as a subject was offered in M.A. in Distance Mode by the EIILM University or that the Petitioner had undergone the Course of study for the prescribed period as no document fortifies her claim.

17. That apart, even if she was appearing through the Distance Education Mode, the ratio in ***Prof. Yashpal's*** case *supra* decided in the year 2005, much before the Petitioner joined the University, has clearly laid down *inter alia* as under;

> **"60.** Dr. Dhavan has also drawn the attention of the Court to certain other provisions of the Act which have effect outside the State of Chhattisgarh and thereby give the State enactment an extraterritorial operation. Section 2(*f*) of the amended Act defines off-campus centre which means a centre of the university established by it outside the main campus (within or outside the State) operated and maintained as its constituent unit having the university's complement of facilities, faculty and staff. Section 2(*g*) defines off-shore campus and it means a campus of the university established by it outside the country, operated and maintained as its constituent unit, having the university's complement of facilities, faculty and staff. Section 3(7) says that the object of the university shall be to establish the main campus in Chhattisgarh and to have study centres at different places in India and other countries. **In view of Article 245(1) of the Constitution, Parliament alone is competent to make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the**

State. The impugned Act which specifically makes a provision enabling a university to have an offcampus centre outside the State is clearly beyond the legislative competence of the Chhattisgarh Legislature."

(Emphasis supplied)

18. It may appositely be noted here that the issue of territorial jurisdiction was taken up for consideration by a Division Bench of this High Court in ***Sikkim Manipal University vs. IGNOU*** *(supra).* The Division Bench examined the matter in the light of the provisions of the UGC Act, 1956 and the UGC Regulations of 2003 in tandem with the various Judgments of the Hon'ble Supreme Court including that of ***Prof. Yashpal's*** case *supra*. It concluded that the Sikkim Manipal University shall contain its operations within the geographical territorial limits of the State under the Statute which created it.

19. Learned Counsel for the Petitioner relied on the Order of ***Deepak Rajak vs. Scheduled Caste Certificate Scrutiny Committee and Others*** *(supra)* before the Hon'ble Supreme Court. A brief reference to the facts in ***Deepak Rajak vs. Scheduled Caste Certificate Scrutiny Committee and Others***[6] before the Hon'ble High Court of Madhya Pradesh (Indore Bench) may be made. The Petitioner, Deepak Rajak, was admitted to the Mahatma Gandhi Medical College, Indore for the M.B.B.S. Course as a Scheduled Caste Candidate. Later, it came to light that his Scheduled Caste Certificate was fake by which time he had already completed not only his M.B.B.S. Degree but also his Post Graduate Course *viz*. M.D. (Anesthesia). The Hon'ble Court referred to Paragraphs 12 and 13 of the ratio of the Hon'ble Supreme Court in ***Kumari Madhuri Patil & Another vs. The Additional Commissioner, Tribal Development and Other***[7] and concluded that the Order passed by the Hon'ble Supreme Court therein made it clear that after cancellation of Caste Certificate, holding that it is a forged and fabricated document, consequential action can be initiated by the authority. That, in the case of Deepak Rajak, consequential action had been taken by the concerned College by cancelling the admission in respect of the M.B.B.S. Course. Once the admission of the Petitioner to the M.B.B.S. Course had been cancelled, the Degree obtained by the Petitioner had

[6] **2019 SCC OnLine MP 4900**
[7] **(1994) 6 SCC 241**

become a nullity and the subsequent admission of the Petitioner to M.D. (Anesthesia) had to be cancelled, and had rightly been done in the peculiar facts and circumstances of the case. The High Court also noted that the cancellation of the Degrees was indeed very harsh punishment but the Court had to decide the issue on the basis of statutory provisions and not by taking into account equity or other factors as prayed by the Petitioner. Impugning this Judgment of the High Court, the Petitioner was before the Hon'ble Supreme Court which found no ground to interfere with the impugned Order and dismissed the Special Leave Petition with the clarification that the impugned Order of the Hon'ble Madhya Pradesh High Court would be confined to the M.D. Course and not to the M.B.B.S. Course. The facts in the cited case are clearly distinguishable from the facts in the instant matter inasmuch as the Medical College was without an iota of doubt offering the M.B.B.S. Course and the Petitioner had enrolled therein and completed the Course. These facts were not disputed. The Degree of the Petitioner was also not in dispute. The only consideration was whether his admission to the Courses were valid based upon a false document, which resulted in the impugned Judgment. In the matter at hand, the very existence of the subject offered *viz.* M.A. (Math) is disputed, as evident from the discussions that have taken place hereinabove and no document lends succour to the case of the Petitioner that Mathematics was offered by the EIILM University at the M.A. Level by DEC.

20. Reliance was also placed by the Petitioner in ***Shanti Lal vs. State of Rajasthan*** *(supra)*. The facts in the said Petition are also discernible from the matter at hand, inasmuch as the Petitioners therein had obtained their Diploma in Education/B. Ed. offered by the Singhania University established under the Singhania University, Pacheri Bari (Jhunjhunu) Act, 2008, which was not contested. Thereafter they participated in the recruitment for the post of Teacher, Grade III and were offered appointment on merit. The appointment was withheld by the State-Respondents on the ground that the Petitioners had obtained B.Ed. Diploma in Education from Singhania University and it was not recognized by the National Council for Teacher Education. The High Court concluded that the Singhania University was established under a Statute and automatically recognized. It needed no recognition by any other authority and hence the prayers of the Petitioners were granted. This is not the dispute in the instant matter. As already pointed out while discussing ***Deepak Rajak's*** case *supra*, the fact of the subject of M.A. (Math) having been offered by EIILM University is denied

and disputed by the UGC and no documents support the claim of the Petitioner. It is no one's case that EIILM University was not a UGC recognized University. It is also no one's case that it was not empowered to grant Degrees on completion of the course. The only issue is that it did not offer M.A. (Math) in the Distance Education Programme as stands unraveled by all documentary evidence before this Court. The Petitioner claims that the official Website of the University indicated all Courses offered by it were UGC recognized but failed to repel the argument of the UGC that M.A. (Math) was not an offered subject as clear from the UGC Act, 1956, wherein Appendix-I and Appendix-II enumerates the list of Degrees specified by the UGC, which does not indicate M.A. (Math) as an offered subject. Moreover, there is no proof that Distance Education Programme was offered in the 2010-2012 Session as Annexure R-7 (document of the Respondent No.3), reveals Courses offered by the EIILM University through Distance Education Mode only for the Session 2009-2010. Reliance by the Petitioner on the decision of ***Vineet Singh and Another*** *(supra)* of this High Court also fails to assist her claim. In the midst of all the discussions that have emerged, it cannot but be remarked that the Petitioner has made no mention of legal steps either already taken by her, or envisaged to be taken by her against the erring University.

21. In light of all the discussions *supra,* the larger question is whether this Court is in a position to declare valid, a Degree granted for a non-existent subject alleged to have been offered by the EIILM University? This would be crossing the amplitude of all legal parameters and the answer would obviously be in the negative. Needless to add that the High Court, while exercising extraordinary jurisdiction under Article 226 of the Constitution, cannot perpetuate illegalities, irregularities or improprieties based on what evidently is a nebulous plea.

22. In conclusion, the Petitioner has failed to make out her case for recognition of her Degree in M.A. (Math) from the EIILM University as legal, genuine and valid for all purposes. Devoid of any merit, the Petition deserves to be and thus stands dismissed.

23. Writ Petition disposed of accordingly.

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

25. No order as to costs.

SLR (2021) SIKKIM 601

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

RFA No. 11 of 2019

Norbu Doma Bhutia ….. APPELLANT

Versus

The Chief Secretary and Others ….. RESPONDENTS

For the Appellant: Mr. B. K. Gupta, Legal Aid Counsel.

For the Respondents: Mr. Sudesh Joshi Additional Advocate General, Mr. Yadev Sharma, Government Advocate and Mr. Sujan Sunwar, Assistant Government Advocate.

Date of decision: 16th August 2021

A. Specific Relief Act, 1963 – S. 10 – Specific performance in respect of contracts – The process of acquisition always begins with a notification under S. 4(1) of the Land Acquisition Act, 1984. Similarly, the process of acquisition of land under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 would begin with the issuance of the notification under S. 11 thereof. S. 11 contemplates the declaration of the Government that the land is required or likely to be required for any public purpose. No such notification had been issued. It is also seen that though there was a proposal to purchase the plaintiff's land, it was not done. There is no evidence of a concluded contract. Consequently, the plaintiff failed to establish what she had asserted in her plaint about the conclusive agreement entered between her and the defendants (*In re. State of Madhya Pradesh* v. *Vishnu Prasad* referred) – Since the plaintiff has failed to establish such an agreement, the prayers cannot be granted.

(Para 13)

Appeal dismissed.

Case cited:

1. State of Madhya Pradesh v. Vishnu Prasad, AIR 1966 SC 1593.

JUDGMENT

Bhaskar Raj Pradhan, J

1. A suit under Section 9 of the Code of Civil Procedure 1908 (CPC) read with Section 10 of the Specific Relief Act, 1963 was filed by the plaintiff (the appellant herein) before the court of the learned District Judge, South Sikkim at Namchi (the learned District Judge). The respondents were the defendants before the Trial Court in the same order as they appear in the appeal. The parties would be referred to as the plaintiff and defendants for clarity.

2. The plaintiff averred that she was a government employee working under the Agricultural Department, Namchi, South Sikkim. The defendants were office bearers of different offices in the government. The plaintiff owned and possessed certain plots of agricultural land at Kamrang block, Boomtar Elaka, Namchi, South Sikkim where she was indulging in agricultural activities in the year 2006. The plaintiff entered into an agreement with certain persons to open a dairy farm and to cultivate crops in several plots of land at Kamrang block which she ultimately purchased in the year 2015. According to the plaintiff these plots of land yielded Rs.4,88,750/- per annum. She asserted that one Govind Pradhan approached the plaintiff and appraised her about the government's desire for constructing Sewage Treatment Plant (STP Project) at Kamrang and the interest shown by the Public Health Engineering Department (the PHE department) to do so in her land. The plaintiff asserted that the officials of the PHE department conducted meetings with the plaintiff and other two individuals. Finally, according to her, a conclusive agreement was entered between the plaintiff, the two individuals viz. Bazar Singh Rai (P.W.4) and Bishal Manger (P.W.5) and the defendants for acquisition of their plots. According to the plaintiff during the acquisition process an amount of Rs.1,96,54,641/- was sanctioned in favour of the plaintiff for acquisition of plot no. 467/1043 and plot no. 467/1305 situated at Kamrang (two plots). She avers that as the acquisition process started, she stopped agricultural activity due to which she suffered a loss of Rs.4,88,750/- annually from

January 2015. In April 2016 the plaintiff was informed that the defendants had dropped the offer of constructing STP Project in her two plots and they were now doing so in the land owned by defendant no.5, the Assistant Engineer of the PHE department. It is the plaintiff's case that as per the agreement the defendants are bound to acquire her two plots and to pay compensation for the loss. The plaintiff, therefore, sought a direction upon the defendants to acquire the suit lands as per the agreement. Further directions upon the defendants were also sought to pay Rs.1,96,54,641/- as compensation for the acquisition and Rs.9,77,500/- as compensation for the two years of financial loss, till the filing of the suit. A further direction was also sought against the defendants to pay future financial damages till disposal of the suit.

3. The defendants filed a joint written statement. They questioned the maintainability of the suit and denied that the plots of land owned by the plaintiff yielded agricultural income. They alleged that the two plots were purchased by the plaintiff with oblique motive of reaping huge benefit in the acquisition, which the sellers were not aware of. They asserted that they do not know any Govind Pradhan or that he was authorised by the PHE department to negotiate with the plaintiff. They deposed that during the inspection of Bazar Singh Rai's (P.W.4) land, the defendant No.4 was informed about the plaintiff's two plots and her willingness to part with it. Accordingly, the plaintiff's land was identified for establishment of the STP Project. They denied that they held any meeting regarding the acquisition. They asserted that since defendant No.4 needed land for the STP Project in the given area an informal survey was conducted in respect of Bazar Singh Rai's (P.W.4) land. They denied that there was any final agreement entered or drawn up with the plaintiff. According to the defendants, since the plaintiff was interested in selling her land, she had been asked to quote her rate. They admitted the several meetings held during the verification/ identification of land process. They admitted the participation of the plaintiff, the defendants, the boundary holders, local panchayat members and other individuals of the locality in such meetings. They admitted that steps had been taken for the acquisition of the plaintiff's lands. They asserted that due to the public complaint against the establishment of the STP Project at Kamrang they could not carry forward this proposal despite the plaintiff and other interested landowners' willingness. The defendants averred that they had failed to convince the public of Kamrang about the STP Project and therefore, the District Collectorate was asked to identify another land. As

the implementation of the project was getting delayed, especially after Namchi was declared a smart city, the defendant no.4 requested the defendant no.5 to give his private land located at Tinzir block, which was accepted by him, after much persuasion. Thereafter, verification was done and since various advantages were seen, the defendants took possession of the land and started construction. It was stated that the plaintiff's land were never acquired by the defendants and therefore, she did not have any *locus standi* to file the suit.

4. The learned District Judge framed ten issues. In the impugned judgment dated 31.07.2019 the learned District Judge examined each of these issues and except for issue no.9 all other issues have been held against the plaintiff. The suit was accordingly, dismissed. Issue no.9 was whether the plaintiff purchased the two plots between 01.12.2015 and 17.02.2015 just to earn huge benefit from compensation as the plaintiff came to know that there was a proposal to acquire the land for STP Project at Kamrang.

5. Mr. B. K. Gupta, learned counsel for the plaintiff, drew the attention of this court to exhibit 8 to 14 filed by the plaintiff which reflects the various stages of the proposed acquisition. He drew the attention of this court to Form 'A' (Exhibit-14) and submitted that it would reflect that the entire acquisition process was over and all that remained was payment of compensation. He submitted that these documents reflected that the defendants were serious about the acquisition and therefore, the plaintiff had abandoned her agricultural activities in the proposed land causing her huge losses. Thus, it was argued that the learned District Judge had failed to appreciate the evidence in its correct perspective.

6. Mr. Sudesh Joshi, learned Additional Advocate General submits that no interference was required. The learned District Judge had correctly appreciated that there was in fact no concluded contract. As the entire case of the plaintiff was based on the alleged concluded contract, the suit must fail since she could not establish it.

7. On examination of the plaint, the pleadings, and the depositions, it is quite clear that the plaintiff sought for specific performance of contract alleged to have been entered between the plaintiff and the defendants. The

reliefs sought under Section 10 of the Specific Relief Act, 1963 is a discretionary relief. It is also well settled that no amount of evidence can be looked into, if there are no pleadings to that effect. The plaintiff deposed that a conclusive agreement was entered between her and the defendants for acquisition of the land at Kamrang. During her cross-examination she admitted that there was no written agreement but asserted that there was a verbal agreement between her and M. K. Rai, Divisional Engineer of the PHE Department. She also deposed that when she insisted for a written agreement from M. K. Rai, he told her that a land assessment was sufficient for government acquisition. M. K. Rai was neither made a defendant nor a witness.

8. The plaintiff's witnesses i.e., Kumar Sunar (P.W.2) and Naresh Mukhia (P.W.3) deposed generally about the plaintiff's involvement in agricultural activities i.e., running poultry farm and growing crops. They would not elaborate or provide any specific details of the plaintiff's income from her agricultural activities. They also deposed about the activities of the defendants during the year 2015 in the process of identification of suitable land for the STP Project. Bazar Singh Rai (P.W.4) and Bishal Manger (P.W.5) deposed about the information they received from Govind Pradhan about the proposal for construction of STP Project at Kamrang in the year 2015. He deposed about the various meetings the defendant had with him and the plaintiff. Bishal Manger (P.W.5) further deposed about the assurance given by M. K. Rai about the acquisition of the lands owned by him, Bazar Singh Rai (P.W.4) and the plaintiff. Dip Kanya Rai (P.W.6) deposed about the construction of the STP Project in the land of defendant no.5.

9. Subash Gurung (P.W.7) the then Assistant Revenue Surveyor identified the official documents exhibited by the plaintiff. The statement of land and other standing properties (exhibit-8) has been signed by the plaintiff and the ward panchayat but not by the governmental authorities. Memo dated 05.10.2015 issued by the Assistant Engineer to the District Collector (exhibit-9) doesn't relate to the plaintiff. Communication dated 18.11.2015 by M. K. Rai to the District Collector relates to the plaintiff. It reports about the proposal to acquire the plaintiff's land and requests for land assessment. Exhibit 11 are the internal note sheets of the District Collector's office between the period 29.07.2015 till 09.04.2016. The note dated 27.10.2015 records the joint inspection conducted in the presence of the

plaintiff and other landowners and representatives of the PHE Department for the construction of the STP Project. It also records that the lands owned by the plaintiff, Bishal Manger (P.W.5), Bhim Bahadur Rai and Bazar Singh Rai (P.W.4) have been identified for the STP Project. The undated note under the signature of the then Revenue Officer (exhibit-11(a)) proposes that since the landowners are willing and the acquisition is not large it could be acquired by registration of sale deed. However, the District Collector's note thereafter, dated 18.11.2016 refers to the discussion with the Secretary, Land Revenue Department and proposes that they should wait till multiplication factor is decided by the government.

10. Form 'A' (exhibit-14) dated 01.04.2015 signed by the PCE-cum-Secretary of the W.S. & P.H.E. department is a form of application for acquisition of land for public purpose. The plaintiff's land verification was done by the acquisition cell of the District Collectorate on 27.08.2015 and recorded in spot verification report (exhibit-13). Memo dated 17.10.2015 (exhibit-12) addressed to the District Collector by the Assistant Engineer, PHE department informs that the plaintiff, Bishal Manger (P.W.5) and Bazar Singh Rai (P.W.4) have quoted a rate of Rs.500/- per square feet for the proposal.

11. Ramesh Subba (D.W.1), Tara Rai (D.W.2) and Khem Lall Chettri (D.W.3), the then Divisional Engineer (defendant No.4), Assistant Engineer (defendant no.5) and Junior Engineer (defendant no.6) respectively deposed on behalf of the defendants. They admitted that there was a proposal for acquisition of the plaintiff's land for the STP Project. They stated that they found residential houses in the lands of Bazar Singh Rai (P.W.4) and Bishal Manger (P.W.5) proposed to be acquired. They admitted the identification, verification, and assessment of the plaintiff's land. They stated that finalisation of the acquisition process got delayed since the multiplication factor required under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 was still not available. They stated that in the meanwhile the public opposed the STP Project coming up in their vicinity after which the defendant No.5's land was identified.

12. Admittedly, there was no written agreement. The evidence of verbal agreement with M. K. Rai, Divisional Engineer came during the cross-

examination of the plaintiff who had not pleaded so in the plaint. There is no evidence to establish such verbal agreement as well, leave alone the legality of it. The official records filed by the plaintiff have not been disputed by the defendants. These documents suggest that identification, verification, and assessment of the plaintiff's land had in fact been done by the defendants. There was in fact an initial proposal to acquire the plaintiff's land. However, as the plaintiff was willing, suggestion to purchase the land by a registered sale deed was also made. The evidence led suggest that there were talks between the plaintiff and the defendants during this process. It is quite evident that the talks with the plaintiff did not fructify and ultimately the land of defendant no.5 was selected for the STP Project. This court is not examining the legality of the selection of the defendant no.5's land for the STP Project in the facts of the present case.

13. In ***State of Madhya Pradesh v. Vishnu Prasad***[1] the Supreme Court held that the process of acquisition always begins with a notification under Section 4(1) of the Land Acquisition Act, 1984. Similarly, the process of acquisition of land under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 would begin with the issuance of the notification under Section 11 thereof. Section 11 contemplates the declaration of the Government that the land is required or likely to be required for any public purpose. No such notification had been issued. It is also seen that though there was a proposal to purchase the plaintiff's land, it was not done. There is no evidence of a concluded contract. Consequently, the plaintiff has failed to establish what she had asserted in her plaint about the conclusive agreement entered between her and the defendants. The reliefs for directions upon the defendants to acquire the suit land and to pay Rs.1,96,54,641/- as compensation is based on the plaintiff assertion of a conclusive agreement. Since the plaintiff has failed to establish such an agreement the said prayers cannot be granted.

14. The plaintiff has sought for compensation for the loss she suffered from agricultural income. Besides oral evidence no other evidence, documentary or otherwise, has been led by the plaintiff to establish the same. During her cross-examination the plaintiff admitted that the tabulation of her agricultural income (exhibit-7) filed by her is not a document

[1] **AIR 1966 SC 1593**

prepared by any chartered accountant or valuer. She admitted that she had not stated to whom she supplied her agricultural produces, dairy, and poultry products. She admitted that no receipts of income raised out of sale proceeds had been produced by her. The plaintiff has therefore, failed to establish the loss of agricultural income as asserted by her in the plaint. Consequently, the relief prayed for compensation for the financial losses and future damages cannot be granted.

15. The appeal fails and is therefore, dismissed. No order as to costs.

SLR (2021) SIKKIM 609

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

C.R.P. No. 1 of 2020

Hem Prasad Subedi ….. PETITIONER

Versus

Deo Narayan Dahal and Another ….. RESPONDENTS

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

For Respondent No.1: Mr. N. B. Khatiwada, Senior Advocate with Ms Gita Bista and Ms. Pratikcha Gurung, Advocates.

For Respondent No.2: Ms. Pema Bhutia, Assistant Government Advocate.

Date of decision: 18th August 2021

A. Code of Civil Procedure, 1908 – O.7 R. 11 – Rejection of plaint – In the plaint, the respondent no.1 has categorically averred that the F.I.R was lodged by the petitioner stating that the victim who was staying with him since childhood had fallen sick and so they had taken her to Gangtok hospital for medical treatment after which the doctor told them that the victim was 28 weeks pregnant. It also avers that it was alleged that the victim was sexually assaulted by the respondent no.1. The plaint avers that after the F.I.R, a criminal investigation was started by the police who filed the charge sheet against the respondent no.1 under Ss. 376 (1)/341 of the I.P.C read with Ss. 4 and 8 of the POCSO Act. The respondent no.1 also clearly avers that the trial Court framed charges against the respondent no.1 under the POCSO Act and under the I.P.C. Thereafter, the trial is referred to and the ultimate acquittal which, according to the respondent no.1, gave the cause of action to file the suit – It is clear from reading of the plaint itself that it was not only the petitioner who had complained to the police

about the commission of the offence against the respondent no.1, but also that the police had investigated the case and concluded by filing a charge sheet that the allegation made by the complainant was *prima facie* true. It is also clear from the reading of the statements in the plaint that the criminal trial pertained to allegations against the respondent No.1 under the POCSO Act – S. 19 (1) of the POCSO Act mandates that any person who has apprehension that an offence under the Act is likely to be committed or has knowledge that such an offence has been committed shall provide such information to the special juvenile police or the local police. S. 19(7) provides that no person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1) – The POCSO Act therefore, clearly ensure that no sexual offence against a child goes unreported and for that matter further assures that the informant would also be protected if such information is in good faith – S. 19(7) of the POCSO Act is a central legislation and the law of the land. It would squarely fall within the meaning of law as contemplated in O. 7 R. The protection under S. 19(7) is unequivocal. The plaint was clearly barred under the provision as the F.I.R was lodged by the petitioner in good faith. If the plaint is allowed to continue the purpose of S. 19 of the POCSO Act would be lost and people would fear to lodge genuine complaints of sexual assault upon a child.

(Paras 18, 19, 21, 23 and 29)

Petition allowed.

Chronology of cases cited:

1. SR. Tessy Jose v. State of Kerala, (2018) 18 SCC 292.
2. Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) dead, (2020) 7 SCC 366.

JUDGMENT (ORAL)

Bhaskar Raj Pradhan, J

1. A revision petition under Section 115 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) has been filed by the petitioner/ defendant no.1 (the petitioner). It is against the impugned order dated 18.12.2019 passed by the learned District Judge, South Sikkim at Namchi

(the learned District Judge). The impugned order rejected the application under Order VII Rule 11 of the CPC filed by the petitioner. The petitioner had sought for rejection of the suit filed by the respondent no.1/plaintiff for failure to disclose a cause of action and for being barred by law.

2. The suit was filed by the respondent no.1 against the petitioner for recovery of money for malicious prosecution and other reliefs. In the plaint it was averred that the petitioner was a teacher by profession and the defendant no.2 (the respondent no.2 herein) was the State of Sikkim who had prosecuted the respondent based on false First Information Report (FIR) lodged by the petitioner. The plaint categorically states that the respondent no.1 is not seeking any reliefs against the respondent no.2.

3. As per the narration in the plaint an FIR was lodged on 14.07.2016 by the petitioner before the Temi police station alleging that the respondent no.1 had committed sexual assault on the victim who was residing with the petitioner and his wife. Consequently, a warrant was issued for the arrest of the respondent no.1, and he was arrested and kept in the lockup from 14.07.2016 to 15.05.2017 for almost 10 months. It is alleged that based on the false FIR, Temi police station Case No.17/2016 dated 14.07.2016 under Section 376 of the Indian Penal Code (IPC) read with Section 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was registered against the respondent no.1. On completion of investigation charge sheet was submitted under Section 376(1)/341 IPC read with Section 4 and 8 of the POCSO Act and cognizance taken by the learned Trial Court. The plaint further narrates that the learned Trial Court heard the parties and charges were framed against respondent no.1 under Section 5(j)(ii), 5(l) of the POCSO Act and under Section 376 (2) (i), (n) and 354-B IPC.

4. It is stated in the plaint that the prosecution examined 12 witnesses and after a protracted trial the respondent no.1 was acquitted on 21.03.2018. It is averred that the petitioner had lodged the false FIR against the respondent no.1 without a reasonable or probable cause which is evident from the evidence recorded during the trial. Various portions of the evidence in the criminal trial have been highlighted in paragraph 11 of the plaint. It is stated that the respondent no.1 and his family members had suffered physical and mental pain; and they have been lowered in the estimation of their friends, relatives, and society.

5. In paragraph 14 of the plaint, it is stated that to prove malicious prosecution the respondent no.1 was required to prove the following ingredients:

> **"***a. That the plaintiff was prosecuted on the complaint lodged by the defendant.*
>
> *b. The proceeding complained was terminated in favour of the present plaintiff.*
>
> *c. That the prosecution was instituted against the plaintiff without any just or reasonable cause.*
>
> *d. That the prosecution was instituted with a malicious intention, that is not with the mere intention of getting the law into effect, but with an intention which was wrongful in fact.*
>
> *e. That the plaintiff suffered damage to his reputation.***"**

6. It is averred that the cause of action first arose on 21.03.2018 from the date of the judgment of acquittal passed by the learned Trial Court and continued thereafter.

7. On such pleadings the respondent no.1 sought for expenses and financial losses incurred for engaging counsel in the criminal case, damaging reputation, mental and physical agony, and interest pendente lite and future.

8. On 21.02.2019 the learned District Judge issued summons to the petitioner and respondent no.2.

9. On 23.03.2019 the petitioner filed an application under Order VII Rule 11 read with Section 151 CPC (the application). In the application it was averred that the plaint was not maintainable and barred by the provisions of Order 11(a) and (d) of the CPC. The respondent no.1 filed his objections.

10. On 27.11.2019 the learned District Judge heard the learned counsel for the parties and on 18.12.2019 passed the impugned order rejecting the application. The petitioner is aggrieved by the impugned order.

11. Heard Mr. Zangpo Sherpa, learned counsel for the petitioner. It is contended that a reading of the plaint would show that the suit was barred by law i.e. Section 19(7) of the POCSO Act. It is his contention that under Section 19 (1) of the POCSO Act there is an obligation cast upon any person having knowledge about sexual assault on a child victim to report the same and failure to do so is punishable under Section 21 thereof. It is pointed out that Section 19(7) provides immunity to the informant against both civil and criminal liability for giving such information in good faith. The learned counsel also draws the attention of this court to the impugned judgment which reflects that this fact was pointed out to the learned District Judge who, however, did not examine it. It is argued, while taking this court through the impugned judgment, that the acquittal was not an acquittal on a conclusion that the FIR was false, but by giving benefit of doubt to the respondent no.1. The learned counsel referred to the judgment of the Supreme Court in ***SR. Tessy Jose v. State of Kerala***[1] which held on examination of Section 19 of the POCSO Act that a person who had an apprehension that such an offence may be committed or knowledge that it has been committed would be required to provide such information to the relevant authority.

12. Ms. Gita Bista, learned counsel for the respondent no.1, vehemently opposes grant of any prayer in favour of the petitioner. While taking this court through the evidence in the criminal trial filed by the respondent no.1 along with the plaint it is submitted that the respondent no.1 had clearly laid out the cause of action in the plaint and shown that it was not barred by limitation. It is contended that neither the petitioner (P.W.2) nor the victim (P.W.1) in the criminal trial had deposed that the victim informed the petitioner that it was the respondent no.1 who was responsible for her pregnancy. It is contended that as such the FIR lodged by the petitioner was evidently false and malicious against the respondent no.1. The learned counsel also drew the attention of this court to the admission made by the victim in her cross-examination where she admitted that **"***it is true that I was told by Sir and Madam to depose before the court about the incident without fear. It is true that I was told to depose before the court saying that I had gone to the house of the accused on the relevant day. It is not a fact that I was told by Sir and Madam to depose saying that I never stayed overnight in any other person's*

[1] **(2018) 18 SCC 292**

house." It is thus, submitted by the learned counsel that this would clearly reflect that the victim was tutored by the petitioner for lodging a false FIR. The learned counsel also argued that the burden was on the petitioner to prove the criminal case against the respondent no.1 and having failed to do so it does not lie upon the petitioner to seek rejection of the plaint for malicious prosecution against him.

13. Ms. Pema Bhutia learned Assistant Government Advocate for the respondent no.2 submits that the dispute is between the petitioner and the respondent no.1 and as the respondent no.1 has chosen not to seek any relief against the respondent no.2, she has nothing to submit.

14. This court has considered the submission made by the learned counsel, examined the plaint and the documents sought to be relied upon therein; the application filed by the petitioner as well as the reply of the respondent no.1.

15. Order VII Rule 11(a) and (d) of the CPC reads as under:

> ***"11. Rejection of plaint.*** *– the plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*
>
> .....
>
> *(d) where the suit appears from the statement in the plaint to be barred by any law;*
> *.....***"**

16. A reading of Order VII Rule 11 clearly reflects that the plaint could be rejected in any of the grounds enumerated in sub-clause (a) to (f). Whereas under sub-clause (a) plaint could be rejected for non-disclosure of cause of action, sub-clause (d) mandates that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

17. In ***Dahiben v. Arvindbhai Kalyanji Bhanusali (Gajra) dead***[2] the Supreme Court held that under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by

[2] **(2020) 7 SCC 366**

scrutinising the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by law.

18. In the plaint the respondent no.1 has categorically averred that the FIR was lodged by the petitioner stating that the victim who was staying with him since childhood had fallen sick and so they had taken her to Gangtok hospital for medical treatment after which the doctor told them that the victim was 28 weeks pregnant. It also avers that it was alleged that the victim was sexually assaulted by the respondent no.1. The plaint avers that after the FIR, a criminal investigation was started by the police who filed the charge sheet against the respondent no.1 under Section 376 (1)/341 of the IPC read with Section 4 and 8 of the POCSO Act. The respondent no.1 also clearly avers that the learned Trial Court framed charges against the respondent no.1 under Section 5 (j) (ii), 5(1) of the POCSO Act and under Section 376 (2) (i), (n) and 354-B of the IPC. Thereafter, the trial is referred to and the ultimate acquittal which, according to the respondent no.1, gave the cause of action to file the suit.

19. It is clear from reading of the plaint itself that it was not only the petitioner who had complained to the police about the commission of the offence against the respondent no.1, but also that the police had investigated the case and concluded by filing a charge sheet that the allegation made by the complainant was *prima facie* true. It is also clear from the reading of the statements in the plaint that the criminal trial pertained to allegations against the respondent No.1 under the POCSO Act.

20. Sections 19, 21 and 22 of the POCSO Act would be relevant at this juncture and quoted herein below.

> ***"19. Reporting of offences.-***
>
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-*

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be-

(a) scribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but

within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

*(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).***"**

.....

"21. Punishment for failure to report or record a case.-

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.

22. Punishment for false complaint or false information.-

(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

*(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimizing such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.***"**

21. Section 19 (1) of the POCSO Act mandates that any person who has apprehension that an offence under the Act is likely to be committed or has knowledge that such an offence has been committed shall provide such information to the special juvenile police or the local police. Section 19(7) provides that no person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

22. The Supreme Court in ***SR. Tessy (supra)*** has clearly held that there is a legal obligation on a person to inform the relevant authorities if he had knowledge about commission of such an offence. It was held that the expression "knowledge" means that some information was received by such a person giving him/her knowledge about the commission of the offence. It was held that a person is supposed to know only where there is direct appeal to his senses.

23. Under Section 21 of the POCSO Act any person, who fails to report the commission of an offence under sub-section (1) of Section 19

shall be punished with imprisonment of either description which may extend to six months or with fine or with both. The POCSO Act therefore, clearly ensure that no sexual offence against a child goes unreported and for that matter further assures that the informant would also be protected if such information is in good faith. If the information provided was not in good faith and if false complaint was lodged, Section 22 provides that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under Sections 3, 5, 7 and Section 9, only with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

24. The protection provided under Section 19(7) of the POCSO Act against civil or criminal liability would be for giving information only in good faith and not for providing or giving false information.

25. A reading of the statements in the plaint makes it clear that the plaint was barred by section 19(7) of the POCSO Act. Ms. Gita Bista, however, seeks to rely upon the documents filed with the plaint as well. The respondent no.1 along with the plaint filed a list of documents consisting of:

(1) Certified copy of the FIR lodged by the petitioner;

(2) Certified copy of the judgment of acquittal;

(3) Certified copy of the deposition of prosecution witnesses and defence witnesses;

(4) Certified copy of CFSL report pertaining to the DNA test of the respondent no.1 and

(5) Original challan.

26. As contended by Ms. Gita Bista, it is correct that during the cross-examination of the victim (P.W.1) in the criminal trial, she had admitted that she was told to depose before the court saying that she had gone to the house of the respondent no.1 on the relevant day. However, the cross-examination stopped there. It was not put to the victim that what she alleged in her deposition was not true. Thus, there is no evidence of tutoring as sought to be made out by the learned counsel for the respondent no.1. The learned Trial Court examined the evidence of the victim, the petitioner,

his wife (P.W.3) and Dr. Salina Tamang (P.W.5) to hold that the victim was pregnant and gave birth to a baby boy. The learned Trial Judge, thereafter, examined as to whether the respondent no.1 was responsible for the same. Considering the DNA report the learned Trial Judge opined that the prosecution had failed to prove his case against the respondent no.1 by giving him the benefit of doubt.

27. The learned Trial Court has not held that the FIR was false or fabricated. What was narrated by the petitioner in the criminal trial about the fact that it was the respondent no.1 who had committed the offence of sexual assault upon the victim was not narrated by him alone but also by the victim which is clearly reflected in the judgment. The learned counsel for the respondent no.1 took this court through the deposition of the victim as well as deposition of the petitioner. These depositions also do not reflect any material that the petitioner had lodged a false FIR. A person guilty of malicious prosecution is punishable under Section 211 IPC. Instead, the respondent no.1 has sought for monetary damages under the civil law for malicious prosecution.

28. Section 19(7) clearly protects the informant who in good faith gives information about his knowledge of sexual assault on a child victim against both civil as well as criminal liability. In the criminal trial the petitioner deposed that he and his wife had taken the minor victim to Ashirbad clinic at Gangtok where after examining her, the doctor told them that the minor victim was 28 weeks pregnant pursuant to which they lodged the FIR. In re-examination the petitioner deposed that after the test when she came out of the clinic, he asked the minor victim how she got pregnant, but she told him that nothing had happened to her. He further deposed that during the third week of January 2016 the victim was left to stay in respondent No.1's house. The petitioner's wife (P.W.3) however deposed that in the chamber of the doctor who conducted the ultrasound at Ashirbad clinic the victim disclosed that it was **"***antaray hajurbah***"** who had made her pregnant. She further deposed that back at Temi the victim disclosed how respondent No.1 had committed penetrative sexual assault upon her twice after which they lodged the FIR. Evidently the petitioner had knowledge about the commission of the offence. Although the FIR was lodged by the petitioner, neither the investigating authority nor the learned Trial Court concluded that the FIR lodged by the petitioner was false. There is no material whatsoever

in the plaint, or the documents sought to be relied upon, to establish even *prima facie* that the petitioner had lodged a false FIR.

29. Section 19(7) of the POCSO Act is a central legislation and the law of the land. It would squarely fall within the meaning of law as contemplated in Order 7 Rule 11 CPC. The protection under Section 19(7) is unequivocal. The plaint was clearly barred under the provision as the FIR was lodged by the petitioner in good faith. If the plaint is allowed to continue the purpose of Section 19 of the POCSO Act would be lost and people would fear to lodge genuine complaints of sexual assault upon a child.

30. This court is thus of the view, that the impugned order passed by the learned District Judge must be set aside and the application filed by the petitioner be allowed. It is accordingly so ordered. No order as to costs.

31. In view of the final disposal, the interim applications are rendered infructuous and accordingly disposed.

SLR (2021) SIKKIM 622

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

Crl. A. No. 25 of 2018

Rabin Baraily and Another ….. APPELLANTS

Versus

State of Sikkim ….. RESPONDENT

For the Appellants: Ms Gita Bista, Advocate.

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

Date of decision: 21st August 2021

A. Sikkim Anti Drugs Act 2006-Chapter V – Chapter V of the SADA, 2006 deals with the procedure to be followed during investigation. Section 21 deals with power of entry, search, seizure and arrest without warrant or authorization by any personal knowledge or information given by any person and taken down in writing that any controlled substance in respect of which the offence punishable under the Act has been committed or any document or other article which furnished evidence after commission of such offence is kept or concealed in any building, conveyance or enclosed space and sealed it in the manner provided. Section 22 of SADA, 2006 deals with the power of seizure and arrest in any public place. Section 23 of SADA, 2006 empowers any officer authorized under section 21 if he has reason to suspect that any conveyance is used for the transport of controlled substances to conduct a search of the conveyance. Section 24 mandates that when the officer is about to search any person under the provision of section 22, he shall, if possible, take such person to the nearest gazette officer of any of the departments mentioned in section 21 or to the nearest Magistrate.

B. Code of Criminal Procedure 1973 – Section 100 – Section 100 of the Cr. P.C. would apply only if the conditions mentioned in section 24 (2) of SADA, 2006 is fulfilled, which means that only when the person cannot be searched in the presence of a gazetted officer or a Magistrate as it is not possible to take the person to be searched to them without the possibility of the suspect parting with possession of the controlled substance he could proceed to search the person as provided under section 100 of the Cr. P.C. As the appellant no. 1 was searched in the presence of a Magistrate, section 24 (2) would not apply. In the circumstances, the evidence of Mahindra Pradhan (PW-10) and the seizure witness Sonam Bhutia (PW-7), would be sufficient to establish beyond reasonable doubt that the seizure was effected in the manner contemplated – What matters is the carrying out of search of the person suspected in the presence of the nearest Gazetted Offcer or the nearest Magistrate to ensure that the search is conducted fairly and to overrule the possibility of false accusations. That having been done, it cannot be now heald that the mere fact that the SDM accompanied the police to the house of the appellant no. 2 would make the search illegal.

Appeal Party Allowed.

Chronology of cases cited:

1. SLR (2018) Sik 1499

JUDGMENT

Bhaskar Raj Pradhan, J

1. This appeal under section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C.) is directed against the judgment and order on sentence dated 30.06.2018 passed by the learned Special Judge (SADA 2006), West Sikkim at Gyalshing in Sessions Trial (SADA) Case No. 03 of 2018 (*State of Sikkim vs Rabin Baraily and another*).

2. The learned Special Judge found the appellants guilty under sections 9(1)(b) and 9(b) of the Sikkim Anti Drugs Act, 2006 (SADA, 2006). The learned Special Judge sentenced the appellants to rigorous imprisonment of

seven years and to pay a fine of Rs.50,000/- under section 9(1)(b) of SADA, 2006. In default, the appellants were to undergo simple imprisonment for six months. The appellants were also sentenced to pay a fine of Rs.5000/- under section 9(b) of SADA, 2006. In default, the appellants were to undergo simple imprisonment for one month. The period of imprisonment already undergone by the appellants were set off. The learned Special Judge also directed that during their term of imprisonment, the appellants were to undergo compulsory detoxification and rehabilitation available in the State Prison at Rongyek, if necessary.

3. Heard Ms Gita Bista, learned counsel for the appellants and Mr. Yadev Sharma, learned Additional Public Prosecutor for the State of Sikkim.

4. The learned counsel for the appellants raised her first challenge about the seizures in the present case. It was her contention that there was no evidence that the seized Puma bag was found in the possession of the appellant no.1. The learned counsel submitted that the Sub-Divisional Magistrate, Tushar Nikhare (PW-1) (SDM) accompanied the police for the search in the house of the appellant no.2 and therefore, was not independent of the police. The learned counsel also submitted that the prosecution has not been able to prove the collection of urine samples of the appellants. The learned counsel relied upon the judgment of this court in ***Sushil Sharma vs State of Sikkim***[1].

5. The learned Additional Public Prosecutor on the other hand submitted that the evidence laid before the court would conclusively establish that the seizures were in fact made and the urine samples properly collected from the appellants which on forensic examination gave positive indication for controlled substances.

6. The FIR was lodged by Police Inspector Mahindra Pradhan (PW-10) on 28.01.2018 stating that on that day, he along with a police team, namely, Sub Inspector (SI) Upashna Sharma, Constable Gyan Bahadur Rai and others were conducting vehicle checking at Tikjuk near Police Station when he received credible source information that appellant no.1 was

[1] **SLR (2018) Sik 1499**

coming towards Gyalshing in a taxi bearing registration no. SK 02 T/0576 from Pelling and that he was suspected to be in possession of contraband substances in his black carry bag. The FIR further reported that as soon as he received the information, the vehicle arrived, and the appellant no.1 was intercepted along with the vehicle in the presence of two witnesses, viz. Sonam Bhutia (PW-7) and Bishnu Chettri (PW-3). The SDM was called over mobile phone and upon his arrival the appellant no.1 was given an option to have himself, and his bag searched under section 24 of SADA, 2006. Appellant no.1 agreed to be searched in the presence of the SDM. As such, the police team conducted search on his body and his bag in the presence of the SDM and the two independent witnesses. Five files (24 x 5 = 120 capsules), 1 loose file containing 6 number of Spasmo Proxyvon capsules were found in the black bag. Two numbers of loose Spasmo Proxyvon capsules were also recovered and seized from the right pocket of his jeans trousers along with one stick cigarette (Sahara) and one brown leather wallet containing Rs.120/-. It was reported that during this process of search and seizure, Bikash Kr. Singh, Assistant Commandant 36th Bn, SSB, Gyalshing (PW-6), was also present as he was called by him to assist and witness the search and seizure. The recovered items were photographed, seized, packed, and sealed in the presence of the witnesses and the SDM. From the seized items, one file (24 x 1 = 24 capsules), one loose file containing six numbers and two loose capsules of Spasmo Proxyvon were separately packed, sealed and labelled in the presence of the SDM and two witnesses, to send it to RFSL for forensic analysis. After the investigation by Sub Inspector (SI) Naresh Chettri (PW-9), the report under section 173 of the Cr.P.C. was filed alleging the commission of offences under section 9/14 of SADA, 2006 read with section 13(c) of the Drugs and Cosmetics Act, 1940.

7. On 04.04.2018, charges were framed against the appellants under section 9(1)(b) of SADA, 2006 as amended vide Notification No. 21/LD/ 17 dated 19.09.2017 and section 9(b) of SADA, 2006. The appellants pleaded not guilty, and the case proceeded for trial. The prosecution examined ten witnesses including the Investigating Officer Naresh Chettri (PW-9). Tushar Nikhare (PW-1) is the SDM involved in the search and seizure of the controlled substances from both the appellants. Sonam

Zangmoo Bhutia (PW-2) is the Junior Scientific Officer in the Chemistry Division of RFSL, Saramsa, who examined the seized substances as well as the urine samples of the appellants. Bishnu Chettri (PW-3) and Sonam Bhutia (PW-7) are the seizure witnesses to the seizure made in front of the Tikjuk Police Station on 28.01.2018 vide seizure memo (Exhibit-2). Mani Kumar Rai (PW-4) - the landlord of appellant no.2 and P. Tshering Bhutia (PW-8), were the seizure witnesses from the room of the appellant no.2. Dr. Pratik Rasaily (PW-5) examined both the appellants and prepared their medical reports, Exhibit-9 and Exhibit–10. The appellants were, thereafter, examined under section 313 Cr.P.C. Both feigned ignorance and said that the allegations were not true.

8. Mahindra Pradhan (PW-10) was the one who conducted the vehicle search and intercepted the appellant no.1 on 28.01.2018 at Tikjuk near the Police Station. He deposed that the appellant no.1 was given option to have his person and his bag searched under the provisions of section 24 of SADA, 2006. Appellant no.1 agreed to be searched in the presence of the SDM and two independent witnesses. According to him, in the notice under section 24(1) of SADA 2006 (Exhibit-1), the appellant no. 1 acknowledged "*Mero body search SDM Gayzing ko pargenc (sic 'presence') ma garnu sakcha*" [Exhibit-1(e)]. Mahindra Pradhan (PW-10) identified the handwriting and signature of the appellant no.1. Mahindra Pradhan (PW-10) was cross-examined by the defence. There was not even a denial of the endorsement made by the appellant no.1 in the notice (Exhibit-1).

9. Bishnu Chettri (PW-3) stated that during the checking the seized items were recovered from the black Puma bag of the appellant no.1. He also stated that two loose capsules were recovered from the right jeans pocket of the appellant no.1. During cross-examination, Bishnu Chettri admitted that when he reached the place of occurrence the search was already on. The appellant no.1 was sitting inside the vehicle. The Driver of the vehicle was not searched and checked by the police. He did not hear the police asking the appellant no.1 anything before conducting the search although he was present there. He also admitted that when he reached the place of occurrence the alleged bag was already in the possession of the police.

10. Sonam Bhutia (PW-7) stated that the contraband drugs were recovered from the appellant no.1. He also stated that some contraband drugs in the black bag were seized by the police. During cross-examination, he admitted that Bishnu Chettri (PW-3) was conducting search of the bag.

11. The facts reveal that the appellant no.1 was intercepted in a vehicle and searched in the presence of the SDM after he was given an option by Mahindra Pradhan (PW-10) under section 24 of the SADA, 2006. Although Mahindra Pradhan (PW-10) deposed this fact, no question was asked to him by the defence which would indicate that the search was not conducted legally. He made a categorical statement that the appellant no.1 had given his option to have himself and his bag searched in the presence of the SDM. Neither in the cross-examination of Mahindra Pradhan (PW-10) nor in the cross-examination of the two seizure witnesses did the defence raise the plea that the black Puma bag did not belong to the appellant no.1. Even during his examination under section 313 Cr.P.C., he did not take such a plea. The statement of Bishnu Chettri (PW-3) during his cross-examination that the accused was inside the vehicle and the bag was already in the possession of the police would not be of much consequence in view of the categorical deposition of Mahindra Pradhan (PW-10).

12. Chapter V of the SADA, 2006 deals with the procedure to be followed during investigation. Section 21 deals with power of entry, search, seizure and arrest without warrant or authorisation by any empowered officer if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any controlled substance in respect of which the offence punishable under the Act has been committed or any document or other article which furnished evidence after commission of such offence is kept or concealed in any building, conveyance or enclosed space and sealed it in the manner provided. Section 22 of SADA, 2006 deals with the power of seizure and arrest in any public place. Section 23 of SADA, 2006 empowers any officer authorized under section 21 if he has reason to suspect that any conveyance is used for the transport of controlled substances to conduct a search of the conveyance. Section 24 mandates that when the officer is about to search any person under the provision of section 22, he shall, if possible, take such person to the nearest gazetted officer of any of the departments mentioned in section

21 or to the nearest Magistrate.

13. Section 100 of the Cr.P.C. would apply only if the conditions mentioned in section 24(2) of SADA, 2006 is fulfilled, which means that only when the person cannot be searched in the presence of a gazetted officer or a Magistrate as it is not possible to take the person to be searched to them without the possibility of the suspect parting with possession of the controlled substance he could proceed to search the person as provided under section 100 of the Cr.P.C. As the appellant no.1 was searched in the presence of a Magistrate, section 24(2) would not apply. In the circumstances, the evidence of Mahindra Pradhan (PW-10) and seizure witness Sonam Bhutia (PW-7), would be sufficient to establish beyond reasonable doubt that the seizure was effected in the manner contemplated. Resultantly, this court does not find anything illegal in the seizures. It is quite evident that the black Puma bag was, in fact, seized from the possession of appellant no.1 and that the controlled substances were found inside the black Puma bag as recorded in the said seizure memo (Exhibit-2).

14. The established facts reveal that the search and seizure operation in the house of appellant no.2 was done immediately after the interception of appellant no.1 in the vehicle on 28.01.2018 and lodging of the FIR. The SDM was requested by Mahindra Pradhan (PW-10) on mobile phone to come to the place where the appellant no.1 and the concerned vehicle was intercepted. It was after the appellant no.1, during interrogation, disclosed to the Investigating Officer that he had purchased the controlled substances from appellant no.2 that his house was searched after obtaining warrant from the learned Judicial Magistrate. The SDM accompanied the police to the house of the appellant no.2 where search was to be conducted. The SDM deposed that the appellant no.2 was given option by the police as to whether he intended to be searched before the Magistrate or a Gazetted Officer to which he conveyed his desire to be searched in the presence of the SDM. Pursuant thereto, the search was conducted, and the controlled substances seized. The Body Search Memo dated 28.01.2018 (Exhibit-3) and Search Memorandum dated 28.01.2018 (Exhibit-4) have been proved by the Investigating Officer; P. Tshering Bhutia (PW-8) and Mani Kumar Rai (PW-4) as well as the SDM. It is, therefore, quite evident that the SDM

had accompanied the police to the house of the appellant no.2 only because he had already been requested earlier to fulfil the requirements of section 24 by Mahindra Pradhan (PW-10). In any case, although an opportunity to cross-examine the SDM was availed by the appellant there is no cross-examination on the alleged illegality of the SDM accompanying the police during the search and seizure in the house of the appellant no.2. What matters is the carrying out of search of the person suspected in the presence of the nearest Gazetted Officer or the nearest Magistrate to ensure that the search is conducted fairly and to overrule the possibility of false accusations. That having been done, it cannot be now held that the mere fact that the SDM accompanied the police to the house of the appellant no.2 would make the search illegal. The facts in ***Sushil Sharma*** (supra) were different.

15. A feeble attempt was also made to question the forensic evidence of the forensic report prepared by Sonam Zangmoo Bhutia (PW-2) by the learned counsel for the appellants. Sonam Zangmoo Bhutia (PW-2) examined the exhibits furnished by RFSL Saramsa and prepared the report (Exhibit-6). The report (Exhibit-6) enumerates the description of the exhibits received and the result of the examination. It also records that the exhibits were examined by chemical analysis using Colour Test, Spectrophotometric and Chromatographic techniques. She deposed that the results were obtained based on those examinations. There were eight specimens, out of which, specimens at serial no. 4 and 8 tested positive for Tramadol which is a controlled substance and the rest of it tested positive for Tramodol Hydrochloride which is also a controlled substance. Sonam Zangmoo Bhutia (PW-2) deposed that she was a Junior Scientific Officer at the Chemistry Division of RFSL, Saramsa, Ranipool. She deposed about having received the exhibits in two sealed cloth cover packets. She also deposed that she examined these exhibits using Colour Test, Spectrophotometric and Chromatographic techniques and the results obtained. The cross-examination neither questioned her expertise nor the incorrectness of the tests conducted by her. The prosecution has, therefore, sufficiently proved that the seized items tested positive for controlled substances.

16. Exhibits 9 and 10, both dated 29.01.2018, are the letters forwarding the appellants for medical examination with a request to the medical officer to collect their urine samples. Dr. Pratik Rasaily (PW-5), the medical officer

who examined both the appellants on 28.01.2018, opined that the appellants were under the influence of psychotropic substances. The appellants pupils were dilated and sluggishly reacted to light. The appellant No.1 was conscious but restless. The appellant No.2 was conscious but drowsy. Dr. Pratik Rasaily (PW-5), thereafter, prepared the medical reports (Exhibit-9 and Exhibit-10). These reports record the collection of urine samples. He also deposed that he collected their urine samples and handed it over to the police. During cross examination, he admitted that the sluggish and dilated pupils could be caused by consumption of alcohol as well. He admitted that there was no witness when he handed over the urine sample to the police. Naresh Chettri, the Investigating officer, also corroborated that the appellants' urine samples were collected and sent for forensic analysis. The handing/taking memo (Exhibit-13) dated 28.01.2018 and the intimation dated 29.01.2018 to the Learned Chief Judicial Magistrate by Mahindra Pradhan (Exhibit-17) also records the collection of the urine samples from the appellants. The forensic report (Exhibit-6) records the receipt of exhibits including the urine samples in glass vials in sealed boxes by a special messenger on 01.02.2018. Sonam Zangmoo Bhutia (PW-2) confirmed receiving the urine samples for forensic examination and its examination by her. The urine samples also tested positive for tramadol which is a controlled substance. Consequently, there is no reason to doubt that the urine samples had in fact been collected and sent for forensic examination.

17. The alleged offence was committed on 28.01.2018. The last amendment to SADA, 2006 was vide Notification No. 20/LD/18 dated 24.10.2018 by which section 9(1)(b) was further amended. Therefore, section 9 as it stood on 28.01.2018 as amended by the Sikkim Anti-Drugs (Amendment) Act, 2017 would be applicable in the facts of the present case. Section 9 as it stood at the time of the commission of the offence reads thus.

> "**9.** (1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-
>
> (a) ……

(b) where the contravention involves large quantity, with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees;

(c) ……..…...……

(2) ……...…….

(3) …….....……

(4) …….....……

(5) …….....”

18. The learned Special Judge has convicted the appellant under section 9(b) of SADA 2006 which did not exist at the time of the offence. Original section 9 as enacted in the year 2006 did contain section 9(b). The Sikkim Anti-Drugs (Amendment) Act, 2017 notified on 19.09.2017, however, vide section 7 thereof, substituted section 9 as it existed thereby also removing section 9(b). Section 9, which therefore existed prior, was now replaced with section 9 which contain sub-sections (1) to sub-section (5). Resultantly, the conviction of the appellant under section 9(b) is set aside. The offence punishable under section 9(1)(b) involves the contravention of any provision of the Act or any rule or order for manufacture, possession, sale, purchase, transport, imports inter-State, exports inter-State or use of large quantity of controlled substances. Under section 2(i), “large quantity” in relation to controlled substances means any quantity as specified in the Schedule to the Act. The schedule provides that anything between 101 to 1500 pieces of controlled substances would be large quantity. According to the evidence, the seizure of controlled substances from the possession of each of the appellants were more than 101 in number and less than 1500. Resultantly, the conviction of the appellants under section 9(1)(b) are upheld.

19. Section 9(1)(b) provides rigorous imprisonment for a term which

shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees. The learned Special Judge has convicted the appellants to the minimum sentence and fine prescribed. Accordingly, the sentence of the appellants under section 9(1)(b) are also upheld.

20. The appeal is partly allowed to the above extent. The other directions issued by the learned Special Judge are maintained.

21. The appellants were enlarged on bail vide order of this Court dated 28.11.2018. In view of their convictions as above, they shall surrender before the Court of the learned Special Judge (SADA 2006), West Sikkim at Gyalshing on 23.08.2021 to undergo the sentences. The learned Special Judge shall take appropriate steps should the appellants fail to surrender as directed hereinabove.

22. No order as to costs.

23. Copy of the judgment be sent to the Court of the Learned Special Judge for information and compliance.