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JANUARY AND FEBRUARY - 2021

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EQUIVALENT CITATION

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SUBJECT INDEX

Code of Criminal Procedure, 1973 – S. 154 – Delay in Lodging First Information Report – There is an inordinate delay of five years in lodging the F.I.R (Exhibit-3). Much of the evidence which may have been available during the relevant time would have been lost – Due to inordinate delay, medical evidence like injuries would have healed and material evidence would be lost – Due to the fact that in the present case, the victim had not reported about the incident for five long years, it is equally important to seek corroboration of what she deposed in Court – The learned Judge may have been correct in concluding that the appellant having committed rape upon the victim could not be ruled out. The victim's vivid description of the two incidents does lead one to understand that it may have been so. However, while it is important to be conscious about the trauma of the victim, it is also important to be conscious about the well settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof. What happened on 17.08.2013 in the confines of the appellant's room at Development Area, and thereafter, in his house would be known only to the victim and the appellant. The victim did not report the matter to the police immediately thereafter, although she was fairly educated and a woman who wanted to stand on her own feet – The F.I.R was lodged on 10.01.2018, after several deliberations between the victim's family and the appellant's well-wishers – Held: Although the evidence led by the prosecution leads to grave suspicion that the appellant had in fact raped the victim, it would not be judiciously prudent to convict the appellant on suspicion alone. None of what the victim deposed have been corroborated even by her family members. The victim's version of rape is not corroborated, so is her version of pregnancy and abortion – There is evidence to suggest that the victim had been infatuated by the appellant and had expressed her desire to marry him. Some of the prosecution witnesses have deposed about their love affair – The possibility of a relationship gone sour cannot be ruled out – Appellant entitled benefit of doubt.
Makraj Limboo* v. *State of Sikkim

Code of Criminal Procedure, 1973 – S. 439 – Bail – The victim is mere child of approximately three years and the allegation against the petitioner is serious, considering that it was committed on a child so young. The penal provision is also duly taken into consideration – In the facts and circumstances and in view of the gravity of the offence and the penalty it entails, which may prompt the petitioner to abscond if enlarged on bail, not inclined to allow the petition.
Sanjay Sewa @ Sanju* v. *State of Sikkim

Code of Criminal Procedure, 1973 – S. 439 – Bail – The victim, her mother as well as several other important witnesses have been examined and their depositions secured – At this stage of trial the primary concern for the Court should be the uninterrupted progress for fair trial to ensure justice is done. This can happen only when prosecution witnesses are able to depose freely, without fear or favour. The Court must also be conscious that the applicant is only an under trial and his liberty is a relevant consideration. While adopting a liberal approach the possibility of interdicting fair trial if released on bail should be obliterated – Considering the nature of the offence and the fact that the applicant has already spend 1year and 8 months in jail out of the minimum sentence of 5 years prescribed for the offence under S. 10 of the POCSO Act, 2012, it may not be proper to continue him in jail any further.

Karma Sherpa* v. *State of Sikkim

Code of Criminal Procedure, 1973 – S. 439 – Bail – It is seen that although charges were framed on 17.07.2020, only one witness has been examined till date. The records reveal that dates have been set for examination of prosecution witnesses till 21.06.2021. There is no likelihood of the trial completing in the near future. In the reply filed by the State respondent, the two grounds taken is the likelihood of the applicant influencing the witnesses and the offence being heinous in nature – The offence charged against the applicant is heinous and most of the witnesses are yet to be examined including Ms. Nirmala Rai, who is sought to be heavily relied upon by the prosecution. The records reveal that her statement under S. 164 Cr.P.C. had been recorded. The applicant is not only a woman but also with a minor child who is, due to her circumstances, also lodged at Rongyek Central Prisons. The applicant has already spent more than a year of incarceration along with the child. The apprehension of the learned Assistant Public Prosecutor is logical but without any material to support it. The apprehension can be safe guarded by laying down strict conditions for bail.

Phurba Lhamu Tamang* v. *State of Sikkim

Goods and Services Tax Regime – Scheme of Budgetary Support – Notification F. No. 10(1)/2017-DBA-II/NER dated 05.10.2017 – The petitioner is aggrieved by the alleged curtailment of 100 % Excise duty exemption granted vide the earlier policies of the Government, which underwent a sea change under the new Tax regime in 2017 – The 100 % Excise duty exemption by way of refund availed by the petitioner prior to

the Tax reform of 2017 was curtailed by the respondents under the GST regime through the Budgetary Support Schemes reducing the benefits earlier granted inasmuch as the budgetary support for specified goods manufactured by the eligible Unit is 58 % of CGST and 29 % of IGST paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax credit of the Central Tax and Integrated Tax. The petitioner in WP(C) No. 41/2015, W P(C) No. 08/2017, WP(C) No. 27/2017 and WP(C) No. 40/2017 had the same grievances. Promissory estoppel has been agitated previously, as also in this writ petition. In WP(C) No. 41/ 2015, the challenge to the impugned Notifications therein was for the reason that the benefit of exemption was sought to be reduced to the prescribed percentage of value addition amount i.e. 56 % applicable to pharmaceutical products mentioned in the respective Notifications and applicable Chapter – The subject matter in the SLP(C) No.10257/2018, 10253/2018, 12148/ 2018 and 12496/2018, before the Hon'ble Supreme Court dealt with the same issue as in the instant writ petition – Held: The question framed in paragraph "47" by this Court in the impugned judgment dated 21.11.2017 clearly deals with promissory estoppel and has been duly examined by this Court. The judgment of the Hon'ble Supreme Court elucidates and clarifies the nature of the Notifications as also the principle of promissory estoppel and has clarified all points in controversy raised in the appeals, which without a shade of doubt, are similar to the issue raised herein – These issues stand truncated and there is no question of this Court delving any further into the question of promissory estoppel.

Sun Pharma Laboratories Limited* v. *Union of India and Others

Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – This Court is well aware and alive to the circumstances of the sale and consumption of controlled substances by the youth specifically and consumption by children as young as eight years old and people of all other age groups as well. It is indeed concerning that the consumers become victims of substance abuse which is sold by persons out to make a quick buck with no conscience whatsoever. They are oblivious to the deleterious and negative effects on the users, the unsuspecting family and the society at large. At the same time, the statement of a co-accused or the unsubstantiated statement of witnesses, at this stage, does not suffice to deprive the petitioner of his liberty – Fit case where the petitioner can be enlarged on bail.

Deepen Chettri* v. *State of Sikkim

Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – S. 18(b) of SADA, 2006 provides for the twin conditions necessary for grant of bail in a case arising in SADA, 2006, notwithstanding anything contained in Cr.P.C. This provision is in *pari-materia* to S. 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 – The words "reasonable grounds" under S. 18 of the SADA, 2006 would have same meaning as has been explained by the Supreme Court *vis-à-vis* S. 37 of the NDPS Act, 1985. It would connote substantial probable cause for believing that the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
Ganesh Sharma @ Gelal* v. *State of Sikkim

Sikkim Finance Accounts Service Rules, 1986 – *Inter se* Seniority – When an Officer had worked continuously for a long period in a post and had never been reverted, it cannot be held that the Officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the Order of appointment may state so. In such circumstances, the entire period of officiation was to be counted for seniority, any other view would be arbitrary and violative of Articles 14 and 16 (1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstance (*In re. D.R. Nim* discussed) – Where the initial appointment is only ad hoc and not according to Rules and made as a stop gap arrangement, the period of officiation to the said post cannot be taken into account for considering seniority – However, an employee appointed to a post according to Rules would be entitled to get his seniority reckoned from the date of his appointment and not from the date of its confirmation (*In re. Direct Recruit Class II Engineering Officers' Association* discussed).
Sushil Pradhan and Others* v. *State of Sikkim and Others

Sikkim Finance Accounts Service Rules, 1986 – Rota Quota Rule – While considering the admitted departure from the Quota Rule and prescribed procedure of recruitment in the instant matter, it is a safe assumption that the appointments of the petitioners, if made in excess of the service quota were valid and legal in view of the existence of the relaxation clause at Rule 28 of the amended Rules of 1986. A presumption thus arises that Rule 28 was invoked legalizing and validating the promotion of the petitioners – The relaxation clause was invoked and effective from the date

the Officiating appointment of the petitioners were made to the posts of Accounts Officers i.e. from 08.05.2008 – The Quota Rule is not broken down until serious efforts are made by the Government to recruit from the open market (*In re N.K. Chauhan* discussed).
Sushil Pradhan and Others* v. *State of Sikkim and Others

Sikkim Government Service Rules, 1974 – Rules 13 and 39 – Officiating Appointment – A person appointed on officiating basis is essentially a Government servant who has not completed the minimum number of qualifying years of service prescribed by the Government from time to time and in a post which carries a higher time scale of pay, if the vacancy is for a period exceeding one year – The qualification necessary for the petitioners to be considered for promotion from Senior Accountant to Accounts Officer is six years of continuous service in the rank of Senior Accountant – While considering the first condition of the Officiating Order dated 08.05.2008, it is in the first instance, unfathomable since it states that the officiating promotion shall not confer any right for regular promotion, in such a circumstance, is it to be construed that despite the person having put in the required years of service, all other qualifications being met and substantive vacant posts existing, he would still be deprived of his regular promotion and would be sentenced to suffer the whims of the State-respondents – The second condition provides that regular promotion can be made on the recommendation of the SPSC, this condition obviously would be contingent upon the action of the State-respondents – The petitioners cannot be answerable for the procrastination or indolence of the State-respondents, thereby depriving them of timely promotions, of course subject to fulfillment of all other requisite conditions.
Sushil Pradhan and Others* v. *State of Sikkim and Others

Sikkim Subordinate Accounts Service Rules, 1984 – Determination of Seniority – The posts of Accounts Officers were to be filled by way of promotion and direct recruitment in the ratio of 50:50 each. The petitioners were qualified as per Rules in 2004-2006 as well as on 08.05.2008, to be considered for promotion as Accounts Officers. The Rules required the State-respondents to decide in each year, the number of vacancies in the service to be filled in that year by direct recruitment and promotion and to take steps after assessing the vacancy, viz., including recommending the names of the service holders for promotion to substantive posts. The State-respondents failed to comply with this requirement of the Rules nor were examinations for either criteria held, as mandated – The procedure

prescribed for recruitment was not adhered to by the State-respondents which has, in fact, led to the heart burning amongst the petitioners and the direct recruits concerning their inter se seniority. Besides failing to take steps as enunciated hereinabove, the Government has not prepared a list of names of persons in order of seniority (as per Rules) who have, on the first day of that year, completed not less than six years of continuous service as Senior Accountants nor was the list of such persons forwarded to the Commission along with the relevant documents. The anticipated number of vacancies to be filled by promotion in the course of the period of twelve months, commencing from the date of preparation of the list was not indicated as well – In the absence of necessary steps by the Government, the Commission was not in a position to take consequential steps and convene a meeting of the Promotion Committee who had been vested with the responsibility of preparing a final list of persons found to be suitable for promotion to the higher service on an overall relative assessment of their service records and interview.

Sushil Pradhan and Others **v.** ***State of Sikkim and Others***

Makraj Limboo v. State of Sikkim

SLR (2021) SIKKIM 1

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

Crl. A. No. 17 of 2019

Makraj Limboo ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Mr. Sushant Subba, Advocate (Legal Aid) and Ms. Sushmita Gurung, Advocate.

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

Date of decision: 7th January 2021

A. Code of Criminal Procedure, 1973 – S. 154 – Delay in Lodging First Information Report – There is an inordinate delay of five years in lodging the F.I.R (Exhibit-3). Much of the evidence which may have been available during the relevant time would have been lost – Due to inordinate delay, medical evidence like injuries would have healed and material evidence would be lost – Due to the fact that in the present case, the victim had not reported about the incident for five long years, it is equally important to seek corroboration of what she deposed in Court – The learned Judge may have been correct in concluding that the appellant having committed rape upon the victim could not be ruled out. The victim's vivid description of the two incidents does lead one to understand that it may have been so. However, while it is important to be conscious about the trauma of the victim, it is also important to be conscious about the well settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof. What happened on 17.08.2013 in the confines of the appellant's room at Development Area, and thereafter, in his house would be known only to the victim and the appellant. The victim did not

report the matter to the police immediately thereafter, although she was fairly educated and a woman who wanted to stand on her own feet – The F.I.R was lodged on 10.01.2018, after several deliberations between the victim's family and the appellant's well-wishers – Held: Although the evidence led by the prosecution leads to grave suspicion that the appellant had in fact raped the victim, it would not be judiciously prudent to convict the appellant on suspicion alone. None of what the victim deposed have been corroborated even by her family members. The victim's version of rape is not corroborated, so is her version of pregnancy and abortion – There is evidence to suggest that the victim had been infatuated by the appellant and had expressed her desire to marry him. Some of the prosecution witnesses have deposed about their love affair – The possibility of a relationship gone sour cannot be ruled out – Appellant entitled benefit of doubt.

(Paras 10, 18 and 19)

Appeal allowed.

Chronology of cases cited:

1. Sudhansu Sekhar Sahoo v. State of Orissa, (2002) 10 SCC 743.
2. Ramdas and Others v. State of Maharashtra (2007) 2 SCC 170.
3. Vijayan v. State of Kerala, (2008) 14 SCC 763.

JUDGMENT

Bhaskar Raj Pradhan, J

1. On 10.01.2018, the victim (PW-1) lodged the First Information Report (FIR) (Exhibit-3) at Sadar Police Station, Gangtok, alleging that she was raped by the appellant on 17.08.2013, due to which she became pregnant and had to abort the baby on his advice. It was alleged that, thereafter, the appellant assured the victim that he would marry her. She further alleged that the appellant had taken her to his house after a month of the miscarriage in the pretext of changing his clothes and raped her again.

2. In Sessions Trial (F.T.) Case No. 15 of 2018 *(State of Sikkim vs. Makraj Limboo)*, the learned Judge, Fast Track Court, East and North

Sikkim at Gangtok (the learned Judge), on 30.07.2019, convicted the appellant and sentenced him on 31.07.2019 under section 376(1) of the Indian Penal Code, 1860 (IPC) to undergo seven years rigorous imprisonment and a fine of Rs.50,000/-. It was held that the case of repeatedly committing rape on the same woman under section 376(2)(n) IPC had not been made out. The learned Judge concluded that the appellant having committed rape upon the victim could not be ruled out. The learned Judge also held that the victim had explained the delay in lodging the FIR in detail.

3. Mr. N. Rai, learned Senior Counsel for the appellant, challenges both the findings of the learned Judge. He further submits that even if this court were to believe the version of the victim, it would be seen that the act complained of may have been consensual and the FIR was lodged only because the appellant did not marry the victim. According to Mr. N. Rai, the delay of five years in lodging the FIR have not been explained sufficiently.

4. He drew the attention of this court to the judgment of the Supreme Court in ***Sudhansu Sekhar Sahoo vs. State of Orissa***[1], to impress that the sole testimony of the victim can be the basis for conviction, provided it is safe, reliable and worthy of acceptance. It was held that the evidence of the prosecution should be cogent and convincing and if there is any supporting material likely to be available then the rule of prudence requires that evidence of the victim may be supported by such corroborative material. Court should be strict and vigilant to protect society from such evils and in the interest of society, serious crimes like rape should be effectively investigated. It is equally important that there must be fairness to all sides, and in a criminal case a court has to consider the triangulation of interest. It involves taking into account the position of the accused, the victim and his or her family and the public.

5. Mr. N. Rai relied upon ***Ramdas and Others vs. State of Maharashtra***[2], in which the Supreme Court found that the delay of eight days in lodging the FIR has not been satisfactorily explained and the appellant therein was given the benefit of doubt. It was held:

> "**24.** Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay

[1] (2002) 10 SCC 743
[2] (2007) 2 SCC 170

in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the

> ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are cases where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straitjacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See *Pandurang* v. *State of Hyderabad* [(1955) 1 SCR 1083 : AIR 1955 SC 216].) Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact."

6. He also relied upon ***Vijayan vs. State of Kerala***[3], in which the Supreme Court had considered a case solely based on the evidence of the prosecutrix. The complaint had been made after seven months after the alleged commission of rape. It was held that in cases where the sole testimony of the prosecutrix is only available, it is very dangerous to convict the accused, especially when the prosecutrix could venture to wait for seven months for filing the FIR for rape leaving the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix had willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR, it would be very hazardous to convict on such sole oral testimony.

[3] (2008) 14 SCC 763

7. Mr. Yadev Sharma, learned Additional Public Prosecutor, on the other hand, vociferously supported the judgment of conviction and order on sentence passed by the learned Judge. It was his contention that the FIR (Exhibit-3), the statement of the victim recorded under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) (Exhibit-5) and her deposition in court had elaborately detailed the circumstances of how, when and why, the victim had been raped by the appellant which could not be demolished inspite of the exhaustive cross-examination. It was, therefore, contended that the judgment of conviction and order on sentence, need not be interfered.

8. The prosecution has examined 18 witnesses including Shekhar Basnett, the Investigating Officer (PW-18). The defence has examined Birkha Bdr. Limboo (DW-1) and San Bdr. Limboo (DW-2), raising a plea of alibi that on the date of the incident, i.e., 17.08.2013, the appellant was in Nepal with them. The learned Judge disbelieved the plea of alibi as it was not cogently proved. The defence plea of alibi would be relevant if the prosecution discharged its burden of proof.

9. The only direct evidence relating to the alleged rape by the appellant is that of the victim. The victim has in her FIR dated 10.01.2018 (Exhibit-3), statement recorded under section 164 Cr.P.C dated 26.02.2018 (Exhibit-5) and her deposition dated 13.02.2019, given a detailed account of what transpired with her before, during the two incidents of alleged rape and thereafter. According to her deposition, she knew the appellant whose wife used to be her teacher in her school. Sometimes in the year 2013, she had met the appellant at a funeral in the village where he had asked her about her future and promised to help her secure a government job. The victim was aware that the appellant had good political contacts and was an influential person. She was aware that he had helped other people of their village to secure government jobs. At the funeral, the appellant told her that he would take her to Gangtok to get her a government job. He took her mobile number and told her that he would contact her in a few days regarding the job. The victim deposed that after two-three months on 17.08.2013, the appellant called her over the phone and told her that he would take her to Gangtok for the job. Thereafter, the victim, along with her brother, who also had to go to Ramthang, North Sikkim, went with the appellant in his vehicle (MAXX bearing registration no. 0042). The appellant dropped her brother at Ramthang and thereafter, they proceeded to Gangtok. On the way to Gangtok, the appellant suggested that they should go to his room at Development Area to prepare an application for her job.

According to the victim, she did not agree to go to his room and said that she would wait for him in the market. The appellant insisted that she should go with him so that he could dictate the contents of the job application. According to the victim, after entering the room, the appellant bolted the door from inside. She told him not to do so. The appellant said that if people saw them together, they would misunderstand. The appellant then told her to sit on the bed, brought a table beside it and started dictating the job application. She started writing it. The appellant inquired about her family. Suddenly, the appellant pushed her on the bed and started kissing her on her mouth, cheeks and neck, despite her resistance. He even fondled her breasts. Although, she tried to resist, he overpowered her. Somehow, she managed to reach the door but before she could unlatch the door, the appellant dragged her to another room where again he bolted the door from inside. The room appeared like a kitchen but had a small bed. The appellant took her to the bed, forcefully opened her clothes and his, as well. She resisted and pleaded that she was menstruating. He did not stop and committed rape on her. She tried to raise hue and cry, but the appellant covered her mouth with his hand, and she was helpless. After the incident, she was traumatised and cried. The appellant threatened her not to disclose the incident and assured her that he would take her as his second wife. He also told her that he had done such activities with nearly a hundred girls. The appellant did not let her go on her own and stayed with her all the while. He, thereafter, took her to a restaurant. She was not in a state to eat anything. From the restaurant, the appellant took her to the Secretariat. They could not meet the officers as they had already left. Later, on the same date, the appellant dropped her back home and told her to inform him whether she got her monthly period or not. After about ten-fifteen days, the appellant called her again and told her that he would take her to Gangtok for the job that he had promised. The victim was in a frustrated state and thought that it would be best for her if she got the government job. So, she agreed to meet him at Zero, North Sikkim. When they met at Zero, the appellant told her that he had to change his clothes and insisted that she should accompany him to his house. Once they reached there, she noticed that there was no one at home. The appellant taking advantage once again forcefully committed rape on her. After the incident, the victim fought with the appellant and went home and told him that she no longer wanted the job. According to the victim, even after the incident, the appellant used to call her over the phone and inquire whether she had her monthly period or not. After a month of the incident, she missed her monthly period and so,

when the appellant called her, she informed him about it. The appellant brought a pregnancy test kit and when she checked, she found out that she was pregnant and told the appellant about it. The appellant gave her a pill to abort her pregnancy and made her take the pill in front of him. After taking the pill, she started bleeding for about fifteen days and her health started deteriorating. Eventually, she had many health issues and was diagnosed with depression for which she was treated at Central Referral Hospital, Manipal. The victim was later informed by her family members that in her state of depression, she used to be delirious and search for the appellant and say that he had killed her child. Her family members doubted that the appellant had done something to her and when they returned home after the treatment, they asked her what happened. The victim then told them about both the incidents. Her family members then called the appellant and asked him about the incidents. The appellant accepted the fact in her presence. The appellant also agreed to take her as his second wife to make up for what he had done and also set the date as 25.09.2017. According to the victim, her brother had also videographed the said conversation in his mobile phone. However, the appellant did not come on the said date but sent his wife along with some money and requested her not to report the matter to the police and also forced her to accept a sum of Rs.1,00,000/-. An agreement was also prepared stating that the wife of the accused would pay a sum of Rs.2,50,000/- by way of compensation for the medical expenses incurred by her during her medical treatment. Thereafter, the victim decided that it would be best for her to lodge a complaint against the appellant and accordingly, lodged the FIR (Exhibit-3). During her cross-examination, she admitted that there was a delay of five years in lodging the FIR; she was aware that the appellant was a married man with children; that he was a rich person working as a contractor and a social worker; that they had gone to hotel Potala after the alleged incident that took place in Development Area, which had many staff present and near the hotel there were many people walking by; that she also saw traffic police personnel on the way to the hotel; that because she was undergoing treatment for depression and was not in a proper frame of mind, she had made different statements before the police and the Magistrate; during the five years she did not disclose about the incident to anyone including the police. She admitted that her statement, that the appellant started kissing her on her mouth, cheeks and neck and fondled her breasts and although she tried to resist him, he overpowered her - was being mentioned by her for the first time in court. She also admitted that although she went home after the

incident at Development Area, she did not disclose about it to her family members. She admitted that she was around 29-30 years old.

10. There is an inordinate delay of five years in lodging the FIR (Exhibit-3). Much of the evidence which may have been available during the relevant time would have been lost. Rape is a violent offence. Penetration is a *sine qua non*. Due to the inordinate delay, medical evidence like injuries would have healed and material evidence would be lost. Yet her statement cannot be brushed under the carpet merely because she took time to come out and disclose it. The victim's statement regarding sexual offence is a delicate evidence which must be examined closely keeping in mind various relevant factors. It is important to keep in mind that in the context of the present Indian and for that matter, even the Sikkimese social setting, a woman would not ordinarily make a false allegation of sexual assault or rape for the fear of stigma. However, more and more women are coming out setting aside their fear and reporting about sexual offences. The stigma which once existed amongst many women may be slowly receding at least with the educated and conscious populace. It is also equally important to keep in mind that the accused should not be put in the same pedestal as that of the victim of crime. One is the injured, the other, the predator. It is well settled that the court can, in a given case, rely upon the sole testimony of the victim if it is safe, reliable and worthy of acceptance and convict the accused. However, it is always prudent for the court to seek corroboration when the sole testimony is the only evidence available. What is, however, vital for the court to keep in mind is that like in all criminal cases, the burden is always upon the prosecution to prove its case beyond reasonable doubt. Due to the fact that in the present case, the victim had not reported about the incident for five long years, it is equally important to seek corroboration of what she deposed in court.

11. Quite evidently, there is no other eyewitness' account. The unnamed brother who accompanied the victim till Ramthang on 17.08.2013, along with the appellant in his car, was not examined as prosecution witness. PW-10, her elder brother, was examined but he said nothing about travelling with the victim and the appellant on 17.08.2013.

12. Out of the 18 witnesses examined by the prosecution, several of them deposed about the settlement talks the family members of the victim had with the appellant. All of them were co-villagers and therefore, known to the victim

and the appellant as well. Besides them, Ranjeeta Pradhan (PW-17) was the learned Judicial Magistrate who recorded the statement of the victim under section 164 Cr.P.C. on 26.02.2018. Bijay Subba (PW-14) was the Officer-in-Charge of the Police Station, who registered the FIR (Exhibt-3) and Shekhar Basnett (PW-18) was the Investigating Officer of the case. Dr. Samrat Singh Bhandari (PW-11) was the Associate Professor in Psychiatry at the Central Referral Hospital, Manipal, who examined the victim in August 2017 and January 2018 just before she lodged the FIR (Exhibit-3). Dr. Mani Gurung (PW-13) was the Gynaecologist at the STNM Hospital who examined the victim on 11.01.2018 a day after she lodged the FIR.

13. Amongst the prosecution witnesses who spoke about the settlement talks, PW-4, PW-7 and PW-8 were not related to the victim but lived in the same village as that of the victim and the appellant. PW-5 was the victim's niece and classmate. PW-9 was the victim's uncle. PW-10 was the victim's elder brother. PW-15 was the victim's distant relative and PW-16, the victim's cousin. PW-12 was the appellant's cousin. Their evidence reflects that the appellant and his wife were also involved in those settlement talks. The evidence suggests that at least two such meetings took place in the victim's house. It is also apparent that two documents were prepared during these meetings. PW-12 – the appellant's cousin, was the scribe of "Lena Dena Patra" (Exhibit-2) and the "Milapatra" (Exhibit-10). PW-4, who accompanied the appellant's wife to the meeting, deposed about their preparations. Some amount of money seems to have been offered during the settlement talks and a promise to pay more seem to have been made. PW-5 - the victim's niece, PW-8, PW-9 – the victim's uncle and PW-10 - the victim's elder brother, all spoke about it. PW-10, the victim's elder brother, admitted having received an amount of Rs.1,00,000/- from the appellant's wife. Some of the witnesses also deposed about the demand of the victim's family members for the appellant to marry the victim. Besides the victim, PW-8, PW-9 and PW-10 deposed about the appellant himself offering to marry the victim. PW-16, the victim's cousin, seems to have prepared a video on his mobile phone recording the execution of an agreement during one of the meetings. This video was transferred into a compact disk at Digital Color Lab in the presence of PW-2 and PW-3 and handed over to the Investigating Officer. The involvement of the appellant's wife during these settlement talks have been deposed by PW-4, PW-5, PW-8, PW-9, PW-10, PW-12, PW-15 and PW-16. The fact that the appellant himself was also involved in at least one of the meetings has been deposed by PW-8, PW-9, PW-10 and PW-16.

14. Although the victim and her niece (PW-5) deposed that the victim had disclosed about the two incidents of rape to the victim's family members after her treatment at the Central Referral Hospital in the year 2017, none of them deposed that she had in fact disclosed to them about the rape on two occasions in the year 2013. PW-9, the victim's uncle, deposed about the appellant having admitted about the physical relationship he had with the victim and promising to marry her only. Even the victim's brother (PW-10) did not depose that the victim had disclosed about the two incidents of rape. In fact, he admitted that even in his statement to the police he had not stated that the appellant had raped his sister. PW-15, the victim's distant relative, admitted during cross-examination that the victim used to admire the appellant since the time she was studying in Class-XI. According to him, the victim used to say that she wanted to marry the appellant. He also admitted that initially the family of the victim and the appellant shared a cordial relation. However, after the appellant physically assaulted the brother of the victim, their relationship strained. The victim's cousin (PW-16) deposed that the victim had confided to PW-5, her relative, about the sexual relationship between the victim and the appellant following which the victim had to abort the child. According to PW-4, the victim's brother (PW-10) told him that the victim was suffering from depression due to the sexual relationship between the appellant and the victim. PW-8 also deposed that he learnt about the physical relationship between them from the family members. According to PW-12, she had heard about the love affair between the two. She also admitted during cross-examination that she had gone to the appellant's house in the year 2017 when he had met with an accident and found the victim along with PW-5 and another girl from their village there. The victim and PW-5 had gone to see the appellant. PW-7 deposed that he had learnt about the affair between the appellant and the victim during the meeting. He also admitted that he had heard few years ago about the altercation between the victim's brother and the appellant.

15. PW-5 admitted during her cross-examination that she and the victim had studied together in Class-X in the year 2010. According to her, the victim had to drop her Class-X examination due to her serious skin infection. She also admitted that the father of the victim was suffering from hypertension and the victim was bearing all the expenses of her parents for the past four-five years. PW-8 and PW-9 (the victim's uncle) also corroborated these facts. The victim's brother (PW-10) admitted that both their parents remained sick due to old age and the school expenses of their

younger sister was borne by the victim as well. He admitted that his brother-in-law had expired two-three years ago. He admitted that the victim had nerve problems for which she had undergone operation. He also admitted that during her school days the victim had skin allergy due to which she had to drop one year from school. PW-5 admitted that the brother-in-law of the victim had died three-four years ago. She also admitted that the victim had become sad due to his death.

16. Dr. Mani Gurung (PW-13), a Gynaecologist at the STNM Hospital, examined the victim on 11.01.2018. This was five years after the alleged two incidents of rape. According to Dr. Mani Gurung (PW-13), the victim gave a history of two assaults by the appellant. She gave history of pregnancy and abortion. On local external genital examination, he noticed old healed hymenal tear suggesting of blunt force injury of the hymen in the past. However, during his cross-examination, he admitted that injury to the vagina could have been caused due to the impact of some material objects (scratch with nail or falling in a hard surface). He also admitted that he had not examined the victim regarding her pregnancy.

17. Dr. Samrat Singh Bhandari (PW-11) examined the victim on 10.08.2017 for the first time at Central Referral Hospital, Manipal, Tadong. The victim was brought by her family members with the complaint of sleep disturbance, reduced interaction with family members, irrelevant talks at times and crying spells. She was also making some gestures indicating hallucinatory behaviour. All the symptoms were since the past four to five days. On mental status examination of the patient, he found that there was decreased psychomotor activity. There was decrease in rate, volume and productivity of speech. Her affect was blunt with decrease intensity and restricted range. They were not able to elicit any disturbance in thought and perception at that time. The victim was provisionally diagnosed with acute and transient psychotic disorder, schizophrenia like with associated stress. The victim was put on antipsychotic olanzapine. The victim was again brought for review on 08.01.2018. At that time, she had improved and had stopped taking her medicine. On mental status examination, there were no significant findings except ideas of reference. During his cross-examination, Dr. Samrat Singh Bhandari (PW-11) accepted that the symptoms he had noticed on the victim was multifactorial and could be a result of bereavement in the family, skin allergy, family responsibility, etc. The FIR was lodged on 10.01.2018, just two days after the victim was reviewed at

the Central Referral Hospital. Exhibit-1 was the medical paper prepared by Dr. Samrat Singh Bhandari (PW-11) at the Central Referral Hospital on 08.01.2018 and exhibited by him. Although not deposed to by him, it is important to note as per Exhibit-1, he had advised the victim to have tablet olanzapine 2.5 mg for two weeks and to follow up after two weeks.

18. The learned Judge may have been correct in concluding that the appellant having committed rape upon the victim could not be ruled out. The victim's vivid description of the two incidents does lead one to understand that it may have been so. However, while it is important to be conscious about the trauma of the victim - a victim of alleged sexual assault, it is also important to be conscious about the well settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof. What happened on 17.08.2013 in the confines of the appellant's room at Development Area, and thereafter, in his house would be known only to the victim and the appellant. The victim did not report the matter to the police immediately thereafter, although she was fairly educated and a woman who wanted to stand on her own feet. The victim has given a detailed account of what happened five years ago in great detail about the two alleged incidents. However, her deposition is conspicuously silent about the period thereafter, till the year 2017, when she went into depression. There is a serious discrepancy in the FIR (Exhibit-3) and the statement recorded under section 164 Cr.P.C on the one side and the deposition on the other. While she had alleged that in between the two rapes she had aborted the child in the statement recorded by the police and the magistrate, in her deposition she alleged that she aborted her pregnancy after the second rape. The FIR (Exhibit-3) was lodged on 10.01.2018, after several deliberations between the victim's family and the appellant's well-wishers. Although, no definite date of the meetings has been given by the prosecution witnesses, from the evidence of the victim and her brother (PW-10), it seems these meetings were held after she was discharged from Central Referral Hospital in September 2017 and just before she lodged the FIR on 10.01.2018. The FIR (Exhibit-3) was lodged by the victim too close to the time of her depression, when admittedly, she had been suffering from transient psychotic disorder and schizophrenia and hallucinating and making irrelevant talks. Although, the victim deposed as if she was aware of the meetings and what transpired there, PW-4 on being questioned by the learned Judge, deposed that she was in fact present during the meeting but was sick and unable to understand what was going on. PW-5 - the victim's niece and classmate,

also corroborated this fact. PW-10 - the victim's elder brother, deposed that the victim was in his house, a little above the main house where the meeting was held. According to PW-9 - the victim's uncle, who had visited the victim at Central Referral Hospital and thereafter, in her house, the victim was very weak and frail and not in a normal state. He deposed that during the meeting the victim was bedridden in the next room. PW-16 also deposed that the victim was not in a proper state of mind.

19. In the circumstances, this court is of the considered view that although the evidence led by the prosecution leads to grave suspicion that the appellant had in fact raped the victim, it would not be judiciously prudent to convict the appellant on suspicion alone. None of what the victim deposed have been corroborated even by her family members. The victim's version of rape is not corroborated, so is her version of pregnancy and abortion. There is evidence to suggest that the victim had been infatuated by the appellant and had expressed her desire to marry him. Some of the prosecution witnesses have deposed about their love affair. There is evidence to suggest that the victim had herself visited the appellant when he had an accident. The possibility of a relationship gone sour cannot be ruled out. Several of the prosecution witnesses had deposed hearing about their "physical relationship" and "sexual relationship", both of which would not amount to rape. In such circumstances, this court is also of the considered view that the appellant must be given the benefit of doubt.

20. The judgment of conviction dated 30.07.2019 and the order on sentence dated 31.07.2019, are set aside. He shall be released forthwith, if not required in any other case. Fine, if any, deposited by him in terms of the impugned order on sentence, shall be refunded to him.

21. The appeal is allowed.

22. Crl. A. No. 17 of 2019 stands disposed of as also the pending Interlocutory Application.

23. Copy of this judgment be sent to the learned trial court for information and records be returned forthwith.

SLR (2021) SIKKIM 15

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

Bail Appln. No. 01 of 2021

Deepen Chettri ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Mr. S.S. Hamal, Advocate.

For the Respondent: Mr. Hissey Gyaltsen, Assistant Public Prosecutor.

Date of decision: 19th January 2021

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – This Court is well aware and alive to the circumstances of the sale and consumption of controlled substances by the youth specifically and consumption by children as young as eight years old and people of all other age groups as well. It is indeed concerning that the consumers become victims of substance abuse which is sold by persons out to make a quick buck with no conscience whatsoever. They are oblivious to the deleterious and negative effects on the users, the unsuspecting family and the society at large. At the same time, the statement of a co-accused or the unsubstantiated statement of witnesses, at this stage, does not suffice to deprive the petitioner of his liberty – Fit case where the petitioner can be enlarged on bail.

(Paras 6 and 7)

Petition allowed.

Case cited:

1. Surinder Kumar Khanna v. Intelligence Officer Directorate of Revenue Intelligence, (2018) 8 SCC 271.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The Petitioner herein is aged about 26 years and having been arrested in connection with Sadar Police Station (FIR) Case No.78 of 2020, dated 15.05.2020, under Sections 7(a)(b)/9/14 of the Sikkim Anti Drugs Act, 2006 ("SADA") read with Section 9(1)(b) of the Sikkim Anti Drugs (Amendment) Act, 2017, seeks to be enlarged on bail.

2. It is contended by Learned Counsel for the Petitioner that, in fact, no controlled substances as detailed in the Seizure Memo, were seized from the possession of the Petitioner, however, he was remanded to judicial custody from 30.11.2020 after his arrest on the same date. That, subsequent to that, the Petitioner applied for bail before the Learned Special Judge, SADA, 2006, East Sikkim at Gangtok, however, his Bail Petition was rejected vide Order dated 14.12.2020, passed in Criminal Misc. Case (SADA) Bail No.90 of 2020. That, presently due to the COVID-19 pandemic, there has been an alarming rate of cases detected amongst the inmates in State Central Jail, Rongyek, hence, he is not only at the risk of contracting the virus but is also unable to prepare his defence in the matter on account of his inability to contact his Lawyer due to the ensuing pandemic. That, he is innocent and has not committed the offence accused of. Learned Counsel further submits that if enlarged on bail, the Petitioner will make himself available on all dates fixed in the Court for the purposes of trial. That, in fact, Charge has been framed against the Petitioner under Rule 17(1) of the Sikkim Anti Drugs Rules, 2006 read with Sections 9(1)(a)(b)(c) and 9(4) of the SADA, 2006 and Section 34 of the Indian Penal Code, 1908, however, as per the Order of the Learned Trial Court, the first Prosecution Witness is summoned only on 07.06.2021 and till such date the trial is taken up, the Petitioner will be incarcerated despite his innocence. That, all that emanates in the Charge-Sheet to implicate the Petitioner, is the Statement of the co-accused Krishna Gopal Chettri and it is a settled position of law that the Statement of a co-accused is not substantive evidence against another accused. On this count, reliance was placed on ***Surinder Kumar Khanna vs. Intelligence Officer Directorate of Revenue Intelligence***[1]. Hence, the Petitioner be enlarged on bail on any terms and conditions deemed appropriate by this Court.

[1] (2018) 8 SCC 271

3. Resisting the arguments of Learned Counsel for the Petitioner, Learned Assistant Public Prosecutor for the State-Respondent submitted that the conduct of the Petitioner is also to be taken into account. Once the investigation commenced, the Petitioner was not traceable in his residence despite all efforts made by the Investigating Officer ("I.O."). In fact, the Petitioner remained untraceable for three months after the FIR was lodged and subsequently the I.O. arrested him on 30.11.2020 after having received source information about his whereabouts, since then he has been in judicial custody. That, the Petitioner was with the co-accused Krishna Gopal Chettri also named in the FIR on the relevant day and they had jointly procured the large quantity of controlled substances, as reflected in the Seizure Memo and hence the question of the Petitioner being innocent does not arise. Considering his conduct, should he be enlarged on bail, it is likely that he will not appear before the Court for the purposes of trial thereby delaying the trial and hindering justice and his Bail Petition thereby deserves a dismissal.

4. Due consideration has been given to the rival submissions of Learned Counsel for the parties and all documents perused.

5. On enquiry by this Court, it is admitted by the Learned Assistant Public Prosecutor that the Petitioner was unaware of the case having been registered against him and no Notice was issued to him to make an appearance before the concerned I.O. In such a circumstance, it is evident that the Petitioner was unaware of the registration of the case against him and therefore he cannot be foisted with the label of an absconder. That apart, it is also admitted and evident from the records placed before this Court today that none of the controlled substances i.e. 85 bottles of 100 ml Relax Cof. T Cough Syrup, 80 tablets of Nitrosun-10 and 544 capsules of Winspasmo, were seized from the specific possession of the Petitioner. In fact, all that the Prosecution is relying on at this stage, as stated before this Court, are the Section 161 Cr.P.C. Statement of one Abhijit Tamang who was not a witness to the offence, one Bir Bahadur Tamang who has not identified the Petitioner and the co-accused Krishna Gopal Chettri. The settled position of law in the ratiocination *supra* relied on by Learned Counsel for the Petitioner, needs no reiteration with regard to the Statement of an accused and its repercussions on another accused.

6. This Court is well aware and alive to the circumstances of the sale and consumption of controlled substances by the youth specifically and

consumption by children as young as eight years old and people of all other age groups as well. It is indeed concerning that the consumers become victims of substance abuse which is sold by persons out to make a quick buck with no conscience whatsoever. They are oblivious to the deleterious and negative effects on the users, the unsuspecting family and the society at large. At the same time, the Statement of a co-accused or the unsubstantiated Statement of witnesses, at this stage, does not suffice to deprive the Petitioner of his liberty.

7. In view of the facts and circumstances as laid out *supra* and the observations made hereinabove, I am of the considered opinion that this is a fit case where the Petitioner can be enlarged on bail. It is thus ordered that the Petitioner be released on bail on furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each, subject to the following conditions:

(i) He shall report to the SHO, Melli Police Station every morning at 10 a.m.;

(ii) He shall not make attempts to contact the co-accused or witnesses pertaining to the instant matter;

(iii) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/them to disclose such facts during trial;

(iv) He shall not leave the jurisdiction of Melli Police Station without the specific written permission of the SHO, Melli Police Station who shall, in turn, inform the I.O. of the case, of the whereabouts of the Petitioner; and

(v) He shall appear before the Learned Trial Court on every date fixed for trial.

Should the Petitioner fail to report to the concerned SHO, Melli Police Station every morning at 10 a.m. or fail to appear before the Learned Trial Court on every date fixed for trial, his Bail Bonds shall stand cancelled and he shall be taken into custody forthwith.

8. The observations made hereinabove are only for the purposes of the instant Bail Petition and shall not be construed as a finding on the merits of

the matter which shall be considered at the time of trial. The Learned Trial Court shall consider evidence placed by the Prosecution at the time of trial unhindered by any observations made by this Court *supra.*

9. The Bail Appln. stands disposed of.

10. Copy of this Order be sent to the Learned Trial Court, for information.

SLR (2021) SIKKIM 20

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

Bail Appln. No. 02 of 2021

Sanjay Sewa @ Sanju ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Hissey Gyaltsen, Assistant Public Prosecutor.

Date of decision: 19th January 2021

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – The victim is mere child of approximately three years and the allegation against the petitioner is serious, considering that it was committed on a child so young. The penal provision is also duly taken into consideration – In the facts and circumstances and in view of the gravity of the offence and the penalty it entails, which may prompt the petitioner to abscond if enlarged on bail, not inclined to allow the petition.

(Para 5)

Petitiondismissed.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The Petitioner herein, a 26 (twenty-six) year old male, was arrested on 24.08.2020, in connection with Singtam Police Station Case (FIR) No.40 of 2020, of the same date, under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act"). By filing this Bail Petition, he seeks release from judicial custody.

2. Learned Counsel for the Petitioner submits that the Petitioner had earlier filed a Bail Petition (Criminal Misc. Case (POCSO) Bail No.23 of 2020) before the Court of the Learned Special Judge, POCSO Act, 2012, East Sikkim at Gangtok, which was rejected on 07.09.2020. Thereafter, on filing of Charge-Sheet, another Bail Petition (Criminal Misc. Case (POCSO) Bail No.38 of 2020) was filed, which was also rejected on 27.11.2020. That, the Petitioner has not committed the offence which he is accused of, this submission is buttressed by the Medical Report of the victim which shows no injuries on the genital of the victim. That, the Petitioner has been falsely implicated in the instant matter on account of animosity between him and the victim's mother who is his maternal aunt. That, although no averments have been made in the Bail Petition, however, the Petitioner was, in fact, employed as an Assistant Lecturer at ATTC, Bardang, East Sikkim, having no criminal antecedents and belongs to a good family. That, should the Petitioner be enlarged on bail, he is willing to abide by any terms and conditions imposed by this Court, besides which, he undertakes to reside in Singtam, East Sikkim away from where the victim resides i.e. Bardang, East Sikkim, which is, in fact, his permanent home. That, due to the number of jail inmates in State Central Jail, Rongyek, testing positive for COVID-19, he is also at risk of contracting the virus. That, considering that there is no *prima facie* evidence on record against him, he may be enlarged on bail.

3. *Per contra,* while repelling the arguments of the Petitioner, Learned Assistant Public Prosecutor submitted that the Petitioner is a grown man of 26 (twenty-six) years, while the victim is a 3 (three) year old child who was unaware of the intent of the act foisted on her by the Petitioner. That, the offence committed is serious and ought to be considered so by this Court. That, considering the gravity of the offence and the penalty thereof, there is every likelihood that he will abscond, should this Court enlarge him on bail. Hence, the Petition deserves a dismissal.

4. Due consideration has been given to the rival submissions of Learned Counsel for the parties and all documents perused.

5. The submission of Learned Counsel for the parties as well as the records reveal that the victim is a mere child of approximately 3 (three) years and the allegation against the Petitioner is serious, considering that it was committed on a child so young. The penal provision is also duly taken into consideration by this Court. In the facts and circumstances placed

before me and in view of the gravity of the offence and the penalty it entails, which may prompt the Petitioner to abscond if enlarged on bail, I am not inclined to allow the Petition. However, all efforts shall be made by the Learned Trial Court to dispose of the matter by the end of May, 2021.

6. The observations made hereinabove are only for the purposes of the instant Bail Petition and shall not be construed as a finding on the merits of the matter which shall be considered at the time of trial.

7. The Bail Appln. stands rejected and disposed of.

8. Copy of this Order be sent to the Learned Trial Court, for information and compliance.

SLR (2021) SIKKIM 23

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

WP(C) No. 30 of 2016

Sushil Pradhan and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

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

For Respondent 1-3: Dr. Doma T. Bhutia and Mr. Sudesh Joshi, Additional Advocate Generals with Mr. S.K. Chettri, Additional Government Advocate and Mr. Sujan Sunwar, Assistant Government Advocate.

For Respondent 4-6: Mr. Karma Thinlay, Senior Advocate.

For Respondent 1-17: Mr. J.B. Pradhan, Senior Advocate with Mr. T.R. Barfungpa and Ms. Yangchen Doma Gyatso, Advocates.

Date of decision: 25th January 2021

A. Sikkim Subordinate Accounts Service Rules, 1984 – Determination of Seniority – The posts of Accounts Officers were to be filled by way of promotion and direct recruitment in the ratio of 50:50 each. The petitioners were qualified as per Rules in 2004-2006 as well as on 08.05.2008, to be considered for promotion as Accounts Officers. The Rules required the State-respondents to decide in each year, the number of vacancies in the service to be filled in that year by direct recruitment and promotion and to take steps after assessing the vacancy, viz., including recommending the names of the service holders for promotion to substantive

posts. The State-respondents failed to comply with this requirement of the Rules nor were examinations for either criteria held, as mandated – The procedure prescribed for recruitment was not adhered to by the State-respondents which has, in fact, led to the heart burning amongst the petitioners and the direct recruits concerning their *inter se* seniority. Besides failing to take steps as enunciated hereinabove, the Government has not prepared a list of names of persons in order of seniority (as per Rules) who have, on the first day of that year, completed not less than six years of continuous service as Senior Accountants nor was the list of such persons forwarded to the Commission along with the relevant documents. The anticipated number of vacancies to be filled by promotion in the course of the period of twelve months, commencing from the date of preparation of the list was not indicated as well – In the absence of necessary steps by the Government, the Commission was not in a position to take consequential steps and convene a meeting of the Promotion Committee who had been vested with the responsibility of preparing a final list of persons found to be suitable for promotion to the higher service on an overall relative assessment of their service records and interview.

(Para 14)

B. Sikkim Finance Accounts Service Rules, 1986 – Rota Quota Rule – While considering the admitted departure from the Quota Rule and prescribed procedure of recruitment in the instant matter, it is a safe assumption that the appointments of the petitioners, if made in excess of the service quota were valid and legal in view of the existence of the relaxation clause at Rule 28 of the amended Rules of 1986. A presumption thus arises that Rule 28 was invoked legalizing and validating the promotion of the petitioners – The relaxation clause was invoked and effective from the date the Officiating appointment of the petitioners were made to the posts of Accounts Officers i.e. from 08.05.2008 – The Quota Rule is not broken down until serious efforts are made by the Government to recruit from the open market (In *re N.K. Chauhan* and *Suraj Parkash Gupta* discussed).

(Paras 16 (iv) and 19 (iii))

C. Sikkim Government Service Rules, 1974 – Rules 13 and 39 – Officiating Appointment – A person appointed on officiating basis is essentially a Government servant who has not completed the minimum number of qualifying years of service prescribed by the Government from time to time and in a post which carries a higher time scale of pay, if the

vacancy is for a period exceeding one year – The qualification necessary for the petitioners to be considered for promotion from Senior Accountant to Accounts Officer is six years of continuous service in the rank of Senior Accountant – While considering the first condition of the Officiating Order dated 08.05.2008, it is in the first instance, unfathomable since it states that the officiating promotion shall not confer any right for regular promotion, in such a circumstance, is it to be construed that despite the person having put in the required years of service, all other qualifications being met and substantive vacant posts existing, he would still be deprived of his regular promotion and would be sentenced to suffer the whims of the State-respondents – The second condition provides that regular promotion can be made on the recommendation of the SPSC, this condition obviously would be contingent upon the action of the State-respondents – The petitioners cannot be answerable for the procrastination or indolence of the State-respondents, thereby depriving them of timely promotions, of course subject to fulfillment of all other requisite conditions.

(Para 17 (iii))

D. Sikkim Finance Accounts Service Rules, 1986 – *Inter se* Seniority – When an Officer had worked continuously for a long period in a post and had never been reverted, it cannot be held that the Officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the Order of appointment may state so. In such circumstances, the entire period of officiation was to be counted for seniority, any other view would be arbitrary and violative of Articles 14 and 16 (1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstance (In *re D.R. Nim* discussed) – Where the initial appointment is only *ad hoc* and not according to Rules and made as a stop gap arrangement, the period of officiation to the said post cannot be taken into account for considering seniority – However, an employee appointed to a post according to Rules would be entitled to get his seniority reckoned from the date of his appointment and not from the date of its confirmation (In *re Direct Recruit Class II Engineering Officers' Association* discussed).

(Paras 20 (i) and 21 (ii))

Petition allowed.

Chronology of cases cited:

1. D.R. Nim v. Union of India, AIR 1967 SC 1301.
2. Rudra Kumar Sain and Others v. Union of India and Others, (2000) 8 SCC 25.
3. O.P. Singla and Another vs. Union of India and Others, (1984) 4 SCC 450.
4. Baleshwar Dass and Others v. State of U.P. and Others, (1980) 4 SCC 226.
5. Ram Nath Sao *alias* Ram Nath Sahu and Others v. Gobardhan Sao and Others, AIR 2002 SC 1201.
6. Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others, (1990) 2 SCC 715.
7. Narender Chadha v. Union of India, (1986) 2 SCC 157.
8. S.B. Patwardhan and Another v. State of Maharashtra and Others, (1977) 3 SCC 399.
9. Pran Krishna Goswami and Others v. State of West Bengal and Others, AIR 1985 SC 1605.
10. G.K. Dudani and Others v. S.D. Sharma and Others, AIR 1986 SC 1455.
11. G.C. Gupta and Others v. N.K. Pandey and Others, (1988) 1 SCC 316.
12. M.V. Krishna Rao and Others v. Union of India and Others, (1994) Supp 3 SCC 553.
13. State of W.B. and Others v. Aghore Nath Dey and Others, (1993) 3 SCC 371.
14. P.S. Gopinathan v. State of Kerala and Others, (2008) 7 SCC 70.
15. Rajen Kumar Chettri v. State of Sikkim and Others, 2019 SCC OnLine Sikk 202.
16. B.S. Sheshagiri Setty and Others v. State of Karnataka and Others,(2016) 2 SCC 123.
17. Nani Sha and Others v. State of Arunachal Pradesh and Others, (2007) 15 SCC 406.

18. Union of India and Others v. M.K. Sarkar, (2010) 2 SCC 59.
19. M.P. Palanisamy and Others v. A. Krishnan and Others, (2009) 6 SCC 428.
20. Suraj Parkash Gupta and Others v. State of J&K and Others, (2000) 7 SCC 561.
21. N.K. Chauhan and Others v. State of Gujarat and Others, (1977) 1 SCC 308.
22. Union of India v. Dharam Pal and Others, (2009) 4 SCC 170.
23. Keshav Chandra Joshi and Others v. Union of India and Others, (1992) Supp 1 SCC 272.
24. Samdup Tshering Bhutia v. State of Sikkim and Others, 2017 SCC OnLine Sikk 153.
25. G.S. Lamba and Others v. Union of India and Others, (1985) 2 SCC 604.
26. A. Janardhana v. Union of India and Others, (1983) 3 SCC 601.
27. Vireshwar Singh and Others v. Municipal Corporation of Delhi and Others, (2014) 10 SCC 360.

JUDGMENT

Meenakshi Madan Rai J

1. The discontentment of the Petitioners arises on account of their appointment and retention on Officiating basis from 08.05.2008 in the posts of Accounts Officers despite alleged existing Substantive vacancies, confirming them in the posts only on 16.03.2013, thus, depriving them of regular Promotion and Service Seniority, as against the Respondents No.7 to 17 directly recruited as Accounts Officers in January/February, 2009, who have been ranked higher than the Petitioners in the *inter se* Seniority.

1.(a) They are further aggrieved that the Respondents No.4, 5 and 6, who had appeared in the same Departmental Examination as them in the year 1997, were promoted on 24.12.1997 as Senior Accountants from the Panel prepared for such Promotion. On 05.02.2005, the same Respondents were further promoted as Accounts Officers on Officiating capacity while the

Petitioners No.1, 2 and 8 despite possessing similar requisite qualifying years of Service, were excluded citing lack of vacancy. The said Respondents were promoted on Substantive capacity as Accounts Officers on 21.01.2009 and as Senior Accounts Officers on Officiating basis on 11.02.2011. The Petitioners No.1 and 2 were promoted as Senior Accountants in 1998, the Petitioner No.8 in 1999 and the remaining Petitioners only on 27.06.2000.

1.(b) It is the Petitioners' case that they were, in fact, eligible for Promotion as Accounts Officers in 2004-2006 itself, having then put in the requisite years of Service required by the Rules as Senior Accountants. When the Cadre strength of Accounts Officers was 77 (seventy-seven), there were adequate vacancies to accommodate them in Substantive capacity, which would have made them seniors to the 11 (eleven) Direct Recruits who were appointed in January/February, 2009, allegedly from the same Cadre strength of 77 (seventy-seven) and promoted as Officiating Senior Accounts Officers on 11.01.2013 after only four years of Service, as against the required number of six years, mandated by the Rules. In December, 2008, the Cadre strength was increased from 77 (seventy-seven) to 103 (one hundred and three), resulting in 26 (twenty-six) new vacancies but it was only on 16.03.2013, that the Petitioners were confirmed in the Substantive posts of Accounts Officers. The Petitioners No.1, 2 and 8 along with one M.R. Chettri, were promoted as Senior Accounts Officers on Officiating capacity on 22.05.2014, leaving out the remaining Petitioners who possessed the requisite qualification and merit.

1.(c) The Petitioners speculate that had they been promoted as Accounts Officers in 2004-2006, by 2013, they could well have been promoted as Senior Accounts Officers in the 12 (twelve) vacancies in the said posts, but vide a Notification dated 21.06.2013, these 12 (twelve) posts were downgraded to that of Accounts Officers, allegedly for the purpose of appointing Direct Recruits as Accounts Officers. Ultimately, no Direct Recruit came to be appointed to the downgraded posts but were then filled by way of Promotion. Thus, the policy of Promotions adopted by the State-Respondents No.1, 2 and 3 has been prejudicial to the Petitioners. On approaching the Respondent No.3, their prayers were declined, while steps taken by the Respondent No.1 to mitigate their grievances on their request led to their confirmation in March, 2013, by which time, the Respondents No.7 to 17 had already stolen a march against them in terms of Seniority.

That, although Petitioners No.2 and 3 have retired during the pendency of the instant Writ Petition, they seek enforcement of their legal rights.

1.(d) Hence, the prayers in the Petition, as extracted hereinbelow;

> *'(i) A Rule upon the Government respondents to show-cause as to why the petitioners seniority in the rank of A.O. and Sr.A.O. shall not be protected and they be declared as seniors to the directly recruited respondent nos.7 to 17 with all service benefits in the rank of A.O. and Sr.A.O. and upon hearing the parties to make the Rule absolute;*
>
> *(ii) A writ or order or direction or declaration that the petitioners are seniors to the respondent nos.7 to 17 i.e. directly recruited A.O. and in the seniority list the petitioners name be incorporated above those of respondent nos.7 to 17 in the said rank of A.O.;*
>
> *(iii) A writ or order or direction or declaration that the three petitioners namely petitioner nos.1, 2 and 8 be deemed to be promoted as Sr.A.O. on the same date when respondent nos.7 to 17 were promoted as Sr.A.O. on officiating capacity with all service benefits; (iv) A writ or order or direction or declaration that the petitioners who were promoted as A.O. in substantive capacity on 16/3/13 be deemed to have promoted as such on 08/5/2008 when they were promoted as A.O. in officiating capacity without service benefits;*
>
> *(v) A writ or order or direction or declaration that the 12 numbers of posts of Sr.A.O. which were downgraded vide Office Order dated 21/6/13 (Annexure-P9) shall be set aside, quashed and cancelled.*

(vi) A writ or order or direction or declaration that the petitioners shall be given all benefits of service in the respective rank of A.O. and Sr. A.O. and they be placed senior over the respondent nos.7 to 17 in the seniority list in the said rank of A.O. and Sr.A.O.

(vii) A writ or order or direction or declaration that the petitioners shall be given all benefits of service in the respective rank of A.O. and Sr.A.O. and they be placed in the seniority list above those of the respondent nos.7 to 17 in both the ranks.

(viii) A writ or order or direction or declaration that the remaining seven petitioners namely petitioner nos.3 to 7, 9 and 10 be also promoted in the rank of Sr.A.O. in substantive capacity before those of respondent nos.7 to 17;

(ix) A writ or order or direction or declaration to follow the process of appointment/ promotion between the petitioners and the respondent nos.7 to 17 on 50:50 ratio i.e. 50% for inservice candidates i.e. petitioners and 50% for direct recruits i.e. the respondent nos.7 to 17. (ix)(a) A writ or order or direction or declaration declaring that the petitioner nos.2 and 3 even after retirement in the service shall be entitled to get their legal rights pertaining to their incidental reliefs/service benefits which they would have got prior to their retirement in the event the petitioners succeed in the instant writ petition.

(x) ……..

(xi) ……..'

2.(i) While denying and disputing the averments of the Petitioners, the State-Respondents No.1, 2 and 3, in their joint Counter-Affidavit, sought to explain that on 03.06.2003, the Cadre strength of the Accounts Officers were increased from 75 (seventy-five) to 77 (seventy-seven). On the date of Cadre revision in December, 2008, 31 (thirty-one) persons were occupying the posts of Accounts Officers while 46 (forty-six) posts were vacant. 23 (twenty-three) posts were to be filled by Direct Recruitment through Open Competitive Examination and 23 (twenty-three) by way of Promotion. Therefore, against the 23 (twenty-three) posts for Promotees, in fact, 55 (fifty-five) Officers were promoted and all were senior in rank to the Petitioners. No Direct Recruitment to the post of Accounts Officers in the 23 (twenty-three) vacant posts meant for Direct Recruits, took place during the said period, the last Direct Recruitment having been made in May, 2003. It was only on 16.07.2007 that the Respondent No.3 forwarded a requisition to the Sikkim Public Service Commission (for short "SPSC"), for filling up 11 (eleven) posts of Accounts Officers under the Sikkim Finance and Accounts Service Rules, 1978 (for brevity "Rules of 1978") by Direct Recruitment. Pending this proposal, 17 (seventeen) Senior Accountants were promoted as Accounts Officers in Officiating capacity on 08.05.2008, subject to the conditions that the Officiating Promotion shall not confer any right for regular Promotion and shall not be counted towards Seniority and their regular Promotion shall be made on the recommendation of the SPSC, which were accepted by the Petitioners without demur. The amendment of the Rules of 1978 on 15.12.2008, increased the Cadre strength of Accounts Officers from 77 (seventy-seven) to 103 (one hundred and three). On 08.04.2008, prior to the above amendment, the SPSC invited applications for filling up of 11 (eleven) posts of Accounts Officers, consequently 11 (eleven) Direct Recruits came to be appointed vide Orders dated 31.01.2009, 02.02.2009 and 04.02.2009. Thus, the appointment of Respondents No.7 to 17 was against the Direct Recruitment Quota of 50 per cent of the Rules of 1978 and having been appointed in Substantive capacity, were made senior to the Petitioners who were promoted on Officiating capacity, as 20 (twenty) Officers senior to them were already working in Officiating capacity. That, Rule 24 Sub Clause 5 of the Sikkim Finance Accounts Service (Amendment) Rules, 1986 (hereinafter "Rules of 1986") provides for Rota Quota but the Government had considered the Promotion of Senior Accountants to the post of Accounts Officers from December, 2003 to June, 2007, duly utilizing Direct Recruitment Quota

either on Officiating basis and then in Substantive capacity, or against Substantive capacity as and when vacancy existed, or against anticipated vacancies.

(ii) Countering the allegation of the Petitioners being made junior to Respondents No.4, 5 and 6, it was explained that they were placed at Serial Nos.1, 2 and 3 amongst 19 (nineteen) candidates in the Departmental Examination held for Promotion which was subject to availability of vacancies, which occurred on 24.12.1997. The validity of the Panel was extended up to 31.12.1999 and the Petitioners No.1, 2 and 3 were promoted as Senior Accountants on 31.12.1998. Similarly, one D.R. Pradhan and the Petitioner No.8, were promoted on 22.05.1999. On 14.06.1999, the Petitioners No.3, 4, 6, 7 and 9 submitted a Petition to the Government seeking extension of the Panel till finalization of anticipated vacancies of Senior Accountants. On due consideration by the Government, these persons also came to be promoted as Senior Accountants on 27.06.2000. That, the Petition deserves a dismissal on grounds of delay and laches, as the Orders of the Petitioners pertaining to Officiating capacity was issued in 2008 while the Writ Petition was filed only in 2016.

3. The Respondents No.4, 5 and 6 filed their respective Counter-Affidavits which, in sum and substance, were similar to each other and substantially reiterated the facts as set out in the Counter-Affidavit of the Respondents No.1, 2 and 3.

4. Respondents No.7 to 17, while denying and disputing the allegations made in the Writ Petition, reiterated the position of Quota and Rota as spelt out by the State-Respondents No.1, 2 and 3 and averred that the prayers in the Petition are misconceived and liable to be rejected by this Court as also the Writ Petition.

5. In Rejoinder, the Petitioners elucidated that by the time the Cadre was revised in the month of December 2008, around 14 (fourteen) people had retired/expired which has not been addressed by the State-Respondents as they were aware that the Petitioners could well have been accommodated in the said 14 (fourteen) vacancies. The names of the 14 (fourteen) persons who had retired/expired between 2003 to December 2008, were also detailed in the Rejoinder.

6.(i) Advancing his arguments for the Petitioners, Learned Senior Counsel Mr. A. Moulik, while reiterating the averments made in the Writ Petition and the Rejoinder, contended that the State-Respondents have attempted to prove that the Promotion of the Petitioners as Accounts Officers in Officiating capacity was merely a stop gap arrangement and a fortuitous appointment as such, their past Services could not be counted for the purposes of rendering them senior to the private Respondents. Relying on the decision in ***D.R. Nim vs. Union of India***[1], it was canvassed that the Petitioners have worked in the post of Accounts Officers for several years and have never been reverted, hence they are entitled to Seniority from 08.05.2008, the date of their Officiating Orders in the posts of Accounts Officers. It was further contended that the Hon'ble Supreme Court has held in ***Rudra Kumar Sain and Others vs. Union of India and Others***[2] that if an appointment is made to meet a particular contingency and for a specific period, then such an appointment is *ad hoc* or stop gap. On the other hand, if the post is created to meet a sudden and temporary situation then the appointment is fortuitous but these criterion are not attracted in the Order of the Petitioners, dated 08.05.2008. Drawing support from the decision in ***O.P. Singla and Another vs. Union of India and Others***[3], Learned Senior Counsel next contended that as per the said ratio, if a temporary employee works for five to twelve years continuously and the Appointment Order reads as *"Until further orders"* then such appointment cannot be termed as *ad hoc* or fortuitous or stop gap, so also is the case of the Petitioners. That, the two conditions laid out in the Officiating Promotion Order dated 08.05.2008 were mere requirements. The Petitioners had indeed completed 6 (six) years of Service as Senior Accountants as required by the relevant Rules, making them eligible for Promotion as Accounts Officers in 2004/2006 itself. However, the Petitioners continued as Officiating Accounts Officers for years together due to inaction and negligence of the State-Respondents, thus the Petitioners have the right to claim Seniority over the private Respondents. On this count, reliance was placed on ***Baleshwar Dass and Others vs. State of U.P. and Others***[4]. ***(ii)*** Canvassing the contention that there were sufficient vacancies in the Substantive posts in which the Petitioners could have been promoted on 08.05.2008 itself, Learned Senior Counsel pointed out that there were 10 (ten) vacancies in the rank of Accounts Officer when the

[1] AIR 1967 SC 1301
[2] (2000) 8 SCC 25
[3] (1984) 4 SCC 450
[4] (1980) 4 SCC 226

Petitioners were promoted on Officiating basis on 08.05.2008, as the State-Respondents have claimed at Paragraph "5(d)" of their Counter-Affidavit that there were 46 (forty-six) vacancies as on 01.07.2003 in the rank of Accounts Officer to be filled up, out of which 9 (nine) posts were filled up on 19.12.2003, another 19 (nineteen) posts were filled up on 20.02.2004 and 8 (eight) vacancies were filled up on 08.06.2006. Thus, up to 08.05.2008, only 36 (thirty-six) vacancies out of 46 (forty-six) were filled up in the Substantive capacity and 10 (ten) vacancies were yet to be filled. Hence, it was erroneous to state that when the 10 (ten) Petitioners were promoted as Accounts Officers (Officiating), there was no vacancy.

(iii) It was further contended that as on 03.06.2003, the Cadre Strength of Accounts Officers was 77 (seventy-seven) for which reliance was placed on Annexure R-2. As on 01.07.2003, the vacancies to be filled up out of 77 (seventy-seven) posts was 46 (forty-six) for which, attention of this Court was invited to Annexure R-3. That, vide Annexure R-11 dated 15.12.2008, the Cadre Strength of Accounts Officers was increased from 77 (seventy-seven) to 103 (one hundred and three) thereby creating 26 (twenty-six) new posts. Hence, as on the said date, total vacancies amounted to 72 (seventy-two) by adding the 46 (forty-six) existing vacancies and 26 (twenty-six) newly created posts. That, 9 (nine) Senior Accountants were promoted as Accounts Officers on Substantive basis of which, 4 (four) retired/died before the Petitioners were promoted on 08.05.2008. Thereafter on 20.02.2004, 19 (nineteen) Senior Accountants were promoted as Accounts Officers in Substantive capacity out of which, 8 (eight) persons retired. Vide Order dated 23.02.2004, 22 (twenty-two) persons were promoted as Accounts Officers who were later absorbed in Substantive posts vide different Orders through the years 2006, 2008 and 2009. Thus, out of the 72 (seventy-two) vacancies existing till 15.12.2008, 56 (fifty-six) vacancies were filled by 21.01.2009 and 16 (sixteen) vacancies were yet to be filled. That, the recruitment of Respondents No.7 to 17 was against non-existent vacancies. That, the 20 (twenty) senior most Accounts Officers had to be promoted out of the 26 (twenty-six) new vacancies of which, 6 (six) vacancies then remained in hand, in which Respondents No.7 to 17 could not be accommodated besides, the State-Respondents have not addressed the death or retirement of 14 (fourteen) Accounts Officers up to the end of 2008, thereby creating vacancies by 2008 in addition to the stated 72 (seventy-two) vacancies.

(iv) That, the delay in approaching the Court is on account of the absence of any Seniority List and that there is still no Confirmation List as on date. On the point of delay, reliance was placed on ***Ram Nath Sao alias Ram Nath Sahu and Others vs. Gobardhan Sao and Others***[5]. Relying on proposition *"(B)"* of Paragraph "47" of the ratio in ***Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and Others***[6], Learned Senior Counsel for the Petitioners submitted that in terms thereof, in the instant matter, even assuming that the initial appointment was not made by following the procedure prescribed, the Petitioners continued in Service uninterruptedly till regularization in accordance with the Rules, therefore the period of Officiating Service ought to be counted towards Seniority vis-à-vis the Respondents No.7 to 17. The Petitioners could have been confirmed in 2006 and 2008 in the existing vacancies. The Petitioners have been deprived of Promotion in their right time and have been kept on Officiating basis when they are entitled to Seniority over the Respondents No.7 to 17. Garnering strength from the ratio of ***Narender Chadha vs. Union of India***[7], it was stated that the Petitioners' case is comparable to the said ratio as the Petitioners were qualified to fill the posts. To further reinforce his submissions, reliance was placed on the decisions in ***S.B. Patwardhan and Another vs. State of Maharashtra and Others***[8], ***Pran Krishna Goswami and Others vs. State of West Bengal and Others***[9], ***G.K. Dudani and Others vs. S.D. Sharma and Others***[10], ***G.C. Gupta and Others vs. N.K. Pandey and Others***[11], ***M.V. Krishna Rao and Others vs. Union of India and Others***[12] and ***State of W.B. and Others vs. Aghore Nath Dey and Others***[13].

7. Learned Additional Advocate General, Dr. (Mrs.) Doma T. Bhutia, for the State-Respondents No.1 to 3, *per contra*, contended that once the Petitioners have accepted the Officiating Promotion along with the conditions therein without demur, it tantamounts to their acceptance of the conditions and hence, they have waived their rights pertaining to Seniority as they failed

[5] AIR 2002 SC 1201
[6] (1990) 2 SCC 715
[7] (1986) 2 SCC 157
[8] (1977) 3 SCC 399
[9] AIR 1985 SC 1605
[10] AIR 1986 SC 1455
[11] (1988) 1 SCC 316
[12] (1994) Supp 3 SCC 553
[13] (1993) 3 SCC 371

to raise any issue on this point, at the relevant time. Towards this point, reliance was placed on ***P.S. Gopinathan vs. State of Kerala and Others***[14]. Drawing strength from the ratio in ***Rajen Kumar Chettri vs. State of Sikkim and Others***[15], it was contended that the Petition has been filed belatedly and for this reason, cannot be sustained. That, there were no vacancies in the Quota for Promotees when the Petitioners were promoted on Officiating basis and their claim for Seniority is unsubstantiated and stale. On this count, reliance was placed on ***B.S. Sheshagiri Setty and Others vs. State of Karnataka and Others***[16]. That, Seniority can be reckoned only from the date that the Petitioners entered the Service in Substantive posts and not retrospectively. Contending that the Promotees cannot be accommodated in the Quota meant for the Direct Recruits, thus resulting in the Officiating Promotion of the Petitioners, reliance was placed on ***Nani Sha and Others vs. State of Arunachal Pradesh and Others***[17]. That, the Petition is hit by laches and delay, this aspect of the argument was buttressed by ***Union of India and Others vs. M.K. Sarkar***[18]. Relying on the facts and circumstances as detailed in the Counter-Affidavit, it was contended that the Petition deserves a dismissal.

8. Learned Senior Advocate Mr. Karma Thinlay, for Respondents No.4, 5 and 6 reiterated and relied on the averments made in their Return and submitted that they were promoted as Accounts Officers on Officiating capacity in the year 2005 and were confirmed in the year 2009. That, should the Petitioners be granted reliefs in terms of Seniority from 2008, the cascading effect thereon would be to the benefit of the Respondents No.4, 5 and 6, who would also then be eligible for Seniority from the year 2005. That, 46 (forty-six) vacant posts of Accounts Officers existed in 2003 and the Officiating Order of the Respondents No.4, 5 and 6 was issued when the 46 (forty-six) posts were vacant. In fact, out of the 77 (seventy-seven) posts of Accounts Officers at the relevant time, 31 (thirty-one) were filled and against the 46 (forty-six) vacancies, Respondents No.4, 5 and 6 had been appointed on Officiating basis on 05.02.2005 and confirmed on 21.01.2009. Respondents No.4, 5 and 6 are therefore senior to the Petitioners. That, the Petition being devoid of merit ought to be dismissed.

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[14] (2008) 7 SCC 70
[15] 2019 SCC OnLine Sikk 202
[16] (2016) 2 SCC 123
[17] (2007) 15 SCC 406
[18] (2010) 2 SCC 59

9.(i) Learned Senior Advocate Mr. J.B. Pradhan, on behalf of Respondents No.7 to 17, building his arguments on the edifice of Rule 24 (5) of the Rules of 1986, pointed out that the said Rule provides that the relative Seniority *inter se* of persons recruited to the Service through Competitive Examination and by Promotion, shall be determined according to the rotation of vacancies between Direct Recruits and Promotees which shall be based on the Quotas of vacancies reserved for Direct Recruitment and Promotion respectively. That, the said Rule also provides in the *"Explanation"* that *"a Roster shall be maintained based on the reservation for Direct Recruitment and Promotion in the Rules, which shall be as follows; (1) Promotion (2) Direct Recruitment (3) Promotion (4) Direct Recruitment and so on. Appointment shall be made in accordance with this Roster and Seniority determined accordingly."* Therefore, the Petitioners cannot be promoted in the Quota of the Direct Recruits, in excess to their own Quota. That, this position is fortified by Schedule II to the same Rules, which provides for 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through Limited Departmental Competitive Examination/ Deputation/Re-employment. Attention was also invited to Rules 6 and 16 of the Rules *supra*. That, as per the Office Note Sheet dated 30.06.2003, out of 77 (seventy-seven) numbers of Posts of Accounts Officers in the Junior Grade in the year 2003, 46 (forty-six) Posts were vacant. In terms of Schedule II of the Rules of 1986, 46 (forty-six) Posts were to be equally divided between Promotees and Direct Recruits, however, between the years 2003 up to 2008, no appointments by way of Direct Recruitment were made, whereas the 23 (twenty-three) posts for Promotees was duly filled up and exceeded as well. Learned Senior Counsel contended that when the Petitioners were promoted on Officiating basis on 08.05.2008, there was no Substantive posts neither were the Rules relaxed then by any executive Order. It was only on 19.05.2012 that a Notification pertaining to relaxation of Rules was published. The State-Respondent No.3 sent the Letter of recommendation for appointment of the Petitioners only on 13.09.2012 to the SPSC, upon which the Departmental Promotion Committee of the SPSC convened on 24.01.2013 and accepted the recommendations. The Petitioners were then promoted to the Substantive posts of Accounts Officers only after 24.01.2013, whereas the Respondents No.7 to 17 were appointed in Substantive posts between 31.01.2009 to 04.02.2009 thereby rendering them senior to the Petitioners in terms of Rule 24 *supra*. Inviting the attention of this Court to the ratio in ***State of W.B.***

and Others vs. Aghore Nath Dey and Others *(supra)* wherein the dispute arose as a result of Promotions being made in excess of the Promotees Quota in the case of the surplus Promotees, it was contended that even if it is to be presumed that the Rules were relaxed, the relaxation can only be effective from the date of issuance of Notification by the Government in this context, i.e. in the case of the Petitioners from 19.05.2012, if not from 16.03.2013 which is the correct approach and would still render them subordinate to Respondents No.7 to 17.

(ii) That, the amendments to the Rules of 1978, notified on 25.02.1987, are relevant which provides at Rule 6 that competitive examination was to be held by the Commission and the number of vacancies to be filled up by Promotion, Deputation or Re-employment in one year, would not exceed 50 per cent of the total number of vacancies to be filled in that year. Pointing to the alleged incongruities in the grounds raised by the Petitioners, more especially in Grounds No.1, 2, 5, 8 and 11, Learned Senior Counsel contended that the Petitioners have approached the Court belatedly as they seek to challenge the appointment of Respondents No.7 to 17 after a period of 8 (eight) years of their appointment as Accounts Officers and that of Respondents No.4 to 6 after a period of 19 (nineteen) years from the date they were appointed as Senior Accountants. That apart, it was a rather strange proposition that the Petitioners were claiming Service Seniority from the date of their Officiating Service despite the clear conditions specified in their Orders. These Orders were unassailed before the concerned authorities thereby barring the Petition by the principles of Waiver, Estoppel and Acquiescence, to buttress this submission reliance was placed on ***P.S. Gopinathan*** *(supra)* and ***M.P. Palanisamy and Others vs. A. Krishnan and Others***[19]. Besides, the Petitioners cannot pick and choose parts of the Order favourable to them and reject the others, as held in ***M.P. Palanisamy*** *(supra)*. That, the Rota Quota Rule was not broken but procedure prescribed therein was not followed, thus to utilize the Rota Quota Rule, the Notification pertaining to relaxation of Rules was issued on 19.05.2012 to enable regularization of the appointment of the Petitioners. That, in fact, the Rota Quota Rule breaks down only when efforts are made by the Government through advertisement inviting candidates for Direct Recruitment but fails to get candidates making such appointments an impossibility. It is then that the Government has to derive a method to

[19] (2009) 6 SCC 428

deviate and see how the posts can be filled up. The Government is thus under an obligation to establish by documentary evidence that there were no suitable candidates for appointment by Direct Recruitment. Paragraph "5 (e)" of the State-Respondents' Counter-Affidavit indicates that no such effort was made. On this count, succour was drawn from the ratio in ***Suraj Parkash Gupta and Others vs. State of J&K and Others***[20] and ***N.K. Chauhan and Others vs. State of Gujarat and Others***[21]. Further, support was garnered from the ratio in ***Union of India vs. Dharam Pal and Others***[22] wherein it was observed that where the initial appointment is only *ad hoc* and not according to Rules and made as a stop gap arrangement, the period of Officiation in such post cannot be taken into account for considering the Seniority. That, even assuming that there were vacancies for the purposes of Promotion, the Petitioners were to have adhered to the procedure of appearing for Departmental Examinations and thereafter obtaining the recommendation of the SPSC, this was not done. Inviting the attention of this Court to ***Keshav Chandra Joshi and Others vs. Union of India and Others***[23] and ***Samdup Tshering Bhutia vs. State of Sikkim and Others***[24], it was canvassed that the Officiating Promotion of the Petitioners was fortuitous appointments and the Direct Recruit Quota on which they were promoted, has to invariably revert back to the Direct Recruits for the next appointments. That, the Petitioners have themselves accepted by averments made in their Rejoinder that other Accounts Officers similarly circumstanced as them, were promoted in Substantive Capacity in the vacancies meant for both Promotees and Direct Recruits. Relying on the ratio of ***Direct Recruit Class II Engineering Officers' Association*** *(supra)*, Learned Senior Counsel advanced the contention that the case of the Petitioners falls under the corollary of Proposition *"(A)"* in Paragraph "47" therein and not under proposition *"(B)"*, as advanced by Learned Senior Counsel for the Petitioners. That, in view of the grounds canvassed, the Petition being devoid of merit deserves to be dismissed.

10. In rebuttal, Learned Senior Counsel for the Petitioners, while agreeing with Learned Senior Counsel for Respondents No.7 to 17 that the Rota Quota Rule had not broken down, submitted that initially due to filling

[20] (2000) 7 SCC 561
[21] (1977) 1 SCC 308
[22] (2009) 4 SCC 170
[23] (1992) Supp 1 SCC 272
[24] 2017 SCC OnLine Sikk 153

up of the posts of Direct Recruits by the Promotees, there was a breakdown of the Rota Quota Rule but these appointments were subsequently regularized restoring the Rota Quota. That, no condition in the Officiating Order debarred the Petitioners from claiming Seniority from the date of Promotion in their Officiating capacity once they were regularized in the Substantive posts. That, the settled position of law is as laid down in ***Direct Recruit Class II Engineering Officers' Association*** *(supra)* by the Constitution Bench and this is applicable to the Petitioners' case. That, the ratio in ***Samdup Tshering Bhutia*** *(supra)* relied on by the Respondents No.7 to 17, is not relevant in the instant matter as the Court was not informed of the correct factual position and its conclusion for arriving at the finding that the appointment was fortuitous, was sans reasons. The question of the Petitioners accepting the Officiating Promotion without demur does not arise, they being mere employees and the State-Respondents were required to look after their welfare. That, the case of ***M.P. Palanisamy*** *(supra)* relied on by the Respondents No.7 to 17, is distinguishable from the instant facts and not applicable to the Petitioners' case as also the ratio in ***P.S. Gopinathan*** *(supra)* and hence the Petitioners are deserving of the reliefs prayed for.

11. The rival submissions of Learned Counsel for the parties were heard *in extenso* by me and given due consideration. The decisions relied on by Learned Counsel for the parties have also been perused as also the pleadings and all documents on record.

12. The only question that falls for consideration before this Court is;

> Whether the fitment of Seniority determined by the Department vis-à-vis the Petitioners and the Respondents No.7 to 17, was in accordance with the Rules?

13.(i) To assess with clarity the grievances of the Petitioners, it is essential to briefly refer to the Rules which govern them. The Sikkim Subordinate Accounts Service Rules, 1984 was notified on 28.01.1985 and governs the posts of Accounts Clerk, Junior Accountant, Accountant and Senior Accountant. The Petitioners were initially appointed in Service under these Rules. The Rules of 1978, notified on 30.04.1979, governs the appointment of Accounts Officers and Senior Accounts Officers consisting of three Grades

i.e. Junior, Senior and Selection Grades. The said Rules comprised of thirteen Clauses including Rule 13 which is the interpretation Clause. Rule 3 provided *inter alia* for *"Constitution of Service"*, Rule 4 was for *"Appointments and Postings,"* Rule 5 detailed *"Initial Constitution of the Service,"* Rule 6 laid down the *"Method of Recruitment to the Service,"* Rule 7 was concerned with *"Qualification for Appointment,"* Rule 8 dealt with *"Constitution of Selection Committees."* The Committee was to comprise of the Chairman, Sikkim Public Service Commission or his nominee, the Chief Secretary to the Government, the Finance Secretary and the Establishment Secretary to the Government and was entrusted with the task of grading persons mentioned in Rule 5, for absorption in the various Grades of the Service and under Sub Rule (4) of Rule 6. The Committee was also to make recommendations for Direct Recruitments under Clause (i) of Rule 6 or Sub Rule (4) of Rule 6. Promotion of persons mentioned in Rule 6 (1) (iv) was also vested on the Committee. The recommendations of the Committee, as finally approved by the Commission, was to be forwarded to the Government along with all other papers sent to the Selection Committee. Rule 9 elucidated the *"Training, Probation and Confirmation"* of persons appointed, while Rule 10 laid the details of how *"Seniority"* was to be computed and provided that the persons deemed to have been appointed to the Service under Rule 5 was to rank as senior to all those who may be appointed under Rule 6 and that, *"The inter-se seniority of direct recruits and promotees shall be in the order in which their names appear in the merit/select list. As for seniority between promotees and direct recruits, persons promoted in one year shall rank senior to persons recruited direct in that year."* Schedule I to the Rules detailed the strength and composition and designation of posts. It indicated 29 (twenty-nine) posts then in the Junior Grade i.e. that of Accounts Officers.

(ii) The Rules came to be amended several times in the interregnum and twice in 1986, one vide Notification No.15/Fin. dated 11.03.1986 and vide Notification No.20/Fin. dated 25.02.1987. Vide the amendment on 25.02.1987, the sanctioned strength of Accounts Officers was shown to be 43 (forty-three) in Schedule I. Rules 6 and 16 of the amended Rules are extracted hereinbelow;

"**Amendment of rules** 6, 7, 8, 9, 10, 11, 12, 13.	*In the said rules, for rules 6, 7, 8, 9, 10, 11, 12 and 13, following rules shall be substituted, namely:-*

"6. Method of Recruitment to the Service -

(1) Subject to the provision of rules 5, recruitment to the Service shall, after the appointed day, be made by the following methods, namely:-

(i) Competitive Examination to be held by the Commission.

(ii) Obtaining the services of any employee of the Central Government or other State Governments.

(iii) ***Promotion from among persons holding substantive appointment in Grade I mentioned in Schedule II to the Sikkim Sub-ordinate Accounts Service Rules, 1984.***

(iv) Re-employment, after retirement of any person, who in the opinion of the Government is suitable for such re-employment.

2. ***(i) Government shall ordinarily decide in each year the number of vacancies in the Service to be filled in that year by direct recruitment and also the number to be filled by promotion or by any other method mentioned in sub-rule (1).***

(ii) The number of vacancies to be filled up by promotion, deputation or re-employment in any one year shall not exceed 50 per cent of the total number of vacancies to be filled in that year."

.....

16. RECRUITMENT BY PROMOTION

(1) .....

(2) ***The Government shall, every year for the purpose of promotion to the Service under Clause (iii) of sub- rule (1) of rule 6, prepare a list of names of persons in order of seniority who have, on the first day of that year, completed not less than six years of continuous service under the Government in a post included in Grade I mentioned in the Schedule II appended to the Sikkim Subordinate Accounts Service Rules, 1984****.*

(3) ***The Government shall forward to the Commission the list of persons referred to in sub-rule (2) of this rule together with their character rolls and service records for the preceding five years indicating the anticipated number of vacancies to be filled by promotion in course of the period of 12 months commencing from the date of preparation of the list****.*

(4) ***The Commission after satisfying themselves that the records and information complete in all respects have been received, shall convene a meeting of the Promotion Committee. The Committee shall prepare a final list of persons who are found to be suitable for promotion to the Service on an overall relative assessment of their service records and interview.***

(5) The number of persons to be included in the list shall not exceed twice the number of vacancies to be filled by promotion.

(6) ***The Commission shall forward the final list prepared under sub-rule (4) of this rule to the Government along with all the character rolls and service records received from the Government.***

(7) ***The list shall ordinarily be in force for a period of twelve months from the date of the recommendation of the Commission.***

(8) ***Appointment of persons included in the list to the service shall be made by the Government in the order in which the names of persons appear in the list.***

(9) *It shall not be ordinarily necessary to consult the Commission before each appointment is made unless during the period of 12 months from the date of recommendation of the Commission there occurs deterioration in the work of the person which in the opinion of the Government, is such as to render him unsuitable for appointment to the service."*

(emphasis supplied)

(iii) Schedule II referred to in Rule 16 (2) *supra* details the *"Designation of Posts," "Method of Recruitment"* and *"Eligibility Conditions"* of Selection Grade I, Selection Grade II, Senior Grade and Junior Grade. So far as the Junior Grade is concerned, it includes Accounts Officer/Accounts-cum-Administrative Officer/ Audit Officer and the *"Method of Recruitment"* is shown to be 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through a Limited Departmental Competitive Examination/Deputation/Re-employment. The *"Eligibility Conditions"* for Promotion is reflected as follows,

*"**SCHEDULE – II***

.....

***By Promotion**: Persons holding posts in Grade-I of the Sikkim Subordinate Accounts Service with at least **6 years** of service in the grade. The promotion shall be made on the basis of seniority-cum-merit."*

(emphasis supplied)

14. From a reading of the above Rules, it emerges that the posts of Accounts Officers were to be filled by way of Promotion and Direct Recruitment in the ratio of 50:50 each. The Petitioners were qualified as per the Rules in 2004-2006 as well as on 08.05.2008, to be considered for Promotion as Accounts Officers. The Rules extracted *supra* required the State-Respondents to decide in each year, the number of vacancies in the Service to be filled in that year by Direct Recruitment and Promotion and to take steps after assessing the vacancy, *viz.,* including recommending the names of the Service holders for Promotion to Substantive Posts. The State-Respondents failed to comply with this requirement of the Rules nor were Examinations for either criteria held, as mandated. From the records available before this Court, it is clear that the procedure prescribed for recruitment was not adhered to by the State-Respondents which has, in fact, led to the heartburning amongst the Petitioners and the Direct Recruits concerning their *inter se* Seniority. Besides failing to take steps as enunciated hereinabove, the Government has not prepared a List of names of persons in order of Seniority (as per Rules) who have, on the first day of that year, completed not less than 6 (six) years of continuous Service as Senior Accountants nor was the List of such persons forwarded to the Commission along with the relevant documents. The anticipated number of vacancies to be filled by Promotion in the course of the period of 12 (twelve) months, commencing from the date of preparation of the List was not indicated as well. In the absence of necessary steps by the Government, it is evident that the Commission was not in a position to take consequential steps and convene a meeting of the Promotion Committee who had been vested with the responsibility of preparing a final List of persons found to be suitable for Promotion to the higher Service on an overall relative assessment of their Service Records and interview.

15.(i) The State-Respondents have failed to enlighten this Court on the number of posts filled vide the two channels till 2009. Clearly, the Rules have been ignored and sidelined by the Government and appointments to the posts of Accounts Officers made by Promotion only. By their own admission, Direct Recruitment had been kept in abeyance from December, 2003 to 2007 and the post of Accounts Officer in the Junior Grade was filled only by Promotion. While considering the conduct of the State-Respondents, it is apposite to refer to the observations made by the Hon'ble Supreme Court in ***Keshav Chandra Joshi*** *(supra)*, wherein the Hon'ble Supreme Court while faced with, once again the proposition of

reckoning *inter se* Seniority, was alive to the lackadaisical attitude of the Government and *inter alia* held as follows;

> "**22.** In a democracy governed by rule of law, it is necessary for the appropriate governance of the country that the political executive should have the support of an efficient bureaucracy. Our Constitution enjoins upon the executive and charges the legislature to lay down the policy of administration in the light of the directive principles. The executive should implement them to establish the contemplated egalitarian social order envisaged in the preamble of the Constitution.
>
> .....
>
> **24.** It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. ....."

A similar attitude of the concerned Departments as indicated above, are reflected even in the facts and circumstances of the instant case by the nonchalant circumvention of the Rules by the State-Respondents. Besides, sloth takes away a man's welfare.

(ii) Rule 24 of the amended Rules of 1986 provides for *"Seniority"* and reads *inter alia* as follows;

> *"**24. SENIORITY:***
>
> *(1) The persons deemed to have been appointed to the Service under rule 5 shall rank as senior to all those who may be appointed under rule 6:*
>
> *Provided that……..*
>
> *(2) ……..*
>
> *(3) The seniority inter-se of the persons recruited to the Service through competitive examination shall be in the same order in which their names appear in the merit list forwarded by the Commission under sub-rule (4) of rule 7.*
>
> ***(4) The seniority inter-se of the persons appointed to the Service by promotion shall be in the same order in which their names appear in the list prepared under sub-rule (4) of rule 16 and forwarded by the Commission to the Government.***
>
> ***(5) The relative seniority inter-se of persons recruited to the Service through competitive examination and appointed to the Service by promotion shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in these rules.***
>
> ***Explanation:- A roster shall be maintained based on the reservation for direct recruitment and promotion in these rules. The roster shall run as follows:-***
>
> *(1) Promotion, (2) Direct Recruitment, (3) Promotion, (4) Direct Recruitment and so on.*
>
> *Appointment shall be made in accordance with this roster and seniority determined accordingly.*

(6) Notwithstanding anything contained in rules 5 and 6, the seniority of persons mentioned in the third proviso to rule 5 and in clause (ii) of sub-rule (1) of rule 6, who are absorbed in the Service shall be such as may be determined by Government in each case."

(emphasis supplied)

(iii) These Rules, for the first time provided for a Roster System, for recruitment. Schedule II to the Rules elucidates that the Junior Grade comprising of Accounts Officers, is to be filled 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through Limited Departmental Competitive Examination/ Deputation/Re-employment. At this juncture, it is worth noticing that the State-Respondents have not explained as to how the rotation of the Quota is fixed, is it to be construed as the Promotees getting the first, third and fifth of the vacancies that occur or was it by way of entitlement of half the vacancies? The facts placed before this Court by the State-Respondents in this context, are opaque and do not reflect the method adopted by them. There is an absence of data to indicate the Quota Rota adopted up to May, 2003, when the last Direct Recruitment to the post of Accounts Officer allegedly took place.

(iv) In 1988, the Rules were further amended and notified on 11.08.1988. Serial number "2" reads as follows;

*"**2. Rules 6 Method of recruitment to the Service**: In clause (iii) of sub-rule (i) of this rule add the following words at the end of the sentence:- "**to be held by the Commission**."*

(emphasis supplied)

"Schedule I" of the existing Schedule was substituted by a new Schedule. As already pointed out, the Commission's hands were evidently tied in the absence of necessary and timely steps by the Government in terms of Rules 6 and 16 *supra*. By a Notification dated 29.06.1996, amending the Rules further, the post of Accounts Officer was indicated to be 73 (seventy-three). On 26.08.1998, another amendment took place which stated *inter alia* as follows;

*"**Amendment of Schedule II.***	***2.** In the Sikkim Finance and Accounts Service Rules, 1978, in Schedule-II, for the post of Accounts Officer/ Assistant Director/Accounts-cum-Administrative Officer/Audit Officer, under the heading method of recruitment, for the figures and words "66% by direct recruitment and 34% by promotion", the figures and words "50% by direct recruitment and "50% by promotion" shall be substituted respectively."*

(v) Indeed, this amendment is superfluous, as the amended Rules of 1986, notified on 25.02.1985, at Schedule II, already indicated 50 per cent by Promotion and 50 percent by Direct Recruitment, besides, a careful scrutiny of the Rules placed before this Court, nowhere indicates *"66 per cent by Direct Recruitment and 34 per cent by Promotion."* On 05.09.2001, vide a Notification of the same date, further amendment was made to the Rules which provided that *"……in Schedule II, in serial No.4, under the column eligibility conditions for the figure „8; the figure „6 shall be substituted"* which meant that Senior Accountants, would be eligible for Promotion to the post of Accounts Officers on putting in 6 (six) years of qualifying service instead of 8 (eight) years, as previously required. The Petitioners thus were in the zone of consideration for Promotion having indubitably completed 6 (six) years of Service as Senior Accountants by 2004/2006. On 03.06.2003, another amendment came to be made in the Rules vide which the post of Accounts Officer was increased to 77 (seventy-seven). However, as already pointed out, the State-Respondents were loath to take timely steps although the Rules made adequate provisions.

16.(i) Notably, vide Notification dated 09.12.2003, the Rules of 1978 were further amended whereby "Rule 28," a provision for relaxation of the Rules, was inserted. The said Rule reads as follows;

> *"**28. Power to relax**:- Where the Government is of the opinion that it is necessary or expedient so to do, it may, by order, for*

reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category or persons or post."

(ii) The Rules of 1978 (unamended) contained no powers of relaxation save to the extent that in Rule 9, the Governor was given the prerogative of extending the period of probation of the Direct Recruits and the Promotees at his discretion, for any particular case or cases and was also empowered to exempt for reasons to be recorded from passing the Examination. On the point of relaxation and *inter se* Seniority, we may relevantly refer to the decision in ***G.S. Lamba and Others vs. Union of India and Others***[25] decided by a two Judge Bench of the Hon'ble Supreme Court wherein the relevant Rules provided for recruitment to the Indian Foreign Service from three different Services *viz.*, (*i*) Direct Recruitment by Competitive Examination, (*ii*) Substantive appointment of persons included in the select list promoted on the basis of a Limited Competitive Examination and (*iii*) Promotion on the basis of Seniority. One of the Rules provided that a recruitment should be made from the above sources on the following basis: (*i*) One-sixth of the Substantive vacancies to be filled in by Direct Recruitment, (*ii*) 33 1/3 per cent of the remaining five-sixth of the vacancies to be filled on the basis of results of Limited Competitive Examinations, and (*iii*) the remaining vacancies to be filled in by Promotion on the basis of Seniority. The Hon'ble Court found that the Direct Recruitment had not been made for years, Limited Competitive Examination had also not been held for years and Promotions from the select list had been made in excess of the Quota. Thus, there was enormous departure from the Rules of recruitment in making appointments over several years. The Hon'ble Court was of the view that the situation was similar to the situation in two other earlier cases *viz.*, ***A. Janardhana vs. Union of India and Others***[26] and ***O.P. Singla*** *(supra)*. It was opined that in the circumstances, it should be presumed that the excess appointment by Promotion had been made in relaxation of the Rules since there was power to relax the Rules. The Hon'ble Court held *inter alia* as follows;

"**27.** ……Therefore assuming there was failure to consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule and further assuming that the

[25] (1985) 2 SCC 604
[26] (1983) 3 SCC 601

> posts in integrated Grade II and III were within the purview of the Union Public Service Commission and accepting for the time being that the Commission was not consulted before the power to relax the rule was exercised yet the action taken would not be vitiated nor would it furnish any help to Union of India which itself cannot take any advantage of its failure to consult the Commission. Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N.K. Chauhan* v. *State of Gujarat* [(1977) 1 SCC 308 : (1977) 1 SCR 1037 : 1977 SCC (L&S) 127]. Therefore the promotion of the promotees was regular and legal both on account of the fact that it was made to meet the exigencies of service in relaxation of the mandatory quota rule and the substantive vacancies in service."

(iii) Similarly, in ***Narender Chadha*** *(supra)* decided by a two Judge Bench of the Hon'ble Supreme Court, the question therein was of *inter se* Seniority between Direct Recruits and Promotees. Evidently, *ad hoc* or *ex gratia* Promotions were made in large numbers from feeder posts to continuously fill several vacancies allocated for Direct Recruits while only few Direct Recruitments were made in deliberate derogation of the Quota Rule. The Promotees, however, had continued in their *ad hoc* posts for fifteen to twenty years without being reverted to their original posts and without their right to hold the Promotion posts being questioned. The Departmental Promotion Committee, which was required to meet annually, in accordance with Rules and instructions, met only thrice in nineteen years and selected for Promotion only those Promotees who had four years of regular Service in their feeder posts, as on a specified date of several years back. The Hon'ble Supreme Court held that Articles 14 and 16 of the Constitution were violated and all Promotees were entitled to regular

Promotion. The Seniority of the Promotees including those selected by the Departmental Promotion Committee, was to be reckoned with effect from the dates of their continuous officiation in the Promotion posts. It was observed *inter alia* as follows;

> "**15.** At one stage it was argued before us on behalf of some of the respondents that the petitioners who have not been appointed in accordance with Rule 8(1)(*a*)(*ii*) could not be treated as members of the Indian Economic Service or of the Indian Statistical Service at all and hence there was no question of determining the question of seniority as between the petitioners and the direct recruits. This argument has got to be rejected. **It is true that the petitioners were not promoted by following the actual procedure prescribed under Rule 8(1)(*a*)(*ii*) but the fact remains that they have been working in posts included in Grade IV from the date on which they were appointed to these posts. The appointments are made in the name of the President by the competent authority. They have been continuously holding these posts. They are being paid all along the salary and allowances payable to incumbents of such posts. They have not been asked to go back to the posts from which they were promoted at any time since the dates of their appointment.** The order of promotion issued in some cases show that they are promoted in the direct line of their promotion. It is expressly admitted that the petitioners have been allowed to hold posts included in Grade IV of the aforesaid services, though on an ad hoc basis. ……..... But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging

> to the Service at all, **particularly where the Government is endowed with the power to relax the rules to avoid unjust results**. In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other contesting respondents have also not urged that the petitioners should be sent out of the said posts. The only question agitated before us relates to the seniority as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the officers concerned into the same grade. In the instant case there is no impediment even under the Rules to treat these petitioners and others who are similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in Rule 16 thereof. ……
>
> **17.** ……Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N.K. Chauhan* v. *State of Gujarat*……..."
>
> **(emphasis supplied)**

(iv) On the bedrock of the principle expounded above, while considering the admitted departure from the Quota Rule and prescribed procedure of recruitment in the instant matter, it is a safe assumption that the appointments of the Petitioners if made in excess of the Service Quota were valid and legal in view of the existence of the Relaxation Clause at Rule 28 of the amended Rules of 1986. A presumption thus arises that Rule 28 was invoked legalizing and validating the Promotion of the Petitioners. I cannot bring myself to agree with the submissions of Learned Senior Counsel for

Respondents No.7 to 17 that the relaxation would only come into effect from the date of Notification i.e. 19.05.2012, if not from 16.03.2013, the date of confirmation, for the reason that the Notification firstly does not specify the date of such relaxation, besides, Rule 28 was inserted vide the amendment dated 09.12.2003 and therefore in existence when the Officiating Orders were issued on 08.05.2008. Thus, the inevitable conclusion is that the Relaxation Clause was invoked and effective from the date the Officiating appointment of the Petitioners were made to the posts of Accounts Officers i.e. from 08.05.2008. Conditions "1" and "2" inserted in the Officiating Order of the Petitioners are sans reasons, no Rules make provisions for insertion of such conditions.

17.(i) Relevantly, the impact and purpose of the word "Officiating" in the case at hand, is to be considered. The Officiating Order, dated 08.05.2008, states that the Petitioners are promoted as Accounts Officers in Officiating capacity and the Officiating Promotion shall be subject to the following conditions:

> *"1. The officiating promotion shall not confer any right for regular promotion and shall not be counted towards seniority.*
>
> *2. Their regular promotion shall be made on the recommendation of the Sikkim Public Service Commission."*

Since the Rules of 1978 do not define "Officiating," we may refer to the Sikkim Government Service Rules, 1974 which, in Chapter II, Rule 13 provides as follows:-

> "**(13) 'Officiating appointment'**.- A Government Servant is said to be holding an officiating appointment when he performs the duties of a vacant or newly created temporary post on which no Government Servant holds a lien without completing the minimum number of qualifying years of service as may have been or as may be prescribed by the Government from time to time."

(ii) Rule 39 of the Sikkim Government Service Rules, 1974 reads *inter alia* thus; "

> **39. Officiating appointment**.-
>
> (1) A Government Servant may be appointed to officiate in a post carrying a higher time scale of pay if the vacancy is for a period exceeding one year
>
> (2) ……
>
> (3) Officiating appointment shall continue till the Government Servant completes the minimum qualifying number of years as may have been or may be prescribed by the Government from time to time."

(iii) Therefore, it is understood that a person appointed on Officiating basis is essentially a Government servant who has not completed the minimum number of qualifying years of Service prescribed by the Government from time to time and in a post which carries a higher time scale of pay, if the vacancy is for a period exceeding one year. The qualification necessary for the Petitioners to be considered for Promotion from Senior Accountant to Accounts Officer is 6 (six) years of continuous Service in the rank of Senior Accountant. It is not the case of the State-Respondents that the Petitioners had not completed the qualifying years of Service or were lacking in any other field, which would render them eligible only for Officiating Promotion. That, having been said, while considering condition number "1." of the Officiating Order, dated 08.05.2008, it is in the first instance, unfathomable since it states that the Officiating Promotion shall not confer any right for regular Promotion, in such a circumstance, is it to be construed that despite the person having put in the required years of Service, all other qualifications being met and Substantive vacant posts existing, he would still be deprived of his regular Promotion and would be sentenced to suffer the whims of the State-Respondents? The second condition provides that regular Promotion can be made on the recommendation of the SPSC, this condition obviously would be contingent upon the action of the State-Respondents in terms of Rule 16 (extracted *supra*) of the amended Rules of 1986, notified on 11.03.1986. The Petitioners cannot be answerable for the procrastination or indolence of the State-Respondents, thereby depriving them of timely Promotions, of course subject to fulfillment of all other requisite conditions. The uncertainty of confirmation is surely not a reflection of the inefficiency of the Petitioners.

18. Related to this would be the question of vacancy in the posts of Accounts Officer. On this aspect, the averments in the Counter-Affidavit are at best nebulous and fail to address the real issues pertaining to vacancy as emanates from the discussions which follow. No reasonable explanation was offered as to why the Petitioners were promoted only on Officiating capacity, besides which, a confirmed Seniority List as on date, is not exhibited. Although the State-Respondents would argue that the 11 (eleven) Direct Recruits had been appointed in the year 2009 against the 23 (twenty-three) vacancies that existed for Direct Recruits at the relevant time, however, Annexure R-15 (collectively) provides that there was a proposal on 30.06.2003 for filling up of 23 (twenty-three) posts by Departmental Competitive Examination via Promotion. Thereafter, again in 2003, a proposal was placed for filling up of 18 (eighteen) Posts of Accounts Officers by Direct Recruitment, however, vide Letter dated 22.11.2003, Annexure R-15/5 (collectively), it was stated that the Department had already forwarded the proposal for filling up of 18 (eighteen) Posts of Accounts Officers by Promotion and a request was made to the Rule Section to allot the Roster Points. Therefore, the Office Notes reveal that for the post of 23 (twenty-three) alleged vacancies of Direct Recruits, 18 (eighteen) posts were also proposed to be filled by Promotion. The Office Notes further reveal that on 12.10.2004, the Chief Minister convened a meeting in which he directed that 10 (ten) new posts of Accounts Officers be created. On 19.05.2007, another Office Note reveals that there were 12 (twelve) posts of Accounts Officers which were proposed to be filled through Direct Recruitment against anticipated vacancy. In the light of what has ensued in the concerned Department, as also the Order of the Chief Minister, it is evident that the contention of the State-Respondents that the Direct Recruits in 2009 were being filled from the 23 (twenty-three) vacant posts of the 46 (forty-six) posts, are erroneous and not buttressed by documentary evidence. The vacancies that arose out of the death and retirements and the allocation of such vacancies to the Quota and Rota, have not been responded to at all by the State-Respondents.

19.(i) Turning my attention now to the Quota Rota Rule, in ***N.K. Chauhan*** *(supra)***,** the question that fell for consideration was whether the 50:50 ratio as between Direct Recruits and Promoted hands was subject to the saving clause "as far as practicable." It was observed that the Government must give proof that it was not practicable for the State to recruit from the open market qualified persons through the specialized

agency of the Public Service Commission. If it does not succeed despite honest and serious efforts, it qualifies for departure from the Rule. It was *inter alia* held as follows;

> "**27.** .....The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. .....The short test, therefore, is to find out whether the government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. ....."

(ii) In ***Suraj Parkash Gupta*** *(supra),* it was held *inter alia* as follows;

> "**38.** That in such situations there can be no breakdown of the quota rule is clear from the decided cases. In *N.K. Chauhan* v. *State of Gujarat* [(1977) 1 SCC 308 : 1977 SCC (L&S) 127] the rule said that "as far as practicable", the quota must be followed. Krishna Iyer, J. said that there must be evidence to show that effort was made to fill up the direct recruitment quota. It must be positively proved that it was not feasible, nor practicable to get direct recruits. The reason should not be "procrastinatory". In *Syed Khalid Rizvi* v. *Union of India* [1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192] it was held that mere non-preparation of select list does not amount to collapse of the quota rule. In *M.S.L. Patil* v. *State of Maharashtra* [(1996) 11 SCC 361] it was held that mere omission to prepare lists did not amount to breakdown of quota rule."

(iii) Therefore, both the ratio of ***N.K. Chauhan*** and ***Suraj Parkash Gupta*** *(supra),* lay down that the Quota Rule is not broken down until

serious efforts are made by the Government to recruit from the open market. In the instant case, right from the inception of the Rules and several amendments thereof, the State-Respondents have not been able to establish before this Court that the Quota Rule was ever adhered to, however, the Rules do exist providing for methods of recruitment for Direct Recruits and Promotees but no effort has been shown to have been made by the Government to recruit from the open market. On the touchstone of the principles enunciated in ***N.K. Chauhan*** and ***Suraj Parkash Gupta*** *(supra)*, the Quota Rule thus cannot be said to have broken down. In ***Direct Recruit Class II Engineering Officers' Association*** *(supra)*, the Hon'ble Supreme Court was also of the opinion that although the Rules fixed the Quota of the appointees from two sources and were meant to be followed but that if it becomes impractical to act upon it, it is no use insisting that the authorities must continue to give effect to it. That, on the Quota Rule not being followed, brings about its natural demise and there is no meaning in pretending that it is still vibrant with life. In such a situation, if appointments from one source are made in excess of a Quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. That, where the Rules permit the authorities to relax the provision relating to the Quota, ordinarily a presumption should be raised that there was such Relaxation when there is a deviation from the Quota Rules. Despite the Quota Rule not having broken down in the instant case, the safety net of Rule 28 inserted in the Rules on 09.12.2003, has come into play, as already elaborately discussed, making the appointments of the Petitioners as Accounts Officers valid and legal.

20.(i) In the light of the above position, it is imperative to discuss here as to how the *inter se* Seniority between the Petitioners and the Respondents No.7 to 17 was to be settled. Relevant reference may be made to the observation in ***D.R. Nim*** *(supra)*, wherein it was held that when an Officer had worked continuously for a long period (as in that case for nearly fifteen to twenty years) in a post and had never been reverted, it cannot be held that the Officer's continuous Officiation was a mere temporary or local or stop gap arrangement even though the Order of appointment may state so. In such circumstances, the entire period of Officiation was to be counted for Seniority, any other view would be arbitrary and violative of Articles 14 and 16 (1) of the Constitution because the temporary Service in the post in question is not for a short period intended to meet some emergent or

unforeseen circumstance. The ratio in ***S.B. Patwardhan*** *(supra)*, may also be referred to. The pivotal question for consideration before a three Judge Bench of the Hon'ble Supreme Court was whether Departmental Promotees and Direct Recruits appointed as Deputy Engineers in the Engineering Services of the Governments of Maharashtra and Gujarat, belonged to the same Class so that they may be treated with an even hand or whether they belonged to different Classes or categories and can justifiably be treated unequally. The Hon'ble Supreme Court observed that concededly, they were being treated unequally in the matter of Seniority because whereas, Promotees rank for Seniority from the date of their confirmation, the Seniority of Direct Recruits is reckoned from the date of their initial appointment. That, a Promotee ranks below the Direct Recruit even if he has officiated continuously as a Deputy Engineer for years before the appointment of the Direct Recruit is made and even if he, the Promotee, could have been confirmed in an available Substantive vacancy before the appointment of the Direct Recruit. After due consideration of the relevant Rules, the Hon'ble Supreme Court was pleased to opine *inter alia* as follows;

> "**39.** If officiating Deputy Engineers belong to Class II cadre as much as direct recruits do and if the quota system cannot operate upon their respective confirmation in that cadre, is there any valid basis for applying different standards to the members of the two groups for determining their seniority? Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet clause (*iii*) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula

gives to the direct recruit even the benefit of his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification. …… It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government. …….....……

43. Rule 8(*ii*) in the instant case adopts the seniority-cum-merit test for preparing the statewise Select List of seniority. And yet clause (*iii*) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That, under Articles 14 and 16 of the Constitution, is impermissible and therefore we must strike down Rule 8 (*iii*) as being unconstitutional.

……..……

48. Rules 33, insofar as it makes seniority dependent upon the fortuitous circumstance of confirmation, is open to the same objection as Rule 8(iii) of the 1960 Rules and must be struck down for identical reasons.

……..……

51. We are not unmindful of the administrative difficulties in evolving a code of seniority which will satisfy all conflicting claims. But care ought to be taken to avoid a clear transgression of the equality clauses of the Constitution.

> ..... **We however hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees**. All other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities. ....."
>
> **(emphasis supplied)**

(ii) In ***Direct Recruit Class II Engineering Officers' Association*** *(supra)*, a Constitution Bench of the Hon'ble Supreme Court was in agreement with the ***Patwardhan*** case *(supra)*, and held *inter alia* therein as follows;

> "**13.** When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and **we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies**. The principle for deciding inter se seniority has to conform to the

principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. **But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for the purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary**. .....

16. .....We are not in a position to agree with the learned counsel that the rules indicate that the officiating posts were not included in the cadre of the Deputy Engineers. It is true that the use of word "promotions" in Rule 8(*i*) of the 1960 Rules is not quite appropriate, but that by itself cannot lead to the conclusion that the officiating Deputy Engineers formed a class inferior to that of the permanent Engineers. .....

17. This question was considered in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] at considerable length, and a categorical finding against the direct recruits was arrived at, which has been followed for the last more than a decade, in many cases arising

> between members of Maharashtra and Gujarat Engineering Services. The question is of vital importance affecting a very large number of officers in the departments concerned and many disputes have been settled by following the judgment in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775]. In such a situation it is not expedient to depart from the decision lightly. It is highly desirable that a decision, which concerns a large number of government servants in a particular Service and which has been given after careful consideration of the rival contentions, is respected rather than scrutinised for finding out any possible error. **It is not in the interest of the Service to unsettle a settled position every now and then**. ……."

(emphasis supplied)

In sum and substance, the Hon'ble Supreme Court summarized the points as follows;

> "**47.** To sum up, we hold that:
>
> **(A)** Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The **corollary** of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.
>
> **(B)** If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

> **(J)** The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position. With respect to Writ Petition No. 1327 of 1982, we further hold:
>
> **(K)** That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."
>
> **(emphasis supplied)**

21.(i) Admittedly, the Promotion of the Petitioners was not made by following the procedure prescribed but they did fulfill the criteria mandated by the Rules. Being thus eligible under the said Rules, they could well have been considered for Promotion on completion of required period in the posts of Senior Accountants but for the passivity of the State-Respondents. Now, would the term *"ad hoc"* as emanates in the **corollary** of proposition "A" of the ratio in ***Direct Recruit Class II Engineering Officers' Association*** *(supra)*, be applicable to the case of the Petitioners. In ***Rudra Kumar Sain*** *(supra)*, a Constitution Bench of the Hon'ble Supreme Court was considering the question of *inter se* Seniority between Direct Recruits and Promotees in the Delhi Higher Judicial Service and while examining the term *"ad hoc"* held *inter alia* as follows;

> "**16**. .....In *Black's Law Dictionary*, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in *Black's Law Dictionary*, means "something which is formed for a particular purpose". The expression "stopgap" as per *Oxford Dictionary*, means "a temporary way of dealing with a problem or satisfying a need".

17. In *Oxford Dictionary*, the word "ad hoc" means for a particular purpose; specially. In the same dictionary, the word "fortuitous" means happening by accident or chance rather than design.

18. In *P. Ramanatha Aiyar's Law Lexicon* (2nd Edn.) the word "ad hoc" is described as: "For particular purpose. Made, established, acting or concerned with a particular (*sic*) and or purpose." The meaning of word "fortuitous event" is given as "an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God".

19. .....If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. ....."

(ii) The Officiating Orders of the Petitioners do not indicate that the posts were created to meet a particular temporary contingency and for a period specified nor is it the case of the State-Respondents that the post was created to meet a situation which had suddenly arisen on account of the happening of some event of a temporary nature to describe the appointment of the Petitioners as fortuitous. The Petitioners were in the posts of Accounts Officers from 08.05.2008 till their confirmation on 16.03.2013 and therefore cannot be said to be for a short period intended to meet emergent or unforeseen circumstances. In fact, only two whimsical conditions have been inserted in the Officiating Order, which also do not lay down that they would be reverted to their posts of Senior Accountants nor are the conditions fortified by any Rules. No conditions were attached to their Officiating Promotion regarding obtainment of qualification at a later date or reversion to the earlier posts, except the two conditions as already

extracted hereinabove sans explanation as to whether there were Substantive vacancies or not. The appointment does not specify that it was made in the exigencies of service or on *ad hoc* or stop gap to meet a sudden temporary situation requiring *en masse* Promotions to define it as fortuitous. It is settled law that where the initial appointment is only *ad hoc* and not according to Rules and made as a stop gap arrangement, the period of Officiation to the said post cannot be taken into account for considering Seniority. In the instant case, however, the well-settled principle of law as propounded by the ratio in ***Direct Recruit Class II Engineering Officers' Association*** *(supra)* is applicable *viz.*, that an employee appointed to a post according to Rules would be entitled to get his Seniority reckoned from the date of his appointment and not from the date of its confirmation. It is but trite to remark that without State action in terms of the prescribed procedure, the Petitioners could not have volunteered to take the Limited Departmental Competitive Examination.

(iii) In ***Vireshwar Singh and Others vs. Municipal Corporation of Delhi and Others***[27]**,** the Hon'ble Supreme Court observed *inter alia* as follows;

> "**15.** It is the view expressed in *Narender Chadha* [*Narender Chadha* v. *Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] which would require a close look as *Keshav Chandra Joshi* [1992 Supp (1) SCC 272 : 1993 SCC (L&S) 694 : (1993) 24 ATC 545] is a mere reiteration of the said view. In *Narender Chadha* [*Narender Chadha* v. *Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] the lis between the parties was the one relating to counting of ad hoc service rendered by the promotees for the purpose of computation of seniority qua the direct recruits. The basis of the decision to count long years of ad hoc service for the purpose of seniority is to be found more in the peculiar facts of the case as noted in para 20 of the Report than on any principle of law of general application. However, in paras 15-19 of the Report a deemed relaxation of the rules of appointment and the wide sweep of the power to

[27] (2014) 10 SCC 360

relax the provisions of the rules, as it existed at the relevant point of time, appears to be the basis for counting of the ad hoc service for the purpose of seniority.

16. The principle laid down in *Narender Chadha* [*Narender Chadha* v. *Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] was approved by the Constitution Bench in *Direct Recruit Class II* [*Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] as the promotion of the officers on ad hoc basis *was found to be* "*without following the procedure laid down under the Rules*". That apart, what was approved in *Direct Recruit Class II* [*Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] is in the following terms: (SCC p. 726, para 13)

> "*13.* … We, therefore, confirm the principle of counting towards seniority the period of continuous officiation *following an appointment made in accordance with the rules prescribed* for regular substantive appointments in the service." ……"

The law on the point of Seniority *qua* the appointments made in excess to the Quotas and the principle of computing the Seniority is thus clearly laid down, further, as expressed in the ratio of ***Direct Recruit Class II Engineering Officers' Association*** *(supra)*, it is not in the interest of the Service to unsettle a settled position now and then.

(iv) We may, therefore now look at the propositions put forth in ***Direct Recruits*** case *supra*. Learned Senior Counsel for Respondents No.7 to 17 relied on proposition *"(A)"* while Learned Senior Counsel for the Petitioners relied on proposition *"(B)"*. From the discussions made hereinabove, it can be culled out that the Petitioners continued in the posts until regularization of their Service in accordance with the Rules. Thus, the

case of the Petitioners squarely falls under proposition *"(B)"* enunciated in ***Direct Recruit Class II Engineering Officers' Association*** *supra*. At the same time, it is worth noticing propositions *"(D)"* and *"(F)"* of the same ratio wherein at *"(D)"* it was held that if it becomes impossible to adhere to the existing Quota Rule, it should be substituted by an appropriate Rule to meet the needs of the situation. In case, however, the Quota Rule is not followed continuously for a number of years because it was **impossible** to do so, the inference is irresistible that the Quota Rule had broken down. It may be explained here that the word "**impossible**" has to be construed in this context in terms of the decision of the Hon'ble Supreme Court in ***N.K. Chauhan*** and ***Suraj Parkash Gupta*** *(supra)*. No effort of the State-Respondents to recruit directly is established herein as already discussed. Proposition *"F"* of ***Direct Recruit Class II Engineering Officers' Association 1990 (2) SCC 715*** *supra* provides that where the Rules permit the authorities to relax the provisions relating to the Quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the Quota Rule. The Relaxation Clause at Rule 28 of the Rules is assumed to have been invoked when deviation from the Quota Rule was made.

22. In conclusion, it must be remarked that no case fits with mathematical or clockwork precision to a previously decided case. The facts of each case are peculiar in their own details. Thus, it is only reasonable that the Courts apply the principles laid down by the Hon'ble Supreme Court, similar to those requiring determination before them. It is worth remarking at this juncture that the Petitioners had also agitated the point that the Direct Recruits appointed in January, 2009 were promoted on Officiating basis as Senior Accounts Officers even before completion of the qualifying years of Service as Accounts Officers, and that 12 (twelve) posts of Senior Accounts Officers to that of Accounts Officers were downgraded for the alleged purposes of Direct Recruitments which were subsequently then filled by Promotions. No light has been shed on these circumstances by the State-Respondents.

23. So far as the grievance of the Petitioners against the Respondents No.4, 5 and 6 are concerned, in the first instance, they had appeared in the Departmental Examination in the year 1997 for Promotion from the posts of Accountants to Senior Accountants and were ranked in the first, second and third place amongst 19 (nineteen) candidates in the Panel prepared for such

Promotion. In such circumstances, in my considered opinion, nothing irregular emanates on their selection and consequent Promotions.

24. The foregoing detailed discussions thus soundly answers the question that fell for consideration before this Court.

25. So far as the question of delay is concerned, the Petitioners are employees of the State-Respondents and bound by official discipline. In the absence of any Confirmation List pertaining to Seniority, it was not for the Petitioners to have run to the Court at the drop of a hat. In my considered opinion, there is no negligence or inaction on the part of the Petitioners or want of *bona fides.* The expectation of the Petitioners was that the State-Respondents would treat them fairly and when such action was not forthcoming, the Petitioners were constrained to seek redressal from the Court. The Courts cannot always take a pedantic and hyper technical view on the point of delay, which ought not to be an obstacle in the exercise of the Courts' discretion to mete out even handed justice to all concerned.

26. While on the issue of waiver and acquiescence, I am inclined to agree with the submissions of Learned Counsel for the Petitioners that the ratio of ***P.S. Gopinathan*** and ***M.P. Palanisamy*** *(supra)* relied on by Learned Counsel for Respondents No.7 to 17, are distinguishable from the instant case. In ***P.S. Gopinathan*** *(supra),* the relief was not granted to the Appellant as the position therein was that the Appellant was well aware of the *"**35**.....mistaken belief of the High Court in appointing and posting him as a temporary employee. ..."* to which he raised no objection and did so only subsequently. In ***M.P. Palanisamy*** *(supra),* the contention of the Appellants was that they had all the qualifications for holding the posts of Post Graduate Assistants when they were appointed under the relevant Rules and there was no break in Service to which they were ultimately regularized in 1988. They were placed below in Seniority to those who were selected in 1986. It was found *inter alia* as follows;

> "**29. .....**however, it must be borne in mind that though the appellants herein had the necessary qualifications at the time of their initial appointment under Rule 10(*a*)(*i*)(1) and though they were subsequently regularised also, the regularisation was conditional regularisation, which was done way

> back in 1988. The condition regarding the seniority was explicit in the said regularisation, which is clear from a mere reading of GOMs No. 1813. ……..." The Appellants therein raised the issue in 1994 and thereafter when the Seniority prayed for by them was refused, they bore it in silence and raised the matter again only in 2003. That apart, it is worth considering that in ***N.K. Chauhan*** *(supra)*, the Hon'ble Supreme Court had also observed *inter alia* as follows*;*
>
> "**36**. ……But we should not forget that seniority is the manifestation of official experience, — the process of metabolism of service, over the years, of civil servants, by the administration — and, therefore, it is appropriate that as far as possible he who has actually served longer benefits better in the future. ……."

27. The Rule of law cannot be anathema to the State-Respondents, it demands obedience and exists to check arbitrary exercise of power which otherwise conceives chaos, as exhibited in the facts and circumstances herein. The fate of the Petitioners have been left to the vagaries of executive indecisions leading to violation of Articles 14 and 16 of the Constitution of India.

28. Considering the entirety of the facts and circumstances and for the reasons discussed *supra* and in terms of the well settled position of law in the ratiocinations relied upon, it is hereby ordered as follows:

(i) The Petitioners shall be accorded Seniority with effect from the date of their Officiating Promotion i.e. 08.05.2008 as Accounts Officers with all benefits of Service;

(ii) The consequent Seniority of the Petitioners in their subsequent senior posts shall be computed in terms of the directions *supra*;

(iii) A Seniority List shall be prepared by the State-Respondents on the above basis, to rule out prejudice to the Petitioners and ensure equity to all, thereby, toeing the line of Articles 14

and 16 of the Constitution and thus satisfying the test of constitutionality;

(iv) The Petitioners No.2 and 3 who have retired during the pendency of the instant Writ Petition are entitled to receive the same benefits as granted to the Petitioners herein, during their time in Service, for the purposes of their retirement benefits.

(v) No Orders need be issued with regard to Respondents No.4, 5 and 6 in view of the foregoing discussions pertaining to their Promotions, they are at liberty to approach the State-Respondents for redressal of any grievances.

29. The Writ Petition stands disposed of with the above directions.

30. No order as to costs.

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

Bail Appln. No. 12 of 2020

Ganesh Sharma @ Gelal ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Mr. Rahul Rathi, Advocate.

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

Date of decision: 25th January 2021

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – S. 18(b) of SADA, 2006 provides for the twin conditions necessary for grant of bail in a case arising in SADA, 2006, notwithstanding anything contained in Cr.P.C. This provision is in *pari-materia* to S. 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 – The words "reasonable grounds" under S. 18 of the SADA, 2006 would have same meaning as has been explained by the Supreme Court *vis-à-vis* S. 37 of the NDPS Act, 1985. It would connote substantial probable cause for believing that the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

(Paras 11 and 16)

Petition dismissed.

Chronology of cases cited:

1. Narcotics Control Bureau v. Kishan Lal and Others, (1991) 1 SCC 705.

2. Intelligence Officer, Narcotics C. Bureau v. Sambhu Sonkar and Another, (2001) 2 SCC 562.

3. Narcotics Control Bureau v. Dilip Pralhad Namade, (2004) 3 SCC 619.

4. Collector of Customs, New Delhi v. Ahmadalieva Nodira, 2004 SCC (Cri) 834.

ORDER (ORAL)

Bhaskar Raj Pradhan, J

1. The applicant has preferred the present application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) seeking bail in Rangpo P.S. Case FIR No. 19/2020 dated 09.06.2020 registered under Sections 7(a)(b)/9/14 of the Sikkim Anti Drugs Act, 2006 (SADA, 2006) read with Section 34 of the Indian Penal Code, 1860 (IPC).

2. The facts as narrated by the applicant is that he was arrested on 09.06.2020 in connection with the aforesaid FIR. He was forwarded to State Jail at Rongyek on the same day itself by the learned Judicial Magistrate, Gangtok. The investigation is over and charge sheet has been filed. It is registered as S.T. (SADA, 2006) Case No. 22 of 2020 and the next date is fixed on 16.03.2021 for examination of prosecution witnesses.

3. It is also stated that the applicant had moved an application for bail before the learned Special Judge, SADA, 2006 which was rejected on 01.09.2020 on the ground that the concerned witnesses had clearly stated in their statements recorded by the police pursuant to the examination under Section 161 Cr.P.C. that the applicant was frequently calling on the mobile phone of accused person-Sandeep Chettri and verifying about the consignment of drugs.

4. The bail application was rejected on the ground that the offences were of serious nature and there was possibility of the applicant abusing his freedom in the event of being enlarged on bail.

5. The State of Sikkim has filed a reply dated 10.12.2020 to the application for bail. The release of the applicant on bail has been objected

to by the State respondent not only on the merit of the case but also that there was possibility of the applicant abusing his liberty and tampering with witnesses.

6. On 14.12.2020 this court directed the learned Additional Public Prosecutor to file the entire charge sheet along with all the materials within a period of one week and listed the matter for hearing today. The charge sheet had been filed by the State of Sikkim on 26.12.2020 along with the documents filed therewith. The orders passed by the learned Special Judge from time to time have also been filed. On perusal it is clear that the learned Special Judge has on 14.10.2020 heard the parties and having considered the materials, framed charged against the accused persons including the applicant herein under Rule 17(1) of the Sikkim Anti Drugs Rules, 2007 and Section 9(1)(c) of SADA, 2006 read with Section 34 IPC and Section 9(4) of SADA, 2006 read with Section 34 IPC.

7. Heard Mr. Rahul Rathi, learned counsel for the applicant and Mr. Yadev Sharma, learned Additional Public Prosecutor for the State of Sikkim.

8. Mr. Rahul Rathi contends that the materials before the learned Special Judge against the applicant are limited to the statements of the two seizures witnesses recorded under Section 161 Cr.P.C. and on perusal thereof it would be clear that the applicant is entitled to bail.

9. The applicant also contends that the learned Special Judge has failed to appreciate the facts and circumstances of the case as well as the law in its correct prospective. It is contested that since the investigation of the case is completed he is entitled to be enlarged on bail. It is stated that the applicant has been falsely implicated and Section 18 of SADA, 2006 had not been appreciated correctly by the learned Special Judge.

10. Section 18 of the SADA, 2006 provides that the offences under it are both cognizable and non-bailable. Section 18 starts with a non obstante clause *"Notwithstanding anything contained in the Code of Criminal Procedure, 1973"*. It reads as under:

> ***"18. Offences to be cognizable and non-bailable:***

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

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

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

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

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

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

11. Section 18 (b) of SADA, 2006 provides for the twin conditions necessary for grant of bail in a case arising in SADA, 2006, notwithstanding anything contained in Cr.P.C. This provision is in *pari-materia* to Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, 1985).

12. The Supreme Court in ***Narcotics Control Bureau vs. Kishan Lal & Ors.***[1] had occasion to examine the provision of Section 439 Cr.P.C. and

[1] (1991) 1 SCC 705

Section 37 of the NDPS Act, 1985. The Supreme Court was pleased to hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the court under the said section are applicable to the High Court also in the matter of granting bail.

13. In ***Intelligence Officer, Narcotics C. Bureau v. Sambhu Sonkar & Anr.***[2] the Supreme Court held that it would be difficult to accept the contention of the learned counsel for the respondents therein that the liberal interpretation given by the High Court to Section 37 was justified as it affects personal liberty of a citizen who is yet to be tried is not acceptable. It was held by the Supreme Court that considering the legislative intent of curbing the practice of giving bail on technical ground in a crime which adversely affects the entire society including the lives of a number of persons and the object of making stringent provisions for control of illicit traffic in narcotic drugs and psychotropic substances, there is no reason to accept the construction of the section which its language can hardly bear.

14. In ***Narcotics Control Bureau vs. Dilip Pralhad Namade***[3] the Supreme Court while examining the provision of Section 37 of the NDPS Act, 1985 held as under:-

> ***"9.*** *As observed by this Court in Union of India v. Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.*
>
> ***10.*** *The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other*

[2] (2001) 2 SCC 562
[3] (2004) 3 SCC 619

twin conditions which really have relevance so far as the present respondent-accused is concerned, are: (1) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence, and (2) that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail. This nature of embargo seems to have been envisaged keeping in view the deleterious nature of the offence, necessities of public interest and the normal tendencies of the persons involved in such network to pursue their activities with greater vigour and make hay when at large. In the case at hand the High Court seems to have completely overlooked the underlying object of Section 37 and transgressed the limitations statutorily imposed in allowing bail. It did not take note of the confessional statement recorded under Section 67 of the Act."

15. In ***Collector of Customs, New Delhi vs. Ahmadalieva Nodira***[4] the Supreme Court held as under:

*" **7.** The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other*

[4] 2004 SCC (Cri) 834

> *twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. ……..***"***

16. The records reveal that the learned Special Judge having found *prima facie* materials against the applicant framed charges under the SADA, 2006 and the IPC. The order framing charge is not under challenge. The materials placed before this court are materials filed along with the charge sheet. It reveals, *prima facie,* that Sandeep Chettri (accused no.1) was apprehended on 09.06.2020 while driving a truck at the Rangpo boarder check post and during his search and seizure various controlled substances were recovered. The controlled substances were accordingly seized. It is the case of the prosecution that during this time the applicant constantly called Sandeep Chettri (accused no.1) from his phone no (8918189280) informing him that he was coming to receive the consignment of controlled substances in his vehicle. According to the prosecution he was thereafter, apprehended at IBM, Rangpo after a team was dispatched. Besides the statements of the two seizure witnesses as pointed out by Mr. Rahul Rathi the statement of the complainant also implicates the applicant for the commission of the alleged offence. The words *"reasonable grounds"* under Section 18 of the SADA, 2006 would have same meaning as has been explained by the Supreme Court vis-à-vis Section 37 of the NDPS Act, 1985. It would connote substantial probable cause for believing that

the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

17. This court has examined the materials which were placed before the learned Special Judge along with the charge sheet and the probable evidence which are required to be tested during trial. None of the materials placed would point to the existence of any facts or circumstances sufficient in themselves to justify the satisfaction that the applicant is not guilty of the offence charged. Contravention of Section 9(1)(c) and Section 9(4) of SADA, 2006 entails punishment of rigorous imprisonment which shall not be less than 10 years but may extend to 14 years. Therefore, in due consideration of the provisions of Section 439 and Section 18 of the SADA 2006, the materials against the applicant and the offences alleged to have been committed by the applicant this court is of the considered view that bail sought for by the applicant cannot be granted. The application is accordingly rejected.

SLR (2021) SIKKIM 81

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

Bail Appln. No. 03 of 2021

Karma Sherpa ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Ms. Zola Megi, Advocate.

For the Respondent: Mr. Yadev Sharma, Additional Public Prosecutor and Ms. Pema Bhutia, Assistant Public Prosecutor.

Date of decision: 5th February 2021

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – The victim, her mother as well as several other important witnesses have been examined and their depositions secured – At this stage of trial the primary concern for the Court should be the uninterrupted progress for fair trial to ensure justice is done. This can happen only when prosecution witnesses are able to depose freely, without fear or favour. The Court must also be conscious that the applicant is only an under trial and his liberty is a relevant consideration. While adopting a liberal approach the possibility of interdicting fair trial if released on bail should be obliterated – Considering the nature of the offence and the fact that the applicant has already spend 1year and 8 months in jail out of the minimum sentence of 5 years prescribed for the offence under S. 10 of the POCSO Act, 2012, it may not be proper to continue him in jail any further.

(Paras 5, 7 and 8)

Petition allowed.

ORDER (ORAL)

Bhaskar Raj Pradhan, J

1. This is an application under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) seeking bail for the applicant who is under trial. The First Information Report (FIR) was lodged against him on 15.05.2019. On the same date he was arrested and since then he has been incarcerated. He is presently lodged at Rongyek, Jail, East Sikkim. According to the applicant he is 22 years old and the charge against him is that he has committed sexual assault on a 15 year old victim. The investigation completed, the prosecution filed a charge sheet on 30.07.2019. On 21.09.2019, it has been informed, charges under section 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) as well as under Section 354 of the Indian Penal Code, 1860 (IPC) were framed against the applicant. The trial has progressed and as of now 7 witnesses have been examined. 7 more witnesses are yet to be examined. The last date scheduled by the learned Special Judge for examination of the prosecution witnesses is 17.05.2021.

2. The records reveal that the learned Sessions Judge had rejected the applicant's application for bail on 30.05.2019 on the ground *inter-alia* that the investigation was in progress. The second bail application was rejected on 25.08.2020 on the ground that victim had deposed about the sexual assault and therefore, it was not the case of being incarcerated without any basis. Further, it was also held that the offences were of serious nature, trial was under progress, some of the witnesses are yet to be examined and given the nature of the case the possibility of the applicant trying to abuse his liberty cannot be ruled out. In so far as the applicant's medical condition is concerned it was observed that the jail authorities had extended the required medical facilities to the applicant in jail.

3. Ms. Zola Megi, learned counsel for the applicant urges this bail application once again on the applicant's medical condition and on the ground that the trial now being substantially over, the main witnesses have been examined and secured. It is also urged that the applicant had just completed school, aged about 22 years only and as such he is neither in a position to influence the witnesses or tamper with evidence. It is urged that the applicant has no past criminal record.

4. Mr. Yadev Sharma, learned Additional Public Prosecutor while opposing the bail on the ground that offences charged are of serious nature and he may misuse his liberty also fairly concedes that even in the charge-sheet the investigating officer has categorically noted that the applicant does not have any criminal record.

5. It is seen that the victim, her mother as well as several other important witnesses have been examined and their depositions secured.

6. Considered the application for bail, the objections filed by the State dated 02.02.2021 as well as the additional documents placed on record on 02.02.2021 by the applicant.

7. At this stage of trial the primary concern for the court should be the uninterrupted progress for fair trial to ensure justice is done. This can happen only when prosecution witnesses are able to depose freely, without fear or favour. The court must also be conscious that the applicant is only an under trial and his liberty is a relevant consideration. While adopting a liberal approach the possibility of interdicting fair trial if released on bail should be obliterated.

8. Considering the nature of the offence and the fact that the applicant has already spend 1 year and 8 months in jail out of the minimum sentence of 5 years prescribed for the offence under Section 10 of the POCSO Act, 2012, it may not be proper to continue him in jail any further. More so when besides the statement that the applicant is likely to abuse the liberty if granted, there is no reason or rationale to the allegation made.

9. The applicant seems to be a patient of congenital heart disease and had been treated previously in the Central Referral Hospital, Tadong. The applicant has urged that because of his medical condition, the ongoing COVID-19 situation and the increase in the number of infections amongst the under trial prisoners at Rongyek Jail he is at high risk of contracting the virus which may prove fatal to him. The State in its response has urged that at present there is no active COVID-19 patient at Rongyek Jail. The medical condition of the applicant is not disputed. The fact that at present there is no COVID-19 patients at Rongyek Jail does not permit an inference that it is likely never to happen considering the fact that admittedly a large number of under trial prisoners at the Rongyek Jail had been

infected with COVID-19 recently. Keeping in mind all the above circumstances this court deems it fit and proper to grant bail to the applicant on his furnishing security to the satisfaction of the learned Special Judge, POCSO Act, East Sikkim on the following conditions:-

(i) The applicant shall not leave the jurisdiction of the Singtam police station without the written permission of the investigating officer.

ii) He shall report to the Station House Officer (SHO) of the Singtam police station every Monday at 10.30 a.m. If the date fixed by the learned Special Judge for the trial of the case falls on a Monday he shall report on the next working day at the same time on which day he is not required for the trial.

(iii) He shall stay away from the victim, her family and friends and the prosecution witnesses during the period of trial and not attempt to influence them or even contact them, directly or indirectly.

(iv) He shall appear before the learned Special Judge, POCSO East Sikkim on every date fixed for trial.

10. The application for bail is allowed and accordingly disposed of.

SLR (2021) SIKKIM 85

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

WP(C) No. 47 of 2018

Sun Pharma Laboratories Limited ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

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

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

For Respondent 3: Mr. S.K. Chettri, Government Advocate.

Date of decision: 5th February 2021

A. Goods and Services Tax Regime – Scheme of Budgetary Support – Notification F. No. 10(1)/2017-DBA-II/NER dated 05.10.2017 – The petitioner is aggrieved by the alleged curtailment of 100 % Excise duty exemption granted vide the earlier policies of the Government, which underwent a sea change under the new Tax regime in 2017 – The 100 % Excise duty exemption by way of refund availed by the petitioner prior to the Tax reform of 2017 was curtailed by the respondents under the GST regime through the Budgetary Support Schemes reducing the benefits earlier granted inasmuch as the budgetary support for specified goods manufactured by the eligible Unit is 58 % of CGST and 29 % of IGST paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax credit of the Central Tax and Integrated Tax. The petitioner in WP(C) No. 41/2015, W P(C) No. 08/2017, WP(C) No. 27/2017 and WP(C) No. 40/2017 had the same grievances. Promissory estoppel has been agitated previously, as also in this writ petition. In WP(C) No. 41/2015, the challenge to the impugned Notifications therein was for the reason that the benefit of exemption was sought to be reduced to the

prescribed percentage of value addition amount i.e. 56 % applicable to pharmaceutical products mentioned in the respective Notifications and applicable Chapter – The subject matter in the SLP(C) No.10257/2018, 10253/2018, 12148/2018 and 12496/2018, before the Hon'ble Supreme Court dealt with the same issue as in the instant writ petition – Held: The question framed in paragraph "47" by this Court in the impugned judgment dated 21.11.2017 clearly deals with promissory estoppel and has been duly examined by this Court. The judgment of the Hon'ble Supreme Court elucidates and clarifies the nature of the Notifications as also the principle of promissory estoppel and has clarified all points in controversy raised in the appeals, which without a shade of doubt, are similar to the issue raised herein – These issues stand truncated and there is no question of this Court delving any further into the question of promissory estoppel.

(Paras 12 (i) and 13)

Petition dismissed.

Chronology of cases cited:

1. Union of India and Another v. V.V.F. Limited and Another, (2020) SCC Online SC 378.
2. S.L Srinavasa Jute Twine Mills (P) Ltd. v. Union of India, (2006) 2 SCC 740.
3. Southern Petrochemicals Industries Co. Ltd. v. Electricity Inspector and Etio and Others, (2007) 5 SCC 447.
4. Unicorn Industries v. Union of India, 2013 (289) ELT 117 (Sikkim).
5. Reckitt Benckiser v. Union of India, 2011 (269) ELT 194.
6. Sal Steel Ltd. v. Union of India, (2010) 260 ELT 158 (Guj).
7. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others, (1979) 2 SCC 409.
8. Pawan Alloys and Casting Pvt. Ltd., Meerut v. U.P. State Electricity Board and Others, (1997) 7 SCC 251.
9. Sales Tax Officer and Another v. Shree Durga Oil Mills and Another, (1998) 1 SCC 572.

10. State of Rajasthan and Another v. Mahaveer Oil Industries and Others, (1999) 4 SCC 357.

11. Shree Sidhbali Steels Ltd. and Others v. State of Uttar Pradesh and Others, (2011) 3 SCC 193.

12. Director of Settlements, A.P. and Others v. M.R. Apparao and Another, (2002) 4 SCC 638.

JUDGMENT

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

1. The Petitioner herein assails the restrictions imposed by the Scheme of Budgetary Support, issued under the Goods and Services Tax regime vide Notification F.No.10(1)/2017-DBA-II/NER, dated 05.10.2017, by the Respondent No.1, reducing the quantum of benefits earlier availed by the Petitioner, thereby reneging on the promises made under the erstwhile Tax regime and adversely affecting the Petitioner.

1.(a) The Petitioner is a Private Limited Company engaged *inter alia* in the manufacture of P&P Medicaments and Consumer Health Products for which purpose Unit I was set up on 2005 and Unit II later in time, both situated at Ranipool, East Sikkim.

1.(b) The Petitioner's case is that vide a Memorandum, dated 17.02.2003, the Respondent No.1 notified the "New Industrial Policy and other concessions for the State of Sikkim" ("Industrial Policy, 2003") which *inter alia* granted 100 per cent exemption from Excise duty for a period of ten years from the date of commencement of commercial production. Pursuant thereto, various exemption Notifications were issued under the respective Fiscal Statutes, including Central Excise original Notification No.56/2003-C.E., dated 25.06.2003. By this Notification, 100 per cent duty exemption was granted to the goods specified in the Schedule thereto, manufactured and cleared from a Unit located in Sikkim from so much of the duty of Excise leviable under the Central Excise Act, 1944 and other allied Acts as is equivalent to the amount of duty paid by the manufacturer of the goods other than the amount of duty paid by utilization of CENVAT Credit under the CENVAT Credit Rules, 2002 for a period of ten years from the date of commencement of commercial production.

1.(c) On 01.04.2007, the Respondent No.1 notified the North East Industrial and Investment Promotion Policy, 2007 ("Industrial Policy, 2007") thereby discontinuing the Industrial Policy of 2003. The Industrial Policy of 2007 also covered the State of Sikkim and *inter alia* provided that the new Units and existing Units which go in for substantial expansion and commence commercial production within ten years of the date of Notification of the said Policy, would be eligible for incentives for a period of ten years from the date of commencement of commercial production. It further provided that 100 per cent Excise duty exemption would be continued on finished products made in the North Eastern Region as available under NEIP, 1997. However, in cases where the CENVAT paid on the raw materials and intermediate products going into the production of finished products (other than the products which are otherwise exempt or subject to nil rate of duty) is higher than the Excise Duties payable on the finished products, ways and means to refund such overflow of CENVAT Credit will be separately notified by the Ministry of Finance.

1.(d) Based on the representations of the Respondent No.1, the Petitioner, by making substantial investments, set up the first Unit in 2005 and commenced commercial production on 20.04.2009. The second Unit set up later, commenced commercial production on 14.04.2014. Thus both Units started its commercial production within ten years from the date of issuance of Industrial Policy, 2007 and were enjoying the full refund of the Central Excise Duties paid by them by way of the mechanism provided in the exemption Notification.

1.(e) It is alleged that the Respondent No.1 issued Notifications No.21/2008-C.E. and 20/2008-C.E., both dated 27.03.2008, amending Notifications No.56/2003-C.E., dated 25.06.2003 and 20/2007-C.E., dated 25.04.2007, to curtail 100 per cent Excise duty exemption provided thereof. The benefit of exemption was sought to be reduced to the prescribed percentage of value addition amount i.e. 56 per cent applicable to pharmaceutical products mentioned in the respective Notifications and applicable Chapter. These amendments were challenged before this Court by the Petitioner in W.P.(C) No.41/2015, W.P.(C) No.08/2017, W.P.(C) No.27/2017 and W.P.(C) No.40/2017 and this Court quashed the impugned Notifications No.20/2008-C.E., dated 27.03.2008 and 38/2008-C.E., dated 10.06.2008, vide Judgment dated 21.11.2017.

1.(f) From 01.07.2017, the entire indirect Tax regime in the country underwent a major reform with the introduction of the Goods and Services Tax ("GST") which thereby introduced the Central Goods and Services Tax Act, 2017 (for short "CGST Act"), the Integrated Goods and Services Tax Act, 2017 (for short "IGST Act") and the Sikkim Goods and Service Tax Act, 2017. Section 174 of the CGST Act repealed the Central Excise Act, 1944 with certain exceptions and vide Notification No.21/2017-C.E., dated 18.07.2017, the Respondent No.1 rescinded Notifications No.20/2007-C.E., dated 25.04.2007 and 56/2003-C.E., dated 25.06.2003.

1.(g) In continuation of the earlier Industrial Policies as well as Excise Notifications to exempt the levy of Central Excise duty on the Goods manufactured and sold from the Units in the State of Sikkim, the Central Government provided for Budgetary Support Schemes for such Units under the GST regime. The Budgetary Support Scheme is applicable to the Units which were eligible for drawing benefits under the earlier Excise Duty Exemption/Refund Schemes and was applicable for the remaining period out of the total period not exceeding ten years, from the date of commencement of commercial production as specified under the erstwhile Notification. The amount of Budgetary Support under the Scheme for specified goods manufactured by the eligible Unit is specified as the sum total of 58 per cent of the Central Tax paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax Credit of the Central Tax and Integrated Tax and 29 per cent of the Integrated Tax paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax Credit of the Central Tax and Integrated Tax. The Excise Duty Exemptions availed by the Petitioner by way of refund in the pre GST regime, for both the Units were curtailed by the Respondent No.1 through the Budgetary Support Policy thereby reducing the benefit granted to the Petitioner. Therefore, the reduction in benefits on the supply of goods by the Petitioner is contrary to Article 14 of the Constitution of India (for short "Constitution") and the Petitioner's right to avail the benefit of exemption cannot be taken away by the limited benefit provided under the Budgetary Support Scheme. That, the Respondent No.1 is estopped from imposition of CGST which was represented by them to be 100 per cent exempt for the specified period. Hence, the prayers in the Writ Petition.

2. Denying and disputing the allegations of the Petitioner, the Respondents No.1 and 2 in their Counter-Affidavit, reagitated that

Notification No.20/2007-C.E., dated 25.04.2007, which was subsequently amended by Notification No.20/2008-C.E., dated 27.03.2008, was issued well before the Petitioner started its commercial production, which started after the amendment of exemption Notification restricting the refund. That, the confinement of 58 per cent of the Central Goods and Services Tax (for short "CGST") and 29 per cent of the Integrated Goods and Services Tax (for short "IGST"), has been fixed taking into consideration that at present the Central Government devolves 42 per cent of the Taxes on Goods and Services to the States, as per the recommendation of the 14th Finance Commission. Moreover, the power of exemption is variously described as conditional legislation and also a piece of delegated legislation. This power of the Central Government has to be exercised in public interest and there is no warrant for reading any limitation into this power. That, the new Budgetary Support Scheme is launched as a measure of goodwill only to the Units which were eligible for drawing benefits under the earlier Excise Duty Exemption/Refund Schemes but otherwise has no relation to the erstwhile Schemes and it is impossible to compare the benefits under the old Scheme and the new Scheme, neither is it feasible or desirable. This has been considered by the Central Government to be expedient in public interest and for revenue. That, in fact, the Petitioner has availed benefits extended by the Government under the Budgetary Support Scheme for various periods from July, 2017 through December, 2017 and after availing the benefits, they have filed the instant Writ Petition which is arbitrary and bad in law, on which ground alone the Petition deserves a dismissal. Moreover, the full benefit in respect of the share of the Central Revenue is being granted to the Petitioner and they have been availing of the said benefit from the Department. Hence, for the aforestated reasons, the Writ Petition is liable to be rejected.

3. The Respondent No.3 chose not to file any Counter-Affidavit.

4. A Rejoinder was filed to the Counter-Affidavit of Respondents No.1 and 2 which, while reiterating the facts stated in the Petition, emphasized that the Respondents No.1 and 2 have not cited the public interest which necessitated the curtailment of benefits promised to the Petitioner under the erstwhile law.

5.(i) Learned Counsel Mr. V. Lakshmi Kumaran for the Petitioner, while relying and reiterating the averments made in the Petition, contended that if

the value addition norms were met, then even under the said Scheme, the manufacturer could avail 100 per cent exemption on the Excise duty paid through cash. That, in the Appeals filed by the Department, the Hon'ble Supreme Court in ***Union of India and Another vs. V.V.F. Limited and Another***[1] set aside the Judgments passed by the various High Courts including the Judgment of this High Court passed on 21.11.2017 however, the Judgment (***V.V.F. Limited*** *supra*) does not conclusively decide the issues raised in the instant Petition.

(ii) It was next contended that the Respondents have acted against their promises and reduced the benefits promised to the Petitioner. That, the Budgetary Support Scheme makes a departure from the erstwhile Scheme restricting the Budgetary Support which is *de hors* the value addition norms and limits the benefits available even if value addition norms are met. It was submitted that the principle of Promissory Estoppel is applicable in the instant case as the Respondents have failed to demonstrate any supervening public interest. That, the Hon'ble Supreme Court in ***V.V.F. Limited*** *(supra)* has not diluted the principle of Promissory Estoppel which would continue to apply in the present case, consequently this Court must independently examine whether the present amendment violates the said principle. That, the Hon'ble Supreme Court, in fact, noted that the principle is applicable in all cases except in cases of supervening public interest which necessitates withdrawal of benefits so promised. In light of this settled principle, the Hon'ble Supreme Court examined the reduction in Excise duty exemption benefits and held that the subsequent Notifications were merely clarificatory in nature and did not take away any vested right and were issued in the larger public interest to prevent misuse and to achieve the original object and purpose of the incentive/exemption. The attention of this Court was invited to Paragraphs 14 and 15 of the said ratio. Support in this context was garnered from the ratio of ***SL Srinavasa Jute Twine Mills (P) Ltd. Vs. Union of India***[2] and ***Southern Petrochemicals Industries Co. Ltd. vs. Electricity Inspector and Etio and Ors.***[3]. That, in the Counter-Affidavit filed by the Respondents No.1 and 2, as also in the Budgetary Support Scheme, it is stated that the limited benefit accorded is due to the reason that the Central Government devolves 42 per cent of the Taxes on goods and services to the State as per the recommendations of the 14th

[1] (2020) SCC Online SC 378
[2] (2006) 2 SCC 740
[3] (2007) 5 SCC 447

Finance Commission. That, even prior to the GST regime, the Central Government was sharing the revenue of Central Excise duty in the same proportion with the State Governments and at the time of introduction of the exemption Notification in 2003, the Centre was sharing 29.5 per cent of the Central Taxes with the States. However, the Petitioner was promised and granted 100 per cent exemption from Excise duty and it was not restricted to 70.5 per cent of the Tax payable. Hence, when the promises were made, the Parliament was well aware of its obligation to share the revenue with the States. That, the position under the GST Scheme is no different than the position under the erstwhile Central Excise regime, whereby the Taxes were shared by virtue of Article 270(1) of the Constitution. The justification put forward by the Respondents on misuse of previous Scheme, something that was specifically noted and was made the basis of the Judgment in ***V.V.F. Limited*** *(supra)*, is wholly without merit and *ex facie* unsustainable. That, the Exemption granted to it under the erstwhile Notifications were vested rights of the Petitioner as recognized by the Hon'ble Supreme Court in ***V.V.F. Limited*** *(supra)*, which are saved by Section 174(2)(c) read with Section 6 of the General Clauses Act, 1897 and do not fall under the proviso to Sec 174(2)(c) of the said Act, which only seeks to exclude a privilege and not a vested right. That, the Budgetary Support Scheme being against the principles of Promissory Estoppel is arbitrary and violative of Article 14 of the Constitution and hence the Court may direct the Respondents to grant refund of 50 per cent IGST/100 per cent CGST, paid through cash on the goods cleared by the Petitioner from its eligible units.

6. *Per contra* the arguments submitted by Respondents No.1 and 2 was that the Petitioner had filed an Interlocutory Application being I.A. No.02 of 2019, stating that the Respondents No.1 and 2 had filed an Appeal against the Judgment of this Court dated 21.11.2017. When the matter was heard and reserved for Judgment by the Hon'ble Supreme Court, the Petitioner prayed that as the subject matter in the Special Leave Petitions dealt with the same issue as in the present Writ Petition, this Writ Petition be kept in abeyance till the pronouncement of the Judgment by the Hon'ble Supreme Court. Hence, the Judgment in ***V.V.F. Limited*** *(supra)* is applicable to the facts and circumstances of the instant case as evident from the observation at Paragraph "14.3" therein. The Hon'ble Supreme Court had rejected the original Petition of the Petitioner wherein they sought benefit on the ground of Promissory Estoppel. Moreover, with the roll out of the GST regime, a new Scheme offered a measure of goodwill unrelated

otherwise to the erstwhile Schemes. That, in fact, instead of 56 per cent exemption that was granted earlier, the amount to be refunded is fixed at 58 per cent, giving the Petitioner the benefit of additional 2 per cent. That although any tax exemption granted as an incentive against investment through a Notification has been discounted as a privilege vide Section 174(2)(c) of the CGST Act read with Notification No.21/2017-C.E., dated 18.07.2017, the Petitioner has been compensated for the benefits they were drawing earlier. That, as per the recommendations of the 14th Finance Commission, the Central Government devolves 42 per cent of the taxes on goods and services to the States, hence, it has been considered to be expedient in public interest and in the interest of revenue by the Central Government. In view of the above grounds, the present Petition deserves no consideration and is liable to be dismissed.

7. Learned Government Advocate for the State-Respondent No.3, in his arguments, contended that the distribution of Revenue Tax in accordance with the recommendation of the Finance Commission in the proportion of 58 per cent to the Union and 42 per cent to the States, is a recommendation involving all States in the Indian Union and does not pertain to the State of Sikkim alone. Of the 42 per cent which is distributed to the State, the share of the State of Sikkim is less than 0.5 per cent and in this view of the matter, it would be wholly erroneous to extrapolate the number of 42 per cent on the recommendation, if any, to be made to the Petitioner without taking into reference the share of the State of Sikkim which is less than 0.5 per cent. That, the "CGST" is a "Central Tax" and liability exacted by the Union. The Union is solely responsible for the refund of the same and any liability, if so found by this Court, would be irrational without any fundamentals or any law.

8. The rival submissions of Learned Counsel for the parties were heard *in extenso* and given due consideration. The decisions relied on by Learned Counsel for the parties have also been perused as also the pleadings and all documents on record. What thereby falls for consideration before this Court is whether the ratio in ***V.V.F. Limited*** *(supra)* would be applicable to the facts and circumstances of the instant case or does this matter require independent examination by this Court.

9.(i) It would be apposite firstly to recapitulate here that the Petitioner had filed W.P.(C) No.41/2015, W.P.(C) No.08/2017, W.P.(C) No.27/2017

and W.P.(C) No.40 of 2017 before this Court, which came to be disposed of vide a common Judgment dated 21.11.2017.

(ii) In W.P.(C) No.41/2015, Notification No.21/2008-C.E. of 27.03.2008 and Notification No.36/2008-C.E. of 10.06.2008, were impugned with the prayer that the Petitioner Units be permitted to avail the benefits of Excise duty exemption provided in terms of Notification No.56/2003-C.E. of 25.06.2003. Notification No.20/2008-C.E. of 27.03.2008 and Notification No.38/2008-C.E. of 10.06.2008, were also impugned with the prayer seeking to avail the benefit of Excise duty exemption, as provided in Notification No.20/2007-C.E. of 25.04.2007.

(iii) Notification No.21/2008-C.E., dated 27.03.2008; Notification No.36/2008-C.E., dated 10.06.2008; Notification No.20/2008-C.E., dated 27.03.2008 and Notification No.38/2008-C.E., dated 10.06.2008 *(also impugned in W.P.(C) No.41/2015)* were impugned in W.P.(C) No.27 of 2017.

(iv) W.P.(C) No.40/2017 assailed Notification No.20/2008-C.E., dated 27.03.2008 and Notification No.38/2008-C.E., dated 10.06.2008 *(also impugned in W.P.(C) No.41/2015 and W.P.(C) No.27/2017).*

(v) It is worthwhile mentioning that in the said Writ Petitions, Learned Senior Counsel submitting on behalf of the Petitioner *inter alia* canvassed the contention that based on the Industrial Policy of 2003 and in terms of the promises made, which also exempted from so much of the duty of Excise leviable thereon as is equivalent to the amount of duty paid by manufacturer of the goods other than the amount of duty paid by utilization of CENVAT Credit under the CENVAT Credit Rules, 2002, for a period of ten years from the date of commencement of commercial production, the Petitioner, by investing large amounts of money, established Units for the manufacture of P&P Medicaments falling under Serial No.11 of the Schedule to the Notification No.56/2003-C.E., dated 25.06.2003. In the meanwhile, Office Memorandum dated 01.04.2007, was issued notifying the Industrial Policy, 2007, which also granted 100 per cent Excise duty exemption as provided in the Industrial Policy, 2003. That, however, the Industrial Policy, 2007, specifically provided that the new Industrial Units which commenced production within ten years of the said Memorandum, would be eligible for the incentive thereunder. In line with the Industrial

Policy, 2007, Notification No.20/2007-C.E., dated 25.04.2007, was issued whereby the Petitioner's goods were exempted from so much of the duty of Excise leviable thereon as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT Credit. In the year 2008, the earlier notified 100 per cent Excise duty exemption was significantly curtailed by issuing two amending impugned Notifications No.21/2008 and 20/2008 *supra*, by which the benefit of exemption was limited to the certain prescribed percentage of value addition i.e. 56 per cent applicable to Pharmaceutical Products, as mentioned in the respective Notifications. Further, amendment to Notifications No.56/2003 and No.20/2007 was made vide impugned Notification No.36/2008-C.E. (amending Notification No.56/2003) and impugned Notification No.38/ 2008-C.E. (amending Notification No.20/2007) both dated 10.06.2008, whereby an option for fixation of special rates for representing the actual value addition in respect of any goods manufactured and cleared under the respective original Notification was given. That, although the Petitioner was eligible to get the benefit of exemption under the Industrial Policy, 2007, inadvertently, after commencing commercial production from 20.04.2009, the Petitioner started claiming Excise duty benefit by way of self-credit of Excise duty in cash for the period April, 2009 to May, 2012 at the reduced rate of 56 per cent instead of 100 per cent of the amount paid in cash. No objection was taken to this credit by the Petitioner. On coming to learn of the decision of this Court in ***Unicorn Industries vs. Union of India***[4] and of the High Court of Jammu and Kashmir in ***Reckitt Benckiser vs. Union of India***[5], wherein the Notifications curtailing benefits promised under Industrial Policy, 2003, were quashed, the Petitioner informed the authorities on 22.10.2011 that it would avail 100 per cent self-credit of the Excise duty paid, placing reliance on the aforesaid Judgments. For the period June, 2012 to February, 2014, the authorities denied self-credit on monthly basis on the ground that the Petitioner was not eligible to claim the benefit at the rate of 100 per cent of the amount paid in cash but was eligible for refund at the rate of 56 per cent on account of the amendment vide impugned Notification No.21/2008-C.E., dated 27.03.2008, which reduced the benefit from 100 per cent. That, the impugned Notifications reduced the 100 per cent Excise duty guarantee to 56 per cent, hence, on the ground of Promissory Estoppel alone, the Writ Petitions were liable to be allowed and the offending Notifications and Orders of the Commissionerate quashed.

[4] 2013 (289) ELT 117 (Sikkim)
[5] 2011 (269) ELT 194

Further, once an exemption Notification has been issued in public interest, the authority cannot, by simply saying it is in public interest, withdraw or reduce its benefit and the onus would be on the authority to establish a superior public interest for such curtailment or withdrawal.

(vi) The Respondents (in the Writ Petitions under consideration then) while defending their action, claimed that a different mechanism was devised in public good and that the impugned Notification No.20/2008-C.E., dated 27.03.2008, does not deviate from the 100 per cent policy. This was sought to be explained by placing two separate calculations of Re-Credit/ Refund under Area Based Exemption Notification. That, the Petitioner had started availing credit of the amount of duty paid other than by way of utilization of CENVAT Credit under the CENVAT Credit Rules, 2004 at the rate of 56 per cent right from the beginning. That, the Petitioner started paying Central Excise duty from the Personal Ledger Account with effect from August, 2009, by which time, the impugned Notifications No.21/2008, dated 27.03.2008 and 36/2008, dated 10.06.2008, were already in existence and the Respondent No.1 was empowered under Section 5A of the Central Excise Act, 1944, to grant exemption from duty of Excise if the Government was satisfied that it was necessary and in public interest so to do by a Notification in the Official Gazette. That, the Petitioner was duly entitled to claim the option for fixation of special rate on the basis of the impugned Notification No.36/2008, dated 10.06.2008.

(vii) After hearing Learned Counsel for the parties and on consideration of the averments thereto, the Court then took up the following question for determination;

> *"**47**. The crucial question which must necessarily be answered is whether the Petitioner has been able to establish that the Respondents had vide the Industrial Policy, 2007 and Notification No. 20/2007 made a promise, which the Petitioner had acted upon putting itself in a detrimental position which would compel the Respondent No.1 to make good the promise. If the answer to the first question is in the affirmative then the second question which also needs to be answered is whether by issuing the impugned Notification*

No.20/2008 the Respondents has done away or curtailed the benefit granted under Notification No.20/2007. To answer the first question it is necessary to examine the pleadings in the present proceedings."

(viii) On due consideration of all the facts and circumstances placed before it, this Court observed as follows;

*"**64**. As the Petitioner had failed to commence commercial production within the period 23.12.2002 to 31.03.2017 as specified by Notification No. 56/2003 as amended by Notification No.27/2004 it was not entitled to claim exemption under the aforesaid notification as held above. **Consequently, we shall refrain from examining the challenge to the impugned Notification Nos. 27/2004, 21/2008 and 36/ 2008**."*

(emphasis supplied)

(ix) While examining the impugned Notification No.20/2008-C.E., dated 27.03.2008 and the point canvassed by the Learned Additional Solicitor General that it does not actually digress from the Industrial Policy, 2007, as put into operation by Notification No.20/2007-C.E., dated 25.04.2007, the Court noted *inter alia* as follows;

*"**67**. Under the amended paragraph 2A of Notification No.20/2007 as amended by impugned Notification No. 20/2008 the duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the excisable goods. For the goods i.e. P & P medicaments falling under chapter 30 of the first schedule, the rate prescribed in the table to the amended paragraph 2A was 56%. Reading of the amended paragraph 2A leaves no room for doubt that the total 100% exemption once declared by the Industrial Policy, 2007 and as put into operation by Notification No. 20/2007 was*

hugely reduced to only 56% that too only on the value addition undertaken in the manufacture of the said goods. Simply put value addition is the amount by which the value of any good is increased at each stage of its production, exclusive of initial cost. Whereas in the original Notification No. 20/2007, the exemption on payment of excise duty was referable to the excise duty payable on the finished goods in the impugned Notification No. 20/2008 the excise duty was restricted to the quantum of value addition only. This surely was something not promised vide the Industrial Policy, 2007 and Notification No. 20/2007."

(x) This Court further expressed its agreement with the views of the High Court of Gujarat in ***Sal Steel Limited vs. Union of India***[6]***, Reckitt Benckiser*** *(supra),* ***Unicorn Industries*** *(supra),* ***Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh and Others***[7] and ***Pawan Alloys and Casting Pvt. Ltd., Meerut vs. U.P. State Electricity Board and Others***[8] and at Paragraph "87" concluded, as follows;

*"**87**. We find that the Respondent No.1, right from the year 2003, had declared a clear policy of 100% excise duty exemption to those new industrial units who would set up industry in Sikkim as well as to those industries who went in for substantial expansion. This policy was put into operation vide Notification No.56/2003. The Respondent No.1 had vide impugned Notification No. 24/2004 limited the period within which new industrial units were required to commence commercial production. The Petitioner started the process of investment in the year 2005 only and could not start commercial production until 20.04.2009 by which time, by the operation of a subsequent impugned Notification No.27/2004, the*

[6] (2010) 260 ELT 158 (Guj)
[7] (1979) 2 SCC 409
[8] (1997) 7 SCC 251

Petitioner did not qualify to take the benefit of the said Industrial Policy, 2003. The Petitioner therefore, is not entitled to the benefit of Notification No. 56/2003. The industrial policy however, did not change. In 2007 the Respondent No.1 declared the Industrial Policy, 2007 by which identical 100% excise duty exemption was once again promised. This Industrial Policy, 2007 was put into operation vide Notification No.20/ 2007. The Petitioner's subsequent investments were obviously intended to reap the benefit of the said Notification No.20/2007. The Petitioner having commenced commercial production on and from 20.04.2009 for the first unit and from 14.04.2014 for the second unit were well within the period notified therein. The policy of the Respondent No.1 was clear and cogent. It was intended to draw investors to Sikkim which was industrially backward. Having acted on the said promise made by the Respondent No.1, the Petitioner made huge investments and altered its position to its detriment. Having issued the said Notification No.20/2007 in public interest it was incumbent upon the Respondent No.1 to place before this Court all materials available to establish a superior public interest which the Respondent No.1 has failed to do. ***The facts and circumstances of the present writ petitions, therefore, squarely falls within the parameters of the doctrine of promissory estoppel and that it would be unconscionable on the part of the Respondent No.1 to shy away from it without fulfilling its promise. The relief that must, therefore be granted on the facts of the present case is that for the period declared vide Notification No.20/2007 the Petitioner would be entitled to the excise duty exemption as promised therein. Consequently impugned Notification Nos.20/2008 and 38/2008 are liable***

to be quashed to the extent they curtail and whittle down the 100% excise duty exemption benefit as promised vide Notification No.20/2007 and is hereby quashed*. All impugned orders/ demand notices/show cause notices which are against the aforestated declarations of law are also quashed."*

(emphasis supplied)

10.(i) As already stated, against the Judgment of this Court dated 21.11.2017, the Union of India was in appeal before the Hon'ble Supreme Court along with Judgments of various other High Courts on similar issues. The Hon'ble Supreme Court, while considering the Civil Appeals arising out of the various impugned Judgments, observed in the case of Sikkim, that the High Court had quashed and set aside Notification No.20 of 2008-C.E., dated 27.03.2008, Notification No.36 of 2008-C.E., dated 10.06.2008 and Notification No.38 of 2008-C.E., dated 10.06.2008, on the ground that the same were against the principle of Promissory Estoppel and the Union of India.

(ii) Before the Hon'ble Supreme Court, the Union of India *inter alia* agitated that there was rampant misuse of Excise duty exemption which was brought to the notice of the Government as the Policy and intention of the Government to provide Excise duty exemption was in respect of genuine manufacturing activities carried out in those areas. The entire genesis of the Policy manifesting the intention of the Government to grant Excise duty exemption, was to provide such exemption only to actual value addition made in these areas. In this background and with a view to give effect to such a Policy, the Government in exercise of powers conferred under Section 5A of the Central Excise Act, 1944 modified the refund mechanism so as to provide that Excise duty refund would be allowed only to the extent of duty payable on actual value addition made by the manufacturer undertaking manufacturing activities in these areas. That, as a result of the Notifications impugned before the High Court, the manufacturers are required to pay duty on full value of the goods manufactured and cleared by them in the same manner as per existing Scheme but refund would be granted only to the extent of duty paid on the value addition made by them in these specified areas based on all India average of percentage of duty paid in cash and CENVAT Credit. That, the Central Government has the

power to provide for exemption from duty on goods either wholly or partly with or without condition as may be called for in public interest which is the guiding factor for exercise of power. That, the amendment Notification is non-discriminatory and treats all industries at par, and only rationalizes the quantum of exemption by proposing rate of refund on the total duty payable and the Central Government has only streamlined the provisions of the Notification relating to refund of duty paid through, other than CENVAT utilization. That, moreover, the doctrine of Promissory Estoppel cannot be invoked against exercise of powers under the statute and the bar of Promissory Estoppel is not applicable in fiscal matters, besides which, the doctrine of Promissory Estoppel will not be applicable if the change in stand of the Government is made on account of public policy and in public interest.

(iii) The Hon'ble Supreme Court *inter alia* held as follows;

> "**10**. ……Therefore, the questions which are posed for consideration of this Court are whether in the facts and circumstances of the case the subsequent notification which has been quashed and set aside by the High Court being notification No. 16 of 2008 dated 27.03.2008 can be said to be clarificatory in nature and can it be said that it takes away the vested right conferred pursuant to the earlier notification of 2001 and whether the same can be made applicable retrospectively and whether the same has been issued in the public interest and whether the same is hit by the Doctrine of Promissory Estoppel?
>
> **11**. While considering the aforesaid questions and before considering the nature of the subsequent notification of 2008, few decisions of this Court on retrospectivity/clarificatory/applicability of promissory estoppel in the fiscal statute are required to be referred to, which are as under:
>
> **11.1** In the case of Kasinka Trading (supra), in paragraphs 12, 20 and 23, it is observed and held as follows:

"12. It has been settled by this Court that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make". There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. In our opinion, the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

20. The facts of the appeals before us are not analogous to the facts in Indo-Afghan Agencies [(1968) 2 SCR 366 : AIR 1968 SC 718] or M.P. Sugar Mills [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] . In the first case the

petitioner therein had acted upon the unequivocal promises held out to it and exported goods on the specific assurance given to it and it was in that fact situation that it was held that Textile Commissioner who had enunciated the scheme was bound by the assurance thereof and obliged to carry out the promise made thereunder. As already noticed, in the present batch of cases neither the notification is of an executive character nor does it represent a scheme designed to achieve a particular purpose. It was a notification issued in public interest and again withdrawn in public interest. So far as the second case (M.P. Sugar Mills case [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641]) is concerned the facts were totally different. In the correspondence exchanged between the State and the petitioners therein it was held out to the petitioners that the industry would be exempted from sales tax for a particular number of initial years but when the State sought to levy the sales tax it was held by this Court that it was precluded from doing so because of the categorical representation made by it to the petitioners through letters in writing, who had relied upon the same and set up the industry.

23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack

of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under Section 25(1) of the Act."

Thus, it can be seen that this Court has specifically and clearly held that the doctrine of promissory estoppel cannot be invoked in the abstract and the courts are bound to consider all aspects including the objective to be achieved and the public good at large. It has been held that while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must forever be present to the mind of the court, while considering the applicability of the doctrine. It is further held that the doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation. It is further held that an exemption notification does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty, etc., wholly or partially and subject to such conditions as may be laid down in the notification by the Government in "public interest". Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification in the "public interest" is an exercise of the statutory power of the State under the law itself. It has been further held that under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. It has been observed

that the withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". It has been held that where the Government acts in "public interest" and neither any fraud or lack of bonafides is alleged, much less established, it would not be appropriate for the court to interfere with the same.

11.2 In the case of Shrijee Sales Corporation (supra), it is observed and held that the principle of promissory estoppel may be applicable against the Government. But the determination of applicability of promissory estoppel against public authority/ Government hinges upon balance of equity or "public interest". In case there is a supervening public interest, the Government would be allowed to change its stand; it would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. Once public interest is accepted as the superior equity which can override individual equity, the aforesaid principle should be applicable even in cases where a period has been indicated for operation of the promise.

.....

12. Now, so far as the decisions relied upon by the learned counsel appearing on behalf of the respective original writ petitioners-respondents herein are concerned, once it is held that the subsequent notifications/industrial policies impugned before the respective High Court are clarificatory in nature and it does not take away any vested rights conferred under the earlier notifications/industrial policies, none of

the decisions relied upon shall be applicable to the facts of the case on hand."

(emphasis supplied)

(iv) Reference was also made to the ratio in ***Sales Tax Officer and Another vs. Shree Durga Oil Mills and Another***[9]***, State of Rajasthan and Another vs. Mahaveer Oil Industries and Others***[10] and ***Shree Sidhbali Steels Limited and Others vs. State of Uttar Pradesh and Others***[11]. The Hon'ble Supreme Court also explained that any legislation or instrument having force of law, if clarificatory, declaratory or explanatory in nature or purport, will have retrospective operation especially in the absence of any indication to the contrary as to retrospectivity either in parent Act or Rules or Notifications involved and held *inter alia* as follows;

"**14.1** The main objective of the earlier respective notifications/industrial policies was to encourage the entrepreneurs to put new industries in the area so as to generate employment and for that an incentive was offered to get back by way of refund the excise duty paid either in cash or PLA, namely, the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization paid by CENVAT credit. The same was subject to conditions that it will be applied to the new industrial units, i.e. the units which are set up on and after the publication of the said notification in the Official Gazette, i.e. not later than 31.07.2003. The notification was modified from time to time. However, during the operation of the earlier notifications, it was noticed that the provision of granting refund of cash paid portion of duty and eligibility of credit the entire amount of duty to the buyers of such excisable goods had prompted certain unscrupulous manufacturers to indulge in different types of tax evasion tactics. It was revealed on analysis of cases booked by the Excise Department and even the representations received from the Industry Association

[9] (1998) 1 SCC 572
[10] (1999) 4 SCC 357
[11] (2011) 3 SCC 193

about misuse of exemptions granted by the Government, which was meant to be available only for genuine manufacturers. It was noticed as under:

i) Reporting of bogus production by mere issuance of sale invoices without actual production of goods and supply/clearance of excisable goods. This would result in availment of CENVAT credit by buyers of such excisable goods in other parts of the country without actual production being carried out and in absence of actual receipt of goods.

ii) Reporting of bogus production by such units in these areas where actual production takes place elsewhere in the country.

iii) Over valuation of goods resulting in availment of excess credit by buyers.

iv) Goods are supplied by manufacturers, importers to these units without issuance of sales invoice and these are backed by bogus sale invoices issued by traders who do not undertake actual supply of goods. The actual supplier of these goods issue bogus duty paid invoices to other manufacturers who take credit based on such invoices without receipt of goods.

Therefore, the Government came out with the impugned notifications/industrial policies that the refund of excise duty shall be provided on actual and calculated on the basis of actual value addition. On a fair reading of the earlier notifications/ industrial policies, it is clear that the object of granting the

refund was to refund the excise duty paid on genuine manufacturing activities. The intention would not have been that irrespective of actual manufacturing/ manufacturing activities and even if the goods are not actually manufactured, but are manufactured on paper, there shall be refund of excise duty which are manufactured on paper. **Therefore, it can be said that the object of the subsequent notifications/ industrial policies was the prevention of tax evasion. It can be said that by the subsequent notifications/industrial policies, they only rationalizes the quantum of exemption and proposing rate of refund on the total duty payable on the genuine manufactured goods. At the time when the earlier notifications were issued, the Government did not visualize that such a modus operandi would be followed by the unscrupulous manufacturers who indulge in different types of tax evasion tactics. It is only by experience and on analysis of cases detected the Excise Department the Government came to know about such tax evasion tactics being followed by the unscrupulous manufacturers which prompted the Government to come out with the subsequent notifications which, as observed hereinabove, was to clarify the refund mechanism so as to provide that excise duty refund would be allowed only to the extent of duty payable on actual value addition made by the manufacturer undertaking manufacturing activities in the concerned areas. The entire genesis of the policy manifesting the intention of the Government to grant excise duty exemption/ refund of excise duty paid was to provide such exemption only to actual value addition made in the respective areas. As it was found that there was misuse of excise duty exemption it was considered expedient in the public interest and with a laudable object of having genuine**

industrialization in backward areas or the concerned areas, the subsequent notifications/ industrial policies have been issued by the Government. Therefore, the subsequent notifications/industrial policies impugned before the respective High Courts were in the public interest and even issued after thorough analysis of the cases of tax evasion and even after receipt of the reports. The earlier notifications were issued under Section 5A of the Central Excise Act and even the subsequent notifications which were issued in public interest and in the interest of Revenue were also issued under Section 5A of the Central Excise Act, which can not be said to be bad in law, arbitrary and/or hit by the doctrine of promissory estoppel.

14.2 The purpose of the original scheme was not to give benefit of refund of the excise duty paid on the goods manufactured only on paper or in fact not manufactured at all. As the purpose of the original notifications/incentive schemes was being frustrated by such unscrupulous manufacturers who had indulged in different types of tax evasion tactics, the subsequent notifications/industrial policies have been issued allowing refund of excise duty only to the extent of duty payable on the actual value addition made by the manufacturers undertaking manufacturing activities in these areas which is absolutely in consonance with the incentive scheme and the intention of the Government to provide the excise duty exemption only in respect of genuine manufacturing activities carried out in these areas.

14.3 As observed hereinabove, the subsequent notifications/industrial policies do not take away any vested right conferred under the earlier notifications/industrial policies. Under the subsequent notifications/industrial policies, the persons who establish the new undertakings

shall be continue to get the refund of the excise duty. However, it is clarified by the subsequent notifications that the refund of the excise duty shall be on the actual excise duty paid on actual value addition made by the manufacturers undertaking manufacturing activities. Therefore, it cannot be said that subsequent notifications/ industrial policies are hit by the doctrine of promissory estoppel. The respective High Courts have committed grave error in holding that the subsequent notifications/industrial policies impugned before the respective High Courts were hit by the doctrine of promissory estoppel. As observed and held hereinabove, the subsequent notifications/industrial policies which were impugned before the respective High Court can be said to be clarificatory in nature and the same have been issued in the larger public interest and in the interest of the Revenue, the same can be made applicable retrospectively, otherwise the object and purpose and the intention of the Government to provide excise duty exemption only in respect of genuine manufacturing activities carried out in the concerned areas shall be frustrated. As the subsequent notifications/industrial policies are "to explain" the earlier notifications/industrial policies, it would be without object unless construed retrospectively. The subsequent notifications impugned before the respective High Courts as such provide the manner and method of calculating the amount of refund of excise duty paid on actual manufacturing of goods. The notifications impugned before the respective High Courts can be said to be providing mode on determination of the refund of excise duty to achieve the object and purpose of providing incentive/ exemption. As observed hereinabove, they do not take away any vested

> **right conferred under the earlier notifications. The subsequent notifications therefore are clarificatory in nature, since it declares the refund of excise duty paid genuinely and paid on actual manufacturing of goods and not on the duty paid on the goods manufactured only on paper and without undertaking any manufacturing activities of such goods.**
>
> **15**. In view of the above and for the reasons stated above and once it is held that the subsequent notifications/industrial policies which were impugned before the respective High Courts are clarificatory in nature and are issued in public interest and in the interest of the Revenue and they seek to achieve the original object and purpose of giving incentive/ exemption while inviting the persons to make investment on establishing the new undertakings and they do not take away any vested rights conferred under the earlier notifications/industrial policies and therefore cannot be said to be hit by the doctrine of promissory estoppel, the same is to be applied retrospectively and they cannot be said to be irrational and/or arbitrary."
>
> **(emphasis supplied)**

Learned Counsel for the Petitioner has admitted that the Hon'ble Supreme Court, while examining the reduction in Excise duty exemption benefits, held that the subsequent Notifications were merely clarificatory in nature and did not take away any vested right and had, in fact, been issued in the larger public interest to prevent misuse and to achieve the original object and purpose of the incentive/exemption.

11. On a meticulous scrutiny of the pleadings before us and from a careful consideration of the facts canvassed by Learned Counsel for the parties, it goes without saying that the issues raised in the previous Writ Petitions determined by this Court vide Judgment dated 21.11.2017, are identical to the issues raised in the instant Writ Petition *viz.* W.P.(C) No.47 of 2018, the only distinguishing factor being that the Notification challenged

herein is "Notification F.No.10(1)/2017-DBA-II/NER," dated 05.10.2017, while the Notifications challenged in the earlier Writ Petitions have already been enumerated hereinabove.

12.(i) The Petitioner, in the instant Writ Petition, is aggrieved by the alleged curtailment of 100 per cent Excise duty exemption granted vide the earlier Policies of the Government, which underwent a sea change under the new Tax regime in 2017. That, the 100 per cent Excise duty exemption by way of refund availed by the Petitioner prior to the Tax Reform of 2017, was curtailed by the Respondents under the GST regime through the Budgetary Support Schemes reducing the benefits earlier granted in as much as the Budgetary Support for specified goods manufactured by the eligible Unit is 58 per cent of CGST and 29 per cent of IGST paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax Credit of the Central Tax and Integrated Tax. The Petitioner in W.P.(C) No.41/2015, W.P.(C) No.08/2017, W.P.(C) No.27/2017 and W.P.(C) No.40 of 2017 had in sum and substance, the same grievances. Promissory Estoppel has been agitated previously, as also in this Writ Petition. In W.P.(C) No.41/2015, the challenge to the impugned Notifications therein was for the reason that the benefit of exemption was sought to be reduced to the prescribed percentage of value addition amount i.e. 56 per cent applicable to pharmaceutical products mentioned in the respective Notifications and applicable Chapter. In the instant Petition, it is contended that the amount of Budgetary Support under the Scheme for specified goods manufactured by the eligible Unit is specified as the sum total of 58 per cent of the Central Tax paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax Credit of the Central Tax and Integrated Tax and 29 per cent of the Integrated Tax paid through debit in cash ledger account maintained by the Unit after full utilization of the input Tax Credit of the Central Tax and Integrated Tax. That, hence the Excise duty Exemptions availed by the Petitioner by way of refund in the pre GST regime, for both the Units were curtailed by the Respondent No.1 through the Budgetary Support Policy thereby reducing the benefit granted to the Petitioner, as the Petitioner is not allowed to take refund of full amount of CGST paid from electronic cash ledger and the refund of 50 per cent of the IGST paid from electronic cash ledger. In fact, it was the submission of Learned Counsel for the Petitioner in I.A. No.02 of 2019, before this Court, that the subject matter in the SLP(s) supra dealt with the same issue

as in the instant Writ Petition. It is relevant to notice that the Order of this Court, dated 17.09.2019, in the said I.A., reads *inter alia* as follows;

> *"Heard on I.A. No.02 of 2019 which is an application filed by the Petitioner, i.e., Sun Pharma Laboratories Limited, bringing on record subsequent developments relating to the subject-matter of WP(C) No.47 of 2018, which was finally heard on 03-09-2019 and Judgment reserved.*
>
> *It is submitted by Learned Counsel for the Petitioner that the Respondents No.1 and 2 filed SLP(C) Nos.10257 of 2018, 10253 of 2018, 12148 of 2018 and 12496 of 2018, before the Hon'ble Supreme Court, against the Judgment of this Court dated 21-11-2017 in WP(C) Nos. 41 of 2015, 8 of 2017, 27 of 2017 and 40 of 2017. That, the said Appeals have been heard by the Hon'ble Supreme Court and Judgment is reserved in those matters.* ***As the subject-matter in the SLP(s) supra deal with the same issue as in WP(C) No.47 of 2018, it is prayed that the Judgment in this Writ Petition be kept in abeyance till the pronouncement of the Judgment by the Hon'ble Supreme Court in the aforestated SLP(s)****.*
>
> *The other parties have no objection.*
>
> *Considered and ordered accordingly.*
>
> *Let the Petitioner inform this Court after the pronouncement of the Judgment by the Hon'ble Supreme Court by filing a Petition to that effect."*
>
> **(emphasis supplied)**

13. The question framed in Paragraph "47" by this Court in the impugned Judgment, dated 21.11.2017, as already extracted *supra*, clearly deals with Promissory Estoppel and has been duly examined by this Court.

The Judgment of the Hon'ble Supreme Court extracted hereinabove, therefore, elucidates and clarifies the nature of the Notifications, while dealing with the amendments to the impugned Notifications, as also the principle of Promissory Estoppel and has clarified all points in controversy raised in the Appeals, which without a shade of doubt, are similar to the issue raised herein *viz.* curtailment of benefits granted vide exemptions. Thus, these issues stand truncated and there is no question of this Court delving any further into the question of the Promissory Estoppel.

14. That having been said, we may notably refer to the ratio of the Hon'ble Supreme Court in ***Director of Settlements, A.P. and Others vs. M.R. Apparao and Another***[12] which, while dealing with the principle of binding precedent, held *inter alia* as follows;

> "**7.** ……Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has "declared law" it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An "obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such

[12] (2002) 4 SCC 638

> an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. **The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court**……..”
>
> **(emphasis supplied)**

15. In conclusion, the grievances of the Petitioner raised in the matter at hand is soundly quelled by the Hon’ble Supreme Court in all aspects by the ratio in ***V.V.F. Limited*** *(supra)* and this Court does not intend to venture further.

16. Hence, in view of all of the foregoing discussions, we find no merit in the Writ Petition, which deserves to be and is accordingly dismissed.

17. No order as to costs.

SLR (2021) SIKKIM 116

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

Bail Appln. No. 04 of 2021

Phurba Lhamu Tamang ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Ms. Zola Megi, Advocate.

For the Respondent: Ms. Pema Bhutia, Assistant Public Prosecutor.

Date of decision: 26th February 2021

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – It is seen that although charges were framed on 17.07.2020, only one witness has been examined till date. The records reveal that dates have been set for examination of prosecution witnesses till 21.06.2021. There is no likelihood of the trial completing in the near future. In the reply filed by the State respondent, the two grounds taken is the likelihood of the applicant influencing the witnesses and the offence being heinous in nature – The offence charged against the applicant is heinous and most of the witnesses are yet to be examined including Ms. Nirmala Rai, who is sought to be heavily relied upon by the prosecution. The records reveal that her statement under S. 164 Cr.P.C. had been recorded. The applicant is not only a woman but also with a minor child who is, due to her circumstances, also lodged at Rongyek Central Prisons. The applicant has already spent more than a year of incarceration along with the child. The apprehension of the learned Assistant Public Prosecutor is logical but without any material to support it. The apprehension can be safe guarded by laying down strict conditions for bail.

(Para 10)

Petition allowed.

Chronology of cases cited:

1. Maulana Mohammed Amir Rashadi v. State of Uttar Pradesh and Another, (2012) 2 SCC 382.
2. P. Chidambaram v. Central Bureau of Investigation, AIR 2019 SC 5272.
3. Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40.
4. R.D. Upadhyay v. State of Andhra Pradesh and Others, (2007) 15 SCC 337.

ORDER

Bhaskar Raj Pradhan, J

1. An application for bail under section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C.) has been filed on 22.01.2021 by the applicant who has been charge-sheeted by the respondent. The learned Sessions Judge, East Sikkim at Gangtok (the learned Sessions Judge) has framed charges under sections 302 and 201 of the Indian Penal Code, 1860 (the IPC) against the applicant on 17.07.2020. Out of 21 prosecution witnesses, only one witness has been examined till date.

2. According to the prosecution, on 03.06.2019 a written report was received from the panchayat member of Upper Pachak, East Sikkim, stating that one Passang Kinzi Sherpa of the same village was found dead in the courtyard of the house owned by the applicant. Based on the information, Rangpo P.S U.D Case No. 10/2019 dated 03.06.2019 under section 174 Cr.P.C. was registered and endorsed to the Investigating Officer for investigation. During the investigation, the Investigating Officer found certain suspicious circumstances and on further examination, one witness named Nirmala Rai of Upper Pachak disclosed that the applicant had killed the deceased by twisting her neck inside the sitting room of the house. On receipt of the post mortem report, Rangpo P.S Case No. 18/2019 dated 20.06.2019 under sections 302/201 IPC was registered and investigated. The charge-sheet was filed thereafter. The applicant was arrested on 24.12.2019 and since then she continues to be incarcerated.

3. On 26.02.2020, the applicant preferred an application for bail under section 439 Cr.P.C. before the learned Sessions Judge which was heard and rejected on 03.03.2020 on the ground that the offences involved were

serious, rather heinous in nature and the materials indicated her involvement. It was also noted that the trial was yet to commence and the witnesses, including vital witnesses, were yet to be examined.

4. On 17.07.2020, the learned Sessions Judge framed charges under sections 302 and 201 IPC against the applicant. Dates were fixed for examination of two witnesses on 08.10.2020 and 09.10.2020. However, since the witness summoned on 08.10.2020 was absent on that day, summons was reissued to him returnable on 04.02.2021. On 04.02.2021, the witness was absent again and fresh summons was issued to him returnable on 17.06.2021.

5. On 09.10.2020, Ms Nirmala Rai, the witness summoned on that day, was absent and fresh summons was issued returnable by 08.02.2021. On the said date, further dates for examination of other witnesses were fixed between 18.02.2021 to 24.03.2021. On 08.02.2021, Ms Nirmala Rai who was scheduled to be examined was present but could not be examined as she was unwell and not in a position to give evidence. She was accordingly directed to appear on 21.06.2021.

6. Ms Zola Megi, learned counsel for the applicant, submits that the applicant is a young woman aged 27 years. According to her, on the date she was taken into custody, she had a minor child, barely two months old, who is also presently lodged with her at Rongyek Central Prisons. It is submitted that the applicant is a permanent resident of Upper Pachak, East Sikkim and therefore, unlikely that she would flee from justice. It is also submitted that the applicant is separated from her husband. Ms Zola Megi submits that the applicant has already spent one year and two months in jail along with her minor child and there is no likelihood of the trial completing in the near future. She further submits that although the prosecution seeks to rely upon the statement of Ms Nirmala Rai against the applicant, other witnesses have stated that the deceased had died as a result of falling down. The learned counsel submits that if granted bail, the applicant would abide by all conditions imposed and furnish a reliable surety. Ms Zola Megi relied on ***Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and Another***[1], ***P. Chidambaram vs. Central Bureau of Investigation***[2], ***Sanjay Chandra vs. Central Bureau of Investigation***[3].

[1] (2012) 2 SCC 382
[2] AIR 2019 SC 5272
[3] (2012) 1 SCC 40

7. Ms Pema Bhutia, learned Assistant Public Prosecutor, on the other hand, vehemently objects to the grant of bail. According to her, the offence alleged to have been committed by the applicant is of heinous nature and vital witnesses are yet to be examined. As the applicant hails from the same village, where most of the witnesses hail from, there is all likelihood that she would influence them. It is also submitted that the applicant's child is well taken care of in the Rongyek Central Prisons following the guidelines laid down by the Supreme Court in ***R.D. Upadhyay vs. State of Andhra Pradesh and Others***[4].

8. Ms Zola Megi would seek to allay the apprehension posed by the learned Assistant Public Prosecutor of influencing the witnesses by submitting that the applicant is willing to stay away from Upper Pachak and live with her sister at Pakyong during the period of trial, if granted bail.

9. In ***P. Chidambaran*** (supra), the Supreme Court held as follows:

> "**22.** There is no hard-and-fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner. .....
>
> **23.** In *Kalyan Chandra Sarkar* v. *Rajesh Ranjan* [*Kalyan Chandra Sarkar* v. *Rajesh Ranjan*, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] , it was held as under: (SCC pp. 535-36, para 11)
>
> "*11.* The law in regard to grant or refusal of bail is very well-settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious

offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(*a*) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(*b*) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(*c*) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay* v. *Sudarshan Singh* [*Ram Govind Upadhyay* v. *Sudarshan Singh*, (2002) 3 SCC 598:2002 SCC (Cri) 688] and *Puran* v. *Rambilas* [*Puran* v. *Rambilas*, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)"

24. Referring to the factors to be taken into consideration for grant of bail, in *Jayendra Saraswathi Swamigal* v. *State of T.N.* [*Jayendra Saraswathi Swamigal* v. *State of T.N.*, (2005) 2 SCC 13 : 2005 SCC (Cri) 481] , it was held as under: (SCC pp. 21-22, para 16)

"*16.* … The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State* v. *Jagjit Singh* [*State* v. *Jagjit Singh*, AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and *Gurcharan Singh* v. *State (Delhi Admn.)* [*Gurcharan Singh* v. *State (Delhi Admn.)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable

> apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case."

10. It is seen that although charges were framed on 17.07.2020, only one witness has been examined till date. The records reveal that dates have been set for examination of prosecution witnesses till 21.06.2021. There is no likelihood of the trial completing in the near future. In the reply filed by the State respondent, the two grounds taken is the likelihood of the applicant influencing the witnesses and the offence being heinous in nature. The charge-sheet does not reflect any material which would show that the applicant had been previously convicted for any offence. It is also to be noted that the offence charged against the applicant is heinous and most of the witnesses are yet to be examined including Ms Nirmala Rai, who is sought to be heavily relied upon by the prosecution. The records reveal that her statement under section 164 Cr.P.C. had been recorded. The applicant is not only a woman but also with a minor child who is, due to her circumstances, also lodged at Rongyek Central Prisons. The applicant has already spent more than a year of incarceration along with the child. The apprehension of the learned Assistant Public Prosecutor is logical but without any material to support it. The apprehension can be safe guarded by laying down strict conditions for bail.

11. This court has examined the nature of accusations made and supporting evidence, reasonable apprehension of tampering with the witnesses, the circumstances peculiar to the applicant and the reasonable possibility of the presence of the applicant during trial. In the circumstances, this court is of the view, keeping in mind the well settled principles laid down by the Supreme Court, that the applicant should be granted bail on her furnishing security to the satisfaction of the learned Sessions Judge on the following additional conditions:-

i. The applicant shall, during the entire period of trial, stay with her sister at Pakyong and away from Upper Pachak, East Sikkim. She shall provide the Investigating Officer and the trial court with her active mobile number as well as the mobile number of her sister. She shall also provide the full postal address of her sister to the trial court and the Investigating Officer.

ii. The applicant shall report to the Station House Officer of the Pakyong Police Station on every Monday at 10:30 a.m. and if that day happens to be a date fixed for trial then on the next working day at the same time on which day she is not required for the trial.

iii. The applicant shall not approach or try to influence any of the prosecution witnesses, either directly or indirectly.

iv. The applicant shall not leave the jurisdiction of the Pakyong Police Station without the written permission of the Investigating Officer except to attend the trial before the learned Sessions Judge.

v. The applicant shall attend each and every date set for trial before the learned Sessions Judge.

12. The learned Sessions Judge shall be at liberty to take steps to send the applicant back to jail in case of breach of any of the conditions imposed on the applicant. The Investigating Officer shall monitor the applicant and take all necessary steps to protect the prosecution witnesses.

13. The bail application is allowed and accordingly disposed of.

14. Certified copies of this order shall be furnished to the applicant, the learned Sessions Judge as well as the Investigating Officer for compliance.

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