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SUBJECT INDEX

application is filed under O. 41 R. 27 by any of the parties, at the appellate stage to take additional evidence on record, such application ought to be heard and decided at the time of final hearing of the appeal – It cannot be decided separately – Impugned order set aside.

***Nar Bahadur Khatiwada (Chettri) & Another* v.**
Devi Lall Khatiwada & Others ***425A***

Code of Civil Procedure, 1908 – S. 100 – Substantial question of law framed: Whether relief of permanent injunction could be granted by the Appellate Court in favour of the plaintiff based on Exhibit-1 which was asserted to be a partition deed by the plaintiff, interpreting the same as a licence, which was neither the case of the plaintiff nor of the defendants and therefore no issue was framed or evidence led by either side and the trial court had also not considered this aspect at all? – Held: The plaintiff had averred that Exhibit-1 was a partition deed and further had not claimed any right arising out of it. The pleadings in the plaint do not even suggest that the partition deed (Exhibit-1) was an irrevocable licence in favour of the plaintiff. In such circumstances, there was no occasion for the learned Appellate Court to revisit the partition deed (Exhibit-1) while examining issue no.1 upon a plea which was never put forward in the pleadings and make out a case which was not even pleaded – The Appellate Court should have confined his decision to the question arising from issue no.1 – The defendant no.1 had preferred an appeal limited to issue no.1 and therefore, it was necessary for him to confine his examination to the pleadings before him. Issue no.1 was confined to whether the suit property was first occupied by the father of the plaintiff thereby giving the plaintiff a right over the suit property after his father's death. The making of the partition deed (Exhibit-1) being a subsequent event, there was no occasion for the Appellate Court to examine it while deciding issue no.1 – Although before the Trial Court, the defendant no.1 had raised the issue of non-registration of the partition deed (Exhibit-1) relied upon by the plaintiff, neither the Trial Court nor the Appellate Court examined the effect of non-registration and decided to examine it. This was also not correct. Consequently, the Appellate Court's finding that the owner of the *"ekra"* house was the defendant no.1 standing unassailed, the suit filed by the plaintiff must be dismissed as both the issues have been held against the plaintiff – The relief of permanent injunction could not have been granted by the Appellate Court in favour of the plaintiff based on Exhibit-1 – Second appeal allowed – Impugned judgment and decree set aside.

***Shri Raju Prasad & Another* v.**
Ram Janam Prasad & Another ***457A***

Code of Criminal Procedure, 1973 – S. 313 – Use of the statement – S. 313 is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice – Refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score (*In re. Nagaraj* v. *State, represented by Inspector of Police, Salem Town, Tamil Nadu* relied).

State of Sikkim* v. *Jigmee Bhutia ***467B***

Constitution of India – Article 226 – The existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution – Neither is the exercise of writ jurisdiction under Article 226 in a contractual matter ruled out. However, this jurisdiction is invoked when there is no efficacious alternative remedy for the petitioner – Petitioner failed to put forth any exceptional circumstances for invoking the writ jurisdiction.

***M/s. Linkwell Telesystems Pvt. Ltd* v.**
State of Sikkim & Others ***400A***

Constitution of India – Article 226 –A road was constructed on the petitioner's land by respondents 1 and 3 without acquisition of the land or payment of any compensation. Petitioner sought for immediate assessment of damages caused to his land and payment of compensation by respondent 1 and 3 – Held: The representation submitted by the petitioner be considered and decided by the respondents within a period of two months – While deciding the representation, the amount of compensation also to be determined within the said period as per the provisions of Right to Fair Compensation Act, 2013 and be paid to the petitioner within a further period of one month – In case the petitioner is not found to be entitled to the relief, appropriate order to be passed within the specified time and if the petitioner is aggrieved by the said order, he is at liberty to take recourse of law.

Vivek Nweang Rai* v. *The Principal Chief Engineer-cum-
Secretary Roads & Bridges Department & Others ***408A***

Constitution of India – Article 226 – Appellant was a Professor in Sikkim University. A student of the appellant's Department, respondent No. 5 made a complaint of sexual harassment against him before the Internal Complaint Committee (ICC). The ICC conducted an inquiry and the report submitted to the Executive Council of the University – Show cause notice along with an inquiry report was served to the appellant, which was defended by him. The Registrar of the University issued Office Order dated 28.06.2019 terminating his services as per the 33rd Meeting of the Executive Council. The appellant preferred a statutory appeal on 01.07.2019 which was pending. In the meantime, a writ petition seeking quashment of the show cause notice, inquiry report and the order of termination with other consequential relief was filed – Learned single Judge proceeded to decide the question of jurisdiction of ICC in view of the definition of 'workplace' defined in S. 2 (o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. While deciding the said issue, the allegations made in the statement of the complainant and of the students before the ICC was seen, and observed that the definition of the 'workplace' is an inclusive one and that *prima facie* ICC had jurisdiction. The writ petition was disposed of holding that that the Executive Authority before whom the appeal is pending may examine the issue of sexual harassment at 'workplace' in view of S. 9 of the said Act – Held: the ambit and scope of workplace as specified in the S. 2 (o) of the Act can be decided after appreciation of the evidence brought before ICC. In case, the ambit and scope is decided by the Court then nothing remains for adjudication by the Executive Authority in an appeal – The observation of the Learned Single Judge referring S. 2 (o) of the Act i.e. 'workplace' its ambit and scope is not proper particularly when the same question is permitted to be decided by the Executive Authority – Executive Authority to independently decide the appeal on the point of jurisdiction or on the point of ambit and scope on the definition of 'workplace' as expeditiously as possible and not later than three months.

Silajit Guha* v. *Sikkim University & Others ***427A***

Constitution of India –Article 226 – Petition filed in the nature of Public Interest Litigation seeking direction to the State for compliance of the judgment dated 05.04.2016 passed by this High Court in *WP (PIL) No. 39 of 2012* (*Shri Rinzing Chewang Kazi* v. *The State of Sikkim and Others*) for immediate implementation of the guidelines for Jananni-Shishu Suraksha Karyakram, 2011 and Public Health Standard Revised Rules, 2012 – Held: All the grievances raised in this case have been decided. If the directions

issued by this Court has not been complied with, the recourse as available to the petitioner is to initiate an appropriate proceedings, but not to come second time by filing the present PIL.
Dew Kumar Chettri* v. *State of Sikkim & Another ***447A***

Constitution of India –Article 226 – Writ in the nature of *mandamus* can only be issued when the petitioners are having indefeasible right. It is a settled law that even selection does not confer right for appointment. It is also settled that the authority withdrawing the advertisement if it has not acted arbitrarily with *mala fide* intention, interference in exercise of the power under Article 226 of Constitution of India is not warranted.
Jina Manger & Others* v. *State of Sikkim & Others ***450A***

Constitution of India –Article 226 – On the basis of the orders of the High Court, the State Government formulated a policy dated 07.09.2020 and notified in Gazette No. 290 dated 11.09.2020. In furtherance to the said policy, the Home Department, Government of Sikkim vide letter dated 29.09.2020 has intimated to all the District Collectors to notify the said policy and to submit the recommendations on the unauthorized religious structures constructed within their respective jurisdiction. By the letters dated 13.10.2020, 13.10.2020, 15.02.2021 and 18.02.2021 recommendations/ proposals of South District Level Committee, North District Level Committee, East District Level Committee and West District Level Committee respectively have been submitted to the State Government, which are under consideration – The recourse as cited by the State Government *prima facie* appears to be just – While dealing with the issue on case to case basis and in terms of the policy, the State Government shall afford an opportunity to the concerned person and take decision in accordance with law.
In Re: Removal of Illegal Religious Structures ***455A***

Constitution of India –Article 226 – Whether subsistence allowance can be claimed during the discliplinary proceedings even after attaining the age of superannuation – Petitioner placed on suspension on 27.08.2001 on account of registration of a criminal case against him under Ss. 420, 467, 468 and 471 of the Indian Penal Code. He was convicted vide judgment dated 18.11.2005 passed by the Judicial Magistrate, East Sikkim. In appeal before the Session Court, the said order was affirmed and on filing the revision, the High Court vide order dated 07.06.2013 modified only the sentence, confirming the findings of the trial Court. SLP preferred before the Hon'ble Supreme Court, which was dismissed on

05.12.2014. Thereafter, the Department decided to take action against the petitioner as per rule 7 of the Sikkim Government Service (Discipline and Appeal) Rules, 1985 – In the meantime, the petitioner attained age of superannuation on 28.02.2017. For reasons best known by the Department, the subsistence allowance was paid to the petitioner up to May, 2019 even after retirement. When a petition was filed seeking direction to pay the subsistence allowance, the Department passed order dated 30.06.2021 retiring the petitioner compulsorily with effect from 28.02.2017 – Held: It is clear that after attaining the age of superannuation on 28.02.2017, the petitioner cannot draw subsistence allowance because the master servant relationship ceased on the date when he attained the age of superannuation.
Ram Bahadur Das* v. *State of Sikkim & Others ***482A***

Constitution of India – Articles 226 and 227 – Lok Adalat Award Challenged – Five and half storied RCC building of Late Kashi Nath Prasad located at Rangpo, East Sikkim was partitioned between the four, out of his six sons. Petitioner No.1 is a wife of respondent No.1 and petitioner No. 2 and 3 are their sons – The petitioners were deserted by respondent No.1 – The suit property, as the petitioners contend, was constructed by them and is in their possession. However, it has been partitioned by an award of the Lok Adalat without notice to them and without joining them or the sixth surviving son of Late Kashi Nath Prasad – They were not afforded an opportunity of being heard in violation of the principles of natural justice – Held:Suit for partition filed by only four sons and compromise decree obtained by an award of the Lok Adalat without any notice to the other parties cannot be sustained in law – Award so passed by the Lok Adalat without joining all the parties and without affording them an opportunity is not proper. In such situation, writ petition under Article 226 and/or 227 of the Constitution of India is maintainable – Award passed by the Lok Adalat set aside – Suit restored to its original file to be decided by the Trial Court in accordance with law – Petitioners and other legal heirs of Late Kashi Nath Prasad joined as party to the suit.
Munni Devi & Others* v. *Dul Dul Prasad & Others ***419A***

Indian Evidence Act, 1872 – S. 61 – Proof of the Contents of Documents – Merely producing and exhibiting a document is not enough. Signatures thereon must be identified and proved. The contents of the documents must also be proved.
***Old Rumtek Monastery & Others* v.**
Lama Karma Dorjee & Others ***431A***

Indian Evidence Act, 1872 – S. 101 – Burden of Proof – It is elementary that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists – The burden of proof in a civil suit would remain on the plaintiffs and their mere assertions in the plaint would not be sufficient to discharge the burden.

***Old Rumtek Monastery & Others* v.**
Lama Karma Dorjee & Others ***431B***

Indian Evidence Act, 1872 – S. 106 – Burden of proving a fact espacially within the knowledge of any person – S.106 of the Indian Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. This section will apply to cases where the prosecution has succeeded in proving facts from which reasonable inference can be drawn about the existence of certain other facts, unless the accused, by virtue of his special knowledge regarding such facts, fails to offer any explanation which might thus lead the Court to draw a different inference. In other words, S. 106 is designed to meet certain exceptional cases where it is an impossibility for the prosecution to establish certain facts (*In re. State of W.B.* v. *Mir Mohammad Omar and Others* referred).

State of Sikkim* v. *Jigmee Bhutia ***467C***

Limitation Act, 1963 – S. 17 – Effect of Fraud or Mistake – When a suit is filed for several reliefs the question whether it is in time or not cannot be decided without examining each of the several reliefs sought for and separately considering them vis-à-vis the relevant articles of the Limitation Act, 1963 – S. 17 embodies the fundamental principles of justice and equity. It ensures that a party is not penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so has been willfully concealed from him. It also ensures that a party who has acted fraudulently should not gain the benefit of limitation in his favour by virtue of the fraud – The word "fraud" has a very wide connotation. It cannot be construed narrowly. It is of infinite variety and may take many forms. Concealing facts which were material is an act of fraud. Fraud vitiates every solemn act. Fraud induces other person to take a definitive stand as a response to the conduct of the former. Misrepresentation itself amounts to fraud. If a party makes a representation which he knows to be false it is also fraud. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would amount to fraud and the transaction

void *ab initio* – The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake – The suit was filed on 16.06.2014 – Counting the period of limitation from 21.11.2011 when his right to sue first accrued, the suit with the prayers for declarations was on time.

Shri Kharga Bahadur Rizal* v. *Shri Suraj Rai ***375A***

Limitation Act, 1963 – Article 65 – Adverse Possession – It contemplates possession which is expressly or impliedly in denial of the title of the true owner. Adverse possession is possession by a person, who does not acknowledge others' rights but denies them – A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of the real owner's title to the property claimed. A person claiming title by adverse possession must prove who is the true owner and if such person is not sure who the true owner is, the question of them being in hostile possession as well as of denying the title of the true owner does not arise (In re. *Uttam Chand* referred) – The foremost defense of the appellant was that he had purchased the property from the mother of appellant in 1981 and that she had done so due to legal necessity to pay back the loan she had taken from the respondent to meet the expenses to take care of her ailing husband – The appellant having claimed possession by way of a lawful title, the plea of adverse possession would not be available to him.

Shri Kharga Bahadur Rizal* v. *Shri Suraj Rai ***375B***

Limitation Act, 1963 – Permanent Injunction – The appellant had prayed for permanent injunction against the respondent not to interfere with the right, title, interest or with the *khas*, peaceful possession of the suit land on eviction of the respondent – Limitation of such suit would be dependent on the nature of relief sought for. The relief sought makes it clear that it is only after a decree of eviction can the decree for permanent injunction not to interfere with the appellant's possession be granted. In such a situation, question of limitation does not arise.

Shri Kharga Bahadur Rizal* v. *Shri Suraj Rai ***375C***

Indian Penal Code, 1860 – S. 376 – Rape – Evidence of a sole witness – This Court is aware of the settled position of law that every rape victim need not have injuries on her body to prove her case. However, the prosecution must establish with some trustworthy evidence that the prosecutrix had indeed been subjected to sexual assault which, in the instant

matter, has not been furnished – After having committed a heinous offence, in the ordinary course of human nature, the first instinct of an accused would be to flee the place of occurrence but the incongruously unbelievable version of PW-1 (prosecutrix) is that the respondent continued to stay inside the room where he had committed the alleged offence and bolted himself from inside. The evidence of PW-6 is to the effect that PW-1 had visited his house subsequent to the call made by her. It is rather surprising that in that interval the respondent although left alone, still made no effort to escape. No investigation was conducted on this aspect. PW-1 is evidently spinning a yarn regarding the incident which fails to find substantiation by evidence – We cannot lose sight of the fact that a sole witness must be a sterling witness and the evidence given by her must be cogent, consistent and the version of the events should be unassailable. On the anvil of these enumerated qualities, constrained to opine that these are lacking in the instant case and the prosecutrix, in no way, can be described as a sterling witness. Her solitary evidence is not trustworthy, cogent or unblemished.
State of Sikkim* v. *Jigmee Bhutia ***467A***

Negotiable Instruments Act, 1881 – S. 142 – Cognizance of Offences – Cheque issued by Radhey Shyam Swami on 19.08.2005. It was presented to the Bank for encashment on 20.11.2005 and dishonored on 24.11.2005. First notice issued on 28.11.2005 returned with a note that the accused is not available to receive. Fresh notice issued on 17.12.2005, which was received on 14.01.2006 with a note of refusal to accept – Complaint filed on 01.02.2006 – Whether time barred? – Held: Cognizance can be taken even after the prescribed period if sufficient cause is shown – On this point, evidence of the parties has not been recorded – Opportunity must be given to the parties to lead evidence on this issue – Case is remitted back setting aside the impugned judgment and sentence, to decide this issue within three months from the date of appearance of the parties.
Radhey Shyam Swami* v. *Jagat Singh & Another ***411A***

Negotiable Instruments Act, 1881 – S. 138 – Code of Criminal Procedure, 1973– Ss. 391 and 482 – Respondent assigned by the complainant to sell his property – Respondent received money from the purchasers after sale of the complainant's property but did not hand over the money to the complainant and instead issued cheques – The cheques issued by the respondent were dishonored – Due to the lack of property documents, the respondent was acquitted by the Trial Court – In appeal, the sale deed and the power of attorney executed by the complainant in

the favor of the respondent were produced – Held: The complainant was required to produce those documents which are relevant – Additional documents are required to be brought on record and the complainant as well as the other side must be given an opportunity to adduce the evidence on those documents – Order of acquittal set aside and cases restored in its original file to be decided within six months.

Amrit Singhi* v. *Radhey Shyam Swami ***415A***

Sikkim Government Services (Advancement Grade) Rules, 1999 – Education Department (Principals of the Senior Secondary Schools and Headmasters of the Secondary Schools) Recruitment Rules, 1992 – It is specifically said by the Order dated 13.12.1995 of this High Court that the period of service rendered on adhoc/contractual basis ignoring the period of break, if any, is to be reckoned as qualifying service towards the "*notional fixation of initial pay*" and also for the purpose of pension. It is clear that the period of contract service rendered by the deceased husband of petitioner No.1 can be counted only for the purpose of fixation of notional pay on his/her regularization or it may be counted for the purpose of fixation of pension. Except for the said two purposes the period rendered by the deceased petitioner on contract service cannot be counted in particular for promotion or any other purpose – On conjoint reading of R. 6 of the Grade Pay Rules and R. 4 of the Recruitment Rules of 1992 with column No.11 of the Schedule, it is clear that promotion of a Graduate Teacher to the Headmaster can only be possible after five years of regular service. In case he cannot get promotion till ten years from the date of regular service, he may be entitled to Grade Pay Scale. The benefit of Grade Pay Scale can only be granted after ten years of regular service – The deceased husband of petitioner No.1 was regularized on 19.06.1996 and the period of five years would be counted from the date of regularization and not from the initial date of contractual appointment for the purpose of grant of promotion. If he is unable to get promotion till ten years from the date of regular service, the benefit of Grade Pay Scale can be granted to him but the period of ten years cannot be counted from the date of contract appointment.

Smt. Asha Devi & Another* v. *State of Sikkim & Another ***438A***

SLR (2021) SIKKIM 375

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

R.F.A. No. 03 of 2018

Shri Kharga Bahadur Rizal ….. PETITIONER

Versus

Shri Suraj Rai ….. RESPONDENT

For the Petitioner: Mr. A.K. Upadhyaya, Senior Advocate with Ms. Rachhitta Rai, Advocate.

For the Respondent: Ms. Laxmi Chakraborty, Advocate.

Date of decision: 3rd June 2021

A. Limitation Act, 1963 – S. 17 – Effect of Fraud or Mistake – When a suit is filed for several reliefs the question whether it is in time or not cannot be decided without examining each of the several reliefs sought for and separately considering them vis-à-vis the relevant articles of the Limitation Act, 1963 – S. 17 embodies the fundamental principles of justice and equity. It ensures that a party is not penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so has been willfully concealed from him. It also ensures that a party who has acted fraudulently should not gain the benefit of limitation in his favour by virtue of the fraud – The word "fraud" has a very wide connotation. It cannot be construed narrowly. It is of infinite variety and may take many forms. Concealing facts which were material is an act of fraud. Fraud vitiates every solemn act. Fraud induces other person to take a definitive stand as a response to the conduct of the former. Misrepresentation itself amounts to fraud. If a party makes a representation which he knows to be false it is also fraud. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would amount to fraud and the transaction void *ab initio* – The period of limitation shall not begin to run until the plaintiff has discovered the fraud or

the mistake – The suit was filed on 16.06.2014 – Counting the period of limitation from 21.11.2011 when his right to sue first accrued, the suit with the prayers for declarations was on time.

(Paras 15, 16 and 17)

B. Limitation Act, 1963 – Article 65 – Adverse Possession – It contemplates possession which is expressly or impliedly in denial of the title of the true owner. Adverse possession is possession by a person, who does not acknowledge others' rights but denies them – A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of the real owner's title to the property claimed. A person claiming title by adverse possession must prove who is the true owner and if such person is not sure who the true owner is, the question of them being in hostile possession as well as of denying the title of the true owner does not arise (In re. *Uttam Chand* referred) – The foremost defense of the appellant was that he had purchased the property from the mother of appellant in 1981 and that she had done so due to legal necessity to pay back the loan she had taken from the respondent to meet the expenses to take care of her ailing husband – The appellant having claimed possession by way of a lawful title, the plea of adverse possession would not be available to him.

(Paras 19, 21, 22 and 25)

C. Limitation Act, 1963 – Permanent Injunction – The appellant had prayed for permanent injunction against the respondent not to interfere with the right, title, interest or with the *khas*, peaceful possession of the suit land on eviction of the respondent – Limitation of such suit would be dependent on the nature of relief sought for. The relief sought makes it clear that it is only after a decree of eviction can the decree for permanent injunction not to interfere with the appellant's possession be granted. In such a situation, question of limitation does not arise.

(Paras 28)

Appeal dismissed.

Chronology of cases cited:

1. Vasantiben Prahladji Nayak and Others v. Somnath Muljibhai Nayak and Others, (2004) 3 SCC 376.

2. State of Madhya Pradesh v. Nomi Singh and Another, (2015) 14 SCC 450.

3. Uttam Chand (Dead) through Legal Representatives v. Nathu Ram (Dead) through Legal Representatives and Others, (2020) 11 SCC 263.

4. Mohan Lal v. Mirza Abdul Gaffar, (1996) 1 SCC 639.

5. M. Venkatesh v. Commissioner, Bangalore Development Authority, (2015) 17 SCC 1.

6. Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Others, (1992) 2 SCC 524.

7. M.T.W. Tenzing Namgyal and Others v. Moti Lal Lakhotia and Others, (2003) 5 SCC 1.

8. Jangpu Sherpa @ Jampu Sherpa v. Phurba Lhamu Sherpa and Others, SLR (2019) Sikkim 183.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The appellant who was the sole defendant in Title Suit No. 07 of 2014 has preferred the present Regular First Appeal No. 03 of 2018 against the impugned judgment and decree dated 30.06.2018 passed by the learned District Judge, Special Division-II, East Sikkim at Gangtok (the learned District Judge) decreeing the suit in favour of the respondent who was the original plaintiff.

2. The suit for declaration of title, possession, injunction and other consequential reliefs was filed by the plaintiff in the year 2014. The plaintiff s case was that he was the only son of late Krishna Bir Rai and late Santa Maya Rai of Sang Chalamthang, East Sikkim. Late Krishna Bir Rai expired on 10.01.1982 and his mother late Santa Maya Rai on 13.08.2013. The plaintiffs paternal grandfather late Dhan Bahadur Rai had three sons and the plaintiffs father was the eldest. Late Dhan Bahadur Rai owned landed properties including one piece of land measuring 1.900 hectares at Sang Chalamthang Block. Before his death, Dhan Bahadur Rai partitioned his properties in Sikkim amongst his three sons and in such partition, the land

measuring 1.900 hectares at Sang Chalamthang Block had been given to late Krishna Bir Rai. The plaintiff further asserted that in the manual land record of Sang Chalamthang Block, the land measuring 1.900 hectares stood recorded in the name of his father as plot nos. 46, 47, 49, 51, 54, 61 and 62 measuring .2780, .0540, .3620, .3200, .0560, .7940 and .0360 hectares, respectively under *'Khatiyan'* no. 28 of Chalamthang Block. After the demise of his father in 1982 the plaintiff and his mother had numerous problems including monetary. Due to this, the plaintiff had to abandon his studies after class VII and leave for Assam in 1996 in search of a job. In 2002, the plaintiff returned to Sikkim as his mothers health was deteriorating. After staying home for some months in the year 2002, the plaintiff left for North Sikkim in search of a job. From middle of 2002 to October 2011, the plaintiff worked hard doing jobs which came his way including roadside labour at various far-flung areas in North Sikkim. With his small savings, he took his mother to doctors for her treatment whenever he was allowed to do so by his employers. The plaintiff asserted that his mother was an illiterate housewife who remained a recluse and bedridden most of the time after the demise of her husband. Sometime in the month of December 2005, late Santa Maya Rai called the plaintiff and gave him one *'Sifaris Patra'* (recommendation letter) and asked him to investigate it. The plaintiff noticed that it was written on 27.10.2004 by the defendant. He had recommended for transfer of title of the land situated below his dry field and bamboo field as well as the government canal at Chalamthang Block to the name of the mother of plaintiff as it had, as per defendant, got wrongly recorded in his name. After going through the *'Sifaris Patra'* the plaintiff tried to contact the defendant several times, but the defendant avoided him. As the plaintiff was hard pressed for time and preoccupied with his job in remote areas of North Sikkim and in treating his ailing mother, he could not pursue on the said *'Sifaris Patra'*. He left it to be dealt in the future since the possession of the land was always with him and his mother and its *'Parcha Khatiyan'* in the name of his deceased father. In 2010, when the plaintiff learnt that the Office of the East District Collectorate was issuing computerized *'Parcha Khatiyan'* to old landowners of Chalamthang Block, he too made an application for it, which was issued on 21.11.2011. It was then when he noticed that only his ancestral lands covered by plot nos. 49, 51 and 54 measuring .3620, .3200 and .0560 hectares were shown in the name of his late father. Out of .7940 hectares of plot no.61 only .4600 hectares was shown recorded. In so far as the balance of the ancestral land was concerned, nothing was mentioned. The plaintiff thus made inquiries

from the panchayat, village level office, East District Collectorate and the revenue department of the Government of Sikkim. It was at this time that the plaintiff learnt that the defendant had, by misrepresentation and fraud committed on the concerned authorities, taking undue advantage of his ailing mother and his absence from his home, surreptitiously transferred title of plot no. 49, 51 and 54 measuring .3620, .3200 and .0540 hectares in his own name without the knowledge and consent of the plaintiff although he was aware that it was his ancestral land. The plaintiff also came to learn that the remaining .0020 hectares of plot no.54 was acquired by the government for construction of road in 1995, 1996 and the compensation was paid to the plaintiff through his mother. He also learnt that .3117 hectares of plot no.61 was transferred in the name of the plaintiffs mother without his consent and that plot was now recorded as plot no.61/487. Despite his best effort, the plaintiff could not find out where the remaining portion of .0233 hectares of plot no.61 had disappeared. The plaintiff thus approached the concerned panchayat and village level officer who summoned the defendant. The defendant appeared before the panchayat and village level officer on 19.06.2013 but he refused to part with the suit land on the ground that he had purchased it from his late mother for Rs.3000/- which she had earlier taken as a loan and not returned. The *'panchayat'* and village level officer directed the parties to approach the appropriate court. On 20.06.2013 the plaintiff submitted a written complaint to the District Magistrate. The District Magistrate sent it to the subordinate Sub-Divisional Magistrate to register a miscellaneous case in his court and disposed the same on 31.07.2013 directing them to either settle the matter amicably or approach the competent court. After this the plaintiffs mother became critical and finally expired on 13.08.2013. The plaintiff made efforts to settle the matter with the defendant but failed. On advice of an Advocate, he obtained a search report (exhibit 10) vide an application dated 26.11.2013 after which it was confirmed that the defendant had wrongly transferred the suit land in his name behind the back of the plaintiff.

3. It is the plaintiffs case that as the suit land is his ancestral property the transfer of title of the suit land by the defendant vide O.O. No. 11528/ Chalamthang/Block/DC dated 11.02.2011 is illegal, obtained by misrepresentation and fraud without the plaintiffs knowledge and consent and liable to be quashed. It is the further case of the plaintiff that even the plaintiffs mother did not have any legal right to execute the sale deed in respect of suit land without the written permission of the plaintiff. The

plaintiff avers that since 2011 the defendant has been in adverse possession of the suit land which he is refusing to handover to the plaintiff although the land rent is still being paid by the plaintiff. The plaintiff avers that the cause of action for the suit arose on 21.11.2011 when he received the computerized *'Parcha Khatiyan'* and learnt for the first time that the suit land was not recorded in his name or in the name of his late father; on 31.07.2013 when the Sub-Divisional Magistrate directed the plaintiff to move the Civil Court; on 21.12.2013 when it was confirmed to the plaintiff through the hand written search report that the title of suit land was transferred to the defendant vide Office Order No. 11528/Chalamthang/ Block/DCE/dated 11.02.2011. According to the plaintiff the cause of action continues. The plaintiff, therefore, prays for the following reliefs:

> *"a) For a decree declaring that the said land is the ancestral property of the plaintiff;*
>
> *b) For a decree declaring that on the demise of Late Krishna Bir Rai on 10-01-1982 his only son the Plaintiff alone has inherited the said land;*
>
> *c) For a decree declaring that the suit land is the part and parcel of the said land;*
>
> *d) For a decree declaring that Plaintiff have the right, title and interest over the suit land;*
>
> *e) For a decree declaring that the O.O. No.11528/ Chalamthang/Block/DCE dated 11/02/2011 of the Office of the District Collectorate East at Gangtok vide which the defendant has transferred the title of the suit land in his name is without the authority of law, illegal, null, void ab-initio and not legally binding on the plaintiff;*
>
> *f) For a decree cancelling the title of the defendant over the suit land in favour of plaintiff;*
>
> *g) For a decree for restoration of khas possession of suit land to the Plaintiff after evicting the defendant his men and agent there from;*
>
> *h) For a decree of permanent injunction against the defendant not to interfere in any manner whatsoever*

either with the right, title interest or with the khas, peaceful possession of the suit land of the Plaintiff on eviction of the defendant there from by the decree of the Hon ble court;

i) For all costs of the suit;

*j) Any other relief or reliefs to which the plaintiff may be found entitled to under the law and equity.***"**

4. To substantiate his pleadings, the plaintiff examined himself, one Dilli Ram Giri (P.W.2) an 82 year old man and a former Panchayat Member from the same village who knew the plaintiffs family. He also examined one Rinchen Dorjee Bhutia (P.W.3) who was attached to the District Collectorate in different capacities and Jassang Lepcha (P.W.4) the Pastor of Shiloh Christian Pentecostal Church. Amongst the various documents the plaintiff produced original copy of the *'Parcha Khatiyan'* (exhibit 3) in the name of his father late Krishna Bir Rai reflecting plot nos. 46, 47, 49, 51, 54, 61 and 62 as his landed property. The plaintiff also produced the original copy of the map (exhibit 4) reflecting the land holding of Krishna Bir Rai resident of Sang Chalamthang Busty, East Sikkim for survey operation of 1979-80. He produced the attested copy of death certificate (document X) which records 10.01.1982 as the date of death of late Krishna Bir Rai. Exhibit 7 was the *'Sifaris Patra'* (recommendation letter) dated 27.10.2004 issued by the defendant recommending the transfer of certain lands to the name of Santa Kumari Rai after verification done by Village Level Officer, Sang. The plaintiff also produced the *'Parcha Khatiyan'* dated 21.11.2011 (exhibit 8) which showed plot no. 46, 47, 61 and 62 in the name of Krishna Bir Rai, son of Dhan Bir Rai excluding the suit land. Exhibit 11 to exhibit 15 and 17 to 29 were the land revenue receipts in the name of Krishna Bir Rai evidencing payment of land taxes till the year 2011. Exhibit 46 produced by the plaintiff was the *'Parcha Khatiyan'* reflecting plot no. 61 in the name of late Santa Maya Rai transferred vide O.O. No. 11528/CHALLAMTHANG/DC(E) Dated:11/21/2011 vide O.O. No.14896/CHALLAMTHANG/DC(E) Dated: 4/25/2013. The plaintiff also produced the *'Parcha Khatiyan'* (exhibit-47) dated 22.06.2016 issued in the name of Dhan Bahadur Rai by the R.O.-cum-Assistant Director, Land Revenue & Disaster Management Department, Government of Sikkim. *'Parcha Khatiyan'* (exhibit 47) reflects that late Dhan Bahadur Rai owned several plots of land at Chalamthang bearing

khasra no. 32, 33, 35, 46, 49, 52, 54, 67, 68, 69, 107 and 121. This '*Parcha Khatiyan'* (exhibit-47) seems to have been issued only for the purpose of reference when sought for in the year 2016. It further reflects that the total area of the 12 plots owned by late Dhan Bahadur Rai was 18.72 acres.

5. The defendant filed his written statement denying substantially all the assertions of the plaintiff. The defendant asserted that late Santa Maya Rai was also known and recognized as Santa Kumari Rai. The defendant claimed that in the year 1981, Santa Kumari Rai *alias* late Santa Maya Rai offered to sell two plots of her land bearing plot nos. 87 and 88/215 recorded as per 1950-52 survey operation to the defendant for paying back the debt which she incurred in providing necessary treatment to her deceased husband late Krishna Bir Rai. According to the defendant the sale of the land was made by the plaintiff s mother for legal necessity to meet the expenses incurred for the treatment of her husband. It was asserted that the defendant had paid the consideration amount of Rs. 3,701/-. The defendant asserts that the suit land is self-acquired land of late Krishna Bir Rai. It is asserted that the plaintiffs mother had personally appeared before the Registrar on the date of registration and affixed her signature on the sale deed. The sale deed was presented for registration and upon compliance of requisites formalities the registration was allowed on 30.08.1982 after which the defendant was issued manual *'Parcha'* with respect to the said land. It is the defendants case, while denying the plaintiff assertion that he had left for North Sikkim in search of job, that the plaintiff was a vagabond who keeps moving from one place to another and it was only recently that he had come back to reside at his parental house. The defendant disputed that late Santa Maya Rai *alias* Santa Kumari Rai was an illiterate person and submitted that she was capable of reading and writing and accordingly affixed her signature on the sale deed executed on 08.03.1981 in the presence of witnesses. The defendant asserted that in the year 2004 when the revenue officer detected some mistake in the measurement of his land, he consented to return the excess land in favour of the plaintiffs mother by executing the *'Sifaris Patra'* The defendant asserts that after the registration of sale deed he applied for mutation of the plots and consequently the Registrar issued manual *'Parcha'* for plot no. 87 and 88/215. In 2006, the defendant applied for computerized record of rights and obtained the same in respect of seven plots of land, out of which, plot no. 49, 51 and 54 were purchased from the plaintiffs mother. The defendant claimed that the plaintiff

had full knowledge of the transfer and therefore, the suit was time barred. The defendant asserts that he has been in exclusive and uninterrupted possession of the suit land for the last 32 years and by virtue of such long occupation the defendant has already perfected his right, title and ownership over the suit land by way of adverse possession. It is contended that the plaintiff, even after attending the age of majority, failed to take necessary steps to agitate the matter on time. It is further submitted that the plaintiff had himself admitted that the defendant was in adverse possession of the suit land.

6. The defendant examined himself as (D.W.1). He examined B.B. Lopchan (D.W.2) a former panchayat and resident of Sang Khola to establish that late Krishna Bir Rai was ill during the relevant period and that the plaintiffs mother, Santa Kumari Rai had told him in the first week of May 2003 that she had sold two plots of land to the defendant, but no correction had been done in terms of payment of land rent. According to him, he advised her to bring her grievance in writing pursuant to which on 16.05.2003, Santa Kumari Rai came to his house with a written document titled '*Lekha Pari*' (exhibit D1-G) wherein she had mentioned that she had already sold two pieces of land to the defendant in the year 1982 and the registration and mutation had already been completed. Since the land rent payable by her was still not corrected, she requested the change of the record of the '*Parcha*' in the name of the defendant from the old record. B.B. Lopchan (D.W.2) deposed that in the month of January 1982, he had learned from the villagers that late Krishna Bir Rai had expired at Singtam Hospital and was buried at Sang Khola. The defendant also examined Nim Tshering Lepcha (D.W.3), also a former panchayat and resident of Chalamthang, who stated that he knew the plaintiffs parents as his co-villagers. According to him, late Dhan Bhadur Rai, the plaintiffs grandfather had left Chalamthang for Nepal with his sons. However, late Krishna Bir Rai, the plaintiff s father returned to Chalamthang after purchasing land from one Rangalal Sanyasi. Nim Tshering Lepcha (D.W.3) also stated that late Krishna Bir Rai had suffered from illness and had been bedridden in the year 1980-82 and died at Singtam Hospital. He deposed that the suit land was not the plaintiffs ancestral land as there were no land records in his name. Karma Loday Bhutia (D.W.4) posted in the district administrative centre as a Revenue Officer was also examined by the defendant. He produced the original '*Parcha Khatiyan*' of Chalamthang Block containing serial no. 1 to 48 as per survey record of 1951-52 in the original.

According to him, exhibit D1-D/A (a) reflects that the name of Santa Kumari Rai w/o of Krishna Bir Rai had been struck off and thereafter, the name of the defendant had been written in the year 1983 after registration of the land. Karma Loday Bhutia (D.W.4) was confronted with the certified copy of sale deed (exhibit D1-B) dated 08.03.1981, executed by Santa Kumari Rai in favour of the defendant by the defendant. He stated that as per the certified copy of the sale deed (exhibit D1-B) it had been executed by Santa Kumari Raini in favour of the defendant. However, during cross-examination Karma Loday Bhutia (D.W.4) could not say if the certified copy of the sale deed (exhibit D1-B) was genuine or not; he had no idea about its registration proceeding; he had not seen the original as well as its office copy and further he had also not seen the file of its registration.

7. The defendant asserted that Santa Kumari Rai had sold the suit land on 08.03.1981 for consideration value of Rs.3700/- vide the certified copy of the sale deed (exhibit D1-B). He also identified the signature of the two witnesses Chandra Lall Sharma and Ratna Bahadur Gurung, the Sub-Divisional Magistrate and of Santa Kumari Rai in the certified copy of the sale deed (exhibit D1-B). He asserted that on 24.01.1981 Santa Kumari Rai executed an acknowledgment letter (exhibit D1-A) stating that she had sold two pieces of land for consideration amount of Rs.3701/-. He identified the signature of Santa Kumari Rai and the witnesses Nima Lepcha, Hari Prasad Lohar and Chandra Lall Sharma. According to the defendant, vide notice (exhibit D1-C) dated 11.03.81 issued by the Registrar, East District, claims and objections were invited on or before 11.04.1981 against the registration of the land. It is the case of the defendants that after the period of notice, sale deed was duly registered vide book no.1 volume no.II, item no.207 for the year 1982. The defendant states that upon registration of the sale deed the land records in the revenue section of the District Collector was corrected and in place of the name of Santa Kumari Rai, his name was entered with respect to the suit land. The *'Parcha Khatiyan'* (exhibit D1-D) was thereafter, issued to him (attested photocopy). The defendant further submits that upon correction of the record and entry made in the *„Khasra* record, a map (exhibit D1-E) with respect to the suit land pertaining to the settlement operation of the year 1950-52 was issued in his favour. Thereafter, *'Parcha Khatiyan'* (exhibit D1-F) (certified to the true copy for the suit land dated 28.06.83) was issued in his favour. The defendant also produced a *'Lekha Pari'* document (exhibit D1-G) and identified the

signature thereon as that of Santa Kumar Rai. According to the defendant in the year 2003 Santa Kumari Rai had come to him and informed him that although she had already sold the land to him the rent of the land is still not been corrected and asked him to do the needful. It is stated that accordingly he advised her to approach the panchayat president. After a lapse of some weeks, Santa Kumari Rai handed over the '*Lekha Pari'* document (exhibit D1-G). It is submitted that in the year 2004 the Revenue Officer, during the measurement of his land, detected that some extra land belonging to Santa Kumari Rai had been inadvertently transferred in his name during the mutation proceedings, which land he immediately returned to plaintiffs mother. He submits that in the year 2006 the Revenue Officer, on his application, issued a computerized *'Parcha'* (exhibit D1-H) which included the suit land purchased from Santa Kumari Rai. The defendant states that he has paid the land rent in respect of all his plots vide exhibit D1-I dated 24.03.2012 for the years 2004 to 2011.

8. The learned District Judge framed five issues on 03.02.2015 and took it for consideration and finally decreed the suit in favour of the plaintiff granting the several reliefs sought for.

9. The present appeal has been filed by the defendant for setting aside the decree granted in favor of the plaintiff.

10. Mr. A.K. Upadhyaya, learned Senior Counsel for the appellant submits that the suit was hopelessly barred under Article 60 of the Limitation Act, 1963, as, though the sale deed was dated 01.09.81, the suit was filed only in the year 2014. It was submitted that the suit also suffered from non-joinder of parties. The learned Senior Counsel submits that the plaintiff had not been able to prove that the suit was ancestral property. In so far as Issue no. 4 is concerned, the learned Senior Counsel submitted that the learned District Judge had put the onus wrongly upon the defendant. He finally argued that the defendant had been in adverse possession of the suit land. It was submitted that the defendant had perfected his title on the suit land by way of adverse possession. He relied upon ***Vasantiben Prahladji Nayak & Ors.*** **vs.** ***Somnath Muljibhai Nayak & Ors.***[1] and ***State of Madhya Pradesh*** **vs.** ***Nomi Singh & Anr.***[2]**.**

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[1] **(2004) 3 SCC 376**
[2] **(2015) 14 SCC 450**

11. Ms. Laxmi Chakraborty, learned Counsel on behalf of the respondent, vehemently defended the conclusions arrived at by the learned District Judge. She submitted that the certified copy of sale deed and other documents relied upon by the defendant had not been proved by him and the plaintiff on the other hand had been able to prove all the facts asserted. The learned Counsel sought to rely upon the judgment of the Supreme Court in ***Uttam Chand (Dead) Through Legal Representatives*** **vs.** ***Nathu Ram (Dead) Through Legal Representatives & Ors.***[3].

12. This Court shall now examine each of these issues: -

Issue no.1

Whether the suit is barred by limitation? (Onus on the defendant).

13. The learned District Judge held that Article 60 of the Limitation Act, 1963 would not be applicable as asserted by the defendant. It was held that in fact, Article 65 would be applicable, and the period of limitation provided was 12 years when the possession of the defendant became adverse to the plaintiff. It was further held that as the plaintiff had prayed for cancellation of the sale deed on the grounds that the defendant had played fraud to transfer the suit land in his name, Section 17 of the Limitation Act, 1963 would be attracted and the period of limitation in such cases would not begin until the plaintiff had discovered the fraud or the mistake. On facts, it was held that the plaintiff learnt that the suit land had been transferred in the name of the defendant only in the year 2011 and thus the suit was not barred by limitation.

14. Article 60 relates to the period of limitation to set aside a transfer of property made by the guardian of a ward. The pleadings in the plaint make it clear that the plaintiff was not claiming minority during the time of transfer. The suit was filed by the plaintiff alleging that the defendant had committed fraud, misrepresented and taken undue advantage of his mother to surreptitiously transfer the title of the suit land in his name without the plaintiff s knowledge. The plaintiff had also averred that he had come to learn about this fact only in the year 2011. This fact was asserted by the plaintiff in his evidence. The plaintiff deposed that after his fathers death in

[3] **(2020) 11 SCC 263.**

1982, due to various problems, he left for Assam in the year 1996. He deposed that he returned only in the year 2002. After staying for some months, he left home for North Sikkim. From 2002 to 2011, he was away in far-flung areas of North Sikkim. This fact has been corroborated by Dilli Ram Giri (P.W.2). Although the defendant denied this assertion of the plaintiff there is no evidence on record which reflects that the plaintiff had prior knowledge. In fact, it was also the defendant assertion that the plaintiff was a vagabond who keeps moving from one place to another and it was only recently that he had come back to reside at his parental house.

15. The plaintiff had sought several reliefs in his plaint. When a suit is filed for several reliefs the question whether it is in time or not cannot be decided without examining each of the several reliefs sought for and separately considering them *vis-à-vis* the relevant articles of the Limitation Act, 1963. Prayers (a) to (e) were for various declarations. Declaratory Suits are dealt with in part III of the Limitation Act, 1963. The prayers at prayer (a) to (e) would be covered by Article 58. To obtain the said declarations, a period of 3 years is provided from the time when the right to sue first accrues.

16. Section 17 of the Limitation Act, 1963 deals with effect of fraud or mistake on the period of limitation. This provision embodies the fundamental principles of justice and equity. It ensures that a party is not penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so has been willfully concealed from him. It also ensures that a party who has acted fraudulently should not gain the benefit of limitation in his favour by virtue of the fraud. The plaintiff had alleged fraud. The Supreme Court has explained the word 'fraud' in many decisions. It has been held that the word 'fraud' has a very wide connotation. It cannot be construed narrowly. It is of infinite variety and may take many forms. Concealing facts which were material is an act of fraud. Fraud vitiates every solemn act. Fraud induces other person to take a definitive stand as a response to the conduct of the former. Misrepresentation itself amounts to fraud. If a party makes a representation which he knows to be false it is also fraud. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would amount to fraud and the transaction *void ab initio*. It was the plaintiff who had alleged fraud and misrepresentation and therefore, it was incumbent upon him to prove it.

17. Section 17 provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake. The pleadings in the plaint make it clear that the plaintiff had discovered the fact that the suit land had been transferred to the name of the defendant on 21.11.2011 when the plaintiff received the computerized *'Parcha Khatiyan'* from the Office of the District Collectorate. It was his specific case, which he has been able to prove, that the suit land was recorded in the name of his father late Krishna Bir Rai who was still alive on the date of the purported transaction between Santa Kumari Rai and the defendant and therefore, even his mother late Santa Maya Rai could not have sold it to the defendant. *The* suit was filed on 16.06.2014. Thus, counting the period of limitation from 21.11.2011 when his right to sue first accrued, the suit with the prayers for declarations was on time.

18. The plaintiff had prayed for khas possession of the suit land and the eviction of the defendant from it as well. Article 65 deals with the period of limitation for a suit for possession of immovable property when the possession of the defendant becomes adverse to the plaintiff. The period of limitation is 12 years from the date of dispossession.

19. At this juncture it would be relevant to examine the alternative plea taken by the defendant that he had perfected his title by way of adverse possession. The concept of adverse possession is well settled. It contemplates possession which is expressly or impliedly in denial of the title of the true owner. Adverse possession is possession by a person, who does not acknowledge others rights but denies them.

20. In ***Vasantiben Prahladji Nayak (supra)***, the Supreme Court held that to establish ouster in cases involving claim of adverse possession the defendant must prove three elements namely, hostile intention; long and uninterrupted possession; and exercise of the right of exclusive ownership openly and to the knowledge of the owner. In cases of adverse possession, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff, but it commences from the date when the defendants possession became adverse.

21. In ***Uttam Chand (Supra)*** the Supreme Court held that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and

amounted to a denial of the real owners title to the property claimed. A person claiming title by adverse possession must prove who is the true owner and if such person is not sure who the true owner is, the question of them being in hostile possession as well as of denying the title of the true owner does not arise.

22. It must straight away be noticed that the foremost defense of the defendant was that he had purchased the property from late Santa Maya Rai, mother of the plaintiff in the year 1981 and that she had done so due to legal necessity to pay back the loan she had taken from the defendant to meet the expenses to take care of her ailing husband late Krishna Bir Rai.

23. In ***Mohan Lal vs. Mirza Abdul Gaffar***[4] it was held that the appellants first plea of adverse possession which was inconsistent with the second plea regarding retention of possession under Section 53-A of the Transfer of Property Act could not be sustained. Since the appellants claim is founded on Section 53-A, he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit.

24. The Supreme Court ***M. Venkatesh vs. Commissioner, Bangalore Development Authority***[5] affirmed its judgment in ***Mohan Lal (Supra)*** and held thus:

> ***"20.*** *Also noteworthy is the decision of this Court in Mohan Lal v. Mirza Abdul Gaffar [Mohan Lal v. Mirza Abdul Gaffar, (1996) 1 SCC 639] , wherein this Court held that claim of title to the property and adverse possession are in terms contradictory. This Court observed: (SCC pp. 640-41, para 4)*
>
> > *"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his*

[4] **(1996) 1 SCC 639**
[5] **(2015) 17 SCC 1**

independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period of his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

21. *To the same effect is the decision of this Court in Annasaheb Bapusaheb Patil v. Balwant [Annasaheb Bapusaheb Patil v. Balwant, (1995) 2 SCC 543], wherein this Court elaborated the significance of a claim to title vis-à-vis the claim to adverse possession over the same property. The Court said: (SCC p. 554, para 15)*

*"15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."***

25. Thus, the defendant having claimed possession by way of a lawful title, the plea of adverse possession would not be available to him.

26. The prayer for khas possession and eviction of the defendant was thus not barred under Article 65 of the Limitation Act, 1963 as the possession of the defendant never became adverse to the plaintiff.

27. The plaintiff had prayed for cancellation of the title of the defendant over the suit land. This prayer would necessarily involve the cancellation or setting aside the sale deed which would be covered by Article 59. Article 59 provides for limitation of 3 years from the time when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside first became known to him. Again counting the date 21.11.2011 as the date when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside first became known to him, the suit for setting aside the title of the defendant was also within time.

28. The plaintiff had prayed for permanent injunction against the defendant not to interfere with the right, title, interest or with the khas, peaceful possession of the suit land of the plaintiff on eviction of the defendant therefrom by the decree of the court. The limitation of such suit would be dependent on the nature of relief sought for. The relief sought makes it clear that it is only after a decree of eviction can the decree for permanent injunction not to interfere with the plaintiff s possession be granted. In such a situation, question of limitation does not arise. Thus, the suit for permanent injunction was not barred by limitation.

Issue no. 2

Whether there is non-joinder of parties as the brothers of late Krishna Bir Rai, the father of the plaintiff, or their legal heirs and successors have not been made parties to the suit? (Onus on the defendant).

29. The learned District Judge held that as the uncles of the plaintiff, i.e., brothers of late Krishna Bir Rai had nothing to do with the suit property their presence was of no significance. It was held that no relief was sought against them and therefore the issue was decided against the defendant.

30. It is settled law that the question of impleading a party must be decided on the touch stone of Rule 10 of the Code of Civil Procedure, 1908. The provision contemplates only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. It has been held so by the Supreme Court in ***Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay & Ors.***[6]**.** On a reading of the plaint and the reliefs sought therein, the brothers of late Krishna Bir Rai or their legal heirs and successors were neither necessary nor proper parties. Thus, the learned District Judge had correctly decided the issue against the defendant.

Issue no.3

Whether the plaintiff is the grandson of late Dhan Bahadur Rai and the suit land is the ancestral property of the plaintiff? (Onus on the plaintiff).

31. The learned District Judge examined the „*Parcha Khatiyan* (exhibit 3) in the name of the plaintiffs father late Krishna Bir Rai, land holding map (exhibit 4) and search report (exhibit 10) and held that the documents had been duly proved by the plaintiff. Considering them with the evidence of the plaintiff and his witness, Dilli Ram Giri (P.W.2), it was held that there was no doubt that the suit property was the ancestral property of the plaintiff. The issue was therefore, decided in favor of the plaintiff.

32. It was the plaintiffs case that he was the grandson of late Dhan Bahadur Rai, and the suit land was the ancestor property of the plaintiff. He pleaded so in the plaint. During his examination, the plaintiff asserted that the suit land was the ancestral property which originally belonged to his grandfather, late Dhan Bahadur Rai, which was later inherited by his father-late Krishna Bir Rai after partition, who enjoyed the suit land till he died in the year 1982. In his evidence on affidavit, the plaintiff asserted that his father late Krishna Bir Rai expired on 19.01.1982 and his mother late Santa Maya Rai on 13.08.2013. He further asserted that his grandfather late Dhan Bahadur Rai was the owner of the piece of land at Chalamthang Block in East Sikkim which he had partitioned, and the suit land given in favour of

[6] **(1992) 2 SCC 524**

his father. He asserted that the suit land stood recorded in the name of his father late Krishna Bir Rai in the manual land record. To establish the same, he exhibited the original copy of the *'Parcha Khatiyan'* (exhibit 3) in the name of his father late Krishna Bir Rai. He also exhibited the original copy of the map of the land (exhibit 4) as recorded in the *'Parcha Khatiyan'* (exhibit 3). The *'Parcha Khatiyan'* (exhibit 3) does record the said lands in the name of Krishna Bir Rai, son of late Dhan Bahadur Rai, so does the map (exhibit 4) which records that the said lands were in the name of late Krishna Bir Rai son of late Dhan Bahadur Rai in the survey operation of 1979-1980. The plaintiff also produced the *'Parcha Khatiyan'* in the name of his grandfather late Dhan Bir Rai (exhibit 47) which reflects that he owned around 18.72 acres of land at Chalamthang.

33. Although the plaintiff was cross-examined extensively by the defendant, the correctness and the authenticity of the *'Parcha Khatiyan'* (exhibit 3), the map (exhibit 4) as well as the *'Parcha Khatiyan'* (exhibit-47) could not be demolished.

34. In ***M.T.W. Tenzing Namgyal & Ors. vs. Moti Lal Lakhotia & Ors.***[7]**,** the Supreme Court held that if the records of rights were not prepared under a statute a presumption of correctness may be raised only in terms of Section 35 of the Indian Evidence Act, 1872. Section 35 provides that an entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record or any electronic record is kept, is itself a relevant fact. It is also settled that the documents made *ante litem motam* can be relied upon safely when such documents are admissible under Section 35.

35. In Sikkim prior to 09.09.1988 when the Sikkim Record Writing and Attestation Rules, 1988 come into force *'Parcha Khatiyan'* were prepared under the Kotha Purnu or Dru-Deb and Attestation Rules, 1951 as held by this court in ***Jangpu Sherpa @ Jampu Sherpa vs. Phurba Lhamu Sherpa & Ors.***[8]. Now it is required to be prepared under the Sikkim Record Writing and Attestation Rules, 1988.

[7] **(2003) 5 SCC 1**
[8] **SLR (2019) Sikkim 183**

36. Mr. A.K. Upadhyaya submitted relying upon the Supreme Court ruling in ***Nomi Singh (supra)***, that the plaintiff must stand on his own legs and as he had not filed any document of title and therefore, the issue must be held against him. It is the plaintiffs case that the plaintiff s father was the owner of the suit land, and it was recorded so in the *'Parcha Khatiyan'* (exhibit 3). It was not the plaintiff case that there was a title deed in his name. The plaint pleads that the plaintiff had been staying out of his house in search of jobs. Dilli Ram Giri (P.W.2), the plaintiffs witness deposed the facts asserted by the plaintiff. The plaintiff has been able to establish that he is the son of late Krishna Bir Rai and grandson of late Dhan Bahadur Rai. He has also been able to prove that the suit land was recorded in the name of his father late Krishna Bir Rai in the '*Parcha Khatiyan'* in the year 1981. Besides the oral submission of the plaintiff and his witness Dilli Ram Giri (P.W.2) that late Dhan Bahadur Rai was the owner of landed properties in Chalamthang, the plaintiff has also produced the '*Parcha Khatiyan'* (exhibit 47) which reflects that late Dhan Bahadur Rai did own landed properties in Chalamthang corroborating the oral testimony of the plaintiff and his witness Dilli Ram Giri (P.W.2). However, as it is the plaintiffs own case that the landed properties owned by late Dhan Bir Rai was partitioned between Krishna Bir Rai and his siblings. It is therefore, held that the suit land was not ancestral property of the plaintiff. Thus, it is held that the plaintiff has been able to establish that he was the grandson of late Dhan Bahadur Rai who owned landed properties at Chalamthang and further the suit land was owned by his father late Krishna Bir Rai in the '*Parcha Khatiyan'* (exhibit 3). The issue decided accordingly.

Issue no. 4

Whether the mother of the plaintiff had the authority to alienate the suit lands to the defendant without knowledge and consent of the plaintiff? (Onus on the defendant).

37. The learned District Judge found that the defendant was not in possession of the sale deed (exhibit D1-B). The learned District Judge examined the acknowledgement letter (exhibit D1-A), '*Lekha Pari'* document (exhibit D1-G) and noticed that none of the attesting witnesses to these documents including the sale deed (exhibit D1-B) had been cited by the defendant. It was also held that these documents had material discrepancies and in the absence of the witnesses, the documents were

suspicious and there was possibility of them being manufactured. It was held that Section 90 of the Indian Evidence Act, 1872 would not be applicable to rescue the defendant, as the certified copy of the sale deed (exhibit D1-B) had not been produced from proper custody.

38. Sale is a Transfer of Property. Section 7 of the Transfer of Property Act, 1882 provides that every person competent to contract and entitled to transferable property or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force. The fact that late Krishna Bir Rai expired on 10.01.1982 is sufficiently clear and well established. The defendants witnesses also admit to the fact that late Krishna Bir Rai expired in the year 1982. The '*Parcha Khaityan*' (exhibit 3) records that the suit land was owned by late Krishna Bir Rai.

39. The plaintiff had asserted in his plaint that even the plaintiffs mother did not have any legal right to execute the sale deed in respect of suit land without the written permission of the plaintiff. The plaintiff has filed the suit for a declaration that on the demise of late Krishna Bir Rai his only son, the plaintiff alone inherited the said land. The plaintiff had also sought for further relief of restoration of khas possession and eviction of the defendant from the suit land. The defendant however, claimed that the plaintiffs mother had sold the suit land to the defendant to pay back the debt she had incurred in providing necessary treatment to her ailing husband late Krishna Bir Rai. The defendant further stated that Santa Kumari Rai had sold the suit land to the defendant for legal necessity and that it was a self acquired land of Krishna Bir Rai. The assertion that the mother of the plaintiff did not have the authority to alienate the suit land was that of the plaintiff and therefore, this fact having been disputed by the defendant the onus of proving the same ought to have been put on the plaintiff and not on the defendant as was done. Similarly the defendant having asserted that the plaintiffs mother had sold the suit land to the defendant, it was for him to prove the same. However, it is quite evident from the pleadings in the plaint, the written statement and the evidence led by the plaintiff and the defendant that the parties knew exactly what the issues were and what was needed to be proved. The plaintiff had established by way of oral and documentary evidence that the suit land was registered in the year 1981 in the name of late Krishna Bir Rai, his father. The defendant has not been able to establish

or produce any evidence that the *'Parcha Khatiyan'* (exhibit 3) recording the name of late Krishna Bir Rai as the owner of the suit land and the contents thereof was incorrect. In view of the entry of the name of Krishna Bir Rai in the record of right of the suit land i.e., *'Parcha Khatiyan'* (exhibit 3) at least a presumption of correctness is raised in terms of Section 35 of the Indian Evidence Act, 1872. This presumption is a rebuttable presumption which can be rebutted by the defendant. To do so the defendant produced a certified copy of the sale deed (exhibit D1-B). It was the case of the defendant that the sale deed was registered in the year 1982. Registration of Deeds in Sikkim is governed by the Registration of Document Rules, 1930.

40. Rule 7 thereof provides that:

> ***"PROCEDURE TO BE OBSERVED IN THE REGISTRY OF DEEDS***
>
> ***7.*** *The person or persons executing the deed on' his or their authorised representative with one or more witnesses to the execution of it, shall attend at the Registrar's office and prove by solemn affirmation before the Registrar the' due' execution of deeds upon which the Registrar shall cause an exact copy of the deed to be entered in the proper register and after having caused it to he carefully compared with the original shall attest the copy with . his signature and shall also cause the parties or their authorised representative in attendance to subscribe their signatures to the copy and shall then return the' original with a certificate under his signature endorsed thereon specifying the date on which such deed was so registered with REFERENCE to the book containing the registry thereof .and the page and number under which the same shall have been entered therein.***"**

41. Thus, in terms of Rule 7 the exact copy of the deed is entered in a register and the original is returned with a certificate specifying the date on

which the deed was so registered with reference to the book containing the registry thereof and the page and number under which the same shall have been entered therein. The defendant has failed to produce the original of the sale deed which was necessarily to be in his custody and produced only the certified copy of the sale deed (exhibit D1-B) without any explanation. The defendants witness Karma Loday Bhutia (D.W.4), the Revenue Officer posted in the administrative centre has categorically stated that he could not say whether the certified copy of the sale deed (exhibit D1-B) produced by the defendant was genuine or not and further that he neither had any idea about the registration proceedings nor had he seen the original or the office copy and the file of registration. Even though Karma Loday Bhutia (D.W.4) was examined by the defendant, the registration proceeding and the sale deed of which the defendant sought to rely upon the certified copy were not produced. The defendant produced one acknowledgment letter (exhibit D1-A). The acknowledgment letter (exhibit D1-A) is said to have been executed on 24.01.1981 by Santa Kumari Rai. It records and refers to the plaintiff s father as "late Krishna Bir Rai". This document has been produced by the defendant to show that on 24.01.1981 Santa Kumari Rai had sold two pieces of land to the defendant for consideration amount of Rs. 3701/- to pay back the debt incurred by her as a loan, from the defendant to meet the expenses of her ailing husband late Krishna Bir Rai. The certified copy of the sale deed (exhibit D1-B) as well as the acknowledgment letter (exhibit D1-A) reflect that they were purportedly executed by Santa Kumari Rai in the year 1981. This fact is of great relevance. It has been established by the plaintiff that late Krishna Bir Rai had expired on 10.01.1982 which has also been admitted by the defendant as well as his witnesses. Thus, on the date of the execution of the purported certified copy of the sale deed (exhibit D1-B) and the acknowledgment letter (exhibit D1-A), the suit land was still recorded in the name of late Krishna Bir Rai who was still alive.

42. There is not a single document on record that shows that the suit land had been transferred in favour of late Santa Maya Rai prior to the execution of the acknowledgment letter (exhibit D1-A) and the certified copy of the sale deed (exhibit D1-B) said to be executed by Santa Kumari Rai. There is also no document to show that late Krishna Bir Rai had authorized his wife late Santa Maya Rai to dispose of the suit land. It is not even pleaded in the written statement. The defendant neither produced the original sale deed said to have been executed on 08.03.1981 nor the

witnesses whose names are reflected in the purported certified copy of the sale deed (exhibit D1-B) to prove its execution or registration. Section 68 of the Indian Evidence Act, 1872 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least have been called for the purpose of proving its execution, if there be an attesting witness alike, and subject to the process of the court and capable of giving evidence. In the circumstances, even if one were to presume the authenticity of the certified copy of the sale deed (exhibit D1-B), it is quite clear that on the date of its execution, i.e., 08.03.1981 by Santa Kumari Rai purportedly selling the suit land to the defendant she had neither the authority nor the ownership to do so. The acknowledgment letter (exhibit D1-A) surprisingly having been executed on 24.01.1981 refers to late Krishna Bir Rai as "late Krishna Bir Rai" when he was still alive having expired one year later 10.01.1982. These facts create substantial doubts regarding the authenticity of the acknowledgment letter (exhibit D1-A) and the certified copy of the sale deed (exhibit D1-B) giving credence to the plaintiffs allegations. The mutation done thereafter, in favour of the defendant would have no value since Santa Kumari Rai had neither the authority nor the ownership to alienate the suit land which was recorded in the *'Parcha Khatiyan'* (exhibit 3) in the name of late Krishna Bir Rai. Further, as held by the learned District Judge there are numerous unexplained material discrepancies making the documents suspect. The defendant did not confront the plaintiff with the signatures of Santa Kumari Rai on the documents produced by the defendant i.e., certified copy of the sale deed (exhibit D1-B), and the acknowledgment letter (exhibit D1-A). The fact that the plaintiff s mothers name was Santa Maya Rai is well established by the plaintiff through her certificate of identification (exhibit 31 and exhibit 32) and the official documents i.e. (exhibits 33 to 39) prepared during the process of making the certificate of identification. In the acknowledgment letter (exhibit D1-A), certified copy of the sale deed (exhibit D1-B), notice (exhibit D1-C) *'Lekha Pari'* document (exhibit D1-G) and the *'Khatiyan'* records (exhibit D1/DA) the name of Santa Kumari Rai is mentioned. Although it is the defendants case that late Santa Maya Rai and Santa Kumari Rai are one and the same person, the defendant failed to convincingly establish the same. The issue is decided against the defendant accordingly.

Issue no. 5

Reliefs.

43. The learned District Judge held that the plaintiff was entitled to the decree sought for in the suit and accordingly granted the reliefs as prayed for in prayers (a) to (h) in the plaint. In view of what has been held above, the plaintiff is entitled to the following reliefs:

(i) A decree declaring that the suit land was owned by late Krishna Bir Rai the father of the plaintiff.

(ii) A decree declaring that the certified copy of the sale deed (exhibit D1-B) is null and void and that on the date of its purported execution i.e., 08.03.1981 Santa Kumari Rai had neither the authority nor the ownership of the suit land to execute the sale deed.

(iii) A decree that all subsequent proceedings of issuance of notice, mutation and the issuance of *„Parcha Khatiyan* in favour of the defendant about the suit land also stands null and void.

(iv) A decree that the plaintiff as the sole surviving heir of late Krishna Bir Rai is entitled to the ownership of the suit land.

(v) A decree for khas possession of the suit land in favour of the plaintiff and the eviction of the defendant, his men and agents therefrom.

(vi) A decree of permanent injunction against the defendant not to interfere in any manner whatsoever either with the right, title, interest or with the khas, peaceful possession of the suit land on the eviction of the defendant therefrom.

44. The judgment and decree passed by the learned District Judge, Special Division-II, East Sikkim at Gangtok, are accordingly modified to the above extent. The appeal, however, fails and is accordingly dismissed.

45. Copy of this judgment be sent to the learned District Judge, Special Division-II, East Sikkim at Gangtok for information. Records of the lower court be remitted forthwith.

SLR (2021) SIKKIM 400

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

WP (C) No. 23 of 2021

M/s. Linkwell Telesystems Pvt. Ltd. ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Sajal Sharma, Advocate.

For Respondent 1-2: Mr. Sudesh Joshi, Addl. Advocate General with Mr. Hissey Gyaltsen, Asst. Government Advocate and Mr. S.K. Chettri, Addl Public Prosecutor.

For Respondent No.3: None.

Date of decision: 9th June 2021

A. Constitution of India – Article 226 – The existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution – Neither is the exercise of writ jurisdiction under Article 226 in a contractual matter ruled out. However, this jurisdiction is invoked when there is no efficacious alternative remedy for the petitioner – Petitioner failed to put forth any exceptional circumstances for invoking the writ jurisdiction.

Petition dismissed.

Chronology of cases cited:

1. Bhaven Construction through Authorised Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another, 2021 SCC OnLine SC 8.

2. Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337

ORDER (ORAL)

Meenakshi Madan Rai, J

1. Learned Additional Advocate General for State-Respondents No.1 and 2 on advance Notice.

2. Heard Learned Counsel for the Petitioner at length.

3. (i) Briefly, the case of the Petitioner is that vide Agreement dated 04.05.2017, the Petitioner was awarded the Contract for the purpose of supply and maintenance of POS Devices, POS application, its installation, maintenance, integration with the TPDS Software and Automation of Fair Price Shops of the 1421 Fair Price Shops in Sikkim.

(ii) As per Clause 2 of the said Agreement, the Petitioner was to adhere to the Request for Proposal (RFP) Guidelines and the Service Level Agreement also formed a part of the Agreement.

(iii) Clauses 2 and 8 of the Agreement were to be read together to determine the rights and liabilities of the parties.

(iv) Clause 7.9 of the RFP contained the Arbitration Agreement as defined under Section 7 of the Arbitration and Conciliation Act, 1996. The relevant portion of Clause of 7.9 of the RFP *inter alia* reads as under;

> "**7.9. Resolution of Disputes**.
>
> FCS&CA Department and the successful bidders shall make every effort to resolve amicably by direct informal negotiation, any disagreement or dispute, arising between them under or in connection with the contract.
>
> Any dispute or difference whatsoever arising between the parties to this Contract out of or relating to the meaning, scope, operation or effect of this

> Contract or the validity of the breach thereof, which cannot be resolved, shall be referred to a sole Arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existene of such dispute, then the Arbitrator shall be nominated by the Secretary, Law Department, Government of Sikkim ("Law secretary"). The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made thereunder shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, rules or re-enactments thereof. The arbitration proceedings will be held at Gangtok, Sikkim, India."

(v) The work was to be taken up by the Petitioner in a phased manner as per the terms and conditions specified in Order No.1804/FCS&CA, dated 29.03.2017. The Petitioner commenced the works accordingly.

(vi) By a Letter, dated 25.05.2020 (Annexure-12), addressed to the State-Respondent No.2 by the Petitioner, the Petitioner raised a Bill of Rs.3,65,01,842.00 (Rupees three crores, sixty five lakhs, one thousand, eight hundred and forty two) only, and requested the State-Respondent No.2 to release the pending payment within seven days to enable them to run the project, besides informing them that the Petitioner may not be able to manage operations beyond 01.06.2020 unless the payments were made over to them for the Bills raised.

(vii) From the month of June, 2020, the Petitioner stopped all works granted to them vide the Contract mentioned *supra.*

(viii) That, the State-Respondent No.2 issued Show Cause (Annexure-10) bearing No.753/F&CSD, dated 11.01.2021, reminding the Petitioner that the State-Respondent No.2 had released a sum of Rs.1,44,87,880.00 (Rupees one crore, forty four lakhs, eighty seven thousand, eight hundred

and eighty) only, in March, 2017, in favour of the Petitioner as mobilization advance.

(ix) The Show Cause also stated that from the month of June, 2020, without informing the State-Respondents No.1 and 2, the Petitioner stopped providing their services resulting in a complete halt in the Public Distribution System through EPOS Machine at Fair Price Shops. That, further the unilateral suspension of services is *ultra vires* the Service Level Agreement. That, the discontinuance of services by the Petitioner caused a set back to the State-Respondents No.1 and 2 for timely implementation of the One Nation One Ration Card Scheme, hence they were to explain as to why the Agreement entered on 04.05.2017 should not be terminated.

(x) By a Letter also of the same date i.e. 11.01.2021 (Annexure-11), the State-Respondent No.2 agreed to release payments which were due to the Petitioner in a phased manner.

(xi) It is the Petitioners case that on 16.01.2021, the response to the Show Cause was given by them.

(xii) Despite the response to the Show Cause, the services of the Petitioner were terminated vide Letter bearing No.801/F&CSD/2021, dated 22.01.2021.

(xiii) Having thus terminated the services of the Petitioner, the Respondent No.2 on 02.02.2021, issued "Notice Inviting E-Tender" from eligible Bidders for the same works that had earlier been awarded to the Petitioner i.e. Automation of Fair Price Shops in Sikkim.

(xiv) Pursuant to the E-Tender, the Respondent No.3 was awarded the Contract and Work Order issued on 09.03.2021.

(xv) On 24.04.2021, the Petitioner was before the Learned Commercial Court, East Sikkim at Gangtok, seeking reliefs under Section 9 of the Arbitration and Conciliation Act, 1996, the prayers being;

> *"**i**. Kindly issue an ad interim ex-parte injunction order to restrain the Respondent from accepting any bid in relation to the Notice Inviting E-Tender dated 02.02.2021.*

ii. *Kindly issue an order of injunction to restrain the Respondent from accepting any bid in relation to the Notice Inviting E-Tender dated 02.02.2021 until the conclusion of the determination of the controversy between the parties by an Arbitrator.*

iii. *Kindly pass an order quashing the Show Cause Notice bearing No.753/F&CSD dated 11.01.2021.*

iv. *Kindly pass an order quashing Notice of Termination of Service issued by the Secretary, Food and Civil Supplies Department bearing No.801/F&CSD/2021 dated 22.01.2021.*

v. *Any other order/orders that this Hon'ble Court deems fit to pass in the interests of justice."* The reliefs so claimed *supra* are similar to the prayers made before this Court.

(xvi) Vide an *ex-parte* ad interim Order, dated 27.04.2021, the Learned Commercial Court restrained the State-Respondent No.2 herein, the Secretary, Food and Civil Supplies Department, who was the Respondent therein, from accepting any Bid in connection with the E-Tender floated by them on 02.02.2021.

(xvii) Later, after hearing both parties, by a subsequent Order, dated 27.05.2021, the Learned Commercial Court vacated its earlier *ex-parte* ad interim Order, dated 27.04.2021.

(xviii) Learned Counsel for the Petitioner submits that subsequent to the Order dated 27.05.2021, the Petitioner invoked the Arbitration Clause of the Agreement, dated 04.05.2017 and sought for appointment of an Arbitrator. The suggested Arbitrator was not agreeable to the State-Respondent No.2 and hence further steps in this context are being taken and the process is underway.

4. (i) Having heard and considered the facts placed before this Court, admittedly the Petitioner did not impugn the Letter dated 22.01.2021 terminating the Contract. It is also admitted that the Petitioner, of their own accord, stopped the works awarded to them vide the Agreement dated 04.05.2017 from the month of June, 2020. Pursuant to the Petitioner having

stopped the works, the Show Cause Notice, dated 11.01.2021, was issued following which the Contract between the Petitioner and the State-Respondent No.2 stood terminated on 22.01.2021. Learned Counsel for the Petitioner canvassed the contention that the E-Tender, dated 02.02.2021, was not assailed as the Petitioner had already written a Letter dated 30.01.2021, to the State-Respondent No.2 expressing their willingness to restart the project by mobilizing funds from other projects and internal fund adjustments but sought an assurance from the State-Respondent No.2 that pending payments would be cleared.

(ii) In the interim, the Contract came to the awarded to a third party.

(iii) The Petitioner approached the Learned Commercial Court on 24.04.2021 and is before this Court by way of filing the instant Writ Petition on 31.05.2021 with prayers which are, in sum and substance, similar in both Courts.

5. It may relevantly be stated here that this Court is aware that the existence of an Arbitration Clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution, neither is the exercise of Writ jurisdiction under Article 226 in a contractual matter ruled out. However, this jurisdiction is invoked when there is no efficacious alternative remedy for the Petitioner.

6. The Honble Supreme Court, recently in ***Bhaven Construction through Authorised Signatory Premjibhai K. Shah vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Another***[1] referred to the ratio in ***Nivedita Sharma v. Cellular Operators Association of India***[2] and *inter alia* observed as follows;

> "**17**. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:

[1] **2021 SCC OnLine SC 8**
[2] **(2011) 14 SCC 337**

> "**11**. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. **However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy.** Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."
>
> **(emphasis supplied)**

18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one

> of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."

7. In light of the detailed discussions that have emanated *supra*, and in view of the obtaining facts and circumstances in the instant matter as reflected hereinabove, I am of the considered opinion that the Petitioner has failed to put forth any exceptional circumstances for invoking the Writ jurisdiction of this Court under Article 226 of the Constitution.

8. The Writ Petition is accordingly dismissed and disposed of.

9. Applications filed along with the Writ Petition, if any, also stand disposed of.

SLR (2021) SIKKIM 408
(Before Hon'ble the Chief Justice)

WP (C) No. 21 of 2021

Vivek Newang Rai ….. PETITIONER

Versus

The Principal Chief Engineer-cum-Secretary, Road & Bridges Department and Others ….. RESPONDENTS

For the Petitioner: Mr. Jorgay Namka, Advocate.

For Respondent 1-3: Mr. Sudesh Joshi, Addl. Advocate General with Mr. Sujan Sunwar, Asst. Govt. Advocate.

For Respondent 2: Ms. Sangita Pradhan, Asst. Solicites General of India

Date of decision: 25th June 2021

A. Constitution of India – Article 226 – A road was constructed on the petitioner's land by respondents 1 and 3 without acquisition of the land or payment of any compensation. Petitioner sought for immediate assessment of damages caused to his land and payment of compensation by respondent 1 and 3 – Held: The representation submitted by the petitioner be considered and decided by the respondents within a period of two months – While deciding the representation, the amount of compensation also to be determined within the said period as per the provisions of Right to Fair Compensation Act, 2013 and be paid to the petitioner within a further period of one month – In case the petitioner is not found to be entitled to the relief, appropriate order to be passed within the specified time and if the petitioner is aggrieved by the said order, he is at liberty to take recourse of law.

Vivek Newang Rai v. The Principal Chief Engineer-Cum-Secretary, Roads & Bridges Departt. & Ors.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Heard Mr. Jorgay Namka, learned counsel for the petitioner, Mr. Sudesh Joshi, learned Addl. Advocate General for respondents no. 1 and 3 and Ms. Sangita Pradhan, learned Asst. Solicitor General of India for respondent no.2 on advance notice.

In the present Writ Petition the grievance of the petitioner is that respondents no. 1 and 3 have not acquired the land of the petitioner and in view of the sanction as granted by the Ministry of Road Transport and Highways, Government of India dated 03.01.2013 construction of the road has been completed. This without payment of compensation of the land and/ or without legal acquisition of the land belonging to the petitioner construction of the road is undesirable. However, a direction has been sought for against respondents no. 1 and 3 to immediately asses the damages caused to the petitioner's land and to direct respondent nos.1 and 3 to make compensation to the petitioner or to pass any other orders or directions as deem fit.

After hearing the learned counsel for the parties and on perusal of the records that the Ministry of Road Transport & Highways, Government of India vide letter dated 03.01.2013, accepting the request so made by the Superintendent Engineer, Roads and Bridges Department, Government of Sikkim granted financial sanction as per the said letter to the extent of Rs.182.28 Crores for construction of the road in view of the adherence of the conditions as specified under clause 9 of the said letter.

Grievance of the petitioner is that after such sanction, road has been constructed in which the land of the petitioner as referred in the Writ Petition has been taken without payment of compensation and without its acquisition. The representation submitted by the petitioner has been referred on 01.10.2019 by the Superintending Engineer to the District Collector, South District which has not been resolved. Thereafter, petitioner has also submitted a Legal Notice dated 18.11.2019 which was also not considered. Therefore, he came before this Court by invoking jurisdiction of this Court under Article 226 of the Constitution of India.

On perusal of the aforesaid facts and the averments, as made in the Writ Petition, at present this Petition deserves to be disposed of with the following directions:-

(i) The representation submitted by the petitioner referred to the District Collector vide Annexure P-4 and P-5 has not been considered and remained unaddressed. Similarly, the Legal Notice sent on 18.11.2019 to the Chief Secretary, Government of Sikkim, Superintending Engineer-NH, Roads & Bridges Department, Government of Sikkim and the District Collector, District Administrative Centre, Namchi, South Sikkim has also been remained unaddressed. Therefore, the said representation and Legal Notice be considered and decided within a period of two months.

(ii) It is further directed that while deciding the representation if the land of the petitioner has been taken for construction of the road as stated in the Writ Petition, the amount of compensation be determined within the said period as per the provisions of Right to Fair Compensation Act, 2013 and be paid to the petitioner further within a period of one month.

In case the petitioner is not found entitled to the relief as prayed for in the Writ Petition, the Authority shall pass appropriate order within the time as specified.

Needless to observe, if the petitioner feels aggrieved by the said order he is at liberty to take recourse of law.

Accordingly, the Writ Petition stands disposed of with the above directions.

SLR (2021) SIKKIM 411
(Before Hon'ble the Chief Justice)

Crl. Rev. P. No. 8 of 2015

Radhey Shyam Swami ….. REVISIONIST

Versus

Jagat Singh Singhi and Another ….. RESPONDENTS

For the Revisionist: Mr. Venkita Subramoniam T.R and
Mr. Pem Tshering Lepcha, Advocates.

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

For Respondent No.2: Mr. Sujan Sunwar, Asst. Public Prosecutor.

With

Crl. Rev. P. No. 1 of 2016

Jagat Singh Singhi ….. REVISIONIST

Versus

Radhey Shyam Swami and Another ….. RESPONDENTS

For the Revisionist: Mr. Jorgay Namka, Advocate.

For Respondent No.1: Mr. Venkita Subramoniam T.R and
Mr. Pem Tshering Lepcha, Advocates.

For Respondent No.2: Mr. Sujan Sunwar, Asst. Public
Prosecutor.

Date of decision: 1st July 2021

A. Negotiable Instruments Act, 1881 – S. 142 – Cognizance of Offences – Cheque issued by Radhey Shyam Swami on 19.08.2005. It was presented to the Bank for encashment on 20.11.2005 and dishonored on 24.11.2005. First notice issued on 28.11.2005 returned with a note that the accused is not available to receive. Fresh notice issued on 17.12.2005, which was received on 14.01.2006 with a note of refusal to accept – Complaint filed on 01.02.2006 – Whether time barred? – Held: Cognizance can be taken even after the prescribed period if sufficient cause is shown – On this point, evidence of the parties has not been recorded – Opportunity must be given to the parties to lead evidence on this issue – Case is remitted back setting aside the impugned judgment and sentence, to decide this issue within three months from the date of appearance of the parties.

Chronology of cases cited:

1. N. Parameswaran Unni v G. Kannan and Another, (2017) 5 SCC 737.
2. MSR Leathers v. S. Palaniappan and Another, 2013 Crl.L.J. 1112.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Criminal Revision Petition No. 08/2015 has been filed arising out of Judgment dated 27.06.2015 passed in Criminal Appeal No.05/2013 by the Sessions Judge, Special Division-II, East Sikkim, Gangtok confirming the judgment dated 24.06.2008 and order of sentence dated 25.06.2008 passed by the Judicial Magistrate, East Sikkim, Gangtok convicting the petitioner of the case, Radhey Shyam Swami in Private Complaint Case No. 18/2006.

2. Criminal Revision Petition No. 01/2016 has been filed by the complainant Jagat Singh Singhi arising out of the same judgment and sentence seeking enhancement of the sentence.

3. In the present case, the arguments are heard at length of learned Counsel representing the parties. But on the point regarding Section 138 (b) and (c) read with Section 142 (1) (a) (b) (c) of the Negotiable Instruments Act, 1881 (for short, "the NI Act"), it is contended by the Counsel for the

accused/applicant that the cheque was issued on 19.08.2005 as alleged and the same was presented on 20.11.2005 to the bank, which was dishonored on 24.11.2005. The first notice was issued on 28.11.2005, Exhibit P-5, which was returned with a note that the accused is not available to receive. The said endorsement is of 09.12.2005. Making a pleading to that effect and on receiving with the said note on 15.12.2005, a fresh notice was issued on 17.12.2005 which was received on 14.01.2006 with a note of refusal to accept, however, the present complaint has been filed on 01.02.2006 which is time barred.

4. It is contended by the applicant/accused that if they failed to make the payment of amount of money to the payee who the holder of the cheque in due course within 15 days of receipt of the notice the complaint must be filed as per Section 142 (1) (b) of the NI Act within a period of one month on the date of the cause of action arises under clause (c) to proviso of Section 138 of the NI Act otherwise taking of cognizance by the Court is barred. Reliance has been placed on the judgment of Hon'ble Supreme Court in the case of ***N. Parameswaran Unni Vs G. Kannan and Anr.*** reported in ***(2017) 5 SCC 737***.

5. On the other hand learned Counsel representing the complainant contends that as per the proviso of Section 142 (1) (b) of N.I Act, the cognizance of a complaint may be taken even after the prescribed period under clause (c) of Section 138 of the NI Act if sufficient cause for not making the complaint with such period be specified. Therefore, the cognizance can be taken even after expiry of the period from the date of arising of cause of action. On this point evidence of the parties has not been brought, therefore, in place of directly dealing the issue looking to the proviso an opportunity must be given to the parties.

6. During hearing both the learned counsel have conceded that on the said issue parties may be given liberty to lead the evidence afresh and the judgment so passed by the Trial Court and Appellate Court may be set aside because it do not deal with the contingency of issuance of the first notice would be a cause of action in the light of judgment of the Hon'ble Supreme Court in the case of ***MSR Leathers vs. S. Palaniappan & Anr.*** reported in ***2013 CRI. L.J. 1112***.

7. Considering the submissions so made by counsel for both the parties by their consent, the case is remitted back setting aside the impugned judgment dated 24.06.2008 and order on sentence 25.06.2008 passed by the Trial Court and the judgment dated 27.06.2015 passed by the Appellate Court.

8. Accordingly, both the Revision Petitions are disposed of with a direction that the learned Trial Court shall record the evidence on the point that cause of action would arise from the first notice or from the second notice and decide the said issues in accordance with law. It is made clear that learned counsel for the parties are not entitled to lead the evidence on other issues and the Trial Court shall decide the other issues afresh on the basis of evidence already adduced by the parties.

9. In view of the foregoing observation both these Revision Petitions are disposed of. Private Complaint No. 18/2006 be restored to its original file before the Trial Court and the said complaint be decided within a period of three months from the date of appearance of the parties.

10. Parties present in the Court are agreed to appear before the Trial Court on virtual mode on 16.08.2021.

SLR (2021) SIKKIM 415

(Before Hon'ble the Chief Justice)

Crl. A. No. 26 of 2016

Amrit Singhi ….. **APPELLANT**

Versus

Radhey Shyam Swami ….. **RESPONDENT**

With

Crl. A. No. 27 of 2016

Amrit Singhi ….. **APPELLANT**

Versus

Radhey Shyam Swami ….. **RESPONDENT**

With

Crl. A. No. 10 of 2017

Amrit Singhi ….. **APPELLANT**

Versus

Radhey Shyam Swami ….. **RESPONDENT**

For the Appellant: Mr. Rahul Rathi, Advocate.

For the Respondent: Mr. Venkita Subramoniam T.R., Advocate
Mr. Pem Tshering Lepcha, Advocate.

Date of decision: 1st July 2021

A. Negotiable Instruments Act, 1881 – S. 138 – Code of Criminal Procedure, 1973– Ss. 391 and 482 – Respondent assigned by the complainant to sell his property – Respondent received money from the purchasers after sale of the complainant's property but did not hand over the money to the complainant and instead issued cheques – The cheques issued by the respondent were dishonored – Due to the lack of property documents, the respondent was acquitted by the Trial Court – In appeal, the sale deed and the power of attorney executed by the complainant in the favor of the respondent were produced – Held: The complainant was required to produce those documents which are relevant – Additional documents are required to be brought on record and the complainant as well as the other side must be given an opportunity to adduce the evidence on those documents – Order of acquittal set aside and cases restored in its original file to be decided within six months.

Appeal allowed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Crl. A. Nos.26/2016, 27/2016 and 10/2017 (Amrit Singhi vs. Radhey Shyam Swami) are arising out of the judgment of acquittal dated 30.07.2016 passed by the learned Chief Judicial Magistrate, East and North Sikkim at Gangtok in Private Complaint Case Nos.52/2013, 53/2013 and 39/2014. These appeals have come up for hearing after granting leave by this Court and taken up together for hearing.

2. Learned counsel representing the respective parties are heard at length. On perusal of the record it is found that the applications under Section 391 read with Section 482 of the Cr. PC, 1973 being I.A Nos.05/ 2018 in Crl. A. No.26/2016, and 04/2018 in Crl. A. No.27/2016 and 04/ 2018 in Crl. A. No.10/2017 are pending. Along with these applications certain documents have been filed, those are: Extract of Register from Sub Registrar, Mangan, North Sikkim, Power of Attorney, Registered Sale Deed dated 03.11.1998 and Land Record of plot no.205 dated 26.11.2008.

3. On perusal of the findings as recorded by the Trial Court on acquittal of the accused/respondent, it would reveal that the Court found the

stand of the complainant contrary to the evidence, documents placed on record and the document of appointing the attorney to the accused and purchase of the land of the complainant by the buyers whose description is not available. It is said that the presumption as specified under Section 118 of the Evidence Act, 1872 read with Section 139 of the Negotiable Instruments Act, 1881, (for short, the NI Act), which is rebuttable is not against the accused, therefore, with the said observation the complaint was dismissed acquitting the accused.

4. After hearing learned counsel for the parties and on perusal of the fact that the land belongs to the complainant and his ancestors. The complainants are same in all the three complaints and one more complaint which is disposed of today remitting back two cases; Crl. Rev. P. No. 08 of 2015 **(Radhey Shyam Swami vs. Jagat Singh Singhi & Anr.)** and Crl. Rev. P. No. 01 of 2016 **(Jagat Singh Singhi vs. Radhey Shyam Swami & Anr.).**

5. Looking to the averments it would reveal that the accused was assigned to sell the property belonging to the complainants who sold their property and taken the money from the purchasers but not paid the complainant. The cheques which were issued to the complainants have been dishonored. The complainants were required to produce the documents i.e. Sale Deeds of the purchasers and the Power of attorney executed in the favor of accused; however, those documents are relevant. Therefore, in the opinion of this Court those documents are relevant and the case must be decided after taking them on record giving due opportunity to the parties.

6. Therefore, allowing the IAs filed under Section 391 read with Section 482 Cr. PC, in the opinion of this Court, additional documents are required to be brought on record and the complainant as well as the other side must be given an opportunity to adduce the evidence on those documents.

7. With the aforesaid observation all the three judgments of acquittal stand set aside. Private Complaints No.52 of 2013, Private Complaint Case No.53/2013 and Private Complaint Case No.39/2014 be restored in its original file. The documents so filed before this Court along with application be taken on record.

8. The complainant as well as the accused would be given one more opportunity to bring any documentary evidence within three months from the date of appearance before the Trial Court and thereafter, giving them an opportunity to adduce oral evidence, the Trial Court would decide the complaint afresh within six months. Disposed of accordingly.

9. Parties are agreed to remain present before the Trial Court on 16.08.2021 by virtual mode.

10. Crl. A. No.26 of 2016, 27 of 2016 and 10 of 2017 stand disposed of accordingly.

SLR (2021) SIKKIM 419

(Before Hon'ble the Chief Justice)

WP (C) No. 21 of 2019

Munni Devi and Others ….. PETITIONERS

Versus

Dul Dul Prasad and Others ….. RESPONDENTS

For the Petitioners: Mr. Nayan Nepal, Advocate.

For the Respondents: Mr. J.B. Pradhan, Sr. Advocate with Mr. D.K. Siwakoti, Ms. Prarthana Ghataney and Ms. Ranjeeta Kumar, Advocates.

Date of decision: 2nd July 2021

A. Constitution of India – Articles 226 and 227 – Lok Adalat Award Challenged – Five and half storied RCC building of Late Kashi Nath Prasad located at Rangpo, East Sikkim was partitioned between the four, out of his six sons. Petitioner No.1 is a wife of respondent No.1 and petitioner No. 2 and 3 are their sons – The petitioners were deserted by respondent No.1 – The suit property, as the petitioners contend, was constructed by them and is in their possession. However, it has been partitioned by an award of the Lok Adalat without notice to them and without joining them or the sixth surviving son of Late Kashi Nath Prasad – They were not afforded an opportunity of being heard in violation of the principles of natural justice – Held: Suit for partition filed by only four sons and compromise decree obtained by an award of the Lok Adalat without any notice to the other parties cannot be sustained in law – Award so passed by the Lok Adalat without joining all the parties and without affording them an opportunity is not proper. In such situation, writ petition under Article 226 and/or 227 of the Constitution of India is maintainable – Award passed by the Lok Adalat set aside – Suit restored to its original file to be decided by the Trial Court in accordance with law – Petitioners and other legal heirs of Late Kashi Nath Prasad joined as party to the suit.

Petition allowed.

Chronology of cases cited:

1. Bhargavi Constructions and Another v. Kothakapu Murthyam Reddy and Others, Civil Appeal No.11345/2017.
2. State of Punjab and Another v. Jalour Singh and Others, (2008) 2 SCC 660.
3. Shalini Shyam Shetty and Another v. Rajendra Shankar Patil, (2010) 8 SCC 329.
4. Radhey Shyam and Another v. Chabbi Nath and Others, (2015) 5 SCC 423.

ORDER

Jitendra Kumar Maheshwari, CJ

1. Assailing the undated Award passed by the Lok Adalat though signed on 26.06.2015, this petition has been filed by the petitioners under Articles 226 and 227 of the Constitution of India.

2. The case of the petitioner in nutshell is that petitioner no.1 is a wife of the Defendant no.1 in the suit and petitioner no.2 and 3 are his sons. It is their grievance that they are deserted by defendant no.1 and the suit property in which they are residing has been partitioned without joining, noticing them and affording opportunity in violation of the principle of natural justice.

3. It is contended that as per the allegations made, the suit, the property in question belongs to Late Kashi Nath Prasad, who died in the year 1996-97 leaving behind six sons namely 1. Dul Dul Prasad, 2. Pradeep Prasad, 3. Shiv Shankar Prasad (died in 2003-04), 4. Sunil Prasad, unmarried, died in March, 1997, 5. Dilip Prasad and 6. Anil Prasad. As pleaded after the death of Kashi Nath Prasad the suit property was recorded in the name of the plaintiff and defendants only and the partition thereof was sought for in the suit. In the said partition suit, a compromise deed dated 22.06.2015 was filed and the respondents only have entered into the compromise partitioning the entire property by collusion and fraud, which was originally belong to Late Kashi Nath Prasad. However, suit of partition filed by the plaintiff/respondent no. 4, Anil Prasad,

has been decreed. Various other allegations have been alleged, inter alia, contending that the construction was raised by her and she is residing in the said premises, however, to oust her, the said suit and compromise was entered into. In view of the foregoing facts, it is urged that without joining the proper parties and adjudicating the issues involved in the facts of the case, a decree has been obtained by virtue of the impugned settlement of the Lok Adalat Award which may be set aside.

4. On the question of maintainability of the petition reliance has been placed on the judgment of Hon'ble the Supreme Court passed on 07.09.2017 in Civil appeal no.11345/2017 **(Bhargavi constructions & Anr. vs. Kothakapu Murthyam Reddy & Ors.)** relying upon the judgment of Hon'ble Apex Court in the case of **State of Punjab and Anr. vs. Jalour Singh & Ors.** reported in **(2008) 2 SCC 660.** On the basis of the said judgments it is urged that the petition under Articles 226 and/or 227 of the Constitution of India is maintainable.

5. On the other hand, learned Senior Counsel representing the respondent nos.1 to 4 has referred various paragraphs of the writ petition and relief clause to submit that the Writin the nature of mandamus/certiorari against private party is not maintainable. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **Shalini Shyam Shetty & Anr. vs. Rajendra Shankar Patil** reported in **(2010) 8 SCC 329** to contend that even within the purview of the Article 227 the power of the Court must be exercised sparingly as specified in paragraphs 49 of the said judgment which is not a case at hand in the facts. Reliance has been further placed on a judgment of the Hon'ble Apex Court in the case of **Radhey Shyam & Anr. vs. Chabbi Nath & Ors.** reported in **(2015) 5 SCC 423** determining the scope of Articles 226 and 227 of Constitution of India, clearly spelt out that the scope of Article 226 is different from the scope of Article 227 of the Constitution of India and by joining the private party until public duties they are discharging the Writ cannot be entertained.

6. In addition to the aforesaid facts it is urged that the suit was filed merely to partition of the property which is recorded in the joint name, however, in such a case the claim of the petitioner is through defendant no.1, which is clearly protected by virtue of settlement arrived between the parties of the suit. The Award of the Lok Adalat do not warrant any interference in this petition, therefore, maintaining the Award, the Writ Petition may be dismissed.

7. After having heard learned Counsel appearing for the parties and in view of the clear pronouncement on the issue involved in the present case squarely decided by the judgment of the **Bhargavi Constructions** (supra) and **Jalour Singh** (supra) the petition under Articles 226 and/or 227 of Constitution of India challenging the Award of the Lok Adalat is tenable. Hon'ble Apex Court in the case of **Jalour Singh** (supra) in paragraph 12 observed as thus:

> "12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

8. The said judgment has been followed in the case of **Bhargavi Constructions** (supra), therefore, there is no cable of doubt that the Award of the Lok Adalat can be assailed by way of petition under Articles 226 and/or 227 of the Constitution of India.

9. The judgment relied upon by the learned Senior Counsel are not in the context of the challenging the Award passed by the Lok Adalat and answering the said question. It is with respect to the maintainability of the petition under Article 226 of the Constitution of India in the context of

Article 12 of the Constitution of India and the scope of the power under Articles 226 and/or 227 of the High Courts. Therefore, the judgments relied by the learned Senior Counsel for the respondents are the easily distinguishable looking to the fact that the judgment of **Bhargavi Constructions** (Supra) and **Jalour Singh** (supra) squarely decide the issue of the maintainability as involved in the present case. Therefore, the argument of non-maintainability of the petition as advanced by the learned Senior Counsel is hereby repelled. The contention referring the petition regarding issuance of the Writ of mandamus and certiorari can be ignored with a view point that such Writ cannot be issued looking to the fact of the present case where the Award of the Lok Adalat has been assailed.

10. Reverting back on the merit of the issue as per the pleadings of the suit in paragraph 2 it is clear that Late Kashi Nath Prasad who was the father of the plaintiff and defendants was allotted a piece of land at Mandi Bazaar, Rangpo, East Sikkim by the Urban Development and Housing Department, Government of Sikkim. In paragraph 3 it is stated that on death of Kashi Nath Prasad it was transferred in the name of the plaintiff and the defendant by document dated 30.06.1999 and later on the Lease Deed was registered in 2004 as pleaded in paragraph 4. It is said that the plaintiff constructed the house of 5 ½ storied RCC building and the said property has been shown as Scheduled property in the suit to which a partition was sought for.

11. On the other hand, the petitioners before this Court have contended that late Kashi Nath Prasad was not survived only by four sons but he was survived by six sons. One son died without marrying and the other son Shiva Shankar Prasad is having legal heirs. If the property was of late Kashi Nath Prasad as stated Shiva Shankar Prasad as stated by the plaintiffs at paragraph 2 then such a situation the suit for partition, if any, filed by only four persons whose names have been subsequently recorded which was decreed by the Lok Adalat without noticing the other cannot be sustained in the law. In addition to the aforesaid the petitioners contend that they are legally wedded wife and sons of defendant no. 1, who have been deserted by the defendant no.1, though they are residing and in possession of the house in question. They have also taken the plea that the said construction has been raised by them. However, in such a situation the issue has to be decided by the Court in a partition suit joining them though they are claiming through defendant no.1.

12. In that view of the matter in place of accepting the plea that the compromise by virtue of collusion and fraud and the Award so passed in the same fashion; but in view of the observation so made it is suffice to observe the Award so passed by the Lok Adalat in view of the pleadings of the suit without joining all the parties and without affording an opportunity is not proper. In such a situation, Writ Petition under Articles 226 and/or 227 of the Constitution of India is maintainable. The Award so passed by the Lok Adalat in the given fact is liable to be set aside.

13. Accordingly, this Writ Petition is allowed, the Award passed by the Lok Adalat stands set aside. The suit be restored to its original file and it would be decided by the Court in accordance with law joining the petitioners as a party and taking all particulars that how many legal heirs are of Kashi Nath Prasad there, to which the partition of the property of Kashi Nath Prasad as pleaded and prayed. It is made clear here that this Court has not expressed any opinion on the merit of the case and the petition has been decided with foregoing observations, however, the Trial Court shall decide the suit in accordance with law affording opportunities to all the parties without influencing with any of the observation, if any, on merit of the case.

14. In the facts of the case, the parties to bear their own cost.

SLR (2021) SIKKIM 425
(Before Hon'ble the Chief Justice)

WP (C) No. 29 of 2019

Nar Bahadur Khatiwada (Chettri) and Another ….. PETITIONERS

Versus

Devil Lall Khatiwada and Others ….. RESPONDENTS

For the Petitioners: Mr. N. Rai, Sr. Advocate with Mr. Gulshan Lama, Advocate (Legal Aid).

For Respondents 1-14: Mr. Sushant Subba, Advocate.

For Respondents 15-18: Mr. N.B. Khatiwada, Senior Advocate with Ms. Gita Bista, Advocate.

For Respondents 19-22: None.

Date of decision: 2nd July 2021

A. Code of Civil Procedure, 1908 – O. 41 R. 27 – Production of Additional Evidence in Appellate Court – Application filed by the petitioners under O. 41 R. 27 was rejected by the District Judge, West Sikkim at Gyalshing without hearing the appeal **–** Held: Whenever an application is filed under O. 41 R. 27 by any of the parties, at the appellate stage to take additional evidence on record, such application ought to be heard and decided at the time of final hearing of the appeal – It cannot be decided separately – Impugned order set aside.

Petition allowed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

This petition under Article 227 of the Constitution of Indiahas been filed challenging the order dated 19.06.2019 passed by the learned District Judge, West Sikkim at Gyalshing in Title Appeal No. 02 of 2018 **(Shri Nar Bahadur (Chettri) Khatiwada and another vs. Shri Devi Lall Khatiwada and others)** rejecting the application under Order XLI Rule 27 of the CPC filed by the plaintiff/appellant without hearing the appeal.

After hearing learned counsel appearing on behalf of both the parties at length, the law on the point is well settled that whenever an application filed under Order XLI Rule 27 of the CPC by any of the parties at the appellate stage to take additional evidence on record, such application ought to be heard and decided at the time of final hearing of the appeal and it cannot be decided separately as decided in the present case by passing the impugned order.

In view of the foregoing,the order dated 19.06.2019 passed by learned District Judge, West Sikkim at Gyalshing rejecting the application under Order XLI Rule 27 of the CPC is hereby set aside.

In view of aforesaid, this petition is allowed and disposed of with an observation that the application filedby the plaintiff/appellant be considered and decided by the Appellate Court at the time of hearing of the appeal affording an opportunity to both parties.

Accordingly, W.P.(C) No.29 of 2019 stands disposed of.

SLR (2021) SIKKIM 427

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

WA No. 1 of 2021

Silajit Guha ….. APPELLANT

Versus

Sikkim University and Others ….. RESPONDENTS

For the Appellant: Mr. Kalol Basu, Mr. Suman Banerjee and Mr. Ranjit Prasad, Advocates.

For Respondents 1-4: Mr. Karma Thinlay, Sr. Advocate with Mr. Karma Thinlay Gyatso, Advocate.

For Respondent No. 5: *Ex-parte*.

Date of decision: 3rd July 2021

A. Constitution of India – Article 226 – Appellant was a Professor in Sikkim University. A student of the appellant's Department, respondent No. 5 made a complaint of sexual harassment against him before the Internal Complaint Committee (ICC). The ICC conducted an inquiry and the report submitted to the Executive Council of the University – Show cause notice along with an inquiry report was served to the appellant, which was defended by him. The Registrar of the University issued Office Order dated 28.06.2019 terminating his services as per the 33rd Meeting of the Executive Council. The appellant preferred a statutory appeal on 01.07.2019 which was pending. In the meantime, a writ petition seeking quashment of the show cause notice, inquiry report and the order of termination with other consequential relief was filed – Learned single Judge proceeded to decide the question of jurisdiction of ICC in view of the definition of 'workplace' defined in S. 2 (o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

While deciding the said issue, the allegations made in the statement of the complainant and of the students before the ICC was seen, and observed that the definition of the 'workplace' is an inclusive one and that *prima facie* ICC had jurisdiction. The writ petition was disposed of holding that that the Executive Authority before whom the appeal is pending may examine the issue of sexual harassment at 'workplace' in view of S. 9 of the said Act – Held: the ambit and scope of workplace as specified in the S. 2 (o) of the Act can be decided after appreciation of the evidence brought before ICC. In case, the ambit and scope is decided by the Court then nothing remains for adjudication by the Executive Authority in an appeal – The observation of the Learned Single Judge referring S. 2 (o) of the Act i.e. 'workplace' its ambit and scope is not proper particularly when the same question is permitted to be decided by the Executive Authority – Executive Authority to independently decide the appeal on the point of jurisdiction or on the point of ambit and scope on the definition of 'workplace' as expeditiously as possible and not later than three months.

Appeal partly allowed.

ORDER (ORAL)

The order of the Court was delivered by ***Jitendra Kumar Maheshwari, CJ***

1. Challenging the Judgment dated 08.12.2020 passed in WP(C) No.30 of 2019 ***(Silajit Guha vs. Sikkim University &Ors.)***by learned Single Bench, partly dismissing the petition deciding the issue of jurisdiction with certain observations this intra Court appeal has been preferred under Section 148 of the Sikkim High Court (Practice & Procedure) Rules, 2011.

2. The appellant who was a Professor in the department of respondent no.1, Sikkim University (hereinafter referred as the University). The respondent no.5, a student of the department made a complaint of sexual harassment against the appellant to the Internal Complaint Committee (in short ICC). The ICC conducted an inquiry and the report dated 08.06.2019 was submitted to the Executive Council of the University i.e. respondent no.3. The appellant was served with show cause notice dated 10.06.2019 enclosing report of inquiry which was replied by him.

3. The Registrar of the University issued the office order bearing no.201/2019 dated 28.06.2019, terminating the services as per the 33rd Meeting of the Executive Council. Relying upon the inquiry report and while considering the representation of the petitioner under clause 8(6) of the University Grant Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulation, 2015 (hereinafter in short referred as UGC regulations) Council was of the opinion that the appellant is not fit to be retained in the service of the University, however, terminated his service with immediate effect. The petitioner preferred a statutory appeal on 01.07.2019 which was pending. In the meantime, the Writ petition seeking quashment of show cause notice dated 10.06.2019, the inquiry report dated 08.06.2019 and the order of termination dated 28.06.2019 and various other consequential reliefs was filed.

4. Learned single Judge observed and proceeded to decide the question of jurisdiction of ICC looking to the definition of 'workplace' specified in Section 2(o) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter to be referred as the Act). While deciding the said issue the Court proceeded to see the allegations made in the complaint statement of the complainant dated 12.05.2019 and also of the student before the ICC and observed that the definition of the 'workplace' is inclusive one. Therefore, looking to the nature of the allegations came in the statement *prima facie* ICC has jurisdiction. It is further observed in the same paragraph that the Executive Authority before whom the appeal is pending may examine the issue of sexual harassment at 'workplace' looking to the definition of the 'workplace', in view of the Section (9) of the Act, Therefore, looking to the said contradictory observation appellant came before this Court assailing the same.

5. Learned Counsel for the appellant contends that at one place learned Single Judge proceeded to decide the scope of the definition of the 'workplace' observing that it is inclusive definition but simultaneously the same question was left open to decide by the Executive Authority in terms of Section 9 of the Act, which cannot be decided exceeding to the observations of the Court.

6. It is further urged that the premises on which observation has been made by the Court is the statement of the Complainant as well as the co-

students. If it has been dealt with by the Court now on this count nothing remain to be decided by the Executive Authority, therefore, the decision taken by the Court on the point of the jurisdiction explaining the ambit and scope of workplace is not justifiable, more so the said question cannot be left open for decision by the Executive Authority.

7. After having heard learned Counsel for the appellant as well as learned Counsel for the respondent, we find much substance in the argument of the learned Counsel for the appellant. It is to observe that in the facts of the case the ambit and scope of workplace as specified in the Section 2(o) of the Act can be decided after appreciation of the evidence brought before ICC, as considered by learned Single Bench. In Case, the ambit and scope is decided by the Court then nothing remain to adjudicate for the Executive Authority in an appeal. In the said context, in our considered opinion, observation of the learned Single Judge referring section 2(o) of the Act i.e. 'workplace' its ambit and scope is not proper in particularly when the same question is permitted to be decided by the Executive Authority. Therefore, the finding on the point of jurisdiction explaining the definition of 'workplace' is inclusive one, stands set aside to such extent and the liberty is granted to the appellant to raise the said question before the Executive Authority who shall decide the same in accordance with law.

8. Learned Single Judge has further proceeded to refer UGC Regulations no.8 and held that because the appeal is pending before the Executive Authority, therefore, order of termination would be kept in abeyance and appeal shall be decided by the Authority on all issues and the questions, as raised. The said finding of learned single Judge would remain intact and it does not warrant any interference.

9. Accordingly, this appeal is hereby allowed in part, in view of the foregoing observation. It is directed that the Executive Authority shall decide the appeal as observed by the learned Single Judge without influencing with the observation recorded in the Judgment on the point of jurisdiction or on the point of ambit and scope on the definition of 'workplace'. The said issue be decided by the Executive Authority independently. The remaining part of the impugned order would continue to operate. The Executive Authority shall decide the appeal as expeditiously as possible not later than three months.

SLR (2021) SIKKIM 431

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

RSA No. 2 of 2018

Old Rumtek Monastery and Others ….. APPELLANTS

Versus

Lama Karma Dorjee and Others ….. RESPONDENTS

For the Appellant: Mr. B. Sharma, Senior Advocate with Mr. Bhola Nath Sharma.

For Respondent 1-4: Mr. Jorgay Namka, Advocate (Legal Aid).

For Respondent 2-3: Ms. Kunzang Choden Lepcha, Advocate.

For Respondent No.5: Mr. S.K. Chettri, Government Advocate with Ms. Pema Bhutia.

For Respondent No.6: None.

Date of decision: 5th July 2021

A. Indian Evidence Act, 1872 – S. 61 – Proof of the Contents of Documents – Merely producing and exhibiting a document is not enough. Signatures thereon must be identified and proved. The contents of the documents must also be proved.

(Para 10)

B. Indian Evidence Act, 1872 – S. 101 – Burden of Proof – It is elementary that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists – The burden of proof in a civil suit would remain on the plaintiffs and their mere assertions in the plaint would not be sufficient to discharge the burden.

(Para 11)

Appeal dismissed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The solitary question which requires examination in the present Regular Second Appeal is "*Whether the learned Trial Court and the First Appellate Court failed to appreciate the documentary evidence relied on by the appellants in its correct perspective?*"

2. The plaintiffs were the appellants in Title Appeal No. 06 of 2017 before the learned District Judge, Special Division-II, Sikkim at Gangtok (the learned District Judge). They are the appellants in the present Second Appeal as well.

3. Four issues had been framed by the learned Trial Court on 25.10.2016 and the suit set for trial. The learned Trial Court dismissed the Suit. However, on the question of maintainability of the suit, particularly on the point of limitation and *locus standi* of the appellants, it was held in favour of the appellants. The sole question framed by this Court is relatable to issue no. 2, i.e., "*Whether the plaintiff no. 2 is the Dorje Lopen of Old Rumtek Monastery for his lifetime and have the right to perform pujas as head lama*?" Since the appellants had sought such a declaration, the onus of issue no.2 was put on the appellants. The learned Trial Court decided the said issue against the appellants. The appellants, therefore, filed Title Appeal No. 6 of 2017 before the learned District Judge. The learned District Judge decided the said issue once again against the appellants and did not interfere with the findings of the learned Trial Court.

4. During the pendency of the Title Appeal before the learned District Judge, the appellants filed an application under Order XLI Rule 27 read with section 151 of the Code of Civil Procedure, 1908 (for short „the Application) seeking to file further documents. The learned District Judge rejected the said application as well, as the documents were found to have no bearing to the facts in issue.

5. The learned District Judge, however, while examining issue no.4, i.e., "*Whether the plaintiffs are entitled for other relief or reliefs?*" held that once the suit filed by the appellants was found maintainable and once the issue no.3, regarding the authority of the respondents no.1 to 4 to constitute

a new *Dutchi*/Committee was decided in the negative, the learned Trial Court ought to have decreed the suit in terms of prayers „a and „b of the plaint instead of dismissing it in its entirety. Accordingly, the learned District Judge decreed the suit in favour of the appellants in terms of prayers „a and „b. The present Second Appeal has been filed by the appellants. There is no cross-appeal by the respondents against the findings in favour of the appellants by the learned District Judge.

6. Heard Mr. B. Sharma, learned Senior Counsel with Mr. Bhola Nath Sharma, learned Advocate, for the appellants; Mr. Jorgay Namka, learned Counsel for the respondents no.1 and 4; Ms Kunzang Choden Lepcha, learned Counsel for the respondents no.2 and 3 and Mr. S.K. Chettri, Government Advocate with Ms Pema Bhutia, Assistant Government Advocate, for the respondent no.5.

7. Mr. B. Sharma reiterated the arguments raised by the appellants before the learned Trial Court as well as before the learned District Judge. Traversing through all the evidences, both oral and documentary, led by the appellants, it was submitted that the appellant no.2 was the *Dorje Lopon* (Head Lama) of the appellant no.1, i.e., the Old Rumtek Monastery, for his life time and had the right to perform pujas as such. Mr. Jorgay Namka on the other hand vehemently supported the findings of the learned Trial Court as well as the learned District Judge. He submitted that since it was the appellants case before the learned Trial Court that the appellant no.2 was the *Dorje Lopon* appointed for his life time it was incumbent upon him to establish the same at least by preponderance of probability which they have failed to do. None of the documents sought to be relied upon established the facts asserted by the appellants. Ms Kunzang Choden Lepcha supported the arguments made by Mr. Jorgay Namka. Mr. S.K. Chettri submitted that he represented the proforma-respondent who had nothing to do with the matter.

8. The appellants had pleaded that the appellant no.2, being the *Dorje Lopon* (Head Lama), held and occupied the permanent post as per customs, traditions and culture and that he could not be removed from his post till he retired on his own or resigned. The respondents had specifically denied the assertion of the appellants that the appellant no.2 had been made the *Dorje Lopon*. It was, in fact, further stated that the appellant no.2 did not even qualify for the post of *Dorje Lopon*.

9. Lama Dup Tshering (PW-2), who is the appellant no.2, reiterated these statements made in the plaint. He was cross-examined. Bhaichung Lepcha (PW-3) and Karma Chuttem Bhutia (PW-4) also stated that the appellant no.2 is the *Dorje Lopon* (Head Lama) of the appellant no.1, i.e. the Old Rumtek Monastery, and as per custom, tradition, precedent and culture, *Dorje Lopon* held the post till he died or till he retired. They were also cross-examined by the respondents. Besides the statements, the appellants sought to rely upon certain documents. "*The Gazetteer of Sikhim by H.H. Rishley*" was exhibited by appellant no.5. Besides the voluminous *Gazetteer of Sikhim* exhibited by the appellant no.5 in *toto*, Mr. B. Sharma also referred to the following correspondences – (i) Memo No. 61/DCE dated 14/07/09 addressed to the President of Old Rumtek Monastery (Exhibit-5). (ii) Correspondence reference no. 03/0RM/09-10 dated 18.07.2009 addressed to the Revenue Officer (Acquisition) under the signature of five persons (Exhibit-6). (iii) Order dated 23.08.12 passed by this Court in W.P.(C) No. 24 of 2008 (Exhibit-10). (iv) Correspondence no. 1059/EA dated 12.9.13 addressed to the appellant no.2 as Dorje Lopon (Head Lama) of appellant no.1 by the Additional Secretary, Ecclesiastical Department of the Government of Sikkim (Exhibit-12). (v) Correspondence bearing reference no. 05/ORM/13 dated 21.11.2013 addressed to certain individuals and signed by four persons (Exhibit-13). (vi) A certificate regarding expenditure incurred for burning butter lamps at the Rumtek Gumpa signed by five persons and certified by the Department of Ecclesiastical, Government of Sikkim (Exhibit-14).

10. Besides the aforesaid documents relied upon by Mr. B. Sharma, the learned District Judge has also examined the following documents – Exhibit-4, Exhibit-8 and Exhibit-15. Exhibit-4 is a petition dated 16.08.2013, filed by the appellant no.2 under section 144 and 145 of the Code of Criminal Procedure, 1973 against the contesting respondents. This document only reflects that the appellant no.2 had filed petition before the learned District Magistrate as the *Dorje Lopon*. Exhibit-8 is the FIR filed by the appellant no.2 dated 31.07.2013 as the *Dorje Lopon* against some of the contesting respondents. Exhibit-15 is a register. Once again, none of these documents have been proved in the manner envisaged by the Indian Evidence Act, 1872. Merely producing and exhibiting a document is not enough. Signatures thereon must be identified and proved. The contents of the documents must also be proved. No attempt has been made by the appellants to do so.

Even these documents do not throw any further light on the issue which was required to be established by the appellants save the fact that during the period of these documents, the appellant no.2 had projected himself as the *Dorje Lopon*. There is no material, therefore, to establish that the appellant no.2 was the *Dorje Lopon* of the appellant no.1, i.e. Old Rumtek Monastery, for his life time.

11. None of the above correspondences exhibited by the appellant no.5 have been proved and exhibited in the manner required under the law. None of the signatures appearing thereon are proved or identified. Mr. B. Sharma insists that since some of these correspondences refer to the appellant no.2 as the *Dorje Lopon*, it must be held to be so. This Court cannot but disagree with the submission made by the learned Senior Counsel. It is elementary that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists. This is the requirement of section 101 of the Indian Evidence Act, 1872. The burden of proof in a civil suit would remain on the appellants as plaintiffs and their mere assertions in the plaint would not be sufficient to discharge the burden. The appellants asserted that the appellant no.2 was the *Dorje Lopon* (Head Lama) of the appellant no.1, i.e. the Old Rumtek Monastery, and he was appointed through custom, tradition, precedent and culture for life. They further asserted that the appellant no.2 had been performing the duty of *Dorje Lopon* (Head Lama) since 1981. It was, therefore, for the appellant to prove the existence of such facts including the custom, tradition, precedent and culture. Unfortunately, save exhibiting the entire *Gazetteer of Sikhim*, no such evidence, either oral or documentary, was led by the appellants. Not even an attempt was made to refer to any extract/statement in the book leave alone support it by any contemporary facts. None of the correspondences exhibited by the appellant throw any light on the appointment of the appellant no.2 as the *Dorje Lopon*. Mr. B. Sharma would draw attention to Exhibit-12 and to the fact that the Ecclesiastical Department had vide this correspondence addressed the appellant no.2 as the *Dorje Lopon* (Head Lama). A closer scrutiny of Exhibit-12 makes it clear that it was in reply to the representation dated 3/8/2013 made by the appellant no.2, quite obviously, as *Dorje Lopon* of the appellant no.1, i.e. the Old Rumtek Monastery. The appellants have not exhibited this representation dated 3/8/2013. Thus, all that one can presume, even if this Court was to take cognizance of Exhibit-12, which lies not proved, is that during this period of correspondence the appellant no.2 had referred to himself as the *Dorje Lopon*.

12. Mr. B. Sharma would also rely on the order dated 23.08.12 passed by this Court in *W.P.(C) No. 24 of 2008*. A perusal of the said order reflects that the writ petition was directed against order dated 25.08.2008, passed by the Sub-Registrar/District Collector, cancelling the Lease Deed dated 16.10.2007. This Court held that the only question which remained to be examined was the procedural anomaly. This Court set aside the impugned order dated 25.8.2008 and remitted the matter back for passing a fresh order after according hearing to the petitioner, the Monastery and the complainants/representationists. This Court is unable to understand how even the order passed by this Court dated 23.08.12 would help the appellants to prove what they asserted.

13. That brings us to the next issue raised by Mr. B. Sharma. It is his contention that as it was held that the appellants had the *locus standi* to prefer the title suit, the learned Trial Court as well as the learned District Judge ought to have held issue no.2 also in favour of the appellants. The learned Trial Court examined the issue of maintainability *vis-à-vis* the question of limitation and *locus standi*. With regard to *locus standi,* it was held that since it was admitted that appellant no.2 managed the harvested crops of the *gumpa* land till 2012 and also since there were other documents like exhibit 6, 7, 12, 14, etc., which showed that the appellants had corresponded with others on behalf of the appellant no.1, i.e. the Old Rumtek Monastery, it was decided that the suit of the plaintiff was maintainable. Thus, it is clear that the learned Trial Court had decided to examine the suit in detail and consequently held the point of *locus standi* in favour of the appellants taking cognizance of the existence of the aforesaid documents. These documents, as held above, have neither been proved in the manner required under the Indian Evidence Act, 1872 nor throw any light as to how and when the appellant no.2 was appointed as the *Dorje Lopon* (Head Lama) for life. These documents exhibited by the appellants to establish that appellant no.2 was the *Dorje Lopon* for life has been examined in detail by the learned Trial Court and concluded - *"43. Since the plaintiffs have to bring in proper evidences to prove their own case, which in the instant case, they have failed to produce, issue no.2 is decided against the plaintiffs."* The learned District Judge in the impugned judgment dated 31.03.2018 held that the finding of the learned Trial Court with regard to the maintainability had not been assailed by the appellants in the first appeal preferred by them before him and as such the findings had attained finality.

14. Mr. B. Sharma then referred to the Application filed by the appellant before the learned District Judge as the First Appellate Court. This application was filed by the appellants before the learned District Judge seeking to produce further documents which was rejected. The learned District Judge examined those documents and held that "*While the attendance sheets proposed to be filed simply show the attendance of monks during the concerned Annual Gootor (Mahakala Puja) from 8th to 16 December, 2009, the RTI reply and its enclosures are seen to be concerning the lease deed document executed between the existing Dutchi of the appellant no.1 Monastery and Alembic Pvt. Company which, strictly speaking, have no bearing to the facts-in-issue in the present matter*." The application as well as the documents have been examined in detail. None of these documents throw any further light in favour of the appellants to prove the facts they assert.

Consequently, the finding of the learned District Judge rejecting the application of the applicant is also upheld.

15. The concurrent findings of both the learned Trial Court as well as the learned First Appellate Court are sound and need not be interfered with. None of the grounds pressed by Mr. B. Sharma fall within the exceptions to the general rule of non-interference in such cases, i.e., (i) material evidence were ignored or the courts acted on no evidence; (ii) wrong inferences from proved facts by erroneously applying the law; or (iii) the courts have cast the burden of proof wrongly. Thus, the solitary question set by this Court is answered in the negative. It is held that neither the learned Trial Court nor the learned District Judge had failed to appreciate the documentary evidence in its correct perspective.

16. The appeal is dismissed and disposed of accordingly.

17. Pending applications, if any, also stand disposed.

18. No order as to costs.

19. Records of the Courts below be remitted forthwith along with a copy each of the judgment, for information.

SLR (2021) SIKKIM 438

(Before Hon'ble the Chief Justice)

WP (C) No. 16 of 2017

Smt. Asha Devi and Another ….. PETITIONERS

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Senior Advocate assisted by Ms. K.D. Bhutia, Advocate.

For the Respondents: Dr. Doma T. Bhutia, Addl. Advocate General assisted by Mr. S.K. Chettri, Government Advocate, Mr. H.P. Dhakal, Addl. Director (Legal), Education Department, Government of Sikkim, Mr. Sushant Subba, Advocate.

Date of decision: 5th July 2021

A. Sikkim Government Services (Advancement Grade) Rules, 1999 –Education Department (Principals of the Senior Secondary Schools and Headmasters of the Secondary Schools) Recruitment Rules, 1992 – It is specifically said by the Order dated 13.12.1995 of this High Court that the period of service rendered on adhoc/contractual basis ignoring the period of break, if any, is to be reckoned as qualifying service towards the "*notional fixation of initial pay*" and also for the purpose of pension. It is clear that the period of contract service rendered by the deceased husband of petitioner No.1 can be counted only for the purpose of fixation of notional pay on his/her regularization or it may be counted for the purpose of fixation of pension. Except for the said two purposes the period rendered by the deceased petitioner on contract service cannot be counted in particular for promotion or any other purpose – On conjoint reading of R. 6 of the Grade Pay Rules and R. 4 of the Recruitment Rules of 1992 with column No.11 of the Schedule, it is clear that promotion of a

Graduate Teacher to the Headmaster can only be possible after five years of regular service. In case he cannot get promotion till ten years from the date of regular service, he may be entitled to Grade Pay Scale. The benefit of Grade Pay Scale can only be granted after ten years of regular service – The deceased husband of petitioner No.1 was regularized on 19.06.1996 and the period of five years would be counted from the date of regularization and not from the initial date of contractual appointment for the purpose of grant of promotion. If he is unable to get promotion till ten years from the date of regular service, the benefit of Grade Pay Scale can be granted to him but the period of ten years cannot be counted from the date of contract appointment.

(Paras 9 and 12)

Petition dismissed.

JUDGMENT (ORAL)

Jitendra Kumar Maheshwari, CJ

1. This Writ Petition under Article 226 of the Constitution of India was filed by the deceased retired employee Mr. A.K. Mishra 0n 03.04.2017, seeking direction to grant pay scale at par with Mr. S.M. Singh, a Graduate Teacher in the regular establishment, who was drawing the basic pay of Rs.7900/- as on 22.06.1996 in the pay scale of Rs.7,000-11,500. A direction has also been sought for to grant of pay to the deceased petitioner in the pay scale of Rs.7500-12000 with effect from 22.01.1997 as he was entitled for advancement grade scale of Headmaster, Secondary School. It is further prayed that the deceased petitioner shall be given the scale of pay of Rs.9000-13800 with effect from 22.01.2002 after completion of five years service with effect from 21.01.1997 as per the Appendix-II of Sikkim Government Revised Pay (Amendment) Rules, 1998. The negative reliefs are also prayed, but it is having no relevance, therefore, it has not been referred. The original petitioner was died on 17.06.2018, therefore, the names of present petitioners were substituted vide Order dated 27.08.2018.

2. The facts unfolded to file the present Writ Petition are that deceased petitioner was posted as Science Graduate (Math) Teacher at Hee - Gyathang High School on contractual basis for a period of three years vide Order dated 15.07.1981, where he joined on 20.07.1981. The said period

of contractual appointment continued without regularizing his service, however, the deceased petitioner and some other similarly situated employees had filed Writ Petitions those were WP(C) Nos. 27/1994, 30/1994, 04/1995 and 17/1995. All these petitions were commonly decided vide Order dated 13.12.1995 issuing the direction to State to formulate the policy for regularization of service to the adhoc or contractual non-local teachers, Graduate or Post Graduate and to consider their service for regularization. In the order, it was specified that for the purpose of notional fixation and pension, the services rendered by the teachers during contractual or on adhoc appointment shall be counted as qualifying service.

3. The State Government has formulated a regularization policy which was Notified on 14.02.1996. As per the said policy the case of the deceased petitioner was considered and he was regularized vide Order dated 19.06.1996 (Annexure P-1) in the pay scale of Rs.1520-40-1600/EB-50-2300/EB-60-2660 (unrevised) with effect from the date he takes over the charge of the post. The deceased petitioner, accordingly, joined the regular services and continued on the post as Graduate Teacher. He attained the age of superannuation in the year 2017 after getting the Grade Pay as per the Sikkim Government Services (Advancement Grade) Rules, 1999, for short, "Grade Pay Rules". It is also the fact that with effect from 01.01.1996 the scale of pay of Rs.1520-2660 has been revised by the Sikkim Government Services (Revised Pay) Rules, 1998 (for brevity it be called Revised Pay Rules) in the scale of Pay of Rs.5500-175-9000. It is not in dispute that on the date of regularization i.e. 19.06.1996 the Revised Pay Rules were not in existence, however, the regularization of the deceased petitioner was ordered in unrevised pay scale. After commencement of Revised Pay Rules, the State Government has passed the order on 21.05.1999 (Annexure R-5) extending the benefit of revised pay scale and on 29.07.2005 (Annexure R-6) on completion of ten years continuous service as a Graduate Teacher, extending the Grade Pay.

4. By filing this petition it is contended by Mr. A. Moulik, learned Senior Counsel that under the Grade Pay Rules, on completion of the period as specified in the Appendix, subject to clearance by the Departmental Promotion Committee, for short, "DPC", due to not having any adverse entry in their confidential reports in preceding three years prior to consideration for advance grade, he would be entitled for grant of grade pay as per the Grade Pay Rules counting the period of contractual

appointment from the initial date and fixation of pay on the date of regularization ought to be done accordingly.

5. He further contends that as per the Rule 4, Column No.11 of the Education Department (Principals of the Senior Secondary Schools and Headmasters of the Secondary Schools) Recruitment Rules, 1992, for short, "Recruitment Rules, 1992", on completion of regular service of five years he/she is entitled to get the benefit of Grade Pay Scale of Headmaster, thereafter, in the Grade Pay Scale of the Senior Secondary School Teacher on completion of period so specified in the Schedule. It is urged, as per the directions of this High Court his services were regularized on 19.06.1996. It is submitted that the period of service rendered by deceased petitioner on contract basis has not counted for the purpose of promotion. On account of not granting promotion on completion of five years, from the initial date of appointment and even on completion of ten years on the date of regularization, benefit of Grade Pay was not allowed as per Grade Pay Rules. Therefore, it is contended that counting his service rendered on contract basis prior to the regularization of deceased petitioner fixation ought to be made in the scale as specified under the Grade Pay Rules and the subsequent fixation as prayed in the Writ Petition may also be directed.

6. Per contra, Dr. Doma T. Bhutia, learned Additional Advocate General representing the State contends that the regularization of the deceased petitioner was directed vide order dated 19.06.1996 with effect from the date he takes over the charge. It is contended as per the Recruitment Rules, 1992, on completion of 5 years of regular service he may be promoted as Headmaster. In case, he could not be promoted, then as per the Grade Pay Rules on completion of 10 years of service, subject to clearance by the DPC and not having any adverse entry in the confidential reports in the preceding three years deceased petitioner may be entitled for the corresponding scale as specified in the Grade Pay Rules. Prayer made by the petitioners in this petition seeking benefit of the Grade Pay Rules counting his service of contractual appointment i.e. from the initial date of appointment is baseless and contrary to the Rules.

7. Learned Additional Advocate General has further contended that looking to the direction of this Court, the service rendered by the deceased petitioner on contract basis prior to regularization cannot be counted for promotion. In fact as directed by this Court, the said period rendered on

contract basis can be counted for the purpose of notional fixation of pay and pension only and not for any other purpose. It is further contended that in terms of the Recruitment Rules, 1992 and the Grade Pay Rules his fixation has already been made as claimed in this petition. She further said that the benefit as claimed at par with Mr. S.M. Singh cannot be directed because his appointment since beginning was on regular basis, therefore, there is no discrimination and the scale which has been allowed to him cannot be granted to the deceased petitioner. At last it is contended that this petition has been filed with inordinate delay, therefore, the reliefs as prayed cannot be directed, in particular, when the petition is filed on attaining the age of superannuation by the deceased employee.

8. After having heard learned counsel appearing on behalf of both the parties in the context of the unfolded facts of the present case and from the previous order of this Court in the WP Nos. 27/1994, 30/1994, 04/1995 and 17/1995 dated 13.12.1995, the relevant paragraph is hereby quoted which reads as thus:

> "28. Keeping everything in view and all the matters considered in the preceding paragraphs we think that justice would be met if steps in the following manner are taken by the Government:
>
> 1. A scheme for regularisation of service, adhoc or contractual, of the non-local teachers, graduate or post-graduate, is to be formulated by the Government, following the guidelines as noted hereafter.
>
> (a) An independent Committee or Service Commission is to be set up to find out candidates whose service might be regularised.
>
> (b) Government will prepare a list of candidates who would be brought to the consideration zone of the Committee/Commission. The list should include all the petitioners before us.

(c) The Committee or Commission would prepare a list of eligible candidates in order of merit-cum-seniority.

(d) Candidate once interviewed or tested at the point of initial appointment or at any subsequent time, should not be asked for further interview or test.

(e) The list of eligible candidates would be prepared on the basis of service records including adverse remarks, if any, of each of the candidates.

2. All further appointments in existing and future vacancies are to be made on regular basis from the list of eligible candidates prepared by the Committee, one after the other.

3. While giving such appointments, restriction on entry-age should be waived.

4. Total period of service on adhoc or contractual basis, ignoring the period of break if any, is to be reckoned as qualifying service towards notional fixation of initial pay in the grade and also for the purpose of pension.

5. There will be no appointment on regular, adhoc or contractual basis either from locals or from non-locals till the list of eligible candidates, as prepared, is exhausted."

9. On perusal, it is clear that the Government was directed to formulate a scheme for regularization of service of adhoc or contractual non-local teachers, Graduate or Post Graduate, as the case may be.Thereafter by setting up of an independent Committee the services were to be regularized. It was clarified that who may be included in thezone of consideration by the Committee, the list be prepared to that effect. Thereafter, the Committee on exercising their wisdom shall prepare the list of eligible candidates on interviewing them, if they were not interviewed earlier or otherwise they be tested as per the wisdom of the Committee. The future appointments on the

future vacancies must be restrained until all the contract/adhoc employees have been regularized granting relaxation of age. It is specifically said that the period of service rendered on adhoc/contractual basis ignoring the period of break, if any, is to be reckoned as qualifying service towards the "notional fixation of initial pay" and also for the purpose of pension. Therefore, it is clear that the period of contract service rendered by the deceased petitioner can be counted only for the purpose of fixation of notional pay on his/her regularization or it may be counted for the purpose of fixation of pension. Except for the said two purposes the period rendered by the deceased petitioner on contract service cannot be counted in particular for promotion or any other purpose.

10. As stated hereinabove it is not in dispute that the Revision of Pay Rules, 1998 is made applicable with effect from 01.01.1996. Those Rules were notified from 27.01.1998 prior to the said date, regularization of the deceased petitioner was done on 19.06.1996, vide order Annexure P-1. Therefore, in the said order, regularization was ordered in the unrevised pay scale of Rs.1520-2660 because the revisions of pay rules were came into force after regularization. After commencement of the Revision of Pay Rules, 1998 the Government by its own, issued the order of regularization of petitioner in a revised scale of pay extending all benefits as specified. Therefore, it is clear that service of the deceased petitioner was regularized appointing him with effect from the date on which the deceased petitioner takes over the charge of office, as apparent vide order dated 19.06.1996.

11. As per the spirit of the Grade Pay Rules, in particular Rule 6, it is clear that the Government servant upto the level of Deputy Secretary and equivalent shall be granted pay scale of the Advancement Grade on completion of ten years of continuous service in a post/grade if they do not get any promotion during the period as specified in the Appendix subject to clearance by the DPC and on not having any adverse confidential report in the preceding three years. Thus, it is clear if a person could not get promotion upto a period of ten years from the date of regular service as specified the benefit of Grade Pay Rule is applicable to them.

12. It is not in dispute that the appointment of the deceased petitioner was on the post of Graduate Teacher. The promotion of Graduate Teacher to a higher post is governed by the Recruitment Rules of 1992. As per Rule 4, it is clear that the method and qualification required for recruitment and/or

eligibility conditions for promotion to the post of Principal and Headmaster shall be such, as specified in column no.5 to 11 of the Schedule attached. The Schedule has been appended thereby it is clear, as per column no.11, the Graduate Teacher with B.Ed. with five years regular service may be eligible to consider for promotion to the post of Headmaster. Thus, a Graduate Teacher completed five years regular service then only he may be entitled for grant of promotion to the post of Headmaster and thereafter, further on the post of Principal of Senior Secondary School as per the eligibility prescribed in column no.11 of the Rule. On conjoint reading of Rule 6 of the Grade Pay Rules and Rule 4 of the Recruitment Rules of 1992 with column no.11 of schedule, it is clear that promotion of a Graduate Teacher to the Headmaster can only be possible after five years of regular service. In case he could not get promotion upto ten years from the date of regular service, as per Rule 6 of Grade Pay Rules he may get Grade Pay Scale. Thus, benefit of Grade Pay Scale can only be granted after ten years of regular service. Admittedly the deceased petitioner was regularized on 19.06.1996 and the period of five years would be counted from the date of regularization and not from the initial date of contractual appointment for the purpose of grant of promotion. If the deceased petitioner could not get promotion upto the period of ten years, from the date of regular service, the benefit of Grade Pay Scale can be granted to him but the period of ten years cannot be counted from the date of contract appointment.

13. The contention as advanced by Senior Counsel that the fixation ought to be made counting the service of contract appointment and on completion of ten years of service under Grade Pay Rules is fallacious which cannot be accepted in view of discussion made hereinabove. Therefore, it is clear that in terms of the Promotion Rules, 1992 and the Grade Pay Rules on completion of five years of regular service if the deceased petitioner could not get promotion, then after ten years of regular service subject to clearance by the DPC and not having the adverse entries in the preceding three years in the confidential report he/she may be entitled to get the benefit of the Grade Pay Scale. In that view of the matter, the argument advanced by the petitioners seeking benefit of the Grade Pay Scale counting the period of contract appointment prior to regularization is impermissible, therefore, the relief prayed in this Writ Petition cannot be directed in view of the foregoing discussion.

14. It is to be observed here that the petitioners are unable to point out that the Grade Pay Scale granted to him subsequently by the orders of the Government is defective or not from due date. Therefore, the said issue is not required to be discussed. As the issue involved in the present case has already been dealt with on merit, therefore, the other plea regarding delay and laches and maintainability is not relevant for adjudication in this case.

15. In view of the foregoing discussion the inescapable conclusion can be arrived is that the petitioners are not entitled to the reliefs as prayed in this petition, accordingly, it is dismissed. In the facts and circumstances, parties to bear their own cost.

SLR (2021) SIKKIM 447

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

WP (PIL) No. 5 of 2021

Dew Kumar Chettri ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner: Ms. Yozna Lepcha and Ms. Mon Maya Subba, Advocates.

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

Date of decision: 5th July 2021

A. Constitution of India –Article 226 – Petition filed in the nature of Public Interest Litigation seeking direction to the State for compliance of the judgment dated 05.04.2016 passed by this High Court in *WP (PIL) No. 39 of 2012* (*Shri Rinzing Chewang Kazi* v. *The State of Sikkim and Others*) for immediate implementation of the guidelines for Jananni-Shishu Suraksha Karyakram, 2011 and Public Health Standard Revised Rules, 2012 – Held: All the grievances raised in this case have been decided. If the directions issued by this Court has not been complied with, the recourse as available to the petitioner is to initiate an appropriate proceedings, but not to come second time by filing the present PIL.

ORDER (ORAL)

The order of the Court was delivered by ***Jitendra Kumar Maheshwari, CJ***

Petition under Article 226 of the Constitution of India has been filed in the nature of Public Interest Litigation (PIL) seeking direction to the State respondents for compliance of the judgment dated 05.04.2016 passed by this Court in **W.P. (PIL) No.39 of 2012 (Shri Rinzing Chewang Kazi vs.**

The State of Sikkim & Ors). Direction has further been sought for immediate implementation of the Guidelines for Jananni-Shishu Suraksha Karyakram (JSSK), 2011. A direction has also been prayed for implementation of the Indian Public Health Standard (IPHS) Revised Rules, 2012 which guarantees the healthcare and the quality oriented health system in every Districts. A direction has also been prayed for constitution of a committee and to find out the report in the matter of implementation of the direction as issued in the case **Shri Rinzing Chewang Kazi (supra).**

After having heard learned Counsel appearing on behalf of the petitioner as well as the learned Additional Advocate General representing the State, the direction as issued by this Court on 05.04.2016 in **Shri Rinzing Chewang Kazi** (supra), paragraph 40, may be looked into gist, which is reproduced as thus:

> "40. On the discussions made above, we dispose of this PIL along with CMA Nos. 387/2014 & 251/2015 on following terms:-
>
> (1) The State will ensure availability of life saving drugs in all the hospitals/health centres. Interim direction in this regard vide Order dated 24.08.2012 is made absolute.
>
> (see Order dated 24.08.2012)
>
> (2) Other interim directions on which compliance reports have not been filed shall also be taken as absolute.
>
> (3) JSY and JSSK shall be implemented in their letter and spirit so that the eligible women and children derive proper benefits from these schemes.
>
> (4) The Maternal Death Reviews and Community Based Monitoring shall be done regularly and necessary materials shall be uploaded in the website of the NHM.
>
> (see paragraph 28)
>
> (5) The State Government shall make all endeavour to establish a Blood Bank in each district and also to establish Blood Storage facility in each CHC in near future.
>
> (see paragraph 29)

(6) State will create a free medicine counter in all district hospitals.

(see paragraph 39)

(7) All free medicines, as per the list provided to this Court, shall be made available in the said counters.

(see para 39)

(8) There shall be separate OPD card centres at STNM Hospital, Gangtok viz. male, female and senior citizens. The Out Patient Duty (OPD) morning and afternoon at STNM Hospital shall be regular and afternoon OPD should be maintained strictly.

(see paragraph 39)

(9) An inquiry desk shall be made available at STNM Hospital, Gangtok, which would be easily visible to assist the patients/their attendants.

(see paragraph 39)"

Looking to the direction as above, it is clear that all the grievances raised in this case are decided. If the direction issued by this Court has not been complied with, the recourse as available to the petitioner is to initiate an appropriate proceedings, but not to come second time by filing the present PIL.

In addition the ancillary issue regarding the implementation of the IPHS Revised Rule, 2012 is concerned, the petitioner is at liberty to submit the representation to the competent authority who may look into and disposed of the same in accordance with the law. Hopefully, if the Rules are there and applicable, it may be taken care and required its implementation following rule of law. However, the representation, if any, be submitted by the petitioner afresh within two weeks from today along with copy of this order. The same may be considered and decided as per law within a period of one month by the competent authority.

The Writ Petition stands disposed of with the aforesaid observation.

SLR (2021) SIKKIM 450

(Before Hon'ble the Chief Justice)

WP (C) No. 7 of 2020

Jina Manger and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. Jushan Lepcha, Advocate.

For the Respondents: Mr. Sudesh Joshi, Addl. Advocate General, Mr. Sujan Sunwar, Asst. Govt. Advocate and Mr. Zigmi Bhutia, Standing Counsel, Education Department .

Date of decision: 7th July 2021

A. Constitution of India –Article 226 – Writ in the nature of *mandamus* can only be issued when the petitioners are having indefeasible right. It is a settled law that even selection does not confer right for appointment. It is also settled that the authority withdrawing the advertisement if it has not acted arbitrarily with *mala fide* intention, interference in exercise of the power under Article 226 of Constitution of India is not warranted.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

The petitioner has assailed the Notification dated 25.02.2020 for withdrawal of the advertisement dated 14.03.2018 which was under challenge in WP(C) No. 19/2019.

Heard learned Counsel for the petitioner as well the Additional Advocate General at length.

On perusal of the facts in the present case a writ in the nature of the mandamus or certiorari has been prayed for while challenging the withdrawal of the advertisement by the impugned notification. It is contended that the petitioners were eligible for appointment having qualification as per Rules. They have applied and faced the process of selection appearing in the written examination and oral interview. It is only the result is awaited at that time withdrawal of the advertisement by the impugned Notification is not permissible.

In such case it is to observe that a writ in the nature of mandamus can only be issued when the petitioners are having indefeasible right. It is a settled law that even selection does not confer right for appointment. It is also settled that the authority withdrawing the advertisement if not acted arbitrarily with mala fide intention, interference in exercise of the power under Article 226 of Constitution of India is not warranted.

On perusal of the pleadings of the Writ Petition it is nowhere averred that withdrawal of the notification is due to mala fide. In absence of having any pleading regarding mala fide for the reasons as stated in the notification for withdrawal of the Advertisement, in the considered opinion of this Court, interference is not warranted. More so, the petitioners who have faced the process of selection do not have any right to seek the writ in the nature of mandamus. Simultaneously, the Writ Petition No.19/2019 has already been dismissed as infructuous wherein the advertisement dated 14.03.2018 was assailed which has been withdrawn in the present case. Therefore, in the said facts, in the considered opinion of this Court, interference in exercise of power under Article 226 is not required. Accordingly, this petition is dismissed.

At this stage, learned Additional Advocate General has assured to this Court that in furtherance to the previous advertisement, the persons who have participated in the process of selection would be given due weightage granting relaxation of age while issuing the fresh advertisement.

Taking note of the said assurance the Writ Petition stands dismissed.

SLR (2021) SIKKIM 452

(Before Hon'ble the Chief Justice)

WP (C) No. 5, 6, 7, 8 and 9 of 2021

Chandu Sherpa and Others ….. PETITIONERS

Versus

Sunita Rai and Another ….. RESPONDENTS

With

WP (C) No. 8 of 2021

Chandu Sherpa and Others ….. PETITIONERS

Versus

Raju Rai and Another ….. RESPONDENTS

For the Petitioners: Mr. Zangpo Sherpa, Advocate and Ms. Lusiyana Thapa, Advocate.

For Respondent No.1: Mr. N. Rai, Senior Advocate with Mr. Yozan Rai, and Ms. Vani Vandana Chhetri, Advocates.

Date of decision: 8th July 2021

A. Code of Civil Procedure, 1908 – O. 8 R. 1A (3) – Defendant to Produce Documents upon which Relief is Claimed – During cross-examination on the petitioner, one document containing the signature of his father, Late Lakey Sherpa was shown to him by the Counsel of respondents on the question of resemblance of the signature. Admittedly the said document is not related to the defence of the respondents but only for the purpose of resemblance of the signature of the petitioner's father – The said document, at this stage, cannot be a relevant document to adjudicate the

subject matter of the case. At a subsequent stage when the question of verification of signature arise, the said issue may be taken for consideration by the Court – The provision of O. 8 R. 1A (3) which confers discretion on the Court is not a unfettered discretion on the Court. The Court must see the *bona fides*, genuineness, relevance of the document to the subject matter of the suit determining the controversy in question – Impugned orders set aside.

Petitions allowed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

All these Writ Petitions have been filed by the plaintiffs arising out the Order passed on 12.11.2019 in different suits bearing Title Suit Case No. 08 of 2017 (Chandu Sherpa & Ors. vs. Sunita Rai & Anr.), Title Suit Case No. 09 of 2017 (Chandu Sherpa & Ors. vs. Sunita Rai & Anr.), Title Suit Case No. 10 of 2017 (Chandu Sherpa & Ors. vs. Sunita Rai & Anr), Title Suit Case No. 11 of 2017 (Chandu Sherpa & Ors. vs. Sunita Rai & Anr.) and Title Suit Case No. 12 of 2017 (Chandu Sherpa & Ors. vs. Sunita Rai & Anr.) allowing the application filed by the defendant under Order VIII Rule 1A (3) of the Code of Civil Procedure, 1908, for short, CPC. Learned Trial Court vide Order passed on 24.12.2020, observed that under Order VIII Rule 1A (3) of the CPC gives discretion to the Court to allow the additional documents but it ought to be used according to well established principles. Those principles may be relevancy of the documents showing of sufficient or good cause for not producing it earlier. Thereafter, the Court proceeded to hold that the documents are relevant and are necessary for effective determination of the issues, however, subject to payment of cost of Rs.4000/- to the plaintiffs, the application filed by the defendants is allowed.

In view of the findings so recorded by the Trial Court it is to be seen from the fact that during cross-examination on the plaintiff one document having signature of late Lakey Sherpa was shown by the counsel of defendants to the plaintiffs on the question of resemblance of the signature of late Lakey Sherpa, father of the plaintiff. Admittedly the said document is not related to the defence of the defendants, however, it is only

for the purpose of resemblance of the signature of late Lakey Sherpa. The said document, at this stage, cannot be a relevant document to adjudicate the subject matter of the case. At the subsequent stage the question of verification of signature arise at that time the said issue may be taken for consideration by the Court.

It is to further observe here the provision of Order VIII Rule 1A (3) which confers discretion on the Court is not a unfettered discretion on the Court. The Court must see the bona fides, genuineness, relevance of the document to the subject matter of the suit determining the controversy in question. At present, merely by denial of the plaintiffs to the document having transaction with other persons by late Lakey Sherpa cannot be relevant to the merit of the present case. In that view of the matter with the observations as made hereinabove all these Writ Petitions are hereby allowed. Impugned Orders passed by the Trial Court are set aside.

All the aforesaid Writ Petitions stand disposed of with the above observation.

SLR (2021) SIKKIM 455

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

WP (PIL) No. 2 of 2018

IN Re: Removal of Illegal Religious Structures

For the Petitioner: Ms. Manita Pradhan, *Amicus Curiae*.

For the Respondents: Mr. Vivek Kohli, Advocate General with
Ms. Y.W. Rinchen, Government Advocate
and Mr. Hissey Gyaltsen, Asst. Govt. Advocate.

Date of decision: 8th July 2021

A. Constitution of India –Article 226 – On the basis of the orders of the High Court, the State Government formulated a policy dated 07.09.2020 and notified in Gazette No. 290 dated 11.09.2020. In furtherance to the said policy, the Home Department, Government of Sikkim vide letter dated 29.09.2020 has intimated to all the District Collectors to notify the said policy and to submit the recommendations on the unauthorized religious structures constructed within their respective jurisdiction. By the letters dated 13.10.2020, 13.10.2020, 15.02.2021 and 18.02.2021 recommendations/proposals of South District Level Committee, North District Level Committee, East District Level Committee and West District Level Committee respectively have been submitted to the State Government, which are under consideration – The recourse as cited by the State Government *prima facie* appears to be just – While dealing with the issue on case to case basis and in terms of the policy, the State Government shall afford an opportunity to the concerned person and take decision in accordance with law.

ORDER (ORAL)

The order of the Court was delivered by ***Jitendra Kumar Maheshwari, CJ***

This petition has been filed in the public interest for removal of the illegal religious structures. On the basis of the orders of this Court, the

Government has formulated a policy on 07.09.2020 which is enclosed with the response and it is notified in the Gazette No. 290 dated 11.09.2020. In furtherance to the said policy, the Home Department, Government of Sikkim, vide letter bearing No. Home/Confdl/112/2018/48/546 dated 29.09.2020 intimated to the District Collectors of four Districts to notify the said policy and to submit the recommendations on the unauthorized religious structures constructed within their respective jurisdiction. The Home Department has issued another letter bearing No. Home/Confdl/112/2018/48/826 dated 27.11.2020 to the District Collectors of the four Districts requesting them to submit the recommendation. It is stated that vide letters dated 13.10.2020, 13.10.2020, 15.02.2021 and 18.02.2021 recommendations/proposals of South District Level Committee, North District Level Committee, East District Level Committee and West District Level Committee respectively have been submitted to the State Government, which are under consideration. All those documents have been produced before this Court.

In view of the aforesaid, it is urged that the State Government in terms of the policy decision dated 11.09.2020 taking action for removal of the illegal religious structures and as per the recommendations received it will be dealt with by the State Government on case to case basis.

After hearing the learned Advocate General and the learned Amicus Curiae present in the Court and looking to the policy, the recourse as cited by the Government prima facie appears to be just. At this stage suffice to observe that while dealing with the issue on case to case basis and in terms of the policy the State Government shall afford an opportunity to the concerned person and take decision in accordance with law.

With the aforesaid observation, this Public Interest Litigation stands disposed of.

Pending IAs, if any, to be treated as disposed of.

SLR (2021) SIKKIM 457

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

RSA No. 3 of 2019

Shri Raju Prasad and Another ….. APPELLANTS

Versus

Ram Janam Prasad and Another ….. RESPONDENTS

For the Appellants: Mr. Zangpo Sherpa, Advocate.

For Respondent No.1: Mr. Jorgay Namka, Advocate (Legal Aid)

For Respondent No.2: Mr. S.K. Chettri, Government Advocate.

Date of decision: 17th July 2021

A. Code of Civil Procedure, 1908 – S. 100 – Substantial question of law framed: Whether relief of permanent injunction could be granted by the Appellate Court in favour of the plaintiff based on Exhibit-1 which was asserted to be a partition deed by the plaintiff, interpreting the same as a licence, which was neither the case of the plaintiff nor of the defendants and therefore no issue was framed or evidence led by either side and the trial court had also not considered this aspect at all? – Held: The plaintiff had averred that Exhibit-1 was a partition deed and further had not claimed any right arising out of it. The pleadings in the plaint do not even suggest that the partition deed (Exhibit-1) was an irrevocable licence in favour of the plaintiff. In such circumstances, there was no occasion for the learned Appellate Court to revisit the partition deed (Exhibit-1) while examining issue no.1 upon a plea which was never put forward in the pleadings and make out a case which was not even pleaded – The Appellate Court should have confined his decision to the question arising from issue no.1 – The defendant no.1 had preferred an appeal limited to issue no.1 and therefore, it was necessary for him to confine his examination to the pleadings before him. Issue no.1 was confined to whether the suit property was first occupied by the father of the plaintiff thereby giving the plaintiff a right over

the suit property after his father's death. The making of the partition deed (Exhibit-1) being a subsequent event, there was no occasion for the Appellate Court to examine it while deciding issue no.1 – Although before the Trial Court, the defendant no.1 had raised the issue of non-registration of the partition deed (Exhibit-1) relied upon by the plaintiff, neither the Trial Court nor the Appellate Court examined the effect of non-registration and decided to examine it. This was also not correct. Consequently, the Appellate Court's finding that the owner of the *"ekra"* house was the defendant no.1 standing unassailed, the suit filed by the plaintiff must be dismissed as both the issues have been held against the plaintiff – The relief of permanent injunction could not have been granted by the Appellate Court in favour of the plaintiff based on Exhibit-1 – Second appeal allowed – Impugned judgment and decree set aside.

(Paras 8 and 9)

Appeal allowed.

Chronology of cases cited:

1. Bachhaj Nahar v. Nilima Mandal and Another, (2008) 17 SCC 491.
2. Shankar Popat Gaidhani v. Hira Umaji More (Dead) by LRS. and Others, (2003) 4 SCC 100.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This is a regular second appeal. Ram Janam Prasad, the respondent herein was the original plaintiff in Title Suit No. 10 of 2014 filed against Ram Das Prasad and the Secretary, Urban Development & Housing Department, Government of Sikkim, the original defendants. The suit was styled as suit for declaration, injunction and consequential reliefs. After the trial, the learned Trial Court decreed the suit vide judgment and order dated 31.08.2017. The learned Trial Court had framed two issues. The first issue was decided in favour of the plaintiff. The second issue was decided against the plaintiff. The findings of the learned Trial Court with regard to issue no.2 was not assailed by the plaintiff. The defendant no.1, however, assailed the judgment and decree passed by the learned Trial Court. In Title Appeal No. 13 of 2017 (*Ram Das Prasad vs. Ram Janam Prasad & Another*), the

learned District Judge, Special Division-I at Gangtok, East Sikkim (Appellate Court), examined the title appeal *vis-à-vis* issue no.1, framed by the learned Trial Judge which was: "(i) *Whether the suit property measuring 40' x 15' was first occupied by the father of the plaintiff thereby giving the plaintiff a right over the suit property after the death of his father? (onus on plaintiff)*". The learned Appellate Court on examination of evidence led by the parties held that there was no doubt that the defendant no.1 who is and has to be regarded as the owner of the '*ekra'* house comprised in the suit properties. It was held that the plaintiff had not put forward anything worthy which could establish that it was his late father who had constructed the '*ekra'* house except making a bald claim. The learned Appellate Court opined that though the claim of the plaintiff and his witnesses were not categorically denied during cross-examination, the defendant no.1 had been denying this fact right since inception. In both his pleadings and his evidence on affidavit, he had also pleaded that it was him who had built the '*ekra'* house which fact was neither denied nor cross-examined by the plaintiff. Thus, it was held that the plaintiff had failed to prove his case with positive evidence and instead sought to take advantage of the weakness of the defendant no.1 in not effectively controverting his bald claim. These findings against the plaintiff with regard to issue no.1 have not been assailed by the plaintiff. The learned Appellate Court, however, while examining the defendant no.1s title appeal limited to issue no.1 only, also examined a purported partition deed styled as '*ansha banda'* (partition document) (Exhibit-1). He held that it could not qualify as a partition deed. However, the learned Appellate Court was of the opinion that it would however amount to an irrevocable licence in favour of the plaintiff by which he was given certain portions in the '*ekra'* house by the defendant no.1. The learned Appellate Court opined that under section 52 of the Indian Easements Act, 1882, no particular form or considerations was required for such irrevocable licence; it can either be express or implied and it is also not required to be created by a registered document. He, thus, decided to grant the relief prayed for by the plaintiff in prayer (viii)(b) of his plaint. Accordingly, the relief was granted in favour of the plaintiff while examining the title appeal filed by the defendant no.1. Prayer (viii)(b) of the plaint reads thus;

"(viii) A permanent injunction:

(a) ….….....

(b) Restraining the defendant no.1 from interfering with the peaceful possession and enjoyment of the plaintiff over 10' x 14' from the ground floor to the third floor."

2. This relief granted in favour of the plaintiff in the title appeal preferred by the defendant no.1, without any cross-appeal by the plaintiff, led to the filing of the present regular second appeal and the formulation of the substantial question of law as under:-

"1) Whether relief of permanent injunction could be granted by the appellate court in favour of the plaintiff based on Exhibit-1 which was asserted to be a partition deed by the plaintiff, interpreting the same as a licence, which was neither the case of the plaintiff nor of the defendants and therefore no issue was framed or evidence led by either side and the trial court had also not considered this aspect at all?"

3. During the pendency of the regular second appeal, the original defendant no.1, i.e., Ram Das Prasad, expired and was substituted by his son Raju Prasad and daughter Asha Devi, as the present appellants.

4. Heard Mr. Zangpo Sherpa, learned counsel for the defendant no.1/ appellants and Mr. Jorgay Namka, learned counsel for the plaintiff/ respondent no.1. Also heard Mr. S.K. Chettri, Government Advocate, for the defendant no.2/respondent no.2.

5. In ***Bachhaj Nahar vs. Nilima Mandal and Another***[1] relied upon by Mr. Zangpo Sherpa, the Supreme Court examined the judgment of the High Court in a similar second appeal. The High Court had allowed the second appeal holding that the plaintiff had failed to make out title to the suit property. It, however, held that the plaintiffs had made out a case based on easementary right in respect of the suit property, as they had claimed in the plaint that they and their neighbour had been using the suit property and the first defendant and his witness had admitted such user. The High Court was of the view that the case based on easementary right could be

[1] **(2008) 17 SCC 491**

considered even in the absence of pleading or issue relating to an easementary right, as the evidence available was sufficient to make out easementary right over the suit property. The High Court, therefore, granted a permanent injunction restraining the first defendant from interfering with the plaintiffs use and enjoyment of the right of passage over the suit property. While examining the appeals arising out of the judgment of the High Court, the Supreme Court held as under:-

> ***"10.*** *The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:*
>
> *(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subjectmatter of an issue, cannot be decided by the court.*
>
> *(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.*
>
> *(iii) A factual issue cannot be raised or considered for the first time in a second appeal.*
>
> ***11.*** *The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any*

anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.

12. *The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.*

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18. *A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an*

easementary right relates to a right possessedby a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

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23. *It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."*

6. In ***Shankar Popat Gaidhani vs Hira Umaji More (Dead) by LRS. And Others***[2]**,** the Supreme Court examined a civil appeal arising from a civil suit in which the plaintiff had not also challenged the judgment passed against him either by filing an appeal or by preferring any cross objection and the original defendant no.1 had alone preferred an appeal. However, the High Court had while dismissing the appeal granted relief in favour of the plaintiff in the appeal filed by the defendant no.1. The Supreme Court held as under;

[2] **(2003) 4 SCC 100**

> *"**12.** The plaintiff, as noticed hereinbefore, did not question the judgment and decree passed by the trial court. Evidently, the court did not grant a decree for recovery of possession so far as the suit land is concerned. In that view of the matter, the High Court, in our opinion, committed a serious error in granting a relief in favour of the plaintiff in an appeal filed by Defendant 1, purporting to modify Relief (a), as aforementioned; particularly in view of the fact that amongst others, the appellant claimed himself to be in physical possession of the lands in question. The appellant, indisputably, was not a party to the said agreement for sale."*

7. In the plaint, the plaintiff had pleaded that in the year 1982, a government land measuring 40' x 15' was lying vacant which was captured by his father who constructed a three storied *„ekra* house from his own hard earned money as well as with a loan from Central Bank of India. It was the further case of the plaintiff that as his father was suffering from gout he used to go to his native place at Bihar and when he had gone out in the month of January 1984, the defendant no.1 got allotted the scheduled property in his own name. On his return from Bihar, he had come to know about this fact and questioned the defendant no.1 about it. He further pleaded that on 10.04.1998, a partition took place between the plaintiff and the defendant no.1 in the presence of the members of Vyapari Sangh and Gram Panchayat. The partition deed was exhibited as Exhibit-1. The plaintiff pleaded that as the allotment was in the name of the defendant no.1, he retained the major portion of the suit property while the plaintiff was given one shop from the ground level up to the third floor with the use of latrine/ bathroom and it was further agreed that a space at the back of the varandah would be given to the plaintiff to build a staircase to go to the second floor and other floors. It was the case of the plaintiff that he was entitled to half share of the scheduled property but the defendant no.1 due to his greed agreed to give only the portion which was in the possession of the plaintiff. The plaintiff pleaded that the defendant no.1 had harassed him by not transferring the portion of scheduled property in the plaintiffs name and as such the plaintiff now claimed half portion of the scheduled property to which he was legally entitled. On the narration of the above fact, the

plaintiff had approached for several reliefs. The learned Trial Court had granted the reliefs prayed for in prayers (i), (ii), (iii) and (iv) in favour of the plaintiff deciding issue no.1 in his favour. The learned Trial Court, as stated above, had decided issue no.2 against the plaintiff which issue was - "*Whether the defendant no.1 by misleading the defendant no.2 got the suit property allotted to him vide an order in 1984 and another in 1985?*" The learned Trial Court had, thus, rejected all other prayers including the prayer (viii)(b) above, as held earlier. This rejection was not assailed by the plaintiff.

8. It is noticed, as rightly pointed out by Mr. Zangpo Sherpa, the plaintiff had averred that Exhibit-1 was a partition deed and further had not claimed any right arising out of it. The pleadings in the plaint do not even suggest that the partition deed (Exhibit-1) was an irrevocable licence in favour of the plaintiff. In such circumstances, there was no occasion for the learned Appellate Court to revisit the partition deed (Exhibit-1) while examining issue no.1 upon a plea which was never put forward in the pleadings and make out a case which was not even pleaded. The learned Appellate Court, with respect, should have confined his decision to the question arising from issue no.1. The defendant no.1 had preferred an appeal limited to issue no.1 and therefore, it was necessary for him to confine his examination to the pleadings before him. Issue no.1 was confined to whether the suit property was first occupied by the father of the plaintiff thereby giving the plaintiff a right over the suit property after his fathers death. The making of the partition deed (Exhibit-1) being a subsequent event, there was no occasion for the learned Appellate Court to examine it while deciding issue no.1. It is further noticed that although before the learned Trial Court the defendant no.1 had raised the issue of non-registration of the partition deed (Exhibit-1) relied upon by the plaintiff, neither the learned Trial Court nor the learned Appellate Court examined the effect of non-registration and decided to examine it. This was also not correct. Consequently, the learned Appellate Courts finding that the owner of the *„ekra* house was the defendant no.1 standing unassailed, the suit filed by the plaintiff must be dismissed as both the issues have been held against the plaintiff.

9. The regular second appeal is thus allowed. The question raised in this regular second appeal is held in favour of the defendant no.1 and against the plaintiff. It is held that the relief of permanent injunction could not

have been granted by the learned Appellate Court in favour of the plaintiff based on Exhibit-1, which was asserted to be a partition deed by the plaintiff, interpreting the same as licence which was neither the case of the plaintiff nor of the defendants and therefore, no issue was framed or evidence led by either side and the learned Trial Court had also not considered this aspect at all.

10. The findings of the learned Appellate Court in the impugned judgment on the partition deed (Exhibit-1) as well as the grant of relief as prayed for by the plaintiff in the plaint as prayers (viii)(b) and the consequential decree, are set aside.

11. No order as to costs.

SLR (2021) SIKKIM 467

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

Crl. A. No. 9 of 2020

State of Sikkim ….. **APPELLANT**

Versus

Jigmee Bhutia ….. **RESPONDENT**

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

For the Respondents: Mr. N. Rai, Sr. Advocate with
Mr. Yozan Rai, Advocate.

Date of decision: 21st July 2021

A. Indian Penal Code, 1860 – S. 376 – Rape – Evidence of a sole witness – This Court is aware of the settled position of law that every rape victim need not have injuries on her body to prove her case. However, the prosecution must establish with some trustworthy evidence that the prosecutrix had indeed been subjected to sexual assault which, in the instant matter, has not been furnished – After having committed a heinous offence, in the ordinary course of human nature, the first instinct of an accused would be to flee the place of occurrence but the incongruously unbelievable version of PW-1 (prosecutrix) is that the respondent continued to stay inside the room where he had committed the alleged offence and bolted himself from inside. The evidence of PW-6 is to the effect that PW-1 had visited his house subsequent to the call made by her. It is rather surprising that in that interval the respondent although left alone, still made no effort to escape. No investigation was conducted on this aspect. PW-1 is evidently spinning a yarn regarding the incident which fails to find substantiation by evidence – We cannot lose sight of the fact that a sole witness must be a sterling witness and the evidence given by her must be cogent, consistent and the version of the events should be unassailable. On the anvil of these

enumerated qualities, constrained to opine that these are lacking in the instant case and the prosecutrix, in no way, can be described as a sterling witness. Her solitary evidence is not trustworthy, cogent or unblemished.

(Paras 11 (a),(b) and 12(a))

B. Code of Criminal Procedure, 1973 – S. 313 – Use of the statement – S. 313 is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice – Refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score (*In re. Nagaraj* v. *State, represented by Inspector of Police, Salem Town, Tamil Nadu* relied).

(Para 12 (b))

C. Indian Evidence Act, 1872 – S. 106 – Burden of proving a fact espacially within the knowledge of any person – S.106 of the Indian Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. This section will apply to cases where the prosecution has succeeded in proving facts from which reasonable inference can be drawn about the existence of certain other facts, unless the accused, by virtue of his special knowledge regarding such facts, fails to offer any explanation which might thus lead the Court to draw a different inference. In other words, S. 106 is designed to meet certain exceptional cases where it is an impossibility for the prosecution to establish certain facts (*In re. State of W.B.* v. *Mir Mohammad Omar and Others* referred).

(Para 13 (a))

Appeal dismissed.

Chronology of cases cited:

1. Ganesan v. State, represented by its Inspector of Police, (2020) 10 SCC 573.
2. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.

3. Alok Debroy and Another v. State of Assam, 2004 Cri.LJ 3048.

4. Panua *alias* Pravat Kumar Chand v. State of Orissa, 2009 SCC OnLine Ori 616.

5. Pratap Chand v. State of H.P, Crl. Appeal 30 of 2011 and Duni Chand v. State of H.P, Crl. Appeal No.31 of 2011, 2014 SCC OnLine HP 3307.

6. Krishan v. State of Haryana, (2014) 13 SCC 574.

7. State of Rajasthan v. N.K. the accused, (2000) 5 SCC 30.

8. Nagaraj v. State, represented by Inspector of Police, Salem Town, Tamil Nadu, (2015) 4 SCC 739.

9. State of W.B. v. Mir Mohammad Omar and Others, (2000) 8 SCC 382.

JUDGMENT

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

1. Dissatisfied with the Judgment in Sessions Trial (F.T.) Case No.17 of 2018, dated 29.08.2019, vide which the Respondent was acquitted of the offences under Sections 376(1), 457 and 323 of the Indian Penal Code, 1860 (for short, "IPC"), the instant Appeal has been preferred.

2. Assailing the findings of the Learned Trial Court, the Learned Public Prosecutor, before this Court, contended that there was sufficient and cogent evidence to establish the Prosecution case against the Respondent. That, in a plethora of Judgments, the Honble Supreme Court has held that conviction on the sole testimony of a victim is permissible and requires no corroboration. On this aspect, reliance was placed on ***Ganesan vs. State, represented by its Inspector of Police***[1]. That, the case of the victim has been consistent in the First Information Report (for short, "FIR"), in her Statement under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") and in her evidence during trial. That, her testimony has been duly corroborated by the evidence of P.Ws.2, 3, 4, 6 and 7, which the Learned Trial Court overlooked. That, a woman who is a victim of

[1] **(2020) 10 SCC 573**

sexual assault is not an accomplice to the crime but stands at a higher pedestal than an injured witness as she suffers from emotional injury, to support this submission strength was garnered from the ratio in ***Mohd. Imran Khan vs. State Government (NCT of Delhi)***[2]. It was further urged that the evidence of the Prosecution Witnesses have withstood the test of cross-examination, hence the Learned Trial Court was in error in arriving at the finding that due to differences between the Respondent and the victim on account of a debt owed by her to the Respondent, the possibility of false implication could not be ruled out. That, this observation was based solely on the evidence of the Defence Witnesses. That, in his responses under Section 313 Cr.P.C., the Respondent merely denied having committed the offence but did not explain the circumstances of his presence in the victim s house. Hence, the impugned Judgment be set aside and the Respondent be convicted of the offences that he was booked under.

3. Resisting the arguments of the Learned Public Prosecutor, Learned Senior Counsel for the Respondent submitted that it is the bounden duty of the Prosecution as per law, to prove its case beyond a reasonable doubt, however, no incriminating evidence has emerged against the Respondent. That, P.W.7, the Doctor, who examined the victim and P.W.9, the Scientific Officer of the Regional Forensic Science Laboratory (for short, "RFSL"), Saramsa, East Sikkim, who examined the Material Objects, were unable to detect any evidence to indicate involvement of the Respondent in the alleged crime. That, the Respondent and the victim were, in fact, known to each other, as emanates from the evidence of D.Ws.1, 2 and 3 and since she was unwilling to repay the amount owed by her to the Respondent for purchases made by her from D.W.1, the Respondents wife, she chose to settle the score by implicating him in a false case. Learned Senior Counsel put forth the alternative argument that the Respondent was at the victims house with her consent. Hence, the conclusion of the Learned Trial Court requires no intervention. To bolster his contentions, Learned Senior Counsel placed reliance on ***Alok Debroy and Another vs. State of Assam***[3], ***Panua alias Pravat Kumar Chand vs. State of Orissa***[4] of the Honble High Court of Orissa, and ***(Cr. Appeal 30 of 2011) Pratap Chand vs. State of H.P. and (Cr. Appeal No.31 of 2011) Duni Chand vs. State of H.P.***[5]

[2] **(2011) 10 SCC 192**
[3] **2004 Cri.LJ 3048**
[4] **2009 SCC OnLine Ori 616**
[5] **2014 SCC OnLine HP 3307**

4. Before embarking on examining the merits of the matter, it would be appropriate to briefly narrate the facts of the Prosecution case for clarity. On 31.07.2017, at around 21:40 Hrs, P.W.1, the Prosecutrix, lodged the FIR, Exhibit 1, before the Singtam Police Station informing that at around 18:30 Hrs the same evening, an unknown person had entered her house on the pretext of requesting her for a glass of water and then raped her. Based on the FIR, Singtam P.S. Case No.56/2017, dated 31.07.2017, under Section 376 IPC was registered against the Respondent. During investigation it emerged that the Respondent entered the house of the Prosecutrix, carried her to a room on the second floor of her house, tore off her clothes and committed penetrative sexual assault on her. Despite resistance, she was unable to fend off his assault and her screams went unanswered, her house being isolated from other houses. After the incident, the Respondent allegedly stayed in the room where the incident occurred, while she escaped and telephonically contacted P.W.3, her mother, narrating the incident to her. P.W.3 advised her to call the Police. Instead, she called P.W.6, the Panchayat President of Martam, Lingtam Ward, who incidentally is her maternal uncle, as the Police number was not known to her and narrated the incident to him as well. P.W.6 called the Police upon which, both P.W.6 and P.W.3 then reached the place of occurrence (for short, "P.O."). They found the Respondent inside the room and on coaxing by the Police, he opened the door, after which he was taken to Singtam Police Station by P.W.2 ASI Tashi Pincho Bhutia. He was arrested that night around 01:10 Hrs (i.e. of 01.08.2017). On completion of investigation, Charge Sheet was submitted against the Respondent under Sections 376 and 457 of the IPC. The Learned Trial Court framed Charge against the Respondent under Sections 376(1), 457 and 323 of the IPC. On his plea of "not guilty," twelve Prosecution Witnesses were examined, on closure of which, the Respondent was afforded an opportunity under Section 313 Cr.P.C. to explain the incriminating evidence against him. He denied any involvement in the offence and examined three witnesses in his defence. Arguments of the parties were finally heard and the Learned Trial Court, finding that the Prosecution had failed to prove its case beyond a reasonable doubt, extended the benefit of doubt to the Respondent and acquitted him of all Charges *supra*.

5. In the backdrop of the submissions of Learned Counsel for the Appellant that conviction on the sole testimony of the Prosecutrix is permissible, it is firstly to be examined as to whether the evidence of the

Prosecutrix is reliable, trustworthy and of sterling quality to inspire the confidence of this Court. It is also to be examined as to whether the Prosecution has proved its case beyond reasonable doubt or whether the Learned Trial Court erred in acquitting the Respondent.

6. (a) The Prosecutrix, examined as P.W.1, deposed that the Respondent came to her house, stood near the entrance of her building and asked her for a glass of water at which time, she noticed that he appeared to be drunk and his eyes were red. Pausing here for a moment, while reverting to Exhibit 1, the FIR and Exhibit 2, her Statement recorded under Section 164 Cr.P.C., identified by her before the Court, it is clear that she has made an effort to improve her case during trial, since neither in Exhibit 1 nor in Exhibit 2, has she stated that the Respondent appeared to be drunk. This Court is conscious that an FIR is not an encyclopaedia but immediate relevant facts would obviously have been recorded in it, although unnecessary details may not have been noted. P.W.2, the Police personnel who took the Respondent to the Police Station did not observe that the Respondent appeared to be drunk, while P.W.10, the Medical Officer of District Hospital, Singtam, who examined the Respondent on 01.08.2017, at 12.40 a.m., deposed *inter alia* as follows;

> *"…… **His breath had no smell of alcohol at the time of his examination. His gait was steady and speech clear. His chest was bilaterally normal, per abdomen was soft. ……***
>
> ***On local examination he had no external injuries**. ……"*
>
> **(Emphasis supplied)**

P.W.6 was witness to the Respondent coming out from the room and thereafter being taken away by the Police but makes no mention of him being drunk. P.W.12, the Investigating Officer (for short, "I.O.") formally arrested the Respondent but does not state that when he forwarded the Respondent for medical examination, he noticed that he was drunk.

(b) That having been said, it is the case of the Prosecution that the Respondent caught hold of the Prosecutrixs neck, carried her to a room in her house forcefully, tore off her clothes and committed rape on her. It is

worth mentioning that the torn clothes of the Prosecutrix finds no place in the Material Objects exhibited by the Prosecution before the Learned Trial Court. In the same thread, it may be noticed that the Prosecutrix has not described which article of her clothing was torn by the Respondent or that the Police seized the said torn clothes, neither does P.W.2, the Police personnel who was the first person to reach the P.O. after the alleged incident, make any mention of seeing the victim in torn clothes. P.W.3, the victims mother, testified that the victim had informed her that the Respondent had torn off her clothes and then raped her but she too failed to enlighten the Court of the state of the Prosecutrixs clothes, whether she saw the Prosecutrix wearing torn clothes, or that the Police had seized such clothes from the Prosecutrix. P.W.4, the father of the Prosecutrix, stated that the Prosecutrix had informed him that one person had entered her house forcefully and 'tried' to force himself on her. His evidence, in fact, makes no mention of rape on the Prosecutrix. This witness found the Prosecutrix standing in the court yard of her house when he reached there. He noticed that she was wearing her night dress but did not state that it was torn. P.W.6 too reached the P.O. and witnessed the Police giving the Respondent his clothes through the ventilator of the room, which was allegedly locked from the inside but his evidence does not reveal that the Prosecutrix was wearing torn clothes, although he had witnessed P.W.3 and the Prosecutrix standing outside her house. P.W.7 was the Doctor who examined the victim at 12.10 a.m. on 01.08.2017, the alleged assault having taken place at 6.30 p.m. on 31.07.2017. He makes no mention of any torn clothes on the person of the Prosecutrix, nor was any such item of clothing forwarded to P.W.9, the Scientific Officer at RFSL, Saramsa, for analysis. P.W.12, the I.O., furnished no evidence of seizure of the alleged torn clothes neither did he state that he found her in such a state or that she showed him the said clothes. Hence, the testimony of the Prosecutrix with regard to her torn clothes appears to be a figment of her imagination totally devoid of truth and unsubstantiated by evidence.

7. (a) Secondly, there are glaring anomalies regarding the time when P.W.1 reported the incident to P.W.3 and P.W.6. According to her, the incident occurred at 6.30 p.m. After the Respondent allegedly pushed her away, she had the opportunity to flee from the room whereupon she telephonically informed P.W.3 about the incident. P.W.3, however, stated that she received the call from P.W.1 informing her of the incident at around 9 p.m. to 10

p.m. According to P.W.6, he too received telephonic information from P.W.1 at 9 p.m. to 10 p.m., which is almost three hours after the alleged incident. As per P.W.1, her information to P.W.6 was only telephonic, while P.W.6 under cross-examination, revealed that after the phone call, P.W.1 personally came to his house when he did not go to her house in response to her call. P.W.1 has nowhere divulged that she visited the house of P.W.6. after making a call to him. P.W.6 revealed further that it was only after about one hour of the call of P.W.1 that he, along with the Police personnel, reached her house.

(b) Added to this, is the anomalous evidence of P.W.2, who stated that Head Constable, one Lakpa Tshering Bhutia of Sang Police Out Post, received a call from P.W.6 on 31.07.2017, at around 7 p.m. to 7.30 p.m., informing that the Respondent had entered the Prosecutrixs house. Contrarily, P.W.6, as reflected *supra*, duly supported by the evidence of P.W.2, individually reveal that they received the call from the Prosecutrix at 9 p.m. to 10 p.m., rendering the Prosecution story suspicious, besides pointing towards shoddy investigation and non-verification of necessary facts. If P.W.2 and P.W.6 received the call from P.W.1 at 9 p.m. to 10 p.m., it is rather strange that the Police Out Post received the information from P.W.6 at 7 p.m. to 7.30 p.m. This inconsistency remains unexplained by the Prosecution.

(c) According to P.W.2, after the Head Constable of the Out Post informed him of the call from P.W.6, he informed his Senior Officer at the Singtam Police Station, who directed him to go to the Prosecutrixs house, which he complied with, taking along with him the said Head Constable. The Head Constable, however, is not a Prosecution Witness for unexplained reasons. P.W.6 further deposed that after he informed the Police personnel at the Out Post, they arrived at his house and he along with them *viz*., one Eden Bhutia and Bhai Bhutia, went to the house of the Prosecutrix. Both Eden Bhutia and Bhai Bhutia are not witnesses in the instant case thereby leading this Court to draw an adverse inference under Section 114 Illustration (g) of the Indian Evidence Act, 1872. The evidence of P.W.2 belies the evidence of P.W.6 with regard to him (P.W.6) having been accompanied by Police personnel to the P.O. The Prosecutrix also does not state that P.W.6 came to her house together with any Police personnel. According to her, the Police came to her house about half an hour to one

hour after the call. That, P.W.6 also came to her house and knocked on the door of the room where the Respondent was present. The Prosecution story on the above discussed aspects are haphazard, inconceivable and thereby fails to convince this Court of the events that transpired.

8. Another relevant factor is that according to the Prosecutrix, her mother P.W.3, lives about twenty minutes away from her house but P.W.3 to the contrary, stated that the Prosecutrix lives at a distance of about five minutes walk from her residence. The house of P.W.6, as stated by him, is at a distance of about five to eight minutes walk from the house of the Prosecutrix. This leads one to mull over as to why the Prosecutrix did not take shelter in her mothers house after having fled from the room, or why P.W.3 and P.W.6 went belatedly to her house when it was a short walk from their respective residences. The veracity of the evidence of the Prosecutrix and the Prosecution witnesses do not inspire confidence and appear to be far-fetched, as the evidence discussed above is rife with contradictions at every turn.

9. While considering the medical evidence of the Prosecutrix, the incident allegedly occurred at around 6.30 p.m. on 31.07.2017. She was forwarded to the District Hospital, Singtam where she was examined by P.W.7, the Consultant Gynaecologist at 12.10 a.m. of 01.08.2017 *viz.*, after about five hours of the alleged incident. She had not bathed or changed her clothes after the alleged incident, as stated by her to P.W.7. P.W.7 prepared his Report, Exhibit 4. He deposed *inter alia* as under;

> *"……I examined the victim after taking due consent from her.*
>
> *On my examination the victim was conscious, cooperative and all her vitals were stable.*
>
> *On local examination;*
>
> ***One bruise was found over her right neck***(sic) ***and four bruises were found over her left neck***(sic)**.**
>
> ***There were no bleeding from the bruises. No injury or bleeding was present over the***

breast(sic), ***abdomen and other parts of the body.***

Per vaginal inspection-No any(sic) ***bruise, injury present over the Perineal region, vulva and vagina.***

Per vaginal examination-No fresh injury present over the hymen and vagina.

Vaginal swab and vaginal wash was collected and sent for examination to determine the presence of spermatozoa. Urine for pregnancy test was found to be negative*. ……"*

(Emphasis supplied)

The medical examination thus revealed no fresh injuries on the person or the genital of the Prosecutrix despite her claim of use of force by the Respondent. The Doctor went on to identify MO I and MO II as the glass vials containing the vaginal wash and vaginal swab respectively, of the Prosecutrix collected by him. Under crossexamination, it came to light *inter alia* as follows;

"……I asked the patient whether she had taken a bath or wash(sic) ***her clothes after the alleged incident and in reply to that she said she had neither taken a bath nor washed her clothes****.*

I had taken the vaginal wash and vaginal swab on the request of the police. I have also answered in my medical report Exbt. 4, the other requests made by the I.O. ***It is true that in my medical report Exbt. 4, I have mentioned "the patient refused to give her undergarments and other clothing for examination****".*

I am not able to identify the signature of the Pathologist in Exbt. 4 who has given his/her opinion as "no motile/non-motile spermatozoa seen in the sample studied."

It is true that my examination as recorded in medical report Exbt. 4 does not show a possible forceful rape on the victim*. ……"*

(Emphasis supplied)

P.W.7 recorded in Exhibit 4 that the Prosecutrix refused to give her undergarment and other clothing for examination with no reason assigned by her for such refusal and investigation too is silent on this count. The age of the bruises found on the left and right portion of the Prosecutrixs neck, was not disclosed by P.W.7, hence, it is not clear whether the bruises were fresh and thereby allegedly caused by the Respondent or whether they were old injuries. The examination of the vagina of the victim too revealed no fresh injuries although she claimed to have been forcibly raped, thereby raising doubts about her allegation of penetrative sexual assault.

10. (a) Along with the evidence of P.W.7 *supra*, it is relevant to examine the evidence of P.W.9, the Scientific Officer, RFSL. She examined MO I and MO II (detailed *supra*). She also examined MO III, the underwear of the Respondent and MO IV and MO V, two glass vials containing the penile swab of the Respondent. In these Exhibits, neither blood nor semen, or any other body fluid could be detected.

(b) The collective evidence of P.W.7 and P.W.9, when meticulously examined, fail to establish that the Prosecutrix had been subjected to rape by the Respondent nor did the Prosecution fortify their case with any other evidence. The medical and scientific evidence therefore fail to support the Prosecution case.

c) The Pathologist who had given his/her opinion on Exhibit 4 regarding the absence of motile or non-motile spermatozoa in the samples studied, was not made a Prosecution witness. P.W.10, the Medical Officer who examined the Respondent at District Hospital, Singtam stated that he did not detect any stain marks on MO III, the undergarment of the Respondent.

11. (a) This Court is aware of the settled position of law that every rape victim need not have injuries on her body to prove her case (See ***Krishan vs. State of Haryana***[6]*)*. Further, the Honble Supreme Court observed in ***State of Rajasthan vs. N.K. the accused***[7]*, inter alia,* as follows;

[6] **(2014) 13 SCC 574**
[7] **(2000) 5 SCC 30**

> "**18**. .....The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. ....."

However, the Prosecution must establish with some trustworthy evidence that the Prosecutrix had indeed been subjected to sexual assault which, in the instant matter, has not been furnished.

(b) It may relevantly be noted here that after having committed a heinous offence, in the ordinary course of human nature, the first instinct of an accused would be to flee the place of occurrence but the incongruously unbelievable version of P.W.1 is that the Respondent continued to stay inside the room where he had committed the alleged offence and bolted himself from inside to boot. The evidence of P.W.6 is to the effect that P.W.1 had visited his house subsequent to the call made by her. It is rather surprising that in that interval the Respondent although left alone, still made no effort to escape. No investigation was conducted on this aspect. P.W.1 is evidently spinning a yarn regarding the incident which fails to find substantiation by evidence.

12. (a) In ***Ganesan vs. State*** *(supra)*, relied on by the Appellant, reference has been made by the Honble Supreme Court, to a catena of decisions wherein it was observed that conviction can be based on the sole testimony of the victim with the caveat that such testimony must be found to be reliable and trustworthy. Consequently, we cannot lose sight of the fact that a sole witness must be a sterling witness and the evidence given by her must be cogent, consistent and the version of the events should be unassailable. On the anvil of these enumerated qualities, we are constrained to opine that these are lacking in the instant case and the Prosecutrix, in no way, can be described as a sterling witness. Her solitary evidence is not trustworthy, cogent or unblemished.

(b) The Prosecution version that the Respondent has not explained the incriminating evidence against him under Section 313 Cr.P.C. besides which, he also had the option of explaining it under Section 106 of the Indian Evidence Act, cuts no ice in view of the fact that the Honble Supreme Court, in ***Nagaraj vs. State, represented by Inspector of Police, Salem Town, Tamil Nadu***[8] observed *inter alia* as under;

> *"…….*
>
> **15. In the context of this aspect of the law it has been held by this Court in *Parsuram Pandey* v. *State of Bihar* [(2004) 13 SCC 189: 2005 SCC (Cri) 113] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. *audi alteram partem*, as explained in *Asraf Ali* v. *State of Assam* [(2008) 16 SCC 328:(2010) 4 SCC (Cri) 278]. ……Having made this clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the**

[8] (2015) 4 SCC 739

extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. ....."

(Emphasis supplied)

13. (a) Besides, the Prosecution is to relevantly note that Section 106 of the Indian Evidence Act is not intended to relieve the Prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. This Section will apply to cases where the Prosecution has succeeded in proving facts from which reasonable inference can be drawn about the existence of certain other facts, unless the accused, by virtue of his special knowledge regarding such facts, fails to offer any explanation which might thus lead the Court to draw a different inference. In other words, Section 106 of the Indian Evidence Act is designed to meet certain exceptional cases where it is an impossibility for the Prosecution to establish certain facts. (See ***State of W.B. vs. Mir Mohammad Omar and Others***[9]*).*

(b) At this juncture, it may be noticed that the Respondent produced three witnesses. The Prosecution was afforded fair opportunity to cross-examine the witnesses. It emerged from the evidence of D.Ws.1, 2 and 3 that the Respondent was not unknown to the Prosecutrix as alleged by her but they had prior acquaintance. Under cross-examination, D.W.1, the wife of the Respondent, revealed that in the month of October, 2014, the Prosecutrix had purchased a carpet from her shop on credit, the cost of which was Rs.60,000/- (Rupees sixty thousand) only, and Rs.10,000/- (Rupees ten thousand) only, was paid by the Prosecutrix to D.W.1. D.W.3, evidently an acquaintance of D.W.1 deposed that the Prosecutrix had been introduced to him by the Respondent as a relative of his wife. The evidence of the D.Ws. adds to the doubts about the veracity of the evidence of the Prosecutrix.

14. In consideration of the gamut of facts and circumstances of the case, the contradictory evidence on record, as discussed in detail hereinabove, the medical evidence and the scientific evidence, all miserably fail to buttress the

[9] **(2000) 8 SCC 382**

Prosecution case. Thus, the evidence of the Prosecutrix definitely lacks the quality of being sterling neither is it absolutely trustworthy. Resultantly, we are in agreement with the finding of the Learned Trial Court that the Prosecution has failed to prove its case beyond a reasonable doubt. Hence, the impugned Judgment warrants no interference whatsoever.

15. Consequently, we find no merit in the Appeal which fails and is accordingly dismissed.

16. No order as to costs.

17. Copy of this Judgment be sent to the Learned Trial Court, for information.

18. Lower Court Records be remitted forthwith.

SLR (2021) SIKKIM 482

(Before Hon'ble the Chief Justice)

WP (C) No. 19 of 2021

Ram Bahadur Das ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

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

For the Respondents: Mr. Thinlay Dorjee Bhutia, Govt. Advocate.

Date of decision: 21st July 2021

A. Constitution of India –Article 226 – Whether subsistence allowance can be claimed during the discliplinary proceedings even after attaining the age of superannuation – Petitioner placed on suspension on 27.08.2001 on account of registration of a criminal case against him under Ss. 420, 467, 468 and 471 of the Indian Penal Code. He was convicted vide judgment dated 18.11.2005 passed by the Judicial Magistrate, East Sikkim. In appeal before the Session Court, the said order was affirmed and on filing the revision, the High Court vide order dated 07.06.2013 modified only the sentence, confirming the findings of the trial Court. SLP preferred before the Hon'ble Supreme Court, which was dismissed on 05.12.2014. Thereafter, the Department decided to take action against the petitioner as per rule 7 of the Sikkim Government Service (Discipline and Appeal) Rules, 1985 – In the meantime, the petitioner attained age of superannuation on 28.02.2017. For reasons best known by the Department, the subsistence allowance was paid to the petitioner up to May, 2019 even after retirement. When a petition was filed seeking direction to pay the subsistence allowance, the Department passed order dated 30.06.2021 retiring the petitioner compulsorily with effect from 28.02.2017 – Held: It is clear that after attaining the age of superannuation on 28.02.2017, the petitioner cannot draw subsistence allowance because

the master servant relationship ceased on the date when he attained the age of superannuation.

Petition dismissed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

The petitioner has filed this petition seeking direction for commanding respondent no.2 to pay the subsistence allowance from the month of June, 2019 to till date to the petitioner with a further prayer to issue any appropriate writ, order or direction.

The facts leading to decide the controversy and relief as prayed are relevant, wherein the petitioner was placed on suspension on 27.08.2001 on account of registration of Criminal case against him under Section 420, 467, 468 and 471 of Indian Penal Code. In a criminal trial he was convicted vide judgment dated 18.11.2005 passed by the Judicial Magistrate, East Sikkim. In Appeal before the Session Court the said order was affirmed and on filing the Revision, the High Court vide order dated 07.06.2013 modified only the sentence part, confirming the findings to prove charge. A Special Leave Petition was also preferred before the Hon'ble Supreme Court CRLMP No.23558- 23559/2014 which was dismissed on 05.12.2014.

Thereafter, the Department has decided to take action as per the provision of Rule 7 of the Sikkim Government Service (Discipline and Appeal) Rules, 1985. It is relevant to note that the petitioner attained the age of superannuation on 28.02.2017. For the reasons best known by the department the subsistence allowance was paid to the petitioner up to May, 2019 even after retirement. Now when the petition was filed seeking direction to pay the subsistence allowance, the department came to pass an order dated 30.06.2021 retiring the petitioner compulsorily with effect from 28.02.2017.

In view of the foregoing facts, it is clear that after attaining the age of superannuation on 28.02.2017 the petitioner cannot get subsistence

allowance because the master servant relationship ceased on the date on which he has attained the age of superannuation, these prayers as made in the Writ Petition cannot be granted.

Counsel for the petitioner has strenuously urged that he must be paid the pension after the date of compulsorily retirement but the said issue is not the subject matter of this case looking to the grievance and relief prayed. In view of the foregoing, it is open to the petitioner to take recourse of law as permissible but in the present case no direction can be issued.

In view of foregoing, in my considered opinion, the relief prayed for by the petitioner cannot be granted, accordingly, this Writ Petition is dismissed.

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SLR (2021) SIKKIM 485

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

I.A. no. 1 of 2020 in WP (C) No. 35 of 2019

Dr. Dilli Ram Dahal and Another ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

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

For Respondent 1 and 3: Dr. Doma T. Bhutia, Additional Advocate General.

For Respondent 2 and 4: Mr. Bhusan Nepal, Advocate.

For Respondent No.5: Mr. Saurabh Tamang, Advocate.

For Respondent No.6: Mr. Thinlay Dorjee Bhutia, Advocate.

For Respondents 7-9: Mr. J.B. Pradhan, Senior Advocate with Ms Sabina Chettri, Advocate.

Date of decision: 28th July 2022.

A. Code of Civil Procedure, 1908 – O.1 R. 10(2) – Court to strike out or add parties – The general rule regarding impleadment of parties is that the plaintiff in a suit is the *dominus litus* whichmeans that the plaintiff is the master of or having dominion over the case – A "necessary party" is a person who ought to have been joined as a party and in whose

absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made – R. 10(2) is about the judicial discretion of the court to strike out or add parties at any stage of the proceeding by exercising the judicial discretion according to reason and fair play and not according to whims and caprices (*In re. Mumbai International Airport (P. Ltd.) v. Regency Convention Centre and Hotels P. Ltd.* relied).

(Paras 10 and 11)

Application dismissed.

Case cited:

1. Mumbai International Airport (P. Ltd.) v. Regency Convention Centre and Hotels P. Ltd. (2010) 7 SCC 417.

ORDER

Bhaskar Raj Pradhan, J

1. The petitioners have filed the present writ petition against nine respondents. Respondent no. 1 and 3 are the State of Sikkim and the Department of Personnel, Administrative Reforms and Training; Respondent no. 2 is the Sikkim Public Service Commission (SPSC); respondents no. 5 and 6 are the Sikkim University and University Grants Commission, respectively; respondents no.7, 8 and 9 are Assistant Professors in various Government Colleges (respondents 7 and 8 belong to the Department of Geography and respondent no.9, the department of Tourism); respondent no. 4 is the Selection Committee through its Chairman. The grievance in the writ petition is the non-selection of the petitioners and the selection of respondent nos. 7, 8 and 9.

2. It is the case of the petitioners that the Selection Committee was illegally constituted and that it has not applied its mind. It is further alleged that the Selection Committee have selected candidates who are not qualified and failed to consider the petitioners who have the required qualifications. It is alleged that the Selection Committee have acted against the University Grants Commission's Acts and Regulations; have not verified and examined the genuineness and authenticity of the articles published of the successful candidates and have violated the provisions of the manual of the Sikkim Public Service Commission. Besides the aforesaid grounds of challenge against the Selection Committee, the petitioners have also alleged in their pleadings that the Selection Committee have committed various other illegalities in the selection process. In paragraph 18(v), the petitioners have alleged "*That the selected candidates namely, Pranesh Pandey (Economics), Santosh Sharma (Economics) were scholars under same subject expert Prof. Manish Choubey (Dept. of Economics, Sikkim University) who was present during Classroom Demonstration. Ph.D. Registration numbers of the above named successful candidates working under Prof. Manish Chowbey as Ph.D Scholars are 14/PhD/ ECON/01 and 14/PhD/ECON/02 respectively. They had been working under the same subject expert since 2014 as PhD scholars who had conducted the classroom demonstration, which is highly unjustified, unfair and objectionable*." Besides the aforesaid, it is also alleged that the selected candidates, i.e., respondent no.7, 8 and 9 had not satisfied various requirements and despite that they were selected by the Selection Committee in violation of the applicable rules. It is alleged that the Selection Committee was not constituted in the manner required and it also did not have the nominee of the Vice-Chancellor of the Sikkim University as required. It is alleged that the Selection Committee have not given due weightage to the extra additional qualifications secured by the petitioners and that the selection procedure was not transparent, objective and credible.

3. The SPSC has filed a counter-affidavit. However, the Selection Committee has not and instead, filed this application, being I.A. No. 1 of 2020, under Order I Rule 10(2) of the Code of Civil Procedure, 1908 for

deletion of the Selection Committee as respondent no.4 from the array of parties. In the application, the Selection Committee have quoted the prayers in the writ petition and submitted that the task of the Selection Committee was only to conduct recruitment/selection test and submit the statement of marks to the SPSC. It is submitted that on completion of the process the Selection Committee becomes *functus officio*. It is thus urged that the Selection Committee is neither a necessary party nor a proper party. In the reply filed by the petitioners, it is urged that the task of the Selection Committee was not only to conduct the recruitment test and submit the statement of marks, but they were to verify and authenticate the relevant documents submitted by the candidates which was not done.

4. Mr. Bhusan Nepal, learned Counsel for the respondent no.2, submitted that all the prayers are directed against the other respondents and none against the Selection Committee. He further submitted that since the process of recruitment is over the Selection Committee has become *functus officio* and therefore, there is no need for the Selection Committee to be arrayed as respondent no.4. He referred to the counter-affidavit filed by the SPSC and drew the attention of this court to Notification dated 14.09.2017 (Annexure R-7). The said notification issued by the SPSC dated 14.09.2017 (Annexure R-7) (the notification) is extracted hereinbelow:-

> " ....……....……
>
> No. 38/SPSC/Exam/2017 Dated 14/09/2017
>
> **NOTIFICATION**
>
> The Sikkim Public Service Commission in terms of Rule 51(7) of the rules of Procedure and Conduct of Business of the Sikkim PSC hereby constitute a Selection Committee consisting of the following members for the purpose of recruitment of candidates to the post of Principal/Lecturers in the Government Colleges of Sikkim under Human resource Development Department:

1. Chairman, SPSC

2. Members, SPSC

3. The Secretary, DoPAR&T

4. The Secretary HRDD

5. One Member to be nominated by the Vice Chancellor, Sikkim University

6. One member to be nominated by the Commission

7. Subject Experts to be co-opted by the Commission whenever necessary.

By order

(Deepa Rani Thapa) SCS
SECRETARY
Sikkim Public Service Commission

……..……..”

5. While supporting Mr. Bhusan Nepal’s application, Mr. J.B. Pradhan, learned Senior Advocate representing respondents no. 7, 8 and 9, also submitted that the SPSC would be able to effectively answer all the allegations made in the writ petition *vis*-à-*vis* the Selection Committee and as none of the reliefs were sought against the Selection Committee, the Selection Committee was neither a necessary party nor a proper party.

6. Mr A. Moulik, learned Senior Counsel for the petitioners, however, vehemently contended that the Selection Committee was a necessary and a proper party in view of the specific allegations being against them in paragraphs 17, 18, 19, 20, 23, 24, 25, 28, 30, 31, 32, 34, 36, 42, 43, 46, 47, 48, as well as various grounds in the writ petition.

7. Dr. Doma T. Bhutia, learned Additional Advocate General representing respondents no. 1 and 3, supported the legal contention made by Mr. A. Moulik and submitted that in the given facts the Selection Committee would be a proper party.

8. The notification has been issued in terms of Rule 51(7) of the Rules of Procedure and Conduct of Business of Sikkim Public Service Commission. Rule 51(7) is quoted hereinbelow:-

> "**51. Recruitment by interview**:-
>
> .....
>
> (7) The Selection Board or the Interview Board constituted by the Government by Notification, and in the absence of such Notification the Selection Board or Interview Board constituted by the Commission, shall interview the candidates. The Commission may invite subject expert or any other person with expert knowledge in the subject concerned to be on its Selection Board or Interview Board.
>
> ....."

9. A perusal of Rule 51(7) makes it evident that the Selection Board or the Interview Board was to be constituted by the Government by notification and in the absence of such notification, the Selection Board or the Interview Board could be constituted by the SPCS to interview the candidates. The notification reflects that it was the SPSC who had constituted the Selection Committee and not the Government. Besides the Chairman and the Members of the SPSC, the Secretary DOPART, the Secretary HRDD, one Member nominated by the Vice Chancellor of the Sikkim University, one member nominated by the SPSC and subject experts co-opted by the SPSC whenever necessary were made the members of the Selection Committee for the purpose of recruitment of candidates to the

posts of principle/lecturers in the Government Colleges of Sikkim. The records reveal that the advertisement for the selection under challenge is dated 13.10.2017 after the issuance of the notification.

10. The general rule regarding impleadment of parties is that the plaintiff in a suit is the *dominus litus. Dominus litus* means that the plaintiff is the master of or having dominion over the case. In ***Mumbai International Airport (P. Ltd.) vs. Regency Convention Centre and Hotels P. Ltd.*** (2010) 7 SCC 417, the Supreme Court held:-

> ***"15.*** *A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. ……."*

11. The Supreme Court also held that Rule 10(2) CPC is about the judicial discretion of the court to strike out or add parties at any stage of the proceeding by exercising the judicial discretion according to reason and fair play and not according to whims and caprices.

12. There are allegations against the Selection Committee strewn across the writ petition although no relief is sought against it. One specific allegation is made against a member of the Selection Committee who is not part of the SPSC but is there by virtue of issuance of the notification. Thus, SPSC would not have the necessary personal knowledge to answer the allegation. It seems that the Selection Committee was constituted for the purposes of

recruitment of candidates to the posts of Principal and Lecturers in Government Colleges generally and not specific to the selection process in question only. It is also not alien to implead a Selection Committee in a litigation. It may be correct that the function of the Selection Committee comes to an end when the process of selection is completed, and the proceedings drawn. The consequence is that the Selection Committee may not be able to alter what they have already done. However, it is completely out of place to argue that therefore Selection Committee is neither a necessary party nor a proper party because the selection process is over. Besides, if the SPCS which created the Selection Committee is answerable so is the Selection Committee. In the given facts judicial discretion may be better exercised in favour of permitting the Selection Committee to reply to the allegations made by the petitioner as the *dominus litus* then to delete it from the array of parties and deny it the opportunity to do so.

13. This court is thus of the view that even if the Selection Committee may not be a necessary party, it is a proper party whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the present writ petition.

14. I.A. No. 1 of 2020 is accordingly rejected.

15. No order as to costs.