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SUBJECT INDEX

Code of Civil procedure, 1908 – S. 151 – Inherent powers of the appellate Court can be availed *ex debito justitiae* only in the absence of express provisions in the Code – In exceptional cases, the Court can exercise the power of remand *dehors* Rr. 23 and 23 A of O. 41, C.P.C – After the amendment Act No.104 dated 01.02.1977, as per S. 99, if there is defect of non-joinder of "necessary party" and the lower appellate Court records a finding that re-trial is necessary by setting aside the decree of the Trial Court, the appellate Court may direct remand in exercise of the powers of Rr. 23 or 23A or even *dehors* the rule in exceptional cases (*In re. P. Purushottam Reddy* discussed).

Jigmi Phunchok Bhutia* v. *Aishwarya Rai and Another ***138C***

Code of Criminal Procedure, 1973 – S. 164 – The statement in Exhibit-59, 67 and 66 being S. 164 Cr.P.C statements of PW-6, PW-7 and one K.K. Rakshit respectively, is of no assistance to the prosecution case. PW-6 in his S. 164 Cr.P.C statement has deposed that he had made his statement before a Judge but that he was told by the CBI Officer what was to be stated before the Judge. On the Court questioning him as to whether he had made a true statement before the Judge, he replied that he had told the Judge what had occurred and what he knew. However, in a subsequent statement he stated that the contents of Exhibit-59 were not read over or explained to him and he was made to affix his signature on Exhibit-59. His vacillating evidence renders his evidence with regard to his S. 164 Cr.P.C statement unreliable – Although his (PW-7) S.164 Cr.P.C statement was shown to him wherein he stated that "the statement made before the Judge was my true statement", but he was not confronted with any specific statement made by him under S. 164 Cr.P.C before the Trial Court and in the absence of such corroboration his S. 164 Cr.P.C statement merits no consideration – It is trite that a statement under S. 164 Cr.P.C is not substantive evidence but can be used only for corroboration or contradiction.

Central Bureau of Investigation* v. *Dr. Pratap Makhija and Others ***196A***

Constitution of India – Article 226 – Public Interest Litigation – The nature of the order issued is by way of internal correspondence for functioning of any political party which cannot be a subject matter of interference in a Public Interest Litigation – Questioning the correspondence of the individual political party, Public Interest Litigation cannot be entertained.

Dorjee Tshering Lepcha* v. *State of Sikkim and Others ***123A***

Constitution of India – Article 226 – Public Interest Litigation – We are of the considered view that the present Public Interest Litigation has served its purpose – The hydro power projects in Sikkim shall ensure strict compliance of the safety guidelines. The concerned Governmental authorities directed to undertake periodic inspection and review to ensure that the hydro power projects in Sikkim follow the safety guidelines and all other rules and regulations mandating safety measures to ensure that life and properties of the people living in the vicinity of the hydro power projects and in the areas which could be affected by the flow of the waters from these projects are safeguarded.

In Re: Release of Water from Dikchu Hydel Power Project **v.** ***The Chief Secretary, Government of Sikkim and Others*** ***128A***

Constitution of India – Article 226 – Relief sought is for shifting of 132/66 KV Dikchupool Sub-Station to another identified place at Samdong – Initially it was decided that 132/66 KV Sub-Station may be established at Dikchu thereafter, a joint survey was conducted and the report was forwarded to respondent no. 4 for scrutinizing of technical suitability of the aforementioned land – Engineering Department opined that the land at Dikchu is not feasible for establishment of 132/66 KV Dikchupool Sub-Station and requested to shift it to any alternative land. In furtherance thereto, steps were taken and it was decided that the land at Samdong Block may be suitable for establishment of 132/66 KV Sub-Station – The directions issued by this Court has been complied with and the technical report of the location at Samdong Block is found technically justifiable for establishment of 132/66 KV Dikchupool Sub-Station – Not inclined to further interfere in this matter so far as the reliefs regarding acquisition of private land is concerned – Aggrieved person may take recourse of law as permissible, if aggrieved. The said issue is not required to be entertained in this Public Interest Litigation, at the instance of the petitioner.

Karma Jigmi Dawa **v.** ***Union of India and Others*** ***135A***

Constitution of India – Article 226 – Relief sought by the petitioner is to issue writ in the nature of mandamus or any other writ, order or direction, commanding the respondents more particularly respondent no. 6, i.e. Election Commission of India to hold assembly elections in the State of Sikkim according to the seat distribution system as envisaged under Article 371-F of the Constitution of India and S. 7A of the Representation of the People Act, 1950 – It was brought to the notice of the Court that the Central Government by Amendment Act No. 08 of 1980, w.e.f.

01.09.1979, inserted an amendment by S. 7 (1A) of the Representation of People Act. The said change of percentage of reservation to constituencies is contrary to the laws which were in force immediately before the appointed date in the territories comprise in the State of Sikkim as specified in Article 371-F of the Constitution of India by 36th amendment brought w.e.f 26.04.1975 and S. 7A of the Representation of People Act – Held: Without challenging the vires of S. 7 (1A) of the amended Representation of People Act, 1950 the relief aforementioned, as prayed for, cannot be directed. Petitioner may take recourse challenging the vires of the provision of Representation of the People Amendment Act, 1980.
Vivek Anand Basnett* v. *Union of India and Others ***149A***

Constitution of India – Article 226 – State respondents No.1 and 3 to appoint petitioner in the post of Under Secretary – Date of appointment of the petitioner shall be deemed to be from 13.01.2018 – Seniority for all purposes of his service shall be computed from 13.01.2018 – Shall rank last in the sequence of seniority in the list of candidates – Benefits of increments to his salary to be extended from 13.01.2018.
Arun Chettri* v. *State of Sikkim and Others ***152A***

Indian Evidence Act, 1872 – Principles of Criminal Law – The basic principle of criminal law is that the prosecution has to prove his own case and they cannot take advantage of the lacuna of the defence. Except in a case of admission of guilt in Court by an accused, his defence may be seen after the discharge of burden by prosecution, when onus shifts – At the appellate stage, the High Court may examine the justiciability of the findings recorded by the Trial Court taking note of the above principles of law and can reverse those findings if it is perverse or illegal on appraisal or reappraisal of evidence. The defence so put by the accused may be looked into only when the prosecution proves the case beyond a reasonable doubt.
Shri Sajal Rai @ Adrian* v. *State of Sikkim ***181A***

Indian Evidence Act, 1872 – Sole Testimony – Evidentiary Value – Sole testimony of a prosecutrix, if it is wholly reliable, safe and worthy to accept, conviction can be based for an offence under S. 376, I.P.C – But if the testimony throws doubt on the prosecution case due to the unnatural conduct of family, the evidence being impeachable, it cannot be relied upon without corroboration by other evidence, more so, when it creates a doubt about the improbability of the story of the prosecution.
Shri Sajal Rai @ Adrian* v. *State of Sikkim ***181B***

Indian Evidence Act, 1872 – Sole Testimony – Evidentiary Value – The statement of the prosecutrix recorded in the Court is an improvement of the prosecution story – The statement of PW-6, sister of the prosecutrix who was with her states different story in this regard – The prosecution story as reflected in the charge-sheet about what happened to the victim, the circumstances before and after the incident is substantially different from what the prosecution witnesses has stated in the Court – The sole testimony of the prosecutrix is not of sterling character even in the manner the allegation of rape is alleged – Not safe to rely upon – Has not found support from medical evidence.

Shri Sajal Rai @ Adrian* v. *State of Sikkim ***181C***

Indian Evidence Act, 1872 – Documentary Evidence – Trial Court of the opinion that Exhibit-87 was a false document not having been issued by the competent authority as the Register Exhibit-86 started from serial No. 2555 and ended at serial No. 4703 with no entry No. 5255 in the said Register – Trial Court despite such finding was of the opinion that as A-4 was only 12 years old at the relevant time, he could not be held liable for obtaining the false Birth Certificate – Disagreeing with the finding of the Trial Court that Exhibit-87 is a false document, it is important at this juncture to consider the admission of PW-22 that the Birth Register Exhibit-86 pertains to registration No. 2555 onwards up to 4703 – The records of births after registration No. 4703 were not produced before the Court and the Police did not seize the Birth Register from their Office beginning from registration No. 4704 onwards. This admission raises doubts about the efficiency of the prosecution investigation which appears to be remiss and perfunctory – Would not render the document false and in fact prompts the Court to draw an adverse inference against the prosecution. The benefit of doubt is thus extended to A-4 as the Trial Court had no occasion to examine whether an entry pertaining to Exhibit-87 existed in any other Birth Register.

Central Bureau of Investigation* v. *Dr. Pratap Makhija and Others ***196B***

Indian Penal Code, 1860 – S. 120B – Criminal Conspiracy – To bring home an offence under S. 120B of the I.P.C, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. Undoubtedly, it is difficult to establish conspiracy by direct evidence, but circumstantial evidence must link the offence unerringly to each of the accused who allegedly enter into a conspiracy.

Central Bureau of Investigation* v. *Dr. Pratap Makhija and Others ***196C***

Motor Vehicles Act, 1988 – Income of the Deceased – Determination – BDO in the State of Sikkim is competent to issue income certificate as per Notification dated 03.04.2007 – If the income certificate issued by a competent authority has been relied by the Tribunal accepting the earning of ₹ 20,000/-, the onus to disprove it shifts on the Insurance Company – It was the duty of the Insurance Company to call the BDO in the witness box and put questions to him whether he has verified the books of transaction of the business recorded in the Books of Account while issuing the income certificate.

***Branch Manager, New India Assurance Co. Ltd* v.**
Shyam Babu Singh and Others ***226A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of delay – It is clear from the second proviso that the High Court may entertain the appeal after expiry of the period of ninety days if it is satisfied that the appellant was prevented by "sufficient cause" from preferring the appeal in time – Incongruous for the petitioner/appellant to have placed reliance on Circulars dated 24.03.2020, 14.04.2020 and 18.04.2020 of the High Court which were issued much after the period of limitation had expired for filing the appeal. No grounds have been put forth as to why the delay of 261 days occurred prior to the COVID-19 pandemic and the issuance of the consequent Circulars.

***Branch Manager, New India Assurance Co. Ltd* v.**
Dechen Ongmoo Lepcha and Others ***175A***

Right to Fair Compensation to Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Relief sought is to issue writ of certiorari and/or appropriate writ/order against respondent No. 3 and 4 to complete the process of acquisition of the petitioners land or in the alternative, direct for compensation – Held: Order of determination of compensation passed by the Government of Sikkim through the Land Revenue and Disaster Management Department dated 01.11.2017 has not been represented or assailed by respondent No. 1 and 2 taking recourse of law, therefore, it has become final. In the said context, relief no. 1 as prayed in the writ petition has outlived its utility on account of the letter referred by respondent No. 1 and 2 dated 22.04.2017 for de-acquisition – The first relief has now rendered infructuous – So far as the second relief prayed in alternative for compensation, the same is surviving because after initiating the proceedings under S. 11 of the new Act, it was not been completed and the process of de-acquisition has been initiated on the

request of respondent No. 1 and 2 – With regard to applicability of S. 93 of the new Act, the person whose land was required to be acquired, a preliminary Notification taking recourse of S. 11 of the Act ought to be issued and possession thereof should not be taken over, only then compensation may be determined and paid.

Karma Tenzing and Others* v. *Chief of the Army Staff and Others ***168A***

Right to Fair Compensation to Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – S. 93 – Legislative intent is clear that completion of compulsory acquisition by the appropriate Government is not necessary, they may have liberty to withdraw the said acquisition of which the possession of land has not been taken over after initiating the process of acquisition – When appropriate Government intends to withdraw any such acquisitions, prior to its completion, the Collector is duty bound to determine the amount of compensation due for the damages suffered by the owner in consequence of the Notice or of any proceedings thereunder and such amount shall be paid to the persons interested together with the cost reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land – Under the new Act, special provisions has been enacted by which even at any stage the Government may have liberty or can decide to withdraw from the said acquisition if not completed subject to payment of compensation for the damages suffered by the owner on account of notice and other proceedings brought against him – The determination of compensation made by the Collector vide letter dated 01.11.2017, inter alia, stating that the said compensation is for damages of crops yield involved due to cancellation of acquisition after Notice under S. 11 of the new Act squarely falls within the connotation "in consequence of the Notice" – Held: Compensation determined by respondent No. 3 and 4 vide letter dated 01.11.2017 shall be deposited by respondent No. 1 and 2 within three months from the date of communication of this order. Failure to deposit within the time limit shall entail deposit with interest @ of 6 % per annum – On receipt of the said amount of compensation, respondent No. 3 and 4 shall pay the same to the petitioners, as per law within a further period of one month or may keep in fixed deposit till its disbursement. On failure to pay by respondent No. 3 and 4 within the stipulated time, the interest as per the rates of fixed deposits prevalent on the date of deposit be payable to the petitioners.

Karma Tenzing and Others* v. *Chief of the Army Staff and Others ***168B***

Sikkim Allotment of House sites and Construction of Building (Regulation and Control) Act, 1985 – No right to construct a garage on Government land adjacent to public road – Not inclined to interfere with the impugned order in exercise of the power of review in absence of any error apparent on the face of the order.

D.B. Thapa **v.** ***Urban Development and Housing Department*** ***166A***

Sikkim Trade License and Miscellaneous Provision Rules, 2011 – Rule 10A – License may be transferrable only in the case of death of the licensee having a valid trade license, if the legal heir submits documentary proof, no objection certificate from the family members and other required documents within three months – The licensee died on 07.03.2016 but at the time of his death valid trade license was not in existence. An application was submitted on 22.03.2016 in the name of the deceased which was granted up to 31.03.2016. Later, by a correspondence made by respondent no. 1, it was observed that the said license was deemed to be cancelled because the application was submitted in the name of a dead person on 22.03.2016 though he had died on 07.03.2016 – The only recourse is the grant of fresh license – The recourse of taking up of renewal of license and transfer of license is not at all available to petitioners – Petitioners must first apply to respondent no.1 for grant of license in Form No.1 of the Rules.

Amirun Nisa and Another **v.** ***Singtam Nagar Panchyat and Others*** ***132A***

SLR (2021) SIKKIM 123

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

WP (PIL) No. 02 of 2021

Dorjee Tshering Lepcha ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

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

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

Date of decision: 1st March 2021

A. Constitution of India – Article 226 – Public Interest Litigation – The nature of the order issued is by way of internal correspondence for functioning of any political party which cannot be a subject matter of interference in a Public Interest Litigation – Questioning the correspondence of the individual political party, Public Interest Litigation cannot be entertained.

Petition dismissed.

ORDER (ORAL)

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

This petition in the nature of Public Interest Litigation has been filed by the petitioner under Article 226 of Constitution of India assailing the Office Order dated 17.11.2019 issued by the respondent no.3 and to declare it as null and void with a further prayer to restrain all departments

of respondent no.1 entertaining the recommendations made by the respondent no.4 an Area In-charge appointed in their respective constituency of respondent nos.2 and 3 with a further prayer to issue a writ in the nature of mandamus declaring that any work, appointment, selection of beneficiaries of rural scheme for whatsoever executed till date on the basis of the recommendations are null and void with a further direction that the respondent no.4 do not have any executive and quasi-executive power in the Government of Sikkim, to make any such recommendation further restraining respondent no.4 and an Area In-Charge from placing their designation place from their Area In-charge of their vehicles.

After hearing learned Counsel for the petitioner Mr. Yam Kumar Subba at a length and looking into the nature of the order which is issued by way of internal correspondence for functioning of any political party cannot be a subject matter of interference in the Public Interest Litigation, therefore, the Consequential reliefs as prayed for, in this Writ Petition by the petitioner seeking writ in the nature of mandamus to issue direction against the respondent no.1 is not required to be invoked.

We are constraint to observe that the Government and the departments of the respondent no.1 ought to have discharge their duties in accordance with law and the merit of the individual issues. In case any aggrieved person is there whose grievance has not been addressed and they have not been given the benefit, which they are entitled to, at liberty to approach the Court in individual. However, questioning the correspondence of the individual political party, Public Interest Litigation cannot be entertained.

It is further to observe that pasting the assignment by a citizen on any Motor Vehicles is the subject matter of issue which is to be looked into by the appropriate Authorities on submitting of the representation in terms of the provisions of the Motor Vehicles Act and to redress it as per law.

In view of the forgoing discussion, in the opinion of this Court this Public Interest Litigation is not entertainable, therefore, dismissed with the observation made hereinabove.

SLR (2021) SIKKIM 125

(Before Hon'ble the Chief Justice)

WP (C) No. 43 of 2018

Malika Rai ….. PETITIONER

Versus

Siri Bahadur Bhujel and Others ….. RESPONDENTS

For the Petitioner: Mr. A. Moulik, Sr. Advocate with Mr. Ranjit Prasad, Advocate.

For Respondent No.1: Mr. N. Rai, Sr. Advocate with Ms. Sudha Sewa, Advocate.

For Respondent 2-4: Mr. Sujan Sunwar, Asst. Govt. Advocate.

Date of decision: 1st March 2021

A. Civil Procedure Code, 1908 – O. VI R. 17 – Amendment of Pleadings – Change of boundaries proposed by amending the pleadings of the suit – The suit is at an initial stage and the trial has not yet commenced – The defendant has right to dislodge the pleadings of the plaintiff by consequential amendment in the written statement – Therefore, the proposed amendments as allowed by the Trial Court directing to incorporate it, do not warrant interference in exercise of the power under Article 227 of the Constitution of India at this stage.

Petition dismissed.

Case cited:

1. Smt. Krishna v. Smt. Laila Begum and Others, 2012 SCC OnLine P&H 3869.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Invoking jurisdiction of Article 227 of the Constitution of India and assailing the order dated 01.08.2018 passed by the learned Civil Judge, East Sikkim at Gangtok in T.S. Case No. 03/2018 allowing the application filed by the plaintiff, plaintiff seeking amendment under Order VI Rule 17 read with Section 151 of the Civil Procedure Code, 1908, this petition has been preferred.

Learned Counsel for the defendant/ petitioner contends that by way of proposed amendment, allowed and permitted to be incorporated by the Learned Trial Court, the boundaries of the property which is in question has been substantially changed therefore, it would amounting to change of nature of the property and suit to which a decree is sought, in such a circumstance the order passed by the learned Civil Judge and in particular reasonings so assigned is not justifiable. Therefore, the order passed by the learned Trial Court may be set aside. Learned counsel placed reliance on a case of Haryana High Court contending that in a similar circumstances the Court refused to entertain the application seeking amendment. In view of the forgoing it is asserted that, the order passed by the learned Civil Judge is in access to the jurisdiction not conferred on him as per the provisions of Order VI Rule 17 CPC, therefore, such an order may be set aside.

On the other hand, learned counsel representing the plaintiff/ respondent submits and has argued in support of the order passed by the learned Trial Court, *inter alia*, contending that the suit is at its initial stage and the trial has not yet commenced and the defendant/petitioner is having right to make consequential amendment in the written statement, therefore, looking to the stage of the case, which is at initial stage, the amendment in pleading if allowed would not prejudice the right of the defendant. Therefore, the order passed by learned Trial Court exercising the power under Order VI Rule 17 CPC is as per Rules. Therefore, interference by this Court in exercise of power under Article 227 of the Constitution of India is not warranted.

Having heard learned counsel for both the parties and on perusal of the facts of the case, it appears that the change of the boundaries has been

proposed by amending the pleadings of the suit. Undisputedly the suit is at initial stage and the trial has not yet commenced, and the defendant is having right to dislodge the pleadings of the plaintiff by consequential amendment in the written statement. It is settled law the Court cannot comment on the merits of the case at the time of considering the application for amendment. Therefore, the proposed amendments as allowed by the Trial Court directing to incorporate it, do not warrant interference in exercise of the power under Article 227 of the Constitution of India at this stage. 3 It is suffice to observe that the defendant/petitioner is having right to make all consequential amendment in the written statement and take their defence whatever is permissible under the law.

At this stage it is suffice to observe the judgment of ***Smt. Krishna*** (supra) of Punjab & Haryana High Court in which 12 opportunities to led evidence were granted to the plaintiff for recording their evidence, in which the trial was commenced. Therefore, the order so passed by the Punjab & Haryana High Court is of no help to the petitioner.

In view of the forgoing discussion and for the reasons stated hereinabove, in the opinion of this Court interference in this petition is not warranted. Accordingly, it is dismissed without any order as to cost.

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SLR (2021) SIKKIM 128
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

WP (PIL) No. 04 of 2017

In Re: Release of Water from Dikchu Hydel Power Project ….. PETITIONER

Versus

The Chief Secretary, Government of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. N. Rai, Sr. Advocate as *Amicus Curiae*.

For Respondent 1-3: Dr. Doma T. Bhutia, Additional Advocate General with Mr. S.K. Chettri, Government Advocate.

For Respondent No. 4: Mr. Tashi Rapten Barfungpa, Advocate.

For Respondent 5 & 8: Mr. A.K. Upadhyaya, Sr. Advocate with Mr. Sonam Rinchen Lepcha, Advocate.

For Respondent No. 6: Ms. Sabina Chettri, Advocate.

For Respondent 1 & 9: Mr. Rahul Rathi, Advocate.

For Respondent 10 & 11: Mr. Sudhir Prasad, Advocate.

Date of decision: 1st March 2021

A. Constitution of India – Article 226 – Public Interest Litigation – We are of the considered view that the present Public Interest Litigation has served its purpose – The hydro power projects in Sikkim shall ensure strict compliance of the safety guidelines. The concerned Governmental authorities directed to undertake periodic inspection and review to ensure

that the hydro power projects in Sikkim follow the safety guidelines and all other rules and regulations mandating safety measures to ensure that life and properties of the people living in the vicinity of the hydro power projects and in the areas which could be affected by the flow of the waters from these projects are safeguarded.

(Para 6)

Petition allowed.

JUDGMENT

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

1. On 31.05.2017 this court issued notice upon the respondent nos. 1 to 5 after it was brought to our notice through a newspaper report titled "Local accuse Dikchu Project Developers of releasing water without warning" which appeared in Summit Times, a local daily, on 28.05.2017 that water was being released from Dikchu hydropower project without any warning or information which may jeopardize the life and property of the residents living downstream. On 01.06.2017 we took note of the "Guidelines for Public Safety at Hydropower Projects" (safety guidelines) issued vide Notification No.26/Home/2015 dated 22.06.2015 and the fact that the respondent no.4, a hydropower project, despite notice had not taken necessary steps. The district collector, East Sikkim was directed to visit the site and verify as to whether the safety guidelines issued were being followed.

2. The district collector filed a report dated 02.06.2017 pointing out various deficiencies which was noted in our order dated 05.06.2017. We therefore, issued directions upon the respondent no.4 to make good the deficiencies and to ensure that all safety standards required be installed and undertaken. On the request of the learned Amicus Curiae, vide order dated 20.06.2017, this court permitted him to make site inspection of other hydropower projects situated in Sikkim as well, and submit a report regarding their compliance of the safety guidelines. On 28.07.2017 the learned Amicus Curiae reported that he had visited various hydropower projects situated in Sikkim and found that several requirements of the safety

guidelines had not been complied with by those hydropower projects. Thus we issued notice upon all the other hydropower projects named in the order dated 28.07.2017 (respondent no.6 to 11). Pursuant to the notice, affidavits were filed by the hydropower projects and the concerned district collectors were directed to examine the affidavits, inspect the site and submit their response vide our order dated 14.09.2017. Various directions to specific hydropower projects for compliance of the safety guidelines were issued from time to time by us on being pointed out the deficiencies. On 12.12.2017 it was noted by us that all safety measures had been complied by the hydropower projects situated in the four districts as per the reports submitted by the four district collectorates in compliance of the order dated 21.11.2017 passed by this court.

3. At this juncture the Energy and Power Department, Government of Sikkim submitted a report with regard to the abandoned pond at the Sirwani hydropower project (Sirwani project) where stagnant water of around 35000 cum. was seen.

4. Thereafter, various orders were passed from time to time to ensure the drainage of the stagnant water at the Sirwani project. An affidavit dated 22.02.2021 has been filed on behalf of respondent no.5 stating that in pursuance to the order dated 30.11.2020 the dewatering of the desilting basin has been completed and there is no water logging in the area. It is also pointed out that seepage water has been collected in a sump and there is continuous dewatering from the sump on a regular basis. The respondent no.5 points out that construction activity in the said area has also started. The latest photographs before and after dewatering has been annexed along with the affidavit.

5. The learned Amicus Curiae, thus, submit that nothing further survives in the public interest litigation which may, therefore, be closed.

6. We have considered the submission made by the learned Amicus Curiae and examined the reports filed from time to time by parties before this court. We are of the considered view that the present Public Interest Litigation has served its purpose. Thus, we close the case with the direction

that the hydropower projects in Sikkim shall ensure strict compliance of the safety guidelines. The concerned Governmental authorities are also directed to undertake periodic inspection and review to ensure that the hydropower projects in Sikkim follow the safety guidelines and all other rules and regulations mandating safety measures to ensure that life and properties of the people living in the vicinity of the hydropower projects and in the areas which could be affected by the flow of the waters from these projects are safeguarded.

SLR (2021) SIKKIM 132

(Before Hon'ble the Chief Justice)

WP (C) No. 01 of 2019

Amirun Nisa and Another ….. PETITIONERS

Versus

Singtam Nagar Panchayat and Others ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Sr. Advocate with Mr. Ranjit Prasad, Advocate.

For Respondent No.1: Mr. J.B. Pradhan, Sr. Advocate.

For Respondent No.2-3: Mr. D.K. Siwakoti, Advocate.

Date of order: 2nd March 2021

A. Sikkim Trade License and Miscellaneous Provision Rules, 2011 – Rule 10A– License may be transferrable only in the case of death of the licensee having a valid trade license, if the legal heir submits documentary proof, no objection certificate from the family members and other required documents within three months – The licensee died on 07.03.2016 but at the time of his death valid trade license was not in existence. An application was submitted on 22.03.2016 in the name of the deceased which was granted up to 31.03.2016. Later, by a correspondence made by respondent no. 1, it was observed that the said license was deemed to be cancelled because the application was submitted in the name of a dead person on 22.03.2016 though he had died on 07.03.2016 – The only recourse is the grant of fresh license – The recourse of taking up of renewal of license and transfer of license is not at all available to petitioners – Petitioners must first apply to respondent no.1 for grant of license in Form No.1 of the Rules.

Petition partly allowed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, J

This petition under Article 226 of Constitution of India has been filed seeking numerous reliefs but the question involved in the present case to grant of license is in very narrow compass.

Md. Mansoor Alam, who was running a shop in the name of M/s Good Luck Tailors was having a valid license issued by the respondent no.1, who died on 07.03.2016. After his death, his wife submitted an application for renewal/transfer of license/grant of fresh license. It is not in dispute that on 30.03.2016 the license was renewed up to 31.03.2016 but later the respondent no.1 made a correspondence with the son of the deceased i.e. petitioner no.2 that the application dated 22.03.2016 was submitted in the name of deceased though he was not survived on that date, therefore, the license, so granted, be deemed to be cancelled. In any case the facts remain that the license which was in the name of Late Md. Mansoor Alam in the name of M/s Good Look Tailors was ceased to expire on 31.03.2016. Thereafter, there is no fresh license or renewal issued by the respondent no.1 on the applications submitted by the petitioner no.1. It is also not in dispute that the house owner made several recourses for taking the possession of the shop, with the deceased Md. Mansoor Alam that includes the proceedings under Section 145 and 146 and other recourses but the wife/son of the deceased late Md. Mansoor Alam is in possession of the said shop. In the said sequel of facts the issue as involved in the present case regarding grant of license is required to be looked into.

After hearing learned Counsel for the respective parties and on perusal of the Rules known as Sikkim Trade License and Miscellaneous Provision Rules 2011 it is clear that Rule 5 deals with the procedure eligibility for obtaining trade/hawker license. Rule 6 is for inspection of premises before issue of license and under Rule 7 trade license would be issued on an application submitted in Form No.1. Rule 12 deal with the conditions for renewal of license and Rule 10 A amended as on 25.07.2012, the license may be transferrable only in the case of death of the licensee having a valid trade license, if the legal heir submits a documentary proof, no objection certificate from the family members and other required documents within three months. In the aforesaid legal position

the fact is required to be noticed that Md. Mansoor Alam who was a licensee died on 07.03.2016 but at the time of his death valid trade license was not in existence. An application was submitted on 22.03.2016 in the name of the deceased which was granted up to 31.03.2016. Later by a correspondence made by respondent no.1 it was observed that said license deemed to be cancelled because the application was submitted in the name of dead person on 22.03.2016 though he was died on 07.03.2016.

In the aforesaid situation, the only recourse of grant of fresh license appears to be justifiable and it has rightly been prayed by the petitioner in relief no.1. The recourse of taking up of renewal of license and transfer of license is not at all available to petitioners, looking the provisions enumerated in the rules. In view of the said factual and legal position the submission made by respondent no.1 appears to be just looking into the stand so taken in their counter affidavit. Taking note of the said stand it is to observe that the petitioners of this case must first apply to respondent no.1 for grant of license in Form No.1 of the rules and thereafter, the application may taken into consideration by respondent no.1 and the final order would be passed by them within timeframe.

At this stage it is suffice to observe that requirement of non submission of the NOC from the house owner of the premises shall be considered objectively, in terms of the rules and in particular looking to the dispute which is prevailing with the deceased / petitioners of this case and the house owner, therefore, the objectivity of the grant of submission of the NOC is to be looked into by the Authorities while disposing the application. It is to also observe that the application submitted in Form No.1 may not be rejected merely because NOC by the house owner has not been given.

In view of the foregoing discussion this Writ Petition is disposed of with the direction to the petitioners to submit a fresh application under Sikkim Trade License and Miscellaneous Provision Rules 2011 in Form No.1 within a period of two weeks from the date of receipt of certified copy of this order and on submission of such application, it shall be considered and decided by respondent no.1, in view of the foregoing observation, in the matter of grant of the fresh license as per law.

The Writ Petition stands disposed of.

SLR (2021) SIKKIM 135

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

WP (PIL) No. 15 of 2017

Karma Jigmi Dawa ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner: Mr. Zangpo Sherpa, Advocate.

For Respondent No. 1: Mr. Karma Thinlay, Central Govt. Counsel.

For Respondent 2-3: Dr. Doma T. Bhutia, Addl. Advocate General and Ms. Pema Bhutia, Asst. Govt. Advocate.

For Respondent No. 4: Mr. Karma Thinlay, Sr. Advocate with Mr. Thinlay Dorjee Bhutia, Advocate.

For Respondent No. 5: Mr. Manish Kumar Jain, Advocate.

Date of decision: 2nd March 2021

A. Constitution of India –Article 226 – Relief sought is for shifting of 132/66 KV Dikchupool Sub-Station to another identified place at Samdong – Initially it was decided that 132/66 KV Sub-Station may be established at Dikchu thereafter, a joint survey was conducted and the report was forwarded to respondent no. 4 for scrutinizing of technical suitability of the aforementioned land – Engineering Department opined that the land at Dikchu is not feasible for establishment of 132/66 KV Dikchupool Sub-Station and requested to shift it to any alternative land. In furtherance thereto, steps were taken and it was decided that the land at Samdong Block may be suitable for establishment of 132/66 KV Sub-Station – The directions issued by this Court has been complied with and the technical report of the location at Samdong Block is found technically justifiable for

establishment of 132/66 KV Dikchupool Sub-Station – Not inclined to further interfere in this matter so far as the reliefs regarding acquisition of private land is concerned – Aggrieved person may take recourse of law as permissible, if aggrieved. The said issue is not required to be entertained in this Public Interest Litigation, at the instance of the petitioner.

Petition partly allowed.

ORDER (ORAL)

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

This petition under Article 226 of the Constitution of India has been filed seeking various reliefs, one of them is regarding shifting of the 132/66 KV Dikchupool Sub-Station to the another identified place at Samdong.

This Court has passed various orders on various dates and the last order passed on 07.12.2020. By which, on the request made by the learned Senior Counsel, Mr. Karma Thinlay to bring on record the soil testing investigation report by way of an affidavit was directed. Learned counsel has endorsed the soil testing report on an affidavit dated 28.02.2021.

On perusal of the said report, it reveal, initially it was decided that 132/66 KV Dikchupool Sub-Station may be established at Dikchu thereafter, a joint survey was conducted and the report was forwarded to respondent no. 4 for scrutinizing of technical suitability of the aforementioned land. Respondent no. 4 in its turn forwarded the said proposal to the Engineering Department, Gurgaon for the examination regarding technical suitability of the land at Dikchu. The Engineering Department opined that the land at Dikchu is not feasible for establishment of 132/66 KV Dikchupool Sub-Station and requested to shift it on any alternative land. In furtherance thereto steps were taken and it was decided that the land at Samdong Block may be suitable for establishment of 132/66 KV Dikchupool Sub-Station.

The technical report has been produced as per annexure R-1 attaching to this affidavit whereby the recommendations so made makes it

clear that the present alternate land location at Samdong Block is suitable for establishment of 132/66 KV Dikchupool Sub-Station.

In view of the aforesaid, the directions as issued by this Court has been complied with and looking to the technical report the present location at Samdong Block is found technically justifiable for establishment of 132/66 KV Dikchupool Sub-Station.

In that view of the matter, we are not inclined now to further interfere in this matter so far as the reliefs regarding acquisition of private land is concerned. The aggrieved person may take recourse of law as permissible, if feel aggrieved. The said issue is not required to be entertained in this Public Interest Litigation, on the instance of the petitioner.

In view of the foregoing, this Public Interest Litigation stands disposed of.

SLR (2021) SIKKIM 138

(Before Hon'ble the Chief Justice)

FAO No. 3 of 2018

Jigmi Phunchok Bhutia ….. APPELLANT

Versus

Aishwarya Rai and Another ….. RESPONDENTS

For the Appellant: Mr. Nilanjan Bhattacharya, Advocate and Mr. Souri Ghosal, Advocate.

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

For Respondent No.2: None.

Date of decision: 6th March 2021

A. Code of Civil procedure, 1908 – S. 99 – The proviso puts an embargo to the applicability of the provisions of S. 99, in case of non-joinder of "necessary" party found by the Court – In view of the proviso, the aid of S. 99, C.P.C would not be available to the appellant.

(Para 9)

B. Code of Civil Procedure, 1908 – O. 41 R. 23 –Remand of Case by Appellate Court –Remand by the appellate Court may be directed when the suit is decided on any primary point reversing the decree. The appellate Court can further direct to decide the issue or issues by re-admitting the suit on its original number, as per law, after recording the evidence – If the suit has been decided otherwise then on preliminary point and if re-trial is considered necessary by the appellate Court reversing the decree under appeal, remand can be directed – R. 25 makes it clear that in case the Trial Court omitted to frame or try any issue or to determine any question of fact, which the appellate Court deems essential for decision of

the suit on merit, after framing the issue and referring the same for trial to the Court who passed the decree, may direct taking such evidence as required while remanding. Similarly, on bringing additional evidence on record under R. 27, the appellate Court may either directly take the evidence or direct the Trial Court to take such evidence and send back to the appellate Court. While taking such additional evidence on record as allowed by the appellate Court, he shall specify the points on which the evidence ought to be taken – Apparent that remand is permissible if a suit is decided on preliminary issue as per R. 23 and if re-trial considered necessary as per R. 23A on any issue which in the opinion of the Court is required to be decided essentially.

(Para 10)

C. Code of Civil procedure, 1908 – S. 151 – Inherent powers of the appellate Court can be availed *ex debito justitiae* only in the absence of express provisions in the Code – In exceptional cases, the Court can exercise the power of remand *dehors* Rr. 23 and 23 A of O. 41, C.P.C – After the amendment Act No.104 dated 01.02.1977, as per S. 99, if there is defect of non-joinder of "necessary party" and the lower appellate Court records a finding that re-trial is necessary by setting aside the decree of the Trial Court, the appellate Court may direct remand in exercise of the powers of Rr. 23 or 23A or even *dehors* the rule in exceptional cases (*In re. P. Purushottam Reddy* discussed).

(Para 14)

Appeal dismissed.

Chronology of cases cited:

1. P. Purushottam Reddy and Others v. Pratap Steel Ltd., AIR 2002 SC 771.
2. Ashwinkumar K. Patel v. Upendra J. Patel and Others, AIR 1999 SC 1125.
3. Promotha Nath Mazumdar v. Nagendra Nath Mazumdar, MANU/ WB/0472/1929.
4. Pasupuleti Venkateswarlu v. The Motor and General Traders, AIR 1975 SC 1409.

5. R.K Tombi v. R.K Maipaksana Singh and Others, MANU/GH/0134/2002.

6. Municipal Corporation, Hyderabad v. Sunder Singh, AIR 2008 SC 2579.

7. Mukund Ramchandra Kolapkar v. Kisan Tryambak Gaikwad and Others, MANU/MH/1366/2008.

8. Rajinder Sharma v. Arpana Sharma, AIR 2011 SC 3161.

9. Remco Industrial Workers House Building Cooperative Society v. Lakshmeesha M and Others, AIR 2003 SC 3167.

10. Jaibunnisha Bibi v. Sk. Jalaluddin and Others, MANU/OR/0735/2008.

11. J. Balaji Singh v. Diwakar Cole and Others, AIR 2017 SC 2402.

12. Radhakrishnan P.S v. A. Indu, ILR 2018 (3) Kerala 820.

13. Jose v. Johnson, 2020 (3) SCC 780.

14. Jegannathan v. Raju Sigamani, (2012) 5 SCC 540.

JUDGMENT

Jitendra Kumar Maheshwari, CJ

1. This Appeal is filed by the defendant no.2/appellant questioning the legality and propriety of the Judgment of remand dated 25.09.2017 passed in Title Appeal Case No.04/2015 by the learned District Judge, Special Division–I, East Sikkim at Gangtok arising out of the Judgment dated 24.07.2015 passed against the plaintiff/respondent in Title Suit No.39/2014 by the Court of Civil Judge, East Sikkim at Gangtok dismissing the suit.

2. The plaintiff filed the suit seeking declaration that she is the daughter of Late Gyanson Rai @ Sonam Topden Bhutia inter alia pleading that her father joined British army in the year 1966. The people from Bhutia community were not recruited in British Army, therefore, he changed his name as Gyanson Rai in place of Sonam Topden Bhutia and joined the British Army. The said change of name was only to secure job in British army. Later he married with Ms. Rupa Rai nee Thakuri in 1976-77. Out of the said wedlock plaintiff was borne at Hongkong in the year 1977.

3. The plaintiff's father, after spending almost 20 years in service at Hongkong came to Kurseong on retirement and started living there. Again after sometime he could get the job at Bahrain. Later he came to Gangtok and stayed at Zigmee Building, old children Park, Gangtok. The real identity of Gyanson Rai @ Sonam Topden Bhutia came to the knowledge of the plaintiff after coming back of him from Bahrain. In 2014 plaintiff's father died and his last rituals were performed as per the traditions of the Bhutia community.

4. In the said backdrop and pleading, the suit has been filed seeking declaration that the plaintiff is the daughter of Gyanson Rai @ Sonam Topden Bhutia. In the suit no one appears as defendantdespite publication of notice. The said suit was dismissed by Learned Trial Court. On filing an appeal the lower appellate Court by the impugned judgment remitted the matter back to the Trial Court because Jigmee P. Bhutia (defendant no.2/ appellant) and the daughter of plaintiff's father were found necessary party to the suit. The Appellate court observed their presence is necessary for effective and complete adjudication and to settle the issue involved in the suit. However, with the help of proviso of Section 99 and under Order 41 Rule 23A of the CPC by setting aside the impugned judgment and decree of the Trial Court remitted the matter back restoring the suit to its original number. The plaintiff is also allowed to amend the pleadings to the extent required and to decide the suit in accordance with law.

5. Learned Counsel for the appellant has argued with vehemence and submitted that the judgment of remand passed by learned Lower Appellate Court is contrary to the spirit of the provisions of Order 41 Rule 23 A of the CPC, without reversing the findings recorded by the Trial Court. It is argued as per Section 99 of CPC, on account of misjoinder or non-joinder of the parties reversing or modifying the decree for error or illegality not affecting the merit and jurisdiction is not permissible. It is further argued the lower Appellate Court while pronouncing the judgment granted liberty to the plaintiff to amend the pleadings without affording opportunity of rebuttal. However, after remand such an observation prejudices the defendant/ appellant, therefore, the judgment of remand passed by the learned Lower Appellate Court is illegal and contrary to the settled law, which, may be set aside. In support of his contention reliance has been placed on the judgment of **P. Purushottam Reddy and Ors vs. Pratap Steel Ltd.,** reported in AIR 2002 SC 771. The reliance has further been placed on the judgment

of **Ashwinkumar K. Patel vs. Upendra J. Patel & Ors.,** reported in AIR 1999 SC 1125. In addition further reliance has been placed on **Promotha Nath Mazumdar vs. Nagendra Nath Mazumdar,** reported in MANU/WB/0472/1929; **Pasupuleti Venkateswarlu vs. The Motor & General Traders,** reported AIR 1975 SC 1409, R.K Tombi vs. **R.K Maipaksana Singh & ors.,** reported in MANU/GH/0134/2002; **Municipal Corporation, Hyderabad vs. Sunder Singh,** reported in AIR 2008 SC 2579; **Mukund Ramchandra Kolapkar vs. Kisan Tryambak Gaikwad & ors.,** reported in MANU/MH/1366/2008; **Rajinder Sharma vs. Arpana Sharma,** reported in AIR 2011 SC 3161. In view of the said submissions, prayer is made to set aside the judgment of remand directing the Lower Appellate Court to decide the appeal on merit as per law.

6. Per contra, learned Senior Counsel representing plaintiff/respondent contends that certainly as per Section 99 of CPC Judgment and decree cannot be reversed or modified by way of remand in an appeal on account of misjoinder or non-joinder or some other defects or irregularity in any proceedings not affecting the merits of the case and also the jurisdiction; but the proviso makes it clear that the substantive provision of Section 99 CPC would not attract in a case of non-joinder of "necessary" party. He placed reliance on the judgments of **Remco Industrial Workers House Building Cooperative Society vs. Lakshmeesha M. & Ors.,** reported in AIR 2003 SC 3167; **Jaibunnisha Bibi vs. Sk. Jalaluddin & Ors.,** reported in MANU/OR/0735/2008; **J. Balaji Singh vs. Diwakar Cole & Ors.,** reported in AIR 2017 SC 2402; **Radhakrishnan P.S vs. A. Indu,** reported in ILR 2018 (3) Kerala 820; **Jose vs. Johnson,** reported in 2020 (3) SCC 780. It is said Lower Appellate Court has not committed any error of law while exercising the jurisdiction and directing remand. It is urged the impugned Order passed by the learned Lower Appellate Court is in conformity to law, which do not warrant any interference.

7. In the present case looking to the findings recorded by the Appellate Court, the appellant as well another sister of the plaintiff were found "necessary" party, looking to the nature of the declaration prayed in the suit. Therefore, by the aid of proviso to Section 99 and as per the procedure prescribed under Order 41 Rule 23 A of CPC reversing the decree of the Trial Court and by recording finding that re-trial considered necessary in the facts of the case remand has been directed.

8. After having heard learned Counsel representing the parties in the facts of the case, it is required to be seen whether the Order passed by the learned Lower Appellate Court directing remand is within the purview of Proviso to Section 99 and the procedure prescribed under Rule 23A of Order 41 of CPC or the Lower Appellate Court acceded from its power while passing the impugned Judgment.

9. On perusal of the relevant provisions, as per Section 99, the decree, if any, passed by the trial Court shall not be reversed or substantially varied nor the case shall be remanded in appeal merely due to misjoinder or non-joinder of the parties or causes of action or any error, defect or irregularity in any proceedings in the suit not effecting the merit of the case or jurisdiction of the court. But the proviso puts an embargo to the applicability of the provisions of Section 99, in case of non-joinder of "necessary" party found by the Court. Thus it is clear, due to non-joinder of "necessary" party, in view of proviso, aid of Section 99 CPC would not available to the appellant. The lower Appellate Court recorded the findings that appellant and another sister of plaintiff are "necessary party" to the suit, in the context of the relief as prayed therein.

10. As per Order 41 Rule 23 of the CPC remand by the Appellate Court, may be directed when the suit is decided on any primary point reversing the decree. The Appellate Court can further direct to decide the issue or issues by re-admitting the suit on its original number, as per law after recording the evidence. Rule 23 A of Order 41 CPC was inserted by Act of 104 of 1976 w.e.f. 01.02.1977 by which as specified if the suit has been decided otherwise then on preliminary point and if re-trial is considered necessary by Appellate Court reversing the decree under appeal, the remand can be directed. As per Rule 25 which as exist was prior to the said amendment makes it clear that in case the Trial Court omitted to frame or try any issue or to determine any question of facts which the Appellate Court deems it essential for decision of the suit on merit, after framing the issue and referring the same for trial to the Court who passed the decree, may direct to take such evidence as required while remanding. Similarly, on bringing the additional evidences on record under Order 41 Rule 27 of CPC, the Appellate Court may either directly take the evidence or direct the Trial Court to take such evidence and send back to the Appellate Court. While taking such additional evidence on record as allowed by the Appellate Court he shall specify the points on which the evidence ought to

be taken. Therefore, looking to the aforesaid it is apparent that remand is permissible if a suit is decided on preliminary issue as per Rule 23 and if re-trial considered necessary as per Rule 23A and on any issue which in the opinion of the Court is required to be decided essentially as per Rule 25 and for taking the additional evidence as per Rule 28 and 29 of Order 41 of CPC.

11. On perusal of the impugned judgment and facts of the case, it is not in dispute that the Judgment of remand passed by the learned Lower Appellate Court is in exercise of the power under Rule 23 A of the Order 41 of the CPC with the aid of Proviso to Section 99 of CPC, therefore, to the said extent it may be seen such remand is in conformity to law, or not permissible.

12. As referred above, by way of Act No.104 w.e.f 01.02.1977 Rule 23A is inserted in Order 41 of CPC. As per proviso to Section 99 it is apparent that the provisions of the Section 99 would not be attracted if a defect of non-joinder of "necessary" party is there. The legislative intent is clear that remand of any judgment by Appellate Court is not permissible for a formal defect but cannot be denied if defect of nonjoinder of "necessary" party is there, in particular when re-trial considered necessary. The wholesale remand can be ordered, if the Court opined that re-trial is considered necessary, reversing the decree, under Rule 23A, akin to the power of Rule 23.

13. The reliance placed by learned Counsel for the appellant on a judgment of P. Purushottam Reddy (supra) throw light to the powers of the Appellate Court, how the power ought to be exercised under Rule 23 A of Order 41 of CPC. The relevant of paragraph 9 is reproduced as thus:-

> " In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the

> cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati [AIR 1965 SC 364 : 66 Bom LR 681] (AIR at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in Ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted Order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

14. On perusal of above, it is clear that inherent powers at the appellate Court can be availed ex debito justitiae only in the absence of express provisions in the Code. In the exceptional cases the Court can exercise the power of remand dehors the Rule 23 and 23 A of the Order 41 CPC. As per the ratio of the said judgment in exceptional cases the Court may exercise the power of remand even dehors the Rule 23 and 23 A of the Order 41 of the CPC. Thus, after the amendment Act No.104, dated 01.02.1977, as per proviso to Section 99 if there is a defect of non-joinder of "necessary" party and the Lower Appellate Court if records a finding that re-trial is necessary, by setting aside the decree of Trial Court, the Appellate Court may direct remand in exercise of the powers of Rule 23 or 23A of CPC or even dehors the rule in exceptional cases, in view of ratio of the above judgment.

15. Looking to the position of law as discussed above, the finding recorded by the Lower Appellate Court is required to be looked into. As per the said finding it is clear that defendant no.2/appellant and daughter of Late Gyanson Rai @ Sonam Topden Bhutia were found to be the "necessary party" being legal heir, to pass a declaratory decree sought by the plaintiff. The nature of the declaration in the present case sought by the plaintiff is that she be declared the daughter of Late Gyanson Rai @ Sonam Topden Bhutia, however, in the said circumstances, joining appellant (son) and daughter of the Late Gyanson Rai @ Sonam Topden Bhutia was rightly found "necessary party" by the Lower Appellate Court. It is to observe that appellant has not said that they are not the necessary party and not assailed such findings. Once the Court found the son and daughter of Late Gyanson Rai @ Sonam Topden Bhutia are the "necessary party" in a suit filed for declaration by the plaintiff who is his other daughter, there is no impediment in remanding the case after following the procedure as contemplated under Rule 23 and 23A of Order 41 of CPC.

16. Now reverting to the arguments advanced that finding of the Trial Court has not been reversed and in absence thereto mere finding that re-trial considered necessary is not sufficient to remand the case. As per the language of Order 41 Rule 23A of CPC the remand may be directed otherwise then on a preliminary point on satisfying twin conditions; (i) reversing the decree passed by the Trial Court (ii) if the Court for the reasons so stated considered re-trial necessary. In the present case on account of non-joinder of "necessary party", the Lower Appellate Court formed the opinion that re-trial is considered necessary, however, reversing the decree the remand has been directed. It is to observe that as per the requirement of law finding, recorded by the Trial Court is not required to be reversed infact the decree is required to be reversed. Therefore, arguments advanced by the Counsel for the appellant regarding non reversal of the finding of the Trial Court by the Lower Appellate Court is misplaced and cannot be countenanced. In addition as per the ratio of the case of **P. Purushottam Reddy** (supra) after amendment in CPC, the remand even dehors to the Rule 23 and 23A is permissible in exceptional cases. But in the present case, as discussed above, the Order impugned is within the purview of Rule 23 and 23A of the Order 41 CPC. Therefore, the said judgment is of no help to appellant.

17. On perusal of the facts, it is apparent that the case at hand is a case wherein the remand has been directed otherwise then only on a

preliminary point, recording the finding that in the facts the re-trial is considered necessary. In the said context the judgment of Hon'ble Supreme Court in **Jegannathan vs. Raju Sigamani** reported in (2012) 5 SCC 540 can be profitably referred by which Apex Court has reiterated the scope of Order 41 Rule 23 A of the CPC specifying the power of the Appellate Court directing remand. Therefore, relying upon the said judgment and looking at the nature of the finding recorded by the Lower Appellate Court, in the opinion of this Court, the case at hand is a case in which the power under Order 41 Rule 23 and 23 A read with Proviso to Section 99 of the CPC has rightly been exercised by Lower Appellate Court, having no scope of interference in this appeal.

18. It is made it clear here, that this Court has not dealt with the provision of remand, as specified in Rule 23, Rule 25, Rule 28, and 29 of Order 41 of CPC, in extentio therefore, ratio of this judgment is confined to the scope of the Order 41 Rule 23A read with proviso of Section 99 of the CPC. Those questions of law and its interpretation are left open, for decision in appropriate cases.

19. On perusal of the records and the Order sheets of the Lower Appellate Court of the present case, it appears that after joining appellant herein as a party, he appeared in the Court and permitted to cross-examine the witnesses of the plaintiff without filing any written statement. As per interim Order dated 06.06.2017 passed in first appeal, while rejecting the objection filed by plaintiff on the Commissioner's report, the Court observed on account of affording due opportunity to plaintiff application for adjournment was rightly rejected by the Commissioner. On perusal of the provisions of Order 18 Rule 4 and Order 26 of CPC in the opinion of this Court no power are vested to the Commissioner to decide any application filed by any of the parties until directed by the Court. In the Order of appointment of the Commissioner also no such power is given to the Commissioner by the Court, therefore, Commissioner cannot decide any such application and such Order cannot be acknowledged by Court while rejecting the objection of the plaintiff. In the opinion of this Court such Order is prejudicial to the parties, therefore, it be not given affect to.

20. It is to observe here, the other judgments cited by the Counsel for the appellant or the respondents are not required to be adverted to in detail as it is not dealing the issues similar to this case and that too on the cost of

making the judgment lengthy for no justifiable reason, therefore, those cases are not referred here.

21. Accordingly, in view of the above discussion, this appeal fails and is hereby dismissed. The Order passed by learned Lower Appellate Court is hereby upheld with an observation that the parties are at liberty to take recourse of law as permissible while deciding the suit afresh on its restoration.

SLR (2021) SIKKIM 149

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

WP (PIL) No. 03 of 2019

Vivek Anand Basnett ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

Petitioner in person.

For Respondent 1-4: Mr. Karma Thinley, Central Govt. Counsel.

For Respondent 5: Mr. Vivek Kohli, Advocate General with Ms. Yeshi W. Rinchen, Advocate.

For Respondent 6: Mr. K.T. Bhutia, Sr. Advocate with Mr. T.R. Barfungpa, Advocate.

Date of decision: 9th March 2021

A. Constitution of India – Article 226 – Relief sought by the petitioner is to issue writ in the nature of mandamus or any other writ, order or direction, commanding the respondents more particularly respondent no. 6, i.e. Election Commission of India to hold assembly elections in the State of Sikkim according to the seat distribution system as envisaged under Article 371-F of the Constitution of India and S. 7A of the Representation of the People Act, 1950 – It was brought to the notice of the Court that the Central Government by Amendment Act No. 08 of 1980, w.e.f. 01.09.1979, inserted an amendment by S. 7 (1A) of the Representation of People Act. The said change of percentage of reservation to constituencies is contrary to the laws which were in force immediately before the appointed date in the territories comprise in the State of Sikkim as specified in Article 371-F of the Constitution of India by 36th amendment brought w.e.f 26.04.1975 and S. 7A of the Representation of People Act – Held:

Without challenging the vires of S. 7 (1A) of the amended Representation of People Act, 1950 the relief aforementioned, as prayed for, cannot be directed. Petitioner may take recourse challenging the vires of the provision of Representation of the People Amendment Act, 1980.

(Paras 1, 17 and18)

Petition permitted to be withdrawn.

ORDER (ORAL)

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

This petition is in the nature of Public Interest Litigation has been filed asking following relief:-

> *"(i) Issue a writ in the nature of mandamus, or any other writ, order or direction, commanding the Respondents more particularly Respondent No. 6, i.e., Election Commission of India to hold assemble elections in the State of Sikkim according to the seat distribution system as envisaged under Article 371-F of the Constitution of India and Section 7A of the Representation of the People Act, 1950."*

It has been brought to the notice of this Court that the Central Government by virtue of the Amendment Act No. 08 of 1980 w.e.f. 01.09.1979 inserted an amendment by Section 7(1A) of the Representation of People Act. The said change of percentage of reservation to constituencies is contrary to the laws which were in force immediately before the appointed date in the territories comprise in the State of Sikkim as specified in Article 371F of the Constitution of India by 36th amendment brought w.e.f 26.04.1975 and Section 7 A of the Representation of People Act. In our opinion without challenging the vires of Section 7 (1A) of the amended Representation of People Act the relief aforementioned, as prayed for, cannot be directed. At this stage petitioner-in-person seeks liberty to take recourse of law as permissible.

In view of foregoing, we dispose of this petition with an observation that the petitioner may take recourse challenging the vires of the provision of Representation of the People Amendment Act, 1980.

Accordingly, this Public Interest Litigation stands disposed of in view of the foregoing observations.

SLR (2021) SIKKIM 152

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

WP(C) No. 45 of 2018

Arun Chettri ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Tashi Norbu Basi, Advocate.

For Respondent 1 & 3: Mr. Vivek Kohli, Advocate General.

For Respondent No.2: Mr. J.B. Pradhan, Sr. Advocate with Mr. Bhusan Nepal, Advocate.

For Respondent No.5: Ms. Mon Maya Subba,Advocate.

Date of decision: 10th March 2021

A. Constitution of India – Article 226 – State respondents No.1 and 3 to appoint petitioner in the post of Under Secretary – Date of appointment of the petitioner shall be deemed to be from 13.01.2018 – Seniority for all purposes of his service shall be computed from 13.01.2018 – Shall rank last in the sequence of seniority in the list of candidates – Benefits of increments to his salary to be extended from 13.01.2018.

(Para 19)

Petition allowed.

Chronology of cases cited:

1. Uttar Pradesh Public Service Commission through its Chairman and Another v. Rahul Singh and Another, (2018) 7 SCC 254.
2. Rajesh Kumar and Others v. State of Bihar and Others, (2013) 4 SCC 690.

3. Bihar Staff Selection Commission and Others v. Arun Kumar and Others, (2020) 6 SCC 362.

4. Pranav Verma and Others v. The Registrar General of the High Court of Punjab and Haryana at Chandigarh and Another, (2019) SCC OnLine 1610.

5. Kanpur University through Vice-Chancellor and Others v. Samir Gupta and Others, (1983) 4 SCC 309.

6. Ran Vijay Singh and Others v. State of Uttar Pradesh and Others, (2018) 2 SCC 357.

JUDGMENT (ORAL)

Meenakshi Madan Rai, J

1. The Petitioner is aggrieved by his non-selection as Under Secretary in the Junior Grade of the Sikkim State Civil Service for which written examinations were held in the month of July, 2017, viva-voce examination held in November, 2017 and result published in the month of December, 2017, the Petitioner is before this Court.

2. The facts pertaining to the matter were detailed by this Court in the Order dated 05-02-2021, nevertheless, for clarity in the matter they are being reiterated herein.

3(i). The Petitioner's case, briefly is that, on 02-02-2017 the Respondent No.2, Sikkim Public Service Commission (SPSC), issued an advertisement inviting application from eligible local candidates for filling up 12 (twelve) posts in the Junior Grade of Sikkim State Civil Service through direct recruitment. The Petitioner as an eligible OBC (State List) candidate appeared for and was successful in the preliminary examination, consequently he took the main examinations with General English, General Knowledge, Public Administration & Management and Indian History as his subjects. The Public Administration & Management examination comprised of two papers of 150 marks each, i.e., a total of 300 marks. Similarly, Indian History also comprised of two papers with a total of 300 marks being 150 marks each in each paper. Part I of both the aforementioned subjects comprised of Objective/Multiple Choice Question (MCQ), while Paper II was Subjective/Conventional paper. For the MCQ papers each

correct answer carried 2 marks while an incorrect answer was negatively mark by deducting 0.66 marks. The Petitioner was successful in the written examinations and shortlisted for the viva-voce examination but eventually was not selected for the advertised posts.

(ii) Aggrieved, the Petitioner filed an application on 08-01-2018 before the Respondent No.2 under the Right to Information Act, 2005 (RTI) seeking the merit list of selected candidates. The required information was furnished to him on 24-01-2018. By a second RTI application dated 02-02-2018 the Petitioner sought information on marks obtained by all candidates in the viva-voce examination, copies of all the subject papers, answer keys and Optical Mark Recognition (OMR) sheets of objective papers, which were made available to him on 15-05-2018. Thereafter, he examined whether the answer keys provided by Respondent No.2 were correct.

(iii) In the meantime, on 18-04-2018 the Petitioner filed WP(C) No.12 of 2018 before this Court challenging the selection of the Respondent No.4 (herein) in the OBC (State List) category for the advertised posts as he fell in the creamy layer. The Writ Petition was withdrawn on 14-10-2020 by the Petitioner as Respondent No.4 resigned from the post. The Respondent No.4 also came to be deleted from the array of Respondents vide Order of this Court dated 26-08-2020 in I.A. No.02 of 2019 in the instant Writ Petition.

(iv) The Petitioner on searching for the correct answer keys found that the Respondent No.2 had provided wrong answer keys to 6 (six) questions of Public Administration & Management paper and 3 (three) questions in the Indian History, while one wrong question had been set in the Indian History paper and one question repeated. He avers that in the light of these errors, 11 (eleven) of his answers which were correct have been marked as incorrect thereby depriving him of 28.66 marks in the main(s) written examination. On 09-08-2018, the Petitioner filed an application before the Respondent No.2 for re-evaluation of the objective type questions while also raising concerns about the modifications made in the merit list of candidates wherein earlier he had ranked above the Respondent No.5 herein, but subsequently was ranked below him by the Respondent No.2 sans opportunity of being heard in the matter. The Respondent No.2 informed him on 27-08-2018 that the matter had been verified by the

subject Experts and the answers keys were found to be correct, hence there would be no changes thereafter. The Petitioner on 01-09-2018 against the reply of the Respondent No.2 reiterated the 11 (eleven) errors made by the Respondent No.2 and prayed for proper re-evaluation of his papers, but to no avail. Another application filed by the Petitioner before the Respondent No.2 seeking a stay for any further action with regard to the revised OBC (State List) candidates was also stonewalled. His averment is that he should be extended the same opportunity by the Respondent No.2 as afforded to one Dipendra Adhikari, Respondent No.5 herein [Petitioner in WP(C) No.27 of 2018], who had applied for re-evaluation of 10 (ten) of his answers in the Philosophy paper (objective type), upon which the Respondent No.2 had awarded him 4 (four) extra marks and placed him higher in order of merit than the Petitioner, who earlier had ranked above the Respondent No.5.

(v) The Petitioner *inter alia* seeks a direction to the Respondent Authorities to establish a fair and competent Committee of Experts to examine the official answer keys for the subjects of Public Administration & Management and Indian History and thereafter evaluation of the Petitioner's papers by the Committee constituted. He also seeks a direction to the Respondent No.2 to quash the modified statement in order of merit of candidates selected for the post of Under Secretary and modified original statement of marks obtained by the candidates of OBC (State List) category in the main(s) written examination and viva-voce examination and to prepare fresh statement in order of merit of candidates selected for viva-voce examination for the post of Under Secretary and original statement of marks obtained by the candidates OBC (State List) category in main(s) written examination and viva-voce examination. A direction to the Respondent No.2 to appoint the Petitioner in the post of Under Secretary as per seniority, consequent upon the new rank attained by the Petitioner.

4. The Respondent No.2 in Counter-Affidavit *inter alia* submitted that the Petitioner seeks re-evaluation of his answer scripts which is not permissible under the rules or the law and on this ground the Writ Petition is liable to be dismissed. Besides, the issue raised by the Petitioner has been examined by the subject Experts and the allegations found to be wrong and mis-conceived. That, the answer papers of the Respondent No.5 was not re-evaluated, but only re-verified.

5. Respondent No.3 in its Counter-Affidavit averred that for want of knowledge, the facts as set out by the Petitioner was not being responded to, while Respondent No.1 adopted the Counter-Affidavit filed by Respondent No.3.

6. The Respondent No.5 disputing the averments of the Petitioner in his Counter-Affidavit stated that he had appeared in the examination for the paper in Philosophy. On being dissatisfied with the marks awarded to him, he verified the correctness of the answer keys and on finding inconsistencies in them sought verification by the Respondent No.2. On typographical errors being detected in the questions by Respondent No.2 grace marks were given to the candidates who took the Philosophy paper

7. The Petitioner filed his Rejoinder to the Counter-Affidavits denying their averments.

8. Learned Counsel for the Petitioner while advancing his arguments before this Court on 01-12-2020 submitted that although the Respondent No.2 has stated that re-evaluation is barred by rules and law, the relevant provisions were not furnished for perusal of this Court. That, contrary to the submission of Respondent No.2 Rule 38(3) of the Rules of Procedure and Conduct of Business of the Sikkim Public Service Commission provides for such re-evaluation. That, the Respondent No.5, also an OBC (State List) candidate had filed WP(C) No.27 of 2018 having applied for re-evaluation of 10 (ten) of his answers in the Philosophy paper to the Respondent No.2. His request was acceded to by Respondent No.2 thereby awarding him extra marks and the Writ Petition (*supra*) came to be withdrawn on 05-11-2019. That, the Petitioner herein had also filed WP(C) No.12 of 2018 (challenging the selection of Respondent No.4 herein) wherein the Respondent No.2 herein was arrayed as Respondent No.3. In the said Writ Petition, the Respondent No.2 filed a modified statement in order of merit of candidates selected for viva-voce examination for the post of Under Secretary along with modified original statement of marks obtained by the candidates of OBC (State List) category in main(s) written examinations and viva-voce respectively. In the modified statement the Petitioner was ranked below the Respondent No.5, whereas, in the original statement of marks the Petitioner had ranked above the Respondent No.5. That, such modifications in the statement of marks was made with no opportunity given to the Petitioner to place his submissions before Respondent No.2. That, the

opportunity afforded to the Respondent No.5 with regard to re-evaluation ought to be also extended to the Petitioner both being similarly situated, although the re-evaluation for the Respondent No.5 was disguised as re-verification by Respondent No.2. That, consequent upon the exercise, the marks of the Respondent No.5 increased by 4 (four) marks, viz., from 525.1 to 529.1. The Respondent No.2 also failed to give any proof that the answer keys to the objected questions raised by the Petitioner had been shown to Experts and merely responded tersely that it had been done. It is contended that the same Experts who set the question papers cannot be asked to verify the answer keys as it would be in the nature of things for them to deny any error and hence, new Experts ought to be requested to make such verification. That, had the Petitioner not been deprived of 28.66 marks on account of the wrong answer keys he would have ranked first in the merit list of OBC (State List) candidates and been eligible for selection as Under Secretary. To fortify his submissions, Learned Counsel placed reliance on ***Uttar Pradesh Public Service Commission through its Chairman and Another*** vs. ***Rahul Singh and Another***[1]; ***Rajesh Kumar and Others*** vs. ***State of Bihar and Others***[2] and ***Bihar Staff Selection Commission and Others*** vs. ***Arun Kumar and Others***[3]. Hence, the prayers as enumerated in the Writ Petition be allowed in the interest of justice.

9. Learned Senior Counsel appearing for Respondent No.2 while vehemently denying and disputing the allegations firstly would invite the attention of this Court to the ration in ***Pranav Verma and Others*** vs. ***The Registrar General of the High Court of Punjab and Haryana at Chandigarh and Another***[4] and contended that the Court should not order a re-evaluation. Learned Senior Counsel further submitted that the Court itself cannot look into the correctness of the answers as was held in ***Kanpur University through Vice-Chancellor and Others*** vs. ***Samir Gupta and Others***[5]. That, this Judgment has been consistently referred to by the Hon'ble Supreme Court in matters such as the present dispute till 2020. Reliance was also placed on ***Ran Vijay Singh and Others*** vs. ***State of Uttar Pradesh and Others***[6]. That, while examining whether the

[1] (2018) 7 SCC 254
[2] (2013) 4 SCC 690
[3] (2020) 6 SCC 362
[4] (2019) SCC OnLine 1610
[5] (1983) 4 SCC 309
[6] (2018) 2 SCC 357

Petitioner has a right to re-evaluation, this Court is to consider that although the Respondent No.2 had informed him that his concerns had been raised before the Expert and no error had been found in the answer keys, he did not challenge the response but chose to accept it. That, the instant Petition is merely a chance Petition undeserving of any consideration while placing the ratio in ***Uttar Pradesh Public Service Commission*** (*supra*) Learned Senior Counsel canvassed the contention that the scope of judicial review in such matters has been elucidated therein. That, in view of the submissions put forth, the Petition deserves a dismissal.

10. Learned Advocate General appearing for Respondents No.1 and 3 contended that in fact no vacancy exists presently for the post for which the Petitioner is agitating his case. That, although Respondent No.4 has resigned from his post, once appointments have been made to a post and the person concerned resigns, then the post is deemed to have been utilized. In such a circumstance either the post is required to be re-advertised or the appointment has to be quashed upon which a vacancy will arise, both having not been done, the Petitioner cannot claim appointment in the post which Respondent No.4 tendered his resignation. Besides, the Court is to examine whether the right of the Petitioner is substantive right or only procedural right and the Writ Petition merits no consideration in view of the aforestated circumstances.

11. The rival submissions put forth by the Learned Counsel were heard *in extenso*, the pleadings, documents and citations made at the Bar carefully perused.

12. On 05-02-2021, this Court vide an Order of the same date, issued the following directions to the Respondent No.2;

> ***"11.*** .....
>
> *(i) The Respondent No.2 shall appoint an Expert Committee consisting of 3 (three) Experts in the subject of Indian History and Public Administration & Management as Members to determine whether the allegations of the Petitioner are justified;*

(ii) To rule out any further grievances of the Petitioner, the Committee is to comprise of Experts excluding the examiners who set the relevant question papers;

(iii) The Committee shall also exclude Experts who corrected the answer scripts of the Petitioner;

(iv) The Expert Committee shall examine as to whether the answers to the questions raised by the Petitioner detailed hereinbelow are correct or otherwise

(v) The Expert Committee shall be appointed within a period of two weeks from today, i.e., on or before 19-02-2021.

(vi) The Expert Committee shall submit its report in a sealed cover to this Court within a period of two weeks, i.e., on 05-03-2021, from the date on which the Committee is formed.

12. *The questions which the Petitioner has raised concerns about and require examination by the Expert Committee are as follows;*

A. <u>Public Administration & Management</u>

Sl. No.	Questions with four options
1.	1. Which one of the following is not a type of informal Communication Network? a) Gossip b) Email c) Probability d) Cluster Answer by Respondent No.2 – (a) **Correct answer as per Petitioner – (b)**

2.	4. Which of the following enjoys the Constitutions status? (1) Finance Commission (2) Planning Commission (3) National Development Council (4) Election Commission a) 2 and 3 b) 1 and 4 c) 1, 2, 3 d) 1, 3 and 4 Answer by Respondent No.2 – (a) **Correct answer as per Petitioner – (b)**
3.	10. Who is the Vice Chairperson of Niti Ayog? a) Bibek Debroy b) Amitabh Kant c) Raj Nath Singh d) Arvind Panagariya Answer by Respondent No.2 – (a) **Correct answer as per Petitioner – (d)**
4.	11. Comptroller and Auditor General of India (CAG) is known as 'friend, philosopher and guide' to which committee? a) Estimates Committee b) Committee of Economic Affairs c) Public Accounts Committee d) Committee on Public Undertakings Answer by Respondent No.2 – (d) **Correct answer as per Petitioner – (c)**
5.	29. The posting of an IAS probationer is decided by: a) Chief Minister of the State b) Central Ministry of Personnel

	c) Director of LBS National Academy of Administration d) Chief Secretary of state Answer by Respondent No.2 – (d) **Correct answer as per Petitioner – (b)**
6.	74. Arrange the committees which examined the different aspects of the functioning of Panchayati Raj in a chronological order in their years of appointment? (i) G.V.K. Rao Committee (ii) Study Team on Panchayat Raj Finances (iii) Ashok Mehta Committee (iv) Balwantrai Mehta Committee **Codes :** a) (ii), (i), (iii) and (iv) b) (iv), (i), (ii) and (iii) c) (iii), (ii), (iv) and (i) d) (i), (iii), (ii) and (iv) Answer by Respondent No.2 – (b) **Correct answer as per Petitioner – (d)**

B. Indian History

Sl. No.	Questions with four options
1.	12. The word gotra is mentioned for the first time in a. Atharva Veda b. Rig Veda c. Yajur Veda d. Sama Veda Answer by Respondent No.2 – (a) **Correct answer as per Petitioner – (b)**

2.	28. Who among the following Englishmen was the first to visit the court of Jahangir? a. George Barlow b. Thomas Roe c. Hawkins d. William Edwards Answer by Respondent No.2 – (b) **Correct answer as per Petitioner – (c)**
3.	50. Who was the immediate successor of Ranjit Singh? a. Dalip Singh b. Gulab Singh c. Teja Singh d. Kharak Singh Answer by Respondent No.2 – (a) **Correct answer as per Petitioner – (d)**

C. ***The alleged wrong question in question No.54 of Indian History***

Sl. No.	Questions with four options
1.	54. The Archaeological Survey of India was established during the period of a. William Bentick b. Lord Curzon c. Warren Hasting d. Lord Ripon Answer by Respondent No.2 – (b) **Correct answer as per Petitioner – None of the above**

D. ***Question No. 14 of Indian History allegedly repeated as Question No. 15.***

Sl. No.	Questions with four options
1.	14. The 'Harappan Civilisation' was named after the Indus site of Harrapa by a) Dr. Sankhalia b) Dr. S. R. Rao c) Sir MEM Wheeler d) Sir John Marshall Answer by Respondent No.2 – (d) **Correct answer as per Petitioner - (d)**
2.	15. The 'Harappan Civilisation' was named after the Indus site of Harrapa by a) Dr. Sankhalia b) Dr. S. R. Rao c) Sir MEM Wheeler d) Sir John Marshall Answer by Respondent No.2 – (d) **Correct answer as per Petitioner – (d)**

13. *.....”*

13. In compliance to the Order of this Court, the Respondent No.2 submitted the report of the Expert Committee on 05-03-2021 in sealed cover which was opened by the Court on 09-03-2021 and the responses as found correct by the Expert Committee read over to the parties present. The Respondent No.2 vide its Counter-Affidavit dated 08-03-2019 had in Paragraph 31 (page 129 of the Paper Book) submitted that grace marks were given for Questions No.14 and 15.

14. In view of the report of the Expert Committee, it was ordered on 09-03-2021 *inter alia* as follows;

> **“**……..……
> ……...…
>
> In view of the circumstance pertaining to the Answer Keys that has arisen today, let the

> Respondent No.2 take necessary steps to reveal the names and qualifications of the persons who comprised the Expert Committee, under sealed cover. ……..”

15. The Respondent No.2, in compliance of the Order dated 09-03-2021 *supra*, submitted today in sealed cover the names and qualifications of the persons who comprised the Expert Committee. The Affidavit and the qualifications of the concerned Expert Committee have been perused and taken on record.

16. Today, it is submitted by Learned Counsel for the Petitioner that in view of the Report of the Expert Committee submitted on 08-03-2021, necessary orders be issued directing the Respondents No.1, 2 and 3 to appoint the Petitioner from the date on which the other candidates who had appeared for the same examination as him were given appointment, viz., 13-01-2018. Learned Counsel concedes that in view of the fact that the candidates who were so appointed have not all been impleaded as Respondents in this matter thereby depriving them of the opportunity of placing their submissions before this Court, he will be satisfied if the Seniority awarded to him is as the last candidate in the sequence of the list of selected candidates.

17. Learned Counsel for the Petitioner also submits that he is willing to forego arrears of salary which may have accrued to him from the date of his deemed appointment, however, prays that the incremental benefits as computed in the salaries of other candidates, already appointed as Under Secretaries, also be computed and granted to him to maintain his salary at par with and equivalent to them from the date of appointment, i.e., 13-01-2018.

18. Considered.

19. In view of the submissions of Learned Counsel for the parties, this Writ Petition is being disposed of with the following directions;

> *(i) The State Respondents No.1 and 3 shall appoint the Petitioner in the post of Under Secretary for which all necessary process*

shall be completed by them on or before 22-03-2021;

(ii) The date of appointment of the Petitioner shall be deemed to be from 13-01-2018;

(iii) The seniority of the Petitioner for all purposes of his service shall be computed from 13-01-2018;

(iv) In view of the circumstance that the selected candidates who are likely to be affected by the outcome of this Writ Petition have not been made party to the Petition, as conceded by the Petitioner, he shall rank last in the sequence of seniority in the list of candidates selected and appointed on 13-01-2018;

(v) The Petitioner shall be extended the benefits of increments to his salary. The incremental benefits thereof that would have accrued to the Petitioner shall be computed from 13-01-2018 to place his salary at par with and equivalent to all other selected candidates; and

(vi) As the Petitioner voluntarily forgoes his claims for arrears of salary, hence there is no necessity for the State Respondents No.1 and 3 to pay the arrears of salary to the Petitioner from 13-01-2018 retrospectively, till the day before his date of joining.

20. No order as to costs.

SLR (2021) SIKKIM 166
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Review Pet. (C) No. 1 of 2020

D.B. Thapa ….. PETITIONER

Versus

Urban Development and Housing Department ….. RESPONDENT

For the Petitioner: Mr. Kumar Subba, Advocate.

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

Date of decision: 17th March 2021

A. Sikkim Allotment of House sites and Construction of Building (Regulation and Control) Act, 1985 – No right to construct a garage on Government land adjacent to public road – Not inclined to interfere with the impugned order in exercise of the power of review in absence of any error apparent on the face of the order.

Petition dismissed.

ORDER (ORAL)

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

Being aggrieved by the Order dated 26.11.2020 passed in W.A No. 04 of 2020, this petition has been preferred seeking review.

Learned Counsel for the appellant has raised three points (i) any house construction on the road side is required to compulsorily construct a garage in the house on the land, (ii) it is further contended that in all the houses situated in the road side are having garage, out of them several

persons have constructed the garage on the Government land and (iii) the notice for demolition suffers with inherent defects without specifying the violation of any of the provisions of the Sikkim Allotment of House sites and Construction of Building (Regulation and Control) Act, 1985, therefore, there is an error apparent on the face of the record in the order under review, which warrants interference in this petition.

On the other hand learned Additional Advocate General argued in support of the Orders passed by this Court inter alia contending that the construction of a garage has been made on the Government land attached to public road for which demolition notice has rightly been issued and the actions has rightly been taken. Learned Single Bench as well as Writ Appellate Court has refused to interfere assigning the detailed reasons, therefore, there is no error apparent on the face of record in this case.

After hearing learned Counsel for the parties, the first argument advanced by the learned Counsel for the appellant do not attract in the present case because the said provisions are applicable in the cases where a person after purchasing a land construct a house on the road side. In such houses construction of garage is made compulsorily. It do not give right to them to construct the garage on Government land adjacent to public road, therefore, the said argument is wholly misplaced and cannot be countenanced.

So far as resume of the construction of garage of various persons on Government land are concerned, the said issue is not involved in the present case, looking to the nature of notice issued to the petitioner, therefore, we are not inclined to entertain the said point.

The issue regarding inherent defect in notice is concerned it is suffice to observe that construction of garage on the Government land situated road side is not permissible at all, therefore, we are not inclined to interfere in the order impugned in exercise of the power of Review in absence of any error apparent on the face of the order.

Accordingly, this Review Petition is dismissed with a cost of Rs. 25,000/- (Rupees Twenty Five Thousand). The amount be deposited to the Sikkim State Legal Services Authority within a period of 15 (fifteen) days from today.

SLR (2021) SIKKIM 168

(Before Hon'ble the Chief Justice)

WP(C) No. 55 of 2018

Karma Tenzing and Others ….. PETITIONERS

Versus

Chief of the Army Staff and Others ….. RESPONDENTS

For the Petitioners: Mr. Jorgay Namka, Advocate.

For Respondent 1, 2 and 6: Mr. Karma Thinlay, Central Govt. Counsel.

For Respondent 3 and 4: Dr. Doma T. Bhutia, Addl. Advocate General.

Date of decision: 19th March 2021

A. Right to Fair Compensation to Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – Relief sought is to issue writ of certiorari and/or appropriate writ/order against respondent No. 3 and 4 to complete the process of acquisition of the petitioners land or in the alternative, direct for compensation – Held: Order of determination of compensation passed by the Government of Sikkim through the Land Revenue and Disaster Management Department dated 01.11.2017 has not been represented or assailed by respondent No. 1 and 2 taking recourse of law, therefore, it has become final. In the said context, relief no. 1 as prayed in the writ petition has outlived its utility on account of the letter referred by respondent No. 1 and 2 dated 22.04.2017 for de-acquisition – The first relief has now rendered infructuous – So far as the second relief prayed in alternative for compensation, the same is surviving because after initiating the proceedings under S. 11 of the new Act, it was not been completed and the process of de-acquisition has been initiated on the request of respondent No. 1 and 2 – With regard to applicability of S. 93 of the new Act, the person whose land was required to be acquired, a

preliminary Notification taking recourse of S. 11 of the Act ought to be issued and possession thereof should not be taken over, only then compensation may be determined and paid.

(Paras 1, 4 and 5)

B. Right to Fair Compensation to Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – S. 93 – Legislative intent is clear that completion of compulsory acquisition by the appropriate Government is not necessary, they may have liberty to withdraw the said acquisition of which the possession of land has not been taken over after initiating the process of acquisition – When appropriate Government intends to withdraw any such acquisitions, prior to its completion, the Collector is duty bound to determine the amount of compensation due for the damages suffered by the owner in consequence of the Notice or of any proceedings thereunder and such amount shall be paid to the persons interested together with the cost reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land – Under the new Act, special provisions has been enacted by which even at any stage the Government may have liberty or can decide to withdraw from the said acquisition if not completed subject to payment of compensation for the damages suffered by the owner on account of notice and other proceedings brought against him – The determination of compensation made by the Collector vide letter dated 01.11.2017, *inter alia*, stating that the said compensation is for damages of crops yield involved due to cancellation of acquisition after Notice under S. 11 of the new Act squarely falls within the connotation "in consequence of the Notice" – Held: Compensation determined by respondent No. 3 and 4 vide letter dated 01.11.2017 shall be deposited by respondent No. 1 and 2 within three months from the date of communication of this order. Failure to deposit within the time limit shall entail deposit with interest @ of 6 % per annum – On receipt of the said amount of compensation, respondent No. 3 and 4 shall pay the same to the petitioners, as per law within a further period of one month or may keep in fixed deposit till its disbursement. On failure to pay by respondent No. 3 and 4 within the stipulated time, the interest as per the rates of fixed deposits prevalent on the date of deposit be payable to the petitioners.

(Paras 7, 10,11 and 14)

Petition allowed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Invoking the jurisdiction under Article 226 of the Constitution of India, the Petitioners have filed this petition seeking following reliefs:-

> "Under the above facts and circumstance, it is therefore, prayed that this Hon'ble Court may be pleased to admit this petition, call for records and issue rule calling upon the Respondents to show cause as to why a Writ of Certiorari and/or appropriate Writ/Order or Direction should not be issued directing Respondent No. 3 and 4 to complete the process of acquisition of the Petitioners land and/or pass any other order/s /directions as your Lordships deem fit and proper for the ends of Justice.
>
> In the alternative direct the Respondents to compensate the Petitioners."

2. On perusal, it is found some facts are not in-disputed in the case. The Notification for compulsory acquisition of the lands belonging to the Petitioners was issued under Section 4 of the Land Acquisition Act, 1894 (in short, Old Act) on 05.10.2013. On account of commencement of the Right to Fair Compensation to Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred as New Act) w.e.f. 01.01.2014, the old Notification of Section 4 of the old Act was came to be lapsed in view of Section 24 of the New Act.

3. It is also not in dispute that after commencement of the New Act a fresh Notification for compulsory acquisition of petitioners' land was issued on 25.11.2016 under Section 11 of the New Act. The acquisition of the said land was for the purpose of "Creation of Logistic Infrastructure for Troops". Later correspondence reflects that vide letter No. 7379/Rab/123/ AC/QM dated 04.01.2017, a request was made by Lt. Col., OIC, ASW for CO, 17th Mtn. Div. Ord Unit, Pin-909417, C/o 99 APO to the Deputy Secretary/Acquisition, Land and Revenue Disaster Management Department, Government of Sikkim for de-acquisition of the land. As per Annexure R-7 dated 04.05.2019, the Deputy Secretary, Land and Revenue Department

informed Lt. Colonel SA Kalam, OIC ASW for CO, 17th Mtn Div Ord Unit, C/0 99 APO, Pin-909417 that the procedure of de-acquisition is under process and the District Collector, South is in the process of assessment of the damage by way of compensation payable to the land owners as per Section 93 of the New Act and same shall be conveyed on finalization. Thereafter, vide letter dated 01.11.2017, the amount of compensation has been calculated to the tune of Rs. 1,89,09,777/- and informed to the respondents no. 1 and 2. It is not in dispute that the said amount has not been paid by them, in lieu of responding the letter of the Collector dated 24.05.2017 vide reply letter dated 27.06.2017.

4. It is also a fact that the Order of determination of the compensation as passed by the Government of Sikkim through the Land Revenue and Disaster Management Department dated 01.11.2017 has not been represented or assailed by the respondents no. 1 and 2 taking recourse of law, therefore, it has become final. In the said context, it is clear that the relief No. 1 as prayed in the Writ Petition seeking direction against respondents no. 3 and 4 to complete the process of acquisition has outlived its utility on account of the letter referred by respondents no. 1 and 2 dated 22.04.2017 for de-acquisition and due to further correspondence made on 24.05.2017 and 01.11.2017 of the State Authorities, therefore, the first relief as prayed for in the Writ Petition has now rendered infructuous.

5. So far as the second relief prayed in alternative to first relief directing respondents to compensate the petitioners in the opinion of the Court is surviving because after initiating the proceedings under Section 11 of the New Act, it was not completed and the process of de-acquisition has been initiated on the request of respondents no. 1 and 2. In regard to applicability of Section 93 of the New Act, the person whose land was required to be acquisitioned, a preliminary Notification taking recourse of Section 11 of the New Act ought to be issued and the possession thereof should not be taken over, then only the compensation may be determined and paid.

6. In the said context, Section 93 is relevant which is reproduced as thus.

> **"93. Completion of acquisition not compulsory, but compensation to be awarded when not completed.-**(1) The appropriate

> Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
>
> (2) Whenever the appropriate Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land."

7. On perusal of the aforesaid, the Legislative intent is clear that completion of compulsory acquisition by the appropriate Government is not necessary, they may have liberty to withdraw the said acquisition of which the possession of land has not been taken over after initiating the process of acquisition. In the present case also after issuance of the Notification under Section 4 of the Old Act and on to commencement of the New Act, the preliminary Notification under Section 11 was issued but the possession of land was not taken from the petitioners. As per Sub-Section 2 above, it is clear that when appropriate Government wants to withdraw any such acquisitions, prior to its completion, the Collector is duty bound to determine the amount of compensation due for the damages suffered by the owner in consequence of the Notice or of any proceedings thereunder and such amount shall be paid to the persons interested together with the cost reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

8. Learned Counsel appearing on behalf of respondents no. 1 and 2 has made an attempt to satisfy this Court that as per letter dated 01.11.2017 the compensation which was determined by the Collector is of the damages of crops yield involved in the process of acquisition of the land. The Sub-Section 2 of Section 93 of the New Act do not confer any power to the Collector to determine the damages of the crops yield involved, therefore, the respondents no. 1 and 2 is not liable to pay the amount of compensation as determined by the Collector under the provisions of Section 93 (2) of the New Act. It is contended that in response to the previous letter dated 24.05.2017, the objections have

already been submitted by the respondents no. 1 and 2 on 27.06.2017 which has not been duly considered by the Collector while issuing the letter dated 01.11.2017, therefore, the amount of compensation is not required to be paid by them and the present petition may be dismissed.

9. On the other hand, the learned Counsel appearing on behalf of the petitioners as well learned Additional Advocate General representing respondents no. 3 and 4 contends that after issuance of preliminary Notification under Section 11, as per Section 93(2) of the New Act, in case the acquisition is not completed and possession of the land has not been taken, the Government can withdraw the said acquisition proceedings. In the said contingencies, the Collector is require to determine the amount of compensation for the damages suffered by the owner in consequence of the Notice or any of the proceedings thereunder. The said amount is liable to be paid by the person to whom the land is being compulsorily acquisitioned, therefore, the arguments as advanced by the Counsel for the respondents no. 1 and 2 is contrary to the spirit of Section 93 of the New Act.

10. After having heard learned Counsel appearing on behalf of both the parties and to advert the arguments as advanced by the parties, the intention of the Legislature while enacting Section 93 has to be seen. On perusal thereto and as discussed above, sub-Section (1) confers a power to the State Government for withdrawal of the compulsory acquisition of any land in case it is not completed and the possession of the said land has not been taken. Sub-Section (2) comes into play when the appropriate Government withdraws the acquisition, at that stage, it is the duty of the Collector to determine the amount of compensation due "for damages suffered by the owner in consequence of a Notice or any Proceedings and any cost incurred". Thus, under the New Act special provisions have enacted by which even at any stage the Government may have liberty or can decide to withdraw from the said acquisition if not completed subject to payment of compensation for the damages suffered by the owner on account of notice and other proceedings brought against him.

11. The Legislative intent is clear that the determination of the amount of compensation shall be based upon or for the damages suffered by the owner in consequence of the Notice or any proceedings alongwith the cost as specified. However, the determination of the compensation made by the Collector vide letter dated 01.11.2017 inter alia stating that the said

compensation is for damages of crops yield involved due to cancellation of acquisition after Notice of Section 11 of the New Act is squarely fall within the connotation "in consequence of the Notice". The arguments as advanced by the Counsel for respondents no. 1 and 2 is completely misplaced and contrary to the Legislative intent as discussed hereinabove, therefore, such arguments cannot be countenanced.

12. In view of the foregoing discussion, petitioner is entitled to, the alternative relief, prayed in this petition, and the direction of the said relief can be issued. It is to observe here that the Order dated 01.11.2017 passed by the District Collector determining the compensation conveyed to the Department has not been assailed by respondents No. 1 and 2 though the period of more than three and half year has already been elapsed, therefore, in consequence of the provision of Sub-Section (2) of Section 93 of the New Act, the direction for payment of compensation as determined by the District Collector can be issued against the respondents no. 1 and 2.

13. As per discussion made hereinabove, the first part of the relief is declared infructuous while for the second part of relief petitioners are entitled to the directions as sought against the respondents to compensate them. In the present case, after issuance of preliminary Notification for compulsory acquisition, it has been withdrawn prior to its completion by the respondents no. 3 and 4 on the request of respondents no. 1 and 2. In consequence the respondents no. 3 and 4 has determined the amount of compensation as per Section 93(2) of the New Act and the said amount of compensation is payable by the respondents no. 1 and 2 to the petitioners.

14. Accordingly, this petition is allowed with a direction that the compensation determined by respondents no. 3 and 4 vide letter dated 01.11.2017 shall be deposited by respondents no. 1 and 2 within a period of three months from the date of communication of this Order. Failure to deposit the said amount within the time limit shall entail deposit with interest at the rate of 6 % per annum. It is further directed that on receipt of the said amount of compensation, the respondent nos.3 and 4 shall pay the same to the petitioners, as per law within a further period of one month or may keep in fixed deposit till its disbursement. On failure to pay by respondents No. 3 & 4 within the stipulated time, the interest as per the rates of fixed deposits prevalent on the date of deposit be payable to petitioners.

The Branch Manager, National Insurance Company Ltd. v. Dechen Ongmoo Lepcha & Ors.

SLR (2021) SIKKIM 175

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

I.A. No. 1 of 2020 in MAC App. No.11 of 2020

Branch Manager,
National Insurance Co. Ltd. …. PETITIONER/APPELLANT

Versus

Dechen Ongmoo Lepcha and Others ….. RESPONDENTS

For the Petitioner/Appellant: Mr. Thupden G. Bhutia, Advocate.

For Respondent 1-2: Ms. Vidya Lama, Advocate.

For Respondent 3: Mr. K.B. Chettri, Advocate.

For Respondent 4: Mr. Umesh Gurung, Advocate.

Date of decision: 19th March 2021

A. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of delay – It is clear from the second proviso that the High Court may entertain the appeal after expiry of the period of ninety days if it is satisfied that the appellant was prevented by "sufficient cause" from preferring the appeal in time – Incongruous for the petitioner/appellant to have placed reliance on Circulars dated 24.03.2020, 14.04.2020 and 18.04.2020 of the High Court which were issued much after the period of limitation had expired for filing the appeal. No grounds have been put forth as to why the delay of 261 days occurred prior to the COVID-19 pandemic and the issuance of the consequent Circulars.

(Paras 6 and 8)

Petition and appeal dismissed.

Chronology of cases cited:

1. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.

2. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The instant application is filed by the Petitioner/ Appellant under Section 173(1) of the Motor Vehicles Act, 1988 ("M.V. Act"), seeking condonation of 261 (two hundred and sixty one) days' delay in filing the Appeal.

2. Learned Counsel for the Petitioner/Appellant, while making an effort to justify the delay, submitted that the impugned Judgment was pronounced on 31.10.2019, copy of the Judgment was sought on 05.11.2019 vide application which was ready on 26.11.2019. The Appeal came to be filed on 05.11.2020 however after curing the defects was re-submitted on 11.12.2020. The limitation period of 90 (ninety) days admittedly, was over on 19.02.2020, as per Learned Counsel for the Petitioner/Appellant. Reliance was placed by Learned Counsel on the Circulars issued by the Registry of this High Court from 24.03.2020 after the lockdown owing to the COVID-19 pandemic. That, in view of the facts submitted hereinabove, the delay be condoned.

3. Learned Counsel appearing for Respondents No.1 and 2, Respondent No.3 and Respondent No.4 objected to the Petition on grounds that the Appeal ought to have been filed on 19.02.2020 and reliance by the Petitioner/Appellant on the Circulars issued by the High Court is erroneous as the first Circular, dated 24.03.2020, was issued almost a month after the period of limitation was over and was concerned with the lockdown after the COVID-19 pandemic broke out. The other Circulars dated 14.04.2020 and 18.04.2020 also have no relevance to the instant matter. That, as no other grounds have been specified for the delay, in such circumstances, the Petition merits no consideration.

4. I have heard Learned Counsel for the parties and considered their submissions. I have also perused the Petition and the Memo of Appeal.

5. The provisions of Section 173 of the M.V. Act which deals with Appeals may relevantly be considered, which is extracted hereinbelow;

> "**173. Appeals**.—(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:
>
> Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:
>
> **Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.**
>
> (2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."
>
> **[emphasis supplied]**

6. It is clear from the second proviso *supra* that the High Court may entertain the Appeal after expiry of the period of ninety days if it is satisfied that the Appellant was prevented by "sufficient cause" from preferring the Appeal in time. Thus, the Appellant is required to prove "sufficient cause" for the delay. While explaining what "sufficient cause" entails, the Hon'ble Supreme Court in ***Basawaraj and Another vs. Special Land Acquisition Officer***[1] held *inter alia* as follows;

> "**11**. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial

[1] (2013) 14 SCC 81

justice is done, but only so long as negligence, inaction or lack of *bona fides* cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. *(Vide Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] and Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201].)*

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale."

[emphasis supplied]

7. In ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others***[2] the Hon'ble Supreme Court,

[2] (2013) 12 SCC 649

while enunciating the principles applicable to an application for condonation of delay would *inter alia* hold as hereinbelow extracted;

> "**21**. From the aforesaid authorities the principles that can broadly be culled out are:
>
> …….....……
>
> **21.4.** (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
>
> **21.5.** (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
>
> ……
>
> **21.7.** (vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
>
> ……
>
> **21.9.** (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
>
> **21.10.** (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.
>
> …….....……
>
> **22.** To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

> **22.1.** (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.
>
> …….....……"

The principles are to be adhered to by parties as also the Court who is vested with discretion, which obviously has to be exercised judiciously.

8. In light of the facts and circumstances placed before this Court today, it is indeed incongruous for the Petitioner/Appellant to have placed reliance on Circulars dated 24.03.2020, 14.04.2020 and 18.04.2020 which were issued much after the period of limitation had expired for filing the Appeal. No grounds have been put forth as to why the delay of 261 (two hundred and sixty one) days occurred prior to the COVID-19 pandemic and the issuance of the consequent Circulars. Although it was also urged by Learned Counsel for the Petitioner/Appellant that substantial justice ought to be meted out to the Appellant, however, in the same vein, Learned Counsel may be reminded that the compensation sought for is under benevolent legislation to mitigate the sufferings of persons who lose an earning member of the family in a motor accident besides suffering other non-pecuniary losses. The Circulars issued by the High Court, as already pointed out by Learned Counsel for the Respondents, have no relevance to the instant matter and are, therefore, outside the ambit of consideration.

9. Consequently, in view of the discussions which have emanated hereinabove and circumstances put forth by Learned Counsel for the Petitioner/Appellant which do not explain the delay, I am not inclined to condone the delay.

10. I.A. No.01 of 2020 stands dismissed and disposed of as also the Appeal.

11. I.A. No.02 of 2020 also stands disposed of.

12. No order as to costs.

SLR (2021) SIKKIM 181

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

Crl. A. No. 7 of 2020

Shri Shajal Rai *alias* Adrian ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. N. Rai, Sr. Advocate (Legal Aid) with Ms. Sudha Sewa, Advocate .

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

Date of decision: 24th March 2021

A. Indian Evidence Act, 1872 – Principles of Criminal Law – The basic principle of criminal law is that the prosecution has to prove his own case and they cannot take advantage of the lacuna of the defence. Except in a case of admission of guilt in Court by an accused, his defence may be seen after the discharge of burden by prosecution, when onus shifts – At the appellate stage, the High Court may examine the justiciability of the findings recorded by the Trial Court taking note of the above principles of law and can reverse those findings if it is perverse or illegal on appraisal or reappraisal of evidence. The defence so put by the accused may be looked into only when the prosecution proves the case beyond a reasonable doubt.

(Para 9)

B. Indian Evidence Act, 1872 – Sole Testimony – Evidentiary Value – Sole testimony of a prosecutrix, if it is wholly reliable, safe and worthy to accept, conviction can be based for an offence under S. 376, I.P.C – But if the testimony throws doubt on the prosecution case due to the unnatural conduct of family, the evidence being impeachable, it cannot be relied upon without corroboration by other evidence, more so, when it creates a doubt about the improbability of the story of the prosecution.

(Para 12)

C. Indian Evidence Act, 1872 – Sole Testimony – Evidentiary Value – The statement of the prosecutrix recorded in the Court is an improvement of the prosecution story – The statement of PW-6, sister of the prosecutrix who was with her states different story in this regard – The prosecution story as reflected in the charge-sheet about what happened to the victim, the circumstances before and after the incident is substantially different from what the prosecution witnesses has stated in the Court – The sole testimony of the prosecutrix is not of sterling character even in the manner the allegation of rape is alleged – Not safe to rely upon – Has not found support from medical evidence.

(Paras 18, 19 and 20)

Appeal allowed.

Chronology of cases cited:

1. Sudhansu Sekhar Sahoo v. State of Orissa, (2002) 10 SCC 743.
2. Yerumalla Latchaiah v. State of Andhra Pradesh, (2006) 9 SCC 713.
3. Ramesh Baburao Devaskar and Others v. State of Maharashtra, (2007) 13 SCC 501.
4. Dinesh Jaiswal v. State of M.P, AIR 2010 SC 1540.
5. State of Rajasthan v. Babu Meena, 2013 Crl.L.J 1634.
6. Mohd. Ali *alias* Guddu v. State of Uttar Pradesh, (2015) 7 SCC 272.
7. B.C. Deva *alias* Dyava v. State of Karnataka, (2007) 12 SCC 122.
8. Sudhansu Sekhar Sahoo v. State of Orissa, (2002) 10 SCC 743.

JUDGMENT

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

Assailing the validity of the Judgment and Order dated 17.02.2020 and the Sentence awarded on 18.02.2020 in Sessions Trial (F.T.) Case No. 04 of 2019 by the Judge, Fast Track Court, East & North Sikkim at Gangtok and challenging the findings recorded against the accused/ appellant of his conviction and sentence of 10 years rigorous imprisonment and the

amount of fine of Rs.50,000/- (Rupees Fifty Thousand), in default three months simple imprisonment for an offence under Section 376 (1) of the Indian Penal Code, 1860 (for short, IPC), this appeal has been preferred by the accused.

2. The case of prosecution, in brief, is that the accused Shajal Rai @ Adrian, aged 22 years, is a resident of Zoom Busty, West Sikkim, at present resident of 6th Mile, Tadong, East Sikkim. He is a driver by profession and was in occupation to drive a tourist vehicle bearing registration number SK01 Z-0702 belonging to Damber Bahadur Chettri of Deorali, East Sikkim. On 17.04.2019 at around 20.30 hrs., the victim's sister while checking the mobile phone of the victim, received a call from the accused, who asked the victim's sister to come and meet him at Putali Garden, East Sikkim. The victim snatched her phone from her sister and switched on the speaker of phone and responded to accused "why should I come". The accused asked the victim whether "she loved him or not". The victim did not respond to that. The victim's sister asked the accused to give Rs.500/- with a promise to return it the next day after going to Gangtok. The accused agreed to give the money as demanded but asked the victim or her sister to come alone, whosoever may be. The story further revealed that the victim got acquainted with the accused over a month back after being introduced by her sister, as her friend's boyfriend. The victim also saw the accused visiting the church situated next to her house. During one occasion the accused met the victim's sister and asked her mobile phone. The victim's sister did not have her own mobile phone, however, gave the number of her sister, which was saved by accused. The accused used to call the victim's sister on the victim's phone. On the date of the incident, after talking with the accused, the victim proceeded towards the main road, i.e. Putali Garden, 32 Mile, East Sikkim and met the accused. The accused forcibly caught the victim and placed her inside his vehicle bearing no. SK01 Z-0702 and locked it from inside by the central locking system. Despite strenuous effort from the victim she could not open the door of the vehicle. The accused had also snatched the phone of the victim and kept it. After driving for a while the accused stopped the vehicle at Radong, New Road, East Sikkim and started the music player on a maximum volume. The accused pushed back the seat where the victim was sitting, forcibly removed the clothes, put a knife on the neck of the victim and threatened to cut her neck if she screamed or resisted. At that time victim continued to curse and scold him but she was overpowered by the accused who then committed

rape on her. Thereafter, the accused threatened the victim with dire consequences if she complained of the incident. After a while, the accused dozed off giving an opportunity to the victim to escape from the vehicle by somehow pressing the button of the driver's seat and taking her mobile phone. When the victim had just walked a few yards, the accused again came, took the victim inside the vehicle and dropped her at Putali Garden, 32 Mile, East Sikkim. By the time the victim reached her house it was already 21.30 to 22.00 hrs. Thereafter, the victim called her boyfriend, PW-4 over his phone on 17.04.2019 around 23.00 hrs. and narrated the incident. On the next day morning, i.e. 18.04.2019, the accused again called the victim and assured to take care of her. He also told her that now they would be treated as a couple. On reaching the house of the victim, the boyfriend suggested to call the accused person to the same place wherefrom she was kidnapped and was raped. On the next day when the accused reached the same place the victim's boyfriend, one Rahul, the victim and victim's sister caught the accused. The father lodged the FIR on 18.04.2019, the next day, in Ranipool Police Station at 22.30 hrs. The SHO, Ranipool Police Station recorded the statement under Section 161 of the Code of Criminal Procedure, 1973 (for short, CrPC) and also sent her for medical examination. After medical examination, seizures of some articles were made by the Doctor who handed over the same to the police team for RFSL examination. The vehicle was also seized by the police. On finding that the place of incident did not fall within the jurisdiction of Ranipool Police Station, the case was transmitted to the Police Station, Singtam on 19.04.2019. The Sub-Inspector prepared the spot map and sent the seized clothes, slides and vehicle for RFSL examination and received the report Exhibit-17. After completion of investigation Challan was filed for alleged commission of offence under Section 376/365 of the IPC.

3. Finding that the case was triable by the Court of Session it was committed to the competent Court then assigned for trial to the Fast Track Court, East & North Sikkim at Gangtok. The Sessions Court framed charges under Section 376(1), 365 and 506 of the IPC. The accused has abjured the guilt and submitted a defence of his false implication demanding trial. The prosecution has examined 14 witnesses while the accused has not examined any witness in support of his defence.

4. Learned Trial Court found that the charges under Sections 365 as well 506 of the IPC have not been proved from the evidence brought by

prosecution. However, relying upon the testimony of the prosecutrix the learned Trial Court held that charge under Section 376(1) of the IPC is proved. Accordingly, the learned Trial Court convicted the accused/ appellant for the said charge and directed the accused to undergo the sentence as described hereinabove.

5. Learned counsel appearing on behalf of the appellant would urge with vehemence that it is a case of false implication of the appellant. The prosecutrix is major. As per the contents of the FIR nothing is alleged regarding sexual assault. The story so prepared by the prosecution is concocted. The FIR registered by Ranipool Police Station on 18.04.2019 had been sent to the concerned Magistrate on 20.04.2019 without any explanation for the delay and non-compliance of Section 157 of the CrPC. The allegations as alleged in the prosecution story does not inspire trust, looking at the testimonies of the victim and witnesses or even by his statement recorded before police. The testimony of the prosecutrix is not of sterling character which can be relied upon to convict the appellant. The allegation of commission of rape is not corroborated by medical evidence or from the scientific evidence, to bring the charge at home.

6. The prosecution has left so many lacunas in the case. DNA test was not conducted; the vehicle though seized and sent for RFSL examination the report did not substantiate the allegation of rape. Although the prosecution alleges that rape was committed after the accused centrally locked the doors but no technical report of the vehicle was obtained. The spot map does not specify the place of incident and no explanation has been offered by I.O. The FIR is delayed by one day although the incident was reported on the same day to the boyfriend, the friend and the victim's sister was present all throughout with her. The father of the prosecutrix was unaware of the incidence though he resided with the victim in the same house. He was called only when the police instructed to call the guardian. He did not know the contents of the FIR, but said he came to know from his son-in-law. He admitted that he did not know the accused who committed rape on his daughter. As per the case of the prosecution, the accused has put a knife on the neck of the prosecutrix, threatened her and overpowered her to commit rape. However, the alleged knife was not recovered by the prosecution. Although the alleged story started from the telephonic conversation and exchange of messages between the accused, the prosecutrix, the boyfriend and Rahul Sharma, PW-5 the CDRs have not

been collected and produced by the police. In view of the forgoing, it is argued that either it may be a case of consent or otherwise of false implication and for these reasons prompt information had not been given to the police station. In view of the forgoing facts, relying upon the judgments of ***Sudhansu Sekhar Sahoo vs. State of Orissa*** reported in (***2002) 10 SCC 743***, ***Yerumalla Latchaiah vs. State of Andhra Pradesh*** reported in ***(2006) 9 SCC 713***, ***Ramesh Baburao Devaskar and others vs. State of Maharashtra*** reported in ***(2007) 13 SCC 501***, ***Dinesh Jaiswal vs. State of M.P.*** reported in ***AIR 2010 SC 1540, State of Rajasthan vs. Babu Meena*** reported in ***2013 Crl LJ 1634*** and ***Mohd. Ali alias Guddu vs. State of Uttar Pradesh*** reported in ***(2015) 7 SCC 272***, it is submitted that the conviction under Section 376(1) of the IPC as directed by the Trial Court is unsustainable and the consequential sentence as directed may also be set aside.

7. On the other hand, learned Additional Public Prosecutor made strenuous attempt to support the findings as recorded by the learned Trial Court, *inter alia,* arguing that the conviction in a case of an offence of commission of rape can be proved by the sole testimony of the prosecutrix. Therefore, finding of guilt as recorded and the sentence as directed by the Trial Court do not warrant interference. The arguments advanced that allegation of rape is belied by medical evidence is of no substance looking at the testimony of the prosecutrix, which is reliable and inspire confidence. Thus the appeal may be dismissed and the conviction and sentence of the appellant may be upheld. In support of his contention reliance is placed on the judgments of ***B.C. Deva alias Dyava vs. State of Karnataka*** reported in ***(2007) 12 SCC 122*** and ***Sudhansu Sekhar Sahoo vs. State of Orissa*** reported in (***2002) 10 SCC 743***.

8. After having heard learned counsel appearing on behalf of both the parties, we have perused the findings recorded by the Trial Court. It reveals that the learned Trial Court relied upon the sole testimony of the prosecutrix, accepting the allegation that the accused brought her to the isolated place in his vehicle removed her clothes and committed rape. The accused has been identified by the prosecutrix in the Court as he was known to her through her sister's friend. The learned Trial Court further, referring the judgments of the Supreme Court held that the sole testimony of the prosecutrix could be relied upon. It was further held that the testimony of PW-2 (father of the prosecutrix), PW-4 (husband of the prosecutrix), PW-5 (friend of the

prosecutrix), PW-6 (sister of the prosecutrix), PW-8 (prosecutrix sister's friend) and various documents were also reliable. Some parts of the testimonies and the cross-examinations have been reproduced in the judgment. It was held that the prosecutrix was staying with the father and younger sister and had acquaintance with the accused. However, the victim believed the accused when he asked for some help and reached Putali Garden to meet him. It was held that the delay in lodging FIR may be due to mental trauma, feeling of guilt, shame because of outraging her modesty in a situation in which she was going to be married soon with PW-4. It was further held that the defence was unable to give any cogent reason why the victim had named the accused as perpetrator of commission of the offence. The learned Trial Court had acquitted the accused from the charge under Sections 365/506 of the IPC, but convicted him for the charge under Section 376(1) of the IPC.

9. In the matter of proving the guilt of an accused in Court it is not out of place to state that the basic principle of criminal law is that the prosecution has to prove his own case and they cannot take advantage of the lacunas of the defence. Except in a case of admission of guilt in Court by an accused his defence may be seen after the discharge of burden by prosecution when onus shifts. The Court has to record a finding that the charge so framed has been proved by prosecution beyond reasonable doubt. Thereafter onus shifts upon the accused and the Court could see the defence put up by the accused while convicting or acquitting the accused. At the appellate stage, the High Court may examine the justiciability of the findings recorded by the Trial Court taking note of the above principles of law and can reverse those findings if it was perverse or illegal on appraisal or reappraisal of evidence. The defence so put by the accused may be looked into only when the prosecution proves the case beyond reasonable doubt. On the said basic parameters, the legality and propriety of the impugned judgment is required to be examined.

10. Prior to appreciating the facts and evidence brought on record, the judgments relied by learned counsel representing the parties may be discussed. As per appellant counsel in the case of ***Dinesh Jaiswal vs. State of Madhya Pradesh*** (supra), the Apex Court observed that the sole statement of the prosecutrix was not reliable. Her testimony had no corroboration and considering the improbabilities in her story, conviction was set aside by allowing the appeal. In the case of ***State of Rajasthan vs.***

Babu Meena (supra), the Apex Court has held that if the statement of the prosecutrix is not at all reliable or wholly unreliable and no other evidence has been led to support the allegation of rape, it would not be safe to convict the appellant on her sole testimony. The Apex Court observed that the testimony of the prosecutrix may be of three categories, first wholly reliable, second wholly unreliable and third neither wholly reliable nor wholly unreliable. While explaining the same it was observed that if the testimony is wholly reliable, the sole testimony can be relied upon otherwise its corroboration from other prosecution witnesses must be sought. In the case of ***Mohd. Ali alias Guddu vs. State of Uttar Pradesh*** (supra), it was held that there can be no iota of doubt that a conviction can be based on sole testimony of prosecutrix even without corroboration if it is of unimpeachable character and beyond reproach. It was observed that the testimony of prosecutrix is placed on a higher pedestal than an injured witness. But if the testimony is not reliable and doubted then there is requirement for search of corroboration.

11. Learned Additional Public Prosecutor in opposition has cited the judgment of ***B.C. Deva alias Dyava vs. State of Karnataka*** (supra), in which the Apex Court has upheld the conviction based upon the sole testimony of the prosecutrix and her subsequent conduct and held that the said testimony was enough to base the conviction of the accused for an offence under Section 376 of the IPC. In the case of ***Sudhansu Sekhar Sahoo vs. State of Orissa*** (supra), the Apex Court observed that the sole testimony of the prosecutrix if safe, reliable and worthy of acceptance is sufficient to convict the accused.

12. In view of the aforesaid judgments relied upon by the learned counsel for the appellant as well as respondent it is crystallized that sole testimony of the prosecutrix if wholly reliable, safe and worthy to accept the conviction can be relied upon for an offence under Section 376 of the IPC, but, if the testimony throws doubt on prosecution case due to the unnatural conduct of family and then evidence being impeachable, it cannot be relied upon without corroboration by other evidence, more so when it creates doubt about the improbability of the story of the prosecution.

13. The Apex Court in the case of ***Yerumulla Latchaiah vs. State of Andhra Pradesh*** (supra) while dealing with a case of a prosecutrix aged 8 years had not found any sign of rape on the body of the victim. In the said

case medical evidence was found to be relevant and it was held that if statement of the prosecutrix is belied by the medical evidence conviction is not safe. In the case of ***Ramesh Baburao Devaskar and others vs. State of Maharashtra*** (supra), the importance of the delay in lodging FIR and the delay in sending the copy to the Magistrate was examined and it was held that the requirement of Section 157 of the CrPC has not been complied. In view of the said two judgments it is clear that the requirement of non-compliance of Section 157 CrPC with a delayed FIR is material and may affect the conviction of the accused in a given case. Simultaneously if the allegation of rape based upon the testimony of the prosecutrix is found not reliable without support from medical evidence then it can be a ground to set aside the conviction. In the light of the law laid down by Hon'ble the Apex Court and relied by the parties the facts of the present case is required to be seen.

14. In the present case, the incident took place in between 20.30 to 21.30 hrs on 17.04.2019. The FIR has been lodged by PW-2, father of the prosecutrix at Ranipool Police Station on 18.04.2019 at 22.30 hrs, *inter alia*, stating that when she was at home, the accused called his daughter on mobile phone to Putali Garden, 32 Mile and forcibly abducted her in an Innova vehicle bearing no. SK 01 Z-0702. The accused after centrally locking the vehicle drove towards Radong, new road and started playing loud music. The accused touched her body and committed bad act which came to his knowledge and so he was submitting the report to punish the accused and give protection to his daughter as per law. As per the statement of PW-2 in Court it is clear that his son-in-law came to his house and asked him to go Ranipool Police Station. When he asked him, he informed that the prosecutrix (daughter) had been raped by the accused at Radong road. Although he has admitted his signature on the FIR, Exhibit P-1, in cross-examination he stated that the prosecutrix (daughter) did not narrate anything about the incident to him. The FIR submitted by him i.e. Exhibit P-1 was not scribed by him. He do not know the contents of the FIR. It is further admitted by him that his son-in-law, PW-4, did not tell him the name of the accused person while narrating about the incident. He admitted that his son-in-law, PW-4, used to stay at his house as he was engaged with his daughter during the relevant time and the prosecutrix is married to PW-4. Thus, it is clear that the FIR was not scribed by the father and he does not know the name of the accused and the contents of the FIR. The prosecutrix although staying with him did not narrate anything

about the incident to him. PW-4 in his Court deposition said that the police personnel instructed him to call the guardian, therefore, he and Rahul, PW-5, informed the father, PW-2, for lodging the FIR. In the deposition of PW-5-Rahul Sharma, it is only stated that the guardian of the victim lodged the FIR in Ranipool Police Station, which was forwarded to Singtam Police Station. Therefore, the lodger of the FIR was not aware who was the accused, what incident took place and also he has not proved the narration of the FIR in the manner as stated therein.

15. With regard to the story of the commission of rape, it is said by the prosecution that on 17.04.2019 around 20.30 hrs. the sister of the victim, PW-6 while checking the mobile of victim, received a call from the accused who asked the victim's sister to come and meet him at Putali Garden. It is their case that the victim snatched her phone and responded to the accused by asking "why should I come". It is also their case that she had switched on the speaker of the mobile on which accused asked whether "she loved him or not", but the prosecutrix did not respond. At the same time the sister of the prosecutrix, PW-6, teased the accused and asked for R.500/- with a promise to return the same. To that the accused agreed but asked either of them to come personally and receive the amount. The acquaintance of the prosecutrix and accused were a month prior to the incident. At that time the victim's sister had introduced the accused to the prosecutrix as her friend's boyfriend. At that time, the mobile phone number of the prosecutrix was given to the accused because the victim's sister did not keep a mobile phone. In such circumstances, the accused called on the mobile of the prosecutrix on the date of incident and the victim and victim's sister both talked with him.

16. In that regard the statement of PW-6, sister of the prosecutrix, under Section 164 of the CrPC is also relevant to know how prosecution set out the case. It indicates the accused had met her earlier. She was shown the accused by her sister as the boyfriend of her friend. She further states that she was in talking term with the accused, as the victim's sister did not have a mobile phone. Therefore, the mobile number of the victim had been given to the accused. PW-8, the friend of victim's sister deposed regarding the meeting. She said that the accused used to be her boyfriend. She did not say anything about giving mobile number of the victim to the accused for her use. The prosecutrix in this regard has stated that the accused met in the Nimtar Church. As per the statement recorded in the

Court PW-6 said that PW-8 saved the mobile number of the accused in the mobile of the victim and asked to contact the victim in case of any emergency, though it is nobody's case (either of PW-1, PW-6 and PW-8) before police. Therefore, the story of asking of the mobile number through victim's sister's friend as the accused being boyfriend of the victim's sister's friend is differently set out. As per their statements under Section 161 CrPC and in Court it can be gathered that the sister of victim was in touch with accused and later the victim had also come in contact and both were in talking terms with the accused. It appears that the story that the accused was boyfriend of victim's sister's friend is a cooked up story. Therefore, how the mobile number of the accused had come to the victim as stated by the prosecution has not been proved beyond reasonable doubt.

17. The story of checking the mobile phone of victim by victim's sister and her conversation with accused or with victim as set out by the police has also not been proved in the Court. The sister of the victim, PW-6, states that she received a call from the accused asking her to meet him at Butterfly Garden for some work which was declined by her. As the accused was calling her again and again the victim picked up the mobile, received the call and went out of the house while talking to accused. The prosecutrix, PW-1 stated that she received a call from the accused to come to Butterfly Garden as her needed help. Accordingly she reached the place and saw the accused in an intoxicating state. As such the story of prosecution about the call by the accused on mobile phone to the victim; the mobile being checked by the victim's sister, PW-6, and the accused asking her whether "she loved him or not" and of "asking of Rs.500/- by victim's sister"; teasing him and the victim going to get the said amount are not proved with the testimonies of PW-1 (victim) and PW-6 (victim's sister). Therefore, the prosecution case has not been proved convincingly by the statement of the prosecution witnesses.

18. Now the statement of the victim that after reaching Putali Garden, the accused told her to sit in the vehicle and she sat on the front seat on her own, thereafter all the four doors were centrally locked by the accused who then overpowered her and raped her, may be examined. The prosecutrix, PW-1 in her testimony tried to make out a case that the accused who was in an intoxicating state at that time asking her to sit on the front seat of the vehicle but she refused and asked him the reason for calling. On the insistence of accused she, however herself sat on the front

seat after boarding the vehicle. The accused locked the door and started playing loud music, drove the vehicle towards Ranipool by the newly constructed road and on reaching there, parked the vehicle at an isolated place and asked the victim for a kiss. On refusal by the victim and on her threatening to inform his girlfriend (PW-8), the accused pushed back the seat, took the mobile phone of the victim, and committed rape after removing her clothes. Thereafter, the accused slept on the driver's seat and the prosecutrix traumatized, managed to wear her clothes, came out from the vehicle after opening the door and taking her mobile tried to flee. After some time again the accused reached there told her that he would drop her at the same place from where she was picked. The accused threatened her that in case she narrated the story to anyone it would be fatal to her. Thus the statement recorded in the Court in fact, is an improvement of prosecution story. She had not stated about the accused putting a knife on her neck while committing rape.

19. The statement of PW-6, sister of the prosecutrix who was with her states different story in this regard. As stated by her, she was called by the accused but the victim had received the call of the accused and while talking to him she visited Putali Garden. PW-6 tried to call from her father's mobile repeatedly but she did not pick up the calls. Finally at about 09.15 pm the accused answer the call from the victim's mobile phone. What was the accused person's reply has not been stated in her testimony. Thereafter PW-6 herself reached the Butterfly Garden to see and meet the victim. She saw one white colour Innova car coming with the victim sitting inside. After opening the door she came out but was not in normal self and appeared tensed. PW-6 has not asked anything from her sister. The aforesaid narration is neither the case of prosecution nor as per the statement of the prosecutrix/victim. The prosecution story as reflected in the chargesheet about what happened to the victim, the circumstances before and after the incident is substantially different to what the prosecution witnesses stated in the Court. The sister of the prosecutrix, PW-6, who was with prosecutrix since the time the accused called her has narrated a different story as described above. Therefore, looking at the prosecution case, the sole testimony of the prosecutrix is not of sterling character even in the manner the allegation of rape is alleged. In addition to the aforesaid, the place of incident in the Court statement was said to be towards Ranipool road not Radong new road. As per Sketch Map Exhibit P-25, the place of incident has not been specified. The perusal of the sketch map makes it clear that

from Putali Garden one side road goes towards Ranipool and the other towards Singtam but the place of incident i.e. new Radong road is not specified in it. Thus place of incident is also not clear in the sketch map.

20. As per the above discussion the sole testimony of the prosecutrix is not safe to rely upon and its corroboration from the medical evidence may have relevance to prove the allegation of rape. As per the materials available, the medical examination of the prosecutrix, Exhibit P-15, was conducted by Dr. Madhu Shweta Sharma, PW-13. As per her testimony it is clear that the victim was examined within 48 hours from the time of incident. At the time of examination no injury was seen by her on the private parts of victim. She further opined that in case rape is committed within 48 hours, some injuries should be found on the victim's private parts. During her internal examination, old tear of hymen was found which may be of about a month old. There was no sign of struggle on the body of the victim. She deposed that she cannot say whether the patient may have been involved in any sexual intercourse within 48 hours prior to the time of examination. PW-13 made the seizure of two vaginal swabs, one oral swab, one salivary sample, two nail clippings, pubic hair sample, hair sample and three vials of blood sample. All were sent for RFSL examination. However, no incriminating material was found during the examination. Therefore, allegation of commission of rape has not found support from medical evidence.

21. Mr. Prem Kumar Sharma, PW-11, who was the junior scientific officer, came from RFSL Saramsa. He has proved the report, Exhibit-16, and as per the said report there is no corroboration regarding commission of rape. It is also relevant that the vehicle was also sent for examination because the prosecution set out a case that the sperm were ejaculated outside after rape, however, it may be in the vehicle, but even in the report of vehicle nothing incriminating was found. As per his statement the vaginal swab slide of the victim from the posterior region is marked in the lab as BIO 471 (B). The vaginal swab slide from the anterior region is marked in the lab as BIO 471 (C). Buccal swab slide of the victim is marked in the lab as BIO 471 (D). Urine sample of the victim is marked in the lab as BIO 471 (E). Oral swab of the victim is marked in the lab as BIO 471 (F). In the test, neither blood nor semen was detected in those exhibits in the report. Nail clippings of right hand of the victim was marked in the lab as BIO 471 (G), nail clippings of left hand of the victim was marked in the

lab as BIO 471 (H) and pubic hair of the victim marked in the lab as BIO 471 (I) on which no foreign material was detected as per the report. On the undergarments of the victim marked as BIO 471 (Q) no blood or semen were detected. The Innova vehicle which was marked as BIO 471 (R), neither blood nor semen or any other foreign material i.e. hair was detected on it. As per the report, BIO 471 (A) and (K), which is a blood sample of accused, blood group was found matching. Human blood was detected in Exhibit BIO 471 (P), which is the underwear of the accused of the same group which alone cannot be incriminating evidence in the case. Considering the aforesaid, it is apparent that neither the blood group of the accused nor the semen was found in the serological test nor as stated by the prosecution no ejaculated semen was found in the vehicle.

22. In addition to the aforesaid, there are several lacunas in the prosecution case. As per prosecution, accused called the victim, PW-1, as well as her sister, PW-6, by making a call on her mobile. Call details of the mobiles have not been collected by calling for the CDRs of the mobile of the accused and victim. After commission of rape, victim has sent the message to her friend i.e. Rahul, PW-5. CDR and message details of Rahul have not been produced. PW-4, husband of the victim is said to have called the victim on the same date at night as per prosecution case, however, the CDR thereto has also not been produced. The conduct of prosecutrix is unnatural. On coming back after the incident, she met with sister when the father was also at home. But she has not said anything about the incident to both of them. It is alleged that at the time of commission of the rape, threat was given putting knife on the neck of the prosecutrix inside the vehicle but the knife has not been seized or produced by the prosecution. The prosecution story is that when prosecutrix entered the vehicle, by a central locking system all the doors were locked. No technical report of the vehicle was produced to prove that the vehicle had a central locking system. DNA test has also not been conducted in the case more particularly when RFSL test did not disclose the commission of offence as per prosecution story. Furthermore, even the FIR was not sent within 24 hours in compliance with the provisions of Section 157 of the CrPC. On the person of the accused, injuries were found, as revealed from his medical report, Exhibit-15, to which no explanation is on record. All these facts also create doubts on prosecution case and the manner in which investigation has been conducted. All these lacunas are collectively fatal to the case of the prosecution in proving the guilt of the accused bringing the charge home under Section

376(1) of the IPC. Learned Trial Court has not considered all these aspects although acquitting the accused under Sections 365 and 506 of the IPC.

23. In view of the discussion made hereinabove, this Court is of the opinion that the testimony of the prosecutrix is not of sterling character, therefore it is not safe to rely upon the testimony of the victim to prove the charge against the accused under Section 376(1) of the IPC. In addition, the case of the prosecution as set out has not been proved by the statements of the prosecution witnesses in Court. The prosecution witnesses disclosed a different story than of prosecution case in the Court. As discussed, sole testimony of the prosecutrix is not of a sterling character and is belied by medical and scientific evidence. As per the material brought on record either it appears to be a case of consent or of false implication. In view of the said discussion it is observed that learned Trial Court has failed to appreciate the evidence in right perspective and held the charge under Section 376(1) of the IPC proved without any cogent evidence, contrary to the basic principles. Therefore, it is held that the findings and judgment of the Trial Court to prove the allegation of commission of rape is perverse and illegal and hence liable to be set aside. Accordingly, the judgment of the Trial Court is hereby set aside.

24. In view of the forgoing, the finding and the judgment holding the accused guilty to the charge under Section 376(1) of the IPC and the sentence as awarded by the learned Trial Court are hereby set aside. Accordingly, this appeal succeeds and is hereby allowed. The accused is acquitted from the charge under Section 376(1) of the IPC giving benefit of doubt. Consequent to it if the accused is in custody, he be forthwith released from the jail, if not required in any other case.

25. The Registry of this Court shall send the copy of the order and record to the Trial Court forthwith.

SLR (2021) SIKKIM 196

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

Crl. A. No. 15 of 2018

Central Bureau of Investigation ….. APPELLANT

Versus

Dr. Pratap Makhija and Others ….. RESPONDENTS

For the Appellant: Mr. Kali Charan Mishra, Special Public Prosecutor/Additional Legal Advisor, CBI, Kolkata.

For Respondents 1: Mr. K.T. Bhutia, Sr. Advocate with Ms. Sunita Chettri, Advocate.

For Respondents 2: Mr. S.K. Pandey, Advocate.

For Respondents 3: Mr. N. Rai, Sr. Advocate.

For Respondents 4: Mr. B.K. Rai, Advocate with Mr. Loknath Khanal, Advocate.

For Respondents 3: Mr. S.S. Hamal, Advocate.

Date of decision: 24th March 2021

A. Code of Criminal Procedure, 1973 – S. 164 – The statement in Exhibit-59, 67 and 66 being S. 164 Cr.P.C statements of PW-6, PW-7 and one K.K. Rakshit respectively, is of no assistance to the prosecution case. PW-6 in his S. 164 Cr.P.C statement has deposed that he had made his statement before a Judge but that he was told by the CBI Officer what was to be stated before the Judge. On the Court questioning him as to whether he had made a true statement before the Judge, he replied that he had told the Judge what had occurred and what he knew. However, in a subsequent statement he stated that the contents of Exhibit-59 were not read over or explained to him and he was made to affix his signature on Exhibit-59. His

vacillating evidence renders his evidence with regard to his S. 164 Cr.P.C statement unreliable – Although his (PW-7)S.164 Cr.P.C statement was shown to him wherein he stated that "the statement made before the Judge was my true statement", but he was not confronted with any specific statement made by him under S. 164 Cr.P.C before the Trial Court and in the absence of such corroboration his S. 164 Cr.P.C statement merits no consideration – It is trite that a statement under S. 164 Cr.P.C is not substantive evidence but can be used only for corroboration or contradiction.

(Para 17 (xiii) and (xiv))

B. Indian Evidence Act, 1872 – Documentary Evidence – Trial Court of the opinion that Exhibit-87 was a false document not having been issued by the competent authority as the Register Exhibit-86 started from serial No. 2555 and ended at serial No. 4703 with no entry No. 5255 in the said Register – Trial Court despite such finding was of the opinion that as A-4 was only 12 years old at the relevant time, he could not be held liable for obtaining the false Birth Certificate – Disagreeing with the finding of the Trial Court that Exhibit-87 is a false document, it is important at this juncture to consider the admission of PW-22 that the Birth Register Exhibit-86 pertains to registration No. 2555 onwards up to 4703 – The records of births after registration No. 4703 were not produced before the Court and the Police did not seize the Birth Register from their Office beginning from registration No. 4704 onwards. This admission raises doubts about the efficiency of the prosecution investigation which appears to be remiss and perfunctory – Would not render the document false and in fact prompts the Court to draw an adverse inference against the prosecution. The benefit of doubt is thus extended to A-4 as the Trial Court had no occasion to examine whether an entry pertaining to Exhibit-87 existed in any other Birth Register.

(Para 18 (ii))

C. Indian Penal Code, 1860 – S. 120B – Criminal Conspiracy – To bring home an offence under S. 120B of the I.P.C, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. Undoubtedly, it is difficult to establish conspiracy by direct evidence, but circumstantial evidence must link the offence unerringly to each of the accused who allegedly enter into a conspiracy.

(Para 20)

Appeal dismissed.

Chronology of cases cited:

1. State of Haryana v. Ram Singh, AIR 2002 SC 620.
2. Hanumant, Son of Govind Nargundhar v. State of Madhya Pradesh, AIR 1952 SC 343.
3. Murugan *alias* Settu v. State of Tamil Nadu, (2011) 6 SCC 111.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellant assails the Judgment of the Learned Special Judge, Prevention of Corruption Act, 1988, East District, at Gangtok, dated 30-08-2016, in S.T. (CBI) Case No.01 of 2013, by which, (a) the Respondent No.1, Dr. Pratap Makhija, (hereinafter "A1") was acquitted of the offence under Sections 120B, 471 of the Indian Penal Code (for short, "IPC") and Section 13(1)(d)(iii) of the Prevention of Corruption Act, 1988 (for short, "P. C. Act"); (b) the Respondent No.2, Ramayana Singh Meena (hereinafter "A2"), was acquitted of the offence under Sections 420 and 120B of the IPC; (c) the Respondent No.3, Surendra Mohan Sihara (hereinafter "A3"), was acquitted of the offence under Sections 420, 471 and 120B of the IPC; (d) the Respondent No.4, Mukesh Kumar (hereinafter "A4"), was acquitted of the offence under Sections 420, 471 and 120B of the IPC; and (e) the Respondent No.5, Tara Chand (hereinafter "A5"), was acquitted of the offence under Sections 197 and 120B of the IPC and Section 13(1)(d)(iii) of the P. C. Act.

2(i). The Special Public Prosecutor Mr. Kali Charan Mishra for the Appellant/Central Bureau of Investigation (CBI) advancing his arguments for the Appellant briefly put forth the facts leading to registration of the case against the Respondents on 25-10-2006. That, on completion of investigation Charge-Sheet was submitted against A1 to A5 and one Dr. Khagendra Neopaney under Sections 120B, 420, 468, 471 of the IPC and Section 13(2) read with 13(1)(d) of the P.C. Act.

(ii) It was the submission of Learned Special Public Prosecutor that relevant sanction for launching prosecution against A1 to A4 had been obtained from the concerned authority, P.W.30 Ramesh Babu Devella as

evident from Exhibits 111 to 114. That, A1 in connivance with A2, A3 and A4 adopted procedural irregularities in the selection process by accepting their applications which were not only devoid of necessary documentation, but forged documents had also been submitted. That, A2 while seeking appointment as General Duty Attendant had submitted a false Scheduled Caste Certificate, besides which his mother s name was recorded as „Mina in Exhibit 39 and "Sunhari" in Exhibit 40 with intent to cheat the Government. A3 while seeking appointment as a Laboratory Attendant had furnished a false local address to project himself as a local candidate, this act was duly supported by the evidence of P.W.2, P.W.6, P.W.12, reliance was also placed on Exhibit 60 and Exhibit 41. A4 had furnished a forged Birth Certificate and inadequate Typing Certificate. The furnishing of a forged Birth Certificate was established by the evidence of P.W.21 and Exhibits 47, 48, 86 and 87. Exhibit 42 submitted by A4 stating that he was undergoing a typing course was false as P.W.27 had deposed that he was suspended from the course and P.W.15 vide Exhibit 85 proved that the typing speed of A4 was '21' words per minute as against the required speed of 30 words per minute for a candidate. That, A2 and A4 had also furnished local addresses dishonestly to project themselves as local candidates and consequently obtained 5 (five) extra marks and were selected for appointment by fraudulent means.

(iii) That, there were other procedural requirements that were flouted by A1 since the Recruitment Rules, Exhibit 'F' required that appointments to the posts were to be made from local candidates by obtaining information of eligible local candidates from the Local Employment Cell. Contrary to the Rules, A1 issued the advertisement for employment first and thereafter sought a list of candidates from the Local Employment Cell. He had also not maintained any backlog roster for Scheduled Caste (SC) and Scheduled Tribe (ST) candidates and discrepancies were found in the roster submitted by him. These facts were supported by the evidence of P.W.1 and P.W.5 as also Exhibits 4, 5, 6, 19, 34, 35, 'F' and 'L'. A1 deliberately concealed the medium of typing test as being in Hindi to enable manipulation and select A2, A3 and A4 as fortified by Section 164 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) statements of P.W.6, P.W.7 and one K. K. Rakshit. As per P.W.5, when he took over charge from A1, the Files relating to the selection procedure of Group 'C' and 'D' staff were concealed from him indicating the dubious intention of A1. The Scrutiny

Committee which was to scrutinize applications was constituted by A1 who gave directions to the Committee to accept the applications of A2, A3 and A4 even without the requisite documentation.

(iv) A5 for his part in connivance with A2 issued and signed a false Scheduled Tribe Certificate for A2 which helped him to obtain employment in the Regional Research Institute (Ayurveda) [for short, "RRI (Ay)"]. Arguments were also furnished with regard to A2 and Exhibits 75 and 76 in this context, but as this has already been discussed at length in Crl.A. No.29 of 2006 by this Court, no further arguments of the Prosecution need be considered being irrelevant. That, the evidence on record establishes the Prosecution case against the Respondents. That, the Learned Trial Court acquitted the Respondents herein on unfounded considerations which thereby occasioned a total failure of justice, as such, the Judgment of the Learned Trial Court is liable to be set aside.

3(i). Learned Senior Counsel Mr. K. T. Bhutia placing his arguments for A1 contended that the Prosecution has failed to prove any *mens rea* and *actus reus* on the part of A1 for the offences he was charged with. That, a simple case of recruitment was blown out of proportion on a misunderstanding of facts. That, A1 as the Head of the RRI (Ay) at the relevant time admittedly was a novice in administrative matters, duly established by the evidence of the Prosecution witnesses themselves. On a requisition by the Central Office, A1 sent the roster indicating the vacancies on the basis of percentage and then proceeded on leave. The next In-Charge sent the vacancies category-wise. Till then, the roster system had not been maintained by the RRI (Ay) as indicated in the evidence of P.W.2 (Lakshmi Kanta Ganguli), P.W.5 (Dr. Ashok Kumar Panda) and P.W.7 (Gopi Prasad). Following instructions received from the Central Authority to fill up the posts for specified categories A1 published the advertisement and on further instructions he sought the names of eligible candidates from the Employment Cell of the Government of Sikkim. The time for interview was extended to enable the local candidates to appear thereof. Pursuant thereto the Selection Committee was constituted by the Central Authority comprising of A1, P.W.3 and P.W.4. This Committee suo moto decided to give extra marks to the local candidates as deposed by P.W.2, contingent upon production of Certificate of Identification/Sikkim Subject.

(ii) Out of 45 (forty-five) non-local candidates, 25 (twenty-five) had furnished local addresses for correspondence, hence the furnishing of local address was not confined only to A2, A3 and A4 nor did they seek to project themselves as local candidates. A1 did not participate in the scrutiny of applications and documents, but constituted a Scrutiny Committee comprising of P.W.6, P.W.7 and one K. K. Rakshit, vide Exhibit 'C', based on their administrative experience. Decisions for appointment were taken by the Selection Committee, hence if A1 is found to have committed offences P.W.3 and P.W.4 were also equally liable and ought to have been arrayed as accused persons. The Selection Committee was to award a total of 50 (fifty) marks to the candidates and it was decided that 20 (twenty) marks would be allotted to A1 as Chairman for the purpose of marking the candidates and the other two Members would do so on 15 (fifteen) marks each. That, P.W.3 and P.W.4 have deposed that there was no unfairness in the functioning of the Selection Committee and in such circumstances the Charge-Sheet was filed merely to harass A1 to A5.

(iii) The departmental enquiry held against A1 during the pendency of WP(C) No.22 of 2006 exonerated him from all charges, while the services of A2, A3 and A4 were terminated but the order of termination was set aside by the Central Administrative Tribunal (CAT). The Order of the CAT came to be challenged by way of WP(C) No.32 of 2009 in this Court which was dismissed. Assailing this Courts Order, a Special Leave Petition (SLP) was preferred before the Honble Supreme Court of India which dismissed the SLP. That, despite these facts, the Prosecution is pursuing this matter by way of Appeal.

(iv) Learned Senior Counsel further urged that the Selection Committee gave extra marks to the local candidates despite their lack of past experience and Exhibit 'K' reveals this circumstance, while P.W.2, P.W.3, P.W.6 and P.W.7 have deposed in this context and P.W.32 has stated unequivocally that no favouritism was shown to A2 by A1. That, Exhibit 3 the relevant advertisement required the typing qualification to be not less than 30 (thirty) words per minute, but did not require the production of a Certificate to that effect. The candidates appeared in person and took the typing test where their speed was assessed. Besides, A1 had no motive to help A2 and the evidence would reveal that less marks were awarded to A2 by A1. A1 at no point had forced the inclusion of Hindi typing to

facilitate the candidature of A2, and Hindi was included on instructions from the Central Authority to encourage the language. That, the entire procedure of appointment was transparent with due information to the Central Authority supported by Exhibit 61, the Dispatch Register, revealing such correspondence buttressed by the evidence of P.W.7. The minutes of the meeting pertaining to the examinations was scribed and prepared by P.W.3 and A1 had no hand in it as evidenced by Exhibits 15, 16 and 17. After the selection process was completed details were forwarded to the Central Authority upon which approval was granted for appointment, as stated by P.W.2 following which the appointments took place.

(v) That, the WP(C) 22 of 2006 came to be filed based on Exhibit 7 dated 20-05-1985 wherein an LDC sought transfer from Gangtok to Hyderabad which was disallowed. The correspondence was leaked by an inimical employee of RRI (Ay) to the newspaper "Hamro Prajashakti", Exhibit 58. The Writ Petitioner interpreted the correspondence to mean that the advertised posts were meant solely for local candidates which was an erroneous interpretation as the Counter-Affidavit relied on by A2 herein would indicate otherwise. Consequently, an Inspection Committee was constituted by the Central Authority and inspection conducted by one Dr. Beni Madhav, Deputy Director (Admn.) and L. K. Ganguly, Admn. Officer (Vig.) [Exhibit 1] which in its report made vague allegations of irregularities, but revealed no illegality. That, Exhibit 7 does not reflect the provisions of the Recruitment Rules (Exhibit 'F') and if the letter had been brought to the notice of the Selection Committee before completion of the recruitment process, a clarification would have been issued to that effect. In the light of these facts, the Appeal be dismissed.

4. Learned Counsel Mr. S. K. Pandey appearing for A2 submitted that A2 was acquitted of the Charges under Sections 420 and 120B of the IPC by the Learned Trial Court, but convicted under Section 471 of the IPC, hence an Appeal was preferred being Crl.A. No.29 of 2016. Vide Judgment of this Court dated 15-03-2018, the Appeal was allowed and A2 acquitted of the offence under Section 471 of the IPC. However, the instant Appeal against A2 still pivots around Section 471 of the IPC. That, in fact the prosecuting agency had failed to establish any of the allegations against A2 or the nexus between A1 and A2. While adopting the submissions made by Learned Senior Counsel for A1, Learned Counsel for A2 contended that there was no requirement for submission of past Experience Certificate and neither

was he the beneficiary by such non-furnishing. The local address furnished by A2 was only for the purposes of correspondence and no benefit accrued to A2 on this account. The evidence of P.W.6 in fact is indicative of the fact that he had allowed use of his address to A2. Due to non-possession of Certificate of Identification or a Sikkim Subject Certificate A2 obtained no extra marks as revealed by the deposition of P.W.2. There is no proof of criminal conspiracy between A1 and A2 no offence by A2 as alleged is proved and the Judgment of the Learned Trial Court be confirmed.

5. Advancing his arguments for A3, Learned Senior Counsel Mr. N. Rai submitted that the specific allegation against A3 was that he had furnished the local address of P.W.12 without his knowledge, which was in fact the culmination of acrimonious relations between A3 and P.W.5 who vitiated the work environment when he came to head the RRI (Ay) and had a fist fight with A3. That, P.W.5 had inimical relations with most of the employees of the Centre, resulting in the instant matter with the object of harassing the Respondents herein. That, Exhibit 41, the application form of A3 for the post of Laboratory Attendant does not contain any requirement for permanent address, but merely provides for postal address. A3 had furnished the address of P.W.12 for correspondence on P.W.12 allowing D.W.3 to do so as D.W.3 had sought permission on behalf of A3. That, Exhibit 43 dated 05-08-2006, a letter addressed to P.W.5 by P.W.12 complaining that A3 had used his residential address was written at the behest of P.W.5 who was known to P.W.12, in order to harass A3. Records would reveal that earlier in time Exhibit 49 the Memorandum of appointment addressed to A3 dated December, 2005 was also delivered in the address of P.W.12 who had raised no objection then. A3 received the letter of appointment issued in the address of P.W.12 through one P.W.6, who was also known to P.W.12. It was urged that no extra marks were given to A3 merely because he furnished a local address. The prosecuting agency had recorded the statement of D.W.3 in this context during investigation, however the statement having failed to support their case, he was not entered as a Prosecution witness. Relying on the decision of ***State of Haryana*** vs. ***Ram Singh***[1] it was contended that defence evidence is sufficient to disprove the Prosecution case. That, Exhibit „AS letter of show cause dated 28-06-2006 shows two addresses of A3 and contrary to the evidence of P.W.5 that A3 did not reveal his permanent address his

[1] AIR 2002 SC 620

application form, Exhibit 41 and Caste Certificate, Exhibit „O reflect his permanent address. That, A3 was acquitted by the Learned Trial Court and the acquittal be confirmed.

6. Learned Counsel Mr. B. K. Rai submitting his contentions on behalf of A4 urged that there was no falsity in the Birth Certificate Exhibit 87 or the local address furnished by him as both his parents are employees at the RRI (Ay) and the address of RRI (Ay) was furnished by him in Exhibit 42. Contending that Exhibit 87 is the Birth Certificate of A4, it was argued that the document is dated 10-06-1991, as A4 was born on 25-07-1979 and the document was obtained by his father when A4 was 12 years old a minor, at which time there was no advertisement for vacancies in the RRI (Ay) thus no *mens rea* can be attributed to A4. P.W.7 in his evidence has clearly stated that A4 has furnished the address of Sikkim and Haryana and the evidence of P.W.8, P.W.9 and P.W.20 are proof of the fact that he was a student in a local school in Sikkim. That, in fact prior to the case under Appeal, a case was earlier registered against A4 under Sections 420, 468 and 471 of the IPC where Charge-Sheet was filed against him along with his father Ram Kishan Balmiki and one Khagendra Neopaney (Accused No.6) all of whom were arrested in G. R. Case No.143 of 2007. During the hearing on consideration of Charge, the Learned Chief Judicial Magistrate discharged all the three persons *supra* vide Order dated 19-06-2008. That, the Investigating Officer of the case has admitted that certain documents pertaining to the case were not seized, hence the non-seizure of relevant Registers fails to establish the alleged forgery of Exhibit 87. That, nothing erroneous emanates in the reasoning of the Learned Trial Court of the innocence of A4 and therefore the Judgment of the Learned Trial Court be upheld.

7. Learned Counsel Mr. S. S. Hamal appearing for A5 submitted that A5 was the Patwari of Nadbai, District Bharatpur in Rajasthan and retired in 2001. That, in fact, Exhibit 75 and Exhibit 81 are the relevant documents for the purposes of the case against A5. A5 being the concerned Officer at the relevant time made the necessary verification and submitted his report stating therein that A2 belongs to the “Meena Caste” and is a resident of Nadbai. As per the Prosecution, A2 is the son of „Munshi when in fact A2 is the son of “Rameshwar Dayal” as proved and buttressed by the documents submitted by A2 before A1 for employment. A2 has already been acquitted by the High Court of the Charge under Section 471 of the

IPC, hence the foundation of the Prosecution case that A5 issued a false Scheduled Tribe Certificate to enable A2 to obtain employment is also demolished. The Prosecution allegation that Exhibit 76 was submitted by A2 to the Tehsildar, Nadbai is sans any proof. Reliance was placed on the evidence of P.W.10, P.W.11, P.W.14, P.W.17, P.W.18, P.W.31, P.W.32, P.W.33, D.W.1 and D.W.2. The issuance Register Exhibit 78 reveals that Exhibit 81 was issued but there is no proof that Exhibit 75 was also issued, hence the CBI has not been all to establish its allegations against A5. It was next contended that Exhibit 81 and Exhibit 75 both are alleged to have been issued during the year 2005 to 2006 in all the three Charges framed against A5, as A5 had already retired from service on 31-10-2001, he had no role to play in the aforestated period. The CBI made no effort to have the Charges or dates in the Charge-Sheet corrected. The first Charge against A5 stands categorically demolished as he was not required by law nor issued or signed on Exhibit 75 or Exhibit 81 which was the duty of the Tehsildar. The Dispatch Register, Exhibit 78 also does not contain his signature. The custodian of Exhibit 75, Exhibit 78 and Exhibit 81 one Amar Chand was not examined by the Prosecution. The concerned authorities on submission of verification report by the Patwari themselves verify the authenticity of the documents furnished. The CBIs allegation is that the verification report was made by A5 based on Document 'X', the Ration Card, while A5 asserts that it could well have been based on the voter list or land documents furnished before him. Advancing his arguments with regard to the second Charge against A5, it was reiterated that he retired in 2001 and A2 never claimed to be the son of „Munshi and the Prosecution failed to establish the *mens rea* of A2 and A5. Reliance was placed on the documents of the Prosecution, i.e., Exhibits 37, 39, 40, 74 to 83 and Exhibit 92. That, in the absence of any proof of any offence by A5 or connivance between A2 and A5 the Judgment of the Learned Trial Court requires no interference and the acquittal of A5 be upheld.

8(i). Having heard Learned Counsel for the parties, it is essential to briefly set out the facts of the case.

(ii) On 09-06-2006, this High Court in WP(C) No.22 of 2006 directed the CBI to conduct an enquiry into the process of selection and appointment made by A1, the then Officer-in-Charge of RRI (Ay) and Chairman of the Selection Committee constituted for filling of backlog vacancies reserved for Scheduled Caste and Scheduled Tribe categories to

various posts in RRI (Ay) in Gangtok, in pursuance to a special employment drive conducted by the Department of Ayurveda (AYUSH) under Ministry of Health and Family Welfare, Government of India. A preliminary enquiry was conducted by the CBI and thereafter a regular case was registered on 25-10-2006 against A1, A2, A3, A4, A5 and one Dr. Khagendra Neopaney (Accused No.6). When the investigation commenced A2 filed an SLP in the Supreme Court of India against the Order of the High Court dated 09-06-2006 (*supra*). Vide Order dated 31-01-2007, the Supreme Court of India remitted the matter to the High Court for fresh disposal and ordered discontinuation of CBI investigation. Pursuant thereto, CBI filed a closure report dated 27-02-2007 before the Learned Court of Sessions Judge on 08-03-2007. However, in Civil Appeal No.684/2008 arising out of SLP(C) No.2301/2007 the Supreme Court passed an Order dated 25-01-2008 wherein it *inter alia* observed that no opinion had been expressed about some criminal proceedings stated to have been initiated. Following this Order, the CBI withdrew the closure report with the permission of the Court and continued investigation. The allegations are that A1 in conspiracy with A2, A3 and A4 facilitated their appointment in various posts at RRI (Ay) based on false information/Certificate submitted by A2 to A4 to establish eligibility of their candidature as well as to project themselves as local residents of Sikkim. These fraudulent acts led to deprivation of employment for the genuine local candidates. A5 was said to have facilitated A2 to obtain a false Caste Certificate to obtain employment at the RRI (Ay). Post based reservation rosters to calculate backlog vacancies was not maintained by the RRI (Ay) and the backlog vacancy position revealed discrepancies post-wise and category-wise which was not brought to the notice of the CCRAS to enable rectification. A1 published the advertisement in the local newspapers for employment, on 04-10-2005 and again on 10-10-2005 and then only approached the Local Employment Exchange on 13-10-2005 contrary to the Rules which required him to first approach the Local Employment Exchange. The Local Employment Cell allegedly sponsored sufficient suitable candidates for the posts advertised which A1 ignored. The Corrigendum issued in the daily local newspaper mentioning that local candidates of Sikkim would be given priority indicated his knowledge that recruitment in the Group 'C' and 'D' posts were to be from local candidates. Investigation further revealed that A1 formed a Scrutiny Committee without ascertaining the competence of the Members therein and despite the Committee finding the application forms of A2 to A4 lacking in

relevant documentation, he directed them to accept the application forms. That, the selection of A2 to A4 were at the behest of A1, the Chairman of the Selection Committee.

(iii) Based on the investigation, Charge-Sheet was submitted against A1, A2, A3, A4 A5 and one Dr. Khagendra Neopaney (Accused No.6) under Section 120B read with Sections 420, 468, 471 of the IPC and Section 13(2) read with Section 13(1)(d) of the P. C. Act. Dr. Khagendra Neopaney, the then Registrar, Births and Deaths, Government of Sikkim on filing Crl.Rev.P. No.04 of 2014 before this Court was discharged by the Order dated 15-04-2015.

9. The Learned Trial Court framed Charge against the Respondents as follows;

(i) A1 under Sections 120B, 471 of the IPC and Section 13(1)(d)(iii) of the P. C. Act;

(ii) A2 under Sections 420, 471 and 120B of the IPC;

(iii) A3 under Sections 420, 471, 120B of the IPC;

(iv) A4 under Sections 420, 471 and 120B of the IPC; and

(v) A5 under Section 197 of the IPC read with Section 13(1)(d)(iii) of the P. C. Act and 120B of the IPC.

On due consideration of the evidence on record all the Respondents were acquitted of the offences charged with except A2 who was acquitted of the Charge under Sections 420 and 120B of the IPC, but convicted under Section 471 of the IPC. On Appeal by A2, Vide Judgment of this Court dated 15-03-2018 in Crl.A. No.29 of 2016, A2 was acquitted of the offence under Section 471 of the IPC.

10. The rival submissions of the parties were heard *in extenso*, the impugned Judgment and all documents and evidence on record carefully perused.

11. What falls for consideration of this Court is whether the Learned Trial Court acquitted the Respondents of the Charges without proper appreciation of the evidence on record?

12. A1 and A5 were charged with offences under Section 13(1)(d)(iii) of the P. C. Act. The relevant portion of the Section is extracted hereinbelow;

> **"13. Criminal misconduct by a public servant.—**(1) A public servant is said to commit the offence of criminal misconduct,—
>
> ………………….........…………………
>
> (d) if he,—
>
> ………………………..........…………………
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or
>
> ……………....………………………....…………..**"**

Dishonest intention is the essence of an offence under Section 13(1)(d)(iii) of the P. C. Act.

13. A2, A3 and A4 were charged under Section 420 of the IPC which provides as follows;

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

The offence is defined under Section 415 of the IPC. For establishing an offence under this Section it is necessary that there should be direct connection between the false representation and the delivery of the property for the doing of something by the person deceived. It is also necessary that the act or the omission complained of should cause or is

likely to cause damage or harm to the person deceived, in mind, body, reputation or property.

14. A1, A2, A3 and A4 were charged under Section 471 which provides as follows;

> **"471. Using as genuine a forged document or electronic record**.%Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.**"**

As clarified *supra*, A2 on Appeal earlier was already acquitted of the offence. Section 471 of the IPC requires that there must be fraudulent or dishonest use of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a forged one.

15. All the Respondents were charged under Section 120B of the IPC which is penalty for criminal conspiracy, the offence having been defined in Section 120A of the IPC. The Prosecution was to establish that there was an agreement between A1, A2, A3 and A4 to commit a criminal offence irrespective of whether or not the offence was actually committed. The evidence furnished must establish the meeting of minds of A1 with all other Respondents and that of A5 with A2.

16. Section 197 of the IPC under which A5 has been charged with deals with issuance or signing of any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point.

17(i). On careful perusal of the evidence furnished by the Prosecution, P.W.2 revealed that no roster was being maintained in the RRI (Ay), Gangtok, as also P.W.5 duly supported by the evidence of P.W.7 a former employee of the RRI (Ay), who stated that he along with P.W.6 after obtaining permission from A1 went to the National Sample Survey

Organisation, typed the roster and handed it over to P.W.6 who affixed his signature on the same. Hence, A1 cannot be foisted with the allegation of non-maintenance of roster as his predecessors too had not taken steps for such maintenance, consequently the blame for discrepancies in the roster cannot be laid at the doorstep of A1 alone. In fact, his predecessors ought to have been taken to task for shoddy administration. The Recruitment Rules, Exhibit 'F' indicates that the eligibility condition therein was that Indian Nationals as defined by the Union Public Service Commission were eligible for appointment under the Council. For Group 'C' and 'D' posts, Rule 3.3 provided that **"***These posts shall be filled through the Local Employment Exchanges or the Central Employment Exchange as the case may be, depending on the level of the posts and availability of candidates at the Local/Central level. In cases where the local Employment Exchanges issue non-availability certificate on requisition sent to them in respect of the vacancies occurring in subordinate offices and Headquarters, the Director, CCRAS, may advertise or authorize the Project Officer to advertise these vacancies through Central Employment Exchange. If there are difficulties in advertising vacancies through Employment Exchange, he may advertise these vacancies at the Headquarters office level through D.A.V.P. Employees of the Council who are appointed on regular basis in the Council shall be eligible for consideration for higher posts alongwith the Employment Exchange candidates, if they apply.***"*** In the light of this Rule, it emerges that the posts were to be filled by local candidates whose names were sent by the Local Employment Exchanges. If the Employment Exchange issued non-availability Certificate of local candidates, in such a situation, either the Director, CCRAS was to advertise these vacancies or to authorize the Project Officer to do so. Admittedly, the Local Employment Exchange being the Department of Personnel, Government of Sikkim, had furnished the list of eligible names for filling up the vacancies that had occurred. However, contrary to the aforementioned Rules, A1 first issued advertisement Exhibit 4 for vacancy of Laboratory Technician from SC candidates in an English local daily newspaper 'NOW' dated 05-10-2005. Following this, on 18-10-2005, Exhibit 3, advertisement was issued in the English local daily newspaper 'NOW' for the posts of Lower Division Clerk, General Duty Attendant, Laboratory Assistant and Peon with the caption "SPECIAL RECRUITMENT DRIVE FOR SCs/STs" indicating the vacancies therein. On 29-10-2005, A1 issued Exhibit 5, a letter to the Editor of 'NOW', stating that he was submitting Corrigendum for publishing in the 31-10-2005

edition of the newspaper. The Corrigendum provided that with reference to the advertisement issued on 05-10-2005 applications were again invited from 31-10-2005 to 05-11-2005. That, with reference to advertisement published on 18-10-2005 the closing date of applications would be 05-11-2005 instead of 31-10-2005. It mentioned **"***NOTE: Local candidates of Sikkim will be given priority.***"** In the interim, on 13-10-2005, it appears that A1 issued Exhibit 6, a letter to the Under Secretary, Employment Cell, Department of Personnel, Government of Sikkim, requesting him to send bio-data of suitable candidates within 20 (twenty) days from the date of issuance of the Circular for appointment in the posts reflected hereinabove. The procedure followed by A1 being contrary to the Rules exhibits irregularity at the hands of an inexperienced administrator, but in no way can it be given the garb of a criminal offence. The Prosecution witnesses have themselves stated that A1 was a technical person and had not been trained in administrative procedure nor is it established that at any point in time he had prior experience in administrative work.

(ii) The allegation of the Prosecution is that A2, A3 and A4 had received undue favour by wrongly furnishing local address to project themselves as local candidates and had thereby obtained the benefit of additional marks and selection in the posts does not hold water. Contrary to the reasoning of the Learned Special Judge in the impugned Judgment that there was no specified format in which the applicants were supposed to submit their applications, Exhibit 4 and Exhibit 3 provide the format and details which the applicants were to submit in their applications. It is specified *inter alia* that the candidate was to furnish his "permanent address" and "correspondence address". A2 had given three addresses, one of Gangtok being that of P.W.20 (wife of P.W.6) in the application form Exhibit 37, another of Delhi in Exhibit 129 (collectively) and third one in the Caste Certificate Exhibit 75, being of Rajasthan. A3 had given two addresses, one of Gangtok of P.W.12 in the application form Exhibit 41 and one of Rajasthan in the attestation form Exhibit „O. A4 had given two addresses, one of Haryana and the other of RRI (Ay), both mentioned in Exhibit 42. Exhibit 3 the advertisement dated 18-10-2005 at Serial No.8 reads as follows; **"**Permanent & Correspondence address (in block letters)**"**

(iii) Hence, A2, A3 and A4 cannot be faulted for furnishing the address of their permanent homes and a second address in which correspondence was to be made. Exhibit 129 (collectively) the Service Book of A2 reveals

that his permanent home address has been mentioned as Delhi, but the Service Book would obviously indicate his address after his appointment. The Prosecution did not make efforts to trace whether he had shifted to Delhi in the year 2006, the year his service book was signed by him. Exhibit 75 which shows an address of Rajasthan, the father s name as "Munshi" is relied on by the Prosecution. This argument is being discarded by this Court in view of the discussions in Crl.A. No.29 of 2016 where this document has been discussed at length in Paragraph 21 of the Judgment which is as follows;

> **"21.** What manifests from the evidence of the witnesses extracted hereinabove is that, in the first instance, Exhibit 81 which is the Scheduled Tribe Certificate in the name of A2, "Ramayan Singh, son of Rameshwar Dayal", was issued vide Exhibit 78, the Dispatch Register, which at Sl. No.1090 clearly reveals the name of "Ramayan Singh, son of Rameshwar Dayal". Exhibit 75 is a Caste Certificate in the name of "Ramayan Singh son of Munshi" purporting to be the Office copy of Exhibit 81, allegedly received by A2 after acknowledging receipt on Exhibit 75 by signing on it. Both Exhibits were admittedly issued by the Tehsildar, Nadbai and Exhibit 75 remained in the Office records. The evidence of P.Ws 10, 11, 14 and 31 clarifies that Exhibit 81 was issued from the Tehsil Office at Nadbai. The Prosecution case rages around the contention that Exhibit 81 is a forged document utilized by A2 to obtain employment at RRI (Ay) Gangtok. Although the Prosecution case is that Exhibit 76 was the application submitted by A2 in the printed proforma of the concerned Tehsil, addressed to the Tehsildar recording his father„s name as "Munshi", no proof of this allegation exists. Exhibit 81 has been issued on 30-08-2000, but Exhibit 76 has not been dated by the applicant, it is only the concerned Officer who has endorsed a date below his signature. The signature alleged to be of A2 is unidentified and it is not proved that A2 is the

applicant. Even assuming that Exhibit 81 was the offshoot of Exhibit 76, it has not been established by the Prosecution that the insertion of the name "Rameshwar Dayal" was infact made by A2 or that he had knowledge of such insertion or whether Exhibit 76 pertained at all to Exhibit 81. In other words, there could have been two persons by the name of "Ramayan Singh", of which one could have been the son of "Munshi" and the other the son of "Rameshwar Dayal". It is the constant refrain of the Prosecution that Exhibit 75 is the office copy of the Scheduled Tribe Certificate issued to A2 and is, therefore, the correct version of the document issued. If this be so, then one cannot help but be perplexed at the entry in the Dispatch Register Exhibit 78 which shows issuance of Certificate to "Ramayan Singh, son of Rameshwar Dayal" and not "Ramayan Singh, son of Munshi". The evidence on record has also clearly established that the Dispatch Register, Exhibit 78 remains in the custody of the Office and more specifically with the dealing Clerk, one Amar Chand and the general public have no access to it. The entries in Exhibit 78 are said to have been made by Amar Chand. It is not the claim of any of the witnesses that the entry in Exhibit 78 was made by A2. A2 had no access to Exhibit 78 as per evidence on record. The I.O. has admitted that he examined Amar Chand recorded his statements and obtained his handwriting and signatures, but Amar Chand although listed as a Prosecution witness was not produced before the Learned Trial Court to establish the Prosecution case. Amar Chand appears to be a pivotal witness, therefore, on his non-production suspicion rears its head and enables this Court to draw an adverse inference under Section 114, *Illustration* (g) of the Evidence Act. It is also questionable as to why Ramcharan who accompanied P.W.11 was not produced as a witness although listed as a Prosecution witness.**"**

(iv) The Prosecution has also tried to make out a case that, as per P.W.6, A1 told him that the address of his wife was used by one of the candidates and A1 being the In-Charge of RRI (Ay) of which P.W.6 was an employee he could not refuse. However, on perusal of the evidence of P.W.6 he has stated that he used to reside in Daragaon, Tadong, along with his wife and one room therein was rented out by him to A2 and A3. In the light of this evidence, if A2 and A3 were tenants of P.W.6, in my considered opinion, no fault or criminality arises on their furnishing the address of P.W.6 as their correspondence address, in terms of Exhibit 3, as they were in occupation of the said premises. Similar would be the reasoning for A4 having furnished two different addresses as it is his case that he was a resident of Sikkim, his parents being employees in the RRI (Ay) but they originally came from Haryana. Furnishing of the two addresses by him was also in compliance to the requirement in Exhibit 3. The Prosecution has relied on the evidence of P.W.2 that in view of the differing signatures of A2 on the application form and the joining report gave rise to a doubt that Ramayan Singh was a different person. If that be so, it was for the Prosecution to have launched an investigation into the matter and by evidence cleared all doubts and established their allegation. No finding can be arrived at by any Court based on conjectures and surmises.

(v) An effort has been made by the Prosecution to indicate that A1 had told P.W.6 to go to Tadong Post Office and collect the appointment letters in the name of A2 and A3, but P.W.6 in his evidence has stated that A2 and A3 told him while leaving Sikkim after the interview that in case they were successful and a calling letter was sent in his address, he should receive it. P.W.6 has specifically stated that he had no objection to them using his address and admittedly collected the appointment letters of A2 and A3 from the Post Office but not at the behest of or duress by A1. It is further the Prosecution case that A3 furnished the address of P.W.12 on the instructions of A1. This is not established by any evidence. Consequently, it is apparent that the Prosecution has failed to establish by any cogent evidence the allegation of the furnishing of address of P.W.12 by A3 on the alleged manipulation by A1. Evidently, A3 had in 2005 received correspondence in the same address but at that time P.W.12 had raised no objection who was offended only when the show cause notice of A3 was sent to his address. The evidence of D.W.3 in fact reveals that he was known to P.W.12 and on his request A3 had furnished the address of

P.W.12, who permitted it. In ***Hanumant, Son of Govind Nargundhar*** vs. ***State of Madhya Pradesh***[2] it was observed thus;

> **"10.** …...……
>
> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. ……**"**

(vi) P.W.2 has under cross-examination admitted that 10 (ten) marks earmarked for local candidates was to be given on production of Sikkim Subject/Certificate of Identification and not on the basis of the address given on the application form. That, no favouritism was shown to any candidate by virtue of having furnished a local address. Column 5 of Exhibit 21 reflects that 10 (ten) marks were for local candidates and 5 (five) for non-local candidates. The Prosecution was not able to establish by any evidence that A2, A3 and A4 were given the said additional 10 (ten) marks which were set aside for local candidates on the basis of the local addresses furnished by them. Exhibit 21 in fact reveals that A3 was given 5 (five) marks, whereas the local candidates were given 10 (ten) marks each. Admittedly, A2, A3 and A4 did not possess Certificate of Identification or Sikkim Subject, therefore, the question of awarding them extra marks did not arise.

(vii) Reliance has been placed by the Prosecution on Exhibit 7 and evidence of P.W.8 to support their contentions that the posts in Group 'C' and 'D' were meant only for local residents. The correspondence reveals

[2] AIR 1952 SC 343

inter alia that P.W.8 was not granted transfer to Hyderabad or Bhubaneswar and that the Council did not encourage employees in Group 'C' and 'D' recruited locally to seek transfer to other places since such posts are "mainly" meant for local residents. Exhibit 7 does not specify that the posts were "only" for local residents but "mainly" and the correspondence did not reflect the Rules. That apart, the Selection Committee had been clothed with sufficient powers to select the appropriate candidate for a particular post. Even assuming that the Rules were flouted no criminality emanates, as it appears to have been done on account of lack of administrative experience.

(viii) It is not contested by the Prosecution that the Selection Committee was formed by the Central Office vide Exhibit 'B' comprising of one Dr. D. Baruah and B. Malik. No specific allegation has arisen from the Prosecution that A1 wrongly nominated himself as its Chairman of the Selection Committee. As per P.W.2, the Selection Committee constituted by CCRAS was incorrect, but the Prosecution did not take the concerned officials of CCRAS to task for their act. Besides, the irregularity detected in the Selection Committee, as per P.W.2, was that B. Mallick was not a Member of the SC/ST Community and Dr. Baruah was not a subject Expert, it was indeed not an error committed by A1. In addition, it is relevant to notice that Exhibit 'F' at Rule 5.5 provides that the Selection Committee shall comprise of the Project Head. As A1 was evidently heading the RRI (Ay) at the relevant time he became the Chairman of the selection by default. Hence, the constitution of the Selection Committee was not by or at the whim of A1.

(ix) It is not the Prosecution case that the backlog vacancies which were reserved for Scheduled Caste and Scheduled Tribe candidates were filled up by candidates of any other category by the Selection Committee. The Scrutiny Committee constituted by A1 comprised of P.W.6, P.W.7 and one K. K. Rakshit who scrutinized the documents submitted by the candidates. P.W.3 has deposed that there were no adverse remarks about the integrity of this Committee. Even if the Prosecution was of the opinion that the Committee was incapable, this in itself would not qualify as a criminal offence, all that was required was to reconstitute the Scrutiny Committee on grounds of incompetence. The Prosecution alleged that A1 had specifically directed the Scrutiny Committee to accept the applications of A2, A3 and A4 irrespective of the absence of relevant documents, this is devoid of any

proof given that the Prosecution witnesses have not stated that A1 had directed them to accept the applications of A2 to A4.

(x) The Prosecution had also contended that in the advertisement, Hindi as the medium of the typing test was not mentioned nor was any Expert engaged for the typing test nor did the candidates submit Certificate of Typing Speed. In my considered opinion in the absence of proof of criminal intent this cannot tantamount to a criminal offence but would be an irregularity which could well have been rectified by cancelling the entire selection process by the Central Authority who despite being aware of the process being undertaken by the RRI (Ay) and information being communicated to them did not deem it essential to take rectifying steps or consider it criminal or irregular at that relevant point in time. In fact, evidence reveals that the list of selected candidates were forwarded to the CCRAS who granted approval for their appointment. No enquiries pertaining to irregularity or illegality was made by CCRAS. The transparency maintained by the RRI (Ay) with the Central Authority is evident from communications sent to the Central Authority vide Exhibits "AO", "AN", "AB", Exhibit 61 and evidence of P.W.7 and other Prosecution witnesses.

(xi) Exhibit 3 the advertisement issued mentions *inter alia* that **"***…….. b) Not less then (sic) @ 30 W.P.M. in typing as evident in test. ……..*.....**"** The advertisement made no mention of a Certificate. The Selection Committee evidently made a decision about the medium of the typing test in view of the guidelines issued by the Central Authority. Relevant reference may be made to the evidence of P.W.3 who stated that the RRI (Ay) was adhering to the guidelines issued by the Central Authority, informing them that there ought to be progressive use of Hindi as issued by the Department of Official Language. Exhibit „T is the letter identified by P.W.3, dated 06-03-2014, from the Director General, CCRAS to the Subordinate Council of all Institutions/ Centres/In-Charge of Units which cautions that the guidelines to follow Hindi in the Institute were being disregarded and the Parliamentary Official Language Committee could inspect the Institution at any time and should it be discovered that the guidelines of the Official Language Department were not complied with then RRI (Ay) would have to face a lot of difficulties. It is clear that A1 did not of his own accord include Hindi as the language for typing, but it was the Selection Committee following the instructions *supra*. Surely following

instructions of a higher authority does not constitute a criminal offence nor can it be deduced that the medium of the typing test was kept under wraps to manipulate the process in favour of A2, A3 and A4. The independence of the Selection Committee is proved by the evidence of P.W.3 who categorically stated that A1 had told him that he could check the entire records including testimonials submitted by the candidates and kept by the Scrutiny Committee. A1 evidently did not scrutinize the documents or influence the Members of the Selection Committee. P.W.2 has admitted that no written instructions were issued for the Special Recruitment Drive and it was up to the Interview Committee to judge the suitability of a candidate for a particular post.

(xii) So far as the statement in Exhibits 59, 67 and 66 being Section 164 Cr.P.C. statements of P.W.6, P.W.7 and one K. K. Rakshit respectively, is of no assistance to the Prosecution case. P.W.6 in his Section 164 Cr.P.C. statement has deposed that he had made his statement before a Judge but that he was told by the CBI Officer what was to be stated before the Judge. On the Court questioning him as to whether he had made a true statement before the Judge, he replied that he had told the Judge what had occurred and what he knew. However, in a subsequent statement he stated that the contents of Exhibit 59 were not read over or explained to him and he was made to affix his signature on Exhibit 59. His vacillating evidence renders his evidence with regard to his Section 164 Cr.P.C. statement unreliable.

(xiii) In the same thread, it is worthwhile noticing that although the Prosecution raised a brouhaha over non-submission of Experience Certificate by A2 when subjected to cross-examine P.W.6 specifically stated that A2 was not required to submit Experience Certificate along with his application and the local candidates also did not submit Experience Certificate. P.W.2 deposed under cross-examination that A2 was not awarded any marks for past experience. That, applications of 43 (forty three) candidates without past experience were also accepted by the Scrutiny Committee, thus A2 was not an exception. According to P.W.6 and P.W.7, A1 did not tell them specifically to accept the application of A2 even without past experience or other documents. Exhibit 37, according to P.W.7, was accepted as per the discussions amongst the Scrutiny Committee Members that the candidate was qualified and the evidence of typing speed could be produced later. Under cross-examination, he admitted that the acceptance of the application

of the candidates were correct and not erroneous and the applications had been thoroughly scrutinized by all Members of the Scrutiny Committee before it was accepted. Although his Section 164 Cr.P.C. statement was shown to him wherein he stated that **"***the statement made before the Judge was my true statement***"**, but he was not confronted with any specific statement made by him under Section 164 Cr.P.C. before the Learned Trial Court and in the absence of such corroboration his Section 164 of the Cr.P.C. statement merits no consideration by this Court. It is trite that a statement under Section 164 Cr.P.C. is not substantive evidence but can be used only for corroboration or contradiction, no such circumstance arose in his evidence before the Court. What is telling and has negative import on the Prosecution case is that P.W.5, according to P.W.6, used to threaten him by saying that he would falsely implicate him in the case if he did not depose in accordance with his instructions. Section 164 Cr.P.C. statement of K. K. Rakshit, Exhibit 66, is of no assistance to the Prosecution case as the said person was not examined as a Prosecution witness to test the veracity of his statement. ***(xiv)*** The Prosecution had contended that A1 did not inform P.W.3 of the procedure and guidelines, however under cross-examination P.W.3 has stated that A1 had told him that he could check the entire records including the testimonials submitted by the candidates and kept by the Scrutiny Committee. This evidence indicates that P.W.3 was at liberty to have examined any of the records including the Rules and convinced himself as to whether there were any procedure and guidelines provided by the Central Authority. A1 evidently did not keep any document concealed for the purposes of giving illegal benefit to A2 to A4. It was also in the evidence of P.W.3 that discussions were held in respect of allocation of marks amongst them to be awarded to the candidates and they themselves decided that the total of 50 (fifty) marks to be allotted by the Members would be in the ratio of 20 : 15 : 15. The Chairman of the Selection Committee was allotted 20 (twenty) marks out of 50 (fifty) and P.W.3 and the other Member of the Committee were allotted 15 (fifteen) marks each, as according to him 50 (fifty) marks could not be equally divided amongst three persons.

(xv) The allegation that different signatures were affixed by A2 in his application form and in his joining report has not been tested during investigation as no forensic examination was carried out to clear this issue. Allegations cannot establish the Prosecution case, forgery if suspected must be established by cogent evidence. In any event, how different signatures

indicate the fraudulent intention of A2 has not been explained or proved by the Prosecution. The Prosecution also sought to make out that the act of A2 in producing Exhibit 39 and Exhibit 40 wherein the name of his mother is given as „Mina in the former and "Sunhari Devi" in the second document was an indication of his intention to cheat the Government. However, the Prosecution has made no investigation to find out whether the mother of A2 went by both names, i.e., „Mina and "Sunhari", or whether it was wrongly inserted by the concerned authority. Document Z/6 was not exhibited by the Prosecution on this aspect and therefore I desist from examining the document or remarking on its contents. The allegation of the Prosecution is not verified by any investigation or supporting documents nor has it been established by any evidence that by allegedly furnishing two different names of his mother A2 intended to cheat the Government. ***(xvi)*** So far as the evidence of P.W.11, P.W.14, P.W.18 and P.W.29 relied on by the Prosecution and reliance on Exhibits 81, 79, 10, 74, 76, 75, 78 and 77 are concerned, in the context of A2 this Court is not taking these evidence into consideration in view of the fact that these documents and the evidence of these witnesses have already been considered at length in Crl.A. No.29 of 2016 as already mentioned *supra*.

18(i). The argument of the Prosecution against A4 is that the record of birth of A4 is not mentioned in the Birth Register maintained by the Office of the Registrar, Births and Deaths. P.W.21 has stated that the Birth Certificate, Exhibit 87 bears Registration No.5255 dated 10-06-1991. However, in the Register shown to him Exhibit 86, he found 11 (eleven) entries on 10-06-1991 bearing No.4059 to 4069. The Prosecution failed to establish as to whether there was any other Live Birth Register or whether the births of 1991 truncated on 10-06-1991 with no other births for that year. P.W.21 has admitted that one Dr. Khagendra Neopaney was the In-Charge of the Office of the Births and Deaths. That, in Exhibit 87 the Birth Certificate of A4 the signature appearing in the space meant for the "signature of the Registrar" reads as "K. Neopaney".

(ii) P.W.22 under cross-examination stated that even in delayed cases when the births and deaths were not registered within the stipulated period, the Department has been registering the births and issuing Certificates as per the Rules. The Learned Trial Court was of the opinion that Exhibit 87 was a false document not having been issued by the competent authority as the Register Exhibit 86 started from Serial No.2555 and ended at Serial

No.4703 with no entry No.5255 in the said Register. The Learned Trial Court despite such finding was of the opinion that as A4 was only 12 years old at the relevant time, he could not be held liable for obtaining the false Birth Certificate. While disagreeing with the finding of the Learned Trial Court that Exhibit 87 is a false document, it is important at this juncture to consider the admission of P.W.22 that the Birth Register Exhibit 86 pertains to Registration No.2555 onwards up to 4703. That, the records of births after Registration No.4703 were not produced before the Court and the Police did not seize the Birth Register from their Office beginning from registration No.4704 onwards. This admission raises doubts about the efficiency of the Prosecution investigation which appears to be remiss and perfunctory. P.W.22 also admitted that Exhibit 87 bears the Office seal of the Department and is in the format issued by their Department and indicates that the applicant was 12 years old when the Certificate was prepared. The signature on Exhibit 87 remained unidentified as Dr. Khagendra Neopaney whose signature it purportedly was discharged by an Order of this Court as already extracted *supra*. However, this would not render the document false for reasons enumerated *supra* and in fact prompts the Court to draw an adverse inference against the Prosecution. The benefit of doubt is thus extended to A4 as the Learned Trial Court had no occasion to examine whether an entry pertaining to Exhibit 87 existed in any other Birth Register maintained by the Office of the Births and Deaths, Government of Sikkim. That apart, the argument of the Prosecution pertaining to A4 furnishing a false Birth Certificate cannot be countenanced as he was 12 years old on the date the document was issued and obviously had no inkling about its preparation. On this aspect, while discussing the principle of *ante litem motam*, the Honble Supreme Court in ***Murugan alias Settu*** v. ***State of Tamil Nadu***[3] held as follows;

> **"23.** In ***Mohd. Ikram Hussain v. State of U.P.*** [AIR 1964 SC 1625] this Court had an occasion to examine a similar issue and held as under: (AIR p. 1631, para 16)
>
> > "16. In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on 20-6-1960 she was under 17 years of age. There [was] also the affidavit of the father stating the date

> of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Evidence Act and the entries in the school registers were made ante litem motam. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the doctor who examined Kaniz Fatima,…. The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."
>
> **24. The documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. (Vide *Umesh Chandra v. State of Rajasthan* *[(1982) 2 SCC 202]* and *State of Bihar v. Radha Krishna Singh* *[(1983) 3 SCC 118]*."**
>
> ***[emphasis supplied]***

The extract above applies with equal vigour in this matter and thereby lends a quietus to the issue of Exhibit 87.

(iii) It is also the contention of the Prosecution that A4 had furnished a false Typing Certificate stating that he was doing typing course from 23-09-2005 in Palbheu Institute, but the Certificate did not reflect that he had typing speed of 30 words per minute. Firstly, it is relevant to mention that the advertisement did not require furnishing of a Typing Certificate. P.W.27 mentioned that the typing speed of A4 as 21 w.p.m. only and that on account of this circumstance A4 was suspended from the course, but the Prosecution has produced no document to augment this evidence or such suspension. P.W.15 appears to have been the Examiner for the typing test. According to him, the typing speed of A4 was 106/5 which amounted to 21 w.p.m. Exhibit 85 is the typing test sheet of A4 for the test conducted on

07-01-2006. The document as per P.W.15 was prepared by him in his own handwriting but his signature does not find place on the document. According to him, the Principal of the Palbheu Institute signed on Exhibit 85 on 06-12-2006. The test was conducted on 07-01-2006 but the Prosecution has not explained as to why the Principal of the Palbheu Institute who evidently had not conducted the examination signed on Exhibit 85 on 06-12-2006, 11 (eleven) months after the examination. That apart, although assuming that A4 could only type 21 w.p.m. the Prosecution did not furnish the typing test result of any other candidates for a comparative study by the Learned Trial Court to assess whether there was a candidate who had performed better in the typing test than A4 which could have been indicative of special favours, if any, extended to A4. Without such comparison, the Court cannot off hand state that the Selection Committee was in error in selecting A4 despite his speed. The Selection Committee was clothed with discretionary powers as deposed by P.W.2 and has exercised the powers and any irregularity if committed does not tantamount to criminality. Hence, I am not inclined to accept this argument of the Prosecution that A4 ought not to have been selected on the basis of his typing speed.

19. So far as the Charge against A5 is concerned, the origins of Exhibit 75 and Exhibit 81 have already been discussed at length by this Court in Crl.A. No.29 of 2016 filed by A2. As pointed out by Learned Counsel for the Appellant, the Charge framed against A5 is for offences committed between 2005 and 2006 whereas it is proved by the evidence of the Prosecution witnesses that he had retired from service in 2001. It is clear that all that A5 was required to do was to verify as to whether A2 was a resident of Nadbai and belonged to the ST community. He has verified the same and evidence reveals that he is not responsible for signing or issuing of either Exhibit 75 or Exhibit 81 which is issued by Authorities higher than him, thus the ingredients of Section 197 of the IPC remain unfulfilled. Besides the *mens rea* of A5 has not been established by the Prosecution. No person can be prosecuted for having carried out his duties. If the Prosecution alleges that a person had *mens rea* and consequently *actus reus* in an offence then it is the bounden duty of the Prosecution to join the dots and prove such a circumstance beyond reasonable doubt.

20. In conclusion, no evidence establishes that A1 in conspiracy with A2, A3 and A4 appointed them in various posts knowing that A2 had

produced a fake ST Certificate, A3 had furnished a false local address and A4 had filed a false Birth Certificate and inadequate Typing Certificate. To bring home an offence under Section 120B of the IPC, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. Undoubtedly, it is difficult to establish conspiracy by direct evidence, but circumstantial evidence must link the offence unerringly to each of the accused who allegedly enter into a conspiracy. The enigma that presents itself in the matter is the lack of evidence to prove such conspiracy or any motive attributed to A1 to favour A2, A3 and A4. Evidently, no investigation was undertaken to establish any relationship between A1 and A2, A3 & A4 before their appointment to the posts. No evidence was led to establish that they were either related, or that they belonged to the same area/cities/State for A1 to favour them. No material benefits are alleged to have accrued to A1 by appointing A2 to A4 neither has any other altruistic motive been attributed to A1 which would egg him on to sully his own reputation by making such appointments. In the absence of any evidence, whatsoever to indicate meeting of minds between A1, A2, A3 and A4, the offence under Section 120B of the IPC has not been made out by the Prosecution against any of the Respondents charged with the offence. No evidence points to any dishonest intention of A1 and A5 as required under Section 13(1)(d) of the P.C. Act. The Prosecution failed to establish that A1, A2, A3 and A4 had used as genuine forged documents to make out an offence under Section 471 of the IPC. The conspiracy between A2 and A5 has also not been established by any evidence or any motive imputed on A5 to favour A2. The Prosecution has not denied that A2 belonged to the tribe "Meena" recognised as Scheduled Tribe in Rajasthan, therefore, there was no reason for him to induce A5 to deliver any forged property to him. None of the evidence on record establishes that A2, A3 and A4 cheated and dishonestly induced delivery of property as required under Section 420 of the IPC. A5 was said to have misused his official position and issued and signed a false Scheduled Tribe Certificate for the benefit of A2 this has been demolished by the evidence on record. In conclusion, none of the Charges against the Respondents have been proved by the Prosecution.

21. The Prosecution after making imputations against the Respondents are required to prove its case beyond reasonable doubt. In the absence of any cogent and clinching evidence against any of the Respondents under the offences charged with, I find no infirmity in the conclusion of the Learned

Trial Court except for conviction of A2 under Section 471 of the IPC which was however dealt with in Crl.A. No.29 of 2016.

22. Consequently, the Appeal is dismissed.

23. No order as to costs.

24. Copy of this Judgment be transmitted to the Learned Trial Court for information along with records of the Learned Trial Court.

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SLR (2021) SIKKIM 226
(Before Hon'ble the Chief Justice)

MAC App. No. 10 of 2020

Branch Manager,
New India Assurance Co. Ltd. ….. APPELLANT

Versus

Shyam Babu Singh and Others ….. RESPONDENTS

For the Appellant: Mr. Sudesh Joshi, Advocate.

For Respondent 1-5: Mr. N. Rai, Sr. Advocate with Mr. K.B. Chettri, Advocate.

For Respondent 6: Mr. Sisir Mothay, Advocate.

Date of decision: 27th March 2021

A. Motor Vehicles Act, 1988 – Income of the Deceased – Determination – BDO in the State of Sikkim is competent to issue income certificate as per Notification dated 03.04.2007 – If the income certificate issued by a competent authority has been relied by the Tribunal accepting the earning of ₹ 20,000/-, the onus to disprove it shifts on the Insurance Company – It was the duty of the Insurance Company to call the BDO in the witness box and put questions to him whether he has verified the books of transaction of the business recorded in the Books of Account while issuing the income certificate.

Appeal dismissed.

ORDER (ORAL)

Jitendra Kumar Maheshwari, CJ

Being aggrieved by the award dated 29.02.2020 passed by the Motor Accidents Claims Tribunal, East Sikkim at Gangtok in MACT CASE

No. 75 of 2018, granting compensation of sum of Rs.30,94,000/- to the claimants who are father, mother and siblings of the deceased, this appeal has been preferred.

On perusal of the record, it reveals that the Claims Tribunal has relied upon the income certificate (Exhibit-9) issued by the Block Development Officer (BDO) showing an earning of Rs.20,000/- per month. Relying thereto and calculating the annual earning of Rs.2,40,000/-, further as per the age of the deceased adding Rs.40,000/- per annum for future prospects deducting one-half because the claimants were the parents, applying the multiplier of 18 looking to the age of deceased awarded a sum of Rs.30,24,000/- in the head of Loss of Dependency and further adding of Rs.70,000/- in conventional heads granted compensation of Rs.30,94,000/-.

Learned Counsel appearing on behalf of the Insurance Company has strenuously argued that as per the Notification issued by the State Government dated 03.04.2007, the income certificate may be issued by the BDO, but he has to verify the details of the transactions recorded in the Books of Account.

In the present case, the BDO has not so verified the transactions in the Books of Account, therefore, the reliance made by the Tribunal on the income certificate issued by the BDO is not justifiable, therefore, the quantum of compensation as awarded is on higher side which may reasonably be reduced.

On perusal of the aforesaid, it is quite clear that the BDO in the State of Sikkim is competent to issue the Income Certificate, as per Notification dated 03.04.2007. In terms of the power conferred on him, the Income Certificate (Exhibit-9) is the relevant and relied by the Tribunal to determine the loss of dependency and future prospects due to death of the deceased.

In the said context, it is to observe that if the income certificate issued by a competent authority has been relied by the learned Tribunal accepting the earning of Rs.20,000/-, the onus to disprove it shifts on the insurance company. However, it was the duty of the insurance company to call the BDO in the witness box and put question to him whether he has verified the books of transaction of business recorded in the Books of

Account while issuing the income certificate. In absence of taking such steps, the argument so advanced by the counsel for the appellant is of no help to him.

In view of the foregoing and in the opinion of this Court, reliance so placed by the Tribunal on the income certificate (Exhibit-9) cannot be doubted as it was issued by the competent authority. The calculation so made by the Tribunal on the basis of the said certificate deducting one-half and applying the multiplier of 18 as per age of deceased is in accordance with law and do not warrant any interference in the appeal. Except the same no other argument has been pressed upon by the learned Counsel for the appellant.

In view of foregoing, this appeal is devoid of any merit hence dismissed at the admission stage.