# THE
# SIKKIM LAW REPORTS

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## SUBJECT INDEX

appellate Court has travelled beyond the pleadings and on its conjectures and surmises and held Exhibit-A to be an irrevocable license even if it was not a gift deed when Exhibit-A was exhibited by the defendants as a gift deed.
***S.T. Gyalsten* v. *Kalu Tamang*** ***671A***

**Code of Civil Procedure, 1908 – O.8 R.1 – Timeline for filing a written statement –** The words "shall not be later than ninety days," does not divest the Court of its discretionary powers to accept written statement beyond the time stipulated in the said provision. In fact, it is propounded that the provision of O. 8 R. 1 providing for the upper limit of ninety days to file written statement is directory. However, it must also be borne in mind that although the Court has wide powers to make such order in relation to a suit as it thinks fit, the order extending time to file the written statement cannot be exercised in a routine manner and frequently to nullify the period fixed by O. 8 R. 1 of the CPC – Time can be extended only in exceptionally difficult cases (*Atcom Technologies Ltd. v. Y.A Chunawala* and *Salem Advocate Bar Association v. Union of India* relied).
***Shanti Subba & Others* v. *Jashang Subba*** ***694B***

**Code of Civil Procedure, 1908 – S. 151 –** Petition under S. 151 of the C.P.C was filed by the petitioners seeking extension of time to file written statement instead of filing it under O. 8 R. 1 – The question was whether petition invoking S. 151 deserves to be disregarded, being inappropriate provision for the purpose of seeking extension of time to file a written statement? – Held: Technicality should not come in the way of meting out even handed justice. Manifest injustice cannot be perpetuated on grounds of technicality. Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. Hence, there is no reason to disregard an application under S. 151 merely for the reason that the appropriate provision was not invoked.
***Shanti Subba & Others* v. *Jashang Subba*** ***694A***

**Code of Criminal Procedure, 1973– S. 164 –Recording of confessions and statements–**Statement of a witness recorded under S. 164 is not substantive evidence and can be utilized only for the purpose of contradiction and corroboration. The trial Court could only rely on the evidence given on oath in the Court and not one under S. 164.
***Bijay Chettri* v. *State of Sikkim*** ***736B***

**Code of Criminal Procedure, 1973 –S.391 –Appellate Court may take further evidence or direct it to be taken –** The power conferred under S. 391 Cr.P.C. is to be exercised with great care and caution. In dealing with any appeal, the appellate court can refer to the additional evidence only if the same has been recorded as provided under S. 391. Any material produced before the appellate court to fill up the gaps by either side cannot be considered (*In re. State (NCT of Delhi)* v. *Pankaj Chaudhary* referred).

***Trilochan Kapoor Sharma* v. *State of Sikkim*** ***665***

**Code of Criminal Procedure, 1973 – S. 482 – Quashing of F.I.R –** When disputes have predominantly civil character and arise out of commercial transactions, and where the parties have resolved the disputes amongst themselves, the Courts can exercise its powers under S. 482 to quash criminal proceedings in non-compoundable offences.

***T. Nagendra Rao & Others* v. *State of Sikkim*** ***726A***

**Constitution of India – Article 14 and 16 – Equality and equal treatment in matters of public employment –** Petitioners were initially employed on muster roll/work charge basis under the State Government and after having worked in various capacities, they were regularized from 30.06.2016, in terms of notification no. 264/GEN/DOP, dated 12.02.2014, which provided that regularization was to be given to the employees who had completed fifteen years or more of service as on 31.03.2013 – Inversely, the services of many temporary employees similarly situated and in some cases, junior to the petitioners were regularized in March 2014 and September 2014 – The petitioners claimed salary, service benefits and arrears of salary from September 2014 – Held: As per the guidelines, the criteria for regularization was to be submission of the relevant documents – Despite claims of their documents being on record and also subsequent submission of documents, the petitioners have not filed such documents for the perusal of the Court to establish that either the documents were in the File of the petitioners or that they filed it along with the other employees who thus availed of regularization of services from September, 2014. Petitioners cannot take advantage of their own error and lackadaisical attitude, as administrative discipline is required to be adhered to – Petitioners have also failed to fortify their claim of equal pay for equal work by any documentary evidence. There are no appointment orders or office orders to indicate the equality of designations or the tasks/

works performed by them being similar or equivalent to those employees whose services were regularized in September, 2014 and who they seek to be placed at par with.

***Garja Man Subba & Others* v. *State of Sikkim & Others*** ***771A***

**Constitution of India – Article 226 –** A party who applies for issuance of a writ should, before he approached the court, have exhausted other remedies open to him under the law. However, this is not a bar to the jurisdiction of the High Court to entertain the petition or to deal with it. It is rather a rule which courts have laid down for the exercise of their discretion.

***Shri Umesh Prasad Sharma & Another* v.**
***Allahabad Bank & Others*** ***771A***

**Constitution of India – Article 226 –** The petitioner appeared for 3rd semester Master of Arts December, 2016 examination conducted by Sikkim University in the subject - Social Movements in India. She secured 69 out of 100 marks – Dissatisfied with the marks, she applied for re-evaluation. On 03.10.2019, Sikkim University issued the corrected grade card wherein she had secured 73 out of 100 and thus her CGPA score increased to 8.08. The fifth convocation of the University for conferment of degrees and awards of medals for the batch of 2017, 2018 and 2019 was announced be held in the first week of November 2019. The gold medal in the Master of Arts in Sociology for the batch of 2017 was to be awarded to respondent no.4 whose CGPA was 7.56. After the petitioner learnt that respondent no.4 who had secured less than her was being awarded the gold medal, she approached the authorities with her grievances. She was then informed about the last sentence of clause 10 of the Regulations on Conduct of Examinations (the impugned provision) which reads: "*The students obtaining the highest and the second highest CGPA score at the Final Semester Examination in their respective subjects shall be awarded with Gold and Silver Medals in the subsequent Convocation held at the university post declaration of such results. The Re-evaluated candidates, however, shall not be eligible for the award of Rank/prizes and medals as the case may be.*" The gold medal was awarded to respondent no.4 – The petitioner challenges the *vires* of the impugned provision which provides that the re-evaluated candidates, however, shall not be eligible for award of

rank/prizes and medals – Held: The impugned provision is discriminatory. It creates an impermissible classification between those students who sought re-evaluation and students who did not. A student who has been permitted to seek re-evaluation in terms of clause 6 of the Regulations and her marks considered as the final score post re-evaluation is discriminated *vis-à-vis* other students who did not seek re-evaluation. The student can seek re-evaluation only because the Regulations permitted her/him to do so. Having thus allowed a student to seek re-evaluation of her/his script by a provision of the Regulations itself, not to have the re-evaluated marks considered for award of a medal, either gold or silver, would amount to punishing the student for seeking re-evaluation even when it is permitted by clause 6 of the Regulations – The impugned provision makes the object of clause 6 and clause 10 of the Regulations they seek to achieve, ineffective – Impugned provision declared *ultra vires* Article 14 of the Constitution of India and struck down.

***Ms. Neha Sharma* v. *Sikkim University & Others*** ***640A***

**Constitution of India – Article 226, 227 –** The petitioners are aggrieved by corrigendum dated 09.11.2017 issued by the SPSC seeking to amend the advertisement dated 13.10.2017 inviting applications from eligible candidates for filling up 100 posts of Assistant Professors under the respondent no.2 through direct recruitment. The advertisement provided the minimum qualification required for each of the post advertised. The minimum educational qualification for the post of Assistant Professor was Masters Degree in respective subject with 55% marks, with NE (SLET)/NET/SET or Ph.D as per UGC Regulation, 2009 – The corrigendum removed the word "M.Phil appearing in the advertisement – Held: The advertisement sought for minimum qualification as required by the service rules. It is for the employer to determine the qualification that may be and if it remained there it would be in conflict with the minimum educational qualification as required by the service rules – Petitioners do not plead that they have either qualified in NET or any accredited SLET/SET which is the minimum requirement for the appointment of Assistant Professors. They instead argue that since they were working on *adhoc* basis for a fairly long time it was not fair upon the respondents to seek from them their qualification in the NET/SLET/SET. They also admit that they do not have a Ph.D. degree in compliance of the UGC (Minimum Standards and Procedure for Awards of

PH.D. degree) Regulation, 2009. The petitioners did not have the necessary qualification as required. There is no merit in the present writ petition.

***Ms. Dechen Ongmu Bhutia & Another* v.**
***Sikkim Public Service Commission & Others*** ***633A***

**Hindu Law – Whether a property gifted by to a son by the father becomes ancestral property – Nature of such property explained –** According to Hindu Law by Sir Dinshaw Fardunji Mulla 23rd edition– "all property inherited by a male hindu from his father, father's father or father's father father, is ancestral property." A property of a Hindu male devolves on his death – Father of a joint Hindu family governed by *Mitakshara* law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way – *Mitakshara* father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants – It is not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. A property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor ( *In re: C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar referred*) – It is also evident that respondent no.4 acquired the property on transfer by his father who had originally acquired it. These facts make the property self-acquired property of the father of respondent no.4 and thereafter, of himself and consequently not the ancestral property of the petitioners. As such respondent no.4 has a right to deal and dispose of the property as he desires.

***Umesh Prasad Sharma & Another* v.**
***Allahabad Bank & Others*** ***771B***

**Protection of Children from Sexual Offences Act, 2012 – Determination of age of the victim –** In a case pertaining to the POCSO Act, it is imperative to establish the age of the victim and thereby her minority. S. 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides for determination of age of the child in conflict with law and child in need of care and protection. Although the victim is neither, nevertheless the same parameters can be utilized for the purposes of determining her age – This provision lays down the requirement for age

assessment and ossification test as the last resort for age determination when birth certificate from the School of the victim or the local governing bodies are not available.

***Bijay Chettri* v. *State of Sikkim*** ***736A***

**Protection of Children from Sexual Offences Act, 2012 – Determination of age of the victim –** The alleged incident occurred on 22.05.2017. The victim claimed to be 15 years old. The School admission register (Exhibit-15), furnished by the School Headmaster records the date of birth of the victim as 20.04.2002.The question for determination was whether the victim was a minor on the date of the alleged offence? Held: Although a column for signature of father or guardian in Exhibit-15 reflects a name similar to that of the victim's stepfather (PW-2). However, in his evidence before the Court, he has affixed his thumb impression. Consequently, the identity of the person who furnished the date of birth and signed on Exhibit-15 was not established – PW-2 not having been shown the document could not verify its contents. The mother of the victim was examined under S. 161, Cr.P.C during investigation, but not before the trial Court – S. 65 of the Indian evidence Act provides for cases in which secondary evidence relating to document may be given. Exhibit-15 may have been relied on by the prosecution in terms of this provision, however it would do well to notice that the provision does not do away the necessity of proof of such documents – That the victim was a child in terms of the POCSO Act, 2012, in the absence of any evidence on this count.

***Dilip Goel* v. *State of Sikkim*** ***755A***

**State Government Notification No.385/G dated 11.04.1928 and Notification No.2947/G dated 22.11.1946 – Validation and admission of unregistered documents –** Exhibit-A was exhibited by the defendants as a gift deed executed in favour of defendant no.2 by late Rhenock Athing Kazi. In that view of the matter, it was a document produced by the defendants as a title deed to prove their title to plot no.221. It was clearly thus a document which ought to have been registered as the aforesaid notification clearly lays down that such a document will not be considered valid unless it is duly registered. First appellate Court has held that it is not a registered document and not a valid gift deed. That finding is correct. If it was so, there was a prohibition, in view of the aforesaid notifications, for

Exhibit-A to be admitted in Court "to prove title or other matters contained in the document." First appellate Court, however, went on to examine Exhibit-A with great difficulty, and held that it reflects that late Dorjee Tamang, father of defendant no.2, had been granted some land. This was clearly not permissible. The First appellate Court came to such conclusion on reading the purported translation of the illegible Exhibit-A. Even if one were to examine the purported translation filed by the defendants, although clearly barred, it reflects that Exhibit-A purported to be a gift deed and not an irrevocable license. Furthermore, Exhibit-A purports to be scribed by late Sonam Topgay Kazi and not by late Rhenock Athing Kazi as pleaded in the written statement. The First appellate Court faltered again by surmising facts, reading beyond the document itself and guessing why signature of late Sonam Topgay Kazi appears thereon. Exhibit-A was not proved by defendants as required under the law. The exhibition of this document was objected to by the plaintiff. Neither the handwriting nor the signature thereof was proved by the defendants – Mere marking of an exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Finding arrived at by the First appellate Court that Exhibit-A was an irrevocable license is clearly unsustainable.

***S.T. Gyalsten* v. *Kalu Tamang*** ***671B***

**SLR (2021) SIKKIM 633**

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

**WP (C) No. 13 of 2018**

**Ms. Dechen Ongmu Bhutia and Another** ….. **PETITIONERS**

*Versus*

**Sikkim Public Service Commission and Another** ….. **RESPONDENTS**

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

**For Respondent No.1:** Mr. Bhusan Nepal, Advocate.

**For Respondent No.2:** Dr. Doma T. Bhutia, Additional Advocate General with Mr. S. K. Chettri, Government Advocate.

Date of decision: 1st September 2021

**A. Constitution of India – Article 226, 227 –** The petitioners are aggrieved by corrigendum dated 09.11.2017 issued by the SPSC seeking to amend the advertisement dated 13.10.2017 inviting applications from eligible candidates for filling up 100 posts of Assistant Professors under the respondent no.2 through direct recruitment. The advertisement provided the minimum qualification required for each of the post advertised. The minimum educational qualification for the post of Assistant Professor was Masters Degree in respective subject with 55% marks, with NE (SLET)/NET/SET or Ph.D as per UGC Regulation, 2009 – The corrigendum removed the word "M.Phil appearing in the advertisement – Held: The advertisement sought for minimum qualification as required by the service rules. It is for the employer to determine the qualification that may be and if it remained there it would be in conflict with the minimum educational qualification as

required by the service rules – Petitioners do not plead that they have either qualified in NET or any accredited SLET/SET which is the minimum requirement for the appointment of Assistant Professors. They instead argue that since they were working on *adhoc* basis for a fairly long time it was not fair upon the respondents to seek from them their qualification in the NET/SLET/SET. They also admit that they do not have a Ph.D. degree in compliance of the UGC (Minimum Standards and Procedure for Awards of PH.D. degree) Regulation, 2009. The petitioners did not have the necessary qualification as required. There is no merit in the present writ petition.

(Paras 2, 3, 10 and 12)

**Petition dismissed**

**Case cited:**

1. Sourav Kafley v. Sikkim Public Service Commission, S.B.WP(C) No.19 of 2013.

**JUDGMENT (ORAL)**

***Bhaskar Raj Pradhan, J***

**1.** Heard Mr. A.K. Upadhyaya, learned Senior Advocate assisted by Ms. Rachhitta Rai, learned counsel for the petitioners. Also heard Dr. Doma T. Bhutia, learned Additional Advocate General along with Mr. S.K. Chettri, learned Government Advocate for the respondent no.2 and Mr. Bhusan Nepal, learned counsel for the respondent no.1 (SPSC). Perused the writ petition, the counter-affidavit as well as the rejoinder.

**2.** The issue in the writ petition lies in a narrow compass. The petitioner is aggrieved by the corrigendum dated 09.11.2017 issued by the SPSC seeking to amend the advertisement dated 13.10.2017 inviting applications from eligible candidates for filling up 100 posts of Assistant Professors under the respondent no.2 through direct recruitment. The advertisement provided the minimum qualification required for each of the post advertised. The minimum educational qualification for the post of Assistant Professor was Masters Degree in respective subject with 55% marks, relaxable by 5% for Scheduled Caste/Scheduled Tribes/Differently-abled persons (physically and visually) with NE (SLET)/NET/SET or Ph.D as per UGC Regulation, 2009. The advertisement also provided:

*"The candidates who have been awarded a M.Phil/P.hD Degree prior to July 11th 2009 in accordance with the UGC Regulation 2009, are exempted from the requirement of NET/SLET/SET subject to the fulfilment of the following conditions:*

| | |
|---|---|
| *a)* | *Ph.D Degree of the candidate awarded in regular mode only;* |
| *b)* | *Evaluation of the Ph.D thesis by at least 02(two) external examiners;* |
| *c)* | *Open Ph.D Viva-voce of the candidate had been conducted.* |
| *d)* | *Candidate had published two research papers from his/her PhD work, out of which at least one must be in a referred journal.* |
| *e)* | *Candidate has made at least two presentations in Conference/Seminars, based on his/her Ph.D work.* |
| *Note.: (a) to (e) as above are to be certified by the Vice-* | |
| *Chancellor/Pro-Vice Chancellor/Dean (Academic Affairs)/ Dean (University Institution)."* | |

....."

**3.** The corrigendum issued about a month later on 09.11.2017 removed the word *'M.Phil'* appearing in the above quoted paragraph in the advertisement.

**4.** The petitioners who have M.Phil Degrees are aggrieved by this corrigendum which is challenged in the present writ petition. The petitioners have sought for a direction upon the respondent to withdraw the corrigendum dated 09.11.2017; to consider the M.Phil Degree of the petitioners and to allow them to sit in the interview for the post of Assistant Professor. The petitioners submit that they are duly qualified for the said posts.

**5.** The advertisement dated 13.10.2017 reflected the minimum educational qualification as per the Sikkim Government College Lecturers' Recruitment Rules, 1992 (The service rules) as amended by the Sikkim Government College Lecturers' Recruitment (Amendment) Rules 2011 whereby item 8 in the schedule was substituted with the following:

> *"8. Educational and other Qualification required for Direct Recruitment:-*
>
> *(i) The minimum requirements of a good academic record, 55% marks (or and equivalent grade in a point scale wherever grading system is followed) at the Masters level and qualifying in the National Eligibility Test (NET), or an accredited test (State Level Eligibility Test-SLET/SET), shall remain the minimum requirement for the appointment of Assistant Professors:*
>
> *Provided however, that candidates, who are or have been awarded a Ph.D. degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D. Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professors or equivalent positions in Colleges.*
>
> *(ii) A relaxation of 5% may be provided at the graduate and masters level for the Scheduled Caste/Scheduled Tribe/ Differently-abled (physically and visually differently-abled) categories for the purpose of eligibility and for assessing good academic record during direct recruitment to teaching positions. The eligibility marks of 55% (or an equivalent*

*grade on a point scale wherever grading system is followed) and the relaxation of 5% to the categories mentioned above are permissible, based on only the qualifying marks without including any grace marks procedures.*

*(iii) A relaxation of 5% may be provided from 55% to 50% of marks to the Ph.d. Degree holders, who have obtained their Masters Degree prior to 19th September, 1991.*

*(iv) Appointment of Assistant Professors is meant for all Government Colleges and* for local candidates only. All vacancies shall *be filled up with proper application of 100 point roster system."*

*.....***"**

**6.** Mr. Bhusan Nepal submits that this amendment vide notification dated 02.09.2011 was pursuant to the University Grant Commission (UGC) amending the University Grants Commission (Minimum Qualifications required for the Appointment and Career Advancement of Teachers in Universities and Institutions affiliated to it) Regulations 2000 which was amended by UGC (Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Institutions Affiliated to it) (3rd Amendment), Regulation 2009.

**7.** The said amendment now provided:

**"***NET/SLET shall remain the minimum eligibility condition for recruitment and appointment of Lectures in Universities/Colleges/ Institutions.*

*Provided, however, that candidates, who are or have been awarded Ph.D. Degree in compliance of the "University Grants Commission (minimum standards and procedure for award of PH.D. Degree), Regulation 2009, shall be*

*exempted from the requirement of the minimum eligibility condition of NET/SLET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/Colleges/ Institutions."*

**8.** Mr. A.K. Upadhyaya relied upon the judgment of this court in ***Sourav Kafley vs. Sikkim Public Service Commission***[1] dated 23.07.2014. The said judgment of this court pertains to a challenge made by the petitioner therein that he could not be penalised for non-compliance of the University Grants Commission (Minimum Standards and Procedure for Awards of Ph.D. Degree), Regulation 2009, which was not amended at the relevant time. The issue is quite different in the present matter.

**9.** Dr. Doma T. Bhutia submits that it was for the respondent no.2 to decide what ought to be the minimum educational and other qualifications and the courts cannot interfere in such academic matters.

**10.** The advertisement sought for the minimum qualification as required by the service rules. It is for the employer to determine the qualification that may be required for a particular post. The petitioners as candidates applying to the post of Assistant Professor cannot dictate to the employer from whom they seek employment as to what the qualification should be for their employment. The petitioners have neither challenged the service rules nor the advertisement. The only challenge as stated before was to the corrigendum seeking to remove the word *'M.Phil'* from the advertisement. A perusal of the advertisement makes it clear that the word *'M.Phil'* was incorrectly inserted in the advertisement and if it remained there it would be in conflict with the minimum educational qualification as required by the service rules. In such a situation it was incumbent upon the SPSC to have issued the corrigendum to caste out the mistake it had made in the advertisement and correct it which had mislead the petitioners to approach this court.

**11.** Mr. A.K. Upadhyaya submitted that the respondents could not have changed the "rule of the game" once they had started it. This court is afraid that the submission may not be correct since the corrigendum did not change the rule of the game. The service rules which the petitioners as well

[1] **S.B.WP(C) No.19 of 2013**

as the respondents are bound by provided for the minimum qualification required of the candidates. The advertisement could not have gone against the service rules. As the word *'M.Phil'* appearing in the advertisement went against the grain of the service rules it was incumbent upon the SPSC to have issued the corrigendum. Merely because it did so, it cannot be said that they sought to change the rule of the game.

**12.** As per the pleadings in the writ petition the petitioner no.1 has a B.A. Degree, Master's Degree (M.A.) in education and M.Phil Degree. The petitioner no.2 has B.A. Degree, Masters (M.A.) Degree in history and M.Phil Degree as well. They do not plead that they have either qualified in the National Eligibility Test or any accredited State Level Test (SLET/SET) which is the minimum requirement for the appointment of Assistant Professors. The petitioners instead argue that since they were working on adhoc basis for a fairly long time it was not fair upon the respondents to seek from them their qualification in the NET/SLET/SET. They also admit that they do not have a Ph.D. Degree in compliance of the University Grants Commission (Minimum Standards and Procedure for Awards of PH.D. Degree), Regulation 2009. The petitioners did not have the necessary qualification as required.

**13.** Thus, this court is of the considered view, that there is no merit in the present writ petition which is accordingly dismissed. With the dismissal of the writ petition the application for stay is rendered infructuous and dismissed accordingly.

**14.** No order as to costs.

**SLR (2021) SIKKIM 640**

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

**WP (C) No. 36 of 2019**

**Ms Neha Sharma ….. PETITIONER**

*Versus*

**Sikkim University and Others ….. RESPONDENTS**

**For the Petitioner:** Mr. S.S. Hamal, Advocate (Legal Aid Counsel).

**For Respondent 1-3:** Mr. Saurabh Tamang, Advocate.

**For Respondent No.4:** None.

Date of decision: 2nd September 2021

**A. Constitution of India – Article 226 –** The petitioner appeared for 3rd semester Master of Arts December, 2016 examination conducted by Sikkim University in the subject - Social Movements in India. She secured 69 out of 100 marks – Dissatisfied with the marks, she applied for re-evaluation. On 03.10.2019, Sikkim University issued the corrected grade card wherein she had secured 73 out of 100 and thus her CGPA score increased to 8.08. The fifth convocation of the University for conferment of degrees and awards of medals for the batch of 2017, 2018 and 2019 was announced be held in the first week of November 2019. The gold medal in the Master of Arts in Sociology for the batch of 2017 was to be awarded to respondent no.4 whose CGPA was 7.56. After the petitioner learnt that respondent no.4 who had secured less than her was being awarded the gold medal, she approached the authorities with her grievances. She was then informed about the last sentence of clause 10 of the Regulations on Conduct of Examinations (the impugned provision) which reads: "*The students obtaining the highest and the second highest CGPA score at the Final Semester Examination in their respective subjects shall be awarded*

*with Gold and Silver Medals in the subsequent Convocation held at the university post declaration of such results. The Re-evaluated candidates, however, shall not be eligible for the award of Rank/prizes and medals as the case may be.*" The gold medal was awarded to respondent no.4 – The petitioner challenges the *vires* of the impugned provision which provides that the re-evaluated candidates, however, shall not be eligible for award of rank/prizes and medals – Held: The impugned provision is discriminatory. It creates an impermissible classification between those students who sought re-evaluation and students who did not. A student who has been permitted to seek re-evaluation in terms of clause 6 of the Regulations and her marks considered as the final score post re-evaluation is discriminated *vis-à-vis* other students who did not seek re-evaluation. The student can seek re-evaluation only because the Regulations permitted her/him to do so. Having thus allowed a student to seek re-evaluation of her/his script by a provision of the Regulations itself, not to have the re-evaluated marks considered for award of a medal, either gold or silver, would amount to punishing the student for seeking re-evaluation even when it is permitted by clause 6 of the Regulations – The impugned provision makes the object of clause 6 and clause 10 of the Regulations they seek to achieve, ineffective – Impugned provision declared *ultra vires* Article 14 of the Constitution of India and struck down.

(Paras 2, 5, 6, 18, 20 and 39)

**Petition allowed.**

**Chronology of cases cited:**

1. Bhagat Ram Sharma v. The Himachal Pradesh University and Others, AIR 1987 HP 21.
2. Manoj Kumar Jindal v. Ravishankar University, Raipur and Others, 1988 M.P.L.J. 608.
3. Anjay Bansal v. Bangalore University and Another, AIR 1990 Karnataka 225.
4. Rajendrakumar Chandrakant Nadkarni v. University of Bombay, 1990 Mh.L.J. 1143.
5. Ram Karan v. The University of Raj Jaipur (Civil Writ Petition no. 1268/87).

6. Fateh Kumari Sisodia v. State of Rajasthan and Others, AIR 1997 Rajasthan 191,

7. Deepa v. Maharishi Dayanand University, Rothak and Others, (2003) 2RCR (Civil) 342 (DB): 2002 SCC online P & H 1178.

8. Maharashtra State Board of Secondary and Higher Secondary Education and Another v. Paritosh Bhupeshkumar Sheth, and Others, (1984) 4 SCC 27.

9. Basheshar Nath v. Commissioner of Income Tax Delhi and Rajasthan and Another, AIR 1959 SC 149.

10. Subramanian Swamy vs. Director, Central Bureau of Investigation and Another, (2014) 8 SCC 682.

**JUDGMENT**

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

**1.** Ms Neha Sharma has filed the present writ petition under Article 226 of the Constitution of India seeking enforcement of her fundamental rights as well as challenging the legality and validity of the last sentence of Clause 10 of the Regulations on Conduct of Examinations of the Sikkim University (the Regulations).

**2.** It is the case of the petitioner that in December 2016, she appeared for the III Semester Master of Arts December 2016 Examination conducted by the Sikkim University (respondent no.1) in the subject Social Movements in India. She secured 69 out of 100 marks and her Sessional Grade Point Average (SGPA) and Cumulative Grade Point Average (CGPA) after the III semester was as follows:

| Semester | I | II | III | C.G.P.A | Result |
|---|---|---|---|---|---|
| S.G.P.A | 8.00 | 8.25 | 7.75 | 8.00 | Pass |

**3.** The petitioner was dissatisfied with the marks she obtained in the subject Social Movements in India. She, therefore, applied for re-evaluation. Before the result of her re-evaluation, the date for the final semester in the

Master of Arts for June 2017 examination was declared. She sat for the examination. After the final semester examination was over, the result of the examination was declared by the Sikkim University and her SGPA and CGPA for the final semester in Master of Arts for June 2017 examination in Sociology was as follows:

| Semester | I | II | III | IV | C.G.P.A | Grade |
|---|---|---|---|---|---|---|
| S.G.P.A. | 8.00 | 8.25 | 8.00 | 7.50 | 7.94 | A(A only) |

**4.** When she received the grade card, she noticed that although SGPA awarded to her for the III semester was 7.75, in the grade card for the IV semester, the SGPA for the III semester was reflected as 8.00. She enquired from the Sikkim University and learnt that this increase from 7.75 to 8.00 for the III semester was due to re-evaluation and her marks had improved from 69 to 73 out of 100.

**5.** On 03.10.2019, the Sikkim University issued the corrected grade card of the III semester Master of Arts December 2016 examination to her in which for her paper Social Movements in India, she had secured 73 out of 100 and thus her SGPA and CGPA after her III semester were as follows:

| Semester | I | II | III | C.G.P.A | Grade |
|---|---|---|---|---|---|
| S.G.P.A. | 8.00 | 8.25 | 8.00 | 8.08 | Pass |

**6.** On 15.10.2019, a letter was written to the Head of the Department of Sociology of Sikkim University by the Controller of Examinations (respondent no.3) stating that the fifth convocation for conferment of degrees & awards of medals for the batch of 2017, 2018 and 2019 was going to be held in the first week of November 2019 and that the gold medal in the Master of Arts in Sociology for the batch of 2017 was to be awarded to respondent no.4 whose CGPA was only 7.56. After the petitioner learnt that the respondent no.4 who had secured less than her was being awarded the gold medal, the petitioner immediately approached the authorities with her grievances. She was then informed about the last sentence of Clause 10 of the Regulations on Conduct of Examinations (the impugned provision). On 25.10.2019, the petitioner wrote to the Registrar, Sikkim University (respondent no.2) and requested him to reconsider their decision for the award of gold medal. Neither the Sikkim

University nor the respondents no. 2 or 3 responded. Instead, the gold medal was awarded to the respondent no.4.

**7.** The petitioner submits that Clause 10 of the Regulations is ultra vires the Constitution and is unreasonable, arbitrary, and violative of the fundamental rights guaranteed under Article 14 of the Constitution of India. The decision of the Sikkim University not to award the gold medal to the petitioner is also unreasonable, arbitrary, and unfair, as it failed to consider that the result of a candidate becomes final only after re-evaluation. It is urged that the artificial barrier created between valuation and re-evaluation by Clause 10 of the Regulations do not stand the test of fairness or reasonableness required by Article 14 of the Constitution. It is also urged that Clause 10 of the Regulations to the extent thereof conflicts with Clause 6 of the Regulations which provides for re-evaluation and re-scrutiny of the result. The rationale underlying the rule of re-evaluation is that no candidate should suffer for the mistake of the examiner and if a candidate is deprived of the result, he/she deserves, which Clause 10 of the Regulations fails to consider. She seeks a writ quashing the impugned provision and for a further direction upon the Sikkim University to award the gold medal to the petitioner.

**8.** The respondents no. 1, 2 and 3 have filed a joint counter-affidavit. It is stated that the Sikkim University is a Central University established in the year 2007 by the Sikkim University Act, 2006 of Parliament of India (the Act) and is empowered to make statutes, ordinances for conditions of award of fellowships, scholarships, studentships, medals and prizes. It is stated that section 30(1)(f) of the Act provides for the issuance of ordinances providing for conditions of award of fellowships, scholarships, medals and prizes. It is stated that Clause 31 of the Act empowers the University to make regulations. It is stated that it is in exercise of section 31 of the Act that the Sikkim University had framed the Regulations which was duly approved by the Executive Council on the recommendation of Academic Council vide resolutions dated 31.10.2015. It is urged that Sikkim University had published and notified the Regulations vide Notification no. 13/2016 dated 10.03.2016. It is also pointed out that Sikkim University had made the amendments in the Ordinance titled: OC-5 - On the Master's Degree Programme in Arts, Science, Law, Medicine, Education, Home Science, Commerce and Professional Courses (the

Ordinance) which was approved by the Executive Council on the recommendation of the Academic Council in its 27th meeting held on 9th June, 2017. It is stated that Clause 11 of the Ordinance provides that scores obtained after re-evaluation or improvement examination shall not be considered for medals. It is stated that the Ordinance was approved by the Executive Council in its 27th meeting held on 09.06.2017. The respondents no.1, 2 and 3 are under an obligation to adhere to and abide by the Regulations and the Ordinance. Respondents no.1, 2 and 3 have admitted to the re-evaluation of marks stated by the petitioner and the marks obtained thereafter. It is stated that the letter dated 15.10.2019 was issued by the respondent no.3 as per the merit list which was duly approved as per the Regulations. It is contended that the petitioner is not entitled to the gold medal in view of Clause 10 of the Regulations. It is submitted that Clause 10 of the Regulations is neither illegal nor arbitrary.

**9.** The Sikkim University Act, 2006 was enacted to establish and incorporate a teaching and affiliating University in the State of Sikkim and to provide for matters connected therewith or incidental thereto. It received the assent of the President on the 10th of January 2007.

**10.** Section 2(q) defines Regulations to mean the Regulations made by any authority of the University under this Act for the time being in force.

**11.** Section 5 enumerates the powers of the University. Section 5(xiii) gives the University the power to institute and award fellowships, scholarships, studentships, medals, and prizes.

**12.** Section 30 of the Act provides for the power of the University to make ordinances. Subject to the provisions of the Act and the Statutes made under section 29 of the Act, the ordinances may provide for any of the matters enumerated in section 30(1)(a) to (p). Amongst them, section 30(1)(f) gives power to the University to make ordinances to provide for conditions for award of fellowships, scholarships, studentships, medals and prizes. In terms of the power conferred by section 30(b) of the Act, the University has made the Ordinance. Clause 11 of the Ordinance thereof, is as under: -

> **11.** Students securing a minimum of 4.0 CGPA shall be considered and would be eligible to be awarded the Degree. Students securing CGPA

higher than the minimum stipulated CGPA shall be placed in the relevant grades as computed on a 10 point scale.

Further, the top two scorers in terms of absolute score shall be awarded Gold and Silver medals respectively subject to the condition that such score, if below 60%, shall not be considered for medal. *The scores obtained after re-evaluation or improvement examination shall also not be considered for medal.*

The mark sheet shall indicate the Grade obtained and the absolute score while the certificates awarded shall carry the Grade obtained and the CGPA.

**13.** The aforesaid Clause 11, as indicated in Annexure R-5 filed by the respondents no.1, 2 and 3, was approved by the Executive Council in its 27th Meeting held on 9th June 2017 only. The Ordinance does not indicate that it has retrospective operation. Admittedly, the petitioner was seeking re-evaluation of her marks obtained in the III semester of the Master of Arts December 2016 examination for which she had appeared in December 2016. Clause 11 of the Ordinance was therefore not in existence at the time when the petitioner sat for her examination and would not apply to her.

**14.** Section 31 of the Act gives the power to the University to make regulations consistent with the Act, the Statutes and the conduct of their own business and that of their committees, if any, appointed by them and not provided for by the Act by the Statutes, or the Ordinances, in the manner prescribed by the Statute. Thus, the authorities, i.e., the Court; the Executive Council; the Academic Council; the College Development Council; the Board of Studies; the Finance Committee; and such other authorities as may be declared by the Statutes to be the authorities of the University have been given the power to make regulations which must be consistent with the Act, the Statutes, and the conduct of their own business and that of the committees.

**15.** The Regulations deal with the Role of Controller of Examinations, Role of the Centre in Charge and the Centre Supervisors, Assessment

Procedures: Sessional Tests and End Semester Examinations; Question Paper Setting; Moderation of Question Papers; Evaluation; Re-evaluation and Re-Scrutiny; Improvement Provisions; Publication of Results, Rectification of Results, Award of Degree/Medal; Examination Disciplinary Committee, Unfair Means and Lapses Committee. A perusal of the relevant provisions for Evaluation, Re-evaluation and Re-Scrutiny, Improvement Provisions, Publication of Result, Rectification of Results and Award of Degree/Medal reflects that detailed procedure has been provided for in the Regulations.

**16.** The petitioner sought for re-evaluation under Clause 6 of the Regulations. Clause 6 of the Regulations deals with re-evaluation and re-scrutiny. It is as under:

> **"6. Re-evaluation and Re-Scrutiny**
>
> a. A student, if dissatisfied with his/her result, may apply to the office of the CoE requesting re-evaluation of one or more papers as the case may be. Such applications for re-evaluation must have to be duly recommended by the principal of the concerned college in case of a college student/Hod in case the student is from a University department and must reach the office of the CoE complete in all respect within 12 days counting from the day of the declaration of the result.
>
> b. All such applications for re-evaluation shall be accepted at the office of the CoE only if they accompany the prescribed fee as is being levied by the University for undertaking such exercises and are submitted within the stipulated timeframe defined at Clause 6(a).
>
> c. The CoE shall appoint an examiner from amongst the empanelled list of such examiners for undertaking the re-evaluation exercise. An examiner so appointed must not be the examiner who originally evaluated the script.

d. Post re-evaluation, the higher of the two scores shall be treated as the final score. However, in case the re-evaluated score exceeds the first score at least by 10 marks or more, the concerned answer script shall be re-examined by the third examiner and the score awarded by the third examiner shall be treated as the final score.

e. There shall be no re-evaluation for sessional tests and/or practical examinations.

f. A student may request for a fresh scrutiny of her/his papers (not more than two in a particular end semester examination) on payment of prescribed fee as fixed by the university. Such requests for re-scrutiny must have to be duly recommended by the Principal of the concerned college in case of a college student/HoD in case the student is from a University department must reach the office of the CoE complete in all respect within 12 days counting from the day of the declaration of the result.

**17.** Clause 6 of the Regulations therefore permits re-valuation on the recommendation of the head of the department. Even a fee is prescribed to seek re-evaluation. The CoE may accept the application if it is accompanied by the prescribed fee and submitted within the timeline. The examiner who is to be appointed by the CoE from the empanelled list cannot be the same examiner who had originally examined the script. Clause 6 of the Regulations clarifies that post re-evaluation, the higher of the two scores shall be treated as the final score.

**18.** The publication of result is thereafter as provided in Regulation 8. Regulation 9 provides for rectification of results after the result has been declared which is in the nature of printing/calculation errors detected on his/her grade card in respect of name, semester, title of paper(s), CGPA and SGPA score within seven days from the date of receipt of the Grade Sheet.

It is thereafter that degrees and medals are awarded as provided for in Regulation 10. Regulation 10 reads as under: -

> **10. Award of Degree/Medal**
>
> The students obtaining the highest and the second highest CGPA score at the Final Semester Examination in their respective subjects shall be awarded with Gold and Silver Medals in the subsequent Convocation held at the university post declaration of such results. The Re-evaluated candidates, however, shall not be eligible for the award of Rank/prizes and medals as the case may be.

**19.** Clause 10 of the Regulations provides that the student obtaining the highest and the second highest of the CGPA score at the final semester examination in their respective subjects shall be awarded with gold and silver medals in the subsequent convocation. Clause 6 and Clause 10 of the Regulations need to be read together. So read, the word score used in both these clauses impart the same meaning. This means that the consideration for award of the gold and the silver medals is the CGPA "score" at the final semester examination which would, in a case of re-evaluation, be the "final score".

**20.** The petitioner has challenged the *vires* of the impugned provision which provides that the re-evaluated candidates, however, shall not be eligible for award of rank/prizes and medals. The impugned provision seems to be disjoint from the scheme of Clause 6 and Clause 10 of the Regulations. The challenge is to the unconstitutionality of the provision and not that it is ultra vires the Act, Statute or the Ordinance. It is also challenged on the ground that the impugned provision conflicts with Clause 6 of the Regulations thereof.

**21.** Similar provisions like that of the impugned provision had been put to test before various High Courts of the country. In ***Bhagat Ram Sharma vs The Himachal Pradesh University and Others1***, the Himachal Pradesh High Court examined the provisions regarding scholarships, etc., contained in Ordinances 16.14 to 16.19 framed by the Himachal Pradesh

[1] **AIR 1987 HP 21**

University. Certain amendments to the Ordinances were made which reads as follows:

> **"14.** ……..…….....
>
> 6.70. (a) to (d) X X X X X X X X
>
> (e) Whatever be the change in awards after re-valuation the same shall be conveyed to the candidate. *A candidate who applies for re-valuation shall not be entitled to claim any retrospective benefit such as admission/promotion to any course/class, eligibility to sit for the Medical College entrance Test, or the grant of scholarship/award/freeship/medal etc. etc., on the basis of declaration of the result of re-valuation. Further that the results of re-valuation declaration shall not be considered as a time-bound process.* Provided further that in case the re-valuation result is received after the commencement of the subsequent examination which the applicant has taken, out of the two results i.e. one on the basis of re-valuation and the other on the basis of his performance in the subsequent examination, the result that is advantageous to the applicant will be conveyed to him.
>
> (f) & (g) X X X X X X X X
>
> [emphasis supplied]

**22.** The appellants contended that the respondents had no right to amend the Ordinances/Rules to the detriment of the appellant and it could not be given any retrospective effect. It was alleged that the actions of the respondents were *mala fide* and violative of the principle of natural justice as also Article 14 of the Constitution. The amendments made by the Executive Council of the HP University were challenged as being illegal and without any authority. The High Court held that the appellant who had secured more marks than the respondent no.4 therein after revaluation was entitled to the grant of the scholarship and the gold medal. It was held that the result declared upon the revaluation of certain papers of a candidate will date back to the date upon which the result of all the candidates including

the appellant (whose papers had been re-valuated) and others who had taken the examination with him was declared. A direction was thus issued to award the scholarship as well as the gold medal to the appellant in preference to respondent no.4. It was also held that the Executive Council of the University had no authority to amend the Ordinances retrospectively.

**23.** In ***Manoj Kumar Jindal vs Ravishankar University, Raipur and others***[2], the Division Bench of the Madhya Pradesh High Court examined a case in which the petitioner therein was shown as ranking third in the merit list of B.Com. final degree examination. On revaluation, as permissible, he was held to have scored the highest marks, and therefore claimed to be shown at serial no.1 in the merit list. The Executive Committee, however, did not amend the merit list as requested on the ground that merit list had to be declared immediately and could not be changed because of revaluation. This decision was challenged under Article 226 and 227 of the Constitution as being arbitrary, discriminatory and a denial of the petitioner's legal right to a legitimate place in the merit list. It was held on examination of Clause 31 of Ordinance 6 of the M.P Vishwavidyalaya Adhiniyam that although it does not expressly state at what stage a merit list must be published but a harmonious construction of provisions for examinations, which include provisions for revaluation, shows that a merit list is of a tentative nature likely to be modified or amended consequent upon revaluation. Since the object behind revaluation is that every student should get his due, a person deserving the first position cannot be deprived of his legal right to the position and consequential benefits. A direction was thus issued for notification of a fresh merit list assigning the first position to the petitioner.

**24.** In ***Anjay Bansal vs Bangalore University and Another***[3], the Karnataka High Court examined notification dated 9.8.1985 issued by the Bangalore University which prohibited revised ranking in respect of those examinees who derived benefit in the revaluation save the declaration of class. The provision of the said notification which was sought to be quashed was as under:

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[2] **1988 M.P.L.J. 608**
[3] **AIR 1990 Karnataka 225**

> **2.** …….....……
>
> **7.** No revised rank will be declared in respect of those who get benefit in the revaluation (review) and no incidental benefit which accrue due to the revaluation (review) will be granted, except declaration of class.

**25.** The petitioner therein had sought for revaluation as permitted. On revaluation, his marks rose and therefore he was entitled to be placed in the tenth rank in place of respondent no.2. His representation to award him the rank was not met with any response in view of para 7 of the impugned notification. The Karnataka High Court quashed para 7 of the impugned notification and directed the respondent no.1 to award the tenth rank to the petitioner in the place of the respondent no.2 in the B.Com. degree examination held in April 1988.

**26.** In ***Rajendrakumar Chandrakant Nadkarni vs. University of Bombay***[4], the Bombay High Court examined the impugned provision of the ordinance which provided:

> The revised marks obtained by a candidate after revaluation as accepted by the University shall be taken into account for the purpose of amendment of its results in accordance with the rules of the University in that behalf, *but these marks shall not be taken into account for the purpose of award of scholarships, prizes, medals and/or the order of merit."*
>
> *[Emphasis supplied]*

***27.*** The Bombay High Court held while relying upon the judgment in ***Anjay Bansal*** (supra) that:

> If revaluation is permitted and if ranking in so far as class is concerned is awarded to the candidates who get the benefit of revaluation, there is no reason to restrict the result to the mere declaration of a class. The full benefit to the

[4] **1990 Mh.L.J. 1143**

vindicated candidate has to be awarded and his marks have to be taken into account for the purpose of scholarships, prizes, medals and/or the order of merit. Accordingly, the impugned communication bringing to the petitioners notice the alleged error in proclaiming him the first amongst the successful candidates was quashed and the special certificate awarded on 17.8.83 was confirmed.

**28.** The Rajasthan High Court in ***Ram Karan vs. The University of Raj Jaipur*** (Civil Writ Petition no. 1268/87, decided on 9.9.96), examined a provision of the Ordinance debarring a person to be put on higher position after re-evaluation of marks. It was held that the Ordinance 157A(11) is absolutely unreasonable and liable to be struck down. The candidate would not be at fault if there is mistake committed by the examiner in giving or totaling the marks. If this clause (11) of the Ordinance 157A is allowed to stand then it will frustrate the very purpose of revaluation. Clause 11 is wholly unreasonable and, therefore, liable to be struck down and accordingly, it was declared to be invalid and struck down. The respondent was directed to include the name of the petitioner in the merit list by including the marks obtained by him in the revaluation. Since the petition was of the year 1987 it was held that it would not be proper at this stage to direct the respondent to withdraw the gold medal from the first candidate and award it to the petitioner. However, it was also held that the respondent can certainly be directed to award gold medal to the petitioner in addition to the gold medal awarded to the first candidate. Accordingly, the respondent was directed to present gold medal to the petitioner for securing the highest marks in M.Sc. Final Examination in Botany held in March 1986.

**29.** In ***Fateh Kumari Sisodia vs State of Rajasthan and Others***[5], the Rajasthan High Court also examined a similar provision in the rule formulated by the Mohanlal Sukhadia University debarring candidates to be eligible for award of gold medal. The impugned rule formulated by the University so far as it debarred the candidate to be eligible for award of gold medal consequent upon the revision in the result due to revaluation, was held to be ultra vires. A direction was issued to the respondents to put the petitioner in

[5]**AIR 1997 Rajasthan 191**

due merit in accordance with the revised mark sheet and include the name of the petitioner in the merit list and award the gold medal to her.

**30.** In ***Deepa vs. Maharishi Dayanand University, Rothak and Others***[6], the Division Bench of the High Court of Punjab and Haryana examined clause 4.2 of the Ordinance concerning Revaluation of Answer Books framed by the University to the extent that it provided that the marks obtained as a result of re-evaluation of the papers of the course concerned shall not come towards determining the position in the order of merits, distinction and award of gold medal. The said clause read as follows:

> **4.2** The marks obtained as a result of re-evaluation of the paper(s) of the last examination of the course concerned shall not count towards determining the position in the order of merit, distinction and award of Gold Medal.

**31.** Clause 4.2 was challenged as being arbitrary, irrelevant and defeating the very object of providing for revaluation. It was contested that the rule therefore did not stand the test of reasonableness as required by Article 14 of the Constitution of India. The High Court held:

> **9.** A candidate would normally seek revaluation of the result with the earnest hope of improving the result. The desire for revaluation is usually based on an apprehension that perhaps some mistakes has been committed by the examiner in evaluating the answer book. In the rules/regulations for re-evaluation, the candidate is given a chance to have the error detected and corrected. There is a legitimate expectation of an increase in marks. We are of the considered opinion that providing such an opportunity to the candidates would be a source of solace to students who are devoted to studies and are meritorious. The rationale underlying the rule of revaluation seems to be that no candidate should suffer for the mistake of the examiner. In other words, every candidate should get the fruits of his/her

[6] **(2003) 2RCR (Civil) 342 (DB): 2002 SCC online P & H 1178**

> labour in pursuing the studies with enthusiasm and vigour. The rule is framed to make sure that no candidate is deprived of the result he/she deserves. The principle of certainty as advocated by Mr. Balram Gupta would put a premium on the mistake committed by the examiner in the first instance. If after revaluation, a candidate secures higher position on merits, there would be no reasonable basis for the denial of consequential awards such as Gold Medals. Clause 4.2, in our opinion, nullifies the benefit of revaluation by declaring that the result of re-evaluation of the papers shall not count towards determining the position in the order of merit, distinction and award of Gold Medal. In such circumstances, revaluation would be sought only by the candidates who have either failed or secured a compartment. The real meritorious candidates like the petitioner in the present case, would be wholly deprived of the benefit of revaluation, when the marks of a candidate are increased on re-evaluation. The unes-capable conclusion is that we see no rationale in depriving the candidate of the benefit of the re-evaluation marks for the purpose of improving the merit or for award of Medals. In our considered opinion, the aforesaid rule is wholly arbitrary and has no nexus with the object sought to be achieved. ……..

**32.** Relying upon ***Fateh Kumari Sisodia*** (supra), ***Rajendrakumar Chandrakant Nadkarni*** (supra), ***Ajay Bansal*** (supra) and ***Manoj Kumar Jindal*** (supra), the High Court held that Rule 4.2 is arbitrary, unreasonable, oppressive and therefore, does not satisfy the equality clause contained in Article 14 of the Constitution of India and further clause 4.2 completely negates the very object it seeks to achieve. Thus, clause 4.2 was declared ultra vires Article 14 of the Constitution of India and was struck down. The impugned order was quashed, and a mandamus was issued directing the respondents to grant the gold medal to the petitioner along with one Navin Kumar and declare that she had topped the University in the 1997 M.Sc. (Physics) Examination alongwith Navin Kumar.

**33.** The Division Bench of the Punjab and Haryana High Court in ***Nidhi Sharma vs. Guru Nanak Dev University, Amritsar and Another***[7], examined a case similar to the present one where the University declined to award the gold medal to the petitioner in the M.Sc. Hons. botany examination consequent upon the higher marks that she had obtained after re-evaluation. The impugned proviso to the regulation 8(i) of Chapter XI of the Guru Nanak Dev University Calendar Volume – III, 1999 read as under:

> 8. The panel of examiners for re-evaluation will be supplied to the chairperson for the Board of Studies in that subject and approved by the Vice-Chancellor.
>
> (i) Each script will be re-evaluated as a whole by two Examiners separately. The average of the two nearest scores out of the three awards including the original shall be taken as final:
>
> Provided that if the change in marks after re-evaluation is more than 10% of the maximum marks of that paper, leads to a change of result than the script shall be re-evaluated by the fourth Examiner and the average of the three nearest scores out of the four shall be taken as final:
>
> *Provided further that no medal shall be awarded to any candidate on the basis of re-evaluation result. However, this condition shall not apply in the case of change of scores due to re-checking of answer books."*
>
> *[Emphasis supplied]*

**34.** The High Court held that the provision contained under Regulation 8(1) was not at all sustainable as the same did not go along with the normal stream of Regulations promulgated by the University. The second proviso to Regulation 8(i) was therefore struck down and a direction was issued to declare the petitioner as first in M.Sc. botany and to award the gold medal to her.

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[7] **(2005) 1 SLR 264 (3): 2004 SCC online P&H 1341**

**35.** In ***Maharashtra State Board of Secondary and Higher Secondary Education and Another vs Paritosh Bhupeshkumar Sheth And Others***[8]**,** relied upon by Mr. Saurabh Tamang, the Supreme Court was dealing with a challenge to a delegated legislation, i.e., Maharashtra Secondary and Higher Secondary Education Boards Regulations, 1977 as being in excess of the power of subordinate legislation conferred on the delegate. The Supreme Court held that it had to be determined with reference only to the specific provisions contained in the relevant statute conferring the powers to make the rule, regulations, etc., and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, it is not within the legitimate domain of the court to determine whether the purpose of the statute can be served better by adopting any policy different from what has been laid down by the legislature or its delegate. Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act for its efficacious implementation. Any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation making power or it being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitation imposed by the Constitution. Paragraph 14 of judgment reads as under;

> **"14.** We shall first take up for consideration the contention that clause (3) of Regulation 104 is ultra vires the regulation-making powers of the Board. The point urged by the petitioners before the High Court was that the prohibition against the inspection or disclosure of the answer papers and other documents and the declaration made in the impugned clause that they are treated by the Divisional Board as confidential documents do not serve any of the purposes of the Act and hence these provisions are ultra vires. The High Court was

[8] **(1984) 4 SCC 27**

of the view that the said contention of the petitioners had to be examined against the backdrop of the fact disclosed by some of the records produced before it that in the past there had been a few instances where some students possessing inferior merits had succeeded in passing off the answer papers of other brilliant students as their own by tampering with seat numbers or otherwise and the verification process contemplated under Regulation 104 had failed to detect the mischief. In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation — whether a rule or regulation or other type of statutory instrument — is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter

> of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute. Though this legal position is well-established by a long series of decisions of this Court, we have considered it necessary to reiterate it in view of the manifestly erroneous approach made by the High Court to the consideration of the question as to whether the impugned clause (3) of Regulation 104 is ultra vires. In the light of the aforesaid principles, we shall now proceed to consider the challenge levelled against the validity of the Regulation 104(3).

**36.** The Supreme Court in ***Maharashtra State Board of Secondary and Higher Secondary Education and Another*** (supra) clearly laid down the approach of the constitutional courts when the challenge is that the delegated legislation is in excess of the power of subordinate legislation conferred on the delegate. The Supreme Court also held that a provision of the delegated legislation could also be rendered ultra vires if it is in violation of any of the limitation imposed by the Constitution.

**37.** In ***Basheshar Nath vs Commissioner of Income Tax Delhi and Rajasthan & Another***[9], the Supreme Court in paragraphs 13 and 14 held as under:

> **"13.** Article 14 runs as follows:—
>
> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[9]**AIR 1959 SC 149**

It is the first of the five articles grouped together under the heading Right to Equality. The underlying object of this article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious Preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall deny to any person within its jurisdiction the equal protection of the laws. There can, therefore, be no doubt or dispute that this article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the article it must be noted, first and foremost that this article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other articles e.g. Article 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Article 12, the State which is, by Article 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as

well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Article 13. Clause (1) of that article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise clause (2) of this article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void. It will be observed that, so far as this article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other articles e.g. Article 19 clauses (2) to (6). Our right to equality before the law is thus completely and without any exception secured from all legislative discrimination. It is not necessary, for the purpose of this appeal to consider whether an executive order is a law within the meaning of Article 13, for even without the aid of Article 13 our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* [L.R. (1931) AC 662] are apposite. Said His Lordship at p. 670 that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a court of justice. That apart, the very language of Article 14 of the Constitution expressly directs that the State, which by Article 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Article 14

protects us from both legislative and executive tyranny by way of discrimination.

**14.** Such being the true intent and effect of Article 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it. I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

**38.** The question whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness being facets of Article 14 are available or

not as grounds to invalidate legislation is no longer *res integra*. A five Judges Constitutional Bench of the Supreme Court in ***Subramanian Swamy vs. Director, Central Bureau of Investigation and Another***[10]**,** held as under:

> **"49.** Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are : (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

[10] **(2014) 8 SCC 682**

**39.** The respondents no.1, 2 and 3 defend their action stating that they had the power to make the Regulations under Section 31 of the Act. The petitioner, however, doesn't challenge their power to make the Regulations. The petitioner submits that the impugned provision is unconstitutional. Examining the impugned provision, it is manifest that it is discriminatory. The impugned provision creates an impermissible classification between those students who sought re-evaluation and students who did not. A student who has been permitted to seek re-evaluation in terms of Clause 6 of the Regulations and her marks considered as the final score post re-evaluation is discriminated v*is*-à-*vis* other students who did not seek re-evaluation. The student can seek re-evaluation only because the Regulations permitted her/ him to do so. Having thus allowed a student to seek re-evaluation of her/his script by a provision of the Regulations itself, not to have the re-evaluated marks considered for award of a medal, either gold or silver, would amount to punishing the student for seeking re-evaluation even when it is permitted by Clause 6 of the Regulations. It, therefore, directly impinges upon the sacrosanct provision of equality secured by Article 14 of the Constitution of India. Furthermore, the impugned provision does not seem to be in consonance with the scheme of evaluation, re-evaluation and re-scrutiny, improvement of provisions, publication of results, rectification of results and award of degree/medal as contemplated by the Regulations. Reading Clause 6 and Clause 10 of the Regulations *sans* the impugned provision thereof, together, it is clear that the re-evaluated marks are the final score for purposes of award of medals. In that view of the matter, the impugned provision is ultra vires the rest of the provision of Clause 10 of the Regulations as well. The impugned provision makes the object of Clause 6 and Clause 10 of the Regulations they seek to achieve, ineffective.

**40.** The writ petition is thus allowed.

**41.** The impugned provision which reads, ..... *The Re-evaluated candidates, however, shall not be eligible for the award of Rank/prizes and medals as the case may be*. is declared ultra vires Article 14 of the Constitution of India and is struck down.

**42.** It is directed that the Sikkim University shall award the gold medal to the petitioner and declare her having secured the highest marks in Master of Arts in Sociology for the batch of 2017.

**SLR (2021) SIKKIM 665**

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

**I.A. No. 4 of 2020 in Crl. A. No. 40 of 2018**

**Trilochan Kapoor Sharma ….. APPELLANT**

*Versus*

**State of Sikkim ….. RESPONDENT**

**For the Appellant:** Mr. B. Sharma, Senior Advocate with Mr. Rajendra Upreti, Advocate.

**For the Respondent:** Mr. Sudesh Joshi, Public Prosecutor and Mr. Yadev Sharma, Additional Public Prosecutor.

Date of decision: 2nd September 2021

**A. Code of Criminal Procedure, 1973 –S.391 –Appellate Court may take further evidence or direct it to be taken –** The power conferred under S. 391 Cr.P.C. is to be exercised with great care and caution. In dealing with any appeal, the appellate court can refer to the additional evidence only if the same has been recorded as provided under S. 391. Any material produced before the appellate court to fill up the gaps by either side cannot be considered (*In re. State (NCT of Delhi)* v. *Pankaj Chaudhary* referred).

(Para 5)

**Application dismissed.**

**Chronology of cases cited:**

1. Rajvinder Singh v. State of Haryana, (2016) 14 SCC 671.
2. State (NCT of Delhi) v. Pankaj Chaudhary, (2019) 11 SCC 575.

## ORDER (ORAL)

***Bhaskar Raj Pradhan, J***

**1.** The appellant has moved an application under section 391 read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for placing further documents as evidence on record. It is pleaded that the appellant had taken a stand that he is suffering from mental illness at the time of alleged commission and even during the trial. It is further averred that the appeal was filed in consultation with his wife as the learned counsel who prepared the memo of appeal was not satisfied with the appellant's behavior. When the counsel for the appellant was preparing the case for final argument, his wife also informed the counsel that the day when exhibit-17 was allegedly prepared, the appellant was mentally unfit, and she had taken him to a doctor. The counsel for the appellant advised the appellant's wife to find out the relevant document. On doing so, she discovered the medical certificate dated 23.05.2012 and discharge certificate dated 26.05.2012 annexed and marked as Annexure-A collectively to the application. It is stated that the documents are relevant and goes to the root of the case. Consequently, the application for leading additional evidence.

**2.** A reply has been filed by the State-respondent contesting the application and stating that the appellant has failed to establish how these documents are necessary.

**3.** Mr. B. Sharma learned Senior Advocate for the appellant submits that a perusal of the impugned judgment reflects that the learned Trial Court has heavily relied upon exhibit-17 against the appellant. He also took this court through the various records of the case. He, therefore, submits that these two documents are necessary, and the application may be allowed. Mr. Sudesh Joshi learned Public Prosecutor for the State-respondent submits otherwise. It is submitted that although the appellant's wife was examined as a defense witness, during the trial she did not depose that on the day of execution of exhibit-17 the appellant was in fact admitted to the hospital. It is his submission that the scope of Section 391 Cr.P.C. is limited to permitting additional evidence when the court finds it necessary and not to fill the lacunae in the case. In support, the judgment of the Supreme Court in ***Rajvinder Singh vs. State of Haryana***[1] is referred to.

[1] **(2016) 14 SCC 671**

**4.** Section 391 Cr.P.C. reads as under:

> ***"391. Appellate Court may take further evidence or direct it to be taken.-***
>
> *(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*
>
> *(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*
>
> *(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.*
>
> *(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."*

**5.** The Supreme Court in ***State (NCT of Delhi) vs. Pankaj Chaudhary***[2] held that the power conferred under Section 391 Cr.P.C. is to be exercised with great care and caution. In dealing with any appeal, the appellate court can refer to the additional evidence only if the same has been recorded as provided under Section 391 Cr.P.C.. Any material produced before the appellate court to fill up the gaps by either side cannot be considered by the appellate court.

**6.** This court has considered the application and the relevant records highlighted by Mr. B. Sharma as well as Mr. Sudesh Joshi. The conviction of the appellant under Section 468, 420, 471, 419, 201 of the Indian Penal

[2] **(2019) 11 SCC 575**

Code, 1860 (IPC) and Section 13(1) (d) (i) of the Prevention of Corruption Act, 1988 relates to offence committed in the year 2012 but prior to the execution of exhibit-17. Exhibit-17 is a letter dated 23.05.2012 under the signature of the appellant as a Deputy Director where he admits to various acts of omission and commission as reflected therein. This document was exhibited by one Thupden Gelep Bhutia (P.W.11). His cross-examination reflects that the stand of the appellant was that exhibit-17 was signed under duress and not what is sought to be made out in the application under Section 391 Cr.P.C. that on the date of preparation of exhibit-17 he was admitted to the STNM Hospital.

**7.** As rightly pointed out by the learned Public Prosecutor the appellant had not even taken this stand during his examination under Section 313 Cr.P.C.

**8.** Mr B. Sharma pointed out the various orders passed by the learned Trial Court which reflects that before the trial an application has been filed on behalf of the appellant with various medical records pertaining to the treatment undergone by him for mental illness. In exercise of the powers under Section 329 Cr.P.C. the learned Trial Court thought it fit to ascertain the appellant's mental status before proceeding with the case. On 31.03.2016 Dr. C. S. Sharma was examined as court witness. On his examination the learned Trial Court held that it was satisfied that the appellant was able to understand the nature of the proceedings and could defend his case properly. The said order also records that the learned Public Prosecutor and the learned Senior Counsel for the appellant conceded that the trial of the case can begin because of the then mental status of the appellant. This order was not assailed. Thus, evidently the trial of the case was conducted in the presence of the appellant who was in good mental condition.

**9.** Dr. C.S. Sharma (D.W.1) was examined as a defence witness. He deposed that the appellant was under treatment since 2010 and in the year 2011 he referred the appellant to National Institute of Mental Health and Neurosciences (NIMHANS) Bangalore. He asserted that as per the discharge summary issued by NIMHANS the appellant was admitted for :-

> ***"1****. episodes of excessive subjective feelings of energy, over talkativeness, over*

*grooming, over spending, tall claims, decreased sleep and decreased appetite suggestive of mania lasting for more than a week alternative with episodes of sadness, loss of interest in all the activities, depressed sleep and appetite suggestive of depression.*

***2.*** *Second person auditory hallucination commanding since last eight years which would increase during episodes but are continually present even in the inter-episodic period.*

***3.*** *Worsening of symptoms since 2008 with delusion of reference, prosecution, second person auditory hallucination, de-realization with extreme fluctuation in mood.*

*The patient was diagnosed as schizoaffective disorder and was started on treatment. ……..."*

**10.** The fact that the appellant was treated in the year 2011 at NIMHANS Hospital, Bangalore and previously by Dr. C.L Pradhan and Dr. C.S. Sharma was also reiterated by Ms. Durga Sharma (D.W.2) wife of the appellant. The first document sought to be relied upon by the appellant is a document of STNM Hospital dated 23.05.2012 with an endorsement that the appellant was directed to be admitted in the psychiatric ward. The other document is a document of the District Mental Health Programme, Department of Psychiatry Health Care, Human Services & Family Welfare Department, Sikkim dated 26.05.2012 which records the complaints of the appellant on that day, the information given purportedly by his brother that the duration of his illness was 3/4 years, as well as the treatment plan by Dr. C.L. Pradhan given on 26.05.2012.

**11.** The Appeal was filed on 26.11.2018. It is supported by an affidavit of the appellant contrary to the stand taken by the appellant in the application under consideration. The evidence of his mental condition is already on record. The explanation sought to be given by the appellant to produce Annexure-A collectively at this stage after 5 years of framing of

charges while the appeal is ready for final argument is wanting and seems to be an attempt to raise a fresh plea not taken during the trial.

**12.** As held by the Supreme Court in ***Rajvinder Singh (supra)*** it was certainly possible for the appellant who was in good mental condition to understand the nature of the proceedings during the trial to produce the said documents during the trial especially when the appellant had also led defense witnesses.

**13.** In the circumstances, this court is of the considered view that the application under Section 391 Cr.P.C. is devoid of merit and is accordingly rejected.

**SLR (2021) SIKKIM 671**

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

**R.S.A. No. 9 of 2019**

**S.T. Gyaltsen ….. APPELLANT**

*Versus*

**Kalu Tamang ….. RESPONDENT**

**For the Appellant:** Mr. B. Sharma, Senior Advocate with Mr. D.K. Siwakoti and Ms. Prarthana Ghataney, Advocates.

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

Date of decision: 4th September 2021

**A. Code of Civil Procedure, 1908 –Pleadings –** The law is well settled that the Court cannot make out a case which was not even pleaded – The First appellate Court has travelled beyond the pleadings and on its conjectures and surmises and held Exhibit-A to be an irrevocable license even if it was not a gift deed when Exhibit-A was exhibited by the defendants as a gift deed.

(Para 19)

**B. State Government Notification No.385/G dated 11.04.1928 and Notification No.2947/G dated 22.11.1946 – Validation and admission of unregistered documents –** Exhibit-A was exhibited by the defendants as a gift deed executed in favour of defendant no.2 by late Rhenock Athing Kazi. In that view of the matter, it was a document produced by the defendants as a title deed to prove their title to plot no.221. It was clearly thus a document which ought to have been registered as the aforesaid notification clearly lays down that such a document will not be considered valid unless it is duly registered. First appellate Court has held that it is not a registered document and not a valid gift deed. That finding is correct. If it was so, there was a prohibition, in view of the aforesaid notifications, for

Exhibit-A to be admitted in Court "to prove title or other matters contained in the document." First appellate Court, however, went on to examine Exhibit-A with great difficulty, and held that it reflects that late Dorjee Tamang, father of defendant no.2, had been granted some land. This was clearly not permissible. The First appellate Court came to such conclusion on reading the purported translation of the illegible Exhibit-A. Even if one were to examine the purported translation filed by the defendants, although clearly barred, it reflects that Exhibit-A purported to be a gift deed and not an irrevocable license. Furthermore, Exhibit-A purports to be scribed by late Sonam Topgay Kazi and not by late Rhenock Athing Kazi as pleaded in the written statement. The First appellate Court faltered again by surmising facts, reading beyond the document itself and guessing why signature of late Sonam Topgay Kazi appears thereon. Exhibit-A was not proved by defendants as required under the law. The exhibition of this document was objected to by the plaintiff. Neither the handwriting nor the signature thereof was proved by the defendants – Mere marking of an exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Finding arrived at by the First appellate Court that Exhibit-A was an irrevocable license is clearly unsustainable.

(Para 20)

**Appeal dismissed.**

**Chronology of cases cited:**

1. Shri K. B. Bhandari v. Shri Laxuman Limboo and Another, SLR (2017) SIKKIM 41.
2. Life Insurance Corporation of India v. Ram Pal Singh Bisen, (2010) 4 SCC 491.

**JUDGMENT**

***Bhaskar Raj Pradhan, J***

**1.** This appeal has been preferred by the plaintiff against the judgement and decree both dated 30.03.2019 passed by the learned First Appellate Court.

**2.** The original suit for declaration, specific performance of contract, mandatory injunction, and other consequential reliefs under Section 10 and 39 of the Specific Relief Act, 1963 read with Section 9 and 151 of the Code of Civil Procedure, 1908 (CPC) was filed by the appellant (the plaintiff) against three defendants including the present respondent who was defendant no.2 therein. For clarity the parties will be referred as the plaintiff and defendants. The plaintiff had prayed for:

> **"***(a) A decree declaring that the plaintiff is the rightful owner of the land in possession of the defendants entitled to recover the same from them;*
>
> *(b) A decree for specific performance of the contract dated 1.2.2011 signed on 05/02/ 2011 along with the undertaking dated 5/ 2/2011;*
>
> *(c) A decree for mandatory injunction against the defendants 1, 2 and 3 directing them to demolish kutcha mud houses on plot No. 207 and shift to demarcated housing sites on plot No.222 and on their failure the plaintiff will be entitled to remove all the kutcha mud houses with the help of the court by executing the Decree that may be passed in favour of the plaintiff and against the defendant Nos. 1, 2 & 3;*
>
> *(d) A decree recovery of possession of the suit land by evicting the Defendant nos. 1 to 3 therefrom;*
>
> *(e) A decree for the cost of the suit and decree for any other relief or reliefs to which the plaintiff may be found entitled to under the law.***"**

**3.** It was the case of the plaintiff that he had negotiated the deal for purchase of the suit land through Kalden Bhutia (P.W.2) his constituted attorney and purchased 9.22 acres of land from one late Sonam Topgay

Kazi after executing a registered sale deed dated 04.10.2010 (exhibit- P1). The plaintiff contended that he owned large area of dry field covered by plot nos. 205, 207, 208, 209, 2011, 220, 221, 222, 220/813 and 220/814 measuring 9.14 acres. The plaintiff stated that out of plot no.221 two plots measuring (60 feet x 60 feet) and (80 feet x 60 feet) were alienated in favour of his relative, Hissey Doma Yongda and his daughter, Kesang Diki Gyaltsen. The plaintiff averred that the defendants had *„kutcha* mud houses in plot no.207 and the defendant no.2's mud house covered plinth area measuring about 40 feet x 25 feet. The total area of land that had the houses of the defendants was the suit land. The plaintiff stated that after various negotiations an amicable settlement was arrived at between the appellant and the defendants. According to the plaintiff this agreement was entered into prior to the execution of the sale deed on 04.10.2010 (exhibit- P1). It was asserted that pursuant to the agreements the plaintiff also paid various sums of money to various persons as enumerated in the plaint. Although the rest of the families who had entered into the agreements moved to plot no 222 owned by the plaintiff, the defendants declined to do so. Ultimately this dispute led to the filing of the suit against the defendants.

**4.** The defendants filed joint written statements. They disputed the plaintiff's ownership of the suit land. They asserted that the real owner of the suit land was late Sonam Topgay Kazi who was then residing in United States of America. They also asserted that the suit land did not fall in plot no.207. According to the defendants the land they were in possession of was the one donated by late Rhenock Athing Kazi, the father of late Sonam Topgay Kazi to the father of defendant no.2, late Dorjee Tamang. They averred that they had been living in the suit properties as the owners and their rights had also matured by way of adverse possession. It was further averred that the plaintiff's act of transferring the land comprising of plot no. 221 to his relative and daughter was to exclude the defendants from the said plot which they were in possession of. They asserted that plot no. 221 belonged to the defendants. It was gifted to the father of the defendant no.2, late Dorjee Tamang by late Rhenock Athing Kazi, father of late Sonam Topgay Kazi as far back as on 11.12.1962 by a written document. The defendants are still residing there. They stated that they were simple, illiterate, and semi-illiterate villagers. They stated that the villagers were called by the panchayat members viz. Phigu Tamang (P.W.4) and Ratan Bahadur Tamang (P.W.3) to Gangtok to sign on certain papers to obtain development benefits. It was due to this that they had signed various written

as well as in blank papers under undue influence but later realized that these papers were being used against them in the suit. They asserted that the defendants never signed any agreement with the knowledge about what they were being made to sign and therefore, it was null and void. They also denied the undertakings alleged to have been executed by them.

**5.** The plaintiff (P.W.1) examined himself, Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi who negotiated the deal for the purchase of suit land; Ratan Bahadur Tamang (P.W.3) the then Zilla Panchayat of the area; Phigu Tamang (P.W.4) the then panchayat member of the concerned ward in Syari; Ashok Tamang who had attested the sale deed (exhibit-P1), the agreements (exhibit-P5), undertaking (exhibit-P6) and other documents; Utpal Yongda (P.W.5) his sonin-law; G. S. Sharma (P.W.6) the concerned amin in the District Collectorate and Babita Rai (P.W.7) the defendants advocate who was examined as plaintiff's witness. All the witnesses except G. S. Sharma (P.W.6) and Babita Rai (P.W.7) had assisted the plaintiff during negotiations and the purchase of the suit land.

**6.** The defendants examined themselves. Sancha Bahadur Tamang (D.W.1) was defendant no.1, Kalu Tamang (D.W.2) was defendant no.2 and Norbu Tamang (D.W.3) was defendant no.3. The defendants also examined Kalu Tamang's wife Phul Maya Tamang (D.W.4) and Ganga Maya Sharma (D.W.5). Ganga Maya Sharma (D.W.5) was an 80-year-old resident of Syari who deposed that she had seen Kalu Tamang (D.W.2) residing in the suit land since 1962 when she came from Geyzing. She also deposed about Kalu Tamang's (D.W.2) father known as *'Lama Bajey'* who had told her that he used to work as a *„chowkidar* with late Rhenock Athing Kazi who had given him the suit land in plot no. 221 and a document to that effect.

**7.** The learned Trial Court framed 8 issues and decreed the suit in favour of the plaintiff. In the judgement dated 26.08.2017 it was held that the plaintiff was entitled to recover possession of the suit land from the defendants and for specific performance of the agreement dated 01.02.2011 (exhibit-P4) and 05.02.2011 read with undertaking dated 05.02.2011 (exhibit-P6). Accordingly, a decree dated 31.08.2017 was passed.

**8.** The defendants were dissatisfied with the judgment and the decree passed by the learned Trial Court. They preferred Title Appeal Case No.

15 of 2017. The learned First Appellate Court by its impugned judgement and decree granted the plaintiff relief against defendant nos.1 and 3 but held that he was not entitled to any relief against defendant no.2. The plaintiff has challenged only those portions of the impugned judgement and decree that relate to defendant no.2. Consequently, this court shall examine only those findings and reliefs which the appellant is aggrieved of.

**9.** The learned First Appellate Court disagreed with the findings of the learned Trial Court on issue no.1 i.e. *"1) Whether plaintiff is the owner of plots of land covered under plot no.205, 207, 208, 209, 211, 220, 221, 222, 220/813 and 220/814?"* The learned First Appellate Court held that since Kalden Bhutia (P.W.2), the constituted attorney of late Sonam Topgay Kazi had himself admitted during cross-examination that he was told by late Sonam Topgay Kazi that he could sell the rest of the suit land except the portion which had already been given to the defendant no.2, it became clear that late Sonam Topgay Kazi had already acquiesced to the continued possession of the defendant no.2 over the portion of plot no.221 which he had been claiming was gifted to his father by late Rhenock Athing Kazi in 1962 vide exhibit-A. It was thus held that the sale of that portion of plot no. 221 cannot be held to be valid. The learned First Appellate Court therefore, modified the findings of the learned Trial Court and held that except portion of plot 221 the plaintiff could be regarded as owners of the said plots by virtue of the sale deed (exhibit-P1). To examine the correctness of the findings it is important to examine the pleadings of the contesting parties, keeping in mind that the burden to prove issue no.1 was upon the plaintiff to prove that he was in fact the owner of the said plots. Mr. B. Sharma, learned Senior Advocate for the plaintiff submitted that the defendant had not been able to prove exhibit-A as a gift deed.

**10.** The plaintiff averred that in the year 2010 he was looking for a suitable land in an around Gangtok to start his hotel business when he learned about the lands owned by late Sonam Topgay Kazi who was residing abroad. The plaintiff thus contacted Kalden Bhutia (P.W.2) of Kalimpong to negotiate the deal for him as his constituted attorney. On 07.09.2010 the plaintiff along with his constituted attorney Kalden Bhutia (P.W.2), Ratan Bahadur Tamang (P.W.2) and Phigu Tamang (P.W.3) conducted physical inspection and verification of the plots of lands and found that the defendants and ten other families had *'kutcha'* mud houses scattered in different plots of lands. After negotiations an amicable solution

was arrived upon to shift the persons including the defendants living in the mud houses to plot no. 222. The defendant no.2's possession and occupation of the *'kutcha'* house in plot no. 207 is admitted by the plaintiff. The plaintiff also averred that by way of the amicable settlement the defendant no.2 had also agreed to shift to plot no.222 where he would be provided a housing site.

**11.** The defendant no.2's plea in the written statement, however, was that the suit land did not fall in plot no.207 but in plot no.221 which was gifted to late Dorjee Tamang, father of defendant no.2, by late Rhenock Athing Kazi father of late Sonam Topgay Kazi. To substantiate their claim the defendant also produced exhibit-B as the *'purcha khatian'* showing defendant no.2's possession of plot no. 221. This document reflects attestation of the year 1978. Mr. B. Sharma submitted that this is a manufactured document since the area is reflected in hectares whereas in fact at the relevant time it ought to have been in acres as observed by this court in ***Shri K. B. Bhandari vs. Shri Laxuman Limboo & Anr.***[1]. The plaintiff, however, has failed to prove that it is in fact a manufactured document. The cross-examination of the defendant no.2 reflects the stand of the plaintiff that the defendant no.2's name was recorded in exhibit-B by mistake. Not even a suggestion was given to the defendant no.2 that he had manufactured exhibit-B. Although it is evident that the defendant is in possession of a *'kutcha'* house on a plot of land owned by late Sonam Topgay Kazi and now sold to the plaintiff there is some amount of uncertainty as to the exact number of the plot in possession of defendant no.2.

**12.** Kalden Bhutia (P.W.2) was the plaintiff's witness. As per his evidence-on-affidavit he was the constituted attorney of late Sonam Topgay Kazi by which he was authorised to dispose of his properties situated in the State of Sikkim. According to him he along with the plaintiff and others inspected the lands, negotiated with the occupants of the *'kutcha'* houses scattered in different plots of land including the defendants and finally an amicable settlement was entered between the plaintiff and the occupants of the *'kutcha'* houses including the defendants who were in plot no.207 to provide for housing sites on plot no.222 by way of lease deed.

**13.** During his cross-examination he admitted that when he was given power-of-attorney by late Sonam Topgay Kazi he had been told that he

[1] **SLR (2017) SIKKIM 41**

could sell the rest of the suit land except a portion which was given to defendant no.2. Mr. B.K. Gupta, learned counsel for the defendant no.2 laid much emphasis on this admission. He submitted that due to this admission by Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi it was clear that he was not authorised to sell the land given to the defendant no.2. Kalden Bhutia (P.W.2) however, feigned ignorance about the details of the land given to defendant no.2. He stated that the defendant no.2 had given a portion of the land below the other land. The power-of-attorney was not produced in court by the plaintiff. Although the defendants disputed that late Sonam Topgay Kazi had in fact appointed Kalden Bhutia (P.W.2) as his constituted attorney no effort was made by the defendants to seek to produce the power-of-attorney before the learned Trial Court. It is the plaintiff's case that the defendant no.2 is not in occupation of plot no.221 and some portions of it were transferred in favour of Hishey Doma Yongda and Kessang Diki Gyaltsen by the plaintiff. Due to the categorical stand of the plaintiff, he is not entitled to a declaration that he is the owner of plot no.221 and the consequential reliefs about the lands he had admittedly alienated.

**14.** In view of the clear admission of Kalden Bhutia (P.W.2) that he was not authorised to sell the land which was given to the defendant no.2, it is important to examine whether it was him who had sold the land to the plaintiff in clear violation of the restricted authority given by the principal. It is pleaded in the plaint that it was the plaintiff who had purchased the land from late Sonam Topgay Kazi. According to the plaintiff, before the execution of the sale deed dated 04.10.2010 (exhibit-P1) an amicable solution was found on 07.09.2010 between the plaintiff and the occupants of the mud houses including the defendants. The agreement entered thereafter, dated 01.02.2011 (exhibit-P4) between the plaintiff and defendant no.2 is a lease agreement which states that the plaintiff had purchased 9 acres and 22 decimals of land from late Sonam Topgay Kazi. This agreement is the agreement which the plaintiff seeks specific performance of along with the undertaking dated 05.02.2011 (exhibit-P6) signed by the defendant no.2 as well. This agreement (exhibit-P4) has been produced by the plaintiff. The defendant no.2 put up a case that he was simple and illiterate and so he was cheated into signing it. The recital in the agreement reflects that late Dorjee Tamang worked as a domestic help at the residence of late Rhenock Athing Kazi. Late Rhenock Athing Kazi had arranged the marriage between late Dorjee Tamang and late Chumkit lepcha. He had also

handed over a plot of land to them for their day to day living on *"Kut"*. Late Dorjee Tamang and late Chumkit Lepcha settled there and survived on the income from small scale farming and by cattle grazing. They had resided in the said land during the lifetime of late Rhenock Athing Kazi and after his demise at *'Kopi bari'* as a tenant of late Sonam Topgay Kazi which had been later purchased by the plaintiff. The recital in the agreement as well as the evidence led by the parties makes it clear that the defendant no.2 is not an alien to the suit land. It is also clear that not only the defendant no.2 but his late father was also living in the suit lands. Admittedly, the suit land in which the defendant no.2 has a *'kutcha'* house is in possession of the defendant no.2 till date. The admission by Kalden Bhutia (P.W.2) the constituted attorney holder of late Sonam Topgay Kazi that he had authorized him to sell his land except that which had been given to the defendant no.2 gains significance. This admission is unequivocally made by the plaintiff's own witness and therefore, is binding upon him and must be accepted.

**15.** The plaintiff in his evidence-on-affidavit deposed that he had executed the sale deed (exhibit-P1) between the constituted attorney Kalden Bhutia (P.W.2) and himself on 04.10.2010 which was registered on 02.12.2010. Thus, clearly it was the constituted attorney who had executed the sale deed (exhibit-P1) on behalf of late Sonam Topgay Kazi for the various plots including the plot which was in the possession of the defendant no.2. The act of Kalden Bhutia (P.W.2) to sell the land which was in possession of the defendant no.2 was in clear violation of the authority given to him by late Sonam Topgay Kazi, the principal. A holder of a power-of-attorney cannot go beyond the principal. A constituted attorney can do all that he has been authorized to do and consequently cannot do what he has been specifically debarred from doing. Thus, it is held that the sale of the portion of land which was in possession of the defendant no.2 purportedly owned by Sonam Topgay Kazi by Kalden Bhutia (P.W.2) his constituted attorney was unauthorized and therefore, null and void.

**16.** The issue no.6 was whether the defendants have become the owners of plot no. 221 measuring 0.3400 hectares in view of it being gifted by Rhenock Athing Kazi. The learned Trial Court held this issue against the defendants. Exhibit-A and exhibit-B were the two important documents exhibited by the defendants for this purpose. The exhibition of these documents was objected to by the plaintiff. Exhibit-B has been dealt with

hereinabove. Exhibit-B is a 'purcha', a record of rights. It reflects that the owner of the land bearing plot no.221 in the year 1978 was late Sonam Topgay Kazi son of late Rhenock Athing Kazi. In the remarks column there is an entry that late Dorjee Tamang was in occupation of the said plot for past 20 years. The document was exhibited in the original and therefore constitutes primary evidence. The learned First Appellate Court examined exhibit-A as well. He found it to be not clearly legible but still readable. On reading the same he noticed that the document was signed by late Sonam Topgay Kazi and not late Rhenock Athing Kazi as pleaded in the plaint. He opined that there was possibility that the initials of late Sonam Topgay Kazi appeared in exhibit-A since plot no 221 was then recorded in his name. He also opined that as exhibit-A was not a registered document and it could not be accepted as a valid gift deed although titled as *"icha patra"*. The learned First Appellate Court however, opined that nevertheless it would still have legal force and would amount to an irrevocable license in favour of late Dorjee Tamang. The learned First Appellate Court was of the view that the nomenclature given by the parties to a transaction or document is not decisive and the true intent and purport of a transaction or document must be gathered from the terms therein based on credible and admissible evidence. It was held that no form or consideration was required for such a license which was based on principles of justice, equity and good conscience and codified by the Easements Act, 1882. It was further held that Revenue Order no. 1 of 1970 would have no restriction in late Rhenock Athing Kazi gifting or granting license in favour of late Dorjee Tamang. Issue no.6 therefore, was decided in favour of the defendant no.2 by the learned First Appellate Court.

**17.** Mr. B. Sharma submitted that exhibit-A was an unreadable, unregistered, and unproved document.

**18.** The burden to prove issue no.6 was upon the defendants. The learned Trial Court held that the defendants had not become the owners of plot no.221 by virtue of exhibit-A. The defendants in their joint written statement had pleaded that plot no.221 belonged to them as it was gifted to the father of defendant no.2, late Dorjee Tamang by late Rhenock Athing Kazi, father of late Sonam Topgay Kazi on 11.12.1962 by a written document. The stand of the defendant no.2 in his written statement was clear. The defendant no.2 also entered the witness box. In his evidence-on-affidavit, he once again reiterated the aforesaid fact. He did not take any

alternative plea save the plea of adverse possession which is admittedly not sustainable in view of his plea of ownership.

**19.** The law is well settled that the court cannot make out a case which was not even pleaded. It is quite evident that the learned First Appellate Court has travelled beyond the pleadings and on its conjectures and surmises and held exhibit-A to be an irrevocable license even if it was not a gift deed when exhibit-A was exhibited by the defendants as a gift deed.

**20.** Notification No.385/G dated 11.04.1928 as amended by Notification No.2947/G dated 22.11.1946 provides that *"an unregistered document (which ought in the opinion of the court to have been registered) may however, be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty up to 50 times the usual registration fee."* Exhibit-A was exhibited by the defendants as a gift deed in favour of defendant no.2 by late Rhenock Athing Kazi. In that view of the matter, it was a document produced by the defendants as a title deed to prove their title to plot no.221. It was clearly thus a document which ought to have been registered as the aforesaid notification clearly lays down that such a document will not be considered valid unless it is duly registered. The learned First Appellate Court has held that it is not a registered document and not a valid gift deed. That finding is correct. If it was so, there was a prohibition, in view of the aforesaid notifications, for exhibit-A to be admitted in court *"to prove title or other matters contained in the document."* The learned First Appellate Court, however, went on to examine exhibit-A with great difficulty, and held that it reflects that late Dorjee Tamang, father of defendant no.2, had been granted some land. This was clearly not permissible. The learned First Appellate Court came to such conclusion on reading the purported translation of the illegible exhibit-A. Even if one were to examine the purported translation filed by the defendants, although clearly barred, it reflects that exhibit-A purported to be a gift deed and not an irrevocable license. Furthermore, exhibit-A purports to be scribed by late Sonam Topgay Kazi and not by late Rhenock Athing Kazi as pleaded in the written statement. The learned First Appellate Court faltered again by surmising facts, reading beyond the document itself and guessing why signature of late Sonam Topgay Kazi appears thereon. Exhibit-A was not proved by defendants as required under the law. The exhibition of this document was objected to by the plaintiff. Neither the handwriting nor the signature thereof

was proved by the defendants. As held by the Supreme Court in ***Life Insurance Corporation of India vs. Ram Pal Singh Bisen***[2] mere admission of a document in evidence does not amount to its proof. In other words, mere marking of an exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Thus, the finding arrived at by the learned First Appellate Court that exhibit-A was an irrevocable license is clearly unsustainable. Neither exhibit-A nor exhibit-B supports the contention that the defendant no.2 was the owner of plot no. 221. It is thus held that the defendant has not been able to prove that plot no.221 was gifted to late Dorjee Tamang by late Rhenock Athing Kazi.

**21.** The learned First Appellate Court then took issue no.2 for consideration. Issue no.2 was whether the defendants have agreed to shift to plot no. 222 from plot no. 207 vide agreement dated 01.02.2011 (exhibit-P4) and whether they had agreed to vacate suit land by an undertaking dated 05.02.2011 (exhibit-P6). The burden to prove this issue was upon the plaintiff. The issue had been decided in favour of the plaintiff by the learned Trial Court. The learned First Appellate Court examined the evidence and held that the defendants had in fact signed the agreement dated 01.02.2011 (exhibit-P4) as well as the undertaking (exhibit-P6). It was noted that the defendant no.2 had admitted that he had executed the agreement with a stipulation that he would shift to plot no.222 and endorse his signature thereon. It was noted that the defendant no.2 had admitted his signature on the undertaking (exhibit-P6). It was noted that the defendant no.2 had admitted having accepted and taken money from the appellant and that he had repaired his house with the money. It was noted that Phul Maya Tamang (D.W.4) wife of the defendant no.2 had also admitted that they were paid Rs.10,000/- by the appellant for shifting. The learned First Appellate Court therefore, concluded that the defendants had in fact signed the agreement (exhibit-P4) and undertaking (exhibit-P6) agreeing to shift to plot no.222. The learned Trial Court findings were upheld. However, in view of its findings on issue nos.1 and 6 it was held that the appellant could not stand to gain anything considering the specific admission by the constituted attorney (P.W.2) that late Sonam Topgay Kazi had directed him not to sell the portion of the land in possession of the defendant no.2.

**22.** The agreement (exhibit-P4) dated 01.02.2011 is under the signature of the plaintiff as the lessor and the defendant no.2 as the lessee. The

[2] **(2010) 4 SCC 491**

authority of the plaintiff to sign the agreement as the lessor is derived from the sale deed dated 04.10.2010 (exhibit-P1). As this court has held that the Kalden Bhutia (P.W.2) the constituted attorney of late Sonam Topgay Kazi did not have the authority to execute the sale deed dated 04.10.2010 (exhibit-P1) with respect to the land which was in possession of the defendant no.2 and the sale to that extent in favour of the plaintiff was null and void, necessarily the plaintiff did not have the authority to execute the agreement dated 01.02.2011 (exhibit-P4) as the owner of the said portion. The subsequently signed undertaking dated 05.02.2011 (exhibit-P6) by the defendants would also lose significance in view of the findings on the admission made by Kalden Bhutia (P.W.2) on the agreement dated 01.02.2011 (exhibit-P4).

**23.** The relief under the Specific Relief Act, 1963 is a discretionary relief. In view of the clear admission made by the plaintiff's own witness Kalden Bhutia (P.W.2) as the constituted attorney of late Sonam Topgay Kazi the seller that he was not authorised to sell the portion of land given to the defendant no.2, this relief cannot be granted in favour of the plaintiff. Consequently, the declaration sought by the plaintiff that he was the rightful owner of land in possession of the defendant no.2 and entitled to recover the same from him cannot be granted; the relief of specific performance of the agreement dated 01.02.2011 (exhibit-P4) and undertaking dated 05.02.2011 (exhibit-P6) also cannot be granted; The decree for mandatory injunction against the defendant no.2 directing him to demolish the *'kutcha'* house and shift to plot no.222 cannot also be granted; and the decree for recovery of possession of the portion of the suit land in occupation and possession of the defendant no.2 cannot also be granted to the plaintiff. It is accordingly so ordered.

**24.** While thus agreeing with the conclusion arrived at by the learned First Appellate Court viz-a-viz the defendant no.2, this court is unable to agree with some of the findings. The judgment of the learned First Appellate Court accordingly stands modified to the above extent. The appeal is dismissed and disposed of accordingly. In the circumstances, no order as to costs.

**SLR (2021) SIKKIM 684**

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

**R.F.A. No. 4 of 2019**

**Kuber Raj Rai ….. APPELLANT**

*Versus*

**Saran Thapa and Another ….. RESPONDENTS**

**For the Appellant:** Mr. S.S. Hamal, Advocate.

**For the Respondents:** Mr. Sushant Subba, Advocate.

Date of decision: 14th September 2021

**A. Code of Civil Procedure, 1908 – O. 41 Rr. 1 and 2 – Appeal –** The respondents had taken a loan of 30,60,000/- from the appellanton various dates through separate money receipts in connection with a civil work – On 01.10.2014, the respondents executed a document titled loan agreement in which they acknowledged the receipt of the said amount as loan amount from the appellant and agreed to return it along with interest of 5,00,000/- on or before 14.11.2014. In spite of the demands and assurances, the respondents failed to pay the loan amount leading to the filing of a money suit by the appellant – During his cross examination, the appellants admitted that the money receipts were regarding payment made as per Exhibit-A. Exhibit-A was a document exhibited by the respondents and under the signature of the appellant which reads that the appellant had agreed to pay a sum of 70,00,000/- to the respondents for providing him the civil work. It was to be paid in three installments. If the admission of the appellant regarding Exhibit-A is to be considered, then his version in the plaint was completely different – On a reading of the plaint, it is evident that there was some understanding between the appellant and the respondents about the civil work. The plaint does not disclose for what purpose such a huge amount of loan was taken by the respondents nor the details of the cash transaction. The appellant in his evidence on affidavit also does not

enlighten on this aspect – The story of the appellant does not inspire confidence. It is quite evident that the appellant has withheld much more than what has been disclosed selectively to make out a case. The pleadings in the plaint do not reflect the facts in the same manner as in the documents exhibited by the appellant – Held: The appellant desirous of the Court to give judgment as to his legal right and the defendants liability to pay the alleged loan amount must prove on the existence of facts which he asserted in the plaint. The appellant failed to do so – The loan agreement is a sham document prepared at the instance and for the convenience of the appellant – Both the appellant as well as the respondents have not stated the entire truth before the Court, although they were in the know of it. The reliefs have been sought by the appellant alone which cannot be granted due to the manner he has chosen to approach a Court of law.

(Paras 2, 9, 10, 11 and 14)

**Appeal dismissed.**

**Chronology of cases cited:**

1. S. Bhattacharjee v. Sentinel Assurance Co. Ltd., AIR 1955 Calcutta 594.
2. Union of India v. Ibrahim Uddin and Another, 2012 8 SCC 148.
3. Uttaradi Mutt v. Raghavendra Swamy Mutt, AIR 2018 SC 4796.

**JUDGMENT**

***Bhaskar Raj Pradhan, J***

**1.** This is a regular first appeal against the judgment and decree, both dated 28.02.2019, passed by the learned District Judge, Special Division-I, Sikkim at Gangtok (the learned District Judge), whereby the Money Suit No. 165 of 2017 (the Money Suit) filed by Kuber Raj Rai, the appellant (plaintiff) was dismissed. The Money Suit was filed on 26.10.2017 against the two respondents, i.e., Saran Thapa (defendant no.1) and Ranjit Rai (defendant no.2). For clarity, they shall be referred to as plaintiff and defendants.

**2.** In the plaint, the plaintiff pleaded that in connection with a civil work, i.e., "*Mastic Alphabet and Repairing of Road Surface, Drain, etc., in between Rangpo - Ranipool (018.500 kms) under 13th Finance Commission during 2013-2014 of Government of India, Office of the Central Public Work Department, Matigara, Siliguri – 734001, Dist. Darjeeling*" (the civil work), the defendants had taken a loan of Rs.30,60,000/- from the plaintiff on various dates through separate money receipts as detailed in paragraph 1 of the plaint. On 1.10.2014, the defendant executed a document titled loan agreement (exhibit-5) in which they acknowledged the receipt of Rs.30,60,000/- as loan amount from the plaintiff and agreed to return it along with interest of Rs.5,00,000/- on or before 14.11.2014. Inspite of the demands and assurances, the defendants failed to pay the amount of Rs.35,60,000/-. On 19.12.2014, the plaintiff sent a legal notice demanding payment within 15 days of its receipt. The defendants failed to comply with the legal notice. According to the plaintiff, the cause of action for the suit first arose on 1.10.2014 when the document titled loan agreement was made and thereafter on 14.11.2014, when the defendants failed to pay the sum of Rs.35,60,000/- on expiry of fifteen days of the legal notice dated 19.12.2014 and continues till date. The plaintiff therefore prayed for recovery of Rs.35,60,000/- from the defendants jointly and severally for payment of interest @12% per annum on the said amount and cost of the suit.

**3.** On 27.12.2017, the defendants filed their written statements. They took various preliminary objections including the maintainability of the suit. They pleaded that the plaintiffs had not come with clean hands and had concealed material facts trying to mislead the court. It is stated that the defendant no.1 used to work as an assistant to the plaintiff. The defendant no.2 was the plaintiff's cousin and a government employee by profession. Whereas the plaintiff is a first-class contractor, the defendants had neither knowledge or experience nor the required documents and investment for pursuing contract works. The defendant no.1 was employed by the plaintiff and the defendant no.2 was sometimes approached by the plaintiff to help him with his miscellaneous works for his ongoing contracts. The plaintiff had promised the defendants verbally and in writing that in return for helping him out the plaintiff would monetarily compensate and reimburse them. It was asserted that the plaintiff had himself undertaken the civil work and the defendants had been asked to help the plaintiff. The defendants had not

taken any loan from the plaintiff and that, the four money receipts were not executed against the loan taken by them. The money receipts handed over by the plaintiff to the defendants were for paying wages of labourers, payment to suppliers and some paid to them as commission, compensation, and reimbursement for their health. The defendants were made to endorse on the loan agreement fraudulently, under coercion and on misrepresentation. It was alleged that the plaintiff was fraudulently trying to extort money from the defendants by misusing the documents submitted by the defendants as security with the plaintiff on good faith. The "suit" filed by the plaintiff against defendant no.1 under section 138 and 142 of the Negotiable Instrument Act, 1881 was rightly dismissed. The defendant no.2 received the legal notice in utter shock and thereafter, went to meet the plaintiff. The plaintiff apologetically assured him that he meant no harm or any court litigation. After proper verification of his fund account handled by the defendants, the plaintiff issued a proper receipt to the defendants discharging them of their liabilities.

**4.** On these pleadings, the learned trial court framed six issues. The plaintiff (PW-1) examined himself, Sukman Tirwa (PW-2) and Kamlesh Kumar Gupta (PW-4). The defendants examined only themselves.

**5.** The learned District Judge held that the plaintiff had put up a false case and that the defendants had not taken the loan of Rs.30,60,000/-. The learned District Judge also held that the four money receipts were not receipts for the loan as sought to be made out. The learned District Judge further held that the plaintiff had executed the undertaking (exhibit-A) agreeing to pay Rs.70,00,000/- to the defendants in three instalments. The learned District Judge held that the loan agreement dated 1.10.2014 (exhibit-5) was a sham document prepared at the instance of the plaintiff for his convenience. It was held that the plaintiff had issued the discharge certificate dated 29.12.2014 (exhibit-B) discharging the defendants of any liability, even if there was any which they owed towards the plaintiff. In the circumstances, the learned District Judge held that the suit was not maintainable and the plaintiff was not entitled to any relief.

**6.** Mr. S.S. Hamal, learned counsel for the plaintiff, vehemently argued that the judgment and decree of the learned District Judge is perverse, expressly illegal, contrary to materials on record and suffers from wrong

appreciation of facts and law. The observations about issues no. 2, 3 and 6 are incorrect and contrary to material on record. It was urged that the learned District Judge failed to appreciate that the respondent had not denied the execution of the loan agreement dated 1.10.2014 (exhibit-5) or its content and that their only contention was that it was executed by them under coercion, fraud and undue influence. The learned District Judge failed to appreciate that there was no connection between exhibit-A and exhibit-5 which were exhibited at different times for different context. That, exhibit-A was undated and contained unlawful consideration. It was also urged that evidence which came in cross-examination was not considered by the learned District Judge. Mr. S.S. Hamal relied upon ***S. Bhattacharjee vs. Sentinel Assurance Co. Ltd.***[1].

**7.** During the pendency of the present appeal, the appellant had filed I.A. no. 3 of 2021 on 1.3.2021 under Order XLI Rule 27 read with section 151 of the Code of Civil Procedure, 1908 (CPC) (the application) for additional evidence, i.e., application of one Sonam Sherpa dated 17.5.2019 under the Right to Information Act, 2005 to the office of the Central Public Works Department; reply dated 17.05.2019 of the Public Information Officer of the Central Public Works Department to Sonam Sherpa and copy of the FIR dated 1.10.2019 lodged by the plaintiff before the Station House Officer, Pakyong Police Station bearing GD entry no. 24 dated 8.11.2019. The defendants have filed their written objection to the said application submitting that it is misconceived, not maintainable and unnecessary. It is also contended that allowing it would cause prejudice to the defendants as the documents is sought to be produced to fill up the lacuna in the case. In support of this contention Mr. S.S. Hamal relies upon ***Union of India vs. Ibrahim Uddin and Another***[2] and ***Uttaradi Mutt vs. Raghavendra Swamy Mutt***[3].

***8.*** Mr. Sushant Subba, learned counsel for the defendants, submits that under section 63 of the Indian Contract Act, 1872 every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such promise, or may accept instead of it any satisfaction which he thinks fit. Exhibit-B, therefore, in terms of section 63 of the Indian Contract Act, 1872 rarely dispenses with

[1] **AIR 1955 Calcutta 594**
[2] **2012 8 SCC 148**
[3] **AIR 2018 SC 4796**

the performance in settlement of all the dues discharging the defendants of all the liabilities.

**9.** Evidently, the plaintiff has based his case on two sets of documents, i.e., the money receipts (exhibit-1 dated 18.06.2014, exhibit-2 dated 25.6.2014, exhibit-3 dated 21.6.2014 and exhibit-4 dated 30.6.2014) and loan agreement dated 1.10.2014 (exhibit-5). The plaintiff also relies upon a cheque for an amount of Rs.35,60,000/- dated 14.11.2014 issued by defendant no.2 in favour of the plaintiff (exhibit-11). This cheque was examined by the learned Chief Judicial Magistrate, East & North Sikkim at Gangtok, in its judgment dated 3.10.2016, in a proceeding initiated by the plaintiff against the defendant no.1 in Private Complaint Case No. 12 of 2015. The learned Chief Judicial Magistrate found the case of the plaintiff highly improbable and acquitted the defendant no.1 under section 138 of the Negotiable Instruments Act, 1881. The money receipts states that the sum specified therein was received from the plaintiff in connection with the civil work issued in the name of contractor Bhaichung Bhutia. The money receipts are signed by both the defendants. Sukman Tirwa (PW-2) and Kamlesh Kumar Gupta (PW-4) are witnesses to exhibit-1. Indra Prasad Rai and Sukman Tirwa (PW-2) are witnesses to exhibit-2 and exhibit-3. Sukman Tirwa (PW-2) and Deepraj Pradhan are witnesses to exhibit-4. Indra Prasad Rai and Deepraj Pradhan were not examined by the plaintiff.

**10.** According to the plaintiff, these money receipts totalling to Rs.30,60,000/- were issued by the defendant no.1 for cash received as a loan on various dates. Sukman Tirwa (PW-2) as well as Kamlesh Kumar Gupta (PW-4) also stated that the money receipts were for the loan given to the defendants by the plaintiff. None of the money receipts specify that they were receipts for the loan taken by the defendants. During his cross-examination, the plaintiff admitted that the money receipts were regarding payment made as per exhibit-A. Exhibit-A was a document exhibited by the defendants and under the signature of the plaintiff, who admitted signing it. It is also signed by the defendants as well as two witnesses Indra Prasad Rai and Bijay Chettri. Neither Indra Prasad Rai nor Bijay Chettri were examined by the defendants. The contents of Exhibit-A reads that the plaintiff had agreed to pay Rs.70,00,000/- to the defendants for providing him the civil work. It was to be paid in three instalments of Rs.6,00,000/- on 19.06.2014, Rs.5,00,000/- on 24.6.2014 and the remaining Rs.59,00,000/- on the day of site visit by the officials from CPWD,

Matigara, Siliguri. If the admission of the plaintiff regarding exhibit-A is to be considered, then his version in the plaint was completely different.

**11.** On a reading of the plaint, it is evident that there was some understanding between the plaintiff and the defendants about the civil work. The plaint does not disclose for what purpose such a huge amount of loan was taken by the defendants nor the details of the cash transaction. The plaintiff in his evidence on affidavit also does not enlighten on this aspect. However, on reading the loan agreement (exhibit-5) filed by the plaintiff there is a suggestion that after the plaintiff decided to ask Bhaichung Bhutia to revoke the general power of attorney dated 18.06.2014 purportedly given to him it was the defendants who had agreed to execute the contract work. However, neither Bhaichung Bhutia was examined, nor the general power of attorney dated 18.6.2014 exhibited by the plaintiff. Although, a series of paper trail seems to have been created, except for the specific amounts mentioned in the documents exhibited by the plaintiff as well as the defendants there is no money trail of such huge amounts. As rightly concluded by the learned District Judge there is certainly more than meets the eye. The story of the plaintiff does not inspire confidence. It is quite evident that the plaintiff has withheld much more than what has been disclosed selectively to make out a case. The pleadings in the plaint do not reflect the facts in the same manner as in the documents exhibited by the plaintiff. If, as admitted by the plaintiff, it is true that the money receipts were regarding payments made as per exhibit-A, then the plaintiff's case as put up in the plaint cannot be sustained. There is a clear disconnect between the four money receipts (exhibits-1 to 4) and the loan agreement (exhibit-5). If the money receipts are allowed to speak for itself the plaintiff's deposition seeks to provide evidence to show that it was not meant to be money receipts but loan documents which is impermissible. The plaintiff desirous of the court to give judgment as to his legal right and the defendants liability to pay the alleged loan amount must prove on the existence of facts which he asserted in the plaint. The plaintiff failed to do so. Therefore, although it is seen that the defendants had signed the loan agreement (exhibit-5), this court has no hesitation to uphold the findings of the learned District Judge that the plaintiff has made out a false case by claiming that he had paid the concerned amounts indicated in the money receipts (exhibits-1 to 4) as loan. It is also quite clear that the loan agreement (exhibit-5) is a sham document prepared at the instance and for the convenience of the plaintiff as held by the learned District Judge.

**12.** A perusal of the discharge certificate (exhibit-B) exhibited by the defendant also supports the finding of the learned District Judge about the loan agreement (exhibit-5) being a sham document and the doubt it had on the case put up by the plaintiff. The discharge certificate (exhibit-B) in the last paragraph clearly states that the defendant no.2 had settled all the dues on behalf of the defendants and that the plaintiff had "*.....no more claims from them and hereby discharge them of all their liabilities"*. The defendants in the written statements had pleaded that on receipt of the legal notice, the defendant no.2 had approached the plaintiff who apologetically assured him that he meant no harm and after verification of his fund amount handled by the defendant issued exhibit-B discharging them of their liabilities. The plaintiff in his evidence on affidavit deposed that the discharge certificate (exhibit-B) is a manufactured, false and forged document created by the defendants. During his cross-examination, the plaintiff admitted his signature thereon but volunteered to say that it was a blank document signed by him. He also stated that Exhibit-B was not a genuine document; it was not in his original letter pad and out of the three cell phone numbers mentioned therein only the last number belonged to him. The plaintiff also crossed examined the defendants. The defendant no.1 admitted that exhibit-B was in the custody of defendant no.2. He denied that exhibit-B was a manufactured document. The defendant no.2 stated the facts as narrated in the written statements about exhibit-B. He denied the suggestion that exhibit-B was a manufactured document and except the signature of the plaintiff, the rest of the contents was filled by him. He also admitted that he did not know who filled exhibit-B and where it was prepared. The defendant no.2 however, volunteered to say that exhibit-B was given to him by the plaintiff in his house at Pakyong. This document too is not clear. The defendants have failed to explain the contents thereof. This court has upheld the findings of the learned District Judge that no loan had been taken by the defendants from the plaintiff in the manner sought to be projected. If it was so, then the discharge certificate (exhibit-B) couldn't have been related to the loan which was not taken. Quite evidently, the discharge certificate (exhibit-B) seems to be a document prepared purportedly in settlement of whatever disputes the plaintiff and the defendants had in connection to their understanding about the civil work which has been suppressed by the plaintiff as well as the defendants. These facts known to the plaintiff as well as the defendants have not been disclosed. The issues are answered accordingly. The plaintiff has failed to prove that the defendants had taken a loan of Rs.30,60,000/- from him.

The four money receipts, although executed by the defendants, did not concern the loan purportedly taken by the defendants from the plaintiff. The defendants have not been able to establish that the loan agreement (exhibit-5) was executed by them under coercion, fraud or undue influence. Although, it is clear that the discharge certificate (exhibit-B) was signed by the plaintiff, the defendants have not been able to clearly prove the contents thereof. Similarly, although it is certain that the signature in the written undertaking (exhibit-A) was of the plaintiff, the defendants have not been able to prove the contents thereof.

**13.** At this juncture, it is important to decide the application filed by the plaintiff on 01.03.2021. The plaintiff urges that it had come to his knowledge that one Sonam Sherpa had applied under the Right to Information Act, 2005 and procured certain information after the impugned judgment which led to the plaintiff filing a First Information Report before the Pakyong Police Station on 01.10.2019. The plaintiff states that these documents, viz., the application made by Sonam Sherpa dated 17.05.2019; the reply dated 17.05.2019 by the Public Information Officer and even the FIR filed by him, strangely; were not within his knowledge and therefore even after exercise of due diligence could not have produced it during the trial. There is not even an attempt to disclose who is Sonam Sherpa and how the plaintiff procured his application and reply. Curiously, the information sought by Sonam Sherpa was about the civil works and the reply was that the work order was not issued from the office of the Central Public Works Department and that the signature on the tender document purportedly of the then Superintendent Engineer did not match. This information makes the case even more curiouser. The relevancy of the documents and whether it is required to pronounce judgment are two vital considerations to such an application. At the threshold there is a bar in taking additional evidence. The exception carved out is on exceptional circumstances and the relief is discretionary. The plaintiff has failed in all counts. The documents sought to be produced at this stage would not help this court to pronounce judgment. The plaintiff has also failed to establish an exceptional case. The case of the plaintiff was that the defendants had taken a loan from him but not returned. The additional documents would not have any relevancy to decide if the loan had in fact been taken and if the defendants were required to return it. The application is rejected.

**14.** It is evident that both the plaintiff as well as the defendants have not stated the entire truth before the court, although they were in the know of it. The reliefs have been sought by the plaintiff alone which cannot be granted due to the manner he has chosen to approach a court of law.

**15.** In the circumstances, it is held that the plaintiff is not entitled to the reliefs prayed for.

**16.** The appeal is dismissed.

**17.** No order as to costs.

**SLR (2021) SIKKIM 694**

(Before Hon'ble the Acting Chief Justice)

**WP (C) No. 28 of 2021**

**Shanti Subba and Others ….. PETITIONERS**

*Versus*

**Jashang Subba ….. RESPONDENT**

**For the Petitioners:** Mr. Zangpo Sherpa, Advocate.

**For the Respondent:** Mr. N. Rai, Senior Advocate with
Mr. Sushant Subba, Advocate.

Date of decision: 14th September 2021

**A. Code of Civil Procedure, 1908 – S. 151 –** Petition under S. 151 of the C.P.C was filed by the petitioners seeking extension of time to file written statement instead of filing it under O. 8 R. 1 – The question was whether petition invoking S. 151 deserves to be disregarded, being inappropriate provision for the purpose of seeking extension of time to file a written statement? – Held: Technicality should not come in the way of meting out even handed justice. Manifest injustice cannot be perpetuated on grounds of technicality. Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. Hence, there is no reason to disregard an application under S. 151 merely for the reason that the appropriate provision was not invoked.

(Paras 8 and 9)

**B. Code of Civil Procedure, 1908 – O.8 R.1 – Timeline for filing a written statement –** The words "shall not be later than ninety days," does not divest the Court of its discretionary powers to accept written statement beyond the time stipulated in the said provision. In fact, it is propounded that the provision of O. 8 R. 1 providing for the upper limit of ninety days to file written statement is directory. However, it must also be borne in mind that although the Court has wide powers to make such order

in relation to a suit as it thinks fit, the order extending time to file the written statement cannot be exercised in a routine manner and frequently to nullify the period fixed by O. 8 R. 1 of the CPC – Time can be extended only in exceptionally difficult cases (*Atcom Technologies Ltd. v. Y.A Chunawala* and *Salem Advocate Bar Association v. Union of India* relied).

(Paras 6 and 9(vi))

**Petition allowed.**

**Chronology of cases cited:**

1. Saleem Bhai and Others v. State of Maharashtra and Others, (2003) 1 SCC 557.
2. SCG Contracts (India) Private Limited v. K.S. Chamankar Infrastructure Private Limited and Others, (2019) 12 SCC 210.
3. Desh Raj v. Balkishan (Dead) Through Proposed Legal Representative Ms. Rohini, (2020) 2 SCC 708.
4. Somar Bhuiya and Others v. Kapil Kumar Gautam and Others, AIR 1974 Patna 289.
5. Smt. Santosh Chopra v. Teja Singh and Another, AIR 1977 Delhi 110.
6. R.K. Roja v. U.S. Rayudu and Another, (2016) 14 SCC 275
7. K. K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275.
8. Rupa Ashok Hurra v. Ashok Hurra and Another, (2002) 4 SCC 388.
9. Atcom Technologies Limited v. Y.A. Chunawala and Company and Others, (2018) 6 SCC 639.
10. Atcom Technologies Limited and Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344.

**JUDGMENT**

***Meenakshi Madan Rai, ACJ***

**1.** The Petitioners are before this Court seeking directions for setting aside the impugned Order, dated 30.03.2021, of the Learned District Judge,

Special Division-II, Sikkim at Gangtok, in Title Suit No.14 of 2018 *(Shri Jashang Subba vs. Smt. Shanti Subba and Others)*, vide which the Learned Trial Court disallowed the Petitioners from filing their Written Statements in the Title Suit.

**2.(i)** The facts relevant for the present purposes are narrated in *seriatim* hereinbelow for clarity.

**(ii)** On 29.09.2018, the Respondent filed a Suit before the Learned Trial Court against the Petitioners for Declaration, Recovery of Possession, Injunction and other Consequential Reliefs, pertaining to a Plot of land situated at Tumlabong, Ranipool, East Sikkim. Summons was received by the Petitioners on 08.10.2018 and appearance through Counsel made before the Learned Court on 26.10.2018, the date previously fixed. The matter was posted for filing of Written Statement on 05.12.2018. On the relevant day i.e. 05.12.2018, instead of filing the Written Statement, the Petitioners filed an Application under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (for short, CPC) seeking rejection of the Plaint. A fortnight later, on 21.12.2018, the Respondent filed his Response to the said Application which came to be heard and rejected by the Learned Trial Court on 11.03.2019.

**(iii)** Pursuant thereto, on 28.03.2019, the Petitioners filed an Application under Section 151 of the CPC seeking leave of the Court to file their Written Statements beyond the period prescribed under Order VIII Rule 1 of the CPC. Objection to this Application, was filed by the Respondent on 24.04.2019. Both the Petition and the Objection were taken on record but not heard on the same day.

**(iv)** On 14.07.2020, the Respondent filed an Application under Order VIII Rule 10 read with Section 151 of the CPC, Response to which was filed by the Petitioners on 10.08.2020. On the same date (10.08.2020), the Petitioners also filed an Application under Order I Rule 9 read with Section 151 of the CPC, Reply to which the Respondent filed on 15.09.2020.

**(v)** On 22.03.2021, the Learned Trial Court heard both, the Application of the Petitioners filed under Section 151 of the CPC and the Application of the Respondent filed under Order VIII Rule 10 read with Section 151 of the CPC. The impugned Order came to be passed on 30.03.2021.

**(vi)** It is relevant to mention that in the interregnum, on the Petitioners' Application under Order VII Rule 11 read with Section 151 of CPC being rejected by the Learned Trial Court vide Order, dated 11.03.2019, the Petitioners were before this Court on 26.04.2019, assailing it. Civil Revision Petition No.01 of 2019 *(Shanti Subba and Others vs. Jashang Subba)* was registered in this Court and vide Judgment pronounced on 26.06.2020, the Revision Petition of the Petitioners was rejected.

**3.(i)** Learned Counsel for the Petitioners while reiterating the facts as reflected hereinabove, advanced the argument that the Learned Trial Court had passed the impugned Order, dated 30.03.2021, arbitrarily, having failed to consider that on 05.12.2018, which was the second date on which the Petitioners appeared before the Court, they had filed their Application under Order VII Rule 11 read with Section 151 of the CPC seeking rejection of the Plaint on the ground of non-disclosure of cause of action. That, the Order, dated 05.12.2018, reflected that the Petitioners were allowed to file their respective Written Statements on the next date fixed i.e. 18.12.2018. However, on 18.12.2018, the Respondent sought time to file Response to the Application of the Petitioners under Order VII Rule 11 read with Section 151 of the CPC, thereafter the matter was fixed for hearing on the Application. That, it was only on 11.03.2019 that the said Application was disposed of and there was no specific Order passed by the Learned Trial Court till then with regard to filing of Written Statement by the Petitioners. Relying on the ratio of ***Saleem Bhai and Others vs. State of Maharashtra and Others***[1], it was canvassed that the Learned Trial Court failed to consider that there was no delay in filing the Written Statement by the Petitioners and that there cannot be a direction to file a Written Statement without deciding the Application under Order VII Rule 11 of CPC. That, in fact, immediately on rejection of the Application under Order VII Rule 11 of CPC on 11.03.2019, the Petitioners on 28.03.2019, filed an Application under Section 151 of CPC seeking leave of the Court to file their respective Written Statements, however this Petition came to be disposed of by the impugned Order only on 30.03.2021.

**(ii)** That, in view of the pendency of the Application under Order VII Rule 11 of CPC read with Section 151 of CPC from 06.12.2018 to 11.03.2019, the limitation for filing of Written Statements by the Petitioners

[1] **(2003) 1 SCC 557**

would begin to run only from 12.03.2019. That, adjournments were granted by the Learned Trial Court on several dates without deciding the Application under Section 151 of the CPC. Besides, the Respondent also jointly sought adjournment with the Petitioners on several dates on grounds as reflected in the Order Sheets of the Learned Trial Court. Despite this circumstance, the Respondent with *mala fide* intention, filed an Application under Order VIII Rule 10 read with Section 151 of the CPC on 14.07.2020 to deprive the Petitioners from filing their Written Statements. That, the Learned Trial Court has erroneously based its finding on the ratiocination of ***SCG Contracts (India) Private Limited vs. K.S. Chamankar Infrastructure Private Limited and Others***[2] disregarding the fact that the said Judgment was passed in an issue pertaining specifically to a Commercial Dispute while the instant matter is a Title Suit. That, the Hon'ble Apex Court in its Judgment, dated 20.01.2020 in ***Desh Raj vs. Balkishan (Dead) Through Proposed Legal Representative Ms. Rohini***[3] has clarified the applicability of the Judgment of ***SCG Contracts (India) Private Limited*** *supra*. That, the provisions of Order VIII Rule 1 of CPC is not Mandatory but Directory in nature and the Rules of procedure are the handmaids of justice. Hence, appropriate Orders be issued setting aside the impugned Order and allowing the Petitioners to file their respective Written Statements in the Title Suit.

**4.** Resisting the contentions of Learned Counsel for the Petitioners, Learned Senior Counsel for the Respondent submitted that firstly, the act of the Petitioners in invoking Section 151 of the CPC seeking extension of time to file the Written Statement is erroneous. Relying on the Judgments of the Hon'ble Supreme Court in ***Somar Bhuiya and Others vs. Kapil Kumar Gautam and Others***[4] and ***Smt. Santosh Chopra vs. Teja Singh and Another***[5], it was contended that it is settled law that where there is a specific provision of law, the provision of Section 151 CPC cannot be invoked. That, the Petitioners ought to have approached the Learned Trial Court under the correct provisions of law seeking extension of time to file their Written Statements, hence the Petition under Section 151 of the CPC deserves no consideration. That, although the Petitioners placed reliance on ***R.K. Roja vs. U.S. Rayudu and Another***[6] wherein the Hon'ble Supreme Court had referred to the case of ***Saleem Bhai and Others*** *supra*, the

[2] **(2019) 12 SCC 210**
[3] **(2020) 2 SCC 708**
[4] **AIR 1974 Patna 289**
[5] **AIR 1977 Delhi 110**
[6] **(2016) 14 SCC 275**

Hon'ble Court has unequivocally stated therein that the liberty to file an Application for rejection under Order VII Rule 11 CPC cannot be a ruse for retrieving lost opportunity to file Written Statement. That, the Hon'ble Supreme Court in ***SCG Contracts (India) Private Limited*** *supra* has, with lucidity, held that the Written Statement of the Defendant must be taken off the record if the time limit, as statutorily prescribed, is not followed. Accordingly, the Petition deserves a dismissal.

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

**6.** The questions that fall for consideration before this Court are:

(1) Whether the Petition invoking Section 151 of the Code of Civil Procedure, 1908, deserves to be disregarded by the Court, being the inappropriate provision for the purpose of seeking extension of time to file Written Statement?

(2) Whether the Proviso to Order VIII Rule 1 of the Code of Civil Procedure, 1908, would apply in the facts and circumstances of the present case?

**7.** The narrative of the events before the Learned Trial Court have already been reflected hereinabove. While addressing the first question formulated above, in ***K. K. Velusamy vs. N. Palanisamy***[7], the Hon'ble Supreme Court relying on a catena of decisions pertaining to the scope of Section 151 of the CPC held that the submission of the Respondent therein that Section 151 of the CPC could not be used for reopening evidence or for recalling witnesses was unacceptable. The Court observed that Section 151 of the CPC is not a substantive provision which creates or confers any power or jurisdiction on Courts, it merely recognizes the discretionary power inherent in every Court as a necessary corollary for rendering justice in accordance with law, to do what is right' and undo what is wrong.' In other words, to do all things necessary to secure the ends of justice and

[7] **(2011) 11 SCC 275**

prevent abuse of its provisions. Nevertheless, the powers under Section 151 or for that matter Order XVIII Rule 17 of the Code are not intended to be used routinely at the drop of a hat.

**8.** In ***Rupa Ashok Hurra vs. Ashok Hurra and Another***[8] it was opined *inter alia* as hereunder;

> **69**. True, due regard shall have to be had as regards opinion of the Court in Ranga Swamy [(1990) 1 SCC 288] but the situation presently centres around that in the event of there being any manifest injustice would the doctrine of *ex debito justitiae* be said to be having a role to play in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. The second alternative seems to be in consonance with time and the present phase of socioeconomic conditions of the society. Manifest injustice is curable in nature rather than incurable and this Court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all. **There is no manner of doubt that procedural law/procedural justice cannot overreach the concept of justice and in the event an order stands out to create manifest injustice, would the same be allowed to remain in silentio so as to affect the parties perpetually or the concept of justice ought to activate the Court to find a way out to resolve the erroneous approach to the problem?** .....In the event there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, **technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of *ex debito justitiae***. The oft-quoted statement of law of Lord Hewart, C.J. in

[8] **(2002) 4 SCC 388**

> *R. v. Sussex Justices, ex p McCarthy [(1924) 1 KB 256 : 1923 All ER Rep 233 : 93 LJKB 129]* that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seen to be done, had this doctrine underlined and administered therein.
>
> **(Emphasis supplied)**

The pronouncements extracted hereinabove lend succour to the\ expectation that technicality should not come in the way of meting out even handed justice. In the instant matter, the Petitioners have filed a petition under Section 151 of the CPC instead of filing it under Order VIII Rule 1 and the Proviso thereof, however, manifest injustice cannot be perpetuated on grounds of technicality.

Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the process. Hence, there is no reason to disregard the Application under Section 151 of the CPC merely for the reason that the appropriate provision was not invoked.

**9.(i)** While dealing with the second question *supra*, we are concerned with the provisions of Order VIII Rule 1 of the CPC, which are extracted hereinbelow for easy comprehension of the matter;

> ORDER VIII
>
> WRITTEN STATEMENT, SET-OFF AND COUNTER-CLAIM
>
> **1. Written statement**.—The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:
>
> *Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

From a bare reading of the provision, it is evident that the Defendant is required to file a Written Statement of his defence within thirty days of service of Summons on him. Nevertheless, failure on the part of the Defendant does not debar him from filing a Written Statement at a later date, subject to the Court allowing him to do so for reasons which the Court is required to record. This is evident from the Proviso to Order VIII Rule 1 of the CPC. That having been cleared, it is essential now to consider whether the Petitioners have made out a case for exercise of the discretionary powers of the Court in their favour.

***(a)*** On 29.09.2018, Title Suit No.14 of 2018 was registered before the Learned Trial Court. The Suit was accompanied by an Application under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC, which was ordered to be listed for hearing on 01.10.2018.

***(b)*** On 01.10.2018, the Petitioners were ordered to maintain *Status Quo* with regard to the disputed property and Notice issued to the Petitioners returnable by 26.10.2018.

***(c)*** On 26.10.2018, the Petitioners entered appearance through their Counsel and the Learned Trial Court recorded *inter alia* as follows,

> *"……*
> *Now to come up for filing of W.S, if any.*
> *To: 05.12.2018.*
> *……"*

***(d)*** On 05.12.2018, the Petitioners were before the Court with an Application under Order VII Rule 11 read with Section 151 of the CPC instead of a Written Statement. The Respondent sought time to file Reply to this Petition which was permitted and the next date fixed on 18.12.2018. The Order of the Court, dated 05.12.2018, *inter alia* reads as follows;

> *"……*
> *Ld. Counsel for the defendants prays for time to file W.S.*

*Ld. Counsel for the defendants also files applications under Order VII Rule 11 r/w section 151 of C.P.C.*

*Ld. Counsel for the plaintiff prays for time to file reply to the same.*

*Considered, time allowed.*

*To: 18.12.2018.*

*For: filing of reply."*

*….…..…..…..…"*

Pausing here for a moment, it may pertinently be noticed that the Court fixed the next date for filing of reply to the Application of the Petitioners under Order VII Rule 11 read with Section 151 of the CPC but made no mention of the fate of the Written Statement. It was for the Court at this juncture to have spelt out whether the Written Statement was to be filed or whether the Petitioners were to await disposal of the aforementioned Application. The Order of the Court is silent on these aspects.

***(e)*** On 18.12.2018, the Respondent sought further time to file the Reply. No reference is made to the filing of Written Statement by the Petitioners, either by the Petitioners themselves nor was it brought to the notice of the Court by either of the parties. The Court itself too neglected to mention the non-filing of the Written Statement in its Order. The next date was fixed on 21.12.2018.

***(f)*** On 21.12.2018, Reply by the Respondent to the Application of the Petitioners under Order VII Rule 11 read with Section 151 of the CPC came to be filed. 06.02.2019 was fixed for hearing on this Petition. No reference was made by the Petitioners about their Written Statements neither did the Court raise a question on this count.

***(g)*** On 06.02.2019, adjournment was sought by the Respondent on grounds that the conducting Senior Counsel was out of

station. The Court considered and granted time till 25.02.2019 for hearing of the Application under Order VII Rule 11 read with Section 151 of the CPC and still failed to consider that Written Statement had not yet been filed.

***(h)*** On 25.02.2019, the Petition under Order VII Rule 11 read with Section 151 of the CPC finally came to be heard and the matter was listed for orders on 11.03.2019.

***(i)*** On 11.03.2019, the Order was pronounced rejecting the Petition filed by the Petitioners. It is only on this date that the Court broached the subject of Written Statement and recorded *inter alia* as follows;

> *"11.03.2019 ……..*
> *Date is fixed for Order.*
> *Order pronounced vide separate sheets of papers.*
> *No Written statement on behalf of the defendants has been filed.*
> *Now to come up for examination of parties under Order X of C.P.C.*
> *……"*

The next date was fixed on 28.03.2019.

***(j)*** On 28.03.2019, the Counsel for the Petitioners filed an Application under Section 151 of the CPC seeking extension of time to file their Written Statements. The Respondent sought time to file Reply to this Petition. Without considering the Petition filed on that day and after permitting the Respondent to file Response to it, strangely enough before deciding the Application, the Court proceeded to examine the Respondent under Order X of the CPC on the same day.

***(k)*** On 24.04.2019, the Respondent filed his Reply and the Court fixed the date for hearing on 03.05.2019.

***(l)*** On 03.05.2019, the Learned Presiding Officer was out of station to attend Training for Judicial Officers and the date was deferred to 23.05.2019.

***(m)*** On 23.05.2019, the Case File was transferred to the Court of the Learned District Judge, Special Division–II, Sikkim by an Order of this Court. On the same date, the Learned Court of Special Division-II posted it to 24.05.2019 for further Orders.

***(n)*** On 24.05.2019, the Learned Trial Court, recorded *inter alia* as follows;

> *"……*
>
> *At the outset, Ld. Counsel for the defendants submit that they have filed a Revision Petition before the Hon'ble High Court of Sikkim against the Order passed by the Ld. District Judge, East Sikkim at Gangtok vide Order dated: 11.03.2019…….……*
>
> *…….……*
>
> *In view of the aforesaid submissions and the Order dated:23.05.2019 of the Ld. District Judge, East at Gangtok, let the matter be fixed on 06.06.2019."*

***(o)*** From 06.06.2019, the matter was adjourned on grounds that the Revision Petition was pending before the High Court from where it was forwarded for Mediation. In fact, the Orders reveal that the parties jointly sought time from 26.09.2019 on grounds that the matter was fixed for Mediation. On 05.03.2020, the Learned Trial Court was informed that the matter could not be settled by Mediation and was fixed for hearing before the High Court. The Learned Trial Court thus fixed 31.03.2020 for further orders. Meanwhile, the country was plagued by the Covid-19 Pandemic and Nation wide lockdown was declared.

***(p)*** The Judgment of this High Court rejecting the Revision Petition was pronounced on 26.06.2020. On 14.07.2020, the parties appeared before the Learned Trial Court and placed the Judgment of this Court before it. On the same date, the Respondent also filed an Application under Order VIII Rule 10 read with Section 151 of the CPC and the matter was listed on 31.07.2020 for further orders. It is apposite to remark here that till then on several dates the parties had jointly sought adjournment and the Respondent did not object to the non-filing of the Written Statement by the Petitioners for almost two years. Due to the Pandemic still ravaging the country, the matter was not taken up and came to be heard finally only on 22.03.2021 and the impugned Order pronounced on 30.03.2021.

**(ii)** From the Orders reflected hereinabove, it is evident that the Court fixed 05.12.2018 for filing of Written Statements by the Petitioners but the said Order did not reflect as to whether the Petitioners had been granted further time or whether further time to file the Written Statements was declined, indicating that the Court was also remiss in its duty, as already observed *supra*. Thereafter the Orders reflect that no reference was made to the filing of the Written Statement and on 11.03.2019, the Court came to the sudden realization that no Written Statement was filed on behalf of the Petitioners but proceeded to fix the matter for examination of the parties under Order X of the CPC, without recording its disinclination to permit filing of the Written Statements. Although the Application under Section 151 of the CPC was filed by Learned Counsel for the Petitioners on 28.03.2019 seeking extension of time to file their Written Statements, the Learned Court while allowing the Petitioners to file Response, kept the matter pending for several months and instead of considering the Petition and pronouncing its decision, examined the Respondent under Order X of the CPC on that date. The Petition was disposed of a year later, on 30.03.2021 vide the impugned Order. In ***Saleem Bhai and Others*** *supra* relied on by Learned Counsel for the Petitioners, the short common question that arose for consideration in the Appeals, was whether an Application under Order VII Rule 11 of the CPC ought to be decided on the allegations in the Plaint and filing of Written Statement by the contesting Defendant is irrelevant and unnecessary. Answering this question, the Hon'ble Supreme Court, after duly considering the matter, at Paragraph 9, observed thus;

> **9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (*a*) and (*d*) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from nonexercising of the jurisdiction vested in the court as well as procedural irregularity**. …...
>
> **(Emphasis supplied)**

The matter was thereafter remitted back to the Learned Trial Court for deciding the Application under Order VII Rule 11 of the CPC on the basis of the averments in the Plaint, after affording an opportunity of being heard to the parties in accordance with law. This ratio therefore observes that an Application under Order VII Rule 11 of the CPC ought to be disposed of before an Order for filing of Written Statement is made for the reasons mentioned therein.

**(iii)** It may relevantly be noticed that in the case of ***R.K. Roja*** *supra,* as correctly pointed out by Learned Senior Counsel for the Respondent, the Hon'ble Supreme Court, while making a reference to the case of ***Saleem Bhai and Others*** *supra,* as extracted hereinabove, had added the observation in its Judgment, *inter alia,* as follows;

> *"**6**. ……..…..…..However, we may hasten to add that the liberty to file an application for*

> *rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement."*

It is, however, worthwhile noticing that although the Hon'ble Court, after hearing the Learned Counsel appearing for the Appellant on the Application under Order VII Rule 11 of the CPC, was satisfied that the Application did not come within the purview of any of the situations under Order VII Rules 11*(a)* to *(f)* of the CPC, concluded that nevertheless in the peculiar facts of the case, the Appellant be given an opportunity to file the Written Statement within two weeks from the date of disposal of the Appeal.

**(iv)** Learned Senior Counsel for the Respondent had buttressed his submissions by relying on ***SCG Contracts (India) Private Limited*** *supra.* On this aspect, we may relevantly refer to the ratio of the Hon'ble Supreme Court in ***Desh Raj vs. Balkishan (Dead) Through Proposed Legal Representative Ms. Rohini*** *(supra)*, wherein it clarified that the Commercial Courts Act, 2015 through Section 16, amended the CPC in its application to Commercial Disputes. Section 16 of the Commercial Courts Act, 2015, provides as under;

> **16.** ***Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes***.—(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a specified value, stand amended in the manner as specified in the Schedule.
>
> (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a specified value.
>
> (3) Where any provision of any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908, by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as

> amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.

Accordingly, Commercial Disputes defined under Section 2*(c)* of the Commercial Courts Act, 2015, are governed by the CPC as amended by Section 16 of the said Act, while Non-Commercial Disputes fall within the ambit of the original provisions of the CPC. It was also observed that the ratio in ***SCG Contracts (India) Private Limited*** *supra,* concerning the mandatory nature of the timeline prescribed for filing of the Written Statement and the lack of discretion of the Courts to condone any delay, is applicable only to Commercial Disputes as the Judgment was undoubtedly rendered in the context of a Commercial Dispute. The ratio in ***SCG Contracts (India) Private Limited*** *supra* is not applicable thereby to the case at hand.

**(v)** In ***Atcom Technologies Limited vs. Y.A. Chunawala and Company and Others***[9], the Hon'ble Supreme Court while examining the provisions of Order VIII Rule 1 of the CPC and the extension of period of filing of Written Statement from thirty days up to ninety days, observed that as per the said provisions, the Defendant is obligated to present a Written Statement of his defence within thirty days from the date of service of summons. That the Proviso thereto enabled the Court to extend the period up to ninety days from the date of service of Summons for sufficient reasons. It was held *inter alia* as follows;

> **20**. This provision has come up for interpretation before this Court in number of cases. No doubt, the words shall not be later than ninety days do not take away the power of the court to accept written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from *Salem Advocate Bar Assn. (2)* v. *Union of India* [*Salem Advocate Bar Assn. (2)* v. *Union of India*, (2005) 6 SCC 344] : (SCC p. 364, para 21)

[9] **(2018) 6 SCC 639**

> *21.* ... There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to make such order in relation to the suit as it thinks fit. **Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory**. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.
>
> **21**. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that writ of summons was not served till 2009?
>
> **(Emphasis supplied)**

**(vi)** On the anvil of the ratiocinations of ***Atcom Technologies Limited*** and ***Salem Advocate Bar Association vs. Union of India***[10] *(supra)*, it emerges that the words shall not be later than ninety days, does not divest the Court of its discretionary powers to accept Written Statement beyond the time stipulated in the said provision. In fact, it is propounded that the provision of Order VIII Rule 1 providing for the upper limit of ninety days to file Written Statement is Directory. However, it must also be borne in mind that although the Court has wide powers to make such Order in

[10] **(2005) 6 SCC 344**

relation to the Suit as it thinks fit, the Order extending time to file the Written Statement cannot be exercised in a routine manner and frequently to nullify the period fixed by Order VIII Rule 1 of the CPC. Both the ratiocinations *supra* have observed that time can be extended only in exceptionally difficult cases.

**(vii)** Based on this principle, in view of what transpired before the Learned Trial Court, as has been reflected from the Orders extracted *supra*, in my considered opinion, it is apparent that the Petitioners were awaiting the disposal of their Petition filed under Order VII Rule 11 read with Section 151 of the CPC. They were evidently of the opinion that pursuant thereto only they were either to file Written Statements or would be debarred from filing it. After rejection of the Petition under Order VII Rule 11 read with Section 151 of the CPC, they have filed an Application under Section 151 of the CPC, the hearing of which the Learned Court procrastinated for approximately two years sans reasons, which is thus unjustified.

**(viii)** The facts placed before this Court sufficiently provide for exercise of discretion in favour of the Petitioners in terms of the Proviso to Order VIII Rule 1 of the CPC. The Petitioners cannot be penalized for the Learned Trial Court also being unmindful of its role, as already discussed hereinabove. The discussions that have emanated *supra,* soundly answers the second question formulated.

**10.** Consequently, the impugned Order, dated 30.03.2021, deserves to be and is hereby set aside.

**11.** The Petitioners are afforded the opportunity of filing their respective Written Statements in the above-mentioned Title Suit on or before 23.09.2021.

**12.** Writ Petition disposed of accordingly.

**13.** Pending applications, if any, also stand disposed of.

**14.** No order as to costs.

**SLR (2021) SIKKIM 712**

(Before Hon'ble the Acting Chief Justice)

**WP (C) No. 34 of 2018**

**Garja Man Subba and Others ….. PETITIONERS**

*Versus*

**State of Sikkim and Others ….. RESPONDENTS**

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

**For the Respondents:** Dr. (Ms.) Doma T. Bhutia, Additional Advocate General with Ms. Tamanna Chhetri, Advocate (Standing Counsel), Energy and Power Department.

Date of decision: 23rd September 2021

**A. Constitution of India – Article 14 and 16 – Equality and equal treatment in matters of public employment –** Petitioners were initially employed on muster roll/work charge basis under the State Government and after having worked in various capacities, they were regularized from 30.06.2016, in terms of notification no. 264/GEN/DOP, dated 12.02.2014, which provided that regularization was to be given to the employees who had completed fifteen years or more of service as on 31.03.2013 – Inversely, the services of many temporary employees similarly situated and in some cases, junior to the petitioners were regularized in March 2014 and September 2014 – The petitioners claimed salary, service benefits and arrears of salary from September 2014 – Held: As per the guidelines, the criteria for regularization was to be submission of the relevant documents – Despite claims of their documents being on record and also subsequent submission of documents, the petitioners have not filed such documents for the perusal of the Court to establish that either the documents were in the File of the petitioners or that they filed it along with the other employees who thus availed of regularization

of services from September, 2014. Petitioners cannot take advantage of their own error and lackadaisical attitude, as administrative discipline is required to be adhered to – Petitioners have also failed to fortify their claim of equal pay for equal work by any documentary evidence. There are no appointment orders or office orders to indicate the equality of designations or the tasks/ works performed by them being similar or equivalent to those employees whose services were regularized in September, 2014 and who they seek to be placed at par with.

(Paras 2, 7, 9, 10 and 11)

**Petition dismissed.**

**Chronology of cases cited:**

1. State of Tamil Nadu through Secretary to Government, Commercial Taxes and Registration Department, Secretariat and Another v. A. Singamuthu, (2017) 4 SCC 113.
2. State of Rajasthan and Others v. Daya Lal and Others,(2011) 2 SCC 429.
3. Vijay Kumar Kaul and Others v. Union of India and Others, (2012) 7 SCC 610.
4. U.P. State Sugar Corporation Ltd. and Others v. Kamal Swaroop Tandon, (2008) 2 SCC 41.
5. Surinder Singh and Another v. Engineer-in-Chief, C.P.W.D. and Others, (1986) 1 SCC 639.
6. Bhagwan Dass and Others v. State of Haryana and Others, (1987) 4 SCC 634.
7. Secretary, Minor Irrigation Department and Rds. v. Narendra Kumar Tripathi, (2015) 11 SCC 80.
8. Dhirendra Chamoli and Another v. State of U.P, (1986) 1 SCC 637.

**JUDGMENT**

***Meenakshi Madan Rai, ACJ***

**1.** The Petitioners are aggrieved by the alleged arbitrary State action of hand picking Employees for regularization of Services and granting them

Salaries higher than the Petitioners, despite the Petitioners having performed similar works as the aforementioned Employees, thereby violating the doctrine of Equal Pay for Equal Work.

**2.(i)** The Petitioners' case is that the Services of select Employees similarly situated with them were illegally and selectively regularized in the months of March, 2014 and September, 2014, whereas the Services of the Petitioners were regularized only in June, 2016, along with that of Employees junior to them. That, they have been receiving their Salaries in the new Pay Scale after their regularization from June, 2016 but not the Arrears of Salary due to them since September, 2014, which Employees whose Services were regularized in September, 2014 have been granted.

**(ii)** To comprehend the matter in its entirety, it is essential to retrace the averments in the Writ Petition. The Petitioners' case is that they were initially employed by the Government of Sikkim on Muster Roll/Work Charge Basis and after having worked in various capacities, acquired sufficient experience in their respective Posts. They had a legitimate expectation that the State-Respondents would regularize their Services in due course of time. This was in view of the Notification No.264/GEN/DOP, dated 12.02.2014, (Annexure-P2), according to which regularization was to be given to Employees who had completed fifteen years or more of Service on 31.03.2013. However, this was not to be, although the Services of many Temporary Employees similarly situated and in some cases, junior to the Petitioners, were arbitrarily regularized in the months of March, 2014 and September, 2014 vide four different Office Orders *viz.* **(i)** Office Order bearing No.2215/Adm, dated 01.03.2014 (Annexure-P4); **(ii)** Office Order bearing No.96/Adm, dated 20.09.2014 (Annexure-P5); **(iii)** Office Order bearing No.200/Adm, dated 20.09.2014 (Annexure-P6); and **(iv)** Office Order bearing No.1009/Adm, dated 20.09.2014 (Annexure-P7). Being thus aggrieved, the Petitioners were before this High Court in W.P.(C) No.05 of 2016 *(Purna Lall Subba and Others vs. State of Sikkim and Others)*. During the pendency of the said Writ Petition, the State-Respondents regularized their Services from 30.06.2016.

**3.(i)** Learned Senior Counsel for the Petitioners advanced the contention that this High Court, vide its Order, dated 01.07.2016, disposed of the said Writ Petition with liberty to the Petitioners to take up the matter for their Incidental Reliefs. That, the names of the Petitioners although included in the

List of Employees whose Services were to be regularized as per the Notification, dated 12.02.2014 *supra*, were left out without assigning any reason.

**(ii)** It was next urged that eleven digit Contributory Provident Fund (for short, "CPF") numbers meant only for regular Government Employees, were issued to the Petitioners from the month of September, 2014, itself when Services of the other Employees were regularized thus recognizing the rights of the Petitioners also to obtain the same Salary as that of the regularized Employees. Hence, the Petitioners are entitled to Arrears of Salary from September, 2014 to 30.06.2016. That, although their period of Probation after regularization in June, 2016 was completed in June, 2017, they were not paid the said Arrears. That, the State action is in violation of the provisions of Articles 14, 16 and 21 of the Constitution of India.

**(iii)** Learned Senior Counsel further urged that Prayer "A." of the Writ Petition *viz., "A writ or order or direction or declaration that the services of the Petitioners be treated under regular establishment with retrospective effect from September, 2014, instead of since 30.06.2016."* is not being pressed by the Petitioners. That, the reliefs being sought for by the Petitioners and which may be granted by this Court, are extracted hereinbelow;

> *"**B.** In the alternative, to pay to the petitioners arrears of salary as well as service benefits w.e.f. September 2014 like those who have been regularised in the month of September 2014;*
>
> ***C.** Difference of salary from September 2014 till the year 2016 to the petitioners;*
>
> ***D.** Cost of the proceedings;*
>
> ***E.** Any other writ or order or direction or declaration as this Hon'ble Court may deem fit and proper."*

**4.** The State-Respondents No.1, 2 and 3 filed a Joint Counter-Affidavit denying and disputing the claims of the Petitioners. Learned Additional

Advocate General, in her submissions, contended that during the month of March, 2014, vide Notification No.264/GEN/DOP, dated 12.02.2014, (document of the Petitioners, Annexure-P2) the Government of Sikkim, sanctioned and created 4,002 (four thousand and two) Posts in various Government Departments exclusively for appointment of Temporary Employees belonging to Groups "C" and "D" category, who had completed Service of fifteen years and more as on 31.01.2013. Pursuant thereto, Memoranda of the Petitioners and all others who were entitled to regularization, were issued. On 01.10.2014, vide Office Order bearing No.1060/Adm (Annexure R-2), all Memoranda of Appointments and Office Orders issued prior to the Code of Conduct stood cancelled. The said Office Order also clarified that all persons whose Services were regularized vide Notification, dated 12.02.2014 *(supra)* would now be issued fresh Memorandum and Office Order. The Petitioners were consequently requested to resubmit documents as per the revised Guidelines issued by the Department of Personnel, Administrative Reforms, Training and Public Grievances, vide Circular No.1547/GEN/DOP, dated 20.08.2014. That, the Petitioners, to their detriment, failed to submit the required documents within the stipulated period and hence their Personal Files were not forwarded in the month of September, 2014 along with the other Employees and their Services consequently not regularized in the year 2014. That, this action of the State was challenged by the Petitioners in the previous Writ Petition No.05 of 2016 and during the pendency of the matter, the Department of Energy and Power, Government of Sikkim, regularized the Services of 257 (two hundred and fifty seven) Employees of the Department, with effect from 30.06.2016, which included the Petitioners in the said Writ Petition *supra*. The Petitioners, having obtained regularization of their Services from 30.06.2016, sought to withdraw the Writ Petition which was accordingly permitted, as reflected in the Order of this Court, dated 01.07.2016. Now, the Petitioners have again raised similar issues praying for regularization of their Services with retrospective effect from 2014 instead of 2016 and in the alternative, for Arrears of Salary. The delayed regularization arose on account of non-action by the Petitioners, hence no allegation of arbitrary action can be foisted on the State-Respondents qua the Petitioners. That, the CPF numbers were allotted to the Petitioners after receiving their respective Memoranda and Office Orders in the month of March, 2014, which were cancelled due to non-submission of genuine and proper documents. Moreover, the Petitioners have not been directed by the State-

Respondents to obtain their CPF numbers without receiving their Office Orders. That, neither can their case be compared to that of the Employees whose Services were regularized in the month of September, 2014, nor can they claim Salaries of Regular Employees from September, 2014, when their Services were regularized only in 2016 and the Petition also being barred by *res judicata* deserves a dismissal. In support of her contentions, Learned Additional Advocate General sought to garner strength from the ratio in ***State of Tamil Nadu through Secretary to Government, Commercial Taxes and Registration Department, Secretariat and Another vs. A. Singamuthu[1]***, ***State of Rajasthan and Others vs. Daya Lal and Others[2]***, ***Vijay Kumar Kaul and Others vs. Union of India and Others3*** and ***U.P. State Sugar Corporation Ltd. and Others vs. Kamal Swaroop Tandon[4]***.

**5.** In rebuttal, Learned Senior Counsel for the Petitioners submitted that consequent to the Circular, dated 20.08.2014 *(supra)*, notifying that fresh Memorandum would be issued, another Addendum Circular bearing No.1567-69/GEN/DOP, dated 21.08.2014, was issued by the Department of Personnel, explaining the meaning of Citizenship Certificate. That, the allegations of non-submission of documents is untrue. That, when the Petitioners' Services were regularized in February, 2014, before the afore-stated cancellation, the authorities were satisfied that the Petitioners had submitted their relevant documents, such as Sikkim Subject Certificate/ Certificate of Identification/Indian Citizenship Certificate, which were already in their Personal Files and hence the Memoranda had been issued to them in March, 2014. That, the Orders of regularization were cancelled vide Office Order, dated 01.04.2014, on the ground that the same were issued before enforcement of the Code of Conduct. That, after cancellation of the Appointment Memoranda, the State-Respondents did not indicate that fresh Memorandum and Office Order of regularization of Service would be issued only upon submission of Sikkim Subject Certificate or Certificate of Identification or Indian Citizenship Certificate. That, for this reason the Petitioners cannot be blamed for alleged non-production of relevant documents. That, it is wrong to state that the Petitioners had accepted regularization Order issued by the State-Respondents which, in fact, is not

[1] **(2017) 4 SCC 113**
[2] **(2011) 2 SCC 429**
[3] **(2012) 7 SCC 610**
[4] **(2008) 2 SCC 41**

reflected in the Order of this High Court which had granted liberty to the Petitioners to take up the matters afresh for their Incidental Reliefs, if so advised, hence this Petition. To buttress his arguments, Learned Senior Counsel placed reliance on ***Surinder Singh and Another vs. Engineer-in-Chief, C.P.W.D. and Others***[5], ***Bhagwan Dass and Others vs. State of Haryana and Others***[6] and ***Secretary, Minor Irrigation Department and Rds. vs. Narendra Kumar Tripathi***[7].

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

**7.** The crux of the case which requires determination by this Court is whether the Petitioners, who allegedly performed similar duties as Employees whose Services were regularized in September 2014, are entitled to Salary, Service Benefits and Arrears of Salary from September 2014, when the Petitioners' Services were regularized only from 30.06.2016.

**8.(i)** It needs no reiteration that the Constitution enshrines equality and equal treatment in matters of Public Employment as guaranteed under Articles 14 and 16 of the Constitution. Under the umbrella of Article 16, similarly situated persons are to be treated equally and afforded equal opportunities in matters of Employment. The provision, however, does not bar a reasonable classification by the State for selection of Employees, although I hasten to clarify that such classification must not produce artificial inequalities. The classification must be founded on a reasonable basis and bear nexus to the object and purpose sought to be achieved to pass the scrutiny of Articles 14 and 16. On the bedrock of these principles, it is necessary to examine whether the Petitioners have been able to make out a case of Equal Pay for Equal Work.

**(ii)** That having been said, in the first instance, it is imperative to refer to the Order of this Court, dated 01.07.2016, in W.P.(C) No.05 of 2016. The Order is extracted hereinbelow for easy reference;

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[5] **(1986) 1 SCC 639**
[6] **(1987) 4 SCC 634**
[7] **(2015) 11 SCC 80**

> "……
>
> The Petitioners, stated to be working under Muster Roll/Work Charge establishment, have come up with the instant petition, seeking for a direction of regularization of their services with retrospective effect and further grant of consequential benefits, thereon. The petitioners have also sought for other incidental reliefs of fixation of the date of regularization and also seniority, accordingly.
>
> The Learned Additional Advocate General, appearing for the Respondents, would submit that the services of all the Petitioners have been regularized.
>
> In such view of the matter, no adjudication is required at this stage, reserving liberty to the petitioners to take up the matter a fresh *(sic)* for their incidental reliefs, if so advised.
>
> For the reasons above-stated, no further adjudication is required at this stage and as such, the petition has become infructuous and is disposed of accordingly.
>
> ……."

The Order *supra* reflects that the Learned Advocate General had submitted that the Services of all the Petitioners had been regularized and the Petition being infructuous thereafter was disposed of with liberty to the Petitioners to approach the Court for fixation of Incidental Reliefs.

**(iii)** In the ratio of ***Dhirendra Chamoli and Another vs. State of U.P.***[8], the Hon'ble Supreme Court was considering the case of Equal Pay for Equal Work. The Writ Petitions were initiated on the basis of two Letters addressed by Employees of the Nehru Yuvak Kendra, Dehradun. The Complaint made therein was that a number of persons were engaged by the Nehru Yuvak Kendra as Casual Labourers on Daily Wage basis and though they were doing the same work as performed by Class IV Employees appointed on Regular basis, they were not being given the same

[8] **(1986) 1 SCC 637**

Salary and Allowances paid to the Class IV Employees. The Hon'ble Court, in consideration of the facts placed before it, allowed the Writ Petitions and directed the Central Government to pay the same Salary and extend the same Conditions of Service as were being received by the Class IV Employees, to those Employees who were concededly performing the same duties as the Class IV Employees.

**(iv)** In ***Surinder Singh and Another*** *(supra)* relied on by Learned Senior Counsel for the Petitioners, the Petitioners therein were employed by the Central Public Works Department on a Daily Wage Basis and had been working for several years and they demanded that they should be paid the same Wages as permanent Employees employed to do identical work. The Hon'ble Court made reference to the decision of ***Dhirendra Chamoli and Another*** *(supra)* and allowed the reliefs sought by the Petitioners.

**(v)** In the case of ***Bhagwan Dass and Others*** *(supra)*, the Petitioners were appointed as Supervisors by a competent Selection Committee constituted by the Education Department of Haryana from time to time since 02.10.1978. Their grievance was that they had been given a deliberate break of one day after a lapse of every six months and thus treated as Temporary Government Servants, notwithstanding the fact that they had been continuously working ever since the dates of their respective appointment, subject to the aforesaid break of one day at intervals of six months instead of absorbing them as Regular Employees in Regular Pay Scales. The second grievance was that although the Petitioners worked as Supervisors in the Education Department and performed the same works as done by their counterparts, the Respondents absorbed in regular Government Service also as Supervisors, they were paid less. The Hon'ble Supreme Court, while allowing the Petition, concluded *inter alia* that;

> "**14**. ……the petitioners are entitled to be paid on the **same basis of same pay scale** as per which respondents 2 to 6 who are discharging similar duties as Supervisors just like the petitioners, are being paid."
>
> **[Emphasis supplied]**

**9.** The facts in this case can be distinguished from those of ***Dhirendra Chamoli and Another***, ***Surinder Singh and Another*** and ***Bhagwan***

***Dass and Others*** *(supra)* relied on by the Petitioners. The Petitioners therein had worked with other Employees similarly situated and continued to do so, at no stage of their Employment were they afforded the opportunity as extended to the Petitioners herein, who after having filed the Writ Petition (C) No.05 of 2016, their Services were regularized and after having accepted regularization from September, 2016 and working for a whole year thereafter, they had a sudden disgruntlement about their Salaries and Benefits. In the instant matter, it is relevant to point out that vide Notification No.264/GEN/DOP, dated 12.02.2014, 4,002 (four thousand and two) Posts were created in various Government Departments for the exclusive purpose of appointing Temporarym Employees belonging to Groups "C" and "D" category, who had completed fifteen years and more of Temporary Service on 31.01.2013. Pursuant thereto, admittedly, Memoranda of Appointment were issued to the Petitioners and others who were entitled for regularization of their Services. The Appointments were to be effective from 01.04.2014 but on 20.08.2014, a Circular bearing No.1547/GEN/DOP was issued by the Department of Personnel, Administrative Reforms, Training and Public Grievances wherein it was informed that a Task Force comprising of Officers of the rank of Additional Secretary, Secretary and Special Secretary was constituted. The Task Force was entrusted with the duty of verification of the details of Temporary Employees for which Guidelines were provided. The Guidelines therein were *inter alia* as under;

> "**1. Sikkimese Origin of the employee**
>
> (a) The Male employee should be in possession of Sikkim Subject Certificate or Certificate of Identification or Indian Citizenship Certificate in his/her name.
>
> (b) In case of a married Female employee, both she and her husband should be in possession of Sikkim Subject Certificate or Certificate of Identification or Indian Citizenship Certificate.
>
> (c) In case of an unmarried Female employee, Unmarried Certificate should also be produced in addition to Sikkim Subject Certificate or Certificate of Identification or Indian Citizenship Certificate in her name.

**2. Length of Service (15 years or more) as on 31/1/2013**

In order to ascertain whether an employee has rendered 15 years or more service as a temporary employee, one of the following documents available in the official file/records of the department can be relied upon:

(a) Office Order of Appointment

(b) Salary payment voucher dated on or before 31st January 1998

(c) Joining Report

(d) Application for job with the endorsement of appointment with date

(e) Copy of Note Sheet/Process Sheet of appointment

(f) Authentic Seniority List

(g) Application or Order for Quarters Allotment

(h) Application or Order for Transfer

(i) Any other credible evidence available in the official file

(j) For cases not covered by any of the options (a) to (i) given above any other document dated before 31.1.2013 which in the view of the Committee can be considered as a credible evidence of the length of service."

Thus, the Task Force had to verify whether the necessary documentation was available with the concerned Temporary Employee. So far as the length of Service of the Employee was concerned, the Task Force was to examine whether one of the documents listed in Serial No.2(a) to (j) of the Guidelines *supra* were available in the Office File/ Records in the Department of the concerned Temporary Employee. Guidelines for asserting the age of the Employee was also detailed therein. On 21.08.2014, an Addendum to the above Circular, bearing No.1567-69/

GEN/DOP, dated 21.08.2014, was issued by the Department of Personnel, pertaining to the Citizenship of the Employees concerned. The Addendum also detailed *inter alia* as follows;

> "**2.** Date of Completion:
>
> (a) Completion of verification : 10th September, 2014.
>
> (b) Issuance of Appointment Letters : 15th September, 2014.
>
> (c) Disbursal of regular Salary : 1st October, 2014."

The Guidelines indicate that the criteria for regularization was to be submission of the relevant documents and a time line for this purpose was also laid down as detailed *supra.*

**10.** Although the Petitioners claim that all relevant documents were submitted by them as per the requirements, an alternative argument was also put forth by them that even if they did not submit the documents as required, the documents were already included in their respective Files on the basis of which, in fact, their Services had been found to be eligible for regularization from 01.04.2014 thus it was only an unnecessary obstacle created by the State-Respondents. That, after cancellation of the Memorandum of Appointment vide Office Order, dated 01.10.2014, the State-Respondents did not indicate that fresh Memorandum and Office Order of regularization of Service was to be issued unless Sikkim Subject Certificate, Certificate of Identification or Indian Citizenship Certificate was submitted. In my considered opinion, this submission is belied by the very existence of Circular No.1547/GEN/DOP, dated 20.08.2014 and the subsequent Addendum bearing No.1567-69/GEN/DOP, dated 21.08.2014. Further, despite claims of their documents being on record and also subsequent submission of documents, the Petitioners have not filed such documents for the perusal of the Court to establish that either the documents were in the File of the Petitioners or that they filed it along with the other Employees who thus availed of regularization of Services from September, 2014. The Petitioners cannot take advantage of their own error and lackadaisical attitude, as administrative discipline is required to be adhered to.

**11.** The Petitioners have also failed to fortify their claim of Equal Pay for Equal Work by any documentary evidence. There are no Appointment Orders or Office Orders to indicate the equality of designations or the tasks/works performed by them being similar or equivalent to those Employees whose Services were regularized in September, 2014 and who they seek to be placed at par with. A meticulous examination of the documents do not reveal the Posts held by them prior to regularization or the Posts held by the Employees regularized in September, 2014. In the absence of such documents, this Court is hard pressed to reach a finding of equality, as insisted upon by the Petitioners. That apart, when the Petitioners had filed the earlier Writ Petition No.05 of 2016 before this Court, although specific date of their regularization was not divulged to the Court by the Learned Additional Advocate General therein, the Petitioners of their own volition withdrew the Petition and accepted regularization granted by the State-Respondents from June, 2016. No issue was raised at all in this context with the State-Respondents and the contention that they waited for one year till completion of probation and when Arrears of Salary were not forthcoming, they have filed the second Writ Petition, is to say the least incongruous. If regularization was granted from June, 2016, it is beyond comprehension as to why they would expect regular Salary from the month of September, 2014. This Court is conscious that the Order in the earlier Writ Petition No.05 of 2016, dated 01.07.2016, permits the Petitioners to approach the Court for "Incidental Reliefs," if so advised. The doors of the Courts are definitely not closed for aggrieved persons when they perceive violation of their rights. Thus, on this aspect, I have to disagree with the submissions of Learned Additional Advocate General that the Petition is barred by *res judicata* as the principle of *res judicata* is applicable to subsequent Suits where the same issues by the same parties have been decided in an earlier proceeding under Article 226 of the Constitution but in the instant matter, this Court itself had permitted them to approach it, if so advised, for Incidental Reliefs. It is also necessary to mention that the doctrine of *res judicata,* as envisaged by Section 11 of the Code of Civil Procedure, 1908 does not *stricto sensu* apply to the proceedings under Article 226 of the Constitution. Yet, the Petitioners herein are reminded that the Order *supra* merely permitted them to approach the Court but the reliefs can be obtained by them only on establishing their case, not only by averments but also by way of documentary evidence which substantiates their stand, which is lacking herein. The documents relied on by the Petitioners fail to lend succour to their case.

**12.** The Petitioners contend that they do not seek to press Prayer "A." of the Writ Petition which provides as follows, *"A writ or order or direction or declaration that the services of the Petitioners be treated under regular establishment with retrospective effect from September, 2014, instead of since 30.06.2016."* However, while pressing Prayer "B." *viz.* "*In the alternative, to pay to the petitioners arrears of salary as well as service benefits w.e.f. September 2014 like those who have been regularised in the month of September 2014,"* an insidious attempt is being made to press "Prayer A." If they seek Salary from September, 2014, along with Service Benefits which would also thereby include yearly Increments, it would, in effect, tantamount to regularization of their Services from September, 2014. This is unacceptable as the Petitioners, besides having surrendered their prayer of regularization have failed to make out their entitlement to the claims put forth.

**13.** The Petitioners' claim of arbitrary action by the State- Respondents and hand picking of Employees for regularization of Services, evidently emanates from the fact that Employees who acted promptly and submitted the relevant documents required by the Task Force were regularized immediately. It is worth noticing that the Petitioners have not assailed Circular No.1547/GEN/DOP, dated 20.08.2014, or the subsequent Addendum of 21.08.2014, or Office Order bearing No.1060/Adm, dated 01.10.2014, in any proceeding.

**14.** In light of the discussions above, lacking in merits, the Writ Petition deserves to be and is dismissed and disposed of accordingly.

**15.** No order as to costs.

**SLR (2021) SIKKIM 726**

(Before Hon'ble the Acting Chief Justice)

**Crl. M.C. No. 4 of 2021**

**T. Nagendra Rao and Others ….. PETITIONERS**

*Versus*

**State of Sikkim ….. RESPONDENT**

**For Petitioners 1 and 2:** Mr. Rajshekhar Rao, Senior Advocate with Mr. Anandh Venkataramani and Mr. Rahul Rathi, Advocates.

**For Petitioner No. 3:** Mr. Aayush Agarwala, Advocate.

**For the Respondent:** Ms. Yeshi Wangmo Rinchhen, Additional Public Prosecutor.

Date of decision: 24th September 2021

**A. Code of Criminal Procedure, 1973 – S. 482 – Quashing of F.I.R –** When disputes have predominantly civil character and arise out of commercial transactions, and where the parties have resolved the disputes amongst themselves, the Courts can exercise its powers under S. 482 to quash criminal proceedings in non-compoundable offences.

(Para 6 (v))

**Petition allowed.**

**Chronology of cases cited:**

1. Gian Singh v. State of Punjab, (2012) 10 SCC 303.
2. State of Madhya Pradesh v. Laxmi Narayan and Others, (2019) 5 SCC 688.
3. Parbatbhai Aahir *alias* Parbatbhai Bhimsinhbhai, (2017) 9 SCC 641.

## ORDER

***Meenakshi Madan Rai, ACJ***

**1.** The Petitioners have filed the present Petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") seeking quashing of FIR bearing No.0007, dated 13.04.2021, lodged at the Police Station-CID, East Sikkim and all proceedings arising therefrom, including Notice under Section 160 Cr.P.C. bearing No.453/POL/CID/2021, dated 23.04.2021, issued to the Petitioner No.1. The present Petition is filed through Petitioner No.2 on behalf of herself and as the Power of Attorney Holder for the Petitioner No.1. The Petitioner No.3 Company is represented by one Balakrishnan Jaikumar (Authorized Representative and Managing Director of Petitioner No.3 Company).

**2.(i)** Learned Senior Counsel for the Petitioners No.1 and 2 submitted that the FIR, dated 13.04.2021, was registered pursuant to a written Complaint filed by one Joseph Lourduraj (Director of Petitioner No.3 Company) before the State-Respondent through the Investigating Officer, Police Station CB-CID, Police Headquarters, East Sikkim. The facts which led to the lodging of the FIR are that, M/s Shiga Energy Pvt. Ltd. was awarded the Contract to construct a Hydro Power Project at Tashiding, West Sikkim by the State of Sikkim on a Build-Own-Operate-Transfer (BOOT) basis. As per the Contract with the State, the Company was to provide a portion of the electricity generated free of cost to the State and at the end of the term (thirty five years), the Project would be transferred free of cost to the State of Sikkim, which was not liable to pay any monies to the Company in relation to the said Project. M/s Shiga Energy Pvt. Ltd. entered into a Contract with the Petitioner No.3 Company on 28.03.2011 and on 13.06.2011, the Petitioner No.3 Company decided to sub-contract the works under the Main Contract to Nirman Vridhi Constructions Pvt. Ltd. (NVCPL) vide Sub-Contract Agreements. The Project was completed in November, 2017. NVCPL and its 100% subsidiary, Indian Ocean Energy Pvt. Ltd. (IOEPL) which is registered in Singapore, also made investments into a related Company of the Petitioner No.3. Investment and Share Subscription Agreements were executed in 2014 and 2015 between and amongst the Petitioner No.3 Company, NVCPL and IOEPL, which led to the latter two entities invoking Arbitration before the Singapore International Arbitration Centre. The Award, dated 24.05.2019, was accordingly passed

and by way of this Award, the Petitioner No.3 Company/Balakrishnan Jaikumar were jointly and severally liable to pay certain sums to NVCPL and IOEPL.

**(ii)** That, the Petitioner No.3 Company/Balakrishnan Jaikumar filed an Appeal against this Award before the High Court of Singapore which was dismissed on 13.03.2020. Further, Appeal was filed before the Court of Appeals, Singapore which is currently pending. On 27.01.2021, NVCPL and IOEPL preferred a Petition before the Hon'ble High Court of Delhi under Chapter I of Part II of the Arbitration and Conciliation Act, 1996 (for short, the "Arbitration Act") read with Order XXI and Section 151 of the Code of Civil Procedure, 1908 (for short, the "CPC"), for the enforcement and execution of the Final Foreign Award. Petitioner No.3 Company/ Balakrishnan Jaikumar filed their Objections under Section 48 of the Arbitration Act. On 12.04.2021, the Petitioner No.3 Company, through its Director Joseph Lourduraj, filed a Criminal Complaint against the Petitioners No.1 and 2, who were Directors of M/s Shiga Energy Pvt. Ltd., leading to the registration of the FIR *supra*. The concerned Police authorities consequently issued the Notice under Section 160 Cr.P.C., dated 23.04.2021, to the Petitioner No.1. Meanwhile, the Hon'ble High Court of Delhi, vide Order, dated 27.05.2021, in the Enforcement Proceedings, directed the matter to be listed before the Delhi High Court Mediation and Conciliation Centre. During the course of Mediation, all parties involved, agreed to resolve their disputes, both present and past, by way of a composite settlement pursuant to which, a Settlement Agreement, dated 05.07.2021, was executed by and between the Petitioner No.3 Company, Balakrishnan Jaikumar, NVCPL, IOEPL, M/s Shiga Energy Pvt. Ltd. and the Petitioners No.1 and 2. The parties also undertook to take appropriate steps to seek quashing of the FIR including swearing an Affidavit in support of the quashing of the FIR. The Affidavit of the authorized personnel of the Petitioner No.3 Company stated that all disputes had been conclusively settled by way of the Settlement Agreement, dated 05.07.2021. The Hon'ble High Court of Delhi, vide its Order, dated 22.07.2021, took the Settlement Agreement, dated 05.07.2021, on record and finding it to be valid and lawful, decreed the Enforcement Proceedings in terms of the said Settlement Agreement. That, the matter having been amicably settled between the parties, the instant Petition has been filed.

**(iii)** It was urged by Learned Senior Counsel for the Petitioners No.1 and 2 that now the disputes and differences between the parties have been set to rest by way of the Settlement Agreement, dated 05.07.2021, and the Petitioners have no grievances against each other and continuing the criminal proceedings would serve no useful purpose.

**(iv)** That, the Petitioner No.3 Company has, in fact, unequivocally and irrevocably understood, agreed and accepted that all its claims, disputes, differences and disagreements with the NVCPL, IOEPL, M/s Shiga Energy Pvt. Ltd. and the Petitioners No.1 and 2 in respect to the Tashiding Project and the said FIR have been completely resolved and irrevocably withdrawn for all legal intent and purposes. It was also canvassed that the Petitioner No.3 Company does not have any further claims, disputes or differences with the said Petitioners No.1 and 2.

***(v)*** That, further the parties have also filed the instant Petition and Affidavits without any pressure, undue influence and coercion and have been done so of their volition and they are performing their respective obligations as described in the Settlement Agreement. While placing reliance on the ratio of ***Gian Singh vs. State of Punjab***[1], it was contended that in matters pertaining to commercial affairs and family disputes, the Criminal Cases can be quashed when the parties so agree. Strength was also drawn from the decision in ***State of Madhya Pradesh vs. Laxmi Narayan and Others***[2] wherein it has been held that offences having the character of civil dispute can be quashed by the High Courts by exercising jurisdiction under Section 482 of the Cr.P.C. regardless of the fact that the offences are Compoundable or Non-Compoundable. That, in the aforestated facts and circumstances the Court may exercise its jurisdiction under Section 482 of the Cr.P.C. and grant the relief sought by the Petitioner.

**3.** Learned Counsel Mr. Aayush Agarwala for the Petitioner No.3 admits the submissions put forth by Learned Senior Counsel for the Petitioners No.1 and 2 and concedes that all differences between the parties have been settled as detailed hereinabove. That, they have no pending claims against each other and consequent upon the settlement of all disputes the instant Petition has been preferred.

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[1] **(2012) 10 SCC 303**
[2] **(2019) 5 SCC 688**

**4.** Learned Additional Public Prosecutor submitted that no losses had occurred to the State Exchequer on account of the Tashiding Project or on account of the differences between the parties. That, the differences *per se* were between the Petitioners and the State-Respondent had no objection to the prayer for quashing of the FIR and other consequential reliefs.

**5.** I have given due consideration to the submissions of the parties and perused all documents on record.

**6.(i)** The FIR No.0007 (Annexure P3), dated 13.04.2021, was filed before the CID Police Station and registered against the Petitioner No.1 and Others under Sections 420, 409 and 120 B of the IPC. The offence under Section 409 is Non-Compoundable as also the offence under Section 120 B of the IPC.

**(ii)** In ***Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai***[3], the Hon'ble Supreme Court, while discussing the provisions of Section 482 of the Cr.P.C. held *inter alia* as follows;

> "**16.** The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:
>
> .....
>
> **16.8.** Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.
>
> **16.9.** In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and
>
> **16.10.** There is yet an exception to the principle set out in propositions 16.8. and 16.9.

[3] **(2017) 9 SCC 641**

above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

**(iii)** In ***State of Madhya Pradesh vs. Laxmi Narayan and Others*** *(supra)* relied on by the Petitioners, the Hon'ble Supreme Court observed *inter alia* that;

"**15.** ……

**15.1.** That the power conferred under Section 482 of the Code to quash the criminal proceedings for the noncompoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

**15.2.** Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

**15.3.** Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

……

> **15.5** While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of noncompoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

**(iv)** In ***Gian Singh vs. state of Punjab*** *(supra)* relied on by the Petitioners, it was held *inter alia* as under;

> "**58.** Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement

between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed.

.....

**61.** The position that emerges from the above discussion can be summarised thus : the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz. : (*i*) to secure the ends of justice, or (*ii*) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However,

before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the

above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

**(v)** On the anvil of the ratiocinations extracted hereinabove, it is evident that when disputes have a predominantly civil character and arise out of commercial transactions, and where the parties have resolved the disputes amongst themselves, the Courts can exercise its powers under Section 482 of the Cr.P.C. to quash the criminal proceedings in Non-Compoundable offences. It is relevant to notice that the offence did not involve the financial and economic well being of the State of Sikkim. Annexure P4 reveals that the parties were before the Delhi High Court Mediation and Conciliation Centre and a Settlement Agreement executed between them. Annexure P5 is a Communication addressed by Balakrishnan Jaikumar to the Station House Officer, CID Police Station and the Investigating Officer of the case submitting therein that the Complainant and the Accused in Annexure P3 (FIR) have entered into a Settlement Agreement, dated 05.07.2021, and resolved their disputes in terms thereof and the matter accordingly be closed. Annexure P8 is the Order of the Hon'ble High Court of Delhi, dated 22.07.2021, whereby it is *inter alia* recorded that the Suit is decreed in terms of the Settlement Agreement, dated 05.07.2021, which shall form part of the Decree. The parties as submitted are performing their respective obligations as delineated in the Settlement Agreement.

**(vi)** In the end result, the parties having settled the disputes amongst themselves and the dispute arising from commercial transactions amongst themselves with no loss to the State Exchequer, I am of the considered opinion that no fruitful result would emerge from continuing the criminal proceedings.

**(vii)** Accordingly, the FIR bearing No.0007, dated 13.04.2021, lodged at the CID Police Station, East District, Sikkim and all proceedings arising therefrom including Notice under Section 160 Cr.P.C. bearing No.453/POL/ CID/2021, dated 23.04.2021, issued to the Petitioner No.1, hereby stand quashed.

**7.** Crl.M.C. No.04 of 2021 stands disposed of.

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**SLR (2021) SIKKIM 736**

(Before Hon'ble the Acting Chief Justice)

**Crl. A. No. 4 of 2021**

**Bijay Chettri** ….. **APPELLANT**

*Versus*

**State of Sikkim** ….. **RESPONDENT**

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

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

Date of decision: 24th September 2021

**A. Protection of Children from Sexual Offences Act, 2012 – Determination of age of the victim –** In a case pertaining to the POCSO Act, it is imperative to establish the age of the victim and thereby her minority. S. 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides for determination of age of the child in conflict with law and child in need of care and protection. Although the victim is neither, nevertheless the same parameters can be utilized for the purposes of determining her age – This provision lays down the requirement for age assessment and ossification test as the last resort for age determination when birth certificate from the School of the victim or the local governing bodies are not available.

(Para 8(i) and (ii))

**B. Code of Criminal Procedure, 1973– S. 164 –Recording of confessions and statements–**Statement of a witness recorded under S. 164 is not substantive evidence and can be utilized only for the purpose of contradiction and corroboration. The trial Court could only rely on the evidence given on oath in the Court and not one under S. 164.

(Para 9(ii))

**Appeal dismissed.**

**Chronology of cases cited:**

1. Milan Rai v. State of Sikkim, 2016 CriLJ 4591.
2. Lall Bahadur Kami and Another v. State of Sikkim, 2017 SCC OnLine Sikk 173.
3. Binod Sanyasi v. State of Sikkim, 2017 SCC OnLine Sikk 28.
4. State of Sikkim v. Karna Bahadur Rai, 2020 SCC OnLine Sikk 33.
5. State of U.P. v. Krishna Gopal and Another, (1988) 4 SCC 190.
6. Vijayee Singh and Others v. State of U.P., (1990) 3 SCC 190.
7. Navin Dhaniram Baraiye v. The State of Maharashtra, 2018 Cri.L.J 3393.
8. Mahadeo S/O Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
9. Jyoti Prakash Rai *alias* Jyoti Prakash v. State of Bihar, (2008) 15 SCC 223.
10. Ram Suresh Singh v. Prabhat Singh *alias* Chhotu Singh and Another, (2009) 6 SCC 681.
11. Rajak Mohammad v. State of Himachal Pradesh, (2018) 9 SCC 248.
12. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
13. Binod Sanyasi v. State of Sikkim, 2020 SCC OnLine Sikk 28.
14. Visveswaran v. State Rep. by S.D.M, (2003) 6 SCC 73.
15. Hemudan Nanbha Gadhvi v. State of Gujarat, (2019) 17 SCC 523.

**JUDGMENT**

***Meenakshi Madan Rai, ACJ***

**1.** The Victim in the instant case was at the time of the alleged offence, seven years old, the Appellant was thirty eight years old. The Appellant is before this Court assailing the Judgment and Order on Sentence of the Learned Special Judge, Protection of Children from Sexual Offences Act,

2012 (for short, "POCSO Act"), South Sikkim at Namchi, in Sessions Trial (POCSO) Case No.33 of 2018, dated 02.02.2021. He stood convicted under Section 9(m) of the POCSO Act and was sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default Clause of Imprisonment. Set off was granted in terms of Section 428 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.").

**2.** The grounds raised herein by the Appellant are that; (i) The Victim did not identify the Appellant in the Courtroom; (ii) The testimony of the Victim was not of sterling quality and the Learned Trial Court placed reliance on the Section 164 Cr.P.C. Statement of the Victim to convict the Appellant, despite the Statement being at variance from her Statement before the Learned Court. Hence, the Appellant deserves an acquittal. In support of his contentions, Learned Counsel placed reliance on the Judgments of this Court in ***Milan Rai vs. State of Sikkim***[1], ***Lall Bahadur Kami and Another vs. State of Sikkim***[2], ***Binod Sanyasi vs. State of Sikkim***[3] and ***State of Sikkim vs. Karna Bahadur Rai***[4]. Reliance was also placed on ***State of U.P. vs. Krishna Gopal and Another***[5], ***Vijayee Singh and Others vs. State of U.P.***[6] and ***Navin Dhaniram Baraiye vs. The State of Maharashtra***[7].

**3.** While resisting the arguments of Learned Counsel for the Appellant, the Learned Additional Public Prosecutor submitted that as the Appellant was present in the Courtroom, there was no question of him not being recognized or identified by the Victim. That, the Section 164 Cr.P.C. Statement of the Victim clearly establishes the act committed by the Appellant as also her evidence before the Learned Court, therefore there ought to be no leniency shown to the Appellant for his heinous act against the innocent Victim. That, consequently, there is no requirement for interference with the impugned Judgment and Order on Sentence.

**4.** Having considered the rival submissions of Learned Counsel, examined the evidence and documents on record, as also the impugned Judgment, the

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[1] **2016 CriLJ 4591**
[2] **2017 SCC OnLine Sikk 173**
[3] **2017 SCC OnLine Sikk 28**
[4] **2020 SCC OnLine Sikk 33**
[5] **(1988) 4 SCC 190**
[6] **(1990) 3 SCC 190**
[7] **2018 CriLJ 3393**

only question that falls for consideration before this Court is whether the Appellant was erroneously convicted by the Learned Trial Court?

**5.** In this regard, we may first look into the facts of the case. Shorn of details, the Prosecution case is that on 15.08.2018, at 18:30 Hrs, a written First Information Report (for short, "FIR") was received by P.W.11 the Station House Officer, Melli Police Station (for short, "Melli P.S.") from P.W.10 ASI Nimchung Bhutia, stating that while he was on duty at the Melli P.S., two boys came to the Police Station with the Appellant and the minor Victim, reporting that the Appellant had sexually assaulted the Victim behind the Melli Hospital Quarters at around 17:00 Hrs of the same day. The FIR was registered at the Melli P.S. under Section 354 of the Indian Penal Code, 1860 (for short, the "IPC") read with Section 10 of the POCSO Act. On completion of investigation, Charge-Sheet was filed against the Appellant under Sections 363, 341, 376, 323 of the IPC read with Sections 6 and 10 of the POCSO Act.

**6.** The Learned Trial Court framed Charge against the Appellant under Sections 363, 342, 376(2)(i) of the IPC and Section 6 of the POCSO Act. On the plea of „not guilty by the Appellant, trial commenced with the Prosecution examining 14 (fourteen) Witnesses to establish its case. On closure of the Prosecution evidence, the Appellant was afforded an opportunity under Section 313 Cr.P.C. to explain the incriminating evidence against him. He denied any involvement in the offence. Arguments of the parties were finally heard and the Judgment of Conviction was pronounced on 02.02.2021, as also the Order on Sentence. Vide the impugned Judgment, the Appellant was convicted under Section 9(m) of the POCSO Act and acquitted of the offences under Sections 363, 342, 376(2)(i) of the IPC and Section 6 of the POCSO Act, hence this Appeal.

**7.(i)** P.W.1 the Victim, was examined before the Learned Trial Court on 24.12.2018, her age was recorded as seven years. Before recording her deposition, she was examined in terms of the provisions of Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872 upon which she was found competent to testify. According to the Victim, on the relevant day, she had gone to witness a football match at Melli Ground with her cousin. In the midst of the football match, she went to purchase juice and in the meantime, her slippers broke. The Appellant came to her and told her that he would repair her slippers and would also buy her sweets.

He took her behind the Hospital, inserted his hand inside her frock, touched her private part, kissed her and touched her chest area. He then grabbed her neck and dashed her head on a nearby stone. In the meantime, two boys arrived at the scene and took them to the Police Station. She identified Exhibit 1, shown to her in the Court, as the Statement recorded by the 'Judge Madam' and Exhibit 2, shown to her in the Court, as another document prepared by the 'Judge Madam'. Her cross-examination did not demolish the statements made by her in her evidence-in-chief. P.W.2 (in whose house the Victim was living) fortified the statement of the Victim to the effect that on the relevant day, he had taken her to watch the football match at the ground, besides which, he knew nothing about the incident except what he learnt of it at the Melli Police Station where he was called by his parents.

**(ii)** The Doctor who examined the Victim on 15.08.2018 itself, testified as P.W.3. On his examination, he found the following;

> *"……..*
>
> *On examination, she was conscious, oriented and cooperative. There was no smell of alcohol in her breath. Her pulse rate was 80 per minute. Pupils were bilaterally reacting to light. On local examination, there was tenderness over left side of neck. On systemic examination, there was no abnormality detected. On genitals examination*(sic)*, pubic hair was absent.*
>
> *There was no vaginal discharge. There was no old and fresh injury on vagina, vulva and perineum. There was no seminal stains on her genitals. Hymen could not seen*(sic)*. I advised her for RPR (venereal disease), serum HbsAg (Hepatitis B), HIV 1 and 2, urine for pregnancy test and ultrasonography for pregnancy. I also advised for Obstetric and Gynaecological and Psychiatric consultation.*
>
> *On Urine Pregnancy Test, it was negative. Following items were handed over to the police by me:-*

> 1. *Injury report;*
> 2. *Vaginal swabs (two numbers, one dry and one wet);*
> 3. *Undergarments (it was yellow with grey stripe); and*
> 4. *Blood sample (one ml) in vial.*
>
> *On the basis of local examination, there were no signs suggestive of recent sexual intercourse, however sexual violence cannot*(sic) *not be ruled out. However, final opinion was reserved till the availability of RFSL report.*
>
> *Final opinion:- On receipt of RFSL report, I gave my final opinion that clinical and cytopathological examination was not suggestive of forceful, sexual intercourse."*

Exhibit 5 was identified as the Medico Legal Examination Report prepared by him. He also identified the articles MO I to MO IV shown to him in the Court. In his cross-examination, he could not state the exact cause of tenderness found in the neck of the Victim but volunteered to state that it matched the history given by the Victim. The rest of his examination-in-chief remained undecimated.

**(iii)** The guardian of the minor Victim P.W.4, while supporting the evidence of the Victim and P.W.2 regarding the Victim's presence at the Melli Ground, deposed that on the relevant day, at around 3 p.m. to 4 p.m. when he was watching the football match at the ground, he was summoned to the Melli Police Station where on reaching, he noticed that the Victim was nervous, her clothes were wet and she had sand stuck on her body. She told him that she was strangled by the Appellant and her neck was paining. He did not witness the incident. The elder sister of the Victim, was a fifteen year old child who was also found competent to testify by the Learned Trial Court and examined as P.W.5. According to this Witness, when the Victim returned home at around 5 p.m., the Witness was told by her that one uncle had put his hands around her neck. P.W.5 noticed that the Victims neck was swollen. The evidence of P.W.6 who knew the

Appellant since 2008, lends no support to the Prosecution case as he was not privy to the offence.

**(iv)** P.W.7 Pravez Khan, was a seventeen year old child, also found competent to depose by the Learned Trial Court. According to this Witness, he along with his friend were going to attend natures call behind Melli PHC, where he saw the Appellant half naked below the waist and the Victim next to him. When the minor Victim saw them, she came crying towards them. Both he and his friend noticed that the Appellant was drunk. They took the Appellant and the Victim to Melli P.S. and handed them over to the Police. Later, he came to the Namchi District Court and identified the Appellant in a Test Identification Parade (for short, "T.I. Parade"). He further deposed that Exhibit 6, shown to him in the Court, was the document prepared by the 'Judge Madam' and he identified his signatures on the document. His evidence-in-chief withstood the test of cross-examination.

**(v)** P.W.8, the then Judicial Magistrate, South Sikkim at Namchi conducted the T.I. Parade, where the Victim and two Witnesses P.W.7 Pravez Khan and one Ujyol Sarki identified the Appellant. P.W.9, the then Judicial Magistrate, South Sikkim at Namchi identified Exhibit 12 as the Section 164 Cr.P.C. Statement of the Victim recorded by her.

**(vi)** The Complainant, ASI Nimchung Bhutia, was examined as P.W.10. His statement was to the effect that on 15.08.2018, he was attending his duty at Melli P.S. from 9 a.m. to 8 p.m. At around 6 p.m., one Pervez Khan (P.W.7) along with one Ujwal Sarki brought the Victim and the Appellant to the Melli P.S. where P.W.7 informed him of the incident. After she was brought to Melli P.S., P.W.10 sought details from the Victim, whereupon she gave her name, her age as being six years and when asked about the incident according to P.W.10, she told him that the Appellant had made her open his pants and touch his penis. He accordingly lodged an FIR against the Appellant at the Melli P.S. He identified Exhibit 17 as the FIR lodged by him. Admittedly, in his crossexamination, he had not mentioned that the Appellant had made the Victim open his pants and touch his private part.

**(vii)** The I.O. P.W.14, evidently, did not seize the Birth Certificate of the Victim, hence she was forwarded for bone age estimation to the District

Hospital, Namchi. The evidence of P.W.12 Dr. Annie Rai, the Radiologist at the Hospital, revealed that the approximate bone age of the Victim was between 7.5 years to 8.6 years. Her Report is as follows;

> "……
>
> On 22.09.2018, the victim was sent for bone age estimation by Dr. Rabin Rai, Medical Officer, District Hospital, Namchi, South Sikkim. The following X-rays were done:-
>
> 1. X-ray right shoulder AP view;
> 2. X-ray right elbow AP view;
> 3. X-ray right wrist AP view;
> 4. X-ray right hip joint AP view; and
> 5. X-ray right knee AP view.
>
> After seeing the X-rays, I gave my opinion that the approximate bone age of the victim was between 7.5 years to 8.6 years.
>
> Exhibit-19, shown to me in the Court today, is the requisition sent by Dr. Rabin Rai for bone age estimation of the victim. Exhibit-20, shown to me in the Court today, is my report on the reverse side of Exhibit-19 wherein Exhibit-20(a) is my signature. Exhibit-21, shown to me in the Court today, is the Xray plate of the minor victim.
>
> ……"

"AP" *supra* means "anteroposterior." The **Butterworth's Medical Dictionary, Second Edition, Page 127**, explains "anteroposterior" as "**1.** Extending from the front to the back. **2.** Referring to the front and the back."

**(viii)** P.W.13 Dr. Meenakshi Dahal, examined the Appellant on the same date of the offence i.e. 15.08.2018. According to her,

> "…….....…
> On examination, person was conscious, cooperative and well oriented. Pulse was 86 per minute. Blood Pressure – 130/70 mmhg. Alcohol in breath was present. Pupils – bilaterally dilated and sluggish in reaction. On external genitalia examination, it was fully developed. No external fresh injury and smegma was absent. Penile swab and undergarment collected and handed over to the accompanying police personnel.
> ……..."

She identified Exhibit 22 as the Medical Report of the Appellant prepared by her.

**(ix)** The I.O., during the course of investigation, had forwarded the Victim for medical examination to P.W.3 and the Appellant to P.W.13 for medical examination. It emerged during her testimony that the Victim and her elder sister, aged about 14 years were orphans and lived in the house of their uncle P.W.4. The Appellant, a Labourer by profession, from the neighbouring State of West Bengal, was working in different sites in Sikkim. On the relevant day, he found the Victim alone playing by the fountain with her juice packet and her slipper broken, thereafter he committed the offence.

**8.(i)** In a case pertaining to the POCSO Act, it needs no reiteration that it is imperative to establish the age of the Victim and thereby her minority. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, (for short, the "JJ Act"), provides for determination of age of the child in conflict with law and child in need of care and protection. Although the Victim is neither, nevertheless the same parameters can be utilized for the purposes of determining her age, this was propounded by the Honble Supreme Court in ***Mahadeo S/O Kerba Maske vs. State of Maharashtra and Another***[8], wherein it was observed *inter alia* as follows;

> "**12**. .....Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules

[8] **(2013) 14 SCC 637**

12(3)(a)(i) to (iii), the medical option can be sought for. **In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"

**(Emphasis supplied)**

**(ii)** Section 94 of the JJ Act is extracted hereinbelow for easy reference. The Section provides for presumption and determination of age;

"**94. Presumption and determination of age.–**(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the

Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining–

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

> (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:
>
> Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.
>
> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

This provision lays down the requirement for age assessment and Ossification Test as the last resort for age determination when Birth Certificate from the School of the Victim or the local governing bodies are not available.

**(iii)** Exhibit 26 is a Communication, dated 16.08.2018, which reveals that the I.O. had given information to the Chairperson, Child Welfare Committee, Namchi, South Sikkim about the registration of the Case. Exhibit 27, another Communication, also dated 16.08.2018, was the intimation given by her to the District Child Protection Officer, District Child Protection Unit, Namchi, South Sikkim. The Victim, however, was not produced before the Juvenile Justice Board or before the Child Welfare Committee and therefore she did not have the benefit of having her age assessed on their orders, nor did the Learned Trial Court have the benefit of the assessment of the Victims age by ocular evidence of the said Authorities. As per the I.Os evidence, the Victim was a Student in a Government School reading in Upper Kindergarten but she was unable to obtain the Birth Certificate or the first School Admission Register pertaining to the Victim, as she was a resident of West Bengal. The evidence of P.W.4, her guardian does not reveal the Victims age and P.W.5, the fifteen year old sister of the Victim, gave no inkling on this aspect. Consequently, although the I.O. could have taken steps to procure the Birth Certificate, in its absence, no error emanates on the step of the I.O. in forwarding the Victim for Ossification Test.

**(iv)** The accuracy of Ossification Test was discussed by the Honble Supreme Court in ***Jyoti Prakash Rai alias Jyoti Prakash vs. State of Bihar***[9], wherein it was *inter alia* observed that;

> "**13.** A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature. After a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. This Court
>
> in *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] opined : (SCC p. 290, para 20)
>
> > "*20*. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence.
>
> The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact."
>
> **In the aforementioned situation, this Court in a number of judgments has held that the age determined by the doctors should be given flexibility of two years on either side**."
>
> **[Emphasis supplied]**

**(v)** In ***Ram Suresh Singh vs. Prabhat Singh alias Chhotu Singh and Another***[10], the Honble Supreme Court held *inter alia* as follows;

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[9] **(2008) 15 SCC 223**
[10] **(2009) 6 SCC 681**

> "**13.** Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In *Jaya Mala* v. *Govt. of J&K* [(1982) 2 SCC 538 : 1982 SCC (Cri) 502 : AIR 1982 SC 1297] this Court held: (SCC p. 541, para 9)
>
> "*9.* … However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."
>
> ……."

**(vi)** In ***Rajak Mohammad* vs. *State of Himachal Pradesh***[11], the Honble Supreme Court *inter alia* observed thus;

> "**9.** While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused."

Hence, it is a well settled proposition of law that other things being equal, the interpretation of any provision sought to be adopted by the Court is one that goes in favour of the accused.

**(vii)** On the bedrock of the extracts of the ratiocinations *supra* and giving the benefit of the Ossification Test to the accused by adding two years to the Victims age, which as per the Ossification Test was "8.6 years," her age would be only "10.6 years" thereby still making her below twelve years of age. Hence, it is concluded that the offence having been committed on a child below twelve years, the provisions of Section 9(m) of the POCSO Act would fall into place. The Learned Trial Court therefore was not in error on this count.

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[11] **(2018) 9 SCC 248**

**9.(i)** The next vehement argument of Learned Counsel for the Appellant was that the Learned Trial Court has based its Judgment on the Statement of the Victim made under Section 164 Cr.P.C. and convicted the Appellant. As per the Victim;

> *"……..At the khola the bhaiya removed my underwear and touched my front part with his hand. Further, bhaiya then put his private all over my front part. When the child was asked to explain what she meant by "front part", she pointed at her vagina. When I tried to scream for help, the bhaiya grabbed my neck and it hurt……"*

However, before the Learned Trial Court, her Statement was limited to the extent that,

> "……He took me behind the hospital. **The accused inserted his hand inside my frock and touched my private part**. The accused kissed me and touched my chest area. The accused grabbed my neck and dashed my head on a nearby stone. ….."
>
> **(Emphasis supplied)**

**(ii)** This Court has in a plethora of Judgments propounded the relevance of Section 164 Cr.P.C. Statement. The Statement of a Witness recorded under Section 164 of the Cr.P.C. is not substantive evidence and can be utilized only for the purpose of contradiction and corroboration. In ***R. Shaji vs. State of Kerala***[12], the Hon'ble Supreme Court observed *inter alia* as under;

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

[12] **(2013) 14 SCC 266**

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

It thus falls to reason that the Learned Trial Court could only rely on the evidence given on oath in the Court and not one under Section 164 of the Cr.P.C. which can be relied on only for the purposes of corroboration and contradiction.

**(iii)** Thus, Section 164 Cr.P.C. Statement of the Victim is to be disregarded for the reason that it is not substantive evidence besides which, it was not read out to the Victim in the Courtroom to refresh her memory or to test the veracity of the Statement. In ***Binod Sanyasi vs. State of Sikkim***[13], this Court held *inter alia* as follows;

> "**14.** Merely because the victim affixed her signature on Exhibit 3, assumptions cannot be drawn of her knowledge of its contents. The document

[13] **2020 SCC OnLine Sikk 28**

> cannot prove itself, the contents thereof are required to be proved in terms of the provisions of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") *viz.* Section 67 of the Act, unless the contents of the documents are said to be admissible by reasoning of a provision of a Statute, example, Section 90 of the Evidence Act. Identification of her signature on Exhibit 3 is not conclusive of knowledge of the contents, when the contents were not put to her to replenish her memory."

Nevertheless, even without the strength of the Section 164 Cr.P.C. Statement, the evidence of the Victim to the effect that the Appellant had indeed touched her genital with his hand cannot be blind sighted as it has weathered the test of cross-examination and remained undemolished. Her evidence reveals that the offence had been committed by the Appellant. P.W.7 Pravez Khan had seen the Appellant in a state of undress below his waist, this circumstance went unexplained by the Appellant. What would be the reason for a grown man to be half naked in front of a child? The evidence of P.W.7 that the Appellant was in a drunken state is substantiated by the evidence of P.W.13, the Doctor who examined him and found alcohol in his breath as also the reaction of his pupils being sluggish.

**10.** That having been said, it is relevant to consider what "sexual assault" means. Section 7 of the POCSO Act defines sexual assault as under;

> "7. Sexual Assault.–Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or make the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

"Aggravated Sexual Assault" finds place in Section 9 of the POCSO Act and Section 9 (m) provides as follows;

> "9. Aggravated Sexual Assault. – ……..
> …….....……

> *(m)* whoever commits sexual assault on a child below twelve years; …"

Once the child is below twelve years and sexual assault is committed on her then it comes within the ambit of "aggravated sexual assault." While ignoring the reference to Section 164 Cr.P.C. Statement of the Victim relied on by the Learned Trial Court, the evidence given by the Victim in the Court regarding the offence committed by the Appellant under Section 9(m) of the POCSO Act cannot be obliterated.

**11.(i)** It was also urged by Learned Counsel for the Appellant that the Victim did not identify the Appellant in the Courtroom. In this context, relevant reference is made to the ratiocination in ***Visveswaran vs. State Rep. by S.D.M.***[14], wherein the Honble Supreme Court observed *inter alia* that;

> "**11.** ……..The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt."

**(ii)** In ***Hemudan Nanbha Gadhvi vs. State of Gujarat***[15] the Honble Supreme Court was considering a matter where the Prosecutrix, aged nine years old, turned hostile and not only denied the sexual assault but also declined dock identification. The Learned Trial Court had consequently acquitted the Appellant. The Honble High Court on Appeal, reversed the acquittal and convicted the Appellant holding that the FIR lodged by P.W.1, the Victims mother, had been duly proved by P.W.12, the Police Sub Inspector and that the T.I. Parade of the Appellant stood proved by P.W.1. It was also observed that it would be a travesty of justice if the Prosecutrix turned hostile and failed to identify the Appellant in the dock. The Honble Court held *inter alia* as hereinbelow;

[14] **(2003) 6 SCC 73**
[15] **(2019) 17 SCC 523**

"**7.** The appellant was apprehended on suspicion along with another. The TIP was held without delay on 22-2-2004. Ext. P-38, the TIP report bears the thumb impression of PW 2 who was accompanied by her mother. The TIP report has been duly proved by PW 11. The appellant was identified by PW 2. There appears no substantive challenge to the TIP, identification in the dock, generally speaking, is to be given primacy over identification in TIP, as the latter is considered to be corroborative evidence. But it cannot be generalised as a universal rule, that identification in TIP cannot be looked into, in case of failure in dock identification. Much will depend on the facts of a case. If other corroborative evidence is available, identification in TIP will assume relevance and will have to be considered cumulatively.

**8.** In *Prakash* v. *State of Karnataka* [*Prakash* v. *State of Karnataka*, (2014) 12 SCC 133 : (2014) 6 SCC (Cri) 642], it was observed as follows : (SCC p. 144, para 16)

> "*16.* …Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran* v. *State* [*Visveswaran* v. *State*, (2003) 6 SCC 73 : 2003 SCC (Cri) 1270] it was held : (SCC p. 78, para 11)
>
> > '*11*. …The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.' "

In the present case, identification of the Appellant by way of T.I. Parade has not been demolished, apart from which P.W.7 was also present at the T.I. Parade and has identified the Appellant in the dock as the same person that he had identified in the T.I. Parade.

**(iii)** On examining the evidence of the Victim, it is seen that the cross-examination did not contest the identification of the Appellant in the Courtroom. All that the cross-examination of the Victim could draw out was as follows, *"It is not a fact that I did not identify the accused person in the line of several other persons."* It was not brought forth to the Victim that the Appellant was not in the Courtroom or that she had failed to identify him. The records of the Learned Trial Court reveal that on the date of the Victims evidence (24.12.2018), the Appellant was produced before the Learned Court from Judicial Custody and thereafter remanded back to the Judicial Custody, after examination of the Victim in the Courtroom, hence, the presence of the Appellant in the Courtroom has been established. On the touchstone of the ratio in ***Visveswaran vs. State*** and ***Hemudan Nanbha Gadhvi*** *(supra),* the identification of the Appellant by the Victim is not decimated. The evidence of P.W.7 establishes that he had seen the Appellant and the Victim together and P.W.7 had identified the Appellant, both in the T.I. Parade and in the Courtroom. Hence, the question of non-identification of the Appellant by the Victim does not arise.

**12.** The entire facts and circumstances and the discussions hereinabove lead to the unyielding conclusion that the impugned Judgment and Order on Sentence warrants no interference by this Court, save to the extent pertaining to the Statement of the Victim under Section 164 Cr.P.C., as already detailed *supra*.

**13.** Appeal fails and is accordingly dismissed.

**14.** No order as to costs.

**15.** Copy of this Judgment be sent forthwith to the Learned Trial Court, for information, along with its Records.

**SLR (2021) SIKKIM 755**

(Before Hon'ble the Acting Chief Justice)

**Crl. A. No. 3 of 2019**

**Dilip Goel** ….. **APPELLANT**

*Versus*

**State of Sikkim** ….. **RESPONDENT**

**For the Appellant:** Mr. N. Rai, Senior Advocate.

**For the Respondent:** Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor.

Date of decision: 29th September 2021

**A. Protection of Children from Sexual Offences Act, 2012 – Determination of age of the victim –** The alleged incident occurred on 22.05.2017. The victim claimed to be 15 years old. The School admission register (Exhibit-15), furnished by the School Headmaster records the date of birth of the victim as 20.04.2002.The question for determination was whether the victim was a minor on the date of the alleged offence? Held: Although a column for signature of father or guardian in Exhibit-15 reflects a name similar to that of the victim's stepfather (PW-2). However, in his evidence before the Court, he has affixed his thumb impression. Consequently, the identity of the person who furnished the date of birth and signed on Exhibit-15 was not established – PW-2 not having been shown the document could not verify its contents. The mother of the victim was examined under S. 161, Cr.P.C during investigation, but not before the trial Court – S. 65 of the Indian evidence Act provides for cases in which secondary evidence relating to document may be given. Exhibit-15 may have been relied on by the prosecution in terms of this provision, however it would do well to notice that the provision does not do away the necessity of proof of such documents – That the victim was a child in terms of the POCSO Act, 2012, in the absence of any evidence on this count.

(Para 6)

**Appeal allowed.**

**Chronology of cases cited:**

1. Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim, Crl.A. No.36 of 2017 decided on 13-10-2018 : SLR (2018) SIKKIM 1373.
2. Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130.
3. Madan Mohan Singh and Others v. Rajni Kant and Another, (2010) 9 SCC 209.
4. Birad Mal Singhvi v. Anand Purohit, 1988 (Supp) SCC 604.

**JUDGMENT**

***Meenakshi Madan Rai, ACJ***

**1.** The minor victim allegedly aged about 15 years was said to have been sexually assaulted by the Appellant aged about 44 years, in a room of a Lodge, which led to the instant case. The Learned Trial Court convicted the Appellant of the offence under Section 3(b) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) and under Sections 342/376(2)(i) of the Indian Penal Code, 1860 (for short, "IPC"), vide the impugned Judgment, dated 18-12-2018 in Sessions Trial (POCSO) Case No.25 of 2017. The Order on Sentence dated 19-12-2018 prescribed the following;

> *(i) imprisonment for a period of 7 years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 3(b) punishable under Section 4 of the POCSO Act, 2012;*
>
> *(ii) imprisonment for a term of 1 year and to pay a fine of Rs.2,000/- (Rupees two thousand) only, for the offence under Section 342 of the IPC; and*
>
> *(iii) rigorous imprisonment for a term of 7 years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 376(2)(i) of the IPC.*

The sentences of imprisonment were ordered to run concurrently and the sentences of fine bore default clauses of imprisonment. Set off was granted in terms of Section 428 of the Code of Criminal Procedure, 1973

(for short, "Cr.P.C."). It was further ordered that the fine, if recovered, was to be made over to the victim as compensation. The Appellant was acquitted of the offence under Section 363 of the IPC.

**2.** The facts of the Prosecution case is that on 22-05-2017, Exhibit 2, an FIR was received from P.W.2, the victims stepfather stating that on 22-08-2017 at around 10.30 hrs. the Appellant, a labour contractor, had lured the victim (P.W.1) to a Lodge and sexually assaulted her. The FIR was accordingly registered on the same day under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012, and investigation endorsed to P.W.20, the Investigating Officer (I.O.). On completion of investigation, Charge-Sheet was submitted against the Appellant under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012. The Learned Trial Court on receipt of the Charge-Sheet framed Charge against the Appellant under Sections 363/342 and 376(1) of the IPC and Sections 3/4 of the POCSO Act, 2012. The Appellant put forth a plea of "not guilty" and the trial commenced with the Prosecution examining 20 (twenty) witnesses in a bid to establish its case, on closure of which, the Appellant was examined under Section 313 of the Cr.P.C. to enable him to explain the incriminating circumstances appearing against him. He claimed not to have been involved in the alleged incident. The final arguments were heard and the Learned Trial Court after examining the evidence on record convicted the Appellant, as detailed hereinabove.

**3.** Learned Senior Counsel for the Appellant contended that the Section 164 Cr.P.C. statement of the victim, P.W.1, before the Learned Trial Court indicates that there was no penetrative sexual assault. As per P.W.1, the Appellant had taken her to a Lodge and then fondled her body parts, no allegation of penetrative sexual assault was put forth by her. P.W.13 the owner of the Lodge where the alleged incident had occurred had seen the victim on the road outside the Lodges gate and not inside the room or in the inside premise of the Lodge, raising doubts about the Prosecution case and the veracity of the Appellants allegation. That, she complained to P.W.13 that the Appellant had verbally abused her, but made no allegation of sexual assault. P.W.16 the Doctor who examined the victim on the same day, found no signs of use of force or injuries on the person of the victim to reveal sexual assault. The blood group of the Appellant, as per P.W.17, the RFSL Expert, is 'O', but the blood group found on the underwear of the victim was of the blood group 'A'. That, in fact, the victim was a married

woman as emanates from the deposition of P.W.2 and P.W.15. Her date of birth was not proved by the said two witnesses although they are her family and no birth certificate was furnished to prove her minority. Relying on the decision of this Court in ***Mangala Mishra @ Dawa Tamang @ Jack*** vs. ***State of Sikkim***[1] it was contended that a photocopy, Exhibit 15, of the entry made in the school admission Register was furnished, but the entry went unproved. As per P.W.8, the Birth Certificate of the victim girl was not found in the school records and he had therefore furnished a photocopy of the relevant page of the school admission Register pertaining to the year 2007 to prove that the victim was born on 20-04-2002, viz., Exhibit 15. His evidence lacked personal knowledge of the entry. P.W.2 also shed no light regarding the entry in Exhibit 15 nor was he aware of the contents of Exhibit 2 which was scribed by P.W.3 on the dictation of the victims mother. That, P.W.3 lent no credence to the Prosecution case as no evidence emerged in regard to the contents of Exhibit 2. The Prosecution failed to produce and examine the victims mother in this context. The Seizure Memo, Exhibit 3, reveals that a total of Rs.400/- in denominations of one hundred was seized by the Police and the I.O. had remarked that the money was given to the victim by the Appellant, but no investigation to unearth the reason for the money having been handed over to P.W.1 was undertaken. The evidence of the victim is untrustworthy and has failed to pass the test of a sterling witness. Strength was drawn on this count from the ratio of ***Krishan Kumar Malik*** vs. ***State of Haryana***[2]. Hence, in view of the facts and circumstances enumerated, the impugned Judgment of the Learned Trial Court deserves to be set aside and the Appellant acquitted all the offences charged with.

**4.** *Per contra*, Learned Additional Public Prosecutor urged that penetrative sexual assault has been proved by the evidence of the Prosecutrix beyond a reasonable doubt as she had unequivocally stated that the Appellant inserted his finger into her private part. That, she was unable to escape from the room as the door was bolted from inside. Her evidence with regard to the Appellant having touched her private part was consistent and the finger nail injury on the face of the Appellant reveals that she had fought off the Appellant when the incident was committed. Accordingly, the impugned Judgment of the Learned Trial Court requires no interference.

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[1] **Crl.A. No.36 of 2017 decided on 13-10-2018 : SLR (2018) SIKKIM 1373**
[2] **(2011) 7 SCC 130.**

**5.** In the light of the arguments advanced above which have been carefully considered and after examining all the evidence and documents on record, the question that falls for determination by this Court is –

*(i) Whether the Prosecution was able to prove that the victim was a minor on the date of the alleged offence?*

*(ii) Whether the Appellant had committed the offences charged\ with?*

**6.(i)** While addressing the first question *supra*, for determination, P.W.1 the victim claimed to be 15 years old on the date of her evidence before the Court, on 12-10-2017. The alleged incident had occurred on 22-05-2017. P.W.2 the victims step father claimed that the victim was 16 years old but admitted that she was a married woman. P.W.15 buttressed the evidence of P.W.2 with regard to the marital status of the victim. P.W.2 claimed to have been married to the victims mother for the past 15 years, if this evidence is believed to be true then it would lead to the preposterous circumstance of the victim having been admitted to school when she was one year old as Exhibit 15 the certified true copy of the relevant page of the school admission Register, furnished by P.W.8 the School Headmaster records the date of birth of the victim as 20-04-2002. Although a column for signature of father or guardian in Exhibit 15 reflects a name similar to that of P.W.2, however, in his evidence before the Court P.W.2 has affixed his thumb impression. Consequently, the identity of the person who furnished the date of birth and signed on Exhibit 15 was not established by the Prosecution. The evidence of the I.O. fails to assist the Court in this direction. No effort was made to show Exhibit 15 to P.W.2 to verify the facts reflected therein. P.W.2 not having been shown the document could not verify its contents. The mother of the victim was examined under Section 161 Cr.P.C. during investigation, but not before the Learned Trial Court. Records before this Court reveal that her evidence was slated for 13-11-2017 and the matter disposed of on 18-12-2018 only, in the interim no efforts were made to procure her presence although she was said to left her husband and gone to Nepal. The fact of her leaving for Nepal was not substantiated by any records furnished either from the Panchyat or any other local governing authority. P.W.8 failed to support the Prosecution case being ignorant of the details of the entry at Exhibit 15 or at whose behest the date of birth of the victim had been recorded as 20-04-2002.

**(ii)** Section 65 of the Indian evidence Act, 1872, provides for cases in which secondary evidence relating to document may be given. Exhibit 15 may have been relied on by the Prosecution in terms of this provision, however it would do well to notice that the provision does not do away the necessity of proof of such documents. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[3] the Honble Supreme Court while differentiating between admissibility of a document and its probative value opined that a document may be admissible but as to whether the entries contained therein had probative value could be examined in the facts and circumstances of a case. The relevant portion of the ratio is extracted below for easy reference;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat* Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

[3] **(2010) 9 SCC 209**

**19.** Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].

**20.** So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value.** The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

**21.** For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi* v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500] .)

> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)**"**
>
> **[emphasis supplied]**

**(iii)** In ***Mangala Mishra*** (*supra*) relied on by the Appellants Counsel Exhibit 7 the birth certificate of the victim was furnished, however, the seizure of the document was suspect, the signatories to the seizure memo were not produced as witnesses and the origin of the document remained an enigma as no witness was examined with regard to entries in any Register or Exhibit 7. This Court observed that merely because Exhibit 7 was a document furnished by the Prosecution it cannot be accepted as gospel truth without fortification by way of supporting evidence sans examination of its probative value.

**(iv)** In ***Birad Mal Singhvi*** vs. ***Anand Purohit***[4] the Supreme Court was examining entries in the scholars register, counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of the Secondary School Examination of 1977 marked respectively as Exhibits 8, 9, 10 and 11. The Supreme Court observed *inter alia* that although Exhibits 8, 9, 10, 11 and 12 were relevant and admissible but the documents had no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid documents. It was further observed that neither of the parents of the two candidates nor any person having special knowledge about their date of birth was examined

[4] **1988 (Supp) SCC 604**

by the Respondent to prove the date of birth as mentioned in the aforesaid documents. That, parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or someone having special knowledge of the fact, it would have probative value. That, the date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

**(v)** On the touchstone of the enunciations *supra* it becomes apposite to notice that Exhibit 15 is of no value to the Prosecution case. P.W.2 did not give evidence about the victims date of birth or prove the contents of Exhibit 15 which in fact he was not shown, neither did P.W.15 her maternal aunt and there was no other person to establish her age as being 15 given that the Prosecution did not examine her mother. As held in ***Birad Mal Singhvi*** and ***Madan Mohan Singh*** (*supra*), parents are the best persons to depose about the age of a child, but the entries in Exhibit 15 were not proved by P.W.2 or the victims mother. P.W.15 being the maternal aunt could well have had personal knowledge of the victims age, but her evidence is devoid of such statement. This Court cannot arrive at a finding that the victim was a child in terms of the POCSO Act, 2012, in the absence of any evidence on this count. It may relevantly be mentioned that the Learned Trial Court accepted Exhibit 15 in totality stating that the Appellant did not refute or controvert the materials on record. However, the evidence of P.W.8, the only person who identified the document being the Headmaster of the School concerned stated that he did not know on what basis the date of birth of the victim was recorded. In the face of such evidence, it goes without saying that the Prosecution has failed to discharge the obligation cast on it to prove its case beyond reasonable doubt. The first question therefore has to be answered in the negative.

**7(i).** Traversing now to the second question formulated *supra* it is relevant to notice that none of the Prosecution witnesses are ocular, save for P.W.13 who I hasten to clarify did not witness the incident but had seen the victim outside the gate of the Lodge that he owns, the same Lodge where the Appellant had checked in on 17-05-2017 as supported by Exhibit 5, the Register of the guests of the Lodge and where the offence was allegedly committed, as per P.W.1. All that the Court can rely on is the statement of

the victim and therefore it is essential to assess whether her evidence would pass the muster of a sterling witness. The victim narrated that the incident pertained to the month of June, 2017, when she was residing with her parents. Contrarily, P.W.2 stated that during the relevant time she was living with her maternal grandmother. Concededly, on the evening prior to the incident, she received a call from an unknown number on her grandmothers mobile number which she was using and she talked to the caller who seemed to know her. Later, she received few more calls from the same number, but she did not answer it. The following morning when she was going to her paternal uncles place she stopped at a place where there was a Peepal tree where the Appellant approached her and struck a conversation with her. Thereafter, he asked her to accompany him to the market and took her to a Lodge there. He dragged her to his room through a narrow passage in the Lodge. After reaching the room, the Appellant bolted the door from inside, touched and fondled her breasts and though she protested he continued his sexual assault on her. He removed her trousers and manipulated her private part and also inserted his finger into her private part. As she was alone in the room she was nervous, but at that moment the Appellant got a call on his mobile phone. When he went to attend to the call she took the opportunity to call her aunt and informed her about the situation, who in turn advised her to approach the Police regarding the matter. She then started ringing the Police emergency number, but the Appellant entered the room and asked her not to inform the Police and gave her Rs.400/- Indian currency notes in the denomination of Rs.100/-. Thereafter, she left the room and straightaway went to the Police Station and informed the Police about the incident. They asked her to accompany them to the Lodge in search of the Appellant, where on reaching they found that the Appellant was about to leave, however the Police apprehended him. The victim was then forwarded to the District Hospital for medical examination. She identified Exhibit 1 shown to her in three pages as the statement made by her before a Magistrate and recorded by the Magistrate and she had also signed on the document. That, later she was taken to the State Jail at Rongyek for identification of the Appellant during which time she identified him on all three occasions. She identified M.O.II as the track pant and M.O.III as the underwear worn by her at the relevant time. Under cross-examination, she failed to identify M.O.I (collectively) as the same Rs.100/- denomination Indian currency notes which were handed over by her to the Police, during the relevant time. Admittedly, she did not make any hue and cry when the Appellant was dragging her to his room. She also

admitted that when the Appellant went to attend to his mobile phone, the Lodge in which she was taken was not locked or latched by the Appellant. The Police did not seize the mobile phone which she was carrying on the relevant day. She had also not inform her parents that she was going to her uncles house on the relevant day neither had she inform the uncle or aunt to whose house she was going on that day. She had left school in November, 2015. That, she had resumed her studies in the Government School after the alleged incident, but presently was not attending school due to ill-health. She further admitted that the Appellant saw her leaving the Lodge.

**(ii)** P.W.13 the owner of the Lodge was aware that the Appellant had checked in to his lodge at the relevant period, having introduced himself as a Tower Mechanic of Airtel Telecom Services. In the month of May, 2017, which was a Monday, a day on which the shops in the particular market are usually closed, at around 10 to 11 a.m. he saw the Appellant inside the gate of the Lodge and the victim on the road outside the gate. The victim was complaining that the Appellant had verbally abused her and she asked him where the Police Station was. He accordingly indicated to her the direction of the Police Station. He noticed that the Appellant was preparing to leave the Lodge, but he restrained him as the victim had gone to the Police Station. He enquired from the Appellant as to what the matter was and the Appellant informed him that the victim had come to collect money. He had given her Rs.400/-, with which she was not satisfied. After some time, the Police arrived at his Lodge and took both the Appellant and the victim with them and later seized Exhibit 5. His cross-examination revealed that he did not hear the voice of the Appellant or the victim prior to him having seen the victim on the road outside the gate and he neither saw the victim entering nor leaving the Lodge. According to him, the Appellant was not nervous when he was preparing to leave the Lodge for his work.

**(iii)** The evidence of P.W.2 was of no assistance to the Prosecution case. He was called to the Police Station by the Police at around 11.30 a.m. when he was at work, informing him that an incident had occurred concerning his daughter. He along with his wife, a worker in a GREF construction site went to the Police Station. He lodged Exhibit 2 before the SHO regarding the incident. The contents were dictated by his wife and scribed by P.W.3, both P.W.2 and P.W.3, however, failed to prove the contents of the FIR. P.W.3 and P.W.4 were witnesses to the seizure of Rs.400/- in the denomination of Rs.100/- each, but the currency notes as

per P.W.4 were in the possession of the Police. They were unaware of the incident, hence the Prosecution could draw no succour from their evidence. P.W.11 a neighbour of P.W.13 was witness to the seizure of the Guest Entry Register Exhibit 5 from P.W.13, but he stated nothing pertaining to the incident.

**(iv)** The wearing apparels of the victim M.O.II and III were seized in the presence of P.W.12 and P.W.14, but they were unaware of the ownership of the articles of clothing. P.W.15 the aunt of the victim did not know about the incident save to the effect that some time in the year 2017 she received a phone call from the victim informing her that one man was chasing her, she advised her to call the Police emergency number. P.W.15 the aunt of the victim claims to have received a call on her mobile phone from the victim sounding nervous and informing her that a man was chasing her. She advised the victim to call the Police.

**(v)** P.W.16 the Doctor, who examined P.W.1, stated as follows;

> **"**On 22.05.2017, I examined a minor girl aged about 15 years, brought by Constable Sabina Pradhan with an alleged history of sexual assault by an unknown person, around 55 years of age, male who pulled to his room and tried to have sexual intercourse and touched her breasts and put his finger on her private part. On my examination of the said minor girl, I found the following;
>
> Her vitals were normal. Bilateral breast - normal. Mons pubis - normal. Labia majora and minor - normal. Hymen-no fresh injuries seen.
>
> Sample was not taken since the victim did not give history of sexual intercourse.
>
> My final opinion was there were no signs of use of force, lack of genital injuries could be because of use of lubricant, it could also be because there was a fingering with the use of lubricant or overpowered or threatened. Sexual violence cannot be ruled out.**"**

Under cross-examination, he admitted that the victim did not have fresh injuries on the hymen and labia majora and labia minora neither did she have any other injuries on her body. He also admitted that his opinion to the extent that sexual violence could not be ruled out was based on the history of the case of the victim.

**(vi)** P.W.17, the Junior Scientific Officer, Biology Division, RFSL examined M.O.II a grey colour track pant of the victim, M.O.III one black underwear of the victim and sample blood of the Appellant M.O.IV. The sample blood M.O.IV of the Appellant, gave a positive test for the blood group 'O' while the blood detected in M.O.II and M.O.III (evidently of the victim) tested positive for the blood group 'A'. The evidence of P.W.17 was brushed off as immaterial for the case by the Learned Trial Court but this conclusion was not buttressed by any reasoning.

**(vii)** The Doctor who examined the Appellant was P.W.18 who had been brought to him with a history of being involved in the sexual offence. He found no injuries on the body of the Appellant. The Appellant had not consumed alcohol or any other intoxicant at the time of his examination. His evidence thus contradicts the argument of the Learned Additional Public Prosecutor who had stated that a finger nail injury was seen on the Appellants face.

**(viii)** P.W.19 the Nodal Officer of Bharti Airtel Ltd. testified that the I.O. of the case had made a requisition seeking certification of the Call Detail Record (CDR) of two mobile numbers which was duly furnished to the I.O. and that there had been incoming and outgoing call between the said mobile numbers. The Prosecution however having failed to exhibit any of the documents obtained from P.W.19, his evidence is thus of no relevance to the case, added to this is the fact that the cell phone of the victim was not seized by the Police to establish who had made the first call or whether the victim was in possession of a mobile phone. The statement of P.W.1 that she had called the Police emergency number of the Lodges room also remained unproved as her mobile phone was not seized to verify the truth of her statement.

**(ix)** The I.O. P.W.20 during his evidence admitted that the Appellant did not try to abscond although there was a time gap of one hour 20 minutes between the registration of the FIR and his arrest.

**8.** The Learned Trial Court while convicting the Appellant was impressed by the statements of the victim and found her testimony to be cogent, believable and trustworthy, but has failed to detail the reasons for arriving at such a conclusion. At Paragraph 17 of the impugned Judgment, the Learned Trial Court has only extracted the evidence of P.W.1 and concluded that there was no reason to doubt her evidence. Reproducing her evidence verbatim does not suffice to establish a finding of truthfulness or trustworthiness. The Learned Trial Court has also placed reliance on Section 164 Cr.P.C. statement of the victim and concluded that as the minor victim was not confronted with her Section 164 Cr.P.C. statement during cross-examination, her evidence therein remained uncontroverted. On this aspect, it is imperative to point out that the Section 164 Cr.P.C. statement of a victim is not substantial evidence and can only be looked into only for the purpose of corroboration or contradiction. Neither was done. In the first instance all that the victim has done is identify Exhibit 1 as her statement recorded by a Magistrate but the contents have not been proved by her in the Court nor was it read out to her. Her story of Rs.400/- being given to her by the Appellant to prevent her from reporting the matter to the Police appears to be unbelievable for the reason that she has accepted it and still gone to the Police. The Lodge owner appears to have been present in the premises but he did not notice the victims entry into or exit from the Lodge raising suspicious of whether she really was forced into the Lodge. She raised no cries for help when the Appellant allegedly dragged her into the Lodge which is indeed an unnatural reaction if one is protesting. It is not her case that her mouth was closed or that her limbs were tied. Above all, it is unfathomable as to why she would mutely go where led by the Appellant as she has stated categorically that, **"***the accused asked me to accompany him to ….. Bazaar and took me to a Hotel* ……..**"** She made no protest to his proposition and reached his Lodge without demur. There appears to be no physical coercion by the Appellant. P.W.13 saw her only outside the gate of the Lodge and at that time all that she told him was that the Appellant had abused her verbally and she was going to report the matter to the Police. No allegation of sexual assault was made by her in the first instance to P.W.13. P.W.13 then restrained the Appellant from leaving the Lodge for his work at which time the Appellant did not appear nervous and he made no effort to abscond which is a mitigating circumstance in his favour as the Police arrived at that spot after about one and the half hours of the Appellant being detained by P.W.13. There is no proof whatsoever of

use of force by the Appellant on the victim duly buttressed by the medical examination conducted on her which shows no injuries, not only in her genital but also on her person. Thus, in the light of the evidence of P.W.1 even if it is to be assumed that such an incident took place in the Lodge it was evidently consensual and the victim being peeved by the Appellant making over only Rs.400/- to her took steps against him. The Learned Trial Court has not discussed how the money came into the hands of the Appellant, but concluded sans grounds that the Appellant was guilty. The Prosecution made no effort to investigate into this aspect and no reasons emanated by investigation as to why the Appellant would have handed over money to her. It also appears that post the lodging of Exhibit 2 she prepared to establish that she was a minor and consequently rejoined school although P.W.2 had deposed that she had already left school in 2015. The victim however volunteered to add that she was not attending school due to ill-health. It is also in the statement of the victim that on the relevant day she was going to her paternal uncles place, but on the way the Appellant met her after which the alleged incident took place. It may relevantly be mentioned that no investigation ensued with regard to the existence of such paternal uncle to establish the veracity of the victims statement. The mother of the victim is alleged to have conveniently left Sikkim, but no effort was made by the Prosecution to trace her out and bring her back nor is there any report about the truth of this statement, as already discussed *supra*. The non-seizure of the mobile phone of the victim also lends suspicion to her statement regarding a third person calling her before the day of incident as also her call to P.W.15 made after the incident occurred. While pausing here momentarily it is pertinent to note that P.W.15 the victims aunt despite stating that the victim sounded nervous made no effort to inform the Police or the parents of the victim regarding the alleged phone call received by her from P.W.1 and surprisingly failed to extend help to her. Her cell phone was not seized during investigation to test the authenticity of her statement. Her evidence fails to inspire the confidence of this Court.

**9.** In light of all the evidence that has been discussed hereinabove, I am of the considered opinion that the second question also deserves to be determined in the negative. The Prosecution has failed to establish its case against the Appellant beyond a reasonable doubt and he consequently deserves an acquittal.

**10.** In the end result, the Appellant is acquitted of the offence under Section 3(b) punishable under Section 4 of the POCSO Act, 2012, Section 342 and Section 376(2)(i) of the IPC.

**11.** Appeal is allowed.

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

**13.** The Appellant be set at liberty forthwith if not required to be detained in any other case.

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

**15.** No order as to costs.

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

**SLR (2021) SIKKIM 771**

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

**WP (C) No. 40 of 2019**

**Shri. Umesh Prasad Sharma and Another** ….. **PETITIONERS**

*Versus*

**Allahabad Bank and Others** ….. **RESPONDENTS**

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

**For Respondent 1:** Mr. Sudesh Joshi, Advocate.

**For Respondents2, 3:** Mr. Pratap Khati, Advocate.

**For Respondents 4, 5:** None.

Date of decision: 30th September 2021

**A. Constitution of India – Article 226 –** A party who applies for issuance of a writ should, before he approached the court, have exhausted other remedies open to him under the law. However, this is not a bar to the jurisdiction of the High Court to entertain the petition or to deal with it. It is rather a rule which courts have laid down for the exercise of their discretion.

(Para 15)

**B. Hindu Law – Whether a property gifted by to a son by the father becomes ancestral property – Nature of such property explained –** According to Hindu Law by Sir Dinshaw Fardunji Mulla

23rd edition – "all property inherited by a male hindu from his father, father's father or father's father father, is ancestral property." A property of a Hindu male devolves on his death – Father of a joint Hindu family governed by *Mitakshara* law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way – *Mitakshara* father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants – It is not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. A property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor ( *In re: C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar referred*) – It is also evident that respondent no.4 acquired the property on transfer by his father who had originally acquired it. These facts make the property self-acquired property of the father of respondent no.4 and thereafter, of himself and consequently not the ancestral property of the petitioners. As such respondent no.4 has a right to deal and dispose of the property as he desires.

(Paras 24, 25 and 26)

**Petitiondismissed.**

**Chronology of cases cited:**

1. State Bank of India v. Ghamandi Ram (Dead) Through Gurbax Rai, AIR 1969 SC 1330.
2. Lakkireddi Chinna Venkata Reddi and Others v. Lakkireddi Lakshmama, AIR 1963 SC 1601.
3. Vineeta Sharma v. Rakesh Sharma and Others, (2020) 9 SCC 1.
4. Bharati Reddy v. State of Karnataka and Others, (2018) 12 SCC 61.
5. Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. and Others, (2014) 6 SCC 1.
6. Shyam Narayan Prasad v. Krishna Prasad and Others, (2018) 7 SCC 646.

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

8. Maktul v. MST. Manbhari and Others, AIR 1958 SC 918.

9. Assistant Commissioner of State Tax and Others v. M/s Commercial Steel Ltd., Civil Appeal No. 5121 of 2021 (decided on 03.09.2021).

10. C. N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar, AIR 1953 SC 495.

**JUDGMENT**

***Bhaskar Raj Pradhan, J***

**1.** The petitioners were not parties before the Debts Recovery Tribunal (the Tribunal). They are adult sons of the respondent no.4 who was proceeded against before the Tribunal having stood as guarantor for the loan taken by the respondent no.2 from the respondent no.1 in Case No.TRC / 127/2018 in re: Allahabad Bank vs. M/s Majestic Printers and Publishers and Ors. The respondent no.4 had for that purpose mortgaged the landed property in dispute (the property) to the respondent no.1 as a guarantor. The respondent no.3 wife of respondent no.2 was also a guarantor. The respondent no.2 was the Certificate Debtor no.2 and the respondent no.4 was Certificate Debtor no.3.

**2.** They have approached this court under Article 227 of the Constitution of India seeking for quashing of the order dated 13.11.2019 (impugned order) purportedly passed by the Tribunal. They seek a declaration that the property involved in the auction sale shall not be sold in auction to realize the dues of the respondent no.1; a declaration that the other landed properties of respondent no.2 first be proceeded against to realize the dues of respondent no.1; and a direction that the loan shall be realized from the respondent no.3 from her employer duly adjusting the considerable amount towards recovery of loan.

**3.** The petitioners state that the property was originally acquired by the father of respondent no.4, late Hari Prasad Sharma and the respondent no.4 got this property as his share from his father on partition and as such it is an ancestral property of the petitioners. It is the petitioner's case that there is an old *'ekra'* house in the property where the petitioners along with their father-the respondent no.4 and other family members used to reside. It is stated that the petitioners and the respondent no.4 jointly cultivate the land appurtenant to the old *'ekra'* house. It is the petitioners' case that if they are removed from the *'ekra'* house and the land appurtenant thereto they would be rendered homeless.

**4.** It is stated that the petitioners as well as respondent no.4 are Hindus governed by Mitakshara School of Hindu Law and that by virtue of their birth; they have become owners of the property along with respondent no.4 as coparceners.

**5.** According to the petitioners the respondent no.2 owns and possesses various landed properties bearing plot nos. 396 (area .2420), 405 (area .0240), 1191 (area .1680), 1489 (area .0600), 1489/1789 (area .2460), 1248/1790 (area .1840) and 1249/1791 (area .2320). The petitioners have relied upon a communication bearing memo no. 63/DCE dated 12.10.2017 issued by the Sub-Divisional Magistrate, East District Collectorate of the Government of Sikkim which states so. It is asserted that these properties which are recorded in the name of respondent no.2 are apart from land bearing plot no.1487/1789 at Tintek Block, East Sikkim which has been attached for sale by auction by the respondent no.1.

**6.** The petitioners further assert that the respondent no.3-wife of respondent no.2 who was also a guarantor of the loan taken by respondent no.2 is a regular employee of the Government of Sikkim in the Energy and Power Department, Gangtok in the rank of ARS. Her gross monthly salary is Rs.49,000/- and net amount received by her per month is Rs.33,669/-.

**7.** Although the respondent no.4 was arrayed as a party in the present writ petition and served, he has chosen not to appear and file his say.

**8.** The respondent no.1 challenges the *locus standi* of the writ petition. The respondent no.1 also contests the claim of the petitioners that the property is ancestral property. According to the respondent no.1 the property was gifted to respondent no.4 by his father late Hari Prasad Sharma by a gift deed dated 21.03.2001 duly registered before the sub-registrar. According to the respondent no.1 the gift deed and *„parcha khaityan* made from the original title deeds were deposited by the respondent no.4 as the mortgager for creating a mortgage with the respondent no.1. The respondent no.1 further pleads that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the DRT Act) provides an efficacious remedy to any person who may have grievances against the order/judgment of the Tribunal and the aggrieved person may preferred an appeal to the Debts Recovery Appellate Tribunal (the Appellate Tribunal). It is thus contended that in view of the availability of efficacious statutory remedy the petitioners ought to have exhausted it before invoking the jurisdiction of this court.

**9.** The respondent no.1 does not dispute the assertion of the petitioners about their humble background; that the petitioners live with the respondent no.4 in the *'ekra'* house and their livelihood being dependent upon the property.

**10.** The respondent no.2 states that he was running a printing press in the name and style of M/s Majestic Printers and Publishers. He was earlier banking with UCO Bank when in the year 2006 the respondent no.1 approached him to be a customer and assured him of granting a loan. Although he had sought a loan of Rs.25 lakhs only, Rs.18 lakhs was sanctioned and finally an amount of Rs.15 lakhs was lent to him. The respondent no.3, his wife, stood as his guarantor. The respondent no.1 asked the respondent no.2 to ensure another guarantor. He requested respondent no.4, who then stood as a guarantor for the loan. On 14.03.2006 the respondent no.4 applied to withdraw as a guarantor. After receiving the respondent no.4's request for discharge as a guarantor the respondent no.1 started pressurising respondent no.2 to pay the entire loan

and as a result he could not concentrate on his business which ultimately led to the downfall. The respondent no.2 has not denied the assertion made by the petitioners that he is owner of various other properties besides the one secured with the respondent no.1.

**11.** The respondent no.3 also accepted that she had stood as a guarantor on behalf of respondent no.2, her husband. The respondent no.3 has stated in her counter-affidavit that she had informed the respondent no.1 at the time when respondent no.2 took the loan that she was not a regular employee and could not be able to submit any salary certificate. However, the respondent no.3 has not disputed the petitioners' assertion that she was now a regular employee earning a salary of Rs.49,000/- per month.

**12.** Rejoinders to the counter-affidavits filed by respondent nos.1 and respondent nos. 2 and 3 were also filed by the petitioners. The petitioners took the plea of the factum of the Appellate Tribunal being outside the State of Sikkim and their inability to approach it; the financial burden on them to deposit 50% of the debt to prefer an appeal; the respondent no.2 having extensive property yet not attached from where the respondent no.1 could realize their dues; and the protection guaranteed by the Old Laws of Sikkim against auction sale of properties if on such sale the holding would become less than 5 acres. It was also pleaded that the respondent no.3 who was also a guarantor was a government servant and therefore, in a position to repay the loan taken by her husband the respondent no.2.

**13.** Mr. A. Moulik, learned Senior Advocate for the petitioners submitted that when the property was gifted by the father of respondent no.4 the petitioners were already born and thus had acquired a right over the coparcenary property. He insisted that the property was ancestor property. To explain what is ancestral property and the effect thereof he relied upon ***State Bank of India vs. Ghamandi Ram (Dead) Through Gurbax Rai***[1]; ***Lakkireddi Chinna Venkata Reddi & Ors. vs. Lakkireddi Lakshmama***[2]; ***Vineeta Sharma vs. Rakesh Sharma &***

[1] **AIR 1969 SC 1330**
[2] **AIR 1963 SC 1601**

***Ors.***[3]**.** To contest the plea of the respondent no.1 of not having availed the efficacious alternative remedy Mr. A. Moulik relied upon ***Bharati Reddy vs. State of Karnataka & Ors.***[4] and ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited & Ors.***[5].

**14.** Mr Sudesh Joshi, learned counsel for respondent no.1 on the other hand drew the attention of this court to paragraph 5 of the writ petition which according to him clearly explains the nature of the property. The learned counsel submits that on these pleadings it is evident that the property was not an ancestral property. He submitted that what is ancestral property has been crystallized by the Supreme Court in ***Shyam Narayan Prasad vs. Krishna Prasad & Ors.***[6]; ***Govindbhai Chhotabhai Patel & Ors. vs. Patel Ramanbhai Mathurbhai***[7] and ***Maktul vs. MST. Manbhari & Ors.***[8] He further submitted that the petitioner could have availed of the alternative remedy and having not done so, the writ petition was not maintainable.

**15.** A reading of the judgments of the Supreme Court cited by the petitioners makes it clear that a party who applies for issuance of a writ should, before he approached the court, have exhausted other remedies open to him under the law. However, this is not a bar to the jurisdiction of the High Court to entertain the petition or to deal with it. It is rather a rule which courts have laid down for the exercise of their discretion.

**16.** In ***Harshad Govardhand Sondagar*** (supra) the Supreme Court examined a case of the appellants who claimed to be tenants of different premises in Mumbai mortgaged to different banks as securities for loan advanced by the banks. The Supreme Court examined the various provisions of the Transfer of Property Act, 1882, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") and it was held that before the

[3] **(2020) 9 SCC 1**
[4] **(2018) 12 SCC 61**
[5] **(2014) 6 SCC 1**
[6] **(2018) 7 SCC 646**
[7] **(2020) 16 SCC 255**
[8] **AIR 1958 SC 918**

mortgage was created, the borrower had already leased out the same in favour of the lessee and thus the lessee would have the right to enjoy the property in accordance with the terms and conditions of the lease. It was further held that there was no remedy available to a lessee of the borrower under Section 17 of the SARFAESI Act before the Tribunal, in case of dispossession by the secured creditor and therefore, the remedy would lie under Article 226 and 227 of the Constitution of India.

**17.** In ***Assistant Commissioner of State Tax & Ors. Vs. M/s Commercial Steel Limited***[9] held:

> ***"11****. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:*
>
> *(i) a breach of fundamental rights;*
>
> *(ii) a violation of the principles of natural justice;*
>
> *(iii) an excess of jurisdiction; or*
>
> *(iv) a challenge to the vires of the statute or delegated legislation."*

**18.** The writ petition is contested by the respondent no.1 on the ground of availability of an efficacious alternative remedy. The respondent no.1 submits that Section 20 of the RDB Act provides an appeal against the order of the Tribunal to any person aggrieved by an order made, or deemed to have been made by a Tribunal.

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[9] Civil Appeal No. 5121 of 2021 (decided on 03.09.2021)

**19.** The petitioners have challenged the impugned order. The impugned order was passed by the respondent no.5 the Recovery Officer-I of the Tribunal (the Recovery Officer) 9 Civil Appeal No. 5121 of 2021 (decided on 03.09.2021) under Section 25 of the RDB Act. It is not an order passed by the Tribunal. Section 20 of the RDB Act provides for an appeal to the Appellate Tribunal to any person aggrieved by an order made, or deemed to have been made by a Tribunal only and not against any order passed by the Recovery Officer under Section 25 thereof. As such this court is of the view that against the impugned order passed by the Recovery Officer of the Tribunal no appeal could have been preferred under Section 20.

**20.** A proceeding under Section 25 of the Act is appealable under Section 30. Section 30 provides that notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under the Act may, within thirty days from the date of which a copy of the order is issued to him, prefer an appeal to the Tribunal. On receipt of an appeal the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Section 25 to 28.

**21.** The proceeding was at the stage of Section 25 of the Act. Section 25, as seen above, relates to the mode of recovery of debts. Section 26 deals with the validity of certificate and amendment thereof and provides that it shall not be open to the defendant to dispute before the Recovery Officer the correctness of the amount specified in the certificate, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer. The Presiding Officer however, would have the power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending intimation to the Recovery Officer. Section 27 deals with stay of proceedings under certificate and amendment or withdrawal thereof. The Presiding Officer has power to grant time for payment of the amount provided the defendants makes a down payment of not less than 25% of the amount specified in the recovery certificate and

gives an unconditional undertaking to pay the balance within a reasonable time acceptable to the applicant bank or financial institution holding recovery certificate. Section 28 deals with other modes of recovery other than as provided in Section 25. Thus it is clear that the scope of Section 30 appeal is limited to confirm, modify or *set aside* the order made by the Recovery Officer in exercise of his powers under Section 25 to 28.

**22.** Although both Sections 20 and 30 of the RDB Act uses the expression *"any person aggrieved"* the scope of the two provisions is materially different. Whereas an appeal under Section 20 is preferred against an order of the Tribunal the appeal under Section 20 is against the order made by the Recovery Officer. The issues sought to be raised in the present petition by the petitioners, who are not parties before the Tribunal are not determinable by the Recovery Officer who is concerned only for recovering the amount specified by the Tribunal in the recovery certificate. The respondent no.4 in an appeal under Section 20 of the RDB Act could have raised those issues while challenging the final order passed by the Tribunal under Section 19 (20) of the RDB Act. This court is not examining whether the petitioners could have challenged the final order passed by the Tribunal in the facts of the case as it is only academic.

**23.** This court shall now examine if the property is an ancestral property of the petitioners or if they had any enforceable right on the property mortgaged by the respondent no.4 in favour of the respondent no.1 as a guarantor.

**24.** According to Hindu Law by Sir Dinshaw Fardunji Mulla 23rd Edition *"all property inherited by a male hindu from his father, fathers father or fathers father father, is ancestral property."* A property of a Hindu male devolves on his death. This was reiterated by the Supreme Court in ***Shyam Narayan Prasad*** (supra).

**25.** A three-Judge Bench decision of the Supreme Court in ***C. N. Arunachala Mudaliar vs. C.A. Muruganatha Mudaliar***[10] held that father of a Joint Hindu family governed by Mitakshara law has full and

[10] **AIR 1953 SC 495**

uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. The Supreme Court while examining the question as to what kind of interest a son would take in the selfacquired property of his father which he receives by gift or testamentary bequest from him, it was held that Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants. It was held that it was not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. It was further held that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.

**26.** On their pleadings, evidently, the petitioners have not inherited the disputed property. Their father, the respondent no.4, is still alive. The petitioners state that the respondent no.4 got the property as his share from his father late H.P. Sharma on partition. However, the petitioners have not filed any partition deed to substantiate their claim. The respondent no.1 has however, pleaded that the property was gifted to respondent no.4 by his late father Hari Prasad Sharma vide gift deed dated 21.03.2001 duly registered in the office of the sub-registrar. The respondent No.1 has also filed the gift deed and the *'parcha khatiyan'* by which the property was mortgaged by respondent no.4 with the respondent no.1 as the guarantor. Without examining whether this document purporting to be a gift deed is in fact a gift deed or a sale deed as sought to be argued by Mr. A. Moulik it is quite evident that respondent no.4 had not got the disputed property as his share on partition as claimed by the petitioners. It is also evident that the respondent no.4 acquired the property on transfer by his father who had originally acquired it. These facts make the property self acquired property of late Hari Prasad Sharma and thereafter, of the respondent no.4 and consequently not the ancestral property of the petitioners. As such the respondent no.4 has a right to deal and dispose of the property as he desires.

**27.** It is not in dispute that the respondent no.4 had mortgaged the property in favour of the respondent no.1. Section 58 (a) of the Transfer of

Property Act, 1882 states that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The respondent no.4 had the right to do so and the petitioners who are his adult sons could not have any right to stop him in dealing with his self acquired property in the manner he chose. Evidently no attempt was also made by the petitioners to do so. The mortgage on the property does create rights in favour of the respondent no.1.

**28.** In view of the aforesaid this court is of the considered view that the present case is not a fit case for interference with the recovery proceedings. More so when the respondent no.4 himself doesn't seem to have any grievance and the petitioners have no right over the property.

**29.** The writ petition is dismissed. Consequently, the interim order dated 20.12.2019 stands vacated. Pending application, if any, is also disposed. In the circumstances, no order as to cost.