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SUBJECT INDEX

Indian Evidence Act, 1872 – Evidence – Neither the prosecution nor the eye witnesses have explained the injuries on accused No. 3 **–** In fact the version of the eye witnesses was that the unknown boys attacked them. There is no mention of the eye witnesses or anyone else getting into a brawl with the unknown boys and any of the accused getting injured – The F.I.R lodged by the informant alleged that the deceased and his friends were assaulted by six unknown persons after which they ran away. The testimonies of the eye witnesses who were present at Café Live & Loud does not show that they and the unknown persons had a scuffle or that any of the unknown persons were also injured. The story as narrated by PW-8 and PW-21 is that while they were enjoying at Café Live & Loud one local boy/unknown boy asked PW-22 for a fight. PW-22 however, is completely silent on this aspect. According to him as they were leaving the pub the accused persons attacked them and ran away. None of the witnesses attribute any motive or reason for the attack – The prosecution has failed to establish as to what exactly transpired that night with cogent evidence. The presence of the deceased and his friends at Café Live & Loud that night is established. However, except for accused No.1 whose presence at Café Live & Loud that night is established, the presence of the rest of the accused persons has not been established – Accused No.1 is said to have left with PW-31 around 12:30 a.m. on 19.05.2013 while the evidence of the eye witnesses reflects that the incident happened around 1:30 a.m. on 19.05.2013.

Smt. Reenu Meena* v. *State of Sikkim and Others ***622-B***

Indian Evidence Act, 1872 – S. 9 – Test Identification Parade – It is well settled that substantive evidence of identification of an accused is the one made in the Court. None of the eye witnesses who were present with the deceased on 18.05.2013 at Café Live & Loud identified any of the accused persons in Court. The F.I.R was lodged against unknown persons. When an F.I.R is lodged against unknown persons T.I.P is held for the purpose of testing the veracity of the witnesses about their capability of identifying the accused persons who were unknown to them. On 19.05.2013 the eyewitnesses who were with him on the night of 18.05.2013 at Café Live & Loud admitted that they were at the Police Station for a long period of time. PW-8 categorically admitted that he, PWs- 21 to 23 and 9 had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime. The T.I.P was admittedly conducted on 29.05.2013 – This admission is fatal to the identification of some of the accused persons during the T.I.P as the

said prosecution witnesses had occasion to see all the accused persons just ten days prior to the T.I.P and therefore, their faces and appearance would have been fresh in their memory – The result of the T.I.P is only corroborative evidence. The admissions made by the learned District & Sessions Judge and the Investigating Officer that persons with similar features and physical attributes were not placed alongside the said five accused persons of whom the T.I.P was conducted would also negatively impact the credibility of the T.I.P – Consequently, in spite of investigation and trial the identification of the unknown boys who assaulted the deceased remains unknown.

Smt. Reenu Meena* v. *State of Sikkim and Others ***622-C***

Indian Evidence Act, 1872 – S. 9 – Test Identification Parade – The establishment of the identity of the accused persons in a criminal case is paramount to the prosecution. More so in a case of a heinous offence. It is well settled that the Court must be absolutely certain that it was the accused persons and no others who are guilty of the offences alleged. In the present case, the F.I.R alleged that six unknown person assaulted the deceased and his friends. The charge-sheet however, charged the seven accused persons for murder and other offences. The learned Principal Sessions Judge however, framed charge of murder only against five accused persons and the other two accused persons for withholding information from the police only. The allegation was of a group of boys assaulting another group of boys. As per the version of the eye witnesses the attack was sudden and immediately thereafter, the assailants ran away. The eye witnesses failed to identify any of the accused person in Court. Even the identification during the T.I.P has been rendered worthless in view of the fact that the eye witnesses had occasion to see the accused persons at the Police Station before the T.I.P.

Smt. Reenu Meena* v. *State of Sikkim and Others ***622-D***

Indian Evidence Act, 1872 – Ss. 101 and 102 – Burden of Proof and Onus of Proof – Difference Explained – A fact is said to be "proved" when, if considering the matters before it, the Court either believes it to exist, or considers the existence so probable that a prudent man might, under the circumstances of a particular case, to act upon the supposition that it exist. The conformational effect of evidence in Civil and Criminal cases is not always the same. Preponderance of probability is sufficient for a decision in a Civil case. Due regard must be given to the "burden of proof". The standard of proof in a Civil case is lesser than a Criminal prosecution.

Therefore, a higher degree of probability providing assurance to the Plaintiff's case set up would shift the "onus of proof" upon the Defendant. It is equally exigent to discern the essential difference between "burden of proof" and "onus of proof". The "burden of proof" lies upon the person who has to prove the fact. This "burden of proof" never shifts. "Onus of proof" on the other hand shifts – In the present suit for recovery of money, Bir Bahadur Rai was required to create a high degree of probability to discharge his "burden of proof" so as to shift Karma Loday Bhutia. If Bir Bahadur Rai succeeded to do so Karma Loday Bhutia would be required to discharge his "onus of proof"and in the absence thereof the "burden of proof" lying on Bir Bahadur Rai would be held to be discharged.

Shri Karma Loday Bhutia* v. *Shri Bir Bahadur Rai ***732-A***

Indian Evidence Act, 1872 – S. 165 – Judge's Power to Put Questions – The victim has used the word "*chara*" in the Nepali vernacular. The exact meaning of the terminology has not been explained before the learned trial Court either by the victim or other witnesses nor was an effort made by the learned trial Court by invoking the provisions under S. 165 of the Indian Evidence Act to elicit the correct context of the word used by the victim. What the victim's understanding of the word tantamount to cannot be assumed by this Court as the word may be used variously to describe different sexual acts and may not necessarily be an expression of penetrative sexual assault. The understanding of the act of penetrative sexual assault by a child of approximately ten years is also a question that baffles and remains unanswered.

State of Sikkim* v. *Sashidar Sharma ***717-B***

The Motor Vehicles Act, 1988 – S. 147 – Gratuitous Passenger – The term "gratuitous" does not find any definition or explanation in the Motor Vehicles Act. The term however is understood to indicate a passenger travelling in a commercial vehicle without payment.

The Branch Manager, Chola MS General Insurance Company Ltd* v. *Mrs. Radha Pradhan and Others ***707-A***

The Motor Vehicles Act, 1988 – S. 147 – Gratuitous Passenger – The object of the provision to S. 147 is to lay down the requirements of the policies and the limits of liability in respect of passengers and persons other than passengers in relation to passenger vehicles and goods carriages – The Section provides that the policy of insurance is to be issued by an

authorized insurer, which must insure the specified person or class of persons, against any liability incurred in respect of death or of bodily injury, to any person or damage to any property of a third party, as well as against the death of or bodily injury caused to any passenger of a public service vehicle, caused by or arising out of the use of the vehicle in a public place. The liability extends to damage to any property to a third person but not of the insured. It includes the owner of the goods carried in the vehicle or his authorized representative.

The Branch Manager, Chola MS General Insurance Company Ltd* v. *Mrs. Radha Pradhan and Others ***707-B***

Indian Penal Code, 1860 – S. 71 – Limit of Punishment of Offence Made Up of Several Offences – In view of S. 71 I.P.C, the conviction under S. 341 I.P.C is not sustainable as the deposition of the victim suggests that the offence of wrongful restraint was part of the offence of penetrative sexual assault committed by the Appellant.

Palden Sherpa* v. *State of Sikkim ***697-C***

Indian Penal Code, 1860 – S. 354 – Assault or Criminal Force to Woman to Outrage her Modesty – No doubt, in the matter of sexual assault, the testimony of the victim should be given much weightage and conviction can be made only on the basis of the statement of the victim – But the Court has to examine the testimony of the witnesses very carefully – The statement of prosecutrix regarding physical contact is contradictory. In her examination in-chief, she has said about physical contact whereas in his cross-examination she has denied this fact – The statement of PW-1 is also contradictory to the statement of PW-2, sister of the victim – Similarly, the statement of the PW-4 is contrary to the statement of the victim – Appellant entitled to the benefit of doubt.

Ram Bijay Singh* v. *State of Sikkim ***614-A***

Prevention of Money Laundering Act, 2002 – S. 42 – Appeal to the High Court – If any person is aggrieved by any decision or order of the Appellate Tribunal, he may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him. Proviso to this Section provides that if the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period of sixty days, the High Court may allow it to be filed within a further period not exceeding sixty days – The proviso clearly mandates the High Court not to allow the appellant to file an

appeal after a further period of sixty days – An appeal can be filed within a period of sixty days, and beyond the period of sixty days, the Act has given power to the High Courts to entertain an appeal within a further period not exceeding sixty days. No appeal can be entertained after exceeding period of sixty days.

Directorate of Enforcement (PMLA)* v. *EIILM University, Sikkim ***654-A***

Prevention of Money Laundering Act, 2002 – S. 42 – Appeal to the High Court – The High Court cannot breach statutory mandate and cannot make the provisions of Limitation Act applicable – The appeals filed by the appellant held not maintainable the same having been filed beyond the prescribed period of limitation as provided under S. 42 of the PMLA.

Directorate of Enforcement (PMLA)* v. *EIILM University, Sikkim ***654-B***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – On the first question put to the victim by the Court as to how old she was, she had unequivocally stated that she is "10 years old." – The Doctor who examined the victim advised X-ray of right wrist, right elbow and right hip of the victim for the purposes of bone age estimation. Upon receipt of the X-ray findings, she recorded her opinion on the Wound Certificate pertaining to the victim which substantiates the evidence of the victim as regards her age – The Registrar of Births and Deaths, STNM Hospital, Gangtok has identified the Birth Certificate issued to the victim by him. The victim's date of birth has been recorded as 18.01.2007 in the said Birth Certificate – The evidence of this witness also establishes the age of the victim at the time of the incident as 9 years.

Nima Tamang* v. *State of Sikkim ***683-A***

Protection of Children from Sexual Offences Act, 2012 – The evidence of the victim and her younger brother clearly indicate that the incident occurred on the relevant day. The evidence of her cousin indicates that there were injuries on the body of the victim, to establish the fact of the incident – The opinion of the Doctor states that as per the physical examination, the evidence of sexual intercourse cannot be refuted and the evidence of penetrative sexual intercourse is present – The evidence *supra* establishes the injuries on the victim and thereby the fact of the incident, in which the Appellant sexually assaulted the victim.

Nima Tamang* v. *State of Sikkim ***683-B***

Protection of Children from Sexual Offences Act, 2012 – The victim, in her evidence has stated that one day when she was going to School, she met the Appellant *en route.* He hit her on her eyes with his fist, caught hold of her and put his hand inside her panty and fondled her vagina. PW-3 saw the Appellant committing the act and admonished the Appellant who fled, while the victim went to School crying – The victim's father has stated that PW-3 had witnessed the incident and it was PW-3 who narrated to him that he saw the child being kissed by the Appellant while she was going to School. After having learnt of the incident, he narrated it to his wife, who then coaxed the victim to tell her the entire incident. The victim narrated the incident to her as detailed *supra*. Thus the evidence of the incident, as narrated by the victim and her mother are consistent.

Lalit Chetri* v. *State of Sikkim ***692-A***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –Determination of the age of the victim during the trial for offences under the POCSO Act is imperative – The victim's mother deposed that the victim was 12 years and studying in Class VIII in a Government School. The victim's step father also stated that the victim was aged about 12-13 years and studying in Class VIII in a Government School. The victim's elder brother deposed that the victim was 13 years during the relevant period. The victim herself informed the Court that she was 13 years old and studying in Class VIII – The defence not able to demolish the oral evidence of persons who would know the age of the victim asserting that the victim was in fact a minor – The birth certificate of the victim was seized from her mother. She would be its custodian. It records the victim's date of birth as 21.04.2004. The birth certificate was proved by its maker i.e. Dr. Amber Subba, Medical Officer who not only identified his signature on it but also stated that the birth certificate was issued after verification of the relevant document presented for registration of the birth like the certificate of identification of the father, voter identity card of the parents, antenatal check up card/immunization card of the mother and the infant and the birth report from the ICDS (pink card) – The birth certificate is a public document and the issuer a public servant. The Head Mistress of the Government School where the victim studied till 13.02.2017 proved the certificate issued by her under her signature which also recorded the date of the birth of the victim as 21.04.2004 – The oral evidence of the mother, step father, elder brother and the victim herself is corroborated by the birth certificate and the certificate of the Head Mistress. Taking the victim's date of birth to be 21.04.2004 and the date of incident as

21.12.2016 she would be exactly 12 years and 8 months. The evidence produced by the prosecution cogently proves that the victim was in fact a minor at the time of the commission of the offence and the failure of the prosecution to produce the register of births and deaths and the school register does not in any way dilute the evidence.

Palden Sherpa* v. *State of Sikkim ***697-A***

Protection of Children from Sexual Offences Act, 2012 – There is no contradiction between the ocular evidence and the medical evidence. The Appellant has been convicted for the offence under S. 3(a) of the POCSO Act under which penetration of the penis to any extent into the vagina amounts to penetrative sexual assault. Lack of injury on the genital of the victim is not conclusive proof that the Appellant had not committed penetrative sexual assault on her.

Palden Sherpa* v. *State of Sikkim ***697-B***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –The prosecution furnished the alleged Birth Certificate of the victim said to be issued by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim. The victim has nowhere given evidence of her age before the learned trial Court, which without putting the question to the victim about her age, has recorded that the witness is eleven years old and a minor, thereby failing to clarify the reason for its conclusion. As per the I.O., the Birth Certificate was was obtained from the aunt of the victim after preparing a Handing and Taking Memo – Beyond the receipt of the Birth Certificate, there is no evidence whatsoever to establish that the Birth Certificate pertains to the victim – Besides, the parents of the victim are alive and could have been examined to prove the victim's age – No other conclusion can be arrived at but the conclusion of failure on the part of the Prosecution to establish the victim's age.

State of Sikkim* v. *Sashidar Sharma ***717-A***

SLR (2019) SIKKIM 611

(Before Hon'ble the Chief Justice)

Tr. P. (Suo Motu) (C) No. 12 of 2019

Kishore Dungmali (Rai) ….. PETITIONER

Versus

Shiva Kumar Rai (Dungmali) and Others ….. RESPONDENTS

Date of decision: 4th September 2019

A. Code of Civil Procedure, 1908 – S. 24 – Transfer of Suit – District Judge, Special Division-I, Sikkim at Gangtok (In-charge) has sent a letter dated 13.08.2019 along with a copy of the Order dated 13.08.2019 expressing his difficulty to proceed with the matter i.e. Title Appeal No.05 of 2018 on the ground that he has passed an injunction Order on 19.10.2015 in Title Suit No.11 of 2015 (between the same parties) in the capacity of Civil Judge, East Sikkim at Gangtok (In-charge).The said suit was finally decided by another Judge. Against that judgment an appeal is before him – Held: District Judge is not correct in showing his inability to hear the matter, as different Orders are passed by Judicial Officers at different stages of the cases and all such orders passed by Judicial Officers merge in the final Orders when the cases are finally decided – The District Judge passed the injunction Order in the suit when he was a Civil Judge. At that time, he had not finally adjudicated the matter and had not decided any issue finally. While deciding an application for interim Order, the Judicial Officer expresses his tentative view in the matter as the matter is to be adjudicated finally. Therefore, there should be no difficulty in hearing a matter in appeal which has been decided by another Judge.

(Paras 1 and 3)

Petition dismissed.

JUDGMENT

Vijay Kumar Bist, CJ

1. The learned District & Sessions Judge, Special Division-I, Sikkim at Gangtok (I/C) has sent a letter bearing reference No.115 dated 13.08.2019 along with the order dated 13.08.2019 in which he has expressed his difficulty to proceed with the matter i.e. Title Appeal No.05 of 2018 *(Mr. Kishore Dungmali (Rai) versus Shiva Kumar Rai (Dungmali) & ors.)* on the ground that he has passed an injunction order on 19.10.2015 in Title Suit No.11 of 2015 *(N.B Dungmali & ors. Versus Kishore Dungmali & Anr.)* in the capacity of Civil Judge, East Sikkim at Gangtok (I/c). The said suit was finally decided by another Judge. Against that judgment appeal is before him.

2. I have seen the injunction order dated 19.10.2015 passed in Title Suit No.11 of 2015 *(N.B Dungmali & ors. Versus Kishore Dungmali & Anr.)* allowing the application filed by the plaintiff under Order XXXIX Rule 1 and 2 read with Section 151 of Code of Civil Procedure, 1908 (for CJ Court short CPC). By the said order temporary injunction was granted in favour of the plaintiff.

3. In my view, the learned District & Sessions Judge is not correct in showing his inability to hear the matter, as different orders are passed by Judicial Officers at different stages of the cases and all such orders passed by Judicial Officers merge in the final orders when the cases are finally decided. The learned District & Sessions Judge passed the injunction order in the suit when he was Civil Judge. At that time, he had not finally adjudicated the matter and had not decided any issue finally. While deciding an application for interim order the Judicial Officer expresses his tentative view in the matter as the matter is to be adjudicated finally. Therefore, there should be no difficulty in hearing a matter in appeal which has been decided by another Judge.

4. Moreover, Sikkim is a small State and there are very few Judicial Officers. Many orders are passed by them at different stages. In case some small order is passed by a Judicial Officer during pendency of a case, in that situation, he cannot be stopped from hearing the matter at appellate stage which is decided by another Judge. If Officers are prevented to hear

the appeal in which matter they had passed some small order at any stage in the suit proceedings, in that event a practical difficulty will also arise in this State. Therefore, in my view, there is no impropriety or illegality if CJ Court the matter is heard by the District & Sessions Judge, Special Division-I, Sikkim at Gangtok at appellate stage.

5. In view of the above, the Suo Motu Transfer Petition (Civil) No.12 of 2019 is hereby rejected.

6. Let a copy of this order be sent to the learned District & Sessions Judge, Special Division-I, Sikkim at Gangtok forthwith.

7. This Suo Motu Transfer Petition is, accordingly, disposed of.

SLR (2019) SIKKIM 614

(Before Hon'ble the Chief Justice)

Crl. A. No. 22 of 2018

Ram Bijay Singh ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. N. Rai, Sr. Advocate with Ms. Malati Sharma, Ms. Sudha Sewa and Mr. Yojan Rai, Advocates.

For the Respondent: Mr. S.K. Chettri, Assistant Public Prosecutor.

Date of decision: 9th September 2019

A. Indian Penal Code, 1860 – S. 354 –Assault or Criminal Force to Woman to Outrage her Modesty – No doubt, in the matter of sexual assault, the testimony of the victim should be given much weightage and conviction can be made only on the basis of the statement of the victim – But the Court has to examine the testimony of the witnesses very carefully – The statement of prosecutrix regarding physical contact is contradictory. In her examination in-chief, she has said about physical contact whereas in his cross-examination she has denied this fact – The statement of PW-1 is also contradictory to the statement of PW-2, sister of the victim – Similarly, the statement of the PW-4 is contrary to the statement of the victim – Appellant entitled to the benefit of doubt.

(Paras 16 and 17)

Appeal allowed.

JUDGMENT

Vijay Kumar Bist, CJ

Present appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (for short CrPC) against the judgment and order dated 29.06.2018 passed by the learned Fast Track Judge, South and West Sikkim at Gyalshing in Sessions Trial (F.T.) Case No.05 of 2017 *(State of Sikkim versus Ram Bijay Singh)* whereby the learned Judge convicted the accused Ram Bijay Singh (hereinafter the appellant) to undergo rigorous imprisonment of one year and to pay a fine of Rs. 6,000/- and a further imprisonment of one month in default of payment of fine, under Section 354 of Indian Penal Code, 1860 (hereinafter IPC) and also to undergo imprisonment of one year and to pay a fine of Rs.4,000/- and in default of payment of fine to further undergo imprisonment of 15 days, under Section 354-A of the IPC. The Court directed that both the sentences will run concurrently and the period of detention already undergone by the appellant during the period of investigation and trial shall be set off against the sentence of imprisonment.

2. The case of the prosecution is that on 25.08.2017 a First Information Report (FIR) was lodged by one Phama Rook Limboo before Khechuperi Police Outpost under Gyalshing Police Station stating that on the previous day i.e. 24.08.2017 at around 08.00 pm the appellant attempted to rape his elder brother's daughter. The FIR was registered under Section 354 (A), 376, 511 of IPC. The victim girl was sent for medical examination.

3. The statement of victim was recorded under Section 164 CrPC by Judicial Magistrate, Soreng Sub Division, West Sikkim. The Investigating Officer after investigating the matter filed the charge sheet under Section 354, 376, 511 of IPC. The Judicial Magistrate committed the case to the Court of learned Judge, Fast Track (S&W) West Sikkim at Gyalshing. The learned Judge framed the charge with one head under Section 376/511 IPC where he pleaded not guilty and claimed to be tried.

4. The prosecution examined as many as 11 witnesses.

5. PW 1 is the victim. PW2 is sister of victim. PW 3 is co-villager. PW 4 is the uncle of victim who lodged the FIR. PW 5 is the doctor who examined the victim girl. PW 6 is co-villager. PW 7 is the class teacher of the victim. PW 8 is teacher in the school where the victim was studying. PW 9 is doctor who examined the appellant. PW 10 is a co-villager. PW 11 is Investigating Officer of the case.

6. PW 1, the victim in her statement stated that she knows the appellant. On 24.08.2017, she was in the house of her kaka (uncle) and was doing her homework, when the appellant suddenly entered her room, apologized, caught and told her to kiss him and tried to kiss her. When she told him that she will tell her uncle, the appellant left and she locked the room. Shortly thereafter, someone knocked the door and when she asked if it was sunu, there was no reply. After a while, she slowly opened the door and saw the appellant was going away. The next day she told Kamala Maa'm who then questioned the appellant. The matter was reported to police. Later, she went to the court where she gave her statement to the Judge and the appellant was arrested and sent to the Jail. In her cross-examination this witness stated that it is true that there are about 8-9 houses surrounding her house. She admitted that she has not stated anywhere that the appellant had forcefully tried to kiss her. She also admitted that at the relevant time she was staying at her uncle's house and at that time her uncle, his wife and their daughter were also present in the house. The house is a kutcha house and only has three rooms. She also admitted that when someone talks, shouts or screams in the room where she was at the relevant time, it can be easily overheard in the adjacent room and the other near houses. She also admitted that she did not raise any hue and cry when the alleged incident had occurred. She also admitted that she had allegedly informed about the incident only on the next day. She also admitted that the appellant did not do anything to her forcefully. She also stated that when the alleged incident had occurred, one B.B Thapa and Lama Sir's wife were talking to each other on the road in front of her room. The door of her room faces the road and the people standing in the road can see anyone who is coming or going from her room. She also stated that toilet of her house is just below her room. She also submitted the fact when she first reported the matter to her teacher and to her uncle, she had only stated that the appellant had allegedly entered her room and had said "I Love You" and had asked for a kiss. She also admitted the fact that she had not made any allegation having any kind of physical contact with her.

7. PW 2 is sister of the victim. In her deposition she stated that on 24.08.2017 (the date of incident) she and her sister were doing homework together at around 08.00 pm. She went to toilet but when she returned to the room, she found it locked from inside. When she knocked, her sister did not open the door. After hearing her voice, her sister opened the door and when she entered, her sister was very scared and told her that appellant had entered the room, apologized, caught her and told her "I Love You" and asked her to kiss him. She was very scared and had locked the door. She also stated that on the same night they informed her father.

8. PW 3 is co-villager. He stated that on the fateful day he was called by Lama Sir through mobile. He went to the house of the victim. He learnt that the appellant had caught the victim and tried to make her kiss him.

9. PW 4 is uncle of the victim in which house the victim used to stay. In his statement he stated that on 24.08.2017 at around 08.00 pm his daughter shouted from her room which was next to his room that the appellant had tried to kiss the victim and told her "I Love You". However, he did not pay any heed as he was tired and went to bed. The next day when he was washing his hair, the appellant came and asked for apology. He thought that he was seeking apology for having scolded her niece, he brushed it aside and said it was ok as he was not aware of exactly what happened. However, shortly afterwards the panchayat and other people arrived and told him that the appellant has mis-behaved with the victim and it ought not to be taken lightly. Thereafter, he along with the panchayat went to the police station and lodged the FIR. He also stated that it is true that victim (PW 1) and his daughter (PW 2) did not tell him that the appellant had tried to kiss the victim and told her "I Love You" and accordingly, the same is not in his statement given to police. He also admitted the fact that panchayat and villagers had scolded him for treating the matter lightly and letting off the appellant. He also admitted the fact that after panchayat and other people arrived, then he came to know what the appellant had allegedly done.

10. PW 5 is a Gynecologist. In her statement she stated that she had examined the victim. She did not find any sign of mark or resistance or struggle on the body of the victim. There were no redness, swelling, tenderness, scratches, abrasion present on the body of the victim. No local injury seen, no bleeding seen. Hymen admits-tip of small finger. Her statement is not relevant as there is no allegation of such sexual assault.

11. PW 6, Bal Bahadur Chettri is co-villager and is not a relevant witness.

12. PW 7, Kamala Dahal is the class teacher, to whom, as per the statement of the victim, she first told about the incident. In her statement this witness stated that she is the class teacher of the victim. She did not know the exact date and month but sometime in the middle session of their school in the year 2017, one day the minor victim told her after attendance that the appellant entered into the house of the minor victim at around 08.00 pm and forced her to kiss him. She also told that the appellant had said "I Love You" twice to victim. Thereafter, she went to the Vice Principal and informed him what victim told her in the class. The Vice Principal called the appellant to his office and enquired about the incident. While the Vice Principal was making enquiry she left the office of the Vice Principal.

13. PW 8 Samber Man Limboo is the teacher working in the same school where the victim was studying. In his statement, he stated that he was not sure about the date but it was sometime during the last week of August 2017 while he was in his office, the Class teacher of class 8 Smt. Kamala Dahal came and informed him that the minor victim told her that she was sexually assaulted by the appellant. He immediately informed the same to the Principal Madam. The Principal Madam told him to call the appellant and enquire about the incident. Accordingly, he called the appellant to his office and enquired from him. At first the appellant refused to have done any such thing to the victim. Thereafter, he called the minor victim to his office and asked her about the incident. The minor victim informed him that the appellant came to her house at night and forced her to say "I Love You" and appellant also put his hand on her waist forcefully. Thereafter, the appellant confessed that he went to the minor victim house and did the same, as alleged. In his statement he also admitted the fact that the appellant did not confessed before them about the alleged incident and he confessed only after forced by victim. This witness admitted that when the appellant was allegedly asked he had refused the allegations made by the victim and had pleaded his innocence.

14. Ms. Malati Sharma, learned Counsel appearing for the appellant submits that if statement of all the relevant witnesses are read together, in that event, the appellant is bound to get the benefit of doubt. She submitted that PW 1 in her statement stated that the appellant suddenly entered her room and apologized, caught and asked her to kiss him and tried to kiss

her and when she told him that she will tell her uncle about this, the appellant left the room. But at the same time she also admitted that the appellant did not do anything to her forcefully. She also admitted that she had not made any allegation against the appellant of any kind of physical contact with her. Learned Counsel submitted that the statements of PW 1 are self contradictory. She referred the statement of PW 1 where she has stated that when the alleged incident occurred, one B.B Thapa and Lama Sir's wife were talking to each other on the road in front of her room and the said room faces to the road and the people standing on the road can see anyone who is coming or going from her room. She submitted that in such situation, it is most unlikely that appellant had sexually harassed the victim. Learned Counsel for the appellant also referred the statement of PW 2 i.e. sister of the victim in which she has stated that at the time of incident she had gone to toilet. By referring the statement of PW 2, learned Counsel has argued that it is very unlikely that the appellant will do such act within a period of 2-3 minutes. Learned Counsel also referred the statement of the uncle of the victim in whose house the victim was residing in which he stated that on 24.08.2017 at around 08.00 pm his daughter shouted from her room which was next to his room that the appellant had tried to kiss the victim and told her "I Love You", however, he did not pay any heed to that as he was tired and went to bed. But this witness in his cross-examination admitted that he came to know about the incident next day. His testimony does not support the prosecution case. Learned Counsel for the appellant submits that as the appellant is outsider, therefore, the victim's uncle under influence of the local villagers filed the false report of the incident against the appellant. Learned Counsel for the appellant lastly submitted that the appellant has been convicted and sentenced for one year and in fact he has completed the sentence of one year in jail and now has been released from the jail. She prayed that considering the fact that there are contradictions in the statements of the witnesses and also considering the fact that appellant is young boy and already undergone full sentence, the appellant be given benefit of doubt.

15. Mr. S.K Chettri, learned Assistant Public Prosecutor submitted that testimony of the victim alone is sufficient to convict the appellant. He submitted that not only the statements of the victim, her sister as well as her uncle have also supported the case of the prosecution. The testimony of PW 8 is also sufficient to convict the appellant before whom appellant confessed his guilt.

16. I have considered the submissions of the learned Counsel for the parties and I have carefully perused the records of the case. No doubt, in the matter of sexual assault, the testimony of the victim should be given much weightage and the conviction can be done only on the basis of the statement of the victim. This Court has to examine the testimony of the witnesses very carefully. In the present case, prosecutrix in her examination in-chief had stated that on 24.08.2017 she was in the house of her uncle and was doing her homework, when the appellant suddenly entered her room, apologized, caught her and asked her to kiss him and also tried to kiss her. When she told him that she will tell her uncle the appellant left. She closed the door and someone knocked the door and she opened the door and saw appellant going away. In her examination in-chief she also stated that she told this fact to Kamala Madam on the next day and the matter was reported to the police. In her cross-examination, the prosecutrix has stated that at the relevant time she was staying at her uncle's house and her uncle, his wife and their daughter were also present in the house. The house is a kutcha house. She also stated that when someone talks, shouts or screams in the room where she was at the relevant time, it can be easily overheard to the adjacent room and the other near houses. She also stated that she did not raise any hue and cry when the alleged incident had taken place. In her statement, she also stated that she had informed about the incident only on the next day. She also admitted that the appellant did not do anything to her forcefully. This victim in her cross-examination admitted the fact that when she first reported the matter to teacher and to her uncle, she had only stated that the appellant had allegedly entered her room and said her "I Love You" and asked for kiss. She also admitted the fact that she had not made any allegation having any kind of physical contact with her. This Court finds that the prosecutrix herself has admitted the fact in her cross-examination that at the first incident she informed her teacher as well as her uncle that appellant had simply stated that he loves her and wants kiss from her. She also admitted the fact that she didn't tell anyone that appellant made any physical contact with her. Her statement regarding physical contact is contradictory. In her examination in-chief she has said about physical contact whereas in his cross-examination she has denied this fact. This Court also finds that the statement of PW 1 is also contradictory to the statement of PW 2, sister of the victim. PW 2 has stated that when victim open the door, at that time she was very scared. She told PW 2 that the appellant had entered the room, apologized, caught her waist and told her "I Love You" and asked her to kiss him. This statement is contrary to

the statement given by the prosecutrix in which she has stated that for the first time about the incident she informed her class teacher Kamala Madam about the incident and that too on the next day. Similarly, the statement of the PW 4 is also contrary to the statement of the victim. PW 4 in his examination in-chief stated that on the date of incident at around 08.00 pm his daughter shouted from her room which was next to his room that the appellant had tried to kiss the victim and told her "I Love You". It is not believable that the uncle of the victim in whose house the victim was staying will not react once he heard all these from the mouth of his daughter. This statement is contrary to his own statement where he stated that only after the panchayat and co-villagers told him about the incident, next day, he came to know about the same. This witness had also admitted that the panchyat and co-villagers had scolded him for treating the matter lightly and letting off the appellant and only thereafter, he lodged the FIR. This statement is supporting the argument of appellant's Counsel that complaint was made on the pressure of the villagers.

17. In view of the above discussion, this Court is of the view that the appellant is entitled for benefit of doubt and accordingly, he is given benefit of doubt. The appeal deserves to be allowed.

18. Accordingly, appeal is allowed, Judgment and Order on Sentence dated 29.06.2018 awarded to the appellant by learned Fast Track Judge, South & West Sikkim at Gyalshing in Sessions Trial (F.T) Case No.05 of 2017 *(State of Sikkim versus Ram Bijay Singh)* is set aside.

19. Since the appellant has already been released from jail on completion of sentence, no further order is required to be passed.

20. Let certified copy of this Judgment be sent to learned Fast Track Judge, South & West Sikkim at Gyalshing.

21. Lower Court records be remitted back forthwith.

SLR (2019) SIKKIM 622

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

Crl. A. No. 30 of 2016

Smt. Renu Meena ….. APPELLANT

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Appellant:	Mr. Santosh Kumar, Mr. Madhurendra Sharma and Ms. Pritima Sunam, Advocates.
For Respondent No. 1:	Dr. Doma T. Bhutia, Public Prosecutor, Mr. S.K. Chettri, and Ms. Pollin Rai, Asst. Public Prosecutors.
For Respondent 2-3:	Mr. Ajay Rathi, Ms. Phurba Diki Sherpa, Ms. Renuka Chettri and Mr. Aditya Makkhim, Advocates.
For Respondent 4-5:	Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates.
For Respondent No. 6:	Mr. Tashi Norbu Basi, Advocate.
For Respondent 7-8:	Mr. Jorgay Namka, Ms. Panila Theengh and Mr. Simeon Subba, Advocates.

With

Crl. A. No. 22 of 2017

State of Sikkim ….. APPELLANT

Versus

Mr. Gurmey Wangchuk Wazalingpa @ Gyurmee Others ….. RESPONDENTS

For the Appellant: Dr. Doma T. Bhutia, Public Prosecutor, Mr. S.K. Chettri, and Ms. Pollin Rai, Asst. Public Prosecutors.

For Respondent 1-2: Mr. Ajay Rathi, Ms. Phurba Diki Sherpa, Ms. Renuka Chettri and Mr. Aditya Makkhim, Advocates.

For Respondent 3-5: Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan and Mr. Saurav Singh, Advocates.

For Respondent No. 4: Mr. Tashi Norbu Basi, Advocate.

For Respondent 6-7: Mr. Jorgay Namka, Ms. Panila Theengh and Mr. Simeon Subba, Advocates.

Date of decision: 12th September 2019

A. Indian Evidence Act, 1872 – Criminal Jurisprudence – It is a cardinal principle of criminal jurisprudence that the prosecution is bound by the evidence it leads and that when two views are possible the one in favour of the accused persons should be accepted –In view of the overwhelming evidence of qualified medical practitioners produced by the prosecution with the medical records of the deceased showing that he was in fact suffering from *haemophilia*, Court not inclined to accept the contention of the Appellant that the oral evidence of his father (PW-43) stating that he was not, should be accepted.

(Para 42)

B. Indian Evidence Act, 1872 – Evidence – Neither the prosecution nor the eye witnesses have explained the injuries on accused No. 3 – The version of the eye witnesses was that the unknown boys attacked them. There is no mention of the eye witnesses or anyone else getting into a brawl with the unknown boys and any of the accused getting injured – The F.I.R lodged by the informant alleged that the deceased and his friends were assaulted by six unknown persons after which they ran away. The testimonies of the eye witnesses who were present at Café Live & Loud does not show that they and the unknown persons had a scuffle or that any of the unknown persons were also injured. The story as narrated by PW-8 and PW-21 is that while they were enjoying at Café Live & Loud one local boy/unknown boy asked PW-22 for a fight. PW-22 however, is completely silent on this aspect. According to him as they were leaving the pub the accused persons attacked them and ran away. None of the witnesses attribute any motive or reason for the attack – The prosecution has failed to establish as to what exactly transpired that night with cogent evidence. The presence of the deceased and his friends at Café Live & Loud that night is established. However, except for accused No.1 whose presence at Café Live & Loud that night is established, the presence of the rest of the accused persons has not been established – Accused No.1 is said to have left with PW-31 around 12:30 a.m. on 19.05.2013 while the evidence of the eye witnesses reflects that the incident happened around 1:30 a.m. on 19.05.2013.

(Paras 48 and 49)

C. Indian Evidence Act, 1872 – S. 9 – Test Identification Parade – It is well settled that substantive evidence of identification of an accused is the one made in the Court. None of the eye witnesses who were present with the deceased on 18.05.2013 at Café Live & Loud identified any of the accused persons in Court. The F.I.R was lodged against unknown persons. When an F.I.R is lodged against unknown persons T.I.P is held for the purpose of testing the veracity of the witnesses about their capability of identifying the accused persons who were unknown to them. On 19.05.2013 the eye witnesses who were with him on the night of 18.05.2013 at Café Live & Loud admitted that they were at the Police Station for a long period of time. PW-8 categorically admitted that he, PWs- 21 to 23 and 9 had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime.

The T.I.P was admittedly conducted on 29.05.2013 – This admission is fatal to the identification of some of the accused persons during the T.I.P as the said prosecution witnesses had occasion to see all the accused persons just ten days prior to the T.I.P and therefore, their faces and appearance would have been fresh in their memory – The result of the T.I.P is only corroborative evidence. The admissions made by the learned District & Sessions Judge and the Investigating Officer that persons with similar features and physical attributes were not placed alongside the said five accused persons of whom the T.I.P was conducted would also negatively impact the credibility of the T.I.P – Consequently, in spite of investigation and trial the identification of the unknown boys who assaulted the deceased remains unknown.

(Paras 57 and 61)

D. Indian Evidence Act, 1872 – S. 9 – Test Identification Parade – The establishment of the identity of the accused persons in a criminal case is paramount to the prosecution. More so in a case of a heinous offence. It is well settled that the Court must be absolutely certain that it was the accused persons and no others who are guilty of the offences alleged. In the present case, the F.I.R alleged that six unknown person assaulted the deceased and his friends. The charge-sheet however, charged the seven accused persons for murder and other offences. The learned Principal Sessions Judge however, framed charge of murder only against five accused persons and the other two accused persons for withholding information from the police only. The allegation was of a group of boys assaulting another group of boys. As per the version of the eye witnesses the attack was sudden and immediately thereafter, the assailants ran away. The eye witnesses failed to identify any of the accused person in Court. Even the identification during the T.I.P has been rendered worthless in view of the fact that the eye witnesses had occasion to see the accused persons at the Police Station before the T.I.P.

(Para 66)

Both appeals dismissed.

Chronological list of cases cited:

1. Khurshid Ahmed v. State of Jammu & Kashmir, (2018) 7 SCC 429.

2. C. Muniappan v. State of T.N., (2010) 9 SCC 567.

3. Raja v. State of Karnataka, (2016) 10 SCC 506.

4. State of Haryana v. Bhagirath, (1999) 5 SCC 96.

5. Zahira Habibbullah Sheikh v. State of Gujarat, (2006) 3 SCC 374.

6. Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537.

7. Tomaso Bruno and Another v. State of U.P., (2015) 7 SCC 178.

8. Madho Singh v. State of Rajasthan, (2010) 15 SCC 588.

9. P.K. Narayanan v. State of Kerala, (1995) 1 SCC 142.

10. Shaikh Umar Ahmed Shaikh and Another v. State of Maharashtra, 1998 Cri.L.J. 2534.

11. Sujit Biswas v. State of Assam, (2013) 12 SCC 406.

12. State of Uttar Pradesh v. Wasif Haider and Others, (2019) 2 SCC 303.

13. Suchand Pal v. Phani Pal and Another, (2013) 11 SCC 527.

14. K. Venkateshwarlu v. State of Andhra Pradesh, (2012) 8 SCC 73.

15. Navaneethakrishnan v. State by Inspector of Police, AIR 2018 SC 2027.

16. Abdul Sayeed v. State of M.P., (2010) 10 SCC 259.

JUDGMENT

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

1. This judgment will decide two criminal appeals preferred against the judgment of acquittal dated 29.07.2016 passed by the learned Sessions Judge, Special Division-II, East Sikkim at Gangtok in Sessions Trial No. 09 of 2015 (State v. Gurmey Wangchuk Wazalingpa & Ors.) whereby all the accused persons were acquitted of the charges levelled against them. Criminal Appeal No. 30 of 2016 has been preferred by Renu Meena the mother of the deceased. Criminal Appeal No. 22 of 2017 has been preferred by the State of Sikkim. As both the criminal appeals seek to

assail the acquittal of the Respondents we shall dispose both the appeals by this common judgment.

The First Information

2. On 19.05.2013 First Information Report (FIR) No.107/2013 (exhibit-7) was registered on the information given by Sameer Pradhan (P.W.1) (the informant) posted at Sadar Police Station, Gangtok.

3. The FIR reported that on 19.05.2013 around 0910 hours vide General Diary No.780 call book intimation was received from Central Referral Hospital, (CRH) Tadong, East Sikkim stating that the dead body of one Rakshit Meena (deceased) was brought to CRH by three friends on 19.05.2013 at 0740 hours. It was further stated that on the basis of said information Sadar Police Case No. 36/2013 dated 19.05.2013 under Section 174 Code of Criminal Procedure, 1973 (Cr.P.C.) was registered and the case endorsed to the informant for investigation. It was reported that the informant visited CRH and conducted the inquest on the dead body. It revealed multiple injuries. During investigation statement of Anirban Neogi (P.W.22) was recorded which revealed that on the evening of 18.05.2013 at 2000 hours the deceased along with Anirban Neogi (P.W.22) went to Café Live & Loud, Tibet Road, Gangtok. Thereafter, at 2200 hours they were joined by their four friends namely Aditya Verma (P.W.8), Amber Chandra (P.W.23), Arindam Parmar (P.W.21) and Divit Vinod (P.W.9). At around 0130 hours the deceased and his friends were assaulted by six unknown persons on the stairs of Café Live & Loud. Thereafter, the six unknown persons ran away through their two cars: one Skoda and another Audi. The injured deceased and his friends somehow ran to Hotel Santiniketan located at Arithang, Gangtok and could not come out from there due to fear of life. At the hotel room the condition of the deceased deteriorated. At 0500 hours on 19.05.2013 the friends of the deceased took him to STNM Hospital Gangtok and thereafter to CRH where he was declared brought dead. The dead body of the deceased was forwarded for autopsy. On the basis of the aforesaid facts the informant reported, an FIR was registered against the six unknown persons.

Charge-sheet

4. A charge-sheet dated 16.08.2013 was submitted before the Court of the learned Chief Judicial Magistrate finding *prima-facie* case against Gurmey Wangchuk Wazalingpa @ Gyurmee (Accused No.1), Bidhan Pradhan (Accused No.2), Roden Wangdi Sherpa (Accused No.3), Ugen Namgyal Basi (Accused No.4) and Sonam Namgyal (Accused No.5) under Section 302, 325, 323, 500 read with Section 34 of the Indian Penal Code, 1860 (IPC) and against Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7) under Section 302, 325, 201 read with Section 109 and 34 IPC.

5. At the trial an application was filed by Bidhan Pradhan (Accused No.2) under Section 91 Cr.P.C. for production of medical history/record of the deceased. The learned Principal Sessions Judge vide order dated 09.04.2014 allowed the said application and issued summons to the Medical Superintendent of the CRH requiring him to appear before the Court on 21.04.2014 and to produce the medical records/history of the deceased. Thereafter, Dr. Samsher Singh (C.W.1) was examined as a Court witness and the medical records of the deceased were exhibited as exhibit-C1 and C2.

6. A supplementary charge-sheet dated 24.09.2014 was filed with the finding that the deceased did not suffer from Haemophilia. A second supplementary charge-sheet dated 28.08.2015 was filed upon receipt of expert opinion on the hard disc containing CC TV footage and Sony Digital Camera containing photographs.

7. Another petition under Section 45 of the Indian Evidence Act, 1872 was also filed by Bidhan Pradhan (Accused No.2) and Ugen Namgyal Basi (Accused No.4) with the prayer to direct Dr. Ashok Kumar Samanta (P.W.34) who had conducted the autopsy of the deceased to place fresh opinion with regard to the cause of death in view of the ailment suffered by the victim during his life time. The said petition was rejected vide order dated 27.10.2014.

Charges

8. On 05.03.2015 the learned Principal Sessions Judge, East Sikkim at Gangtok framed charges against Accused No.1 to 5 under Section 302/34 IPC for the murder of the deceased; Section 325/34 IPC for causing

grievous hurt to Arindam Parmar (P.W.21); Section 323/34 IPC for causing hurt to Divit Vinod (P.W.9); Section 506/34 IPC for threatening the deceased and his friends with injury with intent to cause alarm by challenging them to a physical fight which they were not legally bound to do and against Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No. 7), the employees of Café Live & Loud, under Section 176 IPC for not giving information to the police about the assault.

The Trial

9. During the trial forty five witnesses were examined by the prosecution. Five witnesses were friends of the deceased who were present when the alleged assault took place at Café Live & Loud. Seven staff of Café Live & Loud and nine guests present that night were also examined. On completion of the trial the accused person's statement under Section 313 Cr.P.C. was recorded and thereafter judgment delivered on 29.07.2016.

The Sessions Court's conclusions

10. The learned Sessions Judge after examining the evidence came to the conclusion that the prosecution had failed to prove the charges against the accused persons beyond reasonable doubt and as such they were entitled to acquittal. The learned Sessions Judge held that that there was no evidence to establish the presence of the accused persons at Café Live & Loud and their involvement in the scuffle; the prosecution had failed to establish the cause of death being homicidal; Gurmey Wangchuk Wazalingpa (Accused No.1) had already left Café Live & Loud prior to the incident; the Test Identification Parade (TIP) was defective; persons having similar physique, built, height and belonging to the same race or community were not mixed with the accused persons; the prosecution witnesses i.e. Aditya Verma (P.W.8), Divit Vinod (P.W.9), Arindam Parmar (P.W.21), Anirban Neogi (P.W.22) and Ambar Chandra (P.W.23) (jointly referred to as eyewitnesses) who identified the accused persons during the TIP had occasion to see the accused persons prior to the TIP during the time of their arrest and hence it was not free from doubt and unworthy of credence; there was clinching evidence that the deceased had a fall inside the bathroom which might have led the deceased to sustain injury in his lower

lobe of his lung due to the impact of floating rib; the injuries at serial no. 1 to 4 on the deceased were only scratches and not sufficient to cause death whereas the injury at serial no.5 was due to the impact of fall in the bathroom causing the laceration; such laceration, in a haemophilic patient, if not given prompt medical aid would result in excessive internal bleeding leading to accumulation of the 1200 ml of blood on the thoracic cavity which pressurised the lungs and caused its collapse; the evidence of Dr. Bidita Khandelwal (P.W.28), Dr. S. K. Dewan (P.W.29) and Dr. Shamsher Singh (C.W.1) establishes that the deceased was suffering from haemophilia A, factor VIII and died due to his ailment but not due to the assault by the accused persons; the prosecution has failed to establish that the death was homicidal or the motive for the commission of murder to attract the provision of 302 IPC; similarly, there is no evidence to establish common intention.

11. The learned Sessions Judge also came to the conclusion that there was no evidence to establish criminal intimidation by the accused upon the deceased and his friends; the evidence of Divit Vinod (P.W.9) reflects that there was no fight inside or outside the Café Live & Loud and Anirban Neogi (P.W.22) also categorically admitted the fact that the deceased had fallen on the floor of the bathroom of the hotel during the period 2 a.m. till the morning soon after the incident; Dr. Ashok Kumar Samanta (P.W.34) admitted that in the autopsy report (exhibit-31) there was no mention of the age of injury to ascertain the time of death; Aditya Verma (P.W.8), Divit Vinod (P.W.9), Arindam Parmar (P.W.21), Ambar Chandra (P.W.23) have admitted that there were no external injuries noticed on the body of the deceased soon after the incident when they reached the hotel and thoroughly checked the body and therefore, the injury could have been caused in between 2 a.m. till morning at the hotel room and there was no evidence to prove the charge of assault and causing injury to Divit Vinod (P.W.9) and Arindam Parmar (P.W.21) and thus the charge stood not proved.

The rival contentions

12. We have heard Mr. Santosh Kumar, learned Counsel for the Appellant in Criminal Appeal No.30 of 2016 who is the mother of the deceased. We have also heard the learned Additional Advocate General for the State of Sikkim and the learned Counsel for the Respondents at great

length. We have considered the detailed written submissions filed by the learned Counsel for Renu Meena-the mother of the deceased.

13. Mr. Santosh Kumar and the learned Additional Advocate General submitted that while dealing with an appeal against acquittal this Court has full powers to review the evidence on which the order of acquittal was found and reach its independent conclusion as to whether or not the order of acquittal was justified. Defect in investigation by itself cannot be ground for acquittal. There is a legal obligation on the Court to examine the prosecution evidence *dehors* such lapses. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision and a criminal Court could be convinced of the guilt only beyond the range of reasonable doubt. Merely because there is an inconsistency in evidence it is not sufficient to impair the credit of a witness. While appreciating the evidence of witness, the Court has to assess whether read as a whole, it is truthful. Statement of hostile witness is not to be brushed aside in *toto* and the Court can consider it to corroborate other evidence on record. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny. The evidence adduced by the eyewitnesses does not suffer from any material discrepancy and there is no material to show that they had falsely implicated the accused persons. The presence of eyewitnesses at the scene of the occurrence and the identification of the accused persons by them and other witnesses cannot also be doubted. The medical evidence amply corroborates the evidence of the eyewitnesses. The injuries found on Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) corresponds to the overt act of assault by the accused persons. Their evidence, as injured witnesses, must be considered reliable since it comes with a built-in guarantee of their presence. When there are number of assailants, meticulous exactitude of individual acts cannot be given by eyewitnesses. The finding of the learned Sessions Judge that death is not homicidal in nature is manifestly illegal. When eyewitnesses account is credible and trustworthy medical opinion pointing to alternative possibilities cannot be accepted. As post-mortem lividity was seen on the back, *rigor mortis* was detected all over the body and semi digested food material was found in the stomach at the time of the start of autopsy there could be no doubt in the prosecution case regarding the manner in which the incident happen. The finding of the learned Sessions Judge that the deposition of

Moti Lall Pradhan (P.W.44) and Mordent Thapa (P.W.45) cast a cloud in the case of the prosecution is legally infirm. Failure to trace the Audi car and find out the registered owner cannot be a ground of acquittal. The Skoda was recovered from Sonam Namgyal (Accused No.5) and although Lakpa Doma Bhutia (P.W.4) was declared hostile the Court could consider her evidence for the purpose of corroboration. The story of the deceased falling in the bathroom has been taken out of context and the learned Sessions Judge has adopted a hyper technical approach to come to its conclusion. The fact that the death was homicidal is proved by the inquest report, evidence of the eyewitnesses and the evidence of Sangay Doma Bhutia (P.W.3). The Test Identification Report (exhibit-27) reflects that the eyewitnesses have identified the accused persons and the said report stands proved. The evidence of Bachu Singh Meena (P.W.43) bolsters the case of the prosecution. It was the Appellant's case that the findings recorded by the learned Sessions Judge resulting in acquittal of the accused persons is contrary to the weight of evidence adduced and facts established in trial and is conjectural based on surmises and unfounded assumptions.

14. The learned defence Counsel pleaded that if the view taken by the trial Court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of the accused persons is strengthened by their acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused persons, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused persons cannot be convicted on moral considerations. Suspicion however strong and grave cannot take the place of proof. Graver the crime greater the scrutiny. If two views are possible, one favouring the accused persons should be adopted. Major contradictions in ocular and medical evidence would tilt the balance in favour of the accused. The foremost aspect to be proved in a case under Section 302 IPC is that it was homicidal. Clear, cogent and unimpeachable evidence is required before the accused persons are condemned as convicts. Reasonable doubt

is not an imaginary, trivial or a mere probable doubt, but a fair doubt that is based upon reason and common sense. The identification of an accused in the Court is substantive piece of evidence and the identification during the Test Identification Parade is only corroborative.

15. The principles enunciated by the Supreme Court in the judgments**1** relied upon by the parties and as submitted above are well settled. The present appeals are required to be examined in the light of the above principles.

The eyewitnesses account

16. The fact that Aditya Verma (P.W.8) along with his friends Arindam Parmar (P.W.21), Ambar Chandra (P.W.23) and Divit Vinod (P.W.9) had gone to Café Live & Loud on 18.05.2013 has been established by their testimonies in Court. Their testimonies also establishes that the deceased and Anirban Neogi (P.W.22) were also there. The evidence of these five eyewitnesses thus would be vital for the prosecution case.

17. According to Aditya Verma (P.W.8) they all sat together at Café Live & Loud and at around 12:30 a.m. one local boy met Anirban and asked for a fight. Anirban told them about the challenge. In order to avoid the fight they left the Café at around 1:30 a.m. and on reaching the staircase towards the exit they saw some of the boys standing at the exit. They started basting them. Thereafter, they ran away. After about 5-10 minutes they realized the deceased was not with them and therefore went back to see him and found him sitting at the road side. Thereafter, they took him to

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1 Judgments cited by :

Mr. Santosh Kumar:- (1) Khurshid Ahmed v. State of Jammu & Kashmir (2018) 7 SCC 429; (2) C. Muniappan v. State of T.N. (2010) 9 SCC 567; (3) Raja v. State of Karnataka (2016) 10 SCC 506; (3) State of Haryana v. Bhagirath (1999) 5 SCC 96; (4) Zahira Habibbullah Sheikh (5) v. State of Gujarat (2006) 3 SCC 374; (5) Bhagwan Jagannath Markad v. State of Maharashtra (2016) 10 SCC 537.

Mr. K. T. Bhutia:- Tomaso Bruno & Anr. v. State of U.P. (2015) 7 SCC 178; Madho Singh v. State of Rajasthan (2010) 15 SCC 588; P.K. Narayanan v. State of Kerala (1995) 1 SCC 142; Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra 1998 CRI.L.J. 2534.

Mr. Ajay Rathi:- Sujit Biswas v. State of Assam (2013) 12 SCC 406; State of Uttar Pradesh v. Wasif Haider & Ors. (2019) 2 SCC 303; Suchand Pal v. Phani Pal & Anr. (2013) 11 SCC 527; K. Venkateshwarlu v.State of Andhra Pradesh (2012) 8 SCC 73; Navaneethakrishnan v. State by Inspector of Police AIR 2018 SC 2027.

hotel Santiniketan which was booked by them for nights rest. Aditya Verma (P.W.8) did neither identify any of the accused as the unknown persons who basted them nor identify the person who asked Anirban Neogi (P.W.22) for a fight.

18. Divit Vinod (P.W.9) deposed that they celebrated Arindam's birthday party till 1:00 a.m., rested for half an hour and thereafter planned to go back to the hotel. As they came out of the pub a group of boys attacked them and they ran away and stayed in a safe place. Thereafter, they realized that the deceased was left behind and so they went back and saw the deceased sitting on the road side after which they took him to the hotel. Divit Vinod (P.W.9) did not identify any of the accused persons in Court as the group of boys who attacked them.

19. Arindam Parmar (P.W.21) deposes that Anirban was called by one unknown boy in Café Live & Loud and told him that he wants to fight with all of them. Apprehending danger they left Café Live & Loud. At the exit those unknown boys chased them and they ran away during which time he sustained injury on his nose and hid behind a taxi at the adjacent taxi stand. After ten minutes they went back, saw the deceased sitting at the place of occurrence and asked what happened to him. He told them that he was severely beaten by those unknown boys. They asked him to go to the hospital for medical treatment. The deceased told them that those unknown boys might be searching for them and they should go to the hotel. Accordingly, they went to the hotel. Arindam Parmar (P.W.21) neither identified the accused persons as the unknown boys who chased them nor the unknown boy who wanted to fight with him.

20. Anirban Neogi (P.W.22) deposed that they were enjoying at the pub till 1:30 a.m. Thereafter they left the pub. On reaching the gate the accused persons attacked them and ran away. He was hiding behind a car which was parked nearby. The other friends were hiding in other places. After about ten to fifteen minutes they went back to the place and saw the deceased sitting down. He complained that he got beaten very badly. The deceased told them that they should go back to the hotel as they were searching for them. Thereafter, they went back to hotel Santiniketan. Anirban Neogi (P.W.22) did not identify the accused persons in Court.

21. With regard to the deceased their deposition reflects that none of them specified what transpired with the deceased except Ambar Chandra (P.W.23). Ambar Chandra (P.W.23) deposed that some unknown boys assaulted the deceased on his leg. Ambar Chandra (P.W.23) also did not identify the accused persons as the unknown boys who assaulted the deceased on his leg. Arindam Parmar (P.W.21) further deposed that when they found the deceased sitting they asked him what happened and he said that he was beaten by unknown boys. Anirban Neogi (P.W.22) states that the deceased told them that he got beaten very badly. The deposition of the eyewitnesses reflects that some unknown boys had attacked them. However, none of the eyewitnesses could identify nor attempted to identify any of the accused persons in Court.

22. However, the incident is said to have taken place in a crowded Café. Seven staff members of Café Live & Loud who were present that night were also examined as prosecution witnesses.

The version of the staff members of Café Live & Loud

23. Out of them, Ritesh Rai (P.W.5) who was on duty at the cash counter; Prashant Gurung (P.W.15)-the disc jockey; Bijay Gurung (P.W.16)-working in the bar section; Sanila Rai (P.W.17) a waitress, all knew the accused persons. Adrien Limboo (P.W.18) a waiter; Rubina Rai (P.W.26) and Roshan Rai (P.W.35) the steward were also present that night. However, none of the seven staff members stated that the accused were present or involved in any scuffle during their working hours. Ritesh Rai (P.W.5) only stated that one person informed him that a fight was going on outside Café Live & Loud but when he went outside he did not see what happened. Who was the person who told Ritesh Rai (P.w.5) is unknown even to the investigating agency. Roshan Rai (P.W.35) knew Karna Hang Subba (Accused No. 6) and Phurba Tamang (Accused No.7) but did not even depose about their involvement.

24. Besides the eyewitnesses, five friends of the deceased and the seven staff members of Café Live & Loud nine guests who had visited Café Live & Loud were also examined.

The version of the guests at Café Live & Loud

25. Uttam Pradhan (P.W.6), an actor did not know the accused persons. He had gone to Café Live & Loud with his friend Arjun Chapagai and Sameer Gazmere (P.W.7). They sat there and discussed the script of their upcoming movie and left at around 11:30. According to this witness he was there for five to six hours. Students of Manipal took photographs with him in their mobile phones. These students were fully drunk. Three of them had visited the wash room. There were no abnormal activities there. He was sitting at the table next to the wash room. He was sure that the persons from Manipal were not interrupted and disturbed or threatened by any person. None of the accused persons had followed the said students to the wash room. He had not seen the accused persons there.

26. Sameer Gazmere (P.W.7) also did not know the accused persons. He was with Uttam Pradhan (P.W.6) and Mr. Chapagai that night. During cross-examination he admitted that there was no incident inside or outside.

27. Pema Lhamu Bhutia (P.W.10), Chimey Zangmo Topden (P.W.11), Pema Dechen Wangmo Chingapa (P.W.12), Gawa Choden Dahdul (P.W.13), Rinzing Choden Dahdul (P.W.14), Chepel Topden (P.W.31) and Jigme Lachungpa (P.W.32) had all visited Café Live & Loud that night. Pema Lhamu Bhutia (P.W.10), Chimey Zangmo Topden (P.W.11), Pema Dechen Wangmo Chingapa (P.W.12), Gawa Choden Dahdul (P.W.13) neither identified the accused persons nor had anything to depose about the incident.

28. Rinzing Choden Dahdul (P.W.14) knew the accused persons but deposed that she along with her cousin had gone to Café Live & Loud, danced till 1:00 a.m. and thereafter, went home. She was declared hostile and cross examined. She denied that some unknown boys had asked for beer.

29. Chipel Topden (P.W.31) also identified all the accused persons. She deposed that on 18.05.2013 at around 10:00 p.m. she along with Gyrmey Wangchuk Wazalingpa (Accused No. 1), his family members and friends had gone to Café Live & Loud for a night out. At the restaurant she met many of her friends including Jigmi Lachunga (P.W.32) and his wife. At

around 12:30 a.m. on 19.05.2013 after having food and wishing Jigmi Lachungpa (P.W.32) good night they left Café Live & Loud after which Gurmey Wangchuk Wazalingpa (Accused No.1) dropped her at her residence.

30. Jigmi Lachungpa (P.W.32) also knew the accused persons. He had visited Café Live & Loud with his wife on 18.05.2013 at around 10:30 p.m. for dinner. At the restaurant they met the Accused No.1 and Chipel Topden (P.W.31). At 12 to 12:30 a.m. on 19.05.2013 after wishing them good night both Accused No.1 and Chipel Topden (P.W.31) left the Café. During his cross-examination he deposed that till 1:30 a.m. on 19.05.2013 he had not seen the rest of the accused persons nor witnessed any incident or commotion inside or outside the premises of Café Live & Loud. He was also not declared hostile.

31. The prosecution witness i.e. the staff of Café Live & Loud and the other guests present that night failed to corroborate the version of the incident the eyewitnesses deposed about. They, except one were also not declared hostile and cross-examined by the prosecution. Their evidence is binding upon the prosecution.

The inquest report

32. The informant exhibited the inquest report (exhibit-1) as the one he had prepared and also identify his signature thereon. However, he did not depose about the contents of inquest report (exhibit-1).

The autopsy report

33. The post-mortem was conducted by Dr. Ashok Kumar Samanta (P.W.34) on 19.05.2013.

34. The external injuries detected were:-

(1) abrasion of size 4 cm x 1 cm situated transversely over right supra orbital ridge, 2 cm above and lateral to right eyebrow (lateral end)

(2) a contused abrasion of size 1 cm x 0.5 cm situated over medial side of right lower leg, 5 cm above medial malleolus;

(3) small abrasion measuring 1 cm x 1 cm situated over the back of chest, about 6 cm below left scapula inferior angle.

35. The internal injuries detected were:

(1) Contusion of size 0.5 cm x 0.5 cm on the inner aspect of both upper and lower lips at its middle;

(2) Lacerated injury of lower lobe of left lung with collapse of both lungs;

(3) The thoracic cavity contained about 1200 ml of fluid blood and contained some clots also;

(4) Multiple contusion with clots were seen at the hilar region of left kidney and on perinephric fatty tissue.

36. On examination of the stomach, it contained 100 ml of liquid semi digested food material and had smell of alcohol.

37. Dr. Ashok Kumar Samanta (P.W.34) opined that all the injuries described in the external and internal parts were ante mortem in nature and could have been caused by hard and blunt force impact. He opined that the cause of death of the deceased was due to haemoragic shock as a result of injuries sustained during life. He exhibited the autopsy report (exhibit-31).

38. During cross-examination Dr. Ashok Kumar Samanta (P.W.34) admitted that the time of death which is vital is not reflected in the report; injury No.1 is a small abrasion/scratch on the forehead; injury No.2 and injury No.3 are small scratches only; injury No.4 is a simple injury; all the injuries are not injuries to cause death; abrasions are caused as a result of fall on hard surface, being dragged, finger nails, thorns etc.; injury No.1 to 4 are abrasions which have been caused by force directed tangential to the body and not at right angle; there was no rib fracture; injury No.3 and injury No.5 are not co-related with each other and his findings regarding them were based on assumption and presumption as he could not find sufficient external injury to explain injury No.5; normally both the lungs do

not collapse at a time, but in case of collapse of both the lungs it is a case of emergency as the lungs which are required for respiration would not be able to function and the person could die of asphyxia within two to four minutes; haemorrhagic shock is caused by severe loss of blood; deceased was a registered haemophilic patient and he had himself registered at CRH for ready reference and help in case of emergency; deceased was suffering from haemophilia A factor VIII; at the time of autopsy examination he was not aware of this condition of the deceased and his report (exhibit-31) does not suggest so; haemophilia A is related to inherent blood disease and haemophilic patient suffers from excessive bleeding; haemophilic patient should avoid consumption of alcohol and physical activities; his report (exhibit-31) does not mention the age of injuries and injury No.1 to 4 can be caused due to fall on hard or slippery surface like bathroom floors; there were chances of lacerated injury of lower lobe of left lung being caused due to impact of floating rib which might have caused the lacerated injury as mentioned in the report (exhibit-31) if the victim had a fall on a hard or slippery surface like bathroom floor; the accumulated blood could be the result of the injury in the left lung due to the impact of the floating rib. Dr. Ashok Kumar Samanta (P.W.34) admitted that the injuries at serial No.1 to 4 would be noticed on general examination by a lay person.

39. Dr. Shamsher Singh (C.W.1) the Medical Superintendent of CRH produced the record of the medical file of the deceased and admitted that the deceased was suffering from genetic bleeding disorder.

40. Dr. Bidita Khandelwal (P.W.28) the Professor and Head of the Department, Department of Medicine, CRH confirmed that the deceased had attended medicine OPD of CRH on 05.05.2011 where he had come with a medical certificate from a registered medical practitioner from outside certifying that he has haemophilia A and was to be given injection Factor VIII 750 international unit during active bleeding. Accordingly to Dr. Bidita Khandelwal (P.W.28) the deceased wanted the same to be documented in his medical file. As he had a valid certificate certifying his disease and the treatment being given, she documented the same in the file since in case of active bleeding prompt treatment could be given. During her cross-examination she admitted that if prompt treatment is not given to the patient in case of active bleeding it could be fatal or serious.

41. Dr. S. K. Dewan (P.W.29) also confirmed that the medical record of the deceased at the CRH revealed that he was a known case of haemophilia A on injection Factor VIII. He had clinically examined the deceased on 03.10.2012 when he came to his clinic complaining about pain in his knees and found that he had swelling on both the knee joints. He advised the deceased to have protective medical measures in the form of knee brace.

42. In view of the overwhelming evidence of qualified medical practitioners produced by the prosecution with the medical records of the deceased showing that he was in fact suffering from haemophilia we are not inclined to accept the contention of the Appellant that the oral evidence of his father i.e. Bachu Singh Meena (P.W.43) stating that he was not, should be accepted. It is a cardinal principle of criminal jurisprudence that the prosecution is bound by the evidence it leads and that when two views are possible the one in favour of the accused persons should be accepted.

43. The autopsy report (exhibit-31) and the deposition of Dr. Ashok Kumar Samanta (P.W.34) proves that the injury No.1 was caused on the right supra orbital ridge; the injury No.2 was caused over the medial side of the right lower leg and injury No.3 was caused over the back of the chest.

44. Aditya Verma (P.W.8) during cross-examination admitted that after reaching the hotel from Café Live & Loud, they thoroughly checked the body of the deceased but did not see any injury at all. Arindam Parmar (P.W.21) admitted in his cross-examination that what he had stated to the police that after returning to the hotel they had examined the deceased and found no external injuries on his person was true. Anirban Neogi (P.W.22) admitted in cross examination that after returning from café Live & Loud they laid the deceased down and checked his whole body and he did not have any external injuries.

45. Aditya Verma (P.W.8), Arindam Parmar (P.W.21) and Anirban Neogi (P.W.22) were not declared hostile. Their evidence that they had examined the body of the deceased at hotel Shantiniketan and found no injuries is binding upon it. Although the internal injuries would not have been seen and the injuries on the leg and on back of the chest could be hidden behind the clothes the deceased was wearing, the injury on the right supra

orbital ridge 2 cm above and lateral to right eye brow measuring 4 cm and 1 cm should have been visible to his friends who were with him. The prosecution has failed to explain this.

46. Ambar Chandra (P.W.23) admitted in cross-examination that the deceased had fallen on the floor of the bathroom. When questioned, Divit Vinod (P.W.9) could not say as to whether the deceased had a fall inside the bathroom. Both the witnesses were also not declared hostile by the prosecution and therefore, their evidence is binding upon it. However, the probability of the deceased having fallen on the floor of the bathroom and sustaining injuries both in the front and the back of his body is unlikely.

The medical examination of two accused persons

47. Dr. Sangita Pradhan (P.W.38) was posted as the Senior Medical Officer at STNM Hospital on 19.05.2013 when Bidhan Pradhan (Accused No.2) and Roden Wangdi Sherpa (Accused No.3) were brought for medical examination. According to her she did not see any external injuries on Bidhan Pradhan (Accused No. 2). However, she found swelling with bruise over right frontal region, linear abrasion over back of chest extending from left side of chest to right side of chest about 12 cm. Roden Wangdi Sherpa (Accused No.3) was treated for his injuries and advised to get review from the surgical department. During cross-examination Dr. Sangita Pradhan (P.W.38) agreed to the suggestions that the injuries on Roden Wangdi Sherpa (Accused No.3) could be caused due to fall on hard surface. She also admitted that both the accused persons did not smell of alcohol. The fact that the said two accused persons were medically examined on 19.05.2013 by Dr. Sangita Pradhan (P.W.38) is evidenced by the contemporaneous medical examination reports (exhibit-36 for Bidhan Pradhan (Accused No.2) and exhibit-37 for Roden Wangdi Sherpa (Accused No.3) which she exhibited.

48. Neither the prosecution nor the eyewitnesses have explained the injuries on Roden Wangdi Sherpa (Accused No.3). In fact the version of the eye witnesses was that the unknown boys attacked them. There is no mention of the eye witnesses or anyone else getting into a brawl with the unknown boys and any of the accused getting injured. Roden Wangdi Sherpa (Accused No.3) was given an opportunity to explain the injuries

found on his body by Dr. Sangita Pradhan (P.W.38) when he was examined under Section 313 Cr.P.C. However, he chose not to do so by simply stating *"I do not know"*.

49. The FIR (exhibit-7) lodged by the informant alleged that the deceased and his friends were assaulted by six unknown persons after which they ran away. The testimonies of the eyewitnesses who were present at Café Live & Loud does not show that they and the unknown persons had a scuffle or that any of the unknown persons were also injured. The story as narrated by Aditya Verma (P.W.8) and Arindam Parmar (P.W.21) is that while they were enjoying at Café Live & Loud one local boy/unknown boy asked Anirban Neogi (P.W.22) for a fight. Anirban Neogi (P.W.22) however, is completely silent on this aspect. According to him as they were leaving the pub the accused persons attacked them and ran away. None of the witnesses attribute any motive or reason for the attack. The prosecution has failed to establish as to what exactly transpired that night with cogent evidence. The presence of the deceased and his friends at Café Live & Loud that night is established. However, except for Gurmey Wangchuk Wazalingpa (Accused No.1) whose presence at Café Live & Loud that night is established by the testimonies of Chipel Topden (P.W.31) and Jigmi Lachungpa (P.W.32) the presence of the rest of the accused persons has not been established. Chipel Topden (P.W.31) and Jigmi Lachungpa (P.W.32) however, have deposed that Gurmey Wangchuk Wazalingpa (Accused No.1) left with Chipel Topden (P.W.31) at around 12:30 a.m. on 19.05.2013. The evidence of the eyewitnesses reflects that the incident happened around 1:30 a.m. on 19.05.2013. Jigmi Lachungpa (P.W.32) admitted during cross-examination that he had not witnessed any incident that night till 1:30 a.m. He went on further to state that none of the other accused persons were seen by him at Café Live & Loud that night. The prosecution story that the deceased, while in Café Live & Loud, started interacting with some of the local girls known to the accused persons present there which infuriated them remained a charge-sheet allegation. The eyewitnesses did not even depose about it in Court.

50. It was the prosecution's case that after the incident the accused persons got into two vehicles i.e. Audi and Skoda and ran away. The eyewitnesses did not state anything about it. The sole seizure witness to a Skoda vehicle seizure was Lhakpa Doma Bhutia (P.W.4) who however,

turned hostile. During her cross-examination by the prosecution she admitted signing on the seizure memo (exhibit-11). However, during her cross-examination she admitted that she did not go through the seizure list; police did not read over the contents; she did not scribe the date mentioned below her signature; she did not know that it was for the seizure of the vehicle; Sonam Namgyal (Accused No.5) was inside the *"hazat"* when she was made to sign on the seizure list. The identification of the Audi car allegedly used by the accused persons to run away after the incident still remains unknown. The prosecution also failed to establish the alleged fact that the unknown persons ran away in Audi and Skoda cars.

51. The prosecution seized the hard disc containing CC TV footage and one Sony digital camera containing photographs. Dharmendra Kumar Sharma (P.W.41) deposed that on 21.05.2013 the police seized the hard disc from one lady at Café Live & Loud in his and Pravhat Chamling's (P.W.39) presence. The seizure memo (exhibit-38) was signed by him and the hard disc marked as M.O. X1X. Pravhat Chamling (P.W.39) deposed that he had also witnessed the seizure of the hard disc. The said hard disc was sent for forensic examination. Dr. M. Baskar (P.W.42) the expert from CFSL, Chandigarh deposed that the CC TV footage retrieved was provided in the DVD-R. He admitted that the hard disc and the Sony digital camera were forwarded for forensic examination after a year. The learned Sessions Judge has held that the same was displayed in Court in the presence of the defence but no incriminating evidence could be gathered against the accused persons and to the contrary that there is evidence that the deceased and the eyewitnesses were intoxicated and that the accused persons presence is not seen in the CC TV footage.

Test Identification Parade

52. On 29.05.2013 the learned District & Sessions Judge (P.W.24) conducted the Test Identification Parade (TIP) of the accused persons. The memorandum of TIP (exhibit-27) records the details of how he conducted the same. Gyurmee W. Wazalingpa (Accused No.1), Ugen Namgyal Basi (Accused No.4), Roden Wangdi Sherpa (Accused No.3), Bidhan Pradhan (Accused No.2) and Sonam Namgyal (Accused No.5) (the five accused persons) were to be identified. They were to be identified by the eyewitnesses. There was no TIP done for Karna Hang Subba (Accused

No.6) and Phurba Tamang (Accused No.7). According to the memorandum the five accused persons were placed for identification separately along with other inmates. About nine jail inmates were lined up along side each of the five accused persons who had similar built, height, colour and other physical features. The five accused persons were asked to place themselves in the position most suited to them during their turn. All the inmates (including the five accused persons) were given different batch numbers to be displayed. The eyewitnesses were separately called one by one to the room and few questions put to them. There was no occasion for the eyewitnesses to see the five accused persons while they were being lined up. The five accused persons did not have any objection to their identification. After following the procedure as narrated in the memorandum Ambar Chandra (P.W.23) identified the five accused persons. Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) could not identify Gyurmee W. Wazalingpa (Accused No.1) but identified the rest of the four. Anirban Neogi (P.W.22) could not identify Gyurmee W. Wazalingpa (Accused No.1) and Ugen Namgyal Basi (Accused No.4). He identified the rest of the three accused persons. Aditya Verma (P.W.8) identified Roden Wangdi Sherpa (Accused No.3) and Bidhan Pradhan (Accused No.2). He could not identify the other accused persons.

53. The learned District & Sessions Judge (P.W.24) who conducted the TIP however, admitted during cross-examination by the learned Senior Counsel for Roden Wangdi Sherpa (Accused No.3) and Sonam Namgyal (Accused No. 5) that most of the inmates who were lined up along with the five accused persons were not of the 'Bhutia' community. He admitted that he did not ask the eyewitnesses whether they had visited the Police Station and seen the accused persons. He admitted that he could see from the records that there was no person from the 'Bhutia' community placed alongside Ugen Namgyal Basi (Accused No.4). He admitted that the inmates who were lined up with Bidhan Pradhan (Accused No.2) were not from the same ethnic community.

54. Mordent Thapa (P.W.45) took over the investigation of the case from Police Inspector (PI) Moti Lall Pradhan (P.W.44) as per the order of the Superintendent Police. He had requisitioned for the TIP. During cross-examination he admitted that he had not filed any document stating that other persons who were paraded during TIP were of the same physique

and height. He admitted that the same set of persons was used for the five TIPs conducted. He admitted all other persons lined up during the TIP were from different community and had different physique, complexion and description and as a result they were easily distinguishable from the five accused persons.

55. Aditya Verma (P.W.8), Divit Vinod (P.W.9) and Anirban Neogi (P.W.22) deposed in Court that they had identified some of the boys in the State Jail during the TIP whereas Arindam Parmar (P.W.21) and Amber Chandra (P.W.23) stated that they had *"identified them"* without specifying who they identified.

56. Aditya Verma (P.W.8) during cross-examination admitted that on 19.05.2013 he, Arindam Parmar (P.W.21), Anirban Neogi (P.W.22), Divit Vinod (P.W.9) and Ambar Chandra (P.W.23) had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime. Divit Vinod (P.W.9), Arindam Parmar (P.W.21) and Anirban Neogi (P.W.22) also confirmed that on 19.05.2013 they along with Ambar Chandra (P.W.23) and Aditya Verma (P.W.8) were present in the Police Station on 19.05.2013. Anirban Neogi (P.W.22) admitted during cross-examination that on 19.05.2013 they were present at the Sadar Police Station from 10 a.m. to 6 p.m. approximately. Ambar Chandra (P.W.23) admitted that they were at the Police Station from 10:30 a.m. till the evening around 5-6 p.m. on 19.05.2013. Arindam Parmar (P.W.21) admitted that on 19.05.2013 they had stayed at the Police Station from morning till evening. He also admitted that he and his friends were going in and out of the Station House Officer's office on the said day.

57. It is well settled that substantive evidence of identification of an accused is the one made in the Court. None of the-eyewitnesses who were present with the deceased on 18.05.2013 at Café Live & Loud identified any of the accused persons in Court. The FIR (exhibit-7) was lodged against unknown persons. When an FIR is lodged against unknown persons TIP is held for the purpose of testing the veracity of the witnesses about their capability of identifying the accused persons who were unknown to them. On 19.05.2013 the eyewitnesses who were with him on the night of 18.05.2013 at Café Live & Loud admitted that they were at the Police Station for a long period of time. Aditya Verma (P.W.8) categorically

admitted that he, Arindam Parmar (P.W.21), Anirban Neogi (P.W.22), Divit Vinod (P.W.9) and Ambar Chandra (P.W.23) had gone to the Sadar Police Station and had seen the accused persons who were brought to the Police Station after sometime. The TIP was admittedly conducted on 29.05.2013. We are of the considered view that this admission is fatal to the identification of some of the accused persons during the TIP as the said prosecution witnesses had occasion to see all the accused persons just ten days prior to the TIP and therefore, their faces and appearance would have been fresh in their memory. In any event the result of the TIP is only corroborative evidence. The admissions made by the learned District & Sessions Judge (P.W.24) and the Investigating Officer-Mordent Thapa (P.W.45) during cross-examination that persons with similar features and physical attributes were not placed alongside the said five accused persons of whom the TIP was conducted would also negatively impact the credibility of the TIP.

Identification of the accused persons in Court

58. If the presence of Roden Wangdi Sherpa (Accused No.3) had been established his failure to explain the injuries detected on his person on the same day would have raised probable doubt upon him but suspicion however strong cannot take place of proof. Further the prosecution has failed to bring out what actually transpired that night at Café Live & Loud.

59. In re: ***Abdul Sayeed v. State of M.P.***[2] cited by Mr. Santosh Kumar the Supreme Court was examining a case in which seventeen accused, armed with deadly weapons, were alleged to have assaulted several persons. The prosecution examined twelve witnesses including three eyewitnesses. The trial Court convicted some accused persons separately under Sections 148, 147, 302, 324 of the IPC and one under Section 304 Part II, 323 and 147 IPC. All the convicts filed criminal appeals before the High Court. The State also filed an appeal against the acquittal of some accused. The judgment of the High Court was assailed before the Supreme Court by the Appellants therein. Out of the seventeen accused persons ten stood acquitted by the Courts below. The Supreme Court held that in cases where there are a large number of assailants, it can be difficult for a witness

[2] **(2010) 10 SCC 259**

to identify each assailant and attribute a specific role to him. The Supreme Court held that in the said case a very large number of assailants had attacked the deceased causing injuries with deadly weapons to them and the incident stood concluded within a few minutes; and it is natural that the exact version of the incident revealing every minute detail i.e. meticulous exactitude of individual acts cannot be given by the eyewitnesses. This was not a case in which none of the eyewitnesses had identified any of the assailants like the present one.

60. None of the eyewitnesses who were together at Café Live & Loud on 18.05.2013 have identified the accused persons in Court. Anirban Neogi (P.W.22) has however, stated that the *"accused persons attacked us"* without identifying them in Court. During cross-examination he denied the suggestion that he did not identify *"some accused persons in the State Jail"*. During the TIP it is seen that he had not identified Gurmey W. Wazalingpa (Accused No.1) and Ugen Namgyal Basi (Accused No.4). Mr. Santosh Kumar drew the attention of this Court to the fact that Anirban Neogi (P.W.22) had stated *"accused persons attacked us"* and therefore submitted that it was substantial identification in Court. Anirban Neogi (P.W.22) did not identify any of the accused persons as the ones who attacked them. Even during the TIP (which has no legal value due to the fact that the eyewitnesses had occasion to see the accused persons ten days prior to the TIP) he had not identified all the accused persons. Further, amongst the accused persons on the dock were Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7) who were charged only for concealing information about the incident. Therefore, to hold the other accused persons guilty of murder on the basis of this statement of Arindam Neogi (P.W.22) would not, in our view, be termed identification beyond reasonable doubt.

61. Consequently, it is seen that in spite of investigation and trial the identification of the unknown boys who assaulted the deceased remains unknown. It is probable that the deceased got injured as a result of assault. It is evident that the deceased died as a result of excessive bleeding from the laceration of the left lobe of the left lung. Haemophilia may have aggravated the condition of the deceased as 1200 ml of blood was seen in the thoracic cavity, ultimately resulting in the death. The external injury on the right orbital ridge, right leg, back of the chest and inner aspect of both

the lips were not capable to cause death. These injuries also could not have resulted in the laceration on the lower lobe of the left lung. According to Dr. Ashok Kumar Samanta (P.W.34) the lacerated injury on the lobe of the left lung could not have been caused by the impact causing the abrasion measuring 1 cm x 1 cm situated over the back of the chest of the deceased. The failure of the prosecution to establish and explain if there was any fatal blow has led the defence to put up a theory of fall in the bathroom and probabalise it by the evidence of the eye witnesses-all friends of the deceased. The autopsy report does not suggest any fatal external injury. These failures enure in favour of the accused persons.

62. During the trial the prosecution also examined Bachu Singh Meena (P.W.43)-father of the deceased. According to him on 19.05.2013 at around 0200 hours the deceased called him on one of his mobile phone and told him after having informed his wife-the Appellant in Criminal Appeal No. 30 of 2016 that he had gone to Café Live & Loud to celebrate birthday of his junior fellow student. The deceased told him that he was brutally assaulted by some five-six local guys when he along with his friends were coming down the stairs. The deceased also informed him that after the sudden assault, his friends could escape and he was left alone. He was brutally beaten and seriously injured. The deceased also told him that he had narrated about this incident to his cousin Manasi Saraswat who had called him over his phone. Bachu Singh Meena (P.W.43) asked the deceased about the miscreants who assaulted him and he was informed that they were *"Guirmey, Bidhan, Sonam, etc."* He asked the deceased to keep the phone with him and told him that he was trying to get something managed to enable him to go back to the hotel. After some 10-12 minutes he got a call from Anirban Neogi (P.W.22) who told him that he along with his friends were hiding behind a car park nearby out of fear as Anirban Neogi (P.W.22) the deceased and his friends were attacked. Anirban Neogi (P.W.22) and his friends also told him that the miscreants caught hold of the deceased and started beating him brutally. They kicked the deceased on his chest and stomach several times till he fell unconscious. He asked Anirban and his friends to take the deceased to some hospital. They told him that they do not have vehicle and they could be attacked again. Thereafter, he called Jitendra Kumar, a Professor in SMIT-the local guardian of deceased who also confirmed that he too was told by some students after the brutal assault and that he was trying to get some medical help for the deceased.

Thereafter, he got a call from the hostel mate of the deceased i.e. Ayush Anand Sinha (P.W.36). Ayush Anand Sinha (P.W.36) also told him that the deceased had called him and told him about the brutal assault and his condition was critical. Bachu Singh Meena (P.W.43) asked Ayush Anand Sinha (P.W.36) to get in touch with Jitendra Kumar and go to where the deceased was lying unattended. In the meanwhile his wife got a phone from Manasi Saraswat who told her that she had called the deceased and he had told her about the brutal assault. Thereafter, around 0845 hours in the morning he got a phone call from Jitendra Kumar and Anirban Neogi (P.W.22) that the deceased was taken by his friends to STNM Hospital but since no bed was available he was thereafter taken to CRH. After some months of the incident he visited SMIT Campus and met the friends of the deceased. He asked them as to why the accused had assaulted them. The eye witnesses told him that they did so to establish their supremacy over the outsider students. The eye witnesses told him that they had identified all the accused persons in the TIP. They told him that they had come to know that the accused persons were at the police station for interrogation when the statement of the eye witnesses students were recorded by the police. However, these students did not have any idea regarding the presence of the accused at the police station during that period. He also deposed that the deceased was not suffering from haemophilia and both he and his wife do not have any history of haemophilia.

63. Bachu Singh Meena (P.W.43) admitted in cross-examination that his phone was not seized by the police; he was a Police Officer under the IPS cadre and then posted as IGP, Security in the State of Bihar; his deposition was based on what was told to him by eye witnesses and Jitendra Kumar on the phone; his statement under Section 161 Cr.P.C. was recorded in August 2014; he had not mentioned about Manasi Saraswat in his statement to the police; his call details were not sought for; he had not stated that the eye witnesses had told him that they had identified the accused persons in TIP in his statement to the police. He denied that the deceased was haemophilic. He admitted that various statements made by him in his examination-in-chief were not found in his statement to the police.

64. We are of the view that it could be probable that the deceased had in fact called his father after the incident. It could equally be possible that he did not. However, in a criminal case that too for a grave offence of murder

the prosecution must establish facts with cogent evidence leaving no room for doubt. Bachu Singh Meena's (P.W.43) deposition was recorded on 13.06.2016. His evidence reflects that the police recorded his statement only in August, 2014. If in fact the deceased had named the assailants to Bachu Singh Meena (P.W.43) it would be equally improbable that he would have withheld this information from the police for more than a year. In any case when the eyewitnesses have failed to identify the accused persons in Court leave alone name them it would be impossible to saddle the accused persons for the offences alleged on the deposition of a person who says he heard the deceased name *"Gurmey, Bidhan and Sonam etc."* to him. Manasi Saraswat, Jitendra Kumar and Renu Meena-the mother of the deceased who were mentioned in his deposition were not examined. Anirban Neogi (P.W.22) did not corroborate Bachu Singh Meena's (P.W.43) evidence that he had phoned him and told him about the attack. Neither the call details of the mobile phone of the deceased nor of Bachu Singh Meena (P.W.43) have been produced.

65. Ayush Anand Singh (P.W.36) deposed on 02.12.2015. According to him the deceased called him and asked for help because he was thrashed by some people who he did not know. He also did not report about the call. Although he stated that the deceased had named *"Sonam"* as one of the assailant he admitted that he had not stated so in his statement to the police. He admitted that his statement to the police was given by Bachu Singh Meena (P.W.43)-the father of the deceased. The statement of Ayush Anand Singh (P.W.36) does not help the prosecution.

66. The establishment of the identity of the accused persons in a criminal case is paramount to the prosecution. More so in a case of a heinous offence. It is well settled that the Court must be absolutely certain that it was the accused persons and no others who are guilty of the offences alleged. In the present case the FIR alleged that six unknown person assaulted the deceased and his friends. The charge-sheet however, charged the seven accused persons for murder and other offences. The learned Principal Sessions Judge however, framed charge of murder only against five accused persons and the other two accused persons for withholding information from the police only. The allegation was of a group of boys assaulting another group of boys. As per the version of the eyewitnesses the attack was sudden and immediately thereafter, the assailants ran away. The

eyewitnesses failed to identify any of the accused person in Court. Even the identification during the TIP has been rendered worthless in view of the fact that the eyewitnesses had occasion to see the accused persons at the Police Station before the TIP.

The charge under Section 302 IPC

67. To establish the offence of murder what is necessary is to prove the intention of causing death. It could also amount to murder if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, caused death or such bodily injury as is likely to cause death, and commits such act without an excuse for incurring the risk of causing death or such injury. The evidence led by the prosecution taken in its entirety does not establish a case of murder.

The charge under Section 325/34 IPC

68. The accused persons were charged for causing grievous hurt to Arindam Parmar (P.W.21). Arindam Parmar (P.W.21) deposed that he sustained injury on his nose when he was running away after being chased by the unknown boys. Dr. R. Singh (P.W.40) deposed that he found abrasion of 3 cm on lateral wall of right nostril and tenderness on nasal bridge. During cross-examination he admitted that the nasal bone is the softest bone in a human being and can be fractured due to fall. The prosecution therefore, failed to bring home the charge under Section 325/34 IPC against the accused persons.

The charge under Section 323/34 IPC

69. The accused persons were also charged for causing hurt to Divit Vinod (P.W.9). Divit Vinod (P.W.9) did not state that he got hurt during the attack. The medical report of Divit Vinod (P.W.9) (exhibit-46) was not proved by its maker and instead exhibited by Moti Lal Pradhan(P.W.44)-the

Investigating Officer. The prosecution has failed to prove the charge under Section 323/34 IPC for causing hurt to Divit Vinod (P.W.9).

70. A submission was made by Mr. Santosh Kumar that Arindam Parmar (P.W.21) and Divit Vinod (P.W.9) being injured witnesses must be considered reliable as their evidence comes with a built in guarantee of their presence at the scene of the crime relying upon the judgment of the Supreme Court in re: ***Abdul Sayeed & Ors. (supra).*** This would be true if they had deposed that the injuries were sustained by them during the attack and identified the assailants. They did not say or do so. Although their presence at Café Live & Loud has been proved the fact that they suffered those injuries due to the attack by the accused persons has not been proved.

The charge under Section 506/34 IPC

71. Whoever threatens another with any injury to his person, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation as defined in Section 503 and is made punishable under Section 506 IPC. There must be a person who threatens and a person who is threatened. The prosecution has failed to prove who was the person who threatened. The person who was allegedly threatened was Anirban Neogi (P.W.22) as per Aditya Verma (P.W.8) and Arindam Parmar (P.W.21). However, Anirban Neogi (P.W.22) did not depose about being threatened. The prosecution has failed to establish the charge under Section 506/34 IPC.

The charge under Section 176 IPC

72. Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7) were charged under Section 176 IPC. The allegation was that they being employees of Café Live & Loud were present on 19.05.2013 at around 1:00 a.m. outside the Café and were therefore legally bound to give information to the police regarding the incident that occurred but intentionally omitted to do so. Roshan Rai (P.W.35) identified them as bouncers of Café Live & Loud but did not depose about their presence on 19.05.2013.

None of the other prosecution witnesses have deposed about their presence on 19.05.2013. The prosecution has failed to establish their presence on 19.05.2013. In fact Jigmi Lachungpa (P.W.32) the guest at Café Live & Loud on 19.05.2013 who identified them categorically stated that he did not see them although he was there till 1:30 a.m. of 19.05.2013. This prosecution witness was not declared hostile and his evidence is binding upon it. Consequently, no case under Section 176 IPC has been made out against Karna Hang Subba (Accused No.6) and Phurba Tamang (Accused No.7).

73. Having examined the evidence produced by the prosecution we are of the considered view, conscious about the scope of our consideration in an appeal against acquittal, that the judgment of the learned Sessions Judge does not merit a reversal. Resultantly the acquittal of the accused persons by the learned Sessions Judge's judgement dated 29.07.2016 is upheld. Both the Criminal Appeals are dismissed.

74. Certified copies of the judgment be sent forthwith to the Court of the learned Sessions Judge, Special Division-II, East Sikkim at Gangtok.

SLR (2019) SIKKIM 654
(Before Hon'ble the Chief Justice)

IA No. 01 of 2018
In Appeal (Crl.) No. 01 of 2018

Directorate of Enforcement (PMLA) ….. APPELLANT

Versus

Eastern Institute for Integrated Learning in Management University, Sikkim ….. RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Mr. Shakeel Ahmed, Ms. Zola Megi and Mr. Yogesh Sharma, Advocates.

With

IA No. 01 of 2019
In Appeal (Crl.) No. 01 of 2019

Directorate of Enforcement (PMLA) ….. APPELLANT

Versus

Malavika Foundation ….. RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar

Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Mr. Shakeel Ahmed, Ms. Zola Megi and Mr. Yogesh Sharma, Advocates.

With

IA No. 01 of 2019
In Appeal (Crl.) No. 02 of 2019

Directorate of Enforcement (PMLA) ….. APPELLANT

Versus

Integrated Institute of Excellence Society ….. RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Ms. Gita Bista and Ms. Anusha Basnett, Advocates.

With

IA No. 01 of 2019
In Appeal (Crl.) No. 03 of 2019

Directorate of Enforcement (PMLA) ….. APPELLANT

Versus

Eastern Institute for Integrated Learning in Management University, Sikkim ….. RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Mr. Shakeel Ahmed, Ms. Zola Megi and Mr. Yogesh Sharma, Advocates.

With

IA No. 01 of 2019
In Appeal (Crl.) No. 04 of 2019

Directorate of Enforcement (PMLA) ..... APPELLANT

Versus

Rai Foundation and Another ..... RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Ms.Gita Bista and Ms. Anusha Basnett, Advocates.

With

IA No. 01 of 2019
In Appeal (Crl.) No. 05 of 2019

Directorate of Enforcement (PMLA) ..... APPELLANT

Versus

National Centre for Internship & Studies ..... RESPONDENT

For the Appellant: Dr. Sonali Gopalrao Badhe, Mr. Jigmee Phunchok Bhutia, Ms. Rajani Rizal, Mr. Amresh Kumar Mondal and Ms. Minakshi Balmiki, Advocates.

For the Respondent: Mr. Ajay Rathi, Mr. Rahul Rathi, Mr. Aditya Makkhim, Ms Phurba Diki Sherpa, Ms. Lidya Pradhan and Ms. Deechen Doma Tamang, Advocates.

Date of decision: 14th September 2019

A. Prevention of Money Laundering Act, 2002 – S. 42 – Appeal to the High Court – If any person is aggrieved by any decision or order of the Appellate Tribunal, he may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him. Proviso to this Section provides that if the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period of sixty days, the High Court may allow it to be filed within a further period not exceeding sixty days – The proviso clearly mandates the High Court not to allow the appellant to file an appeal after a further period of sixty days – An appeal can be filed within a period of sixty days, and beyond the period of sixty days, the Act has given power to the High Courts to entertain an appeal within a further period not exceeding sixty days. No appeal can be entertained after exceeding period of sixty days.

(Paras 19 and 20)

B. Prevention of Money Laundering Act, 2002 – S. 42 – Appeal to the High Court – The High Court cannot breach statutory mandate and cannot make the provisions of Limitation Act applicable – The appeals filed by the appellant held not maintainable the same havngi been filed beyond the prescribed period of limitation as provided under S. 42 of the PMLA.

(Para 27)

All applications and appeals dismissed.

Chronological list of cases cited:

1. Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation, MANU/SC/ 0487/2013: (2013) 7 SCC 439.
2. Principal Secretary, Transport Department, Government of Sikkim v.Narmaya Das : 2006 ACJ 150.
3. Simplex Infrastructure Ltd. v. Union of India, (2019) 2 SCC 455.
4. Bengal Chemists and Druggists Association v. Kalyan Chowdhury,(2018) 3 SCC 41.
5. Oil and Natural Gas Corporation Ltd. v. Gujarat Energy Transmission Corporation Ltd. and Others, (2017) 5 SCC 42.
6. Chhatisgarh State Electricity Board v. Central Electricity Regulatory Commission and Others, (2010) 5 SCC 23.
7. Commissioner of Customs and Central Excise v. Hongo India Private Ltd. and Another, (2009) 5 SCC 791.
8. Union of India v. Popular Construction Co., (2001) 8 SCC 470.
9. Commissioner of Income Tax-I and Others v. Mohd. Farooq and Others, (2009) 317 ITR 305 ALL.
10. Lachhman Das Arora v. Ganeshi Lal and Others, (1999) 8 SCC 532.
11. Sunil Kumar Samanta v. West Bengal Pollution Control Board, MANU/GT/0074/2014.
12. Kavitha G. Pillai v. Joint Director, AIR 2017 KER 12.
13. Ketan V. Parekh v. Special Director Directorate of Enforcement and Another, (2011) 15 SCC 30.
14. Chhagan Chandrakant Bhujbal v. Union of India, (2017) 140 SCL 40 (Bombay).
15. Anoop Bartaria v. Deputy Director Enforcement, MANU/RH/0070/ 2019.
16. D. Gopinathan Pillai v. State of Kerala and Another, (2007) 2 SCC 322.

17. Tata Motors Limited v. Pharmaceutical Products of India Ltd. and Another, (2008) 7 SCC 619.

JUDGMENT

Vijai Kumar Bist, CJ

Facts narrated in all the appeals are almost same. The facts, which are common in all the appeals and as stated by the appellant, are being stated hereinafter.

2. The appellant is the agency for investigating the offence of money laundering. During the course of investigation Investigating Officer has located with properties acquired out of the proceeds of crime to the tune of Rs.137 Crores. Therefore, the Provisional Attachment Orders under Section 5 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the PMLA"), were issued by the Investigating Officer.

3. According to the appellant, the charge against the University in every appeal is that it created global selling degrees, diplomas and certificate of various courses through its established network for which it has not been granted permission by any competent authority. The University engaged several Coordinators functioning all across India for conducting distance education courses. These Coordinators made payments to the University authorities on per student basis, after keeping their commission.

4. As offences under Sections 420, 467, 471, 120B of Indian Penal Code, 1860 (hereinafter referred to as "the IPC"), are scheduled offences, as mentioned in section 2 (1) (y) of the PMLA, the matter was referred to Enforcement Directorate, by Sikkim Police for investigation.

5. Further case of the appellant is that during the course of investigation conducted under the PMLA, it revealed that Eastern Institute for Integrated Learning in Management University, Sikkim, is involved in selling degrees, diplomas and certificate for various courses for which they were not authorized to award. The courses were conducted without adhering to any basic rules and regulations. The University also did not bother to maintain any standard or quality of education/examination before awarding the degree and diploma. The University authorities with the assistance of various national/regional coordinators engaged by them duped thousands of innocent

students by fraudulently selling unauthorized degrees, diplomas and certificate through distance education courses. The University was also involved in offering another mode of education known as Collaborative Industry Based Education. The object of the said education was to lure hapless students into grandiose programmes without any approval from any statutory authorities. It is stated that Eastern Institute for Integrated Learning in Management University, Sikkim was created only with the object of duping thousands of innocent students by charging them exorbitant fees for various lucrative courses and offering them degrees which were not recognized by any statutory authority. Some regular courses stated to have been offered by the University are only with a motive to hoodwink the unsuspecting students.

6. Eastern Institute for Integrated Learning in Management University, Sikkim, challenged the provisional attachment order before this High Court in Writ Petition (Crl.) No. 02 of 2015 on the basis of constitution and adjudication by the Member, who according to the petitioner was non-legal. The said writ petition was disposed of on 22.09.2015 in the following manner:

> "(i) The Respondent No. 1 shall take appropriate steps with the concerned authorities of the Central Government for appointment of the Judicial Member of the Adjudicating Authority urgently within a period of 3 (three) months and not later than that;
>
> (ii) On appointment of the Judicial Member, the Chairman of the Adjudicating Authority shall constitute the Bench consisting of a Judicial Member keeping in view the observations made above having regard to the nature of the *lis* and the anxiety expressed by the Petitioner-University;
>
> (iii) Soon after it is constituted, the Bench shall then issue notice upon the Petitioner-University and the Petitioner-University shall appear before the Bench and place before it all grievances expressed in the Petition; and
>
> (iv) Since the proceedings before the Adjudicating Authority was stayed by this Court by order dated 02-04-2015, the period of attachment prescribed under Sub-Section (1) of Section 5 shall exclude the period spent during the pendency of the case before this Court."

7. According to the appellant, the order of this High Court was complied, a Member (Legal) was appointed as provided under Section 6 of PMLA, and the matter was re-adjudicated and the Provisional Attachment Order was confirmed. Against the said Order, appeals were preferred by the respondents before the Appellate Tribunal, Prevention of Money Laundering (hereinafter referred to as "the Tribunal") on the ground that the said Confirmation Order was not passed by the Judicial Member. The Tribunal passed order on 15.06.2017 and remanded back the matter to the Adjudicating Authority by setting aside the impugned order by directing the Authority to comply with the order of this High Court and appoint a Judicial Member. The Tribunal held that the impugned order has not been passed by the Judicial Member despite of directions issued by the High Court. The Tribunal also observed that the Member (Legal) may be having the qualifications to become Judicial Member, but facts remains that his appointment was not made for as Judicial Member. The Tribunal further observed that none of the hearing officer was a Judicial Member, within the mandate of judgment of the High Court and the order was without jurisdiction. The Tribunal set aside the same and remanded back the appeals directing the Adjudicating Authority to comply with the directions of the High Court.

8. Against the order of the Tribunal dated 15.06.2017 these appeals have been filed.

9. Before considering the case of the appellant on merit, this Court is required to consider the applications filed by the appellant for condonation of delay in filing the appeals, as all the appeals have been filed with considerable long delay. In Appeal (Crl.) No. 01 of 2018 there is a delay of 456 days. Similarly in other appeals; Appeal (Crl.) No. 01 of 2019, Appeal (Crl.) No. 02 of 2019, Appeal (Crl.) No. 03 of 2019, Appeal (Crl.) No. 04 of 2019 and Appeal (Crl.) No. 05 of 2019 there is delay of 571 days in filing the appeals.

10. The grounds taken by the appellant in all the condonation of delay applications are same. It is stated by the appellant that the appellant has been very vigilant and diligent in pursuing the appeal and that the reasons for delay in filing the appeals were beyond the control of the appellant and as such there are sufficient reasons for condoning the delay. In support of this submission the appellant has given the facts which are reproduced hereinafter:

"(a) The Registry of learned Appellant Tribunal prepared the certified copy and sent the same vide a letter signed on 30.06.2017, through speed post to the office of the Enforcement Directorate, Kolkata.

(b) The impugned Judgment dated 15.06.2017 was received in the office of the Enforcement Directorate, Kolkata on 17.07.2017.

(c) A letter dated 22.08.2017, received from the Registrar, Adjudicating Authority, addressed to the Director-Enforcement conveying inter alia that "the Order of Appellate Tribunal is per incurium, as it has ignored the decision of Honble Supreme Court in case of Pareena Swarup versus Union of India, and Director may take appropriate action to either get the order of the Honble Tribunal stayed, modified, annulled or take appropriate action as deemed fit for giving effect to the Order of the Honble Appellate Tribunal".

(d) A letter dated 05.09.2017, was sent to Head Office of the Enforcement Directorate, New Delhi by Enforcement Directorate, Kolkata Zonal Office, seeking instruction regarding filing of appeal in Honble Sikkim High Court or otherwise.

(e) The Honble Appellate Tribunal in appeals filed by Rai Foundation and five others directed the respondents vide Order dated 15.09.2017, to file reply within eight weeks and list the matter on 23.03.2017.

(f) Shri N.K Matta, Department Counsel vide his opinion dated 09.10.2017, opined that "since it is difficult to give effect to the directions of the Honble Sikkim High Court regarding Judicial Member we may either challenge the Order of the Honble High Court before the Division Bench, with application for condonation of delay or the Central Government may pass an order giving explanation under Section 6 of PMLA that Member Judicial and / or Member Law are same position".

(g) Enforcement Directorate, Kolkata sent a letter dated 31.10.2017, to its Head Office, seeking instruction in the matter.

(h) On 13.11.2017, Enforcement Directorate, Kolkata Zonal Office received a letter dated 09.11.2017, from its H.O with direction that the Judgment / Order, dated 22.09.2017, passed by the Honble High Court of Sikkim should be challenged before the Division Bench.

(i) On 17.11.2017 a letter sent to Mr. Karma Thinlay, Central Government Counsel, Sikkim High Court from Enforcement Directorate, Kolkata with request to move a Writ Appeal against the order dated 22.09.2015.

(j) Mr. Karma Thinlay, Central Government Counsel, High Court of Sikkim vide his letter dated 09.01.2018, intimated that no appeal shall lie in Sikkim High Court, against any order passed in exercise of criminal jurisdiction. He also instructed to take up the matter with the Ministry of Law, Branch Secretariat, Kolkata.

(k) Letter dated 18.01.2018 sent to H.O of Enforcement Directorate, Kolkata intimating that the matter is being taken up with Ministry of Law, Branch Secretariat, Kolkata, as instructed by Mr. Karma Thinlay.

(l) U.O. note dated 21.01.2018, sent to Ministry of law, Branch Secretariat, Kolkata by Enforcement Directorate, Kolkata.

(m) Ministry of Law, Branch Secretariat, Kolkata vide opinion dated 31.01.2018, opined that it is not a fit case to challenge the Order passed by Honble High Court of Sikkim.

(n) Discussion held between Ministry of Law, Branch Secretariat, Kolkata with Department Official on 12.02.2018.

(o) U.O. note dated 20.02.2018, sent to Ministry of Law, Branch Secretariat, Kolkata, by Enforcement Directorate, Kolkata.

(p) Ministry of Law, Branch Secretariat, Kolkata vide opinion dated 27.02.2018, opined to challenge the Order dated 22.09.2015, before Honble Supreme Court of India.

(q) Opinion dated 22.07.2018, Ministry of Law, Branch Secretariat, Kolkata, received in the office of the Enforcement Directorate, Kolkata on 05.03.2018.

(r) Letter dated 07.03.2018, sent to H.O of the Enforcement Directorate with request to file SLP in the Supreme Court of India.

(s) H.O vide letter dated 04.06.2018, instructed Enforcement Directorate, Kolkata to file Review Petition in Honble Sikkim High Court.

(t) Letter dated 05.07.2018, sent to Mr. Karma Thinlay, Central Government Counsel, High Court of Sikkim by Enforcement Directorate, Kolkata with request to draft a Review Petition.

(u) Mr. Karma Thinlay, Central Government Counsel, High Court of Sikkim, vide his letter dated 17.07.2018, opined that there is no provision in Cr.P.C. 1973, for filing a revision petition against an order passed by High Court itself and further stated only recourse is to move the Honble Supreme Court.

(v) Letter dated 21.08.2018, sent to Sudesh Joshi, SPP by Enforcement Directorate, Kolkata with request to file review petition.

(w) Learned Deputy Legal Advisor, Kolkata Regional Office, vide her opinion dated 23.08.2018, opined to file appeal against the order passed by the Tribunal.

(x) That on the basis of the opinion dated 23.08.2018, Department decided to file an appeal before the Hon ble High Court of Sikkim, and accordingly the Department approached the learned SPPs of Gangtok for the purpose of filing the instant appeal. Further vide email dated 13.11.2018, learned Counsel Jigme Phunchok Bhutia, SPP was instructed to draft the appeal.

(y) That learned Counsel Jigme Phunchok Bhutia, SPP, sent to the draft copy of the appeal for final vetting and sanction to the Regional Office, Kolkata on 23.11.2018."

11. The respondents in their objection to the condonation of delay applications stated that the applications are not maintainable, in view of the express provision of Section 42 of the PMLA, as provisions of the Limitation Act, 1963 are not applicable especially in view of the Section 29 (2) of the Limitation Act, 1963. It is submitted by the respondents that the PMLA is a self-contained code and is comprehensive Special Legislation containing detailed provisions of investigation, search and seizure, arrest, provisional attachment, filing of complaint and filing of appeals before the Appellate Tribunal and the High Court, whereas the Limitation Act, 1963 is a general law. Thus, Section 5 of the Limitation Act, 1963 has no application in view of the specific proviso of Section 42 of the PMLA. It is also stated that as per Section 42 of the PMLA an appeal can be filed within sixty days from the communication of the decision or order.

Proviso to Section 42 of the PMLA further provides that if the High Court is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, it can allow the appeal to be filed within a further period not exceeding sixty days. Since the appeals have been filed much later, the appeals deserve to be dismissed.

12. The matter was argued for more than one day. Dr. Sonali Gopalrao Badhe, learned counsel for the appellant argued the matter at great length, though she did not appear on the last day. It was submitted by Dr. Badhe that the appellant was sincerely persuading the mater on the advice of the Government Counsel. Only after receipt of communication from the Adjudicating Authority, the appeals have been preferred. The appeals have been filed under Section 42 of the PMLA read with Section 5 of the Limitation Act. She submitted that the provision of Section 71 of the PMLA is also to be seen which provides that "……*notwithstanding anything inconsistent therewith contained in any other law for the time being in force*". She said that this clearly provides that provision of the Limitation Act shall also be applicable to the PMLA, as this provision is not inconsistent with the provision of PMLA. She further submitted that though there is considerable delay in filing the appeals but in view of the fact that a huge amount is involved in the matter, the delay in filing the appeals should

be condoned. She also submitted that the Honble Apex Court in the matter of *Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation : MANU/SC/0487/2013: (2013) 7 SCC 439*, has observed that the offences of money laundering are in a calculated manner serious threat to the economy of the country. She submitted that in these appeals more than 100 crores of rupees are involved, therefore, delay in filing the appeals deserves to be condoned.

13. Learned counsel for the appellant further referred the judgment in the matter of *Principal Secretary, Transport Department, Government of Sikkim -Vs- Narmaya Das : 2006 ACJ 150*, which reads as under:

> "10. As regards the sufficiency or otherwise of the cause shown in the present case for condonation of delay it is useful to refer to the following decisions of the Honble Supreme Court in *Ram Nath Sao Vs Gobardhan Sao. AIR 2002 SC 1201*, wherein it has held as follows:
>
> > "(11) Thus it becomes plain that the expression „Sufficient Cause within the meaning of Section 5 of the Act or Order 22, Rule 9 of the code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute „*sufficient cause* or not will be dependent upon facts of each case. There cannot be a strait jacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. *Acceptance of explanation furnished should be the rule and refusal and exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party.*

On the other hand, while considering the matter courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. *However by taking pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merits. While considering the matter, courts have to strike a balance between resultant effects of the Order it is going to pass upon the parties either way.*

(Emphasis added)

11. In view of the above, we cannot lose sight of the fact that the object underlying Section 5 of the Act is to enable the court to do substantial justice and as such, the court should approach the question of sufficient cause with the liberal approach while deciding the application under Section 5 of the Limitation Act. A justice-oriented approach is what is necessary while deciding a question of sufficient cause in an application under Section 5 of Limitation Act.

12. Further, it also becomes clear from the above that where arguable points of facts and law are involved the explanation furnished should not be brushed aside taking hyper technical view of the matter. It is indeed well-established that merits of the case may also be taken into consideration in excusing the delay. In *Urban Improvement Trust V. Poonam Chand : AIR 1997 Raj 134*, it has been held as follows:

"(19) Now it must be taken to be well settled principle of law that before rejecting applications under Section 5 of the Limitation Act and dismissing appeals as barred by lapse of time, the courts of law are required to put a glance as a condition precedent on the merits of the appeals and unless the appeals are found to be hopelessly devoid of merits ordinarily efforts should be made to decide the appeals on merits."

In addition to the above, recent decision of the Honble Supreme Court rendered in *Divisional Manager, Plantation Division, Andaman and Nicobar V. Munnu Barrick : AIR 2005 SCW 109,* leaves no room for doubt that where serious questions of law are raised by appellants the courts should take a liberal view on the application for condonation of delay.

13. ……. It is well settled that laches and delay defeats equity and justice. However, a meritorious matter should not be thrown out on the ground of technical considerations as well as delay when cause of delay has been shown with reasons by the party concerned. It is also well settled that in the matter of condonation of delay the court should adopt liberal approach and the reasons for adopting such approach has been highlighted in the above foregoing paras keeping in view the decision of Honble Apex Court rendered in *Collector, Land Acquisition, Anantnag V. Katiji : AIR 1987 SC 1353,* wherein the Supreme Court laid down about the liberal approach to be adopted on principle as it is realised that:

(1) Ordinarily a litigant does not stand to benefit by lodging and appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the

very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

(3) „Every days delay must be explained does not mean that a pedantic approach should be made. Why not every hours delay, every seconds delay? The doctrine must be applied in a rational common-sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately; or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

14. Therefore, keeping in view the above legal position and the peculiar facts and circumstances of the case in hand, we are of the opinion that sufficient cause has been shown by the petitioner department for condoning the delay in the institution of the present appeal. Accordingly, we are inclined to condone the delay of 853 days and allow the application in the interest of substantial justice."

14. Learned counsel for the appellants further submitted that if the applications for condonation of delay under Section 42 of the PMLA read with Section 5 of the Limitation Act are not considered by this Court, it will cause serious prejudice and respondents will sway away with the properties and will not be available for the purpose of trial. She also submitted that the proceeds of crime are more than 100 crores of rupees and the appellant has a very good case on merit, therefore, the applications for condonation of delay should be allowed.

15. Mr. Shakeel Ahmed, Mr. Ajay Rathi and Ms. Gita Bista, learned counsel for the respondents vehemently opposed the delay condonation applications. They submitted that provisions of Section 42 of the PMLA clearly mandates that the appeal has to be filed within 60 days but in terms of its proviso further 60 days' grace period can be granted by the High Court (who is appellate authority in terms of Section 42 of the PMLA) to entertain the appeal but not further period not exceeding to 60 days. The proviso to Section 42 of the PMLA makes the position crystal clear that the High Court, being an Appellate Court in terms of Section 42 of the PMLA, has no statutory power to allow the appeal to be presented beyond the further period not exceeding 60 days. The language used in Section 42 of the PMLA and its proviso makes the position clear that the legislature intended the High Court, while acting as an appellate court, to entertain the appeal by condoning delay only upto 60 days after the expiry of 60 days which is the normal period for preferring an appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act, 1963 from the provisions of the PMLA as crucial word/ capping *'further period not exceeding sixty days'* has been used in the proviso of Section 42 of the PMLA by the legislation. They submitted that in view of the specific proviso of Section 42 of the PMLA, the High Court has no statutory discretionary power to condone the delay beyond 60 days as stipulated in the said proviso. Learned counsel for the respondents further submitted that many other Special Acts like the Arbitration & Conciliation Act, 1996, Foreign Exchange Management Act, 1999, Securities and Exchange Board of India Act, 1992, the Companies Act, 2013, the National Green Tribunal Act, 2010, the Income Tax Act, 1961, the Central Excise Tax Act, 1944, and the Electricity Act, 2003 have similar provisions wherein, being Special Acts, certain period of limitations with the clear words 'Not Exceeding' or 'But not thereafter' have been provided in these statutes itself which are related

to filing of an Appeal/Objections after the lapse of the prescribed statuary period of limitation. Section 35 of FEMA, 1999 has almost identical and similar wordings as compare to section 42 of the PMLA. Both section 35 of FEMA, 1999 and PMLA provides period of filing of appeal against the order of Tribunal within sixty days with the proviso of a further period not exceeding sixty days.

16. In support of their submissions, the learned counsel for the respondents relied on the following judgments:

(i) (2019) 2 SCC 455 : Simplex Infrastructure Ltd. Vs. Union of India,

(ii) (2018) 3 SCC 41 : Bengal Chemists and Druggists Association Vs. Kalyan Chowdhury,

(iii) (2017) 5 SCC 42 : Oil and Natural Gas Corporation Ltd. Vs. Gujarat Energy Transmission Corporation Ltd. & Ors.,

(iv) (2010) 5 SCC 23 : Chhatisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others,

(v) (2009) 5 SCC 791 : Commissioner of Customs and Central Excise Vs. Hongo India Private Ltd. & Anr.,

(vi) (2001) 8 SCC 470 : Union of India Vs. Popular Construction Co.,

(vii) (2009) 317 ITR 305 ALL : Commissioner of Income Tax-I & Ors. Vs. Mohd. Farooq & Ors.,

(viii) (1999) 8 SCC 532 : Lachhman Das Arora Vs. Ganeshi Lal & Ors.,

(ix) MANU/GT/0074/2014-By Principal Bench of National Green Tribunal consisting of Chairperson, Member Judicial and three Members (Expert) : Sunil Kumar Samanta Vs. West Bengal Pollution Control Board,

(x) AIR 2017 KER 12 : Kavitha G. Pillai Vs. Joint Director,

(xi) (2011) 15 SCC 30 : Ketan V. Parekh Vs. Special Director Directorate of Enforcement and Anr.,

(xii) (2017) 140 SCL 40 (Bombay) : Chhagan Chandrakant Bhujbal Vs. Union of India,

(xiii) MANU/RH/0070/2019 : Anoop Bartaria Vs. Deputy Director Enforcement,

(xiv) (2007) 2 SCC 322 : D. Gopinathan Pillai Vs. State of Kerala & Anr., and

(xv) (2008) 7 SCC 619 : Tata Motors Limited Vs. Pharmaceutical Products of India Ltd. & Anr.

17. I have considered the submissions of learned counsel for the parties.

18. Against the order of the Appellate Tribunal an appeal may be filed in the High Court under Section 42 of the PMLA. Section 42 of the Act is as follows:

> "42. Appeal to High Court.— Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order:
>
> Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
>
> Explanation.—For the purposes of this section, "High Court" means—
>
> (i) The High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
>
> (ii) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain."

19. From the bare perusal of this Section, it is clear that if any person is aggrieved by any decision or order of the Appellate Tribunal, he may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him. Proviso to this Section provides that if the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period of sixty days, the High Court may allow it to be filed within a further period not exceeding sixty days. Thus, the proviso clearly mandates the High Court not to allow the appellant to file an appeal after a further period of sixty days.

20. We can say same things in these words also. The PMLA has clearly given the power to the High Court to condone the delay of sixty days in filing the appeal. Under Section 42 of the PMLA, an appeal can be filed within a period of sixty days and beyond the period of sixty days the Act has given power to the High Court to entertain an appeal within a further period not exceeding sixty days. At the same time the PMLA has made it clear that the High Court cannot entertain an appeal beyond further period of sixty days, thus, the permissible limit of extended period of sixty days is permissible. The legislation has made it very clear that the High Court can allow appeal to be filed within a further period not exceeding sixty days. "not exceeding sixty days" clearly means that no appeal can be entertained after exceeding period of sixty days.

21. The Hon'ble Supreme Court of India has dealt with the issue of condonation of delay under section 35 of the Foreign Exchange Management Act, 1999, which is same as Section 42 of the PMLA, in a case titled as *Ketan V. Parekh Vs. Special Director, Directorate of Enforcement and Anr.,* reported in *(2011) 15 SCC 30*. The Hon'ble Supreme Court of India held as under:-

> **"**18. The question whether the High Court can entertain an appeal under Section 35 of the Act beyond 120 days does not require much debate and has to be answered against the appellants in view of the law laid down in Union of India v. Popular Construction Co., (2001) 8 SCC 470 , Singh Enterprises v. CCE, (2008) 3 SCC 70, CCE &

Customs v. Punjab Fibres Ltd., (2008) 3 SCC 73, Consolidated Engg. Enterprises v. Irrigation Deptt., (2008) 7 SCC 169, CCE & Customs v. Hongo India (P) Ltd. , (2009) 5 SCC 791 and Chhattisgarh SEB v. Central Electricity Regulatory Commission, (2010) 5 SCC 23.**"**

22. In similar cases which came before the Hon ble Supreme Court in which the Honble Supreme Court has clearly held that delay cannot be condoned where legislation has made its intention clear that 'not exceeding and' but not thereafter etc.

23. In Simplex Infrastructure Ltd. Vs. Union of India : (2019) 2 SCC 455, the Supreme Court has held that delay beyond the three months plus thirty days under Section 34 of the Arbitration Act cannot be condoned. The Honble Supreme Court held as under:

"7. The issue which has been raised before this Court is whether the learned Single Judge was justified in condoning a delay of 514 days by the respondent in filing the application under Section 34. In dealing with this issue, this Court needs to assess whether the benefit of Section 5 and Section 14 of the Limitation Act can be extended to the respondent, and if so, whether a delay beyond the specific statutory limitation prescribed under Section 34(3) of the 1996 Act could be condoned.

X X X

18. A plain reading of sub-section (3) along with the proviso to Section 34 of the 1996 Act, shows that the application for setting aside the award on the grounds mentioned in sub-section (2) of Section 34 could be made within three months and the period can only be extended for a further period of thirty days on showing sufficient cause and not thereafter. The use of the words "but not thereafter" in the proviso makes it clear that the extension cannot be

> beyond thirty days. Even if the benefit of Section 14 of the Limitation Act is given to the respondent, there will still be a delay of 131 days in filing the application. That is beyond the strict timelines prescribed in sub-section (3) read along with the proviso to Section 34 of the 1996 Act. The delay of 131 days cannot be condoned. To do so, as the High Court did, is to breach a clear statutory mandate.
>
> **X X X**
>
> **21.** Under the circumstances, we are of the considered opinion that in view of the period of limitation prescribed in Section 34(3), the learned Single Judge of the High Court was not justified in condoning the respondent's delay of 514 days in filing the application. The judgment rendered by the learned Single Judge of the High Court of Calcutta on 27-4-2016, in *Union of India* v. *Simplex Infrastructures Ltd.* [*Union of India* v. *Simplex Infrastructures Ltd.*, 2016 SCC OnLine Cal 12045] is set aside and the appeal is allowed. The petition under Section 34 stands dismissed on the ground that it is barred by limitation. There shall be no order as to costs. **"**

24. Similarly in the matter of Bengal Chemists and Druggists Association vs. Kalyan Chowdhury : (2018) 3 SCC 41, the Honble Supreme Court held that limitation period of 45 days in Section 421 (3) plus additional 45 days grace period are peremptory and mandatory nature and no further time can be granted beyond this total period. The Supreme Court held as under:

> **"4.** A cursory reading of Section 421(3) makes it clear that the proviso provides a period of limitation different from that provided in the Limitation Act, and also provides a further period *not exceeding* 45 days only if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. Section 433 obviously cannot

come to the aid of the appellant because the provisions of the Limitation Act only apply "as far as may be". In a case like the present, where there is a special provision contained in Section 421(3) proviso, Section 5 of the Limitation Act obviously cannot apply.

5. Another very important aspect of the case is that 45 days is the period of limitation, and a further period not exceeding 45 days is provided only if sufficient cause is made out for filing the appeal within the extended period. According to us, this is a peremptory provision, which will otherwise be rendered completely ineffective, if we were to accept the argument of the learned counsel for the appellant. If we were to accept such argument, it would mean that notwithstanding that the further period of 45 days had elapsed, the Appellate Tribunal may, if the facts so warrant, condone the delay. This would be to render otiose the second time-limit of 45 days, which, as has been pointed out by us above, is peremptory in nature.

6. We are fortified in this conclusion by the judgment of this Court in *Chhattisgarh SEB* v. *CERC* [*Chhattisgarh SEB* v. *CERC*, (2010) 5 SCC 23] . The language of Section 125 of the Electricity Act, 2003, which is similar to the language contained in Section 421(3) of the Companies Act, 2013, came up for consideration in the aforesaid decision. The issue that arose before this Court was whether Section 5 of the Limitation Act can be invoked for allowing the aggrieved person to file an appeal beyond 60 days plus the further grace period of 60 days. This Court held that Section 5 cannot apply to Section 125 of the Electricity Act in the following terms: (SCC p. 32, para 25)

> "*25.* Section 125 lays down that any person aggrieved by any decision or order of

> the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression "within a further period not exceeding 60 days" in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days."

The aforesaid judgment was reiterated and followed in *ONGC Ltd.* V. *Gujarat Energy Transmission Corpn. Ltd.* [*ONGC Ltd.* V. *Gujarat Energy Transmission Corpn. Ltd.*, (2017) 5 SCC 42 : (2017) 3 SCC (Civ) 47] , SCC at para 5.

7. It now remains to deal with the decisions cited by the learned counsel appearing on behalf of the appellant. The first is the judgment in *Guda Vijayalakshmi* v. *Guda Ramachandra Sekhara Sastry* [*Guda Vijayalakshmi* v. *Guda Ramachandra Sekhara Sastry*, (1981) 2 SCC 646 : (1981) SCC (Cri) 574] . In that case, a transfer petition was filed under Section 25 CPC, 1908 in this Court. A preliminary objection was taken stating that in view of Sections 21 and 21-A of the Hindu Marriage Act, 1955, Section 25 would not be applicable. This was turned down by this Court

stating that Section 21 would not apply to substantive provisions of the Code as apart from procedural provisions. Equally, Section 21-A of the Hindu Marriage Act, 1955 only dealt with transfers "in certain cases". This being so, the wide and plenary power conferred on this Court to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one civil court in one State to another civil court in any other State was held not to be entrenched upon by Sections 21 and 21-A of the Hindu Marriage Act. We fail to see how this judgment, in any manner, furthers the proposition sought to be canvassed on behalf of the appellant, which is that Section 5 of the Limitation Act would continue to apply even after a second period of 45 days is peremptorily laid down. This judgment, therefore, does not carry the matter any further.

8. Reliance placed on *Partap Singh* v. *Directorate of Enforcement* [*Partap Singh* v. *Directorate of Enforcement*, (1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 SCC (Tax) 352] is equally misplaced. In this case, Section 37 of the Foreign Exchange Regulation Act, 1973 was involved. Section 37(2) provides that the provisions of the Code relating to searches shall, so far as may be, apply to searches directed under Section 37(1). This Court held that the expression "so far as may be" has always been construed to mean that those provisions may generally be followed to the extent possible. In the fact scenario of that case, it was held that to give full meaning to the expression "so far as may be", sub-section (2) of Section 37 should be interpreted to mean that broadly the procedure relating to search as enacted in Section 165 shall be followed.

9. This case again does not take the matter any further. In fact, the ratio of the judgment as far as this case is concerned is that the expression "so far

as may be" only means to the extent possible. If not possible, obviously the Limitation Act would not apply. We have already held that it is not possible for Section 5 of the Limitation Act to apply given the peremptory language of Section 421(3).

10. The third judgment is *Mangu Ram* v. *MCD* [*Mangu Ram* v. *MCD*, (1976) 1 SCC 392 : 1976 SCC (Cri) 10] . In this judgment, Section 417 of the Code of Criminal Procedure, 1898 provided for special leave to appeal from an order of acquittal. Section 417(4) required that the application for special leave should be made before the expiry period of 60 days from the date of the order of acquittal. Applying Section 29(2) of the Limitation Act, this Court held that Section 5 of the Limitation would not be impliedly excluded in such case despite the mandatory and peremptory language contained in Section 417(4) CrPC. This Court held that all periods of limitation are cast in such mandatory and peremptory language and, therefore, Section 5 could not be said to be impliedly excluded.

11. This case again is wholly distinguishable. It applies only to a period of limitation which is given beyond which nothing further is stated as to whether delay may be condoned beyond such period. In the present case, Section 421(3) does not merely contain the initial period of 45 days, in which case the aforesaid judgment would have applied. Section 421(3) goes on to state that another period of 45 days, being a grace period given by the legislature which cannot be exceeded, alone would apply, provided sufficient cause is made out within the aforesaid grace period. As has been held by us above, it is the second period, which is a special inbuilt kind of Section 5 of the Limitation Act in the special statute, which lays down that beyond the second period of 45 days, there can be no further

condonation of delay. On this ground therefore, the aforesaid judgment also stands distinguished.

12. One further thing remains — and that is that the learned counsel for the appellant pointed out the difference between the expression used in the Arbitration Act as construed by *Popular Construction* [*Union of India* v. *Popular Construction Co.*, (2001) 8 SCC 470] and its absence in the proviso in Section 421(3). For the reasons given above, we are of the view that this would also make no difference in view of the language of the proviso to Section 421(3) which contains mandatory or peremptory negative language and speaks of a second period *not exceeding* 45 days, which would have the same effect as the expression "but not thereafter" used in Section 34(3) proviso of the Arbitration Act, 1996."

25. In *Chhatisgarh State Electricity Board vs. Central Electricity Regulatory Commission and Others : (2010) 5 SCC 23*, the Honble Supreme Court held that outer limit for filing of an appeal is 120 days. No provision in the Electricity Act, 2003 in which court can entertain an appeal after more than 120 days delay, as under: -

"25. Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this Court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this Court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Sections 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression "within a further period of not exceeding 60 days" in the proviso to

> Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this Court can entertain an appeal filed against the decision or order of the Tribunal after more than 120 days.
>
> **X X X**
>
> **32.** In view of the above discussion, we hold that Section 5 of the Limitation Act cannot be invoked by this Court for entertaining an appeal filed against the decision or order of the Tribunal beyond the period of 120 days specified in Section 125 of the Electricity Act and its proviso. Any interpretation of Section 125 of the Electricity Act which may attract the applicability of Section 5 of the Limitation Act read with Section 29(2) thereof will defeat the object of the legislation, namely, to provide special limitation for filing an appeal against the decision or order of the Tribunal and proviso to Section 125 will become nugatory. **"**

26. A larger Bench of the Honble Supreme Court in Commissioner of Customs and Central Excise vs. Hongo India Private Ltd. & Another : (2009) 5 SCC 791, held that High Court has no power to condone delay beyond period specified in Section 35 H of the Central Excise Act. It is held as under: -

> **"32.** As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by

showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days.**"**

27. In view of the above discussion, this Court is of the view that the High Court cannot breach statutory mandate and cannot make the provisions of Limitation Act applicable. Consequently, the appeals filed by the appellant are held not maintainable as the same have been filed beyond the prescribed period of limitation as provided under Section 42 of the PMLA.

28. The applications for condonation of delay in filing the appeals are rejected. Consequently, all the appeals stand dismissed. Applications for stay also stand dismissed.

29. Before parting, I put a word of appreciation to those Advocates who have appeared in this case, namely Dr. Sonali Gopalrao Badhe, Mr. Shakeel Ahmed, Mr. Ajay Rathi and Ms. Gita Bista. Though I appreciate the assistance given by Dr. Sonali Gopalrao Badhe to the Court but her sincere efforts could not help the appellant. I have no hesitation in saying that officers/officials involved in the matter were either negligent or did not work for the interest of the institution. Delay could have been avoided. Therefore, I leave open to the Director of the appellant/ competent authority to get an enquiry conducted and take appropriate action in the matter.

30. Assistant Director of the appellant at Kolkata is directed to send a copy of this order to the Director at Headquarter.

SLR (2019) SIKKIM 683

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

Crl. A. No. 10 of 2018

Nima Tamang ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Gulshan Lama, Advocate (Legal Aid Counsel) for the Appellant.

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

Date of decision: 16th September 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – On the first question put to the victim by the Court as to how old she was, she had unequivocally stated that she is "10 years old." – The Doctor who examined the victim advised X-ray of right wrist, right elbow and right hip of the victim for the purposes of bone age estimation. Upon receipt of the X-ray findings, she recorded her opinion on the Wound Certificate pertaining to the victim which substantiates the evidence of the victim as regards her age – The Registrar of Births and Deaths, STNM Hospital, Gangtok has identified the Birth Certificate issued to the victim by him. The victim's date of birth has been recorded as 18.01.2007 in the said Birth Certificate – The evidence of this witness also establishes the age of the victim at the time of the incident as 9 years.

(Paras 11 and 12)

B. Protection of Children from Sexual Offences Act, 2012 – The evidence of the victim and her younger brother clearly indicate that the incident occurred on the relevant day. The evidence of her cousin indicates

that there were injuries on the body of the victim, to establish the fact of the incident – The opinion of the Doctor states that as per the physical examination, the evidence of sexual intercourse cannot be refuted and the evidence of penetrative sexual intercourse is present – The evidence *supra* establishes the injuries on the victim and thereby the fact of the incident, in which the Appellant sexually assaulted the victim.

(Para 13)

Appeal dismissed.

Chronological list of cases cited:

1. Jarnail Singh v. State of Haryana, (2013) 7 SCC 263.
2. Lall Bahadur Kami v. The State of Sikkim, 2018 Cri.L.J. 439 (SC).
3. Sancha Hang Limboo v. State of Sikkim, SLR (2018) SIKKIM 1.

JUDGMENT

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

1. Aggrieved with the Judgment dated 12.12.2017 of the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act"), in Sessions Trial (POCSO) Case No. 16 of 2016 *(State of Sikkim v. Nima Tamang)*, the Appellant is before this Court challenging the conviction and the sentence. The Appellant was convicted under Section 5 (m) punishable under Section 6 of the POCSO Act. He was sentenced to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default clause of imprisonment. The fine, if recovered, was to be made over to the victim, as compensation.

2. Mr. Gulshan Lama, learned Legal Aid Counsel for the Appellant, would firstly assail the First Information Report (for short the "FIR"), Exhibit 3, as according to him, it was lodged belatedly, the incident allegedly having occurred on 16.05.2016 while the FIR came to be lodged only on 20.05.2016. It was also contended that the age of the minor victim remained unproved despite seizure of the victim's Birth Certificate as her parents were not examined as witnesses neither were witnesses to the seizure of the Birth Certificate produced. The Investigating Officer (for short

the "I.O.") is the only witness who stated that the Birth Certificate was handed over to her by the victim's mother which remained unestablished on account of non-examination of the victim's mother. Consequently, as the age of the victim has not been proved, the charge under Section 5(m) of the POCSO Act is not the relevant provision of law to have charged or convicted the Appellant. Towards this contention, reliance was placed on ***Jarnail Singh v. State of Haryana***[1]. Reliance was also placed on the decision of this Court in ***Lall Bahadur Kami v. The State of Sikkim***[2]. Conceding that the victim may well be below 18 years of age, it was urged that however nothing emanates to establish the victim being below 12 years of age. According to him, there are inconsistencies in the evidence of the victim and the cousin of the victim, PW10 which strike at the root of the Prosecution case since according to the victim, she went to the house of her cousin, PW10 whereas PW10 states that she had called the victim to her residence. Moreover, there is also a variation in the evidence of the victim before the Court and in her Statement under Section 164 of the Code of Criminal Procedure, 1973 (for short the "Cr.P.C."). Considering the evidence on record and the anomalies in the Prosecution case, the impugned Judgment and Order on Sentence deserves to be set aside and the Appellant acquitted.

3. *Per contra,* Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the State contended that he relies on the evidence of PW7, Dr. R.N. Deokota to establish the age of the victim. That, the witness has clearly identified Exhibit 9A as the Birth Certificate of the victim issued by him. Once the witness identifies the said document as having been issued by him, there is no reason to doubt the veracity of the witness's statement or the document. On this count, reliance was placed on the decision of this Court in ***Sancha Hang Limboo v. State of Sikkim***[3]. The commission of the act is consistent as can be gauged from the evidence of the Prosecution witnesses. PW5, the Doctor who examined the victim has given proof of the fact of the occurrence of the incident. Hence, in this view of the matter, the findings of the learned trial Court ought not to be disturbed.

4. We have heard the rival contentions of learned Counsel for the parties at length and have carefully considered all evidence and documents

[1] (2013) 7 SCC 263
[2] 2018 Cri.L.J. 439 (SC)
[3] SLR (2018) SIKKIM 1

on record. The impugned Judgment and the Order on Sentence have also been carefully perused as also the citations made at the Bar.

5. We may now take stock of the facts in the instant matter. On 20.05.2016, at around 00:05 Hrs, the victim, PW1 lodged a complaint, Exhibit 2, before the Ranipool Police Station complaining of having been sexually assaulted by her neighbour, the Appellant, on 16.05.2016. Based on the report, a Criminal Case being FIR No. 32/2016, under Sections 342/376 of the Indian Penal Code, 1860 (for short the "IPC"), read with Section 4 of the POCSO Act was registered against the Appellant and investigation taken up. The Appellant, aged 28 years, a resident of Sonada, Darjeeling, West Bengal, residing at East Sikkim at the relevant time, was apprehended and taken into custody. Investigation revealed that although the assault had occurred on 16.05.2016 but the matter came to be reported only on 20.05.2016, the victim being apprehensive of disclosing it to anyone. On 19.05.2016, the victim had gone to visit her cousin, PW10 who noticed that she appeared a little distracted and on her persuasion, the victim disclosed the incident to her. Later, the victim's father came to pick her up from the residence of PW10 and learnt of the incident upon which Exhibit 3, the FIR, came to be lodged at the Police Station. The victim was taken for medical examination. It transpired that the Appellant, the neighbour of the child and also her father's friend took the victim swimming along with her brother, his daughter who was the victim's School friend and his son, on 16.05.2016 to Ray *Khola*. Once there, they all began swimming and after sometime the Appellant asked the victim to fetch clothes and medicines and bait for fishing. She went to do the errand and while returning, thorns got embedded in her foot. The Appellant told her that he would remove the thorns and took her to a jungle by the riverside where he committed penetrative sexual assault on the victim, apart from biting her cheeks and pinching her breasts. She was unable to scream as he covered her mouth. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376(i)(j) and 506 of the IPC read with Section 4 of the POCSO Act.

6. The learned trial Court, framed charge under Section 5(m) punishable under Section 6 of the POCSO Act and under Section 506 of the IPC, against the Appellant. The Appellant pled "not guilty" to the charges and claimed trial. The Prosecution examined fifteen witnesses to establish its case. On closure of evidence, the Appellant was examined

under Section 313 Cr.P.C. and his responses duly recorded. The learned trial Court considered the evidence furnished and pronounced the impugned Judgment and Order on Sentence.

7. The only question that falls for consideration before us is whether the conclusion of the learned trial Court in convicting the Appellant is correct.

8. Before the learned trial Court, the victim was examined under Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872, to gauge her capability to testify. The Court, being satisfied of the witness's capability, proceeded to examine her. She categorically stated that her age was 10 years at the time of evidence, and that she was attending Class V in a Government School. The victim went on to identify the Appellant and narrated the incident of the Appellant having sexually assaulted her at Ray *Khola* on the pretext of removing a thorn from her foot. According to her, he forcibly inserted his genital into hers, pinched her nipples and cheeks and covered her mouth when she tried to scream. After about seven days, she went to the house of her cousin, PW10 where she disclosed the incident to her. Her cousin then called up the victim's mother over the phone and informed her of what the victim had narrated to her. She also told the victim to ask her father to meet her in connection with this matter. Later, the victim accompanied her father and her paternal uncle and aunt to Ranipool Police Station. She was thereafter referred to Manipal Hospital for medical examination. Her cross-examination reaffirmed the fact of sexual assault and the specific act committed by the Appellant. PW2, the Station House Officer, Ranipool Police Station, identified Exhibit 2 as the Statement of the victim recorded under Section 154 Cr.P.C. and Exhibit 3 as the formal FIR drawn up by her, under her signature. Upon lodging of the complaint, the Case came to be registered against the Appellant under Sections 342 and 376 of the IPC read with Section 4 of the POCSO Act and endorsed to the I.O., PW15, for investigation.

9. PW3 and PW8 testified to the seizure of MOI, the black outfit said to be worn by the victim at the time of her sexual assault and MOII, the black swimming shorts with yellow stripes worn by the Appellant during the commission of the offence. PW6 is the aunt of the victim. According to her, one evening, the victim, accompanied by her father, came to her residence where the victim's father told her husband that the Appellant had tried to

sexually assault the victim. On taking the victim aside and enquiring from her as to the veracity of the incident, the victim narrated the same to her. This witness stated that the victim told her that the Appellant had fondled her breasts, removed her panty and tried to insert his penis into her vagina. She examined the body of the victim and noticed bruises and struggle marks on her chest region. Thereafter she along with her husband, accompanied the victim, her father and another aunt of the victim to the Ranipool Police Station. Her cross-examination would further confirm the fact of the incident.

10. PW10 corroborated the evidence of the victim of the fact that she had gone to the house of PW10 and in the course of their conversation, she told the victim that incidents of rape were increasing and warned her to be careful. Upon this, the victim narrated the incident to her stating that the Appellant, her father's friend, had committed rape on her at Ray *Khola* when the victim along with the daughter of the Appellant had been taken fishing, a few days ago. The victim, while revealing some pinch marks on her chest, stated that the Appellant had pinched her during the incident. Her father later came to pick her up at the house of PW10 and the victim narrated the said incident to him, in her presence. The victim's father, the victim and her younger brother went to the Police Station to report the matter. The evidence of the victim, PW1 and PW10 are thus corroborative of the presence of the victim at the house of PW10, the narration of the incident to PW10 by the victim, the consistency of the facts of the act and the victim's father coming to learn of the incident, followed by the matter being reported at Ranipool Police Station. PW14 was the victim's 8 year old brother. He attended a Government School and at the relevant time, was in Class II. The witness stated that he had gone swimming along with the victim, the Appellant and his son and daughter. On reaching Ray *Khola,* the Appellant asked the witness as well as his son and daughter to remain at one spot while he took the victim away from them and returned after sometime. In crossexamination, it came to light that the place where the victim was taken, was not visible from the place where he along with the Appellant's children had remained. The evidence of this witness corroborates the fact of the victim being taken away by the Appellant from him and his friend.

11. While addressing the vehement arguments of the Counsel for the Appellant that the age of the victim has remained unestablished, we may carefully examine the evidence of the victim, PW1. According to her, on the

first question put to her by the Court as to how old she was, she had unequivocally stated that she is *"10 years old."* PW5 was the Doctor who examined the victim on her being forwarded by the Ranipool Police Station. She advised X-ray of right wrist, right elbow and right hip of the victim for the purposes of bone age estimation. Upon receipt of the X-ray findings, she recorded her opinion on Exhibit 9, which is the Wound Certificate pertaining to the victim issued by the Central Referral Hospital, Tadong, Gangtok, East Sikkim, under her signature. It is recorded *inter alia* therein as follows;

> *"Investigations: 1) X-ray (rt) wrist PA + Lat.*
>
> *2) X-ray (Rt) elbow AP + Lat.*
>
> *3) X-ray Pelvis AP"*

Her opinion on the reverse page *inter alia* records, as extracted hereinunder;

> *"X-ray findings : As per report of the radiologist, CRH dated 20/05/16.*
> *(1) X-ray (Rt) elbow AP + Lateral shows – (a) Lateral epicondyle of humerus epiphysis is seen (small) [appears at 10 – 12 yrs of age].*
> *(b) Olecranon process of ulna epiphysis is seen (appears at 10 – 13 yrs)*
> *(2) X-ray (Rt) wrist PA + Lateral shows – (a) Piriform is seen (about 11 yrs)*
> *(3) X-ray Pelvis AP view shows – (a) Iliac crest epiphysis is not seen (appears at puberty) (b) Lesser Trochanter epiphysis is not seen*
> *(appears at 8-14 yrs) - Bone age is estimated to be between 10 yrs to*
> *12 yrs.*
> .....
> *OPINION : As per the queries of the I/O of the case –*
> *(1) As per the physical examination, the evidence of sexual intercourse cannot be refuted.*

> *(2) No evidence of any injury on the vital parts of her body is seen except injury no (1) and (2)c. as described above under physical examination.*
> *(3) Evidence of penetrative sexual intercourse is present.*
> *(4)* ***Age of the patient as per bone age estimation is above 10 yrs and below 12 yrs.****"*
> **(emphasis supplied)**

Her evidence substantiates the evidence of the victim as regards her age.

12. Apart from the evidence of this witness, it is relevant to examine the evidence of PW7, Dr. R.N. Deokota. According to him, in the year 2007, he was holding the post of Registrar, Births and Deaths, STNM Hospital, Gangtok in addition to being the Consultant, Gynaecology and Obstetrics Department, STNM Hospital, Gangtok. He identified Exhibit 9A as the Birth Certificate issued to the victim by him. That, the victim's date of birth has been recorded as 18.01.2007 in the said Birth Certificate, Exhibit 9A. She was issued the Birth Certificate bearing Sl. No. B-I/115 bearing Registration No. 115/2007 which was registered on 19.01.2007 and issued on 12.03.2007. He identified Exhibit 9A(a) as his signature on the Birth Certificate. His examination-in-chief withstood the test of cross-examination. The evidence of this witness also establishes the age of the victim at the time of the incident as 9 years.

13. Now what remains to be examined is whether the incident occurred at all. The evidence of the witnesses i.e. the victim, PW1 and her younger brother, PW14, clearly indicate that the incident occurred on the relevant day. The evidence of her cousin, PW10 indicates that there were injuries on the body of the victim, to establish the fact of the incident. That apart, it is relevant to revert back to the evidence of PW5. According to her, upon examination of the victim, she *inter alia* found the following;

> *"Erythema (redness) over bilateral breast and it was non-tender. Small hymen tear at 7 o' clock position. No other external injury over other parts and genital area were seen. Labia majora covers minora and labia minora is opposed. No haematoma or bleeding present."*

Thereafter, besides advising X-ray of the victim for bone age estimation, she also collected 5 ml blood as sample along with vaginal swab and nail clippings of the victim, for examination. No injuries were found on the vital parts of the body, however, there was evidence of penetrative sexual intercourse on the child as per her physical examination. This evidence remained undecimated in cross-examination. In Exhibit 9, she has opined, as follows;

> *"OPINION : As per the queries of the I/O of the case –*
> *(1) As per the physical examination, the evidence of sexual intercourse cannot be refuted.*
> *(2) No evidence of any injury on the vital parts of her body is seen except injury no (1) and (2)c. as described above under physical examination.*
> *(3) Evidence of penetrative sexual intercourse is present.*
> *(4) Age of the patient as per bone age estimation is above 10 yrs and below 12 yrs."*

Therefore, the evidence *supra* establishes the injuries on the victim and thereby the fact of the incident, in which the Appellant sexually assaulted the victim.

14. In view of the gamut of facts and evidence on record, we are of the considered opinion that there is no reason to differ with the findings of the learned trial Court in the impugned Judgment and the impugned Sentence.

15. In the end result, the Appeal deserves to be and is accordingly dismissed.

16. No order as to costs.

17. Copy of this judgment be sent to the learned trial Court along with its records, for information.

SLR (2019) SIKKIM 692

(Before Hon'ble the Acting Chief Justice)

Crl. A. No. 09 of 2019

Lalit Chettri ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Sudesh Joshi, Advocate for the Appellant.

For the Respondent: Ms. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 24th September 2019

A. Protection of Children from Sexual Offences Act, 2012 – The victim, in her evidence has stated that one day when she was going to School, she met the Appellant *en route*. He hit her on her eyes with his fist, caught hold of her and put his hand inside her panty and fondled her vagina. PW-3 saw the Appellant committing the act and admonished the Appellant who fled, while the victim went to School crying – The victim's father has stated that PW-3 had witnessed the incident and it was PW-3 who narrated to him that he saw the child being kissed by the Appellant while she was going to School. After having learnt of the incident, he narrated it to his wife, who then coaxed the victim to tell her the entire incident. The victim narrated the incident to her as detailed *supra*. Thus the evidence of the incident, as narrated by the victim and her mother are consistent.

(Para 9)

Appeal dismissed.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. The Appellant herein, aged about twenty nine years, is alleged to have sexually assaulted the victim, aged about eight years. The Court of the

learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act"), South Sikkim at Namchi, convicted the Appellant of the offence under Section 9 (m) punishable under Section 10 of the POCSO Act and sentenced him to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.2,000/- (Rupees two thousand) only, under the said provisions of law. In default of payment of fine, he was sentenced to further one month imprisonment. The fine, if recovered, was to be made over to the victim, as compensation.

2. Learned Counsel for the Appellant submits that the victim has not given a correct account of the incident, since there are contradictions in the evidence of the victim PW1 and other witnesses being PW2 and PW3. PW1, the victim, has not stated in her evidence that the Appellant had kissed her, while PW2 and PW3 have stated that the Appellant had kissed the victim. PW3 has said that he did not narrate the incident to anyone but as per PW2, PW3 narrated the incident to him after which they went to the house of the Appellant together. This event is however not corroborated by PW3. In view of the aforestated anomalies and contradictory evidence, according to learned Counsel for the Appellant it is doubtful as to whether the incident occurred at all. Hence, the Appeal be allowed and the Appellant be acquitted of the offence.

3. *Per contra,* learned Assistant Public Prosecutor for the State contended that the evidence of PW1, PW2 and PW3 have withstood the test of cross-examination and none of the statements made by the three witnesses nor their evidencein- chief have been controverted or decimated in crossexamination. No reason whatsoever arises for the victim to have made out a false case against the Appellant and the consistent evidence of PW1, PW2 and PW3 lends support to the Prosecution case. In such a circumstance, the impugned Judgment and Order on Sentence should not be interfered with.

4. I have heard the rival contentions of learned Counsel for the parties at length and have carefully considered all evidence and documents on record. The impugned Judgment and the Order on Sentence have also been carefully perused.

5. The prosecution case commenced on the lodging of Exhibit 6, the First Information Report (for short "FIR") by PW10 on 15.11.2016, when

the mother of the victim informed therein that the incident had occurred sometime between Dussehra and Diwali festival when the victim was going to School from her home. *En route* the Appellant caught her and inserted his hands into the genital of the victim and his tongue into her mouth, which was witnessed by PW3, a co-villager. After the incident, the Appellant fled the place of occurrence and later from his house. Subsequently, on his return to the village, the child refused to go to School hence Exhibit 6 came to be lodged. It was also explained that the belated FIR was on account of apprehension of ignominy of the child and the village, despite which due to the deep impact on the child, PW10 was constrained to lodge it. Pursuant thereto, at about 13:00 Hrs, Police Station Case bearing FIR No.63 of 2016 dated 15.11.2016 was registered against the Appellant under Section 376 of the Indian Penal Code, 1860 (for short the "IPC") read with Section 4 of the POCSO Act. The victim was subjected to medical examination at the Government Health Centre and since the Appellant was absconding, a hue and cry message was sent to trace his whereabouts. Investigation revealed that the victim was a Class II student in a local Government Primary School located about 600 metres away from her house. On 14.10.2016 at about 8.30 a.m., while the victim was on her way to School, the Appellant called out to her and when she went towards him, he grabbed her by her hair, kissed her on her mouth, inserted his tongue therein and touched her genital. PW3, another student of a nearby Government School witnessed the incident and confronted the Appellant upon which the Appellant left the place of occurrence. Thereafter PW3 consoled the minor victim and suggested that she report the incident to her parents which the minor victim did not. Approximately, a month later on 11.11.2016, when PW3 met the victim's father PW2, at a neighbour's house, he narrated the incident to him. PW2 then returned home and informed PW10, his wife, mother of the victim, who in turn enquired from the victim, PW1. The victim then narrated the entire incident to them. PW10 reported the matter at the Panchayat level the next day. The Panchayat member, PW9 withheld the matter for some time. On 14.11.2016, on PW2 coming to learn of the arrival of the Appellant at his residence, he went with his wife to confront him but the Appellant denied the occurrence of any such incident. Thereafter PW2 informed the Panchayat President who suggested that he file a Report before the Police. In the meanwhile, the Appellant absconded from the village and was later arrested on 26.04.2017 at Singtam. On completion of investigation, Charge-Sheet came to be submitted against him under the provisions of law *supra.*

6. The learned trial Court, framed charge under Section 9(m) punishable under Section 10 of the POCSO Act read with Section 5(m) punishable under Section 6 of the POCSO Act. The Appellant pled "not guilty" to the charges and claimed trial. The Prosecution examined twelve witnesses to establish its case. On closure of evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") and his responses duly recorded. The learned trial Court considered the evidence furnished and the impugned Judgment and Order on Sentence came to be pronounced.

7. The age of the victim is not contested. It emanates that her date of birth is 20.05.2009. The incident having occurred sometime in October, 2016, would make her about seven years at the time of the incident.

8. The only question that falls for consideration before this Court is whether the incident occurred at all.

9. PW1, victim, in her evidence has stated that she did not remember the date and month of the incident but in 2016, one day when she was going to School, she met the Appellant *en route*. He hit her on her eyes with his fist, caught hold of her and put his hand inside her panty and fondled her vagina. PW3 saw the Appellant committing the act and admonished the Appellant who fled, while the victim went to School crying. This evidence has withstood the detailed crossexamination. The victim's father, PW2, lends support to her evidence inasmuch as he has stated that PW3 had witnessed the incident and it was PW3 who narrated to him that he saw the child being kissed by the Appellant while she was going to School. After having learnt of the incident, he narrated it to his wife, PW10 who then coaxed PW1 to tell her the entire incident. The victim narrated the incident to her as detailed *supra*. Thus, the evidence of the incident, as narrated by PW1 and PW10 are consistent. Their cross-examination failed to demolish all that was stated in their evidence-in-chief. Although the Section 164 Cr.P.C. Statement of the victim was recorded by a Magistrate but the victim was not confronted with the Statement before the learned trial Court to test its veracity hence shearing the Statement of any relevance.

10. PW9, the Panchayat President has stated that the victim's mother came to her house and reported that the Appellant had sexually assaulted her minor daughter between Dussehra and Diwali 2016, whereupon she told

PW10 that such incident should be informed to the Police. Although it was vehemently argued that the truth of the victim's evidence cannot be trusted, while differing with this argument it is relevant to point out that the evidence of PW1 and PW10 have been consistent on the said aspect. PW3 has supported the evidence of PW2. He has categorically stated that he witnessed the incident, therefore the question of PW1 concocting the incident does not arise nor is there any reason given by the Appellant for PW1 to have made an untruthful statement.

11. In view of the foregoing discussions, I am of the considered opinion that no reason arises to interfere with the findings of the learned trial Court.

12. Consequently, the Appeal stands dismissed.

13. No order as to costs.

14. Copy of this judgment be sent to the learned trial Court, for information.

SLR (2019) SIKKIM 697

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

Crl. A. No. 01 of 2019

Palden Sherpa ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Tamanna Chettri, Legal Aid Counsel for the Appellant.

For the Respondent: Mr. S.K. Chettri, Assistant Public Prosecutor.

Date of decision: 24th September 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –Determination of the age of the victim during the trial for offences under the POCSO Act is imperative – The victim's mother deposed that the victim was 12 years and studying in Class VIII in a Government School. The victim's step father also stated that the victim was aged about 12-13 years and studying in Class VIII in a Government School. The victim's elder brother deposed that the victim was 13 years during the relevant period. The victim herself informed the Court that she was 13 years old and studying in Class VIII – The defence not able to demolish the oral evidence of persons who would know the age of the victim asserting that the victim was in fact a minor – The birth certificate of the victim was seized from her mother. She would be its custodian. It records the victim's date of birth as 21.04.2004. The birth certificate was proved by its maker i.e. Dr. Amber Subba, Medical Officer who not only identified his signature on it but also stated that the birth certificate was issued after verification of the relevant document presented for registration of the birth like the certificate of identification of the father, voter identity card of the parents, antenatal check up card/immunization card of the mother and the infant and the birth report from the ICDS (pink card) – The birth certificate is a public document and the issuer a public servant. The Head

Mistress of the Government School where the victim studied till 13.02.2017 proved the certificate issued by her under her signature which also recorded the date of the birth of the victim as 21.04.2004 – The oral evidence of the mother, step father, elder brother and the victim herself is corroborated by the birth certificate and the certificate of the Head Mistress. Taking the victim's date of birth to be 21.04.2004 and the date of incident as 21.12.2016 she would be exactly 12 years and 8 months. The evidence produced by the prosecution cogently proves that the victim was in fact a minor at the time of the commission of the offence and the failure of the prosecution to produce the register of births and deaths and the school register does not in any way dilute the evidence.

(Paras 3 and 4)

B. Protection of Children from Sexual Offences Act, 2012 – There is no contradiction between the ocular evidence and the medical evidence. The Appellant has been convicted for the offence under S. 3(a) of the POCSO Act under which penetration of the penis to any extent into the vagina amounts to penetrative sexual assault. Lack of injury on the genital of the victim is not conclusive proof that the Appellant had not committed penetrative sexual assault on her.

(Para 18)

C. Indian Penal Code, 1860 – S. 71 – Limit of Punishment of Offence Made Up of Several Offences – In view of S. 71 I.P.C, the conviction under S. 341 I.P.C is not sustainable as the deposition of the victim suggests that the offence of wrongful restraint was part of the offence of penetrative sexual assault committed by the Appellant.

(Para 19)

Appeal partly allowed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Appellant seeks to assail the judgment of conviction dated 15.11.2018 and the order on sentence dated 16.11.2018 passed by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (POCSO Act) in Sessions Trial (POCSO) Case No.10 of 2017. The Appellant was convicted under Section 3(a) of the POCSO Act and

sentenced to seven years of rigorous imprisonment and a fine of Rs.5,000/-. He was also convicted under Section 341 of the Indian Penal Code (IPC) and sentenced to simple imprisonment for a period of one month and a fine of Rs.1000/-.

2. Ms. Tamanna Chettri, learned Legal Aid Counsel for the Appellant challenged the judgment and sentence on two grounds. It was submitted that the age of the victim was not proved. It was further submitted that the medical evidence disproves the case of the prosecution of penetrative sexual assault. Mr. S. K. Chettri learned Assistant Public Prosecutor *per contra* submitted that the victim's evidence cannot be doubted; the identification of the Appellant is certain; the prosecution had been able to prove the age of the victim before the trial Court and there is no conflict between medical and ocular evidence.

Age of the victim

3. Determination of the age of the victim during the trial for offences under the POCSO Act is imperative. The learned Special Judge has examined the birth certificate (exhibit-2) and the deposition of Dr. Amber Subba, Medical Officer-(P.W.24) who had issued the said certificate; Certificate (exhibit-6) issued by the Head Mistress (P.W.9) of the Government School attended by the victim and the person who issued it and the bone age estimation of the victim (exhibit-17) and Dr. K. Giri-(P.W.16) who conducted the bone age estimation and came to the conclusion that the victim was a minor.

4. The victim's mother-(P.W.2) deposed that the victim was 12 years and studying in Class VIII in a Government School. The victim's step father-(P.W.3) also stated that the victim was aged about 12-13 years and studying in Class VIII in a Government School. The victim's elder brother (P.W.19) deposed that the victim was 13 years during the relevant period. The victim (P.W.1) herself informed the Court that she was 13 years old and studying in Class VIII. The defence has not been able to demolish the oral evidence of persons who would know the age of the victim asserting that the victim was in fact a minor. The birth certificate (exhibit-2) of the victim was seized from the mother (P.W.2) of the victim. She would be its custodian. The birth certificate-(exhibit-2) records the victim's date of birth as 21.04.2004. The birth certificate was proved by its maker i.e. Dr. Amber

Subba, Medical Officer-(P.W.24) who not only identified his signature on it but also stated that the birth certificate was issued after verification of the relevant document presented for registration of the birth like the certificate of identification of the father, voter identity card of the parents, antenatal check up card/immunization card of the mother and the infant and the birth report from the ICDS (pink card). He vouched for the correctness of the entries contained in the birth certificate (exhibit-2). The birth certificate is a public document and the issuer a public servant. The Head Mistress (P.W.9) of the Government School where the victim studied till 13.02.2017 proved the certificate (exhibit-6) issued by her under her signature which also recorded the date of the birth of the victim as 21.04.2004. Ms. Tamanna Chettri submitted that since the prosecution failed to produce the register of births and deaths and the school admission register the age of the victim has not been proved. The oral evidence of the mother (P.W.2), step father (P.W.3), elder brother (P.W.4) and the victim (P.W.1) herself is corroborated by the birth certificate (exhibit-2) and the certificate (exhibit-6) of the Head Mistress (P.W.9) proved by its makers. Taking the victim's date of birth to be 21.04.2004 and the date of incident as 21.12.2016 she would be exactly 12 years and 8 months. The evidence produced by the prosecution cogently proves that the victim was in fact a minor at the time of the commission of the offence and the failure of the prosecution to produce the register of births and deaths and the school register does not in any way dilute the evidence.

The evidence of the crime and the medical evidence

5. The victim (P.W.1) has given a detailed account of what transpired that fateful day. During the relevant period she was residing with her school teacher. Her parents used to reside at PK*****. She had gone to visit her parents. That day her mother (P.W.2) and her elder brother (P.W.19) had gone to the hospital and her father (P.W.3) was at home as he was not keeping well. She had also gone to the house of the Appellant located near her house but he was not present as he had gone to KG*****. The wife of the Appellant told her that she should meet the Appellant and ask for Rs.100/- which she needed for her household purposes. Accordingly the victim went to KG***** and asked the Appellant for Rs.100/- as instructed by his wife. The Appellant purchased a *"wai wai"* for the victim but did not give Rs.100/- as requested by his wife. Thereafter, she and the Appellant went to the house of one *"Bara"* located some distance from the victim's house. The

said *"Bara"* switched on the television set and the Appellant and the victim watched television. The *"Bara"* was also present. The Appellant had some *"jar"* (local brew) and the victim had tea. Thereafter, the "Bara" asked the victim to go home as it was getting late. The Appellant left towards KG***** and the victim left for her residence. When the victim was walking up a short cut route to her residence, she saw the Appellant following her instead of proceeding towards KG*****. The Appellant met the victim on the way and suggested that there was another short cut to her residence and led her on the said route. While she was walking along the route the Appellant followed her. After following the victim for sometime the Appellant led her to a bushy place. The Appellant suddenly caught hold of the victim and pulled down her slacks and underwear that she was wearing. The Appellant then pulled the victim down on the ground. He opened the zip of the jeans. The Appellant shut her mouth with his hand and inserted his penis into the victim's vagina. When she told the Appellant that she would narrate the incident to her mother (P.W.2), he told her that he was not scared. The Appellant left her there and ran away from the place. The victim then put on her clothes which were smeared with white coloured substance. She went home and narrated the incident to her father (P.W.3) who called the mother (P.W.2) over her mobile phone and informed her of the same. Thereafter, when her mother (P.W.2) and her elder brother (P.W.19) returned home the victim narrated about the incident to them as well. The victim's elder brother (P.W.19) then reported the matter to the Pakyong Police Station. The victim also gave a statement (exhibit-1) to a Magistrate. She identified her signature on her statement recorded by the Magistrate. The victim identified her purple colored underwear, black colored slacks and white and grey colored frock which she was wearing that day and seized by the police at the Pakyong Police Station. The victim's evidence remained unscathed even after cross-examination.

6. The fact that the victim narrated about the incident to her family members immediately after the incident is corroborated by the deposition of her mother (P.W.2), her step fathers (P.W.3) and her brother (P.W.19). The victim's brother deposed that the same evening he lodged the First Information Report (FIR) (exhibit-21) after the victim told him about the commission of penetrative sexual assault on her. The FIR (exhibit-21) reports about the rape committed by the Appellant upon the victim (P.W.1).

7. The identification of the Appellant as the perpetrator of the crime by the victim cannot be doubted. The victim was known to the Appellant. The victim identified the Appellant as the person whose house she had visited on the relevant day and who she would address as *"Mama"*. The fact that the Appellant was a fellow villager is corroborated by the victim's mother (P.W.2), victim's step father (P.W.3), victim's uncle (P.W.5), victim's aunt (P.W.6) and victim's brother (P.W.19).

8. P.W.20 identified the Appellant as a mason working in his house and also resident of the same village during the relevant period. He corroborated the victim's evidence that she had gone to the house of one *"Bara"* to watch television. According to P.W.20 on that day the victim had come to his residence and requested him to allow her to watch television. Accordingly, he turned on the television for her. The Appellant who was already present at his residence watched television with the victim for some time. However, after some time P.W.20 asked the victim to leave his residence and return to her residence as it was late. Accordingly, the victim left his residence and proceeded towards her residence. After some time the Appellant also followed her. The next morning the Appellant came to his residence at around 6 a.m. and requested him for a loan of Rs.300/- but since he did not have change he asked the Appellant to come later after which he left. Later P.W.20 came to know that the Appellant had sexually assaulted the victim. During cross-examination P.W.20 admitted that the Appellant left the house about half an hour after the victim and that the victim's house is about 20-25 minutes' walk from his house. The learned defence Counsel drew the attention of this Court to this admission and submitted that this statement would disprove the victim's version. This is a minor discrepancy which does not shake the substratum of the prosecution case. The deposition of P.W.20 confirms that the victim and the Appellant were together that day.

9. The victim's uncle (P.W.5) and aunt (P.W.6) deposed that on the relevant day they and the Appellant had gone to look for work. They did not meet the concerned person and so they returned. On their way back they stopped at the house of one KK****** who invited them for refreshments. The victim also reached while they were still there. Both the witnesses stated that the victim and the Appellant left the house of KK******. They confirmed seeing the victim and the Appellant together that day.

10. There was evidently no eye witness to the crime. The victim's statement stands alone. There is also no evidence that the learned defence Counsel could point out which would even remotely suggest that the victim was not speaking the truth. There was no reason for her to lie too.

11. The incident is reported to have occurred on 21.12.2016. On 20.01.2017 the learned Judicial Magistrate (P.W.14) recorded the victim's statement under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The victim narrated what happened to her on 21.12.2016 to the learned Judicial Magistrate (P.W.14). The statement (exhibit-1) of the victim recorded by the learned Judicial Magistrate (P.W.14) has been proved by the victim as well as the learned Judicial Magistrate (P.W.14). The statement (exhibit-1) of the victim corroborates her deposition in Court.

12. On 22.12.2016 the Investigating Officer (P.W.25) seized one purple coloured undergarment with white and black (butterfly) printed having white patches, one black coloured lower pant having white patches and one white and grey coloured frock with brown belt and printed flowers (red, blue and yellow colours), torn on the upper part from the victim at the Pakyong Police Station. P.W.15 confirmed he was the seizure witness but he could not identify the seized wearing apparels of the victim. P.W.21 was the second seizure witness to the seizure memo (exhibit-15). He identified all the wearing apparels of the victim seized by the police. The Investigating Officer (P.W.25) stated that he had seized the wearing apparels of the victim said to have been worn by the victim at the time of the incident. The victim's statement that her wearing apparels were seized by the police is adequately corroborated.

13. On the same day the Investigating Officer (P.W.25) also seized one navy blue colored undergarment with patches of white stains and one black colored half pant from the Appellant at the Pakyong Police Station. P.W.7 whose taxi was hired by the police for taking the victim, her mother (P.W.2) and one lady constable to STNM Hospital witnessed the seizure of the wearing apparels of the Appellant. Dr. O. T. Lepcha (P.W.10) the Medico Legal Consultant examined the Appellant on 22.12.2016. He found no injury during genital examination. Smegma was however absent. He opined that there was nothing to suggest that the Appellant was incapable of sexual intercourse. Dr. Tsewang Donka Bhutia (P.W.18) also examined the Appellant the same day. According to her observation his penis was normal

and he was capable of having sexual intercourse. She also collected the blood sample of the victim.

14. The said wearing apparels of the victim and the Appellant along with the victim's blood sample and her vaginal wash were sent for forensic examination and it was received by the Regional Forensic Science Laboratory Sikkim (RFSL) on 09.01.2017. Pooja Lohar (P.W.13), Analyst and Assistant Chemical Examiner of RFSL tested the wearing apparels along with other exhibits between 11.01.2017 to 30.01.2017 and submitted her report (exhibit-10). The victim's blood gave positive test for blood group AB Rh+. Human body fluid could be detected in the purple colored underwear of the victim and it gave positive test for the blood group AB but gave negative test for the presence of human semen. Blood, semen or any other human body fluid could not be detected in the vaginal wash of the victim, black colored legging of the victim, white and grey colored frock with brown belt and multi colored flowery prints of the victim. Human body fluid could be detected in the navy blue colored underwear of the Appellant however it gave negative result for the presence of human semen. Blood, semen or any other human body fluid could not be detected in the black colored trouser of the Appellant. The vaginal wash of the victim which was obtained by Dr. Paras Mani Karki (P.W.22) on 22.02.2016 was sent for examination. However, the cytopathology report (exhibit-8) prepared by Dr. Sangita Bhandari (P.W.11) could not detect motile or non motile spermatozoa. The learned defence Counsel therefore submitted that the prosecution had failed to corroborate the statement of the victim about the penetrative sexual assault committed.

15. The victim deposed that after the Appellant inserted his penis into her vagina she put on her clothes which were smeared with white coloured substance. The victim was examined by Dr. Tsewang Donka Bhutia (P.W.18) who was the Medical Officer. She deposed that when she examined the victim on 22.12.2016 her lower black pants had fresh white patches. The seizure memo (exhibit 15) also recorded the seizure of the black coloured lower pant with white patches.

16. Dr. Tsewang Donka Bhutia (P.W.18) detected multiple small abrasions (around nine in number) over both hands of the victim. She found that her clothes, the upper shirt was torn, lower black pants had white fresh patches. The victim complained of slight pain over the breast and nipple, she

also detected a whitish discharge from the perineum area of the vagina. After collection of the victim's blood sample and handing it over to the Pakyong Police Station she referred the victim to STNM Hospital for OBG consultation.

17. Dr. Paras Mani Karki (P.W.22) Senior Specialist of Obstetrics and Gynecology at the STNM Hospital also examined the victim on 22.12.2016. The victim told him that she was sexually assaulted by the Appellant on 21.12.2016. The victim complained of fondling of the breast and sexual intercourse by the Appellant. On examination he found that there was no perennial injury and active bleeding. He noticed that the vagina admitted index finger at ease. Based on his examination he opined that there was no forceful penetration of the vagina *"as the injury to it was not that severe"*. He also opined that however, sexual intercourse could not be ruled out.

18. The victim's comprehensive deposition with specific details of the incident and the surrounding circumstances has been sufficiently corroborated by the oral evidence of the prosecution witnesses, medical evidence as well as material evidence. The victim was examined the very next day of the incident. Dr. Tsewang Donka Bhutia (P.W.18) noticed not only the fresh white patches on the black lower pants of the victim but also that her shirt was torn. She also noticed multiple small abrasions on both the hands of the victim. These are telltale sign of the assault. These evidence also suggests the struggle of the victim during the assault. Dr. O. T. Lepcha (P.W.10) noticed absence of smegma on the Appellant's penis which may also be suggestive of recent sexual intercourse. The inevitable cumulative conclusion from the oral evidence of the victim, the material and medical evidence collected and proved by the prosecution is that the Appellant had in fact committed penetrative sexual assault on the victim and thereafter ejaculated on her wearing apparels. Contrary to the submission made by the learned defence Counsel the medical evidence does corroborate the statement of the victim about the assault. There is no contradiction between the ocular evidence and the medical evidence. The Appellant has been convicted for the offence under Section 3(a) of the POCSO Act under which penetration of the penis to any extent into the vagina amounts to penetrative sexual assault. Lack of injury on the genital of the victim is not conclusive proof that the Appellant had not committed penetrative sexual assault on her. The deposition of the victim does inspire complete confidence. This Court is of

the view that the judgment of conviction passed by the learned Special Judge for the offence under Section 3 (a) of the POCSO Act cannot be faulted.

19. In view of Section 71 IPC, the conviction under Section 341 IPC is not sustainable as the deposition of the victim suggests that the offence of wrongful restraint was part of the offence of penetrative sexual assault committed by the Appellant. Accordingly, the conviction under Section 341 IPC is set aside.

20. The learned Special Judge has sentenced the Appellant to seven years of rigorous imprisonment and fine of Rs.5000/- for the offence of penetrative sexual assault punishable under Section 4 of the POCSO Act. That was the minimum sentence prescribed. The sentence imposed is sustained. The period of imprisonment already undergone by the Appellant during investigation and trial shall be set off against the sentence imposed.

21. The learned Special Judge has granted compensation of Rs.1 lakh to the victim under the Sikkim Compensation to Victim or his Dependent's Scheme, 2011 for the offence committed on her on 21.12.2016. The Sikkim Compensation to Victim or his Dependent's (Amendment) Scheme, 2016 was brought into force on 25.11.2016. Thus the victim is entitled to Rs.3 lakhs as provided under the amended schedule. The order of compensation is therefore modified. The victim shall be granted compensation of Rs.3 lakhs. As the victim is still a minor the compensation amount shall be deposited in a fixed deposit in the account of the victim payable on her attaining majority. If the victim does not have a bank account the Sikkim State Legal Services Authority (SSLSA) shall assist the victim to open her account in any scheduled bank located in or nearest to the residence of the victim.

22. The appeal is partly allowed on the above terms. The Appellant is in jail. He shall remain there and serve the rest of the sentence.

23. A copy of the judgment shall be sent to the Court of the learned Special Judge, POCSO, East Sikkim at Gangtok and Sikkim State Legal Services Authority for compliance. A certified copy, free of cost, shall be furnished forthwith to the Appellant.

SLR (2019) SIKKIM 707

(Before Hon'ble the Acting Chief Justice)

MAC App. No. 03 of 2019

The Branch Manager,
Chola MS General Insurance Company Ltd. ….. APPELLANT

Versus

Mrs. Radha Pradhan and Others ….. RESPONDENTS

For the Appellant: Mr. Yadev Sharma and Mr. Dilip Kumar Tamang, Advocates.

For Respondent 1-8: Mr. Tarun Choudhary, Advocate.

For Respondent No.9: Mr. Dilli Bahadur Pradhan, Advocate.

Date of decision: 30th September 2019

A. The Motor Vehicles Act, 1988 – S. 147 – Gratuitous Passenger – The term "gratuitous" does not find any definition or explanation in the Motor Vehicles Act. The term however is understood to indicate a passenger travelling in a commercial vehicle without payment.

(Para 9)

B. The Motor Vehicles Act, 1988 – S. 147 – Gratuitous Passenger – The object of the provision to S. 147 is to lay down the requirements of the policies and the limits of liability in respect of passengers and persons other than passengers in relation to passenger vehicles and goods carriages – The Section provides that the policy of insurance is to be issued by an authorized insurer, which must insure the specified person or class of persons, against any liability incurred in respect of death or of bodily injury, to any person or damage to any property of a third party, as well as against the death of or bodily injury caused to any passenger of a public service vehicle, caused by or arising out of the use of the vehicle in a

public place. The liability extends to damage to any property to a third person but not of the insured. It includes the owner of the goods carried in the vehicle or his authorized representative.

(Para 10)

Appeal partly allowed.

Case cited:

1. Sarla Verma (Smt) and Others v. Delhi Transport Corporation and Another, (2006) 6 SCC 121.

JUDGMENT

Meenakshi Madan Rai, J

1. The only question that arises for determination in this Appeal is whether the deceased was a gratuitous passenger in the vehicle in accident, i.e., truck (Tata), bearing registration No.WB 73 D 8533, the resultant relief or denial thereof would be contingent upon such determination.

2. It was contended by Learned Counsel for the Appellant-Insurance Company that the deceased was a gratuitous passenger and travelling in a goods carrier vehicle which met with the accident and hence was not entitled to claim any compensation whatsoever. The other arguments raised were that the Respondent did not produce any eye-witnesses to the alleged accident nor was the authority who issued the relevant documents including the Driving Licence of the driver examined before the Learned Claims Tribunal. That, the Income Certificate of the deceased was procured only for the purpose of obtaining enhanced compensation and in the absence of proof of income or voucher thereto an income of Rs.3,10,000/- per annum as projected by the Claimants-Respondents cannot be considered as the correct income of the deceased. The seizure list of the vehicle does not reflect that the goods carried therein were bricks as alleged by the Claimants-Respondents, but was infact timber. The owner of the goods alleged to be one Arun Rai was not produced as a witness to prove the plea of the Claimants/Respondents. The aforestated grounds do not entitle the Claimants-Respondents to any compensation, thus the impugned Judgment and Award dated 24-10-2018 of the Learned Claims Tribunal be set aside.

3. Refuting the arguments advanced by Learned Counsel for the Claimants-Respondents it was contended that the deceased was travelling in the goods carrier with the loaded goods as the representative of the owner and therefore the compensation cannot be declined. The income of the deceased being Rs.3,10,000/- (Rupees three lakhs and ten thousand) only, per annum, as has been established by the documentary evidence. All other documents furnished by the Respondents also substantiate their claims and in such circumstances, the impugned Judgment requires no interference.

4. Having heard and considered the submissions and the relevant records, we may briefly advert to the facts of the matter at hand for determination of the issue flagged hereinabove. The Respondents herein were the Claimants before the Learned Motor Accidents Claims Tribunal, South Sikkim, at Namchi, being the widow and five minor children of the deceased and his aged parents. The deceased Santosh Pradhan was travelling in the truck bearing No.WB 73 D 8533 with loaded goods for one Arun Rai of Jorethang. When the truck met with an accident on 20-08-2017 at about 1530 hours near a place called "Tanam Khola", South Sikkim, where he succumbed to his injuries. The Claimants case is that the deceased was 32 years at the time of the accident, a self-employed business man with an annual income of Rs.3,10,000/- (Rupees three lakhs and ten thousand) only. Income Tax had also been deducted from his income for the financial year 2017-18 through his Pan Card. On account of the accident, he succumbed to his injuries on the spot. The vehicle was insured with the Appellant Company. The claimants sought a total compensation of Rs.59,10,200/- (Rupees fifty nine lakhs, ten thousand and two hundred) only.

5. The Appellant-Company who was the Opposite Party No.1 before the Learned Claims Tribunal contested the Claim raising the ground that a gratuitous passenger travelling in a goods carrier vehicle was disentitled to any compensation. That, there was a statutory violation of the conditions of the Insurance Policy as contemplated under Section 149(2) of the Motor Vehicles Act, 1988 (hereinafter, M.V. Act). That, the Respondents had failed to substantiate by documentary evidence that the goods loaded in the vehicle in accident belonged to the deceased or that he was therefore the representative of the owner of the consignment. That apart, the deceased was said to be travelling from Siliguri to Jorethang, but documents, such as,

road challan, invoice, bill, vouchers, etc., were not produced nor were reasons given for non-filing of the said documents casting a cloud on the Claims put forth which was in any event excessive. Hence, the Petition ought to be rejected.

6. The Respondent No.9, who was Opposite Party No.2, before the Learned Claims Tribunal, wife of the driver of the truck averred that all documents pertaining to the vehicle were valid and effective and the O.P. No.1 would be liable to pay the award, if any.

7. The Learned Claims Tribunal framed a single issue, viz., (i) Whether the Claimants are entitled for compensation as claimed, if so, who is liable to pay the same?

8. The Claimant No.1 filed her evidence-on-affidavit as C.W.1 along with that of one Dawa Tamang, C.W.2. The Opposite Party filed the evidence-on-affidavit of its Legal Manager. The Opposite party No.2 had no witness to examine nor any evidence to file. After considering the evidence and documents on record, the Learned Claims Tribunal pronounced the impugned Judgment and awarded compensation of Rs.56,25,200/- (Rupees fifty six lakhs, twenty five thousand and two hundred) only, as total compensation to the Claimants. Thus, aggrieved this Appeal has arisen.

9. While addressing the issue flagged before this Court, i.e., whether the deceased Santosh Pradhan was a gratuitous passenger in the goods vehicle, it may be relevantly noted that the term „gratuitous does not find any definition or explanation in the M.V. Act. The term however is understood to indicate a passenger travelling in a commercial vehicle without payment. That, having been said, the relevant portions of Section 147 of the M. V. Act are extracted below;

> **"147. Requirement of policies and limits of liability**.%(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which%
>
> (a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)%

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person including owner of the goods or his authorised representative carried in the motor vehicle or damage to any property of a third party caused by or arising out of the use of the motor vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a transport vehicle, except gratuitous passengers of a goods vehicle, caused by or arising out of the use of the motor vehicle in a public place.

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee%

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

(2) ……..…

(3) ……..……

(4) ……..…

(5) ……..……"

10. The object of the provision is to lay down the requirements of the policies and the limits of liability in respect of passengers and persons other than passengers in relation to passenger vehicles and goods carriages. Thus, the said Section provides that the policy of insurance is to be issued by an authorized insurer, which must insure the specified person or class of persons, against any liability incurred in respect of death or of bodily injury, to any person or damage to any property of a third party, as well as against the death of or bodily injury caused to any passenger of a public service vehicle, caused by or arising out of the use of the vehicle in a public place. The liability extends to damage to any property to a third person but not of the insured. It includes the owner of the goods carried in the vehicle or his authorized representative.

11. The specific argument of the Appellant is that the deceased was neither the owner of the goods nor the authorized representative of the owner and he was merely travelling in the vehicle. The evidence on record, I find however would establish to the contrary. The Claimants witness Dawa Tamang, C.W.2 was also travelling in the ill-fated vehicle. He has clearly stated that although he boarded the vehicle from Melli as it belongs to his brother who was also the driver of the vehicle, the deceased was already an occupant in the said vehicle. On his enquiry, the deceased told him that he was travelling in the truck with goods, i.e., bricks, loaded in the truck which belonged to one Arun Rai of Jorethang. The Claimant No.1 has also supported this evidence and the cross-examination of both the witnesses were not decimated in this context. Exhibit 23 is the Supervision Charge-Receipt Book of the Transport Department, Sikkim Nationalised Transport (SNT) dated 19-08-2017 which infact lends credence to the statements of both C.W.1 and C.W.2 inasmuch as the document reveals that bricks were loaded in the truck which met with an accident. The argument of the Appellant that the seizure memo revealed the goods to be timber and not

bricks is also obliterated by Exhibit 23 and is therefore an incorrect argument advanced by the Appellant. Exhibit 22 further substantiates that a sum of Rs.1,892/- (Rupees one thousand, eight hundred and ninety two) only, was received from one Arun Rai of Jorethang for the said goods. It also emerges from the evidence of the witness of the Appellant, Deborshi Bhowmick that they had appointed an Investigator to look into the matter but admittedly the report of the Investigator had not been filed before the Tribunal. This concealment raises doubts about the *bona fides* of the Appellant Company and an adverse inference is drawn under Section 114(g) of the Indian Evidence Act, 1872. In the light of the evidence on record, in no way can it be stated that the deceased was a gratuitous passenger in the ill-fated vehicle. In this view of the matter, it consequently cascades that the Claimants are entitled to compensation. Besides, it needs no reiteration that matters filed before the Motor Accidents Claims Tribunals is to be proved by the Claimant by a preponderance of probability and not beyond a reasonable doubt.

12. The rash and negligent driving of the deceased has been categorically established by Dawa Tamang, the brother of the deceased driver who was also travelling in the truck from Melli, South Sikkim. The fact of accident is established by the FIR, Exhibit 1. The death of the deceased is established by Exhibit 2 the Inquest Report and Exhibit 3 the document of which the death body was forwarded for post-mortem. Exhibit 4 is the Insurance Policy pertaining to the vehicle in accident with validity at the time of the accident.

13. The income of the deceased was contested as being exorbitant. The Claimants for their part have relied on the "Indian Income Tax Return Verification", Form Exhibit 12, where the Gross Total Income of the deceased is shown as Rs.3,10,000/- (Rupees three lakhs and ten thousand) only. The total taxes paid is indicated as Rs.1,030/- (Rupees one thousand and thirty) only. Thus, the net annual income of the deceased would be Rs.3,08,970/- (Rupees three lakhs, eight thousand, nine hundred and seventy) only. No document was produced by the Appellant to controvert the income of the deceased. In such a circumstance, no error arises on the reliance of the Learned Claims Tribunal on Exhibit 12. Exhibit 14 is the document pertaining to the computation of the total income of the deceased with income tax deduction. Hence, the annual income of the deceased

would be Rs.3,08,970/- (Rupees three lakhs, eight thousand, nine hundred and seventy) instead of Rs.3,10,000/- as held by the Learned Claims Tribunal, which failed to consider the tax deducted. This settles the contest with regard to the deceased s income hence the correct multiplier for loss of income has been adopted by the Learned Claims Tribunal.

14. His date of birth is established by Exhibit 16, his Birth Certificate, as 06-03-1985. As the date of accident was 20-08-2017, he was approximately 32 years 5 months and 14 days at the time of accident.

15. In view of the aforestated discussions, there is no error in the findings of the Learned Claims Tribunal, however, the compensation stands re-calculated and modified in view of the observations *supra* pertaining to the income of the deceased.

Annual income of the deceased		Rs. 3,08,970.00
Add 40% of Rs.3,08,970/- as Future Prospects	**(+)**	Rs. 1,23,588.00
		Rs. 4,32,558.00
Less 1/5th of Rs.4,32,558/-	**(-)**	Rs. 86,511.60
[in consideration of the expenses which The victim would have incurred towards maintaining himself had he been alive]		
Net yearly income		Rs. 3,46,046.40
(rounded off)		Rs. 3,46,046.00
Multiplier to be adopted **'16'** **(Rs.3,46,046/- x 16)**		Rs. 55,36,736.00
[The age of the deceased at the time of death between 31 and 35 and the relevant multiplier as per Judgment of *Sarla Verma is* '16']		
Funeral Expenses	**(+)**	Rs. 15,000.00
[in terms of the Judgment of *Pranay Sethi* : **(2017) 16 SCC 680**]		
Loss of Estate	**(+)**	Rs. 15,000.00
[in terms of the Judgment of *Pranay Sethi*]		
Loss of Spousal consortium	**(+)**	Rs. 40,000.00
[in terms of the Judgment of *Magma*		

General Insurance : **(2018) 18 SCC 130**]

Loss of Parental consortium **(Rs.40,000/- x 5)** **(+)** Rs. 2,00,000.00
[in terms of the Judgment of *Magma General Insurance*]

Loss of Filial consortium **(Rs.40,000/- x 1)** **(+)** Rs. 40,000.00
[in terms of the Judgment of *Magma General Insurance*]

Total = Rs. 58,46,736.00

(Rupees fifty eight lakhs, forty six thousand, seven hundred and thirty six) only.

16. The Claimants-Respondents shall be entitled to simple interest @ 10% per annum on the above amount with effect from the date of filing of the Claim Petition before the Learned Claims Tribunal, i.e., 09-11-2017, until its full realisation.

17. The Appellant is directed to pay the awarded amount to the Claimants-Respondents within one month from today, failing which the Appellant-Insurance Company shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition, till realisation, duly deducting the amounts, if any, already paid by the Appellant-Insurance Company to the Claimants-Respondents.

18. To consider division of the compensation amongst the Claimants-Respondents, it is appropriate to refer to the ratio in ***Sarla Verma (Smt) and Others*** vs. ***Delhi Transport Corporation and Another***[1] which while considering the dependants of the deceased held as follows;

> **"31.** Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to

[1] (2006) 6 SCC 121

> be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependent on the father."
>
> **[emphasise supplied]**

19. As no evidence was furnished to establish the dependency of the father only the mother would be considered as a dependant of the deceased besides his spouse and children. The awarded amount of compensation shall be divided amongst the Claimant-Respondent No.1 being the spouse of the deceased, Claimant-Respondent Nos.2 to 6 being his minor daughters and Claimant-Respondent No.8 being his mother.

(i) From of the amount awarded, Claimant-Respondent No.1, spouse of the deceased is entitled to 15%, while Claimant-Respondent No.8 shall also be granted 15% considering the fact that she is aged and would obviously has been dependant on the deceased, along with interest as specified above.

(ii) 70% of the total amount awarded shall be divided amongst the Claimant-Respondent Nos.2 to 6, of which 50% of the share of each child shall be kept in individual Fixed Deposit in a Nationalised Bank, until the child attains the age of majority. The remaining 50% of each of the minors share shall be expended on their education.

20. The impugned Judgment of the Learned Claims Tribunal is upheld with modifications to the impugned Award.

21. Appeal allowed to the extent above.

22. No order as to costs.

23. Copy of this Judgment be sent to the Learned Claims Tribunal for information.

SLR (2019) SIKKIM 717

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

Crl. A. No. 04 of 2016

State of Sikkim ….. **APPELLANT**

Versus

Sashidhar Sharma ….. **RESPONDENT**

For the Appellant: Dr. (Ms.) Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

For the Respondent: Mr. N.B. Khatiwada and Mr. B. Sharma, Senior Advocates with Ms. Gita Bista and Mr. B.N. Sharma, Advocates.

Date of decision: 30th September 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age –The prosecution furnished the alleged Birth Certificate of the victim said to be issued by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim. The victim has nowhere given evidence of her age before the learned trial Court, which without putting the question to the victim about her age, has recorded that the witness is eleven years old and a minor, thereby failing to clarify the reason for its conclusion. As per the I.O., the Birth Certificate was was obtained from the aunt of the victim after preparing a Handing and Taking Memo – Beyond the receipt of the Birth Certificate, there is no evidence whatsoever to establish that the Birth Certificate pertains to the victim – Besides, the parents of the victim are alive and could have been examined to prove the victim's age – No other conclusion can be arrived at but the conclusion of failure on the part of the Prosecution to establish the victim's age.

(Para 9)

B. Indian Evidence Act, 1872 – S. 165 – Judge's Power to Put Questions – The victim has used the word "*chara*" in the Nepali vernacular. The exact meaning of the terminology has not been explained before the learned trial Court either by the victim or other witnesses nor was an effort made by the learned trial Court by invoking the provisions under S. 165 of the Indian Evidence Act to elicit the correct context of the word used by the victim. What the victim's understanding of the word tantamount to cannot be assumed by this Court as the word may be used variously to describe different sexual acts and may not necessarily be an expression of penetrative sexual assault. The understanding of the act of penetrative sexual assault by a child of approximately ten years is also a question that baffles and remains unanswered.

(Para 10)

Appeal allowed.

Case cited:

1. Sancha Hang Limboo v. State of Sikkim, 2018 SCC Online Sikk 10.

JUDGMENT

The judgement of the Court was delivered by *Meenakshi Madan Rai, ACJ*

1. The Appellant is aggrieved with the Judgment dated 31.10.2015, in Sessions Trial (POCSO) Case No.03 of 2015 (State of Sikkim v. Sashidhar Sharma), acquitting the Respondent of the offences under Section 9(c), 9(l), 9(m) and 9(o), punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act).

2. Learned Public Prosecutor for the Appellant contends that the victim herein is a girl child of eleven years while the Respondent is her Teacher, aged about fifty five years. Drawing attention to the evidence furnished by the Prosecution, specifically to that of PW7 the minor victim and PW10, PW11, PW13 and PW14 students of the same School, it is urged that the evidence furnished by the witnesses pertaining to sexual assault of the victim has not been demolished. That, the learned trial Court acquitted the Respondent with the reasoning that from the evidence of the witnesses, it

was apparent that there was hostile relationship between the "Bhujel family" and some Panchayat members with the Respondent and his family. That, some complaints regarding the Respondent and his family who were working in the same Primary School, had also been made prior to the alleged incident thus establishing inimical relations. That, in such view of the matter, it would not be proper to convict the Respondent. That, to the contrary, the evidence of the Prosecution witnesses reveal sufficient materials to establish the ingredients of Section 9(c), 9(l), 9(m) and 9(o) of the said Act. That, the statement of the victim recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") was not taken into consideration when this statement would establish consistency with the statement made by her before PW18, the Gynaecologist, who examined the victim. Hence, it is prayed that the impugned Judgment of acquittal be set aside.

3. *Per contra,* it was vehemently argued by learned Senior Counsel for the Respondent that there was a delay in the lodging of the First Information Report (for short "FIR") which itself lends suspicion to the allegation as the incidents are said to have occurred from the month of August, 2014 but the FIR came to be lodged only in November, 2014 sans explanation. That, the evidence on record clearly indicates discrepancies in the statements of the Prosecution Witnesses with regard to who the Class Monitor was at the relevant time as the victim asserts that she was the Class Monitor but her cross-examination elicited information to the contrary. That, the Medical Report given by PW18 indicates absence of external injuries on the victim as her hymen edges were found intact while the hymen opening admitted only the tip of the small finger thereby ruling out penetrative sexual assault. Exhibit 19, the Medical Report prepared by PW17, the Doctor who first examined the victim also found no signs of sexual assault duly substantiated by the evidence of PW18 the Gynaecologist. The learned trial Court had also correctly observed that if penetrative sexual assault had been committed by the Respondent, old injuries on the victim's genital would have indicated the occurrence of such incidents, or the victim would have informed some members of her family of the offence on account of the pain but this was not so. The learned trial Court has also found that the incidents stated by the victim were uncorroborated. That, it is clear from the conduct of the victim that no sexual assault was committed on her as she could have easily raised an alarm on such occurrence as the wife of the Respondent and two Teachers related to the Respondent were working in the same School. That,

in fact, it is the mere enmity of the "Bhujel family" which has led to the lodging of a false complaint and all the minor witnesses are either from the said family or related to them. Moreover Exhibit D1(a) and Exhibit D2(a), also supports the contention of the Counsel for the Respondent that some villagers were against the Respondent. It was next contended that as the age of the victim has remained unproved on the absence of proof of her Birth Certificate and thereby she is not covered by the ambit of the POCSO Act. Hence, on the anvil of the anomalies in the evidence of the victim herself, the Respondent did deserve an acquittal and the finding of the learned trial Court is not erroneous.

4. The rival contentions of learned Counsel for the parties were heard *in extenso* and carefully considered, as also all evidence and documents on record including the impugned Judgment.

5. This Court is to examine whether the learned trial Court correctly concluded that the case against the Respondent was a result of personal enmity of the victim's family with the Respondent and his family culminating in the Respondent's acquittal.

6. For clarity in the matter, we may briefly narrate the facts of the case. On 12.11.2014, the FIR, Exhibit 1 was filed by PW1, a Panchayat member of the area where the victim and the Respondent reside, complaining that the Respondent, the Headmaster of a Government Primary School of which the victim was a student, had sexually assaulted her. That, in this context, the victim's uncle had telephonically contacted the Respondent on the evening of 11.11.2014 after hearing rumours of the incident and it was agreed that the Respondent would meet the complainant in the victim's house the following day, which accordingly took place. The complainant, the Respondent, his wife, the victim and her uncle and his family members assembled therein. The victim, on enquiry about the incident, revealed that she had been raped by the Respondent since the month of August, 2014 in School. The Respondent admitting to the offence, instantly apologized to the family members and requested that the matter be settled amicably. However, those assembled there found him guilty of the offence and sought legal measures by filing Exhibit 1. On the basis of Exhibit 1, P.S. Case No.15(11)2014 of the concerned Police Station under Section 376 of the Indian Penal Code, 1860 (for short "IPC") read with Section 4 of the POCSO Act was registered against the Respondent and investigated into.

7. It transpired during investigation that the Respondent was the Headmaster of the Government Primary School where the victim, a permanent resident of West Bengal was a student. The School Assembly would start at 9:20 Hrs and the School gave over at 15:30 Hrs. In the month of August, 2014 before the classes started, the victim as the Class Monitor went to the School Office to collect the Attendance Register and found the Respondent alone there. On her entry, he forcefully held her hand and while both were on their feet committed penetrative sexual assault on her. Thereafter he threatened to beat and fail her in her exams should she reveal the incident to anyone. In the same month, the Respondent asked the victim and her friend, PW10, to clean the Office and sent PW10 to fetch a glass of water from the storeroom. When PW10 returned, she found the Respondent buckling his belt and fastening the zipper of his trousers while the victim looked nervous and flushed. On another occasion PW13, the victim's classmate witnessed the Respondent kissing the victim on her right cheek while PW11 in a separate incident, witnessed the Respondent holding the victim and moving against her in the back of a classroom. PW14 witnessed the Respondent lifting the victim's skirt inside the classroom and inserting his hand underneath. The victim was sexually assaulted for the last time on the opening of the School after the Diwali vacation in 2014. PW15, a Teacher in the same School had also noticed the stress on the victim's face since the month of August, 2014. On completion of investigation, Charge-Sheet was filed against the Respondent under Section 376 IPC read with Section 6 of the POCSO Act.

8. Charge against the Respondent was framed by the learned trial Court under Section 5(c), 5(l), 5(m) and 5(o) punishable under Section 6 of the POCSO Act. On the plea of "not guilty" by the Respondent, twenty witnesses were examined by the prosecution, on closure of which the Appellant was examined under Section 313 Cr.P.C. and his responses recorded. The evidence furnished was duly considered and the impugned Judgment pronounced.

9. At this juncture, it is relevant to note that the prosecution furnished Exhibit 23, the alleged Birth Certificate of the victim said to be issued by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim. The victim has nowhere given evidence of her age before the learned trial Court, which without putting the question to the

victim about her age, has recorded that the witness is eleven years old and a minor, thereby failing to clarify the reason for its conclusion. As per the I.O., PW20, Exhibit 23 was obtained from the aunt of the victim after preparing a Handing and Taking Memo, Exhibit 24, however beyond the receipt of the Birth Certificate as established by Exhibit 24, there is no evidence whatsoever to establish that the Birth Certificate pertains to the victim. This Court in ***Sancha Hang Limboo v. State of Sikkim***[1] has already detailed as to how the Birth Certificate of the victim is to be proved, the relevant portion of which is extracted hereinbelow;

> "**10**. The requirements for admissibility of a document under Section 35 of the Evidence Act can be summarized as follows;
>
> (i) The document must be in the nature of an entry in any public or other official book, register or record;
>
> (ii) It must state a fact in issue or a relevant fact; and (iii) The entry must be made by a public servant in the discharge of his official duties or in the performance of his duties especially enjoined by the law of the country in which the relevant entry is kept.
>
> [**State of Bihar** vs. **Radha Krishna Singh and Others** : (1983) 3 SCC 118]
>
> **11**. In ***Madan Mohan Singh and Others vs. Rajni Kant and Another*** : (2010) 9 SCC 209 the Hon'ble Supreme Court while distinguishing between admissibility of a document and its probative value observed as follows;
>
> > "**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.

[1] 2018 SCC Online Sikk 10

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.

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 Singhviv. 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]**

A careful reading of the extracts supra would clarify that the document may be admissible under Section 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. Infact, the ratio supra emphasises that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

12. In ***Birad Mal Singhvi*** vs. ***Anand Purohit*** [AIR 1988 SC 1796], the Hon'ble Supreme Court while discussing Exhibits 8, 9, 10 and 11 which were entries in the scholar's 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 Secondary School Examination of 1977 respectively, observed as follows;

> "**14**. ..... Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have 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 document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. 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, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved.

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. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

> Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmichand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.
>
> ....." **[emphasis supplied]**
>
> The observations are self explanatory, succinctly differentiating between admissibility of the documents and its probative value."

None of the procedures enumerated *supra* were adhered to by the prosecution. Besides, the parents of the victim are alive and could have been examined to prove the victim's age and Exhibit 23. Since none of the aforestated steps have been resorted to by the prosecution, no other conclusion can be arrived at but the conclusion of failure on the part of the Prosecution to establish the victim's age.

10. While addressing the allegation of sexual assault on the victim, PW7 the victim, in categorical terms, has identified the Respondent and stated that during the month of August, 2014 as the Class Monitor, in the morning she went to the Office of the Respondent to get the Attendance Register. At that time, the Respondent held her hand, rubbed her breast and committed *"chara"* on her. After the act, the Respondent threatened to fail her in her examination and inflict physical assault should she reveal the incident to anyone, as such she refrained from narrating the incident to anyone. After that incident, the Respondent committed *"chara"* to her on several occasions, however for the self same reason she did not disclose the incident to anyone. The prolonged cross-examination of the victim failed to decimate the facts stated by her. However, it is relevant to point out that the victim has used the word *"chara"* in the Nepali vernacular. The exact meaning of the terminology has not been explained before the learned trial Court either by the victim or other witnesses nor was an effort made by the learned trial Court by invoking the provisions under Section 165 of the Indian Evidence Act, 1872 to elicit the correct context of the word used by the victim. What the victim's understanding of the word tantamounts to cannot be assumed by this Court as the word may be used variously to describe different sexual acts and may not necessarily be an expression of penetrative sexual assault. The understanding of the act of penetrative sexual assault by a child of approximately ten years is also a question that baffles and remains unanswered. As a consequence, the evidence of PW7 is necessarily to be read with the evidence of PW17 and PW18, both of whom have deposed that there were no signs of penetrative sexual assault on the victim. PW18, the Gynaecologist has categorically stated as follows;

> *"Local examination:- Pubic hair sparse, mild discharge present, no fresh bleeding seen. No external injuries were seen. Hymen edges intact. Hymen opening admits top of small finger. Swab collected from perineal, paraurethral and lower vaginal canal and sent for examination for presence of spermatozoa. Opinion was reserved till lab report was received.*
>
> *Final opinion was given on 27.11.2014 that there was no local clinical evidence of injury and swab report prepared by Dr. A.T. Sherpa, Pathologist, District Hospital, Gyalshing – Smear*

studied from the vaginal perineal and paraurethral swab shows no spermatozoa. ..."

11. PW17, the Doctor, who first examined the victim on 12.11.2014 at around 1.45 p.m. opined that due to the remote history of assault, no fresh sign of assault was seen but he forwarded the victim to the Gynaecologist. Hence, the allegation of penetrative sexual assault can safely be ruled out as the prosecution has failed, by any proof whatsoever, for that matter even by the evidence of the victim to establish the said act. However, so far as sexual assault is concerned, we may examine the evidence of PW11 with whom the victim lives. According to her, on a particular day when it was "tiffin break," she saw the Respondent take the victim behind a tree and engage in an act involving some movement both being fully clothed. This fact could not be demolished under cross-examination. PW13 was another student witness. She saw the Respondent kissing the victim on her right cheek during the Mathematics Class during the month of August, 2014. This evidence too remained uncontroverted during cross-examination. PW14, the next student witness narrated that he was in the same Class with the victim and he along with other students and the victim were drawing and when he turned around to ask some question to the Respondent he saw that the victim was on the Respondent's desk and he had lifted her skirt and had his hand inside. He quickly removed his hand on the witness's question. This evidence also withstood cross-examination. PW15, a Teacher in the same School stated that the victim's friends narrated the acts of sexual assault committed by the Respondent on the victim. It is also her statement that on 11.11.2014, the victim told her that she was sexually assaulted by the Respondent on several occasions during the 2014 session and that the assaults took place inside his Office. PW20 was the Investigating Officer of the case who *inter alia* stated that after the allegations of sexual harassment, the Respondent could not be arrested as he had attempted to commit suicide by hanging himself in the Office of his School on 12.11.2014 at around 10:00 Hrs upon which he was immediately evacuated to the Primary Health Centre and later referred to a Gangtok Hospital in an unconscious state. Although an effort was made during cross-examination to establish that the Respondent could have been a psychiatric patient but the fact that the Respondent attempted to commit suicide after the matter of his having sexually assaulted the victim came to light, could not be controverted. Consequently, sexual assault by the Respondent stands proved by uncontroverted evidence.

12. Thus, in consideration of the entire evidence on record, we are of the considered opinion that the learned trial Court was carried away by the red herring introduced by suggestions made by Counsel for the Respondent during the cross-examination of PW1, PW3, PW5, PW7, PW8, PW9, PW13, PW15 and PW20, that the "Bhujel family" was against the Respondent and responsible for false allegations against the Respondent. It may be true that the wife and two women members of his family were also teaching in the same School but the fact remains that the incidents of sexual assault were witnessed by the students inside the Classroom where obviously all the Teachers would not have gathered. Only one incident was witnessed by PW11 outside the Classroom during the tiffin break. There is also no reason to doubt the statement of the victim whose evidence of sexual assault by the Respondent on her have been cogent and consistent. True it is therefore that no penetrative sexual assault has been established, yet, the fact of sexual assault on the victim is proved beyond a reasonable doubt.

13. The delay in lodging of the FIR needs no further explanation as the victim has succinctly deposed that she did not report the matter to either friends or family on account of the threat held out to her by the Respondent. Besides, it has emerged in cross-examination that she is a bright student and secured first position in the Class. In such a circumstance, any student would balk at the ignominy of being failed more so when the threat appears real, having been made by a Teacher.

14. The argument of the Respondent that the Section 164 Cr.P.C. Statement of the victim was not considered is not tenable as the Prosecution itself has failed to elicit corroborative evidence of the victim's statement made therein.

15. In the end result, it cannot but be concluded that the prosecution has failed to establish that the victim was below eighteen years of age to bring her within the ambit of Section 2(d) of the POCSO Act and the benefit thereof is imminently to be extended to the Respondent. However, we conclude that the offence committed by the Respondent would undoubtedly fall under Section 354A of the IPC. Since the punishment prescribed under Section 354A of the IPC is lesser than Section 5(c), 5(l), 5(m) and 5(o) punishable under Section 10 of the POCSO Act, there is no requirement for a fresh hearing on sentence.

16. Consequently, the impugned Judgment of the learned trial Court is set aside.

17. The Respondent is convicted of the offence under Section 354A of the IPC and sentenced to undergo rigorous imprisonment for a term of three years with fine of Rs.25,000/- (Rupees twenty five thousand) only, in default of fine to undergo simple imprisonment of six months. The fine, if deposited shall be made over to the victim who shall also be made over a sum of Rs.50,000/- (Rupees fifty thousand) only, in terms of the Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016.

18. The period of imprisonment already undergone by the Respondent, if any, shall be set off against the period of imprisonment imposed on him today.

19. Appeal allowed.

20. No order as to costs.

21. Copy of this Judgment be sent to the learned trial Court, for information and compliance.

22. Copy be made over to the Member Secretary, Sikkim State Legal Services Authority, for information and compliance.

23. In view of the fact that the Appeal is against the impugned Judgment of the Special Judge (Protection of Children from Sexual Offences Act, 2012), West Sikkim, at Gyalshing, let the Respondent-Accused surrender tomorrow, i.e., 01.10.2019, before the Learned Special Judge by 11 a.m. positively, to undergo the sentence imposed on him by the Judgment of this Court. Should he fail to surrender, the Learned Special Judge shall initiate necessary steps.

24. The bail-bonds of the Respondent-Accused stands cancelled.

25. Records of the learned trial Court be remitted forthwith.

SLR (2019) SIKKIM 732

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

RFA No. 12 of 2017

Shri Karma Loday Bhutia ….. APPELLANT

Versus

Shri Bir Bahadur Rai@ B. B. Rai ….. RESPONDENT

For the Appellant: Mr. A.K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha, Advocate.

For the Respondent: Mr. N. Rai, Senior Advocate with Mr. Sunil Baraily, Advocate.

Date of decision: 30th September 2019

A. Indian Evidence Act, 1872 – Ss. 101 and 102 – Burden of Proof and Onus of Proof – Difference Explained – A fact is said to be "proved" when, if considering the matters before it, the Court either believes it to exist, or considers the existence so probable that a prudent man might, under the circumstances of a particular case, to act upon the supposition that it exist. The conformational effect of evidence in Civil and Criminal cases is not always the same. Preponderance of probability is sufficient for a decision in a Civil case. Due regard must be given to the "burden of proof". The standard of proof in a Civil case is lesser than a Criminal prosecution. Therefore, a higher degree of probability providing assurance to the Plaintiff's case set up would shift the "onus of proof" upon the Defendant. It is equally exigent to discern the essential difference between "burden of proof" and "onus of proof". The "burden of proof" lies upon the person who has to prove the fact. This "burden of proof" never shifts. "Onus of proof" on the other hand shifts – In the present suit for recovery of money, Bir Bahadur Rai was required to create a high degree of probability to discharge his "burden of proof" so as to shift Karma Loday Bhutia. If Bir Bahadur Rai succeeded to do so Karma Loday Bhutia would be required to discharge his "onus of proof"and in the absence thereof the "burden of proof" lying on Bir Bahadur Rai would be held to be discharged.

(Para 10)

B. Code of Civil Procedure, 1908 – O. 14 R. 1 – Framing of Issues – Framing of issue is crucial to arrive at a correct conclusion. An erroneous issue may misdirect the Court. Similary, failure to fix the burden of proof upon the party who asserts the fact may also lead the Court to determine and appreciate facts incorrectly.

(Para 19)

Appeal allowed.

Chronological list of cases cited:

1. State of M.P v. Nomi Singh, (2015) 14 SCC 450.
2. Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal, (1999) 3 SCC 35.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This Appeal under Order XL1, Rules 1 and 2 of the Code of Civil Procedure, 1908 is against the judgment and decree both dated 29.08.2017 passed by the Learned District Judge, East Sikkim at Gangtok in Money Suit No.11 of 2015 decreeing the suit in favour of Bir Bahadur Rai (The Plaintiff).

The Plaint

2. Bir Bahadur Rai's case was that he and Karma Loday Bhutia (Defendant) were both contractors known to each other. Karma Loday Bhutia was entrusted with the contract to construct the Panchayat Ghar at Rakdong-Tintek. As Karma Loday Bhutia was unable to pursue the contract he executed an irrevocable power of attorney (exhibit-2) in favour of Bir Bahadur Rai. Thereafter, Bir Bahadur Rai commenced the construction of the Panchayat Ghar investing his own money and completed it. When he came to learn that Karma Loday Bhutia had received payments from the running bills he issued legal notice dated 30.03.2012 (exhibit-3) to Zilla Panchayat to stop payment. On 27.02.2013 the Department sanctioned the final bill slip of Rs. 7,89,000/- (exhibit-4) and handed over a cheque for the said amount to Karma Loday Bhutia in the presence of Bir Bahadur Rai. Thereafter, Karma Loday Bhutia issued two cheques i.e. State Bank of Sikkim's cheque dated 06.03.2013 for Rs.7,89,000/- (exhibit-5) and HDFC Bank's cheque dated 12.03.2013 for Rs.7,90,000/- (exhibit-6) to Bir Bahadur Rai. Both the cheques

were dishonoured vide return memos dated 19.03.2013 (exhibit-7) and 15.03.2013 (exhibit-8). Although, Bir Bahadur Rai informed Karma Loday Bhutia about it he did not pay the amount due. He could not therefore make the labour payments for which the labourers complained to the Panchayat (exhibit-9). The President of the Panchayat issued letter dated 17.04.2013 (exhibit-10) to Bir Bahadur Rai informing him about it. Bir Bahadur Rai waited till March 2015 for payment and issued legal notice dated 23.03.2015 (exhibit-11) to Karma Loday Bhutia. Thereafter, he filed the suit for recovery of Rs.15,79,000/-.

The Written Statement

3. Karma Loday Bhutia disputed the execution of the irrevocable power of attorney. He denied he was not capable to pursue the contract work. He asserted that he had executed the contract work and completed it on 30.06.2011. Karma Loday Bhutia explained that the irrevocable power of attorney was executed by him as Bir Bahadur Rai had assured him that he had an enlistment of a Grade-B contractor but when he failed to produce it he refused to get it registered and cancelled it. Karma Loday Bhutia specifically denied that Bir Bahadur Rai had executed the work. He asserted that it was him who had executed the work after taking loans from friends, relatives and financial institutions. He denied issuing the two cheques in favour of Bir Bahadur Rai and asserted that he had procured the cheques deceitfully. He also stated that in fact the Panchayat had called him due to the complaint by the labourers after which he settled the dispute with them and drew a *'milapatra'*.

The Issues Framed

4. The learned District Judge framed four issues on 12.05.2016. They were:

> **"***1. Whether the Plaintiff was appointed by the Defendant as his Attorney to execute the contract work for construction of Panchayat Ghar at Rakdong Tintek?*
>
> *2. Whether the Defendant had executed the contract work and had issued to the Plaintiff two cheques bearing No.066152 dated 06.03.2013 of Rs.7,89,000/- (SBS) and No.421328 dated 12.03.2013 of Rs.7,90,000/-?*
>
> *3. Whether the present suit is barred by limitation? 4. Whether the Plaintiff is entitled to the relief claimed?***"**

The Trial

5. During the trial Bir Bahadur Rai examined himself, Tulsi Pradhan (P.W.2) and Binod Rai (P.W.3) both his co-villagers. Karma Loday Bhutia examined himself, Om Prakash Gurung-Junior Engineer (D.W.2) and B. B. Gurung-Panchayat Member (D.W.3).

The Impugned Judgment and Decree

6. Based on the oral and documentary evidence led by the parties during the trial the learned District Judge passed the impugned judgment dated 29.08.2017 decreeing the suit in favour of Bir Bahadur Rai for a sum of Rs.15,79,000/- along with interest @ 8% per annum from the date of filing of the suit till the realization of the decreed amount. Bir Bahadur Rai was further granted a decree for a sum of Rs.31,580/- payable by Karma Loday Bhutia being the court fees deposited by Bir Bahadur Rai.

7. The learned District Judge came to the conclusion that the power of attorney was validly executed by Karma Loday Bhutia in favour of Bir Bahadur Rai and he had not cancelled it; after completion of the contract work Karma Loday Bhutia had issued the two cheques to Bir Bahadur Rai of Rs.7,89,000/- and Rs.7,90,000/- which bears his signatures; suit was not barred by limitation and that Bir Bahadur Rai was entitled to the reliefs claimed.

The Rival Contentions

8. Aggrieved thereby Karma Loday Bhutia has preferred the present appeal. Mr. A. K. Upadhyaya, learned Senior Advocate for Karma Loday Bhutia submitted that the Plaintiff has to prove its own case and cannot take advantage of the weakness of the Defendant. He relied upon the judgment of the Supreme Court in re: ***State of M.P. v. Nomi Singh***[1] for the said proposition. The Supreme Court had held that it is settled principle of law that in respect of relief claimed by a Plaintiff, he has to stand on his own legs by proving his case. It was submitted that therefore, Bir Bahadur Rai was required to prove that the irrevocable power of attorney was valid and enforceable in law and that he had himself executed the contract work and completed the same using his own resources. Bir Bahadur Rai however, failed to do so. On the contrary Karma Loday Bhutia has been able to

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cogently prove that it was he who executed the work. It was submitted that Bir Bahadur Rai had admitted that the cheques were not directly handed over to him by Karma Loday Bhutia and he could not identify the handwritings appearing thereon. Karma Loday Bhutia on the other hand had deposed that he had not issued the cheques in favour of Bir Bahadur Rai for executing the work as his attorney.

9. Mr. N. Rai, learned Senior Advocate for Karma Loday Bhutia on the other hand supported the judgment of the learned District Judge. It was submitted that unlike a criminal case the Civil Court may come to the conclusion on the basis of preponderance of probabilities. The fact that Karma Loday Bhutia had in fact executed the irrevocable power of attorney and issued the two cheques under his signature in favour of Bir Bahadur Rai coupled with the oral and documentary evidence led by him leads to the conclusion on the basis of preponderance of probabilities that the two cheques totaling to Rs.15,79,000/- were issued by Karma Loday Bhutia as the work was in fact executed by Bir Bahadur Rai.

The Consideration

10. Before examining the issues it would be relevant to consider the concept of proving a civil case on the basis of preponderance of probability. Section 3 of the Indian Evidence Act, 1872 provides that a fact is said to be *"proved"* when, if considering the matters before it, the Court either believes it to exist, or considers the existence so probable that a prudent man might, under the circumstances of a particular case, to act upon the supposition that it exist. The conformational effect of evidence in civil and criminal cases is not always the same. Preponderance of probability is sufficient for a decision in a civil case. Due regard must be given to the *"burden of proof"*. The standard of proof in a civil case is lesser than a criminal prosecution. Therefore, a higher degree of probability providing assurance to the Plaintiff's case set up would shift the *"onus of proof"* upon the Defendant. It is equally exigent to discern the essential difference between *"burden of proof"* and *"onus of proof"*. The *"burden of proof"* lies upon the person who has to prove the fact. This *"burden of proof"* never shifts. *"Onus of proof"* on the other hand shifts. In the present suit for recovery of money Bir Bahadur Rai was required to create a high degree of probability to discharge his *"burden of proof"* so as to shift the *"onus of proof"* upon Karma Loday Bhutia. If Bir Bahadur Rai succeeded to do so Karma Loday Bhutia would be required to discharge his *"onus of proof"* and in the absence thereof the *"burden of proof"* lying on Bir Bahadur Rai would be held to be discharged.

Issue No.3

11. Issue No.3 is taken up first. Issue No.3 was whether the suit was barred by limitation? The learned District Judge has held that since the suit was for realization of money the period of limitation was three years and as the two cheques are dated 06.03.2013 and 12.03.2013 the suit filed was within the period of limitation. The said cheques were dishonored on 19.03.2013 and 15.03.2013 and thus the suit filed on 16.07.2015 was within the period of limitation.

Issue No.1

12. Issue No.1 is taken up next. Bir Bahadur Rai produced and exhibited the original irrevocable power of attorney (exhibit-2) which had been signed by the executant i.e. Karma Loday Bhutia and the recipient i.e. Bir Bahadur Rai. It was signed in the presence of two witnesses i.e. Tulsi Pradhan (P.W.2) and Binod Rai (P.W.3). Both the witnesses deposed that they had signed it in favour of Bir Bahadur Rai. It has been executed under the seal and signature of an Oath Commissioner who was however, not examined. The irrevocable power of attorney recited that Karma Loday Bhutia was entrusted with contractual work for the construction of the Panchayat Ghar at Rakdong-Tintek for the sum of Rs.29 lakhs but being unable to fully fulfill the work and effectively deal with it he has decided to appoint Bir Bahadur Rai as his attorney *"to take over the said construction work and to do all acts and deeds in relation thereto"*. It also acknowledged that Bir Bahadur Rai had immensely contributed in respect of obtaining the contract work and had interest therein. Bir Bahadur Rai was cross-examined. Karma Loday Bhutia put to him that the irrevocable power of attorney was invalid which was denied. To the suggestion that a contract awarded to the contractor cannot be sublet Bir Bahadur Rai said he was not aware. Karma Loday Bhutia did not put any further question on the irrevocable power of attorney although in the written statement he had denied the execution thereof. Instead, Karma Loday Bhutia during cross-examination admitted his signatures on the irrevocable power of attorney. He also admitted that it was with regard to construction of the Panchayat Ghar and that he had appointed Bir Bahadur Rai as his lawful attorney through the irrevocable power of attorney to take charge of the construction of the Panchayat Ghar at Rakdong-Tintek. He admitted that he had not filed any document to show that he had cancelled the irrevocable power of attorney. Karma Loday Bhutia admitted that as per the irrevocable power of attorney he had sublet the contract work to Bir Bahadur Rai and that it was not submitted to the concerned Department

for approval. He admitted that the concerned department was not aware of the irrevocable power of attorney having been executed by him in favour of Bir Bahadur Rai.

13. Consequently, the learned District Judge's finding on issue No.1 is affirmed and it is held that Karma Loday Bhutia had in fact executed the irrevocable power of attorney.

Whether after being appointed as attorney by Karma Loday Bhutia did Bir Bahadur Rai commence the construction of the Panchayat Ghar at Rakdong-Tintek investing his own money and completed the same?

14. Bir Bahadur Rai had pleaded that after being appointed as an attorney of Karma Loday Bhutia he had commenced the construction work, invested his own money and completed it. Karma Loday Bhutia on the other hand denied the assertion. The learned District Judge however, did not frame the necessary issue which ought to have been framed on the rival pleadings. The issue was: Whether after being appointed as attorney by Karma Loday Bhutia did Bir Bahadur Rai commence the construction of the Panchayat Ghar at Rakdong-Tintek investing his own money and completed the same? This issue was an issue of fact to be established by cogent evidence. Instead the learned District Judge framed issue No.2 as quoted above. As both the parties were fully aware about their pleadings and led necessary evidence this Court shall examine first if Bir Bahadur Rai has been able to establish that he had invested his money and completed the contract work as claimed.

15. Beside stating that he had done so, during cross-examination Bir Bahadur Rai admitted that he did not make any claim for payments for executing the work; the Department had not issue any letter of authority to him to execute the work; He did not make the final payment to the laborers as claimed in exhibit-9 and exhibit-10; apart from the power of attorney he did not have any other document pertaining to the agreement between him and Karma Loday Bhutia concerning the contract work; he did not file any document or bill showing that he had made payment or the accounts of expenditure pertaining to the said work; he did not hand over any such document or bill to the concerned department as well and he had not deposited any bills, voucher etc. showing the payment made by him in the said contract work.

16. Bir Bahadur Rai's other two witnesses did not throw much light on his involvement in the contract work after the execution of the irrevocable power of attorney. A feeble attempt was made by Binod Rai though. He stated that after a few weeks of signing of the agreement Bir Bahadur Rai asked him to assist him in the construction work and he was his employee on a salary basis. Binod Rai however, stated that he had stayed there for 3-4 days only. He also stated that thereafter also he was sent by Bir Bahadur Rai 2-3 times to the construction site with cash for labour payment which he handed over to B.B. Gurung. During cross-examination however, he admitted that he was a close friend of Bir Bahadur Rai; he did not have any document to establish that he was engaged by Bir Bahadur Rai; Bir Bahadur Rai did not pay him any amount for looking after his work, not even his expenses. Bir Bahadur Rai did not get a confirmation from B. B. Gurung about Bimal Rai handing over money to him for labour payment. Bimal Rai's evidence cannot be construed as satisfactory evidence to prove that after his appointment as Karma Loday Bhutia's attorney, Bir Bahadur Rai had invested his own money, commenced and completed the contract work.

17. Along with the irrevocable power of attorney and the two cheques, Bir Bahadur Rai also produced three other documents. First was a complaint dated 13.04.2013 (Exhibit-9) by labourers about non-payment of their dues by him as the sub-contractor. The second was a communication dated 17.04.2013 (Exhibit-10) by B. B. Gurung, President, Rakdong-Tintek GPU to Bir Bahadur Rai about it bringing to his notice the receipt of the complaint against him for non-payment and requiring him to be present on 21.04.2013 to discuss the matter. Exhibit-9 and exhibit-10 were exhibited by Bir Bahadur Rai. Both were attested copies. It was Bir Bahadur Rai's own case that due to the failure of Karma Loday Bhutia to honor the cheques issued in his favour totaling to Rs.15,79,000/- he could not make the labour payments. Bir Bahadur Rai also produced final bill slip (exhibit-4) dated 27.02.2013 with his signature which does reflect that he had signed it when Karma Loday Bhutia had received the final payment. From the said documents all that could be inferred is that Bir Bahadur Rai was probably involved in the contract work as a sub-contractor but to what extent is not clear.

18. Bir Bahadur Rai did not examine any of the labourers he claimed to have hired for the construction of the Panchayat Ghar. There is not a single independent person who even claimed to have seen him at the contract site leave alone the site engineers. Bir Bahadur Rai has neither produced oral nor documentary evidence to prove that he had in fact invested his own money for the contract work. An investment of 15,79,000/- is a huge amount and it is unbelievable that

Bir Bahadur Rai did not have a single piece of evidence to show the investment although even in the legal notice dated 30.03.2012 (exhibit-3) issued by him to the Department and legal notice dated 23.03.2015 (exhibit-11) issued to Karma Loday Bhutia he had asserted that he had in fact constructed the Panchayat Ghar from his investments and expenses. It was incumbent upon Bir Bahadur Rai to prove the facts he asserted. Bir Bahadur Rai has failed to prove that after being appointed as attorney he commenced the contract work investing his own money and has completed the same.

19. Framing of issue is crucial to arrive at a correct conclusion. An erroneous issue may misdirect the Court. Similary, failure to fix the burden of proof upon the party who asserts the fact may also lead the Court to determine and appreciate facts incorrectly.

20. The Learned District Judge did not examine whether Bir Bahadur Rai had been able to prove that after being appointed as an attorney by Karma Loday Bhutia he had in fact invested his own money, commenced and completed the contract work as no such issue was framed.

Issue No.2

21. This Court shall now examine issue no.2 framed by the learned District Judge. Issue No.2 actually incorporates two issues.

22. The first part related to the assertion made by Karma Loday Bhutia that he had executed the contract work. The Learned District Judge was examining a suit filed by Bir Bahadur Rai against Karma Loday Bhutia. Whereas Bir Bahadur Rai had asserted that it was he who had done the contract work, Karma Loday Bhutia had denied this assertion and asserted that it was in fact he who had done so. The examination of the evidence led by Karma Loday Bhutia must be appreciated keeping this fact in mind.

23. The second part relates to the assertion of Bir Bahadur Rai that the two cheques were issued by Karma Loday Bhutia. Therefore, the burden of proof was on Bir Bahadur Rai to prove the fact he asserted.

24. It would be apposite to refer to Section 101 and 102 of the Indian Evidence Act, 1872 at this juncture. Section 101 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts

which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

25. The learned District Judge examined the evidence and in view of the communication dated 13.04.2013 (exhibit-9) issued by six labourers to the President of the Rakdong-Tintek Unit complaining about the failure of the sub-contractor to make payments to them came to the conclusion that Bir Bahadur Rai was involved in the construction work. The learned District Judge also held that the two cheques had in fact been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai and that it had not been deceitfully obtained. Consequently, the learned District Judge held that Karma Loday Bhutia was liable to make the payment to Bir Bahadur Rai without considering what the consideration was and if he had been able to prove it.

Did Karma Loday Bhutia execute the contract work?

26. Although it was Karma Loday Bhutia's case that he had executed the work after having taken loan from financial institutions, friends and relatives for completion of the work he did not produce any document to substantiate that he had taken loan from relatives. He admitted so in his cross-examination. He produced only a legal notice dated 16.03.2011 (exhibit-H) issued by a lawyer for the State Bank of Sikkim to prove the fact that he had taken loan and advances from financial institutions. The letter reflects that Karma Loday Bhutia had an overdraft account showing debit balance of Rs.4,61,082/- as on 28.02.2011. Karma Loday Bhutia admitted in his cross-examination that exhibit-H does not disclose that he had taken loan from State Bank of Sikkim for completion of the contract work. He also produced a photo copy of an undertaking dated 14.07.2013 (document-Y) executed by him stating that he would repay the amount of loan taken from B.B. Gurung. B.B. Gurung stated that the undertaking was in fact executed by Karma Loday Bhutia to repay the loan taken from him for the purpose of the construction. During cross-examination he admitted that document-Y was only a photo copy and denied the suggestion that it was not executed by Karma Loday Bhutia. The said document was not exhibited being photocopies. Karma Loday Bhutia had not been able to sufficiently prove that he had in fact taken loans and advances to complete the contract work.

27. Karma Loday Bhutia produced attested copy of the work order (exhibit-A) issued in his favour. Om Prakash Gurung (D.W.-2), the Junior Engineer for Karma Loday Bhutia proved the work order.

28. The work order (exhibit-A) issued in favour of Karma Loday Bhutia is dated 11.02.2009. It provided the following details:-

"Completion Time:	9 (Nine) months
Total Sanctioned Amount:	Rs.29,00,000/-
Electrification:	Rs. 1,76,025/-
Contingency:	Rs. 1,01,630/-
Amount Civil Work put to Tender:	Rs.26,22,345/-
Tender Rate ATPAR:	Rs.26,22,345/-
Work Order Value:	Rs.26,22,345/-**"**

29. To prove his assertion Karma Loday Bhutia produced attested copies of Government approvals for procurement of 128 and 300 bags of cement dated 16.03.2009 (exhibit-A) and 11.08.2009 (exhibit-B colly); attested copy of cash memo dated 12.08.2009 (exhibit-B colly) for purchase of 127 bags of cement; attested copy of cash memo dated 16.10.2009 for Rs.32,400/- for purchase of timber (exhibit-C); original receipt of Rs.34,750/- for purchase of timber (exhibit-D); original receipt of Rs.1,50,000/- (exhibit-L) for construction of trust and GCI sheet roof of the Panchayat Ghar and original receipt of Rs.1,05,040/- for the RCC work for the Panchayat Ghar (exhibit-M).

30. None of the aforesaid documents were proved by their makers. Karma Loday Bhutia however, exhibited all of them as recipient of the said receipts without any protest from Bir Bahadur Rai. All these documents relate to the construction of the Panchayat Ghar and apparently involve Karma Loday Bhutia as the contractor executing the work.

31. Karma Loday Bhutia produced exhibit-K i.e. original notebook with handwritten title *"Construction of Panchayat Ghar at Rakdong Tintek, E/Sikkim"*. The said notebook contains attendance of seven labourers for the month of January 2011 till May 2011. None of the labourers were examined. Karma Loday Bhutia exhibited the notebook as labour payment register maintained by him. He deposed that labourers were hired by him for the construction of Panchayat

Ghar and a labour payment register was maintained by him which was submitted to the labour department from time to time and returned after verification. He did not identify the handwriting and signature appearing in exhibit-K. Bir Bahadur Rai did not make an issue of it. During cross-examination Karma Loday Bhutia admitted that the contract work commenced from February 2009 and was completed in June 2011. He also admitted that he had filed labour payment register of January 2011 to May 2011 and not for the year 2009 and 2010. He denied the suggestion that he had not done so as the payment was made by Bir Bahadur Rai.

32. Karma Loday Bhutia produced original show cause notice dated 18.02.2010 (exhibit-E) issued by the Zilla Panchayat requiring him to show cause for the delay in construction; attested copies of recommendations for extension of time till 31.07.2010 (exhibit-F) and 30.06.2011 (exhibit-G); attested copy of completion report dated 14.11.2011 issued by the Audit-cum-Vigilance Committee (exhibit-I colly), completion certificate from the Zilla Panchayat reflecting completion date as 30.06.2011 (exhibit-I colly); handing over certificate issued by the Zilla Panchayat reflecting handing over the Panchayat Ghar on 30.06.2011 (exhibit-J) and attested copy of labour clearance certificate dated 14.02.2012 issued by the Department of Labour giving its no objection for release of final bill in favour of Karma Loday Bhutia (exhibit-N).

33. None of the aforesaid documents were proved by their makers. They were however exhibited by Karma Loday Bhutia as the recipient of the documents without any protest. All these documents also relate to the construction of the Panchayat Ghar and involve Karma Loday Bhutia as the contractor.

34. Om Prakash Gurung (D.W.2) Junior Engineer deposed that in the year 2009 Karma Loday Bhutia was awarded the contract through the work order dated 11.02.2009. After the award of work he being the Junior Engineer under the Zilla Panchayat had shown the construction site and explained the details of the work to Karma Loday Bhutia. He was the immediate site engineer of the construction work. Karma Loday Bhutia started executing the work. Om Prakash Gurung (D.W.2) used to visit the work site from time to time and verify the progress of the work. After 50% of the progress of the work Om Prakash Gurung (D.W.2) processed the first running bill of the construction work of Karma Loday Bhutia.

After processing the first running bill Om Prakash Gurung (D.W.2) was transferred to the Department of Animal Husbandry. Om Prakash Gurung (D.W.2) asserted that Bir Bahadur Rai was not connected to the work in question which was awarded to Karma Loday Bhutia and who completed the work to the satisfaction of the Department and the bills were paid to him. In his cross-examination Om Prakash Gurung (D.W.2) admitted that he did not know that Bir Bahadur Rai had been appointed attorney by Karma Loday Bhutia to execute the construction of the Panchayat Ghar. He admitted that all Government contract works were governed by Sikkim Public Works Manual and subletting of Government contract work is not allowed under it. He admitted that if someone is found subletting the contract work awarded to him the Department/Government has power to cancel the contract work and to award it to another contractor. He admitted that the Zilla Panchayat office was also not aware that Karma Loday Bhutia had in fact sublet the contract work to Bir Bahadur Rai. He admitted that since he was transferred to the Department of Animal Husbandry he could not say who completed the contract work.

35. B. B. Gurung (D.W.3) came to the witness box as witness for Karma Loday Bhutia. He deposed that he was earlier the Panchayat and later the President of the same Panchayat Unit at the relevant time. According to him in the year 2009 Karma Loday Bhutia was awarded a contract for construction of Panchayat Ghar. Karma Loday Bhutia started executing the work and he used to supervise the work as well. Om Prakash Gurung, Junior Engineer used to visit and inspect the construction site. Karma Loday Bhutia hired number of labourers for the construction of the Panchayat Ghar and all the payments were made by him. He had issued letter dated 03.07.2013 (exhibit-O) to Karma Loday Bhutia to be present on 14.07.2013 before him for decision against the complaint lodged by the labourers against him. Karma Loday Bhutia appeared before him and the matter was amicably settled as Karma Loday Bhutia made the necessary payments to the labourers and a *"milapatra"* dated 14.07.2013 (exhibit-P) was executed acknowledging the receipt of the payments from him. During his cross-examination B.B. Gurung admitted that exhibit-9 is a complaint made by the labourers against the sub-contractor Bir Bahadur Rai regarding the default in making payment even after 18 months of completion of work. He also admitted that exhibit-10 was a letter sent to him by Bir Bahadur Rai. However, he denied that the labourers

mentioned in exhibit-9 were engaged by Bir Bahadur Rai. In fact he volunteered to say that the labourers were engaged by Karma Loday Bhutia. B. B. Gurung admitted that the labourers reported the matter before him against Bir Bahadur Rai for non-payment of their money and that he appeared on 21.04.2013 and asked for two more days to make the labour payment.

36. The evidence led by Karma Loday Bhutia proves that he was awarded the contract. It also proves that he started the execution of the contract work. It probablises that he hired labourers and paid them; purchased some materials and paid for them. It proves that when he could not complete the work on time extension was sought for and granted to him. It also proves that the completion certificates were issued to him once the work was completed. Bir Bahadur Rai had to stand on his own feet to establish the case he sought to make out. Karma Loday has been able to make it probable that it was him who had executed the work.

The issuance of the two cheques

37. Bir Bahadur Rai had stated in his plaint that after receiving the final bill of the contract work Karma Loday Bhutia had issued the two cheques in his favour which were dishonoured.

38. Bir Bahadur Rai produced the two original cheques i.e. exhibit-5 and exhibit-6). Exhibit-5 was signed by Karma Loday Bhutia as the drawer of the cheque in the front and two signatures at the back. Bir Bahadur Rai had also signed at the back at two places. Bir Bahadur Rai was the drawee of the said cheque. Exhibit-6 was also signed by Karma Loday Bhutia as the drawer of the cheque in the front and one signature at the back. Bir Bahadur Rai had signed at two places at the back. Bir Bahadur Rai was the drawee of this cheque too.

39. Karma Loday Bhutia admitted during his cross-examination that signatures on the two cheques were in fact his. He also admitted that he had neither lodged any First Information Report before any Police Station alleging that Bir Bahadur Rai had deceitfully obtained the said two cheques nor directed the banks to stop payment.

40. Bir Bahadur Rai produced and exhibited the original cheque return memos of the State Bank of Sikkim (exhibit-7) and HDFC bank (exhibit-8) returning both the cheques one on account of account being closed and the other for insufficient funds.

41. Bir Bahadur Rai was cross-examined on this aspect. He admitted that the two cheques were not directly handed over to him by Karma Loday Bhutia. Bir Bahadur Rai could not identify the handwriting appearing on the said two cheques. He denied the suggestion that the cheques were procured from a third person and they were meant for the said person and not for him. He also denied he had obtained it deceitfully for illegal gain. He admitted that he had not filed any private complaint under the Negotiable Instruments Act, 1881 for the dishonour of the cheques. He admitted that he had not lodged any complaint before the Sadar Police Station for the same. It is therefore, quite certain that the two cheques had in fact been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai. It is also evident that the two cheques were presented for payment by Bir Bahadur Rai but were dishonoured.

Presumption as to negotiable instruments under Section 118(a) and the relevance of the debt being "legally enforceable debt or other liability" under Section 138 of the Negotiable Instruments Act, 1881

42. Bir Bahadur Rai did not lead any evidence at all to prove the fact that he had commenced the construction work, investing his own money and completed it. He sought to rely upon the irrevocable power to attorney and the issuance of the cheques by Karma Loday Bhutia to prove the fact that it was him who had executed the work. The learned District Judge has held that Karma Loday Bhutia after completion of the contract work issued the two cheques. The learned District Judge also held that the two cheques had been issued by Karma Loday Bhutia by affixing his signature thereon in favour of Bir Bahadur Rai and therefore he was liable to make the payment to him. The fact that Karma Loday Bhutia had in fact issued the two cheques which were dishonored is sufficiently proved. The fact that Bir Bahadur Rai had commenced the construction work and completed it investing his own money has not been proved. However, it must be examined whether the mere fact that Bir Bahadur Rai has been able to prove the execution of the

irrevocable power of attorney and the issuance of the two cheques which were dishonored would lead to a presumption that Bir Bahadur Rai executed the said work. For this purpose it is important to examine Section 118 (a) and Section 138 of the Negotiable Instruments Act, 1881 (the said Act).

43. Section 118 of the said Act provides for presumptions as to negotiable instruments. Section 118 (a) of the said Act provides:-

> ***"118. Presumptions as to negotiable instruments****.-Until the contrary is proved, the following presumptions shall be made:-*
>
> *(a)* ***of consideration****-that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*
>
> *xxxxx*
>
> *Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.***"**

44. Section 138 of the said Act reads as under:-

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.*** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the*

discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

45. The cheques having been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai a presumption is raised under Section 118 (a) of the said Act that the same were for consideration. In a case of a negotiable instrument the presumption under Section 118 of the said Act has to be made until the contrary is proved. Karma Loday Bhutia could show either by direct evidence or circumstantial evidence that the negotiable instrument was not supported by consideration.

46. In re: ***Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal***[2] the Supreme Court while hearing a civil appeal arising out of a suit under Order XXXVII of the Code of Civil Procedure, 1908 filed by a holder of a promissory note, the defendant agreeing to pay the amount specified therein to the Plaintiff, held as under:

> ***"12.*** *Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the*

[2] (1999) 3 SCC 35

*non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and the Andhra Pradesh High Court in this regard.***"***

47. Has Karma Loday Bhutia been able to rebut the presumption under Section 118 (a) of the said Act by showing a preponderance of probabilities in his favour and against Bir Bahadur Rai is the vexed question which this Court must answer.

48. The only conclusion one could arrive at on a meaningful and purposeful reading of the plaint is that it was Bir Bahadur Rai's case that the consideration for the issuance of the cheque was his investment in the contract work. As held by the Supreme Court in re: ***Bharat Barrel & Drum MFG.Co. (Supra)*** it was open to Karma Loday Bhutia to prove that the case set up by Bir Bahadur Rai was not true and rebut the presumption under Section 118 (a) of the Act by showing a preponderance of probabilities in his favour and against Bir Bahadur Rai. The words *"until the contrary is proved"* in the said section does not mean that Karma Loday Bhutia must necessarily show that the cheques were not supported

by any form of consideration but he could ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case to act upon the supposition that the consideration did not exist.

49. Although Bir Bahadur Rai claimed to have invested his own money not an iota of evidence was led by him to show that he had invested even a penny. Karma Loday Bhutia on the other hand led substantial evidence not only to show that he had executed the work himself but he had also invested his money. Appreciating the evidence led by Karma Loday Bhutia to this limited extent Karma Loday Bhutia has been able to rebut the presumption against him under Section 118(a) of the said Act on preponderance of probabilities.

50. The question which still remains unanswered is why did Karma Loday Bhutia issue the cheques in favour of Bir Bahadur Rai for such a huge amount of Rs.15,79,000/-. The evidence led by the parties does not permit this Court to come to a definite conclusion.

51. The irrevocable power of attorney acknowledged that Bir Bahadur Rai has immensely contributed in respect of obtaining the said work and had interest therein. Bir Bahadur Rai during the cross-examination of Karma Loday Bhutia suggested to him that as per irrevocable power of attorney he had sublet the contract work to him. It was Bir Bahadur Rai's version that after the execution of the irrevocable power of attorney he had invested his own money, commenced and completed the contract work. Om Prakash Gurung (D.W.2) the only site Engineer and a Government Servant examined by Karma Loday Bhutia during the trial admitted that as per the Sikkim Public Works Manual subletting is not permissible and if someone is found subletting the contract work awarded to him the Department has power to cancel the said contract work on the suggestion made by Bir Bahadur Rai himself. It is therefore, probable that the cheques were issued by Karma Loday Bhutia for subletting as suggested. Section 138 of the Negotiable Instruments Act, 1881 provides that it would be an offence if any cheque drawn for any *"legally enforceable debt or other liability"* is dishonored. Subletting being impermissible and illegal as per Bir Bahadur Rai's own assertion, the cheques issued by Karma Loday Bhutia in favour of Bir Bahadur Rai could

not have been considered as cheques drawn for any *"legally enforceable debt or other liability"*. An agreement of sub-contract contrary to law cannot also be enforced. Bir Bahadur Rai having failed to establish any *"legally enforceable debt or other liability"* against Karma Loday Bhutia, the suit filed by him must necessary fail.

Issue No.4

52. In view of the findings above, issue No.4 is held against Bir Bahadur Rai. It is held that Bir Bahadur Rai is not entitled to relief claimed.

53. Consequently, the judgment and decree both dated 29.08.2017 are set aside. The Appeal succeeds.

54. No order as to costs. Karma Loday Bhutia had deposited an amount of Rs.3 lakhs as security for the present appeal. The amount shall be returned to Karma Loday Bhutia along with interest earned thereon.

55. Copy of this judgment be sent to the Court of the learned District Judge, East Sikkim at Gangtok.

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