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SUBJECT INDEX

Constitution of India – Art. 141 – It is explicit that the question of law as to whether the State Legislature has legislative competence to make an Act, which authorize the Chief Minister to appointment Parliamentary Secretaries and further assigning the duties and responsibilities to assist the Cabinet Ministers is well settled in *Bimolangshu Roy (Dead).*
Pahalman Subba and others v. State of Sikkim and others 231-A

Constitution of India – Art. 141 – Law declared by Supreme Court is binding on all Courts – Observation made by the Supreme Court in various cases affirm the proposition that *ratio decidendi* of a judgment which constitutes a binding precedent, as the same enunciated on points arising or raised in the case directly has a precedential value – Held, as such, the *ratio decidendi* laid down by the Supreme Court in *Bimolangshu Roy (Dead)* is binding on this Court.
Pahalman Subba and others v. State of Sikkim and others 231-B

Constitution of India – Art. 164 (1A) – Whether appointment of the Parliamentary Secretaries infringes the provisions of Article 164 (1A) of the Constitution – The source of authority to make legislation emanates from Article 246 of the Constitution in respect of all the matters enumerated in each of the three lists contained in Seventh Schedule – Entries in the various lists of the Seventh Schedule are not sources of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate – It is evidently plain and clear that the entries setting out the field of legislation therein do not contemplate creation of posts of Parliamentary Secretaries – Article 164 (1) provides for the appointment of the Ministers by the Governor on the advice of the Chief Minister. In the case on hand, the Parliamentary Secretaries were appointed as Ministers of State and became a part of Council of Ministers without there being any appointment by the Governor, as required – Parliamentary Secretaries, partaking character of Ministers is manifestly impermissible in the light of mandate enshrined under Article 164(1A) of the Constitution and is unconstitutional – Is a pretence to circumvent the provisions of constitutional provision, as incorporated in the Constitution of India by ninety- first amendment – The issue of the constitutionality of the impugned Act is squarely covered by the judicial pronouncement made by the Supreme Court in *Bimolangshu Roy (Dead)*.
Pahalman Subba and others v. State of Sikkim and others 231-C

Constitution of India – Art. 192 – Disqualification of MLA – Held, question as to the disqualification of a Member shall be referred to the decision of the Governor and the decision shall be final.
Pahalman Subba and others v. State of Sikkim and others 231-D

Constitution of India – Art. 164 (1A) – Appointment of Parliamentary Secretaries – Held, the impugned Act and other consequential notifications deserve to be quashed. The Parliamentary Secretaries, so appointed under the Act shall cease to function as Parliamentary Secretaries and shall also cease to draw and avail salaries, allowances, perks, etc. as admissible under the Act forthwith – As a sequel, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 and consequential notifications are declared as unconstitutional and, accordingly, quashed.
Pahalman Subba and others v. State of Sikkim and others 231-E

Constitution of India – Article 227 – Government of Sikkim Notification No. 385/G dated 11th April 1928 – Notification No. 2947 G dated 22.11.1946 – Transfer of Property Act, 1882 – Ss. 122 and 123 – S. 122 of the TP Act pertains to how a gift deed is to be executed, S. 123 explains how the gift of immovable property must be effected, while the Notification of 1946 lays down how an unregistered document can be validated – TP Act having been extended and enforced in the State of Sikkim on 01.09.1984, validation of a document after 1984 can be allowed in terms of the Notification of 1946 if the requirements of Ss. 122 and 123 of the TP Act are fulfilled.
Topden Pintso Bhutia v. Sonam Palzor Bhutia 221-A

Constitution of India – Article 227 – Government of Sikkim Notification No. 385/G dated 11th April 1928 – Notification No. 2947 G dated 22.11.1946 – Transfer of Property Act, 1882 – Ss. 122 and 123 – Consequence of validation of an unregistered document as per Notification of 1946 is that, the document is to be admitted in Court to prove title or other matters contained in the document – Document ought to have been correctly executed under the relevant provisions of law, which consequently allows its admission as evidence after the validation – By ordering validation of Exhibit-A, this Court would be implying that the document is legally sufficient and binding, which is not the correct position herein as the document falls short of the legal requirements – It is not every document

that has not been registered which can be validated by the Order of the Court, but only those documents which bear compliance to the legal provisions.
Topden Pintso Bhutia v. Sonam Palzor Bhutia ***221-B***

Criminal Procedure Code, 1973 - S. 482 – High Court's power to quash criminal proceedings – Scope – Court has inherent powers to act ex debito justitiae to do real and substantial justice and to prevent abuse of the process of the Court. But, the power being extraordinary ought to be reserved as far as possible for extraordinary cases.
Vinay Rai v. State of Sikkim ***202-A***

Criminal Procedure Code, 1973 – S. 190 – Cognizance by Magistrate – Order dated 19.08.2016 in I.A. No. 01 of 2016 arising out of Crl. M.C. No. 20 of 2014 referred: It does not involve any formal action, but occurs as soon as the Magistrate applies his mind to the suspected commission of the offence. The Court at that stage is not required to undertake an elaborate enquiry neither is he required to mention the documents which he took into consideration for satisfying himself to take cognizance.
Vinay Rai v. State of Sikkim ***202-B***

Criminal Procedure Code, 1973 – Ss. 161 and 162 (1) – Statement made under S. 161 – Evidentiary value and use of – Fundamental principle of procedural law is that a statement under S. 161 cannot be considered as substantive evidence, this is to be used for confronting the witness to impeach his credibility. Should the witness make contradictory statements, then a suspicion can arise against the witnesses' credibility.
Vinay Rai v. State of Sikkim ***202-C***

Criminal Procedure Code, 1973 – Ss. 161 and 164 – Evidentiary value and object of statement recorded under Ss. 161 and 164, and whether they can be regarded as substantive evidence, discussed – Held, addressing the arguments concerning statements recorded under S. 164, such statements or confession can never be used as substantive evidence but may be utilised for contradiction or corroboration of the witness who made it.
Vinay Rai v. State of Sikkim ***202-D***

Criminal Procedure Code, 1973 – S. 378 (3) – Leave to appeal against acquittal – Although it is true that leave to appeal can be granted where it is shown that the conclusions arrived by the Trial Court are perverse or there is misapplication of law or any legal principle, it is equally true that leave to appeal cannot be rejected on the ground that the judgment of the Trial Court could not be termed as perverse. The power of the Appellate Court is wide. However, the consideration at the time of deciding whether leave ought to be granted or not and at the stage of deciding an appeal against acquittal are different.

State of Sikkim v. Dawa Tshering Bhutia ***185-A***

Criminal Procedure Code, 1973 – S. 378 (3) – Leave to appeal against acquittal – Relevant consideration for grant or refusal of leave to appeal – The Legislature has advisedly used the word 'leave' in S. 378 (3) which merely means 'permission' and nothing more, after of course, a judicious consideration. Leave is required to be obtained before an appeal is 'entertained' for judicial consideration on merits – Sub-section (3) unequivocally prohibits the entertainment of an appeal by the State Government except with the leave of the Court and thus, the power to prefer an appeal by the State Government against an order of acquittal is not an absolute power. Before such appeal is entertained by the High Court, the State Government must necessarily obtain leave of the High Court. The mandate of the law is clear – If the Court is to deny leave it must be for valid and cogent reason as is required of exercise of any judicial power. It must be kept in mind that by such refusal, a close scrutiny of the order of acquittal by the Appellate Forum would be lost once and for all.

State of Sikkim v. Dawa Tshering Bhutia ***185-B***

Criminal Procedure Code, 1973 – S. 378 (3) – Leave to appeal against acquittal – At this stage, whether the order of acquittal would or would not be set aside is not the consideration – At this stage the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of the acquittal recorded by the Trial Court could not be said to be perverse – Held, that at this stage leave to appeal ought to be granted to the State without going further into the merits to enable this Court, as the first Appellate Court, to effectively consider the same on merits, keeping in mind that although leave to appeal is the mandate, the appeal nevertheless is not of any inferior quality or grade – Appeal is not frivolous and *prima-facie* it is evident that the present appeal needs deeper consideration after grant of leave by this Court.

State of Sikkim v. Dawa Tshering Bhutia ***185-C***

Criminal Procedure Code, 1973 - S.482 and Arts. 226 and 227 of the Constitution of India - Petitioner seeks quashing of the ECIR by resorting to Articles 226 and 227 of the Constitution of India-Held, the correct procedure to have been adopted was to file a petition under S. 482 of the Cr. P.C on the bedrock of the decision of the Supreme Court in re: Girish Kumar Suneja v. CBI, 2017 SCC OnLine SC 766 [Criminal Appeal No. 1317 of 2017 dated 17-07-2017], the prayer can neither be consider nor allowed.
Usha Agarwal v. Union of India and others ***280-K***

Prevention of Money-Laundering Act, 2002 – S. 2(u) – Proceeds of crime covers any property derived or obtained directly or indirectly by any person, as a result of criminal activity, related to a scheduled offence or the value of such property – Does not envisage either *mens rea* or knowledge that the property is a result of criminal activity – Such property could be subjected to attachment and confiscation, the Section, however, does not presuppose knowledge of the proceeds being of criminal activity – Properties apart from the "proceeds of crime" are not liable to attachment, neither is it included in the ambit of the Act – Powers exercised under the Act have to be considered at tandem with the object of the Act, which is to shear the process of money-laundering at its very commencement – S. 2(u) enable initiation of proceedings against the person in possession of "proceeds of crime" which may lead to attachment, confirmation and eventual confiscation of the property concerned.
Usha Agarwal v. Union of India and others ***280-A***

Prevention of Money-Laundering Act, 2002 – Ss. 2 and 3 – Only a person who is 'involved' with the proceeds of crime would be guilty of the offence under S. 3 and not a person who is 'only in possession' of the proceeds of crime 'sans *mens rea*' – A conjunctive reading of Ss. 2 and 5 reveals that the concerned Authority can provisionally attach such property only when he has "reason to believe" that "any person" is in possession of any "proceeds of crime", provisionally attach such property, thereby not necessarily encompassing S. 3 in its ambit.
Usha Agarwal v. Union of India and others ***280-B***

Prevention of Money-Laundering Act, 2002 – Ss. 2 and 5 – Provisions of S. 2 are to be read with the intent of S. 5 of the Act, which provides that if the concerned Officer, mentioned therein, on the basis of materials in his possession, has "reason to believe" that any person is in possession of

any "proceeds of crime", such property can provisionally be attached, irrespective of where the ownership lies, be it an offender under S. 3 or a non-offender. It suffices if the property is "proceeds of crime" and *mens rea* is not a pre-requisite – "Reason to believe" in S. 5 is qualified with the words "on the basis of material in his possession". Therefore, it is not mere subjective belief that is required, but is based on a reasoned belief, on the foundation of materials in his possession, thereby preventing any arbitrariness for invocation of powers under S. 5 for the purposes of S. 2 – Held, the definition of "proceeds of crime" has the goal of preventing and stemming criminal activities related to money-laundering at its very inception and cannot be said to be arbitrary or absurdly expansive, or seeking to penalise even non-offenders. Thus, the provision does not suffer from any infirmity.
Usha Agarwal v. Union of India and others ***280-C***

Prevention of Money-Laundering Act, 2002 – S. 3 – Is an offence independent of the predicate offence and to launch prosecution under S. 3, it is not necessary that a predicate offence should also have been committed. This Section criminalises the possession or the conversion of the proceeds of crime, which includes projecting or claiming the proceeds of crime as untainted property – Element of *mens rea* is present in this Section as against the provision of S. 2(u) thereby preventing prosecution of any innocent person – The word "knowingly" used in the Section inheres the intent of keeping an innocent out of the dragnet of the offence. It would conclude that only a person who knowingly attempts to indulge, assists or is a party, or involved in any process or activity connected with the proceeds of crime would be guilty of the offence under the Act – The purpose of S. 3 is to ensure that the proceeds of crime are not subjected to money-laundering, by way of deposits made in the names of people who have not acquired it as of right, but in whose accounts the offender has introduced by way of an ulterior motive.
Usha Agarwal v. Union of India and others ***280-D***

Prevention of Money-Laundering Act, 2002 – S. 4 – Stipulates a minimum penalty – Discretion of the Court is fettered – Penalty is largely a deterrent method – Neither the minimum term nor rigorous imprisonment for an offence means that the provisions are ultra vires.
Usha Agarwal v. Union of India and others ***280-E***

Prevention of Money-Laundering Act, 2002 – S. 5 – Attachment of property involved in money laundering – No arbitrary powers are afforded to the concerned Officers as the provisional attachment is to be made only

on "reason to believe" – Order is to be in writing – Provisional attachment cannot exceed one hundred and eighty days from the date of order – Section extends necessary safeguards to the offender by requiring the concerned Officer to report to his Superior Officer his reasons for believing that any property in the possession of any person is the proceeds of crime – Also allows the person in possession of such property, which has been provisionally attached, to continue the enjoyment of his property – Provision thereby serves a dual purpose – Neither is the person deprived of enjoyment of his property, at the same time the suspect property is secured – Initiation of any action under S. 5 is on the basis of a "reason to believe" that any person is in possession of any "proceeds of crime" and such "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeds relating to confiscation of such "proceeds of crime" – Such action is independent from any enquiry or investigation of any predicate offence but limits the number of days of such provisional attachment and report thereof to the Adjudicating Authority. The provisions of S. 5 while aiming to achieve the object of the Act cannot be said to be violative of Articles 14, 19 or 300A of the Constitution of India.

Usha Agarwal v. Union of India and others ***280-F***

Prevention of Money-Laundering Act, 2002 – S. 8 – S. 8(1) to S. 8(3) affords adequate opportunity to the concerned individual to produce relevant materials and evidence to satisfy the Adjudicating Authority at the stage of confirmation of provisional attachment or retention of the seized property, that the property attached was acquired from legal/known sources of income – Once such material has been furnished, the Adjudicating Authority is required to consider the reply and after giving an opportunity to the person of being heard, may either confirm the attachment of the property or release such property – Provisional attachment can be confirmed only after the Adjudicating Authority affords an opportunity to the offender or any person holding the property to establish his sources of income – The Special Court has been clothed with powers to pass appropriate orders in regard to the property either by way of confiscation or release of the property involved in money-laundering on an application moved by the Director – No reason to hold that S. 8 is arbitrary or violative of fundamental rights.

Usha Agarwal v. Union of India and others ***280-G***

Prevention of Money-Laundering Act, 2002 – Ss. 2 (y) and 13 – A person need not necessarily be booked of a scheduled offence, but if he is

booked and subsequently acquitted, he can still be prosecuted for an offence under the Act – Not necessary that a person has to be prosecuted for an offence under the Act only if he has committed a scheduled offence – Inclusion of "offences under the Indian Penal Code" into Part A in the Schedule by S. 30 of the Prevention of Money-Laundering (Amendment) Act, 2012 (No.2 of 2013) – The object of the Act is to abort the process of money-laundering at its inception – The wisdom of the legislature cannot be questioned, when such inclusion has been made, as there may be circumstances where the predicate offence and the offence under S. 3 are intertwined.

Usha Agarwal v. Union of India and others ***280-H***

Prevention of Money-Laundering Act, 2002 – S. 24 – Burden of proof – The Section clearly indicates that it is a rebuttable presumption – Once the offender is able to explain the source of the property, which is in his possession, then the prosecution is required to discharge its burden – Held, by shifting the onus to the accused, it affords him an opportunity of establishing his innocence and therefore, contains a safeguard for the accused. Consequently, it cannot be said that the provision is unconstitutional. Thus, when considering the Acts the object has to be given primary importance and the provision thereof cannot be said to be ultra vires when the end goal is to be achieved. S. 24 unequivocally extends an opportunity to the offender to establish the source of his property, which if legitimate can be fully justified by the petitioner.

Usha Agarwal v. Union of India and others ***280-I***

Prevention of Money-Laundering Act, 2002 – S. 45 read with Art. 14 and 21 of the Constitution of India – Under S. 45(ii) of the Act, discretion vests with the Court to enlarge the petitioner on bail or to refuse such bail – Limitations are not unfounded or arbitrary – The legislature has evidently used the words "reasonable grounds for believing" in Section 45(1)(ii) to enable the Court dealing with the bail, to justifiably hold, as to whether there is indeed a genuine case against the accused and whether the prosecution is able to produce *prima facie* evidence in support of the charge, and the evidence so furnished if unrebutted could lead to a conviction – Apprehension of repetition of the crime is another consideration in refusing bail, as also the antecedents of an accused person – Prosecution has not been given arbitrary or wide amplitude under S. 45, as the provision with clarity lays down that the matter for consideration falls within the discretion of the Court, who, after extending an opportunity to the

Public Prosecutor, in matters where the person is accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule, is to be satisfied subjectively – It is only subject to the satisfaction of the Court that the bail is to be granted or declined – There is evidently no infirmity in the provision and cannot be said to offend Articles 14 and 21 of the Constitution of India.

Usha Agarwal v. Union of India and others ***280-J***

Protection of Children from Sexual Offences Act, 2012 – Ss. 23, 25, 33 and 37 – Purposeful reading of Section 23, 24, 33 and 37 of the POCSO Act, 2012 reflects that the scheme of the POCSO Act provides vital safeguards to ensure protection of the child's reputation and privacy and that the identity of the child is not disclosed during investigation or trial. This is paramount – The role of the Special Court is not only defined but made special for its effective implementation – The Investigating authorities, the media houses and the Courts have a statutory duty to protect this with all their might – The identity of the child not being disclosed is the interest of the child, both as a victim as well as a witness which is sought to be protected by the POCSO Act. This cannot be compromised.

Rabin Burman v. State of Sikkim ***249-C***

Protection of Children from Sexual Offences Act, 2012 – S. 33 – The Special Court must keep in mind that the identity of the child, as clarified in the explanation to Section 33 (7) of the POCSO Act, 2012 does not mean only the name but includes the identity of the family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed – In the age of super speed internet, whatsapp and other messenger applications and social media, information travels as quick as human thoughts – The statutory authorities under the POCSO Act must be guarded that the information of the identity of child with them, if leaked, transmitted or shared against the mandate of the Act may cause irreparable damage to the child's fundamental right as guaranteed by the Constitution as well as his statutory rights to privacy under the POCSO Act and the IPC. The statutory authorities must remember that the duty to protect the identity of a child who is not capable of safeguarding her/his rights is higher on them.

Rabin Burman v. State of Sikkim ***249-D***

Protection of Children from Sexual Offences Act, 2012 – The Special Judges manning the Special Courts must keep in mind that the nomenclature

"Special Court" has been advisedly used to distinguish it from other Courts by some quality peculiar or out of the ordinary. Similarly, the "Special Public Prosecutor" appointed under Section 32 of the POCSO Act must also be conscious of the fact that they have been specially appointed as "Special Public Prosecutors" under the POCSO Act – The word "special" has to be understood in contradiction to the word "general" or "ordinary". It signifies specialisation – The Special Court constituted under the POCSO Act must necessarily be specialised in the understanding, appreciation and effective implementation of the Act. Similarly the Special Public Prosecutor must also have adequate specialization in the understanding, appreciation and effective implementation of the POCSO Act. That is the only way in which the mandate of the POCSO Act can be successfully fulfilled.

Rabin Burman v. State of Sikkim ***249-E***

Protection of Children from Sexual Offences Act, 2012 – Child's identity not to be disclosed – All statutory authorities involved in the investigation or trial of the offences under the POCSO Act, 2012 shall bear in mind that the identity of a child is not only the name of a child but includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of a child may be revealed – Police Officer recording an F.I.R relating to an alleged offence on a child shall ensure that the said F.I.R is not made public or uploaded on Police websites or State Government websites in compliance with the direction of the Apex Court in re: *Youth Bar Association of India* v. *Union of India* or any other website – Investigating Officer conducting the investigation of an alleged offence on a child shall ensure that the materials collected during investigation is guarded against disclosure of the identity of a child. Any document or photographs obtained during investigation of the case which would contain the identity of a child shall not be disclosed to the public media or to any person who is not involved in the administration of criminal justice under the POCSO Act, 2012. While issuing copies or certified copies of such documents or photographs to the limited stakeholders, necessary masking of the identity of a child shall be ensured before its issuance – The mandate of S. 23 shall be strictly followed. Any person who contravenes the provisions of sub-section (1) by making any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering the child's reputation or infringing upon his privacy shall be prosecuted for contravention thereof under S. 23 (4). Similarly, if any report in any media discloses the identity of a child

including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child, all such persons involved in making such report and disclosure shall be prosecuted for contravention thereof – While recording the statement of a child as provided under S. 24, the Police Officer shall ensure that the identity of a child is protected from the public media, unless otherwise directed by the Special Court in the interest of a child – While recording such statement of a child, the Police Officer shall ensure that the identity of a child is not disclosed and for the said purpose may use pseudonyms or any other appropriate way in accordance with law to protect the identity of a child – While recording a statement of a child by the Magistrate under S. 25 and in any judicial record thereof the Magistrate shall ensure that the identity of the child is not disclosed and necessary precaution is taken to protect the same. Pseudonyms or any other appropriate way in accordance with law shall be adopted to protect the identity of a child – Special Court shall ensure that the identity of a child is not disclosed at any time during investigation or trial as mandate under S. 33(7) unless for reasons to be recorded in writing the Special Court is of the opinion such disclosure is in the interest of a child – Special Court is required to ensure that the identity of the child shall not be disclosed anywhere on judicial records and that names shall be referred by pseudonyms or in any other appropriate way in accordance with law – For the protection of the child's identity as mandated under the POCSO Act, the Special Court and the Investigating Officer shall restrict the disclosure of information to limited stakeholders and ensure there is controlled access of non-essential persons during investigation or trial. The Special Court must ensure the best interest of the child and act as *parens patriae* for the child – To ensure that the identity of the child is not disclosed during investigation or trial, provisions of S. 40 is to be kept in mind – Such lawyers providing assistance of legal counsel to the child and the Special Public Prosecutors appointed by the State Government for every Special Court shall keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and confidentiality by all means and through all stages of judicial process involving the child.

Rabin Burman v. State of Sikkim ***249-F***

Protection of Children from Sexual Offences Act, 2012 – S. 39 – For the proper and effective implementation of the POCSO Act, 2012 the State Government, if not already done, shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and

child development to be associated with the pre-trial and trial stage to assist the child.

Rabin Burman v. State of Sikkim ***249-G***

Protection of Children from Sexual Offences Act, 2012 – S. 43 (b) – The State Government shall take effective measures to ensure that the concerned persons (including the Police Officers) are imparted periodic training on the matters relating to the implementation of the provisions of the POCSO Act, 2012.

Rabin Burman v. State of Sikkim ***249-H***

Protection of Children from Sexual Offences Act, 2012 – S. 40 – As provided for in Rule 4 (2) (f) of the POCSO Rules, 2012 the SJPU or the local police receiving information about offences from any person including the child shall inform the child and his parent or guardian, or other person in whom the child has trust and confidence as to right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with S. 40. The lawyer so appointed must have sound knowledge of the POCSO Act, 2012 and sensitivity towards the best interest of a child to ensure that the child's identity is not disclosed amongst other mandates of the POCSO Act, 2012.

Rabin Burman v. State of Sikkim ***249-I***

Protection of Children from Sexual Offences Act, 2012 – Support Person – As per the mandate of Rule 4 (8) of the POCSO Rules, 2012 the "support person" who are assigned by Child Welfare Committee to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of any offence under the POCSO Act, 2012 shall at all times maintain the confidentiality of all information pertaining to the child to whom he has access.

Rabin Burman v. State of Sikkim ***249-J***

Protection of Children from Sexual Offences Act, 2012 – The prison authorities on whom the custody of the Appellant shall remain during conviction shall keep in mind that it is a depraved mind that indulges in such crime is against a girl child. To battle such evil it is this mind that must also be effectively tackled – The State in such cases must rise to the occasion and also ensure counselling and psychotherapy treatment of the offender while under detention.

Rabin Burman v. State of Sikkim ***249-K***

THE
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SLR (2017) SIKKIM 175

(Before Hon'ble the Chief Justice)

W.P. (C) No. 15 of 2016

Ms. Tshering Eden Bhutia ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner : Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chhetri and Ms. Hemlata Sharma, Advocates

For Respondent No. 1 : Mr. Karma Thinlay, Senior Government Advocate with Mr. Santosh Kumar Chettri and Ms. Pollin Rai, Assistant Government Advocates.

For Respondent No. 2 : Mr. J.K. Kharka, Advocate.

Date of decision: 3rd August 2017

A. Constitution of India – Article 15 and 16 – The concept and philosophy of this kind of reservation is that within the post reserved for a particular category, there should be sufficient representation and placement of women – Two BL (women) seats meant for women candidates already filled up – The petitioner is not entitled to march over other candidates, who have better marks and merit. (Para 9)

B. Constitution of India – Article 15 and 16 – Principle of horizontal reservation – To ensure minimum reservation of women in a vertical category – Woman candidate selected on merit in the category will be reckoned for the purpose of determining the fulfilment of reservation of women category in a particular vertically reserved category – Applying the said principle to the facts of the case, wherein two seats reserved for BL (women) are filled up, other woman candidate cannot be permitted to supersede or bypass the merit list. (Para 14)

Petition dismissed.

Chronological list of cases cited:

1. Indra Sawhney v. Union of India and Others, AIR 1993 SC 477
2. Anil Kumar Gupta and others v. State of U.P. and Others, (1995) 5 SCC 173
3. Rajesh Kumar Daria v. Rajasthan Public Service Commission and Others, (2007) 8 SCC 785
4. R.K. Jain v. Union of India, (1993) 4 SCC 119

JUDGMENT

Satish K. Agnihotri, CJ

In the instant petition, the petitioner seeks to assail her non-appointment on the post of Under Secretary (Bhutia/Lepcha category) (for short "BL category"). The petitioner is stated to be the applicant for selection in the Junior Grade of Sikkim State Civil Service, pursuant to the advertisement dated 12.09.2012 (Annexure P-4). According to the petitioner, she was duly selected as her name was found in the Select List of the Under Secretary and equivalent, notified on 09.06.2015. Thus, she is entitled to appointment against the said category under which she made application and was selected therto. Non-appointment of the petitioner, notwithstanding the availability of post and merit, constraints her to file this petition.

2. The facts, in brief, relevant for adjudication of the lis as projected by the petitioner are that the petitioner pursuant to the aforestated advertisement successfully competed the written test and viva-voce conducted by the second respondent, Sikkim Public Service Commission (for short "SPSC") for the selection to the post of Under Secretary (BL). The petitioner, feeling dissatisfied with the marks awarded to her in the examination at the first instance, made a request for re-evaluation of her answer scripts on 26.08.2015 to the second respondent. On reevaluation, the marks were revised and the revised merit position of the petitioner was informed to the petitioner vide communication dated 15.02.2016 enclosing a statement of her rectified marks and revised merit position, wherein the petitioner's total marks obtained in written test were increased to 408 from 392 and the final total marks were accordingly enhanced to 478 from 462. Consequently, she was upgraded in the merit list in Bhutia/Lepcha category, entitling her to appointment.

3. Mr. A. K. Upadhyaya, learned Senior Counsel appearing for the petitioner, contends that the petitioner was informed under provisions of Right to Information Act, 2005 that out of 25 candidates for the posts of Under Secretary, 23 seats have been filled up and the remaining 2 seats are still vacant. One post reserved for BL category is still lying vacant. Further, one Miss Hissay Doma Lepcha from the BL category opted out and against the said vacant post, one Mr. Topden Ongyal Zangpo was selected. One more seat under BL (W) category fell vacant on account of upward movement of Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia. The petitioner was placed just below Miss Sonam Palmu Bhutia, who belonged to BL (W) category. In such a factual scenario, the petitioner is entitled to appointment against the seat, which fell vacant accordingly. Learned Counsel would further contend that the petitioner, having been duly selected, is denied the appointment which amounts to violation of her fundamental right and also the same is discriminatory, arbitrary and illegal.

4. Referring to a decision rendered by this Court in Mr. Rinzing Choppel Rai vs. State of Sikkim & Ors. [W.P. (C) No.66 of 2015], Mr. Upadhaya seeks parity and similar order for appointment.

5. Responding to the aforestated submission as well as averments made in the Writ Petition, Mr. Karma Thinlay, learned Senior Government Advocate appearing for the first respondent/ State, would submit that 7 candidates under BL category were recommended for appointment to the post of Under Secretary in order of merit. Out of 7, 2 candidates, who were higher in the merit list, were appointed against the unreserved category. The petitioner obtained total marks of 478 on re-verification and was placed in the 10th position in order of merit under the BL category. The two other women, Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia, who were appointed against BL(W) category, obtained 485 and 482 marks respectively. In the BL category, 2 posts meant for BL(W) were accordingly filled up. Mr. Thinlay would further contend that Miss Hissay Doma Lepcha, who was appointed on the post of Under Secretary, declined the offer as she was working as Veterinary Officer in Mangan. The post, fallen vacant, was carried forward to the next recruitment process.

6. It is further contended that under horizontal reservation, if the two seats are filled up by women candidates, the other seat must go to a candidate on merit. In the case on hand, the petitioner is below the other two applicants namely, Mr. Zenden Lingzerpa and Mr. Salem Lepcha, who have obtained 479 and 478 marks respectively and as such the petitioner is not entitled to an appointment in preference to their candidature. It was reiterated by Mr. Thinlay that two seats reserved for

women candidates under BL category are filled up by Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia. Thus, the writ petition is misconceived and deserves to be dismissed.

7. I have considered anxiously the submissions put forth by the learned counsel for the parties, perused and analyzed the pleadings and documents appended thereto.

8. Indisputably, the marks obtained by the petitioner were revised on revaluation and it was enhanced to 478 from 462, accordingly, she was upgraded in the merit list of BL category for appointment on the post of Under Secretary. The merit list for the appointment on the post of Under Secretary was published on 09th June 2015 as under:

Roll No.	Name	Gender	Total Marks obtained	Recommend/ Selected	Category/ Roster Point
2109	Tenzing Choden Bhutia	Female	545	Recommended	UR/16
4344	Sisum Wangchuk Bhutia	Male	533	Recommended	UR/22
3737	Tenzing Pema Bhutia	Female	520	Recommended	BL/02
1609	Hissay Doma Lepcha	Female	512	Recommended	BL/12
831	Topden Ongyal Zangpo	Male	490	Recommended	BL/17
2837	Kunga Diki Lachungpa	Female	485	Recommended	BL(W)/07
773	Sonam Palmu Bhutia	Female	482	Recommended	BL(W)/21
3815	Zenden Lingserpa	Male	479		
373	Salem Lepcha	Male	478		
997	Tshering Eden Bhutia	Female	478		
823	Nancy Choden Lhasungpa	Female	477		
949	Rinkila Bhutia	Female	471		
2548	Yangchen Doma Bhutia	Female	469		
3395	Tseten Palzor Bhutia	Male	467 (Dy. SP)	Recommended	BL/02
2678	Deeki Wangmo Euthenpa	Female	461		
1578	Tshering Lhamu Bhutia	Female	453		

9. The five persons were selected for appointment under BL category are (i) Miss Tenzing Pema Bhutia, (ii) Miss Hissay Doma Lepcha, (iii) Mr. Topden Ongyal Zangpo, (iv) Miss Kunga Diki Lachungpa and (v) Miss Sonam Palmu Bhutia. Out of five seats reserved for BL category, two seats were meant for BL (Women). Under horizontal reservation, requirement of appointment of two women candidates was met on appointment of Miss Kunga Diki Lachungpa and Miss Sonam Palmu Bhutia, who obtained 485 and 482 marks respectively. The petitioner was placed at Sl. No. 3, however, in all, there were two male members, one obtained more marks than the petitioner i.e. 479 and the other one obtained equal marks, but was placed above her in merit on the basis of other criteria. The petitioner is claiming appointment against the post which remained vacant on account of refusal of Miss Hissay Doma Lepcha. The contention of Mr. Upadhyaya is that selection of Miss Kunga Diki Lachungpa as well as Miss Sonam Palmu Bhutia was against general category, being better placed in the merit list. Thus, reserved seat for women category be treated as vacant and against that the petitioner be appointed in preference to other candidates, who have obtained more marks. The contention of Mr. Upadhyaya is misconceived and is rejected on the sole ground that the reservation for a woman in a particular category comes within the ambit of horizontal reservation. The concept and philosophy of this kind of reservation is that within the post reserved for a particular category, there should be sufficient representation and placement of women. Accordingly, two BL (Women) seats meant for women candidates are already filled up. Thus, the petitioner is not entitled to march over other candidates, who have better marks and merit than the petitioner. If the post has fallen vacant, on opting out by Miss Hissay Doma Lepcha, the same may go to the second candidate, who is a male member and not to the petitioner on the ground that the seat has fallen vacant on account of the fact that a woman has declined.

10. Under the constitutional scheme, Article 15 (3) of the Constitution of India enables the State to make any special provision for women and children, in addition to reservation provided to socially and educationally backward classes of citizens as contemplated under clauses (4) and (5) of Article 15. Article 16 provides equality of opportunity in matters of public employment carving out exception under clauses (3), (4), (4A) and (4B). The Court is not concerned with other clauses of reservation in this petition.

11. The issue came up for consideration in **Indra Sawhney vs. Union of India and others**[1], wherein a nine Judges Bench of the Supreme Court, examining

[1] AIR 1993 SC 477

all aspects of the reservation, analyzed and differentiated the reservation under Article 16 (4) and reservation under other clauses as under: -

> "95. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes (under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped (under Clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.
>
> It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions, concessions or relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4)."

12. In **Anil Kumar Gupta and others vs. State of U.P. and others**[2], referring to the principle of law laid down by the Supreme Court in **Indra Sawhney**

[2] (1995) 5 SCC 173

(supra), the Supreme Court reiterated the proposition of law as under:

> "18. …….. The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an over-all horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/ accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.) ……"

13. Again in **Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others**[3], the aforestated proposition of law was reaffirmed and observed as under: -

> "8. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies and 15% is the vertical reservation for SC and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for SC, should be : "For SC : 30 posts, of which 9 posts are for women". We find that many a time this is wrongly described thus : "For SC : 21 posts for men and 9 posts for women, in all 30 posts". Obviously, there is, and there can be, no reservation category of "male" or "men".

[3] (2007) 8 SCC 785

9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the nonreserved posts on their own merit, their number will not be counted against the quota reserved for the respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. [Vide - Indra Sawhney (supra), R. K. Sabharwal v. State of Punjab [(1995) 2 SCC 745], Union of India v. Virpal Singh Chauhan [(1995) 6 SCC 684] and Ritesh R. Sah v. Dr. Y. L. Yamul [(1996) 3 SCC 253]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social)

reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

> If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC woman candidates, then there is no need to disturb the list by including any further SC woman candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four woman SC candidates. (But if the list of 19 SC candidates contains more than four woman candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess woman candidates on the ground that "SC women" have been selected in excess of the prescribed internal quota of four.)"

14. It is well established proposition of law that the horizontal reservation is to ensure minimum reservation of women in a vertical category. A woman candidate selected on merit in the category will be reckoned for the purpose of determining the fulfilment of reservation of women category in a particular vertically reserved category. Applying the said principle to the facts of the case, wherein two seats reserved for BL (Women) are filled up, other woman candidate cannot be permitted to supersede or bypass the merit list. As in the case on hand, there are two male candidates, who are better placed in the merit list and as such the petitioner is not entitled to appointment in preference to others.

15. It is lastly contended by Mr. Upadhaya that the other candidates, who obtained more marks have not come officially to claim appointment, thus, a direction be issued to appoint the petitioner against the vacant post of the Under Secretary.

Not approaching the Court for relief cannot deprive the eligible candidate his/her right to appointment for the reason, other candidate having lesser marks knocked the door of justice. In such view, the petitioner cannot claim appointment in preference to other meritorious candidates. It is apt to refer herein an observation made by the Supreme Court in **R.K. Jain vs. Union of India** [4], which reads as under: -

> "74. ..... In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public-spirited person."

16. In the case of Rinzing Chopel Rai (supra), cited by Mr. Upadhaya, the petitioner, being properly placed in the merit list, was given appointment to the post of Deputy Superintendent of Police by the State during pendency of the petition and as such the petition was dismissed as having become infructuous. The facts involved in the instant case are different and distinguishable, thus, not applicable.

17. As a sequel, there is no merit in the case. The writ petition is dismissed. No order as to costs.

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[4] (1993) 4 SCC 119

SLR (2017) SIKKIM 185

(Before Hon'ble Mr. Bhaskar Raj Pradhan)

Crl. L.P. No. 05 of 2017

State of Sikkim ….. APPELLANT

Versus

Dawa Tshering Bhutia ….. RESPONDENT

For the Appellant : Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor with Mr. S.K Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors

For Respondent : Mr. K.T Bhutia, Senior Advocate with Ms. Bandana Pradhan and Ms. Sarita Bhusal, Advocates

Date of decision: 11th August 2017

A. Criminal Procedure Code, 1973 - S. 378(3) - Leave to appeal against acquittal-Although it is true that leave to appeal can be granted where it is shown that the conclusions arrived by the Trial Court are perverse or there is misapplication of law or any legal principle, it is equally true that leave to appeal cannot be rejected on the ground that the judgment of the Trial Court could not be termed as perverse. The power of the Appellate Court is wide. However, the consideration at the time of deciding whether leave ought to be granted or not and at the stage of deciding an appeal against acquittal are different. (Para 18)

B. Criminal Procedure Code, 1973 - S. 378(3) - Leave to appeal against acquittal - Relevant consideration for grant or refusal of leave to appeal-The Legislature has advisedly used the word 'leave' in S. 378(3) which merely means 'permission' and nothing more, after of course, a judicious consideration. Leave is required to be obtained before an appeal is 'entertained' for judicial consideration on merits - Sub-section (3) unequivocally prohibits the entertainment of an appeal by the State

Government except with the leave of the Court and thus, the power to prefer an appeal by the State Government against an order of acquittal is not an absolute power. Before such Appeal is entertained by the High Court, the State Government must necessarily obtain leave, it must be for valid and cogent reason as is required of exercise of any judicial power. It must be kept in mind that by such refusal, a close scrutiny of the order of acquittal by the Appellate Forum would be lost once and for all.

(Paras 19, 20 and 21)

C. Criminal Procedure Code, 1973 - S. 378 (3) - Leave to appeal against acquittal - At this stage, whether the order of acquittal would or would not be set aside is not the consideration - At this stage the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of the acquittal recorded by the Trial Court could not be said to be perverse - Held, that at this stage leave to appeal ought to be granted to the State, without going further into the merits to enable this Court, as the first Appellate Court, to effectively consider the same on merits, keeping in mind that although leave to appeal is the mandate, the appeal nevertheless is not of any inferior quality or grade- Appeal is not frivolous and prima-facie it is evident that the present appeal needs deeper consideration after grant of leave by this Court.

(Paras 24 and 27)

Leave granted.

Chronological list of cased cited :

1. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192

2. R. Shaji v. State of Kerala, (2013) 14 SCC 266

3. Geeta Sharma v. State NCT of Delhi and Another, 2017 SCC OnLine Del 9313

4. State of M.P. v. Dewadas and Others, (1982) 1 SCC 552

5. State (Delhi Administration) v. Dharampal, (2001) 10 SCC 372

6. State of Rajasthan v. Sohan Lal, (2004) 5 SCC 573

7. State of Maharashtra v. Sujay Mangesh Poyarekar, (2008) 9 SCC 475

8. State of Sikkim v. Kiran Chettri and Another, 2017 SCC OnLine Sikk 58

9. State of Punjab v. Bhag Singh, (2004) 1 SCC 547

ORDER

Bhaskar Raj Pradhan, J

1. The parameters of judicial consideration while deciding an application for leave to appeal against the judgment of acquittal is the issue before this Court in the present application. Leave to appeal has been sought by the State under Section 378 (3)(b) of the Criminal Procedure Code, 1973 (Cr.P.C) against the judgment dated 28.12.2016 passed by the learned Judge, Fast Track Court (East and North) at Gangtok in Session's Trial (Fast Track) Case No. 05 of 2016 under Section 376/511 Indian Penal Code (IPC). Although charges were framed under Section 376/511 IPC on the submission of the learned Additional Public Prosecutor at the stage of final arguments that the evidence produced did not make out a case under Section 376/511 IPC but under Section 354 IPC, the learned Trial Judge held that the prosecution has not been able to prove the case even under Section 354 IPC.

2. On 25.05.2017, notice was issued on the application for leave pursuant to which, on 21.06.2017, the learned Counsel would seek time to file response to the application for condonation of delay as well as the present application for leave.

3. On 04.08.2017, Mr. K.T Bhutia, learned Senior Counsel appearing for the respondent would submit that he would like to argue and contest the application for leave, instead. This Court heard Mr. Karma Thinlay Namgyal, learned Senior Advocate and the Additional Public Prosecutor for the State of Sikkim and Mr. K.T Bhutia.

4. Mr. Karma Thinlay Namgyal would argue that the evidence of the prosecutrix (PW 1) before the Court satisfied the ingredients of the offence under Section 354 IPC and the same had not been demolished in cross examination. The impugned Judgment disbelieving the prosecutrix version and acquitting the respondent is wrong and thus, leave ought to be granted. While doing so, Mr. Karma Thinlay Namgyal, would rely upon the examination-in-chief of the prosecutrix and submit that the ingredients of the alleged offence had been cogently

proved by the Prosecution. He would plead that there is sufficient evidence to prove the offence under Section 354 IPC and that the Learned Trial Court has failed to appreciate the evidence of the victim (P.W.1), Saroj Rai (P.W.2) and Benjamin Lepcha (P.W.3) in its correct perspective.

5. Mr. Karma Thinlay Namgyal would rely upon the judgment of the Apex Court in re: **Mohd. Imran Khan v. State Government (NCT of Delhi)**[1] in which it was held:-

> **"Evidence of the prosecutrix**
>
> 22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence**."**

6. Mr. Karma Thinlay Namgyal would also rely upon the judgment of the Apex Court in re: **R. Shaji v. State of Kerala**[2] in which it was held:-

> "26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161

[1] (2011) 10 SCC 192
[2] 2013) 14 SCC 266

Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide Jogendra Nahak v. State of Orissa [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and CCE v. Duncan Agro Industries Ltd. [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])".

7. Mr. K.T Bhutia would, however, assert that the acquittal of the respondent has bolstered the presumption of innocence in favour of the respondent and leave to appeal can be granted where it is shown that the conclusion arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. To supplement his argument he would also rely upon a judgment of the Delhi High Court in re: **Geeta Sharma v. State NCT of Delhi & Anr**[3]in which it was held:-

"4. The law with regard to the grant of leave is well settled by catena of judgments. Leave to appeal can be granted where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle."

8. To bring home his point, Mr. K.T Bhutia, would take the Court through the cross-examination of the prosecutrix, the Magistrate (PW 10) who recorded the Section 164 Cr.P.C statement of the prosecutrix and the Investigating Officer (PW 13) and contend that the entirety of the examination in chief of the prosecutrix

[3] 2017 SCC OnLine Del 9313

has been demolished and rendered unreliable as both the Magistrate and the Investigating Officer who recorded the Section 164 Cr.P.C statement and the Section 161 Cr.P.C statement of the respondent respectively have admitted that what the prosecutrix has deposed before the Court was not what she had deposed before them on material particulars.

9. Mr. K.T Bhutia would further contend that the evidence of the brother of the prosecutrix i.e. Saroj Rai (P.W.2) and Benjamin Lepcha (P.W.3) would in fact contradict the evidence of the prosecutrix. Mr. K. T. Bhutia would submit that this was a case where the evidence would clearly reveal that the deposition of the prosecutrix was unreliable.

10. Both the learned Senior Advocates appearing for the respective parties would take the Court through various paragraphs of the impugned judgment to contest their respective arguments.

11. This Court has heard the learned Senior Advocates in great detail and examined the impugned Judgment.

12. Section 378 (1) and (3) Cr.P.C provides :-

" 1. Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5), -

(a).....

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

.....

3. No appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court."

13. The Apex Court in re: **State of M.P v. Dewadas & Ors.**[4] would hold that:-

> "10. Under the scheme of the Code, the State Government or the Central Government may prefer an appeal under sub-section (1) or sub-section (2) of Section 378 of the

[4] (1982) 1 SCC 552

Code, but such appeal shall not be entertained unless the High Court grants "leave" under sub-section (3) thereof. The words "No appeal under sub-section (1) or sub-section (2) shall be entertained" used in sub section (3) of Section 378 create a qualified bar to the entertainment of an appeal filed by the State Government or the Central Government under subsection (1) or sub-section (2) from an order of acquittal passed in a case instituted otherwise than upon a complaint. The Code, by enacting sub-section (3) of Section 378, therefore, brought about a change in that there is no longer an unrestricted right of appeal against the orders of acquittal passed in such cases. ....."

"11..... The Law Commission in its 48th Report had observed:

"While one may grant that cases of unmerited acquittals do arise in practice, there must be some limit as to the nature of cases in which the right should be available."

And, keeping in view the general rule in most common law countries not to allow an unrestricted right of appeal against acquittals, it recommended:

"With these considerations in view, we recommend that appeals against acquittals under Section 417, even at the instance of the Central Government or the State Government, should be allowed only if the High Court grants special leave.

It may be pointed out that even now the High Court can summarily dismiss an appeal against an acquittal, or for that matter, any criminal appeal. (Section 422 of the Criminal Procedure Code)

Therefore, the amendment which we are recommending will not be so radical a departure as may appear at the first sight. It will place the State and the private complainant

> on equal footing. Besides this, we ought to add that under Section 422 of the Code, it is at present competent to the appellate court to dismiss the appeal both of the State and of the complainant against acquittal at the preliminary hearing."
>
> The recommendations of the Law Commission were not, however, fully carried into effect. Sub-section (3) of Section 378 of the Code was introduced by Parliament to create a statutory restriction against entertainment of an appeal filed by the State Government or the Central Government under sub-section (1) or sub-section (2) of Section 378 from an order of acquittal passed in a case instituted otherwise than upon complaint....."

14. The report of the Joint Committee of the Parliament dated 04.12.1972, p.xxvi, would give the reason for introducing the then new provision in the following words:-

> "The Committee was given to understand that in some cases this executive power to file appeals against an order of acquittal was exercised some-what arbitrarily. It would, therefore, be desirable and expedient to provide for a check against arbitrary action in this regard. The Committee has therefore provided that an appeal against an order of acquittal should be entertained by the High Court only if it grants leave to the State Government in this behalf."

15. In re: **State (Delhi Administration) v. Dharampal**[5] the Apex Court would hold:-

> "25. A comparison of Section 378 with the old Section 417 shows that whilst under the old section no application for leave to appeal had to be made by the State Government or the Central Government, now by virtue of Section 378(3) the State Government or the Central Government have to obtain leave of the High Court before their appeal could be entertained."

16. The Apex Court in re: **State of Rajasthan v. Sohan Lal**[6] would hold that:-

[5] (2001) 10 SCC 372
[6] (2004) 5 SCC 573

"3. We have carefully considered the submissions of the learned counsel appearing on either side. This Court in State of Orissa v. Dhaniram Luhar [(2004) 5 SCC 568 : (2008) 2 SCC (Cri) 49 : JT (2004) 2 SC 172] has while reiterating the view expressed in the earlier cases for the past two decades emphasised the necessity, duty and obligation of the High Court to record reasons in disposing of such cases. The hallmark of a judgment/order and exercise of judicial power by a judicial forum is to disclose the reasons for its decision and giving of reasons has been always insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The fact that the entertaining of an appeal at the instance of the State against an order of acquittal for an effective consideration of the same on merits is made subject to the preliminary exercise of obtaining of leave to appeal from the High Court, is no reason to consider it as an appeal of any inferior quality or grade, when it has been specifically and statutorily provided for, or sufficient to obviate and dispense with the obvious necessity to record reasons. Any judicial power has to be judiciously exercised and the mere fact that discretion is vested with the court/forum to exercise the same either way does not constitute any licence to exercise it at whims or fancies and arbitrarily as used to be conveyed by the well-known saying: "varying according to the Chancellor's foot". Arbitrariness has been always held to be the anathema of judicial exercise of any power, all the more so when such orders are amenable to challenge further before higher forums. The State does not in pursuing or conducting a criminal case or an appeal espouse any right of its own but really vindicates the cause of society at large, to prevent recurrence as well as punish offences and offenders respectively, in order to preserve orderliness in society and avert anarchy, by upholding the rule of law. The provision for seeking leave to appeal is in order to ensure that no frivolous appeals are filed

against orders of acquittal, as a matter of course, but that does not enable the High Court to mechanically refuse to grant leave by mere cryptic or readymade observations, as in this case ("the court does not find any error"), with no further, on the face of it, indication of any application of mind whatsoever. All the more so, when the orders of the High Court are amenable to further challenge before this Court. Such ritualistic observations and summary disposal which has the effect of, at times, and as in this case, foreclosing statutory right of appeal, though a regulated one, cannot be said to be a proper and judicial manner of disposing of judiciously the claim before courts. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind. All the more so, when refusal of leave to appeal has the effect of foreclosing once and for all a scope for scrutiny of the judgment of the trial court even at the instance and hands of the first appellate court. The need for recording reasons for the conclusion arrived at by the High Court, to refuse to grant leave to appeal, in our view, has nothing to do with the fact that the appeal envisaged under Section 378 Cr.P.C. is conditioned upon the seeking for and obtaining of the leave from the court. This Court has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal."

17. The Apex Court in re: **State of Maharashtra v. Sujay Mangesh Poyarekar**[7] would hold that:-

> "19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.
>
> 20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.
>
> 21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted."
>
> 22. In Sita Ram v. State of U.P. [(1979) 2 SCC 656 : 1979 SCC (Cri) 576] this Court held that: (SCC p. 669, para 31)

[7] (2008) 9 SCC 475

> "31. … A single right of appeal is more or less a universal requirement of the guarantee of life and liberty rooted in the [concept] that men are fallible, that Judges are men and that making assurance doubly sure, before irrevocable deprivation of life or liberty comes to pass, a full-scale reexamination of the facts and the law is made an integral part of fundamental fairness or procedure."

We are aware and mindful that the above observations were made in connection with an appeal at the instance of the accused. But the principle underlying the above rule lies in the doctrine of human fallibility that "Men are fallible" and "Judges are also men". It is keeping in view the said object that the principle has to be understood and applied.

Then again:-

> "33. It is no doubt true that in a case of acquittal, there is a double presumption in favour of the respondent-accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced by the trial court (and certainly not weakened). Nonetheless, it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is "perverse", it cannot interfere. If the appellate court on reappreciation of evidence and keeping in view well-established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law."

Then again:-

> "35. The High Court, in our judgment, was not right in rejecting the application for leave on the ground that the judgment of the trial court could not be termed as "perverse". If, on the basis of the entire evidence on record, the order of acquittal is illegal, unwarranted or contrary to law, such an order can be set aside by an appellate court. Various expressions, such as, "substantial and compelling reasons", "very strong circumstances", "distorted conclusions", "glaring mistakes", "judgment being perverse", etc. are more in the nature of "flourishes of language" than restricting ambit and scope of powers of the appellate court. They do not curtail the authority of the appellate court in interfering with an order of acquittal recorded by the trial court. The judgment of the High Court, with respect, falls short of the test laid down by this Court in various cases referred to in Chandrappa [(2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] . The order of the High Court, therefore, cannot stand and must be set aside."

18. In view of the clear and unequivocal rendition of the Apex Court in re: **State of Maharashtra v. Sujay Mangesh Poyarekar (supra)** this Court respectfully seeks to explain the view expressed by the Delhi High Court in re: Geeta Sharma (supra) cited by Mr. K.T Bhutia as expressed in paragraph 4 thereof to the effect that although it is true that leave to appeal can be granted where it is shown that the conclusions arrived by the Trial Court are perverse or there is misapplication of law or any legal principle, it is equally true that leave to appeal cannot be rejected on the ground that the Judgment of the Trial Court could not be termed as perverse. The power of the Appellate Court is wide. However, the consideration at the time of deciding whether leave ought to be granted or not and at the stage of deciding an appeal against acquittal are different. A Division Bench of this Court in re: **State of Sikkim v. Kiran Chettri & Anr.**[8] while granting leave to appeal would rely upon the judgment of the Apex Court in re: **State of Maharashtra v. Sujay Mangesh Poyarekar (supra)** and hold that when arguable points have been raised in the petition for leave to appeal which are serious in nature the same requires consideration by the Court.

[8] 2017 SCC OnLine Sikk 58

19. The Legislature has advisedly used the word 'leave' in Section 378 (3) Cr.P.C which merely means 'permission' and nothing more, after of course, a judicious consideration. Leave is required to be obtained before an appeal is 'entertained' for judicial consideration on merits.

20. Section 378 Cr.P.C corresponds to Section 417 of the Old Code. Sub-sections (1), (2), (4), (5) and (6) of Section 378 are analogous to Sections (1) to (5) respectively of Section 417 of the Old Code. Section 378 (3) Cr.P.C was, at the time of the coming into force of the Cr.P.C, 1973, however, a new provision. The power of the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal by a Court of Session in revision is subject to Section 378 (3) Cr.P.C. There was no such restriction under the Old Code. Sub-section (3) unequivocally prohibits the entertainment of an appeal by the State Government except with the leave of the Court and thus, the power to prefer an appeal by the State Government against an order of acquittal is not an absolute power. Before such appeal is entertained by the High Court, the State Government must necessarily obtain leave of the High Court. The mandate of the law is clear. Before the Court proceeds to consider on merits or adjudicate upon the merits, leave must be sought by the State Government and granted by the Court.

21. It is clear from the reading of Sub-Section (3) of Section 378 Cr.P.C that the High Court has the power to grant leave or deny the same. If the Court is to deny leave it must be for valid and cogent reason as is required of exercise of any judicial power. It must be kept in mind that by such refusal, a close scrutiny of the order of acquittal by the Appellate Forum would be lost once and for all. The Apex Court in re: **State of Punjab v. Bhag Singh**[9] held:

> "5. The trial court was required to carefully appraise the entire evidence and then come to a conclusion. If the trial court was at a lapse in this regard the High Court was obliged to undertake such an exercise by entertaining the appeal. The trial court on the facts of this case did not perform its duties, as was enjoined on it by law. The High Court ought to have in such circumstances granted leave and thereafter as a first court of appeal, reappreciated the entire evidence on the record independently and

[9] (2004) 1 SCC 547

returned its findings objectively as regards guilt or otherwise of the accused. It has failed to do so. The questions involved were not trivial. The requirement of independent witness and discarding testimony of official witnesses even if it was reliable, cogent or trustworthy needed adjudication in appeal. The High Court has not given any reasons for refusing to grant leave to file appeal against acquittal, and seems to have been completely oblivious to the fact that by such refusal, a close scrutiny of the order of acquittal by the appellate forum has been lost once and for all. The manner in which the appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court order not sustainable. A similar view was expressed in State of U.P. v. Battan [(2001) 10 SCC 607 : 2003 SCC (Cri) 639] . About two decades back in State of Maharashtra v. Vithal Rao Pritirao Chawan [(1981) 4 SCC 129 : 1981 SCC (Cri) 807 : AIR 1982 SC 1215] the desirability of a speaking order while dealing with an application for grant of leave was highlighted. The requirement of indicating reasons in such cases has been judicially recognized as imperative. The view was reiterated in Jawahar Lal Singh v. Naresh Singh [(1987) 2 SCC 222 : 1987 SCC (Cri) 347] . Judicial discipline to abide by declaration of law by this Court, cannot be forsaken, under any pretext by any authority or court, be it even the highest court in a State, oblivious to Article 141 of the Constitution of India."

22. The State seeks leave to appeal against the judgment of acquittal for an alleged offence of assault or criminal force on the victim with intent to outrage her modesty under Section 354, IPC which provides:-

> "354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine."

23. The prosecutrix has in her examination-in-chief narrated in great detail about the alleged incident which is alleged to have taken place in the month of November, 2015.

24. This Court has considered the impugned judgment for the limited purpose of deciding whether in the present case leave ought to be granted to the State for entertaining its appeal, keeping in mind Section 378 (3) Cr.P.C, its object and purpose, as well as the judgments of the Apex Court quoted above. This Court stays conscious of the law that at this stage whether the order of acquittal would or would not be set aside is not the consideration. This Court also stays conscious of the law that at this stage the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of the acquittal recorded by the Trial Court could not be said to be perverse. It is seen that the learned Trial Court even while quoting extensively from the evidence of the prosecutrix, which evidence, Mr. Karma Thinlay Namgyal would argue satisfied the ingredients of Section 354 IPC had been made out, has not dealt with how the said evidence of the prosecutrix has been demolished completely by the evidence of the Magistrate and the Investigating Officer who recorded the statements of the prosecutrix under Section 164 Cr.P.C and Section 161 Cr.P.C respectively as argued by Mr. K.T Bhutia. This was the bulwark of Mr. K.T Bhutia's argument as to why leave ought not to be granted. The learned Trial Court has without analysing the effect of the evidence of the Magistrate and the Investigating Officer concluded in paragraph 21 and 24 of the impugned judgment that:-

> "21……The evidence of PW-13, I.O. of case and PW-10, the then Ld. Chief Judicial Magistrate establishes that she had stated different version while giving her statement."

> "24. The evidence of the victim as well as other prosecution witnesses i.e. PW-2, PW-7, PW-8, PW-10 and PW-13

establish that the victim projected different versions and tried to improve her case."

25. The learned Trial Court having not examined the effect of the cross examination of the Magistrate and the Investigating Officer, so forcefully argued by Mr. K.T Bhutia submitting that the same demolishes the prosecution case, it has become incumbent that the Appellate Court examine the same on merits, after leave, along with the other evidences to come to a decisive conclusion whether the impugned judgment is liable to be sustained or otherwise.

26. On a close scrutiny of the impugned judgment it is evident that the impugned judgment also does not deal with the ingredients of Section 354 IPC which was perhaps vital. Although it is true that the present case being a case of acquittal there is a double presumption in favour of the respondent of his innocence, the mere grant of leave to the State to prefer an appeal would in no way effect the said presumption as it is well settled that the Appellate Court would reverse an acquittal only for very substantial and compelling reasons. Interference of an order of acquittal would arise when the Appellate Court examines the order of acquittal on merits. The present application for leave cannot definitely be termed as arbitrary. Arguable points serious in nature have been raised which need to be heard on merits.

27. In the circumstances, this Court is of the view, that leave to appeal ought to be granted to the State, at this stage, without going further into the merits to enable this Court, as the first Appellate Court, to effectively consider the same on merits, keeping in mind that although leave to appeal is the mandate, the appeal nevertheless is not of any inferior quality or grade. This Court is of the view that the appeal is not frivolous and prima-facie it is evident that the present appeal needs deeper consideration after grant of leave by this Court. Accordingly, the Crl. L.P No. 05 of 2017 is hereby allowed.

28. Leave granted.

29. Let the appeal be registered for hearing.

SLR (2017) SIKKIM 202

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

Crl. M.C. No. 20 and 21 of 2014

Vinay Rai ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner : Mr. Shakeel Ahmed and Mr. Yogesh Kumar Sharma, Advocates

For Respondent : Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S.K.Chettri, Assistant Public Prosecutor and Mr. Thinlay Dorjee Bhutia, Advocate

Date of decision: 11th August 2017

A. Criminal Procedure Code, 1973 - S. 482 – High Court's power to quash criminal proceedings - Scope - Court has inherent powers to act ex debito justitiae to do real and substantial justice and to prevent abuse of the process of the Court. But, the power being extraordinary ought to be reserved as far as possible for extraordinary cases.

(Para 20)

B. Criminal Procedure Code, 1973 - S. 190 – Cognizance by Magistrate - Order dated 19.08.2016 in I.A. No. 01 of 2016 arising out of Crl. M.C. No. 20 of 2014 referred : It does not involve any formal action, but occurs as soon as the Magistrate applies his mind to the suspected commission of the offence. The Court at that stage is not required to undertake an elaborate enquiry neither is he required to mention the documents which he took into consideration for satisfying himself to take cognizance.

(Para 25)

C. Criminal Procedure Code, 1973 - Ss. 161 and 162 (1) - Statement made under S. 161 - Evidentiary value and use of - Fundamental principle

of procedural law is that a statement under S. 161 cannot be considered as substantive evidence, this is to be used for confronting the witness to impeach his credibility. Should the witness make contradictory statements, then a suspicion can arise against the witnesses' credibility.

(Para 28)

D. Criminal Procedure Code, 1973 - Ss. 161 and 164 - Evidentiary value and object of statement recorded under Ss. 161 and 164, and whether they can be regarded as substantive evidence, discussed - Held, addressing the arguments concerning statements recorded under S. 164, such statements or confession can never be used as substantive evidence but may be utilised for contradiction or corroboration of the witness who made it. (Para 28)

Petitions dismissed.

Chronological list of cases cited :

1. Sunil Bharti Mittal v. Central Bureau of Investigation, 2015(1) SCALE 140

2. Thermax Limited and Others v. K.M. Johny and Others, (2011) 13 SCC 412

3. R. Kalyani v. Janak C Mehta and Others, (2009) 1 SCC 516

4. Madhavrao Jiwajirao Scindia and Others v. Sambhajirao Chandrojirao Angre and Others, (1988) 1 SCC 692

5. State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp (1) SCC 335

6. Satish Mehra v. State of N.C.T. of Delhi and Another, 2013 CRI. L.J. 411

7. Anwar P.V. v. P.K. Basheer and Others, (2014) 10 SCC 473

8. V. L. Tresa v. State of Kerala, (2001) 3 SCC 549

9. Ashok Tshering Bhutia v. State of Sikkim, (2011) 4 SCC 402

10. Suresh alias Pappu Bhudharmal Kalani v. State of Maharashtra, (2001) 3 SCC 703

11. Om Wati (Smt) and Another, (2001) 4 SCC 333

12. Mosiruddin Munshi v. Mohd. Siraj and Another, (2014) 14 SCC 29

13. Bhushan Kumar and Another v. State (NCT of Delhi) and Another, (2012) 5 SCC 424

14. Baldev Singh v. State of Punjab, (1990) 4 SCC 692

15. State (Government of NCT of Delhi) vs. Nitin Gunwant Shah, 2016 II AD (CRI.) (SC) 1

ORDER

Meenakshi Madan Rai, J

1. By filing these Petitions under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.'), the Petitioner seeks quashing of the Charge-Sheet, the cognizance order dated 5.6.2013 and subsequent proceedings of the then learned Chief Judicial Magistrate (South and West) at Namchi, in General Register Case No. 119/2013, arising out of FIR No. 51/2012, dated 1.9.2012, under Sections 420/467/471/201/120B of the Indian Penal Code, 1860 (hereinafter 'IPC'), against the petitioner herein. *(Presently pending before the learned Judicial Magistrate (East) at Gangtok, Sikkim, as General Registrar Case No. 21 of 2013, renumbered as 819 of 2013).*

2. Crl. M. C No. 20 of 2014 and Crl. M.C. No. 21 of 2014 are being disposed of by this common Order, as they both pertain to the same FIR.

3. It is indeed pertinent to advert briefly to the background of the filing of the instant Petitions. The Petitioner along with two others, were before this Court in Crl. M. C. No. 17/2013, Crl. M. C. No. 18/2013, Crl. M.C. No. 22/2013, Crl. M.C. No.23/2013 and Crl. M.C. No. 24 of 2013, praying for quashing of the First Information Report (for short 'FIR') and the entire Charge-Sheet filed against them, under Sections 406/420/467/120B/34 of the IPC, as detailed hereinabove. This Court, on due consideration of the matter was of the view that, prima facie, there were sufficient materials to continue the proceedings against the accused persons and dismissed the petitions vide a common order dated 15.10.2014. Against the Order of this Court, the Petitioner approached the Hon'ble Supreme Court in Special Leave to Appeal (Criminal) Nos. 8923-8924/2014, Vinay Rai vs. State of Sikkim, seeking permission to bring additional facts and file additional

documents. The Supreme Court on 1.12.2014, ordered as follows;

> "……
>
> *Mr. Kapil Sibal, learned senior counsel for the petitioner seeks leave to withdraw the special leave petition pointing out that certain documents have not been produced before the High Court and hence to rely upon those documents.*
>
> *He also prays for liberty to pursue appropriate remedy by placing such facts before the High Court in the matter.*
>
> *This special leave petition is not pressed and we have not expressed any opinion on the merits of the case. All points raised are kept open before the High Court and the High Court will decide the same in accordance with law. Liberty is granted to apply before the High Court. Special Leave Petition is dismissed as withdrawn.*
>
> ……"

Hence, the instant Petitions filed with additional documents being Annexures P-6, P-7, P-8 and P-9 and points urged in relation to the documents and the aforestated prayer.

4. The Petitioner's case is that the Eastern Institute for Integrated Learning in Management University (for brevity "EIILM University"), was established vide Notification No. 28/LD/2006 dated 3.4.2006, by enacting the "Eastern Institute for Integrated Learning in Management University, Sikkim Act, 2006 being Act No. 4 of 2006 (hereinafter 'EIILM University Act, 2006'). The sponsor of the said University was EIILM, Kolkata, West Bengal, a Unit of Malvika Foundation, New Delhi. A Suo Motu FIR, being FIR No. 51/2012 dated 1.9.2012, under Sections 406/420/467/120'B' IPC was registered by the Station House Officer, Jorethang Police Station, South Sikkim, making various allegations against the Management of the EIILM University, where the name of the petitioner found mention sans his specific role and position in the University. He was granted anticipatory bail vide Order of this Court dated 15.1.2013. That, he has ceased to be a Trustee of the Rai Foundation or of the Malvika Foundation, having resigned therefrom on 9.11.2001 and 22.3.2004, respectively. The Investigating Officer

(for short 'I.O.') despite being seized of the matter submitted Charge-Sheet against him on 6.5.2013.

5. The learned Trial Court vide its Order dated 5.6.2013, took cognizance in a routine manner without application of judicial mind and summoned the petitioner and others named therein, to face trial. The Police failed to collect any legally admissible evidence against the Petitioner and the statement of witnesses under Sections 161 and 164 of the Cr.P.C. do not support the Prosecution case. The Charge-Sheet fails to disclose what conspiracy the petitioner had entered into and a wrongful reference has been made to a few emails responded to by the Petitioner in his advisory capacity, which were without promise of any illegal act and are not admissible in evidence. The Police have wrongfully linked the Rai Foundation Trustees therein with the petitioner treating him as the owner/beneficiary of the Trust when the Trust is a Charitable Trust, duly registered under Section 12 of the Income Tax Act, 1961. The EIILM University has been granted accreditation by the University Grants Commission (for short 'UGC'), under Section 22 of the University Grants Commission Act, hence, the question of the petitioner conspiring with the EIILM University does not arise.

6. That, allegations in the Charge-Sheet about the pendency of Central Bureau of Investigation matters against the petitioners are sub judice and cannot be referred to in the instant matter. That, the police have relied on Annexure C-6, statements of the Axis Bank, to establish that large amounts of money were transferred to the petitioner but the statements extending from 18.3.2005 to 4.4.2013 reveal that only Rs.4,49,941/- (Rupees four lakhs, forty-nine thousand, nine hundred and forty-one) only, was paid to the petitioner by the Rai Foundation as consultancy charges. It is prayed that in the absence of any materials to make out a case against the Petitioner under any of the afore cited provisions of the IPC and there being no concept of vicarious liability in criminal proceedings, this Court may quash the proceedings as prayed.

7. In response, the State-Respondent averred that the petitioner had agitated the same facts before this Court in the earlier Petitions which have been dismissed with an observation that there are prima facie materials against him. That, the suo motu case was registered after conducting a preliminary inquiry and obtaining permission from the government for registration of the case. That, the petitioner appeared after four months of absconsion from the Investigating Agency and was thereafter granted anticipatory bail. The statements of the Officers of Human Resource Development Department prove that the petitioner was the Chairman and the Founder of Malvika Trust, duly corroborated by documentary evidence

being the 'Minutes' of the relevant meeting annexed with the Charge-Sheet.

8. That, upon search warrant being issued by the learned Chief Judicial Magistrate, South and West Sikkim, in connection with the case, when the Investigating Team reached the location at the Delhi Head Office, it was found abandoned, the documents and computers having been removed and the officials incommunicado. The statements of the students and other official witnesses prove that the students were cheated by the Members/Management of the EIILM University. Although, the Petitioner had in Criminal Miscellaneous Case No. 21 of 2013, denied receiving any remuneration, in contradiction thereof, he now admits receipt of certain amounts by way of remuneration. It is also averred that the Petitioner has responded to the email of one Henok Guangul, as the Head of the University rather than a Consultant. As the Petitioner is stated to be the overall In-Charge of the Rai Foundation and EIILM University, the responsibility of any action taken by the University falls on the Petitioner. That, the documents as per directions of this Court were filed in the previous matter (Annexure P-17), after which the Court being satisfied dismissed all the Petitions so filed under Section 482 of the Cr.P.C. That, in the statements recorded under Sections 161 and 164 of the Cr.P.C., the Petitioner has been named as the overall Chairperson.

9. A Rejoinder was filed to the said response of the State, contending that facts and documents regarding the resignation of the Petitioner from Malvika Foundation and Rai Foundation were never pleaded or annexed with the previous Petitions and were subsequent to the Order of the Hon'ble Supreme Court. The Petitioner claims ignorance of any search operation carried out by the State-Respondent in its Delhi Office and that in the absence of any case against the Petitioner, the Petition be allowed in terms of the prayers made.

10. In Crl. M.C. No. 21 of 2014, the Petitioner reiterated the Orders of the Hon'ble Supreme Court dated 1.12.2014 and averred that the Investigating Agency had lodged FIR No. 92 of 2013 dated 6.5.2013, under Sections 467/468/471/181/120B of the IPC at the Sadar Police Station, Gangtok. The Petitioner herein, was named in the FIR with similar allegations as those in FIR No. 51/2012. FIR No. 92 of 2013, was challenged before this Court and quashed vide Order of this Court dated 4.6.2013. The Investigating Agency carried out further investigation under FIR No. 51/2012 and filed supplementary Charge-Sheet.

11. The Petitioner is, thus, aggrieved with the contents of the supplementary Charge-Sheet which alleges that one Mandeep Kaur had never attended regular classes nor visited the campus in Sikkim but had completed the course via distance

mode while the University had reflected it as regular mode. Further, she was awarded a degree by way of distance education without the approval of the Distance Education Council (for short 'DEC'). In fact, Mandeep Kaur had pursued M.A. in Education from the Directorate of Distance Learning of EIILM University, as evident from the admission-cum-examination form, duly signed by her, clearly mentioning that she is pursuing the course from distance learning mode. Her statements make no allegations against the Petitioner. The Police have falsely alleged that Mandeep Kaur obtained a government job on the basis of a degree of EIILM University, when in fact she is working in a Private College. The allegation in respect of forgery of document is also void, as the opinion of the Regional Forensic Science Laboratory confirms that the degrees of the University bear genuine signatures of its officials. It is also averred that this Court vide its Order dated 15.10.2014, wrongly held that the Petitioner is an Official of the said University, when in fact he has no hand in the affairs thereof. Pausing here, it would be relevant to point out that although the Petitioners had approached the Hon'ble Supreme Court against the said Order, no argument was raised on this point as is evident from the Order dated 1.12.2014 of the Hon'ble Supreme Court, already extracted hereinabove and agitating it before this forum is inappropriate.

12. The State-Respondents, thereafter, filed their response denying and disputing the grounds put forth in the Petition and averred that the instant matter was heard by this Court and vide its Judgment dated 15.10.2014, was pleased to dismiss the Petitions of Vinay Rai and others with the following observations;

> "....
>
> *"15. Thus, there appears to be sufficient materials against the Petitioners to continue the criminal prosecution against them.*
>
> ....
>
> *19. I am of the view that prima facie there is sufficient material to continue with the proceedings against the accused persons.*
>
> *20. The Petitions, therefore, are liable to be dismissed and are hereby dismissed.*
>
> ....."

13. That, the instant Petition being similar to the previous Petitions disposed of by this Court, deserves dismissal.

14. Learned Counsel for the Petitioner while advancing his arguments before this Court, reiterated the submissions in the pleadings and sought to clarify that the Petitioner has been made vicariously liable in the FIR, as alleged Founder and Chairman of the Sponsoring Body and President of the Rai Foundation, as would be evident even from the Charge-Sheet. The Petitioner is nowhere involved in the running of the EIILM University, wherein the Malvika Foundation is the Sponsoring Body. Referring to Annexure P-2 dated 22.3.2004, it was urged that the Petitioner had tendered his resignation from the post of Trustee of the Malvika Foundation and Annexure P-3, the Minutes of the Meeting of the Board of Trustees held on 22.3.2004, would testify to this fact. The EIILM University was established in the year 2006, subsequent to his resignation, thus, no question of his involvement arises. Further, the Petitioner's name does not figure in the list of Trustees dated 31.3.2005 of the Malvika Foundation.

15. It was next urged that Annexure P-6 dated 9.11.2001, would also clearly reveal that the Petitioner had resigned from the Board of Trustees of the Rai Foundation, while Annexure P-7 the Minutes of the Meeting of the Board of Trustees held on 9.11.2001, establishes acceptance of his resignation. That, Annexure P-8 the Income Tax Returns of the Rai Foundation, does not bear the Petitioner's name as a Trustee. That, Annexure P-9 would indicate that his email was vinay.rai@raifoundation.org.

16. It was further canvassed that the occupation of the Petitioner as per the FIR is Chairman ASSOCHAM, with no association with Malvika Foundation or the EIILM University, apart from which no allegations have been made individually against the Petitioner in the FIR. Drawing the attention of this Court to Annexure P-12, learned Counsel would argue that that Mrs. Deepa Basnett, Director, Higher Education, Human Resource Development Department, had attended the Board of Governors Meeting held on 30.7.2012, at Uttarakhand, where the Petitioner was referred to as the Founder and Chairperson of EIILM University but at the relevant time he was not associated with the EIILM University and had merely gone to deliver a welcome address. Besides, Annexure P-17, Prospectus of the Distance Education Programme, does not bear his name. Clarifying the naming of the Petitioner in the Section 161 Cr.P.C. statement of Col. (Retd.) Alok Bhandari, as the 'Advisor' and 'overall In-Charge' of the EIILM University, it was contended that no such designations exist but being a Member of the ASSOCHAM, he used to advise the University. As per learned Counsel, in the statement of O.B. Vijayan,

it is apparent that the Police have inserted the word 'owner' subsequently, following the Petitioner's name, to his detriment, when in fact he is not the owner.

17. That, although in Annexure P-III, the Petitioner has been addressed as Founder Chairman of the Sponsoring Body, it would not imply that the position would subsist for his life time, thus the statement of Mrs. Deepa Basnett is highly prejudicial to him. Annexure R-6 relied, on by the State-Respondent showing payment of Rs.6,00,00,000/- (Rupees six crores) only, to Malvika Foundation, does not bear the Petitioner's name and the only payment that has been made to him is Rs.79,74,258.73 (Rupees seventy-nine lakhs, seventy-four thousand, two-hundred fifty-eight and seventy-three paisa) only, on 7.2.2012 as consultancy fees by the Rai Foundation over a period of time. An amount of Rs.5,42,808.73 (Rupees five lakhs, forty-two thousand, eight-hundred-eight and seventy-three paisa) only, also pertains to monthly amounts deposited in his name for his works as Advisor to Rai Foundation. To buttress his submissions on vicarious liability in criminal proceedings, learned counsel for the Petitioner has placed reliance on **Sunil Bharti Mittal vs. Central Bureau of Investigation[1] , Thermax Limited and others vs K.M. Johny and others[2] , R. Kalyani vs Janak C. Mehta and Others[3]** and **Madhavrao Jiwajirao Scindia and Others vs. Sambhajirao Chandrojirao Angre and Others[4] .** Reliance was also placed on **State of Haryana and others vs Bhajan Lal and Others5 , Satish Mehra vs. State of N.C.T. of Delhi & Ano.[6]** and **Anwar P.V. vs P.K. Basheer & Others[7]** . To prove that he has not caused any disappearance of evidence, he has relied on **V. L. Tresa vs. State of Kerala[8]** , That, Section 161 Cr.P.C. has no value and it can only be used for the purposes of corroboration, reliance was placed on **Ashok Tshering Bhutia vs. State of Sikkim[9].**

18. The contra, arguments advanced by learned Additional Public Prosecutor for the State Respondent was that although the Petitioner claims to have resigned from the University, the Section 161 Cr.P.C. statement of O.B. Vijayan, Vice Chancellor, recorded on 7.5.2013, would reveal that the Petitioner is the owner/ Advisor of EIILM University, while the Statement of Alok Bhandari, Registrar, places the Petitioner as the Advisor and In-Charge of the EIILM University.

[1] 2015(1) SCALE 140
[2] (2011) 13 SCC 412
[3] (2009) 1 SCC 516
[4] (1988) 1 SCC 692
[5] 1992 Supp (1) SCC 335
[6] 2013 CRI. L.J. 411
[7] (2014) 10 SCC 473
[8] (2001) 3 SCC 549
[9] (2011) 4 SCC 402

According to Vinod Kumar Dahiya, Controller of Examination, the Petitioner is the overall In-Charge and Advisor of EIILM University and the Section 164 Cr.P.C. statement of R.P. Banerjee, Member of EIILM University, indicates that the Petitioner was the Chairman of the University, besides, the Respondent asserts that rupees six crores has been collected by the Petitioner through various illegal methods. Learned Additional Public Prosecutor sought to convince this Court that the Rai Foundation consists of the Petitioner and his sister, his sons and other family members, as also the Malvika Trust and the Integrated Institute of Excellence Society and Rai Business School. The Petitioner is the owner of the Malvika Trust, Sponsoring Body of the EIILM University, substantiated by the Statement of witness Tempo Gyamtso, Special Secretary, Technical Education, Human Resource Development Department, Sikkim, who stated that the Petitioner introduced himself as Chairman and Founder of the Sponsoring Body. It was put forth that the modus operandi of the EIILM University was brought to light by one Mohabbat Hussain, a resident of Jalpaiguri District, West Bengal, who having enrolled in EIILM University, went to the University Distance Education Programme at Badarpur, Delhi, but was told by the Security Guard that no such office existed at the said place. The emails between Henok Guangul and the Petitioner indicate that he was still a part of the EIILM University in 2008. He was also using an email ID of Rai Foundation which substantiates the fact that he continued to be a part of the Rai Foundation despite his claim of resignation. To buttress his submissions, reliance was placed on **Suresh alias Pappu Bhudharmal Kalani vs. State of Maharashtra[10], Om Wati (Smt)** and **Another[11] , Mosiruddin Munshi vs. Mohd. Siraj and Another[12]**.

19. The rival contentions advanced were heard at length. The Judgments relied on as also the Order of this Court dated 15.10.2014 and all documents on record, including the emails dated 8.10.2008, received from Henok Guangul, Addis Ababa, Ethopia and the response dated 9.10.2008, from the Petitioner from his email vinay.rai@raifoundation.org, were carefully perused. What requires examination by this Court is whether in the said facts and circumstances, the powers under Section 482 of the Cr.P.C. are to be exercised.

20. Dealing first with the parameters of Section 482 of the Cr.P.C, it may be stated that it is a well established principle that the Court has inherent powers to act ex debito justitiae to do real and substantial justice and to prevent abuse of the

[10] (2001) 3 SCC 703
[11] (2001) 4 SCC 333
[12] (2014) 14 SCC 29

process of the Court. But, the power being extraordinary ought to be reserved as far as possible for extraordinary cases.

21. In **Mosiruddin Munshi vs. Mohd. Siraj and Another (supra)**, it was held as follows;

> "6. The legal position with regard to exercise of jurisdiction by the High Court for quashing the first information report is now well settled. It is not necessary for us to delve deep there into as the propositions of law have been stated by this Court in R. Kalyani v. Janak C. Mehta [(2009) 1 SCC 516] in the following terms;
>
> "15. Propositions of law which emerge from the said decisions are:
>
> (1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct if their entirety, disclosed no cognizable offence.
>
> (2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon the defence.
>
> (3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.
>
> (4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."
>
> 7. Yet again in Mahesh Chaudhary v. State of Rajasthan [(2009) 4 SCC 439] this Court stated the law thus:

"The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The Court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the complaint petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence."

22. This Court in its Order dated 15.10.2014, has already referred to the categories of cases where inherent powers under Section 482 of the Cr.P.C. can be invoked. That in **State of Haryana and others vs Bhajan Lal and Others** (supra), it was held as follows;

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with male fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

23. On the anvil of the principles enunciated hereinabove while considering the investigation undertaken pursuant to the FIR No. 51/2012, it is, inter alia, revealed that after the EIILM University came into existence by the EIILMU Act, 2006. The UGC vide its letter dated 22.7.2008, allowed the University to award degrees, as specified by the UGC, under Section 22 of the UGC Act, 1956, with the approval of the Statutory Council wherever required. The University was allowed to conduct a total of 46 (forty-six) programmes but had been conducting around 74 courses in the Distance Education Mode without any authority from the concerned bodies as enumerated in the Charge-Sheet. Section 10 of the EIILMU Act permitted the University to conduct the programmes as listed in the Charge-Sheet subject to approval from the concerned national accreditation bodies, the University, however, obtained approval only from the Distance Education Council which allowed it to conduct three courses being B.A. (Hospitality & Tourism), M.B.A. and B.C.A. for the academic session 2009-10. In May 2012, the DEC vide a written communication addressed to the Vice Chancellor of EIILM University, O.B. Vijayan, barred it from conducting any courses in distance mode which it ignored and continued enrolling students. The DEC in August 2008 decided not to grant permission to any Institution to conduct B.Tech./B.E. Programmes in the light of the directives of the Ministry of Human Resource Development, Government of India, this decision would continue till clearance by the All India Council of

Technical Education (for short 'AICTE'). In violation thereof, the EIILM University continued to offer such courses by Distance Education Mode and award degrees for wrongful gains. It also transpired that the EIILM University has 17 national coordinators, each having over 300 admission centres and more than 4000 admission centres functioning all across the country, from where students were being admitted, degrees and diplomas signed and issued by the University authorities even for unauthorised courses. The students who were enrolled thereof were paying large amounts as fees in the belief that their degrees and diplomas were genuine. That, an additional category Collaborative Industry Based Education (CIBE) was being offered by the EIILM University in collaboration with National Centre for Internship Studies (NICS), thereby luring students into programmes without approval of any accreditation bodies. The investigation further revealed that the study material for the courses, the conduct of examination, checking of question papers, issue of mark sheets, degrees was all done by the University but the University had failed to comply with any of the directions/requirements of the AICTE, UGC and other national accreditation bodies which are essential pre-requisites for providing quality education to students. It was also found that the faculty members for the teaching courses were short of the requirement. Investigation also brought to light that Malvika Trust was set up by late Kulwant Rai, father of Vinay Rai and the Trust is the Sponsoring Body of EIILM University, Kolkata and consequently became the Sponsoring Body of the EIILM University, Sikkim. Along with Malvika Foundation, Rai Foundation and Integrated Institute of Excellence Society was set up by late Kulwant Rai along with his son, Vinay Rai. Funds collected from students of EIILM University have been transferred to the account of the Rai Foundation and huge sums of money were removed from the account of EIILM University into the accounts of Integrated Institute of Excellence Society, Rai Tech and Rai Business School. Money was also directly put into the account of the Petitioner from Rai Foundation (Annexure C-7). There is a common thread between all the Trusts i.e. Malvika Trust, Rai Foundation and Rai Business School, which were all started by late Kulwant Rai with his family members as Trustees, while the Petitioner is the founding Member/Trustee of Rai Foundation and the Founder and Chairman of Malvika Trust, apart from which the Sections 161 and 164 Cr.P.C. statement of witnesses' fortify the Prosecution case. Thus, it was found that on the basis of the circumstantial facts and material evidence, prima facie case under Sections 406/420/467/120B/34 of the IPC existed against the Petitioner.

24. In **Thermax Limited and others vs K.M. Johny and others** (supra) relied on by the Petitioner, the Supreme Court held that in view of the infirmities in

the case and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safe guard the rights of the appellants. The order passed by the Judicial Magistrate 1st Class, Pimpri on 20.8.2007 and the Judgment of the High Court dated 11.1.2008 in the Criminal Writ Petition were set aside. It would be necessary to point out that in the said matter the Respondent No.1/ Complainant had stated that he had carried out several fabrication jobs for the Accused/Appellant and a sum of Rs.91,95,054/- (Rupees ninety-one lakhs, ninety-five thousand and fifty-four) only, was outstanding from the Appellant. In spite of several requests of the Complainant, the Accused being influential, no cognizance was taken of the complaints lodged by the Complainant. The learned Magistrate called for a report under Section 156(3) of the Cr.P.C. from the Crime Branch, Pune. In appeal by the Appellant Company, the High Court remitted it back to the Magistrate for reconsideration of the entire prayer made by the Complainant and to pass fresh orders after giving adequate opportunity of hearing to both sides and to decide afresh the application seeking direction under Section 156(3) of the Cr.P.C. by giving cogent reasons for such conclusion. Pursuant thereto, an application filed under Section 91 of the Cr.P.C. by the Appellant Company was rejected, order which was upheld by the High Court. The Hon'ble Apex Court after analysing a catena of cases for the purpose and the provisions of Sections 405, 406, 420 and 34 of the IPC, came to the conclusion that the principles enunciated from the decisions quoted, clearly show that for proceeding under Section 156(3) of the Cr.P.C., the complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34 of the IPC. That, if there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding and if there is a huge delay, criminal proceedings cannot be resorted to in order to avoid the period of limitation. The Court also arrived at a finding that the Respondent No.1 had roped all the Appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the Appellant Company by initiating criminal prosecution. That, the Appellants 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial personnel of Appellant No.1 Company, who do not have any personal role in the allegations and claims of Respondent No.1, neither were there specific allegations with regard to their role. Thus, the Respondent No.1 was trying to circumvent the jurisdiction of the Civil Court which estopped him from proceeding on account of the Law of Limitation, hence the above orders. The facts of the case at hand are clearly distinguishable, the matter does not comprise only of civil wrongs, neither are the ingredients of criminal offences found wanting, requiring exercise of powers under Section 482 of the Cr.P.C.

25. Now addressing the argument of the Petitioner pertaining to cognizance and absence of application of judicial mind, I deem it essential to refer to the Order of this Court in I.A. No. 1 of 2016 arising out of Crl. M.C. No. 20 of 2014, dated 19.8.2016, wherein the Petitioner had prayed that the matter be remanded back to the learned Magistrate with a direction to issue a speaking and reasoned order while taking cognizance, if any, duly affording the Petitioner an opportunity of making submissions before cognizance and that liberty be granted to the Petitioner to urge all other pleas raised in Crl. M.C. No. 20 of 2014, before the learned Magistrate at the time of hearing on cognizance. This Court rejecting the Petition concluded as follows;

> "10. Thus, it does not involve any formal action, but occurs as soon as the Magistrate applies his mind to the suspected commission of the offence. The Court at that stage is not required to undertake an elaborate enquiry neither is he required to mention the documents which he took into consideration for satisfying himself to take cognizance. Although it has been argued by Counsel for the Petitioner that the matter be remanded back to the Magistrate for passing a speaking order duly allowing the Petitioner to present his case, in my considered opinion, this is a concept alien to the Cr.P.C. and is not tenable since Section 190 of the Cr.P.C. nowhere envisages such license to the Petitioner. The Section is confined to the duty of a Magistrate and cannot be expanded to allow the Petitioner to make any submissions at this stage. The Petitioner shall be given ample opportunity to make any submissions at the stage of hearing on Charge."

In this context, we may also notice the decisions of the Hon'ble Apex Court.

26. In **Bhushan Kumar and Another vs. State (NCT of Delhi) and Another**[13] , the Hon'ble Supreme Court held as follows;

> "11. In Chief Enforcement Officer v. Videocon International Ltd. [(2008)2 SCC 492] (SCC p.499, para 19) the expression "cognizance" was explained by this

[13] (2012) 5 SCC 424

Court as "it merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone." It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code."

27. In **Sushil Bharti Mittal vs. Central Bureau of Investigation** (supra), the Hon'ble Supreme Court observed as follows;

> "42. .....
>
> Sine Qua Non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the Court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not."

It is evident that the Charge-Sheet was perused by the Magistrate who then took cognizance of the matter. It cannot be said that there was no application of judicial mind. This point has in fact been elaborately discussed in the Order of this Court in I.A. No. 1 of 2016 arising out of Crl. M. C. No. 20 of 2014, mentioned supra.

28. So far as the arguments on statements under 161 Cr.P.C. is concerned, in the first instance, it may be pointed out that Section 161 Cr.P.C. deals with examination of witnesses by the Police, where any police officer making an investigation examines any person who is supposed to be acquainted with the facts and circumstances of a case. The provision authorises the police officer to reduce in writing such statement made by a witness. At the same time there is no obligation on the part of the accused person to make any statement to the police. The fundamental principle of procedural law is that a statement under Section 161 Cr.P.C. cannot be considered as substantive evidence, this is to be used for confronting the witness to impeach his credibility. Should the witness make contradictory statements, then a suspicion can arise against the witnesses' credibility. In **Ashok Tshering Bhutia vs. State of Sikkim** (supra) relied on by the Petitioner, the Hon'ble Apex Court held that any information or statement made before the investigating officer under Section 161 Cr.P.C., requires corroboration by sufficient evidence. In the absence of any corroboration thereof it would merely be a case where some witnesses had stated a particular fact before the investigating officer and the same remained inadmissible in law, in view of the provisions of Section 162. In **Baldev Singh vs. State of Punjab**[14], it was held that the statement recorded under Section 161 of the Cr.P.C. shall not be used for any purpose except to contradict a witness in the manner prescribed in the proviso to Section 162 (1). Addressing the arguments concerning statements recorded under Section 164 of the Cr.P.C., such statements or confessions can never be used as substantive evidence but may be utilised for contradiction or corroboration of the witness who made it. In the case at hand, in light of the above discussions, as the statements under Sections 161 and 164 of the Cr.P.C. have not been tested as required under the law as elaborated hereinabove, therefore this argument of the Petitioner is not tenable being premature.

29. Urging that there is no concept of vicarious liability in criminal law, learned Counsel for the Petitioner relied on **Sunil Bharti Mittal vs. Central Bureau of Investigation** (supra). The matter therein arose as the Appellants were issued summons by the Special Judge, although their names did not figure in the Charge-Sheet. The learned Magistrate after examining the file pertaining to the matter reached the following finding;

[14] (1990) 4 SCC 692

"....

4. I also find at the relevant time, Shri Sunil Bharti Mittal was Chairman-cum Managing Director of Bharti Cellular Limited, Sh. Asim Ghosh was Managing Director of Hutchison Max Telecom (P) Limited and Sh. Ravi Ruia was a Director in Sterling Cellular Limited, who used to chair the meetings of its Board. In that capacity, they were/ are prima facie, in control of affairs of the respective companies. As such, they represent the directing mind and will of each company and their state of mind is the state of mind of the companies. ..... Consequently, I find enough material on record to proceed against them also. ..... It will also be pertinent to mention here that the appellants were not implicated as accused persons in the Charge-Sheet."

The Hon'ble Supreme Court set aside the order on the ground that the Magistrate had not recorded his satisfaction by mentioning the role played by the Appellants which would bring them within the criminal net. The facts in the said matter and the case at hand are clearly distinguishable inasmuch as the Petitioner's name appears in the Charge-Sheet and his role therein has already been reflected hereinabove.

30. Reliance was also placed on **State (Government of NCT of Delhi) vs. Nitin Gunwant Shah**[15] to establish that to prove conspiracy it must be borne in mind that meeting of mind is essential and mere knowledge or discussion would not be sufficient. On this count, it may appropriately be pointed out that at this stage, it is not necessary for the learned Trial Court to delve deeply into each ingredient of the provisions under which the accused has been booked.

31. Having carefully examined the facts placed before this Court pertaining to the matter at hand and also having meticulously examined all documents on record, I am of the considered opinion that there are sufficient prima facie materials to proceed against the petitioner, as it is apparent that there is a predominance of criminality in the acts of the Petitioner which cannot be categorised as essentially of a civil nature, although civil wrongs cannot be ruled out. Thus, it does not call for the exercise of the powers under Section 482 of the Cr.P.C. by this Court.

32. The Criminal Miscellaneous Petitions are liable to be and are accordingly dismissed.

33. No order as to cost(s).

[15] 2016 II AD (CRI.) (SC) 1

SLR (2017) SIKKIM 221

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

CRP No. 05 of 2016

Mr. Topden Pintso Bhutia ….. PETITIONER

Versus

Mr. Sonam Plazor Bhutia ….. RESPONDENT

For the Petitioner : Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chettri, Advocate.

For Respondent : Mr. B. Sharma, Senior Advocate with Mr. B. N. Sharma, Advocate for the Respondent.

Date of decision: 17th August 2017

A. Constitution of India – Article 227 – Government of Sikkim Notification No. 385/G dated 11th April 1928 – Notification No. 2947 G dated 22.11.1946 – Transfer of Property Act, 1882 – Ss. 122 and 123 – S. 122 of the TP Act pertains to how a gift deed is to be executed, S. 123 explains how the gift of immovable property must be effected, while the Notification of 1946 lays down how an unregistered document can be validated – TP Act having been extended and enforced in the State of Sikkim on 01.09.1984, validation of a document after 1984 can be allowed in terms of the Notification of 1946 if the requirements of Ss. 122 and 123 of the TP Act are fulfilled. (Para 10)

B. Constitution of India – Article 227 – Government of Sikkim Notification No. 385/G dated 11th April 1928 – Notification No. 2947 G dated 22.11.1946 – Transfer of Property Act, 1882 – Ss. 122 and 123 – Consequence of validation of an unregistered document as per Notification

of 1946 is that, the document is to be admitted in Court to prove title or other matters contained in the document – Document ought to have been correctly executed under the relevant provisions of law, which consequently allows its admission as evidence after the validation – By ordering validation of Exhibit-A, this Court would be implying that the document is legally sufficient and binding, which is not the correct position herein as the document falls short of the legal requirements – It is not every document that has not been registered which can be validated by the Order of the Court, but only those documents which bear compliance to the legal provisions. (Para 12)

Petition dismissed.

Chronological list of cases cited:

1. Kul Bahadur Gurung and Others v. GajendraGurung and Others, AIR 2007 Sikkim 23

ORDER (ORAL)

Meenakshi Madan Rai, J

1. This Petition under Article 227 of the Constitution of India, filed by the Petitioner, impugns the Order dated 20-07-2016, passed by the Learned Civil Judge (South), South Sikkim, at Namchi, in Title Suit Case No.09 of 2014, whereby the Learned Trial Court rejected the prayer of the Petitioner herein, to validate the document dated 21-12-2001, Exhibit 'A', in terms of the Notification No.2947 G, dated 22-11-1946.

2. Assailing the said Order, Learned Senior Counsel for the Petitioner expostulates that, the said Order suffers from irregularity and illegality as the Learned Trial Court has taken recourse to the provisions of the Transfer of Property Act, 1882 (for short "TPA"), to reject the Petition for validation, when the TPA had not been enforced in the State of Sikkim at the time of publication of the Notification of 1946. In this situation, the requirements and intricacies of various provisions of the TPA and particularly Sections 122 and 123 of the TPA, relating to gift are not a requirement for application of Notification No.385/G, dated 11-04-1928 (hereinafter 'Notification of 1928') of which Para 2 has been amended by Notification No.2947 G, dated 22-11-1946 (hereinafter 'Notification of 1946'), promulgated by the Maharaja of Sikkim. That, Notification of 1946 clearly provides that, an unregistered document (which ought in the opinion of the Court to have

been registered) may, however, be validated and admitted in Court to prove title or other matters contained in the document, on payment of penalty up to fifty times the usual registration fee. That, on the face of the said provision, the validation of Exhibit 'A' ought to have been allowed. It is his further contention that after validation the document may be admitted in Court to prove the title or other matters contained in the document, as laid down in Notification of 1946. That, at this stage, the Court cannot look into the contents of the document or the merits of the case, but has only to allow the document to be validated. Taking this Court through the Judgment in **Kul Bahadur Gurung and Others vs. Gajendra Gurung and Others**[1], it was urged that the judgment lays down that any unregistered document cannot be excluded from the purview of the Notification of 1946 on the ground that it does not answer the description of sale deed, and includes every unregistered document effecting immovable property, thereby covering the instant case.

3. It was vehemently canvassed that the Notification of 1946 does not refer to any particular document, such as, gift or sale, but merely addresses an unregistered document, to prove title or other matters contained in the document. The option thereafter lies with the party who seeks validation of the document to get the same legally admitted in evidence, however, such validation does not change the value, nature and character of the document. The Learned Trial Court is empowered to give findings on the validity and admissibility of the document while deciding the case finally on merits. Hence, the impugned Order be set aside and the document be allowed to be validated and admitted in evidence, in terms of the Notification of 1946.

4. The vociferous contra contention raised by Learned Senior Counsel for the Respondent is that, the document relied on by the Petitioner would reveal that the land in question infact belonged to his mother, one Lakik Bhutia, but Exhibit 'A' was signed by the father, who gifted away the property. He is not competent to sign the document or gift the property as he is not the owner of the property in question. Secondly, Exhibit 'A' is only a declaration and not a deed, thus, the prayer seeking its validation is not tenable. In the third leg of his argument it was expostulated that the document does not comply with the provisions of Sections 122 and 123 of the TPA, the document having been executed on 21-12-2001, after the extension and enforcement of the TPA to the State of Sikkim on 01- 09-1984. It was also further urged that the Respondent denies the signature appearing on the document as that of his father and should the document be allowed validation, it will tantamount to validation of the contested signature, thereby giving the Petitioner

[1] AIR2007 Sikkim23

a handle to put forth the claim that contested signatures appearing on other documents, relied on by him are genuine, hence, the Petition being without merit deserves no consideration and ought to be dismissed.

5. I have heard Learned Counsel for the parties at length and given due consideration to their submissions. I have also perused the records of the case, the contested document as also the impugned Order of the Learned Trial Court, the Notification of 1928 and of 1946 and the relevant provisions of Law.

6. A glimpse of the facts in dispute are necessary for appreciation of the matter at hand. The Petitioner herein is the Defendant, while the Respondent herein is the Plaintiff, before the Learned Trial Court (hereinafter 'Plaintiff' and 'Defendant'). The Plaintiff and the Defendant are blood brothers, the Defendant being the Plaintiff's elder brother. The Plaintiff laid claim to the suit land alleging that his mother, Lakik Bhutia, had verbally gifted him the property in the year 1980. Lakik Bhutia passed away in the year 2008. The Plaintiff claims possession of the suit land since 1980, to the exclusion of his other siblings. After his mother's demise, he approached the Office of the Sub-Divisional Magistrate, Ravangla, South Sikkim, for mutation of the suit property in his name. This was objected to by the Defendant, inter alia, on the ground that, vide a document dated 21-12-2001 (marked as Exhibit 'A'), executed by his father, Late Nim Tenzing Bhutia, allegedly in the presence of the Defendant and his brothers, the suit property was infact gifted to him. It is this document, Exhibit 'A', dated 21-12- 2001, that the Defendant seeks to validate on the basis of the aforesaid Notification.

7. It needs no deep rumination to assess that the Notifications of 1928 and 1946 relied on by Learned Senior Counsel for the Petitioner and Sections 122 and 123 of the TPA pertain to completely different matters. In order to examine the matter in its correct perspective, it is apposite to consider the provisions of Section 122 of the TPA, which defines 'gift' and reads as follows;

> **"122. "Gift" defined.** "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.
>
> **Acceptance when to be made.**—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

8. On the heels of Section 122 of the TPA is Section 123 of the TPA, which delineates how transfer of the gift is to be effected and provides the following;

> **"123. Transfer how effected.**—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.
>
> For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.
>
> Such delivery may be made in the same way as goods sold may be delivered."

9. On the other hand, Notifications of 1928 and 1946 deal with registration of documents and read as follows;

> NOTIFICATION OF 1928
>
> **"SIKKIM STATE GENERAL DEPARTMENT**
>
> Notification No. 385/G;
>
> All Kazis, Thikadars and Managers of Estates.
>
> In continuation of the previous rules on the subject, His Highness the Maharaja of Sikkim is pleased to order that the Law of Registration applicable in the State shall be amended. Notification No. 314 and 2283-36/G., dated the 23rd January, 1907 and 19th July, 1922, respectively shall be read and applied as under :-
>
> "Any document such as mortgage and sale deeds and other important documents and deeds, etc. will not be considered valid unless they are duly registered.
>
> The contents of an unregistered document (which ought in the opinion of the court to have been registered) may be provided in court but a penalty upto fifty times the usual registration fee shall be charged.
>
> Exception :- Handnotes duly stamped shall be exempt from registration penalty."

BY ORDER OF HIS HIGHNESS THE MAHARAJA OF SIKKIM

Gangtok
The 11th April, 1928

Gyaltsen Kazi
General Secretary to
H.H. the Maharaja of Sikkim."

NOTIFICATION OF 1946

"SIKKIM STATE GENERAL DEPARTMENT

Notification No: 2947 G.

Amendment of para 2 of Notification No: 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the court to have been registered) may however be validated and admitted in court to prove title or other matters contained in the document on payment of a penalty upto fifty times the usual registration fee.

Issued by order of H.H. the Maharaja of Sikkim.

Gangtok
The 22nd Nov., 46

T. Tsering
(Offs) General Secretary to
H.H. The Maharaja of Sikkim.

……..**"**

Thus, the Notification of 1946 is relevant for the present purpose.

10. On perusal of the above Laws, it transpires that Section 122 of the TPA pertains to how a gift deed is to be executed, Section 123 of the TPA explains how the gift of Immovable property must be effected, while the Notification of 1946 lays down how an unregistered document can be validated. The purposes of the above Sections and the Notification are specific and the question of the Notification of 1946 being promulgated by the Maharaja of Sikkim and, therefore, inapplicable to the instant situation is a mis-placed argument of Learned Senior Counsel for the Petitioner. True, the Notification is one of 1946 and, therefore, protected under the provisions of Article 371F(k) of the Constitution of India, which commences with a non obstante clause; but this is not the contest at hand, which pivots around the contention as to whether Exhibit 'A' ought to be validated. The Notification of 1946 allows an unregistered document, which the Court is of

the opinion ought to have been registered, to be validated on payment of penalty up to fifty times the usual registration fee and the contents thereof to be admitted in Court, to prove title or other matters, borne in the document. This being the situation, I am of the considered opinion that the document sought to be validated, being bereft only of registration, ought in substance, to be compliant of the provisions of Section 122 and Section 123 of the TPA, the said Act having been extended and enforced in the State of Sikkim on 01-09-1984, prior to Exhibit 'A', which was executed on 21-12-2001. This Court is conscious that a document need not adhere to a specific format, in other words, substance and not the form of a document is relevant, but a glance at Exhibit 'A' clearly indicates that it does not conform to the legal mandate. Consequently, the Court cannot perpetuate any irregularity or for that matter illegality, sans compliance of provisions of Law. It goes without saying that the provisions of Sections 122 and 123 of the TPA go hand in hand with Notification of 1946 and are not at cross purposes. Validation of a document after 1984 can be allowed in terms of the Notification of 1946, if the requirements of Sections 122 of the TPA are fulfilled, but that of Section 123 of the TPA remains incomplete, on account of nonregistration of the document. Although it was contended that this Court in **Kul Bahadur Gurung**[1] had held as follows;

> **"23.** ……. This goes to show that the expression 'unregistered documents' is wide enough to include every unregistered document effecting immovable property. Therefore, the plain language employed in the Notification makes it amply clear that an unregistered document cannot be excluded from the purview of the Notification on the ground that it does not answer the description of sale deed, as contended by the learned Counsel for the Respondents. Therefore, this contention raised by the learned counsel for the respondent also deserves to be rejected.**"**

11. But, it is evident from the judgment supra that the document in question therein had been validly executed. In other words, the document had in substance complied with the provisions of Law, although not in form and had remained unregistered due to the death of the seller soon after execution of the sale deed in the year 1968. The case at hand is undoubtedly distinguishable from the afore cited ratio, lacking, as already stated, in the necessary requisites of Section 122 and Section 123 of the TPA. Besides the authenticity of the signature alleged to be of the Defendant's father is contested by the Plaintiff.

12. The consequence of validation of the unregistered document as per the Notification of 1946 is that, the document is to be admitted in Court to prove title or other matters contained in the document. This points to the inevitable conclusion that the document ought to have been correctly executed under relevant provisions of Law, which consequently allows its admission as evidence, subsequent to the validation. 'Valid' as per Bryan A. Garner Black's Law Dictionary, Eighth Edition, 2nd Reprint – 2007, means "legally sufficient or binding". By ordering validation of Exhibit 'A', this Court would be implying that the document is legally sufficient and binding which is not the correct position herein as the document falls short of the legal requirements. That apart, no Court has opined that the document ought to be registered, which is a prerequisite under the Notification of 1946. Thus, it is not every document that has not been registered which can be validated by the Order of the Court, but only those documents which bear compliance to the legal provisions.

13. In the said circumstances, I find that the impugned Order of the Learned Trial Court brooks no interference.

14. Consequently, the Petition stands dismissed.

15. The Learned Trial Court shall proceed in the matter as per Law, without being prejudiced by the findings herein, which are not to be construed as a decision on the merits of the Suit, confined as it is to one document.

16. Records of the Learned Trial Court be remitted forthwith along with a copy of this Order.

SLR (2017) SIKKIM 229

(Before Hon'ble the Chief Justice)

Writ Petition (C) No. 40 of 2016

Ms. Anu Haangma Thebey ….. PETITIONER

Versus

Deptt. of Roads & Bridges ….. RESPONDENT

For the Petitioners : Mr. U. P. Sharma, Ms. Tshering Palmoo Bhutia and Ms. Tshering Yangchen Bhutia, Advocates

For Respondent No.1-2 : Mr. Karma Thinlay, Senior Government Advocate with Ms. Pollin Rai, Assistant Government Advocate and Mrs. Sangita Pradhan, Advocate (DOP)

For Respondent No. 3 : Mr. Jiwan Kharka, Advocate

Date of decision: 24th August 2017

ORDER (ORAL)

Satish K. Agnihotri, CJ

1. The application, being I.A. No.2/2017, is filed to take on record the corrigendum dated 29.06.2017 to Notice No. 152/SPSC/Exam/2016 dated 17.08.2016.

2. It is ordered.

3. Mr. U.P. Sharma, learned Counsel for the Petitioners, on instructions, submits that in view of the issuance of corrigendum dated 29.06.2017 to Notice No.152/SPSC/Exam/2016 dated 17.08.2016, the relief, sought for in this petition, does not survive as the same is already granted to the petitioner.

4. Mr. Karma Thinlay, learned Senior Government Advocate, concurs with the submission.

5. Resultantly, nothing survives for adjudication and the petition has become infructuous.

6. Accordingly, the petition is dismissed as having been infructuous. No order as to costs.

SLR (2017) SIKKIM 231

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

Writ Petition (PIL) No. 04 of 2016

Pahalman Subba and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners : Mr. O.P. Bhandari, Advocate.

For Respondent No.1-4 : Mr. A. Mariarputham, Advocate General, Mr. Karma Thinlay, Sr. Govt. Advocate with Mr. Santosh Kr. Chettri, Asstt Govt. Advocate

For Respondent No.5 : Mr. D.K. Siwakoti, Advocate

For Respondent No.6-17 : Mr. Jorgay Namka, Ms. Tashi D. Sherpa and Ms. Panila Theengh, Advocates

For Respondent No.18-19 : Mr. N. Rai, Sr. Advocate with Ms. Tamanna Chhetri, Ms.Malati Sharma and Mr. Suraj Chhetri, Advocates

AND

Writ Petition (C) No. 63 of 2016

Sikkim Krantikari Morcha (A Registered Political Party) through its General Secretary (Legal Cell) and Another ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner : Mr. Raghavendra Kumar, Advocate

For Respondent No.1-3 : Mr. A. Mariarputham, Advocate General, Mr. Karma Thinlay, Sr. Govt. Advocate with Mr. Santosh Kr.Chettri, Asstt Govt. Advocate

For Respondent No.4 : Mr. D.K. Siwakoti, Advocate

For Respondent No.5-16 : Mr. Jorgay Namka, Ms. Tashi D. Sherpa and Ms. Panila Theengh, Advocates

For Respondent No.17-18 : Mr. N. Rai, Sr. Advocate with Ms. Tamanna Chhetri, Ms.Malati Sharma and Mr. Suraj Chhetri, Advocates

Date of decision: 25th August 2017

A. Constitution of India - Art. 141 - It is explicit that the question of law as to whether the State Legislature has legislative competence to make an Act, which authorize the Chief Minister to appointment Parliamentary Secretaries and further assigning the duties and responsibilities to assist the Cabinet Ministers is well settled in Bimolangshu Roy (Dead) (Para 14)

B. Constitution of India - Art. 141 - Law declared by Supreme Court is binding on all Courts - Observation made by the Supreme Court in various cases affirm the proposition that ratio decidendi of a judgement which constitutes a binding precedent, as the same enuciated on points arising or raised in the case directly has a precedential value - Held, as such, the ratio decidendi laid down by the Supreme Court in Bimolangshu Roy (Dead) is binding on this Court. (Para 15)

C. Constitution of India - Art. 164 (1A) - Whether appointment of the Parliamentary Secretaries infringes the provisions of Article 164 (1A) of the Constitution - The source of authority to make legislation emanates from Article 246 of the Constitution in respect of all the matters enumerated in each of the three lists contained in Seventh Schedule - Entries in the various lists of the Seventh Schedule are not sources of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate - It is evidently plain and clear that the Entries setting out the field of legislation therein do not comtemplate creation of

posts of Parliamentary Secretaries - Article 164 (1) provides for the appointment of the Ministers by the Governor on the advice of the Chief Minister. In the case on hand, the Parliamentary Secretaries were appointment as Ministers of State and became a part of Council of Ministers without there being any appointment by the Governor, as required - Parliamentary Secretaries, partaking character of Ministers is manifestly impermissible in the light of mandate enshrined under Article 164 (1A) of the Consititution and is unconstitutional - Is a pretence to circumvent the provisions of constitutional provision, as incorporated in the Constitution of India by ninety-first amendment - The issue of the constitutionality of the impugned Act is squarely covered by the judicial pronouncement made by the Supreme Court in Bimolangshu Roy (Dead).

(Paras 18, 22, 23, 28, 30 and 31)

D. Constitution of India - Art. 192 - Disqualification of MLA - Held, question as to the disqualification of a Member shall be referred to the decision of the Governor and the decision shall be final.

(Para 33)

E. Constitution of India - Art. 164 (1A) - Appointment of Parliamentary Secretaries - Held, the impugned Act and other consequential notification deserve to be quashed. The Parliamentary Secretaries, so appointed under the Act shall cease to function as Parliamentary Secretaries and shall also cease to draw and avail salaries, allowances, perks, etc. as admissible under the Act forthwith - As a sequel, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneus Provisions) Act, 2010 and consequential notifications are declared as unconstitutional and, accordingly, quashed. (Paras 32 and 34)

Petitions allowed.

Chronological list of cases cited :

1. Bimolangshu Roy (Dead) through LRs v. State of Assam and Another, 2017 SCC online SC 813
2. Union of India and others v. Kantilal Hematram Pandya, (1995) 3 SCC 17
3. Jagmohan Singh Bhatti v. Union of India and Others, etc., (2016) 184 PLR 110

4. Vishak Bhattacharya v. The State of West Bengal and Others, W.P. 7326 (W) of 2013 and W.P. 8321 (W) of 2013

5. Harakchand Ratanchand Banthia and others v. Union of India and Others, 1969 (2) SCC 166

6. Union of India v. Shri Harbhajan Singh Dhillon, 1971 (2) SCC 779

7. Synthetics and Chemicals Ltd. and Others v. State of U.P. and Ohters, (1990) 1 SCC 109

8. Southern Pharmaceuticals and Chemicals, Trichur and Others v. State of Kerala and Others, (1981) 4 SCC 391

JUDGMENT

Satish K. Agnihotri, CJ

1. W.P. (PIL) No. 04 of 2016 (hereinafter referred to as "the first petition") is filed by public spirited persons, in the nature of Public Interest Litigation, questioning the legality and constitutionality of the Sikkim State Legislators' Appointment to Different Authorities Act, 2006 (hereinafter referred to as "the Act of 2006"), Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 (hereinafter referred to as "the impugned Act") and further extension of status of Cabinet Minister and the Minister of State with facilities and privileges to the Chief Whip. Subsequently, the provision of Section 3A(bb) of the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006, by way of amendment of the petition, was also challenged. The petitioners have further prayed for quashment of consequential notifications and also a declaration disqualifying the sixth to nineteenth respondents from being members of the Sikkim Legislative Assembly, on the ground of holding office of profit.

2. W.P. (C) No. 63 of 2016 (hereinafter referred to as "the second petition") was filed by Sikkim Krantikari Morcha, a political outfit, seeking reliefs on similar terms, questioning the validity of various statutory provisions, as stated hereinabove, during the currency of the first petition.

3. Both the writ petitions involve a common question of law, and as such are being considered jointly and disposed of by this common order.

4. The High Court, on preliminary examination, framed the following questions of law in the first petition on 29th August 2016: -

> "(i) whether the Parliamentary Secretaries appointed under provisions of the Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 (for short "the Act of 2010"), are holding office of profit;
>
> (ii) if the answer of the first question is affirmative, whether they have incurred disqualification as Legislature under provisions of Article 191(a) of the Constitution of India;
>
> (iii) whether the Act of 2010 providing for appointment of Parliamentary Secretary is violative of the provisions of Article 102 read with Article 191 of the Constitution of India and Section 9 of the Representation of the People Act, 1951; and
>
> (iv) Whether 'Explanation' to the provisions of Article 102 with Article 191 of the Constitution of India may be expanded by the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006."

5. In the meantime, the Supreme Court examined an identical issue in **Bimolangshu Roy (Dead) through LRs vs. State of Assam and Another**[1] , on 26th July 2017, wherein the question involved was the constitutional validity of Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2004 (hereinafter referred to as "the Assam Act") and held as under: -

> "54. Thus, it can be seen from the scheme of Article 194 that it does not expressly authorize the State Legislature to create offices such as the one in question. On the other hand, Article 178 speaks about the offices of Speaker and Deputy Speaker. Article 179 deals with the vacation of those offices or resignations of incumbents

[1] 2017 SCC online SC 813

of those offices whereas Article 182 and 183 deal with the Chairman and Deputy Chairman of the Legislative Council wherever the Council exists. In our opinion, the most crucial article in this Chapter is Article 187 which makes stipulations even with reference to the secretarial staff of the Legislature. On the face of such elaborate and explicit constitutional arrangement with respect to the Legislature and the various offices connected with the legislature and matters incidental to them to read the authority to create new offices by legislation would be a wholly irrational way of construing the scope of Article 194(3) and Entry 39 of List II. Such a construction would be enabling the legislature to make a law which has no rational connection with the subject matter of the entry. "The powers, privileges and immunities" contemplated by Article 194(3) and Entry 39 are those of the legislators qua legislators.

55. For the above-mentioned reasons, we are of the opinion that the Legislature of Assam lacks the competence to make the impugned Act. In view of the above conclusion, we do not see it necessary to examine the various other issues identified by us earlier in this judgment. The Writ Petition is allowed. The impugned Act is declared unconstitutional."

6. Resultantly, it was held that the State Legislature is not competent to make an Act for appointment of Parliamentary Secretaries circumventing the mandate ordained under Article 164 (1A) of the Constitution.

7. At the outset, Mr. O.P. Bhandari, learned counsel appearing for the petitioners in the first petition and Mr. Raghavendra Kumar, learned counsel appearing for the petitioners in the second petition submit that the petitioners be permitted to confine their challenge to the constitutional validity of the Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 only in these petitions, seeking further permission to withdraw the challenge to the provisions of other Acts, with liberty to question the same in a different writ petition, at an appropriate stage.

8. Mr. A. Mariarputham, learned Advocate General, Mr. N. Rai, learned Senior Counsel, Mr. Jorgay Namka and Mr. D.K. Siwakoti, Learned counsel appearing for the respondents have no objection, accordingly, the petitioners were permitted to withdraw the challenge on the issue of constitutional validity of the Sikkim State Legislators' Appointment to Different Authorities Act, 2006, extension of status of Cabinet Minister and the Minister of State with facilities and privileges to the Chief Whip, and the provision of Section 3A(bb) of the Sikkim Legislative Assembly Members (Removal of Disqualifications) Amendment Act, 2006 and also the consequential notifications, reserving liberty to the petitioners to agitate the same, if so advised, afresh in accordance with law.

9. Mr. O.P. Bhandari, learned counsel appearing for the petitioners in the first petition would contend that the State Legislature by an enactment of the impugned Act has overreached the Parliament to defeat the mandate as enshrined in Article 164 (1A) of the Constitution. It is further contended that the Parliamentary Secretaries are not only granted the salary and perks of a Minister, but also assigned departments to discharge the duties and functions of Ministers, as is evident from the notifications dated 28th May 2014 (Annexure P-5), 30th November 2015 (Annexure P-10) appointing the 7th to 17th respondents as Parliamentary Secretaries and other consequential notifications, dated 30th November 2015 (Annexure P-8) and 30th April 2016 (Annexure P-11).

10. Referring to the judicial pronouncement made by the Supreme Court in **Bimolangshu Roy (Dead)**[1] , Mr. Bhandari would contend that the validity of the appointment of Parliamentary Secretaries stand settled on declaration of law by the Supreme Court holding that the State Legislature lack competence to make such an enactment for appointment of Parliamentary Secretaries to assist the Ministers to discharge the duties and responsibilities of a member of the Cabinet, thus, the impugned Act deserves to be quashed.

11. Mr. Bhandari would further contend that the 7th to 17th respondents in the first petition, who were appointed as Parliamentary Secretaries have become disqualified even to continue as Members of Legislative Assembly on the ground of holding the office of profit, which is prescribed under Article 191 of the Constitution of India and as such the direction to the same effect be passed.

12. Mr. Raghavendra Kumar, learned counsel appearing for the petitioners in second petition adopts the argument put forth by Mr. Bhandari and submits that the impugned Act deserves to be quashed with an order to quash the consequential notifications granting status, salary, allowance and perks to the said respondents.

13. Mr. A. Mariarputham, learned Advocate General appearing for the State-respondents, in all fairness, submitted that the law in respect of legality and validity of the enactment and also appointment of Parliamentary Secretaries stands settled by the judicial pronouncement of the Supreme Court and as such the State-respondents have nothing much to argue on the issue. The other respondents have also not contested the issue.

14. On consideration and examination of the submissions put forth by the learned counsel as well as on perusal of the pleadings and documents appended thereto, it is explicit that the question of law as to whether the State Legislature has legislative competence to make an Act, which authorize the Chief Minister to appointment Parliamentary Secretaries and further assigning the duties and responsibilities to assist the Cabinet Ministers is well settled in **Bimolangshu Roy (Dead)[1].**

15. Article 141 of the Constitution of India mandates that the law declared by Supreme Court is binding on all courts. The observation made by the Supreme Court in various cases affirm the proposition that ratio decidendi of a judgment which constitutes a binding precedent, as the same enunciated on points arising or raised in the case directly has a precedential value. As such, the ratio decidendi laid down by the Supreme Court in **Bimolangshu Roy (Dead)[1]** is binding on this Court.

16. The Supreme Court in **Union of India and others vs. Kantilal Hematram Pandya[2]**, held as under: -

> "6. ..... The approach of the Tribunal is patently objectionable and does not commend to us. It attempted to circumvent the law laid down by this Court on untenable reasons by stating that "we are required to consider the case on merits" without in fact so considering. The law laid down by this Court is binding on all courts and tribunals. Indeed, the law as declared by this court has to be applied to the facts of a given case and not applied mechanically but we find that in the present case the facts were so eloquent that no scope was available with the Tribunal to get over the opinion expressed by this Court in Harnam Singh case [(1993) 2 SCC 162] and on

[2] (1995) 3 SCC 17

the facts as established on the record the Tribunal had no option but to refuse relief to the respondent."

17. The State Legislature enacted the impugned Act, namely, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 and received the assent of the Governor on 16th September 2010, thereafter, the impugned Act was published in the Sikkim Extraordinary Government Gazette dated 27th September 2010. Section 2 (c) of the Act defines "Parliamentary Secretary" as under:

> "2(c) "Parliamentary Secretary" means a Political functionary as may be appointed by the Chief Minister for one or more departments and to assist the Minister concerned of such department or departments in effective disposal of the government business, pertaining thereto, or as may be decided by the Chief Minister."

Section 3 empowers the Chief Minister to appoint Parliamentary Secretaries and assign to each of them such duties and functions as he may deem fit and proper. Section 4 contemplates granting of rank and status of a Minister of State to the Parliamentary Secretary and also confers power to discharge such functions and duties as assigned by the Chief Minister. Section 5 is in the same term. Section 6 provides for administration of oath by the Chief Minister. Section 7 provides for grant of salary and allowances as are admissible to a Minister of State. Section 8 provides that a Parliamentary Secretary shall not draw salary and allowances as a Member of the Sikkim Legislative Assembly, while drawing salary and allowances for the office as Parliamentary Secretary. Section 10 provides that all other conditions of service of a Parliamentary Secretary shall be governed by the Sikkim Ministers, Speaker, Deputy Speaker and Members of Sikkim Legislative Assembly (Salaries and Allowances) Act, 1977. Except administration of oath, duties, functions, salaries and allowances are at par with the State Ministers.

18. The issue as to whether appointment of the Parliamentary Secretaries infringes the provisions of Article 164 (1A) of the Constitution, came up for consideration before various High Courts.

19. A Division Bench of the High Court of Punjab & Haryana in Jagmohan **Singh Bhatti vs. Union of India & Others, etc.**[3], on an identical issue, held as under: -

> "In the light of the above, it is quite evident that :-
>
> (a) The Governor of the State or the legislature has no competence or legislative sanction to frame rules regulating the conditions of appointment and services of Chief Parliamentary Secretaries and Parliamentary Secretaries for their functioning within the House of the State Assembly. Such posts are not part of regular services of the State under the executive forming part of the bodies involved in the governance of the State;
>
> (b) The services under the State are entirely different from services within the Assembly House. Rules for governing the services under the State or its executive can be made in exercise of powers conferred by the proviso to Article 309 of the Constitution as also under the authority conferred by Entry 41 of List II of the Seventh Schedule of the Constitution, i.e. the State List, which provides for: "State Public Services; State Public Service Commission". These evidently relate to executive services under the State. However, in case a person is working as a Parliamentary Secretary under the State executive, he shall not be disqualified for being a member of the Punjab State Assembly in view of the provisions of the Disqualification Act 1952 which provides that a person shall not be disqualified for being chosen as, and for being, a member of Punjab State Legislature by reason for the fact that he holds the office of Parliamentary Secretary or Parliamentary Under Secretary under the Government of the State of Punjab. The holding of the office of Chief Parliamentary Secretary, therefore, is evidently contemplated under the Government of the State of Punjab and not as a link between the Ministers and the administrative Secretaries

[3] (2016) 184 PLR 110

(c) The provisions of Article 162 of the Constitution relate to the extent of executive power of the State and that the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. The power sought to be derived by the officials respondents is in the context of Article 309 of the Constitution. The 2006 Rules have been framed by the State in exercise of the powers of Article 162 of the Constitution relate to services under the State of the executive and not that of the legislature.

(d) The appointments of Chief Parliamentary Secretaries are contrary to the Constitutional intent of limiting the number of Ministers or the size of the Cabinet. The appointments as made, therefore, are in fact a roundabout way of bypassing the Constitutional mandate of the provisions of Article 164 (1A) of the Constitution and, therefore, have to be invalidated.

For the foregoing reasons, both the writ petitions are allowed and the appointment of the private respondents in both the petitions and their continuing as Chief Parliamentary Secretaries are set aside, invalidated and quashed. There shall, however, be no order as to costs."

20. In **Vishak Bhattacharya vs. The State of West Bengal & Ors.** [4], the constitutionality of the West Bengal Parliamentary Secretaries (Appointment, Salaries, Allowance and Miscellaneous Provision) Act of 2012 came up for consideration in the High Court at Calcutta, the Division Bench held the enactment as unconstitutional.

21. In the case before us, the learned Advocate General and other learned counsel appearing for the parties have emphatically not contested the issued in the light of the judicial pronouncement of the Supreme Court on the issue in **Bimolangshu Roy (Dead)**[1]. The Supreme Court examining the provisions of the Assam Act, held as under:

[4] W.P. 7326 (W) of 2013 and W.P. 8321 (W) of 2013

"21. However, the more accurate legal position is expounded in Union of India & Others v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 at para 6:

> "In view of the rival submissions at the Bar, the question that arises for consideration is whether the impugned legislation can be held to be a law dealing with coordinated development of education system within Entry 66 of List I of the Seventh Schedule or it is a law dealing with the service conditions of an employee under the State Government. The power to legislate is engrafted under Article 246 of the Constitution and the various entries for the three lists of the Seventh Schedule are the "fields of legislation". The different entries being legislative heads are all of enabling character and are designed to define and delimit the respective areas of legislative competence of the Union and the State Legislatures. They neither impose any restrictions on the legislative power nor prescribe any duty for exercise of the legislative power in any particular manner. It has been a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any list it would not be reasonable to import any limitation therein. **The rule of widest construction, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject-matter of an entry. When the vires of enactment is challenged,** the court primarily presumes the constitutionality of the statute by putting the most liberal construction upon the relevant legislative entry so that it may have the

widest amplitude and the substance of the legislation will have to be looked into. **The court sometimes is dutybound to guard against extending the meaning of the words beyond their reasonable connotation in anxiety to preserve the power of the legislature.**

22. The jurisprudential basis for the "rule of widest construction" is the hallowed belief that a Constitution is drafted with an eye on future providing a continuing framework for exercise of governmental power.

Therefore, it must be elastic enough to meet new social, political and historical realities often unimagined by the framers of the Constitution.

23. Chief Justice Marshall's celebrated statement in McCulloch v. Maryland, 17 US 316 (1819) that "… we must never forget that it is a constitution we are expounding" is the starting point. It was a statement made in the context of the interpretation of Article I of the US Constitution which declares the authority of "the Congress" to perform various functions enumerated in sub-sections (1) to (17) of Section 8 and under sub-Section (18) "to make all laws necessary and proper to carrying into execution of the powers vested in the Congress by the preceding 17 sub-sections.".

It is further held as under: -

"28. The authority to make law flows not only from an express grant of power by the Constitution to a legislative body but also by virtue of implications flowing from the context of the Constitution is well settled by the various decisions of the Supreme Court of America in the context of American Constitution. A principle which is too well settled in all the jurisdictions where a written Constitution exists. The US Supreme Court also recognised that the Congress would have the authority to legislate with

reference to certain matters because of the fact that such authority is inherent in the nature of the sovereignty. The doctrine of inherent powers was propounded by Justice Sutherland in the context of the role of the American Government in handling foreign affairs and the limitations thereon. [United States v. Curtiss – Wright Export Corp., 299 U.S. 304, 81 L. Ed. 255]

29. In substance, the power to make the legislation flows from various sources: (1) express text of the Constitution; (2) by implication from the scheme of the Constitution; and (3) as an incident of sovereignty."

22. Indisputably, the source of authority to make legislation emanates from Article 246 of the Constitution in respect of all the matters enumerated in each of the three lists contained in Seventh Schedule.

23. The Supreme Court in several cases have clearly and repeatedly held that the entries in the various lists of the Seventh Schedule are not sources of legislative power but are only indicative of the fields which the appropriate legislature is competent to legislate. It is apposite to refer to observations made by the Supreme Court in various cases.

24. In **Harakchand Ratanchand Banthia and others vs. Union of India and others**[5] , a Constitution Bench of the Supreme Court held as under:

"8. Before construing these entries it is useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and by this Court in the matter of construing the entries. The power to legislate is given to the appropriate Legislatures by Article 246 of the Constitution. The entries in the three lists are only legislative heads or fields of legislation; they demarcate the area over which the appropriate Legislatures can operate. It is wellestablished that the widest amplitude should be given to the language of the entries. But some of the entries in the different lists or in the same list may overlap or may appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring

[5] 1969 (2) SCC 166

about a harmonious construction. ....."

25. In **Union of India vs. Shri Harbhajan Singh Dhillon**[6], the Supreme Court held as under:

"22. It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field. ....."

26. Subsequently, in **Synthetics and Chemicals Ltd. and others vs. State of U.P. and others** [7], again a Constitution Bench observed as under:

"67. ..... It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted as the Constitution must be interpreted as an organic document in the light of the experience gathered. In the constitutional scheme of division of powers under the legislative lists, there are separate entries pertaining to taxation and other laws. ....."

27. It is a trite law that the true nature and character of legislation is determined

[6] 1971 (2) SCC 779
[7] (1990) 1 SCC 109

to which Entry it belongs, in its pith and substance. The Supreme Court in **Southern Pharmaceuticals and Chemicals, Trichur and others v. State of Kerala and others**[8] observed as under: -

> "13. In determining whether an enactment is a legislation "with respect to" a given power, what is relevant is not the consequences of the enactment on the subject-matter or whether it affects it, but whether, in its pith and substance, it is a law upon the subject-matter in question. ....."

28. Gleaning through various entries in List-II of the Seventh Schedule (State List), it is luculent that the creation of post of Parliamentary Secretary is seemingly referable to Entries 37, 39 and 40 of the List-II. On critical examination, it is evidently plain and clear that the Entries setting out the field of legislation therein do not contemplate creation of posts of Parliamentary Secretaries. The post of Parliamentary Secretaries are clothed with the insignia of Ministers with their duties and functions, which is subject to the limitation prescribed under Article 164 (1A) of the Constitution of India. In case of Sikkim, the maximum number of Council of Ministers cannot exceed twelve.

29. Article 164(1A) was incorporated in the Constitution by the Constitution (Ninety-first Amendment) Act, 2003 with effect from 01st January 2004 restricting the number of Ministers in the Council of Ministers, which reads as under :

> "(1A) The total number of Ministers, including the Chief Minister, in the Council of Ministers in a State shall not exceed fifteen per cent. of the total number of members of the Legislative Assembly of that State:
>
> Provided that the number of Ministers, including the Chief Minister in a State shall not be less than twelve:
>
> Provided further that where the total number of Ministers including the Chief Minister in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent. or the number specified in the first proviso, as the case may be, then the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date (7th January, 2004) as the President may by public notification appoint."

[8] (1981) 4 SCC 391

30. Article 164 (1) provides for the appointment of the Ministers by the Governor on the advice of the Chief Minister. In the case on hand, the Parliamentary Secretaries were appointed as Ministers of State and became a part of Council of Ministers without there being any appointment by the Governor, as required.

31. The Rules of Procedure and Conduct of Business in Lok Sabha while defining the term 'Minister' states that it means a Member of the Council of Ministers and includes a member of the Cabinet Minister of State or Deputy Minister or a 'Parliamentary Secretary'. Likewise, Rule 2 of the Rules of Procedure and Conduct of Business in the Sikkim Legislative Assembly defines "Minister" means a member of the Council of Ministers, a Minister of State or a Deputy Minister and "Member" means a Member of the Sikkim Legislative Assembly. Examining the provisions of the impugned Act as well as subsequent notifications to give effect thereto, it is apparent that the Parliamentary Secretaries are privy to official information, all of them having access to official files, official documents in the course of decision making process by the Council of Ministers, and discharge the duties and functions assigned to the Ministers. As aforestated, the Parliamentary Secretaries, partaking character of Ministers is manifestly impermissible in the light of mandate enshrined under Article 164(1A) of the Constitution and is unconstitutional. The appointment of Parliamentary Secretaries under the impugned Act is a pretence to circumvent the provisions of constitutional provision, as incorporated in the Constitution of India by Ninetyfirst amendment. Moreover, the Supreme Court has held in **Bimolangshu Roy (Dead)**[1] that the State Legislature lacks the competence to appoint Parliamentary Secretaries. In such view of the matter, without examining further in detail, which is not contended by either parties, we are of the considered view that the issue of the constitutionality of the impugned Act is squarely covered by the judicial pronouncement made by the Supreme Court in **Bimolangshu Roy (Dead)**[1].

32. Accordingly, the impugned Act and other consequential notifications deserve to be quashed. The Parliamentary Secretaries, so appointed under the Act shall cease to function as Parliamentary Secretaries and shall also cease to draw and avail salaries, allowances, perks, etc. as admissible under the Act forthwith.

33. A feeble attempt is made by the learned counsel appearing for the petitioners to submit that on account of quashing of aforestated impugned Act, the respondents, who are Members of the Legislative Assembly, be declared as disqualified to continue as members. Article 192 of the Constitution mandates that the question as to the disqualification of a Member shall be referred to the decision of the Governor and the decision shall be final. In such view of the matter, we are not inclined to pass any order on the issue.

34. As a sequel, Sikkim Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2010 and consequential notifications are declared as unconstitutional and, accordingly, quashed.

35. In view of the aforestated backdrop, we are not inclined to examine the other issues, which are not necessary at this stage, for the fact that the petitioners have withdrawn the challenge in the instant petition

36. The petitions are allowed. No order as to costs.

SLR (2017) SIKKIM 249

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

Crl. A. No. 18 of 2016

Shri Rabin Burman ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner : Mr. Sonam Palden Bhutia, Advocate.

For Respondent : Mr. Karma ThinlayNamgyal, Senior Advocate and Additional Public Prosecutor with Ms. Pollin Rai, Assistant Public Prosecutor.

Date of decision: 28th August 2017

A. Code of Criminal Procedure, 1973 – Sentencing – The conviction of the Appellant being for a heinous crime, the deterrence theory as a rationale for punishing the offender becomes relevant and in such cases the role of mercy, forgiveness and compassion become secondary as held by the Apex Court in numerous cases – While determining the quantum of sentence in such cases, the Court has to govern itself by reason and fair play and discretion, and is not to be exercised according to whim and caprice. It is the duty of the Court to impose adequate sentence, for one of the purposes of imposing requisite sentence is protection of society and a legitimate response to the collective conscience. (Para 14)

B. Code of Criminal Procedure, 1973 – S. 31 – Offence of voluntarily causing hurt was in pursuit of the appellant's intent to commit sexual assault – in view of the judgment in *Kaziman Gurung* v. *State of Sikkim, 2017 SCC OnLineSikk 117* and in re: *O.M. Cherian (2015) 2 SCC 501* and *Kuldeep Singh* v. *State of Haryana &Others, Manu/SC/1546/2016*,sentences imposed under S. 8 of the POCSO Act, 2012 and under S. 323, I.P.C is to run 'concurrently' and not 'consecutively'.

(Para 18, 21 and 22)

C. Protection of Children from Sexual Offences Act, 2012 – Ss. 23, 25, 33 and 37 – Purposeful reading of Section 23, 24, 33 and 37 of the POCSO Act, 2012 reflects that the scheme of the POCSO Act provides vital safeguards to ensure protection of the child's reputation and privacy and that the identity of the child is not disclosed during investigation or trial. This is paramount – The role of the Special Court is not only defined but made special for its effective implementation – The Investigating authorities, the media houses and the Courts have a statutory duty to protect this with all their might – The identity of the child not being disclosed is the interest of the child, both as a victim as well as a witness which is sought to be protected by the POCSO Act. This cannot be compromised. (Para 41)

D. Protection of Children from Sexual Offences Act, 2012 – S. 33 – The Special Court must keep in mind that the identity of the child, as clarified in the explanation to Section 33 (7) of the POCSO Act, 2012 does not mean only the name but includes the identity of the family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed – In the age of super speed internet, whatsApp and other messenger applications and social media, information travels as quick as human thoughts – The statutory authorities under the POCSO Act must be guarded that the information of the identity of child with them, if leaked, transmitted or shared against the mandate of the Act may cause irreparable damage to the child's fundamental right as guaranteed by the Constitution as well as his statutory rights to privacy under the POCSO Act and the IPC. The statutory authorities must remember that the duty to protect the identity of a child who is not capable of safeguarding her/his rights is higher on them. (Paras 43 and 49)

E. Protection of Children from Sexual Offences Act, 2012 – The Special Judges manning the Special Courts must keep in mind that the nomenclature "Special Court" has been advisedly used to distinguish it from other Courts by some quality peculiar or out of the ordinary. Similarly, the "Special Public Prosecutor" appointed under Section 32 of the POCSO Act must also be conscious of the fact that they have been specially appointed as "Special Public Prosecutors" under the POCSO Act – The word "special" has to be understood in contradiction to the word "general" or "ordinary". It signifies specialisation – The Special Court constituted under the POCSO Act must necessarily be specialised in the understanding, appreciation

and effective implementation of the Act. Similarly the Special Public Prosecutor must also have adequate specialization in the understanding, appreciation and effective implementation of the POCSO Act. That is the only way in which the mandate of the POCSO Act can be successfully fulfilled. (Para 47)

F. Protection of Children from Sexual Offences Act, 2012 – Child's identity not to be disclosed – All statutory authorities involved in the investigation or trial of the offences under the POCSO Act, 2012 shall bear in mind that the identity of a child is not only the name of a child but includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of a child may be revealed – Police Officer recording an F.I.R relating to an alleged offence on a child shall ensure that the said F.I.R is not made public or uploaded on Police websites or State Government websites in compliance with the direction of the Apex Court in re: *Youth Bar Association of India* v. *Union of India* or any other website – Investigating Officer conducting the investigation of an alleged offence on a child shall ensure that the materials collected during investigation is guarded against disclosure of the identity of a child. Any document or photographs obtained during investigation of the case which would contain the identity of a child shall not be disclosed to the public media or to any person who is not involved in the administration of criminal justice under the POCSO Act, 2012. While issuing copies or certified copies of such documents or photographs to the limited stakeholders, necessary masking of the identity of a child shall be ensured before its issuance – The mandate of S. 23 shall be strictly followed. Any person who contravenes the provisions of sub-section (1) by making any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering the child's reputation or infringing upon his privacy shall be prosecuted for contravention thereof under S. 23 (4). Similarly, if any report in any media discloses the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child, all such persons involved in making such report and disclosure shall be prosecuted for contravention thereof – While recording the statement

of a child as provided under S. 24, the Police Officer shall ensure that the identity of a child is protected from the public media, unless otherwise directed by the Special Court in the interest of a child – While recording such statement of a child, the Police Officer shall ensure that the identity of a child is not disclosed and for the said purpose may use pseudonyms or any other appropriate way in accordance with law to protect the identity of a child – While recording a statement of a child by the Magistrate under S. 25 and in any judicial record thereof the Magistrate shall ensure that the identity of the child is not disclosed and necessary precaution is taken to protect the same. Pseudonyms or any other appropriate way in accordance with law shall be adopted to protect the identity of a child – Special Court shall ensure that the identity of a child is not disclosed at any time during investigation or trial as mandate under S. 33(7) unless for reasons to be recorded in writing the Special Court is of the opinion such disclosure is in the interest of a child – Special Court is required to ensure that the identity of the child shall not be disclosed anywhere on judicial records and that names shall be referred by pseudonyms or in any other appropriate way in accordance with law – For the protection of the child's identity as mandated under the POCSO Act, the Special Court and the Investigating Officer shall restrict the disclosure of information to limited stakeholders and ensure there is controlled access of non-essential persons during investigation or trial. The Special Court must ensure the best interest of the child and act as *parens patriae* for the child – To ensure that the identity of the child is not disclosed during investigation or trial, provisions of S. 40 is to be kept in mind – Such lawyers providing assistance of legal counsel to the child and the Special Public Prosecutors appointed by the State Government for every Special Court shall keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and confidentiality by all means and through all stages of judicial process involving the child.

(Para 52 (1-13))

G. Protection of Children from Sexual Offences Act, 2012 – S. 39 – For the proper and effective implementation of the POCSO Act, 2012 the State Government, if not already done, shall prepare guidelines for use of non-governmental organisations, professionals

and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

(Para 52 (14))

H. Protection of Children from Sexual Offences Act, 2012 – S. 43 (b) – The State Government shall take effective measures to ensure that the concerned persons (including the Police Officers) are imparted periodic training on the matters relating to the implementation of the provisions of the POCSO Act, 2012.

(Para 52 (15))

I. Protection of Children from Sexual Offences Act, 2012 – S. 40 – As provided for in Rule 4 (2) (f) of the POCSO Rules, 2012 the SJPU or the local police receiving information about offences from any person including the child shall inform the child and his parent or guardian, or other person in whom the child has trust and confidence as to right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with S. 40. The lawyer so appointed must have sound knowledge of the POCSO Act, 2012 and sensitivity towards the best interest of a child to ensure that the child's identity is not disclosed amongst other mandates of the POCSO Act, 2012.

(Para 52 (16))

J. Protection of Children from Sexual Offences Act, 2012 – Support Person – As per the mandate of Rule 4 (8) of the POCSO Rules, 2012 the "support person" who are assigned by Child Welfare Committee to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of any offence under the POCSO Act, 2012 shall at all times maintain the confidentiality of all information pertaining to the child to whom he has access.

(Para 52 (17))

K. Protection of Children from Sexual Offences Act, 2012 – The prison authorities on whom the custody of the Appellant shall remain during conviction shall keep in mind that it is a depraved mind that indulges in such crime is against a girl child. To battle such evil it is this mind that must also be effectively tackled – The State in such

cases must rise to the occasion and also ensure counselling and psychotherapy treatment of the offender while under detention.

(Para 53)

Appeal against conviction dismissed. Appeal against sentence partly allowed.

Chronological list of cases cited:

1. Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Another, 2017 SCC online SC 787
2. State of Karnataka v.Puttaraja, (2004) 1 SCC 475
3. Purushottam Dashrath Borate &Anr.v. State of Maharashtra, (2015) 6 SCC 652 : (2015) 3 SCC (Cri) 326
4. O.M. Cherian v. State of Kerala, (2015) 2 SCC 501
5. Kuldeep Singh v. State of Haryana & Others, Manu/SC/1546/2016
6. Kaziman Gurung v. State of Sikkim, 2017 SCC Online Sikk 117
7. State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban, (2006) 11 SCC 473
8. Justice K.S. Puttaswamy (retd.) and Anr. v. Union of India & Others, Writ Petition (Civil) No. 494 of 2012 dated 24.08.2017
9. Justice K.S. Puttaswamy (retd.) and Anr. v. Union of India & Others, (2016) 9 SCC 473
10. Budha Singh Tamang v. State of Sikkim, 2016 SCC Online Sikk 48
11. Gaya Prasad Pal @ Mukesh v. State, (2016) SCC Online Del 6214 : (2016) 235 DLT 264 (DB)
12. Bijoy @ Guddu v. The State of West Bengal, (2017) SCC Online Cal 417

JUDGMENT

Bhaskar Raj Pradhan, J

1. Conviction of the Appellant, who had been given shelter by his employer, the unfortunate father of the hapless child, at his own residence, is under appeal in the present case having been convicted by the Court of the Special Judge, East District at Gangtok under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) for having committed the offence of sexual assault on a girl child, the victim herein, as well as under Section 354 A and 323 of the Indian Penal Code, 1860 (IPC) in the very same house in which he was given shelter.

2. Mr. Sonam Palden, learned Counsel appearing for the convict, now the Appellant, fairly submits, at the very outset, that he does not wish to challenge the conviction considering the nature of evidence available. The Learned Special Judge has found that from the testimony of the child (P.W.1) and her father (P.W.2) which is supported by the medical evidence (exhibit-8) it is clear that the Appellant had tried to disrobe the child and had physically and sexually assaulted her on the night of 01.07.2015 at her house. The Learned Special Judge has also found that the victim was a child within the meaning of Section 2 (d) of the POCSO Act, 2012. The conviction of the Appellant by the learned Special Judge under the aforesaid provisions of law thus stands confirmed.

3. However, the Appellant is aggrieved by the order on sentence, dated 23.05.2016 imposing the maximum punishment of imprisonment prescribed under each of the offences for which he stands convicted as well as the direction that the sentences should run consecutively.

4. Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor, would also fairly concede that the sentence imposed under Section 354 A, IPC is not maintainable in view of Section 42 of the POCSO Act. Section 42 of POCSO Act, 2012 provides where an act or omission constitute an offence punishable under POCSO Act, 2012 and also under Section 354 A, IPC, amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the IPC as provides for punishment which is greater in decree. The impugned order dated 23.05.2016 sentences the Appellant to undergo rigorous imprisonment for five years and pay a fine of Rs. 1,000/- under Section 8 of POCSO Act, 2012 and in default of payment of fine to undergo further imprisonment for six months. For the offence under Section 354 A, IPC, the

Appellant has been sentenced to undergo rigorous imprisonment for three years and fine of Rs. 1,000/- and in default of the payment of fine he shall undergo further imprisonment for six months. In view of Section 42 of POCSO Act, 2012, the Appellant shall be liable to punishment under Section 8 of POCSO Act, 2012 as it provides for punishment which is greater in decree. Consequently, the sentence for conviction under Section 354 A, IPC is set aside.

5. On hearing the submissions of Mr. Sonam Palden and Mr. Karma Thinlay Namgyal it seems quite clear that judicial determination in the present case is narrowed down to the rationale of the judicial discretion exercised by the learned Special Judge in imposing the maximum sentences for each of the offences charged and convicted, sans Section 354 A, IPC and whether in the given facts, the sentences ought to have been directed to run 'concurrently' instead.

Sentences

6. Under Section 8 of the POCSO Act, 2012 whoever commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. The learned Special Judge has sentenced the Appellant to undergo rigorous imprisonment for five years and pay a fine of Rs. 1,000/- under Section 8 of the POCSO Act, 2012 and in default of the payment of fine to undergo further imprisonment for 6 months.

7. Under Section 323, IPC whoever except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. The learned Special Judge has sentenced the Appellant to undergo rigorous imprisonment for one year under Section 323, IPC.

8. The word 'heinous' is defined in the Black's Law Dictionary, tenth edition as "shockingly atrocious or odious." The offence of sexual assault committed by the Appellant on a girl child under Section 8 of the POCSO Act, 2012 is a 'heinous' offence. The preamble to the POCSO Act, 2012 which supplies a key to the interpretation of the Sections therein also says so.

9. In re: **Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.**[1] the Apex Court has held:-

"18..... There is also a stipulation that sexual

[1] 2017 SCC online SC 787

exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."

10. The crime depicts depravity and lacks in morality. The criminality is against the Society. In **State of Karnataka v. Puttaraja**[2] the Apex Court held:-

" 12. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women like the case in hand, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude moral delinquency which have great impact and serious repercussions on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time or considerations personal to the accused only in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence in built in the sentencing system."

11. Sexual offences on children constitute a crime, so different even compared to other heinous crimes. When committed by full grown adults it is almost certain

[2] (2004) 1 SCC 475

that it is a result of perversity or a depraved mind.

12. Mr. Sonam Palden would submit that the fact that the Appellant had no previous criminal record; that he has aged parents and is 35 year old is mitigating circumstances to reduce the sentence.

In re: **Purushottam Dashrath Borate & Anr. v. State of Maharashtra**[3]**,** the Apex Court has held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be mitigating circumstances. Mr. Sonam Palden would also submit that the Court must also be alive to the reformative theory of punishment and thus, if the first time convicted Appellant was to be kept with hardened criminals in the State Jail for the long period of sentences imposed, the Appellant may perhaps never reform. It is trite that while imposing the quantum of sentence the Court must examine both mitigating as well as aggravating circumstances. The aggravating circumstances pointed out by Mr. Karma Thinlay Namgyal is the conduct of the Appellant of acting innocent after having committed the crime by first jumping out of the window, then coming to the main door from outside and pretending to enquire what had happened. More aggravating, is the fact that a 35 year old man, in full consciousness, perhaps emboldened by a little drink just before the crime, taking advantage of his proximity to the child and the father and of the shelter so humanely granted by the father of the child to him and of the position of power he held over the child, in the cover of the night, seeking to gratify his lust and committing sexual assault and voluntarily causing hurt on a hapless child.

13. "Do you question the young children in the sorrow why their tears are falling so?" These words by Elizabeth Barrett Browning (1806-1861), British poet, although while lamenting about the plight of the children's condition of employment in mines and factories, but apt on the pain and anguish, perhaps also needs to be kept in mind while sentencing a convict found guilty of sexual assault on the victim, a girl child, barely in her teens. The aggravating circumstances far outweigh the mitigating circumstances projected by Mr. Sonam Palden, learned Counsel for the Appellant.

14. The conviction of the Appellant being for a 'heinous crime' the deterrence theory as a rationale for punishing the offender becomes relevant and in such cases the role of mercy, forgiveness and compassion become secondary as held by the Apex Court in numerous cases. In such cases while determining the quantum of sentence the Court has to govern itself by reason and fair play and discretion

[3] (2015) 6 SCC 652 : (2015) 3 SCC (Cri) 326

and is not to be exercised according to whim and caprice. It is the duty of the Court to impose adequate sentence, for one of the purposes of imposing requisite sentence is protection of society and a legitimate response to the collective conscience.

15. The learned Special Judge has exercised his judicial discretion. The said exercise of judicial discretion is neither perverse nor erroneous. The maximum sentences awarded for each of the two offences has been awarded keeping in mind the aggravating circumstances as reflected in the impugned order on sentence. This Court has no cogent reason to reduce the sentences so awarded for the offence under Section 8 of the POCSO Act, 2012 and Section 323, IPC.

Consecutively or Concurrently

16. In paragraph 23 of the impugned judgment dated 18.05.2016 it has been held :-

> *"It is palpable from the evidence discussed above that the accused had gagged the victim's mouth, throttled her neck, attempted to remove her clothes and touched her body with sexual intent....."*

17. In the impugned order on sentence dated 23.05.2016 it has been held:-

> *"4. The seriousness of the offence could be gathered from the evidence of the victim (PW 2) who has stated thus: ".....He placed his hand on my mouth and told me that it was time for me to die that night. He kept on pressing his hands on my mouth and nose, and also squeezed my throat because of which, I could not scream. I lost consciousness. When I woke up, the accused was on top of me from behind. He tried to open my clothes and laid his hand all over my body with sexual intent....."*
>
> *5. The nature of injury sustained by the victim could be seen from the testimony of the victim's father, who has deposed that: ".....My victim daughter had also sustained injury on her eyes and facial region because the accused had gagged her mouth and squeezed her neck while attempting to sexually assault her in the course of attempting rape, the accused had inflicted*

injury on my daughter during the struggle that ensued between them. It has been about one and half months since my victim daughter has started wearing glasses because of injury on her eyes during the incident....."

18. The findings recorded by the learned Special Judge both in the impugned judgment dated 18.05.2016 and order on sentence dated 23.05.2016 makes it evident that the commission of voluntarily causing hurt was in pursuit of the Appellant's sexual intent to commit sexual assault upon the hapless child. It is thus clear that the occurrence is the same in the present case.

19. Section 31 of the Code of Criminal Procedure, 1973 (Cr.P.C.) provides:-

"31. Sentence in cases of conviction of several offences at one trial. - (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years; (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a

single sentence."

20. The Apex Court in re: **O.M. Cherian v. State of Kerala**[4] would hold that when the prosecution is based on a single transaction where it constitutes two or more offences, sentences are to run concurrently and further imposing separate sentences, when the acts constituting different offences form part of the single transaction is not justified. The Apex Court in re: **Kuldeep Singh v. State of Haryana & ors.** [5] held:-

> *" 5. Since the occurrences is the same, and the punishment is under different provisions of IPC, for the same incident, we are satisfied that the sentence awarded under the different provisions of the IPC ought to have been ordered to run concurrently, specially keeping in mind the facts and circumstances of the present case. Ordered accordingly."*

21. Mr. Karma Thinlay Namgyal fairly concedes that in view of the judgment of this Court in **Kaziman Gurung v. State of Sikkim**[6] on this issue following the dicta of Section 31 of Cr.P.C as well as the judgments of the Apex Court in re: **O.M Cherian4 (supra) & Kuldeep Singh**[5] **(supra)**, the issue stands settled.

22. This Court is therefore of the view that the sentences imposed by the learned Special Judge for the offences under Section 8 of the POCSO Act, 2012 and 323, IPC is to run 'concurrently' and not 'consecutively' as held by the learned Special Judge.

23. While addressing this Court on the quantum of sentence, Mr. Sonam Palden would also rely upon Section 71, IPC. The same reads as follows:-

> *"71. Limit of punishment of offence made up of several offences.— Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.*
>
> *Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished,*

[4] (2015) 2 SCC 501
[5] Manu/SC/1546/2016
[6] 2017 SCC OnLine Sikk 117

or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

24. In re: **State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban**[7], held as under:-

"7. The crucial question is whether the alleged act is an offence and if the answer is in the affirmative, whether it is capable of being construed as offence under one or more provisions. That is the essence of Section 71 IPC, in the backdrop of Section 220 Cr.P.C."

25. In the light of the law enunciated from reading Section 71 of the Cr.P.C. and the judgment of the Apex Court in re: **State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban**[7] **(supra)** it is clear that this is not a case which falls under the parameters of Section 71, IPC. The essence of Section 8 of POCSO Act, 2012 is the touch and the sexual intent. Whereas the ingredient of Section 323, IPC is the voluntarily causing of hurt.

26. In conclusion :-

1. The sentence of conviction of the Appellant under Section 354 A, IPC is set aside.

2. The sentences for the offence under Section 8 of the POCSO Act, 2012 and Section 323, IPC awarded to the Appellant is upheld.

3. The sentences for the offences under Section 8 of the POCSO Act, 2012 and 323, IPC is directed to run 'concurrently' and not 'consecutively'.

4. The direction of the learned Special Judge that the fines imposed vide the order on sentence, if recovered shall be made over to the child as compensation and that the child is also entitled to compensation of Rs. 50,000/- under the Sikkim Compensation to Victims or his Dependants Scheme, 2011 for the physical and mental trauma that the child had to endure because of the incident is maintained.

[7] (2006) 11 SCC 473

27. In view of the aforesaid the Appeal against conviction is dismissed as not pressed. The Appeal against the sentence is partly allowed in the above terms.

Few Concerns

28. Before parting, few concerns of this Court must be voiced. The records reveal that during the recording of the statement of the child under Section 25 of the POCSO Act, 2012 by the Magistrate the identity of the child has been disclosed. It is seen that the judicial record has documents with the identity of the child and photograph of the child collected during investigation. The FIR (exhibit-2) records the identity of the child. The birth certificate of the child (exhibit-4) records the identity of the child. The letter to the Medical Officers (exhibit-5 and 7) forwarding the child for medical examination records the identity of the child. The communication from the Chief Medical Officer to the Investigating Officer dated 09.09.2015 (exhibit-9) records the identity of the child. The property seizure memo (exhibit-10) records the identity of the child. The application of the Investigating Officer to the Chief Judicial Magistrate dated 02.07.2015 (exhibit-11) with the prayer for recording the statement of the child under Section 164 Cr.P.C. records the identity of the child. The preliminary examination of the child conducted on 14.07.2015 by the Learned Chief Judicial Magistrate (exhibit-12) discloses the identity of the child. The records further reveals that the Investigating Officer has filed a report under Section 173 Cr.P.C disclosing the identity of the child. While recording the depositions of the child (P.W.1) and her father (P.W.2) in Court, the Learned Special Judge, although, has ensured that the name of the child is not disclosed but in the body of the depositions the identity of the child through the name of the school and neighbourhood has been disclosed. The examination of the accused under Section 313 Cr.P.C. also records the identity of the child's school.

29. The Constitutional Bench of the Apex Court in re: **Justice K.S. Puttaswamy (retd.) and Anr. v. Union of India & Ors [8].** has held:

> *"3 (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;*
>
> *(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the*

[8] Writ Petition (Civil) No. 494 of 2012 dated 24.08.2017.

Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the

individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three -fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and (I) Privacy has both positive and negative content. The negative content restrains the state from

committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4. Decisions rendered by this Court subsequent to Kharak Singh, upholding the right to privacy would be read subject to the above principles.

5. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non -state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matter of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Sri Krishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment...."

30. Article 39 of the Constitution of India, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to developed in a healthy manner and in conditions of freedom and dignity.

31. The statement of objects and reasons of the POCSO Act, 2012, inter alia, provides that "the interests of the child, both as a victim as well as a witness

need to be protected."

32. The statement of objects and reasons of the POCSO Act, 2012 further provides at paragraph 4 thereof :-

> *"4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial offences and provision for establishment of speedy courts for speedy trial of such offences."(Emphasis supplied)*

33. The preamble to the POCSO Act, 2012, inter alia, provides:-

> *"And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;*
>
> *And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child." (Emphasis supplied)*

34. In re: **Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.[1] (supra)** the Apex Court held:-

> *"18. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the*

child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."

35. The Apex Court whilst holding that the accused persons are entitled to have a copy of the FIR at a stage prior to that prescribed under Section 207 Cr.P.C. and directing the State Governments to upload the FIRs on the Police websites or the State websites within 24 hours of its registration carved out an exception to the said directions in its judgment in re: **Youth Bar Association of India v. Union of India**[9], in the following words:-

"11.4. The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under the POCSO Act and such other offences, should be uploaded on the police

[9] (2016) 9 SCC 473

website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the first information report so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

11.6. The word "sensitive" apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy, regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive."

36. Section 23 of POCSO Act, 2012 provides:-

"23. Procedure for media: (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such

disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or subsection (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both."

37. Section 24 of POCSO Act, 2012 provides:-

"24. Recording of statement of a child: (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child."

38. The Police Officer while recording the statement of the child is required to ensure that the identity of a child is protected from the public media unless otherwise directed by the Special Court in the interest of the child. The protection of the identity of a child is bestowed upon the Police Officer recording the statement and

unless directed otherwise by the Special Court who shall do so only in the interest of child, the said Police Officer must zealously protect the same.

39. Section 33 (7) of POCSO Act, 2012 provides:-

> *"33.....*
> *(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial: Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.*
>
> *Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.*
> .....
> ....."*.*

40. Section 37 of POCSO Act, 2012 provides:-

> *"37. Trials to be conducted in camera: The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:*
>
> *Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of the Code of Criminal Procedure, 1973 (2 of 1974)".*

41. A purposeful reading of Section 23, 24, 33 and 37 of the POCSO Act, reflects that the scheme of the POCSO Act, 2012 provides vital safeguards to ensure protection of the child's reputation and privacy and that the identity of the child is not disclosed during investigation or trial. This is paramount. The role of the Special Court specially constituted under the POCSO Act, 2012 is not only defined but made special for its effective implementation.

The Investigating authorities, the media houses and the Courts have a statutory duty to protect this with all their might. The identity of the child not being disclosed is the interest of the child, both as a victim as well as a witness which is sought to be protected by the POCSO Act, 2012. This cannot be compromised.

42. Under Section 33 (7) of the said Act the Special Court has been given the statutory duty to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. Under Section 19 (6) of the said Act the Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of 24 hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of a child for care and protection and step taken in this regard. The Special Court, therefore, under the Scheme of the POCSO Act, 2012 is kept abreast of the development in the investigation right from the stage of filing of the First Information Report. Under Section 33 (7) read with Section 19 (6) of the POCSO Act, 2012 the Special Court is enjoined to ensure that at no stage of investigation or trial thereof, the identity of child is disclosed. The proviso thereto is an exception for the Special Court to permit such disclosure but only in the "interest of the child." This permission must be only after judicial consideration and coming to a definite conclusion that the disclosure is in the interest of the child.

43. The Special Court must keep in mind that the identity of the child, as clarified in the explanation to Section 33 (7) of the POCSO Act, 2012 does not mean only the name but includes the identity of the family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed. The mandate is unequivocal.

44. All statutory Authorities including the Investigating Agencies and the Courts involved during investigation or trial would have to bear the legislative command against disclosure of identity of the child who are victims of sexual offences in mind and ensure strict compliance thereof.

45. The Special Judge, manning the Special Court must keep conscious of Section 33(9) of the POCSO Act, 2012 which starts within the words "subject to the provision of this Act" and provides:-

> *"33 (9)Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of*

> *Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial bef*ore a *Court of Session.*"

46. The Special Court must also be mindful of Section 42A of the POCSO Act, 2012 which provides:-

> *"42A.* ***Act not in derogation of any other law.****- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

47. The Special Judges manning the Special Courts must keep in mind that the nomenclature "Special Court" has been advisedly used to distinguish it from other Courts by some quality peculiar or out of the ordinary. Similarly, the 'Special Public Prosecutor' appointed under Section 32 of the POCSO Act, 2012 must also be conscious of the fact that they have been specially appointed as 'Special Public Prosecutor' under the POCSO Act, 2012. The word 'special' has to be understood in contradiction to the word 'general' or 'ordinary'. It signifies specialisation. The 'Special Court' constituted under the POCSO Act, 2012 must necessarily be specialised in the understanding, appreciation and effective implementation of the POCSO Act, 2012. Similarly the 'Special Public Prosecutor' must also have adequate specialization in the understanding, appreciation and effective implementation of the POCSO Act, 2012. That is the only way in which the mandate of the POCSO Act, 2012 can be successfully fulfilled.

48. The trauma of a child who has undergone sexual abuse so heinous in nature must be in the mind of all concerned in the process of administration of justice. Children are national assets and must have a special place in life. Children due to their age and innocence are vulnerable. A child who has already undergone sexual abuse and traumatised must be insulated completely from secondary victimization. Investigation of such offences must be entrusted and conducted by Police Officers competent as per the POCSO Act, 2012 and sensitized to the unique role each Police Officer is required to play during the investigation. The POCSO Act, 2012 provides a criminal justice system which is not only child

friendly but also in the best interest of child. A child's right to confidentiality must be respected and protected even by the lawyers who are involved in the case. The process of administration of Criminal Justice in such cases must also necessarily be steps for resurrecting the dignity, self esteem, honour, faith and self confidence of the child. The Police Officers, the Special Public Prosecutors, the lawyers, the Judges and all other persons involved in the investigation or trial of such offences must be sensitive to the special role they are required to perform during the process.

49. In the age of super speed internet, whatsapp and other messenger applications and social media, information travels as quick as human thoughts. The statutory authorities under the POCSO Act, 2012 must be guarded that the information of the identity of child with them, if leaked, transmitted or shared against the mandate of the POCSO Act, 2012 may cause irreparable damage to the child's fundamental right as guaranteed by the Constitution as well as his statutory rights to privacy under the POCSO Act, 2012 and the IPC. The statutory authorities must remember that the duty to protect the identity of a child who is not capable of safeguarding her/his rights is higher on them.

50. Whereas the recording of a statement of child by the Magistrate under Section 25 of the POCSO Act, 2012 read with the additional provisions as provided in Section 26 of the POCSO Act, 2012 provides adequate protection for the child. The mandate of Section 33 (7) of the POCSO Act, 2012 cannot be lost sight of. Complete protection of identity of the child, which is paramount, must be ensured while recording such statement by the Magistrate even under the provision of Section 164 Cr.P.C. or Section 164 A Cr.P.C. If identity of the child is disclosed while recording the statement of the child before a Magistrate in terms of Section 25 and 26 of the POCSO Act, 2012 the interest of the child and the protection of the child's identity is compromised it will run counter to the scheme of the POCSO Act, 2012.

51. This Court in re: **Budha Singh Tamang v. State of Sikkim**[10] in a judgment rendered on 19.04.2016, noticing that the Learned Trial Court had not taken protective measures as required by law and had disclosed the name of the child without recording reasons for such disclosure, directed that the learned Trial Courts dealing with cases under the POCSO Act, 2012 and offences under section 354 A to 354 D, 370, 370 A, 372, 373, 375, 376 or section 509 of the IPC, shall abide strictly by the mandate of the law as provided in section 33(7) of the POCSO Act, 2012. However, it is seen, with a great deal of pain and anguish that the identity of the child continues to be compromised, without adequate reasons.

[10] 2016 SCC OnLine Sikk 48

Directions

52. In view of the aforesaid the following directions are issued:-

1. All statutory authorities involved in the investigation or trial of the offences under the POCSO Act, 2012 shall bear in mind that the identity of a child is not only the name of a child but includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of a child may be revealed.

2. The Police Officer recording an FIR relating to an alleged offence on a child under POCSO Act, 2012 shall ensure that the said FIR is not made public or uploaded on Police websites or State Government websites in compliance with the direction of the Apex Court in re: **Youth Bar Association of India v. Union of India[9] (Supra)** or any other website.

3. The Investigating Officer conducting the investigation of an alleged offence on a child under POCSO Act, 2012 shall ensure that the materials collected during investigation is guarded against disclosure of the identity of a child. Any document or photographs obtained during investigation of the case which would contain the identity of a child shall not be disclosed to the public media or to any person who is not involved in the administration of Criminal Justice under the POCSO Act, 2012. While issuing copies or certified copies of such documents or photographs as per law to the limited stakeholders under the POCSO Act, 2012 necessary masking of the identity of a child shall be ensured before its issuance.

4. The mandate of Section 23 of the POCSO Act, 2012 shall be strictly followed. Any person who contravenes the provisions of sub-section (1) by making any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering the child's reputation or infringing upon his privacy shall be prosecuted for contravention thereof under Section 23 (4) of the POCSO Act, 2012. Similarly, if any report in any media discloses the identity of a child including his name, address, photograph, family details, school, neighbourhood or any

other particulars which may lead to disclosure of identity of the child, all such persons involved in making such report and disclosure shall be prosecuted for contravention thereof under Section 23 (4) of the POCSO Act, 2012.

5. While recording the statement of a child as provided under Section 24 of the POCSO Act, 2012 the Police Officer shall ensure that the identity of a child is protected from the public media, unless otherwise directed by the Special Court in the interest of a child.

6. While recording such statement of a child under Section 24 of the POCSO Act, 2012 the Police Officer shall ensure that the identity of a child is not disclosed and for the said purpose may use pseudonyms or any other appropriate way in accordance with law to protect the identity of a child.

7. While recording a statement of a child by the Magistrate under Section 25 of the POCSO Act, 2012 and in any judicial record thereof the Magistrate shall ensure that the identity of the child is not disclosed and necessary precaution is taken to protect the same. Pseudonyms or any other appropriate way in accordance with law shall be adopted to protect the identity of a child.

8. The Special Court shall ensure that the identity of a child is not disclosed at any time during the course of investigation or trial as mandate under Section 33(7) of the POCSO Act, 2012 unless for reasons to be recorded in writing the Special Court is of the opinion such disclosure is in the interest of a child.

9. The Special Court is required to ensure that the identity of the child shall not be disclosed anywhere on judicial records and that names shall be referred by pseudonyms or in any other appropriate way in accordance with law.

10. For the protection of the child's identity as mandated under the POCSO Act, 2012 the Special Court and the Investigating Officer shall restrict the disclosure of information to limited stakeholders and ensure there is controlled access of non-essential persons during investigation or trial. The Special Court must ensure the best interest of the child and act as parens patriae for the child.

11. To ensure that the identity of the child is not disclosed during the course of investigation or trial, the local police or the Special Juvenile Police Unit recording the report under Section 19, the Police Officer recording the statement of the child under Section 24, the Investigating Officers investigating the offences under the POCSO Act, 2012, the Magistrates recording the statement of the child under Section 25, the Special Court conducting the trial of the offences under the POCSO Act, 2012 shall keep in mind the provisions of Section 40 of the POCSO Act, 2012 which provides:

> "*subject to the proviso to Section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:*
>
> *Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.*"

12. Such lawyers providing assistance of legal counsel to the child shall keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and confidentiality by all means and through all stages of judicial process involving the child.

13. The Special Public Prosecutors who have been appointed by the State Government by Notification in the Official Gazette for every Special Court for conducting cases only under the provision of the POCSO Act, 2012 shall also keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and confidentiality by all means and through all stages of judicial process involving the child.

14. For the proper and effective implementation of the POCSO Act, 2012 the State Government, if not already done, shall prepare guidelines for use of non Governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre trial and trial stage to assist the child as mandated vide Section 39 of the POCSO Act, 2012.

15. The State Government shall take effective measures to ensure that the concerned persons (including the Police Officers) are imparted periodic training on the matters relating to the implementation of the provisions of the POCSO Act, 2012.

16. As provided for in Rule 4 (2) (f) of the Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules, 2012) the Special Juvenile Police Unit or the local police receiving information under sub-section (1) of Section 19 of the POCSO Act, 2012 from any person including the child shall inform the child and his parent or guardian or other person in whom the child has trust and confidence as to right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with section 40 of the POCSO Act, 2012. The lawyer so appointed must have sound knowledge of the POCSO Act, 2012 and sensitivity towards the best interest of a child to ensure that the child's identity is not disclosed amongst other mandates of the POCSO Act, 2012.

17. As per the mandate of Rule 4 (8) of the POCSO Rules, 2012 the 'support person' who are assigned by Child Welfare Committee, in accordance with sub-rule (8) of the Rule 4, of the POCSO Rules, 2012 to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of any offence under the POCSO Act, 2012 shall at all times maintain the confidentiality of all information pertaining to the child to whom he has access.

53. Finally, it is hoped that the prison authorities on whom the custody of the Appellant shall remain during conviction shall keep in mind that it is a depraved mind that indulges in such crimes against a girl child. To battle such evil it is this mind that must also be effectively tackled. The State in such cases must rise to the occasion and also ensure counselling and psychotherapy treatment of the offender while under detention.

54. This Court records its deep appreciation of the assistance of the Learned Counsels appearing for the parties especially on the aspect of the protection of the identity of the child. The erudite judgments of the Division Bench of the Delhi High

Court in re: **Gaya Prasad Pal @ Mukesh v. State**[11] and the Single Bench of the High Court of Calcutta in re: **Bijoy @ Guddu v. The State of West Bengal**[12] cited at the bar by the Learned Counsels has also guided this Court while penning this judgment to voice its concerns as above.

55. The Registrar General of this Court is directed to transmit copies of this judgment to all the Special Courts to ensure full and complete compliance to the mandate of Section 33 (7) of the POCSO Act, 2012; the District & Sessions Judges of all the four districts to ensure that the Magistrates are made aware of the directions issued; the Director General of Police (DGP) to ensure compliance by the Special Juvenile Police Unit (SJPU) and the Police Officers involved in the investigation and trial of offences under the POCSO Act, 2012 and for guidance to the Special Public Prosecutors; the State Government for compliance, the Sikkim Legal Services Authority, Bar Association of Sikkim the Namchi Bar Association for information and guidance to the lawyers and the Press Club of Sikkim for information and guidance to the reporters.

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[11] (2016) SCC OnLine Del 6214: (2016) 235 DLT 264 (DB)
[12] (2017) SCC OnLine Cal 417

SLR (2017) SIKKIM 280

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

W.P. (C) No. 23 of 2015

Smt. Usha Agarwal ….. PETITIONER

Versus

Union of India and Others ….. RESPONDENTS

For the Petitioner : Mr. Shakeel Ahmed and Mr.Yogesh Kumar Sharma, Advocates.

For Respondents : Mr. Karma Thinlay, Central Government Counsel with Mr.Thinlay Dorjee Bhutia, Advocate.

Date of decision: 29th August 2017

A. Prevention of Money- Laundering Act, 2002 – S. 2(u) – Proceeds of crime covers any property derived or obtained directly or indirectly by any person, as a result of criminal activity, related to a scheduled offence or the value of such property – Does not envisage either *mens rea* or knowledge that the property is a result of criminal activity – Such property could be subjected to attachment and confiscation, the Section, however, does not presuppose knowledge of the proceeds being of criminal activity – Properties apart from the "proceeds of crime" are not liable to attachment, neither is it included in the ambit of the Act – Powers exercised under the Act have to be considered at tandem with the object of the Act, which is to shear the process of money-laundering at its very commencement – S. 2(u) enable initiation of proceedings against the person in possession of "proceeds of crime" which may lead to attachment, confirmation and eventual confiscation of the property concerned.

(Paras 31 and 32)

B. Prevention of Money Laundering Act, 2002 – Ss. 2 and 3 – Only a person who is 'involved' with the proceeds of crime would be guilty of the

offence under S. 3 and not a person who is 'only in possession' of the proceeds of crime 'sans *mens rea*' – A conjunctive reading of Ss. 2 and 5 reveals that the concerned Authority can provisionally attach such property only when he has "reason to believe" that "any person" is in possession of any "proceeds of crime", provisionally attach such property, thereby not necessarily encompassing S. 3 in its ambit.

(Para 31)

C. Prevention of Money-Laundering Act, 2002 – Ss. 2 and 5 – Provisions of S. 2 are to be read with the intent of S. 5 of the Act, which provides that if the concerned Officer, mentioned therein, on the basis of materials in his possession, has "reason to believe" that any person is in possession of any "proceeds of crime", such property can provisionally be attached, irrespective of where the ownership lies, be it an offender under S. 3 or a non-offender. It suffices if the property is "proceeds of crime" and *mens rea* is not a pre-requisite – "Reason to believe" in S. 5 is qualified with the words "on the basis of material in his possession". Therefore, it is not mere subjective belief that is required, but is based on a reasoned belief, on the foundation of materials in his possession, thereby preventing any arbitrariness, for invocation of powers under S. 5 for the purposes of S. 2 – Held, the definition of "proceeds of crime" has the goal of preventing and stemming criminal activities related to money-laundering at its very inception and cannot be said to be arbitrary or absurdly expansive, or seeking to penalise even non-offenders. Thus, the provision does not suffer from any infirmity. (Paras 36 and 38)

D. Prevention of Money-Laundering Act, 2002 – S. 3 – Is an offence independent of the predicate offence and to launch prosecution under S. 3, it is not necessary that a predicate offence should also have been committed. This Section criminalises the possession or the conversion of the proceeds of crime, which includes projecting or claiming the proceeds of crime as untainted property – Element of *mens rea* is present in this Section as against the provision of S. 2(u) thereby preventing prosecution of any innocent person – The word "knowingly" used in the Section inheres the intent of keeping an innocent out of the dragnet of the offence. It would conclude that only a person who knowingly attempts to indulge, assists or is a party, or involved in any process or activity connected with the proceeds of crime would be guilty of the offence under the Act – The purpose of S. 3 is to ensure that the proceeds of crime are not subjected to money-

laundering, by way of deposits made in the names of people who have not acquired it as of right, but in whose accounts the offender has introduced by way of an ulterior motive. (Para 39)

E. Prevention of Money-Laundering Act, 2002 – S. 4 – Stipulates a minimum penalty – Discretion of the Court is fettered – Penalty is largely a deterrent method – Neither the minimum term nor rigorous imprisonment for an offence means that the provisions are ultra vires.

(Para 41)

F. Prevention of Money-Laundering Act, 2002 – S. 5 – Attachment of property involved in money laundering – No arbitrary powers are afforded to the concerned Officers as the provisional attachment is to be made only on "reason to believe" – Order is to be in writing – Provisional attachment cannot exceed one hundred and eighty days from the date of order – Section extends necessary safeguards to the offender by requiring the concerned Officer to Report to his Superior Officer his reasons for believing that any property in the possession of any person is the proceeds of crime – Also allows the person in possession of such property, which has been provisionally attached, to continue the enjoyment of his property – Provision thereby serves a dual purpose – Neither is the person deprived of enjoyment of his property, at the same time the suspect property is secured – Initiation of any action under S. 5 is on the basis of a "reason to believe" that any person is in possession of any "proceeds of crime" and such "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeds relating to confiscation of such "proceeds of crime" – Such action is independent from any enquiry or investigation of any predicate offence but limits the number of days of such provisional attachment and report thereof to the Adjudicating Authority. The provisions of S. 5 while aiming to achieve the object of the Act cannot be said to be violative of Articles14, 19 or 300A of the Constitution of India. (Paras 43 and 47)

G. Prevention of Money-Laundering Act, 2002 – S. 8 – S. 8(1) to S. 8(3) affords adequate opportunity to the concerned individual to produce relevant materials and evidence to satisfy the Adjudicating Authority at the stage of confirmation of provisional attachment or retention of the seized property, that the property attached was acquired from legal/known sources of income – Once such material has been furnished, the

Adjudicating Authority is required to consider the reply and after giving an opportunity to the person of being heard, may either confirm the attachment of the property or release such property – Provisional attachment can be confirmed only after the Adjudicating Authority affords an opportunity to the offender or any person holding the property to establish his sources of income – The Special Court has been clothed with powers to pass appropriate orders in regard to the property either by way of confiscation or release of the property involved in money-laundering on an application moved by the Director – No reason to hold that S. 8 is arbitrary or violative of fundamental rights. (Paras 50 and 51)

H. Prevention of Money-Laundering Act, 2002 – Ss. 2 (y) and 13 – A person need not necessarily be booked of a scheduled offence, but if he is booked and subsequently acquitted, he can still be prosecuted for an offence under the Act – Not necessary that a person has to be prosecuted for an offence under the Act only if he has committed a scheduled offence – Inclusion of "offences under the Indian Penal Code" into Part A in the Schedule by S. 30 of the Prevention of Money-Laundering (Amendment) Act, 2012 (No.2 of 2013) – The object of the Act is to abort the process of money-laundering at its inception – The wisdom of the legislature cannot be questioned, when such inclusion has been made, as there may be circumstances where the predicate offence and the offence under S. 3 are intertwined. (Paras 56 and 57)

I. Prevention of Money-Laundering Act, 2002 – S. 24 – Burden of proof – The Section clearly indicates that it is a rebuttable presumption – Once the offender is able to explain the source of the property, which is in his possession, then the prosecution is required to discharge its burden – Held, by shifting the onus to the accused, it affords him an opportunity of establishing his innocence and therefore, contains a safeguard for the accused. Consequently, it cannot be said that the provision is unconstitutional. Thus, when considering the Acts the object has to be given primary importance and the provision thereof cannot be said to be ultra vires when the end goal is to be achieved. S. 24 unequivocally extends an opportunity to the offender to establish the source of his property, which if legitimate can be fully justified by the Petitioner.

(Para 59)

J. Prevention of Money-Laundering Act, 2002 – S. 45 read with Art. 14 and 21 of the Constitution of India – Under S. 45(ii) of the Act, discretion vests with the Court to enlarge the petitioner on bail or to refuse such bail – Limitations are not unfounded or arbitrary – The legislature has evidently used the words "reasonable grounds for believing" in Section 45(1)(ii) to enable the Court dealing with the bail, to justifiably hold, as to whether there is indeed a genuine case against the accused and whether the prosecution is able to produce *prima facie* evidence in support of the charge, and the evidence so furnished if unrebutted could lead to a conviction – Apprehension of repetition of the crime is another consideration in refusing bail, as also the antecedents of an accused person – Prosecution has not been given arbitrary or wide amplitude under S. 45, as the provision with clarity lays down that the matter for consideration falls within the discretion of the Court, who, after extending an opportunity to the Public Prosecutor, in matters where the person is accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule, is to be satisfied subjectively – It is only subject to the satisfaction of the Court that the bail is to be granted or declined – There is evidently no infirmity in the provision and cannot be said to offend Articles 14 and 21 of the Constitution of India.

(Para 61)

K. Criminal Procedure Code, 1973 – S. 482 and Arts. 226 and 227 of the Constitution of India – Petitioner seeks quashing of the ECIR by resorting to Articles 226 and 227 of the Constitution of India – Held, the correct procedure to have been adopted was to file a petition under S. 482 of the Cr.P.C. On the bedrock of the decision of the Supreme Court in re: *Girish Kumar Suneja* v. *CBI*, 2017 SCC OnLine SC 766 [Criminal Appeal No.1317 of 2017 dated 17-07-2017], the prayer can neither be considered nor allowed. (Para 65)

Petition dismissed.

Chronological list of cases cited:

1. Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District I, Calcutta and Another, AIR 1961 SC 372

2. Olga Tellis and Others v. Bombay Municipal Corporation and Others, (1985) 3 SCC 545

3. S. L. Kapoor v. Jagmohan and Others, (1980) 4 SCC 379

4. Mohammad Jafar v. Union of India,1994 Supp (2) SCC 1

5. C.B. Gautam v. Union of India and Others, (1993) 1 SCC 78

6. K.P. Tiwari v. State of M.P, 1994 Supp (1) SCC 540

7. Arnesh Kumar v. State of Bihar and Another, (2014) 8 SCC 273

8. B. Rama Raju v. Union of India & Others, MANU/AP/0125/2011 [Writ Petition Nos.10765, 10769 and 23166 of 2010 dated 04-03-2011]

9. Smt. K. Sowbaghya v. Union of India & Others, MANU/KA/0192/2016 [Writ Petition No.14649 of 2014 (GM-RES) connected with Writ Petition No.19732 of 2014 (GM-RES) dated 28-01-2016]

10. Matajog Dobey v. H. C. Bhari, AIR 1956 SC 44

11. Moti Ram Deka & Others v. General Manager, North East Frontier Railway and Another, AIR 1964 SC 600

12. Budhan Choudhry and Others v. State of Bihar, AIR 1955 SC 191

13. Sukumar Mukherjee v. State of W.B. and Another, (1993) 3 SCC 723

14. Manzoor Ali Khan v. Union of India and Others, (2015) 2 SCC 33

15. Sushil Kumar Sharma v. Union of India and Others, (2005) 6 SCC 281

16. Mehmood Alam Tariq and Others v. State of Rajasthan and Others, (1988) 3 SCC 241

17. Sanjay Dutt v. State through C.B.I., Bombay (II), (1994) 5 SCC 410

18. Obulapuram Mining Company Pvt. Ltd. and Others v. Joint Director, Directorate of Enforcement and Others, MANU/KA/0545/2017 [Writ Petition Nos.5962, 11442 and 11440-11441 of 2016 (GM-MM-C) dated 13-03-2017

19. State of Bihar and Others, etc. v. Bihar Distillery Ltd., etc. etc., AIR 1997 SC 1511

20. R.S. Raghunath v. State of Karnataka and Another, AIR 1992 SC 81

21. Namit Sharma v. Union of India, (2013) 1 SCC 745

22. Shri Ram Krishna Dalmia and Others v. Shri Justice S.R. Tendolkar and Others, AIR 1958 SC 538

23. Ram Jethmalani v. Union of India, (2011) 8 SCC 1

24. Kartar Singh v. State of Punjab, 1994 SCC (Cri) 899

25. Director of Enforcement v. M/s. MCTM Corporation Pvt. Ltd. and Others, AIR 1996 SC 1100

26. J. K. Industries Limited and Others v. Chief Inspector of Factories and Boilers and Others, (1996) 6 SCC 665

27. Attorney General for India and Others v. Amratlal Prajivandas and Others, (1994) 5 SCC 54

28. State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722

29. State of Gujarat and Another v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392

30. Binod Kumar v. State of Jharkhand and Others, (2011) 11 SCC 463

31. Mafatlal Industries Ltd. and Others v. Union of India and Others, (1997) 5 SCC 536

32. The Collector of Customs, Madras and Another v. Nathella Sampathu Chetty and Another, 1961 (1) Cri.L.J. 364

33. State of Rajasthan and Others v. Union of India and Others, (1977) 3 SCC 592

34. Maulavi Hussein Haji Abraham Umarji v. State of Gujarat and Another, (2004) 6 SCC 672

35. Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Others, (2003) 2 SCC 455

36. Padma Sundara Rao (Dead) and Others v. State of T.N. and Others, (2002) 3 SCC 533

37. Tofan Singh v. State of Tamil Nadu, (2013) 16 SCC 31

38. Chikkamma and Another v. Parvathamma and Anrother, MANU/SC/0728/2017 [Civil Appeal No.3409 of 2017 dated 28-02-2017]

39. Girish Kumar Suneja v. C.B.I, 2017 SCC OnLine SC 766 [Criminal Appeal No.1317 of 2017 dated 17-07-2017]

JUDGMENT

Meenakshi Madan Rai, J

1. This Writ Petition under Articles 226/227 of the Constitution of India, challenges the constitutional validity and legality of the provisions of Sections 2(u), 3, 4, 5, 8, 13, 24, 45 and 50 of the Prevention of Money-Laundering Act, 2002 (for brevity "the Act"). The prayer that follows is that, the provisions be declared ultra vires, illegal, unconstitutional and violative of the fundamental rights of citizens, especially Article 14 and Articles 19 to 22 of the Constitution of India. A further prayer is made for quashing the Enforcement Case Information Report (ECIR), lodged against the Petitioner on 19-02-2014.

2. Although mindful that the Act is a path breaking enactment, based on the United Nations Resolutions to globally root out the use of illegal money, acquired via trade in drugs, illegal armaments, acts of terror and misuse of public office and is therefore, the need of the hour, the Petitioner is aggrieved by the indiscriminate application of the provisions of the Act at the whims and fancies of the Officers of the Respondent No.3, who it is alleged, in the absence of a mechanism of proper checks and balances is clothed with unbridled powers, under various sections, leading to possibilities of misuse of the Act can be attracted, by affording an opportunity of hearing to the alleged offender. Agreeing that Sections 420, 467, 471, 120B of the Indian Penal Code (for short "IPC") have rightly been inserted in the Schedule of the Act and that a First Information Report (FIR) can be filed by any Police Station and brought under the Act to book those committing such heinous crimes, the Petitioner's concern is also with the alleged irrationality and procedural impropriety with regard to the implementation of the Act.

3. The facts leading to the instant Petition are that the Eastern Institute for Integrated Learning in Management University (henceforth 'EIILMU'), a State self-financed Private University, was established by the "Eastern Institute for Integrated Learning in Management, University, Sikkim Act, 2006 (hereinafter "Act of 2006"), duly approved by the University Grants Commission (for brevity

'UGC'), in July 2008, enumerating Courses and Disciplines which the University was authorized to offer. Vide a letter dated 12- 04-2009, the EIILMU was permitted to open admission/counselling centres in different parts of the country. As per the Petitioner, on 01-09-2012, a suo-motu FIR, being Case No.51/2012, under Sections 406/420/467/120B/34 of the IPC, was registered by the Station House Officer (for short 'SHO'), Jorethang, Police Station, South Sikkim, making various allegations against the Management of the EIILMU, regarding opening of various Study Centres outside the State of Sikkim and offering Courses without approval of the Distance Education Council (for short 'DEC'). However, neither the UGC nor the DEC or any student has lodged any FIR in this context. On completion of investigation and submission of Charge-Sheet, the Learned Chief Judicial Magistrate took cognizance and summoned the persons named in the Charge-Sheet on 06-05-2013. On the same set of allegations, the Sadar Police Station, Gangtok, registered another FIR, bearing No.92/2013, against the Management of EIILMU, which was quashed vide an Order of this Court dated 04-06-2013, in Criminal Misc. Case No.12 of 2013. A Supplementary Charge-Sheet in FIR No.51/2012, falsely reflected one Mandeep Kaur to be a regular student of the University, when she was a long distance student, neither had she obtained a government job, as alleged, on the strength of a degree issued by the University, but was employed in a Private College. Based on the FIR, the Respondents No. 2 and 3 without conducting any preliminary inquiry, registered an ECIR on 19-02-2014. The Joint Director of the Respondent No.3, vide Order dated 28-10-2014, provisionally attached nine different Bank Accounts of the EIILMU. A Complaint dated 25-11-2014 was then lodged by the Joint Director before the Adjudicating Authority, seeking confirmation of its Provisional Attachment Order. The Adjudicating Authority issued Show Cause Notice to the EIILMU and confirmed the Provisional Attachment, vide Order dated 03-03-2015, assuming that the fees collected from students were "proceeds of crime". On 09-01-2015, the Joint Director of the Respondent No.3, provisionally attached immovable properties referred to in the Notice and lodged a Complaint dated 02-02-2015, before the Adjudicating Authority for confirmation of the Provisional Attachment Order, who in turn issued Show Cause Notice to the EIILMU. That, FIRs for Scheduled offences covered under the Act cannot be called money-laundering or the amounts involved as "proceeds of crime". Thus, due to baseless inclusion of the Petitioner in the impugned ECIR by the Respondents No. 2 and 3, she has been defamed and her fundamental rights seriously prejudiced due to allegations of money-laundering.

4. The Respondents chose not to file Counter-Affidavit submitting that the questions raised were confined to legal propositions.

5. While reiterating the averments in the pleadings, Learned Counsel for the Petitioner would contend that the definition of "proceeds of crime" under Section 2(u) of the Act, not only grossly offends Articles 14, 20, 21 and 300A of the Constitution of India, making no distinction between an innocent person and a culprit, but is flawed as it fails to distinguish between a genuine business transaction or a criminal case, as in the Petitioner's case where the FIR No.51/2012 does not disclose any offence, except violations of provisions of DEC, but the Act was invoked merely on account of the FIR. The definition being absurdly expansive seeks to penalise even an innocent, with no knowledge of the offence and gives wide powers to the Authorities under Section 5 to attach property, in the absence of a mechanism to verify whether a scheduled offence attracts the penalty provided by the Act. If the definition is adopted then every case concerning companies where an FIR is filed, whether it makes out a criminal offence or not, would give rise to the offence of money-laundering. That, there is an inherent arbitrariness in Section 2(u) read with Section 3 of the Act, as there is no connection with the definition and the object sought to be achieved by the Act. The "proceeds of crime", thus, necessarily includes a guilty intention or mens rea to commit the offence of money-laundering. Hence, the provisions of the Act are open to application in every case where any predicate offence is alleged to be committed, which could not have been the intention of the Legislation.

6. Learned Counsel for the Petitioner further canvassed that Section 3 of the Act read with the Schedule has no link with the purpose sought to be achieved by the Act, as the Section makes no distinction between cases pertaining to money-laundering from criminal acts, which it seeks to control, as it applies generally to all offences involving property. The provisions of Section 2(u), 3 and 5 give un-canalised powers to the Officers of the Respondent No.3 to prosecute under the Act and attach property, and are open to misuse and abuse, resulting in victimisation, deprivation of liberty and property of the alleged offenders. Apart from which Sections 2(u), 5 and 6 leads to double jeopardy and prosecution of a person twice for the same offence. Although, proceedings under the Act may start with the registration of an FIR or filing of the report by the Police, under Section 173 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), but proceedings under the Act do not culminate under the IPC as the Authorities have discretionary powers to continue under the Act and invoke all stringent provisions, including denial of bail and trial before a Special Court, thereby subjecting an offender to penalty before trial.

7. The provisions of Section 5 of the Act were assailed as violative of Articles 14, 19 and 300A of the Constitution of India as it bypasses the acclaimed principle of an offender's innocence until proven guilty. The provision can be invoked by the Respondent No.3 on "reason to believe", which is devoid of criteria, to freeze Bank Accounts, thereby jeopardizing the business of the Petitioner or claims could arise in favour of a third party and against the accused. The alleged offender would have to suffer the attachment order, before conviction, as steps against the accused are taken by attachment order or confiscation without even being charged of any offence. No opportunity of being heard is afforded to the Respondent before recording the reasons of such belief. Thus, Section 5 is unfair, unreasonable and open to misuse besides being violative of the principles of natural justice, equity and fair play.

8. Challenging the vires of Section 8 of the Act as violative of Article 14 of the Constitution of India and the principles of justice, equity and fair play, it was contended that the Section leads to a pre judging of an issue by the Adjudicating Authority, which is in the jurisdiction of the Special Court, causing prejudice to the person prosecuted under the Act. The Adjudicating Authority has the trappings of a Court as it comprises of a Judicial Member of the rank of a District Judge. The Adjudicating Authority can declare a property as being involved in money-laundering if it has "reason to believe" that the person has committed an offence under Section 3 of the Act or he is in possession of the "proceeds of crime".

9. In order to buttress his submissions, reliance was placed on **Calcutta Discount Co. Ltd. vs. Income-tax Officer, Companies District [1], Calcutta and Another[1] ; Olga Tellis and Others** vs. **Bombay Municipal Corporation and Others[2] ; S. L. Kapoor vs. Jagmohan and Others[3] ; Mohammad Jafar** vs. **Union of India[4] and C.B. Gautam vs. Union of India and Others[5]** .

10. Questioning the vires of Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009, it was contended that certain offences under the IPC is incorporated in the Schedule, sans links to the aims and objectives of the Act.

11. It was next advanced that the provisions of Section 24 are unreasonable and violative of Articles 14, 20 and 21 of the Constitution of India as it casts a negative burden on the accused which goes against the principle of presumption of

[1] AIR 1961 SC 372
[2] (1985) 3 SCC 545
[3] (1980) 4 SCC 379
[4] 1994 Supp (2) SCC 1
[5] (1993) 1 SCC 78

innocence until proven guilty. The Section creates a fiction that the moment charges are framed, the accused is proved to be guilty in contradiction to the essence of criminal jurisprudence. Moreover, the burden of proof lies upon him who affirms and not he who denies.

12. Arguing on the legality of Section 45 of the Act, it was canvassed that this provision is violative of Articles 14 and 21 of the Constitution of India, as it imposes limitations on grant of bail which is subject to the satisfaction of the Court that there are grounds that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. Thus, Section 45 of the Act with its non obstante clause and the fiction created by Section 24 of the Act would lead to needless incarceration and punishment before conviction.

13. That, Section 50 of the Act allows any statement recorded by the authorities as admissible in evidence and is contrary to Article 20(3) of the Constitution of India. That, Section 50(4) is identical to the provisions of Section 67 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for brevity "NDPS Act"), which is presently pending before the Hon'ble Supreme Court, attention of this Court was drawn to the decision of **K.P. Tiwari vs. State of M.P.** [6] , where it was held that a person ought not to be arrested straight away but enquiries ought to be made before such arrest and to the ratio in **Arnesh Kumar vs. State of Bihar and Another**[7] .

14. An additional Affidavit filed by the Petitioner urged that the Writ Petition is maintainable and no materials existed before the Enforcement Directorate against the Petitioner, to invoke the provisions of the Act, except the fact that she was named as an accused in the impugned Charge-Sheet, despite absence of any evidence against her. That, the Charge-Sheet or Complaint may be quashed in exercise of powers under Article 226 of the Constitution or under Section 482 of the Cr.P.C.

15. Per contra, the arguments forwarded by Learned Counsel for the Respondents was that, the object of the Act is to prevent money-laundering and connected activities by confiscation of "proceeds of crime" and preventing of legitimising of money earned through illegal and criminal activities by investing in movable and immovable property, often involving layering of the money generated through illegal activities. Buttressing his submission with the aid of the decision of

[6] 194 Supp (1) SCC 540
[7] (2014) 8 SCC 273

the Divisional Bench of the Hon'ble High Court of Andhra Pradesh in **B. Rama Raju vs. Union of India & Others**[8] , it was canvassed that the ratio explains that the Act defines the expression "proceeds of crime" expansively to sub serve the broad objectives of the Act. Rebutting the arguments of the Petitioner advanced on Section 3 of the Act, it was put forth that the Petitioners contentions proceed on a misconception of the relevant provision of the Act against transactions constituting money laundering. The provisions of the Act contemplate two sets of procedure;

(a) prosecution for the offence of money-laundering as defined in Section 3 with punishment provided in Section 4, and

(b) attachment, adjudication and confiscation in sequential steps and subject to conditions and procedures enumerated in Chapter III of the Act.

It is only on proof of guilt and conviction thereof that the penalty under Section 4 would follow, after due trial by the Special Court, as provided under Section 44 of the Act. The Prosecution, trial and conviction for offence under the Act has sanction granted by legislation, with an effort to deprive the accused of personal liberty to prevent further offences. The "proceeds of crime" as defined under Section 2(u) is targeted as any property obtained in terms of the definition and is liable for initial attachment and eventual confiscation.

16. Referring to the provisions of Section 5(1), Section 8(3) and Section 8(6) of the Act, it was contended that prosecution under the Act, attachment, as well as eventual confiscation are distinct proceedings and may be initiated against the same person if he is accused of the offence of money-laundering. Even when he not so accused, the property in his possession may be proceeded against for attachment or confiscation, on the satisfaction of the appropriate and competent Authority. That, the Hon'ble High Court of Karnataka in **Smt. K. Sowbaghya vs. Union of India & Others**[9] , has upheld the validity of Section 5 of the Act. It was contended that Section 8 cannot be said to be violative of Article 14 of the

[8] MANU/AP/0125/2011
[Writ Petition Nos.10765, 10769 and 23166 of 2010 dated 04-03-2011]
[9] MANU/KA/0192/2016
[Writ Petition No.14649 of 2014 (GM-RES) connected with
Writ Petition No.19732 of 2014 (GM-RES) dated 28-01-2016]

Constitution of India as the attachment, retention and the essential authority to order confiscation of the property is dependent and contingent upon proof of guilt and finality of conviction for commission of offence under Section 3. The "reason to believe" on the part of the Adjudicating Authority prior to confiscation is in the scheme of the Act, while the determination of the guilt of the accused is in the exclusive domain of the Special Court.

17. With regard to the arguments on Section 24 of the Act, reliance was again placed on **Smt. K. Sowbaghya**[9]. Under Section 45 of the Act the contention put forth was that discretionary powers envisaged therein are not necessarily discriminatory. The mere possibility that the power may be misused or abused cannot lead to it being struck down. Moreover, the conferment of power must be regarded as having been made in furtherance to the scheme and does not attack the equality clause. His submissions were fortified with the decisions in **Matajog Dobey vs. H. C. Bhari**[10]**; Moti Ram Deka & Others vs. General Manager, North East Frontier Railway and Another**[11]**; Budhan Choudhry and Others vs. State of Bihar**[12] **and Sukumar Mukherjee vs. State of W.B. and Another**[13]. That, the submission of the Petitioner pertaining to Section 50 of the Act is wholly incorrect as conviction is not based solely on the statement made to an Officer. Pointing to the decisions of the Hon'ble Supreme Court in **Manzoor Ali Khan vs. Union of India and Others**[14]**, Sushil Kumar Sharma vs. Union of India and Ors.**[15]**, Mehmood Alam Tariq and Others vs. State of Rajasthanand Others**[16] **and Sanjay Dutt vs. State through C.B.I., Bombay (II)**[17] it was contended that a provisions of law cannot be struck down as unconstitutional merely on apprehension of misuse.

18. In rebuttal, the attention of this Court was drawn to the decision of the Hon'ble High Court of Karnataka being **Obulapuram Mining Company Pvt. Ltd. and Others vs. Joint Director, Directorate of Enforcement and Others**[18]**,** wherein a Division Bench held that, once an FIR or a report is filed in the predicate offence, an ECIR can be registered and a provisional attachment order can be passed by the Enforcement Department. However, without the

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[10] AIR 1956 SC 44
[11] AIR 1964 SC 600
[12] AIR 1955 SC 191
[13] (1993) 3 SCC 723
[14] (2015) 2 SCC 33
[15] (2005) 6 SCC 281
[16] (1988) 3 SCC 241
[17] (1994) 5 SCC 410" WP(C) No. 23 of 2015 13

conviction/judicial conclusion of the trial proceedings, any order confirming the attachment and confiscation cannot be passed.

19. I have perused the pleadings of the Petitioner and heard at length the rival arguments advanced by Learned Counsel for the parties. Although, averments were made in the Petition with regard to Sections 16, 17, 18, 19, 20 and 44(1)(c) of the Act being ultra vires the Constitution, the Sections are not being taken up for consideration and discussion, as the Pleadings in Paragraph 40, averments in Paragraph 'D' of the grounds and the prayer portion in the Writ Petition are confined to assailing the vires of Sections 2(u) 3, 4, 5, 8, 13, 24, 45 and 50 of the Act. It is pertinent to point out that in the averments of the Petitioner, the challenge to Section 42 of the Act finds no place, but has been inserted only in the prayer. In the absence of averments or arguments, this Section finds no place for consideration or discussion.

20. The constitutional validity of the provisions of Sections 2(u), 3, 4, 5, 8, 13, 24, 45 and 50 of the Act ultra vires Articles 14, 19, 20, 21 and 22 of the Constitution, have been called in question herein.

21. Before embarking on a discussion on the merits, the parameters and principles laid down by judicial pronouncements, for adjudicating the constitutionality of an enactment or its provisions may be referred to.

22. In State of Bihar and Others, etc. etc. vs. Bihar Distillery Ltd., etc. **etc.**[19], the Hon'ble Supreme Court held that while judging constitutionality of an enactment, the Court should (a) try to sustain validity of the impugned law to the extent possible, it can strike down the enactment only when it is impossible to sustain it; (b) the Court should not approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed; (c) the Court should consider that the Act made by the Legislature represents the will of the people and that cannot be lightly interfered with; (d) the Court should strike down the Act only when the unconstitutionality is plainly and clearly established; (e) the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.

23. In **R.S. Raghunath vs. State of Karnataka and Another**[20], it was observed as follows;

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[18] MANU/KA/0545/2017
[Writ Petition Nos.5962, 11442 and 11440-11441 of 2016 (GM-MM-C) dated 13-03-2017
[19] AIR 1997 SC 1511
[20] AIR 1992 SC 81

"12. ……..
"The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

……."

24. In **Namit Sharma vs. Union of India**[21], the Hon'ble Supreme Court held as follows;

"14. A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute. First and the foremost, as already noticed, is the competence of the legislature to make the law. The wisdom or motive of the legislature in making it is not a relative consideration. The Court should examine the provisions of the statute in light of the provisions of the Constitution (e.g. Part III), regardless of how it is actually administered or is capable of being administered. In this regard, the Court may consider the following factors as noticed in D.D. Basu, Shorter Constitution of India (14th Edn., 2009):

"(a) The possibility of abuse of a statute does not impart to it any element of invalidity.

(b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with the constitutional requirements.

……."

25. In S**hri Ram Krishna Dalmia and Others vs. Shri Justice S.R. Tendolkar and Others**[22] it was observed that;

"11. .....

(a) that a law may be constitutional even though it

[21] (2013) 1 SCC 745
[22] AIR 1958 SC 538

relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself ;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) that the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. ....."

The aforesaid propositions, therefore, provide a guiding light while considering the matter under discussion.

26. That, having been said, it is indeed expedient to consider why it was essential to have legislative intervention to prevent money-laundering, a worldwide phenomenon, which if left unchecked can destabilize financial systems and jeopardize national security.

[23]*[27(a)] Owing to growing awareness amongst countries of the dangers of laundering of "proceeds of crime", international initiatives were taken to counter such activities under the aegis of the United Nations by way of prevention and penalty. The United Nations Political Declaration and Action Plan against Money-Laundering 1998, was the first major initiative against money-laundering. This was devoted to countering the world drug problem, upon which, a political declaration, including the action plan for countering moneylaundering was adopted. The United Nations Global Programme against Money-Laundering established in 1997, had the object of strengthening the ability of the member states to implement measures against money-laundering and the financing of terrorism and in detecting, seizing and confiscating illicit proceeds. The United Nations Convention against illicit trafficking in NDPS Act, highlighted in its preamble the awareness of the parties of the Convention of the generation of large financial benefits and wealth, that enables transnational criminal organizations to penetrate, contaminate and corrupt the structure of Government, legitimate commercial business and society at all levels. The goal was to deprive persons engaged in illicit traffic of the proceeds of criminal activities and thereby eliminate the main incentive for their activities. The effort also included elimination of the root cause of the problem of abuse of narcotic drugs and psychotropic substances, including illicit demand for such drugs and substances and profits obtained from illicit trafficking.

(b) The initiatives under the aegis of the United Nations are;

(i) United Nations Political Declaration and Action Plan against Money-Laundering 1988;

(ii) United Nations Global Programme against MoneyLaundering;

(iii) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;

(iv) International Convention for Suppression of the Financing of Terrorism 1999;

(v) United Nations Convention against Organised Transnational Crimes 2000 and

(vi) United Nations Convention against Corruption 2003.

*[23] See Law on Prevention of Money Laundering in India by Dr. M. C. Mehanathan, First Edition, 2014

(c) Inter-Governmental initiatives emerged such as the "Basel Committee on Banking Regulation and Supervisory Practices" in 1988, which exchanges information and proposes international standards for Banks, to identify customers, avoid suspicious transactions and cooperation with law enforcement agencies to deal with the problem of money-laundering. The Offshore Group of Banking system, International Organization of Securities Commissions, Common Wealth Model Laws of money-laundering are all engaged in working together on anti money-laundering in the financial sector. The Financial Action Task Force (FATF) is the international body which takes effective measures to promote the adoption of countering measures against money-laundering. The FATF has pursued the following tasks;

(i) Monitoring progress by the members in applying measures to counter money-laundering;

(ii) Reviewing money-laundering techniques and countermeasures; and

(iii) Promoting the adoption and implementation of appropriate measures by non-member countries.

(d) With the efforts of International Organization and InterGovernmental Bodies, the global regime in preventing moneylaundering has been developed over a period of time, which comprises of a Code of Conduct to be followed by the Financial Institutions and development of mechanisms, to ensure compliance of the code. The Code of Conduct comprises, inter alia, of three procreative measures;

(i) Customer due diligence;

(ii) Keeping of certain minimum records; and

(iii) Suspicious transaction reporting.*

28. Realizing the threat that money-laundering poses not only to financial systems of the countries but also their integrity and sovereignty, the upshot was the essentiality of a comprehensive legislation to prevent money-laundering in our country. Consequently, the Prevention of Money-Laundering Bill, 1988, was introduced in the Lok Sabha on 04-08-1998, and was passed by both Houses of Parliament and received the assent of the President on 17-01-2003. The Act came into force on 01-07-2005. There have been amendments to the Act in 2005, 2009, 2013, 2015 and 2016. The object of the Act is to prevent money-laundering and connected " activities by confiscation of "proceeds of crime", setting up of agencies and mechanisms for combating money-laundering.

29. According to Black's Law Dictionary, Tenth Edition, 2014, 'money-laundering' means "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced". The offence of money-laundering is resorted to in order to conceal its illicit origin and comprises of the following steps, i.e.,

(i) Placement; where the money obtained as "proceeds of crime" is entered into the financial system, followed by

(ii) Layering; which involves financial transactions in several layers to disguise the "proceeds of crime" from their source and

(iii) Integration; which is investment of the amount into the financial system by way of investment in real estate or other methods, to wipe away its association with crime.

30. In **Ram Jethmalani vs. Union of India**[24], the Hon'ble Supreme Court expressed its concern in the matter as follows;

> "5. The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and then routing them

[24] (2011) 8 SCC 1" WP(C) No. 23 of 2015 21

back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action.

6. The worries of this Court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system-wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives."

31. Focussing now on the matter at hand, the rival contentions of the parties under that Section 2(u) of the Act as already reflected hereinabove is taken up for consideration. Section 2(u) of the Act defines "proceeds of crime" reads as follows;

> "(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;"

Thus, the expression "proceeds of crime" means any property derived or obtained directly or indirectly by any person, as a result of criminal activity, related to a scheduled offence or the value of such property. The expression 'property' is elucidated in Clause (v) of Section 2, as any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible

and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located. Section 2(u), therefore, does not envisage either mens rea or knowledge that the property is a result of criminal activity. If any property, which includes value of the property, is "proceeds of crime" then any transfer in terms of Section 2(za) requires examination to verify as to whether it is by way of a money-laundering operation involving the process of placement, layering or integration. Such property could be subjected to attachment and confiscation, the Section, however, does not presuppose knowledge of the proceeds being of criminal activity. Properties apart from the "proceeds of crime"are not liable to attachment, neither is it included in the ambit of the Act. All that the Section is concerned with is the "proceeds of crime" and does not extend to property not so involved. The argument of Learned Counsel for the Petitioner that the provision necessarily includes a guilty mind, therefore, cannot be countenanced. While reading Section 2 and Section 3 of the Act in juxtaposition it is clear that only a person who is involved with the "proceeds of crime" would be guilty of the offence under Section 3 and not a person who is only in 'posession'of the "proceeds of crime" sans mens rea. This, of course, depends on whether there is reasonable grounds for such suspicion as couched in the language of Section 5 of the Act. A conjunctive reading of Sections 2 and Section 5 reveals that the concerned Authority, can only, when he has "reason to believe" that "any person" is in possession of any "proceeds of crime" provisionally attach such property, thereby not necessarily encompassing Section 3 in its ambit.

32. The provisions of the Act are aimed at preventing the crime of money-laundering, hence, the powers exercised under the Act have to be considered at tandem with the purpose of the Act. Bearing in mind, the object of the Act, which is to shear the process of money-laundering at its very commencement, the provisions of Section 2(u) enable initiation of proceedings against the person in possession of "proceeds of crime", which may lead to attachment, confirmation and eventual confiscation of the property concerned.

33. In **Kartar Singh vs. State of Punjab**[25] the Hon'ble Supreme Court has held that, in a criminal action, the general conditions of penal liabilities are indicated in the old maxim "actus non facit reum, nisi mens sit rea", i.e., the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the Legislature, under certain situations

[25] 1994 SCC (Cri) 899

and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out mens rea in cases of this kind, the element of mens rea must be read into the provisions of the statute. The provisions of Section 2(u) of the Act would indicate that it implicitly rules out mens rea with the objective of ensuring that all property which are "proceeds of crime" derived or obtained directly or indirectly by any person as a result of criminal activity relating to a scheduled offence can be attached. This is to achieve the object of the Act and has to be viewed in this context.

34. In Director of Enforcement vs. M/s. MCTM Corporation Pvt. Ltd. **and Others**[26], a two Judge Bench while considering whether mens rea is an essential ingredient in the proceeding taken under Section 23(1)(a) of the Foreign Exchange Regulation Act, 1973, held that it is not an essential ingredient to establish contravention under Sections 10(1) and 23(1)(a) of that Act.

35. In **J. K. Industries Limited and Others vs. Chief Inspector of Factories and Boilers and Others**[27] the Hon'ble Supreme Court observed that the offences under the Factories Act, 1948, are not part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability, without proof of any mens rea; the offence are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crime as well as in laws concerning the industry, food adulteration, prevention of pollution, etc. in India and abroad. Absolute offences are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty and such offences are generally known as public welfare offences.

36. Pertinently, the provisions of Section 2 are to be read with the intent of Section 5 of the Act, which provides that if the concerned Officer, mentioned therein, on the basis of materials in his possession, has "reason to believe" that any

[26] AIR 1996 SC 1100
[27] (1996) 6 SCC 665

person is in possession of any "proceeds of crime", such property can provisionally be attached, irrespective of where the ownership lies, be it an offender under Section 3 or a non-offender. It suffices if the property is "proceeds of crime" and mens rea is not a prerequisite. "Reason to believe" in Section 5 is qualified with the words "on the basis of material in his possession". Therefore, it is not mere subjective belief that is required, but is based on a reasoned belief, on the foundation of materials in his possession, thereby preventing any arbitrariness, for invocation of powers under Section 5 for the purposes of Section 2.

37. In any event, even if a provisional attachment under Section 5 is made, which shall be discussed in detail later, Section 8 comes into play, only, after an opportunity of hearing is afforded under Section 8(2)(b), thereby adhering to the principles of audi alteram partem. At this juncture, we may usefully refer to the decision of **S. L. Kapoor**[3]**.** In the said matter Section 238(1) of the Punjab Municipal Act, 1911, was under discussion. The Hon'ble Supreme Court observed that natural justice may always be tailored to the situation and held, inter alia, that;

> "11. ..... Minimal natural justice, the barest notice and the 'littlest' opportunity, in the shortest time, may serve. The Authority acting under Section 238(1) is the master of its own procedure. There need be no oral hearing. It is not necessary to put every detail of the case to the committee, broad grounds sufficient to indicate the substance of the allegations may be given. ....."

However, it may be relevant to point out here that the Supreme Court hastened to observe as follows;

> "11. ..... We guard ourselves against being understood as laying down any proposition of universal application. Other statutes providing for speedy action to meet emergent situations may well be construed as excluding the principle audi alteram partem. All that we say is that Section 238(1) of the Punjab Municipal Act does not."

38. The object of the Act, being borne in mind, as already extracted herein above and the discussions that have ensued it is evident that the definition of

"proceeds of crime" has the goal of preventing and stemming criminal activities related to money - laundering at its very inception and cannot be said to be arbitrary or absurdly expansive, or seeking to penalise even non-offenders. Thus, the provision does not suffer from any infirmity.

39. **Section 3 of the Act defines the offence of money - laundering and reads as** follows;

> **"3. Offence of money-laundering.—** Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it is untainted property shall be guilty of offence of money-laundering.**"**

While Section 4 of the Act is the penalty for such crime and provides as under;

> **"4. Punishment for money-laundering.—** Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which mayextend to seven years and shall also be liable to fine: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

Hence, the offence of money-laundering under Section 3 of the Act, involves attempting or indulging in or knowingly assisting or knowingly being a party or being involved in any process or activity connected with the "proceeds of crime", including its concealment, possession, acquisition or use and projecting or claiming it as untainted property. It is an offence independent of the predicate offence and to launch prosecution under Section 3 of the Act, it is not necessary that a predicate offence should also have been committed. This Section criminalises the possession or the 'conversion' of the "proceeds of crime" which includes projecting or claiming the "proceeds of crime" as untainted property. The element of mens rea is present

in the Section as against the provision of Section 2(u) thereby preventing prosecution of any innocent person. Consequently, the word 'knowingly' used in the Section inheres the intent of keeping an innocent out of the dragnet of the offence. It would conclude that only a person who knowingly attempts to indulge, assists or is a party, or involved in any process or activity connected with "proceeds of crime" would be guilty of the offence under the Act which is aimed at eliminating the crime. Section 24(a) of the Act provides that in any proceeding relating to "proceeds of crime" under this Act, in the case of a person charged with the offence of money-laundering under Section 3, the Authority or Court shall, unless the contrary is proved, presume that such "proceeds of crime" are involved in money-laundering. Thus, the burden of proving that the "proceeds of crime" are untainted property rests on the persons alleged to have committed the offence under Section 3. Inexorably, the purpose of the Section is to ensure that the "proceeds of crime" are not subjected to money-laundering, by way of deposits made in the names of people who have not acquired it as of right, but in whose accounts the offender has introduced by way of an ulterior motive. In this context, we may refer to the ratiocination of the Constitution Bench of the Supreme Court in **Attorney General for India and Others vs. Amratlal Prajivandas and Others**[28] which while considering the validity of the provisions of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, (for short "SAFEMA") observed that;

> **"44.** ..... The relatives and associates are brought in only for the purpose of ensuring that the illegally acquired properties of the convict or detenu, acquired or kept in their names, do not escape the net of the Act. It is a well-known fact that persons indulging in illegal activities screen the properties acquired from such illegal activity in the names of their relatives and associates. Sometimes they transfer such properties to them, may be, with an intent to transfer the ownership and title. .....
>
> **56.** .....
>
> (5) The application of SAFEMA to the relatives and associates [in clauses (c) and (d) of Section 2(2)] is equally valid and effective inasmuch as the purpose and object of

[28] (1994) 5 SCC 54

bringing such persons within the net of SAFEMA is to reach the properties of the detenu or convict, as the case may be, wherever they are, howsoever they are held and by whomsoever they are held. They are not conceived with a view to forfeit the independent properties of such relatives and associates as explained in this judgment. ....."

40. In **State of Maharashtra vs. Mayer Hans George**[29] while examining a question as to whether mens rea or actual knowledge is an essential ingredient of the offence under Section 8(1) read with Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947, when it was shown that the accused in that case voluntarily brought gold into India without the permission of the Reserve Bank of India, the majority held that the Foreign Exchange Act is designed to safeguard and conserve foreign exchange which is essential to the economic life of a developing country and therefore, the provisions have to be stringent, aiming at achieving success. Ergo, in the background of the object and purpose of the legislation, if the element of mens rea is not by necessary implication invoked, its effectiveness as an instrument for preventing smuggling would be entirely frustrated. In Section 3 of the Act, as the word 'knowingly' is inserted thereto, the element of mens rea exists in the provision itself and does not have to be culled out from the act of the offender. The relevance of Section 3 would be where the acquisition of property is by illegal means and illegitimate methods coupled with the necessary guilty mind. However, an offender is afforded ample opportunity under Section 24 of the Act, which shall be discussed hereinafter, to establish that he had no mens rea.

41. The offence of money-laundering coupled with necessary mens rea meets with the penalty as provided under Section 4 which has already been extracted hereinabove. The penal provision under the Act stipulates a minimum penalty, thus while awarding sentences the discretion of the Court is fettered inasmuch as the Court has to award the minimum sentence prescribed. The imposition of penalty is largely a deterrent method with some form of relief. No specific arguments were put forth by Learned Counsel for the Petitioner on Section 4 of the Act although the constitutionality was challenged in the prayer, however, it is axiomatic that no offence decries penalty. The Court although clothed with discretion to award punishment has to exercise the discretion ensuring award of minimum penalty provided for by the Act, however, neither the minimum term nor rigorous

[29] AIR 1965 SC 722

imprisonment for an offence means that the provisions are ultra vires. The Hon'ble Supreme Court in **State of Gujarat and Another vs. Hon'ble High Court of Gujarat**[30] while discussing the liability of the prisoners sentence to rigorous imprisonment, culled out the following principles;

> **"50.** .....
>
> (1) It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.
>
> (2) It is open to the jail officials to permit other prisoners also to do any work which they choose to do provided such prisoners make a request for that purpose.
>
> (3) It is imperative that the prisoners should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners, the State concerned shall constitute a wage-fixation body for making recommendations. We direct to each State to do so as early as possible.
>
> (4) Until the State Government takes any decision on such recommendations, every prisoner must be paid wages for the work done by him at such rates or revised rates as the Government concerned fixes in the light of the observations made above. For this purpose, we direct all the State Governments to fix the rate of such interim wages within six weeks and report to the Court of compliance of the direction.
>
> (5) We recommend to the State concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.
>
> .....

[30] (1998) 7 SCC 392

> **104.** ..... that putting a prisoner to hard labour while he is undergoing a sentence of rigorous imprisonment awarded to him by a court of competent jurisdiction cannot be equated with "begar" or "other similar forms of forced labour" and there is no violation of clause (1) of Article 23 of the Constitution. Clause (2) of Article 23 has no application in such a case. The Constitution, however, does not bar a State, by appropriate legislation, from granting wage (by whatever name called) to prisoners subject to hard labour under the courts' orders, for their beneficial purpose or otherwise."

Even during rigorous imprisonment the offender are not deprived of their wages and other rights which accrue to them in incarceration. There appears to be nothing ultra vires to the Constitution of India in Section 4 of the Act.

42. Section 5 of the Act is reproduced herein below;

> **"5. Attachment of property involved in money - laundering.-**(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this Section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—
>
> (a) any person is in possession of any proceeds of crime; and
>
> (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,
>
> he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this Section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the nonattachment of the property is likely to frustrate any proceeding under this Act.

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under subsection (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of Section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.**"**

43. This Section empowers the Officers enumerated therein, who has "reason to believe", after recording such reasons in writing, as well as on the basis of material in his possession, to provisionally attach any "proceeds of crime". Under Section 5(1)(b) where the "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which could frustrate the object of the Act, provisional attachment may be resorted to by an order in writing. Such attachment nevertheless cannot exceed one hundred and eighty days from the date of the order. This provision is followed by the Proviso that even a provisional order of attachment cannot be made in relation to a scheduled offence unless a report has been forwarded to a Magistrate under Section 173 of the Cr.P.C. or else a Complaint has been filed by the concerned Investigating Agency, before a Magistrate or Court, for taking cognizance of the scheduled offence. The second Proviso stipulates that regardless of anything in Section 5(1)(b), if the concerned Officer has "reason to believe", on the basis of material in his possession, that not attaching the property involved in money-laundering immediately, would frustrate the proceedings of this Act, he is clothed with powers to attach the property. Once attachment of property under Section 5(1) takes place the Authority is to forward a copy of the order along with relevant materials to the Adjudicating Authority, as per procedure prescribed. The order of attachment, made under Section 5(1), shall cease to have effect after the expiry of the period specified therein or on the date of an order made under Section 8(2), whichever is earlier. Section 8(2), to be discussed later, specifies the process that the Adjudicating Authority shall take after a reply has been filed under Sub-Section (1) of Section 8. The aggrieved person shall be heard and all relevant materials taken into consideration. Section 5(4) of the Act gives liberty to the person whose property is attached to enjoy the immovable property. Under Section 5(5), the Director or any other Officer who

provisionally attaches any property under Section 5(1) shall within a period of thirty days from such provisional attachment, file a Complaint stating the facts of such attachment, before the Adjudicating Authority. A careful perusal of the provision ostensibly indicates that no arbitrary powers are afforded to the concerned Officers as the provisional attachment is to be made only on "reason to believe", on the basis of materials in possession of the Authority and the order is to be in writing. Besides the provisional attachment cannot exceed one hundred and eighty days from the date of order, under the Section. The Section also extends necessary safeguards to the offender by requiring the concerned Officer to Report to his Superior Officer his reasons for believing that any property in the possession of any person is the "proceeds of crime". The provision also expands to allow the persons in possession of any "proceeds of crime", which has been provisionally attached, to continue the enjoyment of his property. Thus the question of confiscation, immediately on attachment, is not projected. On reading and understanding the Section, arbitrariness does not appear to colour the provision. Although the seizure appears to be the result of a unilateral decision, the provision thereby serves a dual purpose inasmuch as neither is the person deprived of enjoyment of his property at the time of such attachment, at the same time the property suspected to be either under Section 2(u) or under Section 3 of the Act is secured. Besides which number of days for such attachment and report to the Adjudicating Authority have been specified.

44. In **Matajog Dobey**[10] while discussing the vires of Section 197 of the Cr.P.C. pertaining to prior sanction for prosecution of a Government servant, the Apex Court observed as follows;

> **"(15)** .....
>
> It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. ....."

45. The Petitioner also placed reliance on **Olga Tellis**[2], wherein the attention of this Court was drawn to the observation of the Hon'ble Supreme Court that the ordinary rule which regulates all procedure is that, persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard

as to why that action should not be taken. That, having been said, it may be pointed out that in the same Judgment the Supreme Court had observed that there are situations which demand the exclusion of the rules of natural justice by a reason of diverse factor, like time, the place and the apprehended danger. It would be appropriate to extract herein the observation of the Hon'ble Supreme Court at Paragraph 42, which reads as follows;

> **"42.** Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "Is this procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. In Francis Coralie Mullin [(1981) 1 SCC 608], Bhagwati, J., said at p. 524 : (SCC p.615, para 4)
>
> > ... it is for the Court to decide in exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise. (emphasis supplied)**"**

46. In **Mohammad Jafar**[4] the challenge was to certain provisions of the Unlawful Activities Provision Act, 1967. Section 3(2) required that the Notification by which the Government declared any association as unlawful to specify the grounds on which it was issued and such other particulars, as, the central government may consider necessary. It was argued for the Union of India that the expression for "reasons to be stated in writing" did not necessarily mean that the reasons have to be stated in the Notification and would suffice if the reasons were noted on the File of the case. The Hon'ble Supreme Court disagreeing with the submissions, observed that the intention of the Legislature is that the aggrieved party must know the reasons for the grave step of banning which was taken without giving it any

opportunity of being heard. If reasons are non-existent or irrelevant, the association has the right to challenge the same by showing cause against it. The fundamental right of the citizens and the association are to be taken away even temporarily for reasons which are not known to the individual or the association. However, in the instant case, on pain of repetition, it may be pointed out that, although the decision to provisionally attach the property under Section 5 is initially unilateral, at the same time it is for a fixed number of days and opportunity to show cause is afforded. The provisional attachment does not exceed one hundred and eighty days, apart from which Section 5(4) also prescribes that nothing in the Section shall prevent the person interested in the enjoyment of the immovable property attached under Sub-Section (1) from such enjoyment. The Act, however, does not prescribe knowledge that, a property is "proceeds of crime" for the purpose of attachment and confiscation.

47. Consequently, it is clear from the provisions of the Section that initiation of any action under Section 5 is on the basis of a "reason to believe" that any person is in possession of any "proceeds of crime" and such "proceeds of crime" are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceeds relating to confiscation of such "proceeds of crime". Such action is independent from any enquiry or investigation of any predicate offence **[Binod Kumar vs. State of Jharkhand and Others[31]]**, but limits the number of days of such provisional attachment and report thereof to the Adjudicating Authority. The provisions of Section 5 while aiming to achieve the object of the Act cannot be said to be violative of Articles 14, 19 or 300A of the Constitution of India.

48. Section 8 of the Act deals with adjudication and reads as follows;

> **"8. Adjudication.**—(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1)

[31] (2011) 11 SCC 463

of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in moneylaundering and confiscated by the Central Government:

Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under subsection (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in

money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

(a) continue during the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or subsection (2A) of section 60 by the Adjudicating Authority.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of

money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it."

This Section, therefore, provides for adjudication by an Adjudicating Authority in two phases;

(a) Confirmation by the adjudicating authority of the order of attachment/ retention/forging of property or record during the pendency of the proceedings relating to the scheduled offence; and

(b) Recording or finding whether all or any of the property referred to in the notice issued under Sub Section of Section 8 are involved in money-laundering.

49. The wheels of adjudication are set in motion on receipt of a Complaint under Section 5(5) by the Adjudicating Authority from the Authority who makes the provisional attachment, or an application made under Sub-Section (4) of Section 17 or application under Sub-Section (10) of Section 18. If the Adjudicating Authority has "reason to believe" that any person has committed an offence under Section 3 of the Act or is in possession of the "proceeds of crime", necessary steps as provided in Section 8 commences, with the Adjudicating Authority serving a notice, bestowing not less than thirty days to the offender/non-offender to indicate his sources of income, earning or assets out of which or by means of which he has acquired the property attached by the Authority concerned, or seized under Sections 17 or 18. He is not prohibited from furnishing the evidence on which he relies and other relevant information and particulars. He is rendered the opportunity of showing cause as to why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

50. In other words, Section 8(1) to Section 8(3) affords adequate opportunity to the concerned individual to produce relevant materials and evidence to satisfy the Adjudicating Authority at the stage of confirmation of provisional attachment or retention of the seized property, that the property attached under Sub-Section (1) of Section 5 or seized under Section 17 or Section 18 has been acquired by him from his legal/known sources of income. Any attachment of the value of any property can also be explained by the concerned accused by production of necessary materials an evidence to establish his bona fides. Once such material has been furnished, the Adjudicating Authority is required to consider the reply and after giving an opportunity to the person of being heard, may either confirm the attachment of the property, or else as a natural corollary release such property, by demurring to pass an order of confirmation to the property attached provisionally or part of it.

51. The rights of the offender or any person in possession of "proceeds of crime" are clearly protected by reading the provisions of Section 5 and Section 8 cumulatively, inasmuch as the provisional attachment can be confirmed only after the Adjudicating Authority affords an opportunity to the offender or any person holding the property to establish his sources of income. The Director is also given the opportunity of being heard at that stage. Should it be found that the property held is from legitimate sources then the question of confirmation of order of provisional attachment does not arise. In any event, the provisions of Section 5(4) continue to hold sway when the provisional attachment obtains and the accused is

not prevented from enjoyment of the immovable property attached under Section 5(1) of the Act. Hence, there is no reason to hold that the provisions of Section 8 is either arbitrary or violative of fundamental rights. After hearing the persons the Adjudicating Authority under Section 8(3) can confirm the attachment of the property or retention of the property by an order in writing. The property suffers no destruction and on conclusion of trial should the proof of guilt of the offender be established in the Court, the property involved in the money-laundering or which has been used for the commission of the offence under Section 3, shall stand confiscated to the Government. On the contrary, as already stated, should there be no proof, the property so attached is to be released on the order of the Special Court. The law makes further provision for release of the property under Section 8(7) where the trial is truncated on the death of the accused or when the accused is a proclaimed offender or for any other reason as enumerated in the Section. The Special Court has been clothed with powers to pass appropriate orders in regard to the property either by way of confiscation or release of the property involved in money-laundering on an application moved by the Director.

52. In **C.B. Gautam**[5] wherein the argument was that the order for compulsory purchase under Section 269UD(1) of the Income Tax Act, 1961, was served on the Petitioner without any show-cause notice being served and without the Petitioner or other affected parties being given an opportunity of showing cause, against an order for compulsory purchase, nor were the reasons for the said order set out in the order or communicated to the concerned parties. The Hon'ble Supreme Court found that, the order for compulsory purchase under Section 269UD(1) of the Income Tax Act, which was served on the Petitioner in the night of 15-12-1986, had been made without any show-cause notice being served on the Petitioner and without the Petitioner or other affected parties having been given any opportunity to show cause against an order for compulsory purchase, nor were the reasons for the said order set out in the order or communicated to the Petitioner or other concerned parties. It was held that the order is clearly bad in law and it is set aside. This aforestated ratio is clearly distinguishable from the case at hand, the statute under consideration does not want in stipulating the opportunity of showing cause, before the order is confirmed.

53. In **Sushil Kumar Sharma**[15] while discussing the vires on a plea to declare Section 498A of the IPC as unconstitutional and ultra vires, it was held that;

> **"12.** It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless the contrary is proved, that

administration and application of a particular law would be done "not with an evil eye and unequal hand". (See A. Thangal Kunju Musaliar v. M. Venkatichalam Potti) [AIR 1956SC 246]

54. On the same question, reference may also be made to the following ratio;

(i) In **Mafatlal Industries Ltd. and Others vs. Union of India and Others**[32] a Bench of nine Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable.

(ii) In **The Collector of Customs, Madras and Another vs. Nathella Sampathu Chetty and Another**[33] it was observed that;

"(33) ……..

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. ……..……."

(iii) In **State of Rajasthan and Others vs. Union of India and Others**[34] it was held that;

"147. …… It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief. ……..**"**

(iv) In **Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat and Another**[35], **Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and Others**[36] and **Padma Sundara Rao (Dead) and Others vs. State of T.N. and Others**[37] it was observed that while interpreting a

[32] (1997) 5 SCC 536
[33] 1961 (1) Cri.L.J. 364
[34] (1977) 3 SCC 592
[35] (2004) 6 SCC 672
[36] (2003) 2 SCC 455
[37] (2002) 3 SCC 533

provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary.

55. Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009 (No.21 of 2009), has been called in question as ultra vires the Constitution having incorporated certain offences under the Indian Penal Code, in the Schedule of the PMLA.

56. "Scheduled offence" is defined under Section 2(y) of the Act and reads as follows;

> **"**(y) "scheduled offence" means—
>
> (i) the offences specified under Part A of the Schedule; or
>
> (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or
>
> (iii) the offences specified under Part C of the Schedule;"

As already reflected in the foregoing discussions the offence under the Act is also a stand alone offence. In other words, a person need not necessarily be booked of a scheduled offence, but if he is booked and subsequently acquitted, he can still be prosecuted for an offence under the Act. Under Section 5 and Section 8 of the Act, proceedings can be against persons who are accused of a scheduled offence or against persons who are accused of having committed an offence of money-laundering or persons who are found to be in possession of the "proceeds of crime". It is not necessary that a person has to be prosecuted for an offence under the Act only if he has committed a scheduled offence. The prosecution can be independently only for the offence of moneylaundering as defined in Section 3 and Section 2(p) which provides that "money-laundering" has the meaning assigned to it in Section 3.

57. The argument forwarded by Learned Counsel for the Petitioner is that, by including certain offences under the IPC in the Schedule of the Act, such inclusion does not subserve the aim and objective of the Act. It may be highlighted here that the "offences under the Indian Penal Code" had been incorporated in Part B, in the Schedule, by Section 13 of the Prevention of Money-Laundering (Amendment) Act, 2009 (No.21 of 2009), however, it was omitted from Part B, in the Schedule, by Section 30 of the Prevention of Money-Laundering (Amendment) Act, 2012 (No.2 of 2013), and incorporated into Part A, in the Schedule. The object of the Act as already pointed out in elaborate discussions under Section 2(u), is to abort the process of money-laundering at its inception. Thus, the wisdom of the Legislature cannot be questioned, when such inclusion has been made, as there may be circumstances where the predicate offence and the offence under Section 3 are intertwined.

58. While discussing the vires of Section 24 of the Act, the proceedings under the Act commences with provisional attachment under Section 5, on a suspicion of an offence under Section 3 being committed. Section 24 is being extracted here under for clarity;

> **"24. Burden of proof.**—In any proceeding relating to proceeds of crime under this Act,—
>
> (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and
>
> (b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering."

59. The Section clearly indicates that it is a rebuttable presumption, affording the Petitioner sufficient opportunity of establishing that the property in his possession or the value of any such property, has been acquired by legal means and is not the result of any illegal methods, which would comprise of an offence under Section 3. The insertion of this provision obviously takes us back to the object of the Act, being to prevent money-laundering, which itself comprises of a series of illegal acts. Once the offender is able to explain the source of the property, which is in his possession, then the prosecution is required to discharge its burden. In this context,

we may usefully notice the provisions of Sections 101 and 102 of the Indian Evidence Act, 1872, which reads as follows;

> **"101. Burden of proof.**—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 exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **102. On whom burden of proof lies.**—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."

Infact by shifting the onus to the accused, it affords him an opportunity of establishing his innocence and clarifying to the prosecution the source of his property and therefore, contains a safeguard for the accused. Consequently, it cannot be said that the provision is unconstitutional. Thus, when considering the Acts the object has to be given primary importance and the provision thereof cannot be said to be ultra vires when the end goal is to be achieved. Section 24 unequivocally extends an opportunity to the offender to establish the source of his property, which if legitimate can be fully justified by the Petitioner.

60. Section 45 of the Act has next been challenged, inter alia, on the ground that, imposing limitations on bail is violative of Articles 14 and 21 of the Constitution of India, as the grant of bail is subjected to specifications, viz., grounds for believing that the accused is not guilty of such offence and he is not likely to commit any while offence on bail.

61. To examine the aforesaid submissions, we may extract the relevant provision of the Act;

> **"45. Offences to be cognizable and non-bailable.—**
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and

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

Provided that a person, who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.**"**

Thus, it is clear that under Section 45(ii) of the Act discretion vests with the Court to enlarge the Petitioner on bail or to refuse such bail. It emanates, from the provision that even when there is an objection to the bail by the Public Prosecutor,

if the Court is satisfied that there are reasonable grounds for believing the offender is (i) not guilty of such offence; and (ii) not likely to commit any offence while on bail, he can be enlarged on bail. I hasten to add that a discussion on the merits and de-merits of the case is not at that stage, expected to ensue, nevertheless, the order of refusal or permitting bail cannot be bereft of cogent reasons. Obviously the gravity of the offence, the status of the victim, likelihood of fleeing from justice are paramount considerations while granting such bail. Section 45(2) of the Act prescribes that the limitation on granting of bail under Sub-Section (1) is in addition to the limitations under the Cr.P.C. or any other Law for the time being in force on granting of bail. Hence, the Court has to take in consideration the relevant factors which are considered in a Bail Petition under Sections 437 and 439 of the Cr.P.C. when an application under Section 45 of the Act filed. Conditions stipulated in Section 437 of the Cr.P.C. may also be imposed as the import of the accused remaining at large, the impact on society by his enlargement on bail or whether such bail would thwart the ends of justice, all merit consideration. Thus, the evidence before the Court must be worthwhile under Section 45(ii) of the Act, to persuade the Court to conclude that, if rebutted, the accused might be convicted. Evidence "beyond reasonable doubt" is not envisaged at this stage. In my considered opinion, the limitations are not unfounded or arbitrary. The Legislature has evidently used the words "reasonable grounds for believing", in Section 45(1)(ii) to enable the Court dealing with the bail, to justifiably hold, as to whether there is indeed a genuine case against the accused and whether the prosecution is able to produce prima facie evidence in support of the charge and the evidence so furnished if unrebutted could lead to a conviction. Apprehension of repetition of the crime is another consideration in refusing bail, as also the antecedents of an accused person. The prosecution has not been given arbitrary or wide amplitude under Section 45, as the provision with clarity lays down that the matter for consideration falls within the discretion of the Court, who, after extending an opportunity to the Public Prosecutor, in matters where the person is accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule, is to be satisfied subjectively. It is only subject to the satisfaction of the Court that the bail is to be granted or declined. There is evidently no infirmity in the provision and cannot be said to offend Articles 14 and 21 of the Constitution of India.

62. So far as Section 50 of the Act is concerned, it would be appropriate to refer of I.A. No. 2 of 2016 dated 24-09-2016, arising out of this Writ Petition, wherein this Court was apprised that Section 50 of the Act and Section 67 of the

NDPS Act are similar provisions and the issue whether the statement recorded by the Investigating Officer under Section 67 of the NDPS Act can be treated as confessional statement or not has been referred to the larger Bench of the Hon'ble Supreme Court. Reliance was placed on **Tofan Singh vs. State of Tamil Nadu**[38]. It is informed that the matter is now likely to be listed before a larger Bench of the Hon'ble Supreme Court. That, no decision till date has been taken on the said matter.

63. While considering this submission, we may briefly peruse the decision of the Hon'ble Supreme Court in **Chikkamma and Anr. vs. Parvathamma and Anr.**[39] where the issue, inter alia, before the Hon'ble Supreme Court was on the quantum of compensation that should be awarded to the Appellants, who were the Claimants in a proceeding under the Motor Vehicles Act, 1988. The Counsel for the Appellants urged that some amounts on account of Future Prospects should also be awarded while determining the entitlement of the Appellants for the enhancement of the compensation. The said bench taking note of the fact that the question of awarding Future Prospects to a self-employed person was pending before a larger Bench of the Supreme Court, observed as follows;

> "9. Taking into account the fact that the deceased was a self employed person and also as the question with regard to award of future prospects of a self employed person is presently pending before a larger Bench of this Court and as some enhancement of compensation has already been made by us, we are of the view that in the facts of the present case, the claim for future prospects ought not to be gone into by us. The said claim, therefore, is refused."

64. Toeing the line of the above observation, it would be apposite to hold here that as the matter of constitutionality of Section 67 of the NDPS Act, which bears a similarity to Section 50 of the Act is pending consideration before the Hon'ble Supreme Court, it would be in the correctness of things not to enter into a discussion of the matter where a decision is awaited.

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[38] (2013) 16 SCC 31
[39] MANU/SC/0728/2017
[Civil Appeal No.3409 of 2017 dated 28-02-2017]

65. The Petitioner also sought quashing of the ECIR dated 19-02-2014. No separate application under Section 482 of the Cr.P.C. was filed. While dealing with this issue, we may refer to the decision of the Hon'ble Supreme Court in **Girish Kumar Suneja vs. C.B.I.**[40] wherein the Supreme Court discussed the ambit of Section 482 of the Cr.P.C. and Articles 226 and 227 of the Constitution of India. The relevant portion is extracted below;

> **"43.** ..... The power under Section 482 of the Cr.P.C. is to be exercised only in respect of interlocutory orders to give effect to an order passed under the Cr.P.C. or to prevent abuse of the process of any Court or otherwise to serve the ends of justice. As indicated above, this power has to be exercised only in the rarest of rare cases and not otherwise. If that is the position, and we are of the view that it is so, resort to Articles 226 and 227 of the Constitution would be permissible perhaps only in the most extraordinary case. To invoke the constitutional jurisdiction of the High Court when the Cr.P.C. restricts it in the interest of a fair and expeditious trial for the benefit of the accused person, we find it difficult to accept the proposition that since Articles 226 and 227 of the Constitution are available to an accused person, these provisions should be resorted to in cases that are not the rarest of rare but for trifling issues."

The decision being lucid requires no further illumination the Petitioner herein seeks quashing of the ECIR by resorting to Articles 226 and 227 of the Constitution of India, when the correct procedure to have been adopted was to file a Petition under Section 482 of the Cr.P.C. In such a circumstance, on the bedrock of the aforecited case, the prayer can neither be considered nor allowed.

66. In conclusion, bearing in mind the object of the Act and the detailed discussions which have ensued hereinabove, being bereft of merit, this Writ Petition stands dismissed.

67. No order as to costs.

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[40] 2017 SCC OnLine SC 766
[Criminal Appeal No.1317 of 2017 dated 17-07-2017]