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duty to record the facts stated by the person, treat it as a complaint under S. 154 of the Cr.P.C., register a fresh complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short-cut route, foregoing legal provisions and file a charge-sheet on the basis of a S. 161 Cr.P.C. statement of a witness. At best, S. 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in S. 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an F.I.R which connect him with the offence to enable him to protect his interest – The above *ratio* (*Youth Bar Association of India* v. *Union of India and Others*) emphasises the importance of an F.I.R in a criminal offence, in the absence of which an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case.

Taraman Kami* v. *State of Sikkim ***781 - B***

Code of Criminal Procedure, 1973 – S. 313 – Under S. 304B of the I.P.C the burden of proving his innocence shifts to the accused, but when examined under S. 313 of the Cr.P.C. if he opts not to give any response or a satisfactory response, the Court cannot return a finding of guilt on this score – In cases under the POCSO Act also the burden undoubtedly shifts to the accused to prove his innocence for which opportunity is afforded to him under S. 30 of the POCSO Act. Nevertheless, unsatisfactory response under S. 313 of the Cr.P.C. does not empower the Court to find him guilty.

Taraman Kami* v. *State of Sikkim ***781 - D***

Code of Criminal Procedure, 1908 – S. 164 – S. 164 Cr.P.C. statement is not substantive evidence and it is infact the evidence of the witness which is given in the Court which may be corroborated by her S. 164 Cr.P.C. statement. S. 164 Cr.P.C. statement comes into play when the statement of any witness is recorded by a Magistrate during

the course of an investigation and can be used to impeach the credit of the Prosecution witness. However, it is clear that such a statement cannot be treated as substantive evidence even if the evidence given by the witness in the Court falls short of the statement made by her under S. 164 Cr.P.C. The lacuna in the Prosecution case cannot be filled by resorting to the statement under S. 164 Cr.P.C. and treating it as substantive evidence. The statement under S. 164 of the Cr.P.C. is recorded "*res inter alias acta*" which term denotes a thing done between others, to which a given person is not a party. The Appellant is not a party to the S. 164 Cr.P.C. statement of the witness and thus deprived of an opportunity to cross-examine the witness.

Taraman Kami* v. *State of Sikkim ***781 - E***

Code of Criminal procedure, 1973 – Ss. 2(j), 177, 178, 179 – The offence has been committed in Darjeeling, West Bengal; the FIR has been lodged in Darjeeling, West Bengal; the Accused is a resident of Darjeeling, West Bengal; the fact that she was arrested in Namchi, South Sikkim, does not clothe the Sessions Court, Namchi, with jurisdiction to grant bail **–** Held, the bail was granted by the Court which had no jurisdiction to try the offence.

State of West Bengal Through the Criminal Investigation Department, Represented by Goutam Ghoshal, Deputy Superintendent of Police (Special),* v. *Smt. Sabitri Rai ***846 - B***

Constitution of India – Relief – It is trite that no adverse order can be passed against persons who were not made parties to the litigation **–** In an action at law while seeking discriminatory relief from the Court the Petitioners cannot pick and choose the Respondents. If the non-parties were necessary parties they ought to have been impleaded. Any order passed in favour of Petitioners for allotment of seats would obviously affect the non-parties in the facts of the present case keeping in mind the fact that only 29 seats were at the disposal of the Respondent No.2 **–** The Petitioners have chosen not to challenge the admission of the non-parties and acquiesced and waived their rights to claim reliefs before the Court promptly. In fact considered in that light the Petitioners have failed to consciously challenge the selection of the non-parties selected at the first round of counselling held on 17.07.2017 and second round of counselling held on 09.08.2017.The Petitioners have thus failed to pursue their legal remedies on time and chosen to attack only one candidate who has secured the last Central

Pool seat provided by the Respondent No.1 on the 31st August 2017 to the Respondent No.2 – The failure of the Petitioners to implead the said non-parties would not allow this Court to examine the merit of their selection to grant relief of admission in favour of Petitioners. An action at law definitely is not a game of chess. The relief of admission cannot be granted to the Petitioners on account of the fact that the non-parties similarly placed have been consciously kept out of the lis by the Petitioners for reason best known to them, inspite of opportunities to do so.

Miss Deepa Chettri and Another* v. *Ministry of Health and Family Welfare and Others **861 - C**

Criminal Trial – Cancellation of bail – The grounds for cancellation of bail broadly are; interferance or attempt by Accused with the due course of administration of justice or evasion or attempts to evade the due course of justice or abuse of the concession granted in any manner and thereby thwarting the process of investigation. In addition other grounds may also be considered, such as, threats by the Accused to witnesses, indulgence in similar activities during the Bail period and attempts to flee to another country.

State of West Bengal Through the Criminal Investigation Department, Represented by Goutam Ghoshal, Deputy Superintendent of Police (Special),* v. *Smt. Sabitri Rai ***846 - C***

Indian Evidence Act, 1872 – Evidence – There has to be judicial application of mind to the evidence before a Court, which should be reticent about drawing conjectures and conclusions without evidence. Nothing can be based on surmises or assumptions and the evidence furnished has to be viewed with dispassionate judicial scrutiny.

Taraman Kami* v. *State of Sikkim ***781 - C***

General Clauses Act, 1897 – S. 27 – Presumption of Service of Notice – It is clear that the I.O. on Affidavit has stated that she went to the residence of the Accused to serve the Notice by *dasti* on several occasions, but found that the Accused person's house was locked. It is also seen that the service of the Notice upon the Accused issued by this Court could not be served on account of the addressee being out of station. The Notice was issued to the Accused as per the address furnished by her to the Sessions Court, Namchi, at the time of obtaining bail. – Held, in view of the facts and circumstances reflected

hereinabove, it shall safely be presumed in this matter that Notice was served upon the Accused.

***State of West Bengal Through the Criminal Investigation Department, Represented by Goutam Ghoshal, Deputy Superintendent of Police (Special),* v. *Smt. Sabitri Rai* 846 - A**

Limitation Act, 1963 – S. 5 – Expression "sufficient cause" – In ***Esha Bhattacharjee*** the Hon'ble Supreme Court, *inter alia*, observed that no presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of – Held, on the bedrock of the principles in Esha Bhattacharjee when the prayers of the Petitioner are examined, it can indeed be concluded that definitely there has been no negligence on the part of the Petitioner. The error committed has been admitted, which arose on account of a misconception of the Law and no negligence issues. The Petitioner has "sufficient cause" there being no deliberate causation of delay and the grounds are bona fide. In any event, it will be unfair to allow the Petitioner to suffer on account of any error committed by her Counsel as substantial justice should be accorded paramount consideration.

***Smt. Bishnu May Rai* v. *Dr. Rameshwar Prasad and Others* 899 - A**

Motor Accidents Claims – Income Certificate – The voluntary statement of the witness ought to have alerted the Learned Tribunal that there was allegedly an error in the document (Income certificate). The Learned Claims Tribunal without considering her evidence concluded that Exhibit – 13(Income Certificate) was confusing and decided to place the notional income of the deceased at Rs. 6,000/- when the correct procedure to be adopted was to clear the air with regard to the anomalies appearing in Exhibit-13 by examining the issuing authority.

***The Branch Manager, National Insurance Company Limited,* v. *Smt. Tika Devi Limboo and Others* 833 - A**

Motor Accidents Claims – Rules of Evidence – The statutory rules of evidence do not apply to matters in Motor Accidents Claims Tribunal, clothing the Tribunal with sufficient powers to adopt legal methods to reach the crux of the matter and thereby to award just compensation. A claimant in a petition under Motor Vehicles Act, 1988, which is a benevolent legislation to offer respite to the claimant

for loss of the bread winner, should not suffer on account of any negligence on the part of the third person.

The Branch Manager, National Insurance Company Limited* v. *Smt. Tika Devi Limboo and Another ***833 - B***

Motor Vehicles Act, 1988 – Ss. 166 and S. 163A – Multiplier to be adopted **–** Held, for claim petitions under S.166 of the Motor Vehicles Act, 1988, the choice of multiplier is to be adopted as per the Table laid out in the judgment of Sarla Verma and not under the Second Schedule of the Motor Vehicles Act, 1988, as the said Table is for claim petitions filed under S. 163A of the Motor Vehicles Act, 1988.

The Branch Manager, National Insurance Company Limited,* v. *Smt. Tika Devi Limboo and Another ***833 - C***

Motor Accidents Claims – Calculation of the age of deceased – Exhibit 8(Birth Certificate) of the deceased reflects his Date of Birth as 26.08.1978. The accident having occurred on 15.8.2014, the deceased was a few days short of his 36th birthday **–** Held, bearing in mind the contents of Exhibit-8 and ratiocination laid down in *Achhaibar Maurya v. State of Uttar Pradesh and 7 Others: (2008) 2 SCC 639,* the deceased was technically not 36 years of age. Consequently, the choice of multiplier to be adopted for computing loss of dependency would be as laid down in the Judgment in Sarla Verma.

The Branch Manager, National Insurance Company Limited,* v. *Smt. Tika Devi Limboo and Another ***833 - D***

Reservation Policy – Reservation policy issued vide Notification No.01/T.E./HRDD dated 14.06.2014 (in short "Reservation Notification") and amended vide Notification No.132/T.E./HRDD/ 2015 dated 15.04.2015 – As per clause VI of Reservation Notification the 7 categories/ communities shall get first preference over "others" in the choice / selection of seats/ institutions **–** Communication No. U/ 14014/1/2017-ME-II dated 16.08.2017 addressed to the Secretary, Medical, Health and Family Welfare Department, Government of Sikkim issued guidelines for allocation of Central Pool/BDS seat for the Academic year 2017-18. The said guidelines for selection and nomination of candidates against Central Pool MBBS / BDS seats for the Academic year 2017-18 provided for the eligibility conditions, educational qualifications, procedure for selection and reservation of

candidates – The said guidelines issued by the Respondent No.1 provided that the reservation policy being followed by the concerned beneficiary State will apply to the Central Pool MBBS seats – It is evident that after being allotted the last Central Pool seat by the Respondent No.2 on 31.08.2017 i.e. the last date specified for admission by the Medical Council of India the Respondent No.4 had sought extension of time from the Apex Court which had been granted on the submission made on behalf of the Respondent No.1. Judicial propriety demands that this Court shall not delve into examining any issue which may undermine the authority of the Apex Court. In such circumstances, this Court shall refrain from examining the merit of the contentions of the Petitioners challenging the allotment of the last Central Pool seat to the Respondent No.4 – Held, no direction could be issued to the Respondent No.2 and 3 to cancel the allotment of one MBBS seat to the Respondent No.4 and to allocate the same to the Petitioner No.2 for, that would be in derogation of the order passed by the Apex Court.

Miss Deepa Chettri and Another* v. *Ministry of Health and Family and Others ***861 - B***

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – S. 24 (2) – S. 24 (2) of the Act of 2013 contemplates that where an award under S. 11 of the old Act of 1894 has been made five years or more prior to the commencement of the Act of 2013 but the physical possession of the land has not been taken or the compensation has not been paid, such proceedings shall be deemed to have lapsed. Further, where award has been made but the compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under S. 4 of the old Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. Learned Single Bench in its order dated 15th September 2015, which is sought to be reviewed here, held that the proceedings under S. 24(2) of the Act of 2013 is not applicable. There appears to be no mistake, as in the case on hand, it is an admitted position that the award was made long before and full compensation in respect of the entire land in question, thereafter, was also paid to the land owner therein. The question of person interested ought to have been examined in the earlier proceedings under the old Act of 1894. Under the provisions of the Act of 2013, person interested cannot agitate

afresh making the State to pay further compensation under the new Act and as such no alleged miscarriage of justice and grave mistake as pleaded by the petitioner, has occurred in the order sought to be reviewed in this petition.

***Mr. Nar Bahadur Khatiwada* v. *State of Sikkim and Another* 805 - B**

Universities – Admission – Medical College – **Time Schedule –** Strict adherence to the time schedule is the mandate and cannot be deviated from as held repeatedly by the Apex Court – The time schedule notified by Medical Council of India has the force of law **–** Vide Notification published in the Gazette of India on 04.07.2017 the Medical Council of India notified the Regulations on Graduate Medical Education Amendment, 2017 providing for the time schedule for the Universities and other authorities to organised the admission process for the Academic year 2017-18 - As the law stand today as declared by the Apex Court the schedule relating to the admission to the professional college should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the Courts or the Board and midstream admission should not be permitted. It is only under exceptional circumstances, if the Court finds that there is no fault attributable to candidate relief of admission can be directed, however, within the time schedule prescribed. As the last date of admission notified by the Medical Council of India was 31.08.2017 although it is seen that the Petitioners both toppers in their respective categories have suffered non admission due to the fault on the part of the Respondent No.2 this Court is unable to grant any relief for grant of admission to them. MBBS is a professional course. The semesters having begun on 01.09.2017 three months have already lapsed. - Held, in view of the Judgment of the Apex Court in ***re:Chandigarh Administration*** (supra)and specifically para 33.1 to 33.10 and 43, the prayers prayed for in the Writ Petition for a direction to the Respondent No.1 to allocate 3 more MBBS seats to the State of Sikkim and to the Respondent No.2 and 3 to issue nomination to the Petitioners in any Government Medical Colleges cannot be granted. Similarly, the prayer seeking a direction to the Respondents to allot one MBBS seat each to the Petitioners from the Central Pool also cannot be granted.

Miss Deepa Chettri and Another* v. *Ministry of Health and Family and Others ***861 - A***

Universities – Admission – Meritorious Student – Apex Court has consistently held and stressed on the merit in matters of admissions as meritorious student ought not to face any impediment to get admission for some fault on the part of the Institution or the persons involved with it – To protect the student community aspiring for medical admissions – direction may be appropriate to the Respondent No.2 to henceforth not allocate seats in anticipation – In a welfare State the Respondent No.1 as the Centre and the Respondent No.2 as the State must play a key role in ensuring that the most meritorious students are not deprived of their legitimate rights to professional education. Their merits demands that they be given preference. The Respondent No.1 and 2 have a constituted duty for ensuring this which would directly help in nation building. Before devising any method for allotment the Respondent No.3 ought to have considered whether such a method devised would ensure fair-play. Our Constitution guarantees rights to equality. The Respondent No.1 and 2 must, therefore, devise fair, equal, accurate and perfect method to ensure that the allotments of MBBS seats are done not only on time but also equitably and in the manner contemplated by the laws guided by its policies. **Held**, Respondent No.2 shall thus, pay compensation to the Petitioners equivalent to the amount of medical fees payable by them for admission into the MBBS seats to which the Petitioners would have been entitled to as the first candidate in their respective categories had the Respondent No.2 not devised the method to allocate Central Pool MBBS seats in anticipation within a period of two weeks from the date of this Judgment.

Miss Deepa Chettri and Another* v. *Ministry of Health and Family and Others ***861- D***

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SLR (2017) SIKKIM 781

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

Crl. A. No. 32 of 2016

Taraman Kami ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant : Mr. Jorgay Namka, Advocate (Legal Aid Counsel) with Ms. Panila Theengh, Advocate.

For Respondent : Mr. J. B. Pradhan, Public Prosecutor with Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

AND

Crl. A. No. 13 of 2017

State of Sikkim ….. **APPELLANT**

Versus

Taraman Kami ….. **RESPONDENT**

For the Appellant : Mr. J. B. Pradhan, Public Prosecutor with Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

For the Respondent : Mr. Jorgay Namka, Advocate (Legal Aid Counsel) with Ms. Panila Theengh, Advocate.

Date of decision: 1st December 2017

A. Code of Criminal Procedure, 1973 – S. 154 – Criminal Justice System is set into motion by the lodging of an information relating to the commission of an offence, in other words, by the lodging of a complaint as envisaged in S. 154 of the Cr.P.C. If the Police Officer is satisfied that a cognizable offence has been committed, he is bound to record the information and launch an investigation into the matter. It is, of course, not necessary that he has to be satisfied about the veracity of the information, which will emerge only on a complete investigation. Shortcomings, if any, in the F.I.R will not absolve him of his duty to collate the information.

(Para 10)

B. Code of Criminal Procedure, 1973 – S. 154 – When an offence is committed, it is imperative that a complaint under S. 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps – If the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a complaint under S. 154 of the Cr.P.C., register a fresh complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short-cut route, foregoing legal provisions and file a charge-sheet on the basis of a S. 161 Cr.P.C. statement of a witness. At best, S. 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in S. 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an F.I.R which connect him with the offence to enable him to protect his interest – The above ratio (*Youth Bar Association of India* v. *Union of India and Others*) emphasises the importance of an F.I.R in a criminal offence, in the absence of which an individual cannot be

roped in for an offence, based on the statement of a witness, derived during the investigation of a case.

(Paras 13 and 14)

C. Indian Evidence Act, 1872 – Evidence – There has to be judicial application of mind to the evidence before a Court, which should be reticent about drawing conjectures and conclusions without evidence. Nothing can be based on surmises or assumptions and the evidence furnished has to be viewed with dispassionate judicial scrutiny.

(Para 25)

D. Code of Criminal Procedure, 1973 – S. 313 – Under S. 304B of the I.P.C the burden of proving his innocence shifts to the accused, but when examined under S. 313 of the Cr.P.C. if he opts not to give any response or a satisfactory response, the Court cannot return a finding of guilt on this score – In cases under the POCSO Act also the burden undoubtedly shifts to the accused to prove his innocence for which opportunity is afforded to him under S. 30 of the POCSO Act. Nevertheless, unsatisfactory response under S. 313 of the Cr.P.C. does not empower the Court to find him guilty.

(Para 27)

E. Code of Criminal Procedure, 1908 – S. 164 – S. 164 Cr.P.C. statement is not substantive evidence and it is infact the evidence of the witness which is given in the Court which may be corroborated by her S. 164 Cr.P.C. statement. S. 164 Cr.P.C. statement comes into play when the statement of any witness is recorded by a Magistrate during the course of an investigation and can be used to impeach the credit of the Prosecution witness. However, it is clear that such a statement cannot be treated as substantive evidence even if the evidence given by the witness in the Court falls short of the statement made by her under S. 164 Cr.P.C. The lacuna in the Prosecution case cannot be filled by resorting to the statement under S. 164 Cr.P.C. and treating it as substantive evidence. The statement under S. 164 of the Cr.P.C. is recorded "*res inter alias acta*" which term denotes a thing done between others, to which a given person is not a party. The Appellant is not a party to the S. 164 Cr.P.C. statement of the witness and thus deprived of an opportunity to cross-examine the witness.

(Para 28)

Appeal partly allowed in Crl. A. No. 32 of 2016.

Appeal dismissed in Crl. A. No. 13 of 2017.

Chronological list of cases cited:

1. State represented by Inspector of Police v. Saravanan and Another, (2008) 17 SCC 587.
2. State of Himachal Pradesh v. Sanjay Kumar *alias* Sunny, (2017) 2 SCC 51.
3. State of H.P. v. Asha Ram, (2005) 13 SCC.
4. Krishan v. State of Haryana, (2014) 13 SCC 574.
5. State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp (1) SCC. 335.
6. Prakash Singh Badal and Others v. State of Punjab and Others, (2007) 1 SCC 1.
7. Lalita Kumari v. Government of Uttar Pradesh and Others, (2014) 2 SCC 1.
8. Youth Bar Association of India v. Union of India and Others, MANU/SCOR/18594/2016.
9. Rajinder @ Raju v. State of H.P., AIR 2009 SC 3022.
10. Nagaraj v. State, Rep. by Inspector of Police, Salem Town, Tamil Nadu, 2015 Cri.L.J. 2377 (SC).

JUDGMENT

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

1. Crl.A. No.32 of 2016 (Taraman Kami vs. State of Sikkim) and Crl.A.13 of 2017 (State of Sikkim vs. Taraman Kami) are being disposed of by this common Judgment, being related matters.

2. In Crl.A. No.32 of 2016, the Learned Court of the Special Judge (POCSO), West Sikkim, at Gyalshing, in Sessions Trial (POCSO) Case No.05 of 2016, convicted the Appellant for incestuous sexual assault under Sections 5(l) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for brevity "POCSO Act"), and under Section 506 of the Indian Penal Code (for short the "IPC"), vide the impugned Judgment dated 27-09-2016. He was sentenced to rigorous imprisonment of 10 (ten) years and fined Rs.5,000/- (Rupees five thousand) only, under Sections 5(l) and 5(n) of the POCSO Act, with a default stipulation, and simple imprisonment of one year under Section 506 of the IPC. The sentences were ordered to run concurrently, duly setting off the detention already undergone by the Appellant. The Judgment and Order on Sentence are being assailed in this Appeal.

3. In Crl.A. No.13 of 2017, the State-Appellant assailed the Order on Sentence detailed hereinabove, and prayed for imposition of the maximum sentence provided by law, inter alia, on grounds that the Learned Trial Court failed to consider the incestuous nature and gravity of the offence, the perpetrator being the father of the victim. This was vehemently resisted by Counsel for the Respondent on the premise that no such offence against the victim had been made out beyond a reasonable doubt by the Prosecution.

4. Advancing his arguments on behalf of the Appellant in Crl.A. No.32 of 2016, Learned Counsel put forth the contention that although the mother of the victim, P.W.9, is said to have lodged Exhibit 5, the First Information Report (FIR), her evidence to the contrary, would establish that she was an illiterate person and therefore, unaware of the contents of Exhibit 5, which thereby remained unproved. Secondly, Exhibit 5, pertains to sexual assault on the "Victim B", the younger daughter of the Appellant and the Complainant, and not "Victim A", their elder daughter, who was listed only as Prosecution Witness No.3 and deposed as such. Despite the absence of an FIR against the Appellant alleging offence by him on P.W.3, the Investigating Officer (I.O.) proceeded to file a Charge-Sheet against him for allegedly perpetrating rape on her as well, while the Learned Trial Court recorded the statement of P.W.3 as "Victim A", sans FIR. That, P.W.3 is

already married and leading a family life. Besides, the offence of penetrative sexual assault by the Appellant against "Victim B", P.W.4, has also not been established, but the Court has relied on the evidence of P.W.3 to establish the case of "Victim B". The Medical Report of P.W.4 fails to support the Prosecution case. That apart, P.W.4 had infact never claimed intimidation by the Appellant to make out a case under Section 506 of the IPC. Thus, from the anomalies that appear in the Prosecution case, the Appellant deserves an acquittal.

5. Rebutting the stance of the Appellant, Learned Public Prosecutor drew the attention of this Court to Section 29 of the POCSO Act and predicated that the Statute mandates that if the child has alleged the commission of an offence under any of the Sections detailed therein, the Court shall presume that such an offence has taken place. It was further contended that the statement of P.W.4 under Section 164 Code of Criminal Procedure, 1973 (for short "Cr.P.C.") is corroborated by her evidence in Court, which in turn is corroborated by her medical evidence, Exhibit 7. That, although the Appellant was afforded an opportunity under Section 313 Cr.P.C. to establish his innocence, he failed to take advantage of the said circumstance which establishes his guilt. It was next contended that minor discrepancies pointed out by the Appellant do not vitiate the Prosecution case, strength was drawn from the decisions in **State represented by Inspector of Police vs. Saravanan and Another**[1] and **State of Himachal Pradesh vs. Sanjay Kumar alias Sunny**[2] **.** That, it is settled law that absence of injuries on the person of the victim cannot lead to an inference of consensual sexual intercourse or that the offence of rape was not committed. The above submission were fortified with reliance on **State of H.P. vs. Asha Ram**[3] **and Krishan vs. State of Haryana**[4] **.** That, the Medical Report of the victim, Exhibit 7, clearly establishes that there was an old healed tear in the fourchette and since the offence was reported after about a month of the incident, it was likely that any injury in the fourchette had healed. In the circumstances, the Appeal be dismissed.

6. The arguments of Learned Counsel for the parties were heard at

[1] (2008) 17 SCC 587
[2] (2017) 2 SCC 51
[3] (2005) 13 SCC
[4] (2014) 13 SCC 574

length and given due consideration. All documents on record were meticulously examined and considered, as also the citations made at the Bar.

7. It is the Prosecution case that, on 03-12-2015, at 1530 hours, the Naya Bazar Police Station, West Sikkim, received Exhibit 5, the FIR, from P.W.9, the victims mother, stating that, P.W.4, the 14 year old victim, had revealed to her on 03-12-2015, that, around a month back, the Appellant had sexually assaulted her. It was further revealed that in the past also the Appellant had made such attempts. A case was registered under Section 376 of the IPC read with Section 4 of the POCSO Act, on 03-12-2015, against the Appellant, and endorsed to the I.O., P.W.11, for investigation. The Appellant who was alleged to have absconded from the area on 03-12-2015 was apprehended on 09-02-2016 from a quarry site near the river Ringyang, below Singla Bridge, West Bengal and brought to Naya Bazar P.S. During the course of investigation, it came to light that P.W.3 the Appellants elder daughter had also been subjected to sexual assault by the Appellant, therefore, her statement under Section 161 Cr.P.C. was recorded. On completion of investigation, Charge-sheet was submitted against the Appellant for the offences under Sections 376/377/354/506 of the IPC read with Sections 6/10/12 of the POCSO Act, for perpetuating these offences against his minor daughters, allegedly 17 and 14 years old at the time of offence.

8. Upon hearing Learned Counsel for the opposing parties, the Learned Trial Court framed Charge against the Appellant under Section 5(l) of the POCSO Act, for repeated penetrative sexual assault and Section 5(n) of the POCSO Act for incestuous penetrative sexual assault, on the minor "Victim A" and for the selfsame offences against the minor "Victim B" and under Section 506 of the IPC. Having understood the Charges, the Appellant entered a plea of "not guilty", trial thus commenced. The Prosecution examined 11 (eleven) witnesses, including the I.O. of the case, on closure of which the Appellant was examined under Section 313 of the Cr.P.C. and the arguments of opposing parties heard. An analysis of the evidence on record resulted in the impugned judgment and Order on Sentence.

9. What falls for determination before this Court is;

> *(i) Whether the Appellant can be convicted and sentenced for an alleged offence against "Victim A", P.W.3, sans FIR, based*

on her statement under Section 161 of the Cr.P.C.?

(ii) Whether there was any perversity in the impugned Judgment of the Learned Trial Court?

10. Addressing the first question supra, under the Scheme of the Code of Criminal Procedure, the Criminal Justice System is set into motion by the lodging of the information relating to the commission of the offence, in other words, by the lodging of a Complaint as envisaged in Section 154 of the Cr.P.C. If the Police Officer is satisfied that a cognizable offence has been committed, he is bound to record the information and launch an investigation into the matter. It is, of course, not necessary that he has to be satisfied about the veracity of the information, which will emerge only on a complete investigation. Shortcomings, if any, in the FIR will not absolve him of his duty to collate the information. In **State of Haryana and Others vs. Bhajan Lal and Others**[5] **,** the Honble Supreme Court dealing with an offence under the Prevention of Corruption Act, while discussing Section 154(1) of the Cr.P.C., observed, inter alia, held that;

> **"32.** .....
> An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.
>
> **33.** It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.
>
> .....

[5] 1992 Supp (1) SCC 335

36. Section 157(1) requires an officer in charge of a police station who „from information received or otherwise has reason to suspect the commission of an offence — that is a cognizable offence — which he is empowered to investigate under Section 156, to forthwith send a report to a Magistrate empowered to take cognizance of such offence upon a police report and to either proceed in person or depute any one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot, to investigate the facts and circumstances of the case and if necessary, to take measures for the discovery and arrest of the offender. ……. Section 156(1) which is to be read in conjunction with Section 157(1) states that any officer in charge of a police station may without an order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of the concerned police station would have power to enquire into or try under provisions of Chapter XIII. Section 156(3) vests a discretionary power in a Magistrate empowered under Section 190 to order an investigation by a police officer as contemplated in Section 156(1). ……..**”**

[emphasis supplied]

11. In **Prakash Singh Badal and Others vs. State of Punjab and Others**[6] the Honble Supreme Court while discussing the same provision held that;

> **"65.** The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2(o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act of entering the information in the said form is known as registration of a crime or a case.
>
> **66.** At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an enquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can

[6] (2007) 1 SCC 1

send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

…….

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

12. In **Lalita Kumari vs. Government of Uttar Pradesh and Others**[7] the Honble Supreme Court once again held that;

"93. The object sought to be achieved by registering the earliest information as FIR is inter alia twofold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later.

120. ……

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

[7] (2014) 2 SCC 1

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

……."

13. On a reading of the above rationale, it is indeed explicit that when an offence is committed it is imperative that a complaint under Section 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps as enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for

contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest.

14. In Youth Bar Association of India vs. Union of India and Others[8] the Honble Supreme Court while issuing directions to the States to upload each and every FIR registered in all the Police Stations within the territory of India in their official website, observed, inter alia, that;

> **"12.** .....
>
> (a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.
>
> (b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/ parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.
>
> (c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.
>
> .....
>
> (h) In case a copy of the FIR is not provided on the

[8] MANU/SCOR/18594/2016

ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

....."

The above ratio emphasises the importance of an FIR in a criminal offence, in the absence of which an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case. Thus, in view of the gamut of discussions which have taken place hereinabove, it concludes that the answer to the first question is in the negative.

15. Addressing the next question flagged hereinabove, after traversing the Prosecution evidence in its entirety, there is no gainsaying that contradictions do not stare one on the face which are being enumerated as follows;

(i) According to P.W.9, the Police came to her home on 03-12-2015 at around 12 noon making enquires about charcoal, after which, she along with the Appellant and P.W.4 were led to the Naya Bazar Police Station where en route the Appellant allegedly fled. P.W.4, as borne out by the cross-examination of P.W.9, for the first time revealed to her at the Police Station that the Appellant used to sexually assault her, the revelation was also made before two Police personnel leading to

preparation of Exhibit 5 scribed by *"one sir of Nayabazar police station"*.

(ii) P.W.11 the I.O. would have us believe that on 03-12- 2015 he received Exhibit 5 from P.W.9 at 1530 hours, the incident having been revealed to her by P.W.4 that same morning. No revelations of enquiries on charcoal make way into his evidence.

(iii) P.W.5 would depose that she along with P.W.1 and P.W.6 had gone to the "Reshi Out Post" after the victim on 03-12-2017 at around 7.30 p.m. came to her and told her that the Appellant had exposed his genital to her in the cowshed, no information having been given of any other sexual assault by the Appellant on her. No documentary evidence substantiates the visit to the Police Out Post.

(iv) This evidence has to be considered in conjunction with the evidence of P.W.10, the doctor, according to whom, the victim was being medically examined by her on 03-12-2015 at 7.05 p.m. at Gyalshing District Hospital.

(v) Why this is startling is that the distance between Gyalshing and Naya Bazar is 40 kms. approximately entailing a journey of not less than an hour by road. Could the victim possibly be at two places at almost the same time? No clarification on this aspect has been attempted by the Prosecution.

16. Be that as it may, the object and reasons of the POCSO Act and the mandate of Section 29 of the POCSO Act, are being borne in mind as we proceed further.

17. P.W.9 being illiterate did not scribe Exhibit 5, which according to her, was scribed (apparently) by a Police personnel at the Police Station,

nevertheless a voluntary statement under crossexamination to the effect that *"one sir scribed Exhibit-5 in my presence and read over the contents of Exhibit-5"* acknowledging truth of the contents, assumes importance, as it establishes proof of the existence of Exhibit 5. The contents having been set out at the commencement of the facts above, need not be reiterated,.

18. That, having been said, it is only the "Victim B" who is a witness to the offence perpetrated by the Appellant. The Honble Supreme Court in **Rajinder @ Raju vs. State of H.P.**[9] observed that;

> **"21.** In the context of Indian Culture, a woman — victim of sexual aggression — would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no selfrespecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent. ....."
>
> [emphasis supplied]

19. The evidence of the victim is to be tested on the aforesaid principle. We deem it essential to reproduce the evidence given by the witness, which is stated as follows;

> **"**……

[9] AIR 2009 SC 3022

> *I do not remember the exact date, month and year but about six months ago my father used to keep calling me whenever my mother used to go for a work. One night I woke up with a feeling of something on my face, and I found my accused father rubbing his penis all over my face. I did not know what to do so I pinched my younger sister. When my sister woke up my accused father went upstairs. Thereafter my accused father used to often call me for the same act. One morning when I got up from my bed I felt severe pain on my private part and I went to the toilet and checked my private part and I was bleeding from my private part and there was a tear. Thereafter, I thought that my accused father might had been responsible for the same. After 2-3 days of the incident I narrated about the incident to my aunty …….."*

It is admitted by her under cross-examination that she did not know what caused the alleged severe pain on her private part and how she had bled or how the tear had occurred. The other evidence remained uncontroverted.

20. In "A Textbook of Medical Jurisprudence and Toxicology" by Jaising P. Modi, Twenty-fifth Edition 2016, at Page 813, discussed Medico-Legal questions oft asked of which one such question is as follows;

> ***"(i) Can a Woman be Violated during Natural Sleep?*** *— It is impossible for complete sexual intercourse to be accomplished on a virgin during her natural sleep without her knowledge, as the pain caused by the first act of coitus would certainly awaken her from sleep. It is, however, possible, though indeed rare, for partial penetration, to occur in a virgin, within the terms of the law, without awakening her from sleep. It is also possible, though highly improbable for a woman to allow coitus during profound sleep without her being conscious of it, if*

the genital parts are large and accustomed to the intromission of the penis."

21. Bearing this in mind, we may now turn to Exhibit 7, Medical Report of the victim. According to Exhibit 7, P.W.10 found the following;

> **"**……
>
> *Local examination —No bleeding/discharge seen.*
>
> *Hymen — Intact.*
>
> *Hygiene – Maintained.*
>
> *Fourchette — Old healed tear.*
>
> ……
>
> *Final Opinion — Clinical findings shows intact Hymen with old healed tear over the fourchette. Urine for Pregnancy Test is found Negative and vaginal swabs shows absence of spermatozoa.***"**

22. Consequently, considering the evidence of the victim together with Medical Report and the opinion given in **"**A Textbook of Medical Jurisprudence and Toxicology**",** it cannot be assumed, without proof thereof, that the Appellant had indeed committed the offence of penetrative sexual assault. It is well-settled by a catena of judicial pronouncements that, in a case of rape, a victims evidence does not require corroboration, but at the same time her evidence should instil and inspire confidence. The Honble Supreme Court in **Asha Ram** (supra) observed that;

> **"5.** We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing meance of sexual violence against minors much less

by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

23. While considering the matter at hand, we are alive to the aforesaid observation. The victim has admitted that she woke up from bed with severe pain on her private part and she „assumed that her father might be responsible. While keeping in mind the specific mandate of Section 29 of the POCSO Act, one cannot help but remark that, although the rough sketch map drawn by the I.O. shows a one storied house with three rooms, it is not clear why the victim has stated that her father went "upstairs" when she woke up her sister. It is also be appropriate to remark that, there are three rooms in the house and P.W.9 has specifically stated that "It is true that one room used to be occupied by me and the accused and the room adjoining the same used to be occupied by alleged victim 'B' and my another daughter (sic), who is aged about 13 years". No reason furnishes as to why the I.O. assumed that the victim was sharing the room with her parents. The evidence of P.W.11 appears to be discordant with the evidence

of P.W.4 with regard to the threats held out by the Appellant, as she has nowhere stated that she had been threatened by her father, as evident from the deposition extracted hereinabove, contrary to this the I.O. persists that the Appellant had told her not to reveal the incident of the previous night, threatening to kill her if she did so.

24. In view of the evidence that has been reproduced hereinabove, it emerges with clarity that there was indeed sexual assault on the victim, but the fact of penetrative sexual assault by the Appellant on the victim has not been asserted by the victim nor established. The fourchette appears to have an old healed tear, but would it be judicious for the Court to convict the Appellant for such a wound, when neither the age of the wound is stated by P.W.10, nor has the victim been able to confirm unequivocally that it was the Appellant who was responsible for the injury.

25. The Honble Supreme Court in **Sanjay Kumar alias Sunny** (supra) has observed that;

> **"30.** By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. ....."

Thus, there has to be judicial application of mind to the evidence before a Court, which should be reticent about drawing conjectures and conclusions without evidence. Nothing can be based on surmises or assumptions and the evidence furnished has to be viewed with dispassionate judicial scrutiny. The response to the second question, therefore, has to be answered in the positive.

26. It is also essential to address the argument of Learned Public

Prosecutor that although the Appellant was afforded an opportunity under Section 313 of the Cr.P.C. to establish his innocence, he failed to take advantage of the said circumstance, which thereby establishes his guilt. The logic of this argument is undoubtedly contrary to law and fails to convince us. It would be apposite to rely on the decision of **Nagaraj vs. State, Rep. by Inspector of Police, Salem Town, Tamil Nadu**[10] where it has been specifically held that;

> **"15.** In the context of this aspect of the law it is been held by this Court in Parsuram Pandey v. State of Bihar (2004) 13 SCC 189 : (AIR 2004 SC 5068) that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali v. State of Assam (2008) 16 SCC 328 : (AIR 2009 SC (supp) 654). In Sher Singh v. State of Haryana (2015) 1 SCR 29:(AIR 2015 SC (cri) 481) this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either Under Section 313, CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt

[10] 2015 CRI.L.J. 2377 (SC)

> on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination Under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination Under Section 313, Cr PC."

27. As has been explained above, under Section 304B of the IPC the burden of proving his innocence shifts to the accused, but when examined under Section 313 of the Cr.P.C. if he opts not to give any response or a satisfactory response the Court cannot return a finding of guilt on this score. That, having been said, in cases under the POCSO Act also the burden undoubtedly shifts to the accused to prove his innocence for which opportunity is afforded to him under Section 30 of the POCSO Act. At the same time, this court is aware that Section 29 of the POCSO Act mandates as follows;

> **"29. Presumption as to certain offences.-** Where a person is prosecuted for committing or abetting or attempting to commit any offence under

> sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

Nevertheless, unsatisfactory response under Section 313 of the Cr.P.C. does not empower the Court to find him guilty. Other things being equal, it is only the mandate of Section 29 of the POCSO Act that binds the Court. The lucid position of law having been laid down, we need say no further.

28. It was also contended by Learned Public Prosecutor that Section 164 Cr.P.C. statement of P.W.4 is corroborated by her deposition. That, in the Section 164 Cr.P.C. statement of the victim, she has clearly stated that one night she found the Appellant inserting his penis into her anus. Admittedly, this statement finds no place in her evidence before the Court. Hence, the exposition that it ought to supplement the evidence given before the Court, in our considered opinion, is also contrary to law and, therefore, unacceptable. In the first place, Section 164 Cr.P.C. statement is not substantive evidence and it is infact the evidence of the witness which is given in the Court which may be corroborated by her Section 164 Cr.P.C. statement and not the other way around as postulated by Learned Public Prosecutor. Section 164 Cr.P.C. statement comes into play when the statement of any witness is recorded by a Magistrate during the course of an investigation and can be used to impeach the credit of the Prosecution witness. However, it is clear that such a statement cannot be treated as substantive evidence even if the evidence given by the witness in the Court falls short of the statement made by her under Section 164 Cr.P.C. The lacuna in the Prosecution case cannot be filled by resorting to the statement under Section 164 Cr.P.C. first, and treating it as substantive evidence, which the Prosecution in the instant case, is urging this Court to do. The statement under Section 164 of the Cr.P.C. is recorded "res inter alias acta which term denotes a thing done between others, to which a given person is not a party. The Appellant is not a party to the Section 164 Cr.P.C. statement of the witness and thus deprived of an opportunity to cross-examine the witness, hence the above discussed position of law.

29. Therefore, it is clear that the offence committed by the Appellant on the victim was an offence under Section 9(n) of the POCSO Act, i.e.,

aggravated sexual assault, the Appellant being the father of the victim, for which penalty is prescribed under Section 10. Further, in view of the doubt expressed by the victim herself with regard to the offence of penetrative sexual assault, it has not been established that the offence of Section 5(n) of the POCSO Act was committed by the Appellant. Also, a threat may have been held out by the Appellant to the victim, but in the absence of any such evidence given by the minor victim to establish an offence under Section 506 of the IPC, the Court cannot arrive at such a conclusion on assumptions, as suspicion however strong cannot replace proof.

30. In the facts and circumstances, the conviction meted out to the Appellant by the Learned Trial Court is set aside as also the sentence. Consequently, Crl.A. No.32 of 2016 is partly allowed.

31. The Appellant is convicted under Section 9(n) punishable under Section 10 of the POCSO Act. He is sentenced to undergo 5 (five) years imprisonment under the said Section and to pay a fine of Rs.2,500/- (Rupees two thousand and five hundred) only, in default thereof, to undergo simple imprisonment for a further period of two months.

32. In the circumstances, Crl.A. No.13 of 2017 stands dismissed.

33. No order as to costs.

34. Copy of this Judgment be transmitted to the Learned Trial Court for information and to the convict-Appellant.

35. Records of the Learned Trial Court be remitted forthwith

SLR (2017) SIKKIM 805

(Before Hon'ble the Chief Justice)

Review Petition No. 06 of 2015

Mr. Nar Bahadur Khatiwada ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner : Mr. Manoj Goel, Ms. Gita Bista and Mr. Shubodeep Roy, Advocates.

For Respondents : Mr. J.B. Pradhan, Addl. Advocate General with Mr. Santosh Kr. Chettri, Ms. Pollin Rai, Asstt. Govt. Advocates, Mr. Thinlay Dorjee Bhutia and Ms. Roshni Chhetri, Advocates.

Date of decision: 1st December 2017

A. Code of Civil Procedure, 1908 – Order 47 Rule 1 – Principles for maintainability of review laid down thus: (i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. (ii) Review may be entertained when there is some mistake or palpable error which is self-evident and is not detectable by the long drawn process of reasoning. (iii) The error must strike at mere looking of the record. (iv) Jurisdiction of review is not exercisable merely on the ground that the decision is erroneous. (v) There should be apparent grave miscarriage of justice. (vi) On mere ground that other view on the subject is possible, the review cannot be maintained. Power of review can be invoked for correction of mistake but not to substitute a view. (vii) It is impermissible to re-appreciate the evidence to reach a

different conclusion. Review is not a rehearing of a original matter. (viii) Review will be maintainable on discovery of new and important fact or evidence which after the exercise of due diligence was not within the knowledge of the petitioner or could not be brought by him. (ix) Review may be exercised for application of wrong authority or law that falls within the ambit of error apparent on the face of the record. (x) Sufficient reasons, as specified in Order 47 Rule 1 CPC has to be read analogous to those specified in the statutory provision.

(Para 22)

B. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 – S. 24 (2) – S. 24 (2) of the Act of 2013 contemplates that where an award under S. 11 of the old Act of 1894 has been made five years or more prior to the commencement of the Act of 2013 but the physical possession of the land has not been taken or the compensation has not been paid, such proceedings shall be deemed to have lapsed. Further, where award has been made but the compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under S. 4 of the old Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. Learned Single Bench in its order dated 15th September 2015, which is sought to be reviewed here, held that the proceedings under S. 24(2) of the Act of 2013 is not applicable. There appears to be no mistake, as in the case on hand, it is an admitted position that the award was made long before and full compensation in respect of the entire land in question, thereafter, was also paid to the land owner therein. The question of person interested ought to have been examined in the earlier proceedings under the old Act of 1894. Under the provisions of the Act of 2013, person interested cannot agitate afresh making the State to pay further compensation under the new Act and as such no alleged miscarriage of justice and grave mistake as pleaded by the petitioner, has occurred in the order sought to be reviewed in this petition.

(Para 25)

Petition dismissed.

Chronological list of cases cited:

1. Inderchand Jain (Dead) Through LRs. v. Motilal (Dead) Through LRs., (2009) 14 SCC 663.

2. Shivdeo Singh and Others v. State of Punjab and Others, AIR 1963 SC 1909.

3. State of Rajasthan and Another v. Surendra Mohnot and Others, (2014) 14 SCC 77.

4. Union of India v. Sandur Manganese and Iron Ores Limited and Others, (2013) 8 SCC 337.

5. Board of Control for Cricket, India and Another v. Netaji Cricket Club and Others, AIR 2005 SC 592.

6. Lily Thomas and Others v. Union of India and Others, AIR 2000 SC 1650.

7. Kamlesh Verma v. Mayawati and Others, (2013) 8 SCC 320.

8. Vikram Singh *alias* Vicky Walia and Another v. State of Punjab and Another, (2017) 8 SCC 518.

ORDER

Satish K. Agnihotri, C.J.

Seeking review of the order dated 19th May 2015 rendered by this Court in W.P.(C) No. 09 of 2015, wherein and whereunder the writ petition was dismissed summarily, the instant petition is filed.

2. Re-examination of the impugned order is sought primarily on the ground that there is palpable error and miscarriage of justice. It is also contended *inter alia* that the principle of res judicata was wrongly applied when the petitioner was claiming relief under Section 24 (2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "the Act of 2013"), which has accrued subsequently.

3. The facts in brief, relevant for consideration and disposal of the review petition, is that the petitioner claiming to be the interested person, being in absolute possession of the property admeasuring 0.35 acres of land comprised in Khasra No. 713 and housing a single-storey building by virtue of a Gift Deed dated 10th December 1986, has preferred a writ petition, being W.P.(C) No. 09 of 2015, under Article 226 of the Constitution of India, on 16th February 2015, seeking the following reliefs:

> "a. Issue writ, order or direction in the nature of certiorari or any other appropriate writ order or direction thereby setting aside entire Land Acquisition Proceedings including the award.
>
> b. Declare the award is bad, illegal and non est in the eyes of law
>
> c. Direct the Respondents to restore the possession of land in question to the Petitioner herein.
>
> d. Alternatively, without prejudice to foregoing prayer to issue an appropriate writ, order or direction commanding the Respondents to work out the compensation under Section 24(2) Proviso of the 2013 Act.
>
> e. To declare that the payment made to the erstwhile owner is not payment in the eye of law.
>
> f. Issue or pass any writ, direction or order and any other relief(s) which this Honble court may deem fit and proper in the facts of the case and in the interest justice;"

4. Learned Single Bench, having considered all aspects of the matter, dismissed the writ petition summarily holding that Section 24 (2) of the Act of 2013 is not applicable, as no proceedings under Land Acquisition Act, 1894 (hereinafter referred to as "the old Act of 1894") was pending and also physical possession of the land had already been taken under the award dated 15th March 1988.

5. It is beneficial, at this stage, to refer to the genesis of the case. The land in dispute including the house, which was allegedly gifted to the present petitioner, was acquired under the old Act of 1894 under the award dated 15th March 1988, whereunder the compensation was determined to the tune of Rs.6,52,452/- inclusive of solatium, directing to make over the payment of compensation to Shri L.D. Kazi. Registration of the Gift Deed dated 10th December 1986 under which the petitioner is claiming title and possession, was declined by the SubRegistrar on 24th July 1987, which was affirmed by the Registrar vide order dated 15th March 1988. In the meantime, a notification under Section 4(1) of the old Act of 1894 was issued intending to acquire the said land in question. The publication of notification was challenged in Writ Petition No. 05 of 1987, wherein the High Court directed that the proceedings of acquisition would continue but taking over of possession was stayed. During pendency of the writ petition, Section 6 notification under the old Act of 1894 was published on 25th August 1987. The said notification was further challenged by Mr. L.D. Kazi and the present petitioner in Writ Petition No. 48 of 1987, which was withdrawn on 30th November 1987. Subsequently, one more writ petition, being Writ Petition No. 16 of 1988 was filed by Mr. L.D. Kazi and the present petitioner, questioning the legality of both the notifications under Sections 4(1) and 6 (1) of the old Act of 1894 on 02nd September 1988. In the meantime, the award for acquisition of land in question was passed, which came to be challenged in Writ Petition No. 18 of 1988 jointly by Mr. Kazi and the present petitioner. During the currency of Writ Petitions No. 16 of 1988 and 18 of 1988, Mr. Kazi sought permission to withdraw himself from the petitions, stating that he has revoked the Gift Deed and collected the compensation amount awarded for acquisition of the land and also handed over the land to the Government for public purpose.

6. Challenge to denial of the registration was the subject matter of the Writ Petition No. 6 of 1988, which was allowed on 24th May 1989, setting aside the order dated 15th March 1988 of the Secretary, Land Revenue Department with a direction to register the Gift Deed executed by Mr. Kazi Lhendup Dorji in favour of the petitioner. Thereagainst, a Special Leave Petition was preferred by the State of Sikkim, which was admitted and numbered as Civil Appeal No. 6707 of 1995. The Supreme Court dismissed the appeal by order dated 24th November 2004 observing as under:

> "The land, which was the subject matter of the Gift Deed, has already been acquired by the State and compensation has been paid to Respondent No. 1. Counsel appearing for the respondents states that the compensation has wrongly been paid to Respondent No. 1 as the same should have been paid to Respondent No. 2 by virtue of the Gift Deed in his favour. It is further stated by him that the writ petition challenging the constitutional validity of the notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894 filed by Respondent No. 2 having been dismissed by the High Court, Respondent No. 2 filed a Special Leave Petition in this Court on which notice has been issued.
>
> In view of the subsequent developments, without going into the dispute on merits, this appeal is dismissed. The question of law being academic in this case is left open to be decided in an appropriate case."

7. On 06th September 1990, the application of the alleged Doner, Mr. L.D. Kazi for withdrawal from the Writ Petitions No. 16 of 1988 and 18 of 1988 was allowed by the High Court and as such the present petitioner continued to prosecute both the writ petitions. The High Court vide order dated 11th August 2004 dismissed the writ petitions, upholding the acquisition proceedings. Thereagainst, a review petition was filed, which was also dismissed.

8. Assailing the legality of the orders rendered by the High Court in Writ Petitions No. 16 of 1988 and 18 of 1988, and order dated 01st August 2004 passed in Review Petitions No. 05 of 2004 and 06 of 2004, the petitioner preferred Special Leave Petitions, being Special Leave to Appeal (Civil) No. (s) 21982- 21986/2004 in the Supreme Court. The Supreme Court, vide order dated 01st September 2005, dismissed the Special Leave Petitions observing that the petitioner has no locus standi to maintain these petitions. Further liberty was reserved to the petitioner to pursue the dispute regarding the alleged gift in accordance with law.

9. In the meantime, a Title Suit, being Title Suit No. 08/2012 was filed initially before the Civil Judge. Thereafter, on amendment of valuation, the suit was transferred to the Court of District Judge, Special Division-I, claiming ownership and possession on the basis of alleged Gift Deed. The Court of District Judge, Special Division-II, by judgment dated 31st December 2012 dismissed the said Title Suit. Thereagainst, a Regular First Appeal, being RFA No. 02 of 2013 was preferred by the present petitioner. Learned Single Bench disposed of the appeal vide, judgment dated 15th July 2013, inter alia, passing the following orders:

> "(v) Relief (a) - It is declared that at the time when the Land Acquisition proceedings became complete by the passage of the award under Section 11 of the LA Act and taking over of possession, the appellant/ plaintiff was in possession of the suit property having been put in possession of the same pursuant to Exhibit-1 Gift Deed dated 10.12.1986 executed by late L.D. Kazi the registered owner of the property in his favour. It is also declared that the respondents who were bound to register the above gift deed erred in not doing so and therefore the defect if any in the title of the plaintiff on account of non-registration of the gift deed was a defect wrongfully cast on the title by the defendants and therefore liable to be ignored by them in the matter of payment of compensation under Section 11 of Land Acquisition Act.
>
> (vi) Relief (d) - In view of the decision taken under issue no. 6 as recast in this appeal and in view of the situation, I am not inclined to pass any decree in respect of compensation amount against the Government particularly as no such decree is specifically sought for. I find unable to pass any decree in respect of compensation amount against the legal heirs and representatives of late L.D. Kazi, as they are not on the array of parties. But I find that the appellant/plaintiff does have a legitimate grievance in that the compensation amount awarded under

> Section 11 which was due to him only was not paid to him instead was paid to a wrong person. I am, therefore, inclined to make the following observations and directions, which in my view may lead to the appellant/plaintiff securing relief for his grievance."

Further, a liberty was reserved to the appellant therein, the present petitioner, to institute a suit for recovery of the original compensation wrongly paid to Shri L.D. Kazi against the legal representatives of Shri Kazi to the extent of assets left behind by late Kazi and now in their hands.

10. Feeling aggrieved, the State has preferred a Petition for Special Leave to Appeal, being SLP (C) No. 37317/2013, wherein the Supreme Court stayed the judgment dated 15th July 2013 and granted leave on 08th January 2014, thereafter. Thus, the appeal remains pending in the Supreme Court.

11. On admission of Special Leave Petition, as above, it appears that the petitioner has preferred the present W.P.(C) No. 09 of 2015, which was dismissed vide order dated 19th May 2015. This order is sought to be reviewed in this petition. Learned Single Bench, after considering all the aforestated facts in its entirety, came to the conclusion that the writ petition filed by the petitioner is not maintainable and also barred by principles of res-judicata. It was further observed that it also suffers from delay and laches. In so far as applicability of Section 24(2) of the Act of 2013 is concerned, it was held that the same is not applicable. Thus, the facts stand admitted that the compensation was paid to the owner of the land as found proved not only in the observations made by the Supreme Court in its order dated 12th September 2005 passed in SLP No.(s) 21982-21986/2004 but also in the judgment dated 15th July 2013 rendered in RFA No. 02 of 2013. The appeal, thereagainst, is pending consideration before the Supreme Court of India.

12. Mr. Manoj Goel, learned counsel appearing for the petitioner would contend that the judgment requires review as the learned Single Bench failed to appreciate the ambit and scope of provisions of Section 24(2) of the Act of 2013. It is further contended that the possession of the petitioner on the land in question was never disputed. The petitioner, being the person interested, as defined in Section 3 (b) of the old Act of 1894, is entitled to

compensation under the old Act of 1894, as the same was never granted. The observation that the compensation had been paid, was not correct, as the State had wrongly paid to the donor as admitted in various judgments..

13. Referring to the observation that review would also lie if the order has been passed on account of some mistake, laid in **Inderchand Jain (Dead) Through LRs. v. Motilal (Dead) Through LRs.**[1] , Mr. Goel would contend that there was a mistake in not examining the provisions of Section 24(2) of the Act of 2013 in its perspective and as such review is maintainable. Mr. Goel has further referred to **Shivdeo Singh and others v. State of Punjab and others**[2] **, and State of Rajasthan and another v. Surendra Mohnot and others** [3] **,** contending that finding of the impugned order that the suit is barred from the principles of res-judicata is a legal mistake and the same requires review. It is also contended that non-payment of compensation to the petitioner would clearly attract the provision of Section 24 (2) of the Act of 2013 to assess the compensation afresh and make over the same to the person interested.

14. Before adverting to the submissions made by the learned counsel appearing for the petitioner, it is apposite to examine the scope of review jurisdiction. In Shivdeo Singh (supra) referred by the learned counsel for the petitioner, a Constitution Bench of the Supreme Court held as under:

> "(8) ……It is sufficient to say that there is nothing in Art. 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. ……"

15. In Inderchand Jain (supra), cited by Mr. Goel, the Supreme Court laid the following principles: -

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[1] (2009) 14 SCC 663
[2] AIR 1963 SC 1909
[3] (2014) 14 SCC 77

"33. The High Court had rightly noticed the review jurisdiction of the court, which is as under: "The law on the subject—exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

> (i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.
>
> (ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.
>
> (iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.
>
> (iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.
>
> (v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit." ....."

16. In **State of Rajasthan v. Surendra Mohnot** (supra), again referred by Mr. Goel, the Supreme Court observed as under:

> "26. In the case at hand, as the factual score has uncurtained, the application for review did not

require a long-drawn process of reasoning. It did not require any advertence on merits which is in the province of the appellate court. Frankly speaking, it was a manifest and palpable error. A wrong authority which had nothing to do with the lis was cited and that was conceded to. An already existing binding precedent was ignored. At a mere glance it would have been clear to the Writ Court that the decision was rendered on the basis of a wrong authority. The error was self-evident. When such self-evident errors come to the notice of the Court and they are not rectified in exercise of review jurisdiction or jurisdiction of recall which is a facet of plenary jurisdiction under Article 226 of the Constitution, a grave miscarriage of justice occurs. In appeal the Division Bench, we assume, did not even think it necessary to look at the judgments and did not apprise itself of the fact that an application for review had already been preferred before the learned Single Judge and faced rejection. As it seems, it has transiently and laconically addressed itself to the principle enshrined in Section 96(3) of the Code of Civil Procedure, as a consequence of which the decision rendered by it has carried the weight of legal vulnerability."

17. In **Union of India v. Sandur Manganese and Iron Ores Limited and others**[4] **,** the Supreme Court examining the scope of review jurisdiction at length under Article 137 of the Constitution of India read with Order 47 Rule 1 of the Code of Civil Procedure, 1908, held as under:

"23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi v. Sumitri Devi [(1997) 8 SCC 715], this Court held as under: (SCC p. 719, para 9)

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a

[4] (2013) 8 SCC 337

> mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."
>
> **24.** This Court, on numerous occasions, had deliberated upon the very same issue, arriving at the conclusion that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC."

18. In **Board of Control for Cricket, India and another v. Netaji Cricket Club and others**[5] **,** the Supreme Court has observed as under:

> **"88.** We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedents laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the Court except those which are expressly provided in S. 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.
>
> **89.** Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of

[5] AIR 2005 SC 592

the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words „sufficient reason in O. 47, R. 1 of the Code is wide enough to include a misconception of fact or law by a Court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit"."

19. In **Lily Thomas and others v. Union of India and others**[6] **,** the Supreme Court held as under:

"52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji [(1971) 3 SCC 844 : AIR 1970 SC 1273] held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall

[6] AIR 2000 SC 1650

result in miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagaraj v. State of Karnataka, 1993 Supp (4) SCC 595 held:

"Review literally and even judicially means reexamination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest Court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai, AIR 1941 FC 1, the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 that an order made by the Court has final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by Common Law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in.... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced

through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. Basis for exercise of the power was stated in the same decision as under:

> 'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.'

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47 Rule 1 of the Civil Procedure Code. The expression, „for any other sufficient reason in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to

make such orders as may be necessary in the interest in justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength."

20. In **Kamlesh Verma v. Mayawati and others** [7] **,** the Supreme Court, analyzed afresh the ambit and scope of review jurisdiction in detail and held as under:

"15. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. This Court in Parsion Devi v. Sumitri Devi [(1997) 8 SCC 715] held as under: (SCC pp. 718-19, paras 7-9)

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P. [AIR 1964 SC 1372] this Court opined: (AIR p. 1377, para 11)

'11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not

[7] (2013) 8 SCC 320

per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury [(1995) 1 SCC 170] while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389] this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision

to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."

(emphasis in original)

16. Error contemplated under the Rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. The mere possibility of two views on the subject is not a ground for review. This Court, in Lily Thomas v. Union of India[(2000) 6 SCC 224 : 2000 SCC (Cri) 1056] held as under: (SCC pp. 250-53, paras 54, 56 & 58) "54. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure which provides:

'1. ***Application for review of judgment.—***

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and

> important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.
>
> Under Order 40 Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order 40 Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.
>
> ***

56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Article 136 or Article 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created

under any other statute, can take a different view notwithstanding the earlier judgment.

***

58. Otherwise also no ground as envisaged under Order 40 of the Supreme Court Rules read with Order 47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us during the arguments for the purposes of reviewing the judgment in Sarla Mudgal case [Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569] . It is not the case of the petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to the notice of the Court at the time of passing of the judgment. All pleas raised before us were in fact addressed for and on behalf of the petitioners before the Bench which, after considering those pleas, passed the judgment in Sarla Mudgal case [Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569]. We have also not found any mistake or error apparent on the face of the record requiring a review. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. No such error has been pointed out by the learned counsel appearing for the parties seeking review of the judgment. The only arguments advanced were that the judgment interpreting Section 494 amounted to violation of some of the fundamental rights. No other sufficient cause has been shown for reviewing the judgment. The words „any other sufficient reason appearing in Order 47 Rule 1 CPC must mean „a reason sufficient on grounds at least analogous to those specified in the rule as was held in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW

37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] . Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. In T.C. Basappa v. T. Nagappa [AIR 1954 SC 440], this Court held that such error is an error which is a patent error and not a mere wrong decision. In Hari Vishnu Kamath v. Ahmad Ishaque [AIR 1955 SC 233], it was held: (AIR p. 244, para 23)

> '23. … [I]t is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? The learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated.
>
> Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C.J. in—Batuk K. Vyas v. Surat Borough Municipality [ILR 1953 Bom 191 : AIR 1953 Bom 133], that no error could be said to be apparent on the face of the record if it was not self-evident and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that

> might be considered by one Judge as selfevident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.
>
> Therefore, it can safely be held that the petitioners have not made out any case within the meaning of Article 137 read with Order 40 of the Supreme Court Rules and Order 47 Rule 1 CPC for reviewing the judgment in Sarla Mudgal case [Sarla Mudgal v. Union of India, (1995) 3 SCC 635 : 1995 SCC (Cri) 569] . The petition is misconceived and bereft of any substance."

17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court in Kerala SEB v. Hitech Electrothermics & Hydropower Ltd. [(2005) 6 SCC 651] held as under: (SCC p. 656, para 10)

> "10. … In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a

> submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

18. Review is not rehearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications. This Court in Jain Studios Ltd. v. Shin Satellite Public Co. Ltd. [(2006) 5 SCC 501], held as under: (SCC pp. 504-505, paras 11-12)

> "11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all

errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of „second innings which is impermissible and unwarranted and cannot be granted."

and summarized the principle as under :

"20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason. The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius[AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same

principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

21. The aforestated ratio was referred with the approval in **Vikram Singh alias Vicky Walia and another v. State of Punjab and another**[8] **,** referred by Mr. J.B. Pradhan, learned Additional Advocate General.

22. On studied examination of the aforestated decisions laid down by the Supreme Court, the following principles for maintainability of review are discernible:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Review may be entertained when there is some mistake or palpable error which is self-evident and is not detectable by the long drawn process of reasoning.

(iii) The error must strike at mere looking of the record.

(iv) Jurisdiction of review is not exercisable merely on the ground that the decision is erroneous.

(v) There should be apparent grave miscarriage of justice.

(vi) On mere ground that other view on the subject is possible, the review cannot be maintained. In other words, power of review can be invoked for correction of mistake but not to substitute a view.

(vii) In a review petition, it is impermissible to reappreciate the evidence to reach a different conclusion. Review is not a rehearing of a original matter.

(viii) Review will be maintainable on discovery of new and important fact or evidence which

[8] (2017) 8 SCC 518

after the exercise of due diligence was not within the knowledge of the petitioner or could not be brought by him.

(ix) Review may be exercised for application of wrong authority or law that falls within the ambit of error apparent on the face of the record.

(x) Sufficient reasons, as specified in Order 47 Rule 1 CPC has to be read analogous to those specified in the statutory provision.

23. Applying the well-settled principles to the fact of the case, it is manifest that the challenge to the acquisition proceedings failed, the possession of land in question was taken over by the Government and also compensation was paid to the donor i.e. owner of the land in dispute. In such an event, the State cannot be asked to pay the compensation twice over. Accordingly, liberty was granted to the petitioner in the order rendered in RFA No. 02/2013, which is pending consideration in appeal before the Supreme Court, to institute a suit for recovery of the original compensation wrongly paid to Shri L.D. Kazi against his legal representatives.

24. Section 24 (2) of the Act of 2013 contemplates that where an award under Section 11 of the old Act of 1894 has been made five years or more prior to the commencement of the Act of 2013 but the physical possession of the land has not been taken or the compensation has not been paid, such proceedings shall be deemed to have lapsed. Further, where award has been made but the compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the old Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. Learned Single Bench in its order dated 15th September 2015, which is sought to be reviewed here, held that the proceedings under Section 24(2) of the Act of 2013 is not applicable. There appears to be no mistake, as in the case on hand, it is an admitted position that the award was made long before and full compensation in respect of the entire land in question, thereafter, was also paid to the land owner therein. The question of person interested ought to

have been examined in the earlier proceedings under the old Act of 1894. Under the provisions of the Act of 2013, person interested cannot agitate afresh making the State to pay further compensation under the new Act and as such no alleged miscarriage of justice and grave mistake as pleaded by the petitioner, has occurred in the order sought to be reviewed in this petition. It is not a case of discovery of new facts after due diligence or some other sufficient reasons, as contemplated under Order 47 Rule 1 CPC.

25. Resultantly, I am not inclined to entertain this petition.

26. At this stage, it is not necessary for me to go into other submissions/ averments made by the petitioner in respect of amount of compensation, right of the petitioner to get the compensation and also the fact as to whether the petitioners possession was admitted or not. Consideration of these submissions is tantamount to rehearing of the petitioner on appreciation of documents and evidence, which is impermissible in review.

27. For the reasons mentioned hereinabove, the review petition is dismissed.

28. No order as to costs.

SLR (2017) SIKKIM 833

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

MAC App. No. 11 of 2016

The Branch Manager, National Insurance Co. Ltd. Gangtok ….. **APPELLANT**

Versus

Smt. Tika Devi Limboo and Others ….. **RESPONDENTS**

For the Appellant: Mrs. Vidya Lama, Advocate.

For Respondent 1 to 3 : Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms Malati Sharma, Advocates.

For Respondents No. 4 : Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

C. O. No. 1 of 2017

Smt. Tika Devi Limboo and Others ….. **APPELLANTS**

Versus

The Branch Manager, National Insurance Co. Ltd. Gangtok and Another ….. **RESPONDENTS**

For the Appellants: Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms Malati Sharma, Advocates.

For Respondent No. 1 : Mrs. Vidya Lama, Advocate

For Respondents No. 2 : Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

Date of decision: 14th December 2017

A. Motor Accident Claims – Income Certificate – The voluntary statement of the witness ought to have alerted the Learned Tribunal that there was allegedly an error in the document (Income certificate). The Learned Claims Tribunal without considering her evidence concluded that Exhibit -13(Income Certificate) was confusing and decided to place the notional income of the deceased at Rs. 6,000/- when the correct procedure to be adopted was to clear the air with regard to the anomalies appearing in Exhibit -13 by examining the issuing authority.

(Para 7)

B. Motor Accidents Claims – Rules of Evidence – The statutory rules of evidence do not apply to matters in Motor Accidents Claims Tribunal, clothing the Tribunal with sufficient powers to adopt legal methods to reach the crux of the matter and thereby to award just compensation. A claimant in a petition under Motor Vehicles Act, 1988, which is a benevolent legislation to offer respite to the claimant for loss of claimant for loss of the bread winner, should not suffer on account of any negligence on the part of the third person.

(Para 8)

C. Motor Vehicles Act, 1988 – Ss. 166 and 163A – Multiplier to be adopted – Held, for claim petitions under S.166 of the Motor Vehicles Act, 1988, the choice of multiplier is to be adopted as per the Table laid out in the judgment of Sarla Verma and not under the Second Schedule of the Motor Vehicles Act, 1988, as the said Table is for claim petitions filed under S. 163A of the Motor Vehicles Act, 1988.

(Para 10)

D. Motor Accidents Claims Tribunal – Calculation of the age of Deceased – Exhibit 8(Birth Certificate) of the deceased reflects his date of birth as 26.08.1978. The accident having occurred on 15.8.2014, the deceased was a few days short of his 36th birthday **– Held,** bearing in mind the contents of Exhibit-8 and ratiocination laid down in *Achhaibar Maurya v. State of Uttar Pradesh and 7 Others: (2008) 2 SCC 639*, the deceased was technically not 36 years of age. Consequently, the choice of multiplier to be adopted for computing loss of dependency would be as laid down in the judgment in Sarla Verma.

(Paras 10 and 11)

Appeal and Cross Objection partly allowed.

Chronological list of cases cited:

1. Commissioner of Central Excise, Mumbai v. Raymond Limited, (2016) 16 SCC 659.
2. Wasting House Saxby Farmer v. Workmen, (1973) 2 SCC 150.
3. Raghbendra Bose and Others v. Sunil Krishna Ghose and Others, (2005) 12 SCC 309.
4. Kunjan Nair Sivaraman Nair v. Narayan Nair and Others, (2004) 3 SCC 277.
5. Sarla Verma(Smt) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.
6. Raj Rani and Others v. Oriental Insurance Co. Ltd. and Others, (2009) 13 SCC 654.
7. Rajesh and Others. v. Rajbir Singh and Others, (2013) 9 SCC 54.
8. National Insurance Company Limited v. Pranay Sethi and Others, Special Leave Petition (Civil) No. 25590 of 2014
9. Achhaibar Maurya v. State of Uttar Pradesh and Others, (2008) 2 SCC 639.
10. M. Mansoor v. United Indian Insurance Co. Ltd. and Another, 2013 (12) SCALE 324.

JUDGMENT

Meenakshi Madan Rai, J.

1. The learned Motor Accident Claims Tribunal, East District at Gangtok, East Sikkim (hereinafter „the Claims Tribunal) in MACT Case No. 10 of 2016, vide the impugned Judgment dated 17.08.2016, directed the Appellant to pay to the Respondents No. 1, 2 and 3, a sum of Rs.14,23,000/- (Rupees fourteen lakhs, twenty-three thousand) only, with interest @ 10% per annum from the date of filing of the Petition before the learned Claims Tribunal, i.e., 1.3.2016, until its full realization, duly deducting a sum of Rs.50,000/- (Rupees fifty thousand) only, paid as interim compensation to the Respondents. The compensation was awarded on

account of the death of the husband of the Respondent No.1 and father of the Respondents No.2 and 3, in a motor vehicle accident on 15.8.2014, at around 19:30 hours at 20th Mile, Dentam, West Sikkim. Aggrieved by the Award, the Appellant is assailing the same, *inter alia*, on grounds that the learned Claims Tribunal has erred in adding 50% as future prospects to the yearly income of the deceased, when it is not disputed that the deceased was a farmer with no regular income. That, the learned Claims Tribunal had also erroneously granted non-pecuniary damages of Rs.1,00,000/- (Rupees one lakh) only, on account of loss of consortium to the Respondent No.1 and Rs.1,00,000/- (Rupees one lakh) only, on account of loss of love and affection to the Respondents No.2 and 3.

2. The thrust of the verbal arguments of learned Counsel for the Appellant pivoted around the aforesaid grounds with the prayer that the impugned Judgment and Award passed by the learned Claims Tribunal be set aside.

3. A Cross-Objection was filed by the Respondents No. 1, 2 and 3, submitting, *inter alia*, that the learned Claims Tribunal had assessed the monthly notional income of the deceased as Rs.6,600/- (Rupees six thousand and six hundred) only, consequently at Rs.79,200/- (Rupees seventy-nine thousand and two hundred) only, per annum. To the contrary, Exhibit-13, the Income Certificate of the deceased, revealed his monthly income to be Rs.14,070/- (Rupees fourteen thousand and seventy) only, from Agriculture; Rs.21,450/- (Rupees twenty-one thousand, four hundred and fifty) only, from Other Sources and Rs.600/- (Rupees six hundred) only, as Government Allowance for traditional healer/"Shaman" (Jhakri). Hence, the total income of the deceased was Rs.23,222/- (Rupees twenty-three thousand, two hundred and twenty-two) only, per month. Despite such evidence, the learned Claims Tribunal concluded that Exhibit-13 was confusing and rejected it. Had the income reflected in Exhibit-13 been considered, the compensation would have been higher. It was further urged that there was no error in the addition of 50% as future prospects to the annual income of the deceased as he was below 40 years of age. However, the Multiplier of „15 was wrongly adopted to calculate the loss of dependency instead of the Multiplier of „16, as per the Second Schedule of the Motor Vehicles Act, 1988, in consideration of the age of the deceased Victim. Learned Senior Counsel sought to support his submissions by placing reliance on ***Commissioner of Central Excise, Mumbai vs.***

Raymond Limited[1], ***Wasting House Saxby Farmer vs. Workmen***[2], ***Raghbendra Bose and Others vs. Sunil Krishna Ghose and Others***[3] and ***Kunjan Nair Sivaraman Nair vs. Narayanan Nair and Others***[4]. Hence, the prayer for reversing the impugned Award and enhancing the compensation granted.

4. The rival submissions of learned Counsel were heard at length and considered. The documents on record were carefully perused, including the impugned Judgment. I have also perused the citations made at the Bar.

5. Before the learned Claims Tribunal, the Respondents raised a claim for compensation amounting to Rs.46,93,629/- (Rupees forty-six lakhs, ninety-three thousand, six hundred and twenty-nine) only. The learned Claims Tribunal in consideration of the entire evidence and documents on record calculated the compensation as Rs.14,23,000/- (Rupees fourteen lakhs, twenty-three thousand) only. On a careful perusal of the impugned Judgment, the learned Claims Tribunal calculated the age of the deceased to be 36 years old as on 15.8.2014. The learned Claims Tribunal also concluded that Exhibit-13, the Income Certificate of the deceased, was confusing as it showed the *monthly* income of the deceased from other Sources as Rs.21,450/- (Rupees twenty-one thousand, four hundred and fifty) only, while the *per annum* income of Rs.14,070/- (Rupees fourteen thousand and seventy) only, was from Agriculture but the total income "*per annum*" was mentioned as Rs.35,520/- (Rupees thirty-five thousand, five hundred and twenty) only. The anomaly having remained unexplained, the learned Claims Tribunal rejected the document and placed the notional income of the deceased at Rs.6,600/- (Rupees six thousand and six hundred) only. The multiplier of "15" was adopted on the assumption that the age of the deceased was 36 years as on 15.8.2014, in terms of the Table in ***Sarla Verma (Smt) and Others vs. Delhi Transport Corporation and Another***[5]**.** 50% was added as future prospects, while 1/3rd was deducted towards his personal expenses.

6. Firstly, to address the issue of the income of the deceased, Exhibit-

[1] (2016) 16 SCC 659
[2] (1973) 2 SCC 150
[3] (2005) 12 SCC 309
[4] (2004) 3 SCC 277
[5] (2009) 6 SCC 121

13 is his Income Certificate, which reads as follows;

> *".....*
>
> *No. 548/IC/GVK/DTM Date: 26.11.2015*
>
> ***INCOME CERTIFICATE***
>
> *The **YEARLY/MONTHLY** individual income of Shri/Smt/Kumari Santa Kumar Limboo (Subba) S/o, WO,/D/O Lt. Chandra Dhoj Limboo (Subba) resident of Hee West District, Sikkim is as under:-*
>
> *1. SALARY/PENSION RS:_____p.m.x12*
> *2. Agriculture Rs.14,070/- **P.A.***
>
> *3. Other Sources Rs.21,450/- **P.M.***
>
> *TOTAL : RS: 35,520/- **P.A.***
>
> *(Rupees Thirty-five thousand five hundred twenty only)*
>
> *The above income has been prepared on the basis of the report of the Revenue Supervisor/ARS/ Panchayat (tick the relevant) and on the basis of solemn affirmation under OATH before the GVA, Dentam on 26/11/2015.*
>
> *This certificate is valid for the period of one year from the date of issue.*
>
> *……."*

A careful examination of the document reveals an anomaly with regard to the income at Serial No. 2, 3 and the overall amount. The income at Serial No.2 is stated to be '*per annum*' that at Serial No.3 '*per month'* but the total amount is shown as '*per annum'*. It is this error that learned Counsel for the Respondents sought to draw the attention of this Court and contended that the Respondents ought to be allowed to prove this document

afresh before the learned Tribunal, in view of the anomalies persisting therein.

7. The Respondent No. 1 in her evidence asserted that the monthly income of her husband was Rs.23,222/- (Rupees twenty-three thousand, two hundred and twenty-two) only. Under cross-examination, she has stated as follows;

> *"……*
>
> *It is not true that my late husband was not having a monthly income of 23,222/- as per Exbt.13. It is true that the Income certificate Exbt. 13 was issued by the Gram Vikash Kendra, Dentam. It is true that Exbt.13 was prepared on the basis of the report of the Revenue Supervisor and on the basis of Affidavit filed before the gram Vikash Kendra. It is true that in Exbt.13 the total earning of the deceased has been mentioned as 35520/- per annum. (Witness volunteers to say that the issuing authority has erred by calculating jointly the monthly and annual income. The witness further states that the clarification in this regard has been mentioned in para-14 of her evidence on affidavit)*
> *……"*

The voluntary statement of the witness ought to have alerted the learned Tribunal that there was allegedly an error in the document. The learned Claims Tribunal without considering her evidence concluded that Exhibit-13 was confusing and decided to place the notional income of the deceased at Rs.6,600/- (Rupees six thousand and six hundred) only, when the correct procedure to be adopted was to clear the air with regard to the anomalies appearing in Exhibit-13 by examining the issuing authority. The Honble Supreme Court in ***Raj Rani and Ors. vs. Oriental Insurance Co. Ltd. and Ors.***[6], held at Paragraph 13 as follows;

[6] (2009) 13 SCC 654

> "13. …… It is not necessary in a proceeding under the Motor Vehicles Act to go by any rules of pleadings or evidence. Section 168 of the Act speaks about grant of just compensation. The Courts duty being to award just compensation, it will try to arrive at the said finding irrespective of the fact as to whether any plea in that behalf was raised by the claimant or not."

8. In ***Rajesh and Ors. Vs. Rajbir Singh and Ors.***[7], the Honble Supreme Court at Paragraph 13, held as follows;

> **"10.** …….....…

> "10. Thereafter, Section 168 empowers the Claims Tribunal to„ make an award determining the amount of compensation which appears to it to be just. Therefore, only requirement for determining the compensation is that it must be „just. There is no other limitation or restriction on its power for awarding just compensation.""

Thus, the statutory rules of evidence do not apply to matters in Motor Accidents Claims Tribunal, clothing the Tribunal with sufficient powers to adopt legal methods to reach the crux of the matter and thereby to award just compensation. A claimant in a Petition under the Motor Vehicles Act, 1988, which is a benevolent legislation to offer respite to the claimant for loss of the bread winner, should not suffer on account of any negligence on the part of a third person, such as issuing authority of Exhibit-13, herein.

9. The arguments put forth by the Appellant was that the learned Claims Tribunal has erred in calculating 50% future prospects in addition to the income of the deceased when he had no fixed income. On this count, succour can be drawn from the decision of the Hon ble Apex Court in ***Special Leave Petition (Civil) No. 25590 of 2014 in the matter of National Insurance Company Limited vs. Pranay Sethi and Ors.***

[7] (2013) 9 SCC 54

dated 31.10.2017. While concluding the matter, it was held at Paragraph 61(iv), (vi) and (vii) as follows;

> "61. ……....
> ……
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."
>
> ……
>
> (vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.
>
> (vii) The age of the deceased should be the basis for applying the multiplier.
>
> ……."

The ratiocination, therefore, clearly lays down the method of computation towards future prospects for self employed or those with a fixed salary.

10. Now coming to the choice of Multiplier which the Respondent points out is erroneous, in the first instance, it may be clarified that for claim petitions under Section 166 of the Motor Vehicles Act, 1988, the choice of Multiplier is to be adopted as per the Table laid out in the Judgment of ***Sarla Verma*** (supra) and not under the Second Schedule of the Motor

Vehicles Act, 1988, as erroneously stated by the Respondent, as the said Table is for claim petitions filed under Section 163A of the Motor Vehicles Act, 1988.

That having been said, Exhibit-8, the Birth Certificate of Santa Kumar Limboo, reflects his Date of Birth as 26.8.1978. The accident having occurred on 15.8.2014, the deceased was a few days short of his 36th birthday. In ***Achhaibar Maurya vs State of Uttar Pradesh & Others***[8], the Honble Supreme Court while considering a service matter and discussing the retirement age of the appellant held as follows;

> **"12.** It was urged that the appellant was entitled to a hearing as the matter relating to retirement from service depended upon the statutory provisions. A person retires automatically on the day when he completes the age of superannuation. Principles of natural justice, therefore, cannot be said to have any application in a case of this nature. A person attains a specified age on the day preceding that anniversary. (See Shurey, Rs, Savory v. Shurey : LR (1918) 1 Ch 263) and R. v. Scoffin : LR (1930) 1 KB 741)
>
> **13.** This Court in Prabhu Dayal Sesma v. State of Rajasthan [(1986) 4 SCC 59] held : (SCC pp. 63-64, para 9)
>
> > "9. … In calculating a persons age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birthday." **"**
>
> **[Emphasis supplied]**

Thus, bearing in mind the contents of Exhibit-8 and the ratiocination supra, the deceased was technically not 36 years of age.

[8] (2008) 2 SCC 639

11. Consequently, the choice of Multiplier to be adopted for computing loss of dependency would be as laid down in the Judgment in ***Sarla Verma*** (supra). Paragraph 42 of the aforestated Judgment, lays down as follows;

> "**42.** We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas* [(1994) 2 SCC 176], *Trilok Chandra* [(1996) 4 SCC 362] and *Charlie* [(2005) 10 SCC 720]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

12. For non-pecuniary damages, the learned Claims Tribunal had granted Rs.1,00,000/- (Rupees one lakh) only, for loss of love and affection relying on ***M. Mansoor vs. United Indian Insurance Co. Ltd. Anr.***[9]. In the said Judgment, it was held as follows;

> "**17**. …… Besides this amount the claimants are entitled to get Rs.50,000/- each towards the loss of affection of the son i.e. Rs.1,00,000/-……."

In the said matter the deceased was the son of the appellants. In view of the reasoning given by the learned Tribunal, I find that there is no error in the Award of the non-pecuniary damages.

13. So far as the grant of Rs.1,00,000/- as consortium is concerned, the Honble Supreme Court in ***Rajesh & Ors. vs. Rajbir & Ors.*** (supra), held as follows;

> "**20.** ……..In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society,

[9] 2013 (12) SCALE 324

> solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."
>
> **[Emphasis supplied]**

Consequently, no error visits grant of Rs.1,00,000/- (Rupees one lakh) only, for loss of consortium.

14. The Appeal is partly allowed, as also the Cross-Objection.

15. In conclusion, the matter is remanded back to the learned Claims Tribunal for the limited purpose of allowing the Appellant to clarify Exhibit-13 and thereafter, make necessary calculations with regard to future prospects depending on the income of the deceased Victim. The matter be readmitted to its original number in the Register of the learned Member, Motor Accidents Claims Tribunal, Gangtok, East Sikkim. The entire exercise

shall be completed within three months from today including pronouncement of Judgment.

16. The impugned Judgment of the Learned Claims Tribunal is set aside to the afore stated extent.

17. Copy of this Judgment be sent to the Learned Motor Accidents Claims Tribunal, East District at Gangtok, East Sikkim, for compliance.

18. Records be remitted forthwith.

19. No order as to costs.

SLR (2017) SIKKIM 846

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

Crl. M.C. No. 14 of 2017

State of West Bengal ….. PETITIONER
Through the Criminal Investigation Department, Represented by Goutam Ghoshal, Deputy Superintendent of Police (Special), CID, Siliguri

Versus

Smt. Sabitri Rai ….. RESPONDENT

For the Petitioner : Mr. Rajdeep Mazumder, Advocate with Mr. Avrojyoti Das, Mr. Maukh Mukherjee and Mr. Girmey Bhutia, Advocates for the Petitioner.

Mrs. Prassanna Rai Yonzon, Inspector, CID, Siliguri,

Date of decision: 15st December 2017

A. General Clauses Act, 1897 – S. 27 – Presumption of Service of Notice – It is clear that the I.O. on Affidavit has stated that she went to the residence of the Accused to serve the Notice by *dasti* on several occasions, but found that the Accused person's house was locked. It is also seen that the service of the Notice upon the Accused issued by this Court could not be served on account of the addressee being out of station. The Notice was issued to the Accused as per the address furnished by her to the Sessions Court, Namchi, at the time of obtaining bail – Held, in view of the facts and circumstances reflected hereinabove, it shall safely be presumed in this matter that Notice was served upon the Accused.

(Paras 7 and 10)

B. Code of Criminal procedure, 1973 – Ss. 2(j), 177, 178, 179 – The offence has been committed in Darjeeling, West Bengal; the FIR

has been lodged in Darjeeling, West Bengal; the Accused is a resident of Darjeeling, West Bengal; the fact that she was arrested in Namchi, South Sikkim, does not clothe the Sessions Court, Namchi, with jurisdiction to grant bail - Held, the bail was granted by the Court which had no jurisdiction to try the offence.

(Para 12, 13 and 15)

C. Criminal Trial – Cancellation of bail – The grounds for cancellation of bail broadly are; interferance or attempt by Accused with the due course of administration of justice or evasion or attempts to evade the due course of justice or abuse of the concession granted in any manner and thereby thwarting the process of investigation. In addition other grounds may also be considered, such as, threats by the Accused to witnesses, indulgence in similar activities during the Bail period and attempts to flee to another country.

(Para 17 and 20)

Petition Allowed.

Chronological list of cases cited:

1. State of M.P v. Hiralal and Others, (1996) 7 SCC 523.
2. K. Bhaskaran v. Sankaran Vidhyan Balan and Another, (1999) 7 SCC 501.
3. Central Bureau of Investigation, New Delhi v. Showkat Ahmed Bakshi and Others, 1995 Supp (3) SCC 73.
4. Puran v. Rambilas and Another, (2001) 6 SCC 338.
5. Harcharan Singh v. Smt. Shivrani and Others, (1981) 2 SCC 535.
6. Syed Zafrul Hassan and Another v. State, AIR 1986 Patna 194.
7. Dolat Ram and Others v. State of Haryana, (1995) 1 SCC 349.
8. Mahant Chand Yogi and Another v. State of Haryana, (2003) 1 SCC 326.
9. Subodh Kumar Yadav v. State of Bihar and Another, (2009) 14 SCC 638.

ORDER

Meenakshi Madan Rai, J.

1. Assailing the Orders of the Learned Sessions Judge, South Sikkim, at Namchi (for brevity **"**Sessions Court, Namchi**"**), dated 02-09-2017 and 04-09-2017, in Criminal Misc. Case No.99 of 2017, the Petitioner herein seeks setting aside of the impugned Orders and prays that the Respondent-Accused (hereinafter, Accused), be remanded to custody.

2. The arguments of Learned Counsel for the Petitioner were two-pronged. Firstly, the propriety of the Order of the Sessions Court, Namchi, dated 02-09-2017, granting interim Bail to the Accused and confirming the Order on 04-09-2017 was questioned being allegedly on extraneous considerations and without jurisdiction. In the second leg of his arguments, it was contended that despite the fact that the Accused had obtained Bail, she had failed to comply with the conditions set forth therein, viz; to make her self-available before the Investigating Officer (for short "I.O."), thereby impeding investigation.

3. That, several attempts made by the I.O. to locate the Accused at her residence, as reflected in the Affidavit of the I.O. dated 12-12-2017, has culminated in vain, as the house of the Accused was found to be locked. That, the I.O. having no other alternative took it upon herself to serve a Notice dated 07-12-2017 on the Surety of the Accused, who is present in Court, and vouches for the fact that the Accused is untraceable in the address furnished by her. It was further urged that the Accused is avoiding the Notice and ensuring that it cannot be served on her by remaining out of her house. That, the Notice issued by this Court was also returned with the report that the addressee was out of station. Nevertheless as the Notice was properly addressed to her in the residential address, furnished by her before the Sessions Court, Namchi, the Notice is deemed to have been served in terms of Section 27 of the General Clauses Act, 1897. His submission on this count was garnered with reliance on the ratiocination of the Hon'ble Supreme Court in ***State of M.P.*** vs. ***Hiralal and Others***[1] and ***K. Bhaskaran*** vs. ***Sankaran Vaidhyan Balan and Another***[2].

[1] (1996) 7 SCC 523
[2] (1999) 7 SCC 510

4. Learned Counsel would further canvass that the Sessions Court, Namchi issued the impugned Orders without jurisdiction, as the First Information Report (for short "FIR") was lodged against the Accused (numbered as Accused No.14), at Sadar Police Station, Darjeeling, West Bengal, on 09-06-2017, pursuant to an offence committed by her with several others also in Darjeeling and she is a resident of the same place. Following the lodging of the FIR, on 31-08-2017 the Special Superintendent of Police (North), Criminal Investigation Department, Siliguri, West Bengal, informed and sought the assistance of the Superintendent of Police, South Sikkim, Namchi, Sikkim, in apprehending the Accused along with other Accused Persons mentioned in the letter therein. Consequently, the arrest was made, but the Sessions Court, Namchi has recorded that the Accused was arrested without a Warrant of Arrest from a competent Court. The fact of arrest of the Accused under a Warrant of Arrest is evident from the letter addressed by the I.O. to the Court of the Learned Chief Judicial Magistrate, South Sikkim, Namchi, where a prayer for two days' transit remand was sought after her arrest and production before the said Court. No order was passed by the Learned Court of the concerned Magistrate. Instead, the Accused approached the Sessions Court, Namchi, who without considering that the prayer for transit remand was pending, granted Bail *sans* jurisdiction. The Sessions Court, Namchi had in its impugned Order recorded that the Accused was not arrested in the presence of female police personnel, contrary to the records available inasmuch Mrs. Prassanna Rai Yonzon, Inspector, CID, Siliguri, West Bengal, is the I.O. of the case. That apart, following the arrest of the Accused, her husband, Mangal Deo Rai, was duly informed. To fortify his submissions succour was drawn from the pronouncements in ***Central Bureau of Investigation, New Delhi*** vs. ***Showkat Ahmed Bakshi and Others***[3] and ***Puran*** vs. ***Rambilas and Another***[4]. It is urged that, in view of the above facts and circumstances, the impugned Orders deserve to be and ought to be set aside.

5. Due consideration has been given to the submissions made at the Bar and the documents placed on record have been carefully perused by me.

6. The instant matter arose out of an FIR dated 09-06-2017 pertaining to an incident of 08-06-2017, alleged to have originated at "Bhanu

[3] 1995 Supp (3) SCC 73
[4] (2001) 6 SCC 338

Bhawan", Darjeeling, West Bengal. On the said date, at around 11.30 a.m., the Accused along with others named in the FIR, *inter alia* allegedly obstructed the approach to the Raj Bhawan, where a Cabinet meeting was scheduled to be held at 14.00 hours, resulting in a fracas and the lodging of the FIR and registration of the case at Sadar Police Station, Darjeeling, on 09-06-2017. This was followed by the information addressed to the Superintendent of Police, South Sikkim, Namchi, dated 31-08-2017, from the Special Superintendent of Police (North), Criminal Investigation Department, Siliguri, West Bengal, Annexure A2, to the effect that the Accused who was absconding was reportedly under the jurisdiction of the Superintendent of Police, South Sikkim, and his assistance was sought to apprehend the Accused. Annexure A2 was duly endorsed to SHO, Namchi P.S., and on the same date the Accused was arrested on the basis of a Warrant of Arrest as reflected in Annexure A5 and handed over to the SHO, Namchi P.S. for safe custody. On 02-09-2017, vide Annexure A4, the I.O. sought custody of the Accused from the Namchi P.S. for production before the Court of the Learned Chief Judicial Magistrate, South Sikkim and sought transit remand from the Magisterial Court, enclosing for perusal of the Court a copy of the FIR, Warrant of Arrest, Memo of Arrest and Medical Opinion relating to the Accused. Pending orders therein, the Accused approached the Sessions Court, Namchi where Bail was obtained vide the impugned Orders. These being the sequence of events in a nutshell, I now turn to address the question of service of Notice.

7. It is clear that the I.O. on Affidavit has stated that she went to the residence of the Accused to serve the Notice by *dasti* on several occasions till 11-12-2017, but found that the Accused person's house was locked. It is also seen that the service of the Notice upon the Accused issued by this Court could not be served on account of the addressee being out of station. The Notice was issued to the Accused as per the address furnished by her to the Sessions Court, Namchi, at the time of obtaining Bail. In such a circumstance, we may profitably turn to the provision of Section 27 of the General Clauses Act, 1897, extracted hereinbelow;

> **"27. Meaning of service by post**.Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give"

or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.**"**

8. While dealing with this provision, the Hon'ble Supreme Court in ***Harcharan Singh*** vs. ***Smt. Shivrani and Others***[5] expounded as follows;

> **"7.** Section 27 of the General Clauses Act, 1897 deals with the topic — "Meaning of service by post" and says that where any Central Act or Regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting it by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document sought to be served upon him without anything more. Similar presumption is raised under illustration (f) to Section 114 of the Indian Evidence Act whereunder it is stated that the court may presume that the common course of business has been followed in a particular case, that is to say,

[5] (1981) 2 SCC 535

> when a letter is sent by post by prepaying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under Section 27 of the General Clauses Act as well as under Section 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise. ……..."
>
> **[emphasise supplied]**

9. In ***Hiralal*** (*supra*) relied upon by the Petitioner, which pertained to a civil dispute, it was held that;

> **"1.** In view of the office report, it would be clear that the respondents obviously managed to have the noticed returned with postal remarks "not available in the house", "house locked" and "shop closed" respectively. In that view, it must be deemed that the notices have been served on the respondents.**"**

10. In ***K. Bhaskaran*** (*supra*), the stand taken in the decision of ***Harcharan Singh*** (*supra*) was reiterated. Consequently, no further discussions need ensue on this point and in view of the facts and circumstances reflected hereinabove, it shall safely be presumed in this matter that Notice was served upon the Accused.

11. Coming to the question of propriety of the Sessions Court, Namchi in granting Bail to the Accused, while perusing the FIR, Annexure A1, there can be no manner of doubt that the offence was committed in the District of Darjeeling, West Bengal, under the jurisdiction of the Sadar P.S. on 08-06-2017. It is also evident that the name of the Accused finds place at serial no.14, in the FIR, where her place of residence is clearly indicated as **"***Badamtam T.E., Sadar, Darjeeling***"**.

12. In this context, it would be worthwhile to draw attention to the provisions of Section 2(j) of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") which reads as follows;

"2. .....

(j) "local jurisdiction", in relation to a Court or Magistrate, means the local area within which the Court or Magistrate may exercise all or any of its or his powers under this Code and such local area may comprise the whole of the State, or any part of the State, as the State Government may, by notification, specify;**"** **[emphasise supplied]**

A bare perusal of this provision clarifies what local jurisdiction entails.

13. We may also look at the provisions of Sections 177, 178 and 179 of the Cr.P.C. which lay down as follows;

"177. Ordinary place of inquiry and trial.—Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial.—(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

> **179. Offence triable where act is done or consequence ensues –** When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.**"**

It would be trite to state again that the afore-extracted provisions need no further elucidation, be it stated that neither did the offence occur in Namchi, within the jurisdiction of the Sessions Court, Namchi, nor is the Accused a resident thereof.

14. In ***Syed Zafrul Hassan and Another*** vs. ***State***[6], a three Judge Bench of the Patna High Court while discussing the jurisdiction of the Criminal Courts in enquiries and trials, went into provisions of Section 177 of the Cr.P.C. and discussed as follows;

> **"10**. It is then well settled that the Code of Criminal Procedure is exhaustive with regard to the matters with which it deals and is to be read as a harmonious whole. Chapter XIII lays down the jurisdiction of the criminal courts in inquiries and trials. The cornerstone of the principle therein is set out in the first S. 177 which is in the terms following:—
>
> "177. Ordinary place of inquiry and trial.— Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed." It is manifest from the above section and equally from the other provisions of Chapter XIII that the whole concept of jurisdiction for trials and inquiries by criminal courts is the place or the spot of the commission of the crime and not the residence of the accused or any other place where he may choose to flee and may be found. Reference in this connection may also be made to S. 76 and S. 167(2) which are in the terms following:—

[6] AIR 1986 Patna 194

"76. Person arrested to be brought before Court without delay. — The police officer or other person executing a warrant of arrest shall (subject to the provisions of S. 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person :
....."

"167. Procedure when investigation cannot be completed in twenty-four hours.—

x x x x

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

x x x x "

The aforesaid provisions highlight the basic rule that offences are to be inquired into and tried in a court having geographical jurisdiction over the locale of crime. Even if the accused is found far beyond the arena of the crime, he has to be brought back before the court having local jurisdiction to try the same. It is not that the accused person's presence would carry the jurisdiction with him to any court where he may fortuitously be present or where he may deliberately have chosen to flee. It seems further manifest that on larger principle wherever the jurisdiction of the criminal court for trial and inquiry of the offence lies, there alone would lie the

jurisdiction for grant of bail and equally for anticipatory bail, unless a statute expressly provides otherwise. It seems anomalous to hold that one court would have jurisdiction for the trial of the crime but another for the grant of anticipatory bail therefor.

.....

22. .....
Therefore, a fugitive offender may well move from court to court ad infinitum and if he fails in one jurisdiction then on to another until he secures relief in the last. It seems plain that somewhat curious and anomalous results which necessarily flow from the stand canvassed on behalf of the petitioners would be an added factor for not subscribing to such a view.

.....

25. In the present case it is not in dispute that the case against the two petitioners has been registered in Jhinkpani police station which falls in the district of Singhbhum. The matter thus comes squarely within the jurisdiction of the Ranchi Bench. The preliminary objection on behalf of the opposite party State against the very maintainability of this criminal miscellaneous petition at Patna, therefore, must be upheld. This petition is consequently dismissed and the petitioners are relegated to seek their remedy in the appropriate forum of the Ranchi Bench, if so advised.**"**

15. It is evident in the aforesaid matter that the case against the two Petitioners had been registered in a particular Police Station, but Bail was granted by a Court which had no local jurisdiction to try the offence leading to the above order. The situation is similar in the case at hand. The offence has been committed in Darjeeling, West Bengal; the FIR has been lodged in Darjeeling, West Bengal; the Accused is a resident of Darjeeling, West Bengal; the fact that she was arrested in Namchi, South Sikkim, does not clothe the Sessions Court, Namchi, with jurisdiction to grant the Bail.

16. That position being settled, it would next be necessary to delve into the conduct of the Accused post the Order of Bail, dated 04-09-2017, which imposed conditions on her which were as follows;

"Bail petition is accordingly allowed. The interim bail granted to the Petitioner is confirmed subject to the following conditions:-

> 1) That the Petitioner shall appear before the investigating agency as and when required for investigation and shall co-operate with the investigation.
>
> 2) That the Petitioner shall not threatened (*sic*) or influence the witnesses acquainted with the facts of this case.**"**

Although a specific condition has been imposed on the Accused to cooperate with the Investigating Agency, the Accused is untraceable. Instead of remaining in station, or even if elsewhere, instead of making herself available to the Investigating Agency she has chosen to lock her house and become inaccessible to the Police machinery, thereby thwarting and impeding the course of justice. Once on Bail, all that was required was her cooperation in the investigation, which unfortunately for reasons best known to her, she has failed to comply. What has followed as a corollary is a prayer for cancellation of Bail so granted.

17. Now, the next question is when can a Bail be cancelled. In ***Dolat Ram and Others*** vs. ***State of Haryana***[7] this question was elaborately dealt with and the Hon'ble Supreme Court held as follows,

> **"4.** Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the

[7] (1995) 1 SCC 349

> concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. ……."

What emerges therefrom is that the grounds for cancellation of Bail broadly are; interference or attempt by the Accused with the due course of administration of justice or evasion or attempts to evade the due course of justice or abuse of the concession granted in any manner and thereby thwarting the process of investigation. In addition other grounds may also be considered, such as, threats by the Accused to witnesses, indulgence in similar activities during the Bail period and attempts to flee to another country.

18. The principle in ***Dolat Ram*** (*supra*) was followed in ***Mahant Chand Nath Yogi and Another*** vs. ***State of Haryana***[8] wherein the Supreme Court reiterated the law that there is distinction between rejection of Bail in a non-bailable case at the initial stage and the cancellation of Bail already granted. It was held that normally very cogent and over-whelming grounds or circumstances are required to cancel the Bail already granted.

19. In ***Subodh Kumar Yadav*** vs. ***State of Bihar and Another***[9] the Hon'ble Supreme Court observed that,

> **"16.** In fact it is now well settled that if a superior court finds that the court granting bail had acted on irrelevant material, or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the Public Prosecutor/complainant where required, an order for cancellation of bail can in fact be made. (See

[8] (2003) 1 SCC 326
[9] (2009) 14 SCC 638

> *Gajanand Agarwal* v. *State of Orissa* [(2006) 12 SCC 131 : (2007) 1 SCC (Cri) 568 : (2006) 9 Scale 378] and *Rizwan Akbar Hussain Syyed* v. *Mehmood Hussain* [(2007) 10 SCC 368 : (2007) 3 SCC (Cri) 598], at SCC p. 370, para 7.) Further, while cancelling bail, the superior court would be justified in considering the question whether irrelevant materials were taken into consideration by the court granting bail.**"** **[emphasise supplied]**

20. Having taken into consideration the entire gamut of the facts and circumstances unravelled in this matter, it goes without saying that in the first instance, the Bail was granted by the Sessions Court, Namchi without jurisdiction or taking into consideration the facts and circumstances of the matter placed before him. No efforts were employed to examine the state of the prayer for transit remand or call for the records from the concerned Learned Magisterial Court. Secondly, the conditions stipulated in the impugned Order dated 04-09-2017 have been flouted by the Accused. The inevitable conclusion would be that cancellation of the Bail Order should follow.

21. Consequently, the impugned Orders dated 02-09-2017 and 04-09-2017 of the Court of the Learned Sessions Judge, South Sikkim, Namchi, are quashed and set aside.

22. The Bail Bonds of the Accused stand cancelled.

23. Crl.M.C. stands disposed of accordingly.

24. A copy of this Order be sent to the Court of the Learned Sessions Judge, South Sikkim, at Namchi, and also to the Court of the Learned Chief Judicial Magistrate, South Sikkim, at Namchi, for information.

SLR (2017) SIKKIM 860

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

W.P.(C) No. 53 of 2017

Miss Deepa Chettri and Another ….. PETITIONERS

Versus

Ministry of Health and Family Welfare and Others ….. RESPONDENTS

For the Petitioners :	Mr. A.K Upadhyaya, Senior Advocate with Ms. Aruna Chettri, Ms. Hemlata Sharma and Mr. Kawong Bhutia, Advocates.
For Respondent 1 :	Mr. Karma Thinlay, learned Central Government Advocate.
For Respondents 2-3 :	Mr. J.B Pradhan, Additional Advocate General with Mr. Thinlay Dorjee, Govt. Advocate and Mr. S.K Chhetri, Asst. Govt. Advocate and Mr. Bhusan Nepal, Legal Retainer.
For Respondent 4 :	Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri, Advocate.

Date of decision: 18th December 2017

A. Universities – Admission – Medical College – Time Schedule – Strict adherence to the time schedule is the mandate and cannot be deviated from as held repeatedly by the Apex Court – The time schedule notified by Medical Council of India has the force of law – Vide Notification published in the Gazette of India on 04.07.2017, the Medical Council of India notified the Regulations on Graduate Medical Education Amendment, 2017 providing for the time schedule for the Universities and other authorities to organised the admission process for the Academic year 2017-18 - As the law stand today as

declared by the Apex Court the schedule relating to the admission to the professional college should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the Courts or the Board and midstream admission should not be permitted. It is only under exceptional circumstances, if the Court finds that there is no fault attributable to candidate relief of admission can be directed, however, within the time schedule prescribed. As the last date of admission notified by the Medical Council of India was 31.08.2017 although it is seen that the Petitioners both toppers in their respective categories have suffered non admission due to the fault on the part of the Respondent No.2 this Court is unable to grant any relief for grant of admission to them. MBBS is a professional course. The semesters having begun on 01.09.2017 three months have already lapsed – Held, in view of the Judgment of the Apex Court in *re:Chandigarh Administration* (supra) and specifically para 33.1 to 33.10 and 43, the prayers prayed for in the Writ Petition for a direction to the Respondent No.1 to allocate 3 more MBBS seats to the State of Sikkim and to the Respondent No. 2 and 3 to issue nomination to the Petitioners in any Government Medical Colleges cannot be granted. Similarly, the prayer seeking a direction to the Respondents to allot one MBBS seat each to the Petitioners from the Central Pool also cannot be granted.

(Paras 1, 9, 42, 43, 44)

B. Reservation Policy – Reservation policy issued vide Notification No.01/T.E./HRDD dated 14.06.2014 (in short "Reservation Notification") and amended vide Notification No.132/ T.E./HRDD/2015 dated 15.04.2015 – As per clause VI of Reservation Notification the 7 categories/ communities shall get first preference over "others" in the choice / selection of seats/ institutions - Communication No. U/14014/1/2017-ME-II dated 16.08.2017 addressed to the Secretary, Medical, Health and Family Welfare Department, Government of Sikkim issued guidelines for allocation of Central Pool/BDS seat for the Academic year 2017-18. The said guidelines for selection and nomination of candidates against Central Pool MBBS / BDS seats for the Academic year 2017-18 provided for the eligibility conditions, educational qualifications, procedure for selection and reservation of candidates – The said guidelines issued

by the Respondent No.1 provided that the reservation policy being followed by the concerned beneficiary State will apply to the Central Pool MBBS seats – It is evident that after being allotted the last Central Pool seat by the Respondent No. 2 on 31.08.2017 i.e. the last date specified for admission by the Medical Council of India the Respondent No.4 had sought extension of time from the Apex Court which had been granted on the submission made on behalf of the Respondent No.1. Judicial propriety demands that this Court shall not delve into examining any issue which may undermine the authority of the Apex Court. In such circumstances, this Court shall refrain from examining the merit of the contentions of the Petitioners challenging the allotment of the last Central Pool seat to the Respondent No.4 – Held, no direction could be issued to the Respondent No.2 and 3 to cancel the allotment of one MBBS seat to the Respondent No.4 and to allocate the same to the Petitioner No.2 for, that would be in derogation of the order passed by the Apex Court.

(Paras 5, 6, 12, 13, 47, 48)

C. Constitution of India – Relief – It is trite that no adverse order can be passed against persons who were not made parties to the litigation – In an action at law while seeking discriminatory relief from the Court the Petitioners cannot pick and choose the Respondents. If the non-parties were necessary parties they ought to have been impleaded. Any order passed in favour of Petitioners for allotment of seats would obviously affect the non-parties in the facts of the present case keeping in mind the fact that only 29 seats were at the disposal of the Respondent No.2 – The Petitioners have chosen not to challenge the admission of the non-parties and acquiesced and waived their rights to claim reliefs before the Court promptly. In fact considered in that light the Petitioners have failed to consciously challenge the selection of the non-parties selected at the first round of counselling held on 17.07.2017 and second round of counselling held on 09.08.2017.The Petitioners have thus failed to pursue their legal remedies on time and chosen to attack only one candidate who has secured the last Central Pool seat provided by the Respondent No. 1 on the 31st August 2017 to the Respondent No.2 – The failure of the Petitioners to implead the said non-parties would not allow this Court to examine the merit of their selection to grant

relief of admission in favour of Petitioners. An action at law definitely is not a game of chess. The relief of admission cannot be granted to the Petitioners on account of the fact that the non-parties similarly placed have been consciously kept out of the *lis* by the Petitioners for reason best known to them, inspite of opportunities to do so.

(Paras 37, 42 and 43)

D. Universities – Admission – Meritorious Student – Apex Court has consistently held and stressed on the merit in matters of admissions as meritorious student ought not to face any impediment to get admission for some fault on the part of the Institution or the persons involved with it – To protect the student community aspiring for medical admissions – direction may be appropriate to the Respondent No.2 to henceforth not allocate seats in anticipation – In a welfare State, the Respondent No.1 as the Centre and the Respondent No. 2 as the State must play a key role in ensuring that the most meritorious students are not deprived of their legitimate rights to professional education. Their merits demands that they be given preference. The Respondent No. 1 and 2 have a constituted duty for ensuring this which would directly help in nation building. Before devising any method for allotment the Respondent No. 3 ought to have considered whether such a method devised would ensure fair-play. Our Constitution guarantees rights to equality. The Respondent No.1 and 2 must, therefore, devise fair, equal, accurate and perfect method to ensure that the allotments of MBBS seats are done not only on time but also equitably and in the manner contemplated by the laws guided by its policies – Held, Respondent No. 2 shall thus, pay compensation to the Petitioners equivalent to the amount of medical fees payable by them for admission into the MBBS seats to which the Petitioners would have been entitled to as the first candidate in their respective categories had the Respondent No. 2 not devised the method to allocate Central Pool MBBS seats in anticipation within a period of two weeks from the date of this Judgment.

(Para 49)

Petition Dismissed

Chronological list of cases cited:

1. Asha v. Pt. B.D Sharma University of Health Science and Others, (2012) 7 SCC 389.

2. Chandigarh Administration and Another v. Jasmine Kaur and Others, (2014) 10 SCC 521.

3. S. Krishna Sradha v. State of Andhra Pradesh and Others, (2017) 4 SCC 516.

ORDER

Bhaskar Raj Pradhan, J

Heard. The present Writ Petition was filed on 04.09.2017 and refilled on 09.09.2017 aggrieved by the fact that although the Petitioner No.1 and 2 had secured the first position in their respective Other Backward Community (State list) and Other Backward Community (Central list) they had not been given the MBBS seat which they were entitled to. Admittedly, the last date of admission was 31.08.2017. This is a time schedule fixed by the Medical Council of India vide notification dated 04.07.2017. Strict adherence to the time schedule is the mandate and cannot be deviated from as held repeatedly by the Apex Court. The time schedule notified by the Medical Council of India has the force of law. The State Respondents have filed their counter affidavits and the Petitioners have also filed their respective rejoinders. The Respondent No.1 which is the Ministry of Health and Family Welfare, Government of Sikkim inspite of accepting notice on 16.09.2017 has chosen not to file its counter affidavit although the Writ Petition seeks reliefs against the said Respondent and instead on 09.12.2017 filed written submissions. The pleadings, otherwise, being complete the matter was heard.

2. The present Writ Petition, jointly filed by the Petitioners, seeks directions to the Respondent No.1 for allocation of 3 more MBBS seats to the State of Sikkim and to the Respondent No.2 and 3 to issue nomination to the Petitioners in any Government Medical College. It also seeks cancellation of the allotment of one MBBS seat to the Respondent No.4 and to allocate the same to the Petitioner

No.2. Finally, the Writ Petition seeks direction to the Respondents to allot one MBBS seat each to the Petitioners from the Central Pool.

3. Petitioner No.1 belongs to the Other Backward Community as per the State list (in short "OBC-S"). Petitioner No.2 belongs to the Other Backward Community as per the Central list (in short "OBC-C"). Respondent No.4 belongs to the Schedule Caste Community (in short "SC"). These facts are admitted by Respondent No.2 and 3.

4. Respondent No.2 is the State of Sikkim sued through the Secretary, Human Resource and Development Department, Government of Sikkim. Respondent No.3 is the Technical Director, Human Resource and Development Department, Government of Sikkim.

5. The reservation policy of the Respondent No.2 applicable to the present case was issued vide Notification No.01/T.E./HRDD dated 14.06.2014 (in short "Reservation Notification") and amended vide Notification No.132/T.E./HRDD/ 2015 dated 15.04.2015. The percentage of reservation was required to be as under:-

"II. The percentage of reservation shall be as under:-

Sl. No.	*Categories/ Communities*	*% of seat*
1	*Merit*	*10%*
2	*Bhutia and Lepcha*	*20%*
3	*Primitive Tribe*	*05%*
4	**Central List Other Backward Classes*	*20%*
5	**State List Other Backward Classes*	*20%*
6	*Scheduled Tribes*	*13%*
7	*Scheduled Castes*	*07%*
8	*Others*	*05%*

"

6. As per clause VI of the said Reservation Notification the 7 categories/ communities shall get first preference over "others" in the choice / selection of seats/ institutions.

7. For the Academic Session 2017-18, the National Eligibility cum Entrance Test, 2017 (in short "NEET, 2017") for MBBS, BDS/ allied State quota seats was conducted by the Central Board of Secondary Education (in short "the CBSE") on 07th May 2017. The Petitioners as well as the Respondent No.4 along with others appeared for the said examination. The CBSE published the result in their official website on 23.06.2017. Pursuant thereto, the Respondent No.2 and 3 published the consolidated merit list of MBBS /BDS /allied State quota seats for the Academic Session 2017-18. The relevant details from the said list is as under:-

"Consolidated Merit list of MBBS/BDS/ allied State quota seats for the Academic Session 2017-18

Sl No.	Candidate Name	Father's Name	Community	PCB CI XII	NEET total marks secured
1	NISHA GUPTA	SANTOSH GUPTA	Others	95	435
2	SADNDUP DORJEE TAMANG	ASHOK KUMAR TAMANG	ST	92	431
3	ASHISH KUMAR PRASAD	MANAGER PRASAD	Others	78	429
4	DEEPA CHETTRI	BHIM BDR CHETTRI	OBC State	86	403
5	AKANCHYA SHARMA	DILIP KUMAR SHARMA	OBC State	79	351
6	NAGENDRA GURUNG	LT. GAZRAJ GURUNG	OBC Central	89	351
7-8	—	—	—	—	—
9	PRIYA DEOKOTA	UDAY KUMAR DEOKOTA	OBC State	71	335
10	KSHETIZ CHETTRI	HEMANT KUMAR CHETTRI	OBC State	94	328
11	—	—	—	—	—
12	HIMAL NEOPANEY	DHARNI PRASAD NEOPANEY	OBC State	67	326
13	PRAYASH NEPAL	THAKUR PRASAD NEPAL	OBC State	83	326

14-38	—	—	—	—	—
39	SWATHA RAI	JAGAT BAHADUR RAI	OBC Central	85	240
40-43	—	—	—	—	—
44	MARICCA MADAN RASAILY	DR. SURESH MADAN RASAILY	SC	90	230
45-52	—	—	—	—	—
53	SUBHAM SWARUP GIRI	BISHNU LALL GIRI	OBC Central	65	221
54-55	—	—	—	—	—
56	YUGAL RAJ GURUNG	MEGRAJ GURUNG	OBC Central	76	217
57-59	—	—	—	—	—
60	ALLEN SMRITI RAI	BIRBAL RAI	OBC Central	87	210
61	ARATI BISWAKARMA	CHANDRA LAL BISWAKARMA	SC	82	210
62-63	—	—	—	—	—
64	PRANISHA GURUNG	DIL BAHADUR GURUNG	OBC Central	89	210

…….……..…..
……..……
…..…..… ”

8. The Petitioner No.1 stood at Serial No. 4 of the consolidated merit list and ranked first in the OBC-S category securing NEET total marks of 403. The Petitioner No.2 stood at serial no. 6 of the consolidated merit list and ranked first in OBC-C category securing total marks of 351. The Respondent No.4 stood at serial no.61 of the consolidated merit list and ranked second in the SC category securing total marks of 210. These facts are also admitted by the Respondent No.2 and 3.

9. Vide Notification published in the Gazette of India on 04.07.2017 the Medical Council of India notified the Regulations on Graduate Medical Education Amendment, 2017 providing for the time schedule for the Universities and other authorities to organised the admission process for the

Academic year 2017-18. Appendix-„F of the said Regulation inter alia provided:-

"APPENDIX – 'F'

TIME SCHEDULE FOR COMPLETION OF THE ADMISSION PROCESS FOR FIRST MBBS COURSE

(Academic Session 2017-18)

Schedule for Admission	Seats filled up by DGHS for All India Quota (15%) Deemed/ Central Universities.	Seats filled up by the State Govt./Institutions
Conduct of Examination (NEET2017)	7th MAY 2017	7th MAY 2017
Declaration of Result of Qualifying Examination/ Entrance Examination	26th JUNE 2017	26th JUNE 2017
1st Round of counselling / Admission	3rd JULY to 15th JULY 2017	16th JULY to 24th JULY 2017
Last date for joining the allotted college and course	22nd JULY 2017	BY 31st JULY 2017
2nd Round of Counselling / Admission	1st to 7th AUGUST 2017	8th AUGUST to 19th AUGUST 2017
Last date for joining for the candidates allotted seats in 2nd Round of counselling	BY 16th AUGUST 2017	By 25th AUGUST 2017
Mop up round by DGHs for Deemed University/ Central Universities seats	8th AUGUST to 27th AUGUST 2017	
Mop up round by States	Not applicable	26th to 28th AUGUST 2017
Commencement of academic session	1st AUGUST 2017	
Last date up to which students can be admitted against the vacancies arising due to any reason by Deemed Universities/ Medical Institutions	Not applicable	31st August 2017

10. As per the Respondent No.2 the guidelines for allotment of State quota seats for 2017-18 was issued in June 2017.

11. The guidelines issued by the Respondent No.2 for the allotment of State quota seats provided for the application of the reservation policy of the State Government and the application of the roster system as indicated in the guidelines and quoted above. The guidelines for allotment of State quota seats required the application of the roster in which the candidate selected in each of the categories would be given option to choose a seat of their choice in accordance with their merit position on that respective category.

12. The Respondent No.1 vide communication No. U/14014/1/2017-ME-II dated 16.08.2017 addressed to the Secretary, Medical, Health and Family Welfare Department, Government of Sikkim issued guidelines for allocation of Central Pool/BDS seat for the Academic year 2017-18. The said guidelines for selection and nomination of candidates against Central Pool MBBS / BDS seats for the Academic year 2017-18 provided for the eligibility conditions, educational qualifications, procedure for selection and reservation of candidates. The relevant extracts are reproduced hereunder:-

> "1.4 ***Selection of candidates:***
>
> 1.4.1 ***National Eligibility cum Entrance Test (NEET)***
>
> *The selection of candidates will be made on the basis of rank obtained in the National Eligibility cum Entrance Test (NEET)-2017 being conducted by Central Board of Secondary Education, New Delhi. As per Graduate Medical Education Regulation, 1997 of Medical Council of India, it shall be necessary for the candidates to obtain minimum marks at 50th percentile at NEET, 2016. However, in respect of the candidates belonging to Schedule Castes, Scheduled Tribes, the minimum marks shall be at 40th percentile. In respect of candidates with locomotory disability of lower limbs, the minimum marks shall be at 45th percentile. The percentile shall be determine on the basis of highest marks secured in the all India*

common merit list in National Eligibility cum Entrance Test for admission to MBBS/ BDS courses.

(Emphasis supplied)

1.5 **Reservation:**

The reservation policy being followed by concerned beneficiary State/ UT will apply on Central Pool MBBS /BDS seats."

(Emphasis supplied)

13. The said guidelines issued by the Respondent No.1 provided that the reservation policy being followed by the concerned beneficiary State will apply to the Central Pool MBBS seats.

14. The Respondent No.2 issued written instructions to the candidates attending the counselling. As per paragraph 3 and 8 of the said instruction:-

"3. If a candidate is absent when his/her name is announced for allotment of seat or do not opt to avail the seat in that counselling, he/she will forfeit his/her claim for the allotment of seat available at that time and person next in merit will be called for allotment. He/she may, however, be considered for allotment in subsequent counselling if seats are available for allotment."

(Emphasis Supplied)

"8. HRDD has empanelled few institutions who have offered seats for various courses which are in demand. Due care has been taken in selecting the institutes as well as the courses which the students can avail. It is, however, clarified that it is purely the discretion of the candidate/ guardian to avail the seat and department do not promote any college in particular. The candidates are also advised to log on the institutes website to ensure that they suit their requirements before availing the seat."

(Emphasis Supplied)

15. The guidelines for allotment of **State quota seats** for Academic Session 2017-18 issued by the Respondent No.2,inter alia, provided:-

> *"I. The allocation of State quota seats for various courses will be done as per the reservation policy of the State Government as notified vide Notification No. 01/T.E./HRDD-2014 dated 14th June 2014. The allocation for MBBS, BDS & Allied courses and Engineering and Allied courses shall be purely as per the category community wise merit list drawn on the basis of the marks obtained in National Eligibility cum Entrance Test (NEET) and Joint Entrance Examination (JEE) Mains 2017 and subject to criteria as laid down by the Medical Council of India, concerned Institute and other authorities from time to time. For the academic session 2017-18 Sikkim Manipal University has provided 30% MBBS seats out of their total intake. Of this 30% seats, 20% will be on concessional fee and 10% will be on full fee basis For other State quota seats allotment will be made as per the merit list drawn on the basis of the marks obtained in the qualifying examination and subject to criteria as laid down by the concerned Institute/other authorities from time to time. Incase of candidates having obtained similar marks in NEET or JEE (Mains) the tie breaker rule of NEET and JEE (Mains) will be adopted as the case may be.*
>
> *II. The roster will be applied as follows:-*
>
> *The candidates selected in each of the categories would be given option to choose a seat of their choice in accordance with their merit position on that respective category. For instance a candidate who is first in the merit (open category) will be*

given first choice. Thereafter, a candidate who has scored 1st position in BL category would also be given an option to choose a seat of his/her choice. Likewise candidates securing 1st position in order of merit in Primitive Tribe, OBC (central), OBC (State), ST and SC category respectively, would also be given their choice. Thereafter, the allotment and choice of seat will be given to those candidates who are entitled and next in the merit in their respective category. This cycle will operate till the candidates belonging to all categories, excluding „Others are allotted seats as per their entitlement on the basis of seat matrix.

(Emphasis Supplied)

In case seat(s) belongings to any category remains vacant due to candidates not fulfilling criteria for the course as mentioned at para I above or there is no candidate belonging to that category to avail the seat the vacant seat will be allotted to the candidate who is first in the merit at that point of time irrespective of community."

"VIII. Once a seat is allotted and availed by a candidate, he will not be entitled to any other State quota seat even if the State quota seats allotted earlier is surrendered by him."

16. The Respondent No.2 vide counselling notice no.GOS/DTE/2017/ 731 dated 30.06.2017 informed all concerned that the counselling for allotment of State quota seats for MBBS/ BDS for the Academic Session 2017-18 will be held on 13.07.2017. As per the said counselling notice, the following information would be available on the Departments portal www.sikkimhrdd.org and all were advised to log on to the said site on

regular basis:-

> *"(i) the Notification relating to the reservation policy of the State Government for different categories of people of Sikkim for allotment of State quota seats,*
>
> *(ii) Guidelines relating to procedure for allotment of State quota seats*
>
> *(iii) list of institutions and number of seats available for allotment (a week before the date of counselling), and*
>
> *(iv) instructions for counselling."*

17. In so far as candidates belonging to SC/ST, Central and State OBC communities are concerned they were advised to log on to the website www.socialjustice.nic.in and www.tribal.nic.in of Ministry of Social Justice and Ministry of Tribal Affairs, Govt. of India for eligibility conditions and components of the Scholarship.

18. Pursuant to the said counselling notice the Petitioners as well as others attended the counselling on 13.07.2017. The records of the Respondent No.2 reflect that counselling was conducted for the following:-

"

Sl No.	*Name of Institutions*	*No. of seats*
1	*SMIMS*	*10 seats*
2	*RIMS, Manipur*	*05 seats*
3	*Central Pool*	*06 seats (anticipated)*

"

19. On the basis of the counselling seat matrix for 21 MBBS seats along with the details of allotment of the seat was as under:-

Total seats = 21	*Reserved Seats*	*Nominee Name*	*NEET score*	*Institute*
Merit 10%	*2*	*1. Sandup Dorjee Tamang s/o. Ashok Kumar Tamang*	*431*	*Central Pool waiting*
		2. Akanchya Sharma d/o. Dilip Kumar Sharma	*351*	*RIMS, Imphal*
BL 20%	*04*	*1. Jem Pandi Targain d/o. Pempa Tshering Lepcha*	*304*	*Central Pool waiting*
		2. Chepen Wangyal Bhutia d/o. Pema wangyal Bhutia	*289*	*RIMS, Imphal*
		3. Rigsem Gyatso Bhutia d/o. Sonam Gyatso Bhutia	*285*	*SMIMS*
		4. Yanke Doma Sherpa d/o. Karma Sherpa	*282*	*SMIMS*
PT 05%	*01*	*1. Nareep Taraum Lepcha d/o. Topden Lepcha*	*217*	*Central Pool waiting*
OBC (Central) 20%	*04*	*1. Nagendra Gurung* ***(Petitioner No.2)*** *s/o. Lt. Gaz Raj Gurung*	*351*	*Central Pool waiting*
		2. Swatha Rai d/o. Jagat Bahadur Rai	*240*	*RIMS, Imphal*
		3. Subham Swarup Giri s/o. Bishnu Lall Giri	*221*	*SMIMS*
		4. Yugal Raj Gurung s/o. Megraj Gurung	*217*	*SMIMS*
OBC (State) 20%	*04*	*1. Deepa Chettri* ***(Petitioner No.1)*** *d/o. B.B Chettri*	*403*	*Central Pool waiting*
		2. Priya Deokota d/o. U.K. Deokota	*335*	*SMIMS*
		3. Kshetiz Chettri s/o. H.K. Chettri	*328*	*SMIMS*
		4. Himal Neopaney s/o. D.P. Neopaney	*326*	*SMIMS*

ST 13%	*03*	*1. Ankita Subba d/o. R. Subba*	*315*	*RIMS, Imphal*
		2. Prabika Lama d/o. S.D. Lama	*314*	*SMIMS*
		3. Hangma Subba d/o. Ramesh Subba	*272*	*SMIMS*
SC 07%	*02*	*1. Maricca Madan Rasily d/o. Suresh Madan Rasaily*	*230*	*RIMS, Imphal*
		2. Arati Biswakarma ***(Respondent No.4)*** *d/o. C.L. Biswakarma*	*210*	*Central Pool waiting*
Others 05%	*01*	*Nisha Gupta d/o. Santosh Gupta"*	*435*	*SMIMS*

20. The records thus reveal that on the date of first counselling i.e. 13.07.2017 only 15 confirmed State quota MBBS seats were available with the Respondent No.2 for allotment. The records further reveal that the counselling notice dated 30.06.2017 invited the candidates for allotment of State quota seats for MBBS/BDS. However, on the date of counselling held on 13.07.2017 the Respondent No.2 notified that besides the 15 State quota MBBS seats consisting of 10 seats from SMIMS and 5 seats from RIMS, Manipur, 6 Central Pool seats were also anticipated. The above chart would clearly reflect that during the counselling 6 candidates opted to wait for the 6 Central Pool seats which were anticipated by the Respondent No.2 from the Respondent No.1 on the Respondent No.2 projecting that the said 6 Central pool seats were anticipated.

21. In the first round of counselling when the 6 candidates named above opted to wait for the 6 Central Pool seats which were anticipated a declaration were taken from the Petitioner No.1 and 2 to the following effect:-

"Declaration

It is to declare that I Deepa Chettri d/o. Bhim Bdr Chettri was offered MBBS seat in the first round of counselling held on 13th July 2017. I

have however on my own judgment and freewill have decided not to avail the offered seat and to participate in the next round of counselling for MBBS seat which is expected to be held after receipt of central pool seats. I shall have no claim with HRDD in case I am not allotted seat due to less number of seats reserved in Central Pool.

Candidates Name and signature: Deepa Chettri (sd/-)

Parent/Guardian name and signature: Bhim Bdr Chettri (sd/-)

Contact No.: 8290699244"

"Declaration

It is to declare that I NAGENDRA GURUNG s/o. LT. GAZ RAJ GURUNG was offered MBBS seat in the first round of counselling held on 13th July 2017. I have however on my own judgment and freewill have decided not to avail the offered seat and to participate in the next round of counselling for MBBS seat which is expected to be held after receipt of central pool seats. I shall have no claim with HRDD in case I am not allotted seat due to less number of seats reserved in Central Pool.

Candidates Name and signature: NAGENDRA GURUNG(sd/-)

Parent/Guardian name and signature: Kriti Gurung (sd/-)

Contact No.: 8768664944"

22. The Respondent No.2 under the signature of the Respondent No.3 issued the second counselling notice dated 29.07.2017. In the said notice it mentioned that the State Government has fixed the quota for allotment of State quota seats vide notification dated 14.06.2017. It also mentioned that for the academic session 2017-18 the State Government has received 15 MBBS seats and were anticipating 6 Central Pool seats. The counselling notice clearly stated that in the second instalment 10 concessional conditional seats were made available by SMIMS. Accordingly, seat matrix of 31 seats were prepared and communicated which provided for 3 seats for merit (10%), 6 seats for Bhutia & Lepcha (BL) (20%), 2 seats for Primitive Tribe (PT) (5%), 6 seats for OBC-C (20%), 6 seats for OBC-S (20%), 4 seats for Schedule Tribe (ST) (13%), 2 seats for SC (7%) and 2 seats for

others (5%). The said counselling notice informed that during the first round of counselling allotment was done for 21 MBBS seats and allotment was done providing 2 seats for merit, 4 seats for BL, 1 for PT, 4 seats for OBC-C, 4 seats for OBC-S, 3 seats for ST, 2 seats for SC and 1 seats for others totalling to 21 seats. Accordingly, the Respondent No.2 decided to allot 1 seat for merit, 2 seats for BL, 1 seat for PT, 2 seats for OBC-C, 2 seats for OBC-S, 1 seat for ST, no seat for SC and 1 seat for others as balance allocation for second round of counselling. The said notice provided that the counselling for allotment of 10 MBBS (concessional conditional) was scheduled to be held on 05.08.2017 at 10.00 am and that the allotment would be done to the categories indicated in the notice in consonance with the reservation policy of the Government.

23. It is quite evident that the second round of counselling did not give any scope of selecting or preferring any available State quota seats to those 6 candidates who had opted to await the anticipated 6 Central Pool seats as projected by the Respondent No.2.

24. A merit list for second round of counselling for State quota MBBS seats 2017-18 was also drawn in which the Petitioner No.1 is found at serial No.3 and Petitioner No.2 at serial No.4. The said list includes the names of all 6 candidates who had opted to await the Central Pool seats in the first round of counselling. Respondent No.4 was placed at serial No.38 of the said merit list.

25. The second round of counselling for allotment of 10 concessional and 5 full fees conditional MBBS seats of SMIMS, Tadong was held on 05th August 2017. The details of the seats were as under:-

"

Sl. No.	*Course*	*No. of seats*
1.	*MBBS (concessional conditional seat). SMIMS, Sikkim Manipal University.*	*10*
2	*MBBS (full fee conditional seat). SMIMS, Sikkim Manipal University.*	*05*

"

26. Taking note of the fact that during the first round of counselling held on 13.07.2017 in which 21 MBBS seats had already been allotted the

Respondent No.2 decided to allot the ten additional MBBS conditional concessional seats from SMIMS in the following manner:-

"

31 MBBS					
Sl. No.	*Communities*	*Per-centage*	*Total number of seats*	*Allotment in 1st round counselling*	*Balance allocation for 2nd round of counselling*
1	*Merit*	*10%*	*03*	*02*	*01*
2	*Bhutia and Lepcha*	*20%*	*04*	*04*	*02*
3	*Primitive Tribe*	*05%*	*01*	*01*	*01*
4	*Central OBC*	*20%*	*04*	*04*	*02*
5	*State OBC*	*20%*	*04*	*04*	*02*
6	*Scheduled Tribe*	*13%*	*03*	*03*	*01*
7	*Scheduled Castes*	*07%*	*02*	*02*	-
8	*Others*	*05%*	*01*	*01*	*01*
	Total				

"

27. The Respondent No.2 based on the aforesaid calculations and allocations allotted the 10 additional MBBS conditional seats. In the said 10 additional MBBS conditional seats 2 candidates belonging to OBC-C and 2 candidates belonging to OBC-S who were below the Petitioners in the merit list were also allotted as the Respondent No.2 continued to anticipate the 6 Central Pool seats from the Respondent No.1.

28. It is quite evident that the genesis of the present dispute started when the Respondent No.2 decided to project to the candidates who had appeared in the NEET and who found their names in the consolidated merit list that there was an anticipation of 6 Central Pool MBBS seats during the first round of counselling held on 17.07.2017.The Respondent No.2 very candidly admits that it had 'devised' a method for the merit candidates to

wait for the Central Pool seats in the counter affidavit filed. As per this 'devise' 6 candidates including the Petitioners and the Respondent No.4 were given the option to await the Central Pool seats in anticipation. The Petitioner No.1 had secured the 1st position in the category wise merit list of OBC-S and the 4th position in the first consolidated merit list. Similarly, the Petitioner No.2 had secured the 1st position in the category wise merit list of OBC-C and the 6th position in the consolidated merit list. The Respondent No.4 had secured the 2nd position in the category wise merit list of SC and 61st position in the consolidated merit list.

29. Although, the Respondent No.1 has not filed any counter affidavit, in the written submission filed on 09.12.2017 it would contend that the Government of India receives medical seats from different States where Government aided medical colleges exists and it is the prerogative of these States to contribute or not to contribute medical seats to the Ministry. It is only on the receipt of the seats that the same are allocated. The allocation is based on two factors i.e. population of the State and number of Medical Colleges in the State. There are no guidelines or regulations governing allotment of medical seats to the North Eastern States and seats are allocated based on the State contribution. This would mean that allotment of Central Pool seats may not be constant and it is liable to decrease or increase. The learned Senior Counsel appearing for the Respondent No.4 submits that when the Central Pool seats were not available to the Respondent No.2 on the date of first counselling held on 17.07.2017 it was illegal on the part of the Respondent No.2 to allocate the said seats.

30. The Respondent No.2 would, however, contend that as practiced for last many years the department anticipated receiving 6 seats from the Central Pool.

31. The record reveals that the first counselling was held on 17.07.2017 when only 15 confirmed MBBS seats were available. However, due to the method devised by the Respondent No.2 the meritorious students who had excelled in the NEET were given the option to await the Central Pool seats which was anticipated by the Respondent No.2 without any assurance from the Respondent No.1. At this stage 4 other candidates belonging to OBC-C category and 4 other candidates belonging to OBC-S category all lower in the consolidated merit list than the Petitioners were allotted the non central pool State quota seats. Out of the said 4 candidates each, of the OBC-C category and OBC-S category, the Petitioners both toppers in their

respective categories availed the option given by the Respondent No.2 to await the Central Pool seats. However, the said allotments against the anticipated Central Pool seats were conditional upon the Central pools seats being made available. The records placed do not reveal that the Respondent No.2 had any assurance from the Respondent No.1 that 6 seats would be provided. However, to protect itself the Respondent No.2 sought and took a declaration each from the Petitioners. The instructions issued to the candidates by the Respondent No.2 provided that if the candidate do not opt to avail the seat in that counselling he/she shall forfeit his/her claim for the allotment of seat available at that time and the person next in merit will be called for allotment. Even if it is believed that the Petitioners had not opted to avail the 15 State quota seats available at the first round of counselling held on 17.07.2017 and therefore had forfeited his/her claim for the allotment of seats it is evident that the opting out or the forfeiture is only for those 15 seats only. The records however, reveal that it was at the instance of the Respondent No.2 projecting the anticipation of the 6 Central Pool seats that the 6 candidates including the Petitioners opted to await the same. No fault can therefore be attributed to the Petitioner No.1 and 2.

32. The record further reveals that the Respondent No.2issued the second counselling notice on 29.07.2017 once again mentioning about the anticipated 6 Central Pool seats and drew the seat matrix for 31 seats keeping in mind that the 6 Central Pool seats were not only anticipated but also allotted to the 6 candidates including the two Petitioners.

33. The second counselling took place on 09.08.2017 when further 10conditional concessional seats were made available by SMIMS, Tadong. Due to the fact that the Respondent No.2 had given an option to await the so called anticipated Central Pool seats which option was exercised by the 6 candidates on 09.08.2017,in the second round of counselling there is no mention that even at this stage the 6 candidates were given the option to take the further 10 seats made available by SMIMS, Tadong. The instructions issued by the Respondent No.2 to the candidates provided that even if the candidate did not opt to avail the seats in the earlier counselling and he/she forfeited his/her claim for the allotment of the said 15 seats available at that time and the person next would be called for allotment, he/she may still, however, be considered for allotment in subsequent counselling if seats were available for allotment. The records reveal that no such opportunity for considering the Petitioners for allotment in the second round

of counselling was given by the Respondent No.2 although 10 State quota seats were available. Infact the records/ note sheets reveal that on 09.08.2017 the Respondent No.2 allotted the ten additional MBBS seats keeping in mind the fact that it had already allotted 21 seats inclusive of the 6 anticipated Central Pool seats in the first round of counselling held on 17.07.2017. On the allotment of 10 additional MBBS seats to those candidates other than the 6 candidates awaiting the anticipated 6 Central Pool seats two more candidates belonging to OBC-C category and two more candidates belonging to OBC-S category were allotted seats. By doing so the Respondent No.2 seems to have exceeded and transgressed the reservation policy and the roster system in anticipation of the 6 Central Pool seats. By the method devised by the Respondent No.2 to await the Central Pool seats two toppers of their respective categories have lost out and were not allotted any seat at all. In this manner the Petitioners placed higher in the merit list could not secure MBBS seats.

34. On 18.08.2017, 3 MBBS Central Pool seats for the Academic Session 2017-18 were made available to the Respondent No.2 by the Respondent No.1 for the first time. Vide notice dated 25.08.2017 the Respondent No.3 notified that the State of Sikkim had received only 3 MBBS seats from the Central Pool for the year 2017 as against 6 candidates who awaited for the Central Pool seats in the first round of counselling held on 13.07.2017. The said notice did not give any details of the 3 Central Pool seats made available by the Respondent No.1 on 18.08.2017. The Respondent No.3 further notified that the Department was vigorously pursuing with the concerned authorities for allotment of further 3MBBS quota seats so that all 6 wait listed candidate can be nominated but the process would take sometime. The said notice invited candidates for counselling for the 2 BDS Central Pool seats along with the total number of seats available till that date stating that interested candidates who wanted to avail BDS seats may attend the said counselling. The notice clarified that in case less than 6 MBBS seats were available for counselling and the candidates waiting for MBBS seats opt to avail BDS seats such candidate would be given preference over the candidates who are attending counselling for BDS and accordingly the candidates were advised that they should exercise their discretion to attend the counselling for BDS course. The tenor of the notice dated 25.08.2017 makes it evident that the said notice emphasised more on the counselling for the 2 BDS Central Pool seats to be held on 28th July 2017 and gave option to the 6 candidates waiting for the

Central Pool MBBS seat to opt for the BDS seats stating that if they do so preference would be given to them. Neither the records nor the pleadings in the counter affidavit filed by the Respondent No.2 reflect that the Petitioners were called to or were invited for counselling for the 3 Central Pool seats made available by the Respondent No.1 on 18.08.2017. It is not surprising that the Petitioners did not take the option for applying for the BDS seats which are less promising.

35. It is evident that the Respondent No.2 did not invite any of the Petitioners for counselling although 3 Central Pool seats were made available on 18.08.2017.

36. The said 3 seats were allotted to the three toppers in the merit, BL and PT categories who were the 3 candidates who had opted to await the 6 anticipated Central Pool seats in the first round of counselling held on 17.07.2017. The Petitioners were not allotted any of the 3 seats on application of the roster. The guidelines issued by the Respondent No.1 for selection and nomination of candidates against Central Pool MBBS/BDS seats for the academic year 2017-18 does not provide for the application of roster. Under the said guidelines the selection of candidates was required to be made on the basis of rank obtained in the NEET duly applying the reservation policy. The reservation Notification also does not provide for application of the roster. The learned Senior Counsel appearing for the Respondent No.1 as well as the learned Counsel appearing for the State Respondent No.2 and 3 submits that once the Central Pool seats are allocated to the State it goes into the State quota seats. The learned Counsels also submits that since in the guidelines issued by the Respondent No.1 it is provided that the reservation policy of the State would be applicable the roster which was made a part of the reservation policy vide the guidelines issued for the State quota seats by the Respondent No.2 would also apply. There seems to be some force in the aforesaid contention. The guidelines for allotment of State quota seats provides for application of the reservation policy and the roster. The reservation policy provides for 8 categories / communities and the percentage of reservation for each of the categories. The guidelines issued by the Respondent No.2 regarding roster provides that the candidates selected in each of the categories would be given option to choose the seat of their choice in accordance with their merit position in that respective category and then goes on to provide as to how the roster was to apply. It is thus clear that the application of the

roster was integral to the reservation policy of the Respondent No.2.

37. The Petitioners have not arrayed the candidates in their respective categories who had secured lesser marks than them but have been allotted the MBBS seats. At the hearing, the learned senior counsel appearing for the Petitioners were specifically asked twice if they would desire to array the said candidates as party Respondents to which it was specifically replied that they would not do so. It is trite that no adverse order can be passed against persons who were not made parties to the litigation. This Court is of the view that in an action at law while seeking discriminatory relief from the Court the Petitioners cannot pick and choose the Respondents. If the non-parties were necessary parties they ought to have been impleaded. Any order passed in favour of Petitioners for allotment of seats would obviously affect the non-parties in the facts of the present case keeping in mind the fact that only 29 seats were at the disposal of the Respondent No.2.

38. At this juncture it is important to appreciate three important judgments of the Apex Court connected to MBBS admissions to examine what relief could be granted in favour of the Petitioners as prayed for in the Writ Petition.

39. In re: **Asha v. Pt. B.D Sharma University of Health Science and Ors.**[1] the Apex Court would hold:-

> *"21. At this stage, we may refer to certain judgments of the Court where it has clearly spelt out that the criteria for selection has to be merit alone. In fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be a travesty of the scheme formulated by this Court and duly notified by the States, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casualty. It will be useful to*

[1] (2012) 7 SCC 389

refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but is also abuse of the process of law. (Ref.: Priya Gupta v. State of Chhattisgarh [(2012) 7 SCC 433] , Harshali v. State of Maharashtra [(2005) 13 SCC 464] , Pradeep Jain v. Union of India [(1984) 3 SCC 654] , Sharwan Kumar v. DG of Health Services [1993 Supp (1) SCC 632] , Preeti Srivastava v. State of M.P. [(1999) 7 SCC 120] , Guru Nanak Dev University v. Saumil Garg [(2005) 13 SCC 749] and AIIMS Students' Union v. AIIMS [(2002) 1 SCC 428] .)

24. The Court cannot ignore the fact that these admissions relate to professional courses and the entire life of a student depends upon his admission to a particular course. Every candidate of higher merit would always aspire admission to the course which is more promising. Undoubtedly, any candidate would prefer course of MBBS over BDS given the high competitiveness in the present times, where on a fraction of a mark, admission to the course could vary. Higher the competition, greater is the duty on the part of the authorities concerned to act with utmost caution to ensure transparency and fairness. It is one of their primary obligations to see that a candidate of higher merit is not denied seat to the appropriate course and college, as per his preference. We are not oblivious of the fact that the process of admissions is a cumbersome task for the authorities but that per se cannot be a ground for compromising merit. The authorities concerned are expected to perform certain functions, which must be performed in a fair and proper manner i.e. strictly in consonance with the relevant rules and regulations.

30. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer.

31. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission.

32. Though there can be the rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and

principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. (Refer Arti Sapru v. State of J&K [(1981) 2 SCC 484 : 1981 SCC (L&S) 398] , Chhavi Mehrotra v. DG, Health Services [(1994) 2 SCC 370] and Arvind Kumar Kankane v. State of U.P. [(2001) 8 SCC 355])"

40. In re: **Chandigarh Administration and Ano. V. Jasmine Kaur and Ors.**[2] the Apex Court would hold:-

"33. Having noted the various decisions relied upon by the appellant in SLP (C) No. 18099 of 2014 and the contesting respondent, we are able to discern the following principles:

33.1. The schedule relating to admissions to the professional colleges should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the courts or the Board and midstream admission should not be permitted.

33.2. Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate i.e. the candidate has pursued his or her legal right expeditiously without any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstance alone.

[2] (2014) 10 SCC 521

33.3. If a candidate is not selected during a particular academic year due to the fault of the institutions/authorities and in this process if the seats are filled up and the scope for granting admission is lost due to eclipse of time schedule, then under such circumstances, the candidate should not be victimised for no fault of his/her and the court may consider grant of appropriate compensation to offset the loss caused, if any.

33.4. When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the courts cannot grant any relief to the candidate in the form of securing an admission.

33.5. If the candidate takes a calculated risk/chance by subjecting himself/herself to the selection process and after knowing his/her non-selection, he/she cannot subsequently turn around and contend that the process of selection was unfair.

33.6. If it is found that the candidate acquiesces or waives his/her right to claim relief before the court promptly, then in such cases, the legal maxim vigilantibuset non dormientibus jura subveniunt, which means that equity aids only the vigilant and not the ones who sleep over their rights, will be highly appropriate.

33.7. No relief can be granted even though the prospectus is declared illegal or invalid if the same is not challenged promptly. Once the candidate is aware that he/she does not fulfil the criteria of the prospectus he/she cannot be heard to state that, he/she chose to challenge the same only after preferring the application and after the same is refused on the ground of eligibility.

33.8. There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year i.e. carry-forward of seats cannot be permitted how much ever meritorious a candidate is and deserved admission. In such circumstances, the courts cannot grant any relief to the candidate but it is up to the candidate to reapply in the next academic year.

33.9. There cannot be at any point of time a direction given either by the court or the Board to increase the number of seats which is exclusively in the realm of the Medical Council of India.

33.10. Each of these abovementioned principles should be applied based on the unique and distinguishable facts and circumstances of each case and no two cases can be held to be identical.

43. As time and again such instances of claiming admission into such professional courses are brought before the Court, and on every such occasion, reliance is placed upon the various decisions of this Court for issuing necessary directions for accommodating the students to various courses claiming parity, we feel it appropriate to state that unless such claims of exceptional nature are brought before the Court within the time schedule fixed by this Court, court or Board should not pass orders for granting admission into any particular course out of time. In this context, it will have to be stated that in whatever earlier decisions of this Court such out-of-time admissions were granted, the same cannot be quoted as a precedent in any other case, as such directions were issued after due consideration of the peculiar facts involved in those cases. No two cases can be held to be

similar in all respects. Therefore, in such of those cases where the court or Board is not in a position to grant the relief within the time schedule due to the fault attributable to the candidate concerned, like the case on hand, there should be no hesitation to deny the relief as was done by the learned Single Judge. If for any reason, such grant of relief is not possible within the time schedule, due to reasons attributable to other parties, and such reasons are found to be deliberate or mala fide the court should only consider any other relief other than direction for admission, such as compensation, etc. In such situations, the court should ensure that those who were at fault are appropriately proceeded against and punished in order to ensure that such deliberate or malicious acts do not recur."

41. In re: **S.Krishna Sradha v. State of Andhra Pradesh & Ors.**[3] the Apex Court would hold:-

"27. As is seen, stress has always been laid on the merit in the matters of all admissions as meritorious students should not face any impediment to get admission for some fault on the part of the institution or the persons involved with it. He/She has no other remedy but to approach the court for getting redressal of his/her grievances. It is a grievance that pertains to fundamental right. It has to be remembered that a right is conferred on a person by rule of law and if he seeks remedy through the process meant for establishing rule of law and it is denied to him, it would never subserve the cause of real justice. When a lis of this nature comes in a constitutional court, it becomes the duty of the court to address whether the authority had acted within the powers conferred on it or deviated

[3] (2017) 4 SCC 516

from the same as a consequence of which injustice has been caused to the grieved person. The redressal of a fundamental right, if one deserves to have, cannot be weighed in terms of grant of compensation only. Grant of compensation may be an additional relief. Confining it to grant of compensation as the only measure would defeat the basic purpose of the fundamental rights which the Constitution has conferred so that the said rights are sustained. It would be inapposite to recognise the right, record a finding that there is a violation of the right and deny the requisite relief.

28. A young student should not feel that his entire industry to get himself qualified in the examination becomes meaningless because of some fault or dramatic design of certain authorities and they can get away by giving some amount as compensation. It may not only be agonising but may amount to grant of premium either to laxity or evil design or incurable greed of the authorities. We are disposed to think, in such a situation, justice may be farther away and the knocking at the doors of a constitutional court, a Sisyphean endeavour, an exercise in futility. It is well known that the law intends not anything impossible; lex non intendit aliquid impossibile. But when it is in the realm of possibility; and denial of relief hurts the "majesty of justice", it should not be denied. On the contrary, every effort has to be made to grant the relief. Needless to say, to get the relief, conditions precedent are to be satisfied; and that is what has precisely been stated in Asha [Asha v. Pt. B.D. Sharma University of Health Sciences, (2012) 7 SCC 389 : 4 SCEC 611] and Harshali [Harshali v. State of Maharashtra, (2005) 13 SCC 464] .

29. In this context, Mr Narasimha, learned friend of the court submitted that the Court in Jasmine Kaur [Chandigarh Admn. v. Jasmine Kaur, (2014) 10 SCC 521 : 6 SCEC 745] has been guided by the principle adopted by this Court in the cases of constitutional tort. He has drawn our attention to the authorities in Rudul Sah v. State of Bihar [Rudul Sah v. State of Bihar, (1983) 4 SCC 141 : 1983 SCC (Cri) 798] , Sebastian M. Hongray v. Union of India [Sebastian M. Hongray v. Union of India, (1984) 1 SCC 339 : 1984 SCC (Cri) 87 : AIR 1984 SC 571] and Railway Board v. Chandrima Das [Railway Board v. Chandrima Das, (2000) 2 SCC 465] , where the Court granted compensation because there was no other option and the only way of redemption was to grant compensation. It is necessary to state that grant of relief as lawfully due should be the primary duty of the court. Where doctrine of restitution can be applied and there is no impossibility it would be anathema to the cause of justice to deny the same. It is seemly to appreciate that restitution as a concept, as is traditionally understood, is the restoration of an aggrieved party to his condition prior to the wrongdoing. It could be limited to monetary quantification only if the breach is not capable of being remedied. That being so, compensation cannot be the adequate or sole remedy for the wrongful deprivation of admission, as it affects the academic career of a student. There may be cases where restitution may be too harsh. Then, as we are inclined to think, telescoping albeit reasonably is not an impossible one. In Aneesh D. Lawande [Aneesh D. Lawande v. State of Goa, (2014) 1 SCC 554 : 6 SCEC 534] some of the candidates were adjusted as the Government had played possum and telescoping was not allowed

as the candidates had got into the course in contravention of the decision of this Court. The factual score was different. But when a right is comatosed by a maladroit design, we think, the right of the person presently aggrieved should matter, not the right of the future candidate. Present cannot be crucified at the altar of the future. Whether the beneficiary who has got in should go out or not, would depend upon the discretion of the Court.

33. In view of the aforesaid, we think the decision in Chandigarh Admn. [Chandigarh Admn. v. Jasmine Kaur, (2014) 10 SCC 521 : 6 SCEC 745] requires reconsideration by a larger Bench. Papers be placed before the Hon'ble the Chief Justice of India for constitution of the appropriate larger Bench."

42. As the law stand today as declared by the Apex Court the schedule relating to the admission to the professional college should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the Courts or the Board and midstream admission should not be permitted. It is only under exceptional circumstances, if the Court finds that there is no fault attributable to candidate relief of admission can be directed, however, within the time schedule prescribed. As the last date of admission notified by the Medical Council of India was 31.08.2017 although it is seen that the Petitioners both toppers in their respective categories have suffered non admission due to the fault on the part of the Respondent No.2 this Court is unable to grant any relief for grant of admission to them. MBBS is a professional course. The semesters having begun on 01.09.2017 three months have already lapsed. The Petitioners have chosen not to challenge the admission of the non-parties and acquiesced and waived their rights to claim reliefs before the Court promptly. In fact considered in that light the Petitioners have failed to consciously challenge the selection of the non-parties selected at the first round of counselling held on 17.07.2017 and second round of counselling held on 09.08.2017.The Petitioners have thus failed to pursue their legal remedies on time and chosen to attack only one candidate who has secured the last Central Pool seat provided by the Respondent No.1 on the 31st August 2017 to the Respondent No.2.

43. The failure of the Petitioners to implead the said non-parties would not allow this Court to examine the merit of their selection to grant relief of admission in favour of Petitioners. An action at law definitely is not a game of chess. The relief of admission cannot be granted to the Petitioners on account of the fact that the non-parties similarly placed have been consciously kept out of the lis by the Petitioners for reason best known to them, inspite of opportunities to do so.

44. In view of the Judgment of the Apex Court in re: Chandigarh Administration (supra)and specifically para 33.1 to 33.10 and 43, the prayers prayed for in the Writ Petition for a direction to the Respondent No.1 to allocate 3 more MBBS seats to the State of Sikkim and to the Respondent No.2 and 3 to issue nomination to the Petitioners in any Government Medical Colleges cannot be granted. Similarly, the prayer seeking a direction to the Respondents to allot one MBBS seat each to the Petitioners from the Central Pool also cannot be granted.

45. The Petitioners however, seeks to challenge the allotment of the Central Pool seat to the Respondent No.4 which was made available by the Respondent No.1 to the Respondent No.2 on the 31st of August 2017 at 06.01 pm as per the Respondent No.2.The records reveal that on 31.08.2017 i.e. on the last date of admissions as notified by the Medical Council of India the Respondent No.1 allotted an additional MBBS seat at Government Medical College at Haldwani, Uttarakhand (GMC, Haldwani) The communication from the Respondent No.1 was received as per the Respondent No.2 at 06.00 pm on 31.08.2017. On the same day itself the Respondent No.2 allotted the seat to the Respondent No.4 and nominated the Respondent No.4 in its communication to the Dean of the GMC, Haldwani. The Respondent No.4 in her counter affidavit states that at about 04-05 pm on 31.08.2017 the Respondent No.4 suddenly received a call from Respondent No.2 and was informed that one more seat was made available for SC candidate and after being called to the office handed over the order for the State quota seat for GMC, Haldwani. The Respondent No.4 in her counter affidavit states that on 01.09.2017 after the receipt of the communication from Respondent No.2 she along with her guardians proceeded to Delhi and reached Haldwani on 02.09.2017 and reported to the GMC, Haldwani at 09.00 am, the same day. GMC, Haldwani however, refused to give admission stating that the admission was closed on 31.08.2017 as per the guidelines of the Medical Council of India and that

the admission date of the MBBS course was declared by the Honble Supreme Court of India. The Respondent No.4 was also informed that since the admission was declared as per the guidelines of the Honble Supreme Court of India the same could be extended only by the orders of the Honble Supreme Court. In such circumstances, the Respondent No.4 filed Writ Petition (Civil) No. 830 of 2017 (Arati Bishwakarma v. Union of India & Ors.) before the Honble Supreme Court of India on 06.09.2017. The said Writ Petition was heard and decided on 11.09.2017 allowing three days time to the Respondent No.4 for taking admission in GMC, Haldwani. Armed with the certified copy of the said order the Respondent No.4 obtained admission on 12.09.2017 and has paid an amount of Rs. 1,06,000/-. A copy of the order dated 11.09.2017 has been annexed to the counter affidavit. A copy of the said Writ Petition has been filed on 18.12.2017 by the Respondent No.4. A perusal of the said Writ Petition reflects that the Respondent No.4 had pleaded before the Apex Court that the Respondent No.4 belonging to the SC community was granted admission by the State of Sikkim based on allotment of one seat to the State of Sikkim by the Respondent No.1 under the Central Pool in GMC, Haldwani which is far away from the State of Sikkim on 31.08.2017. The Respondent No.4 further pleaded that the State of Sikkim had nominated the Respondent No.4 on the very same date i.e. 31.08.2017 and also informed GMC, Haldwani accordingly. The Respondent No.4 further pleaded that the State of Sikkim also informed the Respondent No.4 of her admission on 31.08.2017 and thus the Respondent No.4 was granted admission by the competent authorities namely the Government of India and the State Government on 31.08.2017 within the time frame fixed for admissions. It categorically stated that the admission of the Respondent No.4 was based on the merit in the NEET. The Respondent No.4 thereafter pleaded the immediate steps taken to reach GMC, Haldwani and how on reaching thereon the next date she was declined admission. The Respondent No.4 also pointed out in the said Writ Petition how she had pleaded with GMC, Haldwani as to how it was impossible to report from a remote village in Sikkim to Haldwani on 31.08.2017 itself, but to no avail. The Respondent No.4 had pleaded that the Apex Court in numerous Judgments had held that the career of students especially in professional courses like the MBBS programme, should not be jeopardized due to administrative or other lapses by the authorities. The Respondent No.4 further pleaded that the Government of India which allotted the seat on 31.08.2017 to the State of Sikkim being aware of the fact that it is allotting

a seat in Uttarakhand which is far away from the Sikkim and any student admitted by the State of Sikkim against the said seat would have to travel from Sikkim to Delhi and from Delhi to Haldwani which could not have been done on 31.08.2017 itself and thus ought to have been given reasonable time to join. It is seen that besides the Union of India, the Medical Council of India, the State of Sikkim as well as the GMC, Haldwani had been made Respondents in the said Writ Petition under Article 32 of the Constitution of India. On the aforesaid pleadings the Respondent No.4 had prayed for a writ, order or direction in the nature of mandamus directing GMC, Haldwani to permit the Respondent No.4 to join the MBBS course for the Academic year 2017-18 pursuant to the allotment/ admission by the Government of India and Government of Sikkim dated 31.08.2017. The Respondent No.4 had filed the letter dated 31.08.2017 by the Government of India addressed to the Secretary, Ministry of Health Family Welfare Department, Government of Sikkim allocating one seat in GMC, Haldwani to Sikkim as well as the communication dated 31.08.2017 issued by the Respondent No.2 to the Dean of the GMC, Haldwani nominating the Respondent No.4 for the allotment. The Respondent No.4 had also annexed the travel details to Haldwani along with the said Writ Petition. The Respondent No.4 also filed the communication dated 02.09.2017 issued by the Principal of GMC, Haldwani to the Respondent No.2 pointing out that the Respondent No.4 had reported for admission on 02.09.2017 and since the last date of admission was 31.08.2017 instructions/ directions were required on the issue of granting the permission for admission. The Respondent No.4 had also annexed a letter dated 06.09.2017 issued by her Advocate to the Registrar of the Apex Court seeking for urgent hearing for immediate urgent orders.

46. The Apex Court examined the Writ Petition on 11.09.2017.The Order dated 11.09.2017 of the Apex Court reads thus:-

> *"Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondents-Union of India, states that the petitioner may be allowed to join the MBBS course for the academic year 2017-18 in the Government Medical College, Haldwani, Uttarakhand, within three days from today.*
>
> *We order accordingly.*

Hence, the writ petition is disposed of in the above terms."

47. It is evident that after being allotted the last Central Pool seat by the Respondent No.2 on 31.08.2017 i.e. the last date specified for admission by the Medical Council of India the Respondent No.4 had sought extension of time from the Apex Court which had been granted on the submission made on behalf of the Respondent No.1. Judicial propriety demands that this Court shall not delve into examining any issue which may undermine the authority of the Apex Court. In such circumstances, this Court shall refrain from examining the merit of the contentions of the Petitioners challenging the allotment of the last Central Pool seat to the Respondent No.4. Although it must be noted that at the hearing when the learned Counsel for the State Respondent was asked as to whether if the reservation policy of the Respondent No.2 read with the guidelines issued by the Respondent No.2 and the roster were to be applied the Respondent No.4 would be entitled to the allotment of the 4th Central Pool seat it was candidly replied that it would entitle the Petitioner No.2 and not the Respondent No.4. The Respondent No.2 would justify this act by stating that on the date of the first counselling since the Central guidelines had not been issued to the Respondent No.2 by the Respondent No.1 the Respondent No.2 had applied the guidelines of 2016-17 in which it was provided that a distinct reservation of 15% for SC category would be reserved from 22½ % of the seats allotted to each State. A perusal of the contemporaneous documents i.e. the file containing the note sheets dated 17.07.2017 allocating 21 seats in the first counselling held on 13.07.2017, however, does not reflect so. In fact the said file contains only the guidelines for selection and nomination of candidates against Central Pool MBBS/BDS seats for the Academic year 2017-18.

48. However, in the peculiar facts of the present case this Judgment shall not preclude the Petitioner No.2 to seek his remedy in accordance with law. In view of the aforesaid circumstances, this Court is of the view that no direction could be issued to the Respondent No.2 and 3 to cancel the allotment of one MBBS seat to the Respondent No.4 and to allocate the same to the Petitioner No.2 for, that would be in derogation of the order passed by the Apex Court.

49. The Apex Court has consistently held and stressed on the merit in matters of admissions as meritorious student ought not to face any

impediment to get admission for some fault on the part of the Institution or the persons involved with it. The Respondent No.2 and 3 have failed in their constitutional duties to ensure merit in the matters of admission to the MBBS courses although it is quite evident that there are only few seats available for the medical aspirants of Sikkim. In fact the record suggest that the counselling sessions conducted by the Respondent No.2 and 3 instead of helping the meritorious candidates to secure their legitimate allotments have ensured that those meritorious student i.e. the Petitioners were deprived of their legitimate allotments. The very word counselling suggests professional assistance and guidance by experts. There is but one medical College in Sikkim. The records reveal that the Respondent No.1 had provided 6 Central Pool MBBS seats in the year 2009, 8 Central Pool MBBS seats in the year 2010, 8 Central Pool MBBS seats in the year 2011, 7 Central Pool MBBS seats in the year 2012, 6 Central Pool MBBS seats from the year 2013 till year 2016. Viewed in these facts the plea of anticipation by the Respondent No.2 for being allotted at least 6 Central Pool MBBS seats thus does not seems improbable. The Respondent No.1 in spite of notice has failed to provide any factual details or data as to why the allocation for the year 2017 was restricted to 4 seats only save stating by way of written submission that the Central Pool MBBS seats are dependent on the contribution of the different States and therefore always subject to fluctuations. However, even if the Respondent No.2 and 3 had good reason to anticipate at least 6 Central Pool seats it had no right to allocate them before the seat was actually allotted to the Respondent No.2.In view of the aforesaid to protect the student community aspiring for medical admissions, this Court is of the view that a direction may be appropriate to the Respondent No.2 to henceforth not allocate seats in anticipation. By doing so the Respondent No.2 has directly harmed the medical professional career of the Petitioners who are both found to be meritorious. In a welfare State the Respondent No.1 as the Centre and the Respondent No.2 as the State must play a key role in ensuring that the most meritorious students are not deprived of their legitimate rights to professional education. Their merits demands that they be given preference. The Respondent No.1 and 2 have a constituted duty for ensuring this which would directly help in nation building. Before devising any method for allotment the Respondent No.3 ought to have considered whether such a method devised would ensure fair-play. Our Constitution guarantees rights to equality. The Respondent No.1 and 2 must, therefore, devise fair, equal, accurate and perfect method to ensure that the allotments of MBBS seats

are done not only on time but also equitably and in the manner contemplated by the laws guided by its policies. Although by the failure of the Petitioners to seek proper remedy and on time they would not fall in the category of "exceptional cases" and entitled to a Writ for admission beyond the time schedule prescribed, the failure of the Respondent No.2 to protect the constitutional mandate and the resultant harm to the academic career of the Petitioners cannot be ignored. The Respondent No.2 shall thus, pay compensation to the Petitioners equivalent to the amount of medical fees payable by them for admission into the MBBS seats to which the Petitioners would have been entitled to as the first candidate in their respective categories had the Respondent No.2 not devised the method to allocate Central Pool MBBS seats in anticipation within a period of two weeks from the date of this Judgment.

50. The Writ Petition is disposed of in the above terms.

51. No orders as to cost. All Interlocutory applications shall stand disposed of accordingly. Urgent photostat certified copy of this Judgment, if applied for, be furnished to the parties expeditiously.

SLR (2017) SIKKIM 899

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

I. A. No. 01 of 2017 in CRP No. 02 of 2017

Smt. Bishnu Maya Rai ….. PETITIONER

Versus

Dr. Rameshwar Prasad and Others ….. RESPONDENTS

For the Petitioner :	Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms. Malati Sharma, Advocates.
For Respondent 1 :	Mr. Sudhir Prasad, Advocate.
For Respondents 2-3 :	Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate.
For Respondents 4-7 :	Mr. Karma Thinlay, Senior Government Advocate with Mrs. Pollin Rai, Assistant Government Advocate.
For Respondent 8 :	Ms. Bandana Pradhan, Advocate.
For Respondent 9 :	None.

Date of decision: 28th December 2017

A. Limitation Act, 1963 – S. 5 – Expression "sufficient cause" – In *Esha Bhattacharjee*, the Hon'ble Supreme Court, *inter alia*, observed that no presumption can be attached to deliberate causation of delay but, gross negligence on the part of the Counsel or litigant is to be taken note of – Held, on the bedrock of the principles in *Esha Bhattacharjee* when the prayers of the Petitioner are examined, it can indeed be concluded that definitely there has been no negligence on the part of the Petitioner. The error committed has been admitted, which arose on account of a misconception of the Law and no negligence issues – The Petitioner has "sufficient cause"

there being no deliberate causation of delay and the grounds are *bona fide*. In any event, it will be unfair to allow the Petitioner to suffer on account of any error committed by her Counsel as substantial justice should be accorded paramount consideration.

(Paras 13 and 14)

Petition allowed.

Chronological list of cases cited:

1. Balbir Singh v. Bogh Singh, (1974) 1 SCC 854.
2. Taktuk Bhutia @ T. T. Bhutia v. M/s. Pure Coke and Others, 2017 (178) AIC 339 (Sikkim) : SLR (2017) Sikkim 81.
3. Smt. Mala Rai v. Shri Bal Krishna Dhamala, Review Pet. No.01 of 2017 and I.A. No.01 of 2017 passed by the Division Bench of the High Court of Sikkim on 18- 05-2017.
4. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.
5. Basawaraj and Another v. Special Land Acquisition Officer, (2013) 14 SCC 81.
6. Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157.

ORDER

Meenakshi Madan Rai, J

1. By filing I.A. No.01 of 2017, the Petitioner herein, seeks condonation of delay of 127 days in filing the Revision Petition.

2. The delay, it is explained, was inadvertent, having arisen on account of a wrong choice of Forum. That, the Learned Civil Judge, East Sikkim, at Gangtok, passed an Order dated 28-07- 2016, in Title Suit No.12 of 2014, after hearing the preliminary issues on res judicata and Order II Rule 2 of the Code of Civil Procedure, 1908 (for short "CPC") and dismissed the issues. Seeking to assail this Order, the Petitioner approached the Court of the Learned Special Division – I, East Sikkim, at Gangtok, by filing an

Appeal, registered as Title Appeal No.02 of 2016. That, the error of wrong Forum, remained unnoticed by the Petitioner and the Court till an objection was raised by the Respondents No.2 and 3, which resulted in withdrawal of the Appeal and the filing of the Revision Petition herein. That, the aforesaid circumstance was due to a bona fide error on the part of the Counsel for the Petitioner, hence, the delay that has occurred due to the wrong choice of Forum, be condoned and the Revision Petition be heard in the interest of justice. The prayers were garnered with support from the ratio in **Balbir Singh vs. Bogh Singh[1].**

3. Refuting the prayer for condonation of delay, the Respondent No.1 filed a written objection stating, inter alia, that the Petitioner had based her claims on manipulated land records, obtained with the help of the Officials of the Respondent No.7 and thereby Judgment had been pronounced in her favour right from the Trial Court to the Hon'ble Supreme Court. That, the Respondents No.5, 6 and 7 by a Petition before the Court of the Learned Civil Judge, East Sikkim, at Gangtok, now seek a spot verification of the disputed site by appointment of a Commission, which is being resisted by the Petitioner, as she is trying to conceal the forgeries carried out by her. That, the Petitioner is adopting all measures to keep the matter pending before the Learned Trial Court, which cannot be termed as "a bona fide mistake". That, the Petitioner had filed the Appeal to mislead the Court of the Learned District Judge, Special Division – II, East Sikkim, at Gangtok. Hence, the Petition being devoid of merit, be dismissed with costs. No verbal arguments were put forth by Counsel for Respondent No.1.

4. Respondents No.2 and 3 filed no written objection, but while advancing his verbal submissions, Learned Senior Counsel in sum and substance supported the averments may by the Respondent No.1 pertaining to manipulation of documents by the Petitioner. Respondents No.2 and 3 also reiterated the stand of the Respondent No.1, that, he seeks spot verification of the disputed area. It was urged that the Respondents No.2 and 3 had raised objection, inter alia, that the Appeal before the Learned District Court was not maintainable, but this was contested by the Petitioner before the Learned District Court with the contention that the Learned Civil Judge, East Sikkim, at Gangtok, had drawn up a Decree in pursuance of the Order. That, the Petitioner seeks to delay the trial before the Learned Trial Court by filing this Revision Petition and as the delay has not been

[1] (1974) 1 SCC 854

satisfactorily explained, the Petition deserved to be dismissed in limine. Strength was drawn from the decisions in **Taktuk Bhutia @ T. T. Bhutia vs. M/s. Pure Coke and Others**[2] **; Smt. Mala Rai vs. Shri Bal Krishna Dhamala**[3] **; Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others** [4] **and Basawaraj and Another vs. Special Land Acquisition Officer**[5] **.**

5. Respondents No.4 to 8 had no response to file nor were verbal submissions advanced.

6. The submissions of Learned Counsel for the parties were heard in extenso and have been given due consideration. I have also perused the documents on record.

7. The facts, as apparent from the averments, is that, on 25-01-2008 the Government of Sikkim allotted an area of 520 sq.ft. to the Petitioner and duly registered the same on 28-01-2008. On 25-04-2011, an additional allotment of 190 sq.ft. was made in favour of the Petitioner. The Petitioner thereafter unauthorisedly constructed a cantilever and staircase and sought for regularisation of the unauthorised construction measuring 119 sq.ft. The Government regularised the construction of the cantilever, while regularisation of the constructed staircase is pending. The Respondents No.1, 2 and 3 herein, filed a Suit for declaration, cancellation, quashing of documents, injunction and consequential reliefs against the Petitioner and the Respondents No.4 to 8 which was registered as Title Suit No.15 of 2008 before the Learned District Judge, East Sikkim, at Gangtok. On transfer of the Suit to the Court of the Learned District Judge, Special Division II, East Sikkim, at Gangtok, it was re-numbered as Title Suit No.02 of 2010. This Suit (i.e., Title Suit No.02 of 2010) was dismissed by the Court of the District Judge, Special Division II, East Sikkim, at Gangtok. An Appeal was preferred against the dismissal, before this Court, which vide its Judgment, dated 30-06-2011, in RFA No.02 of 2011, dismissed the Appeal. Aggrieved, the Respondents No.1, 2 and 3 filed a Special Leave Petition (Civil) No.24765 of 2011 before the Hon'ble Supreme Court which was dismissed in *limine.*

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[2] 2017 (178) AIC 339 (Sikkim) : SLR (2017) Sikkim 81
[3] Review Pet. No.01 of 2017 and I.A. No.01 of 2017 passed by the Division Bench of this Court on 18- 05-2017
[4] (2013) 12 SCC 649
[5] (2013) 14 SCC 81

8. Consequent to the above dismissals, the Respondents No.1, 2 and 3 again filed a Suit for declaration, cancellation of documents, injunction and other consequential reliefs against the Petitioner and the Respondents No.4 to 8, being Title Suit No.15 of 2012, in the Court of the Learned District Judge, East Sikkim, at Gangtok. The Learned District Judge framed preliminary issues on 24-06-2013, being, (i) Whether the Suit is barred by res judicata? (ii) Whether the present Suit is barred by the provisions of Order XI Rule 2 of the CPC in view of Title Suit No.02 of 2010 having been finally decided? Evidently, this matter was transferred to the Court of the Learned Civil Judge, East Sikkim, at Gangtok, and renumbered as Title Suit No.12 of 2014. The Learned Court heard the parties on preliminary issues on 04-05-2016 and after more than two and half months of the conclusion of the hearing, passed the impugned Order dated 28-07-2016, dismissing both preliminary issues.

9. Aggrieved by such dismissal, the Petitioner filed Title Appeal No.02 of 2016 before the Court of the Learned District Judge, Special Division – I, East Sikkim, at Gangtok, on 27-08- 2016. On 29-11-2016, the Respondents No.2 and 3 filed an Application under Section 96 and Order XLI Rules 1 and 2 of the CPC challenging the maintainability of Title Appeal No.02 of 2016 to which the Petitioner filed her response. After the objection was raised by Learned Counsel for Respondents No.2 and 3 Petitioner's Counsel realised that the impugned Order of the Learned Civil Judge was not an appealable Order. Accordingly, an Application for withdrawing the Title Appeal No.02 of 2016 from the Court of the Special Division – I, East Sikkim, at Gangtok, was filed and allowed. Hence, the choice of a wrong Forum was unintentional and on account of a bona fide mistake of Learned Counsel for the Petitioner, pursuant to which the Revision Petition with a prayer for condonation of delay has been filed.

10. To address the issue concerning the delay, Learned Senior Counsel for the Petitioner has candidly admitted that the delay occurred on account of the erroneous choice of Forum evidently on a mis-conception of the Law. For his part, Learned Senior Counsel for the Respondents No.2 and 3 has placed reliance on the ratio of this Court in **Mala Rai** (supra) and **Taktuk Bhutia** (supra) seeking dismissal of the Petition. In **Mala Rai** (supra), it is seen that the Court after considering the delay of 211 (two hundred and eleven) days was of the view that the application for condonation of delay had failed to make out "sufficient cause", inasmuch as the grounds urged

therein were that the Petitioner being an uneducated house wife was unaware of the provision for review of Judgment dated 06-06-2017, pronounced by the Division Bench of this Court in Mat.App. No.01 of 2015. Consequent to awareness dawning, the delay occurred as the Counsel was approached in the month of December, 2016, but due to the intervening Winter Vacation the Review Petition could not be filed. It was pointed out by this Court that it is common knowledge that during Winter Vacation the Registry remains open for the purposes of filing, apart from the fact that she had been provided with Legal Aid Counsel in her earlier litigation being an Appeal before this Court. On these considerations, the Petition was dismissed. In Taktuk Bhutia (supra) this Court after considering the Petition for condoning delay of 98 (ninety eight) days, relied on the decision of Esha Bhattacharjee (supra) more appropriately on Paragraph 15 of the Judgment which culled out the broad principles for condonation of delay and concluded that the grounds put forth by the Petitioner did not merit consideration as it was evident that no attention had been paid to the drafting, the delay calculated was erroneous and above all, no reasons even on a week to week basis for the delay had been placed before the court, giving the impression that the Court was being taken for granted. It was observed that the Petition cannot be dealt with in a routine manner as the interest of not only the Petitioner, but the Opposite Party was also to be borne in mind and the grounds for delay taken by the Petitioner fall short of the requirement of law, as "sufficient cause" for not taking steps on time was found to be lacking. The grounds in the matters supra are clearly distinguishable from the one at hand.

11. In the instant matter, it is evident that the Appeal wrongly or rightly was filed against the Order of the Learned Civil Judge, East Sikkim, at Gangtok, dated 28-07-2016, before the Appellate Forum within the period prescribed by Law. Thereafter, when the matter was fixed for hearing, on the objection of Respondents No.2 and 3, realisation dawned on Learned Counsel for the Petitioner that the Appeal before the Learned District Judge was indeed not maintainable, leading to the filing of the Revision Petition.

12. In **Maniben Devraj Shah vs. Municipal Corporation of Brihan Mumbai**[6] it was held that;

> **"24.** What colour the expression "sufficient cause" would get in the factual matrix of a given case would

[6] (2012) 5 SCC 157

> largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.**"**
>
> **[emphasis supplied]**

13. In **Esha Bhattacharjee** (supra), the Hon'ble Supreme Court, inter alia, observed that no presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

14. On the bedrock of the principles in **Esha Bhattacharjee** (supra) when the prayers of the Petitioner are examined, it can indeed be concluded that definitely there has been no negligence on the part of the Petitioner. The error committed has been admitted, which arose on account of a misconception of the Law and no negligence issues. I am satisfied that the Petitioner has "sufficient cause" there being no deliberate causation of delay and the grounds are bona fide. In any event, it be unfair to allow the Petitioner to suffer on account of any error committed by her Counsel as substantial justice should be accorded paramount consideration.

15. Resultant, the Petition is allowed.

16. Delay condoned.

17. I.A. No.01 of 2017 stands disposed of accordingly.